



Modern Workplaces

TUC response to flexible parental leave,
flexible working and Working Time Regulations
proposals

Introduction

The TUC has 58 affiliated trade unions representing 6.2 million working people, many of whom will be juggling their work commitments with childcare or other caring responsibilities.

The TUC has welcomed the Modern Workplaces consultation and the principles underlying it. Significant advances were made under the previous government to extend maternity leave and pay, introduce paternity leave and pay rights, enable the transferability of unused maternity leave and pay to fathers, introduce unpaid parental leave entitlements, provide time off for carers in emergencies and introduce a right to request flexible working for parents and carers. Despite this, we recognise that there is still more that can be done to promote shared parenting, to provide more choice and flexibility for working parents, particularly in the first year of a child's life, and to open up flexible working opportunities to more people. We believe appropriate reform of family-friendly rights will result in greater gender equality in the workplace, benefits for business and the economy (e.g. stronger employee engagement, better retention and utilisation of women's skills, knowledge and experience, lower sickness absence), and better outcomes for families and children.

While welcoming the creation of a more flexible parental leave scheme and the extension of the right to request flexible working, we have a number of concerns with some of aspects of it. Our main concerns are:

- the poor levels of pay for fathers who are taking paternity or parental leave - without a period of earnings-related leave very few families will be able to afford for fathers to take time out from work and so there will be very limited progress towards achieving the objective of more shared parenting.
- the reduction in the designated maternity leave period to 18 weeks - we are particularly concerned about the impact a reduction to 18 weeks will have on occupational maternity schemes which provide contractually enhanced maternity pay beyond 18 weeks and whether the right to return to the same job upon return from 26 weeks' leave will be retained. If rights to occupational maternity pay and the right to return are diminished then this will undermine the objectives set out in the consultation paper of

achieving more shared parenting and gender equality at work.

- the need to avoid undermining the existing position of working parents and carers when implementing a universal right to request flexible working - we cannot support the proposal to shift from statutory regulation to a statutory Code of Practice if the minimum procedural standards, which are aimed at ensuring working parents and carers' requests or flexible work are given a fair hearing, are removed.

Flexible parental leave

Q 1. Which aspects of the current system work well for parents and employers, and where could improvements be made? Please explain your response.

Under the last government, numerous improvements were made to the maternity leave and pay and its administration. These changes appear to have worked well in practice. The notification requirements under existing maternity leave legislation work well and the TUC supported the self-certification approach for Additional Paternity Leave. While it is too early to have evidence of how self-certification for APL has worked in practice we cannot think of a better approach to making a transferable or shared leave right work and hope this approach will be maintained in the new system.

In terms of what could still be improved upon in the current framework:

- More leave needs to be paid at earnings-related rates so that low income families have more choice about how and when they can take leave. EHRC's Working Better¹ report highlighted that: the majority of mothers earning less than £20,000 do not take more than six months' leave after childbirth; women in lower skilled, lower paid jobs in non-unionised workplaces were less likely to receive any enhanced maternity pay from their employer; and nearly half of fathers did not take their two-week statutory paternity leave entitlement, mainly because they could not afford to lose pay around the birth of their child. Successive reforms of our family leave system have focused on extending or redesigning periods of low paid or unpaid leave which in practice have benefited and given more choice to wealthier families while low income families continue to struggle to balance work with family commitments and this is going to get harder as financial pressures on families intensify.²
- The requirement under the Additional Paternity Leave scheme for the mother to have physically returned to

¹ EHRC, 'Working Better' Phase One Report (2009), available at: www.equalityhumanrights.com/advice-and-guidance/here-for-business/working-better/what-is-working-better/launch-of-working-better-phase-one/

² See www.jrf.org.uk/media-centre/families-must-earn-more-make-ends-meet

the workplace before the father can take leave creates complications and unfairness. For example, in a situation where the mother falls ill and is unable to return to work on the specified date, the father loses his entitlement to take APL. However, as the father is unable to give sufficient notice of a change of plan to his employer, the father's employer can nevertheless insist that he take a period of unpaid leave if the change cannot reasonably be accommodated.

- There should be clear rights to breastfeeding breaks and provision of workplace facilities for women who need to express milk, with guidance promoting good practice. The lack of clarity in the law at present means women often have to choose between going back to work or continuing breastfeeding. If one of the aims of the proposed flexible parental leave scheme is to enable mothers to return to work sooner if they wish to while their partner cares for the child then steps should be taken to ensure breastfeeding can continue upon return to work.
- No provision is made in our current leave system to accommodate the needs of parents who have had a premature birth or multiple births. These families can be particularly vulnerable, facing much greater stress and expense in the initial months. Parents' maternity/parental leave entitlements in these situations should be extended as is the case in some other OECD countries.³ With premature births we suggest paid leave should be extended by the period of hospitalisation so that families have the same period as other families at home with their new baby. For example, in Iceland if the baby is hospitalised for more than seven days leave is extended by that period up to a maximum of four months.
- An anomaly in the current system is that adoptive parents are only entitled to statutory pay which matches the flat rate maternity allowance. We believe they should be entitled to the same level of statutory maternity pay as birth parents, i.e. the first six weeks of statutory adoption pay should be paid at 90% of earnings.

³ For examples see Moss et al, International Review of Leave Policies (BIS 2010)

- Given the importance of antenatal care, all pregnant agency workers should be entitled to paid time off to attend antenatal appointments and not just those who have passed the 12-week qualifying period for equal treatment as provided for in the Agency Worker Regulations due to come into force later this year.
- The notice requirement for taking two weeks' paternity leave is too long at 15 weeks' before the expected week of childbirth (EWC). As highlighted by Working Families' helpline report 2009,⁴ some fathers miss out on their ability to take paternity leave because they are unaware so much notice is required.
- There needs to be better guidance about family-related leave and rights. For example, the Additional Paternity Leave scheme was only covered in an update to a BIS leaflet about pregnancy at work, which few fathers would have seen.
- There needs to be better enforcement of existing rights. Enforcement agencies have failed to take sufficient action to ensure that health and safety risk assessments are carried out for pregnant workers often in industries where they are most vulnerable (e.g. see EHRC's investigation into the Meat and Poultry Processing Industry).⁵ And, as highlighted by the Alliance Against Pregnancy Discrimination, there is still poor compliance with the law when it comes to redundancy and pregnancy/maternity discrimination.⁶ The former Equal Opportunities Commission's investigation into pregnancy and maternity discrimination in 2005 found that 30,000 women a year lose their jobs because of their pregnancy or maternity leave but only 3% take any action to enforce their right not to be discriminated against.⁷

Q 2. How can the Government best encourage a culture of

⁴ www.workingfamilies.org.uk/articles/new-thinking/policy/helpline-report-2009

⁵ www.equalityhumanrights.com/legal-and-policy/inquiries-and-assessments/inquiry-into-the-meat-and-poultry-processing-sectors/

⁶ www.workingfamilies.org.uk/images/Alliance%20against%20pregnancy%20discrimination%20briefing.pdf

⁷ www.equalityhumanrights.com/uploaded_files/eoc_pregnancygfi_summary_report.pdf

shared parenting? Please explain your response.

As research has shown,⁸ fathers who take paternity or parental leave are likely to be more involved in caring for their children. Therefore, key to encouraging more shared parenting is improving fathers' take up of leave. Measures that we believe would help achieve this are:

- reserving periods of leave just for fathers to use
- paying leave at earnings-related rates
- removing the long notice and length of service eligibility criteria for paternity leave, especially as it is proposed all other leave rights will become day one rights
- making a paternity allowance equivalent to the maternity allowance available for fathers who do not qualify for statutory paternity pay
- making the take-up of leave more flexible
- giving fathers a right to take paid time off to attend ante-natal appointments.

