

BERR

Department for Business
Enterprise & Regulatory Reform

**European Commission
proposals to amend the
Pregnant Workers Directive**

A consultation

March 2009

Consultation on European Commission proposals for a Directive of the European Parliament and of the Council amending the Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

The European Commission published a proposal to amend the Pregnant Workers Directive (92/85/EEC) in October 2008. The Directive sets down minimum levels of maternity rights, including leave and pay, which Member States must provide. The Commission's aim is to contribute to better work life balance through improving the protections offered to pregnant workers and workers who have recently given birth or are breastfeeding.

As part of its policies to support working parents, the UK Government has built on the minimum standards set out in the existing Directive and provides a longer period of maternity leave and a higher rate of maternity pay than is currently required.

We welcome your views on the Commission's proposal to change the minimum standards set out in the Directive, including the likely costs and benefits. Your views will inform the UK Government's ongoing negotiations which will take account of existing UK provisions.

If regulation is required the Government does not envisage implementation until at least 2011.

Issued 24 March 2009

Respond by 22 June 2009

Enquiries to Nicola Dissem, Employment Relations – Participation, Department for Business, Enterprise and Regulatory Reform, 1 Victoria Street, London, SW1H 0ET.

Tel: 020 7215 0389

Email: workingparents@berr.gsi.gov.uk

This consultation is relevant to: All employers and employees, particularly women of childbearing age and their employers.

Contents

Executive summary	4
How to respond	6
Confidentiality & data protection.....	7
Help with queries.....	7
Consultation questions	8
The proposal	9
What happens next?	14
Annex A: Text of Commission Proposal	15
Annex B – consultation response form and questions.....	23
Annex C – Impact Assessment of the Pregnant Workers Directive.....	28
Annex D: List of individuals and organisations consulted.....	50
Annex E: Code of Practice on Consultations.....	51

Executive summary

The European Commission's overall objective in amending the Pregnant Workers Directive is to improve the common minimum standard of protection across all Member States for pregnant workers and workers who have recently given birth or are breastfeeding. The proposal also codifies case law that has arisen in this area and brings into the Directive provisions relating to pregnancy which are already in place under the Equal Treatment Directive¹.

The proposal extends the minimum period of maternity leave from 14 to 18 weeks, of which at least six must be taken after birth. The proposal allows for additional leave to be provided in a number of eventualities including late, premature or multiple births. It also introduces the principle of full pay during maternity leave subject to a cap which Member States may set. The proposal strengthens the employment rights of workers covered by the Directive: this includes a right to return to the same job or to a suitable alternative; and the right to request flexible working when returning from maternity leave. The proposal also includes protections common to Directives on equal treatment such as transference of the burden of proof and protection from victimisation.

The UK system is in many ways more generous than the proposed minimum standards set by the European Commission including: providing 52 week's maternity leave; the right to return to the same job or to a suitable alternative; and the right to request flexible working for parents of children under six (16 and under from April 2009). We have worked with employer and employee representatives to create a system which allows both parties to plan ahead and to manage both the maternity absence and return to work. The Commission's proposals should be considered in the light of the UK's generous provisions.

The Commission's proposal is subject to negotiation with all Member States, including discussion of the precise meaning or intention of certain elements, and co-decision by the Council and the European Parliament. Responses to this consultation will be used to inform the UK's position during those negotiations.

¹ Directive 76/207/EEC on the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions as amended by Directive 2002/73/EC, and as recast in Directive 2006/54/EC on the principles of equal opportunities and equal treatment for men and women in matters of employment and occupation.

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

Commission Proposal	UK Provisions
Extend minimum maternity leave from 14 to 18 weeks. Additional leave on top of the 18 weeks for some women in special circumstances.	UK provision (52 weeks) is well in excess of minimum 18 week period. The UK provides all women a longer period of statutory maternity leave and pay to accommodate these special circumstances.
Extend compulsory maternity leave from two weeks to six weeks after the birth.	UK requires two weeks' compulsory leave after the birth.
Women dismissed from start of pregnancy through to six months after maternity leave entitled to request written reasons for dismissal.	Women dismissed during pregnancy or maternity leave are currently entitled to written reasons. All employees with 12 months' service have the right to request written reasons for dismissal.
Suspension from work on maternity grounds must be on full pay.	This right already exists in the UK.
Right to return to the same or equivalent post on terms and conditions no less favourable than if she had not been absent.	This right already exists in the UK.
Full pay during maternity leave, with Member States able to specify a ceiling (which must be at least equal to sick pay).	UK provision (six weeks at 90 percent of average earnings followed by flat rate of £123.06 ²) is well in excess of sick pay levels.
Right to request flexible working for women returning from maternity leave.	Parents of children under six (or 18 if the child is disabled) who have six months' service with an employer have the right to request flexible working.
Copying out of protections given by the Equal Treatment Amendment Directive to Pregnant Workers Directive. This includes transference of burden of proof, protection from victimisation and uncapped compensation.	These protections are already given for workers bringing cases where sex discrimination is the primary concern.

² From 5 April 2009

How to respond

1. This consultation opened on 24 March 2009. Responses must be received by 22nd June 2009.
2. Discussion of the proposal is ongoing and earlier responses will be welcomed.
3. When responding, please state whether you are responding as an individual or representing the views of an organisation, by selecting the appropriate interest group on the consultation response form. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.
4. Responses should be submitted via survey monkey at <http://tinyurl.com/cku6gz>.
5. A response can be submitted by letter, fax or e-mail using the consultation response form in Annex B – consultation response form and questions or available at: www.berr.gov.uk/files/file50577.doc
6. If submitting your response by letter, fax or email, please send it to:

Karen Haseldine
Employment Relations – Participation
Department for Business, Enterprise and Regulatory Reform
1 Victoria Street, London, SW1H 0ET

Tel: 020 7215 5531

Fax: 020 7215 0168

Email: workingparents@berr.gsi.gov.uk

7. A list of those organisations and individuals consulted is in Annex D: List of individuals and organisations consulted. We would welcome suggestions of others who may wish to be involved in this consultation process.

Additional copies

8. You may make copies of this document without seeking permission. Further printed copies of the consultation document can be obtained from:

BERR Publications Orderline
ADMAIL 528
London
SW1W 8YT

Tel: 0845 015 0010

Fax: 0845 015 0020

Minicom: 0845 015 0030

www.berr.gov.uk/publications

9. Other versions of the document in Braille, other languages or audio-cassette are available on request.

Confidentiality & data protection

10. Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.
11. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

Help with queries

12. Questions about the policy issues raised in the document can be addressed to:

Nicola Dissem
Employment Relations – Participation
Department for Business, Enterprise and Regulatory Reform
1 Victoria Street,
London, SW1H 0ET

Tel: 020 7215 0389

Email: workingparents@berr.gsi.gov.uk

Consultation questions

1. What is your overall assessment of the Commission's proposal?
 - a. How well do you think the proposal addresses the Commission's aims?
2. What do you consider the implications of the proposed changes would be on the UK system of rights for working parents?
3. What is your evaluation of risks and benefits for businesses and working parents?
4. Do you consider the proposal strikes the right balance between protecting pregnant women and new mothers and being manageable for employers and employees?
5. Does this proposal present any particular implementation difficulties and if so, what?
 - a. Do you have any suggestions to address these?
6. Do you have any comments about particular proposals? If so please specify, indicating clearly the Article you are commenting upon.
7. Do you have any comments on the Government's Impact Assessment or the Commission's Impact Assessment?
8. Are there any other comments you have on the Commission's proposal?

