Our response to the consultation on extending redundancy protections for women and new parents

Consultation details

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For more information please contact

Charlotte Billington


02078327876

Charlotte.billington@equalityhumanrights.com
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Executive summary

The Equality and Human Rights Commission (EHRC) is the statutory body that promotes and enforces the laws that protect our rights to fairness, dignity and respect in Britain. 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. Work is an important aspect of personal fulfilment, and the right to work and fair conditions at work are fundamental human rights. However, some groups face disproportionate disadvantage and discrimination at work.

We have drawn from our research, ‘Pregnancy and maternity-related discrimination and disadvantage’, (2016), jointly Commissioned with what was then known as the Department for Business, Innovation and Skills (BIS), the following recommendations, policy activity and engagement with other stakeholders to inform this response.

This research found high levels of discrimination or disadvantage as a result of pregnancy and/or maternity leave. Over three quarters of women (77%) reported experiencing discrimination or disadvantage as a result of pregnancy, maternity leave and/or return from maternity leave, equivalent to 390,000 mothers a year. The research found that one in nine mothers (11%) said they felt forced to leave their jobs. If scaled up to the general population this could mean as many as 54,000 women every year. Compulsory redundancy made up just 1% of this group, however nearly one in ten (9%) felt that they were treated so poorly they had no other choice than to leave employment.

The Equality Act 2010 legislative framework for pregnancy and maternity discrimination is very clear; women who are pregnant or have recently given birth are explicitly protected from discrimination. However, our research highlights that these legal obligations are not enough by themselves to protect pregnant women and new mothers from discrimination in employment.
We are glad that the government continue to prioritise pregnancy and maternity related discrimination, as we know that this is a barrier facing women’s progression and inclusion in the workplace. However, we believe that amendments on their own will not be enough to significantly reduce pregnancy and maternity discrimination in employment. This consultation provides an opportunity for the government to show leadership by introducing a suite of measures to make meaningful progress in tackling pregnancy and maternity related discrimination, and allow women’s full access to the labour market.

In order to ensure that redundancy legislation for pregnant women and new parents is strengthened, we agree with the recommendation that it be extended to a period of six months following return to work. As above, our research has shown that women experience discrimination and disadvantage, such as redundancies, dismissals and ill treatment, following their return from maternity leave. We also recommend that these protections should apply from as soon as an employer is aware that an employee is pregnant or expecting a child. Women have told us that they face negative treatment or behaviours following on from informing their employer about their pregnancy, which may deter women from doing so as early as they might like to. This fear should not prohibit women from accessing their rights.

These existing legal protections would help ensure that women are not experiencing negative experiences as a result of taking leave from work to care for a child. Therefore, it is right that these protections be extended to other groups, such as those taking adoption, shared parental or longer periods of parental leave, to ensure they too are protected against discrimination.

Changes to the law will be important. But in order for this legislation to help create positive working practices, steps should be taken to ensure that employers are aware of, and follow, their legal obligations. The government should consider the best approaches to ensure adherence with the law, working with appropriate professional bodies and regulators where needed. This should go hand in hand with ensuring that employers have an increased awareness and understanding of their obligations.
Furthermore, the government and other bodies and networks have a role to play in continuing to highlight the economic benefits of unlocking and retaining the talent and experience of pregnant women and new parents, as well as understanding the scale and extent of pregnancy and maternity related discrimination. Existing transparency measures within employment such as Gender Pay Gap Reporting should be harnessed to ensure that employers are using measures, such as robust action plans, to highlight where discrimination is happening, and take action to tackle it.

Flexible working is a key solution to ensuring that pregnant women and new parents are able to access and stay within employment. However, over half of women (51%) told us that they experienced negative consequences after approval of a flexible working request. In order to ensure that everyone has equal access to the labour market the government should extend the right to request flexible working as a day one right and employers should offer all jobs, including the most senior, on a flexible basis, unless there are genuine business reasons that mean this isn’t possible.

Other initiatives, such as improving the uptake of shared parental leave and improving recruitment practices to ensure pregnant women and parents are not being discriminated against, will also demonstrate that the workplace is open and inclusive to pregnant women and new parents, whilst working to balance caring responsibilities between women and men.

Employers also need easily accessible advice and guidance on their obligations to pregnant women and new parents. This will help ensure that there is a welcoming and supportive working environment for pregnant women and women returning for maternity leave, supported by a well-informed line manager.

