

# STATES OF JERSEY



## **FAMILY FRIENDLY EMPLOYMENT RIGHTS (S.R.9/2019): RESPONSE OF THE MINISTER FOR SOCIAL SECURITY**

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**Presented to the States on 24th July 2019  
by the Minister for Social Security**

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**STATES GREFFE**

**FAMILY FRIENDLY EMPLOYMENT RIGHTS (S.R.9/2019): RESPONSE OF  
THE MINISTER FOR SOCIAL SECURITY**

<b>Ministerial Response to:</b>	S.R.9/2019
<b>Ministerial Response required by:</b>	23rd July 2019
<b>Review title:</b>	Family Friendly Employment Rights
<b>Scrutiny Panel:</b>	Economic and International Affairs Scrutiny Panel

**INTRODUCTION**

The Minister is grateful to the Panel for undertaking a detailed review of the possible impacts that her proposed changes to family friendly employment rights might have on businesses and the Island's economy. During the course of the review, the Minister acknowledged the concerns raised by businesses in respect of her proposal that parental leave should be available in up to 4 blocks over a 3-year period. The Minister had lodged an amendment to amend this right to a maximum of 3 blocks of parental leave over 2 years. These changes will be incorporated into the revised legislation to be lodged in the autumn.

By providing equality in periods of parental leave entitlement, the proposed employment legislation is intended to encourage gender balance in childcare roles, reducing discrimination against women by encouraging a change in workplace attitudes and practices towards involvement of the father or partner in childcare. This relates to a key finding of the recent report from Scrutiny's Gender Pay Gap Review Panel about the importance of flexibility for both parents so that women do not have to make a choice between a career and starting a family. The Minister accepts that this culture change will take time, particularly in some traditionally male-dominated sectors but this positive step is vital to start that process of change.

**FINDINGS**

	<b>Findings</b>	<b>Comments</b>
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	The policy aims underpinning the phased introduction of employment and discrimination law were set out in P.99/2000, including the provision of family friendly employment measures.  The former Social Security Minister, Deputy Pinel, sent a detailed letter to the Employment Forum in August 2016. The letter explained that when the first stage of the legislation was presented to the States in 2014 (which provided up to 18 weeks of maternity leave), there were calls from the Health and Social Security Scrutiny Panel for a more generous period of maternity leave. The former Minister was concerned that additional public consultation would be required if the rights were to be extended beyond the recommendations of the Forum, accepted some years

	Findings	Comments
		<p>earlier, which would further delay the introduction of family friendly rights. The former Minister decided that it was vital to introduce that first stage of new rights as soon as possible including, most importantly, the right for a woman to return to the same job after having a baby and protection against detriment and dismissal. The former Minister committed to review the family friendly rights one year after they came into force with a view to extending the rights. That commitment is recorded by the Health and Social Security Scrutiny Panel in the outcomes of its review of the Minister’s proposition.</p> <p>The Minister’s 2016 letter directed the Forum to make a recommendation on a wide range of topics relating to family friendly legislation by the end of December 2017, including the following:</p> <ol style="list-style-type: none"> <li>1. The impact of the 2015 legislation on employers and parents.</li> <li>2. Extension of statutory leave to provide longer periods of paid and unpaid leave for all types of parents</li> <li>3. Removal of the length of service requirement.</li> <li>4. Time off to attend antenatal care appointments for the father/partner</li> <li>5. Extension of the right to request flexible working to all employees and removal of the qualifying period.</li> <li>6. Shared leave (parents and grandparents)</li> <li>7. Paid time off work for health and safety reasons relating to pregnancy/maternity.</li> <li>8. Breastfeeding rights and/or facilities in the workplace.</li> </ol>
2	<p>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.</p>	<p>The Forum’s recommendation<sup>1</sup> explains the reasons for the two–phased approach, as follows;</p> <p><i>“The Forum’s recommendations in this report are, in some cases, presented in a phased approach with recommendations for changes to the Law in September 2018 and in September 2019. The Forum has selected these dates based on advice from the Social Security Department as to the earliest that changes are likely be made to the Employment Law if its recommendations are accepted. The Forum understands that law changes would have to be adopted by the States in March 2018 in order to come into force in September 2018. The Forum is conscious that this gives only 5 months’ notice for employers of the confirmed legislation and the recommendations for the first phase reflect that short notice period. A more significant step forward is therefore recommended for implementation in September 2019.</i></p>

<sup>1</sup>[www.gov.je/SiteCollectionDocuments/Benefits%20and%20financial%20support/R%20Review%20of%20Family%20Friendly%20Employment%20Rights%2020171218%20AC.pdf](http://www.gov.je/SiteCollectionDocuments/Benefits%20and%20financial%20support/R%20Review%20of%20Family%20Friendly%20Employment%20Rights%2020171218%20AC.pdf) (page 6)

	<b>Findings</b>	<b>Comments</b>
		<p><i>The Forum recommends that if, for any reason, it is not possible to introduce the first phase of changes in September 2018, then it would be appropriate to skip the first phase of changes for maternity and parental leave and move directly to the second phase in September 2019 rather than maintaining a two phased approach.”</i></p> <p>The recommendations for 2019 were the ultimate target. The recommendation for 2018 was intended to provide an interim, relatively straightforward, step so that parents did not have to wait too long for improved rights (2 years after the Forum’s recommendation) and to allow employers time to adjust more gradually.</p>
3	<p>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</p>	<p>That review was undertaken by the Forum in 2017. The former Minister wrote to the Forum on 26 August 2016, one year after the first family friendly rights came into force (1 September 2015). In directing the Forum in 2016, the Minister re-iterated the assurance given to Scrutiny when the draft legislation was presented to the States in 2014 that the Law would be reviewed with a view to extending the rights after one year.</p> <p>In the Forum’s recommendation published in December 2017, the section ‘Impact of legislation on employers and working parents’, the Forum summarised the responses from both employers and employees about the impact of the family friendly employment rights since the 2015 law came into force.</p>
4	<p>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.</p>	<p>Agreed.</p> <p>A key finding of the recent report from Scrutiny’s Gender Pay Gap Review Panel (17 July 2019) is that “The importance of flexibility in the workplace for parents was a common theme throughout the review. Flexibility for both parents is particularly important to women as it enables them to not have to make a choice between a career and starting a family.”<sup>2</sup></p>
5	<p>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.</p>	<p>The Minister accepts this as the view of the members of the Panel.</p>
6	<p>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.</p>	<p>The Minister has already committed to a number of changes to the way in which employees can take parental leave that would address the key concerns, as expressed by businesses and their representatives, during this scrutiny review.</p> <p>On 14 April 2019, the Minister lodged an amendment to P.17/2019 to improve the position for businesses without detracting significantly from the original policy intent and she intends to consolidate those</p>

