

Summary of responses to
consultation on European
Commission proposals to
amend the Pregnant Workers
Directive

MARCH 2010

Summary of Responses to Consultation on European Commission Proposals to amend the Pregnant Workers Directive

Consultation

1. In October 2008 the European Commission published a proposal to amend the existing Pregnant Workers Directive (92/85/EEC). The current directive sets minimum standards for maternity protections, including maternity leave and pay.
2. In March 2009 the Government launched a consultation¹ on the Commission's proposal². The Commission's proposal is subject to negotiation with all Member States, including discussion of the precise meaning or intention of certain elements, and co-decision by the Council and the European Parliament. Responses to this consultation will be used to inform the UK's position during those negotiations. The consultation considered only the Commission proposals and not those amendments subsequently proposed by the European Parliament.
3. 39 responses to the consultation were received. Nine of these were from business representatives or trade bodies, 3 were from local government, three were from charities or social enterprises, one was from family or parent representative organisations, two were from equality commissions, three were from individuals, five were from large businesses, one was from a small business, two were other types of business and nine were from trade unions or staff associations. A list of respondents is at Annex A. The ETUC did not respond directly to our consultation, however, their position on the Pregnant Workers Directive was passed on to us by the Northern Ireland TUC and its opinions have been included here.
4. For copies of responses contact Nicola Dissem (nicola.dissem@bis.gsi.gov.uk or 020 7215 0389).
5. This document sets out a summary of the consultation responses. Responses to each of the consultation questions are summarised but most detail is contained in the section setting out responses to question 6, which looks at the elements of the Commission's proposal. There was general broad consensus that, because of the generous periods of maternity leave and pay already in place in the UK, the Commission proposals would have limited impact on the UK. Where elements of the proposal would potentially have more of an impact, the response was more mixed. For example, while

¹ European Commission proposals to amend the Pregnant Workers Directive: A consultation (URN 09/767) available from www.bis.gov.uk

² Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding . Available from www.ec.europa.eu

there was support for the extension of compulsory maternity leave from two weeks to six weeks after birth, some respondents raised concerns about the subsequent reduction in choice for mothers about their maternity leave. It was noted that the proposals for maternity pay contained a presumption that a woman would receive her usual pay during maternity leave but allowed Member States to set a ceiling at the current level. Although this means the UK's current pay scheme would be unaffected, some business representatives raised concerns that there could be further costs passed on to them.

Consultation Questions

6. The questions asked in the consultation document were:

Question 1 - What is your overall assessment of the Commission's proposal? How well do you think the proposal addresses the Commission's aims?

Question 2 - What do you consider the implications of the proposed changes would be on the UK system of rights for working parents?

Question 3 -What is your evaluation of risks and benefits for businesses and working parents?

Question 4 - Do you consider the proposal strikes the right balance between protecting pregnant women and new mothers and being manageable for employers and employees?

Question 5 - Does this proposal present any particular implementation difficulties and if so, what? Do you have any suggestions to address these?

Question 6 - Do you have any comments about particular proposals? If so please specify, indicating clearly the Article you are commenting upon.

Question 7 - Do you have any comments on the Government's Impact Assessment or the Commission's Impact Assessment?

Question 8 - Are there any other comments you have on the Commission's proposal?

7. The Commission's proposals and current UK provisions can be summarised as:

Commission Proposal	UK Provisions
Extend minimum maternity leave from 14 to 18 weeks. Additional leave on top of the 18 weeks for some women in special circumstances.	UK provision (52 weeks) is well in excess of minimum 18 week period. The UK provides all women a longer period of statutory maternity leave and pay to accommodate these special circumstances.
Extend compulsory maternity leave from two weeks to six weeks after the birth.	UK requires two weeks' compulsory leave after the birth.
Women dismissed from start of pregnancy through to six months after maternity leave entitled to request written reasons for dismissal.	Women dismissed during pregnancy or maternity leave are currently entitled to written reasons. All employees with 12 months' service have the right to request written reasons for dismissal.
Suspension from work on maternity grounds must be on full pay.	This right already exists in the UK.
Right to return to the same or equivalent post on terms and conditions no less favourable than if she had not been absent.	This right already exists in the UK.
Full pay during maternity leave, with Member States able to specify a ceiling (which must be at least equal to sick pay).	UK provision (Statutory Maternity Pay - six weeks at 90% of average earnings followed by a standard rate of £124.88 ³ , or a fallback of Maternity Allowance - 39 weeks with same standard rate) is well in excess of sick pay levels.
Right to request flexible working for women returning from maternity leave.	Parents of children aged 16 or under (or under 18 if the child is disabled) who have six months' service with an employer have the right to request flexible working.
Copying out of protections given by the Equal Treatment Amendment Directive to Pregnant Workers Directive. This includes transference of burden of proof, protection from victimisation and uncapped compensation.	These protections are already given for workers bringing cases where sex discrimination is the primary concern.