Underpinning all of these measures will be the need to ensure that pregnant women and new parents who do feel as if they have been wrongfully discriminated against are able to access justice. We recommend that the government should rule out the reintroduction of Employment Appeal Tribunal (EAT) fees, which have previously deterred women taking forward claims. EAT time limits should also be
increased from three to six months, in line with other employment claims, such as redundancy and equal pay.

When implementing the ‘Good Work Plan’ the government should consider how changes to employment status and rights can be used to ensure that pregnant women and new parents working in insecure or casual employment are able to access legitimate redundancy protections. Any legislative or policy interventions should also be structured to ensure they consider the needs of people with protected characteristics and ensure that they promote equality of opportunity.

We recommend:

1. Extending the redundancy protections for a period of six months following return to work, aligning to those already in place during maternity leave.

2. Enacting redundancy protections as soon as the employer is aware that the person is pregnant or expecting a child (such as through being verbally informed).

3. Extending redundancy protections to employees who have taken adoption, shared parental and longer periods of parental leave.

4. Taking further steps to ensure that employers are meeting their legal obligations for redundancy protections under the Maternity and Parental Leave Etc Regulations (MAPLE) 1999. The government should consider the best approaches to encourage adherence with legal obligations, working with professional bodies or regulators, where needed.

In addition to enhanced redundancy protections we recommend:

5. The Government should take action to include relevant questions about pregnancy and maternity discrimination and disadvantage in planned surveys of employers and mothers, report on the outcomes
and keep under consideration what further research or action may be needed to address enduring areas of discrimination and disadvantage.

6. The UK Government should legislate to extend the right to request flexible working to apply from day one in all jobs unless there is a genuine business reason that means this isn’t possible.

7. Employers should offer all jobs, including the most senior, on a flexible, job-share and/or part-time basis unless there is a genuine business reason that means this isn’t possible.

8. The UK Government should 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.

9. The UK government should amend the Equality Act 2010, to prohibit employers asking job applicants questions related to family planning, pregnancy and maternity leave, with appropriate exceptions. The government should consult as to whether these protections should be extended to other forms of leave, such as Shared Parental Leave, adoption leave or paternity leave. Breach of the prohibition should be an unlawful act under the Equality Act 2006, which would be enforceable by the EHRC.

10. We recommend that government should rule out reintroducing fees, which have previously acted as a deterrent to women taking forward claims and seeking justice for possible workplace discrimination.

11. We recommend that Employment Tribunal time limits should be increased from three to six months, in line with other employment claims such as redundancy and equal pay.
Our consultation response

Extending the current redundancy protections (answering questions 1-16)

Our research shows that current legal protections around pregnancy and maternity redundancies are not proving sufficient in addressing the most pressing barriers facing women’s inclusion in the workplace. Despite their legal obligations, 27% of employers told us that they felt pregnancy put an unreasonable cost burden on the business and 28% felt that enhanced protection from redundancy during ordinary maternity leave was unreasonable. Pregnant women and new mothers also experience negative attitudes in the workplace, with one in five mothers (20%) telling us that they experienced verbal harassment for their employer or colleagues relating to their pregnancy or request for flexible working.

We are glad that the government continue to prioritise pregnancy and maternity related discrimination, as we know that this is a barrier facing women’s progression and inclusion in the workplace. However, it is important to note that any amendments to current legislative protections will only be effective if they form part of a wider strategy to support women’s inclusion in employment and tackle negative attitudes towards pregnancy and maternity in the workplace.

We would recommend that the current Maternity and Parental Leave Etc. Regulations 1999 (MAPLE) could be made more effective by:

1. **Extending the redundancy protections for a period of six months following return to work, aligning to those already in place during maternity leave.**

Our research in to the discrimination and disadvantage experience of mothers (2016) found that 2% of women were made redundant on their return from maternity leave. Women working for large employers more likely to be made redundant when returning from maternity leave (12%), with this figure increasing if the employer did not have trade union representation (15%).
Whilst not being made redundant, 6% of women reported that they had been dismissed following their return to work. 11% of women experienced changes to their role that were against their wishes, with a further 4% returning to a different job that was not the role they wanted to do. Nearly one in 10 mothers (9%) said they felt treated more poorly by their employer on their return to work than they were before pregnancy.

This demonstrates that women are experiencing discrimination and disadvantage following their return to work, therefore additional protections should be put in place to mitigate redundancy discrimination. As outlined below in relation to increasing transparency, we believe that these legal protections should also be supported by enhanced scrutiny over employer practice for people returning to work. We recommend that employers required to publish gender pay gap figures should also be required to publish a narrative and action plan with time bound targets. As part of this reporting, employers should use this opportunity to review and publish the retention rates of pregnant women and returning parents, the number of pregnant women and new parents who had been made redundant and to highlight flexible working requests and arrangements.