In our opinion, what would have the greatest effect on fathers' take up of leave and involvement in childrearing is to provide a period of leave just for fathers, which is paid at earnings-related rates. International evidence shows that fathers' take-up of leave is significantly influenced by the provision of a period of leave to fathers on a 'use it or lose it' basis and payment of that leave at earnings-related rates. The impact assessment that accompanies the consultation paper includes a 'medium' prediction for fathers' take up of leave of just 8% for the reserved month and 2% for any of the shared parental leave entitlement. According to the impact assessment, this compares with take-up rates of 84% to 90% in countries where there is a reserved period of leave and it is paid at earnings replacement levels. In countries such as Iceland and Sweden where there are significant reserved periods of leave paid at earnings replacement rates not only do nearly all fathers take some leave but they take between just over a fifth to a third of all the parental leave days taken.⁹

⁸ E.g. Tanaka, S & Waldfogel, J, 'Effects of parental leave and work hours on fathers' involvement with their babies', *Community, Work and Family*, 10: 4, 409 - 426 (2007)

⁹ Moss et al (2010), n4 above

So, while we welcome the proposals to introduce a reserved month of leave for fathers and to enable more flexibility in how the leave can be taken, we would urge the government to prioritise making some leave available to fathers at earnings-related rates rather than seeking to maximise the period of unpaid or low paid leave that could be taken but in practice is unlikely to be taken. At minimum, serious consideration should be given to paying the two weeks of paternity leave at 90% of earnings as the first weeks of statutory maternity pay are. This would at least encourage much higher take up of paternity leave than exists at present and across all income brackets.

Encouraging fathers' take up of leave is just one side of the story in terms of encouraging more shared parenting. The importance of factors that retain women's attachment to the labour market and give them access to quality jobs and progression once they become mothers must also be recognised, as maintaining employment opportunities for women through childbirth and early motherhood will increase the demand for more shared parenting within the home. Well-paid maternity leave is one of those factors. Women are more likely to return to work with the same employer where there is a good period of well-paid leave, as evidenced by companies like Ford and BT who report returner rates of well over 90% as a result of their occupational maternity pay policies and a DWP study of maternity rights found that mothers who received occupational maternity pay were significantly more likely to return to their pre-birth employer than those who received no maternity pay (93% versus 62%).¹⁰ If women are able to take maternity leave and resume their previous jobs when they feel ready to rather than before they are ready to for financial reasons and then potentially dropping out of the labour market altogether or switching to a lower level job with less responsibility, then this will be better for gender equality at work and will increase pressure for greater equality within the home. The TUC is disappointed that this Government sometimes fails to see how well-paid maternity leave has a role to play in creating demand for more shared parenting and promoting gender equality, for example, in its opposition to the revised Pregnant Workers' Directive

¹⁰ Ivana La Valle, Elizabeth Clery & Mari Carmen Huerta, 'Maternity rights and mothers' employment decisions, (DWP 2008)

and comments made about maternity rights in the media by those closely associated with the Government.¹¹

Finally, there needs to be cross-departmental working by Government to ensure consistent support for shared parenting, for example, working with the Department of Health and Department for Education to ensure that midwives, maternity units and health visitors speak to both parents and make fathers feel involved throughout pregnancy, childbirth and the early years.

Q3. Are you aware of companies that have gone beyond the existing statutory requirements in encouraging shared parenting? Why have they done this and what have the outcomes been? How can the Government help to ensure that lessons are disseminated to other businesses?

Yes No

Please explain your response.

The TUC Equality Audit 2009¹² found that in unionised workplaces, 63% had collective agreements in place that provided better pay or leave entitlements for paternity leave. This figure will not be reflective of the whole economy as unionised workplaces and the sectors in which unions tend to be recognised are more likely to provide enhanced pay and leave. The Audit found that the sectors most likely to have above statutory provisions were further and higher education, public administration and energy, water, mining and nuclear. In other sectors the proportion providing enhanced paternity rights was quite low, for example, construction (33%) and manufacturing (43%). Among those organisations that provided full pay, this was provided for between two and twenty days.

According to the EHRC's Working Better report, the main reason why fathers do not take paternity leave is because they cannot afford to, so it can be presumed that more fathers will take paternity leave in those organisations where there are collective agreements entitling them to full pay for some or all of the leave. Working Better also found that 69% of fathers who took the leave felt it improved the quality of family life and 56% said it had led to them playing a greater role in caring for their children.

¹¹ E.g. see www.ft.com/cms/s/0/11cc97ae-b85f-11e0-b62b-00144feabdc0.html#axzz1TNGODK54

¹² <http://www.tuc.org.uk/equality/tuc-16977-f0.pdf>

Studies have shown¹³ one of the determining factors of employee engagement is the extent to which an organisation is perceived to care about its employees' well-being so it can also be presumed that supporting workers through one of the most pressured, life changing events will result in more engagement in return, with all the proven business benefits that brings.

Q4. Should 18 weeks of maternity leave, accompanied by either statutory maternity pay or maternity allowance, be reserved exclusively for mothers?

Yes [] No []

If not, what proportion should be reserved? Please explain your response.

The TUC believes that the period of leave reserved exclusively for mothers should be 26 weeks. A number of concerns have been expressed by affiliate trade unions about reducing the period designated as maternity leave to 18 weeks. The primary concerns are:

- the impact this would have upon occupational maternity schemes which enhance pay beyond 18 weeks
- what this would mean for a woman's current right to return to the same job after 26 weeks' leave
- what it might mean for employees' rights if the Government chooses to "provide exemptions from some of the detailed provisions for small employers" (paragraph 31 of the consultation paper) which would be possible in EU law if maternity leave were re-designated as parental leave.

In addition, we believe 26 weeks is a more appropriate period of time to designate as maternity leave in terms of promoting the health and well-being of mother and child. When the previous government consulted on its proposals to introduce transferable maternity leave, the TUC commissioned a survey of low income mothers which found there was a clear consensus that 26 weeks was the most appropriate period in terms of health and well-being of mother and child.

According to the TUC Equality Audit 2009, 58% of collective agreements in unionised workplaces provide some enhancement to statutory maternity pay. A DWP survey of 2,000 recent

¹³ E.g. see www.employment-studies.co.uk/pubs/summary.php?id=408

mothers in 2008 found that 58% of them had received occupational maternity pay.¹⁴ The DWP survey also found that among mothers who received occupational maternity pay, 74% received it for 26 weeks, with 9% receiving it for more than 26 weeks.

While trade unions wish to see occupational pay extended to fathers who take parental leave and will seek to negotiate such improvements in the workplaces where they are recognised (just as they have successfully argued for improvements to other statutory family leave and pay rights in the workplaces where they are recognised),¹⁵ we are concerned that employers in the current climate will decide to cutback the occupational maternity pay period to 18 weeks and not pay any of the parental leave period because they consider they cannot afford to extend it to men, assuming that not to do so would put them at risk of sex discrimination claims. A Working Families survey of its good practice employer members found that only a minority (one third) of companies had opted to extend any occupational pay to men taking Additional Paternity Leave when the scheme took effect in 2011,¹⁶ despite concerns that under European law this could be sex discrimination following a CJEU ruling.¹⁷

As stated in response to Q2 we believe well-paid maternity leave is an important factor driving the pressure for more shared parenting as it has encouraged more mothers to return to work in the companies and at the levels at which they were previously employed and is therefore likely to lead to more demand for more equal roles at home. We understand the desire to create as much choice and flexibility for families in the design of the new system and to build on the gender equality achievements of our current leave system but as the parental leave is going to be paid at very low statutory rates of pay and very low numbers of fathers are expected to take any of the parental leave - 8% are expected to take the reserved month and only 2% are expected to take any parental leave beyond that - we consider that designating a period of 26 weeks as maternity

¹⁴ La Valle, Clery, Huerta (DWP 2008), n10 above

¹⁵ See TUC Equality Audit 2009, n 12 above.