The proposal

Section 1 – Current provisions under the Pregnant Workers Directive

13. The Pregnant Workers Directive (Directive 92/85/EEC³) (hereafter called ‘the Directive’) sets out minimum provisions to ensure the health and safety at work of pregnant workers and workers who have recently given birth or who are breastfeeding. The Directive was adopted in 1992 and was transposed into UK law in October 1994. The UK provisions are contained within the Social Security Contributions and Benefits Act 1992 and related regulations, the Employment Rights Act 1996, the Maternity and Parental Leave Regulations 1999, supported by the Sex Discrimination Act 1975, as amended.
14. The Directive provides for a minimum of 14 continuous weeks’ maternity leave, including two weeks’ compulsory leave. These 14 weeks (including the compulsory leave period) can be allocated before or after childbirth as dictated by domestic law. During maternity leave the woman is entitled to all her rights connected with her employment contract and to ‘an adequate allowance’ which must be at least equivalent to the amount a woman would receive under state legislation if she were off work sick.
15. The Directive also includes provisions to protect the safety of pregnant workers, including a requirement for a health and safety assessment to be carried out and acted upon by the employer. The worker is also protected from dismissal during pregnancy and maternity leave except in exceptional cases not concerned with pregnancy or childbirth.
16. The UK, like many other Member States, has built on this minimum to create its own system of support for working parents.

Section 2 – Description of the Commission’s proposal

17. The Commission’s overall objective in amending the Directive is to improve and build upon the common minimum standard of protection already in place across all Member States for pregnant workers and workers who have recently given birth or are breastfeeding. The amending Directive also codifies case law that has arisen in this area since 1996 and brings into the Directive provisions relating to pregnancy which are already in place under the Equal Treatment Directive⁴.

³ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC).

⁴ Ibid.

18. The Commission's proposal and its Impact Assessment are available from <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=402&furtherNews=yes>

Maternity Leave

19. Article 8 would be amended to ensure that a longer minimum period of maternity leave is provided to women to enable full recovery from pregnancy and childbirth and to support breastfeeding for a longer period, specifically:

- The minimum period of maternity leave available to workers covered by the Directive would be extended from 14 to 18 continuous weeks, of which at least six weeks would be compulsory after childbirth;
- Women would have complete freedom as to when to take the non-compulsory element of maternity leave;
- In cases of a child being born later than expected, leave would be extended so that there is no reduction in the post-natal portion;
- Additional periods of leave would be provided by Member States in the event of premature births, multiple births, children hospitalised at the time of birth, and new-born children with disabilities. The amount of leave must be proportionate to accommodate the special needs of mothers and their child/children that arise from these events.
- Any period of pregnancy-related sick leave, four weeks or more before childbirth, would not shorten the period of maternity leave.

Existing UK provisions

The UK provides 52 weeks' maternity leave to all employed mothers. This provides certainty for both the employer and employee as to when the mother should return to work and allows all mothers the freedom to choose to take as much or as little time off (within overall limits) as they need according to their own circumstances. All UK mothers must take two weeks (or four weeks if employed in a factory) of 'compulsory maternity leave' after childbirth.

UK mothers can choose to start their maternity leave up to 11 weeks before the expected week of childbirth. Maternity leave starts automatically if a woman gives birth before the planned start of her maternity leave. If a woman is absent from work due to pregnancy during the four weeks prior to the expected week of childbirth, the employer can automatically start the maternity leave.

The proposals would mean that women could start their maternity leave at any point in their pregnancy, but must take six weeks maternity leave following childbirth. The 'sickness trigger', which allows employers to automatically start maternity leave where the mother is sick within four weeks of the expected week of childbirth, would remain.

Protection from dismissal

20. Article 10(1) would be amended to prohibit employers from dismissing a worker covered by the Directive, and from making preparations in order to dismiss a woman, save in exceptional cases not connected with their condition, during the period from the beginning of pregnancy to the end of maternity leave. This implements the judgement in *Nadine Paquay v Société d'architectes Hoet* (C-460/06) which found that an employer may not make preparations to dismiss a worker during her maternity leave except where the dismissal is not connected to pregnancy or maternity. Article 10(2) of the proposal would give women who are dismissed during the six months following return from maternity leave the right to written reasons for the dismissal, should they request them.

Existing UK provisions

In the UK, the Employment Rights Act 1996 and the Employment Rights (Northern Ireland) Order 1996 (both as amended) provide protection from dismissal or detriment for workers covered by the Directive.

All UK employees who have been continuously employed for a period of one year or more are entitled to request a written statement of reasons for dismissal. A woman dismissed during her pregnancy or maternity leave is entitled to written reasons for her dismissal, regardless of how long she has been employed and regardless of whether she requests a written statement.

Suspension from work

21. New Article 11 (1a) would provide that when a pregnant woman is suspended from work during pregnancy by her employer because the employer considers her unfit for work even though the worker has not given medical information to support this, the worker is to be entitled to full salary until the start of her maternity leave. This implements the judgement in *Pedersen v Fællesforeningen* (Case C-66/96) which found that an employer may not send home a woman who is pregnant, and not unfit for work, without paying her salary in full when he considers that he cannot provide work for her.

Under UK law, an employee who has been suspended from work on maternity grounds is entitled to payment equivalent to full salary during the suspension until maternity leave begins.

Right to return

22. New Article 11(2c) would give employees the right to return to their jobs or to equivalent posts on terms and conditions no less favourable than if they had not been absent. This right is currently provided within the Equal

Treatment Directive⁵ but was not previously within the Pregnant Workers Directive.

In the UK an employee returning to work before or at the end of Ordinary Maternity Leave (weeks 1 – 26 of maternity leave) has the right to return to the same job on terms and conditions as if she had not been absent. This also applies to an employee returning during or at the end of Additional Maternity Leave (weeks 27- 52 of maternity leave), unless it is not reasonably practicable for the employer to keep the original job open. In that case, the employee must be offered suitable and appropriate alternative work with terms and conditions no less favourable than if she had not been absent.

Maternity Pay

23. New Article 11(3) would provide the principle of entitlement to payment of full monthly salary during maternity leave. Member States may place a ceiling on this payment so long as it is not lower than the allowance a woman would receive if she were off work sick.

24. In negotiations we are seeking to clarify the level of the permitted cap.

In the UK, Statutory Maternity Pay is paid for 39 weeks at 90 percent of the woman's average earnings. There is no upper limit for the first six weeks of payment and a maximum of £123.06 for the remaining 33 weeks. State paid Maternity Allowance is similar but with a ceiling of £123.06 throughout the 39 weeks of payment. This ceiling is set well above the level of Statutory Sick Pay which is £79.15 (from April 2009).⁶

Flexible working

25. New Article 11(5) would require Member States to give women returning from maternity leave the right to request changes to their working hours and patterns with an obligation on employers to consider such requests, taking into account business and employee needs.

Parents of children aged under six years or disabled children under 18 years, who have worked for their employer for six months or more, have the legal right to apply to work flexibly and their employers have a duty to consider these requests seriously. Employers may refuse a request on one of a number of specified business grounds. This will be extended to parents of children up to 16 from 6 April 2009⁷.

⁵ Ibid

⁶ Rates apply from 5 April 2009

⁷ The extension will apply to employees in Great Britain. The position in Northern Ireland is to be reviewed.

