EMPLOYMENT
LAWYERS
ASSOCIATION

P.O. BOX 353
UXBRIDGE UB10 0UN
TELEPHONE/FAX 01895 256972
E-MAIL ela@elaweb.org.uk
WEBSITE www.elaweb.org.uk

BEIS Consultation on extending redundancy protection for women and new parents

Response from the Employment Lawyers Association

5 April 2019

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Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent claimants and respondents in courts and employment tribunals. It is not ELA's role to comment on the political or policy merits or otherwise of proposed legislation or regulation, rather it is to make observations from a legal standpoint. Accordingly, in this consultation we do not address such issues. ELA's Legislative and Policy Committee consists of experienced solicitors and barristers who meet regularly for a number of purposes including to consider and respond to proposed legislation and regulations.

The Legislative and Policy Committee of ELA set up a working party which was co-chaired by Catrina Smith of Norton Rose Fulbright LLP and Elizabeth Drake of the Metropolitan Police's Directorate of Legal Services to respond to this consultation paper. A list of the members of the ELA working party is at the end of this paper.

EMPLOYMENT LAWYERS ASSOCIATION

Executive Summary

1. A six-month "return to work" period may help a new parent who has taken extended family leave to re-establish themselves in the workplace.

2. An alternative approach could be to run the period of protection for a set period, such as 18 months, from the date of the birth/placement. This approach has the advantage of certainty and simplicity but could result in employees who take shorter periods of family leave having a long period of post-return protection.

3. An extension of Regulation 10 of Maternity and Parental Leave etc. Regulations (1999) (SI 1999/3312) ('MAPLE') protection will not protect women from a minority of employers who will discriminate against pregnant employees and new mothers regardless of their legal rights. However, it would provide women with greater redress in limited circumstances and counter avoidance tactics by employers.

4. Pregnancy, for redundancy protection purposes, should be defined as starting at the point a woman informs her employer that she is pregnant but that this does not need to be in writing. However, in line with current legislation, employers should have a right to request, following an oral notification, that the employee confirms their pregnancy in writing.

5. The most direct equivalents to return to work from statutory maternity leave are adoption leave and shared parental leave. This is on the basis that they are forms of leave that can potentially be taken by a parent, not just the birth mother, for longer periods. The law currently provides protection from detriment and/or unfair dismissal where treatment/dismissal is because of pregnancy/maternity leave/adoption leave/shared parental leave, so it may be regarded as illogical, confusing and potentially discriminatory for enhanced redundancy protection to be given only to those who take maternity leave.

6. ELA shares the view expressed in the consultation documents about the difficult technicalities of implementing enhanced redundancy protection in the context of shared parental leave. ELA's view is that no distinction should be made between shared parental leave taken in one block vs discontinuous blocks or based on which parent is taking the leave.

7. ELA does not take a stand on policy matters, but we have set out below the potential implications of extending MAPLE protection to other groups.

    7.1 On balance ELA's view is that given the current lack of statutory framework around career breaks additional protection would be difficult to implement without a legal framework to attach the right to.

    7.2 Surrogates and intended parents could both be covered by the extended protection, as the types of leave identified above could also be included in the extension of the protection.

7.3 ELA believes it would not be logical to extend the right to parental bereavement leave when that leave comes into force.

8. Experience amongst ELA committee members suggests that there is still a lack of awareness of certain employment rights amongst pregnant women and new mothers. These rights include the right to accrue holiday during maternity leave and the right to be offered suitable alternative employment in a redundancy situation. There is a particular lack of awareness of employment rights for new and expectant mothers who are engaged as workers.

9. ELA committee members reported that employer clients were also often confused and unsure about their rights and obligations in relation to pregnant women and new mothers. In many cases, it was sensed that there was a nervousness by employers to make decisions relating to pregnant women or new mother's employment because of the fear of acting unlawfully, which is not necessarily good for business.

10. ELA considers that things could be improved by adopting our suggestions regarding: the Government (.gov) website; NHS Start4Life; and ACAS guidance as set out in response to Question 21 to this consultation (see below).

11. Regarding the Working Forward campaign, ELA considers more needs to be done to raise the profile of the campaign. ELA suggests advertising this within pages that employers/individuals might visit, such as .gov, ACAS and advertising more on social media.