<sup>2</sup> <https://statesassembly.gov.je/news/pages/GenderPay.aspx>

	<b>Findings</b>	<b>Comments</b>
		<p>amendments into the draft Law before re-lodging.</p> <p>Administrative burden – Parents are already taking time off work or changing their job or hours following childbirth. Even without specific employment rights, pregnancy and childbirth bring administrative implications and costs for employers, both in terms of replacing staff (whether temporarily or permanently) and the potential loss of key skills. In a business that requires specialist skills and training, with concerns about finding qualified replacements, there are benefits to enabling staff to take a period of parental leave and return to the workplace in order to retain staff with appropriate skills.</p> <p>Financial burden – The Employment Law already provides that both parents are entitled to 26 weeks of leave, including 6 weeks of paid maternity leave for the mother and 2 weeks of paid parental leave for the other parent (e.g. father of the child, husband/partner of the mother). The draft Law would extend the period of paid leave from 2 weeks to 6 weeks for the other parent, i.e. 4 extra weeks of paid parental leave for the father or partner.</p>
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.	There was considerable publicity about the Forum’s review, giving every opportunity for employers and employees alike to engage. As well as being circulated to those on the Forum’s consultation database, this public consultation was distributed by multiple means and was open to anyone who wished to respond. The consultation was circulated to States Members and promoted via the States of Jersey website, social media, the Jersey Advisory and Conciliation Service (JACS) and Citizen’s Advice Jersey, amongst others. The Forum Chair advised the Panel that she considers this to have been the most heavily publicised consultation that the Forum has undertaken during her tenure as Chair. The Forum’s consultation method is outlined in their recommendation <sup>3</sup> .
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.	<p>The Forum’s consultations are not designed to provide representative samples of employers and employees from which statistics can be drawn. The Forum does not simply count the number of ‘yes’ and ‘no’ answers given in response to surveys, but is guided by the reasons that people give for their responses, the qualitative data, and the full range of evidence.</p> <p>In addition to the written responses from 27 individuals who recorded their respondent category as ‘employer’, the Forum also received responses from 78 respondents who did not specify a respondent category, 30 ‘other’ respondents (which included those who identified as both an employer and an</p>

<sup>3</sup>[www.gov.je/SiteCollectionDocuments/Benefits%20and%20financial%20support/R%20Review%20of%20Family%20Friendly%20Employment%20Rights%2020171218%20AC.pdf](http://www.gov.je/SiteCollectionDocuments/Benefits%20and%20financial%20support/R%20Review%20of%20Family%20Friendly%20Employment%20Rights%2020171218%20AC.pdf) (pages 4-5)

	<b>Findings</b>	<b>Comments</b>
		<p>employee), as well as responses in person and in writing from a number of employer representative groups, including the Jersey Hospitality Association, the Jersey Farmers' Union, the local branch of the Institute of Directors and the Jersey Chamber of Commerce.</p> <p>This consultation attracted more individual survey responses from employees than from employers. This is unusual for an Employment Forum consultation and demonstrates the strength of feeling amongst parents, many of whom wanted to highlight the lack of flexibility in the system at that time. It is to be expected that a consultation on a topic such as this would attract responses from parents, employees and individuals. This does not mean that employees' views were given greater weight in the decision-making.</p> <p>The Forum's 2013 recommendation on the unfair dismissal qualifying period provides a useful explanation of the Forum's standard process in relation to the evidence, as follows; <i>"Few responses were received from employees and their representatives. However, this has not created an imbalance in the Forum's consideration of the matter. The Forum reaches its recommendations not by being persuaded by the most forcefully expressed, insistent or recurring responses, but by taking a balanced approach to the evidence and information that is available from many sources."</i><sup>4</sup></p>
9	<p>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.</p>	<p>It is clear from the detailed comments that have been quoted in the Forum's recommendation that a wide range of views are represented in the consultation from employers of different sizes and in different sectors. As always, the Forum presented a selection of the comments received to demonstrate the range of views and different perspectives that have been expressed, rather than choosing comments to support its own recommendations. Section 3 of the Recommendation provides a wide range of quotes from different respondent types, in accordance with the permissions given.</p> <p>Many of the responses to this consultation were particularly detailed, giving reasons for responses and reflecting on experiences, rather than just ticking 'yes' and 'no' boxes. The Forum accepts anonymous responses to encourage those who may be affected to give their views freely. Even where employer respondents have submitted an anonymous response, their comments often describe the impact on their particular business.</p> <p>The Forum's database does not constitute a list of who was consulted because –</p>

<sup>4</sup>[www.gov.je/SiteCollectionDocuments/Working%20in%20Jersey/ID%20Unfair%20Dismissal%20Qualifying%20Period%20Recommendation%2010Jun2013%2020130607%20JJ.pdf](http://www.gov.je/SiteCollectionDocuments/Working%20in%20Jersey/ID%20Unfair%20Dismissal%20Qualifying%20Period%20Recommendation%2010Jun2013%2020130607%20JJ.pdf) (page 16)

	Findings	Comments
		<ul style="list-style-type: none"> <li>• it is a list of those who have requested to receive consultations and recommendations from the Forum</li> <li>• there is no obligation to respond and some of those on the database would have chosen not to respond to this consultation.</li> <li>• The Forum’s consultation extends beyond the database (see response to key finding 7).</li> </ul> <p>The details of the Forum’s database constitute personal data and so are subject to specific legal duties under the Data Protection (Jersey) Law 2018. 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 to the Panel would amount to an alternative, collateral use of their personal data.</p>
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.	<p>It cannot be assumed that a representative body is representing the specific views of every one of its individual members. However, employers pay their membership fee and trust organisations such as the Jersey Chamber of Commerce to represent their views collectively. For example, according to its website<sup>5</sup>, the stated purpose of the Chamber of Commerce as <i>“the largest independent business membership organisation in Jersey, representing businesses of all sizes and sectors”</i> is to <i>“ensure Members’ views are heard in Government through our Committees and lobbying work”</i>. As part of its own review, the Panel has accepted a submission from Chamber as representing the views of its membership.</p> <p>The Forum did not claim that the response it received from Chamber represented the majority of Chamber members. In fact, the Forum’s recommendation (page 8) quotes the same excerpt from the Chamber of Commerce submission that the Scrutiny report refers to. That excerpt explains that Chamber received responses to its own survey from 14% of its 540 member organisations. This represents survey responses from <b>76 businesses</b>. Chamber reported that those employers had experienced few issues; 93 percent of those taking part in the survey – which is <b>71 employers</b> – <i>“said they did not find any difficulty in applying the current statutory maternity rights”</i>. If those employment rights (introduced in 2015) were causing difficulties for employers, it is likely that this would have become evident from the responses to Chamber’s survey.</p>
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	The Forum encourages and facilitates responses, but it cannot force stakeholders to engage with the consultation process.

