STATES OF JERSEY

DRAFT EMPLOYMENT (AMENDMENT No. 8) (JERSEY) LAW 201- (P.109/2014): COMMENTS (P.109/2014 Com.(2)) – RESPONSE OF THE MINISTER FOR SOCIAL SECURITY

Presented to the States on 15th July 2014
by the Minister for Social Security

STATES GREFFE

COMMENTS

The Minister is very grateful to the Health, Social Security and Housing Scrutiny Panel (the "Panel") for completing its review of the amendment in a short period of time. The Minister is pleased to note the broadly positive reaction to his proposals and that the vast majority of the amendment was found to be fit for purpose. The report prepared by Ogier Legal (the "adviser's report") was detailed and it gave the Minister the opportunity to review and reaffirm his proposals. The Minister is assured by the conclusion that: *"whilst the consultation was undertaken some years ago, there is no reason to believe that anything has changed in the interim that would make the introduction of these basic rights inappropriate."*.

Six 'representative organisation' stakeholder groups were invited to submit comments to the Panel[1] and the Minister is pleased to note that the majority of them supported the legislation, particularly so given that half of the stakeholders are representatives of employers.

Given that no employee representative organisations were invited to submit comments, and there were other omissions, such as the Jersey Community Relations Trust, it is not surprising that the comments appeared to highlight the impact on small businesses.

The Minister was grateful to have the opportunity to review the adviser's report before the Panel presented its comments to the States. Having consulted with representatives of the Law Officers' Department and the Law Draftsman's Office, the Minister prepared a detailed submission in response to the suggestions raised, which he discussed with the Panel on 10th July. At that meeting, the Minister assured the Panel that a number of the suggestions do not require any further consideration and explained why he is unable to accept any of the suggested amendments to the legislation, except for one paragraph numbering error which has been corrected by corrigendum.

As the Panel has noted, many aspects of the proposed legislation can be changed by Regulations. It is possible, but not expected, that this may be necessary when we come to prepare the sex discrimination Regulations next year and when we review the amendment in 2016. The Minister is grateful to the Panel for deciding to include within its legacy report a recommendation that the next Scrutiny Panel should follow up on the Minister's commitment to review the new rights in 2016.

The Panel's comments set out a list of recommendations and a table of provisions[2] that the advisers to the Panel suggested should be reviewed or altered. The Minister responds, as follows –

[1] Citizen's Advice Bureau, Jersey Advisory and Conciliation Service, Jersey Childcare Trust, Jersey Chamber of Commerce, Jersey Farmers' Union, Institute of Directors

[2] The table is set out at Appendix 5 of the adviser's report, and the Minister's response is provided in the Appendix to these comments, as Table 1, starting on page 9.

1. ***Give particular consideration to small businesses, such as partial exemptions or qualifications to the rights, and also whether the administrative burden of the FFR[3] can be reduced. Small businesses will also require greater support and assistance to implement the changes.***

The Minister has given consideration to the impact on small businesses and is committed to making the proposed first stage of rights available to all employees in Jersey. In making its recommendations, the Forum had consulted with small businesses and representatives of employers and was aware of the number of small businesses in Jersey and their importance. That is one of the reasons why the rights being introduced at this stage are modest. This is a minimal level of protection that is suitable for all employers, whatever their size.

The adviser's report suggests that a comparison between Jersey and the UK regarding the impact on small businesses may not be appropriate, and that a comparison with a jurisdiction where small companies make up a large proportion of business may have been more fitting. The report goes on to highlight the position in the USA, where the legislation for 12 weeks' family leave is limited to employers with more than 50 employees.

The USA, however, has one of the world's smallest small business sectors[4] and so is not the best comparator for Jersey. International comparisons are always problematic. Specific measures should not be seen in isolation, but in their overall context. The USA is well known for providing very low levels of protection for pregnant employees, quite out of line with the rest of the developed world – and considerably behind most of the developing world. The federal law of the USA is not an example we should follow.

Excluding employees who happen to work for small businesses from the minimum level of protection proposed would have a much bigger impact in Jersey, where the small business sector is much larger. We should remember that the purpose of the proposed maternity leave is for the health of the mother and to allow new mothers to provide vital care for their baby in the first weeks of life. 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 only other jurisdictions that appear to make an exception for small businesses are Honduras – where maternity protection does not cover workers in agricultural and stockbreeding enterprises that employ fewer than 10 permanent workers – and the Republic of Korea, where women working in enterprises with less than 5 employees are not entitled to maternity leave[5].

