

Family Friendly Employment Rights

Economic and International Affairs
Scrutiny Panel

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Chairman's Foreword

Most importantly and on behalf of the Panel, I would like to thank the many stakeholders from all sides of the debate who took the time to provide us with submissions. It is because so many people, including the Minister and the Department, engaged openly with us that we have been able to deliver a report that is unambiguous in its conclusions.

The need for quality

Islanders often wonder whether Jersey creates too much legislation for such a small jurisdiction. Whilst this is a very valid question, and one which is pertinent to this review, a more important question would be one that asks whether the legislation we do adopt is of a sufficiently high quality. When looked at from the perspective of quality, it quickly becomes clear that legislation needs to be well-researched, evidence-based, inclusive and appropriate to the needs of the island.

Our review of the proposed family friendly legislation has been entirely directed by the evidence. Unfortunately, this has led us to reach the conclusion that some of the proposals contained in P.17/2019 are neither well-researched, evidence-based, inclusive, nor appropriate to the needs of the island.

Nobody wants to find themselves criticising legislation that is billed as “family friendly” but the Panel, which includes among its members, a breastfeeding champion, members of the Gender Pay Gap Review Panel and members of PPC’s Diversity sub-committee, found itself with little choice. This is because the submissions we received pointed to the conclusion that this proposal was developed without appropriate strategic policy aims and followed a consultation process that failed to engage with a fully representative sample of stakeholders.

The need to ensure an appropriate range of stakeholders were consulted was heightened by the fact that the parental leave proposals place all of the cost onto families and employers, with the government avoiding the burden of paying for any of the measures it is so keen to bring into force.

Practical effects of the law

Importantly, there was clear support for the general aims and sentiments behind the proposals but this support has not transferred to the actual proposal placed before the States Assembly because of a failure to ensure that the proposition is practically viable.

The Panel heard from a range of stakeholders that included the Jersey Childcare Trust, the Jersey Early Years Association, small businesses, recruitment agencies, representative organisations and employment lawyers. All raised concerns about the practical effects of the law, should it become statute.

We also heard from the Minister and the Employment Forum. Their testimony showed that a lack of high level policy aims, a failure to carry out promised reviews or to undertake a review into the effects of the latest (2018) tranche of parental leave legislation, as well as an insufficient consultation process, had resulted in a proposal for legislation that does not include an assessment of its likely effects on those stakeholders.

As a result, the extended parental leave proposal gives rise to unanswered questions about its effect on employers, particularly small and third sector organisations, who, in an extremely tight employment market, could genuinely find themselves struggling to operate.

Furthermore, if it is only the better off who are able to take time out of work to care for their young children, what will happen to society as those on lower incomes spend less time with their new families in comparison to the wealthy? The noticeable lack of government money to support the legislation raises serious concerns about its long-term effects on our island community.

Unresolved issues

There are also unresolved issues around the transferability of parental leave between employers, questions surrounding the liability of recruitment agencies, and concerns about the possibility that larger employers could react to accusations of discrimination by “reducing” their more generous maternity benefit schemes to the minimum statutory level in order to provide equal levels of parental leave.

These are just a few of the issues that our review has uncovered and the fact that, on the eve of debate, they remain concerns, points to the conclusion that the parental leave aspects of the law have not been sufficiently thought through.

Throughout this review, it became clear that this proposal was developed in isolation rather than being understood as part of a corpus of regulatory legislation that is raising the demands and costs of running an organisation in Jersey. The Panel is very concerned that so little attention has been paid to the cumulative effect of regulation on those trying to operate in Jersey.

Positive developments

The Panel is however, in no doubt that the provisions in the proposed law relating to breastfeeding and ante-natal appointments are welcome and should play an important role in changing attitudes to breastfeeding and supporting mothers who wish to work whilst continuing to breastfeed.

We support these elements wholeheartedly but note that even here, the government appears to be pushing for social change without providing government support. It is imperative that government leads and should do so by providing investment in breastfeeding facilities throughout the island rather than seeking to push the costs unilaterally onto employers.

Jersey deserves family friendly legislation that works for everyone and that gives all children the opportunity to receive the best possible care from their families in the early stages of their lives. We urge the Minister to implement our overarching recommendation by withdrawing the parental leave aspects of her proposals and bringing a new proposal that will ensure equality of access to parental leave for all working islanders.



Finally, for their hard work and enormous help and support, I would like to thank my colleagues on the Panel - Deputy David Johnson (Vice Chairman), Senator Kristina Moore, Deputy Jess Perchard and Deputy Scott Wickenden. We also wish Deputy Wickenden all the best in his new role as Assistant Minister.

Deputy Kirsten Morel

Chairman, Economic and International Affairs Scrutiny Panel

1. Executive Summary

The Minister for Social Security lodged [P.17/2019](#) on 12th February 2019 which seeks to amend the Employment (Jersey) Law 2003 to extend family friendly employment rights. The proposals come as part of the second phase of extensions to the legislation following a [recommendation](#) made by the Employment Forum in 2017.

The Panel began its review with an analysis of the consultation process undertaken by the Employment Forum because this work was instrumental in the development of the proposals. The Forum's consultation exercise in 2017 resulted in 22 recommendations to the Minister and informed both the 2018 and 2019 proposals.

The previous Social Security Minister directed the Employment Forum, as part of the consultation, to review the impact of the existing family friendly legislation exploring the views and experience of employers in order to inform any developments in the existing rights. In terms of the balance between employer and employee responses, the consultation received 27 written responses from individual employers and 191 written responses from employees. In order to determine whether the consultation reached a balance between employers and employees, the Panel requested a list of those consulted.

The Forum was unable to provide the Panel with such a list because its database does not contain that level of detail. Therefore, the Panel has found that the consultation is very unlikely to have reached a sufficiently broad range of stakeholders. In addition, any assessment of the impact of existing legislation on employers was not as thorough as it should have been because an insufficient number of employers were consulted.

The Employment Forum is, and must continue to be, an independent body, but for this type of consultation, the Panel believes that the Department could have advertised the consultation using its own database to ensure that it captured the full range of stakeholders affected. If legislative changes are going to be based on consultation, there must be evidence that the process gathered meaningful participation from all types of stakeholders. As the Government of Jersey's consultation code of practice states: "*Consultation is based on the principle that people affected by a decision should be involved in the decision-making process. It is an exchange of views, which aims to identify issues, develop or change policies, test proposals or evaluation provision*".

The legislation proposed by the Minister ([P.17/2019](#)) has therefore been based on a consultation process which was not as thorough as it should have been. Once the proposals were published, a number of concerns were raised, directly to the Minister, from smaller businesses and the Chamber of Commerce. These concerns were shared with the Panel, at which point it decided to undertake a review.

In collating the number of concerns, the Panel has separated these into the following categories:

- Impact on employees;
- Impact on employers;
- Impact on children;
- Impact on the economy.

Employees

The key policy aims contained in P.17/2019 are that the extensions will improve the position for families in the workplace, give families more choice and flexibility to help meet work and family responsibilities and encourage gender balance in childcare roles.

The Panel accepts that the rights on breastfeeding and the right for surrogate and adoptive parents to attend antenatal appointments will create more choice and flexibility. These are very positive aspects of the proposals and were welcomed by many stakeholders.

Stakeholders were mainly concerned with the parental leave aspects of the legislation which would allow up to 52 weeks leave, which may be taken in up to 4 blocks over a 3 year period. This would provide a generous proportion of unpaid leave to those employees who are parents and who are able to afford it.

The interchangeable proportion of unpaid leave, however, could impact on other employees within an organisation. For example, some employees may be required to provide cover for those colleagues on parental leave, particularly if periods of parental leave have changed at short notice. There may also be instances when holiday leave has to be forfeited to make way for changes to another employee's previously agreed blocks of parental leave. A number of stakeholders asked, "*what about those who choose not to have children or those who cannot afford to take unpaid time off work?*"

Employers

Under the proposals, 6 weeks of the 52 week parental leave period has to be funded by the employer. Some businesses commented that 6 weeks full pay would be economically unviable and the blocks of leave could cause disruption and staffing issues. This impact will most likely be greater within smaller businesses where one employee makes up a significant proportion of the overall workforce.

The Employment Forum's recommendation included a suggestion that, in addition to the 6 weeks funded by the employer, a further 6 weeks should be funded by the Government. This part of the recommendation, however, was not taken forward by the Minister and so it follows that the Government is declining to take any financial responsibility for providing paid leave (except to its own employees). The Panel also found that the Customer and Local Services Department did not undertake any calculations in order to ensure that businesses would be able to afford 6 weeks full pay. This is concerning as it is conceivable that a proportion of businesses will find the 6 weeks paid element financially difficult.

It is also conceivable that the proposals, as drafted, could have a number of unintended consequences. The proposals effectively replace maternity leave with parental leave, which provides equal rights to all parents. A number of employers offer enhanced periods of paid maternity leave to their female employees, but if the proposals are implemented, there is a risk that employers will lower these packages to the statutory minimum because they are less likely to offer such packages to both males and females. If employers continued to only offer enhanced packages to female employees, should the proposals be implemented, they could be accused of discrimination against male employees.

Children

Although the proposals allow for up to 52 weeks leave, only 6 weeks would be fully funded by the employer. The paid and unpaid elements of the proposals could be considered divisive because

there will be many families in Jersey who will not be able to afford to take unpaid leave. The Jersey Opinions and Lifestyle Survey (2016) found that 52% of parents would have taken more leave but were prevented from doing so for financial reasons.

This has led the Panel to find that the proposals risk creating greater social inequality because there will be one group of parents unable to take unpaid leave to be with their children and another that is financially able to benefit from the full 52 weeks with their children.

Economy

The proposals recognise that good employment practices can benefit employers in terms of productivity, retaining skills and reduced recruitment and training costs. Alongside those benefits, however, the Panel has found that the proposals could also increase the cost of doing business. These costs stem mainly from the blocks of parental leave and the necessity to recruit to provide cover, as well as directly from the 6 weeks paid leave.

The Panel has also found that the cumulative effect of regulation on business over the years is having an impact on the economy. The number of single person undertakings has risen quite substantially from 1,300 in 2001 to 4,300 in 2018. The Panel questions whether the continuous employment legislation is creating disincentives for businesses to employ people. As one stakeholder points out, smaller businesses should be encouraged to grow into larger businesses because local businesses create a much more sustainable economy and are not reliant on imported labour and external financial markets.

Government responsibilities

The responsibility for implementing these proposals falls mostly with employers in Jersey. As well as providing 6 weeks leave at full pay, the employer must manage their workforce to allow for up to 4 blocks of (interchangeable) leave over a 3 year period and they must take reasonable steps to provide breastfeeding facilities. A number of stakeholders believe that it is the Government's responsibility to share some of the burden, particularly in relation to paid leave and providing breastfeeding facilities.

- **Paid leave:** As one of the aims of the extensions is to give parents greater choice relating to caring for their children, it is perhaps the Government's responsibility to accept greater responsibility for funding a proportion of paid leave.
- **Breastfeeding facilities:** Although the breastfeeding elements of the proposals have been welcomed by stakeholders and the Panel, it should also be the Government's responsibility to create more child-friendly facilities for families in publicly-owned buildings. Particularly as one of the ambitions of Future Jersey (a Government strategy document) is to improve breastfeeding rates in Jersey.

It also became clear during the review that the only research undertaken in the development of the proposals was the consultation by the Employment Forum. The Forum's recommendation has been based on the consultation responses and, other than providing an overview of parental leave rights in other jurisdictions, no other evidence or research has been gathered to support the proposals' policy aims or their suggested benefits.

Amendments

The Panel received a number of concerns during the review and these were mostly focussed on the parental leave aspects of the proposals. The Panel considered the significance of these concerns

and believes that further work needs to be carried out on the parental leave elements to ensure they are fit for purpose and that they work well for families, employers and employees. In that regard, the Panel has lodged an amendment to remove the new articles on parental leave.

The Panel believes that this will give the Minister the opportunity to revise the parental leave proposals in order to minimise any hardship to employers and also to explore the factors that create barriers to parents in Jersey. This should inform a new set of proposals that work for all parties concerned.

If this amendment is not accepted by the Assembly, the Panel has also proposed a further two changes in respect of the parental leave aspects of the draft Law. The Panel accepts that it may be counter intuitive to propose three changes, one of which calls to remove an article and a further two that propose to change elements of it. Given the significance of the concerns raised by stakeholders, and the fact that there has been no impact assessment of the existing rights, the Panel felt it had little choice but to lodge an amendment which completely removes the parental leave element so that it can be reworked by the Minister. If this is not accepted by the States Assembly, the Panel hopes the second and third amendments regarding parental leave will minimise the concerns and improve those aspects of the draft Law.

In March 2019 the Panel dedicated time to detailed legislative scrutiny. As a result, a number of questions arose around the surrogacy aspects of the legislation. The Panel sought advice from a number of sources and has proposed two changes. One is to make the definition of surrogate parent human rights compliant and the second is to make the definition clearer in respect of which of the criteria in the UK's Human Fertilisation and Embryology Act 2008 should be met before a person is treated as a surrogate parent.

The Panel also found that there were no safeguards in place should an employee provide false information to their employer. Although an unlikely scenario, there may be cases where an employee provides false information to their employer in respect of a pregnancy and is able to receive 6 weeks paid leave. Therefore, the Panel has lodged an amendment to make it an offence to provide false statements in respect of pregnancy.

Conclusion

The Panel concludes that the proposals put forward by the Minister were based on a consultation which was not as thorough as it should have been. The consultation process did not achieve a representative balance of responses, particularly from employers, and more work should have been carried out to assess the impact of the existing legislation before the extensions were developed.

The Panel's review has found that the proposals, as drafted, will have unintended consequences for families, employers and employees. The strength of the concerns received has necessitated several amendments be lodged and the Panel hopes that its amendments, if accepted, will minimise the impacts of the concerns it received during the review.

Notwithstanding those concerns, the Panel does support the underlying principles of the draft Law. The new rights for breastfeeding are most welcome as are the same rights being applied to adoptive and surrogate parents. These are very positive aspects of the legislation. Family friendly rights are an important part of any society but a balance of responsibility must be achieved between all parties, including the Government.

2. Key Findings

Key Finding 1: The Social Security Minister instructed the Employment Forum to undertake a consultation in respect of extending family friendly employment rights but did not provide the Forum with clear policy aims.

Key Finding 2: The Employment Forum recommended that extensions to family friendly rights should be undertaken in two phases. Phase one extended maternity leave from 18 to 26 weeks in September 2018 and phase two, under the current proposals, seeks to extend the leave period from 26 weeks to 52 weeks.

Key Finding 3: During a 2015 scrutiny review of the first phase of family friendly legislation (18 weeks maternity leave), the previous Health, Social Security and Housing Scrutiny Panel was assured that a review of the legislation to assess the overall impact of the changes would be undertaken one year following their introduction. No review was carried out to investigate the overall impact of the changes.

Key Finding 4: The main features of the 2019 proposals contained in P.17/2019 are: promoting equality and gender balance in childcare roles; putting the child first and encouraging and supporting the breastfeeding of babies.

Key Finding 5: The Panel is supportive of the underlying principles of the legislation specifically the new rights for surrogate and adoptive parents, and the rights on breastfeeding.

Key Finding 6: Most stakeholders are supportive of the principles behind the proposals and what they are trying to achieve. However, alongside this support, a number of concerns have been raised about the practicalities of the proposals and the financial and administrative burdens they place on employers.

Key Finding 7: The Employment Forum consulted between January and March 2017. The consultation was circulated to those on the Forum's database (around 300 in total) and a survey was also available on online platforms. A number of meetings also occurred during the consultation period.

Key Finding 8: The consultation gathered 27 written responses from individual employers and 191 written responses from employees. It appears that the consultation did not accumulate a representative spread of responses from both employers and employees.

Key Finding 9: The Panel has found that there is no way of knowing whether a sufficient range of employers were consulted because the Employment Forum's database does not constitute a list of those who took part.

Key Finding 10: The Employment Forum's recommendation explains that some of the written responses count as a single response but represent the views of a group or organisation rather than an individual respondent. However, this does not necessarily mean that a majority of members of these organisations were represented in the consultation responses.

Key Finding 11: Although Jersey Business was established in 2012 and has direct contact with all types of businesses, it was not involved in the Employment Forum's consultation process.

Key Finding 12: Given that the Customer and Local Services Department holds details of every employer (and employee) in the Island, the Department could have played a role in ensuring the consultation reached a sufficiently broad range of stakeholders.

Key Finding 13: Significant legislative change requires proportionate and meaningful consultation. The Panel found that in this case the level of consultation was not proportionate to the impact of the changes.

Key Finding 14: One of the key aims of the proposals is to give parents flexibility around when they can take their parental leave, but the legislation does not explicitly say whether blocks of leave are transferable between employers. There are differences in opinion between stakeholders, which has meant that this part of the legislation is ambiguous in that it does not specify whether leave is transferable.

