Written evidence submitted by Maternity Action (MRS0183)

Introduction

1. Maternity Action welcomes the opportunity to submit evidence to the Women & Equalities Committee's inquiry on the Impact of Coronavirus on People with Protected Characteristics. We deliver free advice on employment rights, relevant social security benefits and access to healthcare, to pregnant women and new parents through our telephone helplines. And we undertake research, policy and influencing work to protect and strengthen maternity rights and improve the health and wellbeing of all pregnant women, new mothers and their partners.

2. It is clear from the calls to our advice lines since early March that pregnant women and new parents in the UK workforce have faced extraordinary financial and other pressure as a result of COVID19, and that many have been further disadvantaged by a lack of clear governmental guidance to employers, a failure to pay proper regard to the specific circumstances of pregnant women and new parents in the design of the Coronavirus Job Retention Scheme (CJRS) and Self-Employment Income Support Scheme (SEISS), and a related failure to adapt existing Regulations to ameliorate the impact of lockdown on the most vulnerable pregnant women and new mothers.

3. In this submission, we focus on five specific issues, the first three of which require *immediate* action by Government:

- The impact of the Government's failure to deliver unambiguous advice to employers on their legal obligations (under existing health & safety law) to pregnant employees;
- The impact of the Government's failure to adapt the Universal Credit Regulations 2013 to ameliorate the impact of lockdown on low-income pregnant women and new mothers;
- The impact of the NHS overseas visitors charging regime and the NRPF rule on pregnant migrants and asylum-seekers;
- The case for stronger legal protection against unfair redundancy for pregnant women and new mothers; and
- The case for an extension of the employment tribunal time limit.

Pregnant women in the workforce: COVID19-related advice to employers

4. On 16 March, at a televised Downing Street press conference, the Prime Minister and the Chief Medical Officer (CMO) announced that pregnant women are classed as vulnerable and should effectively self-isolate for 12 weeks, starting that weekend. And this 'vulnerability' of pregnant women was confirmed in the *Health Protection (Coronavirus, Restrictions) (England) Regulations 2020*, SI 350, that came into force on 26 March. Regrettably, however, this very public advice was not followed up with any guidance to employers on how to treat pregnant employees.

5. It is evident from calls to our helplines that, in the absence of guidance from Government, some employers have treated the clinical guidance produced by the Royal College of Obstetricians and Gynaecologists (RCOG) as *de facto* official guidance. And the Secretary of State for Health & Social Care referred only to this

RCOG guidance at the Health & Social Care Select Committee evidence session on 17 April. However, the RCOG guidance is *not* Government guidance and is concerned only with *clinical* issues, not the legal obligations of employers or the rights of pregnant employees. The RCOG occupational health guidance of 22 April states:

> "Neither the RCOG nor the Faculty of Occupational Medicine are trade unions, and it is not within either's remit to advise healthcare professionals on employment rights …This guidance aims to provide employers and pregnant women with information and available clinical evidence on the risks of continuing to work during the COVID19 pandemic."

6. This lack of follow through by ministers in relation to the Prime Minister's own very public advice, and a complete abdication of responsibility on the part of the Health & Safety Executive, is deeply unfortunate.

7. For, since 16 March, our advice lines have been swamped by calls from extremely distressed pregnant women, most of them working in health and social care, whose employers are insisting that they continue to attend work in public-facing roles, especially if they are less than 28 weeks pregnant (the unhelpful distinction made in the RCOG guidance). And many of these women have been told that they will have to take sick leave, paid holiday or unpaid leave if they feel unsafe to attend work.

8. Indeed, it is clear that, following the Prime Minister's announcement on 16 March, many pregnant workers were sent home on sick pay or unpaid leave, in breach of existing health & safety law (which provides that, if a pregnant employee cannot be provided with alternative safe work or work from home, she should be suspended *on full pay*). And, since the Chancellor's subsequent announcement of the Coronavirus Job Retention Scheme (CJRS), many of these pregnant women have been kept on Statutory Sick Pay (just £95.85 per week), while some or all of their fellow employees have been placed on furlough, on 80% of their normal pay.

9. This not only puts employers at risk of employment tribunal claims for unlawful deduction of wages and discrimination, but leaves women with a substantial reduction in income now, adding to financial pressures at a time when family budgets are already under stress from a new baby. Wrongly placing women on sick pay or unpaid leave can also leave them ineligible for Statutory Maternity Pay (SMP) later on, which in turn can lead to reduced access to Universal Credit.