Unlike the UK, there is no burden of administering a statutory maternity pay scheme in Jersey. Statutory maternity pay in the UK is funded by the state, but it is administered and paid to the employee by the employer. The report states that statutory maternity pay is reimbursed to small businesses at a rate of 103% to compensate for the administration cost. In Jersey, Maternity Allowance is paid directly

[3] Family-friendly rights
[4] www.cepr.net/documents/publications/small-business-2009-08.pdf
[5] Report of the International Labour Organisation on 'Maternity at work: A review of national legislation' (2010)

to the employee by the Social Security Department. The administrative burden that employers are compensated for in the UK is simply not being imposed in Jersey.

The adviser's report itself notes that: *"It needs to be remembered however that the majority of recruitment costs are costs that businesses face now in any event whether they offer maternity leave or not. At the moment businesses will either replace a pregnant employee or hire a temporary replacement. Therefore these ancillary costs and burdens are little different under the Amendment."*[6]

The Jersey Advisory and Conciliation Service will continue to provide proactive support targeted to small businesses to help them meet the requirements of the Law. In addition, the Minister has provided funding so that JACS can provide training courses on the new legislation at no cost to delegates, which will commence later this year.

2. ***Give particular consideration to flexible working/maternity in light of impending alterations in the UK. We recommend observing the impact of these changes to see whether they will be viable in Jersey.***

The Minister has committed to a review of the new rights one year after they come into force. That review will allow for consideration of the recent changes in the UK, as well as careful consideration as to whether extending the rights would be appropriate for small businesses.

Shared parental leave – In many other jurisdictions, family-related legislation has been developed over decades, often having been driven by the pressures of European polices and initiatives. As Jersey has a blank slate, the Employment Forum considered during consultation whether a flexible system of leave could be introduced that would allow parents to share the total period of leave. However, the administration would be complex, and would require further investigation. The Forum recommended further consultation before taking such a step, including as to how shared leave is administered in other jurisdictions, where there is a change of employer, divorce, separation or re-marriage.

The Forum suggested that further research would be necessary to review whether fathers and partners are using the flexibility to take more leave in other jurisdictions, or whether traditional child care roles are being maintained. The Forum had noted reports that Sweden was reconsidering some aspects of their shared parental leave system, as fathers were not taking their full share of leave and so the flexibility had not necessarily increased equality in child care. In 2013, only 2% of new fathers in the UK took the opportunity to share up to 6 months of their wife or partner's maternity leave (according to recent research by the law firm EMW).

In the UK, a full system of shared parental leave will be introduced from April 2015. There are likely to be lessons to learn from the UK experience of how this is administered and any difficulties that are caused by 2 parents – usually with different employers – sharing a period of leave entitlement. The UK has a total availability of 52 weeks' leave compared to Jersey's proposed 18 weeks, and it is felt that the concept of shared leave should be considered if and when it is decided to extend the period of leave that is available in Jersey.

[6] Page 50

Flexible working – The administration that will exist around flexible working requests may be more preferable to employers than the new UK system which replaces some of the statutory procedures. Employer representatives in the UK have indicated that they are not convinced that this de-regulation measure will simplify or improve the process. The statutory procedure helps employers to focus on the business implications of the request and to handle it in a certain way. The lack of certainty could make it harder for employers to understand what they must do to demonstrate that they have considered an application reasonably. As the report itself notes in relation to the removal of the statutory grounds to refuse an application on business grounds: *"Theoretically it is less bureaucratic, but in practice we think it is unlikely to be so."* Rather than make provision equivalent to the UK, we decided to retain a statutory procedure, as recommended by the Forum, and keep the UK change under review, as recommended by the Panel's adviser.

We could give every employee the right to request flexible working; however, the right has been targeted to people with caring responsibilities because they will have a particular need for work/life balance, and the proposed new right is anchored within a family-friendly policy agenda. It is a question of balance between rights for employees and burdens for businesses. The proposal brings a first step that is wider than the right that existed in the UK until 30th June 2014 and is also much simpler. There is nothing to stop any employee making a request of their employer, but the employer would not be obliged to follow the statutory procedure to consider and respond to the request.

The Forum had consulted on who should have the right to request flexible working, and many of the responses were in favour of giving this right to all employees. The Forum was conscious, however, that the policy context relates to family-friendly rights in the workplace rather than legislation to support employees in their general lifestyle choices. If all employees have the right to request flexible work, carers and parents may be in a situation where flexible working has already been agreed for other members of staff to undertake leisure activities, and the business cannot support any more changes to terms and conditions of employment.

The Minister would recommend considering whether to extend the right to all employees in the next stage of legislation, subject to further consultation.

3. ***Ensure that the proposed sex discrimination law is consistent with the family friendly rights.***

The Minister has given a commitment that the 2 Laws will dovetail where required, and this will be undertaken when law drafting commences on the sex discrimination Regulations later this year. The recent consultation on sex discrimination highlighted the areas where the Laws are expected to overlap.