Key Finding 15: There have been a number of concerns that the proposals to allow up to 4 blocks of leave within a 3 year period could impact on other employees within an organisation and are unfair to either those who choose not to have children, those who already have children or those who cannot afford to take unpaid time off work.

Key Finding 16: The proposals to allow up to 4 blocks of leave within a 3 year period impact more directly on smaller businesses where each individual makes up a significant proportion of the entire workforce and therefore planned (and unplanned) absence management is key.

Key Finding 17: A number of concerns have been raised from businesses in relation to the 6 weeks paid leave (funded by the employer). Some businesses have responded that 6 weeks full pay is economically unviable and 46 weeks unpaid leave which can be taken in 4 blocks over 3 years will create extra costs, disruption and staffing issues.

Key Finding 18: In relation to the 6 weeks paid leave (funded by the employer), the Employment Forum acknowledges the impact on businesses, particularly on the large proportion of small businesses in Jersey but makes no attempt to quantify it.

Key Finding 19: The Customer and Local Services Department did not undertake any calculations or analysis regarding the 6 weeks paid leave and its cost to business. The Panel's high-level calculation estimates the total cost of paid parental leave to be approximately £6.4 million but further analysis should be undertaken.

Key Finding 20: Some businesses in Jersey offer enhanced periods of paid maternity leave for their employees. A number of concerns have been raised that replacing maternity leave with parental leave could result in employers lowering their enhanced paid leave employment packages. Businesses may be less likely to offer enhanced periods of paid leave to both male and female employees which could result in them only offering the statutory minimum.

Key Finding 21: There is a risk that those employers only offering enhanced periods of leave to female colleagues would be discriminating against male employees, should the proposals be implemented.

Key Finding 22: Under Jersey legislation, recruitment agencies are identified as the legal employer of temporary employees. The proposed extensions to family friendly employment rights will create difficulties for recruitment agencies as they will be liable for the costs of paid and unpaid parental leave.

Key Finding 23: An Early Years Policy Development Board has been established to develop: a shared strategic policy across early years; a regulatory framework for child care provision; funding options for child care and an early years learning framework.

Key Finding 24: It is unclear what evidence has been used to support the Employment Forum's recommendation to allow up to 4 blocks of leave over a 3 year period other than enhancing flexibility for taking leave for families. The 1001 Critical Days agenda was endorsed by Jersey in 2015 but has not been mentioned in the Employment Forum's Recommendation nor in the Minister's report to the proposals.

Key Finding 25: The proposals allow for up to 52 weeks leave, 6 weeks of which are to be paid by the employer. It is highly unlikely, however, that every parent will be able to afford to take unpaid leave and therefore there will be some children who will benefit from the time with their parents and there will be some children who will not. This risks deepening inequality in society.

Key Finding 26: Concerns have been raised about the continuity of care for children who attend nursery if their parents are taking 4 blocks of leave over a three year period. Most nurseries would be unable to keep places open for parents so that leave can be taken in blocks which would result in children being unable to access childcare in the same environment between their blocks of care.

Key Finding 27: Although the proposals could benefit the economy in terms of productivity, reputation and maximising Jersey's workforce, it is important to consider that the proposals will also increase the cost of employment in Jersey.

Key Finding 28: Local businesses create a sustainable economy but continuous additional employment legislation can create disincentives for businesses to employ people. During the period from 2001 to 2018, the number of single person undertakings has risen substantially from 1,300 to 4,300.

Key Finding 29: Concerns have been raised about the cumulative effect of regulation on businesses in Jersey starting with the first phase of extensions to family friendly rights and the introduction of discrimination legislation in 2015 followed by data protection changes. The effects on businesses include financial, administrative and resource implications.

Key Finding 30: Recent changes to employment legislation have affected the economy in terms of new businesses in Jersey. Given the increasing responsibility placed on businesses, some newer businesses have decided not to proceed with their ventures or these burdens have discouraged smaller businesses from growing into larger businesses.

Key Finding 31: The proposals, including the paid leave element, the blocks of leave and providing breastfeeding facilities (where reasonable), place much of the responsibility on the employer. Some stakeholders believe that it is the government's responsibility to share some of this burden.

Key Finding 32: The Employment Forum recommended that 12 weeks of paid leave in total should be available, with 6 weeks funded by the employer and 6 weeks funded by the States of Jersey at 100% of pay. This recommendation was only partially accepted by the Minister who cited the government's inability to pay a further 6 weeks. It is unclear whether any research was undertaken by the Department to determine whether small businesses could afford to provide 6 weeks of paid leave.

Key Finding 33: Evidence suggests that the public believes that the government should share some of the burden for funding a proportion of paid leave. Research undertaken by Statistics Jersey shows

that more parents would take parental leave if it was paid but they are currently prevented from doing so for financial reasons. If parents cannot afford to take unpaid leave, it is doubtful whether the aim of the proposals to give parents greater choice, will be achieved.

Key Finding 34: A report by the [Organisation of Economic Co-operation and Development](#) says that there is evidence which strongly supports making 6 months paid leave available to parents, with 3 months as a minimum bar for supporting health and women's economic opportunities.

Key Finding 35: The Employment Forum recommended that employers should take reasonable steps to provide facilities in the workplace for breastfeeding mothers to express and store milk where an employee requests it. Although the breastfeeding elements of the proposals have been welcomed by stakeholders, the question of whether facilities should also be available within public buildings in the community was raised.

Key Finding 36: Two contributory benefits are paid to new mothers: a one-off maternity grant (£650.58) and a maternity allowance (£216.86 per week). The maternity allowance is only available up to 18 weeks which corresponds with the first set of family friendly proposals implemented in 2015. No changes have been made to extend the allowance to correspond with the subsequent extensions to leave periods (currently 26 weeks).

Key Finding 37: If a female employee is in receipt of the maternity allowance (£216.86 per week for up to 18 weeks), employers are able to offset the balance for the 6 week paid period of leave. Under the current proposals for parental leave, employers are unable to claim back the allowance for anyone other than the mother giving birth.

Key Finding 38: The only research undertaken in the development of the proposals was the consultation by the Employment Forum. The Employment Forum's recommendation has been based on the consultation responses and, other than providing an overview of parental leave rights in other jurisdictions, no other evidence or research has been gathered to support the policy aims and the suggested benefits contained in the proposals.

Key Finding 39: Since the first tranche of extensions to family friendly employment rights was implemented in September 2018, no analysis has been undertaken by the Customer and Local Services Department to assess their impact on employers, employees, parents or the wider economy in Jersey.

Key Finding 40: The amendment to exempt small businesses could have unintended consequences. If smaller businesses were exempt from providing the same level of employment rights as larger businesses, they may experience difficulties in recruitment. Another consequence may be that some businesses would be inclined to keep the number of employees down to a certain level to come within the exemption.

3. Recommendations

OVERARCHING RECOMMENDATION: In considering the significance of the various concerns surrounding the parental leave aspects of the draft Law and the difficulties this element of the proposals creates, the Minister should withdraw Article 4 from the legislation. Following the withdrawal of this Article, the Minister should then undertake an evidenced-based review to include:

- An examination of the best ways to ensure parents of all income brackets are able to afford to take a minimum of 6 months leave;
- An examination of the level of government funding needed for paid leave as there are many parents who will not be able to afford to take unpaid time off work;
- A review of the impact of the changes on the full range of employers in all sectors.

The outcome of a comprehensive review of this nature will result in clear, evidence-based policy aims that will guide the creation of a parental leave system that strikes the appropriate balance of responsibility between employers, employees and the government in order to truly put children first.

Recommendation 1: The Customer and Local Services Department should use its own database, where practical, to support the promotion of consultations.

Recommendation 2: The Government should significantly improve its consultation guidelines. This should include comprehensive guidance on how to engage with stakeholders in a meaningful way and also how to identify relevant stakeholders. The guidance should be revised and published before the end of 2019.

Recommendation 3: If the proposals are adopted by the States Assembly, the Minister should lodge an amendment to clarify the position on transferability of leave within 6 months of its implementation.

Recommendation 4: The Government of Jersey should, in consultation with Parishes, create more child-friendly facilities for families, and in particular breastfeeding mothers, around the Island. This would allow the government to share some of the burden being placed on employers to create these types of facilities and would also support the ethos of “putting children first”. This work should be carried out by Q3 2019 with a view to providing more facilities by the end of 2019.

Recommendation 5: If the proposals are adopted by the States Assembly, the Minister should bring forward proposals to align the contributory benefits for employees and financial support for employers. This would support the ethos that parental leave includes all parties and not only the mother or those with the financial means to take unpaid leave. Proposals should be brought forward before the end of 2019.

Recommendation 6: The Minister should lodge an amendment to the [Social Security \(Maternity Benefit\) \(Jersey\) Order 1975](#) to include all parents (non-mothers) so employers can claim the £216 from all parents taking leave and the period of maternity allowance should be extended from 18 weeks to 52 weeks.

4. Introduction

The Minister for Social Security lodged [P.17/2019](#) on 12th February 2019 which calls to amend the Employment (Jersey) Law 2003 to extend family friendly employment rights. The proposals come as part of the second phase of extensions to the legislation following a [recommendation](#) made by the Employment Forum in 2017.

The first phase of extensions was brought forward in 2018, when the Employment Law was amended to extend maternity leave from 18 weeks to 26 weeks. The latest set of proposals completely replaces maternity leave with parental leave and extends leave from 26 weeks to 52 weeks.

Some of the key features of the latest proposals are¹:

- 52 weeks of parental leave (combining maternity, adoption and parental leave) for all parents, including surrogate parents, which can be taken in up to 4 blocks over a three year period;
- Time off work to attend appointments for adoptive and surrogate parents;
- Breastfeeding rights – breaks and workplace facilities;
- Paid leave where necessary on health and safety grounds for pregnant and breastfeeding women.

The Review

The Economic and International Affairs Panel agreed to undertake a review of the proposals following concerns about the effects the changes may have on employers.

The Panel's review has focussed in particular, on the consultation process undertaken by the Employment Forum because this informed the recommendations to extend family friendly employment rights and subsequently, the Proposition (P.17/2019). The Panel's main aim was to ensure that the legislation works well for both families, employers and other employees.

In addition to inviting submissions from key stakeholders and members of the public, the Panel held several public hearings with Ministers, the Employment Forum and other interested parties. The submissions and transcripts can be found on the [review page](#) of the States Assembly website.

Request for withdrawal

The proposals were originally due to be debated on 26th March but the Minister agreed to defer the debate until 30th April to allow the Panel time to conduct its review. During that period, the Panel received many submissions that highlighted areas where changes to the legislation could be made. Despite its best efforts, the Panel did not have sufficient time to explore these in detail with a view to ensuring they were acceptable changes to make.

The Panel met the Minister on 9th April to explain its position and to formally request her to withdraw the Proposition. The Minister explained in her response that withdrawing the proposition would

¹ [P.17/2019](#)

cause a significant delay which she could not support. The Minister did, however, acknowledge that certain themes and concerns had emerged from the Panel's review and as a result lodged amendments to the legislation. Both the Proposition as currently drafted and the amendments have been considered by the Panel.

5. Development of Family Friendly Legislation

The Employment Forum first consulted on maternity, paternity and adoption leave, and family friendly, flexible working policies in 2007. A detailed timeline demonstrating the development of family friendly legislation can be found in appendix one.

The role of the Employment Forum

The Employment Forum acts as a non-political consultative body. It has a duty to consult on the rate of the minimum wage and other employment-related issues, as directed by the Social Security Minister. The forum must report to the Minister with recommendations on each issue, based on the views received in consultation².

The Employment Forum's Terms of Reference include:

1. The primary purpose of the Employment Forum is to make recommendations to the Minister for Social Security in relation to the minimum wage, in particular, the hourly minimum wage rate and associated rates.
2. The Forum may also be required to make recommendations to the Minister on any other matters relating to the Employment (Jersey) Law 2003, as the Minister sees fit.
3. Before making any recommendations to the Minister, the Forum will consult and will have regard to the effect of the recommendation on the economy of Jersey as a whole and on competitiveness, as well as any additional factors which the Minister specifies in referring matters to the Forum.
4. When consulting on any matter, the Forum will consult with representatives of employers and of employees, and any other body or person, as it considers appropriate in the circumstances.
5. The Forum will make its recommendations within any time period specified by the Minister³.

The Minister and Assistant Minister outlined⁴ the function of the Forum:

Assistant Minister for Social Security:

"Yes, the structure is that the department, the officers, the Ministers decide on policy and we use the Employment Forum to consult and to advise around that policy making. I think many people would look at the consultation and the work that the Employment Forum does time and time again as very effective and very detailed and in depth. They have got a great reputation for the level of their research and the advice that they give. It is very, very rare; I do not think any Minister has ever turned down the advice from the Employment Forum".

The Minister for Social Security:

"Even on the minimum wage and that is the other thing they consult on yearly. As I say, they were around obviously before even we had employment law. They started around 1999, the Employment Forum, as a body."

² Information obtained from gov.je

³ Employment (Jersey) Law 2003, Articles 18 to 21

⁴ [Public Hearing](#) with the Minister for Social Security, 28th March 2019

The Forum's involvement in family friendly legislation

As a result of the Employment Forum's consultation in 2007, the first stage of family friendly rights was implemented in 2015 at the same time as sex discrimination [legislation](#). The first stage introduced 18 weeks maternity leave.

When the first stage of family friendly rights was adopted by the States, a commitment was made to review the rights one year after they came into force. In a letter dated 26th August 2016 the previous Minister directed the Employment Forum to undertake a consultation as part of that review, and to make a recommendation by the end of 2017.

The Minister listed 8 points for the Forum to cover, which included:

1. The impact of the new legislation exploring the views and experience of employers to inform any developments in family friendly rights. To include exploring the experiences of working parents who had had a baby in the past year.
2. To consider extensions to rights to statutory leave (including paid and unpaid maternity, parental and adoption leave).
3. To consider extending the statutory maternity leave so that there is no length of service requirement.
4. To consider extending the right to take time off work to attend antenatal care appointments to the partner/husband/partner of the baby.
5. To consider extending the right to request flexible working so that it applies to all employees (not just those with caring responsibilities and that it applies irrespective of length of service).
6. To consider providing a right for periods of maternity, parental or adoption leave to be shared by two parents and by grandparents.
7. To consider introducing a right to paid time off work where an employee is suspended for pregnancy-related reasons in order to ensure the health and safety of the pregnant woman and foetus.
8. To consider introducing statutory provision for breastfeeding rights and/or facilities in the workplace.

Key Finding 1: The Social Security Minister instructed the Employment Forum to undertake a consultation in respect of extending family friendly employment rights but did not provide the Forum with clear policy aims.

In December 2017, the Employment Forum published a recommendation document which suggested 22 specific recommendations relating to extending family friendly rights. Part of the recommendation was that the extensions should be undertaken in two phases, phase one extended maternity from 18 weeks to 26 weeks (from September 2018) and phase two to introduce the concept of parental leave to cover all parents and extend the statutory leave period from 26 to 52 weeks (starting from September 2019).

Key Finding 2: The Employment Forum recommended that extensions to family friendly rights should be undertaken in two phases. Phase one extended maternity leave from 18 to 26 weeks in September 2018 and phase two, under the current proposals, seeks to extend the leave period from 26 weeks to 52 weeks.

6. Phase One: Family Friendly legislation

Context: Previous legislative scrutiny

As previously referred to, in 2014 the [first set](#) of family friendly employment rights was approved by the Assembly (and implemented in 2015). There has been no review of the effects of that legislation nor has there been legislative scrutiny of the proposals put forward in 2018.

Summary of 2015 changes:

- A maximum of 18 weeks' maternity and adoption leave
 - 2 weeks compulsory leave immediately after childbirth at full pay by the employer (not applicable to adoptive parents)
- Paid time off work to attend ante-natal appointments for the pregnant woman.
- 2 weeks unpaid parental leave for a man or woman (other than the mother) who has parental responsibility for the child.
- The right to request flexible working for employees with caring responsibilities and 15 months' service.
- Protection against dismissal in relation to the above rights.

Scrutiny of the 2015 family friendly rights detailed above was undertaken by the Health, Social Security and Housing Panel in 2014. The Panel presented [comments](#) and made it clear that it had not had sufficient time to undertake a thorough review of the proposals and had commissioned Ogier Legal to undertake a desktop review:

Previous Health, Social Security and Housing Scrutiny Panel:

The Panel believes it deserved thorough scrutiny to ensure it is fit for purpose however, with a lodging date of 4th June 2014 and a debate of 14th July, the Panel found itself with less than 6 weeks to undertake a thorough review. Due to the abundance of propositions brought before the Assembly before the summer recess and the Panel's already heavy workload, the Panel appointed local firm Ogier Legal to undertake a full desktop review on the legislation.

Ogier Legal highlighted a number of concerns with the proposals, particularly in relation to the impact on small businesses. On the impact to employers Ogier Legal said:

Ogier Legal:

We do not have detailed data to provide a complete or accurate indication of the actual impacts and burdens on employers.

