Written evidence submitted by Rachel Crasnow QC, Catherine Casserley and Catherine Meenan, Cloisters Chambers (MRS0510)

INTRODUCTION

Cloisters is a set of barristers specialising in employment, discrimination & equality law.

The Government's response to the Coronavirus (COVID) pandemic has been put together urgently and without an Equality Impact Assessment. In such circumstances we are concerned that the Government has not sufficiently considered the impact of its policies on people with protected characteristics. There are many areas where the Government response is having an unequal, and potentially discriminatory impact on those groups.

Although by no means the only areas of concern, in short summary the issues considered in this submission are:

Section 1 Unequal impact and potentially discriminatory impact on pregnant women in employment.

Section 2 Unequal impact and potentially discriminatory impact on women in employment.

Section 3 Unequal impact and potentially discriminatory impact on disabled people in the provision of goods and services.

The purpose of these submissions is to summarise some areas of concern for the groups we have identified. Further detailed legal analysis is not set out here, and these submissions do not constitute legal advice.

We hope they will be of assistance to the Women and Equalities Committee ("the Committee").

SECTION 1: Pregnancy

1. Pregnant women are protected in law against risks to their health and safety and that of their baby, as well as against unfavourable treatment because they are pregnant.

Management of Health and Safety at Work Regulations 1999 ("MHSWR")

2. Employers have a general duty to assess health and safety risks for all employees whilst at work and, under existing law, must introduce measures to control those risks (Reg 3 MHSWR). Upon a pregnant employee notifying her employer in writing that she is pregnant (Reg 18 MHSWR), specific risks posed to her and/or her unborn baby by virtue of a process, working conditions, or physical, biological or chemical agents, also need to be risk assessed (Reg 16 MHSWR).

3. If measures cannot be taken to remove the risks posed to pregnant employees, employers must take the following steps:

    a. If it is reasonable to do so and would avoid such risks, alter her working conditions or hours of work. (Reg 16(2) MHSWR).
    b. If that is not reasonable, or would not avoid the risk, the employee has a right to be offered to be provided with the alternative work if that is available (s67 Employment Rights Act 1996 ("ERA"))
    c. If that is not possible, employers should suspend the employee from work for so long as is necessary to avoid such risk.

4. References to "risk" in relation to risk from any infectious or contagious disease, refer to workplace risks existing "in addition to" the level to which a new or expectant mother may be expected to be exposed outside the workplace. (Reg 16(4) MHSWR).

The Equality Act 2010 ("EqA 2010")

5. It is unlawful pregnancy discrimination to treat a pregnant worker unfavourably because of her pregnancy (s18(2)(a) EqA 2010).

6. A woman's pregnancy does not have to be the only reason for her treatment, but it does have to be an 'effective cause'. The employer's motive or intention is not relevant when deciding whether there has been unfavourable treatment. There is no defence for treating a pregnant woman unfavourably because of her pregnancy.

Requiring Pregnant Employees to Work in Public-Facing Roles

7. COVID poses a potential threat to the health and safety of pregnant women. This was rightly acknowledged by the Prime Minister in his statement on coronavirus on 16 March 2020 ("the Statement"): *"advice about avoiding all unnecessary social contact, is particularly important for people over 70, for pregnant women and for those with some health conditions*.[1]" This advice does not differentiate between pregnant women in different trimesters of their pregnancy but applies to all pregnant women.

8. As stated above, the MHSWR mandate that pregnant women should be suspended on full pay where a workplace poses additional risk to the health and safety of a pregnant employee, and such risk cannot be removed via alternative working conditions or suitable alternative work. The purpose of this is clear: pregnant women and their unborn babies should not be required to continue to work in unsafe environments, thereby exposing them to danger.

9. COVID is a new disease about which much remains unknown. We do not know to what extent pregnant women are at greater risk. Occupational health advice published by the Royal College of Obstetricians and Gynaecologists for employers and pregnant women during the COVID pandemic[2] ("RCOG Advice) recognises that: "*we cannot give absolute assurance that contracting COVID*

carries no additional risk to pregnant women" (para. 2.2). Yet, RCOG Advice also recommends that pregnant women in their first and second trimesters can, subject to risk assessments, continue to travel to workplaces and work there.