The adviser's report states that there is the possibility that the new rights: *"will lead to certain employers refusing to hire female employees who might take maternity leave.*[7]*"*. Women who are denied employment for reasons relating to pregnancy and maternity currently have no rights. That is why the Minister is committed to introducing protection against sex discrimination on the same date as these new employment rights. Subject to the approval of the Assembly, the Minister anticipates that such protection will be provided by the enactment of Regulations prohibiting sex discrimination under the Discrimination (Jersey) Law 2013.

[7] Page 55

4. Give particular consideration to fixed-term contracts, agency workers and zero-hour contracts.

The Minister will give further consideration to the impact of employment legislation generally on zero-hour contracts (which includes many agency workers) when data on the extent of the use of such contracts in Jersey is available from the Statistics Unit later this year. This will provide details such as the number of affected individuals and the sectors in which they work. The Minister considers that this data collection would not prevent the amendment progressing, as drafted.

All that matters in qualifying for maternity leave and the associated rights is whether the individual is or is not an 'employee' as defined by the Employment Law.

There is nothing in the Employment Law currently that defines zero-hour contracts or states that zero-hour workers are, or are not, employees, although certain rights are dependent on an employee having a minimum number of contractual hours. The new family-friendly rights will therefore apply to people working under zero-hour contracts, provided that they have a contract of employment. This is a matter of fact depending on the circumstances of the individual case; including, for example, whether mutuality of obligation has been established. Any extension of employment rights to non-employees would be likely to have implications for employers by removing the flexibility that genuine zero-hour contracts can offer.

Agency contracts are covered by the Employment Law because agency workers are treated as employees (see Article 1 of the Employment Law). The UK position is different, in that agency workers are not usually employees and therefore do not qualify for maternity, paternity or parental leave, and are specifically excluded from the right to request flexible working.

Fixed-term contract employees are simply employees and are protected by the Employment Law. The adviser's report misunderstands the position of employees on fixed-term contracts. These employees have the same right to maternity leave as any other employee. However, their right is, like any other employee, dependent on them remaining an employee. When a fixed-term contract expires (in accordance with its terms) without being renewed, the contract of employment terminates and the individual is no longer an employee. Pregnancy and maternity do not change this position.

5. How will social security contributions be maintained during ordinary maternity leave?

Contribution credits are provided by the Social Security Department to protect a person's contribution record and their entitlement to certain benefits. Credits are given when a person is receiving certain benefits, including Maternity Allowance. The person is treated as if they had made contributions during that period. There is no financial burden on the employer or the employee. Contributions are also credited for up to 10 years when a person stays at home to look after a child under age 5 (home responsibility protection).

6. What will be the likely increase to social security contributions?

An increase in Social Security contributions is not proposed at this first stage.

As the report accompanying the proposition for the Minister's changes to Maternity Allowance[8] states, it is anticipated that expenditure on maternity benefit will increase, given that the Social Security Law is being amended to allow women to start their maternity leave later and still claim the full 18 weeks' benefit. A total maximum increase of £341,700 is expected, but no additional contributions will be collected at this time.

An increase in contributions will be considered as part of stage 2 of the family-friendly legislation, along with any increase in the Maternity Allowance period. The recent actuarial review of the Social Security Fund identified that the annual cost of benefits and pensions paid out would exceed the contribution income received into the fund within the next 2 years. The actuary has recommended that action is taken to adjust the scheme following the next review in 2016 and so any changes, such as a contribution increase to provide additional funding for Maternity Allowance, would be considered at that time.

7. How will accommodation be dealt with when provided as a benefit?

Accommodation is only likely to be provided as a benefit if it is intended to be the employee's home. If accommodation is excluded from the scope of the protection of terms and conditions of employment during statutory maternity leave, then new mothers will face eviction, which is clearly not acceptable. They would also be deterred from taking their maternity leave, as to do so would render them homeless. It is crucial therefore that when living accommodation is provided as a benefit under the terms and conditions of employment, that it continues during the maternity leave period.

It should be noted that employers that provide tied accommodation to staff in Jersey already have to deal with this issue when a woman becomes pregnant. Given the range of circumstances and types of accommodation that may be offered, it is best for the employer and employee to agree appropriate contractual provisions with respect to accommodation, with the assurance that the mother will continue to enjoy the benefit of those provisions during her maternity leave. Guidance will provide advice for employers on these issues.

8. There is a balance to be struck between providing sufficient security and protection for employees, whilst ensuring that employers are not overburdened or vulnerable to being exploited.

The report itself states that: "*The Forum's recommendation tries to reach a balance between competing rights and obligations. We think it is unrealistic to expect Jersey to bring in rights comparable to the UK, where there has been protection for employees claiming maternity leave and maternity pay since the 1970s. The recommendations should be relatively easy for employers to implement and understand.*"[9] Taking this draft Employment Law amendment in combination with the proposed changes to the Maternity Allowance and the planned protection against sex discrimination, the Minister believes that the right balance has been struck.

