

Report of the Working Group on the Review and Improvement of the Maternity Protection Legislation

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Foreword by John O'Donoghue T.D., Minister for Justice, Equality and Law Reform



I am very pleased to be associated with this Report. The Government Action Programme for the Millennium called for the “review and improvement of maternity protection legislation” as a key component towards the achievement of equality for women. The Programme for Prosperity and Fairness echoed this commitment, and provided that the Department of Justice, Equality and Law Reform set up a Working Group to review the legislation.

This Report is the latest in a series of family friendly initiatives which I have undertaken since coming into office in 1997. My Department has very substantial funding under the National Development Plan to support the supply of childcare. We also have funding under the National Development Plan for the promotion of family friendly policies in the workplace. I introduced the parental leave legislation and my Department will conduct a review of this legislation in consultation with the social partners this year.

This Report is the result of the deliberations of the Working Group on the Review and Improvement of Maternity Protection Legislation, and it makes key recommendations which will significantly improve maternity protection in this country. The speed with which this Government has already begun to implement the recommendations is clear evidence of its commitment to promoting the equal opportunities agenda. The Government has decided to make relevant changes to adoptive leave legislation in line with the recommendations in this Report. The increased periods of leave and other improvements recommended by the Group are also evidence of the growing awareness of the need for a greater balance between work and family responsibilities. Implementation of the Recommendations of the Working Group will make the workplace a better place to be for pregnant women and new mothers. The shortage of childcare places for babies is well-known, and improvements in maternity leave will help towards easing the childcare situation in respect of this category of children.

The achievement of the Working Group in reviewing maternity protection legislation is commendable. There have been significant changes in the labour market and the workplace since the Maternity Protection Act came into operation in 1994 and the Report makes a valuable contribution in discussing the issues that have arisen in relation to the operation of a complex body of legislation over this period.

The Working Group on the Review and Improvement of Maternity Protection Legislation met between April and November, 2000. The Group comprised the social partners and representatives from relevant Government departments and agencies. I would like to thank all the members of the Working Group who achieved an immense amount within a short timeframe in reviewing a complex body of legislation and coming up with a significant package of recommendations.

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Executive Summary

The Government Action Programme for the Millennium includes a commitment to the “review and improvement of maternity protection legislation” as a key component in the development of equality for women.

The Programme for Prosperity and Fairness commits the Department of Justice, Equality and Law Reform to set up a Working Group, including the Social Partners, early in 2000, for the purpose of completion of the review. The Working Group, comprising the Social Partners and the relevant Government Departments and agencies, was set up on 14th April, 2000. The Group met on 11 occasions and finalised its work on 27th November, 2000.

Chapter One of the Report describes the current situation in relation to maternity protection in Ireland, including an outline of the maternity protection and relevant health and safety legislation, other relevant legislation, description of the maternity and health & safety benefit schemes and an outline of remuneration arrangements for employees in the private and public sectors while on maternity leave. *Chapter Two* describes the role of the various bodies involved in the implementation and enforcement of the maternity protection legislation. *Chapter Three* compares the situation in relation to maternity protection in Ireland with that in other EU Member States. *Chapter Four* reflects the deliberations of the Group in arriving at its recommendations. Each recommendation is fully discussed in this chapter. The *Appendices* contain texts of presentations that were given to the Group during the course of its deliberations, and other background information.

The full text of the Group’s *Recommendations* and *Conclusions* is as follows:

Duration of Leave

The Group recommends:

- 4 extra weeks maternity leave which attracts a payment from the Social Insurance Fund (bringing total entitlement to 18 weeks).
- 4 extra weeks additional (unpaid) maternity leave (bringing total entitlement to 8 weeks).

Employment Rights during additional maternity leave

The Group recommends that:

- The period of additional maternity leave should count for the same employment rights as provided under Section 14(1) of the Parental Leave Act, 1998 which provides that: “an employee shall, while on parental leave, be regarded for all purposes relating to his or her employment (other than his or her right to remuneration or superannuation benefits or any obligation to pay contributions in or in respect of the employment) as still working in the employment and none of his or her other rights relating to the employment shall be affected

by the leave.” It was also agreed that the period of additional maternity leave would count for public holidays.

- The Department of Social, Community and Family Affairs should make arrangements to provide for PRSI credits during the period of additional maternity leave.

Ante-Natal classes

- The Group recommends that provision be made in legislation or Regulations for paid time off for mothers to attend one complete set of ante-natal classes. At least 3 of the classes are to be taken during the pre-confinement maternity leave period. The situations which could result in the woman not taking a full set during one pregnancy can be covered in Regulations setting out the conditions for paid time off for ante-natal classes.
- In light of the arguments for greater balance of participation of fathers and mothers in family life, fathers should be facilitated to be involved in the pregnancy and childbirth. The Group also recommends that provision be made in legislation for paid time off for fathers to attend the two ante-natal classes immediately prior to the birth.
- As ante-natal classes given outside of normal daytime working hours in maternity hospitals are subject to a charge, the Group is of the view that, in the interest of equity, consideration should be given to having all public ante-natal classes free of charge.

Breastfeeding

The Group recognises the importance of breastfeeding as a health gain for the child which persists into later life. In line with the recommendation of the *National Breastfeeding Policy* that “mothers should be encouraged to practise exclusive breastfeeding for at least 4 months and thereafter with appropriate weaning foods”, the Group recommends that employers provide employees who have recently given birth and are breastfeeding with either an adjustment of working hours or breastfeeding facilities/facilities to express breastmilk in the workplace in order to facilitate breastfeeding for 4 months after the birth. These breaks or any reduction in working hours would count as working time and be remunerated accordingly. The employer will determine which of these two options apply in each particular case. The provision of breastfeeding facilities will be subject to it not giving rise to cost, other than nominal cost, to the employer.¹

Paternity Leave

The Group recognises the importance of the role of fathers at the time of and immediately after childbirth. The Group, without commitment from any party, agreed that the issue of paternity leave would be considered in the context of the forthcoming review of the Parental Leave Act, 1998 or such other review as may be appropriate.

Health & Safety

- (a) The Group discussed the following proposals:
 - (i) If, as a result of the risk assessment, an employee is transferred to other duties, she should not lose financial and other benefits.

¹ Wording here mirrors Section 16(3)(c) of the Employment Equality Act, 1998.

- (ii) If, following advice of a medical practitioner, a pregnant woman is transferred from night duties to other duties and hours, she would not suffer financial loss (e.g. loss of shift allowance).

The Group is not making any recommendation in relation to these issues.

(b) In relation to enforcement and monitoring of risk assessments, the Group concludes as follows:

- The Flow Chart in Chapter 1 sets out the procedures dealing with the Health and Safety complaints. It indicates that the Pregnancy Regulations are usually reactively enforced at present, and, accordingly, the Group recommends that the Health and Safety Authority includes a proactive approach to these regulations in its future programmes.

Transfer from additional maternity leave to sick leave

The Group recommends that, in the event of illness, an employee should, subject to the agreement of the employer, be able to transfer from additional maternity leave to sick leave. If an employee transfers from additional maternity leave to sick leave, she will forfeit her right to any additional maternity leave not taken at the date of the commencement of the sick leave.

Split period of maternity leave in the event of hospitalisation of the baby

The Group recommends that the Act should provide that, provided the employer agrees, in the event of hospitalisation of the child, the employee may return to work after a minimum of 14 weeks maternity leave (at least 4 of which must be after the end of the week of confinement). In such circumstances, the mother will retain her entitlement to take the balance of her maternity leave in one continuous block, when the baby is discharged from hospital. The issue of the mother going on sick leave, period of notice of return to work, the maximum duration of postponement etc., will be determined by Regulations.

Transfer of any increase in minimum period of maternity leave to fathers

The Group considers that maternity leave is linked to the mother's welfare, and that, as such, it is not appropriate to make any portion of maternity leave optionally transferable to fathers.

Compulsory pre-confinement leave

In view of the Attorney General's advice, the Group notes that the period of leave to be taken pre-confinement cannot be reduced at this time.

Compulsory two-week period of maternity leave post-confinement

The Group recommends that, in view of the Attorney General's advice, that the Act should not be amended to provide for a compulsory period of 2 weeks maternity leave post-confinement.

Leave in event of miscarriage

The Group is not making any recommendation in this matter.

Protection from dismissal because of absence arising from pregnancy-related illness

The Group concluded that protection from dismissal during pregnancy and maternity leave cannot, on the basis of the European Court of Justice decision in *Brown v. Rentokil C-394/96*, be extended to cover pregnancy-related illness arising after the conclusion of maternity leave. This leave would be treated in the same way as sick leave for a male worker, and would be covered by the same protections under Unfair Dismissals legislation.

Increase in upper ceiling of maternity benefit payment

As increases in Social Welfare rates are budgetary matters, the Group is making no recommendation as far as increasing the maximum rate of maternity benefit is concerned.

Pensions

The Group was not in a position to come to any view on the pension issues within the timescale of its remit. It recommends that the issue of pension rights during maternity leave should be examined in the context of the review of the Pensions Act, 1990, where appropriate.

Disputes procedures — Rights Commissioner Decisions & Representation

- (i) In relation to the publication of Rights Commissioner Decisions, the Group recommends that the issue of publishing decisions of rights commissioners should be considered in the context of any future review of the Rights Commissioners Service as the implications of any recommendation in relation to this issue would extend beyond maternity legislation.
- (ii) In relation to representation by the Equality Authority at a Rights Commissioner hearing under the Maternity Protection Act, 1994, the Group notes the comments of the Equality Authority in relation to the issue of representation for victims of discrimination. The Group considers that the representation of employees under Maternity Protection Act, 1994 would have major implications for the Rights Commissioner Service and the functions of the Equality Authority and, consequently, is not making a recommendation on the matter.

The Current Situation

Pregnant Workers' Directive (92/85/EEC)

The Maternity Protection Act, 1994 and the Safety, Health and Welfare at Work (Pregnant Employees etc.) Regulations, 2000 implement the provisions of the Pregnant Workers' Directive (92/85/EEC). A summary of the Pregnant Workers' Directive is at the beginning of Chapter 3. Details of relevant EU case law is set out at Appendix V in a paper by Ms. Marguerite Bolger, Barrister.

Maternity Protection Act, 1994

Introduction

The Maternity Protection Act, 1994 repeals and re-enacts with amendments the Maternity Protection of Employees Acts, 1981 to 1991 while also implementing the employment rights aspects of the EU Pregnant Workers' Directive (92/85/EEC). In essence the Act retains all of the entitlements of the previous maternity legislation and provides additional protection and rights as required by the EU Directive.

Maternity, additional maternity and natal care leave

The Act provides that all female employees who have notified their employer of their condition are entitled to 14 consecutive weeks' maternity leave plus 4 weeks' additional maternity leave. Employees are obliged to take four weeks maternity leave before the end of the week in which the baby is due and four weeks after that week. The remaining 6 weeks can be taken as the employee chooses. The Act does not require an employer to pay an employee during maternity leave. However, a woman who is entitled to maternity leave and who has paid sufficient PRSI contributions can qualify for maternity benefit from the Department of Social, Community and Family Affairs. The optional additional maternity leave is at the employee's own expense. During the pregnancy and for the 14 weeks' period immediately following the birth, employees are entitled to time off without loss of pay for ante-natal and post-natal medical visits.

The Act also entitles the father of a child to leave in the event of the death of the mother within 14 weeks of the birth of a living child.

Health & Safety Leave

The Act introduced a new entitlement to health and safety leave for employees covered by it. Regulations made under the Safety, Health and Welfare at Work Act, 1989 require an employer to conduct a risk assessment of the workplace in relation to pregnant employees, employees who have recently given birth and employees who are breastfeeding. Where a risk to such employees is identified, the legislation requires employers to remove the risk or transfer the employee to suitable alternative work. Where neither option is feasible, the Act provides that the employee is entitled to health and safety leave. If an employee is certified by her own doctor as unfit for nightwork, she may not be obliged to undertake nightwork. If the employer is unable to provide suitable alternative employment, the

employee is entitled to health and safety leave under the Act. Health and safety leave continues for so long as the employee is vulnerable to the risk. An employer is liable to pay the employee for the first three weeks of this leave and thereafter eligible employees receive a health and safety benefit from the Department of Social, Community and Family Affairs.

Right to return to work

Following any absences authorised under the Act, an employee has the right to return to work in the same employment and under the same conditions. Any purported termination of or suspension from employment during protective leave¹ or natal care leave or any notice of termination given during protective or natal care leave and due to expire during such leave is invalid. Employees have a statutory entitlement to return to work on the expiration of all periods of protective leave. The legislation also deals with arrangements for return where there has been a change of ownership of the enterprise concerned. Where resumption of the same work is not practicable, suitable alternative work may be offered. The Act contains safeguards to prevent an unacceptable dilution of the employee's entitlement to return to work.

Protection of Employment Rights

During maternity leave, health and safety leave, natal care absences and maternity leave to which the father is entitled on the death of the mother, employment rights (e.g. annual leave, increments, seniority) whether they are conferred by law, under the terms of a contract of employment or otherwise, are preserved and continue to build up as if the employee was not absent from work.

During additional maternity leave, additional leave to which a father is entitled or further leave to which the father is entitled, an employee's employment relationship with the employer continues to exist. These absences, however, do not count as reckonable service.

Protection from Dismissal

The Act amends the Unfair Dismissals Acts, 1977- 1993 to the effect that the dismissal of an employee, wholly or mainly because of the exercise of any right under the Maternity Protection Act, 1994, is deemed to be an unfair dismissal. In addition, the dismissal of an employee from the beginning of her pregnancy to the end of her maternity leave, is deemed to be unfair if it results from her pregnancy, from having recently given birth or breastfeeding (or connected matters).

Disputes and Appeals about entitlements

A dispute under the Act, which does not relate to a dismissal or to technical matters on health and safety risk, may be referred to a rights commissioner and may be appealed to the Employment Appeals Tribunal. A rights commissioner or the Employment Appeals Tribunal may as appropriate, order either party to the dispute to take action in resolution of the dispute. Where the rights commissioner or the Tribunal finds in favour of the employee, they may order the granting of leave for a specified period and/or the payment of compensation, of up to twenty week's remuneration, to the employee. Technical disputes about health and safety matters must be referred to the Health and Safety Authority.

¹ "Protective Leave" is defined in Section 21 of the Maternity Protection Act, 1994 as "(a) maternity leave; (b) additional maternity leave; (c) leave to which a father is entitled under *subsection (1) or subsection (4) of Section 16*; or (d) leave granted under Section 18."

Safety, Health and Welfare at Work (Pregnant Employees etc.) Regulations, 2000²

The Safety, Health and Welfare at Work (Pregnant Employees etc.) Regulations, 2000, give effect to the health and safety provisions of the Pregnant Workers' Directive (92/85/EEC). The Regulations provide for the protection of an employee who is pregnant, has recently given birth or is breastfeeding from agents, processes or working conditions which may prove harmful to the pregnant or breastfeeding mother. In respect of a breastfeeding mother, the protection extends to 26 weeks following childbirth. The Regulations require the employer to assess the possible risk to the pregnant or breastfeeding employee of agents, processes or working conditions in the workplace. The Regulations also provide that if a risk is identified an employer must adjust the working conditions or move the employee to suitable alternative employment. If none of these steps are possible she must be granted Health and Safety leave as outlined in Section 18 of the Maternity Protection Act, 1994. In addition, the Regulations provide that if an employee is certified by her medical practitioner as unfit for nightwork, she may not be obliged to perform nightwork up to 14 weeks following the birth, and the employer must supply alternative daytime work or grant health and safety leave.

The procedures in relation to the enforcement of the Safety, Health and Welfare at Work (Pregnant Employees etc.) Regulations, 2000 (hereafter referred to as "pregnancy regulations") are outlined on the attached Flow Chart. Supporting text is set out hereunder. The numbers on the paragraphs refer to the numbered boxes on the chart.

Health and Safety Authority (HSA)

The HSA are responsible for enforcement of the Safety, Health and Welfare at Work Act, 1989 and regulations arising therefrom including the Safety, Health and Welfare at Work (Pregnant Employees etc.) Regulations, 2000. The Safety, Health & Welfare at Work (General Application) Regulations, 1993 are also relevant, because employers are advised that, in producing their safety statement, they should consider the possibility of pregnancy among employees.

Obligations of Employer (Boxes 1-1.4)

Under the Safety, Health and Welfare at Work Act, 1989 and the Safety, Health and Welfare at Work (General Application) Regulations, 1993, the employer should include hazards and risks to pregnancy in the general risk assessment and in the Safety Statement.

The Pregnancy Regulations require that an employer, as soon as he is made aware, carries out a risk assessment in relation to each employee as defined by Regulation 2 of the pregnancy regulations (i.e. pregnant, recently given birth or breastfeeding).

It is important that employers follow the appropriate steps in the order set out in the pregnancy regulations. Health and Safety Leave is not an extension of maternity leave, and should only be used where the options as set out in the regulations have been exhausted. The correct steps are:

- If a risk is identified, the employer must remove the risk/adjust the work.
- If the employer cannot remove the risk, the employee must be provided with suitable alternative employment.
- If the employer cannot provide suitable alternative employment, the employee must be granted Health and Safety Leave in accordance with Section 18 of the Maternity Protection Act, 1994.

² Replaced the Safety, Health & Welfare at Work (Pregnant Employees, etc.) Regulations, 1994 with effect from 30 June, 2000.

Enforcement of Health and Safety (Pregnancy) Regulations by Health and Safety Authority (Boxes 2-2.3)

Where an employee has a dispute in relation to the risk assessment in relation to her pregnancy, or where the employer has not undertaken a risk assessment or provided a safety statement, the employee may make a complaint to the Health and Safety Authority. The Health and Safety Authority may intervene by contacting the employer by telephone, and advising him of the contents of the Guidelines on implementing the Pregnancy Regulations. In some cases an inspector may need to visit the workplace to assist with the risk assessment. Where an employer is obviously not responding, an inspector may take enforcement action by way of an improvement notice or prohibition notice.

Enforcement of issues related to Health & Safety by Rights Commissioner and Employment Appeals Tribunal (Boxes 3-3.3)

Section 30 of the Maternity Protection Act, 1994 provides that all disputes under that Act shall be referred to a Rights Commissioner, with the exception of unfair dismissals cases, and “a dispute as to a matter which is within the competence of the Authority under the 1989 Act.”, i.e. within the competence of the Health and Safety Authority.

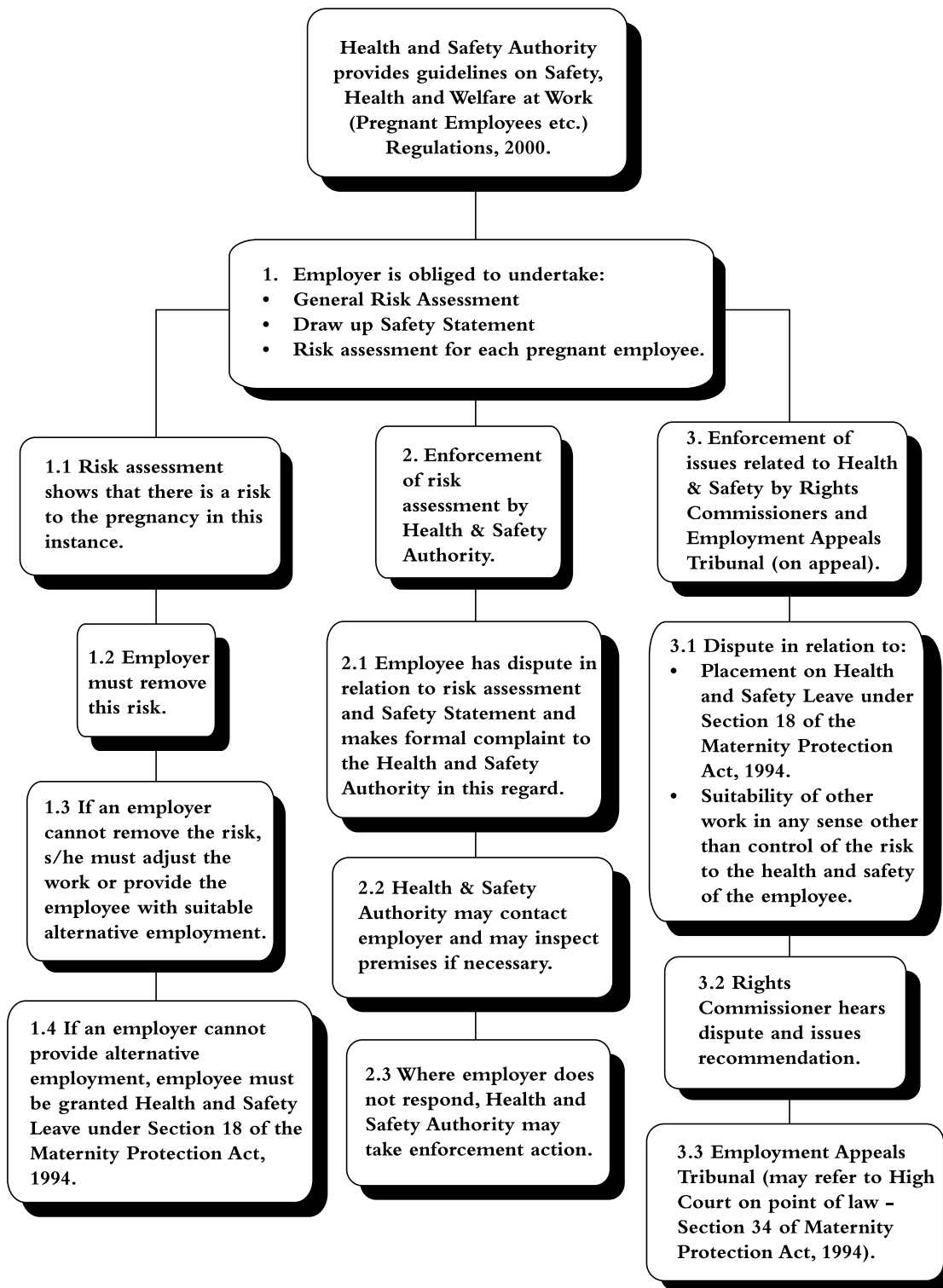
Under the pregnancy regulations an employer is obliged to conduct a risk assessment for an employee who has notified him of her pregnancy.

Under Section 18 of the Maternity Protection Act, 1994, an employer who has taken the correct steps in relation to a risk assessment for a pregnant employee, and who is unable to carry out the actions required under the pregnancy regulations, can grant an employee Health and Safety Leave. Section 18 also provides that if the alternative work provided to the employee is unsuitable for her, she may be granted Health and Safety Leave. Section 18 defines “other work” as:

“of a kind which is suitable in relation to the employee concerned, as an employee to whom this Part applies; and appropriate for the employee to do in all the circumstances”.

An employee has the right of redress to a Rights Commissioner in relation to a dispute which stems from a risk assessment, and which relates to an action which can be taken under Section 18 of the Maternity Protection Act, 1994. If a dispute does not relate to the competency of the Health and Safety Authority, then the Rights Commissioner can hear it. Such a dispute would relate to the placement on Health and Safety Leave or the suitability/availability of other work in any sense other than the control of the risk to the health and safety of the employee. Therefore, an employee has the right of redress to a Rights Commissioner in the following circumstances:

- (i) A dispute which relates to placement on Health and Safety Leave (under Section 18 of the Maternity Protection Act, 1994) following risk assessment.
- (ii) A dispute which relates to suitability of other work in any sense other than its suitability in terms of control of the risk to the health and safety of the employee.
- (iii) A Rights Commissioner cannot adjudicate on a risk assessment as far as control of risk is concerned. This is confined to the adjudication of the Health and Safety Authority.



OTHER RELEVANT LEGISLATION

Unfair Dismissals Acts, 1977-1993³

The Unfair Dismissals Acts, 1977-1993 protect employees from being unfairly dismissed from their jobs by laying down criteria by which dismissals are to be judged unfair and by providing an adjudication system and redress for an employee whose dismissal has been found to be unfair. In general, the Acts apply to any person who is working under a contract of employment or apprenticeship, or employed through an employment agency. The Acts do not apply to a person who is normally required to work for the employer for less than eight hours a week or who has been in the continuous service of the employer for less than one year.⁴ The requirement of one year's service does not apply where the dismissal results from an employee's pregnancy, giving birth or breastfeeding or any matters connected therewith or the exercise or proposed exercise by an employee of a right under the Maternity Protection Act, 1994. There are certain other exclusions of categories of persons protected under the Acts. However, in the case of the Maternity Protection Act, 1994, the exclusions in relation to persons working for close relatives in a private house or farm, provided both are living in the same house or farm; and in relation to persons undergoing full-time training or apprenticeship in FÁS establishments, do not apply.

The Acts do not apply to a person who is employed specifically as a replacement employee for an employee on maternity or health and safety leave and who is dismissed solely to facilitate the return of the employee on maternity or health and safety leave to work.

The redress provisions under the Unfair Dismissals Acts apply to dismissals cases which relate to maternity. The following types of redress may be awarded — re-instatement in the employee's old job, entitling the employee to any improvement in terms and conditions which may have occurred in the interim; re-engagement in the employee's old job, or a suitable alternative job, on conditions considered reasonable by the adjudicating bodies; or where financial loss has been incurred by the employee, financial compensation subject to a maximum of two years' remuneration; or where no financial loss has been sustained by the employee, financial compensation subject to a maximum award of four weeks' remuneration.

Disputes under the Maternity Protection Act, 1994, which do not relate to dismissal, are covered by Sections 30-37 of that Act.

Organisation of Working Time Act, 1997⁵

The Organisation of Working Time Act, 1997 sets out statutory rights for employees in respect of rest, maximum working time and holidays. Those rights apply either by law as set out in the Act, in Regulations made under the Act, or through legally binding collective agreements.

Certain provisions in the Working Time Act are affected by provisions under the Maternity Protection Act, 1994 as follows:

- (i) Employers must establish a reference period when calculating weekly working hours. Any absence from work under the Maternity Protection Act, 1994, is not counted in the reference period. The Act has a similar provision in relation to establishing a reference period in relation to night work.

³ Information from Unfair Dismissals Acts, 1977-1993 Explanatory Booklet, Department of Enterprise, Trade & Employment, 1999.

⁴ See paragraph on Protection of Employees (Part-Time Work) Bill, 2000 on Pp. 19-20 which will amend these provisions.

⁵ Sources: Guide to Labour Law, Department of Enterprise, Trade & Employment, 1997.

IBEC Guideline 10 Annual Leave and Public Holidays.

- (ii) The Act provides for minimum statutory annual leave for employees with a certain level of service. As the Maternity Protection Act, 1994, preserves all employment rights (except remuneration) during the period of maternity leave, time spent on maternity leave is counted towards annual leave entitlement. As time spent on additional maternity leave does not count as reckonable service, there is no entitlement to annual leave during this period.
- (iii) The Act sets out employees entitlement to public holidays. All whole-time employees are entitled to public holidays, regardless of length of service, and, in the case of part-time employees, entitlement is contingent on the employee having worked for at least 40 hours for the employer during the period of 5 weeks ending on the day before that public holiday. There are certain exceptions, in relation to extended absences in respect of injury, absence authorised by the employer or strike, which are set out in the Third Schedule to the Act. Again, the Maternity Protection Act preserves the employees' employment rights, the entitlement to public holidays remains during the period of maternity leave.

Employment Equality Act, 1998⁶

The Employment Equality Act, 1998, came into operation on 18 October, 1999. The Act outlaws discrimination in relation to employment on nine grounds, namely gender, marital status, family status, sexual orientation, religion, age, disability, race and membership of the Traveller community. The scope of the Act is comprehensive and covers discrimination in relation to access to employment, conditions of employment, equal pay for work of equal value, promotion, training and work experience. These kinds of discrimination are outlawed whether by an employer, an employment agency, a trade union, a professional body, a vocational training body or a newspaper advertising jobs in its careers and appointments pages. Discrimination on the grounds of pregnancy amounts to direct discrimination on grounds of gender.

Persons who consider that they have been discriminated against contrary to the provisions of the Act may in the first case seek advice from the Equality Authority. The Authority may decide to provide assistance in taking proceedings in respect of which redress is provided for under this Act. Persons may seek redress by referring a case to the Director of Equality Investigations or, in a dismissal case, the Labour Court. Alternatively a person who considers that she/he has been discriminated against on the gender ground may apply to the Circuit Court for redress. Where discrimination has been found to have taken place the Director of Equality Investigations and the Labour Court may order appropriate redress (subject to limits set out in the Act). Similarly the Circuit Court may also award redress (subject only to a limit in relation to backdating).

