



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

## **Response to the Public Consultation regarding Sharing Parental Rights, Extending Flexibility at Work**

1. Pursuant to Section 69 (1) of the Northern Ireland Act 1998 the Northern Ireland Human Rights Commission (the Commission), reviews the adequacy and effectiveness of law and practice relating to the protection of Human Rights in Northern Ireland.<sup>1</sup> In accordance with this function the following statutory advice is submitted to the Department for Employment and Learning (the Department) in respect of the Sharing Parental Rights, Extending Flexibility at Work Public Consultation.
  
2. The Commission bases its position on the full range of internationally accepted human rights standards, including the European Convention on Human Rights as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe and United Nations systems. The relevant international treaties in this context include;
  - The European Convention on Human Rights, 1950 (ECHR) [UK ratification 1951];
  - European Social Charter, 1961 [UK ratification 1962];
  - The International Covenant on Civil and Political Rights, 1966 (ICCPR)[UK ratification 1976];
  - The International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) [UK ratification 1976];
  - The United Nations Convention on the Elimination of Discrimination Against women (CEDAW) [UK ratification 1986];

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<sup>1</sup> *Northern Ireland Act 1998, S.69(1).*

- The United Nations Convention on the Rights of the Child (CRC) [UK ratification 1991];
  - Charter of Fundamental Rights of the European Union, 2010/C 83/02.
3. In addition to these treaty standards there exists a body of 'soft law' developed by the human rights bodies of the United Nations and the Council of Europe. These declarations and principles are non-binding but provide further guidance in respect of specific topic areas. The relevant standards in this context include:
- Beijing Platform for Action adopted by the United Nations 4<sup>th</sup> World Conference on Women (Beijing, 1995);
  - Council of Europe, Recommendation No. R (96) 5 of the Committee of Ministers to Member States on Reconciling Work and Family Life, 1996;
  - Council of Europe, Parliamentary Assembly, Recommendation 1769 (2006), The need to reconcile work and family life.
4. The Northern Ireland Executive (NI Executive) is subject to the obligations contained within these international treaties by virtue of the United Kingdom's ratification. The Commission recalls that Section 24(1) of the Northern Ireland Act 1998 requires that all Acts of the Department are compatible with the ECHR. In addition, Section 26 of the Act also requires compliance with international obligations. The Commission, therefore, advises that the Department scrutinize the proposed Strategy for full compliance with international human rights standards.

### **Relevant international human rights standards**

5. The Commission notes the key purpose of the consultation "to create a system of shared parental leave that will enable mothers to retain a closer connection to the workplace and also allow partners to take a more active role in caring for and

bonding with a new baby or adopted child during the crucial first year following birth or adoption.”<sup>2</sup>

6. In this regard the Commission recalls that the UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee) expressed its appreciation for “the [UK]’s efforts to provide flexible working arrangements for women and men, and to introduce shared parental leave envisaging new legislation in 2015.”<sup>3</sup>
7. The Commission further recalls that the Committee recommended that the UK “[i]ntensify its efforts to promote the use of flexible working arrangements and introduce shared parental leave to encourage men to participate equally in child care responsibilities.”<sup>4</sup>
8. The consultation document recognizes the impact of the proposals on the right to family life. The Commission advises that a number of other international human rights standards are also directly affected by the proposals. These include the right to equality<sup>5</sup> and non-discrimination<sup>6</sup>, the rights of the child with respect to upbringing and development, and the

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<sup>2</sup> Sharing Parental Rights, Extending Flexibility at Work – Public Consultation, Department for Employment and Learning, para. 1.2.

<sup>3</sup> UN Committee on the Elimination of Discrimination against Women, Concluding Observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, CEDAW/C/GBR/CO/7, 26 July, 2013, para. 46.

<sup>4</sup> UN Committee on the Elimination of Discrimination against Women, Concluding Observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, CEDAW/C/GBR/CO/7, 26 July, 2013, para. 47.

<sup>5</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2005/411, August 2005, para 14: “[g]ender based assumptions about economic, social and cultural roles preclude the sharing of responsibility between men and women in all spheres that is necessary to equality.” See *also*, para. 22.