12. The government might provide a video, pamphlet and/or flier setting out the basic rights for women in the workplace (either employees or workers). This could be given to women with their MATB1 form. A similar short video, pamphlet or flier could be provided by ACAS (in an electronic form) to give a basic overview of maternity / family friendly rights that could be available to employers via the ACAS website. This document could set out the basic rights to provide awareness, and then employers could be directed to the fuller guidance elsewhere.

13. ELA suggests that it would be helpful for it to be a requirement for employers of a certain size (for example employers with over 250 employees), and recommended for all employers, to have a family friendly rights workplace champion.

14. ELA considers it should be a mandatory requirement for employers to have a maternity, paternity, shared paternity leave, adoption and flexible working policy, including reference to pay, in the Staff Handbook, and for that Handbook to be easily accessible by staff.

Opening Remarks

Most employees, at some point during their working lives, start or expand their families. Navigating maternity, shared parental and other forms of family leave is therefore something which faces all employers and most employees. Despite this, because of the piecemeal manner in which the law and rights have developed, the family leave and family rights regime is extremely complex and challenging to understand and apply. ELA would therefore support any measures which are designed to simplify family rights.

Please note that in the context of responding to queries about extending the protection period for birth mothers, the same or similar considerations apply to any parent or person with parental/caring responsibilities, and our responses should be read on that basis.

Regulation 10 of Maternity and Parental Leave etc. Regulations (1999) (SI 1999/3312) ('MAPLE') entitles the protected employee to be offered and allowed to take up suitable alternative employment in a redundancy situation. As a general point, we would note that any extension of the Regulation 10 right increases the risk of an employer finding themselves unable to comply with Regulation 10. This is the case whether the extension is in terms of time periods for mothers returning from maternity leave or to other parents/those with parental responsibility who take other forms of family leave. While it is possible that an employer may have two women on maternity leave at risk of redundancy and only one suitable alternative vacancy, such a situation is rare. However, if the scope of the protection were extended, we would suggest that the Regulation be amended to allow for a situation where there are more protected persons than available vacancies. We would also note that in a number of jurisdictions, the dismissal of a pregnant woman or one on maternity leave is prohibited. We are not advocating that as an approach, but simply note it in the context of protection which is given to mothers generally.

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

Yes.

6. Please give reasons for your answers

ELA agrees that there is benefit to both employees and employers in creating a simpler and more consistent approach to protection from redundancy throughout pregnancy, maternity leave and for a period after the employee has returned to work.

ELA is of the view that a six-month "return to work" period may enable a new parent who has taken extended family leave to re-establish themselves in the workplace. However, we acknowledge that there may be some parents for whom 6 months may feel too short e.g. those with babies who are sick or where new routines have been difficult to establish.

In this regard ELA notes the case of *Eversheds Legal Services Ltd v De Belin [2011] IRLR 448 (EAT)* in which the EAT ruled that an employer's treatment of a woman on maternity leave during a redundancy selection process did not need to extend beyond what was reasonably necessary to compensate the woman for the disadvantage she had suffered by being on maternity leave. The EAT recognised that the protection under equality law which requires women who are pregnant or on maternity leave to be accorded special treatment may be legitimate. However, it held that such special treatment refers only to treatment accorded to a woman so far as it constitutes a proportionate means of achieving the legitimate aim. That legitimate aim is to compensate the person for disadvantages occasioned by pregnancy or maternity leave, and cannot go beyond what is reasonably necessary.

Any extended period for redundancy protection purposes which is to be afforded to women returning to work from maternity leave should therefore be proportionate and no more than reasonably necessary to remove any maternity related disadvantage.

ELA refers to the BEIS and EHRC research, flagged by the Taylor Review and the Women and Equalities Select Committee, which highlighted the extent of discrimination experienced by pregnant employees and new mothers. ELA notes that the additional protection for women which forms the subject of this consultation is limited to an extension of Regulation 10 of MAPLE, such that pregnant women and women returning to work (for an initial period) would benefit from the right to be offered a suitable alternative vacancy, where one is available. An alternative vacancy must be both suitable and appropriate for the woman to do in the circumstances and the terms and conditions must not be substantially less favourable than her previous role.