10. In the current climate, healthcare settings are surely beyond doubt unsafe workplaces for pregnant women, given the lack of clarity as to risks. Some pregnant women, however, are still being required to work on the frontline. There is anecdotal evidence that NHS Trusts are quoting the RCOG Advice and telling pregnant healthcare workers that they must continue to attend work during their first and second trimester. A study by the campaigns group Organise quoted in *The Times* found that at least one pregnant member of staff at 43% of UK trusts had reported that they were not allowed to stay at home[3].

11. We believe the NHS should be sending pregnant women to work from home if possible. If that is not possible, they should be suspended on full pay. Otherwise, they are being exposed to potential danger. RCOG Advice should be changed immediately. It differs from government advice and takes unacceptable risks.

12. We ask that the Committee urges Government to issue immediate guidance to ensure that the health and safety of pregnant employees working on the frontline is protected.

Paying Pregnant Employees Statutory Sick Pay ("SSP")

13. The SSP (General) Regulations 1982 (the "SSP Regulations") set out, in short, that SSP is payable by employers to qualifying employees who are off sick for four or more days in a row. SSP is usually paid from the fourth day of absence. Employees can also be deemed incapable of work by, for example, a GP in certain circumstances. On 13 March 2020, the Government amended the SSP Regulations and the circumstances in which SSP could be paid to employees[4]. In short, these changes meant that employees would be deemed incapable of work receive SSP from the first day of any absence if they were:

> (i) isolating himself from other people in such a manner as to prevent infection or contamination with coronavirus disease, *in accordance with guidance published by Public Health England*, … and
>
> (ii) by reason of that isolation is unable to work."[5] 5

14. PHE Guidance indicated that pregnant women should self-distance stringently, but there was nothing to suggest that just because someone was pregnant they were required to isolate. SSP Regulations were amended again on 28 March 2020. A Schedule ("Schedule") was inserted and reference to the PHE Guidance removed to set out the circumstances in which a person was eligible for SSP. Those circumstances covered where a person, or a member of their household, were experiencing symptoms. Again, this did not necessarily require pregnant women

who did not fall into those categories to isolate. The Schedule was amended on 16 April 2020 and a new para 5A added. People eligible for SSP were extended to those who were: "(a) … defined in public health guidance as extremely vulnerable and at very high risk of severe illness from coronavirus because of an underlying health condition…". PHE Guidance, last updated on 17 April 2020, stated that only "*Women who are pregnant with significant heart disease, congenital or acquired" are classified as "clinically extremely vulnerable".*

15. We have heard worrying reports from campaigners and organisations that when the Statement was made, many pregnant women were sent home by their employers and paid SSP[6]. The inconsistency lies in the fact that pregnant employees who are neither experiencing symptoms of COVID or living with someone who is, nor clinically extremely vulnerable, are not eligible for SSP.

16. The correct steps to be taken by employers, as mandated by MHSWR, remain to carry out risk assessments, offer alternative working conditions or an suitable alternative role. If those steps are not possible, they should suspend the pregnant employee on full pay.

17. Many pregnant women were – and continue to be – wrongly paid SSP in circumstances where they should have been suspended on full pay, or in the alternative been paid full pay if the conditions set out in §3-4 above were not met. This is likely unfavourable treatment because of pregnancy, and consequently potentially unlawful discrimination pursuant to s18 EqA 2010. This may also give rise to an Unlawful Deduction from Wages claim (s13 ERA).

18. We refer the Committee to the helpful and detailed Advice[7] obtained by Maternity Action that explores this issue in more detail.

19. We ask the Committee to urge Government to issue guidance to employers to reflect this position: pregnant women should not be on SSP unless they are isolating for other reasons.

<u>Furloughing Pregnant Employees instead of Suspending on Full Pay</u>

20. The Coronavirus Job Retention Scheme ('the Scheme') incentivises employers to 'furlough' employees because of COVID-19 instead of terminating their contract of employment. That way, businesses can claim for 80% of their employee's wages plus any employer National Insurance and pension contributions.