Defence of rights

26. Article 12 would be amended to reflect the protections already provided by the Equal Treatment Directive⁸. Changes to the Pregnant Workers Directive would be:

- The transference of the burden of proof in judicial procedures to the respondent;
- Provision for protection from victimisation for those who have brought complaints based on matters protected under the Directive;
- An express requirement that no upper limit can be placed on penalties (including compensation) for breach of provisions within the Directive
- Existing equality bodies would be given responsibility covering the equal treatment aspects of the proposal. (For Great Britain this would be the Equality and Human Rights Commission, and for Northern Ireland the Equality Commission for Northern Ireland).

27. In negotiations we are clarifying that these provisions apply only to cases where equal treatment is the primary concern.

In the UK, the Sex Discrimination Act 1975 and the Sex Discrimination (Northern Ireland) Order 1976 (both as amended) already provide the above protections for those seeking to bring a claim on the grounds of sex discrimination, including pregnancy and maternity discrimination.

⁸ Ibid

What happens next?

28. The UK Government will use the responses received to inform its negotiating position during discussions on the draft Directive. The text of the proposed Directive can undergo major changes during negotiations and the timetable and progress of discussion can change very quickly.
29. Decisions taken in light of the consultation will be publicised along with a summary of the responses received.
30. Stakeholders will be able to follow developments on this Directive following the consultation on the BERR website at <http://www.berr.gov.uk/consultations/page50579.html>
31. As negotiations on the draft Directive progress it may be necessary to hold a further consultation. This may be done via a similarly wide exercise or using a more targeted approach.

Annex A: Text of Commission Proposal

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
amending Council Directive 92/85/EEC on the introduction of measures to
encourage improvements in the safety and health at work of pregnant
workers and workers who have recently given birth or are breastfeeding

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN
UNION,

Having regard to the Treaty establishing the European Community, and in
particular Articles 137(2) and 141(3) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social
Committee²⁷,

Having regard to the opinion of the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the
Treaty,

Whereas:

(1) Article 137 of the Treaty provides that with a view to achieving the
objectives of Article 136 of the Treaty, the Community shall support and
complement the activities of Member States in improving the working
conditions to protect the safety and health of workers and in ensuring equality
between women and men with regard to labour market opportunities and
treatment at work.

(2) Article 141 of the Treaty provides that the Council, acting in
accordance with the procedure referred to in Article 251, and after consulting
the Economic and Social Committee, shall adopt measures to ensure the
application of the principle of equal opportunities and equal treatment of men
and women in matters of employment and occupation.

(3) Since this Directive addresses not only the health and safety of
workers who are pregnant, or have recently given birth or are breastfeeding,
but also, inherently, issues of equal treatment, such as the right to return to
the same or an equivalent working place, the rules on dismissal and
employment rights, or on better financial support during the leave, Article 137
and 141 are combined to form the legal base for this Directive.

(4) Equality between men and women is a fundamental principle of the
European Union. Articles 21 and 23 of the Charter of Fundamental Rights of
the European Union prohibit any discrimination on grounds of sex and require
equality between men and women to be ensured in all areas.

- (5) Under Article 2 of the Treaty establishing the European Community, promoting such equality is one of the Community's essential tasks. Similarly, under Article 3(2) of the Treaty the Community must aim to eliminate inequalities and to promote equality between men and women in all its activities.
- (6) Directive 92/85/EEC²⁹ implements measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.
- (7) One of the six priorities laid down in the Roadmap for equality between women and men 2006-2010³⁰ is to achieve a better balance between work and private and family life. In this connection the Commission undertook to review the existing legislation in the field of gender equality with a view to modernising it, where necessary. The Commission also announced that in order to improve governance of gender equality, it would 'review the existing EU gender equality legislation not included in the 2005 recast exercise (...) with a view to updating, modernising and recasting where necessary'. Directive 92/85/EEC was not included in the recasting exercise.
- (8) In its Communication *Renewed Social Agenda: Opportunities, access and solidarity in 21st century Europe*, the Commission affirmed the need to improve reconciliation of private and professional life.
- (9) The vulnerability of pregnant workers and of workers who have recently given birth or who are breastfeeding makes it necessary for them to be granted the right to maternity leave of at least 18 continuous weeks, allocated before and/or after confinement, and renders necessary the compulsory nature of maternity leave of at least six weeks allocated after confinement.
- (10) The International Labour Organization recommends a minimum duration of maternity leave of 18 weeks remunerated at the full amount of the woman's previous earnings. The ILO Maternity Protection Convention of 2000 provides for a period of six weeks' compulsory leave after childbirth.
- (11) The Court of Justice of the European Communities has consistently recognised the legitimacy, in terms of the principle of equal treatment, of protecting a woman's biological condition during and after pregnancy. It has, moreover, consistently ruled that any unfavourable treatment of women related to pregnancy or maternity constitutes direct sex discrimination.
- (12) On the basis of the principle of equal treatment, the Court has also recognised the protection of employment rights of women, and in particular their right to return to the same or an equivalent job, on terms that are no less favourable, as well as to benefit from any improvement in working conditions introduced during their absence.
- (13) Women should therefore be protected from discrimination on grounds of pregnancy or maternity leave, and should have adequate means of legal protection.

(14) This Directive is without prejudice to Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, as recast in Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

(15) The protection of the safety and health of pregnant workers, workers who have recently given birth or workers who are breastfeeding should be guaranteed and not run counter to the principles enshrined in the Directives concerning equal treatment for men and women.

(16) In order to improve the effective protection of pregnant workers and workers who have recently given birth or are breast feeding, the rules on the burden of proof should be adapted where there is a prima facie case of a breach of the rights granted under this Directive. For those rights to be applied effectively, the burden of proof should fall on the respondent when evidence of such a breach is brought.

(17) The effective implementation of the principle of equal treatment requires adequate judicial protection against victimisation.

(18) Member States should provide for effective, proportionate and dissuasive penalties in the event of any breach of the obligations under this Directive.

(19) Experience shows that protection against breaches of the rights guaranteed by this Directive would be strengthened by giving the equality body or bodies in each Member State competence to analyse the problems involved, to consider possible solutions and to provide practical assistance to victims. Therefore, provision should be made to this end in this Directive.

(20) This Directive lays down minimum requirements and thus offers the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation prevailing in each Member State.

(21) Since the objectives of the action to be taken, namely to improve the minimum level of protection of pregnant workers and workers who have recently given birth or are breastfeeding and to improve the effective implementation of the principle of equal treatment cannot be sufficiently achieved by the Member States in view of their diverging levels of protection, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the EC Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve the stated objectives.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 92/85/EEC is amended as follows:

1. Article 8 is replaced by the following:

"Article 8 Maternity leave

1. Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of at least 18 weeks allocated before and/or after confinement.
2. The maternity leave stipulated in paragraph 1 shall include compulsory leave of at least six weeks after childbirth. The Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to choose freely the time at which the non-compulsory portion of the maternity leave is taken, before or after childbirth.
3. The prenatal portion of maternity leave shall be extended by any period elapsing between the presumed date and the actual date of childbirth, without the remaining portion of leave being reduced.
4. Member States shall take the necessary measures to ensure that additional leave is granted in the case of premature childbirth, children hospitalised at birth, children with disabilities and multiple births. The duration of the additional leave should be proportionate and allow the special needs of the mother and the child/children to be accommodated.
5. Member States shall ensure that any period of sick leave due to illness or complications arising out of pregnancy occurring four weeks or more before confinement does not impact on the duration of maternity leave."