<sup>5</sup> [www.jerseychamber.com/about-chamber](http://www.jerseychamber.com/about-chamber)

	<b>Findings</b>	<b>Comments</b>
	process.	
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.	To ensure that Social Security data is used appropriately (i.e. is not used for a purpose that it was not collected for), internal advice indicates that employers can be notified via their business address that a Forum consultation is underway, as long as specific employers (or groups of employers) are not targeted and any communication is clear that the consultation is being undertaken at the direction of the Social Security Minister.
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.	The Minister does not agree with the Panel and is satisfied that the Forum's consultation and recommendation are robust. The Forum is an established statutory body with a balance within its own membership including employers, employees and independent members. This was a significant piece of work for the Forum, which was undertaken over a one-year period.  Stakeholders are not always satisfied with the outcomes following public consultation, particularly in relation to an issue such as employment legislation where views are often polarised. That is not the same as inadequate consultation.
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.	An employee intending to take leave must notify their employer of their intended period(s) of leave at the 15th week before the expected week of childbirth, or 7 days after being notified of a match in the case of an adoption. When a parent starts working for a new employer, that new employer will not have been informed of the birth or adoption at the appropriate time. It is acknowledged that this aspect of the current law could be clearer, and this point will be addressed in the revised draft Law to be put forward later this year.
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.	The clear intention of these proposals is to provide rights to parents. As such, it is inevitable that employees who are not parents will not have equivalent rights. This government is committed to enabling all children in Jersey to have the best start in life. There is strong evidence that time with parents in the early years is vital. While the intention is not to disadvantage employees without children, the Minister believes that supporting parental leave is the right thing to do for children, for parents, and for our community.
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	The Employment Law already provides 26 weeks of parental leave that can be taken in 3 blocks over a one-year period for the father/partner.  Existing legislation supports employers in finding

	<b>Findings</b>	<b>Comments</b>
	therefore planned (and unplanned) absence management is key.	<p>replacement staff to cover a period of parental leave.</p> <ul style="list-style-type: none"> <li>• The Control of Housing and Work (CHW) Law<sup>6</sup> allows employers to recruit anyone to fill the vacancy in this situation, regardless of their CHW status.</li> <li>• The Employment Law allows employers to terminate a contract without the risk of an unfair dismissal claim where replacement staff have covered absence due to pregnancy, childbirth, maternity leave, adoption leave, or parental leave.</li> </ul> <p>During the course of the Scrutiny Review, the Minister acknowledged the concerns in respect of this aspect of the proposals and lodged an amendment to provide for three blocks of leave over a two-year entitlement period. The Minister intends to consolidate those amendments into the draft Law before re-lodging.</p>
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.	<p>The Employment Law already requires 6 weeks of paid maternity leave for the mother and 2 weeks of paid parental leave for the father/partner. The draft Law would provide an additional 4 weeks of paid parental leave for the father/partner.</p> <p>Parents are already taking time off work following childbirth. Even without specific employment rights, pregnancy and childbirth bring administrative implications and costs for employers, both in terms of replacing staff and the potential loss of key skills.</p> <p>The Director of JACS commented as follows during her hearing with the Panel:<sup>7</sup></p> <p><i>“I think that the cost of recruiting a replacement for somebody is always going to be same cost, so if somebody is not entitled to any maternity leave, if we left it just as it is at the moment and somebody left their business, resigned because they needed more time, the recruitment costs are exactly the same as those you have just described...Employers are saying that they believe – the ones that we have spoken to – it will reduce absenteeism and it will encourage women and parents generally to remain in the workplace. If you have invested in somebody and trained them in their job for a long period of time, there is often a long-term investment, what you do not want is to lose them because you are not able to give them some flexibility.”</i></p> <p>During the course of the Scrutiny Review, the Minister acknowledged the concerns in respect of the provision of 4 blocks of leave over 3 years and lodged an amendment to provide for three blocks of leave</p>

<sup>6</sup> This covers up to 9 months of maternity leave. The Chief Minister will amend the existing CHW order in line with the Employment Law once any changes are agreed.

<sup>7</sup> <https://statesassembly.gov.je/scrutinyreviewtranscripts/2019/transcript%20-%20family%20friendly%20employment%20rights%20-%20jersey%20advisory%20and%20conciliation%20service%20-%203%20april%202019.pdf>

	Findings	Comments
		over a two-year entitlement period. The Minister intends to consolidate those amendments into the draft Law before re-lodging.
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.	<p>To clarify, the draft Law would provide an additional 4 weeks of paid parental leave for the father/partner. The Employment Law already requires 6 weeks of paid maternity leave for the mother and 2 weeks of paid parental leave for the father/partner.</p> <p>The additional cost of statutory parental leave to employers will depend on how much employees are paid each week, their existing contractual rights, and how many weeks they take off work.</p> <p>It is not clear how many fathers and partners will choose to take the full period of paid leave, much of which will depend on culture change for fathers in Jersey. According to the 2016 Jersey Opinions and Lifestyle Survey, around two-thirds of recent male parents said that they had not taken any parental leave. For those that did, a total of 2 weeks' parental leave was taken on average. 92% of male parents would have liked to have taken more leave.</p>
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.	<p>The Panel's approximate figure is based on the gross cost of 12 weeks' paid parental leave, i.e. 6 weeks of leave each for two parents. It does not take the following points into account:</p> <ul style="list-style-type: none"> <li>• The Employment Law already requires 6 weeks of paid maternity leave and 2 weeks of paid parental leave. The Minister's current proposal (the subject of this scrutiny review) would provide an additional 4 weeks of paid leave</li> <li>• Employers can already deduct from the weekly wage bill the value of the maternity allowance provided to the mother (£216.86 per week) Many employers provide contractual payments that are equivalent to or exceed the proposed statutory paid leave requirements and are already meeting this cost Not every baby born in Jersey has two parents in employment</li> </ul> <p>The Panel's review page on the scrutiny website includes the Minister's letter to a small business owner<sup>8</sup> which includes some examples of the cost of an additional 4 weeks of parental leave for fathers and partners, as follows;</p> <p>£1,261 – Minimum wage (£7.88 from 1 April 2019 based on a 40-hour week)</p> <p>£2,000 – Mean weekly earnings in wholesale and retail (£500, AEI June 2018)</p> <p>£2,960 – Mean weekly earnings (£740 for all sectors, AEI June 2018)</p>