³ From April 2010

Question 1 - What is your overall assessment of the Commission's proposal? How well do you think the proposal addresses the Commission's aims?

8. The majority of respondents felt that the Commission's proposal would meet its objectives of improving the common minimum standard of protection across all Member States for pregnant workers and workers who have recently given birth or are breastfeeding. In the main, the overall assessment was that the Commission's proposal would have limited impact in the UK because domestic provisions already exceed the Commission's proposals in most aspects. Raising minimum standards and codifying case law was broadly welcomed.
9. Some respondents set out elements of the proposal which required further clarification, e.g. on maternity pay and flexible working. Others highlighted areas where they felt the proposal could have gone further to protect the health and safety of pregnant women, for example in providing further protections for breastfeeding mothers or setting the minimum period of maternity leave at 26 weeks, matching ordinary maternity leave in the UK.
10. British Chambers of Commerce (BCC) raised concerns about the impact on small business, in particular, for example through increased flexibility for women about when to take maternity leave adding greater uncertainty for employers. Partnership of Public Employers raised concern about increased public expenditure as a result of the proposal.

Question 2 - What do you consider the implications of the proposed changes would be on the UK system of rights for working parents?

11. As set out above, the majority of respondents considered that many elements of the UK's provisions already exceed the Commission's proposals and therefore expected the implications for the UK system to be limited.
12. Some respondents, for example the Employment Lawyers Association, set out areas where they considered changes would be necessary, such as prohibiting all preparations for dismissal during maternity leave and ensuring all women have a right to written reasons for a dismissal which takes place within six months of the end of maternity leave. The proposed change to the compulsory maternity leave period was commented on, with some employers and business organisations highlighting that this reduced choice for women.
13. The importance of ensuring women are aware of their maternity rights was emphasised (e.g. by the Mothers Union and the Transport Salaried Staffs' Association).

Question 3 - What is your evaluation of risks and benefits for businesses and working parents?

14. Respondents noted that overall there would be little change to the UK's provisions but benefits and risks were noted.
15. It was argued that there would be benefits to women, for example through the extension of compulsory maternity leave and through the extension of flexible working to women returning from maternity leave. Some raised concerns about the loss of choice as a result of longer compulsory leave.
16. Many respondents, including BT and Cheshire East Borough Council argued that any costs to business would be outweighed by the benefits, for example from increased retention of staff and a more motivated workforce. A benefit to the health and welfare of mothers was noted, as were benefits in terms of increased clarity in the law. There were concerns though, in particular about a move to maternity pay paid at 100% of a woman's salary. It was felt this could have a significant impact on business, through increased costs and increasing the length of maternity leave women take. The risk of increased costs to the Exchequer was also commented on by employers and business organisations. BCC raised a concern that the reversal of the burden of proof could lead to increased tribunal applications and disproportionate administrative impact on small business. CBI raised concerns that the changes could make maternity leave systems more rigid and reduce the opportunity for dialogue between women and employers.
17. There was a concern that sectors with a high number of female employees will be affected more than others, as may small businesses because the impact on them of a member of staff taking leave will be proportionately greater. It was also argued that there was a risk that the improved provisions for pregnant and recent mothers may cause resentment from non-pregnant staff who are expected to take on extra work to cover for the absent employee.
18. More broadly it was noted that there could be benefits from codification of case law and bringing law in this area together. However, the uncapped compensation provision also prompted fears of increased litigiousness.

Question 4 - Do you consider the proposal strikes the right balance between protecting pregnant women and new mothers and being manageable for employers and employees?

19. The majority of respondents felt the Commission proposal struck the right balance. Again, business raised concerns about a requirement for full pay tipping the balance against employers. There was concern from employers in their responses that the wording of the flexible working provisions could change the balance of the right in the UK as it sets out that the employer must take account of both employer and worker concerns. However other

respondents considered the wording of the Commission's proposal to be consistent with the UK's existing provisions.