Pensions Act, 1990

Section 72 of the Pensions Act, 1990 covers accrual of pension rights during a period of maternity absence paid by the employer, and compliance with the principle of equal treatment.⁷

Protection of Employees (Part-Time Work) Bill, 2000

The Protection of Employees (Part-Time Work) Bill, 2000 will provide for the removal of discrimination against part-time workers where such exists. It will also improve the quality of part-time work, facilitate the development of part-time work on a voluntary basis as well as contribute to the flexible organisation

⁶ The Employment Equality Act, 1998 repeals and replaces the Employment Equality Act, 1977 and the Anti-Discrimination (Pay) Act, 1974.

⁷ See Appendix III for full text of Section 72 of the Pensions Act, 1990.

of working time in a manner which takes into account the needs of employers and workers. The Bill will also guarantee that part-time workers may not be treated less favourably than full-time workers.

The Bill will ensure that the rights guaranteed to part-time workers in the Worker Protection (Regular Part-Time) Employees Act, 1991 including the right to coverage by the Unfair Dismissals Acts are carried through to the Bill but without the service thresholds laid down in the 1991 Act (13 weeks continuous service and 8 hours per week).

Carer's Leave Bill, 2000

The proposed Carer's Leave Bill, 2000 seeks to complement — in regard to leave — the Government's Budget 2000 proposal to introduce a Carer's Benefit Scheme. The proposed Bill will allow employees to take leave from their employment for a period up to 15 months to provide full-time care for older people or people with disabilities in need of full-time care and attention and to have their employment rights protected. An undertaking was given in the *Programme for Prosperity and Fairness* to introduce carer's leave.

CURRENT BENEFIT ENTITLEMENTS DURING MATERNITY AND PREGNANCY

Maternity Benefit

Maternity Benefit is payable to employed and self-employed women who satisfy certain PRSI contribution conditions on their own insurance record. PRSI contributions paid at Classes A, E, H and S⁸ count for Maternity Benefit purposes.

How to Qualify

To qualify a woman must—

- Be entitled to maternity leave under the Maternity Protection Act, 1994, or be self-employed, and
- Satisfy the relevant PRSI contribution conditions.

PRSI Contribution Conditions

To qualify, an employed woman must have—

- at least 39 weeks PRSI paid in the 12 month period immediately before the first day of her maternity leave; or,
- at least 39 weeks PRSI paid since first starting work and at least 39 weeks PRSI paid or credited in the Relevant Tax Year.

The Relevant Tax Year is the last complete tax year before the calendar year in which the maternity leave commences. If a tax year later than the Relevant Tax Year has ended before the Maternity Leave is due to commence, then that tax year may be used instead.

⁸ **PRSI Class A** contributions apply to most people working in the private sector whose weekly earnings are £30 or more and to new recruits to the public service since April, 1995. PRSI Class A contributions provide cover for all social insurance benefits, including Maternity Benefit. **PRSI Class E** contributions apply to Ministers of Religion employed by the Church of Ireland Representative Body.

PRSI Class H contributions apply to Non-Commissioned Army Officers and enlisted personnel of the Defence Forces. While only certain benefits are paid during service, once a person leaves the defence forces, all social insurance benefits covered, including Maternity Benefit, may be paid.

PRSI Class S contributions apply to self-employed people earning £2,500 or more in any tax year.

For example

If the maternity leave starts between	The Relevant Tax Year is
January 2000 and December 2000	1998/99
January 2001 and December 2001	1999/2000

To qualify, a self-employed woman must have—

- 52 weeks PRSI contributions paid at Class S in either of the last 2 Relevant Tax Years before the year in which the claim is made.

For example

If the Maternity Benefit claim is made between	The Relevant Tax Years are
January 2000 and December 2000	1998/99 or 1997/98
January 2001 and December 2001	1999/2000 or 1998/99

If these contribution conditions cannot be satisfied and the woman was previously an employee before becoming self-employed, her employment contributions may be used to enable her to qualify.

In addition, if a woman has worked in another EU Member State or certain other European countries, her social insurance record in that country may be used in order to qualify for benefit.

Rates of Payment

The weekly rate of payment is 70% of the woman's average reckonable weekly earnings/income in the Relevant Tax Year, subject to minimum and maximum payment limits. The current minimum payment is £90.70 a week and the maximum is £172.80 a week.

The rate of Maternity Benefit is compared to the rate of Disability Benefit payable if the claimant was absent from work due to illness and the higher of the two is payable.

Reduced Rates of Maternity Benefit

In the case of a woman who is already getting any of the following payments—

- One-Parent Family Payment
- Widow's Contributory/Non-Contributory Pension
- Deserted Wife's Benefit/Allowance
- Prisoner's Wife's Benefit

Maternity Benefit can also be paid, but is payable at half-rate in this case.

Duration of Payment

Maternity Benefit is normally payable for a continuous period of 14 weeks. At least 4 and not more than 10 of these weeks must be taken before the end of the week in which the baby is due. If the baby is

born later than expected and there are less than 4 weeks maternity leave remaining it may be possible to extend payment of Maternity Benefit to 4 full weeks after the birth.

Father's entitlement to Maternity Benefit

If a mother dies within 14 weeks of the birth, the child's father may qualify for leave for the unused portion of the maternity leave period. Where it is certified by his employer that he is entitled to leave under the Maternity Protection Act and he satisfies the relevant contribution conditions as outlined above, then the child's father can qualify for Maternity Benefit.

Taxation

Maternity Benefit is not subject to income tax.

Other Social Welfare Benefits Available during “Maternity Leave” Period

For Women who are in Employment or Self-Employment

An employee or self-employed woman who does not have sufficient PRSI to qualify for Maternity Benefit, may qualify for **Supplementary Welfare Allowance** from the start of the maternity leave or for **One-Parent Family Payment** on the birth of the baby.

Supplementary Welfare Allowance, which is means-tested, is payable to people whose means are insufficient to meet their own and their dependants' needs. The payment comprises a personal rate (currently £76 a week), with additional increases for qualified adults (£47 a week) and for each qualified child (£13.20 a week).

The **One-Parent Family Payment**, which is also means-tested, is payable to people who, for a variety of reasons, are bringing up children without the support of a partner. The payment comprises a personal rate (currently £77.50 a week) and an additional increase of £15.20 for each qualified child.

For Women who are not in Employment or Self-Employment

Women who are no longer in employment or self-employment and who have an underlying entitlement to another social welfare payment, e.g. either **Unemployment Benefit** or **Unemployment Assistance** if they are unemployed or **Disability Benefit** if they are long-term sick, can continue to receive these payments regardless of the pregnancy.⁹

On the birth of the baby, a woman who is no longer in employment or self-employment, if she is bringing up the child without the support of a partner, may qualify for the **One-Parent Family Payment**. Where Disability or Unemployment Benefit had been paid before the birth, these payments can continue to be paid at half-rate with One-Parent Family Payment. Unemployment Assistance cannot be paid with the One-Parent Family Payment.

Other Social Welfare Benefits available before and after “Maternity Leave” Period

An employee who is unfit for work because of illness, whether related to the pregnancy or otherwise, can qualify for **Disability Benefit**.

⁹ Self-employed women are not covered for either Unemployment Benefit or Disability Benefit, but may qualify for Unemployment Assistance.

How to Qualify

To qualify for Disability Benefit a woman must—

- Be unfit for work due to illness, and
- Satisfy the relevant PRSI contribution conditions, as follows—
have at least 39 weeks PRSI paid since first starting to work, and have at least 39 weeks PRSI paid or credited in the Relevant Tax Year¹⁰ (a minimum of 13 of which must be paid contributions).

Rates of Payment

Payment is made up of a personal rate for the claimant with additional amounts for qualified adult and/or child dependants. The weekly rate payable depends on the level of earnings in the Relevant Tax Year. To qualify for the standard rate, the claimant's average weekly earnings in the Relevant Tax Year must be at least £70. The current standard weekly rates of payment are — Personal Rate: £77.50, Increase for Qualified Adult: £47.00 and Increase for Child Dependant: £13.20.

Where the claimant's average weekly earnings are below £70, the personal rate of Disability Benefit and the increase in respect of the Qualified Adult are payable at reduced rates.

If a woman is getting one of the following payments—

- One-Parent Family Payment
- Widow's Contributory/Non-Contributory Pension
- Deserted Wife's Benefit
- Prisoner's Wife's Benefit

Disability Benefit can also be paid, but is payable at half the personal rate. No increases for qualified children are payable in this case.

Duration of Payment

Where the illness continues beyond the date of commencement of maternity leave, Disability Benefit is paid up until the Maternity Benefit commences. (Disability Benefit cannot be paid in addition to Maternity Benefit). As the same PRSI contribution conditions applying to Disability Benefit apply also to Maternity Benefit, a woman who is entitled to Disability Benefit will satisfy the contribution conditions for entitlement to Maternity Benefit.

A woman who has been in receipt of Maternity Benefit and who, due to illness, is unfit to resume work after the end of the maternity leave period can similarly claim Disability Benefit, if she satisfies the relevant contribution conditions.

Disability Benefit is normally paid from the 4th day of illness and can continue to be paid for up to a year. Where the person has a total of 260 PRSI contributions paid (5 full years), payment of Disability Benefit can continue for as long as the person is unfit for work and under age 66.

Self-employed women are not covered for Disability Benefit purposes.

¹⁰ The Relevant Tax Year for Disability Benefit purposes is the last complete tax year before the calendar year in which the claim for benefit is made. Unlike Maternity Benefit, a subsequent complete tax year may not be used to qualify for Disability Benefit.

Taxation

Disability Benefit payments (excluding any increases for Qualified Children) are regarded as taxable income. However, Disability Benefit payments for the first 6 weeks are exempt for tax.

Health & Safety Benefit

Health and Safety Benefit is a weekly payment for women who have been granted Health and Safety Leave under the Maternity Protection Act, 1994. Health and Safety Leave is granted to an employee by her employer when her employer cannot remove a risk to her health or safety during her pregnancy or whilst breastfeeding, or cannot assign her to suitable alternative ‘risk-free’ duties. Unlike Maternity Benefit, Health and Safety Benefit is not available to self-employed women.

How to Qualify

In order to qualify, a woman must:

- be a pregnant employee and be exposed to certain risks in the workplace or involved in nightwork;¹¹ or
 - be an employee who has given birth in the last 14 weeks and be involved in nightwork; or
 - be breastfeeding (up to 26 weeks after giving birth) and exposed to certain risks¹² in the workplace;
- and
- have been awarded health and safety leave under Section 18 of the Maternity Protection Act, 1994; and
 - satisfy the relevant PRSI contribution conditions.

PRSI Contribution Conditions

To qualify, a woman must have—

- at least 13 weeks PRSI paid in the 12 months immediately before the date the baby is due, or
- at least 39 weeks PRSI paid since first starting work and at least 39 weeks PRSI paid or credited in the Relevant Tax Year.

PRSI contributions paid at Classes A, E and H count for Health and Safety Benefit purposes.

The Relevant Tax Year is the last complete tax year before the calendar year, which includes the first day for which Health and Safety Benefit is claimed. If a tax year later than the Relevant Tax Year has ended before the Health and Safety Benefit starts, contributions in that tax year may be used instead.

An employee who receives Health and Safety Benefit while pregnant is deemed to satisfy the PRSI contribution conditions for Maternity Benefit and an employee who applies for Health and Safety Benefit, having been in receipt of Maternity Benefit, is deemed to satisfy the PRSI contribution conditions.

¹¹ Under the Safety, Health and Welfare at Work (Pregnant Employees, etc.) Regulations, 2000, nightwork is defined as: “... *work in the period between the hours of 11pm on any day and 6am on the next following day, where:*

— *the employee works at least 3 hours in the said period as a normal course; or*
— *at least 25% of the employee’s monthly working time is performed in the said period”.*

¹² Details of the risks involved are available from the Health and Safety Authority.

Rates of Payment

The employer is obliged to pay the employee for the first 21 days of the Health and Safety Leave. Following this, Health and Safety Benefit becomes payable if the qualifying conditions are satisfied. Payment is made up of a personal rate for the claimant with additional amounts for qualified adult and/or child dependants.

The weekly rate payable depends on the level of earnings in the Relevant Tax Year. To qualify for the standard rate, the claimant's average weekly earnings in the Relevant Tax Year must be at least £70. The current standard weekly rates of payment are — Personal Rate: £77.50, Increase for Qualified Adult: £47.00 and Increase for Child Dependant: £13.20. Where the claimant's average weekly earnings are below £70, the personal rate of Health and Safety Benefit and the increase in respect of the Qualified Adult are payable at reduced rates.

If a woman is getting one of the following payments—

- One-Parent Family Payment
- Widow's Contributory/Non-Contributory Pension
- Deserted Wife's Benefit
- Prisoner's Wife's Benefit

Health and Safety Benefit can also be paid, but is payable at half the personal rate. No increases for qualified children are payable in this case.

Duration of Payment

Following the initial 21 days payment by the employer, Health and Safety Benefit is payable for the remainder of the Health and Safety Leave, which is up to:

- the day on which Maternity Benefit becomes payable, if the woman is pregnant;
- 14 weeks following the date of the baby's birth, in the case of an employee who has recently given birth and is involved in nightwork; and
- 26 weeks following the date of the baby's birth, in the case of an employee who is breastfeeding.

Health and Safety Benefit is not payable for any day for which Maternity Benefit is payable. The benefit ceases to be payable if the employee is no longer vulnerable to the risk involved or the employer has eliminated the risk or provided the employee with alternative work. Payment will also cease if the claimant is employed on a fixed-term contract which has expired.

Taxation

Health and Safety Benefit is not subject to income tax.

Other Social Welfare Benefits Available during “Health and Safety Leave” Period

For Women who are in Employment

An employee who does not have sufficient PRSI contributions to qualify for Health and Safety Benefit, may qualify for **Supplementary Welfare Allowance**. This allowance, which is means-tested, is payable to people whose means are insufficient to meet their own and their dependants' needs. If the health and

safety leave relates to a period after the birth of the baby and an employee does not have sufficient PRSI to qualify for Health and Safety Benefit, then, if she is bringing up the child without the support of a partner, she may qualify for the **One-Parent Family Payment**, which is also means-tested.

For Women who are not in Employment

Health and Safety Benefit is not relevant to women who are not in employment.

Other Social Welfare Benefits available before and after “Health and Safety Leave” Period

See under “Other Benefits available before and after ‘Maternity Leave’ Period” above.

Statistics

Relevant statistical information relating to the Maternity Benefit and Health and Safety Benefit schemes follows.

Statistics on Maternity Benefit and Health and Safety Benefit 1990-2000

Year	Maternity Benefit					Health and Safety Benefit†				
	Number of Recipients at 31 Dec.	Total No. of Awards during year	% Increase/Decrease	Expenditure £000	% Increase/Decrease	Number of Recipients at 31 Dec.	Total No. of Awards during year	% Increase/Decrease	Expenditure £000	% Increase/Decrease
1990	4,656	15,529	—	20,825	—	—	—	—	—	—
1991	4,747	16,357	5.33	22,702	9.01	—	—	—	—	—
1992	3,411‡	14,876	−9.05	21,957	−3.29	—	—	—	—	—
1993	3,651	15,535	4.43	22,206	1.13	—	—	—	—	—
1994	3,971	14,378	−7.45	24,353	9.67	4	5	—	Minimal	—
1995	3,889	15,664	8.94	27,273	11.99	17	70	1,300.00	53	—
1996	4,592	17,628	12.54	29,839	9.41	19	79	12.86	89	67.92
1997	5,512	19,796	12.30	34,058	14.14	24	123	55.7	124	39.33
1998	5,453	22,384	13.07	38,208	12.19	18	93	−24.39	89	−28.23
1999	6,008	23,851	6.55	41,530★	8.69	34	125	34.41	129★	44.94
2000	6,127§	N/A	N/A	44,300#	6.67	20	N/A	N/A	200#	55.04

† Health and Safety Benefit was introduced on 19 October, 1994.

‡ Prior to 1992, there were two separate Maternity Allowance schemes — a Maternity Allowance scheme for women in employment who were entitled to maternity leave and a general scheme which applied to women insured for social insurance purposes but not entitled to maternity leave. Entitlement to maternity leave and social insurance cover, including cover for maternity purposes, was extended to part-time workers in 1991. As a consequence the general Maternity Allowance scheme was discontinued with effect from April, 1992.

★ Provisional.

Estimated.

§ Number of recipients as at 30 June, 2000.

Numbers of Recipients of Maternity Benefit at Different Payment Rates

Weekly Rate of Maternity Benefit	% of Recipients
IR₹ 90.70	17.29
IR₹ 90.71	6.65
IR₹105.01	2.14
IR₹110.01	2.11
IR₹115.01	2.26
IR₹120.01	2.42
IR₹125.01	2.59
IR₹130.01	2.68
IR₹135.01	3.08
IR₹140.01	2.41
IR₹145.01	2.51
IR₹150.01	2.70
IR₹155.01	2.57
IR₹160.01	2.93
IR₹165.01	2.07
IR₹170.01	43.59
	100

The minimum weekly rate of Maternity Benefit is ₹90.70.

The maximum weekly rate of Maternity Benefit is ₹172.80.

Age Analysis of Recipients of Maternity Benefit

Age Group	% of Recipients
16-24	14.24
24-44	85.72
45+	0.04
	100

REMUNERATION ARRANGEMENTS FOR CIVIL AND PUBLIC SERVANTS ON MATERNITY LEAVE

A description of the remuneration arrangements for civil servants and certain categories of public servants on maternity leave is set out below. The situation for public servants largely mirrors that for civil servants, and the arrangements for certain major categories of public servants is set out below. However, this is not intended to be an exhaustive representation of the situation in relation to remuneration during maternity leave and health and safety leave in the public sector.

Civil Servants

1. Subject to paragraph 2 below, a woman on maternity leave is entitled to full pay, except where she has been appointed for a fixed term of less than 26 weeks. A woman who has been appointed for a fixed term of less than 26 weeks is entitled to the same rate of pay that she would receive if she were absent on sick leave — this entitlement (if any) may vary according to the length of continuous service given.
2. A woman who is (or was) fully insured for PRSI purposes and who fulfils certain contribution conditions may be entitled to maternity benefit from the Department of Social, Community and Family Affairs. A woman who is entitled to maternity benefit is entitled to payment by her Department on the

basis provided for in paragraph 1 above or of an amount equivalent to the full rate of benefit to which she is entitled, whichever is the greater, provided she

- (i) signs a mandate authorising the Department of Social, Community and Family Affairs to pay any benefit due to her under the social insurance system directly to her employing Department; and
- (ii) makes the necessary claims for social insurance benefit to the Department of Social, Community and Family Affairs within the required time limits and complies with whatever requirements are laid down by that Department as a condition of claiming benefit.

3. Maternity leave may not be treated as part of any other leave (including sick leave or annual leave) to which the employee concerned is entitled. Therefore, a woman who has gone onto sick leave at half pay or unpaid sick leave immediately prior to going on maternity leave will resume full pay upon commencement of maternity leave, subject to the terms of paragraphs 1-2 above.

4. No payment is made in respect of an absence on additional maternity leave.

Health Service Employees

1. Arrangements for remuneration of health service employees are based on the arrangements for Civil Servants as outlined above.

2. A woman in full-time or regular part-time employment who is on maternity leave will receive her full normal pay, less any amount attributable to overtime, night work, shift work, working unsocial hours, standby or on-call fees.

3. The same arrangements as apply in the Civil Service apply to a woman either in full-time or part-time employment who is (or was) fully insured for PRSI purposes and who fulfils certain contribution conditions entitling her to Maternity Benefit from the Department of Social, Community and Family Affairs.

4. As in the Civil Service, a woman on a fixed term contract of less than 26 weeks is entitled to maternity leave but not to any remuneration.

Teachers

1. The same arrangements as apply in the Civil Service apply to teachers recruited since 6 April 1995.

2. For teachers, recruited before 6 April 1995, the remuneration arrangements are related to the PRSI contribution which that teacher pays. For teachers paying an A1 contribution (i.e. fully insured for PRSI purposes) and who fulfil the requisite contribution conditions, maternity benefit is recouped from the teacher by the Department of Education and Science, and the teacher continues to receive her full pay. For teachers paying a D1 contribution (i.e. a restricted PRSI contribution), there is no entitlement to maternity benefit and that teacher continues to receive her full pay.

Gardaí

Arrangements for payment of Gardaí on maternity leave are the same as in the Civil Service.

REMUNERATION ARRANGEMENTS IN THE PRIVATE SECTOR FOR EMPLOYEES ON MATERNITY LEAVE

Employees have no statutory right to remuneration from their employer during the period of maternity leave. The options open to employers are:

- (i) Employees do not receive remuneration from the employer, and claim maternity benefit from the Department of Social, Community and Family Affairs.
- (ii) Employers may choose to pay employees their full remuneration.
- (iii) Employers who pay their employees during maternity leave, may recoup the maternity benefit to which the employee is entitled, to offset their salary costs.

Surveys conducted by the Irish Business and Employers Confederation (IBEC) of the Retail Sector in 1999, and of the Manufacturing and Wholesale Distribution, Finance and Insurance Sectors in 1997, give some indication of the practice of large companies in the private sector in relation to paying employees during maternity leave.

42 companies in the retail sector were surveyed by IBEC on their maternity benefit schemes in 1999. Of these six companies provided maternity payments to staff. In four companies, management and supervisors were entitled to full salary for 14 weeks. Social welfare cheques were returned to the company. This entitlement was not service related.

In one company, permanent full-time staff were entitled to full salary (social welfare cheques to be returned to the company) after 12 months' service, while another company provided full pay for 14 weeks (social welfare cheques to be returned to the company) after two years' service.

IBEC's 1997 survey of the Manufacturing and Wholesale Distribution, Finance and Insurance sectors found that 85 companies (21%) out of a total of 404 surveyed paid employees over and above the Social Welfare entitlement. This was broken down as 53 companies (15%) in the Manufacturing and Wholesale Distribution sector; 22 companies (92%) in the Finance sector, and 10 companies (50%) in the Insurance sector.

However, it should be noted that these surveys relate to companies with more than 50 employees, and that approximately 97% of Irish employers employ less than 50 employees. There does not appear to be any data available on the number of companies continuing to pay salaries to their employees during maternity leave in the small business (less than 50 employees) sector.

Enforcement and Implementation of Maternity Protection Legislation

Department of Justice, Equality and Law Reform

General Functions of the Department

The functions of the Department of Justice, Equality and Law Reform include the following objectives in relation to equality:

- To bring about a more equal society by outlawing discrimination and by facilitating equality of opportunity, especially for certain groups that have experienced disadvantage.
- To put in place a statutory foundation for equality, especially rights based anti-discrimination legislation.
- To provide a sound infrastructure to work towards the elimination of discrimination, to promote equal opportunities and provide redress for persons who have suffered discrimination contrary to employment equality or equal status legislation.
- To develop and pursue equal opportunities policies in the areas of equal pay for like work; equal treatment and positive action measures in employment; and the equal provision of goods, services and facilities.
- To promote the reconciliation of work and family responsibilities.¹

Function of the Department in relation to maternity protection

Equality Division is responsible for the Maternity Protection Act, 1994.

The implementation and periodic review of the Maternity Protection Act, 1994 is part of this remit. The Government's Action Programme for the Millennium charges the Department of Justice, Equality and Law Reform with the review and improvement of the current maternity protection legislation.

The Department of Justice, Equality and Law Reform is assisted in its responsibilities in relation to the Maternity Protection Act, 1994 by the Equality Authority which provides an information service to the public on the provisions of the Act, and is involved in any review.

Department of Enterprise, Trade and Employment

The Department of Enterprise, Trade and Employment has responsibility for policy formulation and drafting of legislation in the area of employment rights — with the exception of maternity protection, adoptive leave, parental leave and the employment equality legislation which are the responsibility of the Department of Justice, Equality and Law Reform.

¹ Department of Justice, Equality and Law Reform Strategy Statement 1998-2000.

The Labour Relations Commission, the Employment Appeals Tribunal and the Health and Safety Authority (which are all agencies under the auspices of the Department of Enterprise, Trade and Employment) provide a redress mechanism in respect of non-compliance with provisions of the Maternity Protection Act, 1994 and the Safety, Health and Welfare at Work (Pregnant Employees etc) Regulations, 2000 made under the Safety, Health and Welfare at Work Act, 1989.

In view of the above, the Department of Enterprise, Trade and Employment is continually consulted on any legislative or policy initiatives relating to employment rights in the area of, *inter alia*, maternity protection proposed by the Department of Justice, Equality and Law Reform.

Department of Social, Community and Family Affairs

General Functions of Department of Social, Community and Family Affairs

The main functions of the Department are—

- To formulate appropriate social protection policies, and
- To administer and manage the delivery of statutory and non-statutory social, community and family schemes and services.

In this regard, the Department is responsible for the delivery of a range of social insurance and social assistance schemes. These include provision for unemployment, illness, widowhood, retirement and old age, as well as for maternity.

Role of Department of Social, Community and Family Affairs in relation to Maternity Protection legislation

Maternity Benefit

The Department is responsible for the administration of the statutory Maternity Benefit scheme. This is an income maintenance payment which is available to pregnant employees—

- Who have been certified by their employers as being entitled to maternity leave under Section 8 of the Maternity Protection Act, 1994, and
- Who have a sufficient level of PRSI contributions.

Full details of the scheme are set out in Chapter One of this report.

Health and Safety Benefit

The Department of Social, Community and Family Affairs has responsibility for the administration of the statutory Health and Safety Benefit scheme. Full details of the scheme are set out in Chapter One of this report.

Rights Commissioner Service of the Labour Relations Commission

The mission of the Labour Relations Commission is “to promote the development and improvement of Irish industrial relations policies, procedures and practices through the provision of a range of services to employers, trade unions and employees.” The Commission carries this out by providing the following services:

- An industrial relations conciliation service
- An industrial relations advisory service

- A Rights Commissioner service
- Assistance to Joint Labour Committees and Joint Industrial Councils in the exercise of their functions.

Rights Commissioners are independent adjudicators appointed by the Minister for Enterprise, Trade and Employment. They investigate disputes, grievances and complaints referred to the Labour Relations Commission by individuals or small groups of workers under specific industrial relations and employment rights legislation. Rights Commissioners can only deal with cases referred to them under the appropriate legislation. They investigate disputes under the:

- Industrial Relations Acts, 1969 — 1990
- Unfair Dismissals Acts, 1977 — 1993
- Payment of Wages Act, 1991
- Maternity Protection Act, 1994
- Terms of Employment (Information) Act, 1994
- Adoptive Leave Act, 1995
- Protection of Young Persons (Employment) Act, 1996
- Organisation of Working Time Act, 1997
- Parental Leave Act, 1998
- Protection for Persons Reporting Child Abuse Act, 1998
- National Minimum Wage Act, 2000

Under the Maternity Protection Act, 1994, either the employee or relevant employer may refer a dispute to a Rights Commissioner. 18 cases were referred to the Rights Commissioner service under the Maternity Protection Act, 1994 in 1999, 5 of which were heard in 1999.²

Employment Appeals Tribunal

The Employment Appeals Tribunal is a statutory body consisting of a chairman, vice chairmen and a panel of 60 other members, thirty nominated by the Irish Congress of Trade Unions and thirty by organisations representative of employers. It deals with and adjudicates on employment disputes under the following statutes:

- Redundancy Payments Acts, 1967 to 1991
- Minimum Notice and Terms of Employment Acts, 1973 to 1991
- Unfair Dismissals Acts, 1977 to 1993
- Protection of Employees (Employers' Insolvency) Acts, 1984 to 1991
- Worker Protection (Regular Part-Time Employees) Act, 1991
- Payment of Wages Act, 1991

² *Labour Relations Commission Annual Report 1999, p.35.*

- Maternity Protection Act, 1994
- Terms of Employment (Information) Act, 1994
- Adoptive Leave Act, 1995
- Protection of Young Persons (Employment) Act, 1996
- Organisation of Working Time Act, 1997
- Parental Leave Act, 1998
- Protection for Persons Reporting Child Abuse Act, 1998

The Tribunal is an independent body bound to act judicially and was set up to provide a speedy, fair, inexpensive and informal means for individuals to seek remedies for alleged infringements of their statutory rights.

A Rights Commissioner's decision on a dispute under the Maternity Protection Act, 1994 may be appealed by a party concerned to the Employment Appeals Tribunal. One case was referred to the Employment Appeals Tribunal under the Maternity Protection Act, 1994 in 1999.

Health and Safety Authority

The Health and Safety Authority (HSA) is a State-sponsored body governed by a board, consisting of the social partners and other Ministerial appointees, (which operates under the aegis of the Department of Enterprise, Trade and Employment), established under the Safety, Health and Welfare at Work Act, 1989. It aims to promote a working environment in which the safety and health of persons at work is ensured to the highest possible level.

The HSA operates from eight offices nationwide. It serves employers and employees by:

- Ensuring a National Agenda that supports safety, health and welfare at work.
- Enabling people to meet their responsibilities.
- Ensuring compliance with responsibilities and duties.
- Managing the business of the HSA.

Policies are determined by the HSA's eleven member Board.