2. Article 10 is replaced as follows:

"Article 10

Prohibition of dismissal

In order to guarantee that workers within the meaning of Article 2 can exercise their health and safety protection rights as recognised under this Article:

1. The Member States shall take the necessary measures to prohibit the dismissal and all preparations for a dismissal of workers within the meaning of Article 2 during the period from the beginning of their pregnancy to the end of the maternity leave provided for in Article 8(1), save in exceptional cases not connected with their condition which are

permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent.

2. If a worker within the meaning of Article 2 is dismissed during the period referred to in point 1 the employer must cite duly substantiated grounds for her dismissal in writing. If the dismissal occurs within six months following the end of maternity leave as provided for in Article 8(1), the employer must cite duly substantiated grounds for her dismissal in writing at the request of the worker concerned.
3. The Member States shall take the necessary measures to protect workers within the meaning of Article 2 from the consequences of dismissal which is unlawful by virtue of points 1 and 2.
4. Less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Article 8 shall constitute discrimination within the meaning of Directive 2002/73/EC, as recast by Directive 2006/54/EC."

3. Article 11 is amended as follows:

(a) The following point 1a is inserted:

"1a. workers, within the meaning of Article 2, who are excluded from work by their employer who considers them not fit for work without medical indication supplied by the worker, shall, until the beginning of the maternity leave in the sense of Article 8(2), receive a payment equivalent to their full salary."

(b) In point 2, the following point (c) is added:

"(c) the right of workers within the meaning of Article 2 to return to their jobs or to equivalent posts on terms and conditions that are no less favourable to them and to benefit from any improvement in working conditions to which they would have been entitled during their absence;"

(c) Point 3 is replaced by the following:

"3. the allowance referred to in point 2(b) shall be deemed adequate if it guarantees income equivalent to the last monthly salary or an average monthly salary, subject to any ceiling laid down under national legislation. Such a ceiling may not be lower than the allowance received by workers within the meaning of Article 2 in the event of a break in activity on grounds connected with the worker's state of health. The Member States may lay down the period over which this average monthly salary is calculated."

(d) The following point 5 is added:

"5. Member States shall take the measures necessary to ensure that workers, within the meaning of Article 2, may, during maternity leave or when returning from maternity leave, as provided for in Article 8, request changes to their working hours and patterns, and that employers shall be obliged to consider such requests, taking employers' and workers' needs into account."

4. The following Article 12a is inserted:

"Article 12a

Burden of proof

5. Member States shall take such measures as are necessary in accordance with their national judicial systems to ensure that when persons who consider that their rights under this Directive have been breached establish, before a court or other competent authority, facts from which it may be presumed that there has been such a breach, it shall be for the respondent to prove that there has been no breach of the Directive.
6. Paragraph 1 shall not prevent the Member States from introducing rules of evidence which are more favourable to plaintiffs.
7. Paragraph 1 shall not apply to criminal proceedings.
8. Member States need not apply paragraph 1 to proceedings in which the court or competent body investigates the facts of the case.
9. Paragraphs 1 to 4 shall also apply to any legal proceedings commenced according to Article 12."

5. The following Article 12b is inserted:

"Article 12b

Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence resulting from a complaint they have lodged or proceedings they have initiated with the aim of enforcing compliance with the rights granted under this Directive."

6. The following Article 12c is inserted:

"Article 12c

Penalties

Member States shall lay down the rules on penalties applicable to breaches of national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are applied. Penalties may comprise payment of compensation, which may not be limited by the fixing of a prior upper limit, and must be effective, proportionate and dissuasive."

7. The following Article 12d is inserted:

"Article 12d

Equality body

Member States shall ensure that the body or bodies designated under Article 20 of

Directive 2002/73/EC as recast by Directive 2006/54/EC for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex shall be competent in addition for issues falling within the scope of this Directive, where these issues pertain primarily to equal treatment and not to the worker's health and safety."

Article 2

1. Member States may introduce or maintain provisions which are more favourable to workers than those laid down in this Directive.
2. Implementation of this Directive shall under no circumstances constitute grounds for reducing the level of protection in the fields covered by this Directive.

Article 3

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by at the latest [two years after adoption]. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.
2. The measures thus adopted by the Member States shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Article 4

1. Member States and national equality bodies shall communicate to the Commission, by [five years after adoption] at the latest and every five years thereafter, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of Directive 92/85/EEC as amended by this Directive.
2. The Commission's report shall take account, as appropriate, of the viewpoints of the social partners and relevant non-governmental organisations. In accordance with the principle of gender mainstreaming, the report shall *inter alia* provide an assessment of the impact on women and men of the measures taken. In the light of the information received, the report shall, where necessary, include

proposals to revise and update Directive 92/85/EEC as amended by this Directive.

Article 5

This Directive shall enter into force on the day of its publication in the Official Journal of the European Union.

Article 6

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament

For the Council

The President

The President

Annex B – consultation response form and questions

The response form can be completed online at <http://tinyurl.com/cku6gz> and your views captured electronically. There are 8 questions to this consultation which closes on 22nd June 2009.

Alternatively you can complete the response for here or through <http://www.berr.gov.uk/files/file50577.doc> and responses can be emailed or hard copies posted via the addresses below.

Employment Relations – Participation
Department for Business, Enterprise and Regulatory Reform
1 Victoria Street
London
SW1H 0ET

Telephone: 020 7215 5531
Fax: 020 7215 0168
Email: workingparents@berr.gsi.gov.uk

Your name

What organisation do you represent (if any)?

E-mail address

Please tick the box below that best represents you as a respondent:

- | | |
|---|--------------------------|
| Micro business (up to 9 staff) | <input type="checkbox"/> |
| Small business (10 to 49 staff) | <input type="checkbox"/> |
| Medium business (50 to 250 staff) | <input type="checkbox"/> |
| Large business (over 250 staff) | <input type="checkbox"/> |
| Family/ parent representative organisation | <input type="checkbox"/> |
| Legal representative | <input type="checkbox"/> |
| Business representative organisation/trade body | <input type="checkbox"/> |
| Trade union or staff association | <input type="checkbox"/> |
| Charity or social enterprise | <input type="checkbox"/> |
| Local government | <input type="checkbox"/> |
| Central government | <input type="checkbox"/> |
| Individual | <input type="checkbox"/> |
| Other | <input type="checkbox"/> |

We will publish all the responses received in this consultation unless we are asked to keep it confidential.

Please treat my response as confidential:

Yes

No

We would like to keep you informed of the developments of the Directive. If you wish to join the mailing list please indicate below:

Please add me to the list (using the e-mail address above)

Please do not add me to the list

Consultation questions

Q1: What is your overall assessment of the Commission's proposal?

Q1a: How well do you think the proposal addresses the Commission's aims?

Q2: What do you consider the implications of the proposed changes would be on the UK system of rights for working parents?

Q3: What is your evaluation of risks and benefits for businesses and working parents?

Q4: Do you consider the proposal strikes the right balance between protecting pregnant women and new mothers and being manageable for employers and employees?

Q5: Does this proposal present any particular implementation difficulties and if so, what?

Q5a: Do you have any suggestions to address these?

Q6: Do you have any comments about particular proposals?

If so please specify, indicating clearly the Article you are commenting upon.

Q7: Do you have any comments on the Government's Impact Assessment or the Commission's Impact Assessment?

Q8: Are there any other comments you have on the Commission's proposal?

Annex C – Impact Assessment of the Pregnant Workers Directive

Summary: Intervention & Options

Department /Agency: Department for Business, Enterprise & Regulatory Reform (BERR)		Title: Impact Assessment of the Pregnant Workers Directive	
Stage: Consultation	Version: FINAL	Date: February 2009	
Related Publications:			

Available to view or download at:

<http://www.berr.gov.uk/consultations/page50579.html>

Contact for enquiries: Dhiren Patel

Telephone: (020) 7215 3945

What is the problem under consideration? Why is government intervention necessary?

