Our response to the Good Work Plan: Proposals to support families

Consultation details

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Executive summary

The Equality and Human Rights Commission (the Commission) is a statutory body established under the Equality Act 2006. It operates independently to encourage equality and diversity, eliminate unlawful discrimination, and protect and promote human rights. The Commission enforces equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

It encourages compliance with the Human Rights Act 1998 and is accredited at UN level as an ‘A status’ National Human Rights Institution in recognition of its independence, powers and performance. As part of this role we are responsible for highlighting issues of concern, inform and guide good practice, engage others in solutions and influence change in employment practice.

The Commission welcomes this opportunity to respond to the Government’s plans to reform parental leave. Our response sets out the key principles which we believe will fundamentally enhance and contribute to the development of a simpler and more flexible model of parental leave, in a way that will minimise the burden on employers by providing greater clarity on rights and obligations, and support the Government’s policy objectives. We also identify areas for further consideration in order to properly address the stated policy objectives.

Background

Balancing work and family life continues to be a challenge for new parents. Women still bear the brunt of responsibility for childcare, so are more likely to work part-time or take time out of the labour market, which contributes to the gender pay gap¹ and to the gender pension gap. Fathers increasingly want to play a greater and more active role in bringing up their children, but current parental leave offers are failing to meet this demand because of complexity, ineligibility, low financial incentive, and concerns about employer attitudes.

¹ The Gender Pay Gap Brynin/EHRC 2017
Recent research shows that since the introduction of Shared Parental Leave (ShPL) in 2015, only 1% of eligible new parents have taken it up because of concerns about the financial impact\textsuperscript{2}. Statutory pay for fathers during paternity or ShPL is lower than that for mothers, and there is no statutory requirement on employers to enhance statutory Shared Parental Pay. The TUC echoes this, stating that uptake is low because the scheme is unaffordable for most fathers in insecure work, and notes in addition that self-employed and agency workers are not eligible\textsuperscript{3}.

A further barrier is the lack of individual entitlement to leave. The current system simply reallocates the existing maternity leave provision to both parents which places pressure on both parents to decide whether to reduce the mother’s leave in order to enable the father to have time to look after children.

The Government’s policy objectives in relation to parental leave and pay are considered and holistic. We welcome the restated commitment to facilitating women’s labour market participation, increasing paternal involvement in childcare, and closing employment and gender pay gaps. We also welcome the commitments within the Government’s Gender Equality Roadmap to modernise parental leave, encourage good practice amongst employers in relation to Shared Parental Leave and improve access to information for parents\textsuperscript{4}. However, we believe that the current consultation proposals to reform parental leave are insufficient, and do not reflect the wider context within which parents have to balance the often competing demands of childcare and employment, nor the circumstances of single parents who are often left unable to return to work, or struggling to meet the costs of expensive and inflexible childcare.

The Commission believes everybody should be entitled to maternity leave, paternity leave and shared parental leave regardless of whether they are self-employed, an agency worker or on a zero hours contract, and that this should become a day one

\textsuperscript{2} Shared Parental Leave: where are we now? My Family Care and Women’s Business Council 2016
\textsuperscript{3} TUC calls for overhaul of shared parental leave, TUC 2019
\textsuperscript{4} Gender equality at every stage: a roadmap for change, Government Equalities Office 2019
right. We also recommend the development of a new system based on ring-fenced individual allocation on a ‘use it or lose it’ basis. Having individual entitlement to parental leave reflects the value of both parents sharing childcare, removes gendered stereotypes, and is particularly important too for women who may be subject to domestic violence or coercive control, whose partners may force particular leave arrangements as a form of abuse.

Any change to the current system should also ensure that existing leave and pay provisions for mothers are maintained so that they are able to recover fully from childbirth and breastfeed their child, should they so choose. This will also ensure that single mothers are not unfairly disadvantaged as a result of not having a partner, and do not face financial penalties as a result of having to pay more in childcare costs because of reduced maternity leave.