10. Due to the different treatment of Maternity Allowance and SMP in the calculation of Universal Credit awards, women who fail to qualify for SMP and end up on Maternity Allowance can be more than £4,100 worse off over 39 weeks than new mothers in similar circumstances who *do* qualify for SMP. We return to this issue below.

11. Furthermore, while the CJRS explicitly covers "employees that need to look after children", there is no mention of pregnant women in the CJRS Guidance or Treasury Direction to HMRC. And it is clear from calls to our advice lines that this has led to employers refusing to furlough pregnant employees who wish to follow the Prime Minister and CMO's advice of 16 March and stay at home, on the entirely spurious

ground that ‘the furlough scheme is only for businesses like pubs and restaurants that have had to close *completely* under lockdown’.

> **Caller A** works in the kitchen of a (private sector) care home, and was 19 weeks pregnant when sent home on Statutory Sick Pay (SSP) on 17 March, the day after the Prime Minister and CMO announced that pregnant women are vulnerable. A few days later, her employer told her by telephone that she was only entitled to SSP for two weeks, and would then need to return to work or take *unpaid* leave. She asked about being furloughed, but was told the CJRS does not apply to workplaces that are still open.
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> We advised the caller that she should be suspended on full pay, as she had not been offered suitable alternative work, and that the care home could choose to furlough her under the CJRS.
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> **Caller B** works for a large national employment agency and had a six-month placement until June 2020. She was 30 weeks pregnant when, a few days after the Prime Minister and CMO’s announcement on 16 March, the (public sector) hirer terminated her placement. The agency then said that they had no obligation to provide sick pay, maternity pay, suitable alternative work, or suspension on full pay.
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> We advised the caller that she had met the qualifying conditions for Statutory Maternity Pay, which the agency must pay and reclaim from HMRC. Also, an agency is obliged to offer an agency worker with at least 12 weeks continuous service suitable alternative work or, if no suitable alternative work is available, suspension on full pay for as long as her placement would have lasted. It is also open to the agency to furlough her under the CJRS, as she was on their payroll at the relevant time.
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> **Caller C** works on the shop floor of a major supermarket, and was 16 weeks pregnant when sent home on SSP on 17 March; she also has asthma. A few days later, her employer told her by telephone that there is no suitable alternative work for her and, as she is less than 28 weeks pregnant, she should return to work.
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> We advised the caller that she should be suspended on full pay, as the employer was unable to offer her safe alternative work that complied with social distancing.

12. We wrote to the Minister for Women & Equalities, and other ministers, about these issues on 7 April, having previously written to the Chancellor and Secretary of State for Work & Pensions on 17 and 30 March. And, on 17 April, we wrote again to the Chancellor, noting a conflict between the CJRS Guidance and the Treasury Direction to HMRC published on 15 April, as they relate to pregnant employees. In that letter, we noted that we were seeking formal legal advice on this point.

13. This formal Advice, obtained from Michael Ford QC (Old Square Chambers) and Karon Monaghan QC (Matrix Chambers) on 21 April, concludes that:

> "There is an apparent conflict between the [CJRS] Direction and Guidance in respect of sick workers:
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> According to §6.3 of the Direction, a worker is not entitled to furloughing 'Where SSP is payable or liable to be payable (whether or not a claim to SSP is made)' until the original SSP certificate has expired. Where SSP is not payable, then an employer may furlough an employee under CJRS where the conditions for furloughing are otherwise met. In the case of the women with which this Advice is concerned, they were not furloughed and nor were they entitled to SSP. They were, then, always entitled to their full pay.
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> It seems many employers may wrongly have assumed women were eligible for SSP. By the same token, many may still consider that pregnant workers are not eligible for furloughing. It is sensible, we consider, that the correct legal position should be clarified as soon as is practicable: pregnant women should not be paid SSP if they are sent home unless they are eligible under the SSP Regulations (which few will be, absent an underlying or separate health condition); such workers, if suspended under a contractual power, should be paid full pay; and pregnant workers are eligible for furloughing and are not excluded by §6.3 of the Direction."

14. On 21 April, we wrote to both the Chancellor and the First Secretary of State, Dominic Raab, enclosing this formal legal Advice and urging that the CJRS Direction and Guidance be amended to make it clear to employers that, if a pregnant employee cannot be provided with alternative safe work or work from home, she should be suspended on full pay, or furloughed under the CJRS. As of 29 April, we have not received any response from ministers or officials, and the Direction and Guidance have not been amended.