The direct financial impact of the Amendment is relatively clear, and it is primarily the cost of 2 weeks maternity leave. However there are wider financial costs, including the costs of recruitment, increased administrative and human resources costs. It is these that will create the biggest impact on businesses, as they have to adapt to the new system.

Small businesses will probably suffer a greater impact than larger businesses, as they are less likely to have the staffing resources or support resources to deal with the additional financial burden of the Family Friendly Regulations. They will also require greater support and assistance to implement the changes.

The Panel explained in its Comments that it discussed the concerns with the Minister at the time, who assured the Panel that the proposals would be reviewed one year following its introduction:

Previous Health, Social Security and Housing Scrutiny Panel:

The Panel has also been assured that the Amendment will be reviewed one year following its introduction to look at the overall impact and any areas that may need to be amended can be done through future regulations.

As far as the Panel is aware, no specific review has been carried out to look at the *overall* impact of the changes, which in this case was 18 weeks' maternity leave and 2 weeks paid leave for the mother. The only work carried out since family friendly legislation was first implemented in 2015 was:

- The consultation undertaken by the Employment Forum in 2017. The purpose of that consultation, as stated in the recommendation, was to review existing rights with a view to extending them.
- A consultation ([Living Today: Thinking Ahead](#)) undertaken by the then Social Security Department which asked for the public's views on protection and benefits around starting a family (parental benefits) and following a death (bereavement benefits).

In terms of scrutiny work, the 2018 changes were not scrutinised by the previous Health and Social Security Panel.

Key Finding 3: During a 2015 scrutiny review of the first phase of family friendly legislation (18 weeks maternity leave), the previous Health, Social Security and Housing Scrutiny Panel was assured that a review of the legislation to assess the overall impact of the changes would be undertaken one year following their introduction. No review was carried out to investigate the overall impact of the changes.

2018 Legislation

The following employment rights have applied to all employees since 1st September 2018:

1. Increased maternity, adoption and parental leave to 26 weeks.
2. Increased paid maternity leave to 6 weeks.
3. 2 weeks of paid parental leave (available to the father of the child, or the person who is married to, the civil partner of, or the partner of, the child's mother or adopter).
4. 6 weeks of paid adoption leave.
5. Antenatal appointments for the father/partner.
6. Extending the right to request flexible working to all employees.

These were proposed ([P.27/2018](#)) by the previous Social Security Minister and debated and approved on 22nd March 2018.

7. 2019 Proposals

P.17/2019 would amend the Employment (Jersey) Law 2003 to further extend family friendly employment rights. The proposed changes to the 2018 proposals are more significant than the 2018 proposals and were originally due to be implemented in September 2019. The debate date was deferred to the 18th June which allowed more time for the Panel to conduct its review. As a result, the implementation date will be delayed, should the proposition be adopted by the Assembly.

An overview of the proposed changes are detailed in P.17/2019 as follows⁵:

	CURRENT RIGHTS		SEPTEMBER 2019
Maternity leave	26 weeks of leave of which 6 weeks paid at 100% of pay by the employer. No qualifying period.		<u>52 weeks</u>
Parental leave	26 weeks of leave of which 2 weeks paid at 100% of pay by the employer. Can be taken in up to 3 blocks of leave.	➡	52 weeks of leave for all parents of which 6 weeks paid at 100% of pay by the employer, with no qualifying period.
Adoption leave	Paid and unpaid leave equivalent to maternity leave and parental leave.		Can be taken in up to 4 blocks of leave during a 3 year period. [The Minister has subsequently proposed an amendment to change this to 3 blocks of leave over a 2 year period].
Surrogacy leave	Currently no right to leave for the intended surrogate parents.		Also available to adoptive and intended surrogate parents.
Surrogate parents - antenatal care	Currently no right to time off to attend appointments.	➡	Unlimited attendance at appointments - up to 10 hours paid, the rest unpaid.
Adoptive parents – appointments	Currently no right to time off to attend adoption appointments.	➡	Unlimited attendance at appointments - up to 10 hours paid, the rest unpaid.
Breastfeeding breaks	Currently no rights	➡	Right to request temporary variation to terms and conditions.
Breastfeeding facilities	Currently no rights	➡	Employers must take reasonable steps to provide facilities in the workplace.
Paid absence on health and safety grounds	Currently no rights	➡	Right to paid absence where a risk assessment prevents a pregnant or breastfeeding woman from carrying out her normal job and she cannot be allocated to other duties.

⁵ [P.17/2019](#)

When the Panel met the Minister and Assistant Minister for Social Security, they explained⁶ the main features of the proposals and what they were trying to achieve:

- **Gender balance:** “I think it is about promoting equality, which is a fundamental part of the Strategic Plan and, yes, we are supposed to be doing. It opens up the avenue for men to take parental leave, as well as women. It also, I think, is designed and will improve working conditions and that, obviously, has to apply particularly to women.” (Assistant Minister)

“...we are trying to make an even playing field to get parental leave, so fathers can have as much time, if they want to, if they can afford to, with baby, as mum can; over the couple of years they can share leave.” (Minister)
- **Putting the child first:** “Our Strategic Plan is literally putting children first and we do know the evidence is there; for the first 2 years of a baby’s life, that is when they must be nurtured.” (Minister)
- **Breastfeeding:** “The other one is the breastfeeding breaks because we have a really good uptake at birth, we still have a pretty good uptake at 6 weeks and then it goes down. It seems to taper off, it is around the maternity leave time now. Is there a choice or is that: “I am going back to work and it is a bit hard for me to do”? That, to me, would be a fantastic thing for mums who want to do that”. (Minister)

Key Finding 4: The main features of the 2019 proposals contained in P.17/2019 are: promoting equality and gender balance in childcare roles; putting the child first and encouraging and supporting the breastfeeding of babies.

Support for family friendly policy

During the Panel’s review it became evident that the majority of stakeholders are supportive of the concepts behind the proposals and what they are trying to achieve.

Chamber of Commerce

“To be clear, Chamber wholeheartedly supports the desired principles contained within Proposition P.17, as we fully support the provision of good and fair employment for our members’ employees. A workforce that feels supported, fairly paid and empowered is far more likely to provide their employers with loyal and valuable service”.

Jersey Retail Association

“The feedback from our members has been incredibly supportive of the aims of the draft recommendations. Retailers are “people people” working with the community every day and they welcome the recognition that a family unit comes in many different forms, and that all parents should have the opportunity to spend time with a new arrival.”

Collective response by 52 businesses in Jersey

“Many of us are parents and we understand the importance of involvement with children from an early age”.

The Panel is also supportive of the underlying principles of the legislation and specifically, the new rights for surrogate and adoptive parents, and the rights on breastfeeding.

⁶ [Public Hearing](#) with the Minister for Social Security, 28th March 2019

Alongside this support however, stakeholders have expressed many concerns about the practicalities of the proposals and the financial burden put on employers. These concerns, and others, are explored further on in the report.

Key Finding 5: The Panel is supportive of the underlying principles of the legislation specifically the new rights for surrogate and adoptive parents, and the rights on breastfeeding.

Key Finding 6: Most stakeholders are supportive of the principles behind the proposals and what they are trying to achieve. However, alongside this support, a number of concerns have been raised about the practicalities of the proposals and the financial and administrative burdens they place on employers.

8. The consultation process

The Employment Forum consulted between 5th January and 17th March 2017. The consultation was circulated to those on the Forum's database (around 300 in total) and a survey was also available on online platforms. A number of meetings also occurred during the consultation period.

Information obtained from Customer and Local Services explained that the Forum receives an annual budget to cover the cost of consultation in that year. The Forum's budget for 2017 was £6,000 which included a budget for the annual minimum wage review. In relation to family friendly work, the Panel was advised that £2,691 was spent which included the public meeting venue, refreshments for meetings and training in preparation for consultation⁷.

The Employment Forum's recommendation sets out how many written responses to the survey were submitted which have been separated into respondent categories:

Employee	191
Employer	27
Trade union/staff association	2
Employers' association/trade body	3
Other	30
Not specified	78
Total	331

Who was consulted?

The Panel is concerned that the consultation process did not achieve a balance of employer types or reach a sufficiently broad range of employers. As can be seen from the table, only 27 written responses were received from individual employers. This concern was also raised by Advocate Huw Thomas (an employment lawyer):

Advocate Huw Thomas:

It is apparent from the Employment Forum's Recommendation that the overwhelming majority of their responses came from employees and their representatives. I am accordingly concerned that the consultation may have not taken into account the full range and scope of the concerns of employers and I would suggest that the Forum could perhaps have been more proactive in seeking their views.

In order to determine whether the consultation reached a broad range of employers, the Panel requested a list of those consulted by the Forum as part of its consultation. The Employment Forum responded to the Panel's request as follows:

There is no definable list of who was consulted.

...the consultation was a public consultation and was distributed by multiple means. The Forum does not control who receives consultation documentation; it is distributed by various publicly available means, for example, via social media and third parties... We make every effort to publicise and disseminate the consultation documentation as widely as possible.

⁷ Information obtained from Customer and Local Services, 1st April 2019

The Forum's database does not constitute a list of who was consulted.

We do not believe that your request is for a copy of the Forum's database, however, to the extent that that is what you seek we would state as follows:

- a) *The database does not constitute a list of who was consulted as the consultation went beyond the database;*
- b) *The database has been updated and amended since the consultation in early 2017 and so a version of the database from the time of the consultation would not be easily ascertainable;*
- c) *The database would include a number of individuals who did not respond at all to the consultation, and so their details would be irrelevant;*
- d) *The details on the database constitute personal data and so subject to specific legal duties under the Data Protection (Jersey) Law. Individuals have agreed to be included on the database specifically for the purpose of receiving consultations and recommendations direct from the Forum, and disclosing their details in response to your request would amount to an alternative, collateral use of their personal data.*

The Panel remains concerned that the consultation did not accumulate a representative spread of responses from both employers and employees. Without a definable list, there is no way of knowing for certain whether a sufficient number of employers were consulted in order to gain an informed view of the proposals. The Panel asked Helen Ruelle, Chair of the Employment Forum whether responses to the consultation were categorised into different types of business (for example small, medium and large businesses):

The Deputy of St. Mary:

"On the database. What about from the actual responses? You must have an idea of the sort of businesses that respond generally, do you not? Do you put them in categories?"

Chair, Employment Forum:

"Sometimes. We only ask questions about sizes and breakdown of business where that is pertinent to the consultation. "

The Deputy of St. Mary:

"Was it pertinent to the consultation this time?"

Chair, Employment Forum:

"No, I do not think it was pertinent in terms of does it necessarily matter, for example, how big an employer is. Employers are very clear in their responses generally about the impact of a particular piece of legislation...."⁸

Due to the number of concerns the Panel has received from businesses, particularly smaller businesses, the evidence suggests that size is a significant consideration when designing legislation that affects employing organisations and as such, it is important to ensure an appropriate range of voices are heard.

⁸ [Public Hearing](#) with the Employment Forum, 8th April 2019

Key Finding 7: The Employment Forum consulted between January and March 2017. The consultation was circulated to those on the Forum's database (around 300 in total) and a survey was also available on online platforms. A number of meetings also occurred during the consultation period.

Key Finding 8: The consultation gathered 27 written responses from individual employers and 191 written responses from employees. It appears that the consultation did not accumulate a representative spread of responses from both employers and employees.

Key Finding 9: The Panel has found that there is no way of knowing whether a sufficient range of employers were consulted because the Employment Forum's database does not constitute a list of those who took part.

Representative bodies

The recommendation explains that some of the written responses count as a single response but represent the views of a group or organisation rather than an individual respondent and examples such as the Jersey Farmers' Union and Jersey Hospitality Association are given. This does not necessarily mean, however, that the responses represent the views of all members or is representative of the different sizes of member organisations.

The Panel makes this observation by using the Chamber of Commerce as an example. In the recommendation it explains that the Chamber: "*represents 550 member businesses across a variety of sectors, including finance, retail and tourism. The consultation response was prepared following a survey of Chamber members*".

The Chamber of Commerce provided the Panel with its original submission to the 2017 consultation. The submission explains that it had not received a high participation rate to its survey (just 14%) and considered it too soon to provide thorough feedback:

Chamber of Commerce - response to Employment Forum consultation:

Chamber and its members are fully supportive of legislation that provides protective measures to support family life and a recent survey with our members, regarding family friendly legislation, illustrated that 93% of those taking part in the survey (which was 14% of Chamber's 540 member organisations) said they did not find any difficulty in applying the current statutory maternity rights. Of the 7% that did find the current maternity provision difficult to implement, a number of anecdotal examples were supplied:

- *'Staff have left as we cannot afford to pay for long term leave'*
- *'In a small workforce, losing a fee earner has significant impact on revenue'*
- *'We are a small organisation and have difficulty covering maternity leave and the cost involved'*

We had hoped for a higher participation rate from our own membership survey but we do not feel 14% is representative enough to provide thorough assessment of how businesses are coping with the existing provision and therefore, we would conclude that it is too soon to provide thorough feedback on legislation that has only been in place for 18 months⁹.

⁹ Chamber of Commerce [submission](#) to 2017 consultation

The Panel met representatives from the Chamber of Commerce who commented that the consultation was limited:

Chief Executive, Chamber of Commerce:

“....I think in terms of that consultation ... and I do not think it is the fault of the Employment Forum, I do not think the consultation was in-depth enough. It did not encompass enough people and if you look at 2005 to 2017 and you look at 2019, there are real, serious issues in terms of accommodation, in terms of availability of a labour workforce, that do point to a different world now”.

Deputy S.M. Wickenden:

“Have you read through the Employment Forum’s actual report and do you feel that your views are taken into consideration within that report?”

Chair, H.R. Committee, Chamber of Commerce:

“I do not feel they are. I think it was very limited. The consultation itself was very limited. What has come out of it, there have been a few surprises.”

Key Finding 10: The Employment Forum’s recommendation explains that some of the written responses count as a single response but represent the views of a group or organisation rather than an individual respondent. However, this does not necessarily mean that a majority of members of these organisations were represented in the consultation responses.

The Panel asked the Jersey Retail Association and Jersey Business, who also represent a large number of members, whether they had been involved in the consultation process:

Jersey Retail Association:

Deputy K.F. Morel:

“I was just going to ask before, the consultation process. It is just to ask in relation to these proposals whether the J.R.A. was involved in the consultation process. This is back in 2017”.

Chief Executive Officer, Jersey Retail Association:

“No, we were not. Back in 2017 the J.R.A. were just a small voluntary organisation so we did not become active with a paid employee until March 2018. So we were not part of the consultation process. I did ask that question directly to all of the businesses that spoke to me either in the written consultation, our focus group, our one-to-ones and not one of those businesses had been part of the consultation”.

Deputy K.F. Morel:

“And that was a range of business sizes as well?”

Chief Executive Officer, Jersey Retail Association:

“All businesses sizes, including the large businesses that you would imagine would normally have been requested”¹⁰.

¹⁰ [Public Hearing with the Jersey Retail Association and Jersey Business, 3rd April 2019](#)

Jersey Business

Chief Executive Officer, Jersey Business:

"No, there was no consultation with Jersey Business. I think in some ways the structural changes that we had gone through and others have gone through make that a lot easier now going forward. I think as a generalisation, Jersey Business were probably not consulted historically as much as they potentially could have been, but as we have evolved and changed and demonstrated the value across the sectors, we are now approached; the likes of yourselves and what have you. It is not a criticism of the past, it is a reality. I think going forward it is quite different now that we are engaged and we are brought in".¹¹

The Panel would have expected that Jersey Business in particular, which was established in 2012 and will have ongoing direct contact with all types of businesses, would have been part of the consultation. When describing the role of Jersey Business, the Chief Executive told us:

"We work well with government but also with businesses. So we can understand how government works but also we have got the confidence of the business sectors. So we can help both government and businesses in terms of policy development, in terms of issues that the sectors face, and we provide a neutral view".¹²

Key Finding 11: Although Jersey Business was established in 2012 and has direct contact with all types of businesses, it was not involved in the Employment Forum's consultation process.

Balance of employee and employer responses

The Panel wishes to make it clear that its questions around the consultation process are not a criticism of the Employment Forum or the work that they do. The Panel is seeking evidence that the consultation process reached a sufficiently broad and balanced range of stakeholders including both employers and employees. This is important in any consultation process but particularly when consultations are used to form recommendations for legislation. The Panel asked the Minister about the consultation process and whether it included a balance between employees and employers:

Deputy S.M. Wickenden:

"..... In your opinion, did the consultation process include a sufficiently representative selection of employees and employers?"

The Minister for Social Security:

"Yes".

Deputy S.M. Wickenden:

"Yes. What evidence do you, as Minister, have to support that view?"

The Minister for Social Security:

"Because I have total faith in the Employment Forum. They have been doing this for 20 years. They have the people they consult with, you have seen the representatives they consult with. These are big bodies who sometimes do their own consultation and they come back to the forum and they go through everything in fine detail. I absolutely have total confidence in the forum".