The mission statement of the HSA provides that they "help toward promoting a working environment:

- In which the safety, health and welfare of people is ensured, at the highest level possible, consistent with technical development and economic and social progress
- In which a preventive approach is maintained, underpinned by occupational safety, health and welfare law
- In which there is widespread and effective consultation between those affecting and those affected by working conditions, especially between employers and employees."³

³ *Health and Safety Authority Annual Report, 1999.*

The Health and Safety Authority ensures compliance of employers with the Safety, Health and Welfare at Work (Pregnant Employees etc.) Regulations, 2000, which define and regulate the health and safety hazards in the workplace (including nightwork) for pregnant employees, or those who have recently given birth or are breastfeeding. The Schedules of harmful Agents, Processes and Working Conditions in the Regulations were drawn up by the Minister for Enterprise, Trade and Employment in consultation with the Health and Safety Authority.

Equality Authority

The Equality Authority was established on 18th October, 1999 under the Employment Equality Act, 1998. It replaced the former Employment Equality Agency.

The Equality Authority has the statutory remit to work towards the elimination of discrimination and the promotion of equal opportunities in employment under the Employment Equality Act, 1998 and in relation to the provision of goods and services under the Equal Status Act, 2000. Under the Employment Equality Act, 1998 and the Equal Status Act, 2000, discrimination is outlawed on nine distinct grounds: gender, marital status, family status, sexual orientation, religion, age, disability, race and membership of the Traveller community.

The Equality Authority provides an information service to the public on the equality legislation and the Parental Leave Act, 1998, the Adoptive Leave Act, 1995 and the Maternity Protection Act, 1994. It is also charged with keeping equality legislation and the Adoptive Leave Act, 1995 and the Maternity Protection Act, 1994 under review.

The Equality Authority keeps statistics on the nature of queries dealt with by the Authority in relation to the Maternity Protection Act, 1994. Details of queries received by the Employment Equality Agency/Equality Authority in the period November, 1998 to May, 2000 are given in Appendix VII. The Employment Equality Agency published research on women experiencing the combined challenge of parenting and working, entitled “New Mothers at Work”, in 1999.

Employer Obligations in Relation to Pregnancy and Maternity

General Obligations on Employer

Subject to compliance with certain stipulated conditions under the Maternity Protection Act, 1994, an employee, falling under the scope of the legislation, is entitled to various rights as listed below. In turn, a general obligation rests with the employer to allow the employee to avail of these entitlements.

- Maternity Leave from her employment of not less than 14 consecutive weeks
- “Additional maternity leave” of 4 weeks
- Variation of maternity leave owing to early/late confinement
- Time off for natal care
- Leave for fathers on death of mothers
- Leave on health and safety grounds
- Preservation of certain rights while on maternity leave
- General right to return to work on expiry of protective leave⁴

⁴ “Protective Leave” is defined in Section 21 of the Maternity Protection Act, 1994 as “(a) maternity leave; (b) additional maternity leave; (c) leave to which a father is entitled under *subsection (1) or subsection (4) of Section 16*; or (d) leave granted under Section 18.

- Right to suitable alternative work in certain circumstances on return to work
- Right to refer a dispute to a Rights Commissioner
- Redress where an employer fails to comply with provisions of the Act
- Appeal from a decision of a Rights Commissioner

Specific Obligations on Employer

There are few specific obligations on the employer under the Maternity Protection Act, 1994. These arise mainly under the Safety, Health and Welfare at Work (Pregnant Employees etc.) Regulations, 2000. This instrument states that:

1. It shall be the duty of every employer to:
 - Assess any risk to the safety or health of employees, and any possible effect on the pregnancy of, or breastfeeding by, employees, resulting from any activity at that employer's place of work which is likely to involve a risk;
 - To determine the nature, degree and duration of any employee's exposure to any risk; and
 - To take preventive and protective measures necessary to ensure the safety and health of such employees.
2. The employer is obliged to provide information to the employee and/or their safety representative on the results of an assessment and subsequent measures taken to ensure the health and safety of such an employee.
3. Where the risk assessment reveals a risk and it is not practicable to ensure the safety or health of such an employee through such protective or preventive measures, the employer must adjust temporarily the working conditions or the working hours (or both) of the employee concerned so that exposure to such risk is avoided.
4. In cases in which the adjustment of working conditions or working hours (or both) is not technically and/or objectively feasible, or cannot reasonably be required on duly substantiated grounds, the employer must provide the employee with other work which does not present a risk.
5. Where an employee is certified by a registered medical practitioner as not being able, for health and safety reasons, to perform nightwork during pregnancy or for the 14 weeks following childbirth, the employer shall transfer the employee to day work.
6. If an employer is obliged to move an employee to other work (whether as a result of a risk assessment or because the employee cannot be required to perform nightwork), but is unable to do so (for certain listed reasons), the employee must be granted health and safety leave.
7. The employer is obliged to remunerate (S.I. No. 20 of 1995) the employee for the first 21 days of health and safety leave.
8. The employer must take all reasonable steps to enable the employee to return to work after health and safety leave where s/he is satisfied that a risk no longer exists.

Comparative Situation in EU Member States

Pregnant Workers' Directive

Directive 92/85/EEC of 19 October, 1992 on the introduction of measures to encourage improvements in the health and safety at work of pregnant workers, workers who have recently given birth or are breastfeeding (the Pregnant Workers' Directive) sets out minimum requirements, to be upheld by Member States in national legislation, in relation to the rights of pregnant workers. The Directive lays down minimum requirements for maternity leave, and provides for protection in relation to ante-natal care, prohibition of dismissal, employment rights and establishment of redress provisions. Article 1.3 of the Directive provides that a Member State may not reduce the level of maternity protection which existed prior to the Directive's coming into EU law. The Directive also lays down requirements in relation to health and safety in the workplace for the protection of pregnant workers, workers who have recently given birth or workers who are breastfeeding and provides for workplaces to be assessed for risk to pregnant employees and for measures to be undertaken for the protection of workers at risk, including health and safety leave.

The Commission's Report of 15th March, 1999¹ assesses the transposition of the Directive by the various Member States. This Chapter summarises the findings of the Report in relation to the implementation of the various elements of the Directive in the EU Member States, viz., Health and Safety protection including night work, Maternity Leave including maintenance of an adequate allowance, Ante-Natal Care, and protection against dismissal. It also considers aspects of maternity care which fall outside the scope of the Directive such as paternity leave and provision for breastfeeding in employment. Three more detailed examples of provision of maternity protection are given in this chapter — in Finland, France and the UK. The Chapter draws on sources other than the Commission report in relation to cash benefits for maternity and health and safety leaves,² aspects of maternity protection which fall outside the scope of the Directive, and in relation to the examples.³

A. Scope of protection under Directive

The Commission report found that all Member States cover both public and private sector workers in their maternity protection provision and also workers on fixed-term and temporary contracts. In Belgium, workers who provide services under another person's authority are also covered under maternity protection legislation. In Austria, trainee nurses are not protected, and only partial protection exists for student dentists and probationary teachers.

¹ Report from the Commission on the implementation of Council Directive 92/85/EEC of 19 October, 1992 on the introduction of measures to encourage improvements in the health and safety at work of pregnant workers and workers who have recently given birth or are breastfeeding, Brussels: 15/03/1999.

² MISSOC — Social protection in the Member States of the European Union — Situation on 1 January 1999 and evolution, Luxembourg: Office for Official Publications of the European Union, 1999.

³ Specific referencing throughout chapter.

B. Notification of employer

Different requirements in relation to notification of the employer of the pregnancy exist in different Member States, and some of the notification requirements have specific implications in relation to the degree of maternity protection. The Commission report finds that there is no general requirement to inform the employer of the pregnancy in Finland, Belgium and France, but that entitlement to maternity rights and protection is dependent on the employer being informed of the pregnancy. Conversely, in Spain, if the employer is aware of the pregnancy, even without being officially notified, the employer comes under the scope of the legislation. According to the Commission report, in the UK, an employer is not obliged to undertake a risk assessment until informed of the pregnancy. Luxembourg, Portugal and Austria require the production of medical certificates to the employer, and in the case of Austria also to the Labour Inspectorate. In Luxembourg, the medical certificate must be sent by registered post.

C. Risk Assessment

Under the Directive, each Member State must draw up a non-exhaustive list of agents, processes and working conditions which can prove harmful to a pregnant or breastfeeding woman and in relation to which a pregnant or breastfeeding employee must be protected. In Member States, either the employer or a national health and safety regulatory body undertake the risk assessment and inform the employee or her representative of the result.

The Commission instigated proceedings against Ireland, on the grounds that the list of agents, processes and working conditions in Schedule A of the Safety, Health and Welfare at Work, (Pregnant Employees etc.) Regulations, 1994 appeared to be exhaustive. The Regulations have now been amended through the Safety, Health and Welfare at Work (Pregnant Employees etc.) Regulations, 2000 to clarify that the list is non-exhaustive.

The Directive specifies the action to be taken on foot of a risk assessment which identifies risk to the employee. Either the risk must be removed, the employee must be transferred to other suitable duties or Health and Safety Leave which attracts a suitable allowance at least equivalent to sickness benefit must be given. The Commission report found that most Member States follow this. Spain did not have a statutory provision for Health and Safety Leave at the time of the report, and the Commission planned to initiate proceedings.

In relation to nightwork, the Commission report found that most Member States gave pregnant women the option not to work at night on production of a medical certificate. Some Member States had an outright ban on nightwork for pregnant women, which the Commission found contrary to the Equal Treatment Directive 76/207/EEC. The Commission initiated infringement proceedings against one Member State on this point.

D. Length of Leave

Details of length of maternity leave in the different EU Member States are laid out in Table 1. While Table 1 is confined to duration of maternity leave, it should be noted that, in some countries, there is a very fine line between maternity and parental leave, and that the maternity leave provision given may not reflect the actual situation in relation to time off work to care for a young child. For example, in Sweden and Finland, both employed parents have access to a parental allowance fund, a portion of which is claimable only by the mother for the protection of her health and safety at the time of childbirth. While the 14 weeks maternity leave in Sweden matches Ireland's 14 weeks provision, the initial period of parental leave in Sweden (i.e. up to when the child is 18 months old) is more akin to maternity leave.

In Finland there is a further 26 weeks paid parental leave.⁴ In Germany, there is only 14 weeks maternity leave, but this can be immediately followed by paid parental leave until the child is three years old. In Denmark, the last 10 weeks of the 22-week post-confinement period can be transferred to the father, although, in practice, this 10 week period is usually taken as maternity leave. Parental leave provision varies greatly from Member State to Member State. Sweden and Finland have highly developed systems of family support. At the opposite end of the scale, UK, Portugal and Ireland provide around 3 months (14 weeks) unpaid parental leave. While parental leave is an integral part of the support system in a particular Member State to take care of a young child, this Review is confined to maternity leave. Therefore, while it is necessary to be aware of the role that parental leave plays and that there is a fine line between maternity and parental leave in many Member States, the comparison of maternity leave alone is most relevant to this report.

It is also notable that some countries increase leave appreciably for multiple births. In France, leave increases from 16 weeks for a first or second child, to 34 weeks for twins and 46 weeks for multiple births greater than twins. Also, leave for a single birth increases to 26 weeks from the third child on.

There is a difference between the *entitlement* to maternity leave and *compulsory* leave in many Member States. It does not appear to be always the case that a woman is obliged to take all the leave to which she is entitled. For example, Belgium and France specifically provide that a mother may return to work after 8 weeks, if she so wishes, without being required to do so. Also in Belgium, if a baby is hospitalised, a woman may defer 6 weeks of her maternity leave until the baby comes home. Other Member States have compulsory periods of leave which are less than the total entitlement. The Commission Report does not state whether or not there is a specific entitlement to return to work in these countries. There is quite possibly a distinction to be made between maternity leave which must be compulsorily broken up in a certain way (for example, Ireland's minimum four weeks pre-confinement and four weeks post-confinement) and compulsory maternity leave which leads to the option of taking less leave than the full maternity leave entitlement.

⁴ Statistics from European Trade Union Institute, May 2000.

Table 1: Maternity Leave Entitlement (attracting payment) in EU Member States⁵

Member State	Leave Entitlement (attracting payment)	Compulsory Leave
Austria	16 weeks	8 weeks pre-confinement and 8 weeks post-confinement
Belgium	15 weeks	1 week pre- and 8 weeks post-confinement. A woman has the option to return to work after 9 weeks. The optional 6 weeks may also be taken after a baby comes home after hospitalisation.
Denmark	28 weeks	4 weeks pre- and 2 post-confinement, followed by a further 22 weeks. Last 10 weeks of 22 can be transferred to father.
Finland	105 Days — Maternity protection is predicated on length of payment of allowance rather than leave. Allowance is payable for 30 days before the birth and 75 days after, calculated over a six day week.	No compulsory maternity leave — although for 2 weeks after the birth, the woman may only undertake light work, which is certified as risk free.
France	16 weeks. 26 weeks for third child and subsequent. 34 weeks for twins. 46 weeks for multiple births greater than twins.	8 weeks compulsory — 2 weeks before and 6 weeks after. A woman has the right to return to work after 8 weeks, although she may not be obliged to.
Germany	14 weeks	6 weeks pre- (although exemptions allowed) compulsory 8 weeks post-confinement.
Greece	16 weeks	8 weeks pre-confinement and 8 weeks post-confinement.
Italy	5 months	Two months pre- and three months post-confinement. If woman is on heavy work, then there is 3 months pre-confinement.
Ireland	14 weeks	Four weeks must be taken pre-confinement and four weeks post-confinement.
Luxembourg	16 weeks (or 20 if breastfeeding)	8 weeks pre-confinement and 8 weeks post-confinement, which is extended to 12 weeks if the woman is breastfeeding.
Netherlands	16 weeks	4 weeks pre-confinement and 8 weeks are post-confinement.
Portugal	98 days	60 of the 98 days (if taken) must be taken after the birth. 14 days are compulsory.
Spain	16 weeks	6 weeks post-confinement are compulsory.
Sweden	14 weeks	No compulsory maternity leave.
UK	18 weeks	2 weeks post-confinement.

⁵ All data on maternity leave is sourced from ILO (February 1998) and the European Commission Report on the Pregnant Workers' Directive (92/85/EEC) (June, 1999).

E. Maintenance of an adequate allowance during maternity leave and health and safety leave

The remuneration arrangements for maternity leave and health and safety leave are laid out in Table 2. All Member States provide for remuneration at least equal to disability benefit as required under the Directive, and many for considerably more.

However, there are a number of issues to be aware of, when looking at this data. In Member States where there are high levels of earnings-related benefits, these require higher levels of social insurance contributions to fund them. For instance, in EU countries which have earnings-related benefits such as Germany, France and Italy, social insurance contribution rates are significantly higher than in Ireland — 40.36%, 49.68% and 55.54% respectively as against 18.5% in Ireland.

However, other factors also influence the level of social insurance contribution rates in the different Member States. For instance, the range of contingencies covered by social insurance systems varies considerably, while the rates and duration of payments also varies from country to country. The demands placed on social insurance systems in different countries also varies in terms of their demographic structure, unemployment rates, disparities of income distribution etc. In addition, a relatively large proportion of social welfare spending in Ireland is funded directly by the Exchequer from general taxation, rather than by social insurance.

For all these reasons, it is difficult to make meaningful direct comparisons between the various social insurance systems.

It should also be noted that the Maternity Benefit systems can also vary significantly from one country to another — in that, in some countries the percentage rate of the payment is based on the woman's net earnings and in some on her gross earnings. For example, in Germany, France and Austria, the level of Maternity Benefit is related to the woman's net earnings; in Ireland Maternity Benefit is calculated with reference to the woman's gross earnings. Finally, the issue of taxation is also significant. For example, if benefit is paid at 100% of gross earnings and is subject to tax, then the level of benefit will equate to the woman's net earnings. If, however, the benefit is paid at 100% of net earnings and is taxable, then the level of benefit will be lower than the woman's net earnings.

While it is necessary to be aware of the above factors, the detailed information required to make a fully accurate comparison between the social security systems of different Member States is not readily available and beyond the scope of this Report. The data set out in the Table has been taken from the EU's annual social security publication, *MISSOC* and cross-referenced with data from the ILO survey on maternity protection provision in February 1998 and the European Commission report on the implementation of the Pregnant Workers' Directive in March, 1999.

Most Member States have separate arrangements for civil/public servants and the private sector. In accordance with the provisions of the Directive, most Member States lay down qualifying conditions in terms of employment or membership of a statutory insurance scheme in order to claim benefit, with varying degrees of stringency. In the Netherlands, a woman is insured from the first day of work, while in Greece there must be a contribution record over the previous 2 years.

Table 2: Cash Benefit Schemes for Maternity and Health and Safety Leave

Member State	Qualification Criteria	Cash Benefit Maternity	Cash Benefit Health and Safety
Austria	Insured women. ⁶	Maternity Allowance is payable, calculated on the basis of 100% of the average of the previous 13 weeks income. ⁶	Average of remuneration over previous 13 weeks. However, if H&S Leave is granted on foot of a Labour Inspectorate medical cert, then maternity allowance is payable. ⁷
Belgium	Contributions paid for six months. ⁶	Maternity Allowance is payable at a rate of 82% of wages (without a ceiling) for first 30 days and at 75% (subject to ceiling) for remainder. ⁶	
Denmark	In employment for previous 13 weeks. For non-manual workers who have worked at least 15 hrs a week, there is an entitlement to half-pay or benefit whichever is higher. ⁷	100% subject to hourly maximum.	Daily cash benefit or half pay, whichever is greater. Entitlement to daily cash benefit requires working for previous 13 weeks. ⁷
Finland	Residency in Finland for 180 days before birth. ⁷	Maternity Allowance (80% of salary) paid to mother for 105 consecutive days, except Sundays. Civil Servants receive full pay.	Special maternity allowance equivalent to 60% of pay to insured persons.
France	Must be registered with social security at least 10 months prior to confinement. ⁶ Worked 200 hours in the 3 months preceding the birth. ⁷	Daily allowance equivalent to full salary paid for duration of leave, subject to ceiling. ⁶ Civil servants are paid in full. ⁶	90% of pay for thirty days and two thirds of pay for next 30 days. ⁷
Germany	Maternity Benefit: Membership of statutory insurance scheme for 12 weeks in a period spanning from the 10th month to the 4th month prior to the benefit. If not in the statutory insurance scheme, women who have been in employment over the same period are entitled to maternity allowance. ⁷	Benefit of 100% of earnings. In the case of benefit, the difference between the insurance payment and the net salary is made up by the employer. Uninsured women get a flat rate allowance. There is also a confinement grant. ⁶	Average of salary during previous 13 weeks. ⁷
Greece	Insured over previous 2 years. ⁶	Women have the right to half pay for the first 25 days of maternity leave. ⁷ After that, women in the public sector receive 100% of pay, and women in the private sector are paid by the employer or from social security. Social security maternity allowance of 75% of earnings is payable for 56 days before and 56 days after confinement. ⁶	Half pay from employer for first 25 days, then same as maternity leave. ⁷

⁶ MISSOC — Social protection in the Member States of the European Union — Situation on 1 January 1999 and evolution, Luxembourg: Office for Official Publications of the European Union, 1999, Table IV.

⁷ Report from the Commission on the implementation of Council Directive 92/85/EEC, Brussels: 15/03/99.

Table 2—continued.

Member State	Qualification Criteria	Cash Benefit Maternity	Cash Benefit Health and Safety
Ireland	39 qualifying contributions paid in 12 months prior to leave or in a recent tax year.	70% of gross earnings subject to minimum and maximum payments.	First 21 days paid in full. Afterwards, insured employees may be entitled to Health and Safety Benefit.
Italy	No qualifying conditions. ⁶	If wage is discontinued, woman is entitled to an allowance for duration of leave. Allowance is equivalent to 80% of pay, or 100% of pay in the public sector. If 6 months additional maternity leave is taken, an allowance equivalent to 30% of pay is payable. ⁶	Allowance equivalent to 80% of her pay, 100% in the public sector.
Luxembourg	Benefit payable to insured women. Allowance payable to residents of Luxembourg. ⁷	Maternity Cash Benefit of 100% of salary. Maternity Allowance is payable if not entitled to Cash Benefit. ⁶	Allowance equivalent to sickness benefit payable to insured women. ⁷
Netherlands	Payable to insured women. ⁶ Women are insured from first day of work. ⁷	Confinement allowance (100% of daily wage with an upper ceiling) in the case of cease of payment of salary. ⁶	Allowance equivalent to 100% of pay. ⁷
Portugal	All insured employees. ⁶	100% of average daily wage. ⁷	Same as maternity benefit for insured persons.
Spain	Paid up insurance contributions for a continuous period of 6 months in last 5 years. ⁷	100% of contribution basis.	No Health and Safety Leave, therefore no pay.
Sweden	Registered with social security office 180 days prior to claiming allowance. Higher rate payable if registered for 240 days. ⁷ Pregnancy cash benefit paid at a daily rate.	Pregnancy cash benefit is payable for a maximum of 50 days and is payable from 60 days pre-confinement. Parents cash benefit is payable for 450 days. This can be taken out 60 days prior to confinement by the mother, and thereafter by either parent until the child is 8 years old. ⁶	Pregnancy cash benefit of 75% of pay for insured persons.
United Kingdom	Statutory Maternity Pay (SMP): Continuously employed for 26 weeks by end of 15th week pre-confinement. Maternity Allowance: Not eligible for SMP and has paid contributions for 26 weeks in the 66 weeks before the baby is due. ⁶	SMP is 90% of earnings for first 6 weeks, and a fixed rate thereafter. Maternity Allowance is a fixed rate. ⁶	Continues to receive full pay.

⁶ MISSOC — Social protection in the Member States of the European Union — Situation on 1 January 1999 and evolution, Luxembourg: Office for Official Publications of the European Union, 1999, Table IV.

⁷ Report from the Commission on the implementation of Council Directive 92/85/EEC, Brussels: 15/03/99.

F. Ante-natal care

All Member States implement the Directive's provision for paid time off for ante-natal medical appointments. Time off to attend ante-natal classes is not in the scope of the Directive and will be addressed later on in the chapter.

G. Protection against dismissal

Article 10 of the Pregnant Workers' Directive provides that Member States should prohibit the dismissal of workers from the beginning of their pregnancy until the end of maternity leave, save in exceptional circumstances unconnected with their pregnancy.

If a woman is dismissed during pregnancy, most Member States require the employer to prove that the dismissal was for an objective reason unconnected to pregnancy. In some Member States, the dismissal has to be registered or ratified by a specific authority. In Germany, Laender authorities must declare the dismissal lawful, while, in Portugal, the dismissal must be declared lawful by the Equal Employment Commission. In Greece, the Labour Inspectorate of the Prefecture must be informed of any dismissal taking place up to one year after the birth.

Maternity protection issues which fall outside the scope of the Pregnant Workers' Directive

The Pregnant Workers' Directive does not include provision for paternity leave or paid time off for breastfeeding and provision of breastfeeding facilities, but these rights are often conferred by Member States.

Paternity Leave

Table 3 details paternity leave in Member States and whether or not the leave attracts paternity cash benefit.

There is a distinction between short periods of leave guaranteed at childbirth to fathers, and options in certain Member States for certain portions of maternity leave to be transferable to fathers. This transferred leave often attracts a cash benefit.

Most Member States provide for the transfer of the remainder of maternity leave to the father, in the event of the death of the mother during childbirth or during maternity leave. This has not been considered as paternity leave for the purposes of the table.

In Ireland, there is no statutory entitlement to paternity leave. However, some employers operate paternity leave schemes and the Civil Service introduced 3 days paid paternity leave per child effective from 1st January, 2000.

Breastfeeding

Table 4 details provision for paid time off for breastfeeding in Member States. This material is taken from *Care in Europe*, 1998. Leave provision varies from one fourth of full working time (Netherlands) to two breaks of one hour each (Portugal) to two breaks of half hour each in the working day (Spain, Germany). Sweden provides additional maternity leave to breastfeeding mothers, and Luxembourg increases the compulsory period of post-natal leave to 12 weeks for mothers who are breastfeeding.

Table 3: Paternity Leave in EU Member States

Member State	Paternity Leave ⁸	Cash Benefit ⁹
Belgium	3 days	
Denmark	14 days (+ 14 days after the 24 week maternity period expires). ¹⁰ Last 10 weeks of maternity leave may be transferred to father. ¹¹	Weekly payments during both 2-week periods of paternity leave.
Finland	18 days	Paternity allowance paid up to a maximum of 18 days.
France	3 days	
Germany	<i>Care in Europe</i> refers to short periods of leave for specific reasons — this could include paternity leave at time of childbirth.	
Greece	1 day	
Italy	Father may claim optional supplementary maternity leave of 6 months, if the mother does not claim it or if he has sole charge of the child. ¹²	Weekly allowance of 30% of salary during supplementary period.
Netherlands	2 days	
Portugal	2 days Also possibility to transfer maternity leave — see across.	Apart from the 2 days paternity leave at the time of the birth, paternity benefit may become payable in the case of: <ul style="list-style-type: none"> • The physical or mental incapacity of the mother • Based on a joint decision made by both parents.¹³
Spain	2 days	Apart from the 2 days paternity leave at the time of the birth, 4 weeks of the maternity leave and allowance may be transferable to the father, if both parents work.
Sweden	10 days	Temporary parental benefit in connection with childbirth is payable.

⁸ *Care in Europe* — Joint Report of the Gender and Employment and the Gender and Law Groups of Experts, Luxembourg: 1998, p.18.

⁹ MISSOC — *Social protection in the Member States of the European Union — Situation on 1 January 1999 and evolution*, Luxembourg: Office for Official Publications of the European Union, 1999. Table IV.

¹⁰ Ibid. Table IV.

¹¹ The Commission Report classifies all of this as maternity leave: MISSOC, Table IV reveals that 10 weeks maternity benefit may be transferred to father. *Care in Europe* refers to the 10 weeks transferable leave as parental leave.

¹² *Care in Europe* refers to the 6 months as “de facto parental leave.” p.82.

¹³ MISSOC, Table IV.

Table 4: Paid Breastfeeding Provision in EU Member States¹⁴

Member State	Provision
Germany	2 periods a day of 30 minutes each.
Greece	Reduced working time.
Italy	2 optional rest periods of one hour each.
Luxembourg	Compulsory post-natal maternity leave increased to 12 weeks for breastfeeding mothers. ¹⁵
Netherlands	Entitlement to breastfeed own child at work up to 9 months after the delivery — no more than a total of one fourth of working time may be used.
Portugal	2 one hour periods daily for a child up to 1 year.
Spain	2 periods a day of 30 minutes each.
Sweden	Extra leave for breastfeeding mothers. ¹⁶

Examples of maternity leave provision in 3 Member States

1. France¹⁷

Employed persons in France are entitled to a minimum of 16 weeks maternity leave, 6 weeks to be taken pre-confinement and 10 weeks post-confinement. This increases appreciably from the third child, when the employed woman is entitled to 26 weeks maternity leave, 8 weeks to be taken before the birth and 18 weeks after.

There is an increased leave entitlement for multiple births. In the case of the birth of twins, there is an entitlement to 34 weeks — 12 weeks pre-confinement and 24 weeks after the birth. However, if the employee so wishes, she may increase her pre-confinement leave by 4 weeks, and decrease her post-natal entitlement accordingly.

In the case of triplets, the woman is entitled to 24 weeks maternity leave before the birth and 22 weeks leave afterwards.

France also has compensatory provisions in the case of an overdue or premature baby. If a woman delivers after the expected date, the period of pre-confinement leave is increased and the post-confinement leave is unaffected. If the delivery is premature, the portion of pre-confinement leave which could not be availed of, is transferred to the post-confinement period, so that the total entitlement remains unaffected.

Maternity leave may be increased in the case of illness due to the pregnancy or delivery, by up to 2 weeks pre-confinement and up to 4 weeks post-confinement, on production of a medical certificate.

¹⁴ Sourced from *Care in Europe — Joint Report of the Gender and Employment and the Gender and Law Group of Experts*, Luxembourg: European Commission, 1998.

¹⁵ Ibid. p.11.

¹⁶ *Commission Report on Directive 92/85/EEC*, Brussels: 1999. p.11.

¹⁷ Sourced from website “vosdroits.admifrance.gouv.fr.” These rights were cross-referenced with data in the Commission Report, *MISSOC* 1999 and *Care in Europe*, 1998.

Eight weeks of maternity leave in France is compulsory. The employee may decide to curtail her overall maternity leave entitlement, provided she takes the minimum 8 weeks leave. However, she cannot be obliged to cut short her full entitlement.

Women in France are entitled to authorised paid absences for medical appointments, which count for service purposes. A pregnant woman obtains a “Carnet de maternité” from the health authorities, which is filled out by an obstetrician or midwife certifying each examination.