**Summary of key recommendations**

The Commission believes that the Government should:

- Introduce dedicated non-transferable, flexible ‘use it or lose it’ shared parental leave for parents with a pay rate that acts as a real incentive to take-up
- Make paternity and shared parental leave a day one right for employees, and include provisions for agency and self-employed workers
- Ensure that there is no regression on existing maternity rights as a result of changes to parental or paternity leave
- Encourage employers to raise paternity and parental leave pay upwards to match maternity leave pay, as a means of encouraging uptake of shared parental leave by fathers
- Work with the Commission to provide clear advice and support to employers on parental leave and pay, including clarity on existing protections under equality and employment law, and encourage employers to enhance ShPP (or its replacement) in a way that does not reduce any current offer for women on maternity leave.
• Legislate to make flexible working a day one right for all employees, unless there is a genuine business case that means this isn’t possible.

• Consult on setting minimum statutory maternity, paternity and shared parental pay rates at National Minimum Wage level to increase take up of parental leave

• Amend the Equality Act 2010 to prohibit employers asking job applicants questions related to family planning, pregnancy and maternity leave, with appropriate exceptions and consult on whether these protections should be extended to other forms of leave, such as Shared Parental Leave, adoption leave or paternity leave

• Work with the Scottish Government and Welsh Assembly to assess the impact of current funding provision for childcare on women’s labour market participation, and take steps to address problems with the availability and affordability of childcare, including by ensuring adequately funded, flexible and high-quality childcare for all children

• Work with the Commission and others to raise awareness of existing rights and obligations under equality and employment law amongst both employees and employers.

Our consultation response

Work is an important aspect of personal fulfilment, and the right to work and to fair conditions at work are fundamental human rights as set out in a number of international human rights treaties ratified by the UK.\(^5\)

Article 11 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires governments to ‘take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights’.\(^6\) In addition, under

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\(^6\) Article 11(1) CEDAW. ICESCR also protects the right to just and favourable conditions of work without discrimination on the grounds of sex, and requires States to guarantee the equal right of men and women to work: see Articles 2(1), 3, 6 and 7 ICESCR.
Article 27 of the Convention of the Rights of the Child (CRC), the UK Government is required to take appropriate measures to assist parents to implement the right to an adequate standard of living for their children, including material assistance and support programmes.

Our recommendations are in line with those made by the CEDAW Committee in its examination of the UK’s compliance with the Convention earlier this year, where it recommended that the UK:

a) Ensure the availability of affordable and accessible childcare facilities and/or arrangements throughout the State party
b) Consider removing the 26-week waiting period for employees to apply for flexible working arrangements
c) Provide further incentives for men to take parental leave, such as non-transferable leave, and encourage men to participate equally in childcare responsibilities.

The Commission believes that a positive response to our recommendations will assist the Government in meeting its international human rights obligations, including those under CEDAW and CRC, and will contribute towards equalising women’s labour market participation and closing the gender pay gap.

Ten years ago, the Commission published Working Better which sought to find ways to meet the changing needs of families, workers and employers in the 21st century, and increase choice, fairness and equality for those balancing work and childcare. Based on extensive research into the experience of families, and drawing upon learning from international approaches to parental leave, we found that parents’ ability to share work and family care more equally were constrained by inflexible and low paid family leave provisions based on a traditional division of paid work and care.

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7 UN Convention on the Rights of the Child (CRC).
8 Concluding observations on the eighth periodic review of the United Kingdom of Great Britain and Northern Ireland, OHCHR 2019
9 Working Better: meeting the changing needs of families, workers and employers in the 21st century, EHRC 2009
We also noted that it is harder for men than women to access flexible working because of attitudinal barriers and outdated workplace cultures which rely on gendered notions of child-rearing. The progressive extension of maternity leave from six, to nine and then to 12 months also entrenched the assumption that women do the caring, compounding the career penalty many face. Ten years on, this analysis has been echoed by others, in particular the Women and Equalities Committee which found that assumptions about who within a family is responsible for childcare can mean that fathers are ‘embarrassed’ to ask their employers for their entitlements, or fear the impact it could have on their career if they do.\textsuperscript{10}

Gender equality stakeholders also believe that fathers can have little confidence that their own rights as parents will be respected as a result of the high level of pregnancy and maternity discrimination women experience.\textsuperscript{11} In exercising rights to leave and flexible working, fathers may risk job loss, demotion and negative comments, which can be a deterrent to fathers considering changing their working arrangements to take on a greater share of caring responsibilities.