¹¹ [Public Hearing](#) with the Jersey Retail Association and Jersey Business, 3rd April 2019

¹² [Public Hearing](#) with the Jersey Retail Association and Jersey Business, 3rd April 2019

Deputy K.F. Morel:

"Are we to take faith in this as evidence?"

The Minister for Social Security:

"I am telling you, I have total confidence in the forum and if you do not you have to find me some evidence to prove it".¹³

The issue is not one of having confidence in the Employment Forum, but rather, it is about whether the consultation process collected a sufficient level of input from employers. Without a definable list to evidence the people, types and sizes of organisations that were consulted, the Panel remains unconvinced that a fully representative range of stakeholder views were included in the consultation.

Promotion of the consultation

The Employment Forum recommendation explains that details of the review of family friendly rights were circulated to States Members and promoted via the radio, media interviews, the Government of Jersey website, social media, the Jersey Advisory and Conciliation Service (JACS) and Citizen's Advice Jersey. The Panel spoke to the Director of JACS who explained the process undertaken by JACS to promote the consultation:

Director, J.A.C.S.:

"What we do is we would get advised that there is going to be a consultation going out, so we send out newsletters and we have got around about 1,200 - or we had - people on our newsletter, so it is people that signed up to it and that is all there that is there. If we get notification that a consultation is going out, we will add our stuff and then we will say: "The Employment Forum is consulting on this, click this link if you want to have your say" and that is basically what we do".

[....]

Deputy K.F. Morel:

"What kind of people or organisations do you have in your database in general terms? Obviously I know you cannot name them".

Director, J.A.C.S.:

"The thing is we do not have a database. People sign up for our newsletters, so ..."

Deputy K.F. Morel:

"That is what I mean, so yes".

Director, J.A.C.S.:

"... we do not look at who has signed up. It is anybody that chooses to, so it will be across the business sectors. It will be all sorts of organisations that we have dealt with, people that have attended our training, we will say: "There is a free newsletter, just sign up for it. We do not do anything other than give you information.""¹⁴

The Panel note that there is no way of establishing who is signed up to and who receives the JACS newsletter and therefore there is no way of knowing how far reaching JACS' promotion of the consultation was. This type of promotion does have its merits and can help to ensure that consultations reach a greater range of stakeholders than can be achieved with a single database. It

¹³ [Public Hearing](#) with the Minister for Social Security, 28th March 2019

¹⁴ [Public Hearing](#) with the Jersey Advisory and Conciliation Service, 3rd April 2019

should be noted, that because such promotion is not controlled in any way, when used, it is important to capture basic descriptive details of each respondent.

Given that the Customer and Local Services Department holds details of every employer (and employee) in the Island, the Panel asked whether the Department contacted employers to notify them of the consultation in a similar way to the promotion by JACS:

Deputy K.F. Morel:

“Given that the Department for Social Security has details of every employer in the Island and also details of every employee in the Island did the department itself write to you or contact by other means every employer in the Island to inform them of this?”

The Minister for Social Security:

“No”.

Deputy K.F. Morel:

“Why would the Department for Social Security not do that, as it is their consultation?”

The Minister for Social Security:

“It is something that has always been taken on by the Employment Forum. As I say they have built up ... there is a different relationship for me taking the contributions and the department, in that they can openly discuss their fears or what they want with the forum. It is completely confidential.”

Deputy K.F. Morel:

“Sorry, if I can just say, I did not mean to contact them to tell them to speak to the Department for Social Security, but you could contact every employer in the Island to tell them about the Employment Forum’s consultation, so you could point them towards the Employment Forum’s consultation. I was wondering if that had happened, and if not, why not?”

The Minister for Social Security:

“It did not happen, did it? It does not happen that way”¹⁵.

In order to ensure that the consultation reached those who needed to be consulted, the Panel believes that the Customer and Local Services Department could have played a role in publicising the consultation.

The Employment Forum is, and must continue to be, an independent body, but in this instance and for this type of consultation, the Panel believes that the Department could have advertised the consultation using its own database to ensure that it captured the full range of stakeholders affected. Both the Minister and Assistant Minister accepted that this could be considered in future¹⁶.

Key Finding 12: Given that the Customer and Local Services Department holds details of every employer (and employee) in the Island, the Department could have played a role in ensuring the consultation reached a sufficiently broad range of stakeholders.

Recommendation 1: The Customer and Local Services Department should use its own database, where practical, to ensure promotion of consultations.

¹⁵ [Public Hearing](#) with the Minister for Social Security, 28th March 2019

¹⁶ [Public Hearing](#) with the Minister for Social Security, 28th March 2019, p.23

If the Minister is to develop legislation based on a consultation, there must be evidence that the range of consultation responses is proportionate to the range of affected stakeholders.

The Department of Public Expenditure and Reform (Ireland) identified in its consultation principle and guidance document that meaningful participation in consultation exercises increases the legitimacy of decision-making, improves knowledge and awareness of policy challenges, and helps decision-makers to make better decisions¹⁷.

The Government of Jersey Consultation Code of Practice states that: “*Consultation is based on the principle that people affected by a decision should be involved in the decision-making process. It is an exchange of views, which aims to identify issues, develop or change policies, test proposals or evaluate provision.*”¹⁸

Key Finding 13: Significant legislative change requires proportionate and meaningful consultation. The Panel found that in this case the level of consultation was not proportionate to the impact of the changes.

Recommendation 2: The Government should significantly improve its consultation guidelines. This should include comprehensive guidance on how to engage with stakeholders in a meaningful way and also how to identify relevant stakeholders. The guidance should be revised and published before the end of 2019.

¹⁷ Republic of Ireland, Department of Public Expenditure and Reform, [Consultation Principles and Guidance](#), 2016

¹⁸ States of Jersey: “Planning a Consultation” (States Intranet)

9. Impact of the proposals

Most of the submissions to the Panel have been supportive of the underlying principles contained in P.17/2019 and acknowledge the importance of family friendly policy. The main concerns about the current proposals are:

- The practicalities of the changes;
- Unintended consequences;
- The consultation process;
- The financial and resource impacts on businesses, and in particular, smaller businesses;
- The timing of the changes so soon after the previous changes (implemented in September 2018)

Under the proposals (as currently drafted), 6 weeks of the 52 week parental leave period would be paid by the employer at the employee's normal rate. Parental leave will continue to be available from day one of employment and parents would have the right to return to the same job (where it still exists) after taking up to 52 weeks of parental leave.

Parental leave would be available to each of the following (if implemented):

- The mother of the child
- The father/partner¹⁹
- The adoptive parent(s)
- The intended parent(s) in a surrogacy arrangement

The 52 weeks may be taken in up to 4 blocks, of no less than 2 weeks each, over a 3-year period. Parents must give their employer notice of their intended leave dates 15 weeks before the birth of their child. Employees may change their leave dates provided they give their employer 14 days' notice.

As well as enhanced rights for surrogate and adoptive parents, a significant part of the proposals relate to breastfeeding. If the proposals are adopted, employees would have the right to request reasonable breaks from work to breastfeed or express. If an employee returns to work within the 52 week period after the child's birth, she would be paid for breastfeeding (or expressing) breaks at the normal rate of pay. Any breaks after the 52 week period would be unpaid. The proposals also require that reasonable steps are taken by the employer to provide facilities in the workplace for breastfeeding mothers to express and store milk, where an employee requests it.

Impact on employees

Transferability for employees taking parental leave

Some of the key policy aims contained in the proposals are that the extensions will improve the position for parents in the workplace, give families more choice and flexibility to help meet their work and family responsibilities, and to encourage gender balance in childcare roles.

¹⁹ The father of the child, or the person who is married to, the civil partner of, or the partner of the child's mother or adopter. That person must also expect to have responsibility for the upbringing of the child

In respect of the above, a number of submissions to the Panel questioned whether parental leave was transferable should an employee change employers within the three year period. If one of the aims of the proposals is to give parents flexibility around when they can take their parental leave, are the blocks of leave transferable and if not, should they be?

The legislation states that an employee must give notice of the intention to take leave before the end of the 15th week before the expected week of childbirth. Where an employee fulfils the criteria for taking parental leave, that leave cannot be taken before the beginning of the 11th week before the expected week of childbirth (which relates to Article 55D(2)). If an employee takes parental leave with a first employer (no earlier than the 11th week before birth) and moves to a second employer that will necessarily be at a point after the end of the 15th week before the expected week of childbirth. This matter was raised by Advocate Huw Thomas who said it was unclear whether leave was transferable:

Deputy K.F. Morel:

"I wanted to talk about portability, because you raised that in here and I think it is really interesting. You say that the law is unclear about portability and should employees move between employers. How important is it from your perspective to put something into the law about that?"

Advocate Huw Thomas:

"I think it is vital. I just simply do not yet understand whether this applies to a single employer or multiple employers. It would seem sensible for it to apply to multiple employers, although I am not entirely clear whether it also applies to one or multiple partners if a woman changes partner in the period of her shared parental leave."²⁰

Some stakeholders believed that an employee would not have any entitlement to parental leave under the Employment (Jersey) Law 2003 with a second employer, because he or she would not be in a position to submit notice of his or her intention to take leave under Article 55F (notification of intention to take parental leave). This matter was discussed with Advocate Daniel Read (employment lawyer) who said that there was no mention in the draft Law that leave was *not* transferable, and therefore employees would be entitled to take leave if they moved employer:

Deputy K.F. Morel:

"Can I just ask you about the idea of switching employees while in a period of leave? We have been asking and are trying to find out more about this and it has been suggested that in the proposed law, it says you have to give notice of your leave 15 weeks before the due date of the birth. It has been suggested that that stops the transference, because as we understand it, the department do not intend this to be transferable between employers and so we are looking for is there anything which stops it being transferable. This has been suggested as a way of stopping it being transferable. I just wondered what you thought about that as a mechanism to stop this transference".

Advocate Daniel Read:

"I do not think that stacks up, because if you look at the way it is drafted, it is the same as the current law. It is a 15-week notice period under the current law and it says "where practicable" and it allows you to give notice at a later date. Because there is no absolute and there is no express sanction in the law that prohibits notice after that date, the argument will always be made - and I suspect it would be treated very sympathetically - that it was not practicable for me to give notice 15 weeks before. I have gone to a new job. I have a statutory

²⁰ [Public Hearing](#) with Huw Thomas, Advocate and Counsel, Carey Olsen, 4th April 2019

right with no qualification period. The law does not say I cannot transfer it and therefore, as you probably know, the way statutory interpretation works is you need to look at the express terms of the law. If there is not anything express, you then look at the wider context. In my view, if you look at the wider context of this, the fact that you can change your leave periods with only 2 weeks' notice, which is less than the 15 weeks, all of that suggests, looking at it purposively, an employee would be allowed to switch their employment to a new employer".

Deputy K.F. Morel:

"So you are quite convinced that a convincing argument could be made?"

Advocate Daniel Read:

"I think a very convincing argument could be made."²¹

In order to gain clarity around this issue, the Panel asked the department whether leave was transferable between employers. The Department explained that: *"while notice of intention to take leave should normally be given at the 15th week before the expected week of childbirth, if that is "not reasonably practicable" (e.g. because of a change of job) then the employee can give notice when it is practical and would be entitled to their parental leave. If the employer decides not to accept that notice and refuses parental leave they risk a tribunal claim, potentially also including a discrimination complaint"²².*

Key Finding 14: One of the key aims of the proposals is to give parents flexibility around when they can take their parental leave, but the legislation does not explicitly say whether blocks of leave are transferable between employers. There are differences in opinion between stakeholders, which has meant that this part of the legislation is ambiguous in that it does not specify whether leave is transferable.

Recommendation 3: If the proposals are adopted by the States Assembly, the Minister should lodge an amendment to clarify the position on transferability of leave within 6 months of its implementation.

Impact on other employees

A number of the submissions to the Panel highlighted that the proposals as to leave could impact on other employees within an organisation and are unfair to either those who choose not to have children or those who cannot afford to have unpaid time off work:

Deputy K.F. Morel:

".....from a family perspective, say one of your staff does go off for some period of time within this law, would you expect the other staff members left behind, including yourself to work harder to pick up some of that slack if you were not able to recruit, or if recruitment was not an option?"

Mr. N. Beddoe (small business owner):

"Okay, let me give you a scenario, and this is one that was put to me this morning by a very concerned small business person. She was debating this in her office and 2 members of staff were in her office at the same time, both cabinetmakers. She said to the guys: "What do you think about this?" Now, one of them has 2 children and the other one does not want children. They both thought it was ridiculous. The one without children said: "I cannot believe you are going to give them all this time off. There is so much I want to do with my life that I would

²¹ [Public Hearing](#) with Advocate Daniel Read, 8th May 2019

²² Email from Customer and Local Services Department, 28th May 2019

love to be able to take unpaid leave like this. Why am I being discriminated against?" Discrimination is a really strong word, and I do not necessarily agree with its use there but it did make me think and I thought it can create a really bad feeling in a working environment. We have all worked in offices and we know how office politics works. I think I would be a little bit aggrieved if somebody who had a child or somebody who was a father was able to nip off for 3 weeks down to the beach with their family and I had to sit in front of my computer. I do not think it is fair at all".²³

The Panel met Advocate Huw Thomas (employment lawyer) and questioned him on this issue:

The Deputy of St. Mary:

"A final point on this, obviously the legislation has been drawn up with the employee in mind, and we accept that, but it is not just the employee concerned. There is a knock-on effect to all the other employees. Would you agree with that?"

Advocate Huw Thomas:

"I think so, and one of the comments that came from one of my colleagues was: "Well, what about people without children?" Particularly in smaller employers and teams under pressure it would appear here that there has been absolutely no thought for anybody but those taking parental leave, where you have got a range of people's interests involved, colleagues, those without children, those who have already had children, and employers themselves and are we asking too much of all those people? I think under these proposals we probably are."

Deputy K.F. Morel:

"When you say that the law has been drawn up without other people in mind other than those having children, how do you think they could have had other people in mind, given that the law is about family-friendly legislation?"

Advocate Huw Thomas:

"One of the ways that we could have looked at it, of course, is adopting perhaps some of the mechanics from the shared parental leave in the U.K., so if employees want to take discontinuous leave, i.e., separate blocks of it rather than one continuous block, you would enable employers to either say: "That is not going to work at all; please take it in one continuous block." That is quite a big step and I think we would need to think that through, but the other thing we could do of course is permit employers simply to push back and say: "You cannot take it then" or: "You have got to take it in fewer blocks" or some flexibility around that, to take account of the interests of employers and the interests of other employees. The worry is, of course, that many people quite rationally will look at this and think: "I will just take school holidays off" if they have got older children, for 2 years, which is great for them but not necessarily so great for those around them and those trying to manage working teams and that sort of thing."²⁴

Key Finding 15: There have been a number of concerns that the proposals to allow up to 4 blocks of leave within a 3 year period could impact on other employees within an organisation and are unfair to either those who choose not to have children, those who already have children or those who cannot afford to take unpaid time off work.

A more specific point in relation to the impact on other employees is the 4 blocks of parental leave over a 3-year period and how that interacts with other employees' holiday leave. Although employees going on parental leave have to notify their employer 15 weeks before the birth of their

²³ [Public Hearing](#) with N. Beddoe, small business owner, 9th April 2018

²⁴ [Public Hearing](#) with Huw Thomas, Advocate and Counsel, Carey Olsen, 4th April 2019

child of their intended blocks of leave, they are able to change their leave periods by giving 14 days' notice to their employer. The Panel questioned whether this would impact on other employees in respect of their holiday leave. For example if an employee requested holiday leave which had been accepted by the employer but then had to be denied, changed or limited because an employee able to take parental leave requested changes to their previously agreed blocks of leave. The Panel questioned the Director of the Jersey Advisory and Conciliation Services (JACS) on this issue:

Director, J.A.C.S.:

"It is the employee who has notified in advance. If an employer is saying: "You need to give your holiday request in for the whole of this year" we have already got blocked out "Frieda's" parental leave, so we have already factored that into our planning process, because Frieda notified us last year that she was going to be off, I do not know, in May or she might be off from May until September, whatever that looks like. When you are doing that and you are planning and scheduling holidays on top of that, you have already got blocks where people are already taken out of the business, so you manage those blocks accordingly".

The Deputy of St. Mary:

"Yes, but Frieda can then come in and upset the apple cart by changing it [by giving 2 weeks' notice] and then the employer is not covered because of the double-booking [with the employee taking holiday leave and the employee taking parental leave], shall I say".

Director, J.A.C.S.:

"I think that ultimately it would be for the employer to turn around and say: "If you still want those 2 weeks in June, you can have those now, because Frieda is coming back early." That kind of thing happens all the time."²⁵

The Panel accepts that the impact of this scenario would most likely be greater in small businesses where each individual makes up a significant proportion of the entire workforce (or larger ones where employees work in small teams) and therefore planned (and unplanned) absence management is key. However it is clear that, whatever the size of the business, there will still be an impact on other employees because it is possible that their holiday leave may be forfeited to make way for changes to another employee's previously agreed blocks of parental leave.