Access to Universal Credit

15. Under the *Universal Credit Regulations 2013*, Maternity Allowance is treated as 'unearned income' and is deducted pound for pound from any Universal Credit award, whereas SMP (and also Statutory Sick Pay) is treated as 'earnings' and is largely disregarded under the Work Allowance and 63% taper. This inequitable treatment of Maternity Allowance can result in women losing out on Universal Credit altogether, leaving them more than £4,100 worse off over 39 weeks of maternity leave than women in similar circumstances on SMP.

16. In 2019, more than half of the some 60,000 women granted Maternity Allowance also applied for Universal Credit, and in the current circumstances the number of women on Maternity Allowance is likely to increase substantially. This is not least because, as noted above, many pregnant women have been (wrongly) forced onto Statutory Sick Pay or unpaid leave in recent weeks, taking their income below the Lower Earnings Limit during the eight-week SMP calculation period. So, tens of thousands of low-income women stand to lose out from the inequitable treatment of Maternity Allowance in the calculation of Universal Credit awards.

17. Given the vital role of Universal Credit as a safety net for those experiencing a sudden and unexpected drop in income due to the COVID19-related lockdown – a

role emphasised by Government ministers in recent weeks – a fair approach would ensure that Maternity Allowance is treated in the same way as SMP is now in the calculation of Universal Credit awards, with those in receipt of Maternity Allowance benefiting from the Work Allowance and 63% taper. This would require only minor amendments to the *Universal Credit Regulations 2013*.

18. We have raised this issue repeatedly with successive Work & Pensions ministers since the roll-out of Universal Credit. And, most recently, we wrote to the Chancellor and the Secretary of State for Work & Pensions about this and other issues on 17 March 2020, and again on 30 March and 7 April.

Impact of NHS charging & the NRPF rule on pregnant migrants & asylum seekers

19. There is now a substantial body of evidence, including research reports by Doctors of the World, Maternity Action and the BMA, that the NHS England overseas visitors charging regime deters vulnerable migrant women living in the UK from seeking essential health care, and creates professional dilemmas for clinical staff. For example, our September 2019 report, *Duty of Care*, highlights how the requirements of the charging regime conflict with professional standards in midwifery. And the MBRRACE-UK report, *Saving Lives, Improving Mothers' Care 2019*, published in December, links the charging regime and a possible fear of being charged to the deaths of three women who delayed seeking critical antenatal care in 2015-17.

20. Prior to the onset of the COVID19 pandemic, the Royal College of Physicians (RCOP), the Royal College of Paediatrics & Child Health, the Royal College of Obstetricians & Gynaecologists, the Faculty of Public Health, the Academy of Royal Colleges, and the Royal College of General Practitioners all urged ministers to suspend the charging regime pending a full independent review of its impact on individual and public health. And almost 100 MPs have signed cross-party Early Day Motion 56, in support of our call – backed by the Royal College of Midwives (RCM) – for the immediate suspension of charging for maternity care.

21. It is evident from calls to our advice lines that women will now face debts of thousands of pounds for their maternity care, through no fault of their own, as a result of the measures put in place to address the pandemic.

> **Caller D** had come to the UK to visit relatives, before returning to her young children in India. However, her return flight was cancelled by the airline. At the time she contacted us to discuss her situation, she was 32 weeks pregnant and was concerned that flights would not resume before the 36-week limit for flying imposed by the airline. As someone in the UK on a visitor visa, she will therefore be liable for all maternity care received by her and her baby if she is unable to return to India before the birth (as seems likely).
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> **Caller E** is the British partner of a pregnant Iranian national, who had come to the UK on a fiance visa. The couple were aware of the NHS charging regime, so had planned to marry at the beginning of April, and had booked a priority appointment to allow her to change her immigration status prior to her due

> date in May. However, as all marriage ceremonies have been postponed, she has been unable to take the steps that would have entitled her to free maternity care. As a result, she will now be liable for upwards of £3,000 for the birth of her baby, depending on the level of care required.

22. There are many more women who use our immigration advice service who will find themselves chargeable for their maternity care due to delays in the process of receiving an immigration decision, in addition to those who are already deterred from accessing maternity care as a result of the charging regime.

