



Law Society
of Scotland



Consultation Response

Pregnancy and maternity discrimination: extending
redundancy protection for women and new parents

April 2019



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Employment and Equalities Law sub-committees welcome the opportunity to consider and respond to the Department for Business, Energy & Industrial Strategy's consultation, pregnancy and maternity discrimination: extending redundancy protection for women and new parents. The sub-committee has the following comments to put forward for consideration.

Consultation questions

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.

Agree.

Question 2. Please give reasons for your answer.

In our experience, issues regarding potential discrimination often arise after a woman has returned to work after maternity leave. Women may find it difficult to 'fight their corner' in a redundancy exercise when they have been out of the workplace for up to year and feel vulnerable if they have less evidence to fall back on in redundancy exercises. They are also vulnerable to assumptions being made about their commitment to the job and the impact their childcare responsibilities may have on future performance.

However, we are also conscious of the fact that this would represent an extension to positive discrimination, which should only occur in exceptional circumstances, and that the consequence of

extending this right is that potentially another employee (whether male or female), who may otherwise have been offered the role, will lose out.

On balance, we consider that extending redundancy protection under MAPLE so that it is in line with the 'protected period' under the Equality Act and extending the protection for a six-month period thereafter would strengthen protection for women and bring clarity and consistency to the legal position which would assist employers and employees.

Question 3. What costs do you believe the extension would bring:

a) For individuals

b) For businesses

We have not identified any significant costs to individuals, save that there will be some employees (non-maternity returners) who may lose out in a redundancy situation where otherwise they would have been offered a suitable alternative vacancy.

In relation to businesses, other than the risk of losing an employee who might otherwise have been more suitably qualified for the vacancy, we do not believe that there will be costs in relation to the actual extended protection, but minimal costs will be associated with familiarising themselves with any change in the law.

Question 4. What benefits do you believe the extension would bring:

a) For individuals

b) For businesses

As discussed at question 2, above, benefits to the individual include decreasing potential or perceived disadvantage to women in a redundancy exercise when they have been out of the workplace as a result of pregnancy or maternity leave.

Benefits to businesses include being confident that the extended rights help to create an environment that is supportive of those returning from maternity leave.

Question 5. Do you agree that 6 months would be an adequate period of “return to work” for redundancy protection purposes?

Yes.

Question 6. Please give reasons for your answers

Six months should be an adequate period of time for a woman returning to work to settle back into work and be less vulnerable to redundancy based on assumptions about their commitment to the role and their childcare responsibilities etc. This length of protection should give employers the flexibility they need in a redundancy exercise.

Question 7. If you think a different period of “return to work” would work better, please say what that should be and explain why

Not applicable.

Question 8. Should pregnancy for redundancy protection purposes be defined as starting at the point a women informs her employer that she is pregnant in writing?

Agree.

In the majority of situations, protection should start from the point that an employer is informed in writing. This ensures clarity for both parties. However, there may be cases where it is clear that the employer had been informed, and was aware of the pregnancy, albeit they have not been informed in writing. In situations where considerable unfairness or disadvantage would be created by requiring a written notification, consideration should be given to providing for discretion to allow protection to begin from the point that an employer was informed, whether by writing or other means.

Question 9. Do you think an earlier reference point should be used?

No. However, please refer to our response to question 8, above.

Question 10. If yes, please say what that should be and explain why.

Not applicable.

Question 11. 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**
- b) shared parental leave**
- c) longer periods of parental leave**
- d) Other**

We agree that adoption leave and shared parental leave are the most direct equivalents to return to work from statutory maternity leave, but disagree with longer periods of parental leave.

Question 12. If other, please explain your reasons.

Not applicable.

Question 13. 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?

Strongly agree.

Question 14. Please explain the reasons for your answer.

We agree that MAPLE protection should be extended to parents taking adoption leave (AL) and shared parental leave (SPL). All parents, male or female, should have the same protection in connection with leave associated with the birth or arrival of a child. We do not agree that it should be extended to cover those returning from periods of longer parental leave which is not designed to cover leave associated with the birth or arrival of a child. If the protection is extended to AL and SPL there are likely to be concerns about competing claims for consideration for suitable alternative employment and to widen the protection to those on parental leave increases the risks and complexities for employers. We are not aware of any evidence to suggest that taking leave under the parental leave provisions leads to less favourable treatment in redundancy situations. We recognise that such treatment could arise if a parent uses parental leave to extend a period of SPL, AL or maternity. In these cases, we would suggest that the six-month protection period may have to start when the period of maternity leave, SPL or AL ends rather than at the end of the parental leave and the actual return to work. Given that the maximum period of parental leave is

four weeks, we do not believe that this would dilute the return to work protection too much and balances against the needs of employers to have the necessary flexibility in redundancy exercises.

Question 15. Are there other forms of leave which should be considered for additional redundancy protection on return to work?

No.

Question 16. Please give your reasons.

As discussed in our response to question 14, above, we believe that SPL and AL are the most comparable types of leave to pregnancy and maternity leave. Extending protections beyond these groups would not strike the correct balance between the need to protect from potential or perceived disadvantage, and the need for flexibility in redundancy exercises.

Question 17. How effective have these steps been in achieving their objective of informing pregnant women and new mothers of their employment rights?

Don't know.

Question 18. Please give your reasons.

Not applicable.

Question 19. 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?

Don't know.

Question 20. Please give your reasons.

Not applicable.

Question 21. How do you think these steps might be improved?

We have no comments to make at this stage.

Question 22. 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.

We have no comments to make at this stage.

Question 23. If further steps should be taken, who is best placed to take that action?

We have no comments to make at this stage.

For further information, please contact:

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