Key Finding 16: The proposals to allow up to 4 blocks of leave within a 3 year period impact more directly on smaller businesses where each individual makes up a significant proportion of the entire workforce and therefore planned (and unplanned) absence management is key.

Impact on employers

The recommendation by the Employment Forum acknowledges the impact on businesses, particularly on the large proportion of small businesses in Jersey, in relation to 6 weeks paid leave (funded by the employer). The Forum explains that a limited number of employees and employers will be affected each year because a relatively small proportion of working women give birth each year (850-950 based on maternity benefit data). In the Forum's recommendation for parental leave to be taken in 4 blocks over 3 years, there was no mention of the impact on employers only that leave should "suit the needs of the family".

The 2018 proposals ([P.27/2018](#)), lodged by the previous Minister and accepted by the States, acknowledged the impact of the extensions on small businesses but explained that an exemption

²⁵ [Public Hearing](#) with the Director of JACS, 3rd April 2019

for small businesses would not be included because the majority of businesses in Jersey employ less than 6 employees:

2018 proposals:

"The Forum has not recommended, and the Minister does not propose to include, a small business exception. If small businesses were to be exempt, any new rights would be ineffectual given that around three-quarters of local businesses employ less than 6 employees in Jersey. If employees need legislative protection, it should generally be available to them irrespective of the size of an employer".

The Panel received a submission from a small business owner²⁶, whose response was supported by 51 other businesses in Jersey. Regarding the impact on businesses they said:

Collective response from 52 businesses:

"We feel that six weeks on full pay is economically un-viable for some small businesses and a further 46 weeks leave taken over three years at the employee's choosing will cause major disruption and staffing issues. This may well result in a loss of productivity for a business with a very small number of employees with contracts to fulfil".

The Panel also received the same concerns from the Jersey Retail Association, Jersey Chamber of Commerce, a private submission from a large employer, Director of Quadra (creative marketing agency) and Advocate Huw Thomas (Employment Lawyer). Jersey Business also raised concerns particularly in relation to the 4 blocks which can be taken over a 3 year period:

Chief Executive Officer, Jersey Business:

"..... in particular the 3-year spread in terms of understanding what the benefits of that are compared to the actual concerns that it would have of the small businesses. In practice it probably would not be utilised to an extreme extent but small businesses will look at that scenario and my concern with that is if they are concerned about that, that will impact in terms of their recruitment policies and what have you. So it could have an unforeseen impact that is not desired. Should this be stepped in terms of the changes and that is perhaps looked at a later stage when it is understood".

Deputy K.F. Morel:

"Can I ask what you think that unforeseen impact might be?"

Chief Executive Officer, Jersey Business:

"The impact potentially could be if, as we hear, small businesses are concerned about this that if that happened, and they are a team of three, it would have very significant impact on their business. So when they look to recruit and the unforeseen impact could be they consider that as part, which is not the right thing to do. That is not the intention of what is changing. That would be a personal concern if that is how it is then taken by some businesses".

Deputy S.M. Wickenden:

"So if somebody was to go for employment and they say: "Do you currently have any outstanding paternity leave waiting and if so, how much and when is the cut-off period?" that could be a question that gets asked within an interview and it might have an impact on whether they get employed or not."

²⁶ The submission was originally sent to the Social Security Minister

Chief Executive Officer, Jersey Business:

"I just think we have not experienced that 3-year period and it may be that if we had experienced the full changes and it is over one year and it has worked and you have got a view as to how likely a 3-year would be used, and if it was clear that it was going to be relatively rare I do not think it would have a negative impact. But if it is all on day one that comes through. I think some businesses will automatically look to the worst-case scenario as to how it could impact them. The other aspect I would say is the general view we get from small businesses is there has been a whole series of legislative and policy changes which have a direct cost impact on them, and as ever when you look in isolation at one you can say it is the right direction, it is the right thing to do over the long term, but when they are coming through consistently small businesses will say: "It is another cost to our business" and it is the cumulative effect, which is quite challenging".

Key Finding 17: A number of concerns have been raised from businesses in relation to the 6 weeks paid leave (funded by the employer). Some businesses have responded that 6 weeks full pay is economically unviable and 46 weeks unpaid leave which can be taken in 4 blocks over 3 years will create extra costs, disruption and staffing issues.

Key Finding 18: In relation to the 6 weeks paid leave (funded by the employer), the Employment Forum acknowledges the impact on businesses, particularly on the large proportion of small businesses in Jersey but makes no attempt to quantify it.

Cost to businesses

When the Panel met the Minister, it was acknowledged that the proposals would result in a cost to businesses and in particular, the cost of providing 6 weeks paid leave to employees. The Panel notes that P.17/2019 includes the additional cost impact of paid leave in respect of the Government of Jersey as the employer (calculated potential cost of £172,200) but it does not include any calculations on the cost to business in general. The Panel asked whether the Department had undertaken any calculations:

Deputy K.F. Morel:

"You mentioned there is a cost to business in doing this. Has there been any attempt to calculate that cost to business?"

Director, Strategic Policy, Performance and Population:

"I think there were about 900 babies born last year. About 90 per cent of those mothers were in work, so that is about 800 babies. We can do the rough calculations. We do not have direct knowledge of what wages these individual mothers were earning. It would be a very ballpark figure".

Deputy K.F. Morel:

"So the answer is: "No, we have not tried to analyse the cost to business"?"

Director, Strategic Policy, Performance and Population:

"It is correct that we have not tried to identify the wages of the parents who had babies last year and there are many things that the Government do not know. Government do not know the contractual arrangements between employers and employees, so it would be quite hard for us to work out what the extra cost is to businesses of these laws"²⁷.

²⁷ [Public Hearing](#) with the Minister for Social Security, 28th March 2019

The Panel is concerned that the Department did not undertake any calculations to try and find out the cost to businesses. Particularly so when the Employment Forum's recommendation suggested that a further 6 weeks should be paid for by the government and this part of the recommendation was not taken forward. Using the figure of 850 - 950 babies born each year and the median weekly earnings, the Panel calculates the total cost to business of new and existing parental leave provision at approximately £6.4 million:

High level calculation

The median (middle value) average weekly earnings for full time (FTE) employees in Jersey was £590 per week²⁸

$900 + 900 = 1,800$ (the number of babies is doubled because each parent has the same rights under the proposals)

£590 weekly earning x 6 weeks = £3,540

£3540 x 1,800 parents = £6,372,000

Key Finding 19: The Customer and Local Services Department did not undertake any calculations or analysis regarding the 6 weeks paid leave and its cost to business. The Panel's high-level calculation estimates the total cost of paid parental leave to be approximately £6.4 million but further analysis should be undertaken.

Replacing maternity leave with parental leave

Some companies offer enhanced periods of paid maternity leave for their employees. A number of the submissions to the Panel raised concerns that replacing maternity leave with parental leave could result in employers lowering enhanced paid leave:

Jersey Child Care Trust

"Many employers on the island provide enhanced maternity pay. Changing maternity leave into parental leave and making it available to both parents creates problems for these employers, especially as the cost is passed on to the employer (unlike the UK). Many will be unwilling to make enhanced maternity pay available to both men and women in the form of parental leave pay and may have to revise their policies which could lead to a lowering of enhanced maternity/parental leave pay".²⁹

This point was also raised by Advocate Huw Thomas who said that employers would be less likely to offer enhanced periods of paid leave to both male and female employees which could result in them only offering the statutory minimum. There is a risk that those employers only offering enhanced periods of leave to female colleagues would be discriminating against male employees, should the proposals be implemented:

Advocate Huw Thomas:

"Here, if you had everybody on parental leave from the off, and an employer chose not to enhance rights for men, but chose to enhance rights for women, there is a strong argument that the only differentiating factor there is sex and that would be discriminatory. The concern there is not to say that employers should not also enhance for men. The obvious reaction for most employers is going to be to equalise downwards, so employers will be quite rationally looking at these schemes and thinking: "We will just go down to the statutory minimum for everybody", which would be unfortunate because I think there is a strong argument to say that where employers can enhance particularly pay rights for mothers they give mothers a

²⁸ [Earnings and Income Statistics](#)

²⁹ [Written Submission](#), Jersey Child Care Trust

far greater chance of doing two things. One is bonding with their child in the first place but the other is decreasing the financial burden or disadvantage that arises from taking maternity leave, and it makes it more likely that they will come back to work with a more positive frame of mind after a potentially slightly longer period. It is the unintended effect of this that needs to be thought through as well”.

Key Finding 20: Some businesses in Jersey offer enhanced periods of paid maternity leave for their employees. A number of concerns have been raised that replacing maternity leave with parental leave could result in employers lowering their enhanced paid leave employment packages. Businesses may be less likely to offer enhanced periods of paid leave to both male and female employees which could result in them only offering the statutory minimum.

Key Finding 21: There is a risk that those employers only offering enhanced periods of leave to female colleagues would be discriminating against male employees, should the proposals be implemented.

Impact on recruitment agencies

The Panel received a collective response from 16 recruitment agencies. The agencies were mostly concerned about the practical issues in applying the parental leave to temporary zero hours workers which will be the responsibility of the recruitment agencies from day one of employment:

Collective response from 16 recruitment agencies:

“Unlike other jurisdictions where the government financially supports statutory family friendly leave payments through the individuals’ involved or through the business affected, there is no such arrangement in Jersey. The full responsibility lies with the employer and in the case of Agencies, these are for the most part small commercial companies.”

[....]

The Agencies continue to be caught in a difficult situation as they are deemed under Jersey employment law to be the legal employer of an agency temp, although this was not the original intention when employment law was first drafted. Unlike UK employment law, which provides for more than one employment status i.e. ‘worker’ and ‘employee’ to which different employment rights apply, Jersey employment law only has ‘employee’ status. Therefore agency temps are deemed to be employees from day one.

One of the key points arising from the submission was that the recruitment agencies wanted some reassurance as to the extent to which they are liable for the costs of paid and unpaid parental leave and the extent to which they can pass on the cost and liability to the businesses to whom they supply staff. It is recognised, however, that some of these issues already arise in relation to the current maternity and paternity rights.

Key Finding 22: Under Jersey legislation, recruitment agencies are identified as the legal employer of temporary employees. The proposed extensions to family friendly employment rights will create difficulties for recruitment agencies as they will be liable for the costs of paid and unpaid parental leave.

Impact on children

P.17/2019 explains that the extension of family friendly employment rights contributes to the strategic priorities (one of which was putting children first) outlined in the Common Strategic Policy

(2018-2022). It also explains that the extensions will give parents greater choice relating to their children, providing early investment in the health of the mother and child in the weeks surrounding childbirth, and will ensure that breastfeeding does not have to be a financial choice for the mother.

P.17/2019 also highlights evidence about the importance of a child's early years, quoting research that indicates that there are links between a period of maternity leave and health and societal benefits for both the mother and child.

Policy Development Board

Under the “putting children first” section of P.17/2019 it explains that a Policy Development Board will bring forward policy development proposals across the terms of government, ensuring key connections are made to existing areas of policy work. The Terms of Reference for the Board are as follows³⁰:

1. Establishing a shared strategic policy position across Early Years, based on a consistent vision and set of agreed principles and outcomes that evidence improvements and progress.
2. Developing a regulatory framework to ensure all childcare provision is of a high quality and offers a safe environment for children.
3. Setting out funding options that deliver equitable access to high quality child care.
4. Describing approaches to developing an early years learning framework that supports a shared pedagogy for early childhood education that is aligned to workforce development, home learning programmes, and the nursery education funding programme.

The Panel asked the Minister for Education for further details on the Policy Development Board and what it aims to achieve:

The Minister for Education:

“I set up the Policy Development Board, it is in the Common Strategic Policy, I have been extremely ambitious with looking at early years. I have had a lot of advice suggesting that maybe I should only look at certain things but I think this is too important a subject not to recognise the importance between the conception to 5 years. It is looking very much at that peri and pre-natal situation, during pregnancy and then, of course, the birth and the family and all those types of things. This very much then fits in around that, because there is the question of families being able to take time off for bonding and attachment with their children. Then of course it is up to the 2 years, we have the 1,001 Days, we have Baby Steps for Family Nursing and Homecare but then what I worry about is we have lots of really good things going on but they are dropping off at certain ages and these good programmes that may still be needed for some of these children are dropping off at certain points...”³¹

Key Finding 23: An Early Years Policy Development Board has been established to develop: a shared strategic policy across early years; a regulatory framework for child care provision; funding options for child care and an early years learning framework.

³⁰ Ministerial Decision: [Policy Development Board: Early Years](#)

³¹ [Public Hearing](#) with the Minister for Education, 29th March 2019

1001 Critical Days

Recommendation 11 from the Employment Forum is that parental leave should be available to take in up to 4 blocks within a 3 year period. The justification for this recommendation was that if parental leave was only available to take in one block, take-up might be low. Additionally, fathers and partners were likely to want to take a shorter period of leave after the birth and another period later, either at the same time as the mother or after her maternity leave had ended. The Forum considered that, in order to make an improvement for families, parental leave must be available to take in shorter blocks of time.

It is unclear what evidence has been used to support this recommendation. The Panel had anticipated that the reason for leave to be taken during the 3 year period was because of the 1001 Critical Days agenda, which Jersey endorsed in early 2015. The agenda highlights the importance of the 1001 critical days between conception to age 2 to enhance the outcomes for children. The Panel asked the Employment Forum for the reasoning behind the recommendation:

Deputy S.M. Wickenden:

"So to split it up over 3 years what was the reasoning for the 3 year? Was that the 1001 Days?"

Chair, Employment Forum:

"Off the top of my head I cannot remember why particularly 3 years. Certainly when we originally talked about it a lot of it was around flexibility for both parties, to try and give the employer some ability as well to manage it over a longer period of time. The discussions were around flexibility for everybody to try not to be burdensome".³²

It appears that the main justification for recommending 4 blocks of leave over a 3 year period was to provide more flexibility for families. The Panel also notes that P.17/2019 does not mention the 1001 Critical Days agenda under the "putting children first" section of the Minister's report.

Key Finding 24: It is unclear what evidence has been used to support the Employment Forum's recommendation to allow up to 4 blocks of leave over a 3 year period other than enhancing flexibility for taking leave for families. The 1001 Critical Days agenda was endorsed by Jersey in 2015 but has not been mentioned in the Employment Forum's Recommendation nor in the Minister's report to the proposals.

Two-tier society

The proposals allow for up to 52 weeks leave, 6 weeks paid by the employer but not every parent will be able to afford to take unpaid leave. Therefore, it is likely that there will be some families who will be unable to benefit from the unpaid leave element because of financial barriers. This matter was raised by the Jersey Early Years Association:

Jersey Early Years Association:

"Although these proposals offer better parental leave it must be pointed out that it is still only 6 weeks of paid leave. This is a very short period of time for parents and baby to start out in life. The single biggest factor for parents returning to work is financial responsibility. We have concern that particularly mothers who work in low paid, powerless situations will only be able

³² [Public Hearing](#) with the Jersey Employment Forum, 15th April 2019

to take 6 weeks leave. The additional amendments will benefit professional parents and parents at management level".³³

The Panel asked the Minister whether the proposals could create a division in society where some children will benefit from the time with their parents because they can afford to be off work for a year, and there will be some children who will not because their parents could not afford to do so:

Deputy K.F. Morel:

"....are you concerned that the law, as you are proposing it, could create this kind of 2-tier? Kids whose parents could not take 52 weeks' leave, kids whose parents could afford to take 52 weeks' leave. Is that something that could be a consequence of this law, in your view?"

The Minister for Social Security:

"It is happening now, so I really do not know if this law would make it any worse".

Assistant Minister for Social Security:

"When you look at the take-up of maternity leave, and that is the way we support maternity so far, directly, then you look at how long that lasts and what is the major reason for giving up and going back to work, giving up the care of your baby and organising yourself, is economic and I am very aware of that. We have not taken a look at the maternity allowance, which is a separate issue from the employment law yet but it is something that we have to take a look at and consider whether we need to make some moves there as well exactly to respond to what you are saying is one rule for those who can afford it and another for those who cannot."

Deputy K.F. Morel:

"Is this something that you will be monitoring?"

Assistant Minister for Social Security:

"It is certainly something that I think we would be advising we would monitor very carefully"³⁴.

Key Finding 25: The proposals allow for up to 52 weeks leave, 6 weeks of which are to be paid by the employer. It is highly unlikely, however, that every parent will be able to afford to take unpaid leave and therefore there will be some children who will benefit from the time with their parents and there will be some children who will not. This risks deepening inequality in society.

Continuity of care

The Panel also received a submission from the Jersey Early Years Association who commented that the proposals could create difficulties in terms of continuity of care for children. Most nurseries would be unable to keep places open for parents so that leave can be taken in blocks:

Jersey Early Years Association:

"Continuity of care is important for young children. The nurseries would not be able to keep a place open for a child in order that care can be taken in blocks, (unless parents were able to pay to keep the place open). This would result in children being unable to access childcare in the same environment for their blocks of care".