20. Uncertainty about the length of maternity leave could make maternity leave difficult to manage. Bliss highlighted that additional leave would benefit women in certain difficult situations.

Question 5 - Does this proposal present any particular implementation difficulties and if so, what? Do you have any suggestions to address these?

21. There were calls for greater clarity about some of the Commission's proposals, particularly on the level of maternity pay and on how employers should consider flexible working requests. Employers highlighted concerns about the extent to which increased maternity pay costs would be picked up by government or passed on to employers. Trades Union Congress (TUC) called for consultation on how the maternity pay proposals would be implemented, calling for some increase in maternity pay.
22. Areas where respondents saw implementation issues included the start time for maternity leave, where it was considered a change would be needed to allow women to start their maternity leave earlier than the current 11 week limit; and on ensuring written reasons for dismissal are given if a woman is dismissed within six months of her maternity leave.
23. The overwhelming message on addressing any implementation difficulties was to highlight the need for government to ensure there was sufficient notice of any changes and to ensure there was clear guidance available for women and their employers.

Question 6 - Do you have any comments about particular proposals? If so please specify, indicating clearly the Article you are commenting upon.

Compulsory maternity leave extension

The Commission's proposal would increase compulsory maternity leave from two weeks after birth to six weeks after birth. The UK would have to extend the existing two-week compulsory maternity leave provision in line with this.

24. On balance, responses to this proposal were positive. Most of those who responded noted that the extension was unlikely to have much impact as almost all women in the UK already take six or more weeks' maternity leave.
25. It was suggested (e.g. by EHRC) there would be benefits for some women from this change since the requirement to take six weeks' compulsory maternity leave could reduce pressure on some women to return to work early. However, some respondents were concerned that the increase would restrict women's choices. These were mostly, but not solely, employers or

representatives of employers. CIPD argued it was for women, in consultation with their medical advisors, to decide when to return to work. Asda acknowledged circumstances where a longer period of compulsory leave may be undesirable, for example where a child is to be adopted soon after the birth.

26. One element highlighted was that an extension to compulsory maternity leave would increase women's entitlements to some bonus payments. Where compulsory maternity leave is included in the bonus payment period, this must be included in the bonus calculation. Bonus periods would therefore be required to cover the longer six week period.

Longer minimum maternity leave

The Commission's proposal would extend the minimum length of maternity leave offered by Member States from 14 to 18 weeks. The UK already offers 52 weeks' maternity leave which is well in excess of this. Additionally women would be able to choose freely the time when the non-compulsory portion of the leave is taken.

27. The overwhelming majority of respondents did not think that the extension of the minimum period of maternity leave under the directive to 18 weeks would have any effect on the UK. Some respondents noted that the impact of allowing women complete freedom to choose when to start their maternity leave would require a legislative change since women are currently only able to choose to begin their maternity leave from 11 weeks before their baby is due. There was concern that giving women complete freedom about when to begin their leave could lead to their using more maternity leave ahead of the birth and then using sick leave to supplement maternity leave later. However the TUC argued that it was unlikely women would want to front load their maternity leave.
28. Some respondents felt that the minimum requirement did not go far enough – Liverpool John Moores University, the Equality and Human Rights Commission (EHRC) and the Royal College of Midwives all recommended extending the minimum leave offered by Member States to 26 weeks.
29. Many of the respondents believed the extension to 18 weeks to be a positive change as it will strengthen maternity provision offered by other Member States.

Right to request flexible working

The Commission's proposal includes a right for women returning from maternity leave to ask her employer to adapt her working patterns and hours to the new family situation and the employer is obliged to examine such a demand. All UK employees, with a six month's qualifying service, with a child aged 16 or under (of under 18 if the child is disabled) have the right to request flexible working.