The European Commission published a proposal to amend the Pregnant Workers Directive (92/85/EEC) ("the Directive") in October 2008. The Directive sets down minimum levels of maternity rights, including leave and pay, which Member States must provide.

The rationale for the proposal is to improve work-life balance and protection for pregnant workers and workers who have recently given birth or are breastfeeding. The Government is currently seeking views on the Commission's proposals including the likely costs and benefits. The aim is to inform the UK Government's ongoing negotiations which will take account of existing UK provisions.

What are the policy objectives and the intended effects?

The revision of the Directive is a step towards the Commission's objective of achieving more gender equality in labour market participation rates and allowing women and men to achieve a better reconciliation of their professional, private and family lives. The Commission's overall objective in amending the Directive is to improve and build upon the common minimum standard of protection already in place across all Member States for pregnant workers and workers who have recently given birth or are breastfeeding. The amending Directive also codifies case law that has arisen in this area since 1996 and brings into the Directive provisions relating to pregnancy which are already in place under the Equal Treatment Directive.

The Commission considered:

- (i) No action;
- (ii) Non-binding measures such as communication and exchange of information;
- (iii) Legally binding measures – directive or regulations.

The European Social Partners are currently discussing the Parental Leave Directive. In light of this, the Commission believes the revision of the Pregnant Workers Directive is the appropriate starting point and has therefore brought forward its proposals.

Once a directive has been agreed at EU level, the UK must implement the necessary changes. This assessment assesses the impact of the proposals on UK provisions.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? The legislation would be reviewed by the Commission five years after the adoption of the Directive and every five years thereafter.

Ministerial Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options

Signed by the responsible Minister:

..... Date: February 2009

Summary: Analysis & Evidence

Policy Option: 2	Description: Amend the length of maternity leave, protection from dismissal, suspension from work, right to return, maternity pay, flexible working, and defence of rights.
-------------------------	--

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' Amending the length of compulsory maternity leave to six weeks would incur a cost to the exchequer, small and large firms and individuals who would have returned to work before six weeks.
	One-off (Transition)	Yrs	
	£ N/A		
	Average Annual Cost (excluding one-off)		
	£ 6.7m to 6.9m		Total Cost (PV) £ 58m to 60m
Other key non-monetised costs by 'main affected groups' Under the proposal for protection from dismissal, firms who employ mothers with less than six months tenure would have to provide written reasons for dismissal. The right to request flexible working would impact employers as there could be some procedural and accommodation costs.			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' Mothers would benefit from reduced childcare costs as they would be on six weeks compulsory leave rather than two weeks.
	One-off	Yrs	
	£ N/A		
	Average Annual Benefit (excluding one-off)		
	£ 442k to 506k		Total Benefit (PV) £ 3.8m to 4.4m
Other key non-monetised benefits by 'main affected groups' The extension of flexible working would result in a better work-life balance for employees, improved health and wellbeing, increased labour supply due to availability of more flexible working opportunities and positive environmental impact, e.g. reduction in commuting. In addition businesses could benefit from the extension of flexible working as there would be lower turnover, increased profits and lower absenteeism.			

Key Assumptions/Sensitivities/Risks See impact assessment (below) for a full explanation of the assumptions used for the calculations. Provision in the UK already meets many of the new minimum standards being proposed.

Price Base Year 2009	Time Period Years 10	Net Benefit Range (NPV) £ -54m to -55m	NET BENEFIT (NPV Best estimate) £ -54.5m
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What is the geographic coverage of the policy/option?	UK
On what date will the policy be implemented?	2 years after the directive is agreed
Which organisation(s) will enforce the policy?	EHRC
What is the total annual cost of enforcement for these	£ NK
Does enforcement comply with Hampton principles?	Yes
Will implementation go beyond minimum EU requirements?	No

What is the value of the proposed offsetting measure per year?	£			
What is the value of changes in greenhouse gas emissions?	£			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (ORC Interim Results - 2008 Prices)	(Increase - Decrease)
Increase of £ 0k Decrease £ 0k Net	£ 0k

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Evidence Base (for summary sheets)

A. Strategic Overview

The European Commission published a proposal to amend the Pregnant Workers Directive (92/85/EEC) in October 2008. The Directive sets down minimum levels of maternity rights, including leave and pay, which Member States must provide. The Commission's aim is to contribute to better work-life balance through improving the protections offered to pregnant workers and workers who have recently given birth or are breastfeeding.

This Impact Assessment (IA) covers the impact the proposed changes would have on the UK's provisions. The UK Government has built on the minimum standards set out in the existing Directive and provides a longer period of maternity leave and a higher rate of maternity pay than is currently required.

The Commission's proposal and its Impact Assessment are available from <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=402&furtherNews=yes>

B. Issue

B1. Groups Affected

The groups that would be affected by the Directive are; pregnant workers, workers who have recently given birth or are breastfeeding and their employers.

B2. Consultation

Within Government

The Department for Business, Enterprise and Regulatory Reform (BERR) has developed these proposals in consultation with the following Government departments: Department for Work and Pensions (DWP) and Government Equalities Office (GEO).

Public Consultation

This partial IA accompanies a formal public consultation.

B3. Rationale for Government Intervention

The Directive proposed by the Commission sets down minimum levels of maternity rights, including leave and pay, which Member States must provide. The rationale for the proposal is to improve work-life balance and protection for pregnant workers and workers who have recently given birth or are breastfeeding.

C. Objectives

C1. Objectives

The Commission's overall objective in amending the Directive is to improve and build upon the common minimum standard of protection already in place

across all Member States for pregnant workers and workers who have recently given birth or are breastfeeding. The amending Directive also codifies case law that has arisen in this area since 1996 and brings into the Directive provisions relating to pregnancy which are already in place under the Equal Treatment Directive⁹.

The Commission's IA also sets out the following objectives:

The objectives are to contribute to the strategy for more growth and better jobs by achieving more gender equality in labour market participation rates and allowing women and men to achieve a better reconciliation of their professional, private and family lives.

The more specific objectives are (in order of importance) to:

1. Reduce the difference in employment rates of women with and without children;
2. Widen the scope of family-related leave and the conditions for taking it;
3. Reduce the gender imbalance in taking the leave;
4. Give financial support during leave; and
5. Ensure that taking family-related leave does not lead to discrimination or to weakened job security.

C2. Background

The Directive sets out minimum provisions to ensure the health and safety at work of pregnant workers and workers who have recently given birth or who are breastfeeding. The Directive was adopted in 1992 and was transposed into UK law in October 1994. The UK provisions are contained within the Social Security Contributions and Benefits Act 1992 and related regulations plus the Employment Rights Act 1996, and the Maternity and Parental Leave Regulations 1999, supported by the Sex Discrimination Act 1975, as amended.

The proposal would extend the minimum period of maternity leave from 14 to 18 weeks, of which at least six must be taken after birth. The proposal allows for additional leave to be provided in a number of eventualities including late, premature or multiple births. It also introduces the principle of full pay during maternity leave although Member States may set a cap so long as the cap is at least equal to the amount of sick pay a woman would receive. The proposal strengthens the employment rights of workers covered by the

⁹ Directive 76/207/EEC on the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions as amended by Directive 2002/73/EC, and as recast in Directive 2006/54/EC on the principles of equal opportunities and equal treatment for men and women in matters of employment and occupation.

