

Written evidence submitted by Professor Nicole Busby and Dr Catriona Cannon to the Business and Trade Committee, 6 December 2024

1. [Nicole Busby](#) is a Professor in Human Rights Equality and Justice and [Catriona Cannon](#) is a Lecturer in Equality Law in the School of Law at the University of Glasgow. Both are experts in equality law. Nicole's areas of interest include sex discrimination, the reconciliation of paid work and unpaid care, the protection of social and economic rights and access to justice. Catriona's main interests are religion or belief equality, sex discrimination and the preferred regulatory methods for achieving transformative change. Catriona is a member of the research team for the [Women in Law Project](#). She is a member of the Scottish Discrimination Lawyers' Association and sits on the Law Society of Scotland's Employment Law and Equality Law sub-committees. She is also a former practising solicitor, specialising in employment law.
2. Given our research and practical expertise in the relevant fields and our experience of engaging with civil society organisations and providing guidance to policymakers, we believe that we can, by submitting evidence which focuses on women's employment and gender equality, provide value to the Public Bill Committee's consideration of the Employment Rights Bill.
3. We would be happy to provide oral evidence to the Committee if it is of interest.

Summary

4. This submission provides evidence on 7 questions posed in the call for evidence.
5. The provisions in the Employment Rights Bill (the 'Bill') on zero hours workers, flexible working, statutory sick pay, entitlement to leave, protection from harassment, dismissal, duties of employers relating to action plans, and adult social care offer enhanced protections to workers, particularly women. In our view some of these provisions could go further to improve gender equality in the workplace. In particular, we recommend an increase in the paternity leave period, an element of income-related pay for paternity and parental leave, increased flexibility in the patterns of permitted parental leave, a presumption in favour of flexible working, and enforcement action for breach by employer of a published gender equality action plan.
6. The omissions from the Bill of enhanced protection for carers and clarification on the ability to plead claims of multiple discrimination under the Equality Act 2010 (the 'EA') weaken workers' protections. We recommend that the Government introduce amendments to the EA to implement a 'right to care' and provide legislative clarity on the ability to plead claims of multiple discrimination under the existing framework.
7. The time limits for pleading employment and equality claims and the lack of legal aid for representation at the employment tribunal hinder the ability of employees to adequately enforce the new rights afforded by the Bill. We recommend that the time limit for relevant claims be increased to 6 months and that the availability of legal aid representation in the employment tribunal, at least in discrimination complaints is improved.
8. Overall, the provisions of the Bill will have a positive impact on staff retention and UK employment rates and that an outcome of this will be an increase to household income.

Protecting Workers

Context

The gender pay gap is currently 11.3% (mean hourly) for full time workers and 13.7% for all workers (Fawcett Society 2024). This is largely attributable to the overrepresentation of women in low paid, precarious work because of the need to balance unpaid caring responsibilities with paid work. Women experience the care penalty throughout their lives and are more likely than men to endure pension poverty which, as well as being gendered, is also racialised and more likely to affect disabled women (Age UK 2021).

Does the Employment Rights Bill adequately safeguard workers it seeks to protect?

Entitlements to Leave

9. The removal of the qualifying period of employment for paternity leave (s12) addresses the current anomaly whereby maternity leave is a 'day-one' right, yet paternity leave is only eligible to those who have completed a qualifying period of service. This has the practical impact of preventing those fathers with less than 6 months' qualifying service at the relevant time from taking leave in the first year following a child's birth. It, further, serves to reinforce the woman's role as primary caregiver and the 'absent' or 'involved' (but not 'active') fatherhood ideology (Busby and Weldon Jones, 2019). Removing the qualifying period for paternity leave will facilitate leave for a greater number of fathers to care. It will, moreover, support a model of family leave provision based on shared work and care responsibility. It will not, however, by itself, challenge the gendered stereotypes which are reinforced by the UK's current family leave provision. Paternity leave entitlement is to a mere 2 weeks compared to a maternity leave entitlement of 52 weeks. The shared parental leave scheme, introduced in 2015, has failed in its goal to encourage more fathers to care, with only 5% of eligible fathers having taken it up (BEIS/DBT, 2023). Whilst the removal of the qualifying period for paternity leave is to be welcomed, a more radical re-thinking of family leave provision in the UK is needed if a model of shared work and family responsibility is to be achieved (Mitchell, 2023). Lessons could be learnt from the Nordic jurisdictions which afford mothers and fathers non-transferable periods of leave. At the very least, consideration should be given to extending the period of paternity leave available to eligible employees and providing for an initial period of income-related pay (akin to statutory maternity pay). Further, consideration ought also to be given to removing the qualifying period of employment for shared parental leave, there being no sound rationale for retaining this if both maternity leave and paternity leave are to be 'day one' rights.
10. The removal of the qualifying period for parental leave is also welcome: the current one-year qualifying period provides a barrier to leave for all parents with less than 1 year's continuous service. Removal of the qualifying period might also lead to more fathers taking leave in the first year after birth, mitigating the impact of the 2-week limit on paternity leave. That said, there are limitations to the right to take parental leave: only 4 weeks can be taken in any one year, leave must normally be taken in blocks of one week, the leave is unpaid, and the leave request can be postponed by the employer for business reasons (James, 2016: 482). Whilst removing the qualifying period of leave is a step in the right direction, a parental leave system which incorporates more flexibility in relation to patterns of leave as well as some income-related pay would have a bigger impact on addressing the inequalities experienced by women who continue to be overrepresented as primary carers.
11. The Bill's amendment to the flexible working regime to permit employers to refuse a request for flexible working only where reasonable to do so (and relying on one of the listed grounds) (s 7) offers an additional layer of protection for all employees and, particularly, those (predominantly women) workers who need to combine work with family. At present, employers have wide discretion to refuse a request to work flexibly provided they follow the relevant procedure, consider the request in a reasonable manner and fit their reason for refusal into one of a generous list of grounds (s80F-80I, Employment Rights Act 1996). A requirement that any request must not be refused unreasonably enhances worker protection. However, the extent to which it does so will depend on how the reasonableness standard is interpreted by the courts and tribunals: if it adopts the reasonableness standard used in unfair dismissal cases (band of reasonable responses), the protection it affords workers will be limited. Whilst