<sup>8</sup> <https://statesassembly.gov.je/scrutinyreviewsubmissions/submissions%20-%20family%20friendly%20employment%20rights%20-%20response%20from%20minister%20to%2052%20businesses%20-%2029%20march%202019.pdf>

	<b>Findings</b>	<b>Comments</b>
		<p>£3,120 – Mean weekly earnings in construction (£780, AEI June 2018)</p> <p>The cost of parental leave to employers clearly depends on how much employees are paid each week, how many weeks they take off work and any existing contractual entitlements.</p>
20	<p>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.</p>	<p>See the Minister’s response to key finding 21. There is no incentive for employers to downgrade their existing enhanced maternity leave entitlements to the statutory minimum in order to avoid the cost of enhanced leave entitlements for both parents.</p> <p>While employers may choose not to enhance paid leave for parents who are not birth mothers, employers that voluntarily offer enhanced packages to employees who give birth are unlikely to remove those entitlements if there is no risk in offering birth mothers an enhanced employment package.</p>
21	<p>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.</p>	<p>This issue has been the subject of debate in the UK since the introduction of Shared Parental Leave. Subject to an appeal to the Supreme Court, the situation has now been resolved quite firmly by the Court of Appeal. On 24 May 2019 the Court gave its decision in the case of <i>Ali v Capita Customer Management Ltd</i><sup>9</sup>. The Court ruled that the case of a father taking Shared Parental Leave was not comparable with the case of a woman taking Maternity Leave and that it was not direct discrimination to pay an enhanced rate for one but not the other.</p> <p>Importantly, this ruling did not depend on the fact that Maternity Leave and Shared Parental Leave are in themselves distinct statutory entitlements (which they are in the UK, but will not be under the proposed Parental Leave provisions in Jersey). Direct discrimination occurs when someone is treated less favourably because of the protected characteristic. If an employer chooses to pay more than the statutory minimum for a parent who has actually given birth, then that does not lead to less favourable treatment <i>on the grounds of sex</i>. Childbirth and sex are not the same thing. The two employees are not comparable. In Jersey, the Employment and Discrimination Tribunal would focus on the ‘reason why’ the difference in treatment has occurred and conclude that it is childbirth rather than sex that is the reason for the difference in pay. The key point is that both men and women who have <u>not given birth</u> will be treated in the same way. A woman who is the partner of the birth mother will qualify for parental leave on exactly the same basis as a man who is the partner of the birth mother.</p> <p>Nor can the difference in pay amount to</p>

<sup>9</sup> [2019] EWCA Civ 900

	Findings	Comments
		<p>discrimination on the grounds of pregnancy or maternity. Under Article 6(8) of the Jersey Discrimination Law there is an exception providing that:</p> <p><i>‘in relation to the protected characteristics of pregnancy and maternity, for the purposes of Parts 3, 4 and 5 and where the subject is not a woman, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.’</i></p> <p>It is clear that when it comes to direct discrimination, there is no difficulty in an employer paying an enhanced rate for maternity leave and therefore no disincentive for doing so.</p> <p>On the question as to whether the difference could amount to <i>indirect</i> sex discrimination<sup>10</sup>, this was considered by the Court of Appeal at the same time as the Ali case in <i>Hextall v Chief Constable of Leicestershire Police</i>. The Court said that it was not clear that the employer’s policy put men at a particular disadvantage when compared to women and that the employer’s policy in that case was in any event justified as a ‘proportionate means of achieving a legitimate aim’.</p> <p>Any challenge to an employer’s policy of paying an enhanced rate for maternity leave would therefore face considerable obstacles. It might be possible where the difference was disproportionate – for example, a year’s leave on full pay for employees who have given birth and only the legal minimum for their partners – for that to be challenged as indirect discrimination and the Tribunal would then have to decide whether men were being unjustifiably disadvantaged. But this is a highly speculative case and it is not possible to legislate specifically for every possible scenario without making legislation unduly cumbersome. This is the sort of issue that it is right for the Tribunal to decide should the situation arise.</p>
22	<p>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.</p>	<p>The Employment Law provides that where staff are supplied by an agency to work for another business, the employer is deemed to be whichever party is directly responsible for paying the employee. The current legal position means that, unlike in the UK, there is a clear way to determine who is the employer of an employee in a tripartite relationship involving an agency.</p> <p>In most cases in Jersey, the agency pays the employee’s wages. Recruitment agencies in Jersey are already responsible for paying 6 weeks of paid maternity leave and 2 weeks of paid parental leave.</p>
23	<p>An Early Years Policy Development Board</p>	<p>Agreed.</p>

<sup>10</sup> Note that there can be no indirect discrimination based on pregnancy or maternity (Discrimination (Jersey) Law 2013, Article 7(4))

	Findings	Comments
	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.	
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.	<p>The Forum's recommendation includes three references to the 1,001 Critical Days agenda (pages 8, 10 and 52).</p> <p>The Forum's recommendation states the following in relation to the taking of blocks of leave over a period of time (p.33).</p> <p><i>"If parental leave was only available to take in one block, take-up might be low. Unlike maternity leave, fathers and partners are likely to want to take a short period, such as 2 to 4 weeks shortly after the birth (a typical 'paternity leave' period) and another period later, either at the same time as the mother, or after maternity leave has ended. The Forum considers that, in order to make an improvement for families, parental leave must be available to take in shorter blocks of time. The Forum considers that 3 blocks of time are sufficient for a 26 week leave period but that the number of blocks should be increased to 4 when 52 weeks of '2019 parental leave' are available in order to ensure that parents can use the full period of leave appropriately to suit the needs of the family."</i></p> <p>In addition, the Chair of the Forum referred to the reason for the blocks of leave in the Forum's hearing with panel.<sup>11</sup></p> <p><i>"Firstly, remember obviously that the blocks of leave are already in the law. It is already in force now. The only change from September will be adding one more block of leave. So this is already in force so what is proposed from September this year is not going to be a big change on where we are now. But I think the thing about the blocks was in order to make it meaningful you have got to balance that. If you say to a partner or a father of a child or the partner of the birth mother: "You have to take your 52 weeks immediately" is it really meaningful? That was one of the debates that we had... 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."</i></p> <p>During the course of the Panel's review, the Minister acknowledged the concerns in respect of the provision of four blocks of leave over three years and lodged an</p>

