



Bar Council response to the Department for the Business, Energy & Industrial Strategy's consultation paper on Pregnancy and Maternity Discrimination: Extending Redundancy Protection for Women and New Mothers

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Department for Business, Energy & Industrial Strategy's consultation paper on the Pregnancy and Maternity Discrimination: Extending Redundancy Protection for Women and New Mothers.¹

2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Question 1 – To what extent do you agree that protections against redundancy for a period following return to work should be aligned with those already in place during maternity leave?

4. Strongly agree.

Q2 – Please give reasons for your answer.

¹ [Department for Business, Energy & Industrial Strategy \(2019\) Pregnancy & Maternity Discrimination](#)

5. We agree that the existing law concerning the protection afforded to pregnant women and those who have returned to work after a period of maternity leave is not always well understood by employers or employees. Further, in principle, we agree a pregnant woman and a woman returning from maternity leave is in an especially vulnerable situation, given the attitudes of employers highlighted by the Taylor Review. We also consider that the vulnerability may be even greater for a returner as employers may have held off executing decisions made during maternity leave until the return from leave or may be labouring under the erroneous impression that a pregnant woman cannot be made redundant, whereas there is no legal protection for a woman returning from maternity leave.

Q3 – What costs do you believe the extension would bring?

a) For individuals

b) For businesses

6. It is difficult to see any cost to the individual.

7. Other than the cost of training those in HR or tasked with managing redundancies in the workplace, it is hard to see any direct cost to extending protection. It would remain the case that a pregnant worker or one returning from maternity leave could still be made redundant, on a lawful basis, but proper procedure would have to be followed.

Q4 – What benefits do you believe the extension would bring?

a) For individuals

b) For businesses

8. In both cases, the benefit is likely to be increasing the diversity of the workplace, boosting the economic productivity of maternity returners, ensuring a better return on the investment in women at work who have children, reducing the attrition of skills and talent and overall reducing the gender pay gap in many instances. It would also ensure a greater understanding of rights and obligations, which would avoid misunderstandings, grievances and possibly also litigation, which would save time and costs for individuals and businesses alike.

Q5 – Do you agree that 6 months would be an adequate period of “return to work” for redundancy protection purposes?

9. No.

Q6 – Please give reasons for your answers.

10. The particular vulnerability of women returning to work after a period of maternity leave and the use of ‘redundancy’ to exit a woman from the business is such that we consider a longer period of time is appropriate. This would also take account of the fact that some women may work part-time hours before returning to their full-times, if at all, and this can bring its own challenges to their management of work expectations alongside childcare responsibilities.

Q7 – If you think a different period of “return to work” would work better, please say what that should be and explain why.

11. We suggest 12 months would address the issues set out in response to (6) above.

12. 12 months represents a better balance of the competing interests that exist. A woman who returns to work relatively early in her maternity leave would otherwise have had the protection of being on maternity leave for a period of up to 12 months.

13. It would also offer a degree of protection to those who are at a relatively early stage in their career and have not accrued statutory protection from unfair dismissal. If the policy objective is to offer a degree of protection to women to reduce the risk of their careers being adversely affected, a period of 12 months would be a more effective step in achieving that policy objective.

Q8 – Should pregnancy for redundancy protection purposes be defined as starting at the point a woman informs her employer that she is pregnant in writing?

14. Disagree.

Q9 – Do you think an earlier reference point should be used?

15. There is a strong argument for protection commencing at the point of pregnancy itself as suggested in *Porrás Guisado v Bankia SA* Case 103/16, [2018] IRLR 563. This shifts the onus away from the pregnant worker, who bears the responsibility for notifying the employer in order to obtain protection, to the protected characteristic itself. However, we acknowledge that there is also a counter-argument, that it is unfair for an employer to assume obligations towards an employee without actual or constructive knowledge of the protected characteristic itself i.e. the pregnant status of the employee.

Q10 – If yes, please say what that should be and explain why.

16. Please see above in response to (9).

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Q11 – Do you agree that the most direct equivalents to return to work from statutory maternity leave (on the basis that they are forms of leave that can potentially be taken by parent of either gender for longer periods) are:

- a) adoption leave (yes/no)
- b) shared parental leave (yes/no)
- c) longer periods of parental leave (yes/no)
- d) other

Q12 – If other, please explain your reasons.

17. On the basis that two weeks' statutory paternity leave is not commensurate to Ordinary Maternity or Additional Maternity Leave, we do not point to any others.

Q13 – Supposing that the additional redundancy protection afforded by MAPLE is extended to mothers returning to work after maternity leave, to what extent do you agree that the same protection should be extended to those groups?

18. Agree.

Q14 – Please explain the reasons for your answer.

19. We agree that those returning from other forms of parental leave may also be in a position of greater vulnerability in a redundancy situation than those who have not. We also agree that if this area of law is to be reformed then it is sensible to address other types of leave at the same time whilst not losing sight of the fact that the most common form of family leave to be taken is maternity leave and this will affect the greater number of workers. To that end, we would not be opposed to a systemic review, but we would not wish for this to unduly delay reform in relation to maternity returners.

Q15 – Are there other forms of leave which should be considered for additional redundancy protection on return to work?

20. No, but on the basis that surrogacy arrangements would be covered under the proposed reforms i.e. a maternity returner who had become a mother through surrogacy would not be in any less protected a position than someone who had been pregnant.

Q16 – Please give your reasons.

21. Please see above. We are not aware of any other groups that is especially vulnerable after a period of leave though we would have thought that further work and research into the position of those returning from long-term sickness absence, whether disabled under the Equality Act 2010 or not, would be worth conducting.

Q17 – How effective have these steps been in achieving their objective of informing pregnant women and new mothers of their employment rights?

22. Don't know.

Q18 – Please give your reasons.

23. The practitioners who have informed this response probably see a disproportionately high number of cases in which employees have not been as aware of their rights as they might have been or did not understand them properly. This is also true of employers including those with dedicated HR professionals, which is of concern. However, the true extent of the success or otherwise of the steps taken is outwith the knowledge of those responding.

Q19 – How effective have these steps been in achieving their objective of informing employers of their rights and obligations in relation to pregnant women and new mothers?

24. Don't know.

Q20 – Please give your reasons.

25. Please see answer to (18).

Q21 – How do you think these steps might be improved?

26. It is clear that a simplification of the protections that apply whilst pregnant (or undergoing IVF treatment or possibly also entering into surrogacy arrangements), whilst on leave and once returned to work would assist employees and employers alike.

Q22 – Please outline any further steps which should be taken to provide advice and guidance to employees and employers about the employment rights of pregnant women and new mothers and employers' obligations towards them.

27. We are not best placed to respond to this question, but it would have thought that information in an easily accessible format should be provided to women who are

likely to need it in clinics, hospitals, surgeries and all other places where a pregnant woman or one with a young child is likely to visit. It is also arguable that a responsibility ought to be placed on employers to provide information to workers as well. Obviously, ACAS should update its guidance and so should the EHRC. It may be helpful to have a dedicated website for new mothers on the GOV website where all this information could be brought together.

Q23 – If further steps should be taken, who is best placed to take that action?

28. Please see above.

Bar Council²
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