30. A number of responses addressed the right to request flexible working in detail. In particular they highlighted the success of the existing UK entitlement for parents and carers to request a flexible working pattern with a duty for employers to consider requests seriously. Some argued for a further extension of the right in the UK.
31. There was general concern from several respondents that the Pregnant Workers Directive is not the right place to include a flexible working provision. By explicitly linking flexible working to women returning from maternity leave, the directive could reinforce the view that flexible working is a 'women's issue' which would represent a regression in the UK. Good progress has been made in the UK to encourage flexible working for mothers and fathers of older children and for carers. Business representatives in particular expressed concern about this possible step back.
32. Business raised concerns that the wording of the provision could shift the emphasis away from business and towards individual need when assessing requests. They were concerned that this could lead to greater pressure on them in managing requests. The Newspaper Society, for example, called for clarification about the precise meaning of requirements to take employers' and workers' needs into account.
33. Large employers (250+ staff) responded positively to the proposal on flexible working. Nearly all commented that they already support their employees to work flexibly or see the benefits of flexible working to improved employee retention rates.
34. Some employers said that the extension of the right to request flexible working to returning mothers with less than six months' service would present a problem; most did not comment on this. Many respondents suggested a benefit from introducing the UK standard more widely across Europe in this area.
35. Some family groups, equality groups and the trades unions recommended that workers returning from maternity leave be granted *a right to* flexible working, rather than *a right to request* it. The Family and Parenting Institute argued this may reduce the length of maternity leave and encourage a return to work by some women who may not currently go back after maternity leave. There were also some calls to extend the Commission's proposal to provide the right to request to male workers with young children. (Fathers with six months' qualifying service with their employer are already able to request flexible working under the UK's domestic legislation.)
36. There were three respondents who called for employers to be required to set out the reasons for turning down the right to request, rather than just prove that they have followed the correct procedures.

Maternity pay

The Commission's proposal includes an aspiration for Member States to pay full pay during maternity leave. This payment can be subject to a ceiling to be determined by Member States which must not be set below the level of sickness pay. In the UK, most women receive Statutory Maternity Pay. This is 90% of their pay for the first six weeks and then the lower of that 90% rate or the standard rate of £124.88 a week.⁴ Mothers who do not qualify for Statutory Maternity Pay may receive Maternity Allowance which is paid at the lower of 90% of their pay or £124.88 a week. The standard rate is considerably higher than Statutory Sick Pay.

37. The majority of respondents felt that the full pay aspiration would not pose a problem to the UK, as long as Member States retained the ability to set a ceiling is retained. It was argued that the wording in the proposal was not clear and there were a number of requests that the wording be clarified to ensure that the ceiling is retained at the level of Statutory Sick Pay. Many suggested that without this cap many UK businesses (especially small businesses) would be badly affected.
38. Business respondents noted that under the current funding arrangements the majority of costs arising from full pay would fall to the Exchequer. They were concerned, though, that increased costs could lead the Government to review the funding arrangement and pass a greater share of the costs to employers. A few respondents set out that if there was a move to full pay, the Government would be expected to pick up this extra cost.
39. Some respondents questioned whether the Commission had the appropriate authority to address pay and said that the principle of subsidiarity must be respected.
40. Union and equality body responses supported a move to a higher rate, or full, pay during maternity leave. The EHRC supported a move to 26 weeks at 90% pay whilst ETUC and NASUWT both welcomed the full pay proposal. TUC set out that they would like to see the UK providing full pay for 18 weeks but acknowledged that Statutory Maternity Pay and Maternity Allowance are currently paid at a level well above Statutory Sick Pay. The TUC argued that 18 weeks' maternity leave at full pay would have a significant impact on working parents and families in the UK and ensure that more working women and children benefit *in practice* from longer periods of maternity leave.

Additional leave

The Commission's proposal requires Member States to provide additional leave in the case of premature childbirth, children hospitalised at birth, children with

⁴ From April 2010

disabilities and multiple births. Member States may decide the appropriate period of additional leave. The UK provides all employed women with 52 weeks' maternity leave. This period would already accommodate all of the special circumstances set out in the Commission's proposal.

41. Respondents noted that the UK's provisions, being well in excess of 18 weeks, should be long enough to take account of these special circumstances. However, it was noted that the revised Directive needed to be clear about whether the additional leave was additional to the proposed 18 weeks' minimum maternity leave rather than on top of the 52 weeks already available in the UK. There was also a call for the Government to provide guidance on this issue to help businesses properly understand changes.
42. The majority of responses from employers and employer organisations noted that additional leave in special circumstance would cause employers difficulties with administration and increase uncertainty regarding employees' maternity leave entitlement since it would not be clear how much maternity leave a woman would be entitled to.
43. Charities supporting parents of twins and other multiple births (Twins and Multiple Births Association) and sick and premature babies (BLISS) were in favour of leave in addition to 52 weeks. ETUC is in general supportive of additional leave in special circumstances but did not comment on whether this leave should be additional to the 18 week minimum or the UK provision of 52 weeks.

Question 7 - Do you have any comments on the Government's Impact Assessment or the Commission's Impact Assessment?

