

## Written evidence from Maternity Action (COV0135)

### Introduction

1. Maternity Action welcomes the opportunity to submit evidence to the Joint Human Rights Committee's inquiry on the Human Rights Implications of the Government's response to COVID19. Maternity Action delivers 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 and policy influencing work to protect and strengthen maternity rights, and to 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 mid-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 policies and Regulations to ameliorate the impact of lockdown and the forthcoming transition out of lockdown on the most vulnerable pregnant women and new mothers in the UK.

3. In this submission, we focus on six specific issues:

- The impact of the NHS overseas visitors charging regime on pregnant migrants and asylum-seekers in the UK, and the case for suspending the charging regime for the duration of the pandemic;
- The impact of the NRPF rule on pregnant migrants in the UK, and the case for suspending the rule for the duration of the pandemic;
- The failure to raise asylum support rates in line with the uplifts to the Universal Credit standard allowances;
- The case for amending the Universal Credit Regulations 2013 to ameliorate the impact of lockdown on low-income pregnant women and new mothers;
- The Government's failure to deliver unambiguous advice to employers on their legal obligations to pregnant employees; and
- The case for an extension of the employment tribunal time limit.

### Impact of the NHS charging regime on pregnant migrants & asylum seekers

4. 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.

5. 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 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.

6. 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 measures put in place to address the pandemic.

**Caller A** is a heavily pregnant woman from a non-EEA country who came to the UK in December 2019 as a visitor, planning to stay with a family member and return home in March, when six months pregnant. Her flight was booked for a few days after lockdown began, and was cancelled. She has contacted the airport and airline repeatedly, asking for information on when she might be able to return home to give birth there and be with her partner, to no avail. As she is now almost full term, she would be unable to travel at this point even if flights become available. She is trapped in the UK and has no choice but to give birth here.

This woman contacted us when eight months pregnant. She had accessed antenatal care but learned that she would be charged for maternity care, and is now terrified of being invoiced thousands of pounds that she does not have. She confided in us that she planned not to attend her antenatal appointments to try and reduce the costs. Fortunately, we were able to work with her and encourage her to attend, but we will not be able to do anything to solve her fundamental problem, which is that she is being charged thousands of pounds she does not have to give birth in the UK because she is trapped by the pandemic. She will be liable for costs of £5000 to £15,000, depending on the complexity of the birth.

**Caller B** was 22 weeks pregnant when she contacted us, having come to the UK at the start of March 2020 on a fiancée visa. This visa expires in early September, and her baby is due at the start of October. As her partner is British and the birth will take place in the UK, her child will be a British citizen. She had planned to marry her British partner quickly and pay for a priority appointment for her spouse visa, in order to ensure that she would receive this in time for the birth. Under normal circumstances, there would be plenty of time to achieve this.

Because of the pandemic, this woman and her partner cannot even marry yet, and they do not know when this might be possible. This means she cannot submit a spouse visa application, and if her visa needs to be extended before the marriage, it will be as a fiancée. She is chargeable for the antenatal care she has received so far, and faces the prospect of paying costs of £5000 to £15,0000, including birth and postnatal care if she and her partner cannot marry and obtain a spouse visa for her by the time of birth.

7. There are many more women who use our 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.

8. 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.

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.”

### **Impact of the NRPF rule on pregnant migrants**

9. Many pregnant women with insecure immigration status or limited leave to remain 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, due to the No Recourse to Public Funds (NRPF) rule. Since the onset of the COVID19 pandemic, many local services have ceased face-to-face operations, and social distancing has necessarily impacted on informal sources of support, such as ‘sofa surfing’. Yet Government measures to ameliorate the impact of the NRPF rule have been limited and patchy. On 25 March, in a letter to the Prime Minister, more than 100 MPs noted that:

“Those with leave to remain with an NRPF condition cannot currently access all of the Government’s measures to protect families. For example, a person who is self-employed is not currently able to claim Universal Credit if they have leave to remain with NRPF. It is also unclear whether funds provided from the Job Retention Scheme will extend to those without recourse to public funds. This could not only leave people at risk of destitution but also in a situation where following NHS guidance on self-isolation presents serious challenges and potentially far-reaching, fatal consequences.

We are calling on the Government to temporarily waive the NRPF [rule] so that this group of people can access the provisions to help those facing an adverse economic impact due to the outbreak of COVID19. The Government must provide more help and guidance to local government so that they are able to effectively help this portion of our communities.”

10. Accordingly, it is little short of astonishing that, on 27 May, when appearing before the Commons Liaison Committee of MPs, the Prime Minister appeared to be wholly unaware of both the NRPF rule and its impact on, for example, access to Universal Credit. However, we very much agree with the Prime Minister’s statement to the Committee that “People who have worked hard here, who live and work here, should have support.” We hope that this exchange will lead promptly to the suspension of the NRPF rule for the duration of the COVID19 crisis. We note that, on 15 June, the Home Affairs Committee recommended “the temporary lifting of NRPF conditions”, and that “there must be clarity that all who are prohibited from having recourse to public funds must have access to the support they need during this crisis, and funding provided to ensure that happens.”