"Small businesses need continuity of revenue so places cannot be kept open for parents to use when they need. If nurseries needed to employ extra staff to react to care taken at 2

³³ [Written Submission](#), Jersey Early Years Association

³⁴ [Public Hearing](#) with the Minister for Social Security, 28th March 2019

weeks' notice, in blocks, the increase in cost would need to be passed on to parents. It would be ironic if supposedly family friendly legislation increased the cost of childcare".³⁵

Key Finding 26: Concerns have been raised about the continuity of care for children who attend nursery if their parents are taking 4 blocks of leave over a three year period. Most nurseries would be unable to keep places open for parents so that leave can be taken in blocks which would result in children being unable to access childcare in the same environment between their blocks of care.

Impact on the economy

The proposals explain that pregnancy and childbirth bring administrative implications for employers, particularly as a high proportion of women are in the workplace (86%) in Jersey. The proposals also identify that extending family friendly rights can bring benefits to employers including productivity, retaining skills and reduced recruitment and training costs.

The Panel acknowledges that the proposals may provide certain benefits in terms of reputation and the potential to maximise Jersey's workforce, but it is important to consider that the proposals may also increase the cost of employment in Jersey. These costs stem from:

- Recruitment costs to hire temporary replacement employees (licences, advertising, accommodation etc...)
- Training costs
- Cost of providing paid leave

Recruitment costs was raised by Advocate Huw Thomas, specifically in relation to the 4 blocks of leave over a 3 year period, and the cost implications it could have on an employer if an employee changed their previously agreed blocks of leave:

Advocate Huw Thomas:

"It may be that they [the employer] have gone to significant cost to recruit and hire a temporary replacement and if that is going to cost employers time and money that is going to be unacceptable because, again, that puts further cost on employers that are not going to be recoverable from anybody"³⁶.

The overall cost of managing a business was also raised by Gerald Voisin (Chairman of Voisins Department Store):

Gerald Voisin:

"The current proposals represent a further significant erosion in the rights of business owners (on top of rights that have already been eroded) to operate a profitable business. They will cause a further increase in the bureaucracy and cost of managing their business, managing the multi-leave aspect of maternity/paternity leave and will hinder the business's capability to be competitive in what is already a highly regulated economy."

Key Finding 27: Although the proposals could benefit the economy in terms of productivity, reputation and maximising Jersey's workforce, it is important to consider that the proposals will also increase the cost of employment in Jersey.

³⁵ [Written Submission](#), Jersey Early Years Association

³⁶ [Public Hearing](#) with Advocate Huw Thomas, 4th April 2019

Gerald Voisin also commented that employment legislation has changed over the years and, as a result, has had an impact on the economy. The cumulative effect of regulation on businesses is examined in the next section but in terms of the impact on the economy, Gerald Voisin said:

Gerald Voisin:

"The Council of Ministers' Common Strategic Policy 2018 - 2022 sets out to "create a sustainable, vibrant economy and skilled local workforce for the future". It would be nice to see some real action in this respect to back up the platitudes so often rolled out by the Council of Ministers on Economic Growth. The Island must encourage small businesses and encourage them to grow into large businesses. Who would have thought 30 years ago that some of the small trust companies started by a couple of friends would grow into some of the Island's largest employers today? Local businesses create a much more sustainable economy being bedded into the Island's community and not reliant on imported labour and external financial markets, but the continuous additional legislation surrounding employment is now a significant disincentive to employ people, a disincentive to take that step to engage the first employee. Perhaps this is why such a high proportion of island businesses are single employee firms".³⁷

The Panel notes that between June 2001 and June 2013 the number of single person undertakings increased from 1,300 to 3,400³⁸. During the period covered by the Control of Housing and Work Law, the number of single person undertakings increased from 3,320 to 4,300 in December 2018³⁹. Therefore, the number of single person undertakings has risen quite substantially between the period of 2001 and 2018. These figures support Mr Voisin's suggestion that the additional employment legislation over the years has created disincentives for employers to employ people.

Key Finding 28: Local businesses create a sustainable economy but continuous additional employment legislation can create disincentives for businesses to employ people. During the period from 2001 to 2018, the number of single person undertakings has risen substantially from 1,300 to 4,300.

Cumulative effect of regulation on businesses

During the review, a number of stakeholders raised concerns about the cumulative effect of regulation on businesses particularly in recent years with the first phase of extensions to family friendly rights, the introduction of discrimination legislation in 2015 and subsequent regulations and data protection changes. The Chamber of Commerce commented on this issue and raised, in particular, the financial implications for businesses:

President, Chamber of Commerce:

"The cost of doing business is significantly more now than it used to be, so the user pays side of things and obviously getting a licence. You have got to pay for each one of those now. Disability legislation; making changes. The cost of doing business is significantly more now. Again, it always feels like: "Business will pay for it. It is a retail tax." Looking at other things like Jersey Infrastructure Levy; that was defeated. De minimis. Looking at waste charges ... and I know that that did not pass but again it is that trend that we are seeing that: "It is okay, "business will pay for this." It is one of those bits of legislation where we can grant all these great bits and the businesses will put their hands in their pockets and so it is a great, very popular piece of legislation, I am sure in the employee/voters side of things, but it is businesses that pay for it so double tick there and that is the thing. That is the feeling that

³⁷ [Written Submission](#), Gerald Voisin, Chairman of Voisins Department Store

³⁸ [Labour Market report, June 2013](#)

³⁹ [Labour Market report, December 2018](#)

we get as a business representative is that these are things that will come our way and the consequence of that is that businesses will decide that they cannot trade anymore.”

The Jersey Retail Association raised in particular the administrative and resource implications for businesses when new employment related legislation is introduced:

Chief Executive Officer, Jersey Retail Association:

“Obviously, the implication of the general data protection regulations, which then affected a lot of stores because they had to then have a separate G.D.P.R. (General Data Protection Regulation) for closed-circuit television. We had to retrain the staff. They had to normally get an outside person in to help them be compliant because that is not something they had as part of their business model. We have had a change to retirement ages, so that had to change handbooks, et cetera, H.R. procedures. We had the changes last September so obviously that cost implication directly of the maternity law. Disability has not really affected that much monetary but again it is more the ... all these different changes of legislation, it is keeping up with that in the smaller business model, which means always outsourcing H.R. solutions, attending workshops. We have tried to facilitate as much of this through J.A.C.S. (Jersey Advisory Conciliation Service) and Citizens Advice to keep the cost down but it is the cumulative. In a short 3-year period of time it is very challenging for a smaller business.”

The Minister for Economic Development, Tourism, Sport and Culture recognised that the increase in the amount of employment legislation in recent years has affected the economy in terms of new businesses in Jersey:

The Minister for Economic Development, Tourism, Sport and Culture:

“I think that given all the amount of new regulation ... in fact, I know this, because I liaise with Jersey Business on a regular basis. I think a lot of people are put off from going into business. I think there is a strong filter process now. People come with an idea and as they begin to understand the responsibilities placed on a new business, many of them decide not to proceed. It is not just with employment legislation, but G.S.T. (Goods and Services Tax), Social Security and other such responsibilities that businesses and the employers have”.

This point was also raised by Gerald Voisin who said:

Gerald Voisin:

“The problem is that as these rights are bestowed upon the employee, the rights of the employer to manage and operate their business profitably are rescinded with no compensatory steps. This removal of the rights of employers to manage their business is strangling the entrepreneurial spirit from Jersey’s economy and discourages micro-businesses from growing into larger businesses.”⁴⁰

Key Finding 29: Concerns have been raised about the cumulative effect of regulation on businesses in Jersey starting with the first phase of extensions to family friendly rights and the introduction of discrimination legislation in 2015 followed by data protection changes. The effects on businesses include financial, administrative and resource implications.

Key Finding 30: Recent changes to employment legislation have affected the economy in terms of new businesses in Jersey. Given the increasing responsibility placed on businesses, some newer businesses have decided not to proceed with their ventures or these burdens have discouraged smaller businesses from growing into larger businesses.

⁴⁰ [Written Submission](#), Gerald Voisin, Chairman of Voisins Department Store

OVERARCHING RECOMMENDATION: In considering the significance of the various concerns surrounding the parental leave aspects of the draft Law and the difficulties this element of the proposals creates, the Minister should withdraw Article 4 from the legislation. Following the withdrawal of this Article, the Minister should then undertake an evidenced-based review to include:

- An examination of the best ways to ensure parents of all income brackets are able to afford to take a minimum of 6 months leave;
- An examination of the level of government funding needed for paid leave as there are many parents who will not be able to afford to take unpaid time off work;
- A review of the impact of the changes on the full range of employers in all sectors.

The outcome of a comprehensive review of this nature will result in clear, evidence-based policy aims that will guide the creation of a parental leave system that strikes the appropriate balance of responsibility between employers, employees and the government in order to truly put children first.

10. Government responsibilities

The extensions to family friendly employment rights place much of the responsibility on the employer. Under the proposals, employers must provide 6 weeks paid leave, manage their workforce to allow for up to 4 blocks of (interchangeable) leave over a three year period and they must take reasonable steps to provide breastfeeding facilities. Some stakeholders believe that it is the government's responsibility to share some of the burden.

Key Finding 31: The proposals, including the paid leave element, the blocks of leave and providing breastfeeding facilities (where reasonable), place much of the responsibility on the employer. Some stakeholders believe that it is the government's responsibility to share some of this burden.

Paid parental leave

Recommendation 9 by the Employment Forum is that 12 weeks of paid leave in total should be available, with 6 weeks funded by the employer and 6 weeks funded by the government at 100% of pay. The Panel notes that this recommendation was only partially accepted by the Minister, and that the government is unwilling to pay a further 6 weeks. The Panel asked the Minister about this recommendation and whether any evidence had been collected to ensure small businesses can afford 6 weeks paid leave:

Deputy K.F. Morel:

"If it is a case of affordability and the Government are unable to afford the cost of parental leave as originally wanted to be recommended by the Employment Forum, so if the Government cannot afford to pay 6 weeks of parental leave, what evidence do you have that small businesses can afford to pay 6 weeks of parental leave?"

The Minister for Social Security:

"There are lots of companies already doing it and we have had this conversation".

Director, Strategic Policy, Performance and Population:

"Can I make a technical point about that forum recommendation? Since the Employment Forum was set up under the employment law that past recommendation about the States paying it does sit outside their remit, so you would never pay money out of the employment law. You would have to pay it out of some other law, and therefore it does sit outside the other recommendations"⁴¹.

The Chamber of Commerce comments that government should share some of the burden:

Chamber of Commerce:

"...I go back to facilities that Government may or may not have provided while they want everyone else to provide. They want them to provide paid maternity leave, which is very desirable, but do not want Government to have any responsibility to pay any of that. I think that there has to be some sharing of the burden...."⁴²

A submission from the Jersey Child Care Trust also comments on this recommendation. Their concerns are about whether there would be much uptake of the leave period beyond the 6 weeks paid element and called for further provision of paid leave:

⁴¹ [Public Hearing](#) with the Minister for Social Security, 28th March 2019

⁴² [Public Hearing](#) with the Chamber of Commerce, 3rd April 2019

Jersey Childcare Trust

As we understand the proposal for Jersey is to offer up to 52 weeks leave for BOTH parents, of which the first 6 weeks will be paid in full by the employer. If we compare this to the UK's shared parental leave (where the leave is shared and more weeks are paid), whilst Jersey is offering a longer period of leave to both parents the paid element is still limited to just 6 weeks. Considering the reported uptake of the UK leave provision is just 2% we would be concerned that we would see an even lower uptake here in Jersey beyond the paid 6 week period. The reasons given for the low uptake in the UK are the cultural and financial barriers, which we think would be present here too – so will it really improve gender balance in childcare roles? Only for those families where the father can sacrifice their salary and faces no cultural barriers in taking extended periods of leave to care for their children.

[...]

On the whole it's a generous policy on paper but the reality for most families is that the financial barrier will be too great for them to benefit from the extended unpaid leave element. It would be fairer to see a statutory maternity/parental pay provision in place that could help extend the period of paid leave for parents beyond 6 weeks⁴³.

The Jersey Opinions and Lifestyle Survey (2016) found that, over a 5 year period, females took an average of 14 weeks unpaid leave and 15 weeks paid leave and males took an average of 2 weeks unpaid leave and 1 week paid leave. The reasons preventing parents from taking more leave were split between financial reasons (52%) and length of leave limited by the employer (48%).⁴⁴

The evidence shows a public appetite for government to accept greater responsibility for funding a proportion of paid leave. The results of the Jersey Opinions and Lifestyle Survey suggests that, if more paid leave was available, more parents would take parental leave but they are currently being prevented from doing so for financial reasons. The extensions aim to give parents greater choice relating to caring for their children but this will not be the case if parents cannot afford to take unpaid leave.

In appendix two, the Panel has included the main findings of a report on paid parental leave in OECD countries. OECD (Organisation of Economic Co-operation and Development) is an intergovernmental economic organisation with 36 member countries, founded to stimulate economic progress and world trade. The report said that the best available evidence supports 6 months paid leave available to both parents:

"There is rigorous research on the effects of paid parental leave on health, economic, and gender equality outcomes. The best available evidence strongly supports making 6 months of paid leave available to parents of infants, with 3 months as a minimum bar for supporting health and women's economic opportunities. While most research focuses on paid maternity or maternal leave, there is a growing body of literature around the importance of paid leave for fathers as well"⁴⁵.

Key Finding 32: The Employment Forum recommended that 12 weeks of paid leave in total should be available, with 6 weeks funded by the employer and 6 weeks funded by the States of Jersey at 100% of pay. This recommendation was only partially accepted by the Minister who cited the government's inability to pay a further 6 weeks. It is unclear whether any research was undertaken by the Department to determine whether small businesses could afford to provide 6 weeks of paid leave.

⁴³ [Written Submission](#) - Jersey Childcare Trust

⁴⁴ [Jersey Opinions and Lifestyle Survey](#), 2016

⁴⁵ [Paid Parental Leave: A Detailed Look at Approaches Across OECD Countries](#)

Key Finding 33: Evidence suggests that the public believes that the government should share some of the burden for funding a proportion of paid leave. Research undertaken by Statistics Jersey shows that more parents would take parental leave if it was paid but they are currently prevented from doing so for financial reasons. If parents cannot afford to take unpaid leave, it is doubtful whether the aim of the proposals to give parents greater choice, will be achieved.

Key Finding 34: A report by the [Organisation of Economic Co-operation and Development](#) says that there is evidence which strongly supports making 6 months paid leave available to parents, with 3 months as a minimum bar for supporting health and women's economic opportunities.

Breastfeeding facilities

Recommendation 19 by the Employment Forum is that employers should take reasonable steps to provide facilities in the workplace for breastfeeding mothers to express and store milk where an employee requests it. This was accepted by the Minister and has been factored into the proposals. The Jersey Retail Association explained that, although the breastfeeding elements of the proposals were very welcome, the facilities should already be available within the community:

Jersey Retail Association:

*“...it is not very likely that those small businesses are going to have somewhere with the level of privacy and hygiene that you can store the breast milk in a fridge and express. So we would call for more investment in community so that we could have more facilities to get those mums to those facilities and utilise them”.*⁴⁶

This was a matter also raised by the Chamber of Commerce:

Chamber of Commerce:

*“I think dignity at work is a really important thing and it is important that facilities are there but I think the question has to be pushed back from business to Government to ask: “How many breastfeeding facilities do Government have?” I do not mean in Government buildings. How many do they provide for the public? How many places could you walk around St. Helier and say there are breastfeeding facilities that our Government have put into place?”*⁴⁷

One of the key ambitions in the Future Jersey (2017 - 2037)⁴⁸ report is to improve breastfeeding rates. As part of this, a family room was opened on the ground floor of the Town Hall in May 2018. Although a positive step towards creating more facilities for families and in particular mothers who are breastfeeding, the government should look at introducing more facilities in public buildings in St Helier, and around the Island. This would not only create more opportunities for mothers to breastfeed when not in the comfort of their own homes but also allows the government to share some of the burden which will be placed on employers to create these types of facilities.

Key Finding 35: The Employment Forum recommended that employers should take reasonable steps to provide facilities in the workplace for breastfeeding mothers to express and store milk where an employee requests it. Although the breastfeeding elements of the proposals have been welcomed by stakeholders, the question of whether facilities should also be available within public buildings in the community was raised.

⁴⁶ [Public Hearing with the Jersey Retail Association and Jersey Business, 3rd April 2019](#)

⁴⁷ [Public Hearing with the Chamber of Commerce, 3rd April 2019](#)

⁴⁸ [Future Jersey](#)

Recommendation 4: The Government of Jersey should, in consultation with Parishes, create more child-friendly facilities for families, and in particular breastfeeding mothers, around the Island. This would allow the government to share some of the burden being placed on employers to create these types of facilities and would also support the ethos of “putting children first”. This work should be carried out by Q3 2019 with a view to providing more facilities by the end of 2019.