<sup>11</sup> <https://statesassembly.gov.je/scrutinyreviewtranscripts/2019/transcript%20-%20family%20friendly%20employment%20rights%20-%20employment%20forum%20-%208%20april%202019.pdf>

	Findings	Comments
		<p>amendment to provide for three blocks of leave over a two-year entitlement period. This ensures that the period from birth up to the child's second birthday which forms part of the 1,001 Critical Days period is included within the amended proposals. The Minister intends to consolidate these amendments into the draft Law before re-lodging.</p>
25	<p>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.</p>	<p>The Forum's recommendation noted that not all parents will be able to take advantage of the full 52 weeks of leave.</p> <p><i>"The Forum noted that, even if a 52 week period of statutory maternity leave is available, many employees will not take the full 52 weeks, particularly if part of it is <b>unpaid</b>. However, it is considered important to give working families the choice of taking longer periods of leave with the financial security of returning to work afterwards, even if some cannot afford to take a period of <b>unpaid</b> leave. This view came across strongly from parents who attended the Forum's first stakeholder meeting, including the view that this should be a statutory right, rather than a matter for negotiation with the employer, with some employers being more likely to grant it than others."</i></p> <p>Starting a family is a major decision and parents will plan carefully around the costs of bringing up a child, finding the right childcare provision and the impact on their employment. According to the Jersey Births and Breastfeeding Profile 2018<sup>12</sup>, the proportion of older mothers in Jersey has increased over the last 15 years, with a third of mothers aged 35 or over at the time of birth in 2017. A new baby brings extra costs to all households. When parents choose to take unpaid leave, they see a reduction in wages. When they return to work, they face the additional cost of childcare. Each family will make its own choices and not all options will be available to all parents.</p> <p>The previous Minister had already made a commitment (R.25/2018) to introduce equal contributory parental benefits as part of the ongoing review of the Social Security Scheme. Other parts of the benefit system already provide equal support to both parents. Any parent receiving income support is fully supported during a period of unpaid parental leave and any parent can receive Home Responsibility Credits which maintains their pension record whilst at home with a small child. As part of the proposals put forward in the Government Plan, the existing contributory maternity allowance, paid from the Social Security Fund, will be replaced by a parental allowance, with both parents able to claim a</p>

<sup>12</sup>

<https://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/R%20Breastfeeding%20Profile%202018%2020180329%20SJ.pdf>

	<b>Findings</b>	<b>Comments</b>
		contributory benefit (see finding 31).
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.	<p>The Employment Law proposals do not place any obligation on childcare providers and providers will continue to make their own business decisions as to the conditions under which children are accepted and any notice periods required.</p> <p>In a hearing with the Panel as part of this review, the Head of Early Years, Childcare and Early Years Service<sup>13</sup> said that few parents choose to place young babies in childcare; only 8 babies under 6 months old were in registered day nurseries at that time. It is anticipated that parents are likely to use their separate leave entitlements so that the baby is cared for at home from birth continuously until the age at which the parents decide to make the move to nursery or other childcare provision.</p> <p>Childcare providers are already flexible in their approach, communicating with parents about times when childcare may not be required, such as days when members of the family provide childcare, periods of annual leave and for parents who work term-time only. During the hearing with the Panel, the Head of Early Years, Childcare and Early Years Service said:</p> <p><i>“I think they have that good dialogue with parents now. I would like to think that that existed. It could be something that we would have to explore in terms of parental agreements that they have, in terms of allowing that flexibility and working more closely with the parents to allow that to happen.”</i></p>
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.	<p>It is accepted that an additional 4 weeks of paid leave for the father/partner would bring a cost to the employer. However, there are benefits to business in enabling staff to take a period of parental leave and return to the same job, retaining staff with appropriate skills who feel valued. Under the current law some parents need to move out of paid employment completely to allow them to spend more than six months with a new baby, with their skills, training and experience lost to the employer.</p> <p>Existing legislation supports employers in finding replacement staff to cover a period of parental leave.</p> <ul style="list-style-type: none"> <li>• The Control of Housing and Work (CHW) Law allows employers to recruit anyone to fill the vacancy in this situation, regardless of their CHW status.</li> <li>• The Employment Law allows employers to terminate a contract without the risk of an unfair dismissal claim where replacement staff have covered absence due to pregnancy, childbirth,</li> </ul>

<sup>13</sup> <https://statesassembly.gov.je/scrutinyreviewtranscripts/2019/transcript%20-%20family%20friendly%20employment%20rights%20-%20education%20minister%20-%2029%20march%202019.pdf>

	<b>Findings</b>	<b>Comments</b>
		<p>maternity leave, adoption leave, or parental leave.</p> <p>Family friendly rights can bring genuine benefits for employers in terms of productivity, retaining skills in the workplace and reducing administration costs by enabling increased participation rates.</p> <p>According to the Channel Islands Women in Work Index 2019 produced by PwC<sup>14</sup>, if Jersey could increase its female employment rate by 8% then GDP could be increased by 6% – the equivalent of £239 million. The report recommends that the States could help to achieve this by promoting examples of family-friendly working and improving family support, such as through proposals for improved parental leave. It also recommends that businesses should work to destigmatise flexible working for men and women.</p>
28	<p>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.</p>	<p>The period 2001 to 2018 covers significant changes in many areas of the economy including the impact of, and recovery from, a global recession. It is not clear if there is any relationship between the statistics quoted and the development of employment legislation.</p>
29	<p>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.</p>	<p>Following consultation in 1998, the States Assembly committed in 2000 (P.99/2000) to introduce employment rights over a period of time. This has happened very gradually (perhaps more gradually than had been anticipated). The future provision of family friendly rights was included in the original States commitment.</p> <p>The States Assembly committed in 2011 (P.118/2011) to introduce a discrimination law with a number of protected characteristics. The first phase provided for protection against race discrimination in 2014. It was essential to introduce sex discrimination legislation at the same time as the first stage of family friendly employment rights in 2015. Without sex discrimination legislation, the proposed family friendly legislation would protect parents who are already working, but there would be a risk that parents (women of child bearing age in particular) may suffer in recruitment.</p> <p>The development of these rights form an important element of a modern, high quality business environment, attractive to local and international investors and reputable organisations.</p> <p>JACS provides a free service to help employers prepare for changes to both the employment law and the discrimination law, including guidance, advice on changing policies and procedures, template forms, training sessions. The JACS outreach service provides tailored support for small businesses.</p>