In its report on "Unfair Redundancies During Pregnancy, Maternity Leave and Return to Work" Maternity Action highlighted that the existing Regulation 10 MAPLE protection exists "*because a woman may have recently given birth or may have been out of the workplace for a long time and could be significantly disadvantaged in having to compete for roles*." ELA's view is that, in some cases, this disadvantage may continue to apply to employees in the early stages of returning to work from maternity leave/extended family leave. Any such disadvantage may be greater if the employee has taken a longer period of leave versus employees who take only a relatively short period of leave. During this period an employee may have missed out on a number of things, including training and knowledge development, access to resources, opportunities to develop client and colleague relationships, as well as the ability to sufficiently prepare for interviews and assessment procedures and compete for roles along with their colleagues. Consequently, such employees returning to work from maternity leave may be disadvantaged, for a certain period, in having to compete for roles in redundancy situations compared to their colleagues. ELA recognises that there are already statutory arrangements which are designed to help employees overcome any such disadvantage, namely KIT/SPLIT days, but anecdotal evidence suggests that these

arrangements may not be as effectively utilised as they might be. In addition, some of our members have commented that employers sometimes feel nervous about keeping up "social" contact with employees on extended family leave and guidance about what is/is not acceptable may be helpful.

ELA considers that, from a practical perspective, any disadvantage is likely to subside after around six months back in the workplace. If the purpose of the proposed extension of protection is intended to put the returning parent on the same footing as any colleagues who have not been out of the workplace, this period may suffice.

In considering a suitable "return to work" period, ELA also took into account that assessments in respect of redundancies frequently include a period of 'looking back', often of six months to two years, in order to assess a candidate's performances, skills, attitude, etc. against the relevant criteria. This assessment can be a difficult one for an employer to 'get right' in these circumstances, as evidenced by the *Eversheds v De Belin* case. While any periods spent away from work should, clearly, be discounted when carrying out a redundancy assessment exercise, a period of protection post-return would give returning parents an opportunity to re-build their employment track record.

In forming its view ELA also took into account:

(i) that after the "return to work" period has ended a returning parent who has reduced his/her working hours on return or otherwise works part time will continue to be protected by s.4 of the Part-time Working (Prevention of Less Favourable Treatment) Regulations 2000;

(ii) that after the "return to work" period has ended women with childcare responsibilities are potentially afforded protection from indirect discrimination on the grounds of sex pursuant to s.19 of the Equality Act 2010;

(iii) under s.123(1) of the Equality Act 2010 the returning parent will have (at present) three months from the breach of her/his Regulation 10 MAPLE rights (if extended) to bring her/his potential claim to ACAS' attention, such that the protection may in practice extend beyond her/his making a decision on whether or not to bring a claim within that six month "return to work" period (ELA are aware that the Reforming Employment Law Hearing Structures consultation paper which closed on 31 January 2019 is reviewing the existing time limits); and

(iv) When new flexible working arrangements pursuant to Part 8A of the Employment Rights Act 1996 are put in place on a trial basis this may coincide with the "return to work" period such that the enhanced protection could support the parent/person with parental responsibilities establishing such arrangements.

ELA has identified as a potential practical issue to be addressed regarding the point at which a person is considered to have returned to work. Employees returning from maternity/shared parental leave may choose to take an additional period of leave in the form of accrued annual leave; a period of parental leave; sabbatical or career breaks.

One way in which the purpose of the proposed extension to Regulation 10 MAPLE could be met would be to count the "return to work" period as commencing when the employee actively returns to work following maternity/family leave and any other form of leave that immediately followed her/his maternity/family leave. ELA notes that the EAT considered an analogous point in *Fidessa PLC v Lancaster UKEAT/0093/16/LA* in which it determined that a woman could still benefit from protection under Regulation 4 of the Part Time Worker Regulations 2000 despite having returned to work after a period longer than twelve months. The EAT stated that any requirement that a woman return to work immediately after a period of twelve months was artificial, and that it was not uncommon for women returning from maternity leave to take other periods of leave. The disadvantage of this approach however, is that the period of protection could be uncertain and could result in a very long total period of protection.

It is noted that different levels of protection which are offered to employees whilst at work, during maternity leave and on return to work can cause confusion, particularly in circumstances where redundancy processes overlap during periods of maternity leave and return to work. Providing the same protection during pregnancy, maternity/other family leave and period of return is likely to assist in avoiding such confusion and ensure a consistent approach to protection from redundancy during such periods.

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

It was felt by ELA that six months should be an adequate period of "return to work" for redundancy protection purposes (subject to comments under question 6). ELA considered that the most likely options for "return to work" periods of extended protection would be three months, six months, or twelve months. ELA felt that a three-month period would be too short to satisfy the purpose of the protection, namely allowing an employee to re-establish themselves in the workplace, but that a twelve-month period would potentially be too long and burdensome for employers.