[8] Draft Social Security (Amendment of Law No. 8) (Jersey) Regulations 201- (P.106/2014)
[9] Page 16

Statement under Standing Order 37A [Presentation of comment relating to a proposition]

These comments were submitted after the deadline set out in Standing Order 37A because the comments of the Scrutiny Panel to which the Minister is responding (P.109/2014 Com.(2)) were presented to the States on Monday 14th July, and so it was not possible to submit the Minister's comments by the noon deadline on Thursday 10th July.

APPENDIX

TABLE 1 – Response of the Minister for Social Security to the Health, Social Security and Housing Scrutiny Panel's review of the Draft Employment (Amendment No. 8) (Jersey) Law 201-

Article of the amendment	Current wording	Recommended wording	Ogier's comments	Minister's response
Part 3A – Flexible Working				
Dealing with an application Art.15B(1)	*"may agree the change in the terms or conditions applied for under Article 15A or agree different terms and conditions of the employee's employment to those applied for;"*	*"may agree the change in the terms or conditions applied for under Article 15A, agree different terms and conditions of the employee's employment to those applied for, or refuse the application so long as one of the grounds under 15B(5) below is satisfied; and"*	The current wording gives the impression that an employer can only do one of two things: (a) agree to the employee's proposal, or (b) agree to a slightly different variation. There is no express provision within this Article to allow an employer to refuse an application under Art.15A. We think that this is an unnecessary ambiguity	**Amendment not required.** Article 15B(4) states what is to happen if the employer's decision is to refuse the application. Article 15B(1) enables the employer and employee to reach a compromise, where the employer will permit flexible working but not on the terms that the employee has applied for, without the employee having to make a fresh application. It is not necessary to expressly state this as it is clear that the employer can refuse an application.
Grounds Art.15B(5)	*"would create a burden of additional costs."*	*"would create the burden of additional costs"*		**Amendment not proposed or required.** The recommended wording does not improve (or worsen) the provision.
Variation Art.15A	Under the current wording there is no statutory right to allow an employer to vary any contractual changes agreed to under a request made under Art.15A. Any variation would become part of the new terms and conditions of an employee's contract, and so any variation could be dealt with using customary law principles such as	N/A	This could probably be dealt with under the ACOP issued by JACS, which can make specific reference to the possibility of variation, and that employers may want to put in place a review to ensure that the Art.15A variation is suitable for both parties.	**Amendment not required.** It is common practice in the UK for employers to agree to a flexible working request subject to a review period or a right to return to the original arrangement. This is not based on any specific provision, but is simply part of the normal process of negotiating a change to the contract. Article 4 of the EJL makes provision for changes in terms of employment (e.g. a written statement of the change to be given to the employee within 4 weeks). We can make it clear in guidance that employers may do this, but any specific provision made in the legislation itself would be

Article of the amendment	Current wording	Recommended wording	Ogier's comments	Minister's response
	discussion and consent.			complicated and unnecessarily restrictive. The parties should be free to negotiate whatever terms they agree to.
Part 4 – Minimum wage				
Detriment Art.31	Currently detriment is not defined in the EJL 2003, and this has not been discussed in the few JET cases that have dealt with a claim under this Article.	This is a point that could probably do with clarification from JACS in the future.		**Amendment not proposed or required.** There is no definition of detriment in the UK, but there are cases that clarify the scope of the concept. It would not be appropriate to include a restrictive definition in the draft Law. The ordinary meaning of "detriment" will apply, e.g. a cause of harm or damage.
Part 5A – Maternity, adoption and parental rights				
Holiday Art.55D(2)(b)	*"(2) An employee who is not permitted to work under paragraph (1), but who would normally have been required to do so during that period under her contract of employment – (b) is entitled, during the compulsory maternity leave period, to the benefit of all of the terms and conditions of employment which would have applied if she had not been absent;"*	We recommend considering wording to make this point clear.	We anticipate that unless it is made clear that maternity leave is not the same, and that there is a separate entitlement.	**Amendment not required.** The suggestion is to clarify that maternity leave is different from annual leave. This is not necessary. The EJL provides a separate entitlement to annual leave at Article 11. Employees may choose to end their maternity leave early and then take some paid contractual leave. However, if the employer required them to do this, it would clearly amount to a failure to provide the full maternity leave entitlement.
Benefits Art.55D(2)(c)	*"(2) An employee who is not permitted to work under paragraph (1), but who would normally have been required to do so during that period under her contract of employment – (c) is bound,*	We recommend reconsidering this as there is a potential conflict with the Forum's recommendation that all benefits continue to accrue during	This applies equally to similar provisions for ordinary maternity leave (Art.55G(1)(b)) and adoption leave (by virtue of Art.55M).	**Amendment not required.** In relation to paid compulsory maternity leave, the employer and employee would continue to make their respective contributions to the pension fund. Pension contributions from the employer and employee during the unpaid ordinary maternity leave period would be defined under the employment contract or the rules