21. On 26 March 2020, HMRC issued guidance updating the Scheme ("The HMRC Guidance")[8], the latest version of which was updated on 23 April. On 15 April and in the meantime, the Treasury published The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction ('the Direction')[9].

22. The Direction sets out at para.6 that in order to be furloughed the first two conditions an employee must meet are:

    a. The employee must be instructed to cease all work in relation to their employment;
    b. The cessation of work must be for a period of at least 21 days.

23. Employers are being required to make difficult decisions that may have legal repercussions about furlough. Take the following example: there is a pregnant employee, and, after a risk assessment, it becomes clear it is not safe for her to undertake her work. There are no suitable alternative roles and she cannot work from home. Can the employer lawfully declare that because there is no work for her to do, he can furlough her rather than medically suspend her on full pay? Is the specific work she cannot do because of her condition distinct from the lack of work due to the pandemic?

24. For employers facing this question, there is an obvious business consideration: there is an incentive for employers to furlough pregnant employees at a cost to the Government, as opposed to suspension on full pay at a cost to them.

25. We believe that if the pregnant employee would be able to work safely but for the pandemic, it may be permissible to offer furlough. However, because of the statutory requirement to suspend *on full pay* where no safe place of work can be provided, the employer should ensure the employee receives full pay by topping up the 80% which the Scheme covers.

26. The justification for this is that if there is no work to do because the workplace poses a risk to health and safety and there are no suitable alternatives, pregnant women should be suspended on full pay. It is our view that suspension for pregnant women in these circumstances is a statutory right and therefore 'trumps' furloughing. By furloughing a pregnant woman and adding a "top up" to ensure full pay, it is less likely that an employer will be subjecting the employee to unfavourable (and unlawful) treatment.

27. If there is work to do and a pregnant woman can, for example, work from home safely, furloughing is not the right solution. She should continue to work. To take work away from a pregnant employee simply *because* she is pregnant (and not, for example, because she has requested to be furloughed), is potentially unlawful pregnancy discrimination. The intention of the employer, however sympathetic, will be irrelevant.

28. The reality on the frontline appears to be that many pregnant employees are struggling to enforce their right to suspension on full pay, and as set out above, some are wrongly being paid SSP. Many pregnant employees are therefore accepting furlough, and requesting to be furloughed, in order to obtain a better outcome than SSP: it is the 'least bad option'.

29. We ask the Committee to urge Government to issue guidance making it clear that if pregnancy is the reason why the worker is not going into work, then furloughing

is unlikely to be the solution rather than suspension on full pay.

Waiting for SSP to 'expire' instead of (1) Suspension or (2) Furloughing

30. The HMRC Guidance sets out that: "Your employer can furlough you at any time- if they do, you will no longer receive sick pay, but should be treated as any other furloughed employee". There is no suggestion that an employee's entitlement to SSP precludes them from being furloughed.
31. The Direction contradicts the HMRC Guidance. The Direction sets out (at para 6.3) in summary that if the employee is *entitled* to SSP at the time the employer's instruction to cease all work is given, the employee cannot be furloughed until entitlement to SSP has ended.

32. The general consensus is that the Direction, as a quasi-statutory instrument, will take precedence over the Guidance. There are many employers, therefore, who may be labouring under the misapprehension that those pregnant women they sent home on 16 March and paid SSP will have to wait for that to expire before furloughing them. However, given many of those women were not eligible for SSP, they can be furloughed if necessary and otherwise eligible.

33. There is a real risk that may pregnant women are continuing to be wrongly paid SSP instead of being 1) medically suspended on full pay or 2) furloughed. This constitutes potentially unlawful pregnancy discrimination, as well as a potential claim for unlawful deduction from wages.

34. We ask the Committee to urge Government to provide guidance clarifying the up to date position and making it clear that furloughing can be back-dated even if SSP was wrongly commenced.

The Impact of Furloughing on Statutory Maternity Pay ("SMP") – only recently clarified

35. One of the conditions of receiving SMP is, in that the pregnant woman must earn net weekly earnings ("NWE") of at least £120 gross (as of 6 April 2020). There has been recent clarification[10]10 that the calculation of NWE for the purposes of SMP (and pay for a various other statutory family related leave) is based on pre-furlough pay.