2. Making redundancy protections start as soon as the employer is aware that the person is pregnant or expecting a child (such as being verbally informed).

One in ten women told us that they felt that their employer did not value them as much once they had informed them about their pregnancy, and 7% said that they felt under pressure to hand in their notice once their employer knew about their pregnancy. Some mothers reported initial negative reactions including unprofessional behaviour, bullying and abuse and some saw a marked change in behaviour from their manager.

This demonstrates that women may be hesitant to inform their employer about their pregnancy, fearing negative treatment or behaviour as a result. However, this should not act as a barrier to women accessing the protections and support they should be entitled to, including redundancy entitlements and
considerations for her health and safety needs. Therefore, redundancy protections should begin as soon as an employer is aware that a person is pregnant or expecting a child, such as being verbally informed. This will mean that women and expectant parents are afforded their rightful protections.

3. **Extending redundancy protections to employees who have taken adoption, shared parental and longer periods of parental leave.**

Employees who take adoption, shared parental, or longer periods of parental leave should not experience unfair treatment as a result of taking an extended period out of the workplace to care for a child.

Extending redundancy protections to other groups who may require leave to care for children, such as fathers, may also have a positive impact on encouraging the uptake of initiatives such as shared parental leave. This may work towards equalising the care burden that currently disproportionately falls to women and so drives the gender pay gap.

Alongside these recommended enhancements to redundancy protections,

4. **We recommend that further steps should be taken to ensure that employers are following their legal obligations for redundancy protections under the Maternity and Parental Leave Etc Regulations (MAPLE) 1999.** The government should consider the best approaches to encourage adherence with legal obligations, working with professional bodies or regulators, where needed.

**Improving practice and ensuring accountability (answering questions 17-23)**

These improvements to redundancy legal protections must be accompanied by a suite of policy actions led by government and employers in order to improve practice and ensure accountability - including:

1. Taking a leadership approach;
2. Harnessing the power of transparency;
3. Flexible working as a day one right;
4. Improving the uptake of shared parental leave;
5. Training and support for managers;
6. Improving recruitment practices;
7. Improving access to justice

**Taking a leadership approach**

UK Governments, alongside business leaders, should continue to highlight the economic benefits of unlocking and retaining the talent and experience of pregnant women and new mothers.

There are many recent positive examples of this. Gender pay gap reporting regulations have been successful in drawing increased attention to the inequalities women face in employment. As part of their work to address some of the drivers of gender pay gaps the Government Equalities Office committed £1.5million to support parents and carers back in to the workplace. In March 2019 The Scottish government published its Gender Pay Gap Action Plan¹, which outlines work to tackle pregnancy and maternity related discrimination, as part of a wide range of other structural interventions to tackle the gender pay gap and support women’s inclusion and fair treatment within employment.

To continue to show leadership, we recommend the government act upon the feedback of this consultation to implement a broader, more holistic suite of improvements for pregnant women and new mothers.

**Harnessing the power of transparency**

The government has already demonstrated its commitment to the use of transparency measures to increase awareness and tackle the drivers of inequalities faced by specific groups in the workplace. Examples include the 2018 Gender Pay Gap Reporting regulations, and the consultation from the Department

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of Business Energy and Industrial Strategy on ethnicity pay reporting. Jo Swinson MP has also tabled a bill around the requirement for large employers to publically publish parental leave policies.

The government should continue to increase transparency around employment practice in relation to pregnancy and maternity by:

5. The Government should take action to include relevant questions about pregnancy and maternity discrimination and disadvantage in planned surveys of employers and mothers, report on the outcomes and keep under consideration what further research or action may be needed to address enduring areas of discrimination and disadvantage.

Employers should use current transparency measures to identify any discriminatory practice in relation to pregnancy and maternity and take action to tackle it. We recommend that employers who are required publish gender pay gap figures should also be required to publish a narrative and action plan with time bound targets. This will allow employers to highlight to staff, customers, partners and shareholders if they have identified any causes of inequality in their workplaces and outline what action they plan to take, moving beyond pay figures in isolation to clearly defined action.

We recommend that employers use the opportunity of gender pay gap monitoring, analysis and action planning to:

- Review the retention rates of pregnant women and returning parents, in order to understand if they need to take action to support women’s retention in their organisation, and highlight any possible discriminatory practice.