Article of the amendment	Current wording	Recommended wording	Ogier's comments	Minister's response
	during that period, by any obligations arising under those terms and conditions, subject only to the exceptions in this Part."	period of maternity leave, including employer contributions, and the current drafting. 22. There may also be a problem, in that the rules of the pension scheme may prohibit employer contributions in the absence of any employee contribution		of the particular pension scheme.
Reduction for Social Security maternity allowance – Art.55D(5)	*"(5) Any remuneration to be paid by an employer to an employee under paragraph (2) shall be reduced by any amount that the employee receives by way of short term incapacity allowance under Article 15 of the Social Security (Jersey) Law 1974, or any maternity allowance under Article 22 of that Law, in respect of the compulsory maternity leave period."*	*"Any remuneration to be paid by an employer to the employee under paragraph (2) shall be reduced by:* *(a) the amount of the maternity allowance under Article 22 of the Social Security (Jersey) Law 1974, whether the employee qualifies for the allowance or not; or* *(b) any amount that the employee receives by way of short term incapacity allowance under Article 15 of that Law."*	We recommend altering this so that it is clear that the employer can reduce the pay by the amount of the maternity allowance in any event, and by any sick pay the employee actually receives.	**Policy decision – no amendment.** If the employer could deduct from pay the standard rate of benefit (currently £191.38 per week) where a woman does not receive the benefit, it could result in a woman receiving little or no pay or benefit: e.g. if a woman who is not entitled to Maternity Allowance earns £200 per week and the employer deducts the standard rate of benefit, this would give her an income of £9 per week for the 2 week compulsory leave period. The purpose of this period of leave – in which the employee is not permitted to work – is to safeguard the health of the mother.
Ordinary maternity leave Art.55E(1)	*"(1) An employee is entitled to ordinary maternity leave (in addition*	There is an inherent contradiction in the way the Law	Our comments apply equally to Art.55K(2) and Art.55P(2)(c).	**Amendment not required.** There is no contradiction in the framing of the Law. There appears to be confusion in the report between

Article of the amendment	Current wording	Recommended wording	Ogier's comments	Minister's response
	to compulsory maternity leave) provided that she satisfies the following conditions – *(a) no later than the end of the 15th week before her expected week of childbirth, or, if that is not reasonably practicable, as soon as is reasonably practicable, she notifies her employer of –* *(i) her pregnancy,* *(ii) the expected week of childbirth, and* *(iii) the date on which she intends her ordinary maternity leave period to start,"*	is framed, which comes out in the Forum's recommendations, and this is the way that notice of the right to take maternity leave, adoption leave or parental leave is notified to employers. We think it would be better to ensure that there is consistency in the way these terms are meant to work. This may mean being clear that the qualification period is 15 weeks, and notice is required to become "entitled" for FFR leave, or that notice is not required but will normally be expected to be given at least 15 weeks before the expected week of childbirth, but that later notice does not affect an employee's entitlement to leave.	- There is no guidance as to how the reasonably practicable provision will be applied in practice. - This is an area that requires more thought, and a consistent approach in respect of the different FFRs being brought into force.	the requirement for the employee to give their employer notice of their intention to take maternity leave by the 15th week before the expected week of childbirth (the "15th week") and the 15 month qualifying period for the additional 10 weeks' maternity leave. Guidance will provide examples of when notice by the 15th week may not be "reasonably practicable". Most UK guidance notes give only one example; where the employee was not aware that she was pregnant. The onus would be on the employee to show why she did not give notice in time and each case will depend on its own particular facts. If for some reason it is not reasonably practicable for the mother to give notice by the 15th week, it is also unlikely to be reasonably practicable for the child's father or the mother's partner to give notice by the 15th week of his or her intention to take parental leave. It would be unfair in these circumstances to deny parental leave because the required notice had not been given.
Termination – Arts.55F(5), 55L(7) and 55Q(3)	*"(5) Where the employee's employment terminates after the commencement of the ordinary maternity leave*	We think that Arts.55F(5), 55L(7) and 55Q(3) would be improved by the inclusion of the words "for		**Amendment not required.** The termination can be "for whatever reason" as currently drafted and the suggested wording does not add anything.