Similar maternity leave provisions exist for public servants in France. Public servants, however, enjoy certain extra privileges. Authorised absence covers not only medical appointments connected with the pregnancy but also pain management classes. Public servants can benefit from an adjusted work timetable (flexi-time) from the 3rd month of pregnancy. After the birth, if the workplace has a crèche, public servants are entitled to two paid half-hour breaks to feed the baby (this is not limited to breastfeeding).

All woman employees in France are covered by social insurance for maternity benefit. Public service employees get their full salary. Certain collective agreements provide for payment by the employer.

It is forbidden in France for a woman to be dismissed for reasons connected with her pregnancy. The employer must be aware of the pregnancy for the employee to avail of this protection. However, if a woman is dismissed while her employer is unaware of her pregnancy, she has a grace period of 15 days, within which she can notify the employer in writing of her pregnancy and obtain proof of receipt of the notification. The dismissal can then be nullified.

2. Finland

A woman employee in Finland is entitled to 105 weekdays maternity leave, during which she receives an income-related maternity allowance payment. An expectant mother can start her maternity leave no earlier than 50 days, and no later than 30 days (calculated on the basis of weekdays only) before the calculated date of birth. Women not in work in Finland are also entitled to some maternity allowance payment.¹⁸

Finnish women are covered by Health and Safety Leave (special maternity leave) as prescribed in the Pregnant Workers’ Directive (92/85/EEC).

The guiding principle of family policy in Finland is that both parents should be involved in the care of small children.¹⁹ Maternity and special maternity leave and allowance is designed to protect the health and safety of the mother during pregnancy, at childbirth, and to assist recuperation after the birth. A father is entitled to a maximum of 18 days of paternity leave calculated on a six day week basis, which attracts a paternity allowance, which is designed to assist parental bonding between father and child. In 1997, 60% of fathers exercised their right to paternity leave.²⁰

Maternity and parental leave are considered as part of the same package in Finland, although the necessary distinction between maternity and parental leave is preserved, in that maternity leave is linked to the health and safety of the mother.

Expectant mothers in Finland receive a comprehensive package of benefits-in-kind. Maternity health care covers screenings, health education and health promotion, preparation of both parents for childbirth

¹⁸ *Social Policy in Tandem with the Labour Market in the European Union*, Helsinki: Ministry of Social Affairs and Health, 1999, p.165.

¹⁹ “Family Policy 2”, Finnish Ministry of Social Affairs and Health website — www.vn.fi

²⁰ Ibid.

and counselling and support of well-baby care. Ante-natal and post-natal checkups are linked to qualification for maternity allowance in Finland. The ante-natal checkup at the end of the fourth month is necessary to qualify for the maternity allowance and the maternity care package. The post-natal checkup is required to qualify for parental allowance.

A woman whose pregnancy has lasted 154 days (employed or unemployed) and who has undergone a checkup in a maternity clinic is entitled to the maternity grant. This can take the form of a cash benefit or a maternity care package. This package is unique to Finland, and is of great value to the expectant parents, as it includes many necessary baby supplies including diapers, mattress, blankets, sleeping bag, changing pad, toy, picture book, baby recipe leaflet and a full wardrobe of baby clothes including shirts, romper suits, socks, caps, mittens, bedclothes and a snowsuit.²¹

3. United Kingdom

The United Kingdom have recently brought in some changes to their maternity leave provision which affect women whose date of confinement is on or after 30 April, 2000.²²

Pregnant employees are now entitled to 18 weeks ordinary maternity leave, regardless of length of service. Women who have completed one year's service with their employer are entitled to additional maternity leave (without payment) which extends to 29 weeks after the birth. Women can begin their maternity leave any time from the eleventh week before the baby is due, provided they give their employer 21 days notice beforehand that they are pregnant, the expected date of childbirth and the start date of the maternity leave.

A woman employee is entitled to paid time off work for ante-natal care, but this includes not only medical appointments but parentcraft and relaxation classes.

Pregnant women are protected from dismissal in line with the Pregnant Workers' Directive (92/85/EEC), but they are also protected against discrimination in the workplace on grounds of pregnancy, childbirth or taking maternity leave. An employee, who believes she has been treated unfairly, can seek redress from an employment tribunal.

An employee on maternity leave is entitled to all the benefits from the terms and conditions of her employment, except remuneration throughout the 18 week maternity leave period. During additional maternity leave, the employment contract continues and some contractual benefits and obligations remain in force, for example, contractual redundancy rights and notice.

Women who have worked for their employer for 26 weeks up to the fifteenth week before childbirth are entitled to Statutory Maternity Pay (SMP). This is paid at a rate of 90% for the first five weeks of pregnancy, and afterwards at a fixed rate. If a woman employee is not entitled to SMP, but has a national insurance record, she may be entitled to maternity allowance from the benefits agency. If a woman is paid her normal remuneration by the employer, or is entitled to SMP, then the employer must continue to pay her pension contributions to any occupational pension scheme based on her normal rate of remuneration.

A woman is entitled to Health and Safety Leave, on the same conditions as set out under the Pregnant Workers' Directive. During any period of Health and Safety Leave (maternity suspension) she is entitled to her full remuneration, provided she has not unreasonably refused an offer of suitable alternative work.

²¹ Kolimaa Maire and Vallimies-Patomai Marjukka, "Health Promotion in maternity, child and school health care", Virtual Finland website — virtual.finland.fi (Note: authors Ministry of Social Affairs and Health senior advisors)

²² Department of Trade and Industry website "Changes to Maternity Rights", www.dti.gov.uk

Recommendations

This Chapter sets out the proposals examined by the Group, the Group's consideration of them and its Recommendations and Conclusions.

DURATION OF LEAVE

Background

Article 8 of the Pregnant Workers' Directive (92/85/EEC) provides that workers within the meaning of Article 2 of the Directive are afforded an entitlement to a continuous period of maternity leave of at least 14 weeks, which must attract a payment. The Maternity Protection Act, 1994 provides for the following entitlements in relation to duration of maternity leave: (a) Section 8 provides that a pregnant employee is entitled to a minimum period of maternity leave of not less than 14 consecutive weeks. This attracts a social insurance payment;¹ (b) Section 14 provides that an employee is entitled to 4 weeks additional maternity leave, after the expiration of her 14 weeks maternity leave, if she so wishes. This does not attract any payment; and (c) Section 4 clarifies that nothing in the Act prohibits any agreement which would be more favourable to the employee than the provisions under the Act.

Proposals considered by the Working Group

- The period of maternity leave should be increased to 20 weeks (Irish Congress of Trade Unions/National Women's Council of Ireland/Equality Authority).
- The period of additional maternity leave should be extended to 8 weeks (EA).
- The period of additional maternity leave should be extended to 10 weeks (ICTU/NWCI).

The Working Group considers that the question of an increase in maternity leave is central to the Group's work, given its remit, set out in the Government's Action Programme for the Millennium, "to review and improve maternity protection legislation." This view is supported by feedback received by ICTU from its members, NWCI from its affiliates and the Equality Authority from the public.

The Group discussed extensions to the duration of maternity leave (with a payment) and additional maternity leave. Extension to leave was discussed in terms of:

- (i) comparative situation in other EU Member States
- (ii) balance between work and family life
- (iii) childcare
- (iv) benefit and cost to employers and the economy generally

¹ Section 12 of the Act provides that, in cases where the child is born in a week after the expected week of confinement, and that this would result in less than 4 weeks post-confinement maternity leave remaining to the mother, the maternity leave may be extended by the relevant number of weeks up to a maximum of 4 weeks. This does not affect any entitlement to additional maternity leave under Section 14.

- (v) cost to the Social Insurance Fund
- (vi) cost to Public Service employers
- (vii) breastfeeding
- (viii) specific factors in relation to additional maternity leave

(i) Comparative situation in other EU Member States

Ireland's provisions in relation to maternity leave are compared with other EU Member States in Chapter Three of this report. The period of maternity leave to which the employee is entitled varies in EU Member States from 14 weeks (Ireland, Portugal, Sweden) to 28 weeks (Denmark). There is a problem, however, in relation to the picture which the statistics provide, as maternity leave needs to be seen in the context of the overall package of parenting entitlements available in Member States. In Ireland, 14 weeks maternity leave (with a payment) and 4 weeks additional leave (without a payment) is complemented by 14 weeks unpaid parental leave, available to both parents. While the 14 weeks maternity leave in Sweden matches Ireland's 14 weeks provision, the initial period of parental leave in Sweden (i.e. up to when the child is 18 months old) is more akin to maternity leave. There are other parental leave arrangements in Sweden which apply until the child is 8 years old. Portugal is, therefore, the only other EU Member State with only 14 weeks maternity leave entitlement.

(ii) Balance between work and family life

There is a growing awareness that the promotion of the reconciliation of work and family life is now integral to policy making. The Government is committed to promoting family friendly policies at national level through the Programme for Prosperity and Fairness. At EU level, the Pregnant Workers' Directive and the Parental Leave Directive (96/34/EC) underpin the EU's commitment to legislative measures which promote the reconciliation of work and family life. A *Resolution on the balanced participation of women and men in work and family life* (2000/C218/02) was adopted at the June, 2000 meeting of the Labour and Social Affairs Council of Ministers.² The EU Employment Guidelines, 2000 state that better reconciliation between work and family life is of key importance in supporting women's and men's entry and continued participation in the labour market and in achievement of equality between women and men. The Fourth Pillar in the 2000 Employment Guidelines contains a commitment by Member States and the Social Partners to design, implement and promote family friendly policies.

As an acknowledgement of these commitments, an increase in maternity leave would facilitate the reconciliation of work and family life, including the bonding of mothers and children in the early months.

(iii) Childcare

One of the arguments for an increase in the length of maternity leave is the difficulty for parents to get access to high-quality, affordable childcare, particularly for babies under 1 year old. Access to childcare in this category is a particularly acute problem at present. There are few childcare places for children under 1 year due to the higher costs for childcare providers of providing childcare for this age group. Under the Child Care (Pre-School Services Regulations), 1996 the staff/child ratio for babies under 1 year in full day care is 1:3, whereas the ratio for children between 1 and 3 years is 1:6. Any increase in maternity leave would contribute towards an alleviation of this serious problem.

² This Resolution will be discussed further in the context of the proposal on paternity leave.

An increase in the length of maternity leave might also help lessen the cost for mothers in respect of childcare for babies, as the need for childcare facilities would occur later in the child's life.

It is a widely held view, supported by leave arrangements in several other countries, that the best interests of infants under 12 months old are served by their remaining in the direct care of their parents. An increase in the length of maternity leave could contribute very positively to this goal.

(iv) Benefit and cost to employers and the economy generally

Any increase in maternity leave will result in both benefits and costs to employers and to the economy generally. The Group considered these benefits and costs in the course of its discussions.

The number of women in the labour force has risen dramatically with Ireland's current buoyant economy. The most recent figures indicate that 47.2% of women aged 15 or over were in the labour force in the second quarter of 2000.³ The most recent CSO figure on labour force participation for women aged between 15 and 45 (roughly corresponding with childbearing years) is 61.5%. The fertility rate has fallen from 4.1 births per woman in 1964 to 1.89 births in 1999.

A benefit to the economy of increased length of maternity leave would be the contribution this would make to the enhanced welfare and health of mothers and children. Social benefits to children ultimately result in increased human capital. Increased participation by women in the labour force makes this issue all the more important, as it is likely in the future that most mothers will be working outside the home. It is recommended in the Conclusions of the Lisbon European Council of March 2000 that the number of women in employment in the EU be increased from a current average of 51% to more than 60% by 2010. Complying with this target will mean a further increase in the number of women of childbearing years in the labour force and, therefore, it will be necessary to address their welfare and the welfare of children in a context where an ever increasing number of mothers will be at work.

Incentives which can assist in keeping women in the labour force are, of course, beneficial to employers and the economy generally, both in terms of retaining skilled workers and not exacerbating labour shortages. The Equality Authority's presentation to the Group (Appendix VII) indicates the types of concerns which are expressed by female employees in relation to combining pregnancy and caring for new-born babies, and work. A report, *New Mothers at Work*, commissioned by the Employment Equality Agency, and published in 1999 shows the difficulties experienced by 30 women in combining motherhood and the demands of the workplace. A strong theme which emerged from this research was that the women interviewed wanted to stay in the labour force but felt inadequately supported by legislative and other measures in exercising their choice. Some women surveyed indicated that the dual pressures of motherhood and work were too much and that they were withdrawing reluctantly from the workplace. While this was a small survey, it does indicate that women are facing pressures which may force them, unwillingly, out of the workforce. If women did not drop out of the workforce after childbirth, this would result in less recurrent recruitment and retraining costs for employers. Retention of women in the workforce is obviously of benefit to employers and, conversely, their loss can only be a cost to them.

There are several other factors, however, which must be taken into consideration when looking at the full cost to employers of any extension in maternity leave. The cost to employers of extending maternity leave has to be seen in the context of the cost of the recent introduction of parental leave, where an employee is entitled to 14 weeks leave in respect of each of his/her children under 5 years of age. It has

³ Quarterly National Household Survey, Second Quarter 2000.

also to be seen in the context of staff shortages which are being experienced at present and which are particularly acute in some sectors.

Any extension of maternity leave (which attracts a payment) or additional maternity leave will result in additional costs to individual employers, including hiring of replacement staff, overtime payments to staff to provide cover etc. There will be a greater wage bill if overtime is necessary to cover for the absent employee. This applies to any increase in maternity leave whether it is paid or unpaid. In addition, if it is not possible to replace the person (even with overtime worked by existing employees) during increased periods of maternity leave and additional maternity leave, there is great potential for loss of business. Any increase in paid maternity leave would impact on the Social Insurance Fund. The Social Insurance Fund is partly funded by employer PRSI contributions. The introduction of any other benefits, such as paid breastfeeding breaks, annual leave entitlements to accrue during additional maternity leave period and pensions to accumulate during additional maternity leave would obviously increase costs for employers.

The Group also considered benefits to the economy. Retention of women in the workforce is a major benefit to the economy generally. Our growing economy has been supported by dramatically increased female labour force participation. It is of benefit to the economy's continued growth that skilled and experienced women stay in the labour force, and are not forced to drop out after childbirth. The increase in the labour force participation of women results in increased taxation and social insurance receipts to the State. This can reduce the cost to the exchequer and employers of providing extra maternity leave. Obviously, increased labour force participation results in greater prosperity and the multiplier effect of more disposable income encourages the economy's growth.

(v) Cost to the Social Insurance Fund

A direct cost to the exchequer of extending the period of maternity leave (attracting a payment) is the cost to the Social Insurance Fund. Expenditure on the maternity benefit scheme from 1995 to 2000 has risen from £27.3 million in 1995 to an estimated cost of £44.3 million for the whole of 2000. This reflects the increase in the number of claims from 15,664 in 1995 to 23,851 in 1999 and an estimated 26,000 in 2000. The increase in the number of claims is obviously directly related to the increase in women in employment and to the extension of coverage to further categories. These costs are based on the current 14 week maternity provision.

The estimated full year cost to the Social Insurance Fund of increasing the period of maternity leave is £3.16 million for each extra week.

While the Social Insurance Fund is in a strong position at present, the increased expenditure levels implicit in the current proposals, together with other Social Welfare commitments contained in the Government Action Programme for the Millennium and the PPF will have implications for the future financing of the Fund.

(vi) Cost to public service employers

Permanent and pensionable civil servants, recruited prior to April 1995, pay a modified rate of PRSI contributions and are therefore not entitled to Maternity Benefit. They are however entitled to full pay from their employer.

Other civil and public service employees, including all those recruited since April 1995, are fully covered for PRSI purposes. In the case of such employees, public sector employers may pay the employee's

salary in full, and recoup the maternity benefit scheme payment. This is the procedure operated in respect of most Civil Service employees recruited since April 1995.

The cost of extending maternity leave for the public sector would include payments made to employees who do not qualify for Maternity Benefit, and any extra contractual payments made to employees in receipt of Maternity Benefit. The cost of an increase in 4 weeks of maternity leave (which attracts payment) to the public service is at least £8 million per annum.

(vii) Breastfeeding

Proposals to improve breastfeeding facilities are dealt with separately by the Group. A description of the Department of Health and Children's role in promoting breastfeeding is at Appendix VIII.

The *National Breastfeeding Policy* recommends that mothers be encouraged to practise exclusive breastfeeding for at least 4 months to provide health benefits which persist from infancy into later life. The current paid maternity leave entitlement of 10 weeks after confinement plus four weeks unpaid leave doesn't facilitate exclusive breastfeeding for 4 months.

The national breastfeeding policy supports the case for an increase in the duration of leave. Any increase in the length of leave would assist employed mothers in respect of breastfeeding.

(viii) Specific factors in relation to additional maternity leave

Many of the issues already discussed in this section have an equal application to maternity leave and additional maternity leave. It is clear that increases in both maternity and additional maternity leave have an impact on the reconciliation of work and family life, and in terms of costs and benefits to individual employers and the economy (other than cost to the Social Insurance Fund). The opportunities for breastfeeding can be enhanced by extending either or both types of leave. There are some issues, however, which can impact somewhat differently in relation to additional maternity leave.

a. Financial viability of additional maternity leave for the employee

The Group has considered proposals to increase maternity leave and additional maternity leave. The difference between the two types of leave is that maternity leave attracts a payment while additional maternity leave does not. This raises the question of whether the less well off can afford to take additional maternity leave.

b. Uptake of additional maternity leave

Statistics on the uptake of additional maternity leave are not available either for the private sector or the public sector. Anecdotal evidence indicates quite a high level of uptake in both the public and private sectors.

The Group recommends:

- ***4 extra weeks maternity leave which attracts a payment from the Social Insurance Fund (bringing total entitlement to 18 weeks).***
- ***4 extra weeks additional (unpaid) maternity leave (bringing total entitlement to 8 weeks).***

EMPLOYMENT RIGHTS DURING ADDITIONAL MATERNITY LEAVE

Background

Section 22(2) of the Maternity Protection Act, 1994 provides as follows:

“In respect of a period of absence from work by an employee while on—

- (a) additional maternity leave,
- (b) subsection 1(b) leave as defined in Section 16(3),⁴ or
- (c) further leave under Section 16(4)⁵

the period of employment before such absence shall be regarded as continuous with the employee’s employment following such absence in respect of any right (other than the right to remuneration during such absence) whether conferred by statute, contract or otherwise, and related to the employee’s employment.”

This means that an employee is still in an employment relationship with the employer while on additional maternity leave, and retains rights in relation to that employment. However, the period of additional maternity leave is not counted as reckonable service and, therefore, there is no entitlement to any right based on reckonable service during the additional maternity leave period, for example, annual leave.

Proposals considered by the Working Group

- Employment rights should be preserved for the period of additional maternity leave. Section 14(1) of the Parental Leave Act, 1998 states that: “an employee shall, while on parental leave, be regarded for all purposes relating to his or her employment (other than his or her right to remuneration or superannuation benefits or any obligation to pay contributions in or in respect of the employment) as still working in the employment and none of his or her other rights relating to the employment shall be affected by the leave.” This creates a discrepancy between the two Acts with regard to employment rights. (EA/Department of Social, Community and Family Affairs/ICTU).
- The period of additional maternity leave should count for credited PRSI contributions. (ICTU).

(i) Employment Rights

Both a period of additional maternity leave and a period of parental leave are protected in respect of rights which are not related to reckonable service, such as protection against dismissal and the right to return to the same job. Where the two pieces of legislation differ is on the question of rights which are linked to reckonable service in the employment.

As stated above, under the provisions of Section 22(2) of the Maternity Protection Act, 1994, the period of additional maternity leave is not reckonable service. Section 14(1) of the Parental Leave Act provides that the employee retains all his or her employment rights, except remuneration and pension rights, while on parental leave. These rights include rights dependent on reckonable service such as annual leave and the right to have the time counted for incremental and seniority purposes.

⁴ Leave for father, up to 14th week following the confinement, if mother dies following tenth week after childbirth.

⁵ If mother dies before tenth week after childbirth, father is entitled to leave up to the end of that tenth week. Section 16(4) entitles him to a further four weeks leave.

Where a female employee takes parental leave directly after maternity and additional maternity leave, out of the three types of leave taken, only additional maternity leave is not reckonable service for the employee. There is a strong argument that there is an unjustifiable discrepancy between the employment rights associated with the two types of leave.

Parental leave, which is reckonable service, is an option open to both parents. Additional maternity leave, which is not reckonable service, is open only to the mother. It is argued that the fact that additional maternity leave is not reckonable service constitutes an inequity in employment rights for women, in that a type of leave which is open only to women attracts less favourable conditions than a type of leave open to both sexes.

The main cost to employers of making additional maternity leave count for reckonable service in the same way as parental leave is the cost of annual leave.

It should be noted that the Civil Service has provided that additional maternity leave counts for promotion and incremental purposes for its employees since January, 2000.

(ii) Credited PRSI contributions

While a woman's cover for social insurance benefits is protected during the 14 week period of maternity leave, through the award of credited contributions, the period of additional maternity leave does not currently count for PRSI credits. This contrasts with the treatment of the period of parental leave during which a parent's cover for social insurance benefits is also protected through the award of credited contributions. Extension of PRSI credit coverage to additional maternity leave is a logical extension to this process.

The Group recommends that:

- *The period of additional maternity leave should count for the same employment rights as provided under Section 14(1) of the Parental Leave Act, 1998 which provides that: “an employee shall, while on parental leave, be regarded for all purposes relating to his or her employment (other than his or her right to remuneration or superannuation benefits or any obligation to pay contributions in or in respect of the employment) as still working in the employment and none of his or her other rights relating to the employment shall be affected by the leave.” It was also agreed that the period of additional maternity leave would count for public holidays.*
- *The Department of Social, Community and Family Affairs should make arrangements to provide for PRSI credits during the period of additional maternity leave.*

ANTE-NATAL CLASSES

Background

Section 15 of the Maternity Protection Act, 1994 provides for time off without loss of pay for ante-natal and post-natal care, in accordance with Regulations made under that section. The Maternity Protection (Time off for Ante-Natal and Post-Natal Care) Regulations, 1995 set out the details of the general entitlement of employees to time off from work for the purpose of ante-natal or post-natal care. The Regulations provide for time off for a medical or related appointment which is defined as:

“an appointment for the purposes of an examination or test to be undergone by the employee that

is carried out by, under the supervision of, or at the direction of a registered medical practitioner and that —

- (a) in the case of ante-natal care, relates directly to an existing pregnancy of the employee; and
- (b) in the case of post-natal care, is after a confinement of the employee and consequential on that confinement.”

The entitlement to time off for post-natal medical appointments applies up to 14 weeks after confinement. Generally, women would be on maternity leave for a substantial portion of this period.

Proposals considered by the Working Group

- The legislation should provide for time off without loss of pay for ante-natal classes. (ICTU/EA/NWCI).

In the course of the Group’s discussions, a further proposal was considered:

- All public ante-natal classes should be free.

The question of whether ante-natal care should include ante-natal classes as well as medical or related appointments was considered by the Group.

There is a strong argument that ante-natal classes form an intrinsic part of the ante-natal care package, on the first pregnancy. The Group consulted the Institute of Obstetrics in this matter and received an oral opinion that pregnant women need one complete set of ante-natal classes irrespective of the number of pregnancies. One complete set of ante-natal classes is sufficient for the woman’s health and safety in the course of childbirth. However, it would be necessary to build in safeguards for women who deliver early, miscarry or undergo Caesarean section, as they would not either have got the full benefit from their classes, or be in a position to attend a full set of classes.

At present, there is a strict code, under the Maternity Protection (Time off for Ante-Natal and Post-Natal Care) Regulations, 1995 to ensure that employees give their employer adequate notice and proof of their medical appointments. A similar mechanism would be required to monitor time off for ante-natal classes.

A complete set of ante-natal classes consists of up to 8 one hour classes for a woman on her first pregnancy. The first and last classes are generally held on a walk-in basis every week, thus facilitating the woman to attend any class when she has been diagnosed pregnant and immediately prior to the birth. A woman is also enrolled for a course of six ante-natal classes.

The Group also learned that ante-natal classes run outside of normal daytime working hours are generally subject to a charge.⁶ This could be problematic for mothers unable to attend ante-natal classes during normal working hours.

The Group also considered the issue of facilitating fathers to attend ante-natal classes with their partners. Many fathers attend the two last classes.

⁶ See *Preparing Together for Birth and Beyond — A Consumer Guide to the Maternity Services in Ireland*, Cuidiu Irish Childbirth Trust, 1999.

The Group recommends that:

- *provision be made in legislation or Regulations for paid time off for mothers to attend one complete set of ante-natal classes. At least 3 of the classes are to be taken during the pre-confinement maternity leave period. The situations which could result in the woman not taking a full set during one pregnancy can be covered in Regulations setting out the conditions for paid time off for ante-natal classes.*
- *In light of the arguments for greater balance of participation of fathers and mothers in family life, fathers should be facilitated to be involved in the pregnancy and childbirth. The Group also recommends that provision be made in legislation for paid time off for fathers to attend the two ante-natal classes immediately prior to the birth.*
- *As ante-natal classes given outside of normal daytime working hours in maternity hospitals are subject to a charge, the Group is of the view that, in the interest of equity, consideration should be given to having all public ante-natal classes free of charge.*

BREASTFEEDING

Background

Breastfeeding is covered by the Maternity Protection Act, 1994 only in the context of Health and Safety Leave. There is no obligation on an employer to provide breastfeeding facilities. Under the Health and Safety (Pregnant Employees etc.) Regulations, 2000, breastfeeding mothers, who have notified their employer of their condition, are protected up to 26 weeks after the birth. In carrying out the risk assessment, the employer must, in particular, protect employees who are breastfeeding from exposure to chemical agents, lead and lead derivatives and underground mining work (pregnancy regulations, Schedule 2, Part B). If an employer cannot remove the risk, or provide suitable alternative employment, the mother may be granted Health and Safety Leave under Section 18 of the Maternity Protection Act. This is the only statutory provision for leave for breastfeeding mothers in Irish law at the present time.

A further provision for breastfeeding mothers exists in the Safety, Health and Welfare at Work (General Application) Regulations, 1993, which provide that an employer must take into account the needs of breastfeeding mothers, **if** a restroom is provided on the premises.

Proposals considered by the Working Group

- There should be provision for at least two half-hour paid lactation breaks during the day for an employee who is breastfeeding. The employer should provide appropriate facilities such as a restroom and fridge for expressed milk. (NWCi).
- Provision should be made for two paid half hour breaks during the working day to allow an employee to express milk. (EEA).
- Employers should be obliged to provide facilities for breastfeeding mothers in the workplace.(ICTU).

The proposals were discussed with regard to the following:

- (i) Current national breastfeeding policy
- (ii) ILO Maternity Convention in relation, *inter alia*, to breastfeeding

- (iii) Current barriers to breastfeeding
- (iv) Benefits of breastfeeding
- (v) Cost to employers of providing lactation breaks and breastfeeding facilities

(i) Current national breastfeeding policy

The *National Breastfeeding Policy* was published by the Department of Health in 1994, with the express purpose of increasing Ireland's breastfeeding rate, as part of the Department of Health's overall health promotion strategy. (A presentation from the Department of Health and Children and the Women's Health Council on the policy and breastfeeding is at Appendix VIII). The *National Breastfeeding Policy* recommends that mothers should be encouraged to practise exclusive breastfeeding for at least 4 months for health benefits which persist later in the child's life. The recommended duration of breastfeeding is for at least 4 months and up to 2 years.

The policy contains over 50 recommendations to promote breastfeeding. The purpose of the policy is to promote breastfeeding as a lifelong health benefit for both mothers and children. The Women's Health Council, which has statutory responsibility for advising the Government on and promoting women's health gain, also support breastfeeding as a lifelong health benefit.

In relation to maternity leave, the National Breastfeeding Policy states that length of maternity leave, job protection, nursing facilities and workplace facilities to express milk are of major practical consideration in influencing women's decision to breastfeed. The National Breastfeeding Committee recommended a gradual extension of maternity leave and the provision of workplace facilities to express milk.

The Department of Health and Children's *Health Promotion Strategy 2000–2005* reiterates that an area of concern in relation to women's health is infant feeding. Two priority objectives of the new *Strategy* are to appoint a National Breastfeeding Co-ordinator to review the National Breastfeeding Policy, and to continue to support the Baby Friendly Hospitals Initiative within the Health Promotion Hospitals Network.⁷ This underpins the continued commitment of the Department of Health and Children to the National Breastfeeding Policy.

(ii) ILO Convention on Maternity Protection, June, 2000

The facilitation of breastfeeding in the workplace for new mothers has also been addressed in the international context. The UN Convention on the Rights of the Child, the European Social Charter and the European Social Charter (Revised) have provisions which relate to breastfeeding.⁸ Most recently, the International Labour Organisation has revised its Convention on Maternity Protection.