- Increase transparency around flexible working requests, highlighting the number of flexible working requests that they receive and approve. This will allow employers to understand if they need to consider, or improve, flexible working offers in order to support new parents’ inclusion in the workplace.
• Publish the number of pregnant women or new parents who have been made redundant during pregnancy, maternity/parental leave or on return from parental leave. This will allow employers to identify if they are following their legal obligations.

The government should continue to assess the impact of transparency measures, action plans and interventions to help support and drive change by employers, as to inform further proposed areas of workplace reporting.

**Flexible working as a day one right**

Flexible working is an important way to enable some people to be part of the labour markets, particularly those with caring responsibilities, such as new mothers. Over half of women (51%) reported experiencing discrimination and disadvantage as a direct result of having their request for flexible working agreed. However, flexible working has been proved to increase staff retention and improve motivation, which can support women to remain and progress within work.

We know that women are more likely to leave employment because they felt they were unable to stay, rather than being made compulsorily redundant. The legal framework for protecting pregnant women and new mothers in the workplace is extensive, but employers must also review their practice to ensure that they are creating working environments within which mothers are able to stay and flourish. This should include providing guidance and training to managers of women going through pregnancy and maternity, and offering flexible working to all employees to ensure that women do not experience negative attitudes as a result of their flexible working arrangements.

**Therefore, we recommend:**

6. **The UK Government should legislate to extend the right to request flexible working to apply from day one in all jobs unless there is a genuine business reason that means this isn’t possible.**
7. Employers should offer all jobs, including the most senior, on a flexible and part-time basis unless there is a genuine business reason that means this isn’t possible.

Improved uptake of Shared Parental Leave

Women still take the lead role in taking on caring responsibilities, so are more likely to work part-time or take time out of the labour market – two factors contributing to the gender pay gap (Brynin, 2017). However, men want to play a larger and more active role in bringing up their children (EHRC, 2009). Sharing parenting responsibilities would enable fairer participation for women and men at home and work, ensuring that women feel able to stay within employment. (House of Commons Women and Equalities Committee, 2016a). In principle, recently introduced rights to paternity pay and shared parental leave means this is possible. However, a recent survey (My Family Care and Women’s Business Council, 2016) of parents and businesses found that just 1% of men had taken it thus far, and that parents looked at their relative earning potential and the financial impact when deciding who should care for their children.

Statutory pay for fathers during paternity or shared parental leave is lower than that for mothers. There is no statutory requirement for employers to enhance shared parental pay. However evidence has shown that countries with the highest uptake of shared parental leave replace 60-80% of a father’s lost income, offer a non-transferrable allocation of leave for fathers with a ‘use it or lose it’ condition, and offer fathers’ leave as an add on to mothers’ leave.

8. Therefore, we recommend that the UK Government should 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

This will incentivise women’s return to employment following pregnancy, and will address some of the barriers women face when considering whether to stay within the labour market.
Training and support for managers and employers

One in five mothers (20%) told us that they experienced harassment or negative comments related to pregnancy or flexible working needs from their employer or colleagues. Mothers reported that they had especially positive experiences at work if the attitudes of managers and general culture of the workplace was supportive about pregnancy and work-life balance.

The biggest influencer for women’s positive experiences at work was having a supportive line manage. However over half of employers (55%) said that they provided no guidelines, training or support to their managers on managing pregnancy and maternity related issues. Under half of employers (47%) knew what they would need to do to accommodate mothers’ requests to express milk or breastfeed at work and two in five employers (42%) had no facilities for breastfeeding. One in 10 employers reported low awareness of pregnant women’s rights and two thirds of employers (67%) had not sought information or guidance.

More needs to be done to support pregnant women and returning mothers to stay within work, including taking health and safety seriously. All employers have a legal responsibility to conduct general health and safety risk assessments, including ensuring a safe working environment for pregnant women and women returning from maternity leave, for example by adjusting specific duties, such as lifting, that may put the mother or baby at risk. However, 4% of mothers told us that they had left their job as a result of workplace risks not being resolved.

One of the issues that women identified as a barrier to raising concerns with their employer was a lack of information about rights. A minority of women sought advice from sources including their union, ACAS or a Citizens Advice Bureau. However, where mothers told their employers they had sought advice from an external organisation, this often triggered action from the employer to resolve the issue.

If employers are not facilitating inclusive workplace practices for pregnant women and new mothers then women are much more likely to leave employment. The
government should ensure that women are not facing any barriers to accessing employment advice and guidance, and that employers are aware of their obligations around rights, responsibilities and best practice. Employers should be supported to understand their legal obligations and how to meet them, with accessible and easily understood guidance and information available in a single location.