An alternative approach could be to run the period of protection for a set period, such as 18 months, from the date of the birth of the relevant child/date of placement for adoption. While this could result in employees who take shorter periods of family leave having a long period of post-return protection, it does have the advantage of certainty and simplicity if, for example, the protection covers periods of shared parental leave and this is taken on a discontinuous basis.

ELA is aware that some employers may delay redundancy exercises until women on maternity leave have returned to work and are obliged to participate in the selection process for roles in redundancy situations in order not to engage the Regulation 10 MAPLE protection. In circumstances where this is a potentially discriminatory evasion, a woman may otherwise benefit from pregnancy and maternity discrimination or unfair dismissal protection (Section 99 of the Employment Rights Act, Regulation 20 of MAPLE and Section 18 of the Equality Act 2010). However, ELA does not consider such an argument to be persuasive, taking into account the aim of this consultation is to address women being forced out of the workplace on their return. It also removes the burden on new parents from having to seek enforcement action in the employment tribunal, the take up of which is very low at around 1%. Extending the Regulation 10 MAPLE protection to employees returning to work from maternity/family leave would assist in countering any such avoidance tactics by employers.

ELA is of the view that an extension of the Regulation 10 MAPLE protection beyond a woman's return to work will not protect women from the minority of employers who will discriminate against pregnant employees and new mothers irrespective of their legal rights. However, it would provide women who fall victim to such actions with enhanced redress in limited circumstances. This would not, of course help if the extension of these rights has the unintended consequence of employers being less willing to employ women who they think will take maternity leave.

In response to those who consider that a twelve-month "return to work" period is required, ELA considers that this is likely to go beyond what is necessary to 'level the playing field' on an employee's return to work such that it may constitute positive discrimination. This is not the intended aim of the proposed extension and would likely cause employers to have difficulties with other employees, including other groups of employees who can be disadvantaged by redundancy exercises and who do not have the benefit of an equivalent of Regulation 10 MAPLE, such as disabled employees or those on long term sick leave.

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? Strongly agree / agree / neither agree or disagree / disagree / strongly disagree / don't know

Neither agree nor disagree.

ELA's view is that pregnancy for redundancy protection purposes should be defined as starting at the point a woman informs her employer that she is pregnant but that this does not need to be in writing. However, ELA's view is that, in line with current legislation, employers should have a right to request, following an oral notification, that the employee confirms their pregnancy in writing (s.4 (2)(a) MAPLE 1999).

Starting point for protection

ELA considers that in order to benefit from the proposed additional redundancy protection during pregnancy there should be a positive obligation on the employee to inform their employer of their pregnancy. ELA's view is that the means of such notification is a secondary issue and we have considered this further below.

In ELA's view, if it were possible for an employee to benefit from the protection without having notified her employer, there could be negative effects for both employees and employers. This could be the case for example if the protection simply applied from the beginning of pregnancy (as suggested by the Advocate General in *Porras Guisado v Bankia SA (C-103/16) EU:C:2017:691* in respect of the "protected period" concerning pregnancy discrimination), or was capable of being engaged when an employer has a belief that an employee is pregnant, or perhaps ought reasonably to have been aware an employee may be pregnant.

ELA has taken into account that some pregnant employees may not wish to notify their employers of pregnancy at an early stage. There may be cultural reasons for this, or purely personal ones, perhaps based on previous difficult experiences. Very early notification may also result in practical difficulties and an incorrect application of the protection in circumstances where, sadly, the pregnancy is unsuccessful. However, we consider that there is no obligation on employees to make this notification if they do not want to, and that should a redundancy process commence prior to the employee informing their employer of their pregnancy, the employee may decide to make the notification in response without prejudice to their position and before they are made redundant. Given that the Regulation 10 MAPLE protection would be engaged at the point at which the individual had been through the redundancy selection process and been notified of potential redundancy, we do not consider that a late notification would or should deprive the individual employee of their right to benefit from the protection and be offered a suitable alternative position, where available, before being made redundant.

Clearly there is a benefit to both parties for the employer to be made aware of the pregnancy. This enables the employer to be put on notice of their legal obligations and take into account from an early stage the number of employees who should benefit from the Regulation 10 MAPLE protection, and to plan accordingly. For the employee, notification ensures there is no ambiguity as to whether she is protected. It would also assist in avoiding unnecessary protracted and costly legal debates on the point at which the protection began.