Article 10 of the International Labour Organisation Convention on Maternity Protection adopted in Geneva in June 2000 provides that a woman shall be provided with the right to one or more daily breaks or a daily reduction of hours worked to breastfeed her child. The Convention provides that the period during which nursing breaks or the reduction of daily hours of work are allowed shall be determined in accordance with national law and practice. Similarly, the number of nursing breaks, the duration of nursing breaks and the procedures for the reduction of daily working hours, shall be determined in accordance with national law and practice. The Convention also provides that lactation breaks or any reduction in working time to facilitate breastfeeding is to be counted as working time and remunerated accordingly.

⁷ *The National Health Promotion Strategy 2000–2005*, Department of Health and Children, July, 2000, p.42.

⁸ See Appendix IV on international instruments for extracts from texts.

(iii) Current barriers to breastfeeding

The National Breastfeeding Policy had a target of 50% breastfeeding initiation rate by the year 2000, with a 30% breastfeeding rate at 4 months. These targets have not yet been met, with only a 30–35% initiation rate, with a large drop-off further away from the birth. According to the *National Health Promotion Strategy 2000-2005*, the percentage of mothers who reported to have breastfed their last child was only 29%. Some of the barriers responsible for this are not work-related. The following are work-related barriers:

- The perception of breastfeeding as inconvenient. Lack of statutory provision for lactation breaks and the low prevalence of breastfeeding facilities in the workplace obviously contributes to this perception. The current environment in relation to breastfeeding facilities is leading to women's decision not to breastfeed.
- The current length of maternity leave. Breastfeeding patterns are difficult to establish and weaning takes 6 weeks. With the current maternity leave entitlement, the woman would have a maximum of 14 weeks off after the birth (10 weeks paid post-confinement leave and 4 weeks unpaid leave), and this would effectively mean a very short period of established breastfeeding. When the breastfeeding pattern is established for such a short period of time, there is a consequent reduction in health gain for the child.
- Due to the difficulty in establishing worthwhile breastfeeding patterns within the current maternity leave entitlement, many women may not choose to breastfeed if they want to return to work. Stress is another factor in relation to the decision not to breastfeed when the woman returns to work.

(iv) Benefits of breastfeeding

A greater facilitation of the reconciliation of breastfeeding with work responsibilities has several benefits. These include:

- Breastfeeding for a period of at least 4 months and up to 2 years has health benefits for the child which persist later into life. The *National Breastfeeding Policy* cites studies which conclude that breastfeeding can protect babies against certain acute infectious diseases including gastrointestinal illness, and that breastfeeding can also protect against the development of ulcerative colitis and coeliac disease in later life. Research has also shown that their own mothers' milk is the optimal diet for premature infants.⁹
- In the current labour market, it is important that the reconciliation of motherhood and work is not disincentivised in any way for mothers. As the Government is committed to increasing female labour force participation, any provision which can promote retention of women in the labour force needs to be encouraged. The provision of breastfeeding facilities could function as a recruitment incentive and encourage women to return to work after maternity leave.
- The provision of breastfeeding facilities could have benefits even further down the line, as it would be likely that the healthier child would be sick less often, and result in reduction of stress for the parents.

(v) Cost to employers of providing lactation breaks and breastfeeding facilities

The *National Breastfeeding Policy* recommends greater flexibility in relation to post-natal leave and that employers provide facilities where breastfeeding mothers can express milk. In their presentation to the

⁹ *National Breastfeeding Policy*, Department of Health 1994, pp.22–23.

Group, the Women's Health Council recommended certain specific provisions to facilitate breastfeeding in the workplace:

- (i) two lactation breaks of at least half hour each
- (ii) basic facilities for the lactation break viz., a space with some indication of privacy, a suitable chair and a washbasin, and a secure place for storing expressed milk, preferably a fridge.

Any proposal to provide breastfeeding facilities and lactation breaks in the workplace needs to take into account the costs and problems faced by employers in the provision of such facilities.

Concerns for employers include:

- Cost of paid lactation breaks.
- The physical arrangements recommended for breastfeeding in the workplace would pose extreme difficulty for small employments.
- In relation to provision of lactation breaks, 75% of Irish employers employ 4 or less employees, and would face great difficulties in implementing lactation breaks.
- The possibility of breastmilk becoming contaminated while being stored on the employer's premises.

Greater flexibility on the part of the employer and the employee could contribute towards lessening these barriers to breastfeeding in the workplace. For example, more flexible working practices which would allow an employee to come in early or late and to take lactation breaks first thing in the morning or late in the evening, might lessen the pressure on busy team environments. Similarly, the physical arrangements for lactation breaks need not be elaborate.

The Group recognises the importance of breastfeeding as a health gain for the child which persists into later life. In line with the recommendation of the National Breastfeeding Policy that “mothers should be encouraged to practise exclusive breastfeeding for at least 4 months and thereafter with appropriate weaning foods”, the Group recommends that employers provide employees who have recently given birth and are breastfeeding with either an adjustment of working hours or breastfeeding facilities/facilities to express breastmilk in the workplace in order to facilitate breastfeeding for 4 months after the birth. These breaks or any reduction in working hours would count as working time and be remunerated accordingly. The employer will determine which of these two options apply in each particular case. The provision of breastfeeding facilities will be subject to it not giving rise to cost, other than nominal cost, to the employer.¹⁰

PATERNITY LEAVE

Background

There is no provision in the Pregnant Workers' Directive (92/85/EEC) or in the Maternity Protection Act, 1994 for leave for fathers at the time of childbirth. Section 16 of the Act provides for leave for employed fathers in the event of the death of the mother before the end of the fourteenth week following the week of her confinement, when she has been delivered of a living child.

Some employers have arrangements in place where they grant new fathers leave at the time of the birth. Since 1st January, 2000, civil servants have an entitlement to 3 days paid paternity leave, which may be

¹⁰ Wording here mirrors Section 16(3)(c) of the Employment Equality Act, 1998.

taken up to four weeks after the birth. As the allowances are per child, in the case of twins the entitlement is to six days leave.

Proposals considered by the Working Group

- The legislation should provide for 5 days paid paternity leave on the birth of the child to be paid on the same basis as maternity leave is currently paid. (ICTU/EA/NWCI)

This proposal was discussed and the following issues were taken into account:

- (i) Comparative situation in other EU Member States
- (ii) *Force majeure* and paternity leave
- (iii) Reconciliation of work and family life and balanced participation of men and women in work and family life
- (iv) Cost to employers

(i) Comparative situation in other EU Member States

The comparative situation in other EU Member States in terms of paternity leave provision is covered in Chapter Three of this report. Available information indicates that Belgium, Denmark, Finland, France, Germany, Greece, Italy, Portugal, Spain, Sweden and the Netherlands have some statutory entitlement to leave for fathers at the time of childbirth. The length of paternity leave varies from 18 days (up to 12 can be taken at the time of the birth) in Finland to 1 day in Greece. In the case of the UK,¹¹ there is no provision for paternity leave, other than in the context of *force majeure* leave. The UK Employment Relations Act, 1999 provides that employees may take a reasonable amount of time off work to deal with certain unexpected or sudden emergencies in relation to a dependant of the employee, and to make any necessary longer term arrangements. One of the circumstances in relation to which an employee can take time off is to assist a dependant who is having a baby.

(ii) *Force majeure* and paternity leave

Paternity leave is an individual right for fathers at the time of and immediately after the birth of the child. Nevertheless it is notable that there is some collapsing of the principles of *force majeure* leave and paternity leave in some Member States. According to *Care in Europe*, employees in Germany may take leave for emergencies which may include the birth of a child by a partner. The position in the UK is as outlined above.

In Ireland entitlement to *force majeure* leave is confined to emergencies relating to illness or injury and does not encompass paternity leave. Section 13 of the Parental Leave Act, 1998 provides for *force majeure* leave with pay where, for urgent family reasons, owing to an injury to or illness of a family member, the presence of the employee, at the place where the person is, is indispensable. A spouse or partner is included in the list of qualifying family members. However, pregnancy or childbirth is not an illness or injury, even though the presence of the employee at the birth may be considered indispensable.

¹¹ *Time off for Dependents — A Guide for Employers and Employees* — Department of Trade and Industry leaflet — URN 99/1186.

(iii) Reconciliation of work and family life and balanced participation of men and women in work and family life

A statutory arrangement to allow for a father's entitlement to leave at the time of and immediately after childbirth would enhance arrangements for the reconciliation of work and family life. The question of equal participation by women in the workplace and by men in family life has been the subject of EU debate in recent times. As already mentioned, the EU Council of Labour and Social Affairs Ministers passed a *resolution on the balanced participation of women and men in work and family life* at the June, 2000 Council.

The Portuguese Presidency saw this resolution as complementing Council Resolution 95/C 168/02 on the balanced participation of women and men in decision-making. The Preamble makes a number of statements, notably that the imbalance of participation of women in the labour market and of men in the domestic sphere has individual and social costs, and constitutes an obstacle to gender equality. It also states that both maternity and paternity are important social values to be protected by the State, and that both sexes have a fundamental right to work and a fundamental right to family life. The Resolution makes a number of proposals in this regard, including encouraging Member States to become involved in:

“Examining the scope for the respective legal systems to grant working men rights likely to provide support for family life with a view to cementing equality.”¹²

and

“Examining the scope for the respective legal systems to grant working men an individual and untransferable right to paternity leave, subsequent upon the birth or adoption of a child, maintaining their rights relating to employment to be taken at the same time as the mother takes maternity leave irrespective of the lengths of the periods of maternity and paternity leave.”¹³

(iv) Cost to employers

Any increase in leave would have a cost implication for employers, both in terms of the absence of the father from the workplace, and a monetary cost if the leave were to be paid by the employer.

The Group considered the proposal to pay the leave on the same basis as maternity leave, i.e. a payment from the Department of Social, Community and Family Affairs, based on the father's social insurance contributions. While this arrangement would alleviate the cost of implications for employers of paternity leave, it would have extensive cost implications for the State, in terms of the cost efficiency of putting a complex administrative system in place for a small amount of leave.

The Group recognises the importance of the role of fathers at the time of and immediately after childbirth. The Group, without commitment from any party, agreed that the issue of paternity leave would be considered in the context of the forthcoming review of the Parental Leave Act, 1998 or such other review as may be appropriate.

¹² Article 2(b)(ii).

¹³ Article 2(b)(i).

Background

The Maternity Protection Act, 1994 and the Safety, Health and Welfare at Work (Pregnant Employees etc.) Regulations, 2000 give effect to the health and safety provisions of the Pregnant Workers' Directive (92/85/EEC).

The Pregnant Workers' Directive sets out the steps which must be followed to ensure the adequate protection of pregnant workers, workers who have recently given birth or workers who are breastfeeding. The employer must identify any risk and take appropriate action to protect the employee from that risk, by either removing the risk, moving the employee to suitable alternative employment or altering her working hours. If the removal of the risk, or the transfer to alternative duties is not "technically or objectively feasible, or cannot reasonably be required on duly substantiated grounds," the worker is granted leave on health and safety grounds.

The provisions of the Safety, Health and Welfare at Work (Pregnant Employees etc.) Regulations, 2000 are set out in the presentation by the Health and Safety Authority at Appendix VIII. Under these Regulations, if the employer cannot remove the risk, or move the employee to suitable alternative employment, or transfer her to daytime work in the event of her medical practitioner certifying her unfit for nightwork, the employee can be granted leave on health and safety grounds under Section 18 of the Maternity Protection Act, 1994. The first 21 days of this leave are paid by the employer, after which the employee may apply for Health and Safety Benefit from Department of Social, Community and Family Affairs.

Regulations made under the Maternity Protection Act, 1994 regulate the administration of the health and safety leave system. The Maternity Protection (Health and Safety Leave Remuneration) Regulations, 1995 determine the manner of calculation of the amount of remuneration which an employee is entitled to receive from her employer for the first 21 days of leave granted by the employer to protect her safety and health, whether as a result of a risk assessment or because the employee cannot be required to perform nightwork. The Maternity Protection (Health and Safety Leave Certification) Regulations, 1995 determine the form of the certificate to be issued by employers to employees who are pregnant, have recently given birth or are breastfeeding where the granting of leave on health and safety grounds is deemed essential. The employee needs this certificate to apply for Health and Safety Benefit from the Department of Social, Community and Family Affairs.

Proposals considered by the Working Group

- (a) If as a result of the risk assessment, an employee is transferred to other duties, she should not lose financial and other benefits. (NWCI).
- (b) If, following advice of a medical practitioner, a pregnant woman is transferred from night duties to other duties and hours, she should not suffer financial loss (e.g. loss of shift allowance). (ICTU).
- An individual risk assessment should be carried out once an employee has informed the employer of her pregnancy, and the HSA should monitor compliance by employers of this obligation. Section 30 of the Maternity Protection Act, 1994 should be amended to provide for redress for an employee in circumstances where an employer has not carried out a risk assessment but nonetheless makes a decision which results in the employee not being allowed to continue at work. (ICTU).

(i) Loss of financial or other benefits as a result of transfer to other duties or working hours

The Safety, Health and Welfare at Work (Pregnant Employees etc.) Regulations, 2000 provide that where a removal of the risk is not possible the employer may transfer the employee to other duties which do not “present a risk to the safety or health of, or any possible effect on the pregnancy or breastfeeding by, such employee.” In the case of nightwork, the Regulations provide that the employer must transfer an employee, who presents a medical certificate certifying that she is unfit for nightwork, to daytime hours and if that is not possible to put her on Health & Safety Leave. The purpose of the Regulations is to avoid risk to the health or safety of the employee.

Section 18 of the Maternity Protection Act, 1994, defines other suitable work as a kind of work which is suitable and which is “appropriate for the employee to do in all the circumstances.”

The Group considered the implications for employees who transferred to other duties, from duties including from night duty which would accrue a shift premium.

The position is that no employee is *banned* from night work under the legislation, but she may present a certificate from her own medical practitioner stating that she is unfit for nightwork and she then may not be *obliged* to undertake nightwork. This could cause significant reduction in income for a woman.

The concerns of employers must also be taken into consideration. If an employer transfers a woman from night work to day time work, s/he may need to hire a replacement for the night work and pay that person a shift allowance. If the employer is also obliged to maintain the shift allowance of the pregnant employee, s/he is open to the cost of a shift allowance on the double for the one job.

(ii) Monitoring and enforcement of employers’ obligations in relation to risk assessment

It should be noted that the Department of Social, Community and Family Affairs report that the take-up of the Health and Safety Benefit scheme is negligible. There were 64 claims to the Department between 1st January, 2000 and 19th May, 2000. One possible reason for such low take-up could be that, where risks are identified, employers are largely complying with removing the risk or offering the employees suitable alternative employment, and there is little need arising to take the leave. However, as employers are responsible for paying the first 21 days leave, there are no statistics to indicate how many employees are taking up to three weeks health and safety leave.

It emerged from the Group’s discussion of the health and safety proposals that there is lack of clarity about the Health and Safety Authority’s monitoring role in relation to risk assessments and in relation to disputes arising from those risk assessments.

Members of the Group felt that there was a lack of clarity about where an employee can go for redress in relation to a dispute concerning a risk assessment. The issue of appeal of a Health and Safety Authority decision was also raised in the context of the presentations by the Health and Safety Authority and the Rights Commissioner. The Group decided that the Report should set out clearly the procedures in relation to the enforcement of the pregnancy regulations. These procedures are outlined on a Flow Chart and explanatory text in Chapter One of the Report.

With regard to the proposal put to the Group that Section 30 of the Maternity Protection Act, 1994 should be amended to provide redress for an employee whose employer does not undertake a risk assessment, but makes a decision which results in the employee being unable to remain at work, the Group considers that the current procedures as outlined provide appropriate avenues of redress. Section 30 of the Maternity Protection Act, 1994 sets out clearly the remit of the Rights Commissioner and of the Health and Safety Authority in relation to redress. Any problem in relation to adequate enforcement

of health and safety arrangements therefore, cannot be usefully addressed by any amendment to Section 30 of the Maternity Protection Act.

The Group is not making any recommendation in relation to (i).

In relation to enforcement and monitoring of risk assessments, the Group concludes as follows:

- *The Flow Chart sets out the procedures dealing with the Health and Safety complaints. It indicates that the Pregnancy Regulations are usually reactively enforced at present, and, accordingly, the Group recommends that the Health and Safety Authority includes a proactive approach to these regulations in its future programmes.*

TRANSFER FROM ADDITIONAL MATERNITY LEAVE TO SICK LEAVE

Background

Section 14 of the Maternity Protection Act, 1994 provides that an employee may take up to 4 consecutive weeks' additional maternity leave immediately after her maternity leave. In order to avail of this leave, the employee must ensure that her employer is notified in writing, of her intention to take the leave. While this notification could be given at the same time as that relating to her intention to take maternity leave, it must reach her employer not later than 4 weeks before the end of her maternity leave. If the employee no longer wishes to take additional maternity leave it is necessary to revoke, in writing, her original notification not later than 4 weeks before the end of her maternity leave.

Proposal considered by the Working Group

- The Act should be amended to provide for a situation whereby an application for additional maternity leave can be revoked in cases of illness. (ICTU).

If an employee, who has notified her employer of her intention to take additional maternity leave, becomes ill during the last four weeks of her maternity leave, and this illness extends into the additional maternity leave period she will be in an unfavourable position financially compared with other employees on sick leave. On the other hand, any facility to transfer from additional maternity leave to sick leave could involve cost and have other practical implications for employers. In order to alleviate any practical difficulties which this proposal may create for employers, the Group considers that any option to transfer from additional maternity leave to sick leave should be subject to agreement between the employer and the employee.

The effect of any proposal to transfer from additional maternity leave to sick leave on the entitlement to the balance of the additional leave was also considered. In this regard it was noted that the European Court of Justice stated in *Margaret Boyle & Others -v- Equal Opportunities Commission* (C-411/96) that “in order for a woman on maternity leave to qualify for sick leave, she may be required to terminate the period of supplementary maternity leave granted to her by the employer.”

The Group recommends that:

- *In the event of illness, an employee should, subject to the agreement of the employer, be able to transfer from additional maternity leave to sick leave. If an employee transfers from additional maternity leave to sick leave, she will forfeit her right to any additional maternity leave not taken at the date of the commencement of the sick leave.*

SPLIT PERIOD OF MATERNITY LEAVE IN THE EVENT OF HOSPITALISATION OF THE BABY

Background

The Pregnant Workers' Directive (92/85/EEC) provides for an entitlement to a continuous period of maternity leave of at least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice (Article 8). The Maternity Protection Act, 1994 provides for an entitlement to 14 consecutive weeks maternity leave, at least 4 of which must be taken before the end of the week in which the baby is due and 4 weeks after that week (Sections 8 and 10). The Act also provides an entitlement to up to 4 weeks additional maternity leave immediately after her maternity leave.

Proposal considered by the Working Group

- The legislation should allow for split period of maternity leave in circumstances where the child is required to remain in hospital, subject to agreement between the employer and the employee. (DSCFA/ICTU).

This issue was considered by the Group and it was noted that neither the Directive nor the 1994 Act provides for the splitting of maternity leave in circumstances where the child is hospitalised. The wording of the Directive would suggest that it is not permissible to split the 14 weeks maternity leave as proposed. Furthermore, it was noted that the European Court of Justice stated in *Margaret Boyle & others -v- Equal Opportunities Commission* (C-411/96) that "... Article 8 of Directive 92/85 provides that the period of maternity leave provided for therein must be at least 14 continuous weeks, allocated before and/or after confinement. It follows from the purpose of that provision that the woman cannot interrupt or be required to interrupt her maternity leave and return to work, and complete the remaining period of maternity leave later."

It would appear from the foregoing that it is not permissible to split the minimum 14 weeks maternity leave period provided for in the Pregnant Workers' Directive in the event of the hospitalisation of the child.

The issue of allowing for the splitting of any maternity leave in excess of 14 weeks in the event of the hospitalisation of the child was then considered. It was noted that this proposal could create practical difficulties for employers. For example, s/he may have employed another person to replace the employee on maternity leave. In addition, the child could be in hospital for several months, in which case it would be more difficult to justify maternity leave on the basis of health & safety considerations. It was acknowledged however that while the primary purpose of maternity leave is the health of the mother, the splitting of the leave in excess of 14 weeks in the event of the hospitalisation of the child would not be inconsistent with this objective as a woman may return to work under the legislation 4 weeks after the birth of the child subject to taking a total of 14 weeks maternity leave.

The Group recommends that the Act should provide that, provided the employer agrees, in the event of hospitalisation of the child, the employee may return to work after a minimum of 14 weeks maternity leave (at least 4 of which must be after the end of the week of confinement). In such circumstances, the mother will retain her entitlement to take the balance of her maternity leave in one continuous block, when the baby is discharged from hospital. The issue of the mother going on sick leave, period of notice of return to work, the maximum duration of postponement etc., will be determined by Regulations.

TRANSFER OF ANY INCREASE IN MINIMUM PERIOD OF MATERNITY LEAVE TO FATHERS

Background

There is no entitlement under the Maternity Protection Act, 1994 to transfer any portion of maternity leave or additional maternity leave to fathers, if the mother is still living.

Section 16 of the Act provides for the transfer of remaining maternity leave entitlement to the father “if the mother who has been delivered of a living child dies before the fourteenth week after childbirth.”

Proposal considered by the Working Group

- The possibility of transferring any increase in the minimum period of maternity leave to fathers should be explored. (DSCFA).

This issue was discussed in relation to

- (i) the situation in other EU Member States
- (ii) links between maternity leave and the health and safety of the mother
- (iii) facilitation of greater balance in participation of men in family life

(i) Situation in other EU Member States

The situation in relation to paternity leave and transfer of any maternity leave to fathers is set out in chapter three, which compares the overall situation in relation to maternity protection in other EU Member States.

Some Member States have some limited provisions whereby a portion of maternity leave may be transferred to the father.¹⁴ In Denmark, the last 10 weeks of the 22 weeks post-confinement entitlement may be transferred to the father. In Italy, an optional 6 months supplementary maternity leave (attracting an allowance of 30% of salary) may be taken after the minimum period of maternity leave expires; this can be transferred to the father, if the mother does not claim it or if he has sole charge of the baby. The transferable leave in Denmark and Italy is quite similar to parental leave, a point which is highlighted by *Care in Europe* (1998). In these cases, the mother has already enjoyed a significant portion of maternity leave to assist her recovery after childbirth before any leave is transferred to the father.

In Spain, if both parents are in employment, the final 4 weeks of leave and allowance may be transferred to the father. The reported arrangement in Spain is the most comparable to the proposal put to the Working Group — the health and safety of the mother is protected by a minimum compulsory period of leave (6 weeks post-confinement) and the final 4-week portion of the remaining 10 weeks entitlement is optionally transferable to the father. This arrangement, however, could result in a quite short period of leave (12 weeks in total) specifically linked to the health and safety of the mother.

(ii) Links between maternity leave and the health and safety of the mother

The provisions of the Pregnant Workers’ Directive, including the minimum entitlement to maternity leave of 14 continuous weeks, are designed to assist the mother’s recovery after childbirth and to enable her to have uninterrupted contact with the baby at this time.

¹⁴ All data taken from *MISSOC 1999*, Table IV.

(iii) Facilitation of greater balance in participation by men in family life

The facilitation of greater participation by men in family life is an argument for providing an option to transfer any increase in maternity leave to men.

The option to transfer part of maternity leave to the father does not offer the father the same freedom to exercise his family responsibilities as a specific statutory entitlement to parental leave or paternity leave would. In this regard, it should be noted that, according to *Care in Europe* (1998), in Italy, 95% of the users of supplementary maternity leave are women, and in Denmark, the 10 weeks transferable leave is normally regarded as part of maternity leave. On the other hand, in Denmark, 58.2% of fathers exercised their right to paternity leave in 1995, and in Finland, approximately 64% of fathers exercise their right to paternity leave.¹⁵

The Group considers that maternity leave is linked to the mother's welfare, and that, as such, it is not appropriate to make any portion of maternity leave optionally transferable to fathers.

COMPULSORY PRE-CONFINEMENT LEAVE

Background

The Pregnant Workers' Directive provides that a woman must take compulsory maternity leave for at least two weeks before and/or after confinement. Section 10(1) of the Maternity Protection Act, 1994 provides that the minimum period of maternity leave (14 weeks) shall begin not later than 4 weeks before confinement and end not later than 4 weeks after confinement. This is the same provision as existed in the Maternity (Protection of Employees) Act, 1981.

Proposals considered by the Working Group

- The minimum period of maternity leave which must be taken before the confinement date should be reduced from 4 weeks to 2 weeks. (EA/DSCFA).
- The minimum period of leave which must be taken beforehand should be 2 weeks (with the option of taking 4 weeks). (NWCI).

Arguments in favour of a reduction of the pre-confinement period to 2 weeks were supported by the number of queries on the subject received by the Employment Equality Agency / Equality Authority. In the light of the provision in the Pregnant Workers' Directive some members of the Group felt that a 2 week compulsory period before confinement would generally serve the needs of pregnant women. It is considered that there is ample evidence of this, both in terms of queries dealt with by the Employment Equality Agency/Equality Authority and particularly in view of the anecdotal evidence that many women submit medical certificates with incorrect confinement dates, which mean that in effect they take only two weeks before their confinement. The view was also put forward that women would still have the option of taking 4 weeks (or more) of their maternity leave prior to confinement. On the other hand, a reduction in the pre-confinement period could mean that the level of protection to the woman is reduced. While women would still be protected this could lead to pressure for the woman to stay on very close to the date of the birth, with a consequent risk to her health.

As Article 1.3 of the Pregnant Workers' Directive states that Member States may not reduce the existing levels of protection and as the Maternity (Protection of Employees) Act, 1981 provided for 4 weeks

¹⁵ Estimate by *Care in Europe* (1998).

leave to be taken before confinement, (a provision mirrored in the Maternity Protection Act, 1994), the Department of Justice, Equality and Law Reform sought legal advice from the Attorney General's office on this point. The Attorney General's office advised that to reduce the pre-confinement period from 4 weeks to 2 weeks would be contrary to Article 1.3 of the Pregnant Workers' Directive.

In view of the Attorney General's advice, the Group notes that the period of leave to be taken pre-confinement cannot be reduced at this time.

COMPULSORY PERIOD OF TWO WEEKS MATERNITY LEAVE

Background

Section 8 of the Maternity Protection Act, 1994 provides that an employee is entitled to a minimum period of 14 consecutive weeks maternity leave. Section 4 of the Act prohibits a provision in any agreement which seeks to exclude or limit the application of the Act. Further, a provision in any agreement which is or becomes less favourable to an employee than entitlements conferred by the Act is prohibited.

Proposals considered by the Working Group

- A pregnant employee should be obliged to take at least 2 weeks' maternity leave after confinement to comply with the EU Pregnant Workers' Directive (EA).

Concerns were expressed in the Group that if the legislation provided for a compulsory period of only 2 weeks maternity leave or explicitly provided for an option to return to work prior to the end of the maternity leave period, some women might feel obliged to return to work early.

The Group considered that the Attorney General's advice in relation to compulsory pre-confinement leave also applies to this proposal, in that any reduction in protection would be contrary to Article 1.3 of the Pregnant Workers' Directive.

The Group recommends that, in view of the Attorney General's advice, the Act should not be amended to provide for a compulsory period of 2 weeks maternity leave post-confinement.

LEAVE IN EVENT OF MISCARRIAGE

Background

Current legislation provides that a woman who suffers a miscarriage after the 24th week of pregnancy is entitled to 14 weeks maternity leave. Section 13 of the Maternity Protection Act, 1994 provides that the full maternity leave may be taken from the date of confinement in the event of the date of confinement occurring in a week that is 4 weeks or more before the expected week of confinement. "Confinement" and "the date of confinement" are defined in the Maternity Protection Act, 1994 as having "the meanings respectively assigned to them by Section 41 of the Social Welfare (Consolidation) Act, 1993."

The definition of confinement was subsequently amended by the Social Welfare (Amendment) Act, 1994 which defines confinement as "labour resulting in the issue of a living child, or labour after 24 weeks of pregnancy resulting in the issue of a child whether alive or dead." Thus, the woman is entitled to her full 14 weeks maternity leave if she has a miscarriage after 24 weeks of pregnancy.

Proposal considered by the Working Group

- Miscarriage is a very real and unfortunate part of maternity. It is usually covered by paid sick leave. It would be appropriate that the Maternity Protection Act recognises this with a provision that women who suffer a miscarriage up to 24 weeks of a pregnancy should be entitled to a maximum of four weeks paid leave. (EA).

Arguments put forward in support of this proposal included (a) that the loss of a child at any stage of a pregnancy is a traumatic experience for mothers and fathers and (b) an important part of the grieving process encouraged in maternity hospitals is to recognise the child as a baby.

The Group took into consideration that sick leave applies and the Group's understanding is that the question of miscarriage is dealt with sensitively by employers and that there is no evidence of complaints in cases where employers are informed.