<sup>14</sup> <https://www.pwc.com/jg/en/publications/women-in-work-channel-islands-2019.pdf>

	<b>Findings</b>	<b>Comments</b>
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.	The Panel has not presented any statistical evidence to support this finding. The most recent statistics show that the number of employees in the private sector in December 2018 was the highest ever, at 53,120. <sup>15</sup>
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.	<p>The essential purpose of the Employment Law is to place duties and responsibilities on the employer as a minimum standard in the employment relationship.</p> <p>The Minister has already put forward proposals to provide for a maximum of 3 blocks of leave over two years, compared to the original proposal for a maximum of 4 blocks of leave over 3 years. This proposal will be carried forward into the revised draft Law to be lodged later in 2019.</p> <p>The Minister is committed to working with government departments, parishes, businesses and other organisations to improve access to breastfeeding facilities, in the town centre as well as in the parishes, to support the 1,001 Critical Days manifesto. This will assist, for example, where an employer is not able to provide facilities in the workplace, so that a breastfeeding mother can take a break from work and use nearby facilities outside of the workplace.</p> <p>The previous Minister had already made a commitment (R.25/2018) to introduce equal contributory parental benefits as part of the ongoing review of the Social Security Scheme. Other parts of the benefit system already provide equal support to both parents. Any parent receiving income support is fully supported during a period of unpaid parental leave and any parent can receive Home Responsibility Credits which maintains their pension record whilst at home with a small child.</p> <p>As part of the proposals put forward in the Government Plan, the existing contributory maternity allowance, paid from the Social Security Fund, will be replaced by a parental allowance, with both parents able to claim a contributory benefit. To support this additional cost, the liability of employers and class two contributors, paying contributions above the Standard Earnings Limit of £53,304 will be increased.</p> <ul style="list-style-type: none"> <li>• the Upper Earnings Limit is the maximum level of earnings that is taken into account for contribution purposes. This will increase from £176,232 to £250,000</li> <li>• the percentage rate levied on earnings above the</li> </ul>

<sup>15</sup>

[www.gov.je/SiteCollectionDocuments/Government%20and%20administration/R%20Jersey%20Labour%20Market%20Dec%2018%2020190405%20SJ.pdf](http://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/R%20Jersey%20Labour%20Market%20Dec%2018%2020190405%20SJ.pdf)

	Findings	Comments
		<p>Standard Earnings Limit (£53,000-£250,000) will increase by 0.5% from 2% to 2.5%.</p> <p>The overall impact of these two changes is additional contributions into the Social Security Fund of £3.35 million a year.</p> <p>The legislation required to make the legal changes to the Social Security contribution rate and earnings cap will be debated after the main debate on the Government Plan itself. The legislation to provide for parental benefits will be lodged separately.</p>
32	<p>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.</p>	<p>Adjusting social security benefits under the Social Security (Jersey) Law 1974 is outside of the Forum's remit. The Forum's remit relates only to the Employment (Jersey) Law 2003.</p> <p>However, the previous Minister made a commitment (R.25/2018) to introduce equality in contributory parental benefits as part of the ongoing review of the Social Security Scheme.</p> <p>Under the Employment Law, employers can already discount the value of any maternity allowance received against their legal requirement to provide 6 weeks of paid leave. When maternity allowance is replaced by a parental allowance (see finding 31), employers will be able to discount the value of the benefit against 6 weeks of paid leave for both parents.</p>
33	<p>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.</p>	<p>The Panel has not provided the evidence on which it bases this statement of public opinion. The Panel's own review did not consult the public generally, but focused on the views of businesses and their representatives.</p> <p>The Jersey Opinions and Lifestyle Survey report for 2016<sup>16</sup> included a number of questions requested by the Social Security Department to feed into the work on family friendly employment legislation.</p> <p>As the Panel's report notes, the research showed that financial reasons were not the only factor in the amount of leave that parents take. The reasons for not taking more leave were split between financial reasons (52%) and the length of leave being limited by their employer (48%). The majority of <u>male</u> parents (69%) said they were prevented from taking more leave due to the length of leave being limited by their employer. This demonstrates that for some parents, having the right to take a period of leave is more significant than financial reasons. This indicates that requiring employers to permit periods of unpaid leave will meet the aim of the proposals – to give parents greater choice – particularly fathers.</p> <p>The data also showed the following –</p>

<sup>16</sup> Pages 12-13

[www.gov.je/SiteCollectionDocuments/Government%20and%20administration/R%20Opinions%20and%20Lifestyle%20Survey%202016%20report%2020161129%20SU.pdf](http://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/R%20Opinions%20and%20Lifestyle%20Survey%202016%20report%2020161129%20SU.pdf)

	Findings	Comments
		<ul style="list-style-type: none"> <li>• Female parents were already taking more leave than the statutory minimum – the average was 29 weeks of leave, including 14 weeks’ paid and 15 weeks’ unpaid compared to a statutory entitlement at that time of up to 18 weeks’ leave including 2 weeks’ paid. This indicates that many women already had greater contractual entitlements.</li> <li>• Male parents were taking 2 weeks’ leave on average, including 2 weeks paid and 1 week unpaid. The statutory minimum at that time was 2 weeks’ unpaid leave.</li> <li>• Around 8 out of 10 parents who had taken parental leave in the previous 5 years said that they would have liked to have taken more leave</li> </ul> <p>A greater proportion of male parents (92%) than female parents (69%) felt they would have liked to have taken more leave</p>
34	<p>A report by the <a href="#">Organisation of Economic Co-operation and Development</a> 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.</p>	<p>The OECD report states that most countries provide paid leave through social security schemes that rely on a mix of contributions from employers and employees, sometimes with additional central tax revenues. Employers are likely to bear at least part of the cost of ‘government funded’ paid leave.</p> <p>The OECD report also supports the taking of leave flexibly/in blocks – <i>“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... 20 of 27 OECD countries with paid parental leave that can be taken by either parent explicitly permit this leave to be taken part-time...17 of 27 OECD countries with paid parental leave that can be taken by either parent explicitly permit this leave to be taken in discrete blocks of time or intermittently instead of requiring that all parental leave be used at the same time.”</i> In only 4 of those countries, employer consent is required for workers to use this flexibility in the leave.</p>
35	<p>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.</p>	<p>The Minister would support the provision of more breastfeeding facilities in public buildings and intends to work with the parishes, businesses and community organisations to try to assist in this. The Minister is also working with representatives of the Breastfeeding Working Group with a view to encouraging those with breastfeeding facilities on their premises to make these available more widely (as the Town Hall already does) and to provide mothers with a map of breastfeeding facilities in town, taking a more proactive approach to finding out about locations and improving awareness (e.g. through social media).</p> <p>The Minister is very supportive of promoting best practice ahead of the introduction of the law. JACS provides a best practice guide to providing facilities in the workplace and flexible working to accommodate</p>