### **Asylum Support rates**

11. On 20 March, the Chancellor announced that, to ensure that “no one will face hardship in the weeks ahead”, he was increasing the Universal Credit standard allowance, for the next 12 months, by £1,000 per year. And, on 25 March, the Prime Minister pledged that the Government will “look after all the most vulnerable in society”, including asylum-seekers and those whose asylum claim has been refused, who will “receive the Home Office funding they need and deserve” during the COVID19 pandemic.

12. Prior to the onset of the COVID19 pandemic, people in the asylum system received £37.75 if supported under section 95 of the Immigration and Asylum Act 1999, or £35.39 if supported under section 4 of the 1999 Act. This amounted to a little over £5 per day per person.

13. On 3 April, we were one of more than 60 joint signatories, including the Refugee Council, Freedom from Torture, Amnesty International UK and the Child Poverty Action Group, of a letter to the Home Secretary and Chancellor, noting that:

“Even before the Coronavirus outbreak, people on asylum support struggled to meet their essential living needs on an amount of support far lower than mainstream benefits, leading to extremely difficult decisions on what to prioritise amongst essential expenditure. Asylum seekers, including torture survivors and other highly vulnerable people, tell us that, in the current context, they are finding it even harder to buy the items that they need to keep themselves and their families healthy and safe.”

14. The letter urged an immediate increase of £20 per week to asylum support for the next 12 months in the first instance, in line with the temporary uplift to Universal Credit standard allowances.

15. Accordingly, we were deeply disappointed by the Home Secretary’s announcement, on 8 June, of an increase of just £1.85 in the weekly rate of asylum support. On 9 June, we were one of more than 220 joint signatories of a further letter to the Home Secretary, urging reconsideration of this decision.

### **Access to Universal Credit**

16. 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 Statutory Maternity Pay (SMP) 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 up to £5,000 worse off over 39 weeks of maternity leave than women in the same circumstances who qualify for SMP and claim Universal Credit.

17. 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 fail to qualify for SMP and end up on Maternity Allowance is likely to increase substantially. This is not least because, following the Prime Minister and CMO’s announcement on 16 March that pregnant women are part of the ‘vulnerable’ group who should self-isolate, many pregnant employees were (wrongly) forced onto Statutory Sick Pay or unpaid leave, 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.

**Caller C** works as a bank nurse in the NHS, and has worked regular shifts at the same hospital for the last three years. The day after the Prime Minister and CMO’s announcement on 16 March, she was told by the nurse in charge that it was not safe for her to work on a ward with COVID19 patients, and was (unlawfully) sent home without pay (she should have been offered suitable alternative work or suspension on full pay for as long as her assignment would have been expected to continue).

By the time she called our advice line in April, she was 25 weeks pregnant, and had had no income for nine weeks, despite having applied for Universal Credit. Because of this loss of income she has lost her entitlement to SMP, and will need to claim Maternity Allowance, which will give her no extra support during her maternity leave as it will be deducted in full from her eventual Universal Credit award.

18. 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*.

19. We have raised this issue repeatedly with successive Work & Pensions ministers since the roll-out of Universal Credit. Together with the Child Poverty Action Group, we consider the inequitable treatment of Maternity Allowance in the calculation of Universal Credit to be unjustified, and in breach of Article 14 of the European Convention on Human Rights, read with Article 8 and Article 1, Protocol 1.

20. Following the onset of the COVID19 pandemic, 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. Together with the Child Poverty Action Group, Gingerbread, the Women’s Budget Group and the Fawcett Society, we again wrote to the Secretary of State for Work & Pensions on 4 May, and 110 MPs from all nine parties in the House of Commons have signed Early Day Motion 421, in support of our call for amendment of the Universal Credit Regulations 2013.

21. Most recently, after the Secretary of State for Work & Pensions said in the House of Commons on 4 May that she would “look into” the issue, we wrote to Dr Coffey once more on 6 May, highlighting the key points as we see them. These include the fact that the uplifts of the Universal Credit standard allowances announced by the Chancellor on 20 March, and which came into force on 6 April, have *increased* the differential (which was up to £4,100 over 39 weeks prior to the uplifts).

### **Pregnant women in the workplace**

22. 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*, which 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.

23. 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. 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.

24. 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.

25. 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, pharmacies and supermarkets, whose employers have insisted 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, if they wish to follow the Prime Minister's advice of 16 March and stay at home, they will have to take sick leave, use their paid holiday entitlement, go on *unpaid* leave, or start their maternity leave early.

26. Furthermore, while the Coronavirus Job Retention Scheme (CJRS) explicitly covers "employees that need to look after children", there is no mention of pregnant employees in the CJRS guidance or Treasury Direction to HMRC. And it is evident from calls to our advice lines that this has led to employers refusing to furlough pregnant employees who wish to follow the Prime Minister's advice of 16 March and stay at home, on the entirely spurious ground that 'the CJRS is only for businesses like pubs and restaurants that have had to close *completely* under lockdown'.