Article of the amendment	Current wording	Recommended wording	Ogier's comments	Minister's response
	period but before the time when (apart from this paragraph) that period would end, the ordinary maternity leave period ends at the time of the termination of the employment." *"(7) Where the employee's employment terminates after the commencement of the adoption leave period but before the time when (apart from this paragraph) that period would end, the period ends at the time of the termination of the employment."* *"(3) Where the employee's employment terminates after the commencement of the parental leave period but before the time when (apart from this paragraph) that period would end, the period ends at the time of the termination of the employment."*	whatever reason", e.g. *"Where the employee's employment terminates for whatever reason after the commencement of the ordinary maternity leave…"*		
Work during maternity leave – Art.55I	*"(4) Reasonable contact from time to time between an employee and her employer which either party is entitled to make during a compulsory maternity leave period or ordinary*	**Section (4)** is missing a sub-paragraph (b): it jumps from (a) to (c). **Section (2)**; the drafting at section (2) states that any work carried out		**This has been amended by corrigendum.** **Amendment not required.** The employee would be paid if she worked on any day during the ordinary maternity leave period, but not if she was simply "making reasonable contact". In the UK, the rate of pay for 'keeping in touch days' is a matter for

Article of the amendment	Current wording	Recommended wording	Ogier's comments	Minister's response
	maternity leave period (for example to discuss an employee's return to work – *(a) shall not constitute work; and* *(c) shall not bring that period to an end.* *(2) For the purposes of this Article, any work carried out on any day shall constitute a day's work."*	will constitute a day's work. This is likely to be interpreted consistently with the rest of the EJL 2003 (i.e. Art.16), and accordingly an employee is entitled to be remunerated for a day's work under this Article. This can be remedied by including wording that expressly confirms that any attendance by an employee during ordinary maternity leave is unpaid. **Section (1)** There is no provision to allow an employer to refuse to allow an employee to return. We recommend putting in a control provision so that the right is not solely at the employee's option, such as *"(1)…an employee may, subject to the consent of the employer, such consent not to be unreasonably withheld, carry out unpaid work for her*		agreement between the employer and employee, e.g. set out in the employment contract or agreed on a case-by-case basis (subject to being paid at least the minimum wage). EJL Article 16 requires payment at the minimum hourly rate. It does not create the concept of a 'day's pay'. **Amendment not required.** If the employee keeps coming to work and her employer does not want her to recommence work, then this situation is dealt with under Article 55H(2). An employee is required to give her employer 4 weeks' notice that she intends to return to work earlier, and if she attempts to return before the new date, the employer can postpose her return to such a date that will secure 4 weeks' notice. Employees work under the instruction of their employer. This provision will not create a problem of employees reporting for work during their leave in order to accrue a right to pay.

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		employer during her ordinary maternity leave period…"		
Right to return to work – Art.55J	Art.55J is expressed in absolute terms, i.e. "*she is entitled to return to her job"*. There is no mention here as to what happens if the job no longer exists.	We recommend drafting a provision that means that an employee whose fixed-term contract has expired during maternity leave is not automatically entitled to return to work.		**Amendment not required.** A woman whose fixed-term contract has expired during maternity leave is not entitled to return to work. The right to return applies to an **employee** who returns to work after her statutory maternity leave. The question is not whether the job still exists, but whether the woman is still an employee. Article 55J does not create an artificial right to continue working beyond termination of employment. Article 55F(5) provides that where employment terminates during the ordinary maternity leave period, the maternity leave ends on the date when the employment is terminated. The end of a fixed-term contract constitutes a termination of employment.
Employer's right to reclaim pay for compulsory maternity leave – Art.55D(5)	*(5) Any remuneration to be paid by an employer to an employee under paragraph (2) shall be reduced by any amount that the employee receives by way of short term incapacity allowance under Article 15 of the Social Security (Jersey) Law 1974, or any maternity allowance under Article 22 of that Law, in respect of the compulsory maternity leave period."*	There is no provision within the amendment to allow an employer to recoup any monies paid under Art.55D(5), i.e. contractual pay less the maternity allowance. We recommend including an Article that allows an employer to make such a deduction. We also recommend that the period required should be expressly stated, to		**Policy decision – no amendment**. It would be inappropriate to permit an employer to reclaim pay that relates to the compulsory maternity leave period which is intended to safeguard the health of the mother during a period in which she is not permitted to work. Insofar as the employer provides pay in excess of the 2 weeks, the parties are free to agree 'claw-back' provisions subject to the normal rules of contract. This is commonly done in the UK and does not require any specific provision in the Law.