36. Prior to that clarification, there was concern that SMP was to be calculated on furlough pay i.e. 80% of NWE. This would have meant that some furloughed pregnant women would receive less SMP, and for others it would render them ineligible for SMP if 80% of NWE took them below the £120 threshold. HMRC Guidance seemed to confirm this: "You should start maternity leave as normal. If your earnings have reduced because you were put on furlough or off sick before your maternity leave started, this may affect your Statutory Maternity Pay."

37. We welcome the clarification that the average earning period for the purpose of calculating SMP will reflect normal earnings rather than pay affected by COVID absences or furloughing. The complexity of this area of law means it is vital workers have very clear guidance and information sheets should be given to GPs,

midwives, and advice centres etc.

Making Furloughed Pregnant Women Redundant

38. The Scheme has been set up to provide help for employers whose 'business is severely affected by coronavirus'. An unfortunate impact of COVID may be large-scale redundancies if the Scheme does not continue and further offer businesses the costs savings needed. More speculatively, businesses may make decisions after this pandemic that they can continue to function properly and more cheaply without furloughed workers i.e. they don't need so many employees to continue to work. Many furloughed workers are likely to find themselves exposed to a risk of redundancy.

39. Large scale redundancies will hit all employees affected hard, but pregnant workers might be disproportionately selected for furlough and later redundancy. Would this still be indirect sex discrimination where pregnant employees consented to or even requested furlough? Where consent was not freely given because the alternative was a redundancy dismissal, it may not amount to a successful justification in such a claim. Hence, employers should be reminded of the need to avoid using pregnancy as any kind of selection criteria, directly or indirectly.

40. This is not to say that redundancy will never be appropriate, but employers need to be reminded of the priority accorded to pregnant women by law for other available roles (under Regulation 10 and 20(1)(b) of The Maternity and Parental Leave etc Regulations 1999) and that selection for redundancy on grounds of pregnancy is unlawful.

SECTION 2: SEX

41. Schools will remain closed until further notice, except for children of critical workers and vulnerable children who are encouraged to attend where it is appropriate for them to do so[11]. Almost all younger students will require some form of supervision from parents or carers ("Carers"), many of whom will simultaneously be attempting to work from home.

42. There was hopeful speculation that given both Carers are more likely to be working from home, the burden of childcare might be shared more equally between the sexes. However, early data gathered by researchers from the universities of Cambridge, Oxford and Zurich indicates that women continue to bear the brunt of childcare: from 9 –14 April, during a typical working day, men in the UK spend under 2.5 hours on childcare, and do under two hours of home-schooling. Women in the UK, however, spend over 3.5 hours on childcare, and do over two hours of home-schooling[12]. Childcare seems to continue to fall to women as the primary carers, at least according to this research.

Requiring Women to take Leave for Childcare

43. What is an employer to do when a working Carer, for whom there remains home-

based work, is not able to work because of school closures and childcare responsibilities? If a Carer cannot work at evenings or weekends because, for example, their partner is a key worker at a hospital on shifts, the natural recourse might be for them to apply to take annual leave, since that is the key form of non-sickness related paid leave.

44. Other forms of leave are, at first glance, less advantageous: time off to look after a dependent is unpaid leave unless the contract says otherwise.

45. Women in this situation might ask why they should be required to use up precious annual leave for childcare when they will need a holiday later in the year just as much as their colleagues without childcare responsibilities. Their inability to work is, after all, involuntary. It may be indirectly discriminatory to require Carers to take annual leave in such circumstances since more women than men carry the primary burden of childcare and other domestic responsibilities.

46. On one hand, the employer could say they were being generous by not insisting on the female employee having to take unpaid leave for dependents. On the other, the fact of the offer of annual leave could suggest that funds exist to suspend on full pay, which ought to have been offered in the first place. Much will depend on the options open to the particular employer at this extraordinary time.

47. During this economic downturn, cost is more likely than ever to be proffered by employers as a justification for potentially discriminatory treatment. There is ongoing legal debate about the legitimacy of reliance on costs as justification for discrimination. The 'cost plus' principle, i.e. that cost can used as a justification alongside other factors to justify indirect discrimination, has been endorsed in a number of cases by the Employment Appeals Tribunal. More recently, this has come into question. If any indirect discrimination claims do arise out of treatment of employees during COVID, it seems likely that the 'costs' justification will be subject to judicial development.