<sup>6</sup> CEDAW requires that State parties take appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in the field of employment, and “to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work”. CEDAW, Article 16 § 1. See *also*, Article 11 and Committee on the Elimination of Discrimination Against Women, General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, 16 December 2010, para. 22.

related “common responsibilities for the upbringing and development of the child”.<sup>7</sup>

9. In accordance with CEDAW the Northern Ireland Executive must take appropriate measures:

(a) to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;<sup>8</sup>

(b) to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.<sup>9</sup>

10. The Committee on the Elimination of Discrimination Against Women has explained that the Convention:

imposes a due diligence obligation on States parties to prevent discrimination by private actors. In some cases, a private actor’s acts or omissions of acts may be attributed to the State under international law. States parties are thus obliged to ensure that private actors do not engage in discrimination against women as defined in the Convention. The appropriate measures that States parties are obliged to take include the regulation of activities of private actors with regard to education, employment and health policies and practices, working conditions and work standards, and other areas in which

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<sup>7</sup> UNCRC, Article 18 § 1. See *also*, UN Human Rights Committee, General Comment No. 28, Article 3 (The equality of rights between men and women), HRI/GEN/1/Rev.9 (Vol. I), para 25: “States parties must ensure that the matrimonial regime contains equal rights and obligations for both spouses with regard to the custody and care of children...”

<sup>8</sup> CEDAW, Article 5.

<sup>9</sup> CEDAW, Article 5.

private actors provide services or facilities, such as banking and housing.<sup>10</sup>

11. The CRC contains similar obligations to:

create employment conditions within business enterprises which assist working parents and caregivers in fulfilling their responsibilities to children in their care such as: the introduction of family-friendly workplace policies, including parental leave... protection from discrimination and violence in the workplace...<sup>11</sup>

### ***Unpaid Parental Leave***

12. The Commission notes that the Consultation document addresses the age limit of a child in respect of whom unpaid parental leave can be claimed.<sup>12</sup> It recalls that in accordance with the CRC, the best interests of the child must be a primary consideration in this decision. The Committee on the Rights of the Child has explained that

[t]he obligation to make the best interests of the child a primary consideration becomes crucial when States are engaged in weighing competing priorities, such as short-term economic considerations and longer term development decisions. States should be in a position to explain how the right to have the best interests of the child considered has been respected in decision-making, including how it has been weighed against other considerations.<sup>13</sup>

13. The Commission further recalls that for the purposes of the CRC "a child means every human being below the age of 18

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<sup>10</sup> Committee on the Elimination of Discrimination Against Women, General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, 16 December 2010, para. 13

<sup>11</sup> Committee on the Rights of the Child, General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, CRC/C/GC/16, 17 April 2013, para. 54.

<sup>12</sup> Sharing Parental Rights, Extending Flexibility at Work – Public Consultation, Department for Employment and Learning, para. 3.35.

<sup>13</sup> Committee on the Rights of the Child, General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, CRC/C/GC/16, 17 April 2013, para 17.

years unless under the law applicable to the child, majority is attained earlier.”<sup>14</sup>

14. The Committee of Ministers of the Council of Europe has made a number of relevant recommendations regarding actions to be taken by governments of member states, including

The need for women and men to meet their responsibilities for child rearing should be made a priority, not only in respect of their very young children but also in respect of their older children.<sup>15</sup>

15. The Commission recalls that the UK Government has decided that it was appropriate to increase the age limit regarding unpaid parental leave to 18 years. Thus, from 2015 in England and Wales “each parent will have the right to 18 weeks of unpaid parental leave for each child up to the age of 18.”<sup>16</sup> In light of the definition of a child under the CRC, and in accordance with the best interests of the child, the Commission advises that the Department should take steps to ensure that the age limit regarding unpaid parental leave in Northern Ireland should also be increased to 18 to allow greater flexibility with respect to the right to take unpaid parental leave.

### ***Right to Return to the Same Job***

16. The Commission notes that the consultation document addresses various options regarding the right to return to work following parental leave.<sup>17</sup>
17. The Commission advises that in order to comply with international human rights law the current right to return to the same or a similar job should not be reduced. If a parent is facing uncertainty regarding the status of their job upon return to work this may make them less likely to avail of the leave to which they are entitled.

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<sup>14</sup> CRC, Article 1.

<sup>15</sup> Council of Europe, Recommendation No. R (96) 5 of the Committee of Ministers to Member States on Reconciling Work and Family Life, Appendix, para. 2.