the Bill provision on flexible working will benefit workers and will contribute to improved work / family balance (which in turn should impact positively on gender equality), a more radical amendment which affords workers the *right* to flexible working ought to be given consideration (Fawcett Society, 2023). Such a ‘right’ could be implemented by way of a presumption of flexible working which is capable of being overturned where necessary for business reasons. A ‘right’ to flexible working implemented in this way would engender a change in culture around flexible working, encouraging shared family and work responsibility.

12. The Bill provisions which would permit Regulations to be introduced in respect of dismissals after a period of pregnancy or statutory family leave offer potential to enhance the protections afforded to women but more detail on the scope of the permitted Regulations is necessary to assess the extent of the potential benefit. At present, Regulations apply only on redundancy after a period of pregnancy or statutory family leave and provide that the relevant employee is first offered any suitable alternative employment available. It is unclear what protections the Regulations envisaged by the Bill will afford relevant employees in the case of dismissals for reasons other than redundancy.

Harassment (Sexual Harassment and Third-Party Harassment)

13. The Bill’s provision which requires employers to take ‘all’ reasonable steps to protect their employees from sexual harassment is to be welcomed. There is no sound rationale for the current position whereby employers need to demonstrate they took ‘all’ reasonable steps to avoid vicarious liability for sexual harassment of their employees but only ‘reasonable steps’ to discharge the positive duty to prevent the harassment in the first place. See Busby, 2024.
14. By introducing employer liability for third-party harassment, the Bill also serves to address the current anomaly in the legislation whereby employers are under a duty to take reasonable steps to prevent sexual harassment of employees by third parties, but employees have no recourse to the tribunals or courts in the event of third-party sexual harassment (and therefore no remedy for breach of the duty as it applies to sexual harassment by third parties)
15. It is noted that the Bill extends the protections against third-party harassment to all protected characteristics in the Equality Act 2010 and does not, unlike the previous legislative provision for third-party harassment (s40(2)-(4) EA) require there to be two previous occasions of third-party harassment before action against the employer can be taken. This offers significantly more protection for workers than the current position which, since *Unite the Union v Nailard* [2018] EWCA Civ 203 and *Bessong v Pennine Care* UKEAT/0247/18/JOJ only permits claims arising from third-party harassment where the complaint concerns unwanted conduct by the employer which itself is related to the protected characteristic in issue.
16. The Bill’s provision to make a report of sexual harassment a qualifying disclosure will improve reporting of sexual harassment which remains low due to fear of repercussions and the use of non-disclosure agreements. See Busby, 2024.

Zero hours contracts / Statutory sick pay / Unfair dismissal

17. The Bill’s provisions which refer to: (i) the attainment of guaranteed hours for those on zero-hours contracts; (ii) the removal of the waiting period and minimum threshold for statutory sick pay; and making unfair dismissal a day 1 right, all seek to improve the protections afforded to those engaged in precarious work. Women are more likely to be engaged in precarious employment, with many engaged on zero hours and part-time or fixed term contracts, with broken periods of service. It follows that these provisions have the indirect potential to improve gender equality in the workplace.

18. Adult Social Care Negotiating Body

As the social care sector is predominately comprised of female workers (3.8 million women compared to 1.1 million men (Statista, 2024)), the Bill provision which permits Regulations to be made to create an Adult Social

Care Negotiating Body with a remit over, for example, remuneration and terms and conditions, could offer additional protection to the many women who work in this traditionally low-paid sector and increase the value attached to their work.