Our Working Better analysis and proposals informed the Commission’s gender pay gap strategy published shortly after the introduction of the gender pay reporting regulations,\textsuperscript{12} in which we reiterate our call for Government to introduce dedicated non-transferable, ring-fenced ‘use it or lose it’ parental leave for fathers with a pay rate that acts as a real incentive to take-up. That strategy also calls for Government to assess the impact of statutory childcare provision and different models of provision on women’s labour market participation, and take steps to improve or adjust accordingly.

\textsuperscript{10} Fathers in the workplace, Women and Equalities Committee 2017
\textsuperscript{11} Fathers in the workplace: written submission from Maternity Action, 2017
\textsuperscript{12} Fair opportunities for all: a strategy to reduce pay gaps in Britain, EHRC 2018
Our recommendations to improve parental leave

As we have noted there remain a number of barriers to parents taking up current Shared Parental Leave offer. We believe that a number of fundamental changes are required in order to facilitate uptake, but emphasise that Government should maintain existing leave and pay provisions for women and ensure that there is no regression or diminution of entitlement or protection.

Individual allocation

The current system of Shared Parental Leave requires mothers to give up some of their entitlement so that fathers can take parental leave. This places both parents at a disadvantage, as mothers are often unwilling or unable to share leave because they are either still recovering post-birth, wanting to establish and maintain breastfeeding, or because they simply want to spend the first year with their child.

There is clear evidence internationally that providing individual allocation of leave increases fathers’ uptake. For example, the introduction of father-specific leave in Iceland and Sweden has doubled the number of parental leave days taken by fathers\(^\text{13}\).

In order to meet the needs of all parents who require childcare to be able to work, and contribute to the fulfilment of children’s right to an adequate standard of living as protected by Article 27 CRC\(^\text{14}\), we call for a system of dedicated, non-transferable parental leave entitlement, which can be taken flexibly, in tandem or separately. Evidence shows that fathers are more likely to be involved carers if they experience this time alone with their children at an early stage but we recognise that every family is different and may wish to use their allocation more flexibly. Simplifying parental leave will also enable employers to anticipate and plan effectively.

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\(^{13}\) Parental leave: where are the fathers? Organisation for Economic Co-operation and Development, 2016

\(^{14}\) Children’s Rights in the UK, EHRC 2016
Make paternity and parental leave a day one right

We agree with the Women and Equalities Committee\(^\text{15}\) that employed fathers or partners should be eligible for paternity leave from day one of employment, and that partners who are agency workers should receive paternity pay. The current qualifying position for paternity leave suggests less importance should be placed on the role of fathers, and prevents many who want to play an active role in child care from doing so. Fathers and partners who are employees should be eligible to paternity as a day one right, in line with maternity leave.

Extend eligibility

Self-employed parents, and agency workers, should also receive financial support. While self-employed mothers currently receive Maternity Allowance, self-employed partners receive no paid leave at all. Research by Parental Pay Equality and Parents in Performing Arts shows that over 70% of self-employed parents would take up shared parental leave if it was available.\(^\text{16}\) To reach its aim of supporting families within the early stages of a child’s life and its obligations under Article 27 CRC, the Government should provide paternity leave for self-employed partners, and parental leave for all self-employed parents.

Flexible working

The Commission has consistently called for flexible working to be a day one right for all employers. This will have particular benefits for parents, and will reduce the burden of child care costs. We know that many employees have flexible working requests refused for no clear reason\(^\text{17}\), or face discrimination as a result of their requests\(^\text{18}\).

\(^{15}\) [Fathers and the Workplace](https://www.parliament.uk/briefingkit/fathersandthe workplace) Women and Equalities Committee

\(^{16}\) [Parental Leave Consultation](https://www.parliament.uk/briefingkit/parentalleaveconsultation), Parental Leave Equality 2019

\(^{17}\) [One in three flexible working requests turned down](https://www.tuc.org.uk/blog/one-in-three-flexible-working-requests-turned-down), TUC 2019

As we noted in our recent submission to the Government consultation on flexible working\(^\text{19}\) taking action to provide flexible working options will increase opportunities for fathers who increasingly seek greater work/life balance. Legislating to make flexible working a day one right, and increasing awareness of the need for flexible working arrangements, will provide vital support for working families and facilitate women’s participation in the labour market.