<sup>16</sup> Modern Workplaces: Shared parental leave and pay – administration consultation, Department for Business Innovation and Skills, February 2013, p. 15.

<sup>17</sup> Sharing Parental Rights, Extending Flexibility at Work – Public Consultation, Department for Employment and Learning, pp. 15-16.

18. The Committee of Ministers of the Council of Europe has noted that

both the father and the mother should have the right to take parental leave during a period to be determined by the national authorities without losing either their employment or any related rights provided for in social protection or employment regulations.<sup>18</sup>

19. The Commission notes that a reduction in protection regarding the return to work would result in a negative impact on the right to work, the rights of the child and equality rights. In order to comply with ICESCR "the State party should reduce the constraints faced by men and women in reconciling professional and family responsibilities by promoting adequate policies for childcare and care of dependent family members."<sup>19</sup>

20. Similarly, the Beijing Platform for Action called for Governments to "[e]nsure, through legislation, incentives and/or encouragement, opportunities for women and men to take job-protected parental leave and to have parental benefits..."<sup>20</sup>

21. The Commission advises that if this right were to be reduced as part of the current proposals this would negatively affect the best interests of the child and would constitute retrogression. The UN Committee on Economic, Social and Cultural Rights has noted that

Any deliberately retrogressive measures... would require the most careful consideration and would need to be fully justified by reference to the totality of the rights

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<sup>18</sup> Council of Europe, Recommendation No. R (96) 5 of the Committee of Ministers to Member States on Reconciling Work and Family Life, Appendix, para. 13.

<sup>19</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2005/411, August 2005, para 24.

<sup>20</sup> Beijing Platform for Action adopted by the United Nations 4<sup>th</sup> World Conference on Women (Beijing, 1995), Strategic objective, F. 6: Promote harmonization of work and family responsibilities for women and men, Actions to be taken (c).

provided for in the Covenant and in the context of the full use of the maximum available resources.<sup>21</sup>

### ***Paternity Leave***

22. The Commission recalls that the 2011 Consultation on Modern Workplaces proposed “that part of the paid period of flexible parental leave be reserved for the exclusive use of each parent. The Government consider[ed] that a period of four weeks per parent should be reserved... An additional four weeks of paid leave will therefore be provided...”<sup>22</sup>
23. That consultation explained that The UK Government recognized that “[i]nternational evidence suggests that fathers’ usage of parental leave is higher under schemes that offer them targeted or reserved leave as opposed to just making shared leave available to the father”<sup>23</sup> and that “reserved leave for fathers supports culture change towards shared parenting.”<sup>24</sup>
24. This extension of paternity leave would further a number of international human rights commitments, including those discussed under CEDAW, ICESCR and the CRC, as well as the European Social Charter and the EU Charter on Fundamental Rights.

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<sup>21</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 3, The Nature of States parties obligations (Art. 2, par. 1), 14 December 1990, para. 9.

<sup>22</sup> HM Government, Consultation on Modern Workplaces, (i) Flexible parental leave, (ii) Flexible working, (iii) Working time regulations, (iv) Equal pay, May 2011, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31549/11-699-consultation-modern-workplaces.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31549/11-699-consultation-modern-workplaces.pdf), para. 50-51.

<sup>23</sup> HM Government, Consultation on Modern Workplaces, (i) Flexible parental leave, (ii) Flexible working, (iii) Working time regulations, (iv) Equal pay, May 2011, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31549/11-699-consultation-modern-workplaces.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31549/11-699-consultation-modern-workplaces.pdf), para. 48.

<sup>24</sup> Consultation on Modern Workplaces, Modern Workplaces – Government Response on Flexible Parental Leave, November 2012, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/34689/12-1267-modern-workplaces-response-flexible-parental-leave.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/34689/12-1267-modern-workplaces-response-flexible-parental-leave.pdf), p. 6.