¹⁶ Working Families, Additional Paternity Leave - Survey of organisational readiness (March 2011)

¹⁷ *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA*, Case C-104/09, CJEU

leave and thereby ensuring that most of the good occupational maternity schemes will continue is more important, will benefit more families and encourage more shared parenting in more households, than a policy of maximising the period of low paid or unpaid leave that can be shared between parents.

The Government's impact assessment shows that the highest expectation for the average duration of shared leave that will be taken by fathers is 13 weeks, the medium expectation is 6 weeks and the low expectation is just 2 weeks. If the maternity leave period were 26 weeks, with a reserved month for dads, there would still be 22 weeks that could be shared if the proposed reserved month for mums were retained (or if that was included in the maternity period - see response to Q11 below - there would be 26 weeks that could be shared). This far exceeds even the highest expectations of the average number of weeks of shared leave that fathers are expected to take under the new system.

The Government says in the consultation paper that it intends to enable employers with occupational maternity schemes to continue to provide such schemes as contractual maternity leave. However, they could not benefit from claiming statutory parental pay reimbursements (at present many organisations claim reimbursements and top up statutory maternity pay to full pay levels rather than fully paying the period themselves) and they would have to provide the statutory parental leave and pay entitlements on top of any contractual maternity leave and pay. It would also mean for employees where some contractual enhancement short of full pay (e.g. half pay) is provided in addition to statutory pay that they would not be able to benefit from receiving both elements beyond 18 weeks.

In addition, women on contractual maternity leave may find it difficult to ensure that all the statutory protections that apply when they are taking a statutory period of maternity leave apply when they are on contractual maternity leave. Legislation would need to be amended and guidance given to make sure the situation was clear to those employers who may wish to continue with a more generous occupational scheme. Reg. 21 of the Maternity and Parental Leave etc Regulations 1999 explains that a woman may not exercise a contractual right to maternity leave separately from the statutory right (i.e. they are to be taken in parallel) but the woman can benefit from any more favourable contractual term governing the leave and that

the statutory protections set out in the Regulations and in the Employment Rights Act 1996 apply to the exercise of that composite right. However, the right not to be discriminated against on grounds of pregnancy and maternity in the Equality Act 2010 only applies to the protected period which is defined as the statutory period of ordinary or additional maternity leave.

We urge the government to give more serious and thorough consideration to the potential unintended consequences of diminishing the rights and benefits that many employees have under existing occupational maternity schemes and to do some research into the likely impact the proposals will have on employers who provide such schemes and on the families who benefit from the occupational pay.

Finally, we would like more detail from the Government in its response to the consultation on what it is considering when it says it may “provide exemptions from some of the detailed provisions for small employers” (paragraph 31 of the consultation paper). The TUC would firmly oppose anything that would mean reducing the existing rights and protections of new mothers.

Q5. Should parental leave and pay be available to mothers and fathers on an equal basis? What benefits do you foresee? What difficulties are likely to arise?

Yes No

Please explain your response.

We agree with the reasoning outlined in the consultation paper for moving away from a transferable right, as exists under APL, to making parental leave available on an equal basis. Our response to Q1 highlights some of the problems associated with APL and the requirement that the mother must have returned to work before the father is entitled to take any leave. In addition, enabling parents to take leave concurrently is likely to be more beneficial to families in certain situations, such as where the mother or child is ill and has an extended period of recuperation or hospitalisation after the birth, for example, following a Caesarian section or in the event of a premature birth especially where there are older children at home who need to be cared for. It would also be useful in cases of multiple births where the pressures on parents are greater in the initial weeks and months.

From an employee perspective, one of the potential difficulties of such a scheme is both parents using up a

lot of the parental leave entitlement in the initial months to cope with immediate pressures and so having to return to work earlier than they are ready to. In circumstances such as premature birth, we have therefore suggested that the leave entitlement should be extended to take account of any period of hospitalisation (see response to Q1).

Another problem is likely to be providing adequate notice to employers of an intention to take leave in those situations where unanticipated events occur, such as a premature birth, difficulties in childbirth or a sick baby, which would really benefit from parents being on leave at the same time. Consideration needs to be given to how notification requirements are designed so that in these circumstances it would still be possible for leave to be taken by fathers, provided notice was given as soon as it was reasonably practicable.

Q6. Do you agree with our proposals to facilitate greater flexibility in the taking of parental leave?

Yes No

Please explain your response.

We support the principle of allowing parental leave to be taken on a flexible basis. This could enable a father to take a period of leave around the birth of the child to provide support in the first few weeks (especially where the father does not qualify for paternity leave and pay because he lacks the necessary 26 weeks' service) and to have the option of taking more leave later in the year if the mother were to return to work early. Allowing short periods of leave to be taken, for example, to facilitate part-time working, is also likely to encourage more fathers to take the leave as it will be more affordable to them (in the Netherlands, where this is possible, fathers take an average 8 hours' leave per week over 36 weeks)¹⁸ and it could ease mothers' return to work by enabling them to work reduced hours for a period.

There are potential benefits to business of allowing flexible take-up of leave, for example, it could mean a mother returning sooner than she otherwise would if she can combine work with some leave during her initial weeks or

¹⁸ European Foundation for the Improvement of Living and Working Conditions, 'Parental Leave in European Companies' (2007).
www.eurofound.europa.eu/pubdocs/2006/87/en/1/ef0687en.pdf

months back at work. However, we would not want employees to be pressured into returning to work sooner than they wish or to break or postpone their leave against their real wishes. Therefore, the fallback position must be that the employee has a right to take their preferred amount of leave on a continuous basis, as is outlined in the consultation paper. We also think that it must be made clear that this will be at a time of the employees' choosing - this latter point is not spelt out in the consultation - and there should be no opportunity for an employer to postpone leave as is presently the case with unpaid parental leave.

Despite the potential benefits to business that a flexible leave system may bring, some employers are likely to resist change and may not want to engage in dialogue with employees about their preferred leave plans. The TUC believes that in order to get maximum benefit from these proposals there must be guidance for employers on how to handle requests for flexible leave and a duty to consider such requests. Without such guidance and a duty to consider, couples may find it hard to co-ordinate and finalise their plans with each of the employers and to give adequate notice to them. There should also be a requirement that an employer's consent must be in writing.

Finally, it is not clear from the consultation paper whether the intention is to make all parental leave available on a flexible basis subject to employer agreement, or just the paid element of parental leave. The TUC has previously argued for more flexibility in the statutory default scheme for the existing unpaid parental leave entitlement so that leave can be taken as days rather than in weekly blocks. Many workforce agreements provide for greater flexibility than is allowed in the default scheme. This is particularly beneficial for employees as the leave is unpaid so parents may not be able to afford to take it in blocks of one week or more. However, we do not think that taking this leave on a flexible basis should depend upon employer consent. Flexibility should be introduced for everyone through amendments to the statutory default scheme.

Q 7. If parents are not living together, should the default position be for the parent with main responsibility for the child to be able to take all the unreserved period of leave and pay?

Yes No

Please explain your response.

The parent who has the main responsibility for the child is going to be most in need of the leave. Lone parents of young children face significant problems in accessing and remaining in work because of the difficulties of managing their caring commitments with work. Plus, there will still be periods of reserved leave and a period of unpaid parental leave that the separated parent could use to care for the child, especially if they are able to take it on a flexible basis.

Q 8. On what principles should the notification process for parental leave be based? Do you have any comments on our proposal that the process be based on that for additional paternity leave?

Please explain your response.

We support the principle of self-certification. We supported this approach at the time APL was consulted upon and still think it is the simplest, least burdensome approach and works to the benefit of employees and employers.

Q 9. Should parents be expected to provide an indication of their full plans for taking the paid elements of parental leave prior to the child's expected date of birth (with the ability to changes these plans subject to notice); or should separate notification be allowed for each period of parental leave?