**Level of Pay**

We agree with the WEC’s assessment\(^\text{20}\) that current paternity and parental leave pay is too low, and discourages take up, undermining the Government’s aim that fathers should be able to spend time with their young children.

In addition, many employers only offer the minimum statutory Shared Parental Pay (ShPP), even if they enhance maternity pay, which adds to the concern that taking up Shared Parental Leave is not financially viable for many families\(^\text{21}\) and reiterates the assumption that early years childcare is women’s work. Low-income fathers are far less likely to receive wage top-ups from employers than better-paid fathers, so are less likely to take statutory paternity or parental leave\(^\text{22}\).

Recent case law has also reiterated concerns about the financial implications of taking Shared Parental Leave. In the cases of *Ali v Capita Management Ltd* and *Hextall v Chief Constable of Leicestershire Police*, the claimants took forward claims for direct and indirect sex discrimination respectively because their employers paid ShPP at the statutory rate, rather than increasing it to the same rate at which they paid enhanced maternity pay.

The Court of Appeal judgement found that neither claimant was discriminated against. Mr Ali was not directly discriminated against because of his sex, as a man on Shared Parental Leave is not comparable to a woman on Maternity Leave. Mr Ali

\(^{19}\) *Our response to the Good Work Plan consultation: flexible working*, EHRC 2019

\(^{20}\) *Fathers and the Workplace* Women and Equalities Committee 2017

\(^{21}\) *Where next for shared parental leave: reflections on 'Fathers and the Workplace' recommendations* Working Families 2018

\(^{22}\) *Fathers and the Workplace* Women and Equalities Committee
had to compare his treatment with a woman on shared parental leave. The Court of Appeal found that Mr Hextall’s claim should have been brought under the equal terms provisions of the Equality Act 2010, not as an indirect discrimination claim. As such, his claim failed due to protection in the Equality Act for terms of work affording special treatment to women in connection with pregnancy or childbirth. This means it is currently lawful for employers to pay men ShPP at a rate which is lower than any enhanced maternity pay that they pay to women.

Ali and Hextall are currently seeking leave to appeal this judgment at the Supreme Court. Concerns have been expressed that a finding of discrimination could lead employers to level down any current enhanced maternity pay offer, which could lead to new mothers, particularly those with continuing health conditions, being forced back into the workplace earlier for financial reasons. There is a risk that relying on the development of case law could potentially have unintended adverse consequences, so we encourage Government to review the current judgement and to consider ways to mitigate the current pay disparity in a way that does not diminish existing offers for women on maternity leave.

We note the assessment by the Women and Equalities Committee that there could be significant financial benefits to the tax-payer for improving parental leave entitlements23. This includes in particular the likelihood of mothers remaining in the workforce in the longer term as a result of fathers taking greater responsibility for childcare. This in turn may lead to increased tax contributions throughout their careers, and secure longer-term financial security, decreased likelihood of poverty in old age, and a better pension, all of which will reduce economic demands on the state.

Providing National Minimum Wage for the full duration of Shared Parental Leave would help alleviate the financial burden on families and encourage the take up of parental leave offers. We recommend that the Government consult on proposals to increase to this amount, and undertake a cost-benefit analysis of parental leave and

23 Fathers and the Workplace Women and Equalities Committee 2017
pay, as we believe increased entitlements would likely have a cost saving effect in the long term, rather than negatively impacting on public finances.

**Prohibit employers from asking questions relating to pregnancy and maternity at interview**

The Commission has previously called for the Government to amend the Equality Act 2010 to include a ban on asking direct pre-employment questions about family planning, pregnancy and maternity leave, with appropriate exceptions\(^{24}\). We would also encourage Government to consult on whether these protections should be extended to other forms of leave, such as Shared Parental, adoption or paternity leave\(^{25}\).

Commission research\(^{26}\) shows that employers still think it is acceptable to ask questions relating to pregnancy and maternity but prospective employees find this difficult to challenge and the number of cases brought are very low. A job applicant who has been rejected at interview is less likely to be invested in spending the time and money bringing an ET claim against a prospective employer than someone already in employment experiencing discrimination.