Article of the amendment	Current wording	Recommended wording	Ogier's comments	Minister's response
		provide clarity for employers and employees.		
Adoption leave – Art.55K(1)	*"(1) An employee is entitled to adoption leave in respect of a child provided the employee –* *(a) is the child's adopter; and* *(b) has either notified the approved adoption society that he or she agrees that the child should be placed with him or her and has agreed the date of placement or, in the case of an overseas adoption, has received an official notification; and* *(c) has given his or her employer notice of his or her intention to take adoption leave in respect of a child, specifying –* *(i) the date on which the child is expected to be placed with him or her for adoption or, in the case of an overseas adoption, the date on which the child is expected to enter Jersey, and* *(ii) the date on which the employee has chosen that his or her period of leave should begin."*	Art.55K(1) should state: *"An employee is entitled to unpaid adoption leave in respect of a child…".* We recommend including a provision that defines "child", so that it expressly excludes a foster child, step-child, or other child that the employee has an established relationship with. We also recommend considering a provision to deal with the situation where an adoption breaks down.	The Minister's intention was that this leave would be unpaid. The Minister also accepted the Forum's recommendation that adoption leave would not be available where there is an established relationship, i.e. in the case of a foster or step-child (p.12). There is no such provision within the Amendment.	**Amendment not required.** The Article does not give a right to paid leave. The provisions for ordinary maternity leave do not state 'unpaid leave'; they provide at Article 55G that the terms and conditions of employment, except those about remuneration, apply during the period of leave. By Article 55M, Article 55G applies to adoption leave in the same way that it applies to ordinary maternity leave. **Policy decision – no amendment.** By Article 55K(1)(b), it is implicit that the adoption must be through an 'approved adoption society'. It would be problematic if adoptive parents were excluded because they had established a relationship with the child; it would suggest that there is a need to establish the degree of closeness of the relationship before determining who has the benefit of the right. However, the purpose of adoption leave is to enable the adopter to establish a relationship with the child, and that may be necessary even if the child is somehow related to or known to the adopter. A person is unlikely to abuse a right to take unpaid leave where it isn't required. **Policy decision – no amendment.** The report recommends that we include something like the UK provision which fixes an end date of 8 weeks after the adoption fails, or the anticipated end of the adoption leave if earlier. This is not considered to be necessary for Jersey because of the relatively short adoption leave period (8 or 18 weeks) compared to the UK (52 weeks).

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Parental leave – Art.55N (2)(a)(ii)	*"(2) The conditions referred to in paragraph (1) are that the employee – (a) is – (ii) married to, the civil partner of, or the partner of, the child's mother or adopter, but not the child's father or adopter; and"*	There is no definition of *"partner"* within EJL 2003 or Amendment. We recommend including a definition of "partner" in Art.55N so that it is clear that there needs to be some form of long relationship to qualify for the right. Otherwise the provision is open to ambiguity.	The Forum and the Minister both accepted the interpretation that a partner is someone living in an enduring relationship with the mother, but who is not an immediate relative (p.11 of the Minister's Response).	**Amendment not required.** This is already included in the proposed draft amendment; see Article 55A(1) for the definition of "partner".
Part 7 – Article 67 – dismissal for family reasons				
Connected with – Art.67(1)	This makes any dismissal unfair if it *"is connected with"* one of the FFRs.	We recommend giving consideration to the way Art.67(1) has been drafted, and the reasons for including the lower test of "connected with." If this was not intentional, then we suggest reverting to the usual test of *"the reason (or, if more than one, the principal reason..."* This would provide consistency.	This is a very significant departure from the rest of the protections under Part 7 EJL 2003. The test of "connected with" creates a much lower threshold, and could give rise to difficulties for employers, who would have to show that there was no connection at all with one of the FFRs. This is a very difficult hurdle to overcome.	**Policy decision – no amendment.** The report states that, in the UK the test is whether the "*reason or principal reason for the dismissal*" is related to one of the prescribed grounds. The Maternity and Parental Leave Regulations 1999 provide that an employee is unfairly dismissed "if the **reason or principal reason** for the dismissal is of a kind specified in paragraph (3)" and paragraph 3 provides that 'the kinds of reason referred to in paragraphs (1) and (2) are reasons **connected with**…" and then lists the reasons such as pregnancy, giving birth, seeking to take maternity leave, etc. In an unfair dismissal claim. the employer must prove the principal reason for dismissal (EJL Article 64) and show that it is a potentially a fair reason. If the employee wants to argue that the dismissal is automatically unfair, the employee will have to raise evidence to show that it is 'connected with' one of the

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				matters listed. The Tribunal will then have to decide whether the reason for dismissal shown by the employer was indeed connected with one of those matters. In practice, this is not therefore a hurdle for the employer to overcome, but a question of fact for the Tribunal to decide. The phrase 'connected with' has caused no problems in the UK (e.g. the Tribunal would expect to see a proper connection, not an obscure one).
Redundancy – Art.67(2)	*"(2) An employee who is dismissed shall also be regarded for the purposes of this Part as unfairly dismissed if –* *(a) the reason (or, if more than one, the principal reason) is that the employee was redundant;* *(b) it is shown that the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking who had positions similar to that held by the employee and who have not been dismissed by the employer; and* *(c) it is shown that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was a reason connected with any of the reasons referred to*	We think consideration should be given to Art.67(2) at it will arguably force employers to prioritise pregnant employees.		**Amendment not required.** The intention is that employees should not make a woman redundant before other colleagues just because they are pregnant or for some other pregnancy-related reason. Paragraph (2)(c) is the critical point. The employer must decide who is to be made redundant based on criteria that are not pregnancy-related. A pregnant employee can still be made redundant if she comes within the objective criteria set for all employees.