**Caller D** works in a care home on a zero hours contract, and was 16 weeks pregnant when (unlawfully) sent home on SSP on 17 March. Two weeks later, after her employer had discovered that she was not eligible for SSP, as she wasn't self isolating with COVID symptoms, she was told she would be put on *unpaid* leave, or could claim SSP if she obtained a 'shielding letter'. She asked her employer about being put on furlough, but the employer said that it did not apply to them because the care home is largely publicly-funded by the local authority and did not need to reduce staff because of the pandemic.

The caller was not entitled to a shielding letter, but both her GP and midwife advised her that she should not be working with patients on account of both her pregnancy and her asthma, and there were known to be cases of COVID19 in the care home. She wrote to her employer to ask for a risk assessment, and maternity suspension (on full pay) until there was adequate PPE available. However, she has had no risk assessment and, as of 17 June, has been without pay for three months. As a result, she has lost her entitlement to Statutory Maternity Pay (which would be based on her earnings in April and May), so will have to claim Maternity Allowance instead (which, as described above, will impact on her access to Universal Credit).

27. We wrote to the Chancellor and/or other ministers about these issues on 17 and 30 March, on 7, 17, 21, 24 and 27 April, and on 18 May. In this correspondence we have urged, for example, that the CJRS guidance be amended to make 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 (in line with existing health and safety law), and the employer can then claim support in respect of that employee under the CJRS (if she is eligible). As of 17 June, we have not had any response from ministers to this correspondence.

28. More recently, on 1 June, following the announcement of the new NHS Test & Trace regime, we wrote to the Business Secretary, urging revision of the relevant Regulations to ensure that pregnant women and other parents-to-be do not lose entitlement to statutory maternity pay, statutory paternity pay, statutory adoption pay or statutory shared parental pay as a result of their compliance with the regime.

29. Under the NHS Test & Trace regime, those who have been in close contact with someone who has tested positive for coronavirus will be told to self-isolate for 14 days, and workers will be entitled to SSP for every day they are in isolation, if they meet the eligibility conditions. So, given that they could be told to self-isolate more than once over a period of weeks, pregnant women and other parents-to-be who are put onto SSP during this period risk their average weekly earnings falling below the Lower Earnings Limit (£120), rendering them ineligible for statutory maternity or other parental pay.

30. We first raised this issue with ministers on 30 March, in the contexts of pregnant women and other parents-to-be being put on 80% furlough pay under the CJRS, and of pregnant women wishing to comply with the Prime Minister and CMO's advice of 16 March being wrongly put on SSP, rather than being suspended on full pay. We suggested that a fair approach would base entitlements to statutory maternity pay, statutory paternity pay, statutory adoption pay and statutory shared parental pay on *usual*, full earnings, rather than 80% furlough pay or SSP of just £96 per week.

31. We raised this specific issue again on 7 April, in a letter to the Business Secretary and other senior ministers, and on 27 April, in an email to BEIS minister Paul Scully and officials. And, while we have not had any reply to that correspondence, on 24 April BEIS announced that "furloughed workers planning to take paid parental or adoption leave will be entitled to pay based on their usual earnings rather than a furloughed pay rate".

32. In our email of 27 April to Paul Scully and BEIS officials, we welcomed this amendment to the relevant Regulations, but urged that the amendment be widened to cover SSP as well as furlough pay. Had this request been acted upon then, or when we first raised it with ministers on 30 March, there would have been no need for us to renew it in relation to the new NHS Test & Trace regime. On 11 June, when giving oral evidence to the House of Commons Petition Committee, Mr Scully stated that the 24 April change to the SMP Regulations had been made because the CJRS is "new", but that women claiming SSP during the SMP assessment period is "not

new”, so requires no revision of the Regulations. However, pregnant employees having to go on SSP for two weeks under the NHS Test & Trace regime is as ‘new’ as pregnant employees being put on furlough pay under the CJRS.

### **Employment tribunal time limit**

33. In 2015, joint research by the then Department for Business, Innovation & Skills and the Equality & Human Rights Commission found that, overall, three in four new mothers have a negative or possibly discriminatory experience during their pregnancy or maternity leave, or after return to work, with almost one in ten being treated so poorly that they have to leave their job. And, in August 2016, the Women & Equalities Committee of MPs noted that such discrimination is “getting worse”.

34. Based on our experience of the post-2008 economic recession, we fear that transition from the current lockdown will generate a new wave of pregnancy and maternity discrimination and unfair redundancies, as government support schemes fall away and employers seek to adjust to the new economic circumstances. A recent survey by the TUC found that more than one in 10 pregnant employees say their commitment has been questioned by their manager or employer since the COVID19 crisis began, and one in four have experienced discrimination or unfair treatment at work, while the OECD predicts that the UK will suffer the worst post-COVID economic contraction among developed countries.

35. It is clear to us that, at such an unusually challenging 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.

36. Accordingly, 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. And, on 4 May, we co-signed a letter from the Fawcett Society to the Business Secretary, similarly urging a temporary extension of the time limit, from the current three months, to six months.

*17/06/2020*