	<b>Findings</b>	<b>Comments</b>
		breastfeeding.
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).	There is no requirement for the periods of benefit entitlement and statutory time off work to match. In the UK, for example, maternity benefit is available for 39 weeks and statutory maternity leave is 52 weeks.  As part of the proposals put forward in the Government Plan, the existing contributory maternity allowance, paid from the Social Security Fund, will be replaced by a parental allowance, with parents able to claim a contributory benefit for a total of more than 18 weeks (see finding 31). The legislation to provide for parental benefits and the collection of additional contributions will be lodged separately.
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.	To clarify, employers are able to offset the value of the benefit (£216.86 per week) against the employee's weekly pay during the 6-week statutory paid leave period. The Panel states that employers are unable to claim back the allowance for anyone other than the birth mother. However, the allowance is only payable to the birth mother. There is no equivalent allowance for other parents.  The previous Minister made a commitment (R.25/2018) to introduce equality in contributory parental benefits as part of the ongoing review of the Social Security Scheme. When maternity allowance is replaced by a parental allowance as part of the proposals put forward in the Government Plan (see finding 31), employers will be able to discount the value of the benefit against 6 weeks of paid leave for both parents.
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.	The Minister is satisfied that the Forum's background research, public consultation and its detailed report on its recommendations provide a comprehensive review of the subject. Considerable background work, research and preparation goes into the Forum's recommendations. In this case, that process was undertaken over a year.  As well as setting out examples of parental leave rights in other jurisdictions, a number of reports drawing international comparisons were taken into account. A summary of that research was set out in the Forum's consultation paper.  In addition, survey questions were included in the 2016 Jersey Annual Social Survey specifically to provide statistics to inform this piece of work.
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.	No commitment was given to undertake a review between the two stages of legislation and the Forum did not recommend such a review. As the Forum Chair explained during the hearing with the Panel <i>"The 2019 recommendations were always the Forum's recommended targets and there was no "We think the recommendation is that you review in 2018". That was not the Forum's recommendation. 2018 and</i>

	<b>Findings</b>	<b>Comments</b>
		<p><i>2019 were inextricably linked. I think you will see from the recommendation it was only because it was such a short period of time and there happened to be an ability to ... we could have just said: "Let us just go straight to 2019".<sup>17</sup></i></p> <p>JACS is funded by the Government of Jersey to provide advice, guidance and training to employers and employees. If issues were arising, this would become evident from the number of queries to JACS and complaints to the Employment and Discrimination Tribunal. There is no evidence that the existing legislation, which came into force in 2015 and was extended in 2018, has caused difficulties for businesses.</p>
40	<p>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.</p>	<p>The Minister does not support a small business exception. The amendment, as proposed by the Connetable of St Mary, would revert employment rights to the position before September 2015 for employees of small businesses in Jersey. Those parents would have no right to take parental leave of any duration as the proposed amendment would remove the existing family friendly employment rights from all employees who work in a business that employs five staff or less, as well as ensuring that employers do not have to comply with any of the proposed new employment rights.</p> <p>The children of parents who work for small businesses do not deserve a lower level of protection than the children of parents who work for larger companies. The effect on employees who suffer a detriment, dismissal or discrimination is the same, whatever the size of the business.</p> <p>Neither the UK nor Isle of Man has a small business exception. As employment laws have progressed in other jurisdictions, small business exceptions have been removed. Women who work for small businesses are excluded from maternity protection laws only in 3 countries: the Republic of Korea, Honduras and the USA.</p>

<sup>17</sup> <https://statesassembly.gov.je/scrutinyreviewtranscripts/2019/transcript%20-%20family%20friendly%20employment%20rights%20-%20employment%20forum%20-%208%20april%202019.pdf>

## RECOMMENDATIONS

	Recommendations	To	Accept/ Reject	Comments	Target date of action/ completion
	<p><b>OVERARCHING RECOMMENDATION:</b> 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:</p> <ul style="list-style-type: none"> <li>• 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;</li> <li>• 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;</li> <li>• A review of the impact of the changes on the full range of employers in all sectors.</li> </ul> <p>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.</p>	<b>Min. SocSec</b>	Reject	<p>The Minister is confident that the consultation undertaken by the Employment Forum, and its gathering and interpretation of evidence, was of good quality.</p> <p>The Minister is grateful to the Panel for the constructive highlighting of a potential improvement to the affordability of proposals for business. She acknowledged the concerns earlier this year and lodged an amendment to provide for three blocks of leave over a two-year entitlement period. The Minister now intends to consolidate those amendments into a revised draft Law before re-lodging.</p> <p>The government's work on family-friendly employment rights in Jersey started 12 years ago in 2007 with the intention of making evidence-based changes gradually at a pace that employers could tolerate.</p> <p>It is the Minister's judgement that further lengthening this process would not be advantageous to children, parents or business.</p>	NA
1	The Customer and Local Services Department should use its own database, where	<b>Min. SocSec</b>	Accept	CLS internal advice indicates that employers can be notified via their business address that an Employment	At the next appropriate opportunity

	<b>Recommendations</b>	<b>To</b>	<b>Accept/ Reject</b>	<b>Comments</b>	<b>Target date of action/ completion</b>
	practical, to support the promotion of consultations.			Forum consultation is underway, as long as specific employers are not targeted and any communication is clear that the consultation is being undertaken at the direction of the Social Security Minister.	
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.	<b>Chief Minister</b>	Partially accept	<p>The Chief Minister notes the Panel's comments and is committed to encouraging wide engagement in policy development – as the introduction of policy development boards (PDBs) indicates. PDBs bring together a combination of Assembly, Ministers and lay members to develop policy options and recommendations to the Chief Minister, as a supplement to public consultation.</p> <p>The government aims for continuous improvement, and an internal review of how we consult will be undertaken shortly. Scrutiny will be given the opportunity to comment on this piece of work before finalisation.</p> <p>With regards to the Employment Forum, it is bound to follow the statutory process set out in the Employment (Jersey) Law 2003. As an independent body, the Government of Jersey guidelines do not formally apply to it. Nonetheless, the Forum follows best practice which corresponds with the key principles of the guidelines, including an appropriate consultation period, objective analysis of results and publishing the outcome.</p>	Work to start in 2020
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.	<b>Min. SocSec</b>	Accept	The Minister wishes to remove uncertainty regarding the portability of employment rights. To clarify the position, the Minister will amend this aspect of the draft legislation before it is re-lodged for debate.	Oct 2019
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	<b>Min. SocSec</b>	Accept on behalf of the Government, subject to timing	<p>The Minister supports the provision of more breastfeeding facilities in public buildings and intends to work with the parishes, businesses and community organisations to try to assist in this.</p> <p>The Minister is also working with representatives of the Breastfeeding Working Group with a view to encouraging those with breastfeeding</p>	Work has started in 2019