It is a delicate balancing exercise between the protection to be afforded to a pregnant woman and the needs of her employer. Regulation 10 MAPLE places an obligation on employers to afford protection to woman on maternity leave. It is difficult to see how an employer can be expected to provide this protection if it is not notified of pregnancy. ELA therefore considers that for the purposes of clarity and certainty, it would be most

straightforward for both parties if protection begins on the notification to the employer of pregnancy. This would provide a clear and definable starting point for protection and assist in avoiding protracted legal debates about the employer's belief/knowledge and the point at which protection began.

Means of notification

Whilst we appreciate that written notification of pregnancy would provide clarity to employers, ELA does not consider that written notification should be required because this is not consistent with the current notification requirements of s.4(1) of MAPLE 1999.

As a practical point, ELA notes that it is likely that in most circumstances in which an employee informs their employer of their pregnancy, this will be confirmed in writing soon after.

9. Do you think an earlier reference point should be used? Yes / No

No.

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

N/A.

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 – yes
b) shared parental leave - yes
c) longer periods of parental leave - no
d) Other

12. If other, please explain your reasons.

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?
See below.

14. Please explain the reasons for your answer.

Adoption leave and shared parental leave are rights which are most closely analogous with maternity leave and share many of the same characteristics and offer similar legal

protections. If MAPLE protection were to be extended to other types of leave, these would be the most logical type of leave to be brought within the MAPLE regime. In particular, we would note that at a time when shared parental leave is being promoted by the government, it may seem illogical to possibly push women into taking maternity leave rather than shared parental leave because of the extra protection maternity leave affords.

After the compulsory period of maternity or adoption leave, the primary purpose of maternity, adoption and shared parental leave is to bond with a child and/or provide care to a child. While the first two weeks of maternity leave are protected, the SPL regime allows those with parental responsibility for the child to arrange care for that child in the manner that best suits them as a family – which can, of course involve the partner of the birth mother taking the bulk of any leave.

Adopters cannot benefit from maternity leave but may well need to take long periods of time away from the workplace both before and after a child/children are placed with them for adoption. Adoptive parents (particularly primary adopters who may take up to 52 weeks off) might be disadvantaged in the same way that maternity leavers are for taking this length of time away from the workplace. Primary adopters cannot benefit from the protection afforded to a birth mother in the Equality Act, so arguably they need more protection on their return to work, not less than those who are pregnant and/or on maternity leave.

ELA notes that there is jurisprudence which suggests that the first 14 weeks of maternity leave are different from other types of leave as during this period the birth mother may be physically recovering from the effects of pregnancy and childbirth[1]. However, our view is that the legislation would become unnecessarily complicated for employers to grapple with if enhanced redundancy protection only kicked in at this point for those on adoption leave or shared parental leave. This would not have the desired effect of codifying or clarifying the law, but would make it more complex.

In respect of shared parental leave we note that; it is not always a birth mother who takes a period of leave to provide care upon the birth/adoption of a child. Family units are more flexible than they have been in the past and parents/those with parental responsibility could feel that the law discriminates against them if they are not afforded similar protection from redundancy as birth mothers.

It was stated by Business Minister Andrew Griffiths in launching the 'Share for Joy' campaign that "providing truly flexible employment options is a key part of the Industrial Strategy, the government's long-term plan to build a Britain fit for the future by helping businesses create better, higher-paying jobs in every part of the UK" and Minister for Women Victoria Atkins, stated "providing parents with choice and flexibility in how they balance childcare responsibilities is a key step towards achieving equality in the workplace and beyond" and "This government is determined to tackle and ultimately close the gender pay gap. To do

[1] Capita Customer Management Ltd v 1) Mr M Ali 2) Working Families (Intervenor): UKEAT/0161/17/BA

this, we need to support women to fulfil their potential in the workplace – and giving women the choice to share childcare with their partners is crucial to that effort."[2]

Further, in the House of Commons, Women and Equalities Committee 'Fathers and the Workplace' report, in summary they identified that the Government said it wants to "enable families to share caring roles more easily and equitably to deliver positive employment outcomes. However, we have heard evidence from employer organisations, unions, researchers, think-tanks and experts, but most importantly from fathers and mothers themselves, that the current policies supporting fathers in the workplace do not deliver what they promise, despite good intentions. This is particularly the case for less well-off fathers.[3]" Additionally; "Paid paternity leave was only introduced in the UK in 2003, and this historical lack of workplace support for fathers both reflects and reinforces cultural assumptions about traditional gender roles where the father is the breadwinner and the mother is the primary carer. While we recognise and welcome the positive steps forward there have been for working fathers in recent years, we do not think they should have to wait longer for workplace policies to catch up with the social changes that are taking place in men and women's lives."