In addition, a claimant would need to prove that the employer would not have asked male applicants the same question, or that they acted upon the answer given by treating the female applicant less favourably. Sourcing the necessary evidence to prove discrimination in situations such as this is almost impossible. Amending the Equality Act 2010 to ban questions relating to pregnancy, maternity and associated leave would take the onus off employees to challenge the discriminatory practice, as it would be enforceable by the Commission.

**Review current childcare funding arrangements**

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\(^{26}\) [Pregnancy and maternity discrimination research findings](https://www.gov.uk/government/publications/pregnancy-and-maternity-discrimination-research-findings), EHRC 2016
One of the other main barriers to women’s participation in the labour market, and a contributing factor to the gender pay gap, is the cost and availability of childcare. The high cost of childcare means that many women decide not to return to work, or have to work part time, in lower paid roles or roles which don’t reflect their skills and experience, in order to care for their children themselves.

Recent research by the Organisation for Economic Co-operation and Development reveals that the UK has the most expensive childcare system in the world. The Family and Childcare Trust’s 2018 Childcare Survey found that the average price for a part time nursery place for a child under two is over £6,300 per year.

A recent survey by Pregnant then Screwed to understand more about the cost and impact of childcare on families has found that the exorbitant cost of childcare creates financial anxiety in 84% of households. The financial burden of childcare has meant that 17% of parents have had to leave their jobs, with 62% saying they work fewer hours because of childcare costs. As women mostly bear the brunt of childcare, this adds further to the motherhood penalty and the gender pay gap.

We are also aware of increasing concerns about the viability and sustainability of the current system of 30 hours funded childcare. The Family and Childcare Trust also note that only half of local authorities in England and Wales have enough childcare available for parents who are working full-time. In March 2018, the House of Commons Treasury Select Committee published its report into childcare policy and its influence on the economy. It found that the Treasury had ‘made little effort to calculate the economic impact of the Government’s childcare interventions’, and that ‘the level of complexity has become overwhelming’ for parents navigating government policies.

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27 Net childcare cost for parents using childcare, OECD 2019
28 Research and insights, Pregnant Then Screwed, 2019
29 30 hours: nearly one year on, government must wake up to warning signs, National Day Nursery Association 2018
30 Childcare Survey 2018, Family and Childcare Trust 2018
31 Women’s rights and gender equality in 2018: update report, EHRC 2018
In our submission to the Committee on the Rights of the Child in relation to the UK’s compliance with the CRC, we noted that the availability and affordability of childcare for working parents plays an important role in contributing to the fulfilment of children’s CRC Article 27 right to an adequate standard of living and their Article 6 right to development. The affordability of childcare is a particular difficulty for low-income and lone parents, who often tend to be less informed about the childcare available, and there are concerns about a lack of provision for disabled children.

The Committee raised concerns about the ‘negative effect of the high cost of childcare on children and their family environment’ and recommended that the UK Government assess the impact on children’s rights of funding cuts for childcare and family support, and review family support policies to make childcare services available to everyone in need.

We reiterate our call for UK, Scottish and Welsh Governments to address problems with the availability and affordability of properly regulated childcare, including by ensuring adequately funded, flexible and high-quality childcare for all children, and monitoring the impact different models of provision have on women in the workplace, in line with recommendations made by both CRC and CEDAW Committees.

We would also urge the Government to look particularly at the childcare funding gap between 9 months, when current maternity or Shared Parental Leave entitlement ends, and three years, when 30 hours free childcare funding kicks in. The Government should assess the impact on women’s labour market participation as a result of the gap, and the economic impact of increasing childcare subsidies to cover that gap.

**Raise awareness of existing rights**

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32 Children's rights in the UK, EHRC 2016
33 Concluding observations of the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, Committee on the Convention of the Rights of the Child, 2016
34 Fair opportunities for all: a strategy to reduce pay gaps in Britain, EHRC 2018
Finally, the Commission recommends that in order to address the concerns noted by the Women and Equalities Committee regarding the cultural and attitudinal barriers impacting on fathers’ ability to take up parental leave, the Government should work with the Commission and others to raise awareness amongst employers and employees of existing rights and responsibilities under equality and employment law.