	<b>Recommendations</b>	<b>To</b>	<b>Accept/Reject</b>	<b>Comments</b>	<b>Target date of action/ completion</b>
	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.		considerations	facilities on their premises to make these available more widely (as the Town Hall already does) and to provide mothers with a map of breastfeeding facilities in town, taking a more proactive approach to finding out about locations and improving awareness (e.g. through social media).  The Minister is very supportive of promoting best practice ahead of the introduction of the law. JACS provides a best practice guide to providing facilities in the workplace and flexible working to accommodate breastfeeding.	
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.	<b>Min. SocSec</b>	Partially accept	The previous Minister made a commitment (see R.25/2018) to introduce equality in parental benefits as part of the ongoing review of the Social Security Scheme (the contributory benefit system).  Other parts of the benefit system already provide equal rights to both parents. Any parent receiving income support is fully supported during a period of unpaid parental leave and any parent can receive Home Responsibility Credits which maintains their pension record whilst at home with a small child.  The Minister is taking forward the commitment made by the previous Minister as part of the proposals put forward in the Government Plan. The existing contributory maternity allowance, paid from the Social Security Fund, will be replaced by a parental allowance, with both parents able to claim a contributory benefit. To support this additional cost, the liability of employers and class two contributors, paying contributions above the Standard Earnings Limit of £53,304 will be increased. <ul style="list-style-type: none"> <li>• the Upper Earnings Limit is the maximum level of earnings that is taken into account for contribution purposes. This will increase from £176,232 to £250,000</li> <li>• the percentage rate levied on</li> </ul>	Implementation in 2020

	<b>Recommendations</b>	<b>To</b>	<b>Accept/ Reject</b>	<b>Comments</b>	<b>Target date of action/ completion</b>
				<p>earnings above the Standard Earnings Limit (£53,000-£250,000) will increase by 0.5% from 2% to 2.5%.</p> <p>The overall impact of these two changes is additional contributions into the Social Security Fund of £3.35 million a year.</p> <p>The legislation required to make the legal changes to the Social Security contribution rate and earnings cap will be debated after the main debate on the Government Plan itself. The legislation to provide for parental benefits will be lodged separately.</p>	
6	<p>The Minister should lodge an amendment to the <a href="#">Social Security (Maternity Benefit) (Jersey) Order 1975</a> 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.</p>	<b>Min. SocSec</b>	Partially accept	<p>The Social Security (Maternity Benefit) (Jersey) Order 1975 provides for a number of detailed rules around the entitlement to maternity benefits in respect of issues such as: the birth of twins, a baby being born more than a week late, a mother only partially satisfying the contribution conditions and the definition of “keeping in touch days”.</p> <p>The entitlement to maternity allowance is provided through Article 22 of the Social Security (Jersey) Law 1974 and it is this article that will be amended or replaced to provide for a parental allowance.</p> <p>The right for employers to discount the value of maternity allowance is provided for in Article 55D of the Employment (Jersey) Law 2005.</p> <p>There is no automatic right for the employer to “claim £216 from all parents taking leave”. The right is to reduce the value of the normal weekly wage by the amount of allowance, if any. If the employee is not entitled to a maternity/parental allowance or is only entitled to a partial allowance, it is only this lower amount that can be deducted.</p> <p>The current funding within the Social Security scheme provides for 18 weeks of maternity allowance, paid for from contributions.</p> <p>The Minister is taking forward the commitment made by the previous Minister as part of the proposals put</p>	Implement ation in 2020

	Recommendations	To	Accept/ Reject	Comments	Target date of action/ completion
				<p>forward in the Government Plan. The existing contributory maternity allowance, paid from the Social Security Fund, will be replaced by a parental allowance, with both parents able to claim a contributory benefit. To support this additional cost, the liability of employers and class two contributors, paying contributions above the Standard Earnings Limit of £53,304 will be increased.</p> <ul style="list-style-type: none"> <li>• the Upper Earnings Limit is the maximum level of earnings that is taken into account for contribution purposes. This will increase from £176,232 to £250,000</li> <li>• the percentage rate levied on earnings above the Standard Earnings Limit (£53,000-£250,000) will increase by 0.5% from 2% to 2.5%.</li> </ul> <p>The overall impact of these two changes is additional contributions into the Social Security Fund of £3.35 million a year.</p> <p>This additional funding will support an increase in the allowance available to parents from 18 weeks to a total of 32 weeks.</p> <p>An extension of maternity allowance to provide 52 weeks of allowance to 900 mothers at £216 per week would cost £6.6 million above the existing budget.</p> <p>Extending allowances to both parents for 52 weeks – an extra 86 weeks – for 900 babies would cost £16.7 million above the existing budget.</p> <p>Employers will be entitled to reduce the paid element of leave by the value of the parental benefit.</p>	

## CONCLUSION

The Forum spent a year consulting and preparing its recommendation. The Panel has spent an additional four months conducting its own review, hearing evidence from a number of stakeholders, including employers and their representatives. There will inevitably be differences of opinion on employment law and a balance must be struck.

The Panel raised concerns as to the general level of regulation applied to local businesses. The Minister appreciates that this legislation is a bold step forwards and that Jersey's family friendly employment rights have developed significantly since 2014. Prior to 2014, Jersey was one of only two jurisdictions in the world that did not provide statutory maternity leave. (Guernsey was the other). Jersey sets its stall in the global marketplace as a well-regulated and modern jurisdiction. There are costs associated with regulation but benefits for employers, as well as for the Island in terms of Jersey's international reputation.

The Minister has firmly committed via the Government Plan to bringing forward parental contributory benefit reforms to complete the move to parity for both parents across both employment and benefit legislation, along with the required collection of additional contributions.

In line with previous political commitments to the 1,001 Critical Days agenda and the current CSP commitment to putting children first, this proposed change to Jersey's Employment Law is another major step towards a family friendly island.