Yes [] No []

Please explain your response.

If parents are expected to provide an indication of their full plans to take leave prior to the EWC then it is more likely that employers will subsequently receive numerous notifications of a change of plan. A requirement to indicate intentions to take parental leave before the EWC will be particularly problematic for fathers as they may not have any intention to take parental leave before the birth but it may transpire that they do wish to take leave some time afterwards, for example, when their partner returns to work or because family circumstances are different from those expected. This could mean a father being denied the ability to take any leave in such circumstances because they had not given an indication of an intention to take leave before the child was born.

On the other hand, we recognise that mothers should be encouraged to give a single notification of the maternity and parental leave they intend to take otherwise there

could be confusion about having to give separate notifications for maternity leave and different elements of parental leave.

The notification requirements could cause problems for the scheme's workability and affect access to the rights if not properly thought through. One of the benefits of the notification requirements under current maternity legislation is the presumption that the woman will take their full entitlement unless notification of an early return is given 8 weeks before their intended return date. This means mothers only have to give notification of their intention to take maternity leave and one other notification if they intend to return early. There is no fear of the mother inadvertently losing her right to take any element of her leave or losing her right to return to work because of a failure to notify in the correct manner.

We suggest that under any system of flexible parental leave there should still be a presumption that the woman will take all her maternity leave and reserved parental leave (if this were rolled up into maternity leave this could make things easier - see our response to Q11) unless otherwise notified of an early return date. At least 8 weeks' notice should then be given of an intention to take any other parental leave with intended start and finish dates, although guidance/example notification forms/letters should encourage women to also give notification before the EWC if they plan to add on some of the shared portion of parental leave directly to their maternity leave/reserved parental leave.

In all cases, an employer should be required to write to the employee within 28 days of receiving any notice of intention to take leave, confirming the leave to be taken and the start and finish dates and any agreed flexible patterns for taking the leave.

Q10. Do you agree that it would be inappropriate to exempt small and medium-sized employers from the flexibility provisions? Are there any other special arrangements that would be helpful for such businesses?

[
Yes] **No** []

Please explain your response.

We do not agree with a two-tier system of employment rights with some employees benefiting from better rights because of the size of the employer they happen to work for. Also, as it is proposed that the flexibility provisions depend

upon employer consent there is no case whatsoever for an exemption in this situation.

Q11. Should a portion of flexible parental pay be reserved for each parent? If so, is four weeks is the right period to be reserved for each parent?

Yes [x] No []

Please explain your response.

We agree that a portion of leave should be reserved for fathers only to take and we are pleased that it is proposed that an additional month of leave will be added on to the current entitlement to accommodate this. Four weeks seems about right at this stage.

We do not necessarily agree with reserving a month of leave for mothers as we believe this could be designated as maternity leave instead which would give a longer maternity period than is currently proposed, meaning more employers could continue to pay occupational maternity pay for a longer period and the notification requirements for taking leave would be simpler as a woman would not have to notify of her intention to take both maternity leave and reserved parental leave. If there is concern about equality and the need to not discriminate between men and women in the provision of reserved periods of leave, then the Government could consider the possibility of designating the reserved month for fathers a positive action measure aimed at ensuring full equality in practice between men and women.

We recognise that in reclassifying the proposed reserved month of parental leave for mothers as maternity leave, the period of paid leave that a woman could take flexibly would be reduced, but we think this idea should be given further consideration and the choice of having more maternity leave versus a longer period of flexible parental leave for women should be consulted upon, in light of any extra research into the impact the proposals are likely to have on occupational maternity schemes (see response to Q21 below).

Q12. What do you see as the core challenges to administration? Do you support the initiatives described above as a means of addressing them? What other opportunities for improvement to administration can you identify?

We support the self-certification approach adopted for APL. As stated above in response to Q10, we believe the notification requirements could be a challenge to administration and could potentially affect access to the rights if not properly thought through. In addition, we

believe that it will be a challenge for parents to co-ordinate plans and give proper notification if one of their employers is refusing to enter into a conversation and properly consider a request to take parental leave flexibly. For this reason and for the benefit of employees and employers, there should be a statutory duty to consider any request and procedural guidance on how to respond to any request should be given.

Q13. Should the year's qualifying period for existing parental leave under the European Parental Leave Directive be retained, or should the two types of leave be consolidated to avoid confusion? Please explain your response.

No, the year's qualifying period should not be retained. It is excessive and to avoid confusion under the proposed flexible leave scheme, all unpaid parental leave should be treated in the same way. In addition, it should be possible to take any unpaid parental leave in shorter blocks than one week and this should not depend upon employer consent, it should just be built into the default scheme covering unpaid parental leave. This would make it far more affordable for families to use and encourage more take up by fathers. At present take up of the existing parental leave is very low. One study found that only 11% of eligible mothers and 7% of eligible fathers took any parental leave and it was usually for only one week.¹⁹

Q14. Is the child's first birthday the right cut-off point for parents to receive parental pay? Please explain your response.

Yes. Given the importance of the first year for bonding and establishing parenting patterns we think it is advisable to require the proposed paid parental leave entitlements be taken in the first year.

Q15. Up to what age of the child should unpaid parental leave be available? (Five as it is currently) or:

Five [] Eight []
 12 [] 16 []
 18 [x]

Please explain your response.

Families experience different pressures at different times, for example, transitions to school, exams, possible

¹⁹ Deborah Smeaton and Alan Marsh, 'Maternity and Paternity Rights and Benefits: Survey of Parents 2005', (DTI 2006)

parental separation, bereavement, or moving house and school. Parents should have the right to take unpaid leave from work to spend with their children and to support them at these times. In addition, many working parents covered by workforce agreements on parental leave that have higher age limits use parental leave to help cover school holidays. Access to parental leave during the school years is more beneficial for some families than in the pre-school years when it is far more likely childcare will be in place to cover most working days and the cost of paying for regular childcare makes it difficult for parents to take unpaid time off work. In addition, as previously stated, unpaid parental leave should be available in blocks of less than one week so that parents can use it to attend special occasions such as school sports days or events or to cover when normal childcare arrangements are not available.

The TUC Equality Audit 2009 gives examples of collective agreements which already provide a much higher upper age limit than age 5. These are: NHS Agenda for Change (up to age 14), NHS Highland (up to age 15), Leeds Metropolitan University (up to age 18) and Derbyshire Constabulary (up to age 18). Organisations like these may be able to provide further information on the benefits of allowing the leave to be taken over a much longer period of time.

The Government will have to extend the age limit or make amendments to the Parental Leave Regulations soon in order to implement the revised Parental Leave Directive by March 2012, as otherwise it will not be possible for parents to take the new 18-week entitlement by age 5 under the current default scheme which only allows a maximum of four weeks a year to be taken. The Government should therefore make clear its intentions in this regard very soon and we would suggest that for the sake of legislative efficiency it should make the other suggested changes to the Parental Leave Regulations at the same time i.e. to get rid of the one-year qualifying period and to enable leave to be taken in blocks of less than one week.

Q16. Do you agree with the proposed approach on employment protections? How can the protections given to employees on parental leave be made more effective?

[
Yes] No []

Please explain your response.

We agree in so far as the consultation paper states that
"We are keen that steps already taken to combat pregnancy

discrimination are not lost as a result of reducing maternity leave. We therefore propose that the protections given to women whilst on maternity leave should apply equally to all parents who are out of the workplace on maternity, paternity or parental leave”.

However, this does not provide sufficient clarity and reassurance about whether the right to return to the same job after 26 weeks’ leave will be retained as at present. We would like specific reassurance that this will be the case.