19. Action plans

The Bill provision which permits Regulations to be made to require employers to produce and publish equality action plans which address matters relating to gender equality (including the gender pay gap and support for women going through menopause) is welcome insofar as it requires employers to focus their attention on actions which they can take to improve gender equality. This requires more from employers than, for example, the Equality Act 2010 (Gender Pay Gap) Regulations 2017, which require only reporting of the gender pay gap itself, and which do not require the employer to stipulate what actions it intends to take, if any, to address gaps identified. It is also welcome that the Regulations can make non-compliance an offence. However, to achieve meaningful and positive change, it will be necessary for the Regulations to provide for enforcement action in the event that an employer (without reasonable excuse) does not comply with their published action plan. This enforcement role could be undertaken by the Equality and Human Rights Commission (EHRC), but it is essential that the EHRC is properly resourced to undertake it.

Are there areas of employment law not covered by the Bill that weaken workers' protections?

20. The Bill does not address adequately the position of carers. Care relationships are integral to society and to the economy, yet there is very little attention paid to such relationships out-with the provisions which permit leave to be taken to care for children (mainly in the first year following birth). The introduction last year of one week's unpaid carers' leave does little to accommodate the needs of the caring population, who are predominately female. A more radical proposal would be to introduce the status of carer as a protected characteristic under the EA or to introduce a duty of reasonable accommodation to alleviate disadvantage in the workplace experienced by those undertaking care roles (Busby, 2011).
21. The Bill does not address intersectional discrimination. It is understood that the Government intends to revisit s14 of the EA, which – if brought into force – would prohibit direct discrimination on grounds of two protected characteristics in combination. Whilst we do not advocate for s14 in its current form, we do regard legislative clarity on workers' ability to claim redress for multiple discrimination under the current legislative framework as beneficial. See Cannon, 2023.

Can the measures in the Bill be adequately enforced? What are the barriers to setting up a Single Enforcement Body (Fair Work Agency) and how can these challenges be overcome?

22. We consider that a significant barrier to enforcement is the 3-month time limit which applies to most employment and equality complaints. Complainants, particularly, of discrimination and harassment, are more likely to experience difficulty in seeking advice and completing a claim form in light of the traumatising effect of their experiences (GEO, 2021: 4.4). We consider a 6-month time limit is preferable and suitably balances the interests of workers and the interests of employers. It would also bring employment, and equality claims into line with the relevant limitation period for equal pay claims.
23. Legal aid for advice and/or representation in respect of discrimination complaints is available only in very limited circumstances so that the vast majority of potential claimants are unable to access it (EHRC, 2019). This is a significant barrier to workers' enforcement of rights.
24. Careful consideration will need to be given to how the any new Single Enforcement Body (Fair Work Agency) should operate alongside the enforcement powers of the EHRC. It will also be important that any new Single Enforcement Body is properly resourced to undertake its role.

Impact on Business

What impact will these measures have on staff retention, hiring practices, probationary periods and wages?

25. We anticipate that the Bill provisions will, overall, have a positive impact on staff retention rates. In particular, the potential improvements to gender equality in the workplace (discussed above) may facilitate the retention of female employees.

What impact will strengthen protections, such as day one rights, have on the hiring practices of businesses, UK employment rates and UK investment rates?

26. As above, we anticipate that the ERA Bill provisions will have a positive impact on staff retention (and therefore UK employment) rates.

Economic Growth and Wealth Creation

How will the Plan to Make Work Pay impact: Employment levels / household income?

27. As noted above, we anticipate that the ERA Bill provisions will have a positive impact on staff retention (and therefore UK employment) rates. A corollary of this will be higher levels of household income.

What solutions or actions are required by Government, businesses and workers to effectively support the labour market while boosting productivity and protecting workers' rights?

28. We refer below to our recommendations.

Recommendations

29. Given the gender pay and pension gaps arising in large part due to the predominance of women in caring roles, the Government should
- a. increase the amount of paternity leave to which eligible workers are entitled.
 - b. increase flexibility in the leave patterns permitted for parental leave and restrict the power of employers to postpone requests
 - c. introduce income related pay for paternity leave and parental leave
 - d. remove the qualifying period for shared parental leave
 - e. introduce a right to flexible working (through the application of a presumption that work can be performed flexibly)
 - f. implement a 'a right to care' through amendments to the EA

30. Given the importance of action for change, the Government should provide that Regulations introducing mandatory equality action plans on gender equality include an enforcement process for non-compliance (without reasonable excuse) with actions in published plans.
31. Given the lack of any express right in the EA to plead an intersectional discrimination complaint, the Government should provide clarity in the EA that claims *can* be pled under the EA on the basis of discrimination or harassment because of/related to two or more characteristics in combination.
32. Given the barriers to enforcement of rights presented by strict time limits and limited legal aid for employment tribunal representation, the Government should increase the time limit for employment and equality claims to 6 months and enhance the availability of legal aid for representation in discrimination complaints.
33. Finally, it will be important in informing law and policy developments in this area that the Government undertake detailed equality impact assessments in relation to each of the proposals in the Bill and consult with all relevant stakeholder groups.

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