Directive: this includes a right to return to the same job or to a suitable alternative; and the right to request flexible working when returning from maternity leave. The proposal also includes protections common to Directives on equal treatment such as transference of the burden of proof and protection from victimisation.

The UK government has worked with employer and employee representatives to create a system which allows both parties to plan ahead and to manage both the maternity absence and return to work. The UK system is in many ways more generous than the proposed minimum standards set by the Commission including: providing 52 weeks' maternity leave; 39 weeks' Statutory Maternity Pay or Maternity Allowance at a higher level than Statutory Sick Pay; the right to return to the same job or to a suitable alternative; and the right to request flexible working for parents of children under six (16 and under from April 2009). In addition, the employment rate of women is fairly high compared to other Member States. In 2007, the employment rate of females in the UK was around 65.5 per cent, this compares to the EU-27 average of 58 per cent and EU-15 average of 60 per cent¹⁰.

D. Options

D1. Option 1

Do Nothing

Once a directive has been agreed at EU level, the UK must implement the necessary changes or be subject to infraction proceedings. Doing nothing therefore will not be a viable option.

D2. Option 2

D2.1 Maternity Leave

Article 8 of the Directive would be amended to ensure that a longer minimum period of maternity leave is provided to women to enable full recovery from pregnancy and childbirth and to support breastfeeding for a longer period, specifically:

- The minimum period of maternity leave available to workers covered by the Directive would be extended from 14 to 18 continuous weeks, of which at least six weeks would be compulsory after childbirth;
- Women would have complete freedom as to when to take the non-compulsory element of maternity leave;
- In cases of a child being born later than expected, leave would be extended so that there is no reduction in the post-natal portion;

¹⁰ Eurostat.

- Additional periods of leave would be provided by Member States in the event of premature births, multiple births, children hospitalised at the time of birth, and new-born children with disabilities. The amount of leave must be proportionate to accommodate the special needs of mothers and their child/children that arise from these events;
- Any period of pregnancy-related sick leave, four weeks or more before childbirth, would not shorten the period of maternity leave.

D2.2 Protection from Dismissal

Article 10(1) would be amended to prohibit employers from dismissing a worker covered by the Directive, or making preparations in order to dismiss a woman, save in exceptional cases not connected with their condition, during the period from the start of pregnancy to the end of maternity leave. This implements the judgement in *Nadine Paquay v Société d'architectes Hoet* (C 460/06) which found that an employer may not make preparations to dismiss a worker during her maternity leave except where the dismissal is not connected to pregnancy or maternity. Article 10(2) of the proposal would give women who are dismissed during the six months following return from maternity leave the right to written reasons for the dismissal, should they request them.

D2.3 Suspension from Work

New Article 11 (1a) would provide that when a pregnant worker is suspended from work during her pregnancy by her employer because the employer considers her unfit for work even though the worker has not given medical information to support this, the worker is to be entitled to full salary until the start of their maternity leave. This implements the judgement in *Pedersen v Fællesforeningen* (Case C-66/96) which found that an employer may not send home a woman who is pregnant, although not unfit for work, without paying her salary in full when he considers that he cannot provide work for her.

D2.4 Right to Return

New Article 11(2c) would give employees the right to return to their jobs or to equivalent posts on terms and conditions no less favourable than if they had not been absent. This right is currently provided within the Equal Treatment Directive¹¹ but was not previously within the Pregnant Workers Directive.

D2.5 Maternity Pay

New Article 11(3) would provide the principle of entitlement to payment of full monthly salary during maternity leave. Member States may place a ceiling on this payment so long as it is not lower than the allowance a woman would receive if she were off work sick.

¹¹ Ibid

D2.6 Flexible Working

New Article 11(5) would require Member States to give women returning from maternity leave the right to request changes to their working hours and patterns with an obligation on employers to consider such requests, taking into account business and employee needs.

D2.7 Defence of Rights

Article 12 would be amended to reflect the protections already provided by the Equal Treatment Directive¹². Changes to the Pregnant Workers Directive would be:

- The transference of the burden of proof in judicial procedures to the respondent;
- Provision for protection from victimisation for those who have brought complaints based on matters protected under the Directive;
- An express requirement that no upper limit can be placed on penalties (including compensation) for breach of provisions within the Directive;
- Existing equality bodies would be given responsibility covering the equal treatment aspects of the proposal. (For Great Britain this would be the Equality and Human Rights Commission, and for Northern Ireland the Equality Commission for Northern Ireland).

E. Costs and Benefits

Option 2

E2.1 Maternity Leave

Existing UK Provisions

The UK provides 52 weeks' maternity leave to all employed mothers, which allows a generous period of maternity leave to cover all special circumstances, whilst providing certainty for both the employer and employee as to when the mother should return to work.

UK mothers can choose to start their maternity leave up to 11 weeks before the expected week of childbirth. Maternity leave starts automatically if a woman gives birth before then. If the woman is absent from work due to pregnancy or childbirth in the four weeks prior to the expected week of childbirth, then the employer can automatically start maternity leave.

All UK mothers must take two weeks (or four weeks if employed in a factory) of 'compulsory maternity leave' after childbirth.

¹² Ibid

The proposals would mean that women could start their maternity leave at any point in their pregnancy, but must take six weeks' maternity leave following childbirth. The 'sickness trigger', which allows employers to automatically start maternity leave where the mother is absent because of her pregnancy within four weeks of the expected week of childbirth, would remain.

Impact of Proposal

The UK provides all employed women with 52 weeks' maternity leave, longer than the 18 week minimum set by the proposal. This allows all mothers the freedom to choose to take as much or as little time off (within overall limits) as they need according to their own circumstances. We therefore do not expect the UK's maternity leave period to be extended as a result of the proposal.

The proposal would require a woman to take six weeks' compulsory maternity leave following childbirth. This would pose additional costs and benefits, as currently the UK has two weeks' compulsory maternity leave following childbirth.

GENERAL ASSUMPTIONS & DATA

The Maternity Rights Survey (MRS) 2007 found that around 99 per cent of new mothers took at least six weeks or more of maternity leave.

- The table below sets out the proportion of mothers that have taken maternity leave of 6 weeks or fewer:

Table E2.1.1: Length of Maternity Leave

Length of leave (weeks)	Per cent	Cumulative Per cent
1	0.2	0.2
2	0.2	0.4
4	0.2	0.5
5	0.1	0.6
6	0.4	1.0

Source: MRS 2007

- In 2008/09 there are expected to be around 329k mothers on Statutory Maternity Pay (SMP) and around 58k on Maternity Allowance (MA)¹³.

¹³ Source: DWP.

- The table below shows a breakdown of the number of mothers receiving SMP and MA during maternity leave in 2008/09:

Table E2.1.2: Number of Mothers on Maternity Leave

Length of leave (weeks)	SMP	MA*
1	327,956	57,884
2	327,463	57,797
4	326,970	57,710
5	326,642	57,652
6	325,327	57,420

* We applied the same length of leave to the MA figures as we were unable to obtain a breakdown for mothers on MA.