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	in paragraph (1)(a), (b), (c), (d), (e) or (f)."			
Schedule 1 – calculation of week's salary	Schedule 1 sets out the method for calculating a week's salary for the purposes of the EJL 2003. For the purposes of the claims in relation to ante-natal care or compulsory maternity leave, the period required for a calculation is reduced to 12 weeks.	This requires clarification and further amendments to Schedule 1.	There is no mechanism for calculating an employee's weekly salary if they have worked for an employer for less than 12 weeks.	**Amendment not required.** Paragraph 6 of Schedule 1 of the EJL makes special provision for new employments so that where an employee has not been employed for a sufficient period of time, the amount of a week's pay is an amount that 'fairly represents a week's pay'. In determining this amount, the employer must apply as closely as possible the provisions of Schedule 1 and must have regard to the amount of pay that the employee receives for that employment.
Fixed-term/Agency/Zero-hours contracts				
Fixed-term contracts.	There has been little specific drafting for fixed-term contracts.	We recommend giving consideration to whether employers might, in limited circumstances, be able to break a fixed-term contract. Technically, an employee also has the right to return to the job in which she was employed prior to her maternity leave (Art.55J). There is no carve-out to say that this does not apply to a fixed-term contract that has expired during the period of the employee's ordinary maternity leave	A person working under a fixed-term contract is classed as an employee for the purposes of EJL 2003. If a person is on a fixed-term contract and they cannot complete the contract due to pregnancy, then the employer will be forced to pay maternity leave, and will have to arrange further temporary cover. This is a heavy burden to impose on employers.	**Policy decision – no amendment.** The sex discrimination consultation proposed that: *"there may be very specific and limited circumstances in which an employer may have a compelling business need to discriminate. A blanket rule against discrimination based on pregnancy could place an unfair burden on some employers. For example, an employer recruiting for a temporary position which requires the employee to be working at a particular time may legitimately want to recruit somebody who will be available for work at that time. The Minister invites views on whether and in what circumstances it may be legitimate to discriminate against an employee or job applicant on the grounds of pregnancy or maternity."* **Amendment not required.** A woman whose fixed-term contract has expired during maternity leave is not entitled to return to work. The right to return applies to an **employee** who returns to work

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				after her statutory maternity leave. The question is not whether the job still exists, but whether the woman is still an employee. Article 55J does not create an artificial right to continue working beyond termination of employment. Article 55F(5) provides that where employment terminates during the ordinary maternity leave period, the maternity leave ends on the date when the employment is terminated. The end of a fixed-term contract constitutes a termination of employment.
Agency contracts	There is also no provision to deal with agency contracts and temporary employees provided under those contracts.	This is an area that warrants further consideration.	This contrasts starkly to the UK, where a there are number of specific protections in place for agency contracts.	**Amendment not required.** Agency contracts are covered by the EJL because agency workers are treated as employees (see Article 1 of the EJL). This contrasts starkly with the UK position, under which agency workers are not usually employees and so do not qualify for maternity, paternity or parental leave, and are specifically excluded from the right to request flexible working. Further consideration will be given to the impact of employment legislation generally on zero-hour contracts (which includes many agency workers) when data on the extent of the use of zero-hour contracts in Jersey is available from the Statistics Unit later this year.
Zero-hours contracts	Workers under a zero-hours contract will be specifically excluded from claiming any of the FFR, as they are not classed as employees under EJL 2003.	This is an area that warrants further consideration.	There may be a way to provide some protection under the DJL 2013.	**Amendment not required.** Zero-hour contracts are not excluded from the EJL (or even defined in that Law). There are some rights that require a contract for at least 8 hours per week (e.g. unfair dismissal), but there is no such threshold for the family-friendly rights, so zero-hour employees **will** be covered, provided that they meet the definition of 'employee' within the EJL. This will depend on the individual circumstances of each case; including, for example,

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				whether mutuality of obligation has been established. The definition of 'employee' in the EJL is wider than in the UK, as it includes those covered under the UK definition of 'worker'. Any extension of employment rights to non-employees would be likely to have implications for employers by removing the flexibility that genuine zero-hours contracts can offer. Further consideration will be given to the impact of employment legislation generally on zero-hour contracts when data on the extent of the use of zero-hour contracts in Jersey is available from the Statistics Unit later this year.