Currently statute provides protection from detriment and/or unfair dismissal where treatment/dismissal is because of pregnancy/maternity leave/adoption leave/shared parental leave, so it may be regarded as illogical, confusing and potentially discriminatory for enhanced redundancy protection should be afforded to only one of these groups.

A failure to mirror the enhanced redundancy protection, may well lead to conversations between new parents, concluding that it is a safer option for the birth mother to take maternity leave, so as to benefit from enhanced protection following that leave. Matching the enhanced protection provides a truly flexible approach providing options and opportunity to new parents to provide childcare in a way that suits their personal and professional circumstances.

ELA shares the view expressed in the consultation documents about the difficult technicalities of implementing enhanced redundancy protection in the context of shared parental leave. Shared parental leave can be taken by one or both parents and can be taken as one continuous block or multiple discontinuous blocks. We recognise that the date at which the enhanced redundancy protection commences needs to be carefully identified so as not to eliminate the benefits of the enhanced protection either during the periods of discontinuous leave or at the end of this. As noted above, taking the start of the protected period from the date of the birth of the child/placement for adoption would simplify the position when parents/those with parental responsibility took periods of discontinuous leave.

[2] https://www.gov.uk/government/news/new-share-the-joy-campaign-promotes-shared-parental-leave-rights-for-parents

[3] https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/358/358.pdf

While shared parental leave is complex ELA's view is that a distinction should not be made between whether shared parental leave is being taken in one block, in discontinuous blocks or which parent is taking it. ELA takes the view that the enhanced redundancy protection could bite in any of these scenarios. This is because it would be difficult for employers to keep track of whether someone on shared parental leave has an enhanced right to suitable alternative employment if the right applies differently depending on how, and by whom the leave is taken. Furthermore, the take up of shared parental leave has been limited to date and enhancing the protection to those taking shared parental leave may increase the take up. In order to potentially increase the numbers using shared parental leave, our view is that employees who take shared parental leave could be protected for six months after they have taken the last of that leave. Alternatively, a simpler option could be to take the start of the protected period from the date of the birth of the child/placement for adoption would simplify the position when parents/those with parental responsibility took periods of discontinuous leave.

In terms of pre-leave protection, there is less evidence that parents/those with parental responsibility other than birth mothers are particularly at risk of redundancy before a period of leave. This is likely to be a result of the much lower incidence of adoption leave and take up of shared parental leave. However, we would recommend that the situation is kept under review as if changes in society and the law result in a greater uptake of these rights.

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

As an organisation, ELA does not take a stand on policy matters, but we have set out below the potential implications of extending MAPLE protection to other groups.

ELA has considered the impact of extending the additional protection afforded by MAPLE to those on career breaks. One view is that career breaks are not similar to maternity, adoption and shared parental leave as they may be taken for a range of reason which may not relate to child care. Further, there is no specific statutory framework or legal protection for those who take career breaks. The opposing view is that parents/carers who take a career break may be at greater risk of redundancy than others on their return to work. On balance ELA's view is that given the current lack of statutory framework around career breaks additional protection would be difficult to implement without a legal framework to attach the right to.

ELA have also considered the impact of extending additional protection to surrogates. In the UK, if a couple use a surrogate the surrogate will be the child's legal parent at birth. If the surrogate is married or in a civil partnership their spouse or civil partner will be the child's second parent at birth, unless they did not give their permission. What the birth mother does after the child is born has no impact on her right to maternity leave. Legal parenthood can be transferred by parental order or adoption after the child is born to the "intended parents" who have entered into the surrogacy agreement. The intended parents who have used a surrogate may then be eligible for adoption pay and leave and paternity pay and leave. All three individuals, i.e. the surrogate, and the intended parents would be entitled to maternity,

adoption and paternity pay respectively, as well as shared parental leave if they wished to use it. Surrogates and intended parents could therefore both be covered by the extended protection, as the types of leave identified above could also be included in the extension of the protection.