In terms of improving protection, more needs to be done to ensure compliance and better enforcement with the existing anti-discrimination rights and employment protections. As the former EOC’s investigation showed, pregnancy and maternity discrimination is rife but only a very small percentage of those affected will take claims to tribunal to enforce their rights. Among those advising workers there is a perception that pregnancy and maternity discrimination has risen in recent years since the onset of the recession in 2008. For example, the TUC has heard anecdotal evidence from trade unions about a rise in complaints and founder members of the Alliance Against Pregnancy Discrimination have similarly reported a rise (it was this perceived increase that led to the Alliance being formed and the TUC has recently joined it). According to the employment tribunal statistics, the incidence of unfair dismissal or detriment cases as a result of pregnancy have increased by nearly a fifth since 2007/8. If it is still the case, as was found in the former EOC’s investigation in 2005, that only 3% of women who have suffered a detriment or lost their jobs because of pregnancy enforce their rights at tribunal, this would suggest that over 60,000 women are experiencing such problems each year compared to around 50,000 three years ago.

The TUC is greatly concerned that measures this Government is taking or proposing to take will diminish access to justice and result in weaker protection in practice for pregnant workers and those on maternity leave, for example, proposals to introduce fees for use of the tribunal system, the cuts in EHRC funding and the loss of the strategic grants programme from the EHRC which has supported grass roots legal advice services and casework throughout England and Wales.

We would urge the Government to act on the recommendations made by the Alliance Against Pregnancy Discrimination to monitor the incidence of pregnancy and maternity

discrimination, to actively promote guidance to employers and employees, to take a leadership role and publicly communicate that such discrimination is wrong, and to communicate to the public sector what their obligations are under the new public sector equality duty i.e. to have due regard to the need to eliminate unlawful discrimination and advance equality of opportunity on the grounds of pregnancy and maternity among others.²⁰

Q17. Can you provide case studies on occupational paternity and maternity schemes and the benefits these bring to business and employees? We would also welcome thoughts on how the new system will affect those schemes.

Employers with occupational maternity and paternity pay schemes often promote and cite the benefits of such schemes in corporate literature on equality and diversity/corporate sustainability, citing high return to work rates, retention of women's skills and experience and the avoidance of high recruitment and replacement costs. Organisations such as Opportunity Now and Working Families have produced case studies of good practice which include the positive outcomes for those employers, usually maternity returner rates of over 90%. Ford, in its submission to the Working Families' Top Employers awards in 2010, said its generous occupational maternity scheme had saved them an estimated cost saving of £2m p.a.²¹

The TUC Equality Audit 2009 also includes examples from male-dominated industries that have generous maternity packages, for example, at Peugeot which provides 52 weeks' paid maternity leave, 40 weeks of which is paid at full or 90% pay, and Transpennine Express which provides 39 weeks' leave at full basic pay or 90% of earnings, whichever is the greater, and Northern Rail which provides 39 weeks' leave at full pay. The decision to introduce such schemes in these sectors is likely to be driven by the desire to attract and retain women.

As explained in response to Q4, we believe there is a high risk that the parental leave scheme as set out in the consultation paper will lead to employers cutting back on their occupational maternity pay benefits. If that was the

²⁰ www.workingfamilies.org.uk/images/Alliance%20against%20pregnancy%20discrimination%20briefing.pdf

²¹ E.g. www.topemployersforworkingfamilies.org.uk/index.php/archive/2009
www.topemployersforworkingfamilies.org.uk/index.php/archive/2010
www.bitcdiversity.org.uk/best_practice/exemplar_employers/women_returner_s/case_studies/citi.html

case this would have harmful consequences for the intended objectives of achieving greater gender equality in the workplace and more shared parenting. This would not be an issue if the new scheme were proposing to make the parental leave paid at earnings-related rates, but as it is clear that the Government intends to only make such leave available at very low statutory rates or with no pay attached, the loss of occupational maternity pay would be hugely regrettable and take away vital financial support for many families at a time of great need.

As already highlighted a DWP survey of 2,000 women on maternity leave found that 58% of mothers received occupational maternity pay, over 80% for a period of 26 weeks or more. If the designated period of maternity leave is cut back to 18 weeks, it is likely that some employers will seek to cut back their occupational maternity schemes and will not extend pay to fathers as well, particularly in male-dominated industries. Only a third of employers surveyed by Working Families (who are likely to be good practice on these issues as they are Working Families' members) have extended any occupational pay enhancements to fathers with the move to APL. We are not reassured by the presumption in the consultation paper that employers will simply opt to provide a more generous contractual maternity leave scheme because they would not be able to claim reimbursement of statutory parental pay for any period of contractual maternity leave beyond 18 weeks and employers would have to provide the statutory parental leave entitlements on top of any contractual maternity leave scheme rather than within it. Plus, we are concerned that the important statutory rights and protections that women have while on maternity leave may not be fully recognised during any period of contractual maternity leave.

Q18. Should fathers be entitled to time off to attend some antenatal appointments?

Yes [] No []

If so, is two the right number?

Fathers should be given paid time off to attend ante-natal appointments if the aim of achieving shared parenting from the earliest stages of pregnancy is going to be achieved. We believe that paid time off should be given to attend three appointments as getting fathers' involvement in ante-natal education is also important and this would enable them to attend at least one ante-natal class with their partners. This is necessary as ante-natal classes available

on the NHS are often not easy to access outside of working hours or often become over-subscribed if they are.

Q 19. Do you have a preference between :

(a) giving fathers a new right to attend antenatal appointments

[
x]

(b) allowing fathers to use parental leave to attend antenatal appointments

[]

Please explain your response.

Having a stand-alone right will be far simpler to administer and access than using parental leave. If parental leave were used then parental leave would have to be designed in such a way that it could be taken on an hourly basis and the notice requirements would have to be adapted so that the leave could be taken at quite short notice. In addition, it would create problems in setting out the statutory eligibility criteria and statutory purpose for parental leave as fathers using it would not be parents. It may also create complications for employers in terms of maintaining records of parental leave.

Q 20. Are there any special circumstances in which parents will need additional support?

Additional reasonable time off should be provided if there are complications with the pregnancy or a multiple birth is expected and more scans are needed.

Q 21. Do you have any further comments or suggestions relating to our proposals or impact assessment on flexible parental leave?

The impact assessment does not consider the impact these proposals will have on existing occupational maternity schemes. As outlined in response to Q17 and Q4, we think there may be a significant impact on these schemes. This impact and ways of minimising it must be considered before the proposals are taken any further.

The right to request flexible working

Q1. Should the Government legislate to extend the right to request flexible working to all employees?

Yes [] No []

Please explain your response.

The TUC has supported the creation of a universal right to request flexible working for some time. This is based on a belief that a universal right to request would begin to change the mindset that is still prevalent in many organisations that flexible working is a non-standard form of working, an exception to the 'norm', which is to be restricted for some (i.e. mothers of young children) to use if necessary. This approach often results in a sense of unfairness from colleagues who do not have access to it, which hinders its successful implementation and the benefits that it can bring. With a universal right to request organisations will have to consider the wider working time preferences of the whole workforce and therefore they will have to give more thought to the design of jobs, general working time policies and the need to invest in technology to allow more varied working arrangements. Teams are also more likely to understand the need to reach compromises and find workable solutions that accommodate the different needs and preferences of the individuals within them. In organisations that have really embraced flexible working in this way it has become core to how the business operates and numerous benefits have been realised such as better employee relations, greater productivity, reduced absenteeism, and easier recruitment and retention. In such organisations, those who really need flexible working like parents and carers find it easier to access and are less likely to be sidelined into an alternative 'mummy track' that harms their career progression and pay. In addition, as outlined in the 'Out of Time' research report published by the TUC in 2006,²² by extending the right to request flexible working to all, other policy objectives beyond the work-family agenda such as lifelong learning and active ageing will also be achieved.

Q2. Do you support the proposal to replace the statutory process for the consideration of requests with a Code of Practice?