The Group is not making any recommendation in this matter.

PROTECTION FROM DISMISSAL BECAUSE OF AN ABSENCE ARISING FROM PREGNANCY RELATED ILLNESS

Background

Section 22 of the Maternity Protection Act, 1994 provides that where an employee is absent from work on, *inter alia*, maternity leave and additional leave, her job is protected during the absence. Section 38 of the Act deems the dismissal of an employee, solely or mainly from the exercise of any rights under the Act, to be an unfair dismissal for the purposes of the Unfair Dismissals Acts, 1977-1991. In addition the dismissal of an employee, from the beginning of her pregnancy to the end of her maternity leave, is deemed to be an unfair dismissal if it results from her pregnancy, from having recently given birth or from breastfeeding (or matters connected therewith).

Proposal considered by the Working Group

- The Act should be amended to include protection from dismissal because of an absence arising from pregnancy related illness beyond the end of the maternity leave period. (ICTU/NWCI).

The protection afforded against dismissal for pregnancy related illnesses from the beginning of pregnancy to the end of the maternity leave period does not apply where an employee is dismissed because of illness after maternity leave. The Unfair Dismissals Acts, 1977-1991 would apply to such a dismissal in the same way as it would apply to dismissals generally.

It was noted that in the case of *Brown -v- Rentokil* (C-394/96) the European Court of Justice stated that “ where a woman is absent owing to illness resulting from pregnancy or childbirth, and that illness arose during pregnancy and persisted during and after maternity leave, her absence not only during maternity leave but also during the period extending from the start of her pregnancy to the start of her maternity leave cannot be taken into account for computation of the period justifying her dismissal under national law. As to her absence after maternity leave, this may be taken into account under the same conditions as a man's absence, of the same duration, through incapacity for work.” It is clear from this judgement that where an illness persists after maternity leave, an employee's absence after maternity leave through incapacity for work may be taken into account under the same conditions as a man's absence, of the same duration.

*The Group concluded that protection from dismissal during pregnancy and maternity leave cannot, on the basis of the European Court of Justice decision in **Brown v. Rentokil C-394/96**, be extended to cover pregnancy-related illness arising after the conclusion of maternity leave. This leave would be treated in the same way as sick leave for a male worker, and would be covered by the same protections under Unfair Dismissals legislation.*

INCREASE IN UPPER CEILING OF MATERNITY BENEFIT PAYMENT

Background

The Department of Social, Community and Family Affairs is responsible for the administration of the statutory Maternity Benefit scheme. This is an income maintenance payment which is available to pregnant employees—

- Who have been certified by their employers as being entitled to maternity leave under Section 8 of the Maternity Protection Act, 1994, and
- Who have a sufficient level of PRSI contributions.

This payment is also available to self-employed women who have a sufficient level of PRSI contributions.

The weekly rate of payment is 70% of the woman's average reckonable weekly earnings/income in the Relevant Tax Year, subject to minimum and maximum payment limits.

Proposals considered by the Working Group

- The upper ceiling of the Maternity Benefit payment should be increased. (ICTU/NWCI/EA)

The Group discussed this proposal in the context of the relationship between Maternity Benefit rates and the cost of living; minimum rate of benefit; adequacy of maternity benefit; and the comparable situation in other EU Member States.

The Group was also of the view that it is necessary to consider this issue in the context of the Group's recommendation that maternity leave with a payment should be increased by 4 weeks. The cost to the Social Insurance Fund of increasing maternity leave at current values is £3.16 million per annum for each extra week. Any increase in the level of payment or the ceiling, combined with an increase in the period of maternity leave attracting a payment, would result in increased pressure on the Fund. An increase in the length of such leave would benefit all women including those on the lowest incomes. It is necessary to weigh up the advantages to female employees of an increase in the overall length of leave which attracts a payment, against any increase in that payment.

As increases in Social Welfare rates are budgetary matters, the Group is making no recommendation as far as increasing the maximum rate of maternity benefit is concerned.

PENSIONS

Background

Section 22(1) of the Maternity Protection Act, 1994 provides that, while on maternity leave, the employee shall retain all rights associated with the employment, except remuneration.

Section 22(2) of the Act provides that, while on additional maternity leave, the period of leave before taking such leave is deemed continuous with the period of employment commencing directly after it.

Section 72 of the Pensions Act, 1990 covers accrual of pension rights during a period of maternity absence paid by the employer and compliance with the principle of Equal Treatment.¹⁶

Proposals considered by the Working Group

- Section 22 should be amended to explicitly cover occupational pension schemes. All women employees in occupational pension schemes should have the fourteen weeks maternity leave and the four weeks additional maternity leave counted as a period of pensionable service. (ICTU).

The Group discussed the question of whether or not the 14-week period of maternity leave is reckonable as pensionable service. The debate centred on the interpretation of the word “remuneration” in Section 22(1) of the Maternity Protection Act, 1994. Section 22(1) of the Act guarantees all rights associated with the employment, except the right to remuneration. The question of whether the term “remuneration” also includes pension rights was central to the discussion.

It was clear from the discussions surrounding pensions that pension rights is a very specialised area which could not be dealt with within the timescale of the Group’s remit.

In their presentation to the Group, the Pensions Board indicated that they have put forward a proposal to amend Section 72 of the Pensions Act, 1990 to keep it in line with their interpretation of Section 22(1) of the Maternity Protection Act, 1994. As the Pensions Board are already taking the initiative on the area of pension rights and maternity leave, it can be argued that it is better to leave consideration of all the issues in the area in the one forum. It was noted in this regard that because the Pensions Act, 1990 covers the question of Equal Treatment in pensions between men and women that it was not considered necessary to include pension rights in the definition of remuneration in the Employment Equality Act, 1998.

The Group was not in a position to come to any view on the pension issues within the timescale of its remit. It recommends that the issue of pension rights during maternity leave should be examined in the context of the review of the Pensions Act, 1990, where appropriate.

DISPUTES PROCEDURES — RIGHTS COMMISSIONER DECISIONS AND REPRESENTATION

Background

The Maternity Protection Act, 1994 (Section 30) provides that disputes in relation to entitlements under the Act, other than disputes in relation to the dismissal of an employee or a dispute as to a matter within the competence of the Health and Safety Authority, may be referred to a Rights Commissioner. Proceedings before the Rights Commissioner in relation to disputes under the Act are held in private (Section 31). Section 31 of the Act also provides that copies of each decision by a Rights Commissioner shall be furnished to the Employment Appeals Tribunal. A Rights Commissioner decision may be appealed to the Employment Appeals Tribunal (Section 33). In general, Tribunal hearings are held in public and the Tribunal is required to maintain a public register of its determinations (Maternity Protection (Disputes and Appeals) Regulations, 1995).

¹⁶ See Appendix III for full text of Section 72 of the Pensions Act, 1990.

The Equality Authority (which replaced the Employment Equality Agency) was established under the Employment Equality Act, 1998. The functions of the Equality Authority include the provision of information to the public in relation to the Maternity Protection Act, 1994 (Section 39 of the Employment Equality Act, 1998).

Proposals considered by the Working Group

- Decisions in relation to disputes brought to a Rights Commissioner should be made public. (EA/NWCI).
- The Maternity Protection Act, 1994 should be amended so that the Equality Authority may represent an employee before the Rights Commissioners. (EA).

(i) Publication of Rights Commissioner decisions

This issue was considered by the Group. The Equality Authority explained that the purpose of their recommendation in relation to publication of Rights Commissioner decisions is to assist their information and advice-giving role. The Authority is also of the view that if they were in a position to advise employers and employees, who have queries in relation to entitlements under the legislation, of the outcome of a previous similar case it would be of guidance to them and would assist both employers and employees in addressing difficulties in relation to entitlements under the Act. The Equality Authority stated that the role of a Rights Commissioner under the Maternity Protection Act, 1994 is equivalent to that of an Equality Officer under equality legislation and Equality Officer decisions are published; that the function of Rights Commissioners under the Maternity Protection Act, 1994 is to interpret the legislation and that it is a basic right of an individual to know what the law is in a particular area and, in order to ensure this, Rights Commissioner decisions should be made public.

It was acknowledged that this is a complex issue and a number of strong arguments against the publication of Rights Commissioner decisions were put forward by members of the Group. The Rights Commissioner Service was established under industrial relations legislation. The hearing of disputes under the Maternity Protection and other employment legislation was subsequently added to the role of the Rights Commissioner. In a dispute under the Maternity Protection Act, 1994, a Rights Commissioner must determine the issue under that legislation. It is also appropriate for the Rights Commissioner to take other factors into account as appropriate. This results in the settlement of many disputes. Publication of decisions, it was feared, could militate against this flexibility in resolving disputes. The Rights Commissioners hear disputes under many pieces of legislation, the vast majority of which are held in private (the exception being hearings under the Payment of Wages Act, 1991). Under the new National Minimum Wage Act, 2000, a register of decisions is required to be available for public inspection. It was argued that hearings under the Payment of Wages Act, 1991 do not deal with issues which are as personal as those arising throughout a hearing under the Maternity Protection Act, 1994.

It was also argued that publication of Rights Commissioner decisions could deter individuals from taking cases. In this regard it was noted that the number of cases which are appealed to the Employment Appeals Tribunal is far less than the number of disputes referred to the Rights Commissioners. Entitlements under the Maternity Protection Act, 1994 are relatively clear cut. Rights Commissioners are independent in the performance of their functions and individual decisions of Rights Commissioners do not create precedents. Privacy of the decisions protects the independence of Rights Commissioners in the exercise of their functions. It could therefore be counter-productive for the decisions to be made public. Imposition of an obligation to publish decisions could result in the adoption of more formal procedures

and could cause delays in dealing with cases. It is important in the context of maternity legislation to deal with disputes expeditiously.

(ii) Equality Authority to represent an employee before the Rights Commissioner

The issue of representation, by the Equality Authority, of employees before the Rights Commissioner under the Maternity Protection Act, 1994 was discussed by the Group. It was pointed out that the role of the Equality Authority in relation to maternity protection is to provide information to the public on the Maternity Protection Act, 1994 whereas its role in relation to the Employment Equality Act, 1998 includes providing assistance to persons, who consider that they have been discriminated against, in taking proceedings under the Act. The Equality Authority say that it is difficult in practice to draw a distinction between giving information and providing assistance. The majority of the Authority's queries at present concern maternity related issues.

The Group noted that disputes under maternity legislation are comparable with disputes under other employment rights legislation e.g. redundancy, unfair dismissals legislation, etc., rather than under equality legislation. Maternity protection legislation provides for specific and clearly defined rights. The rights under equality legislation apply to all areas of employment and are therefore more complex. The Department of Enterprise, Trade and Employment provides an information service to the public in relation to employment rights legislation for which it has responsibility. Neither the Department of Enterprise, Trade and Employment or any other body similar to the Equality Authority provides assistance to employees who wish to refer disputes under other employment rights legislation. The Group also noted that the Rights Commissioner Service is intended to provide a relatively informal means of redress in relation to maternity disputes which do not require legal representation. It is open to trade unions, employers organisations, etc. to represent parties to a dispute. Empowering the Equality Authority to represent complainants in disputes before a Rights Commissioner could change the nature of this service.

The Employment Equality Agency Annual Reports for the period up to 18 October, 1999 indicates that maternity/adoptive leave queries accounted for over 32% of all queries received by the Agency in that period. Implementation of this recommendation would therefore have serious resource implications for the Equality Authority.

- (i) In relation to the publication of Rights Commissioner Decisions, the Group recommends that the issue of publishing decisions of Rights Commissioners should be considered in the context of any future review of the Rights Commissioners Service as the implications of any recommendation in relation to this issue would extend beyond maternity legislation.*
- (ii) In relation to representation by the Equality Authority at a Rights Commissioner hearing under the Maternity Protection Act, 1994, the Group notes the comments of the Equality Authority in relation to the issue of representation for victims of discrimination. The Group considers that the representation of employees under Maternity Protection Act, 1994 would have major implications for the Rights Commissioner Service and the functions of the Equality Authority and, consequently, is not making a recommendation on the matter.*

Council Directive 92/85/EEC

of 19 October 1992

on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)

Official Journal L 348, 28/11/1992 p. 0001 — 0008

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 118a thereof,

Having regard to the proposal from the Commission, drawn up after consultation with the Advisory Committee on Safety, Hygiene and Health Protection at work,⁽¹⁾

In cooperation with the European Parliament,⁽²⁾

Having regard to the opinion of the Economic and Social Committee,⁽³⁾

Whereas Article 118a of the Treaty provides that the Council shall adopt, by means of directives, minimum requirements for encouraging improvements, especially in the working environment, to protect the safety and health of workers;

Whereas this Directive does not justify any reduction in levels of protection already achieved in individual Member States, the Member States being committed, under the Treaty, to encouraging improvements in conditions in this area and to harmonising conditions while maintaining the improvements made;

Whereas, under the terms of Article 118a of the Treaty, the said directives are to avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings;

Whereas, pursuant to Decision 74/325/EEC,⁽⁴⁾ as last amended by the 1985 Act of Accession, the Advisory Committee on Safety, Hygiene and Health Protection at Work is consulted by the Commission on the drafting of proposals in this field;

⁽¹⁾ OJ N° C 281, 9. 11. 190, p. 3; and OJ N° C 25, 1. 2. 1991, p. 9.

⁽²⁾ OJ N° C 19, 28. 1. 1991, p. 177; and OJ N° C 150, 15. 6. 1992, p. 99.

⁽³⁾ OJ N° C 41, 18. 2. 1991, p. 29.

⁽⁴⁾ OJ N° L 185, 9. 7. 1974, p. 15.

Whereas the Community Charter of the fundamental social rights of workers, adopted at the Strasbourg European Council on 9 December 1989 by the Heads of State or Government of 11 Member States, lays down, in paragraph 19 in particular, that:

“Every worker must enjoy satisfactory health and safety conditions in his working environment. Appropriate measures must be taken in order to achieve further harmonisation of conditions in this area while maintaining the improvements made;”

Whereas the Commission, in its action programme for the implementation of the Community Charter of the fundamental social rights of workers, has included among its aims the adoption by the Council of a Directive on the protection of pregnant women at work;

Whereas Article 15 of Council Directive 89/391/EEC of 12 June, 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work⁽⁵⁾ provides that particularly sensitive risk groups must be protected against the dangers which specifically affect them;

Whereas pregnant workers, workers who have recently given birth or who are breastfeeding must be considered a specific risk group in many respects, and measures must be taken with regard to their safety and health;

Whereas the protection of the safety and health of pregnant workers, workers who have recently given birth or workers who are breastfeeding should not treat women on the labour market unfavourably nor work to the detriment of directives concerning equal treatment for men and women;

Whereas some types of activities may pose a specific risk, for pregnant workers, workers who have recently given birth or workers who are breastfeeding, of exposure to dangerous agents, processes or working conditions; whereas such risks must therefore be assessed and the result of such assessment communicated to female workers and/or their representatives;

Whereas, further, should the result of this assessment reveal the existence of a risk to the safety or health of the female worker, provision must be made for such worker to be protected;

Whereas pregnant workers and workers who are breastfeeding must not engage in activities which have been assessed as revealing a risk of exposure, jeopardising safety and health, to certain particularly dangerous agents or working conditions;

Whereas provision should be made for pregnant workers, workers who have recently given birth or workers who are breastfeeding not to be required to work at night where such provision is necessary from the point of view of their safety and health;

Whereas the vulnerability of pregnant workers, workers who have recently given birth or who are breastfeeding makes it necessary for them to be granted the right to maternity leave of at least 14 continuous weeks, allocated before and/or after confinement, and renders necessary the compulsory nature of maternity leave of at least two weeks, allocated before and/or after confinement;

Whereas the risk of dismissal for reasons associated with their condition may have harmful effects on the physical and mental state of pregnant workers, workers who have recently given birth or who are breastfeeding; whereas provision should be made for such dismissal to be prohibited;

⁽⁵⁾ OJ N° L 183, 29. 6. 1989, p. 1.

Whereas measures for the organisation of work concerning the protection of the health of pregnant workers, workers who have recently given birth or workers who are breastfeeding would serve no purpose unless accompanied by the maintenance of rights linked to the employment contract, including maintenance of payment and/or entitlement to an adequate allowance;

Whereas, moreover, provision concerning maternity leave would also serve no purpose unless accompanied by the maintenance of rights linked to the employment contract and or entitlement to an adequate allowance;

Whereas the concept of an adequate allowance in the case of maternity leave must be regarded as a technical point of reference with a view to fixing the minimum level of protection and should in no circumstances be interpreted as suggesting an analogy between pregnancy and illness,

HAS ADOPTED THIS DIRECTIVE

SECTION I

PURPOSE AND DEFINITIONS

Article 1

Purpose

1. The purpose of this Directive, which is the tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC, is to implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding.
2. The provisions of Directive 89/391/EEC, except for Article 2 (2) thereof, shall apply in full to the whole area covered by paragraph 1, without prejudice to any more stringent and/or specific provisions contained in this Directive.
3. This Directive may not have the effect of reducing the level of protection afforded to pregnant workers, workers who have recently given birth or who are breastfeeding as compared with the situation which exists in each Member State on the date on which this Directive is adopted.

Article 2

Definitions

For the purposes of this Directive:

- (a) *pregnant worker* shall mean a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice;
- (b) *worker who has recently given birth* shall mean a worker who has recently given birth within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice;
- (c) *worker who is breastfeeding* shall mean a worker who is breastfeeding within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice.

SECTION II

GENERAL PROVISIONS

Article 3

Guidelines

1. In consultation with the Member States and assisted by the Advisory Committee on Safety, Hygiene and Health Protection at Work, the Commission shall draw up guidelines on the assessment of the chemical, physical and biological agents and industrial processes considered hazardous for the safety or health of workers within the meaning of Article 2.

The guidelines referred to in the first subparagraph shall also cover movements and postures, mental and physical fatigue and other types of physical and mental stress connected with the work done by workers within the meaning of Article 2.

2. The purpose of the guidelines referred to in paragraph 1 is to serve as a basis for the assessment referred to in Article 4 (1).

To this end, Member States shall bring these guidelines to the attention of all employers and all female workers and/or their representatives in the respective Member State.

Article 4

Assessment and information

1. For all activities liable to involve a specific risk of exposure to the agents, processes or working conditions of which a non-exhaustive list is given in Annex I, the employer shall assess the nature, degree and duration of exposure, in the undertaking and/or establishment concerned, of workers within the meaning of Article 2, either directly or by way of the protective and preventive services referred to in Article 7 of Directive 89/391/EEC, in order to:

- assess any risks to the safety or health and any possible effect on the pregnancy or breastfeeding of workers within the meaning of Article 2,
- decide what measures should be taken.

2. Without prejudice to Article 10 of Directive 89/391/EEC, workers within the meaning of Article 2 and workers likely to be in one of the situations referred to in Article 2 in the undertaking and/or establishment concerned and/or their representatives shall be informed of the results of the assessment referred to in paragraph 1 and of all measures to be taken concerning health and safety at work.

Article 5

Action further to the results of the assessment

1. Without prejudice to Article 6 of Directive 89/391/EEC, if the results of the assessment referred to in Article 4 (1) reveal a risk to the safety or health or an effect on the pregnancy or breastfeeding of a worker within the meaning of Article 2, the employer shall take the necessary measures to ensure that,

by temporarily adjusting the working conditions and/or the working hours of the worker concerned, the exposure of that worker to such risks is avoided.

2. If the adjustment of her working conditions and/or working hours is not technically and/or objectively feasible, or cannot reasonably be required on duly substantiated grounds, the employer shall take the necessary measures to move the worker concerned to another job.

3. If moving her to another job is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds, the worker concerned shall be granted leave in accordance with national legislation and/or national practice for the whole of the period necessary to protect her safety or health.

4. The provisions of this Article shall apply *mutatis mutandis* to the case where a worker pursuing an activity which is forbidden pursuant to Article 6 becomes pregnant or starts breastfeeding and informs her employer thereof.

Article 6

Cases in which exposure is prohibited

In addition to the general provisions concerning the protection of workers, in particular those relating to the limit values for occupational exposure:

1. Pregnant workers within the meaning of Article 2 (a) may under no circumstances be obliged to perform duties for which the assessment has revealed a risk of exposure, which would jeopardise safety or health, to the agents and working conditions listed in Annex II, Section A;
2. Workers who are breastfeeding, within the meaning of Article 2 (c), may under no circumstances be obliged to perform duties for which the assessment has revealed a risk of exposure, which would jeopardise safety or health, to the agents and working conditions listed in Annex II, Section B.

Article 7

Night work

1. Member States shall take the necessary measures to ensure that workers referred to in Article 2 are not obliged to perform night work during their pregnancy and for a period following childbirth which shall be determined by the national authority competent for safety and health, subject to submission, in accordance with the procedures laid down by the Member States, of a medical certificate stating that this is necessary for the safety or health of the worker concerned.

2. The measures referred to in paragraph 1 must entail the possibility, in accordance with national legislation and/or national practice, of:

- (a) transfer to daytime work; or
- (b) leave from work or extension of maternity leave where such a transfer is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds.

Article 8

Maternity leave

1. Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of at least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice.
2. The maternity leave stipulated in paragraph 1 must include compulsory maternity leave of at least two weeks allocated before and/or after confinement in accordance with national legislation and/or practice.

Article 9

Time off for ante-natal examinations

Member States shall take the necessary measures to ensure that pregnant workers within the meaning of Article 2 (a) are entitled to, in accordance with national legislation and/or practice, time off, without loss of pay, in order to attend ante-natal examinations, if such examinations have to take place during working hours.

Article 10

Prohibition of dismissal

In order to guarantee workers, within the meaning of Article 2, the exercise of their health and safety protection rights as recognised under this Article, it shall be provided that:

1. Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8 (1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent;
2. If a worker, within the meaning of Article 2, is dismissed during the period referred to in point 1, the employer must cite duly substantiated grounds for her dismissal in writing;
3. Member States shall take the necessary measures to protect workers, within the meaning of Article 2, from consequences of dismissal which is unlawful by virtue of point 1.

Article 11

Employment rights

In order to guarantee workers within the meaning of Article 2 the exercise of their health and safety protection rights as recognised in this Article, it shall be provided that:

1. In the cases referred to in Articles 5, 6 and 7, the employment rights relating to the employment contract, including the maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2, must be ensured in accordance with national legislation and/or national practice;

2. In the case referred to in Article 8, the following must be ensured:
 - (a) the rights connected with the employment contract of workers within the meaning of Article 2, other than those referred to in point (b) below;
 - (b) maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2;
3. The allowance referred to in point 2 (b) shall be deemed adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down under national legislation;
4. Member States may make entitlement to pay or the allowance referred to in points 1 and 2 (b) conditional upon the worker concerned fulfilling the conditions of eligibility for such benefits laid down under national legislation.

These conditions may under no circumstances provide for periods of previous employment in excess of 12 months immediately prior to the presumed date of confinement.

Article 12

Defence of rights

Member States shall introduce into their national legal systems such measures as are necessary to enable all workers who consider themselves wronged by failure to comply with the obligations arising from this Directive to pursue their claims by judicial process (and/or, in accordance with national laws and/or practices) by recourse to other competent authorities.

Article 13

Amendments to the Annexes

1. Strictly technical adjustments to Annex I as a result of technical progress, changes in international regulations or specifications and new findings in the area covered by this Directive shall be adopted in accordance with the procedure laid down in Article 17 of Directive 89/391/EEC.
2. Annex II may be amended only in accordance with the procedure laid down in Article 118a of the Treaty.

Article 14

Final provisions

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than two years after the adoption thereof or ensure, at the latest two years after adoption of this Directive, that the two sides of industry introduce the requisite provisions by means of collective agreements, with Member States being required to make all the necessary

provisions to enable them at all times to guarantee the results laid down by this Directive. They shall forthwith inform the Commission thereof.

2. When Member States adopt the measures referred to in paragraph 1, they shall contain a reference of this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

3. Member States shall communicate to the Commission the texts of the essential provisions of national law which they have already adopted or adopt in the field governed by this Directive.

4. Member States shall report to the Commission every five years on the practical implementation of the provisions of this Directive, indicating the points of view of the two sides of industry.

However, Member States shall report for the first time to the Commission on the practical implementation of the provisions of this Directive, indicating the points of view of the two sides of industry, four years after its adoption.

The Commission shall inform the European Parliament, the Council, the Economic and Social Committee and the Advisory Committee on Safety, Hygiene and Health Protection at Work.

5. The Commission shall periodically submit to the European Parliament, the Council and the Economic and Social Committee a report on the implementation of this Directive, taking into account paragraphs 1, 2 and 3.

6. The Council will re-examine this Directive, on the basis of an assessment carried out on the basis of the reports referred to in the second subparagraph of paragraph 4 and, should the need arise, of a proposal, to be submitted by the Commission at the latest five years after adoption of the Directive.

Article 15

This Directive is addressed to the Member States.

Done at Luxembourg, 19 October, 1992.

For the Council

The President

D. CURRY

NON-EXHAUSTIVE LIST OF AGENTS, PROCESSES AND WORKING CONDITIONS

referred to in Article 4 (1)

A. Agents

1. *Physical agents* where these are regarded as agents causing foetal lesions and/or likely to disrupt placental attachment, and in particular:

- (a) shocks, vibration or movement;
- (b) handling of loads entailing risks, particularly of a dorsolumbar nature;
- (c) noise;
- (d) ionising radiation ^(*);
- (e) non-ionising radiation;
- (f) extremes of cold or heat;
- (g) movements and postures, travelling — either inside or outside the establishment — mental and physical fatigue and other physical burdens connected with the activity of the worker within the meaning of Article 2 of the Directive.

2. *Biological agents*

Biological agents of risk groups 2, 3 and 4 within the meaning of Article 2 (d) numbers 2, 3 and 4 of Directive 90/679/EEC,⁽⁶⁾ in so far as it is known that these agents or the therapeutic measures necessitated by such agents endanger the health of pregnant women and the unborn child and in so far as they do not yet appear in Annex II.

3. *Chemical agents*

The following chemical agents insofar as it is known that they endanger the health of pregnant women and the unborn child and insofar as they do not yet appear in Annex II:

- (a) substances labelled R40, R45, R46, and R47 under Directive 67/548/EEC⁽⁷⁾ insofar as they do not yet appear in Annex II;
- (b) chemical agents in Annex I to Directive 90/394/EEC;⁽⁸⁾
- (c) mercury and mercury derivatives;
- (d) antimitotic drugs;
- (e) carbon monoxide;
- (f) chemical agents of known and dangerous percutaneous absorption.

B. Processes

Industrial processes listed in Annex I to Directive 90/394/EEC.

C. Working conditions

Underground mining work.

^(*) See Directive 80/836/Euratom (OJ N° L 246, 17. 9. 1980, p. 1).

⁽⁶⁾ OJ N° L 374, 31. 12. 1990, p. 1.

⁽⁷⁾ OJ N° L 196, 16. 8. 1967, p. 1. Directive as last amended by Directive 90/517/EEC (OJ N° L 287, 19. 10. 1990, p. 37).

⁽⁸⁾ OJ N° L 196, 26. 7. 1990, p. 1.

NON-EXHAUSTIVE LIST OF AGENTS AND WORKING CONDITIONS

referred to in Article 6

A. Pregnant workers within the meaning of Article 2 (a)

1. *Agents*

(a) Physical agents

Work in hyperbaric atmosphere, e.g. pressurised enclosures and underwater diving.

(b) Biological agents

The following biological agents:

- toxoplasma,
- rubella virus,

unless the pregnant workers are proved to be adequately protected against such agents by immunisation.

(c) Chemical agents

Lead and lead derivatives insofar as these agents are capable of being absorbed by the human organism.

2. *Working conditions*

Underground mining work.

B. Workers who are breastfeeding within the meaning of Article 2 (c)

1. *Agents*

(a) Chemical agents

Lead and lead derivatives insofar as these agents are capable of being absorbed by the human organism.

2. *Working conditions*

Underground mining work.

**Statement of the Council and the Commission concerning Article 11 (3)
of Directive 92/ 85/EEC, entered in the minutes of the 1608th meeting of the
Council (Luxembourg, 19 October 1992)**

THE COUNCIL AND THE COMMISSION stated that:

‘In determining the level of the allowances referred to in Article 11 (2) (b) and (3), reference shall be made, for purely technical reasons, to the allowance which a worker would receive in the event of a break in her activities on grounds connected with her state of health. Such a reference is not intended in any way to imply that pregnancy and childbirth be equated with sickness. The national social security legislation of all Member States provides for an allowance to be paid during an absence from work due to sickness. The link with such allowance in the chosen formulation is simply intended to serve as a concrete, fixed reference amount in all Member States for the determination of the minimum amount of maternity allowance payable. In so far as allowances are paid in individual Member States which exceed those provided for in the Directive, such allowances are, of course, retained. This is clear from Article 1 (3) of the Directive.’