23. On 18 April, we were one of almost 600 joint signatories – including the BMA, the RCOP, the RCM and the British Red Cross – of a joint letter to the Secretary of State for Health & Social Care, published in *The Times*, urging suspension of the charging regime, as well as all associated immigration checks and data sharing, for the duration of the COVID19 crisis. That letter states:

> "Any measure known to obstruct the delivery of healthcare or prevent patients coming forward to NHS services is inappropriate and dangerous during a pandemic. A wealth of evidence shows that the regulations prevent people with insecure immigration status, including those seeking asylum, from seeking the medical care they need, often because they cannot afford to pay and fear it will impact on an immigration application.
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> We recognise that the Government moved quickly to add COVID-19 to the list of conditions exempt from charges under the regulations in recognition of the need for the whole population to access NHS services during the pandemic. However, this exemption does not ensure that those with pre-existing conditions can seek the care they need without fear of charging or exposure to immigration enforcement. Under the current exemption, these patients would be charged for the treatment and management of their pre-existing conditions whilst in hospital, or may even have treatment withheld if they cannot pay."

24. Many pregnant women with insecure immigration status are not entitled to social security benefits, have limited entitlement to support from local authorities, and face additional barriers to accessing support from refuges and other services. During the COVID19 crisis, many local services have ceased face-to-face operations, and social distancing has necessarily impacted on informal sources of support, such as 'sofa surfing'. This group of women, commonly described as having 'No Recourse to Public Funds' (NRPF), have been severely impacted by the COVID19 crisis, and Government measures to lift the NRPF restrictions have been limited and patchy.

Legal protection against unfair redundancy for pregnant women & new mothers

25. Maternity Action was pleased to be able to give written and oral evidence to the Committee's 2016 inquiry on Pregnancy & Maternity Discrimination, which concluded that such discrimination was on the increase. In its report, the Committee noted that "we want to be able to look back in five or 10 years and see that the situation has improved significantly, not that the same problems exist on the same scale or, worse, that there has been a further decline."

26. Nearly four years on, it is deeply disappointing that the Government has still not taken a single legislative step to address the Committee's findings and recommendations. Indeed, ministers have not even acted upon their own July 2019 pledge to establish a Taskforce on pregnancy and maternity discrimination in the workplace. For the evidence from our advice lines and elsewhere suggests that, even before the onset of the COVID19 pandemic and associated lockdown, such limited action as the Government *has* taken on this issue since 2016 has done little if anything to improve the situation. And we fear that transition from the lockdown will generate a new wave of unfair redundancies and unlawful discrimination as businesses and organisations seek to adjust to the new economic circumstances.

27. A key recommendation of the Committee's 2016 report was that the Government should implement a system of protection from unfair redundancy for pregnant women and new mothers "similar to that used in Germany, under which such women can be made redundant only in specified circumstances". And, last year, we were pleased to work closely with Maria Miller MP on her 10-minute Rule Bill, the Pregnancy and Maternity (Redundancy Protection) Bill 2019, which sought to prohibit redundancy during pregnancy and maternity leave, and for six months after the end of the pregnancy or leave, except in very limited circumstances.

28. Maternity Action has previously welcomed, as a step in the right direction, the Government's intention to include an extension of the existing Regulation 10 protection against redundancy, so as to cover a period of six months after the return from maternity leave, in the Employment Bill included in December's Queen's Speech. However, in our view Regulation 10 does not adequately protect women and, given the likely repercussions of the COVID19-related lockdown noted above, we hope that Ministers will now be prepared to go further, and implement the so-called German model, in line with the Committee's 2016 recommendation. This would take the onus off women to challenge their employer, and make it much harder for employers to discriminate in the first place.

Employment tribunal time limit

29. Another recommendation of the Committee's 2016 report was that the Government should "review the three-month time limit for bringing [an employment tribunal] claim in maternity and pregnancy discrimination cases. We suggest that six months would be a more suitable time limit."

30. As noted above, pregnant women and new parents are under extraordinary financial, time and other pressures as a result of the COVID19-related lockdown, and sadly we must expect a new wave of discrimination and unfair treatment by employers in the coming months. It is clear to us that, at such an unusual time, pregnant women and new parents would benefit from having more time to prepare and submit legal challenges to such discrimination and unfair treatment through the employment tribunal system.

31. On 27 April, we were one of more than 20 joint signatories, including Liberty, Working Families and the Law Centres Network, of a letter to the Secretary of State for Justice, urging a temporary extension of the employment tribunal time limit.

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