Finally, ELA have considered the impact of extending protection for people who return to work following the death of a child. Currently the MAPLE protection would apply to a woman who lost a child at or after 24 weeks of pregnancy, but in no other circumstances. This is the only protection currently given to working parents on the death of a child. In April 2020 the position will change so that parents and primary carers who lose a child will be entitled to two weeks paid parental bereavement leave (provided they have 26 weeks' continuous service). This includes adopters, foster parents, and guardians as well as close relatives or family friends who have taken responsibility for the child's care in the absence of the parents. Leave will be able to be taken in one block or in two separate blocks of one week. It will be able to be taken within a 56 week window from the child's death to allow time for moments such as anniversaries, and notice requirements will be flexible. The right also provides protection from suffering a detriment, redundancy and dismissal as a result of the carer taking bereavement leave.

While this is a big leap forward in the protection that is afforded to bereaved parents, in the same way that ELA believes that it would not be logical to extend the enhanced redundancy protection to parental leave, we believe it would also not be logical to extend the right to parental bereavement leave when that leave comes into force.

16. Please give your reasons.

Evidence suggests that those employees who have taken reasonably significant periods of time away from work to concentrate on family matters are most vulnerable to selection for redundancy. Despite our comments at 15 above, the government could also consider whether other people who have taken time away, with the agreement of their employer, such as those on career break might also benefit from some post-return to work protection. This may also increase the attractiveness of career breaks and reduce the number of parents who feel they have no realistic option other than to resign from employment entirely for a few years.

Pregnancy and Maternity Consultation - Questions 17-23

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

Not very effective.

Question 18: Please give your reasons.

Experience amongst ELA committee members suggests that there is still a lack of awareness of certain employment rights amongst pregnant women and new mothers.

It was felt that pregnant women and new mothers were often aware of the basic maternity rights, in particular those relating to maternity leave and pay. However, it was felt there was less awareness of other rights such as those around returning to work after maternity leave, such as the right to accrue holiday during maternity leave and the right to be offered suitable alternative employment in a redundancy situation.

ELA committee members reported that employee clients were often confused and unsure as to their rights, even after consulting the guidance referred in the consultation paper. It is our view that the effectiveness of this guidance is undermined by the sheer complexity of the law relating to pregnant woman and new mothers.

Experience amongst ELA committee members also suggests that there is a particular lack of awareness of employment rights for new and expectant mothers who are engaged as workers. It is noted that much of the guidance referenced in the consultation paper refers to 'employee' rights. This is despite the fact that workers are also protected from dismissal on the grounds of pregnancy (by the Employment Rights Act 1996 and MAPLE), less favourable treatment during the protected period (by the Equality Act 2010) and have rights that flow from the Pregnant Workers Directive. Other research has also demonstrated that individuals may not be aware of what particular status they necessarily have, which other consultations are considering, but this is a relevant factor in whether individuals are aware of their own rights.

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?

Not very effective

Question 20: Please give your reasons.

Experience amongst ELA committee members suggests that there is also a lack of awareness amongst employers of their rights and obligations in relation to pregnant woman and new mothers.

It was felt that employers also had an awareness of the basic maternity rights, in particular those relating to maternity leave and pay and the obligation not to treat pregnant women and new mothers less favourably. However, there was less awareness of other rights and obligations.

ELA committee members reported that, in general, employer clients appeared to have more awareness of the guidance referred to in the consultation paper. In particular, many were aware of ACAS and the guidance and services that it offered. However, it was not clear to members how often employer clients actually looked at this guidance.

ELA committee members reported that employer clients were also often confused and unsure about their rights and obligations in relation to pregnant women and new mothers. In many cases, it was sensed that there was a nervousness by employers to make any decisions relating to pregnant women's or new mother's employment because of a fear of acting unlawfully, which is not necessarily good for business. It was reported that many employers appeared to lack a proper understanding of the law and how it applied to various

employment situation for pregnant women and new mothers. As stated above, it is our view that that the effectiveness of this guidance is undermined by the sheer complexity of the law relating to pregnant woman and new mothers.

As set out above, it is also the experience amongst committee members that there is a particular lack of awareness among employers of their rights and obligations in relation to pregnant women and new mothers who are engaged as workers.

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

It is the view of the ELA committee members that there are a number of improvements that could be made to increase the effectiveness of the steps outlined in the consultation paper. In particular, we suggest the following:

Government (.gov) website

- further consolidation of pages relating to rights and obligations in relation to pregnant women and new mothers. At present, the information is fragmented over a number of different webpages and it is not easy to navigate between them.

- enhancing the information that is provided by adding more detail and perhaps including examples or case studies.

- using a more accessible, user-friendly layout such as bullet points or a Q&A format.

- including more links to other webpages which contain information about rights and obligations in relation to pregnant women and new mothers (for example, the HSE's website).