44. The Government's Impact Assessment was included in the consultation document. The Commission's Impact Assessment is available from the Europa website⁵.
45. The Government's Impact Assessment looked at direct policy costs. A number of employers commented that the extension of compulsory maternity leave would impact on the payment of bonuses. The period of compulsory maternity leave must be taken into account in calculation of bonuses which relate to work done by an employee. A longer period of compulsory maternity leave would therefore increase bonus payments. This would increase benefits for women but also increase costs for employers. These were not reflected in the Government's Impact Assessment. Bliss questioned the assumptions about increases in average earnings for calculations and suggested actual costs would be lower.

⁵ Commission Staff Working Document *accompanying the* Proposal for a directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding: Impact Assessment Report. Available from www.ec.europa.eu

46. South East Employers highlighted that costs of revising HR policies and familiarisation with new laws had not been included.
47. It was noted that some of the benefits, such as better work life balance, improved morale were difficult to quantify. Some respondents (e.g. BT) commented that there was no assessment of what the optimum period of maternity leave would be.

Question 8 - Are there any other comments you have on the Commission's proposal?

48. There were various more general comments made about the proposal.
49. There was a concern that this was not the right time to make changes due to the economic climate. Of particular concern in this context was the restriction on making preparations for dismissal. There was also a worry that the new proposal would adversely impact upon young women's employment rates.
50. The Commission's proposal addresses only provisions for pregnant women and new or breastfeeding mothers. Respondents who commented were split on the inclusion of provisions about paternity leave and work-life balance, overall it was considered the proposals would contribute to improvements in work life balance and improved protections for women. Calls for fathers' rights to be included in the directive were made primarily by charities (Tamba) and unions (NASUWT, ETUC, National Union of Teachers). The TUC in particular regretted the absence of proposals for paid paternity leave. Employer organisations, such as FSB, PPE and CBI said that a long-term view should be taken and that maternity provision should be viewed as one part of a complete package of family friendly provisions. They also said this directive should not address paternity rights or work-life balance.
51. Equality bodies and trades unions argued provisions should be extended to all workers. There were a number of calls for the discrimination protection provided by the Equal Treatment in Employment and Occupation Directive to be extended to the Pregnant Workers Directive. The TSSA additionally felt that discrimination and equality protection should be extended to women undergoing fertility treatment.
52. There was also support from unions and two large employers for women to have the right to return to the same post (Liverpool John Moores University, Transport for London, NASUWT and the National Union of Teachers).
53. There was some discussion of rights related to breastfeeding. EHRC and TUC both would have liked to see extra support for breastfeeding included in the proposal; however, one individual felt that sufficient time to breastfeed is easily covered by the UK's 52 weeks' maternity leave and that any

breastfeeding breaks should be specified as unpaid leave. In addition, National Union of Teachers called for paid time off for ante-natal appointments to be extended to all expectant mothers and fathers. The importance of childcare in supporting mothers to return to work was highlighted.

A list of respondents to the consultation

Business representative organisation / trade body

British Retail Consortium
Chartered Institute of Personnel and Development (CIPD)
Federation of Small Businesses (FSB)
British Chambers of Commerce (BCC)
South East Employers
Confederation of British Industry (CBI)
Partnership of Public Employers
Newspaper Society
Institute of Directors (IOD)

Charity or social enterprise

Mother's Union
Twins and Multiple Births Association (Tamba)
Bliss

Family / parent representative organisation

Family and Parenting Institute

Equality commission

Equality Commission for Northern Ireland
Equalities and Human Rights Commission (EHRC)

Individual

Ben Houchen
Janet Elizabeth Kelly
J Jowers

Large employer

Liverpool John Moores University
ASDA
BT
PriceWaterhouseCoopers
Transport for London

Small employer

Enigma Diagnostics Ltd

Local government

Cheshire East Borough Council
Wirral Council
Local Government Employers

Trade Union or staff association

Trades Union Congress
Transport Salaried Staffs' Association (TSSA)
Royal College of Midwives
National Association of Schoolmasters/Union of Women Teachers (NASUWT)
European Trade Union Confederation (TUC)
National Union of Teachers
Engineering Employers Federation (EEF)
Institute of Payroll Professionals
Friends Provident

Legal

Addleshaw Goddard LLP
Employment Lawyers Association

Research Institute

Agri-Food & Biosciences Institute

Department for Business, Innovation & Skills

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