Source: MRS 2007

- The Annual Survey of Hours and Earnings (ASHE) 2008 shows that the mean weekly pay for female employees is around £359.30. Assuming that wages would rise by 3.5 per cent in 2009, the average weekly pay would be around £371.88. As the first six weeks of SMP is 90 per cent of a mothers' salary, the average weekly pay would be around £334.69.
- MA in 2009 will be around £123.06 per week¹⁴.
- We assume that mean weekly earnings of female employee jobs where the mother is entitled to MA are likely to be around £246.85.¹⁵
- When calculating the cost to firms we assume a 21 per cent mark-up for non-wage costs. Therefore a female employee's weekly pay would be around £449.97 and weekly earnings for females on MA would be around £298.69.
- The Labour Force Survey (LFS) shows that in 2007, of the females interviewed, around 36 per cent worked for an organisation with less than 25 employees.¹⁶
- It is assumed that 70 per cent of larger employers and 40 per cent of smaller employers accommodate maternity leave through temporary replacement.¹⁷

¹⁴ The 2009 MA rate is likely to come into effect from April 2009. However, it is subject to Parliamentary approval.

¹⁵ The 2005 Work & Families Regulatory Impact Assessment (RIA) estimates that in 2007/08, MA weekly earning would be around £238.58. To adjust for 2008/09 prices we assume a 3.5 per cent increase.

¹⁶ The 2005 Work & Families RIA uses 25 employees or less as the cut-off. For the purpose of this IA, we will use the same cut-off.

¹⁷ This was used in the 2005 Work & Families RIA, and we assume the same ratios for 2008.

- The costs of extending the employment of temporary replacement are assumed to be 3 per cent to 5 per cent of weekly labour costs. The costs of internal allocation are assumed to be around 9 per cent to 15 per cent of weekly labour costs.¹⁴
- Statistics from the Day Care Trust show that the cost of childcare for a child under 2 in 2008 was between £139 and £159 per week. Assuming a 3.5 per cent increase to adjust to 2009 prices, the cost would amount to around £143.87 to £164.57 per week. The Maternity Rights and Mothers Employment Decisions¹⁸ found that 30 per cent of mothers use formal childcare services.

COSTS

Given that under the new proposal, mothers will have to take six weeks' compulsory maternity leave, the additional cost would arise from the 1 per cent of mothers who currently take less than six weeks maternity leave.

The additional cost to the Exchequer from paying SMP to mothers for six weeks compulsory leave would be around £3.5m per year. For paying MA it would be around £225k per year.

Large firms are reimbursed at a rate of 92 per cent; therefore the additional cost to them would be around £176k per year. Furthermore, the additional cost to employers (small and large) of covering for absence would be around £2.2m to £2.4m per year.

There is also a potential cost to mothers, as those who would have returned to work before six weeks would now not be able to under the new proposals. Therefore, these mothers would not be earning their full salary. We estimate that the cost to individuals claiming SMP would be around £385k per year, and the cost to mothers on MA would be around £226k/year.

Table E2.1.3: Summary of Costs

	£/year
Costs to the Exchequer	£3.7m/year
Costs to Firms (Small)	£759k - £843k/year
Costs to Firms (Large)	£1.6m - £1.7m/year
Costs to Individuals	611k/year
TOTAL	£6.7m - £6.9m/year

BENEFITS

As mothers will be on compulsory six weeks' leave, they would benefit from savings associated with not having the need for childcare services. From the difference between the number of mothers who would be required to take

¹⁸ <http://www.dwp.gov.uk/asd/asd5/rports2007-2008/rrep496.pdf>

compulsory leave and those that currently take six weeks, we estimate that the benefits of these savings would be around £442k to £506k per year.

Benefits to employers would be that mothers would have more time to recover from giving birth and therefore are more likely to be productive when they return to work should they decide to after the compulsory six weeks. However, without better data, we are unable to quantify this benefit.

Table E2.1.4: Summary of Benefits

	£/year
Benefits to Individuals	£442k - £506k/year
Benefits to Firms (Small & Large)	Productivity might increase (not quantified)
TOTAL	£442k - £506k/year

E2.2 Protection from Dismissal

Existing UK Provisions

In the UK, the Employment Rights Act 1996 and the Employment Rights (Northern Ireland) Order 1996 (both as amended) provide protection from dismissal or detriment for reasons related to pregnancy or maternity leave for workers covered by the Directive.

All UK employees who have been continuously employed for a period of one year or more are entitled to request a written statement of reasons for dismissal. A woman dismissed during her pregnancy or maternity leave also is entitled to request written reasons for her dismissal, regardless of how long she has been employed and regardless of whether she requests a written statement.

Impact of Proposal

Women without the qualifying length of service, i.e. those who are dismissed within six months of return and who have less than 12 months service with their employer in total (including their period of maternity leave), would, under this proposal be eligible to request written reasons for dismissal. Without better data we are unable to quantify the costs and benefits. The table below shows a summary of the qualitative costs and benefits of this option.

Table E2.2.1: Summary of Costs & Benefits

Costs	Benefits
Firms would have to provide a written reason for dismissal if woman is dismissed (not quantified)	Individuals would be entitled to request written reasons for dismissal (not quantified)

E2.3 Suspension from Work

Existing UK Provisions

Under UK law, an employee who has been suspended from work on maternity grounds is entitled to payment equivalent to full salary during the suspension until maternity leave begins.

Impact of Proposal

None.

E2.4 Right to Return

Existing UK Provisions

In the UK an employee returning to work before or at the end of Ordinary Maternity Leave (weeks 1 – 26 of maternity leave) has the right to return to the same job on the same terms and conditions as if they had not been absent. This also applies to an employee returning during or at the end of Additional Maternity Leave (weeks 27- 52 of maternity leave), unless it is not reasonably practicable for the employer to keep the original job open. In that case, the employee must be offered suitable and appropriate alternative work with terms and conditions no less favourable than if she had not been absent.

Impact of Proposal

None.

E2.5 Maternity Pay

Existing UK Provisions

Statutory Maternity Pay is paid at 90 per cent of average earning with no upper limit for the first six weeks and a maximum of £123.06 for the remaining 33 weeks. State paid Maternity Allowance is similar but with a ceiling of £123.06 throughout the 39 weeks of payment. This ceiling is set considerably above the level of Statutory Sick Pay (SSP) which is £79.15¹⁹.

Impact of Proposal

Member States will be permitted to set a cap, so long as that is not less than a woman would receive if she were on sick leave. In negotiations we are seeking to clarify the level of the permitted cap. However for the purposes of this Impact Assessment we have assumed that we would be able to retain our standard rate of SMP as a ceiling on maternity pay since this is more than the SSP a woman would receive.

¹⁹ From 5 Likely to come into affect in April 2009.

E2.6 Flexible Working

Existing UK Provisions

Parents of children aged under six years or disabled children under 18 years, who have worked for their employer for six months or more, have the legal right to apply to work flexibly and their employers have a duty to consider these requests seriously. Employers may refuse a request on one of a number of specified business grounds. This will be extended to parents of children 16 and under from April 2009²⁰.

Impact of Proposal

Mothers who return back to the same employer, who have less than six months tenure (including the period of maternity leave), will be eligible to request flexible working. This right to request flexible working would pose additional costs and benefits.

Annex C2. Flexible Workers shows a breakdown of the number of mothers that would be affected by this proposal. Given the small numbers, we have not quantified the costs and benefits as the overall impact would be negligible. The table below provides a qualitative summary of the likely costs and benefits of this option.

Table E2.6.1: Summary of Costs & Benefits

Costs	Benefits
Procedural costs arising from exercise of the right to request flexible working (not quantified)	Benefits from lower labour turnover (not quantified)
Costs of accommodating requests, when they are accepted (not quantified)	Benefits from increased productivity (not quantified)
	Benefits from lower absenteeism (not quantified)
	Better work-life balance for employees (not quantified)
	Increased labour supply due to availability of more flexible working opportunities (not quantified)
	Improved health and wellbeing (not quantified)
	Positive environmental impact, e.g. a reduction in commuting as a result of enabling more employees to work from home (not quantified)

²⁰ The extension will apply to employees in Great Britain. The position in Northern Ireland is to be reviewed.