48. It will likely not amount to a breach of contract for an employer to instruct workers who are not on sick leave to take statutory annual leave if due notice is given (although the wording of contracts should be carefully checked).

<u>Furloughing Employees for Childcare</u>

49. In order to furlough employees under the Scheme, the Direction sets out that instruction to cease work must be "by reason of circumstances arising as a result of coronavirus or coronavirus disease" (para 6.1). Children being at home because of school closures seems to fall comfortably into "circumstances as a result of coronavirus". If otherwise eligible, it seems that employees can be furloughed to enable them to look after their children.

50. However, it would be a highly regrettable outcome if, during a period where we could have worked towards sharing childcare more equally as both Carers are more likely working from home, women ended up being furloughed to enable them to look after children.

51. If proportionately more women than men are furloughed, there may be wide-ranging and unknowable unequal impact regarding possible redundancies. The same applies more generally in terms of promotion and development. Guidance needs to remind employers not to make assumptions as to who will want to be furloughed, particularly in terms of gender divide.

Flexible Working and Childcare

52. Eligible Carers of dependent children have a statutory right to request flexible working set out in s80F ERA. There is nothing to stop an employee requesting a temporary change to work flexibly. Therefore, as long as an employee has worked continuously for 26 weeks and has not made a flexible working request in the previous 12 months, they have a statutory right to make temporary flexible working requests until, say, schools reopen.

53. The overriding requirement is for the employer to deal with a request for flexible working in a reasonable manner (s80G (1) ERA). Employers can only refuse the application on one or more specified grounds (s80G(2)(i)-(ix) ERA), including the burden of additional costs, detrimental effect on ability to meet customer demand, and inability to re-organise work among existing staff.

54. For members of staff who are not eligible under the statutory scheme to make a request for flexible working, there is nothing to prevent them from making informal flexible working requests.
55. Employers should be aware of potential discriminatory treatment that may arise from their response. For example, if a man's request for flexible working to provide childcare is not treated as seriously as it would be if the request came from a woman, it is potential sex discrimination for which there is no justification.

56. Issues of indirect discrimination may also arise. For example, a policy requiring that a job be performed on a 9am - 5pm full-time basis may have a disproportionate impact on women because of their newfound childcare responsibilities during the day. Whether an employer could justify the treatment would very much depend on the woman's role and office resource, as well as other factors. In the current context where many other employees may be working irregular hours in order to provide childcare, and where remote working is enabling more flexibility in methods and patterns of working than ever, it may prove more difficult for employers to justify a refusal of a request for flexible working.

57. Employees should ensure that, if they do not want to be furloughed to look after children, both male and female employees should make requests for flexible working without fearing the repercussions. We ask the Committee to urge Government to encourage afresh employers to seriously consider requests for flexible working. This should particularly be the case where employers perceive that the burden of childcare falls on female employees' shoulders in particular workplaces. This may already be happening, but we urge Government to remind employers that advancements in technology are aiding remote working measures to meet our changing work expectations at this difficult time.

58. We refer the Committee to the Cloisters' articles which detail various aspects of our response at https://www.cloisters.com/category/covid-19/ as well as other discriminatory implications of the pandemic such as in relation to PPE.

SECTION 3: DISABILITY

Government communications strategy

59. When the Prime Minister first began his briefings, communicating critical information to the public including about the "lockdown", and subsequently about the Scheme, there was no access whatsoever to a BSL interpreter. This meant that the 77,000 Deaf BSL users in England and Wales[13] had no access to information at this critical time. It was only after some weeks that the BBC began to have BSL interpreters on its broadcasts – and this is only on the news channel. As the Committee may be aware, there is an obligation on those providing a service – and on public authorities exercising a function – to make reasonable adjustments (in accordance with sections 20 and 21 of EqA 2010) where disabled people would otherwise be at a substantial disadvantage from a Practice, Criterion or Practice; this might involve the provision of an auxiliary aid or service, such as a BLS interpreter.