Aligning benefits

Currently there are two contributory benefits that are only paid to new mothers. These are:

- a one-off Maternity Grant of £650.58
- up to 18 weeks of Maternity Allowance, worth £216.86 a week while a mother is off work.

The contributory benefit scheme also provides:

- an Adoption Grant of £650.58 if a child is adopted
- contribution credits to protect a parent's future pension if they stay at home while a child is young. (Home Responsibility Protection).

There are no contributory benefits for surrogate parents or those parents within a surrogacy agreement.

During the review, there have been three main areas of concern in relation to the maternity allowance:

1. The Jersey Retail Association raised an issue of equality between male and female parents. At the moment, only a mother can claim the maternity allowance: *“In the ideals of the legislation of equality and diversity, to be able to claim for a lady and not claim for parental seems very strange”*⁴⁹.
2. The maternity allowance is also only available up to 18 weeks whilst the mother is on leave which corresponds with the first set of proposals implemented in 2015. Since 2015, the period of maternity leave has been extended from 18 weeks to 26 weeks in 2018 and, under the current proposals, to 52 weeks which replaces maternity leave with parental leave.
3. In terms of financial support for employers, if a female employee is in receipt of the maternity allowance, employers are currently able to offset the balance (£216) for the 6 week paid period of leave. Under the current proposals, for anyone other than the mother giving birth, employers are not able to claim back the £216.

The government's unwillingness to pay for any of the proposals contained in P.17/2019 should be weighed against the far-reaching nature of the proposals in regard to parental leave. The proposed legislation creates costs for thousands of individuals and organisations but most of those costs have neither been identified nor quantified by the Department. The cost of 6 weeks paid leave for the employer is just one example where costs have not been quantified.

There is a significant risk that the lack of financial support from the government will undermine the Minister's own policy aims of equality between parents and between families by creating a set of rights that are only accessible to the wealthiest in society.

⁴⁹ [Public Hearing with the Jersey Retail Association and Jersey Business, 3rd April 2019](#)

If the proposals are adopted by the States Assembly, the Department should be obliged to identify ways in which the contributory benefits for employees and financial support for employers can be aligned to support the ethos that parental leave includes all parties and not just the mother or the wealthy.

Key Finding 36: Two contributory benefits are paid to new mothers: a one-off maternity grant (£650.58) and a maternity allowance (£216.86 per week). The maternity allowance is only available up to 18 weeks which corresponds with the first set of family friendly proposals implemented in 2015. No changes have been made to extend the allowance to correspond with the subsequent extensions to leave periods (currently 26 weeks).

Key Finding 37: If a female employee is in receipt of the maternity allowance (£216.86 per week for up to 18 weeks), employers are able to offset the balance for the 6 week paid period of leave. Under the current proposals for parental leave, employers are unable to claim back the allowance for anyone other than the mother giving birth.

Recommendation 5: If the proposals are adopted by the States Assembly, the Minister should bring forward proposals to align the contributory benefits for employees and financial support for employers. This would support the ethos that parental leave includes all parties and not only the mother or those with the financial means to take unpaid leave. Proposals should be brought forward before the end of 2019.

Recommendation 6: The Minister should lodge an amendment to the [Social Security \(Maternity Benefit\) \(Jersey\) Order 1975](#) to include all parents (non-mothers) so employers can claim the £216 from all parents taking leave and the period of maternity allowance should be extended from 18 weeks to 52 weeks.

Evidence-based policy aims

The proposals explain that a key objective for the Customer and Local Services Department is to “complete implementation of family friendly law changes” and a number of policy aims are identified and their benefits:

- **Putting children first:** the proposal cites research that indicates that there are links between a period of maternity leave and health and societal benefits including stronger mother and child bonding, reduced post-natal depression, improved child cognitive development, increased rates of immunisation, increased rates of breastfeeding and improved child health and development in later life.
- **A skilled local workforce for the future:** the proposal explains that, by introducing provisions to retain the skills of parents in the workplace and ensuring that workplaces are more family friendly, will help to ensure that locally qualified people are available to work, and will support employers to retain and attract those locally qualified employees.
- **Reduce income inequality and improve the standard of living:** the proposal explains that improved rights will help to provide greater economic stability for families with both parents entitled to take a longer period of leave and return to the same job on the same rate of pay. Parents would also be able to combine their parenting responsibilities and aims to address inequality.

In order to support the statements about the benefits to society, a Gender Pay Gap Scrutiny Review Panel asked the Minister what research had been gathered by the Department, particularly on women in the workplace, when developing the proposals:

Deputy K.F. Morel:

"When developing proposals for the new parental leave policy, did you come across or use any research about women and the issues they may face once they have been out of the workplace? That is the actual question. You then mentioned the 2015 and I was saying: "Okay, since 2015 then."

The Minister for Social Security:

"Obviously only the consultation that has been had with employers and employees who are saying even as what we have done now is not flexible enough for them"⁵⁰.

More specifically, the Gender Pay Gap Review Panel asked about research in terms of part-time work and flexible working, the economic effects of the legislation and zero-hour contracts:

Deputy K.F. Morel:

"Can I just ask, what you are saying is since that came in we have no research about how many people are requesting part-time work or flexible working since the legislation came in to enable them to do that?"

Director, Policy and Strategy:

"Since September 2018, it would be a very small amount of time".

Deputy K.F. Morel:

"So you would say not enough time?"

Director, Policy and Strategy:

"But also you are trying to make a changing culture through creating a legislative framework. Getting that change of culture right would mean that people ... there will be very few statistics to gather because it would just have happened in the workplace, just naturally. So what is it the Government would measure? How do you find that information ...?"

Deputy K.F. Morel:

"Would it be fair to say at this stage it is too early for the Government to know or to understand?"

Director, Policy and Strategy:

"Yes".

Deputy K.F. Morel:

"Thank you."

The Assistant Minister for Social Security 2:

"That would also link to economic effects. If the woman happens to be the larger earner then that issue becomes one economically that makes sense."

Deputy K.F. Morel:

"Do we have any information about the economic effects?"

⁵⁰ [Public Hearing](#) with the Minister for Social Security, Gender Pay Gap Review, 4th March 2019

The Assistant Minister for Social Security 2:

"I do not think so."

Deputy K.F. Morel:

"No, we do not. Can I also ask the Assistant Minister as well, just whether we have any information about whether there are more males or females that take zero-hour contracts? Do we have any information on that, on zero-hour contracts?"

The Assistant Minister for Social Security 2:

"The evidence is, as far as I know it, that it is dominated by young people and it is also females on zero-hour contracts and on minimum wage".

The Assistant Minister for Social Security 1:

"Does the department record any type of stats like that?"

Director, Policy and Strategy:

"I think there are government statistics on zero-hour contracts".

The Assistant Minister for Social Security 2:

"Yes, there are numbers."⁵¹

Further on in the hearing, the Director of Policy and Strategy explained that any qualitative research was undertaken by the Employment Forum and was included in their recommendation:

Director, Policy and Strategy:

"That is the Employment Forum Report. It is a very detailed report. It is available on the internet, which gives you all the findings from that research, which is by people making written submissions and having meetings with various interest groups so that the forum then get a rounded view of the whole thing. Jersey is a very small place. Some types of quantitative research were quite hard to do in Jersey because of the small number of people, small number of employers involved. There has been significant research, if that is what you are going to call it, into this topic which lead the forum to come to their recommendations. This Minister obviously took over halfway through a big project, yes, but has been very happy to press on with the recommendations of the forum from the end of 2017"⁵².

It would appear that, when developing the proposals, the only research undertaken was by the Employment Forum in its recommendation. The Employment Forum's recommendation has been based on the consultation responses and, other than providing an overview of parental leave rights in other jurisdictions, no other evidence or research has been undertaken in terms of:

- Women in the workplace and the barriers they may face once they go back to work after a period of maternity leave;
- How many people have requested part-time work or flexible working since family friendly legislation was implemented;
- How many males and females are on zero-hour contracts;
- The economic effects of the legislation since it was implemented.

⁵¹ [Public Hearing](#) with the Minister for Social Security, Gender Pay Gap Review, 4th March 2019

⁵² [Public Hearing](#) with the Minister for Social Security, Gender Pay Gap Review, 4th March 2019

Key Finding 38: The only research undertaken in the development of the proposals was the consultation by the Employment Forum. The Employment Forum's recommendation has been based on the consultation responses and, other than providing an overview of parental leave rights in other jurisdictions, no other evidence or research has been gathered to support the policy aims and the suggested benefits contained in the proposals.

Impact of 2018 proposals

One of the reasons why the extensions to family friendly rights were proposed in two parts (2018 proposals and then 2019 proposals) was to give employers more time to prepare for a fundamental change to the parental leave system. In a letter to the Minister, the Chamber of Commerce requested a delay to the implementation of the 2019 proposals so that an analysis could be undertaken on the impact of the 2018 proposals:

Chamber of Commerce:

We request that analysis be undertaken following the significant changes implemented in September 2018; that at least 12 months be allowed to pass following the changes made last year to fully assess the impact on employers, employees, job seekers, parents and the commercial impact on local businesses both large and small in supporting their employees in this way.

Given the burden on our businesses and the unknown economic impact to our island, we would urge that further time is sought to provide clear analysis and data before bringing Proposition P.17 to the States Assembly⁵³.

The Panel questioned the Minister on this issue and asked whether 12 months (as the 2019 proposals were originally due to be implemented in September 2019) was a sufficient amount of time for employers to prepare and, in addition, what analysis has been undertaken since the 2018 proposals were implemented:

Deputy K.F. Morel:

"We had the 2018 law come in back in September and we have now got obviously these new proposals. I wondered what brought you to the conclusion that 12 months is a sufficiently large gap between the introduction of each part of the legislation to allow businesses time to prepare and so far what analysis of the impact on businesses of the 2018 legislation has been made?"

The Minister for Social Security:

"Well, as to the consultation; late 2017 it was all proposed. I think that did not happen - 2 things politically - because of the elections and it was a big piece of law drafting so they did the easy bit. Not the easy bits but the things that were already in law, like breastfeeding there is no law at all so the reasonable steps and everything. So that is where we are. People know. J.A.C.S. had been promoting this law coming in and since it has been in 2018 there is still very low ... they had about 65 queries last year, and it is 70 I think this year, but in context I think their highest is unfair dismissal. So 66 family friendly to 75, or it might be other way round, to unfair dismissal last year was 309 to this year 243. I just have not heard anything. Nobody has been saying this is really affecting me as they know it is coming. Sorry, there was a second part to your question."

⁵³ Chamber of Commerce, [letter](#) to the Minister for Social Security

Deputy K.F. Morel:

"Is the department planning to do any analysis of the effects of that 2018 law before this one comes in, is what I am saying?"

The Minister for Social Security:

"J.A.C.S. are the people who will hear everything. Their newsletter. They are already doing training. It is about even. I think they have had about 35 employees and about a similar amount of employers ring them on what is in and what is coming in and what they have got to do to prepare for but this has been known to be coming in. How do you monitor something that is not in?"

Deputy K.F. Morel:

"No, but the monitoring of the one that is in is what I am saying. Monitoring from September 2018 until now, are you planning to do any assessment of the impact of that law?"

The Minister for Social Security:

"I am saying the impact is so quiet that it seems to be going very smoothly. If it really affected businesses they would be screaming it from the rooftops."

Key Finding 39: Since the first tranche of extensions to family friendly employment rights was implemented in September 2018, no analysis has been undertaken by the Customer and Local Services Department to assess their impact on employers, employees, parents or the wider economy in Jersey.

11. Amendments

During the course of the Panel's review it became apparent that the proposals, as currently drafted, would have a significant impact on businesses in Jersey. The Panel is grateful to the Minister for deferring the debate to allow it time to consider all of the concerns and to lodge amendments to the proposition, as necessary. This section provides an overview of the amendments lodged by the Minister, the Connétable of St Mary and the Panel's amendments.

Minister's Amendment

The Minister has recognised that there are significant concerns with the proposals and has lodged an amendment which proposes a number of changes to try and address those concerns. The Minister hopes that the amendment will improve the position for businesses without detracting from the original policy intent. The Minister's amendment is as follows:

1. To increase from 14 days to 28 days, the notice periods that an employee must give to their employer to vary their parental leave dates.
✗ The Panel does not support this amendment and proposes an amendment to increase the notice period from 28 days to 90 days.
2. To reduce the parental leave entitlement period by one year so that it may start no earlier than the 11th week before the expected week of childbirth or adoption and would end 2 years after the date of childbirth or adoption.
✓ The Panel supports this amendment
3. To reduce the number of separate blocks in which parental leave may be taken from 4 blocks to 3 blocks.
✓ The Panel supports this amendment
4. To amend the heading to Article 55F to clarify that the article applies to parental leave in relation to childbirth (i.e. all parents other than adoptive parents, not just mothers and surrogate parents).
✓ The Panel supports this amendment
5. To provide that three categories of person may provide proof of pregnancy in relation to the right to paid time off work on health and safety grounds (a registered medical practitioner, a registered midwife or a registered nurse) for consistency with proof in relation to parental leave⁵⁴.
✓ The Panel supports this amendment

Connétable of St Mary's Amendment

The Connétable of St Mary has also lodged an amendment which calls to exempt small businesses with five or fewer employees on a permanent, part-time or zero-hours contract. The Connétable's report states that the exemption clause would also allow businesses employing five or fewer people to "opt out", providing that it is clearly stated within the contract of employment⁵⁵.

⁵⁴ [Draft Employment \(Amendment No.11\)\(Jersey\) Law 201-\(P.17/2019: Third Amendment](#)

⁵⁵ [Draft Employment \(Amendment No.11\) \(Jersey\) Law 201-\(P.17/2019\): Second Amendment](#)

The 2018 proposals ([P.27/2018](#)), lodged by the previous Minister and accepted by the States, acknowledged the impact of the extensions on small businesses but explained that an exemption for small businesses would not be included because the majority of businesses in Jersey employ fewer than 6 employees.

The Panel met Advocate Daniel Read and asked for his views on the amendment.

Senator K.L. Moore:

"The Constable, in that he is asking the Assembly to consider carving out the micro-businesses you talked about, those with 5 or fewer employees. Are there, in your experience, any other areas of employment law that carve out or offer a carve-out to such employers and for any other reasons?"

Advocate Daniel Read:

"Not really, not that I am aware of. I know that in America they have a micro-employer policy in relation to their maternity leave. I remember when the maternity law came in I looked at this, because we drafted an advice on this and looked at that model very briefly to see how they defined micro-employer. I think it is less than 20 employees and I think they had an exemption from certain of the maternity provisions. It is difficult, I think, for the point you made, that it has an impact on all businesses and should we just be looking at those businesses or not, should we be looking at the wider picture about what support is given to all businesses to make sure that this remains a jurisdiction that is open to new businesses, big businesses, that allows everyone the opportunity to make sure that their business operates effectively? I think if you single out the micro-businesses, I am not sure. What about the businesses with 20 employees? They are also going to be affected disproportionately; 40 employees, they are also going to be affected disproportionately. The scale does not necessarily change".

The Deputy of St. Mary:

"It could lead to unintended consequences. Firms could keep their level of employees down to a certain level to come within the exemption and that sort of thing".

Advocate Daniel Read:

"Yes. That is a strained example, but I guess you have got to test all law by looking at the extreme. You are right, theoretically an employer, given the option of expanding and saying: "Look, I could really push this business, I could make it something", look at all the fintech businesses we wanted to promote, those normally start with 2 or 3 guys working on a laptop, and then they get a great product and they want to scale that out. Do they decide to keep at five employees because they do not want to take the risk of opening themselves up to disproportionate costs? Conceivably so⁵⁶".

It is acknowledged that exempting small businesses with five or fewer employees would likely remove the greatest disruption presented by the proposals because larger employers are more likely to need the necessary resources to deal with planned absences. It was Advocate Read's view, however, that the proposals would have an impact on all businesses not just smaller businesses.

When the Panel met JACS, the Director explained that if smaller businesses were exempt it could result in those businesses struggling to recruit because those smaller businesses would not offer the same employment rights as larger businesses:

⁵⁶ [Public Hearing with Advocate Daniel Read, 8th May 2019](#)

Director, J.A.C.S.:

"If you want to look at the size of administrative resources, you are basically saying that the smaller employer would not have to comply. That could be the end result, which could then mean that they would have trouble recruiting in the first instance, because if you end up with like a small business carve-out using the size of administrative resources to not enable ... to say: "You work for an employer that is smaller, therefore we do not expect the employer to allow you your leave or to have more of a say in it" then I think you are going to struggle to recruit into those smaller businesses generally"⁵⁷.

Key Finding 40: The amendment to exempt small businesses could have unintended consequences. If smaller businesses were exempt from providing the same level of employment rights as larger businesses, they may experience difficulties in recruitment. Another consequence may be that some businesses would be inclined to keep the number of employees down to a certain level to come within the exemption.