For example, The Commission has developed the Working Forward campaign, which aims to offer support and advice on attracting, developing and retaining women in the workforce before, during and after pregnancy. Employers are encouraged to look at four key action areas to improve the experiences of pregnant women and new parents; leadership; employee confidence; supporting line managers and flexible working. This initiative can be used to support the improvement of employer practice in creating inclusive workplaces for pregnant women and new parents.

**Improve recruitment practices**

In a 2016 survey\(^2\) the Commission found that, of 1,106 senior decision makers, around a third (36%) of private sector employers agree that it is reasonable to ask women about their plans to have children in the future during recruitment and six in 10 employers (59%) think that a woman should have to disclose whether she is pregnant during the recruitment process. The law already states it is unlawful to reject an applicant because she is a woman, pregnant or likely to become pregnant. This shows that attitudes can be slow to change, despite legislation, and the potential for discrimination persists at all stages of a mother’s employment journey.

We recommend that the law be clarified to explicitly prohibit employers asking job applicants questions related to family planning, pregnancy and maternity leave.

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This will ensure that women are not facing barriers to accessing employment, either before or after a period of maternity leave.

A similar type of protection already exists in the Equality Act 2010, which makes it unlawful to ask questions about disability and health before making a job offer, unless one of a number of exceptions applies. We believe that new legislation using a similar model would be helpful to make clear to employers that interview questions about pregnancy, plans to have a family and care of children have no place in a recruitment situation. This protection will work to prevent discrimination and tackle negative workplace attitudes towards pregnancy and parenting, facilitating more inclusive working practices.

Therefore, we recommend:

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

Breach of the prohibition should be an unlawful act under the Equality Act 2006, which would be enforceable by the EHRC.

Improving access to justice

The initiatives and recommendations that we have outlined above will support women’s increased inclusion in the labour market, and help women access or stay within employment. Enhancing the protections of the MAPLE regulations will support wider groups of women and new parents against discriminatory practice in relation to redundancy.

However, legislation and policy will not always prevent pregnancy and maternity related discrimination at work. Where discriminatory practice is happening, women
should be able to fairly access means to justice, should she want to pursue a discrimination claim against her employer.

Our research showed that over three quarters of the mothers surveyed (77%) reported potentially discriminatory or negative experiences, yet only around a quarter (28%) discussed this with their employer and only 3% went through their employers internal grievance procedure. Very few mothers pursued a claim to an Employment Appeal Tribunal (less than 1%). Since Employment Tribunal fees were declared unlawful and scrapped in 2017 claims have risen.

10. We therefore recommend that government should rule out reintroducing fees, which have previously acted as a deterrent to women taking forward claims and seeking justice for possible workplace discrimination.

We also welcome the forthcoming government consultation on extending EAT time limits in cases involving pregnancy and maternity discrimination. The consultation paper states that in the period from January to June 2018, 25 cases were accepted for late submission, and none were rejected. However, we understand that these figures reflect the fact that cases are not rejected on first sift following receipt by the employment tribunal. Where the respondent to the claim submits a response following acceptance of the claim at first sift, which states that the employment tribunal does not have jurisdiction to hear it because it is out of time, the tribunal will then consider this point at a preliminary or final hearing. The claim may then be struck out unless the tribunal finds that it is just and equitable to extend time, which is not reflected in the figures cited.

Our research found that mothers reported numerous reasons why they didn’t feel able to take forward a claim. This included the personal impact of the process, a lack of information about their rights and entitlements, the financial cost and fear of adverse consequences. Therefore, there are legitimate reasons why the time limit should be increased beyond three months. The role fear and guilt of mothers played throughout the research highlights that more should be done to make the process of seeking access to justice as facilitative as possible, including opening
time limits up from the outset, rather than requiring people to request extensions that may act as further barriers to justice.

11. We recommend that EAT time limits should be increased from three to six months, in line with other employment claims such as redundancy and equal pay.

Finally, the government should use the proposed recommendations and changes outlined in their ‘Good Work Plan’, to consider how any changes to employment status and rights can be reviewed to ensure women and new parents working in insecure, or causal employment are afforded redundancy protections.

Our research showed that people with insecure employment status were more likely to report certain negative experiences including feeling that they were less valued by their employer than they did before telling their employer they were pregnant and being treated with less respect by their line manager as a result of their pregnancy. Over one fifth (22%) of mothers in agency or casual employment reported feeling that their employer was unhappy about them taking maternity leave. When considering policy or legislative change the government should consider how such interventions and changes will affect people with protected characteristics, and should work to ensure these changes promote equality of opportunity.