²² Colette Fagan, Ariane Hegewisch and Jane Pillinger, 'Out of Time' (TUC 2006). Available at: www.tuc.org.uk/extras/outoftime.pdf

Yes [] No []

Please explain your response.

We cannot support the proposal without more detail about the form and content of a proposed statutory Code of Practice and reassurances that the procedural rights that parents and carers currently have will not be diminished in any way. The statutory process is all some employees have to fall back on when trying to get a fair hearing for their request. Without it, managers may be more dismissive of a request, for example, rejecting a request as set out in a written application without taking the time to discuss it with the employee, outlining their concerns and exploring ways in which current work organisation could be altered to accommodate it or an alternative arrangement could be agreed upon that met the needs of both parties.

Agreement is often reached on flexible working through discussion and compromise and we believe this would be difficult to achieve, and achieve in a fair way, without a requirement to hold a meeting at which the individual could be accompanied by a union workplace representative or colleague. It is also important that there is a requirement upon the employer to hold the meeting at a time that the employee's chosen companion is available and that the employer's decision following the meeting is provided in writing and that there is an opportunity to appeal the decision. Safeguarding these basic procedural steps to ensure a fair hearing is particularly important given that an employee only has one opportunity a year to make a request.

If reassurances were given about maintaining the statutory procedure, we would be supportive of having a statutory Code of Practice to accompany it as we recognise that beyond the minimum procedural safeguards there are issues which employers would benefit from further advice and guidance on such as, how to handle requests for temporary variations in working arrangements or trial periods without making a permanent change in the contract, requests to return to full-time/standard hours work (it is not clear this is covered by the right to request procedure), collective negotiations to vary work organisation to enable more flexible working, and the interaction between rights not to be discriminated against and the right to request. This latter point is covered well in the EHRC's Codes of Practice and non-statutory guidance on the Equality Act 2010 but these may not be where line managers/union

workplace representatives think to look for advice on flexible working when dealing with a request under the Flexible Working Regulations. If the right to request is extended, we think it will be important to ensure that there is easy-to-access guidance on the interaction of the right to request and discrimination law in a Code of Practice on flexible working so that employers and line managers understand the higher standard of objective justification they need to fulfil before rejecting requests from some workers who could claim unlawful discrimination.

If the idea of a statutory Code of Practice is pursued, the TUC considers Acas best placed to develop a Code that has the support of both unions and employers. It also has the knowledge and expertise gained from drafting other statutory Codes, like the dispute resolution Code, which was focused on getting constructive and fair resolution of issues within the workplace.

Q3. Should the Code of Practice detail the existing statutory procedure.

Yes [] No []

Is there a less burdensome procedure? Please explain your response.

As set out in response to the previous question, it is our belief that without the statutory procedure an employee's request is much less likely to receive a fair hearing. If the only statutory requirement is that an employer has to reasonably consider a request, there will be uncertainty. A manager may respond to a request by claiming he has been reasonable as he has read the written application before deciding to reject it. The employee would then struggle to have a constructive dialogue about the substance of the request as the debate/disagreement would become focused on what is a reasonable process and whether it is reasonable to deny the employee a meeting. We also believe many line managers and employers would prefer to have clear guidance about what they must do to show reasonableness rather than face the uncertainty, if their approach was challenged, of not knowing how an employment tribunal might interpret what is reasonable and having to keep up-to-date with case law providing guidance on this.

We fundamentally disagree with the portrayal of the statutory procedure as being burdensome. The consultation paper says employers have often commented that this is the case but there is no evidence to support this statement. If there is a widespread perception among employers that the

procedure is burdensome, we believe more should be done to communicate to them the importance and value of flexible working and why it is necessary to ensure a fair procedure for dealing with requests, rather than seeking to further weaken the position of the weaker party in the process.

Given the importance of flexible working for some individuals and the fact that it can mean the difference between remaining in work or being unemployed and that individuals are restricted to only making a single request a year, we find it hard to understand how, on balance, a requirement to have a meeting with the employee, to allow them to be accompanied, to give them a written response and to allow them an opportunity to appeal a decision can be considered excessively onerous. The time limits for each stage of the process are reasonable as well: 28 days for holding the meeting (longer if the person dealing with the request is on annual leave at the time the request is made), 14 days for a written response (with the business reasons for rejecting a request already set out in statute to aid the employer), an appeal has to be made within 14 days of receipt of the decision and an appeal meeting held within 14 days of the appeal. It should also be noted that if an employer agrees to a request or an appeal there is no need to hold a meeting or an appeal meeting and, under Regulation 12 of the Flexible Working Regulations, the time limits for any stage of the process can be extended with employer and employee consent.

It would be good to know what part of this process employers find particularly burdensome and what amendments could possibly be made without weakening the position of employees. It is our opinion that omitting any of the stages of the process – the right to a meeting, the right to accompaniment, the right to a written response, and the right to an appeal – would irrevocably damage employees' ability to secure a fair hearing and would not constitute a reasonable approach by employers. Having the procedure set out in statute has the added benefit that it provides certainty and makes employers and employees more likely to focus on discussing the substance of the request and how it could work rather than debating what is a reasonable process for handling it.

A final point: we doubt that the right to request flexible working would have had the impact it has had in creating what the CBI refers to as "a British success story", with flexible working "now deeply ingrained in the modern workplace" if the statutory procedure had not been there

to support it and employers had just had to demonstrate reasonableness instead.²³

Q4. Should a Code of Practice be principle-based (i.e. requiring requests to be considered in a reasonable manner and time) or provide a 'safe harbour' (i.e. where employers following the process precisely get protection)?

Please explain your response.

We are inclined towards the 'safe harbour' approach because of our concern that what is being proposed is a complete dilution and removal of existing rights employees have to ensure a fair hearing. The statutory procedure should remain, with additional interpretive and good practice guidance on flexible working in the Code.

Q5. If you do not agree that we should introduce a Code of Practice to govern flexible working requests, what alternative could be introduced to reduce the administrative burdens of considering requests, without diminishing employee rights?

Please explain your response.

We do not agree with the introduction of a Code of Practice that does not include the existing statutory procedure for handling requests. We dispute the view presented in the consultation paper that the current approach for handling requests is too administratively burdensome and cannot see how any 'deregulatory' changes can be made that do not diminish employee's rights.

If the Government wants to promote wider adoption of flexible working it must not risk diminishing employee's rights especially at this current time when some organisations appear to view work-life balance measures as a luxury only for the good times. Some of our affiliate trade unions have reported that in some workplaces individuals with flexible working are feeling more insecure and are being pressured to work different or longer hours for fear of losing their job; Working Families' recent report on fathers with flexible working arrangements found that those in the public sector were reporting more insecurity because of fears they could be more at risk of redundancy as a result of their flexible working;²⁴ and a recent poll of 3,000 workers found work-life balance was

²³ CBI, Employment Trends Survey 2011 (CBI June 2011)

²⁴ 'Working and fathers - combining family life and work' (Working Families 2011). Available at: www.workingfamilies.org.uk/admin/uploads/WF_WorkingAndFathers-Report-FINAL.pdf

suffering as many were taking on extra responsibilities, working in under-staffed offices, putting in longer hours to earn money or feared for their job if they did not spend more time at work.²⁵

Q6. Do you agree with our proposals on prioritisation of multiple flexible working requests that cannot all be accommodated?

Yes No

Please explain your response.

We agree in so far as the consultation paper rejects the idea of creating a formal prioritisation list and that it only proposes to allow prioritisation when dealing with two competing requests at the same time and the employer has first shown that they cannot meet both requests on business grounds. We do not believe the Government should go any further than this.

Prioritisation is mainly an issue for those who perceive there to be a fixed lump of flexible working available which has to be carefully rationed to those most in need. There is often the added fear that with the extension of the right to request they will be inundated with requests to work from home or work reduced hours which they say the business could not accommodate. Some of this misperception and fear could be addressed by looking at what has happened in practice in those organisations, from a range of sectors, which already operate a universal right to request policy. And we would caution against going too far in seeking to appease those employer groups that are pressing for more opportunities for prioritisation to be built into statute.