60. In addition, the letters that were sent out to every household in the UK, re-enforcing the stay at home message was sent in print, with no attempt it seems to comply, again, with the duty to make adjustments and to ensure that disabled people who are unable to access print could access the messages contained in the communication. This sends a message to disabled people, at a time of high anxiety, that they are not to be included in these preventative measures.

Impact upon disabled people of supermarket priority policies

61. Disabled people have had considerable difficulty in accessing services from supermarkets. Members of chambers are working with solicitors (in particular, those at Fry Law) in representing individuals who have been unable to (a) access online deliveries despite the fact that they are shielding; (b) unable to access online deliveries despite the fact that they are unable to shop in person and require the service; (c) obtain shopping as a result of visual impairment and inability to go round a shop unaided, at a time when guided assistance cannot be supplied because of social distancing. These are just a sample of the difficulties that disabled people are facing. Service providers have an obligation to make reasonable adjustments in accordance with section 20/21 of the EqA 2010.

Impact upon disabled people of guidance on hospital treatment and in particular ICU care

62. There are significant concerns regarding the guidance which has been put out by NICE and the BMA. The Committee will doubtless be aware of the letter produced by organisations of disabled people (to which members of Cloisters

Chambers were signatories) regarding the principles by which disabled peoples' treatment should be considered[14]. There are significant concerns regarding the lawfulness of the guidance. An article has been written by two members of Chambers detailing the concerns that we have, and the legal issues raised by the guidance[15]. Though further articles addressing disability and age in more depth will be produced after the deadline for submissions to the Committee, we will nevertheless forward these in case they should be of further assistance in examining this very difficult area.

Impact on disabled people of lack of PPE

63. Both disabled people as those being the subject of care and as employers have as we understand had difficulty in getting access to any PPE (Catherine Casserley of Cloisters is a participant with Fry Law in Disability Rights TV which has had calls from disabled people advising of this). This puts both disabled people and their PAs/ carers, front line workers, at risk of the virus. It is potentially negligent and risks breaching rights under Health and Safety at Work legislation.

64. Lastly, the Committee will be aware that the Coronavirus Act 2020 ("the Coronavirus Act") gave local authorities the ability to derogate in effect from certain of their obligations under the Care Act 2014. It appears that 6 local authorities have now done this. This will have considerable implications for disabled people for some time to come. It means that local authorities have no obligations to carry out an assessment of need, for example. It is not clear, however, that such authorities have, before determining to rely on the provisions in the Coronavirus Act, gone through the process set out in the Government's Easements guidance, nor complied with their obligations under s.149 EqA 2010. We would suggest that the Committee consider whether those authorities have complied with the guidance before taking such a draconian step.

September 2020

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[1] PM statement on coronavirus: 16 March 202016 March 2020 (Transcript of the speech, exactly as it was delivered) https://www.gov.uk/government/speeches/pm-statement-on-coronavirus-16-march-2020

[2] https://www.rcog.org.uk/globalassets/documents/guidelines/2020-04-21-occupational-health-advice-for-employers-and-pregnant- women.pdf

[3] https://www.thetimes.co.uk/article/coronavirus-keep-working-despite-the-risks-pregnant-nurses-and-doctors-told-gvlxtbmqf

[4] Statutory Sick Pay (General) (Coronavirus Amendment) Regulations 2020.

[5] (Reg 2(a)(i)(c) Statutory Sick Pay (General) (Coronavirus Amendment) Regulations 2020)

[6] https://maternityaction.org.uk/wp-content/uploads/Ford-Monaghan-Advice-on-SSP-CJRS-21-04-20.pdf

[7] Statutory Sick Pay, The Coronavirus Job Retention Scheme And Pregnant Workers, Advice, Micahel Ford QC and Karon Monahgan QC, 21 April 2020 https://maternityaction.org.uk/wp-content/uploads/Ford-Monaghan-Advice-on-SSP-CJRS-21-04-20.pdf

[8] https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme

[9] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879484/200414_CJRS_DIRECTION_-_33_FINAL_Signed.pdf

[10] http://www.legislation.gov.uk/uksi/2020/450/pdfs/uksi_20200450_en.pdf
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