NHS Start4Life

- including information (or at least links to information) about employment rights for pregnant women and new mothers on the NHS Start4life website. At the moment, the website has no content relating to employment rights.
- Written materials could also be given to new mothers in the "starter pack" they receive from the hospital, midwife or health visitor along the lines of the general information about health and early reading/picture book packs.

ACAS guidance

- consider creating guidance that is specifically aimed at individuals. The current guidance seems to have been drafted more from the perspective of an employer. Therefore, it may not be as useful to pregnant women and new mothers.

- using more accessible media of communication, e.g. a more user-friendly layout for written material such as bullet points or a Q&A format or posting a video/podcast. It is the opinion of ELA committee members that the information provided is too lengthy and could be off-putting to individuals (and businesses).

All of the steps outlined in the consultation paper could be improved by adding more information around the rights and obligations in relation to pregnant women and new mothers engaged as workers. It is the opinion of the ELA committee members that the steps outlined in the consultation paper are not clear enough about which rights apply to employees only and which also apply to workers (or even self-employed contractors in some cases).

In relation to the Working Forward campaign, more needs to be done to raise the profile of the campaign. To do this, we would suggest advertising this within pages that employers / individuals might visit, such as .gov, ACAS and advertising more on social media.

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.

Experience of ELA members is that not all individuals will read lengthy texts on websites like gov.uk or the ACAS guidance, and many individuals may not be aware of bodies like ACAS or the Health and Safety Executive. Furthermore, experience of members is that in relation to individuals, they may not proactively visit a link set out in an email or on a MATB1 form.

As a result, it is suggested by members that the government might provide a pamphlet or flier setting out the basic rights for women in the workplace (either employees or workers) that can be issued to women with their MATB1 form to enable them to know about their rights prior to giving their employer the MATB1 form.

A similar short pamphlet could be provided by ACAS (in an electronic form) to give a basic overview of maternity / family friendly rights that could be available to employers via the ACAS website. This document could set out the basic rights to provide awareness, and then employers could be directed to the fuller guidance elsewhere.

Furthermore, ELA suggests that it would be helpful for it to be obligatory for employers of a certain size (we would suggest employers with over 250 employees which would be in line with gender pay gap reporting obligations), and recommended for all employers, to have a family friendly rights workplace champion. This would be someone whom employees could ask questions of in terms of their rights for pregnancy/maternity, or family friendly rights in general, on a strictly confidential basis so that the employer as a legal entity did not necessarily know that the questions were being asked. It is considered that this may also help with side factors, such as employee retention, if one of the questions to be asked might be what maternity and SPL pay in that organisation looked like. Instead of an employee

leaving as they know what pay is elsewhere but didn't have the courage to ask internally, it may give her the opportunity to stay.

ELA considers that it would be a good recommendation for employers to engage in training regarding managing pregnant women and new mothers/parents, and in terms of family friendly rights generally.

It is also considered that it may be appropriate for employers of a certain size (again, we would suggest 250 employees or more) to be required to have a mandatory maternity paternity, SPL, adoption and flexible working policy, including reference to pay, in the Staff Handbook, and for that Handbook to be easily accessible by staff. It may be helpful for smaller employers in particular for example policies and guidance to be drawn up. That will enable individuals to find out the policy operated by their employer without having to ask openly for it and to know about the policy their employer will follow in advance. This should be mandatory even if only statutory.

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

In terms of resources, these can be amended by the relevant bodies. In terms of a new flier or pamphlet, this could be produced by the government to be included with MATB1 forms and given out by health professionals.

In terms of other support, employers would be best placed to take the relevant action, for example in having a family friendly rights workplace champion.

In terms of a maternity/parental policy, a pro forma could be produced and available on the ACAS website if employers are only following the statutory rules. However, otherwise it will be the employer's responsibility to produce it.

APPENDIX
LIST OF MEMBERS OF
THE WORKING PARTY

Catrina Smith, Norton Rose Fulbright LLP: co-chair
Elizabeth Drake, Metropolitan Police's Directorate of Legal Services: co-chair
Tom Bernard, Howells
Rachel Easter, CMS Cameron McKenna Nabarro Olswang
Ceri Fuller, DAC Beachcroft LLP
Rachel Hearn, Charles Russell Speechlys LLP
Lara Kennedy, Leigh Day
Tammy McDermott, King's College London
Bina Patel, Archon Solicitors Limited
Jessica Piper, Ashtons