According to BERR's Work-Life Balance Survey 2007, 92% of employers reported that they would consider a request to work flexibly from any employee.²⁶ However, a smaller proportion will have adopted a formal policy that gives all employees a contractual right to request flexible working. The TUC Equality Audit 2009 included examples of collective agreements agreed at national level in the NHS and higher education that encouraged flexible working for all and at private sector employers like Unilever. Other examples

²⁵ www.cornwalldevelopmentcompany.co.uk/news.html

²⁶ Bruce Hayward, Barry Fong and Alex Thornton, 'Third Work-Life Balance Survey', (BERR 2007)

would be available from organisations like Working Families. These organisations should be asked how many requests to work flexibly they actually deal with, what kind of requests they are, what proportion the business finds it can accommodate, how it accommodates them and whether prioritisation has been an issue for.

Interestingly, a collective agreement highlighted in the TUC Equality Audit between Usdaw and Unilever provides that all employees have a right to make a flexible working request and to have it seriously considered and that the company will take a 'reason neutral' approach to requests, with the agreement specifically stating it "will not rank reasons for flexible working in any order of acceptability".

While the TUC believes the primary focus should be on whether the business can accommodate flexible working, employers do need to be aware that requests from some individuals should be given more serious consideration than the Flexible Working Regulations demand. The Regulations provide no opportunity for proper scrutiny of an employer's business reasons for rejecting a request and very poor remedies for individuals whose requests have not been properly handled. This is a particularly inadequate approach when it comes to dealing with requests from people like parents and carers or disabled people, for whom flexible working is not just a 'nice to have' but can be essential to them staying in work. Some of these individuals will have the back up of discrimination law (and more of them would have, had the TUC's arguments for including caring status as a ground of discrimination in the Equality Act 2010 been followed). This means employers must make sure that when handling a request from an individual with a potential discrimination claim any decision to reject it does genuinely reflect a business need and is proportionate given the potential impact it would have on that individual.

The TUC believes more needs to be done to ensure there is good guidance available to employers on the interaction between the right to request and discrimination law but we are concerned that if too much weight were given to the issue of prioritisation it may encourage employers to inappropriately delve into individuals' personal circumstances and domestic arrangements and to base their decisions on stereotypical assumptions and subjective value judgements, which may also result in an unlawful act of discrimination occurring. The Government should therefore stick to the very limited approach to prioritisation set

out in the consultation paper and ensure that if a Code of Practice is developed it covers the kinds of potential discrimination claims that could be brought and the need to take an objective approach and to ensure that their business reasons stand up to scrutiny.

Q7. Do you agree that the current 26-week qualifying period should be retained?

Yes [] No [**x**]

Please explain your response.

The TUC has argued repeatedly for the removal of the 26-week qualifying period. Its existence means that only those who are already in employment have the opportunity to access flexible working. Many people, such as lone parents, the vast majority of whom are women, find it extremely difficult to gain employment because so few jobs are advertised on a flexible basis. Less than two-fifths of single mothers with pre-school children are in work compared to more than three-fifths of those in couples and one of the most common reasons given is the difficulty in finding work that fits with their caring responsibilities.²⁷ Removing the 26-week qualifying period would encourage employers to think about flexible working opportunities at the recruitment and job design stage, rather than just reactively responding to requests from existing employees. Thanks to the introduction of the right to request, most employers are used to dealing with flexible working requests from maternity returners and find they can accommodate many of them. To get that kind of change in behaviour and mindset at the recruitment stage the 26-week qualifying period should go.

Q8. Do you agree that the restriction on the number of requests allowed in any 12-month period should be changed?

Yes [**x**] No []

Please explain your response.

This would benefit situations where a temporary period of flexible working is required but the employer is reluctant to grant a temporary variation in contract and guarantee a

²⁷ Gingerbread, 'Changing the workplace - the missing piece of the jigsaw' (August 2010). Available at www.gingerbread.org.uk/uploads/media/17/6948.pdf

reversion to the previous working arrangement at some future date.

Q9. Do you have an alternative proposal for promoting temporary changes to working patterns?

Please explain your response.

For an employee who requires a temporary change in their working pattern it would be better to encourage employer and employee to agree to a temporary variation rather than dealing with it as a request for a permanent change with the employee being given the right to make a request to change back at a later date. An agreed temporary variation would mean the employee did not have to face the uncertainty of not knowing whether or not the employer will agree to them returning to their previous working arrangement when they no longer need flexible working. Many men are likely to be deterred from making a request in the first place if they cannot guarantee a return to their normal working arrangement. If the proposed Code of Practice goes ahead then it should include guidance on dealing with agreed temporary variations with agreed finish or review points at which the employee will be able to revert to their normal working arrangement. This should be in addition to the statutory amendments that would enable more than one request in a 12-month period for those situations where an employer will not agree to a temporary variation.

Q10. Do you agree with the Government that micro-businesses and start-ups should be exempted from the extension to the right to request flexible working for the three year moratorium?

Yes [] No []

Please explain your response.

Access to employment rights to ensure fair treatment at work should not depend upon the size of employer that you happen to work for. In addition, it is likely that a moratorium would apply only for a very short period of time given the expected timetable for implementing the Modern Workplaces proposals. Micro businesses would then have to get to grips with the changes to the flexible working legislation at the same time as all the other legislative changes that they had been exempted from coming into force.

Q11. What support do you think employers need to enable them to operate flexible working? Employers:

- **What existing support and guidance have you used?**

- **Has this been helpful to you?**

Please explain your response.

There must be significant promotional activity around the introduction of any changes to the legislation, to raise awareness and to address any misperceptions or concerns from business about having a universal right to request. This should include short examples or provide guidance drawing on the experiences of organisations, from a variety of sectors and size of business, who have been operating with a universal right for some time about how it has worked and what it has meant for them.

Trade union representatives and officers have an important role to play in providing access to independent advice for individuals seeking flexible working and in negotiating policies that mean individuals and managers have appropriate support and guidance on how to implement flexible working in that particular workplace. As the 'Out of Time' research report stated: "The individualised right to request flexible work must be underpinned by collectively agreed principles to ensure it is implemented effectively and fairly across the workforce." If the proposed Code of Practice goes ahead it should address the collective dimension and the value of joint working between trade unions and employers - again, Acas would be well placed to develop this kind of guidance.

In addition, in order for trade unions to continue to play the valuable role they have played in many workplaces in securing widespread implementation of flexible working, workplace representatives and officers must continue to have access to the reasonable paid time off they are statutorily entitled to so they can effectively carry out their duties and attend trade union training to update their knowledge and skills. Employers should also be encouraged to give similar entitlements to paid time off to trained union equality representatives who are particularly well placed to assist with flexible working implementation.

Q12. When looking for jobs, what could employers or recruitment agencies provide that would highlight that a job has flexible working opportunities?

The job advertisement should include wording that makes clear that the position is open to those seeking flexible work opportunities and such applications would be welcome. Details of any flexible working policies should be included in the recruitment pack for all potential job applicants.

The TUC is part of the DWP flexible working group, chaired by Sarah Jackson from Working Families, which is looking at non-legislative means of promoting flexible working in the private sector. The group is considering the possibility of developing a generic job ad strapline that employers could use to show their support for flexible working.

Q13. What support is required to help people to undertake varied-hours working?

The demand for varied-hours working is not an issue that has been raised with us by our affiliates. More frequently, from the perspective of enabling working parents and carers to manage work with their other commitments, the issue of certainty around working hours has been raised, in particular, the difficulty of accommodating variable shift patterns or varied unsocial hours working at short notice when childcare is only available at fixed times and during the standard working day.²⁸

Q 14. Do you have any further comments or suggestions relating to our proposals or impact assessment on flexible working?