Panel Amendments

The following amendments have been based on the strength of the concerns received during the review and the Panel's legislative scrutiny of the draft Law:

Amendments as a result of the concerns raised during the review:

- **To remove the proposed new Articles on parental leave**

The Panel has considered the significance of the concerns raised around the parental leave aspects of the draft Law and believes that further work needs to be carried out to ensure they are fit for purpose, and to ensure they work well for families, employers and employees. In that regard, the Panel has lodged an amendment to remove the new articles on parental leave. If this is accepted by the States Assembly, it will give the Minister the opportunity to revise the proposals in order to minimise any hardship to employers and also to explore the factors that create barriers to parents in Jersey. This should inform a new set of proposals that work for all parties concerned.

If this amendment is not accepted by the Assembly, the Panel has also proposed a further two changes in respect of the parental leave aspects of the draft Law:

- **Amending the article in respect of the blocks of leave to include an element of conversation for the second and third blocks of leave (as amended by the Minister).**
- **To increase the notice period from 28 days to 90 days:** The Panel has lodged an amendment to the Minister's amendment: "*To increase from 14 days to 28 days the notice periods that an employee must give to their employer to vary their parental leave dates*".

The Panel accepts that it may be counter intuitive to propose three changes, one of which calls to remove an article and a further two that propose to change elements of it. Given the significance of the concerns raised by stakeholders, and the fact that there has been no impact assessment of the existing rights, the Panel felt it had little choice but to lodge an amendment which completely removes the parental leave element so that it can be reworked by the Minister. If this is not accepted by the States Assembly, the Panel hopes the other two changes will minimise the concerns and improve those aspects of the draft Law.

⁵⁷ [Public Hearing with JACS, 3rd April 2019](#)

Amendments as a result of the Panel's legislative scrutiny of the draft Law:

In March 2019 the Panel dedicated a number of hours to line by line legislative scrutiny. As a result, a number of questions arose around the surrogacy aspects of the legislation. The Panel sought advice from a number of sources and has proposed two changes to the definition of surrogate parent.

- **Amending the definition of surrogate parent:**

- To include a reference to a person whose application under section 54A of the Human Fertilisation and Embryology Act 2008 has been granted or a potential applicant for an order under that section.
- To say explicitly that the relevant child's home will be with the potential applicant(s) who is resident in Jersey.

The definition of surrogate parent in the draft Law comes under section 54 of the UK Human Fertilisation and Embryology Act 2008 because there is no surrogacy law in Jersey.

A new section (54A) was inserted into the 2008 Act in January 2019 to remedy the incompatibility of section 54 of the 2008 Act with the European Convention on Human Rights. Therefore, the purpose of this amendment is to ensure that the draft Law is compatible with the ECHR and that it is made clearer which of the criteria and conditions in the 2008 Act should be met before a person is treated as a surrogate parent for the purposes of the draft Law.

During the legislative scrutiny exercise, the Panel also found that there were no safeguards in place if an employee provided false information to their employer. There may be some instances where an employee provides false information to their employer in order to gain the benefit of receiving 6 weeks paid leave. Therefore, the Panel has also lodged an amendment to make it an offence to provide false statements in respect of pregnancy.

- **Amendment to include an offence of making false statements:**

The Panel notes that the provision of false information in relation to the birth of a child for the purposes of Part 5A (Maternity, Adoption and Parental Rights) is not a criminal offence under the Employment (Jersey) Law 2003. The draft Law would amend Part 5A (under Article 4) to provide entitlements to take parental leave subject to the notification obligations. Due to the fact that parental leave entitlements have been extended which provide 6 weeks full pay and can be taken over a number of years, the Panel felt that safeguards should be put in place should a person provide false information.

The amendment, therefore, makes it an offence to intentionally provide false or misleading information to another person, including an employer, for any purposes connected with securing a right under Part 5A of the Employment (Jersey) Law 2003.

The Panel's amendments can be read in full [here](#).

12. Conclusion

This review has uncovered a significant number of concerns about the proposals from a wide variety of stakeholders including (but not limited to) employers and childcare organisations. The proposals, as drafted, have the potential to cause financial hardship to employers, particularly for smaller organisations, they could create division within teams and most importantly, they could create a two-tier society. The government is not funding any element of parental leave and so, the opportunity to take extended periods of time off to care for young children is likely to be available only to those wealthy enough to afford it.

It is important to recognise that, in spite of the concerns and the potentially negative consequences of the proposals, most stakeholders acknowledged the importance of family friendly policy. There are many benefits to introducing effective legislation which makes it easier for employees to balance family and work obligations. But with any legislative change, the proposals have to work well for all parties concerned and must be based on informed thinking.

The consultation process undertaken by the Employment Forum did not achieve the necessary balance of responses from both employers and employees. The Forum was unable to provide the Panel with the level of detail it required because there is no definable list of those consulted. Therefore, there is no way of knowing whether a sufficiently broad range of stakeholders were engaged or whether the lack of employer responses was because they chose not participate or because the consultation did not reach the breadth of stakeholders it should have. The number of concerns received after the legislation was published indicates that it was the latter.

If legislative changes are going to be based on consultation, there must be evidence that the process gathered meaningful participation from all relevant stakeholders. Without this evidence, the Panel has found that the legislation proposed by the Minister (P.17/2019) was based on a consultation process which was not as thorough as it could have been.

The Panel concludes that, although there are many positive elements to the extensions to family friendly rights, there are a number of issues with the practical implementation of some of the proposed changes. The Panel hopes that its recommendations and amendments will minimise the hardship that some of the proposals will create for employers.

13. Appendix 1 - Timeline of Family Friendly Legislation

2000 - 2008

[P.99/2000](#) was lodged by the Employment and Social Security Committee and resulted in States approval of an **employment legislation programme**.

As part of the programme, the Employment and Social Security Committee were charged to develop measures to deal with maternity (amongst other areas)

The employment legislation programme was delivered in **two phases**.

The Employment Forum submitted several [recommendations](#) around the employment legislation programme as part of **phase 1**:

- 2001 - Unfair dismissal legislation
- 2002 - Holiday entitlement and rest days
- 2004 - Fixed term contracts and unfair dismissal
- 2004 - Rest day entitlements and operational urgency

Phase 2 included work on maternity rights.

In 2003, the States also approved the introduction of the [Employment \(Jersey\) Law 2003](#)

The Employment Forum subsequently issued other recommendations (in addition to maternity rights) as part of **phase 2**:

- 2006 - Redundancy and business transfers
- 2008 - Employment tribunal powers in unfair dismissal awards

The Forum consulted during June - August 2007 regarding the introduction of legislation on **maternity, paternity and adoption leave, and family friendly, flexible working policies**.

The Forum issued its [recommendations](#) to the Social Security Minister in June 2008 with the intention that the new rights would be introduced in 2 stages. Many of the respondents indicated that it would be excessive to introduce the full range of new family friendly related rights.

In his [response](#), the Minister accepted the Forum's recommendations and indicated that the drafting of stage 1 of the proposed new rights would begin in 2010.

2008 - 2014

It was intended that law drafting would begin in 2010 but, following the economic downturn, priority was given to introducing statutory redundancy pay and developing an insolvency scheme. Consequently, drafting of the first stage of family friendly rights was delayed until 2013/2014.

In 2014, the Social Security Minister lodged [P.109/2014](#) "Draft Employment (Amendment No.8) (Jersey) Law 201-" which was the **first stage** of family friendly rights (as recommended by the Employment Forum in 2008). This proposed **18 weeks** maternity leave.

The Proposition was accepted and was implemented at the same time as the sex discrimination [legislation](#) in 2015.

When the legislation was adopted by the States, a commitment was made to review the rights one year after they came into force. The Minister directed the Employment Forum to consult and make a recommendation by the end of December 2017.

The Health, Social Security and Housing Scrutiny Panel undertook a review of P.109/2014 and commissioned Ogier to look at the proposals. In July 2014 the Panel issued [Comments](#) adding Ogier's report as an appendix. The Minister [commented](#) on the Panel's Comments.

In P.109/2014 the Minister explained that he also lodged an [amendment](#) to the Social Security Law in respect of maternity allowance (P.106/2014).

2014 - 2019

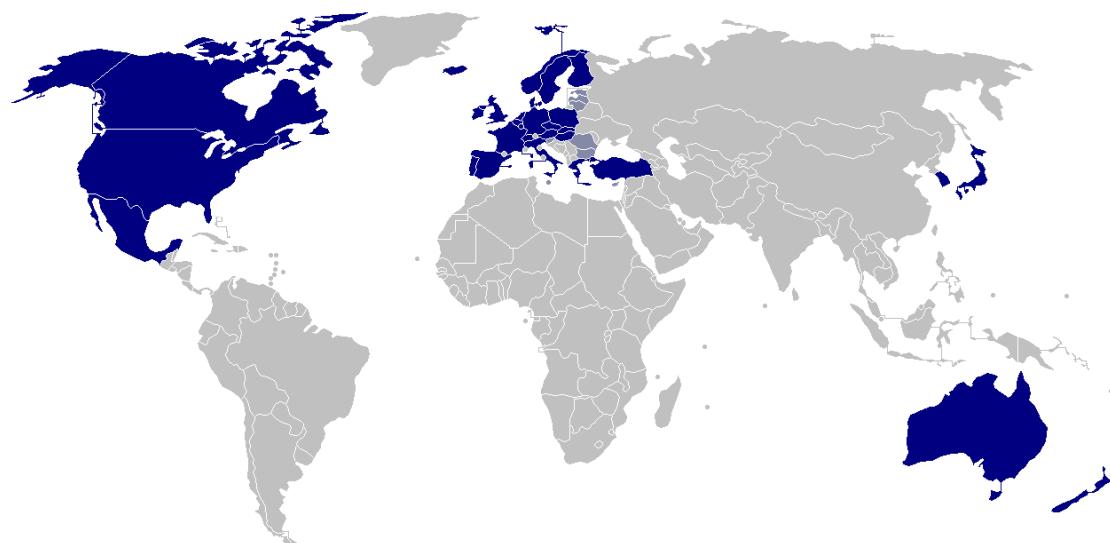
In December 2017, the Employment Forum made a [recommendation](#) to the Social Security Minister to extend family friendly rights. It was recommended that maternity leave should be extended from **18 weeks** to **26 weeks** (starting from September 2018) and then extended again from **26** to **52 weeks** (starting from September 2019).

The Minister for Social Security lodged [P.21/2018](#) "Draft Employment (Amendment of Law) (No.2) (Jersey) Regulations 201-" in February 2018. This proposed, amongst other things, the maternity leave extension of **26 weeks** (as suggested by the Forum in 2017).

The Social Security Minister lodged [P.17/2019](#) "Draft Employment (Amendment No.11) (Jersey) Law 201-" in February which proposed, amongst other things, the parental leave extension of **52 weeks**.

14. Appendix 2 - Parental leave in other jurisdictions

The World Policy Analysis Center reported on paid parental leave across OECD (Organisation for Economic Co-operation and Development) countries in 2018. The OECD is an intergovernmental economic organisation with 36 member countries, founded to stimulate economic progress and world trade. The map below shows which countries are members of the OECD:



G The following quotes have been taken directly from the report and are the overall findings of the report: "Paid Parental Leave: A Detailed Look at Approaches Across OECD Countries".⁵⁸

- **Length of paid leave**

There is rigorous research on the effects of paid parental leave on health, economic, and gender equality outcomes. The best available evidence strongly supports making 6 months of paid leave available to parents of infants, with 3 months as a minimum bar for supporting health and women's economic opportunities. While most research focuses on paid maternity or maternal leave, there is a growing body of literature around the importance of paid leave for fathers as well.

Cross-national longitudinal studies of OECD countries have consistently found that longer paid leaves are associated with lower infant and child mortality. Paid leave supports mothers' opportunities to breastfeed, parents' ability to take children for vaccinations and well-baby visits, and parent-infant bonding.

- **Male and female participation in the workforce**

Evidence suggests increased women's labour force participation and reductions in wage inequalities when up to 6 months of paid parental leave is available. Making leave available to both men and women is critical to ensuring equal economic opportunities.

⁵⁸ [Paid Parental Leave: A Detailed Look at Approaches Across OECD Countries](#)

Research evidence suggests that paid leave policies that encourage men to take paid parental leave support gender equality at home, but very lengthy paid parental leaves that are predominantly taken by women may undermine it.

The evidence strongly supports that making at least 6 months of paid parental leave available to both parents is economically feasible.

Unpaid or low-paid leave is not affordable for those who need it most. The economic and health benefits that are associated with adequately paid leave have not been linked to unpaid or low-paid leave.

When benefits do not fully replace income, it may not be affordable for the primary earner to take paid leave. In many households, men still earn more than women.

- **Job protection**

Job protection is critical for allowing all workers to enjoy the benefits of paid leave. All but 1 OECD country guarantee job protection for the full duration of leave for mothers, and a majority do so for fathers.

- **Flexibility**

Taking leave part-time or intermittently may support earlier return to work for parents and a better work-life balance. A majority of OECD countries offer flexibility in leave.

- **How paid leave is funded**

Most countries provide paid leave through social security schemes that rely on a mix of contributions from employers and employees, often with additional government funds. This approach is compatible with a strong national economy.

In a time of increased job turnover and mobility, paid leave benefits should not be dependent on a person's length of time at an employer, the formality of employment, or the company's size. The availability of job-protected paid parental leave without an employer-specific tenure requirement is compatible with strong economic growth.

- **Minimum period of work**

A majority of OECD countries do not require a minimum period of work with a specific employer to be eligible for paid parental leave benefits. Tenure requirements are not necessary for a strong national economy.

- **Self employed**

Few OECD countries exclude self-employed workers entirely from paid parental leave benefits, although some do specify less generous benefits for self-employed workers.

While a majority of countries ensure that paid maternity and gender-neutral parental leave is available to self-employed women and gender-neutral leave is available to self-employed men, only a minority of countries provide paternity leave reserved for fathers to the self-employed.

- **Small businesses**

Most OECD countries do not have separate provisions for small businesses.

- **Type of leave**

Policy decisions about whether leave should be an individual or family entitlement have important implications for gender equality in different family types and the take-up of leave. Policies that support both parents' leave-taking through individual entitlements should include provisions ensuring that the availability of leave is equal for all family types, including widows/widowers, divorced parents, single parents, unmarried couples, and gay and lesbian families. Differences in leave availability for adopting families should be limited to exclusion from accessing leave associated with medical needs of pregnancy.

- **Adoptive leave**

Adoptive families need parental leave for many of the same reasons birth parents do.

While leave is not needed for post-natal maternal recovery and breastfeeding, it is needed for the adoption process as well as for infant care.

- **Same sex couples**

Across the OECD, there is variability in the extent to which paid parental leave provisions cover same-sex couples. Some countries are proactive in ensuring that legislative language is inclusive of different family types. Others use gendered language, possibly the result of attempts to ensure that mothers have enough leave for recovery, or to promote fathers' more equal involvement in caregiving. Though well-intentioned, such language can disadvantage same-sex parents when explicit provisions for same-sex parents are not made. Greater work is needed in this area to understand how legislative language and interpretations of that language affect all family types and their ability to care for and bond with an infant, including lesbian couples with a birth mother, lesbian couples adopting, gay couples using surrogacy, and gay couples adopting.

- **Single parents**

A majority of OECD countries do not have provisions to ensure that single parents receive the same total duration of paid leave as two-parent families. Generally, this is because there are no provisions to allow single parents to access leave entitlements that are reserved for partners. However, 5 OECD countries have proactive provisions that explicitly allow single parents to take parental leave reserved for another parent, or give a higher entitlement to single parents, and 2 do so just for single mothers.

15. Appendix 3

Panel Membership



It is noted that Deputy Perchard joined the Economic and International Affairs Panel on 29th April and therefore was not party to all of the discussions regarding the review.

It is noted that Deputy Wickenden resigned from the Panel on 30th May to become Assistant Minister for Social Security.

Terms of Reference

1. To review the Draft Employment (Amendment No.11) (Jersey) Law 201- with a particular focus on (but not limited to):
 - a. the consultation process used to feed into the proposals.
 - b. the impact the new proposals will have, if any, on businesses and the island's economy.

Evidence Considered

Public Hearings

- Minister for Economic Development, Tourism, Sport and Culture - 25th March 2019
- Minister for Social Security - 28th March 2019
- Minister for Education - 29th March 2019

- Jersey Retail Association and Jersey Business - 3rd April 2019
- Jersey Advisory and Conciliation Service - 3rd April 2019
- Jersey Chamber of Commerce - 3rd April 2019
- Advocate Huw Thomas - 4th April 2019
- Jersey Employment Forum - 8th April 2019
- Mr Nathan Beddoe (small business owner) - 9th April 2019
- Advocate Daniel Read - 8th May 2019

Written Submissions

11 written submissions were received during the Panel's review which can be viewed [here](#). 2 of the submissions were received on behalf of a number of businesses (52) and recruitment agencies (16). The Panel is grateful to everyone who took the time to provide their views.



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