E2.7 Defence of Rights

Existing UK Provisions

The proposal would transfer the burden of proof in judicial procedures to the respondent; require protection from victimisation for those who have brought complaints based on matters protected under the Directive; require that no upper limit can be placed on penalties (including compensation) for breach of provisions within the Directive. The proposed amendments reflect the protections already provided by the Equal Treatment Directive which has been implemented in the UK. In the UK, the Sex Discrimination Act 1975 and the Sex Discrimination (Northern Ireland) Order 1976 (both as amended) already provide these protections for those bringing a claim on the grounds of sex discrimination, including pregnancy and maternity discrimination.

Impact of Proposal

In negotiations we are clarifying whether these provisions apply only to cases where equal treatment is the primary concern. As the UK has already implemented the Equal Treatment Directive we do not expect a change to be necessary.

F. Risks

The estimates of costs and benefits presented in this impact assessment are necessarily based upon a number of assumptions. We will continue to firm up our estimates for the final impact assessment as new data and information becomes available.

G. Enforcement

The policy will be enforced by the Equality and Human Rights Commission (EHRC) and individual complaints made to the Tribunals Service.

H. Summary and Recommendations

The table below outlines the costs and benefits of the proposed changes.

Table H.1 Summary of Costs and Benefits

Proposal	Cost	Benefit
E2.1	£6.7m - £6.9m/year	£442k - £506k/year Productivity might increase (not quantified)
E2.2	Firms would have to provide a written reason for dismissal (not quantified)	Individuals would be protected from dismissal (not quantified)
E2.6	Procedural costs arising from exercise of the right to request flexible working (not quantified) Costs of accommodating requests, when they are accepted (not quantified)	Benefits from lower labour turnover (not quantified) Benefits from increased productivity (not quantified) Benefits from lower absenteeism (not quantified) Better work-life balance for employees (not quantified) Increased labour supply due to availability of more flexible working opportunities (not quantified) Improved health and wellbeing (not quantified) Positive environmental impact, e.g. a reduction in commuting as a result of enabling more employees to work from home (not quantified)
TOTAL	£6.7m - £6.9m/year	£442k - £506k/year

I. Implementation

The Commission's proposal is that Member States should implement the proposed directive within two years of its adoption.

J. Monitoring and Evaluation

The legislation would be reviewed by the Commission five years after the adoption of the Directive and every five years thereafter. Monitoring and evaluation of the measures within the UK will be carried out through surveys of employers and employees. BERR and DWP conducts surveys of this nature, recent examples include the *Maternity rights and*

*mothers' employment decisions*²¹ and *Maternity and Paternity Rights and Benefits: Survey of Parents 2005*²². It is likely that the next survey will be carried out in two – three years time.

²¹ <http://www.dwp.gov.uk/asd/asd5/rports2007-2008/rrep496.pdf>

²² <http://www.berr.gov.uk/files/file27446.pdf>

Specific Impact Tests: Checklist

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	No	Yes
Small Firms Impact Test	No	Yes
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	No	Yes
Disability Equality	No	Yes
Gender Equality	No	Yes
Human Rights	No	No
Rural Proofing	No	No

Annexes

Annex C1. Specific Impact Assessments

Competition Assessment

No option would directly limit the range of suppliers as new firms can enter the market to supply individuals. Firms will enter the market if it is economically viable for them to do so. No option would indirectly limit the number of suppliers. This is because the proposals are not likely to significantly raise the costs of new entrants relative to existing ones. No option would limit the ability of suppliers to compete or reduce suppliers' incentives to compete vigorously. Thus we do not consider that the Regulation changes would cause a significant detriment to competition.

Small Firms Impact Test

The proposed changes apply to firms of all sizes. Without better data it is not possible to breakdown the number of female employees by the size of organisation they work in. However, it is judged that the impact is not significant or disproportionate, as the same costs would be borne by all businesses.

Equality Impact Test

The proposed changes apply to female workers who are either pregnant, new mothers or breastfeeding. However, the impact would not be disproportionate as most of the amendments being proposed are already implemented in the UK and employers would still have to comply with the Sex Discrimination Act.

The proposed changes would not have a disproportionate effect by race or disability.

Annex C2. Flexible Workers

	2008/09	Notes
MA (Employees)	20,500	<i>This figure excludes the self-employed, and mothers on MA with more than six months tenure. Source: DWP</i>
% return to same employer	53%	<i>Source: Maternity Rights and Mothers Employment Decisions</i>
MA	10,931	
Length of Leave	1%	<i>% of mothers on MA who took less than 26 weeks' Maternity Leave.</i> http://www.dwp.gov.uk/asd/asd5/rports2007-2008/rrep496.pdf
Entitled Employees	77	
Eligibility		
Entitled Employees	77	
% that made a request	38%	<i>Source: Third Work-Life Balance Survey - pg 55</i> http://www.berr.gov.uk/files/file38388.pdf
Number of Requests	29	
Deadweight Request	30%	<i>Assumption. Deadweight is defined as request that would have occurred already</i>
	23	
New Requests	6	

Acceptance Rate (1st Stage)	87%	Source: Third Work-Life Balance Survey - pg 58 http://www.berr.gov.uk/files/file38388.pdf
	<hr/> 5	
Unsuccessful Cases (1st Stage)	1	
% taken to Appeal Stage	25%	Assumption from previous IA's
	<hr/> 0	
Acceptance Rate (2nd Stage)	20%	Assumption from previous IA's
	<hr/> 0	
Unsuccessful Cases (2nd Stage)	11	
Referred to Dispute Resolution	2%	Assumption from previous IA's
	<hr/> 0	
Of which Successful	20%	Assumption from previous IA's
	<hr/> 0	
TOTAL FLEX WORKERS	<hr/> 5 <hr/>	

Annex D: List of individuals and organisations consulted

Advisory, Conciliation and Arbitration Service
Association of Colleges
Association of Train Operating Companies
British Chambers of Commerce
British Retail Consortium
Chartered Institute of Personnel and Development
Chartered Management Institute
Chemical Industries Association
Daycare Trust
Engineering Employers Federation
Employment Lawyers Association
Equality and Human Rights Commission
Equality Commission for Northern Ireland
Fatherhood Institute
Families need Fathers
FEB (Families, Education and Business) Committee
Federation of Small Business
Horticultural Trades Association
Institute of Directors
Institute of Employment Studies
Law Society
Local Government Employers
NASUWT
National Family and Parenting Institute
National Hairdressers Federation (NHF)
One Parent Families
PriceWaterHouse Coopers
The Confederation of British Industry (CBI)
The Institute of Payroll Professionals
The Mothers Union
The Public and Commercial Services Union
Trades Union Congress
UK Resource Centre for Women in Science, Engineering and Technology
Union of Shop, Distribution and Allied Workers
UNISON
UNITE
Universities and Colleges Employers Association
Working Families

Annex E: Code of Practice on Consultations

1. Formal consultation should take place at a stage when there is scope to influence policy outcome.
2. Consultation should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. Consultation exercise should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Comments or complaints

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

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Consultation Co-ordinator
Better Regulation Team
Department for Business, Enterprise and Regulatory Reform
1 Victoria Street
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Tel: 020 7215 0412
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