ILO Convention and Recommendation on Maternity, 2000¹

Text of the Convention concerning the revision of the Maternity Protection Convention (Revised), 1952

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its 88th Session on 30 May 2000, and

Noting the need to revise the Maternity Protection Convention (Revised), 1952, and the Maternity Protection Recommendation, 1952, in order to further promote equality of all women in the workforce and the health and safety of the mother and child, and in order to recognise the diversity in economic and social development of Members, as well as the diversity of enterprises, and the development of the protection of maternity in national law and practice, and

Noting the provisions of the Universal Declaration of Human Rights (1948), the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (1979), the United Nations Convention on the Rights of the Child (1989), the Beijing Declaration and Platform for Action (1995), the International Labour Organisation's Declaration on Equality of Opportunity and Treatment for Women Workers (1975), the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998), as well as the international labour Conventions and Recommendations aimed at ensuring equality of opportunity and treatment for men and women workers, in particular the Convention concerning Workers with Family Responsibilities, 1981, and

Taking into account the circumstances of women workers and the need to provide protection for pregnancy, which are the shared responsibility of government and society, and

Having decided upon the adoption of certain proposals with regard to the revision of the Maternity Protection Convention (Revised), 1952, and Recommendation, 1952, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention;

adopts this 15th day of June of the year two thousand the following Convention, which may be cited as the Maternity Protection Convention, 2000.²

¹ International Labour Conference, Provisional Record, Eighty-eight Session, Geneva 2000.

² Adopted 15th June, 2000.

SCOPE

Article 1

For the purposes of this Convention, the term “woman” applies to any female person without discrimination whatsoever and the term “child” applies to any child without discrimination whatsoever.

Article 2

1. This Convention applies to all employed women, including those in atypical forms of dependent work.
2. However, each Member which ratifies this Convention may, after consulting the representative organisations of employers and workers concerned, exclude wholly or partly from the scope of the Convention limited categories of workers when its application to them would raise special problems of a substantial nature.
3. Each Member which avails itself of the possibility afforded in the preceding paragraph shall, in its first report on the application of the Convention under article 22 of the Constitution of the International Labour Organisation, list the categories of workers thus excluded and the reasons for their exclusion. In its subsequent reports, the Member shall describe the measures taken with a view to progressively extending the provisions of the Convention to these categories.

HEALTH PROTECTION

Article 3

Each Member shall, after consulting the representative organisations of employers and workers, adopt appropriate measures to ensure that pregnant or breastfeeding women are not obliged to perform work which has been determined by the competent authority to be prejudicial to the health of the mother or the child, or where an assessment has established a significant risk to the mother’s health or that of her child.

MATERNITY LEAVE

Article 4

1. On production of a medical certificate or other appropriate certification, as determined by national law and practice, stating the presumed date of childbirth, a woman to whom this Convention applies shall be entitled to a period of maternity leave of not less than 14 weeks.
2. The length of the period of leave referred to above shall be specified by each Member in a declaration accompanying its ratification of this Convention.
3. Each Member may subsequently deposit with the Director-General of the International Labour Office a further declaration extending the period of maternity leave.

4. With due regard to the protection of the health of the mother and that of the child, maternity leave shall include a period of six weeks' compulsory leave after childbirth, unless otherwise agreed at the national level by the government and the representative organisations of employers and workers.
5. The pre-natal portion of maternity leave shall be extended by any period elapsing between the presumed date of childbirth and the actual date of childbirth, without reduction in any compulsory portion of post-natal leave.

LEAVE IN CASE OF ILLNESS OR COMPLICATIONS

Article 5

On production of a medical certificate, leave shall be provided before or after the maternity leave period in the case of illness, complications or risk of complications arising out of pregnancy or childbirth. The nature and the maximum duration of such leave may be specified in accordance with national law and practice.

BENEFITS

Article 6

1. Cash benefits shall be provided, in accordance with national laws and regulations, or in any other manner consistent with national practice, to women who are absent from work on leave referred to in Articles 4 or 5.
2. Cash benefits shall be at a level which ensures that the woman can maintain herself and her child in proper conditions of health and with a suitable standard of living.
3. Where, under national law or practice, cash benefits paid with respect to leave referred to in Article 4 are based on previous earnings, the amount of such benefits shall not be less than two-thirds of the woman's previous earnings or of such of those earnings as are taken into account for the purpose of computing benefits.
4. Where, under national law or practice, other methods are used to determine the cash benefits paid with respect to leave referred to in Article 4, the amount of such benefits shall be comparable to the amount resulting on average from the application of the preceding paragraph.
5. Each Member shall ensure that the conditions to qualify for cash benefits can be satisfied by a large majority of the women to whom this Convention applies.
6. Where a woman does not meet the conditions to qualify for cash benefits under national laws and regulations or in any other manner consistent with national practice, she shall be entitled to adequate benefits out of social assistance funds, subject to the means test required for such assistance.
7. Medical benefits shall be provided for the woman and her child in accordance with national laws and regulations or in any other manner consistent with national practice. Medical benefits shall include pre-natal, childbirth and post-natal care, as well as hospitalisation care when necessary.

8. In order to protect the situation of women in the labour market, benefits in respect of the leave referred to in Articles 4 and 5 shall be provided through compulsory social insurance or public funds, or in a manner to be determined by national law and practice. An employer shall not be individually liable for the direct cost of any such monetary benefit to a woman employed by him or her without that employer's specific agreement except where:
 - (a) such is provided for in national law or practice in a Member State prior to the date of adoption of this Convention by the International Labour Conference; or
 - (b) it is subsequently agreed at the national level by the government and the representative organisations of employers and workers.

Article 7

1. A Member whose economy and social security system are insufficiently developed shall be deemed to be in compliance with Article 6, paragraphs 3 and 4, if cash benefits are provided at a rate no lower than a rate payable for sickness or temporary disability in accordance with national laws and regulations.
2. A Member which avails itself of the possibility afforded in the preceding paragraph shall, in its first report on the application of this Convention under Article 22 of the Constitution of the International Labour Organisation, explain the reasons therefore and indicate the rate at which cash benefits are provided. In its subsequent reports, the Member shall describe the measures taken with a view to progressively raising the rate of benefits.

EMPLOYMENT PROTECTION AND NON-DISCRIMINATION

Article 8

1. It shall be unlawful for an employer to terminate the employment of a woman during her pregnancy or absence on leave referred to in Articles 4 or 5 or during a period following her return to work to be prescribed by national laws or regulations, except on grounds unrelated to the pregnancy or birth of the child and its consequences or nursing. The burden of proving that the reasons for dismissal are unrelated to pregnancy or childbirth and its consequences or nursing shall rest on the employer.
2. A woman is guaranteed the right to return to the same position or an equivalent position paid at the same rate at the end of her maternity leave.

Article 9

1. Each Member shall adopt appropriate measures to ensure that maternity does not constitute a source of discrimination in employment, including — notwithstanding Article 2, paragraph 1 — access to employment.
2. Measures referred to in the preceding paragraph shall include a prohibition from requiring a test for pregnancy or a certificate of such a test when a woman is applying for employment, except where required by national laws or regulations in respect of work that is:
 - (a) prohibited or restricted for pregnant or nursing women under national laws or regulations; or
 - (b) where there is a recognised or significant risk to the health of the woman and child.

BREASTFEEDING MOTHERS

Article 10

1. A woman shall be provided with the right to one or more daily breaks or a daily reduction of hours of work to breastfeed her child.
2. The period during which nursing breaks or the reduction of daily hours of work are allowed, their number, the duration of nursing breaks and the procedures for the reduction of daily hours of work shall be determined by national law and practice. These breaks or the reduction of daily hours of work shall be counted as working time and remunerated accordingly.

PERIODIC REVIEW

Article 11

Each Member shall examine periodically, in consultation with the representative organisations of employers and workers, the appropriateness of extending the period of leave referred to in Article 4 or of increasing the amount or the rate of the cash benefits referred to in Article 6.

IMPLEMENTATION

Article 12

This Convention shall be implemented by means of laws or regulations, except in so far as effect is given to it by other means such as collective agreements, arbitration awards, court decisions, or in any other manner consistent with national practice.

FINAL PROVISIONS

Article 13

This Convention revises the Maternity Protection Convention (Revised), 1952.

Article 14

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 15

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General of the International Labour Office.
2. It shall come into force 12 months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member 12 months after the date on which its ratification has been registered.

Article 16

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.
2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 17

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and acts of denunciation communicated by the Members of the Organisation.
2. When notifying the Members of the Organisation of the registration of the second ratification, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention shall come into force.

Article 18

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations, for registration in accordance with Article 102 of the Charter of the United Nations, full particulars of all ratifications and acts of denunciation registered by the Director-General in accordance with the provisions of the preceding Articles.

Article 19

At such times as it may consider necessary, the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 20

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides:
 - (a) the ratification by a Member of the new revising Convention shall *ipso jure* involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 16 above, if and when the new revising Convention shall have come into force;

- (b) as from the date when the new revising Convention comes into force, this Convention shall cease to be open to ratification by the Members.
2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 21

The English and French versions of the text of this Convention are equally authoritative.

Text of the Recommendation concerning the Revision of the Maternity Protection Recommendation, 1952

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its 88th Session on 30 May, 2000, and

Having decided upon the adoption of certain proposals with regard to maternity protection, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of a Recommendation supplementing the Maternity Protection Convention, 2000 (hereinafter referred to as “the Convention”),

adopts this 15th day of June of the year two thousand the following Recommendation, which may be cited as the Maternity Protection Recommendation, 2000.³

MATERNITY LEAVE

1. (1) Members should endeavour to extend the period of maternity leave referred to in Article 4 of the Convention to at least 18 weeks.
- (2) Provision should be made for an extension of the maternity leave in the event of multiple births.
- (3) To the extent possible, measures should be taken to ensure that the woman is entitled to choose freely the time at which she takes any non-compulsory portion of her maternity leave before or after childbirth.

BENEFITS

2. Where practicable, and after consultation with the representative organisations of employers and workers, the cash benefits to which a woman is entitled during leave referred to in Articles 4 and 5 of the Convention should be raised to the full amount of the woman’s previous earnings or of such of those earnings as are taken into account for the purpose of computing benefits.

³ Adopted 15th June, 2000.

3. To the extent possible, the medical benefits provided for in Article 6, paragraph 7, of the Convention should include:
- (a) care given in a doctor's office, at home or in a hospital or other medical establishment by a general practitioner or a specialist;
 - (b) maternity care given by a qualified midwife or by another maternity service at home or in a hospital or other medical establishment;
 - (c) maintenance in a hospital or other medical establishment;
 - (d) any necessary pharmaceutical and medical supplies, examinations and tests prescribed by a medical practitioner or other qualified person; and
 - (e) dental and surgical care.

FINANCING OF BENEFITS

4. Any contribution due under compulsory social insurance providing maternity benefits and any tax based upon payrolls which is raised for the purpose of providing such benefits, whether paid by both the employer and the employees or by the employer, should be paid in respect of the total number of men and women employed, without distinction of sex.

EMPLOYMENT PROTECTION AND NON-DISCRIMINATION

5. A woman should be entitled to return to her former position or an equivalent position paid at the same rate at the end of her leave referred to in Article 5 of the Convention. The period of leave referred to in Articles 4 and 5 of the Convention should be considered as a period of service for the determination of her rights.

HEALTH PROTECTION

6. (1) Members should take measures to ensure assessment of any workplace risks related to the safety and health of the pregnant or nursing woman and her child. The results of the assessment should be made available to the woman concerned.
- (2) In any of the situations referred to in Article 3 of the Convention or where a significant risk has been identified under subparagraph (1) above, measures should be taken to provide, on the basis of a medical certificate as appropriate, an alternative to such work in the form of:
- (a) elimination of risk;
 - (b) an adaptation of her conditions of work;
 - (c) a transfer to another post, without loss of pay, when such an adaptation is not feasible; or
 - (d) paid leave, in accordance with national laws, regulations or practice, when such a transfer is not feasible.

- (3) Measures referred to in subparagraph (2) should in particular be taken in respect of:
- (a) arduous work involving the manual lifting, carrying, pushing or pulling of loads;
 - (b) work involving exposure to biological, chemical or physical agents which represent a reproductive health hazard;
 - (c) work requiring special equilibrium;
 - (d) work involving physical strain due to prolonged periods of sitting or standing, to extreme temperatures, or to vibration.
- (4) A pregnant or nursing woman should not be obliged to do night work if a medical certificate declares such work to be incompatible with her pregnancy or nursing.
- (5) The woman should retain the right to return to her job or an equivalent job as soon as it is safe for her to do so.
- (6) A woman should be allowed to leave her workplace, if necessary, after notifying her employer, for the purpose of undergoing medical examinations relating to her pregnancy.

BREASTFEEDING MOTHERS

7. On production of a medical certificate or other appropriate certification as determined by national law and practice, the frequency and length of nursing breaks should be adapted to particular needs.
8. Where practicable and with the agreement of the employer and the woman concerned, it should be possible to combine the time allotted for daily nursing breaks to allow a reduction of hours of work at the beginning or at the end of the working day.
9. Where practicable, provision should be made for the establishment of facilities for nursing under adequate hygienic conditions at or near the workplace.

RELATED TYPES OF LEAVE

10. (1) In the case of the death of the mother before the expiry of post-natal leave, the employed father of the child should be entitled to take leave of a duration equal to the unexpired portion of the postnatal maternity leave.
- (2) In the case of sickness or hospitalisation of the mother after childbirth and before the expiry of post-natal leave, and where the mother cannot look after the child, the employed father of the child should be entitled to leave of a duration equal to the unexpired portion of the post-natal maternity leave, in accordance with national law and practice, to look after the child.
- (3) The employed mother or the employed father of the child should be entitled to parental leave during a period following the expiry of maternity leave.
- (4) The period during which parental leave might be granted, the length of the leave and other modalities, including the payment of parental benefits and the use and distribution of parental

leave between the employed parents, should be determined by national laws or regulations or in any manner consistent with national practice.

- (5) Where national law and practice provide for adoption, adoptive parents should have access to the system of protection offered by the Convention, especially regarding leave, benefits and employment protection.

Section 72 of the Pensions Act, 1990

(1) Subject to the provisions of this section, nothing in this Part shall prevent a scheme from providing special treatment for women in connection with pregnancy or childbirth.

(2) Where an occupational benefit scheme contains a rule —

(a) which relates to continuing membership of, or the accrual of rights under, the scheme during any period of paid maternity absence in the case of a woman who —

(i) is; or

(ii) immediately before the commencement of such period, was,

an employee and which treats that woman in a manner other than that in which she would be treated under the scheme if she was not absent from work and was in receipt of remuneration from her employer during that period, or

(b) which requires the amount of any benefit payable under the scheme to or in respect of any such woman, to the extent that it falls to be determined by reference to her earnings during a period which includes a period of paid maternity absence, to be determined other than it would so be determined if she was not absent from work, and was in receipt of remuneration from her employer during that period,

it shall be regarded to that extent as not complying with the principle of equal treatment.

(3) Where a scheme is regarded as not complying with the principle of equal treatment by virtue of *subsection (2)*, the trustees of the scheme or (where appropriate) the employer concerned shall take such measures as are necessary to ensure that the treatment accorded to the woman concerned under the scheme is no less favourable than that which would be accorded to her thereunder throughout the period of maternity absence concerned if she were not absent from work and was in receipt of remuneration from her employer during that period.

(4) In this section “period of paid maternity absence” means any period —

(a) throughout which a woman is absent from work due to pregnancy or childbirth, and

(b) for which her employer, or (if she is no longer in his employment) her former employer, pays her any contractual remuneration.

Other International Instruments

United Nations

International Covenant on Economic, Social and Cultural Rights

Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 (XXI) of 16 December, 1966.

Entry into force: 3 January, 1976, in accordance with Article 27.

Article 10

The States Parties to the present Covenant recognise that:

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

Convention on the Elimination of All Forms of Discrimination against Women

Adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180.

Entry into force: 3 September, 1982, in accordance with Article 27.

Article 11

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:
 - (a) the right to work as an inalienable right of all human beings;
 - (b) the right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
 - (c) the right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
 - (d) the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
 - (e) the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
 - (f) the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:
 - (a) to prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
 - (b) to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
 - (c) to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
 - (d) to provide special protection to women during pregnancy in types of work proved to be harmful to them.
3. Protective legislation relating to matters covered in this Article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

Convention on the Rights of the Child

Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November, 1989.

Entry into force: 2 September, 1990, in accordance with Article 49.

Article 24

States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

- (a) to diminish infant and child mortality;
- (b) to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
- (c) to combat disease and malnutrition, including within the framework of primary health care, through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution;
- (d) to ensure appropriate pre-natal and post-natal health care for mothers;
- (e) to ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breast-feeding, hygiene and environmental sanitation and the prevention of accidents;
- (f) to develop preventive health care, guidance for parents and family planning education and services.

Council of Europe

European Social Charter¹

Open for signature: Turin, 18 October, 1961.

Entry into force: 26 February, 1965, in accordance with Article 35.3.

Article 8 — The right of employed women to protection

With a view to ensuring the effective exercise of the right of employed women to protection, the Contracting Parties undertake:

1. to provide either by paid leave, by adequate social security benefits or by benefits from public funds for women to take leave before and after childbirth up to a total of at least 12 weeks;
2. to consider it as unlawful for an employer to give a women notice of dismissal during her absence on maternity leave or to give her notice of dismissal at such a time that the notice would expire during such absence;
3. to provide that mothers who are nursing their infants shall be entitled to sufficient time off for this purpose;
4. (a) to regulate the employment of women workers on night work in industrial employment;
(b) to prohibit the employment of women workers in underground mining, and, as appropriate, on all other work which is unsuitable for them by reason of its dangerous, unhealthy, or arduous nature.

European Social Charter (Revised), 1996

Open for signature: Strasbourg, 3 May, 1996.

Entry into force: 1 July, 1999, in accordance with Part 6 Article K.

Article 8 — The right of employed women to protection of maternity

With a view to ensuring the effective exercise of the right of employed women to the protection of maternity, the Parties undertake:

1. to provide either by paid leave, by adequate social security benefits or by benefits from public funds for employed women to take leave before and after childbirth up to a total of at least fourteen weeks;
2. to consider it as unlawful for an employer to give a woman notice of dismissal during the period from the time she notifies her employer that she is pregnant until the end of her maternity leave, or to give her notice of dismissal at such a time that the notice would expire during such a period;
3. to provide that mothers who are nursing their infants shall be entitled to sufficient time off for this purpose;

¹ Ireland has recently signed and ratified the European Social Charter (Revised) 1996. Ireland will complete its reporting cycle under the 1961 Charter on 30 June, 2001. After that date, the Revised Charter will supersede, for Ireland, the original 1961 Charter.

4. to regulate the employment in night work of pregnant women, women who have recently given birth and women nursing their infants;
5. to prohibit the employment of pregnant women, women who have recently given birth or who are nursing their infants in underground mining and all the work which is unsuitable by reason of its dangerous, unhealthy or arduous nature and to take appropriate measures to protect the employment rights of these women.

EU CASE LAW

A Presentation by Marguerite Bolger, Barrister

The Pregnancy Directive¹

The purpose of the Pregnancy Directive is to provide for special treatment for women who are pregnant, or have recently given birth or are breastfeeding and it seeks to achieve its aims without having a negative effect on women's working conditions and their place in the job market. It was introduced by the Commission pursuant to the health and safety framework of Article 118A (now 138) rather than the more established scheme of employment equality law pursuant to Article 119 (now 141). It is generally felt that this was done to avail of the majority voting procedures provided for by Article 118A (now 138), thereby avoiding rejection for lack of unanimity. Whilst this political expediency did enable the Directive to be adopted, the result hints at the paternalism of protective legislation, rather than the protection of women's rights and the requirements of equal treatment between women and men.

The Directive contains two groups of provisions. The first are designed to protect women from hazardous or dangerous work during pregnancy and after childbirth,² and the second, give women rights to maternity and sick leave and protect their employment rights during the relevant periods.³ It applies to three categories of female workers; pregnant workers, workers who have recently given birth, and workers who are breastfeeding.

In order to safeguard women's position in the workplace as a result of maternity the Directive sets out a series of minimum rights which include the right not to be dismissed between the beginning of the pregnancy and the end of maternity leave,⁴ the right to have working conditions adapted so that they do not present a risk to a pregnant woman or nursing mother or if this is not feasible, the right to additional leave.⁵ The most important provisions of the Directive are the right to maternity leave of at least 14 weeks⁶ during which time the Directive provides an adequate allowance shall be payable which will be at least what a person on statutory sick pay would receive under national rules.⁷

¹ Council Directive 92/85/EEC of 19 October 1992 on the Introduction of Measures to Encourage Improvements in the Safety and Health at Work of Pregnant Workers and Workers who have recently given Birth or are Breastfeeding [1991] O.J. L348/1.

² Articles 3 to 7.

³ Articles 8 to 11.

⁴ Article 10.

⁵ Article 11.

⁶ Article 8 provides that 'Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of at least 14 weeks'. The European Parliament wanted 16 weeks as 14 did not, in their opinion, represent an improvement in any of the Member States other than Portugal.

⁷ Article 11(2) and (3).

Permitted Derogations in European Law from the Equality Principle on Grounds of Pregnancy and Maternity

Whilst the Equal Treatment Directive 76/207/EEC⁸ that gives explicit recognition to the principle of equal treatment between men and women in the workplace,⁹ express provision is made for derogating from that principle in relation to pregnancy and maternity. Article 2(3) provides:

“This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.”

An initial reading of Article 2(3) suggests that it allows Member States to provide for special treatment of *pregnant* women, an obvious example of which is the provision of a period of paid maternity leave from work together with a guaranteed right to return to work. However the jurisprudence reveals that Article 2(3) is not so straightforward. By referring to “provisions concerning the protection of women *particularly* as regards pregnancy and maternity”¹⁰ it suggests that there are other grounds on which protective provisions for women could be permitted.

The ECJ has applied Article 2(3) to the wider area of “motherhood” rather than limiting the permitted derogation from the principle of equal treatment to pregnancy and maternity, an approach that tends to reinforce existing stereotypes of women and motherhood. This is illustrated by the *Commission v. Italy*.¹¹ Italian legislation allowed women, but not men, to take a period of maternity leave when they adopted children under six years of age. The legislation was challenged by the Commission which argued that the provision of a period of leave to men but not women was contrary to the Equal Treatment Directive. The ECJ found that the purpose of the leave was to assimilate as far as possible the conditions of entry of the child into the adoptive family to those of the arrival of a newborn child in the family during the very delicate initial period. The assumption here is of course that it was *only* the woman who would be on leave after the arrival of her biological child into the family.

The case of *Hofmann v Barmer Ersatzkasse*¹² is a further example of the difficulties caused by this reading of Article 2(3). Mr Hofmann claimed that restricting payment of a State maternity allowance to women was unequal treatment on grounds of sex. He argued that the leave was for childcare purposes and should be available to both mothers and fathers. The German government sought to justify their action on the basis that the leave constituted a provision for the protection of the mother under Article 2(3) of the Equal Treatment Directive and as such could be provided to women and not men. This argument was accepted by the Court in holding that the purpose of Article 2(3) was to “protect a woman in connection with the effects of pregnancy *and motherhood*” and that fathers were not entitled to a similar period of leave.¹³ The Court went on to state that it was legitimate to ensure protection of a woman during pregnancy and afterwards and secondly to protect the “special relationship” between a woman and her child following childbirth by preventing that relationship from being disturbed by the pursuit of employment. Implicit in the Courts judgment is the view that this bonding function can *only* be performed by women and that being in paid employment is inconsistent with this role. The dangers of the Court’s outmoded notions of parental role playing within families is that while ostensibly women are being protected in an important phase of their lives, in fact choice in parenting is taken away from

⁸ Council Directive on Implementation of the Principle of Equal Treatment For Men and Women as regards Access to Employment, Vocational Training and Promotion, and Working Conditions. 76/207/EEC: [1976] O.J. L39/40.

⁹ Article 2(1) provides that “the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.”

¹⁰ Emphasis added.

¹¹ Case 163/82 [1983] E.C.R. 3273.

¹² Case 184/83 [1984] E.C.R. 3047.

¹³ Emphasis added.

families and women are encouraged to stay at home while men continue uninterrupted with their careers. Given the ECJ's enthusiastic support for sex equality as one of the fundamental rights of Community law it is surprising that it did not take the opportunity to question differential treatment based on socially created roles for women. In failing to do so, the ECJ has encouraged a focusing of domestic responsibilities on the mother from the very beginning of the family's existence.

However, in more recent cases the ECJ has been willing to draw a line with regard to more extensive interpretations of Article 2(3). In *Commission v. France*,¹⁴ French legislation that allowed women to have extensive rights in connection with motherhood, was challenged as being contrary to the equal treatment principle. The rights in question included not only maternity leave, but also time off for sick children, extra holidays each year per child, pension bonuses after the birth of the first child and special allowances for nurseries and childminders as well as other rights and benefits. The ECJ found that the rights being protected related to the protection of women in their capacity as older workers or parents — categories to which both men and women may equally belong and as such did not fall within the derogation to the equal treatment principle in Article 2(3). Implicit in this decision is an understanding that the exception in Article 2(3) must in some way be connected with the period following pregnancy and childbirth.

A more positive application of Article 2(3) can be seen in *Caisse Nationale d'Assurance Vieillesse des Travailleurs Salaries v Thibault*.¹⁵ The claimant argued that the refusal of the employer to assess her performance for the purposes of career advancement because of her absence from work on maternity leave, was unlawful discrimination on grounds of her sex, and that as a result she had lost the opportunity for a promotion. The ECJ examined the conduct of the employer in light of Articles 5(1) of the Directive, which guaranteed equality in relation to the terms and conditions of employment, Article 3(1) which concerns access to promotion and Article 2(3). The Court had no difficulty in holding that the claimant had been discriminated against on grounds of her pregnancy and maternity leave and in striking down the rules in question. The Court held that:

“The principle of non-discrimination requires that a woman who continues to be bound to her employer by her contract of employment during maternity leave should not be deprived of the benefit of working conditions which apply to both men and women and are the result of that employment relationship. In circumstances such as those of this case, to deny a female employee the right to have her performance assessed annually would discriminate against her merely in her capacity as a worker because, if she had not been pregnant and had not taken the maternity leave to which she was entitled, she would have been for the year in question and could therefore have qualified for promotion.”¹⁶

More recently the ECJ found that the principle of equal pay in Article 119 (now 141) of the Treaty does not preclude preferential treatment for women who have recently given birth. In *Abdoulaye v. Régie Nationale des Usines Renault SA*¹⁷ the terms of an employment agreement which provided a lump sum payment to female employees but not male employees when they took maternity leave was unsuccessfully challenged. The Court held that it was not contrary to Article 119 to make a lump sum payment to female workers who take maternity leave where such a payment was made to offset “the occupational disadvantages which arise for those workers as a result of their being away from work.”

¹⁴ Case 312/86 [1988] E.C.R. 6315.

¹⁵ Case 136/95 [1998] E.C.R. I-2011; [1998] All E.R. (E.C.) 385.

¹⁶ at para 29.

¹⁷ Case C-218/99 [1999] IRLR 811.

A Refusal to Employ on Grounds of Pregnancy

Since the decision of the ECJ in *Dekker*¹⁸ it has been a principle of European law that less favourable treatment of a woman on grounds of her pregnancy is unlawful discrimination on grounds of sex. This means that to refuse to employ a woman because she is pregnant is unlawful, as was applied in Ms Dekker's case who was offered a job which offer was withdrawn when her prospective employers were informed of her pregnancy. In *Webb*¹⁹ this principle was extended to a woman who had been employed to replace a female employee during the planned maternity leave of that employee and was to be kept on thereafter as a permanent employee. Two weeks after starting work, Ms Webb announced that she, too, was pregnant, and was immediately dismissed. The ECJ strongly rejected the employer's argument that she had been dismissed on grounds of her non-availability during a crucial time rather than on grounds of her pregnancy. The judgement of the Court began by setting out the "general context" of such protection. It noted that Article 2(3) of the Equal Treatment Directive recognised the legitimacy, in terms of the principle of equal treatment, first, of protecting a woman's biological condition during and after pregnancy, and, second, of protecting the special relationship between a woman and her child over the period which followed pregnancy and childbirth. The Court also made extensive reference to the Pregnancy Directive,²⁰ and in particular Article 10, even though the Directive was not yet in force at that time. It drew attention to the fact that Article 10 prohibited the dismissal of a pregnant worker from the beginning of their pregnancy to the end of their maternity leave, in view of the harmful effects which the risk of dismissal might have on the physical and mental state of such women. On the basis of that legislative context, the Court laid down two principles:

1. There could be no question of comparing a pregnant woman who found herself incapable of performing the task for which she had been recruited, by reason of her pregnancy, with a man similarly incapacitated due to illness.
2. The protection afforded by Community law to a woman during pregnancy and after childbirth could not be dependent on whether her presence at work during maternity was essential to the proper functioning of the undertaking in which she was employed. Any contrary interpretation would render ineffective the provisions of the directive. Thus, the fact that Ms Webb was initially recruited to cover during the maternity leave of another employee could not affect these principles of Community law.²¹

The more recent case of *Silke-Karin Mahlburg v Land Mecklenburg-Vorpommern*²² also involved a permanent contract where the claimant was not appointed to a job which she could not do for the duration of her pregnancy due to exposure to dangerous substances, which was not permitted for pregnant women under national law. Whilst the ECJ found that she had been discriminated against on grounds of her sex, they appeared to leave open the possibility of upholding such treatment in the case of a temporary contract. The Court held:

"It follows from that case-law that the application of provisions concerning the protection of pregnant women cannot result in unfavourable treatment regarding their access to employment, so that it is not permissible for an employer to refuse to take on a pregnant woman on the ground that a prohibition on employment arising on account of the pregnancy would prevent her being

¹⁸ Case C-177/88 [1990] E.C.R. I-3941.