As mentioned in response to Q6, the Government should look at how a universal right to request flexible working has operated in those organisations that already provide it as a contractual right to gain more understanding of the likely impact in practice of their proposals.

²⁸ See 'Out of Time', n22 above.

Working Time Regulations

Q1. Do you agree with the proposal to allow employers to limit the carryover of leave in sickness cases to the four week entitlement under Regulation 13?

Yes [] No []

Please explain your response.

The TUC does not agree that carry over should be limited to the 4-week entitlement underpinned by the Working Time Directive. We regard the full 5.6 weeks set by domestic legislation as the minimum standard that will underpin health and well-being and if the Government supports the current domestic legislative standard, then there is no case for failing to treat all statutory annual leave in the same way.

The increase in the UK statutory minimum leave entitlement to 5.6 weeks per year was implemented with the aim of ensuring that those who do not get paid leave for public holidays may still have entitlements that reach a decent minimum standard. In many other EU countries, public holidays are supported by separate employment rights. The TUC believes that if the European Commission had been aware of the lack of such rights in the UK they may well have added provision for public holidays to the text of the Directive.

It is also the TUC's view that treating different types of leave in different ways introduces an unnecessary level of complexity into the Regulations. If employers and workers are put in a position where they have to argue about whether leave stems from EU or domestic rights, then it seems likely that a significant number of disputes will end up in employment tribunals.

Q 2. Do you agree with the proposal to allow employers to limit the right to reschedule leave in the event of sickness to the four week entitlement under Regulation 13?

Yes [] No []

Please explain your response.

We do not agree that employers should be able to reschedule leave that has not been taken due to sickness absence into the next leave year for business reasons, as this provision would be certain to be abused by bad employers, who would use it as a route to ensure that leave is lost.

Q3. Do you agree with the proposal that the Working Time Regulations be amended to specify the order in which leave is deemed to be taken, subject to contrary provision in a relevant agreement or contract?

Yes [] No [**x**]

Please explain your response.

It would be far better to protect all statutory annual leave. If the government is determined to make the law more complex then there might be certain logic to specifying that the “default setting” is that the 4 weeks specified by the WTD is deemed to be taken first. However, this has the drawback of imposing rigidity on employers and workers alike. If only 4 weeks is to be protected, then it should be possible to alter the “default setting” by a relevant agreement, in order to suit the circumstances prevailing in workplaces where vulnerable workers are protected by unions.

Q 4 Do you agree that there is no merit in amending the Working Time Regulations to limit the accrual of annual leave during sickness absence to the four-week entitlement under Regulation 13?

Yes [**x**] No []

Please explain your response.

The TUC agrees that the full statutory leave entitlement of 5.6 weeks should continue to accrue during periods of sickness absence. We regard this entitlement as a vital minimum standard. There would be no merit in amending the current arrangements, and to do so would both undermine the protection that workers expect in the UK and make the Regulations more complicated for employers.

Q 5 Do you foresee any problems or difficulties with the approach proposed on the interaction of annual and family-related leave? Please explain your response.

We support the proposal to allow the carryover of 5.6 weeks of annual leave to the subsequent leave year if it has not been possible to take it due to family-related leave being taken in that leave year.

We do not agree with the proposal that would mean employers could require rescheduling and carryover of leave to a subsequent leave year for reasons set out in response to Q8 below.

Q 6 Do you agree that these existing statutory notification provisions will be sufficient to enable employers to manage issues arising from the proposed changes to the Working

Time Regulations? If not, what additional statutory requirements might be helpful in relation to rescheduling or carrying over leave?

Yes [] No []

Please explain your response.

The existing statutory notification procedure and the power to discipline any workers who may try to abuse the system provides employers with ample powers to ensure that the provisions are not abused. However, countervailing measures to ensure that workers can access their rights are not in place.

The consultation document reports that the Government is aware that business has concerns about possible abuse of arrangements that allow workers to postpone annual leave if they are sick (p51, para 27). The TUC is not aware of any evidence to support this. In sharp contrast, we have heard numerous anecdotes about rogue employers who cheat their workers out of the statutory annual leave entitlements with apparent impunity. This view is supported by evidence from the ONS Labour Force Survey, which currently shows 940,000 employees saying that they have no holidays at all, and 3.8 million full-time employees reporting that they have less than 20 days leave per year¹. When part-time workers are also considered, the official figures suggest that more than one in five employees is not getting their statutory holiday entitlement.

Q7. More generally, are there any additional issues that you would like to raise in relation to the proposed amendments around the interaction of annual leave with sick leave and family leave?

The main omission is that no improvements to enforcement of the working time rights are being proposed. Workers find enforcing their holiday rights very difficult, as recourse is ultimately to Employment Tribunal. Few workers will pursue such a case while they remain in post, so most cases are brought by workers at the point where they leave the employment relationship. The Government should seriously consider whether the current arrangements are sufficiently robust to protect vulnerable workers. Indeed, the TUC would strongly suggest the creation of "dual-channel" enforcement, whereby workers can either take a case to a government inspectorate or to Employment Tribunal. This arrangement is exactly what is used to enforce the National Minimum Wage, where complaint can be made either to HM Revenue and Customs or to Employment Tribunal.

Q8. Would you support amendment of the Working Time Regulations to allow:

- 'buy out' by agreement of the additional 1.6 weeks leave entitlement under Regulation 13A; and
- employers to require the carry-over of the additional 1.6 weeks leave entitlement under Regulation 13A in cases of overriding business need

Please explain your response.

The TUC opposes proposals to allow the buyout of the 1.6 weeks' leave stemming from Regulation 13a. We believe that such a change in the law is inherently undesirable because, in our view, 5.6 weeks' paid leave including public holidays is the bare minimum necessary to provide for a good work-life balance. As mentioned above, we believe that the WTD only failed to include public holiday rights in addition to the 4 weeks' paid annual leave entitlement because they were not aware that such a provision was needed in the UK.

Such a provision is also unnecessary because most people already have contractual leave entitlements that exceed the statutory minimum, and so some flexibility is therefore potentially available to most employers and workers already. The average entitlement for a UK worker is a total of 33 days' paid annual leave and public holidays per year so on average around 5 days of contractual leave could be sold back without the need to reduce the minimum statutory entitlement.

If the Government were to go ahead with this proposal for buy-back, workers must be protected by ensuring that these arrangements could only be used if there was a collective or relevant workforce agreement in place permitting it.

On the issue of business need triggering the carry-over of statutory annual leave, the Government's consultation document argues that the proposals are consistent with the Pereda judgement². But if employers can choose to carry over untaken annual leave into the following year, then some will abuse this provision. The right to delay leave is already used by bad employers as a tool to ensure that entitlements are never taken.

It is therefore not entirely clear to the TUC that the explanation in paragraphs 22 and 23 in the ECJ judgement can be reliably interpreted in the way that is suggested in the consultation document. In our view, the right to paid annual leave is likely to take precedence in certain circumstances at least. It might thus be hard for the

Government to defend enshrining such a view in the domestic regulations.

The example give on page 48 of the consultation document concerns a retail worker who has suffered a period of sickness absence and returns to work in December, which is both the last month of the employers leave year, an their busiest trading month. Surely the simplest solution here is for the employer to consider changing the holiday year, say to coincide with the financial year, so that it does not always end during the busiest trading month.

Q9. Do you have any other proposals for ways in which the operation of the annual leave provisions could be made more flexible, consistent with the requirements of the Working Time Directive?

Good employers would be better supported if the Government would take firm steps to end abuse of the statutory holiday right provisions by rogue employers. Official figures suggest that more than one in five employees in the UK is not getting their rights.

Q 10. Do you have any comments on analysis contained within the Impact Assessment?

No.

¹ Source, LFS microdata Oct-Dec 2010.

² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0277:EN:HTML>