¹⁹ Case 32/93 [1994] I.R.L.R. 482.

²⁰ Directive 92/85/EEC.

²¹ At paras 24-27.

²² Case C-207/98; judgement of the Court of Justice 3 February, 2000.

employed from the outset and for the duration of the pregnancy in the post of unlimited duration to be filled.”²³

The one difficulty with the decisions in both *Webb* and *Silke-Karin Mahlburg* is that both applied to women hired on full-time, permanent contracts. Whether or not women on temporary contracts would be similarly protected remains to be resolved by the ECJ. This apparent gap in *Webb* in relation to a temporary contract was in fact used by an Equality Officer to rule that dismissal on grounds of non-availability at a crucial time was lawful. In *Fox v National Council for the Blind*²⁴ the claimant had been hired on a fixed term contract. Because she was pregnant she would not have been available during the crucial training period and for that reason the job offer was withdrawn. The employer sought to justify the discrimination on the ground that the job offer was withdrawn because the pregnant woman would not be available at the crucial time rather than because she was pregnant. The decision of the ECJ in *Webb* was distinguished on the basis that Ms Webb’s contract was of indefinite duration. As the contract in *Fox* was a fixed term contract where the training was an essential element, the Equality Officer found that there was no discrimination on grounds of sex and that recommendation was upheld by the Labour Court on appeal.

It is submitted that this was an unfortunate decision when one considers the rationale of the law being to protect pregnant women from less favourable treatment on grounds of their pregnancy. Women on temporary contracts are in an even more vulnerable position than their permanent colleagues and perhaps even more in need of protection from discrimination and exploitation. The recent Council Directive on fixed-term work²⁵ may have some relevance here. The directive is intended to outlaw less favourable treatment of fixed-term workers as compared to permanent workers but it permits less different treatment that can be justified on objective grounds.²⁶ Whether or not a pregnant woman’s non-availability during a crucial period of her short-term employment due to her impending maternity leave would constitute such objective grounds awaits further judicial consideration.

²³ At paragraph 27.

²⁴ [1995] E.L.R. 74.

²⁵ Council Directive 1999/70/EC of 28th June 1999 concerning the framework agreement on fixed-term work.

²⁶ Clause 4(1) states: “In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds.”

Redress

Presentation by Colin Walker, Rights Commissioner

The Rights Commissioner provided indicative statistics on hearings on employment legislation. According to the 1999 Labour Relations Commission Annual Report, 18 cases were referred to the Rights Commissioner Service of the Labour Relations Commission in 1999, 5 of which were heard during 1999 (some cases referred in 1999 were carried forward to 2000).

Recommendations

1. Framework of legislation for redress

It would make the process of adjudication much easier, if there was one piece of legislation, covering all employment rights, which clearly laid out redress procedures. Small divergences in every Act can cause confusion. An ideal solution would be a framework piece of legislation to cover all employment rights, into which the different provisions of various Acts could be slotted. At present, the appeals period under the Maternity Protection Act, 1994 is 4 weeks, while under other pieces of employment legislation it is 6 weeks. This can cause confusion and there is a need for standardised procedures.

2. Publication of Rights Commissioner Decisions

Rights Commissioner Decisions should not be made public. The work of the Commissioners is better carried out in private. The Commissioner often takes Industrial Relations considerations into account, although ultimately all decisions are issued in accordance with provisions of the Act. About 70% of the disputes are settled during hearing — the atmosphere of privacy is conducive to this. However, interestingly, the Payment of Wages Act, 1991 introduced public hearings. No member of the public has ever exercised this right in my experience.

3. Hearings under the Maternity Protection Act, 1994 by Colin Walker between April 1999 and 2000

Between April 1999 and 2000, I heard 6 disputes under the Maternity Protection Act, 1994 (the Act). 3 settled during the hearing. One was out of time for the referral. One other involved a transfer under a “risk assessment.” The last was a dismissal during pregnancy. Generally there are very few referrals under the Act (annually 1%) compared with all of the other Acts.

All Rights Commissioners operate independently in the exercise of their functions. Mr. Walker based the presentation on his own experience.

Presentation by Ms Mary Faherty — Chairperson of Employment Appeals Tribunal

According to statistics provided by the Tribunal and its Secretariat, pregnancy related discrimination cases do not feature frequently before the EAT. There were few cases under the Maternity Protection Act, 1994 in contrast with the 1981 Act. Many cases were against small employers. It was suggested that lack of information was a problem. Most of the cases relate to pregnancy related dismissal. The requirement under the Unfair Dismissals Act to have one year's continuous service before taking a case does not apply to dismissal cases on grounds of pregnancy. The complainant can take a case to the Rights Commissioner and then on appeal to the EAT. The cases can also be taken directly to the Tribunal under the Unfair Dismissals Act. The EAT decides on a form of redress which is appropriate to the circumstances. Once dismissal is on grounds of pregnancy it comes under the remit of the Unfair Dismissals Act.

The Maternity Protection Act, 1994 sets out the rights of the employee during pregnancy. Since 1994 there have been 7 cases taken under the Maternity Protection Act, 1994 to the EAT on appeal from the Rights Commissioner Service. 5 cases were heard by the Tribunal. The dismissal cases on grounds of pregnancy are covered by the Unfair Dismissals Act and therefore are not considered under the Maternity Protection Act, 1994.

Ms Mary Faherty has been Chairperson of the Employment Appeals Tribunal for the past ten years and has heard cases under the Maternity Protection of Employees Act, 1981 and the current Maternity Protection Act, 1994.

Issues highlighted by the public through the Equality Authority's Information Service on the Maternity Protection Act, 1994

Presentation by the Equality Authority to the Working Group

The Equality Authority provides an information service to the public on the Maternity Protection Act, 1994. This paper contains details of the issues highlighted by our clients through this information service and also on research commissioned and published by the Employment Equality Agency (now the Equality Authority) in 1999, entitled "New Mothers at Work." This research was undertaken as part of the EEA/IPD NOW project in partnership with First Active and Microsoft, and involved a sample survey of thirty women who were experiencing the combined challenge of parenting and working.

ISSUES HIGHLIGHTED BY RESEARCH

EEA New Mothers at Work

Dual Career: Worker and Mother = Norm

Social Contract: Makes Dual Career Possible

"I think maternity laws should be changed in this country to reflect the demand of the parents. When one income is not enough to make a decent living, a society has to think over its values. We are talking about the next generation here. We want them to be healthy and strong and for this the first steps should be breastfeeding and a protected, calm environment." (IT Professional).

"This 'feminisation of the labour market' (O'Connor, 1998) has come about in the same period that Irish women's total fertility rate has fallen steeply, to the point that we have finally come into line with European patterns of fertility established far sooner in the twentieth century (Murphy-Lawless and McCarthy, forthcoming). The total period fertility rate has dropped from 4.1 per woman in 1964 to just over 3 births per woman in the 1970s, to 2.96 in the early 1980s to 1.92 in 1997 (CSO, 1998). Thus pregnancy and birth have become infrequently experienced events in the lives of contemporary Irish women when compared with their mothers."

ISSUES HIGHLIGHTED BY INTERVIEWS

- Fourteen of the 30 women did not reveal the true date of expectant delivery to their managers because they wished to adjust their maternity leave to maximise the amount of time they could spend with the baby.
- Women who were breastfeeding encountered difficulties in relation to a sufficiently long maternity leave, lack of facilities, and lack of support amongst colleagues.
- Half the sample recorded difficulty in accessing childcare, and out of those who did not record difficulty, two thirds had older children indicating that childcare arrangements may be particularly problematic for first time mothers.
- Despite demonstrating strong and continuing commitment to their jobs, women expressed concerns about the impact of their status as new mothers on promotion prospects.

- Several women indicated that the pressures of the dual burdens of work and new motherhood were too difficult to sustain on a full time basis and they were therefore withdrawing reluctantly from the workplace.
- Women found difficulty around the adjustment of work duties and hours to accommodate the physical changes of pregnancy.
- Women with moderately serious, and serious symptoms of pregnancy, were reluctant to ask for the reallocation of duties to deal with these problems. Seven of the thirty women had symptoms related to birth outcomes which continued after they returned to work.
- Despite demonstrating strong and continuing commitment to their jobs, women expressed concerns about the impact of their status as new mothers on promotion prospects.
- Eleven women expressed the need for more flexible work packages to smooth the return to work in line with their new responsibilities as mothers.
- The main difficulties encountered by mothers who wished to breastfeed their children while in the workplace are:
 - Length of maternity leave
 - Lack of facilities
 - Lack of support

Pregnancy Regulations 2000 state that women must not be permitted to work near lead substances or underground mine work.

The National Breastfeeding policy recommends a target of 30% of all women breastfeeding their babies at 4 months by 2000.

The main issues highlighted by the research in relation to breastfeeding include:

- Lactation breaks
- Storage facilities
- Privacy

“I found it difficult returning to work while still breastfeeding as I would need to feed/relieve the fullness before going home which was not possible. I was also very tired every day as I was up several times during the night feeding my baby. I had the option to take 1 month unpaid leave plus paid vacation which gave me a total of 20 weeks off work which was great. Ireland should look at other countries in EU, where long maternity/paternity leave (of up to 1 year in some countries) is offered.”

“I found that after my first pregnancy people in the workplace still treated me the same as before but after my 2nd pregnancy things changed. I have recently accepted to take a redundancy package; this was not something I would have considered before my 2nd pregnancy. Lack of child care in the workplace, no designated breastfeeding or expressing areas plus not having the option to work either a 3 day week or job share had forced me to make this decision to leave. I currently have a 2 year old and a baby 4 months, whom I am still feeding. I have to express in the evenings for the following day and this had greatly affected my milk supply.”

“Maternity leave is too short and does not support the needs of the working mother, of the child or breastfeeding.”

“Expressing at work has been difficult, reaction by colleagues and managers not very positive.”

“Paid maternity leave should last for six months. Three months is too short as the baby is only beginning to settle and mother is still exhausted from night feeds. Also it would allow mothers to breastfeed for longer instead of trying to organise expressing milk etc.”

The issues these women pointed to are:

- the absence of a sufficiently long maternity leave;
- the absence of long paternity leave;
- the problem of lack of facilities in the workplace for the breastfeeding mother;
- the lack of support amongst work colleagues for breastfeeding”;

MATERNITY (and Adoptive) LEAVE ENQUIRIES

<i>By Category</i>	<i>May '00</i>	<i>June '00</i>
Additional Maternity Leave	6	3
Ante Natal/Post Natal Care	14	7
Booklet General	58	24
Certificate of Placement	—	—
Fathers Leave Entitlement	—	1
Foreign Adoption	—	—
Leave Entitlements	49	34
Notification	2	2
Public Holiday/Annual Leave	14	2
Return to Work	2	3
Health & Safety Leave	7	3
Other	15	4
Total	167	83
Outside Scope		
Ante Natal Classes	2	1
Paternity Leave	17	11
Sick Leave	3	—
Social Welfare Benefit	—	—
Breast Feeding	3	—
Other	2	—
Total	27	12

Additional Maternity Leave	114
Ante Natal/Post Natal Care	139
Booklet	1,094
Fathers entitlement to Leave	13
Foreign Adoption	6
Leave Entitlements	270
Notification	45
Other	154
Public Holidays/Annual Leave	115
Return to Work	96
Redundancy	3
Health & Safety Leave	65
Sub Total	2,114
Outside Scope	
Ante Natal Classes	34
Paternity Leave	121
Sick Leave	16
Breast Feeding	6
Other	16
Sub Total	196
Total Queries	2,310

ISSUES HIGHLIGHTED BY ENQUIRIES MADE TO EQUALITY AUTHORITY

- Great need for Information
- Great need for Advice
- Parental Leave is being used to compensate for inadequate Maternity Leave
- Many Pregnancy complaints are about dismissal or fixed term contracts
- Women fear and suffer exclusion from promotion while on maternity leave
- If an employer does not carry out a risk assessment what can an employee do? Do they leave the work area where they feel at risk?
- How does an employer carry out a risk assessment? Is s/he qualified to do so?
- Duration of maternity leave before and after birth enquiries
- Splitting leave if the baby is detained in hospital
- Ante-natal classes at night should be free
- Public holidays should be either
 - (a) added to leave
 - (b) extra day's pay
 - (c) set paid day off within a month
 - (d) extra day annual leave

- There is an increasing practice to take parental leave immediately following the end of maternity leave.
- Maternity Benefit Cap of £180.00 or 70% of salary is seen as an economic disadvantage. Some women want to return to work early for financial reasons. A balance is needed between minimum period of maternity leave and avoiding undue hardship.
- How many hours can be worked each day by a pregnant woman? At present there are no guidelines — would 7 hours be appropriate?
- Pregnant employees who must stand a lot must be provided with sitting breaks or have seating provided. Toilet breaks must also be provided.
- Paid Paternity Leave is a necessity for equality.
- Paid time off for ante/post natal appointments should extend to ante natal classes for first time mothers.
- Women who have a miscarriage before the 24th week should have a minimum 1 weeks paid leave provided for recuperation.

Health and Safety Issues and Breastfeeding

1. Presentation by Health and Safety Authority

Safety, Health and Welfare at Work (Pregnant Employees etc.) Regulations, 2000 (S.I. No. 218 of 2000).

1. Assessment and Pregnancy

Health and Safety Regulations come into effect once a pregnant employee has notified her employer of her condition and supplied a medical certificate to confirm that condition. This would normally occur at approximately 12-14 weeks into the pregnancy. The HSA made the important point that the most serious reproductive hazards to which pregnant women can become exposed happen long before the Health and Safety Regulations for pregnant employees come into effect. Therefore, at the early stages of the pregnancy, the woman is protected by general Health and Safety Regulations, which provide that the possibility of pregnancy is implicit, rather than the specific Regulations for pregnant employees.

2. Other Relevant Legislation

Other relevant Health and Safety Regulations which would have a bearing on the health, safety and welfare at work of pregnant employees are as follows:

- Safety, Health and Welfare at Work Act, 1989 (S6) lays down general duties (Pregnancy implicit in all health and safety risk assessments).
- Safety, Health and Welfare (General Application) Regulations, 1993 — Regulation 5 lays down conditions in relation to breastfeeding mothers if an employer is providing a restroom.
- Manual Handling Regulations (Another part of the G.A. Regulations) particularly relevant in pregnancy.
- Lead Regulations, 1988 — present guidelines mean that a pregnant woman is immediately taken off duties as defined in these Regulations.
- Carcinogens Regulations, 1993
- Labeling Regulations, 1994
- Biological Agents Regulations, 1994

3. Main Provisions of Health and Safety Regulations for Pregnant employees

(a) S.I. No. 218 of 2000 covers:

- An employee who is pregnant
- An employee who is breastfeeding which is defined under the Regulations as “an employee who, having given birth not more than twenty six weeks previously, is breastfeeding.”
- An employee who has recently given birth which is defined under the Regulations as “an employee who gave birth not more than fourteen weeks preceding a material date.”

- (b) An employee is required under the Regulations to give her employer notification of her pregnancy and provide certification of that pregnancy in order for the Regulations to come into effect.
- (c) An employer is required under the Regulations to assess the risk on the health of the employee and the effect on the pregnancy or the breastfeeding of the employee of exposure in the workplace to any agent, process or working condition. The onus is on the employer to take protective and preventive measures to ensure the health of the employee and to prevent any harmful effect to the pregnancy or breastfeeding.

4. Schedules

The list of agents, processes and working conditions in relation to which an employer is obliged to conduct a risk assessment for a pregnant or breastfeeding employee are listed in the two Schedules to the Regulations. Major risks identified in the Schedules are, for example:

- Physical Risks (Fatigue, Movements and Postures)
- Exposure to sheep at lambing time (Chlamidia), Toxoplasma, Rubella
- Underground Mining
- Lead (Crystal Glass Manufacture)

5. Employers obligations in relation to the risk to the employee

- The employer is obliged under the Regulations to conduct a risk assessment to determine the nature, degree and duration of the risk.
- The employer is then obliged to prevent the risk to the pregnant or breastfeeding employee, or if this is not possible, to adjust work conditions or hours to remove the employee from exposure to the risk.
- If this is not possible, then the employer must move the employee to suitable alternative work. (This can lead to complexity in relation to the suitability and remuneration level of the alternative work).
- If none of these options are feasible, then the employee can have recourse to Section 18 of the Maternity Protection Act, 1994 and get Health and Safety Leave. Employers pay the employee for 21 days of this leave. The Maternity Protection (Health and Safety Leave Certification) Regulations, 1995 are administered by the Department of Social, Community and Family Affairs.
- The HSA pointed out that such leave should be rarely required.

6. Application of Health and Safety Leave

- The Regulations should prevent harm to any “normal” pregnancy.
- They are not designed to be used as a form of “extra maternity leave.”
- Complications in a pregnancy are dealt with by sick leave.

7. Night Work

- If a pregnant employee is certified by her own medical doctor as unfit for night work during the pregnancy or for 14 weeks following childbirth, she shall not be obliged to perform night work for that period.
- Hours of attendance which comprise “night work” are defined at Section 5(3) of the Safety, Health and Welfare at Work (Pregnant Employees, etc.) Regulations, 2000.
- It is not mandatory for an employee not to undertake night work; and removal from night work is not necessarily beneficial from a health and safety point of view.

8. Problem Areas

There are many problem areas which can be identified within pregnancy which are not covered by the Health and Safety Regulations. These include:

- Varicose veins
- Prolonged standing or sitting
- Fatigue (when this is due to the pregnancy rather than the nature of the work)
- “Bump and Balance” problems (just due to the anatomical fact of pregnancy)
- Need for breastfeeding time or facilities

Although the Health and Safety Regulations, provide protection with regard to breastfeeding, no regulation provides that an employer must facilitate breastfeeding. The Safety, Health and Welfare (General Application) Regulations, 1993 set out conditions if that facility is being provided.

9. Constraints

There are constraints which a pregnant employee claiming benefit can face. These can be in relation to claims for:

- Disability Benefit (insufficient PRSI contributions)
- Maternity Benefit (insufficient PRSI contributions to claim benefit)
- Health and Safety Benefit
- Health and Safety Leave Certification Regulations — an employer must prove that a risk assessment has been carried out, and that Health and Safety Leave is necessary.

Practical Examples

Statistics from Department of Social, Community and Family Affairs of 19th May, 2000 on Health and Safety Benefit on claims in payment since 1st January, 2000 show that there were 64 claims in benefit. Principal among these were claims in relation to air stewardesses; workers in a drug clinic; and workers in the catering industry. 44 of the claims were from one airline. Claims in respect of air stewardesses are steadily increasing. The risks associated with the claims included heavy lifting, cramped space, prolonged standing and inflight emergency in relation to the air stewardesses; and heavy lifting, excessive heat and prolonged standing in relation to the catering industry. Heavy lifting can be identified as the most obvious health and safety risk in pregnancy. The claims from the drug clinic were for breastfeeding employees in relation to risk of assault from young offenders; risk of exposure to Hepatitis B&C and risk from IV drug users. One interesting example related to a claim from a bus worker, due to risk from the position of the bus steering wheel.

2. Presentation by Department of Health and Children/Women's Health Council Department of Health and Children Health Promotion Unit

The First International Conference on Health Promotion was held in Ottawa, Canada in 1986. The Ottawa Charter for Health Promotion was adopted at this Conference and in 1988 the Department of Health established the Health Promotion Unit.

The Health Promotion Unit has a dual remit — a policy formulation function concerned with strategic planning and priority setting and an executive function in relation to the development and implementation of health promotion programmes and initiatives.

National Breastfeeding Policy

In 1994, the Department of Health published *A National Breastfeeding Policy for Ireland*¹ — the report to the Minister for Health by the National Committee to Promote Breastfeeding. The Committee, which was formed in 1992, had the following terms of reference:

- (i) to increase the percentage of mothers in all socio-economic groups who breastfeed
- (ii) to increase the number of mothers who practice exclusively breastfeeding for at least four months and thereafter with appropriate weaning foods.

It was agreed that, taking into account the context of maternity and infant care in Ireland, the policy should also focus on the following issues:

- Breastfeeding policy in hospitals
- Breastfeeding policy at community level
- The training of health professionals
- The promotion and support for breastfeeding in the wider community
- Targets, implementation and monitoring of the policy

The National Breastfeeding Policy contains over 50 recommendations in the above areas, specific targets and an action plan for their implementation.

The National Breastfeeding Policy also addresses the question of maternity leave in relation to breastfeeding. It states that maternity leave, job protection, nursing breaks and workplace facilities to express milk are of major practical consideration in influencing women's decision to breastfeed. The Committee recommended as follows:

“The Committee instead recommends greater legislative flexibility in relation to post-natal leave. Initially this might involve more extended optional unpaid leave with a gradual extension in the longer term of the length of paid leave. The Committee recommends that employers provide facilities where breastfeeding mothers who are working can express milk. The Committee also recommends the extension of workplace crèche facilities along the lines recommended in the Second Report of the Council for the Status of Women. The public sector, and, in particular, the health sector, should give a lead in providing crèche facilities and lactation breaks.”²

¹ *A National Breastfeeding Policy for Ireland — A Report to the Minister for Health by the National Committee to Promote Breastfeeding* Department of Health: July 1994.

² *National Breastfeeding Policy*, Chapter 6.

Health Promotion Strategy

The first Health Promotion Strategy was published in 1995 by the Department of Health and Regional Health Promotion Departments were established to implement health promotion policies. These Departments are headed by a team of Health Professionals involved in health promotion. With regard to the National Breastfeeding Policy, the Health Boards are required to promote breastfeeding on the ground, and to work towards an increase in breastfeeding rates. The Department of Health and Children also consult with and support voluntary organisations involved with breastfeeding promotion like La Leche League.

The incidence of breastfeeding in Ireland still remains lower than that of our European counterparts. While the National Breastfeeding Policy set the target of a 50% initiation rate by 2000, the initiation rate at present is at 30 – 35%. A more strategic approach to the promotion of breastfeeding is outlined in the new Health Promotion Strategy published in July 2000. The new strategy provides for the appointment of a national breastfeeding co-ordinator to conduct a review of the breastfeeding policy, and to identify barriers to breastfeeding. The re-establishment of the National Committee to Promote Breastfeeding will be considered in the context of this review.

Women's Health Council

The Women's Health Council is a statutory body set up in 1997 to advise the Minister for Health and Children on all aspects of women's health. Its mission is to inform and influence the development of health policy to ensure the maximum health and social gain for women in Ireland. The membership of the Women's Health Council is representative of a wide range of expertise and interest in women's health.

The Women's Health Council supports the recommendations of The Food Safety Authority's infant feeding policy and the Department of Health and Children's National Breastfeeding Policy that exclusive breastfeeding for a period of at least four months provides optimal benefits in terms of disease prevention, these benefits persist during infancy and into later life.

In order to facilitate all women to breastfeed the Women's Health Council would support measures to enable nursing women to continue breastfeeding when they return to work. Including:

1. A flexible work schedule
2. Lactation breaks of thirty minutes minimum
3. Adequate facilities that provide privacy, a comfortable chair, washbasin and hygienic storage facilities for breast milk.

The Women's Health Council recognises that the decision to breastfeed is influenced by a range of factors, which include access to information, education and legislation. For example, an extension in the length of maternity leave, an integrated approach between Government Departments in promoting breastfeeding and for employers to take a proactive approach to breastfeeding in the workplace, would improve the levels of breastfeeding in Ireland which remain low.

Sources and Bibliography

1. Legislation

(a) National

Maternity Protection Act, 1994.
 Safety, Health & Welfare at Work (Pregnant Employees, etc.) Regulations, 2000.
 Organisation of Working Time Act, 1997.
 Unfair Dismissals Acts, 1977 to 1993.
 Employment Equality Act, 1998.

(b) EU legislation and international instruments

Pregnant Workers' Directive 92/85/EEC.
 ILO Convention and Recommendation on Maternity, 2000.
 UN Convention on Economic, Social and Cultural Rights.
 UN Convention on the Prevention of Discrimination against Women.
 UN Convention on the Rights of the Child.
 Council of Europe Social Charter and Social Charter (Revised), 1996.

2. Books and Reports

MISSOC — Social Protection in the Member States of the European Union, Luxembourg: European Commission, Employment & Social Affairs, 1999.

Care in Europe: Medium-Term Community Action Programme on Equal Opportunities for Women and Men, Luxembourg: European Commission, Employment & Social Affairs, 1998.

Human Rights in International Law, Strasbourg: Council of Europe Press, 1992.

The Regulation of Working Conditions in the Member States of the European Union, Vol I, Luxembourg: Office for Official Publications of the European Union, 1999.

Family Observer, Employment & Social Affairs, European Commission, Luxembourg: Office for Official Publications of the European Union, 1999.

A National Breastfeeding Policy for Ireland — A Report to the Minister for Health by the National Committee to Promote Breastfeeding, Dublin: Department of Health, 1994.

Preparing Together for Birth and Beyond — A Consumer Guide to the Maternity Services in Ireland, Dublin: Cuidiu and Department of Health and Children, 1999.

Report from the Commission on the implementation of Council Directive 92/85/EEC of 19 October, 1992 on the introduction of measures to encourage improvements in the health and safety at work of pregnant workers and workers who have recently given birth or are breastfeeding, Brussels: Commission of the European Communities, 15 March, 1999.

Report on the Commission Report on the implementation of Council Directive 92/85/EEC of 19 October, 1992 on the introduction of measures to encourage improvements in the health and safety at work of pregnant workers and workers who have recently given birth or are breastfeeding, Committee on Employment and Social Affairs, European Parliament, 30 May, 2000.

New Mothers at Work/Identifying the needs of new mothers in the workplace, Dublin: Employment Equality Agency, 1999.

Social Policy in Tandem with the Labour Market in the European Union, Helsinki: Ministry of Social Affairs and Health, 1999.

3. Articles and Information Booklets

“Information collected in Sweden on Leave and Childcare Services,” in *Reconciling Employment and caring for children — What information is needed for an effective policy?* Brussels: 1995, pp. 17-22.

“Suspension from work on medical or maternity grounds under health and safety regulations,” *Employment Rights 10*, UK: Department of Economic Development, 1998.

“Maternity Rights — A guide for employers and employees,” *Employment Rights 16*, UK: Department of Economic Development, 1998.

“Personnel Policies and Procedures — Annual Leave and Public Holidays — Guideline 10,” Dublin: Irish Business and Employers Confederation.

“Summary — Organisation of Working Time Act, 1997,” Dublin: IBEC Employee Relations Information Unit, January 2000.

“Summary — Organisation of Working Time Act, 1997 — Holidays,” Dublin: IBEC Employee Relations Information Unit, January, 2000.

Unfair Dismissals Acts, 1977-1993: Explanatory Booklet for Employers and Employees, Dublin: Department of Enterprise, Trade & Employment, 1999.

Guide to Labour Law, Dublin: Department of Enterprise, Trade & Employment, 1999.

Organisation of Working Time Act, 1997 — Information on Holidays and Public Holidays, Dublin: Department of Enterprise, Trade & Employment, 1999.

The Organisation of Working Time Act, 1997,” Dublin: Department of Enterprise, Trade and Employment, September, 1997.

4. Websites

“Employment Legislation — Maternity Rights”, Department of Trade and Industry website — www.dti.gov.uk.

“Droit des salariés: Congé Maternité”, French Government website — vosdroits.admifrance.gouv.fr.

“Family Policy 2 — Maternity leave and maternity allowance”, Finnish Ministry of Social Affairs and Health website — www.unifi, 1999.

Kollina Maire and Vallimies Patamai Marjukka, “Health promotion in maternity, child and school health care,” Virtual Finland website — virtual.finland.fi., 1998.

Labour Relations Commission website — www.lrc.ie

Department of Enterprise, Trade and Employment website — www.entemp.ie

Health and Safety Authority website — www.hsa.ie