25. Article 9 of ICESCR requires “guaranteeing adequate maternity leave for women, paternity leave for men, and parental leave for both men and women.”<sup>25</sup>

26. Similarly, the UN Committee on the Rights of the Child has stated that

In the context of care of children, particularly young children, other measures will be needed for creating an enabling environment for business to respect article 6 through, for example, the introduction of family-friendly workplace policies. Such policies must take account of the impact of working hours of adults on the survival and development of the child at all stages of development and must include adequately remunerated parental leave.<sup>26</sup>

27. With respect to England and Wales the determination was made that paternity leave and pay would not be extended at this time as it was considered “unaffordable for both Government and business.”<sup>27</sup> However, as outlined in the consultation document, “the UK Government intends to establish powers covering Great Britain that would allow for an extension to paid paternity leave at a later date when economic circumstances are more favourable.”<sup>28</sup>

28. The Commission advises that, in keeping with the international human rights law principle of “progressive

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<sup>25</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2005/411, August 2005, para 26.

<sup>26</sup> Committee on the Rights of the Child, General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights, CRC/C/GC/16, 17 April 2013, para. 20.

<sup>27</sup> Consultation on Modern Workplaces, Modern Workplaces – Government Response on Flexible Parental Leave, November 2012, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/34689/12-1267-modern-workplaces-response-flexible-parental-leave.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/34689/12-1267-modern-workplaces-response-flexible-parental-leave.pdf), p. 6.

<sup>28</sup> Sharing Parental Rights, Extending Flexibility at Work – Public Consultation, Department for Employment and Learning, para. 3.28. Consultation on Modern Workplaces, Modern Workplaces – Government Response on Flexible Parental Leave, November 2012, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/34689/12-1267-modern-workplaces-response-flexible-parental-leave.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/34689/12-1267-modern-workplaces-response-flexible-parental-leave.pdf), p. 6.

realization” of economic, social and cultural rights,<sup>29</sup> the Department should ensure that the legislation adopted establishes powers that will similarly allow for the extension of paternity leave in Northern Ireland when Government and business finances permit.<sup>30</sup>

### ***Guidance regarding the proposed legislation***

29. The Commission notes that the UN Committee on the Rights of the Child has explained that:

States should encourage a business culture that understands and fully respects children’s rights. ... [States] should develop guidance that explicitly sets out government expectations for business enterprises to respect children’s rights in the context of its own business activities, as well as within business relationships...<sup>31</sup>

30. In this regard the Commission recalls that the UN Committee on the Elimination of Discrimination against Women in its recent Concluding Observations regarding the UK expressed concern “at reports of persistent discrimination of pregnant women in employment and their access to justice” and recommended that the UK should “Ensure women’s access to justice in employment cases, including cases related to discrimination on grounds of pregnancy and motherhood.”<sup>32</sup>
31. The Commission further recalls that the European Committee of Social Rights has asked the UK Government “what legal

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<sup>29</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 3, The Nature of States parties obligations (Art. 2, par. 1), 14 December 1990, para. 9.

<sup>30</sup> See *also*, Human rights Joint Committee, Legislative Scrutiny: Children and Families Bill; Energy Bill, para 108 -110.

<sup>31</sup> Committee on the Rights of the Child, General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights, CRC/C/GC/16, 17 April 2013, para. 73.

<sup>32</sup> Committee on the Elimination of Discrimination against Women, Concluding Observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, CEDAW/C/GBR/CO/7, 26 July, 2013, paras. 46 and 47 (e).

safeguards exist to avoid any undue pressure from employers to shorten their maternity leave."<sup>33</sup>

32. The Commission recommends that the Department provide Guidance to employers regarding any new legislation adopted as a result of this consultation in order to ensure compliance with relevant international human rights obligations. This Guidance should emphasise the importance of upholding anti-discrimination legislation as it relates to the new provisions in order to ensure that women who choose to avail of the full entitlement to maternity leave, and men who choose to avail of shared parental leave, are not discriminated against in comparison to their counterparts who may not have children or may choose not to take full maternity or parental leave.

### ***Right to Maternity Benefits***

33. The Commission recalls that the European Committee of Social Rights has concluded that "the situation in the United Kingdom is not in conformity with Article 8 §1 of the Charter of 1961 on the ground that the standard rates of Statutory Maternity Pay (SMP), after six weeks, and Maternity Allowance (MA) are inadequate."<sup>34</sup>
34. The Commission advises that the Department should ensure that new provisions that are introduced are fully compliant with the Government's obligations regarding the European Social Charter and other international human rights obligations.

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<sup>33</sup> European Committee of Social Rights, European Social Charter, Conclusions XIX-4 (2011) (United Kingdom), Articles 7, 8, 16, 17 and 19 of the Charter, p. 8.

<sup>34</sup> European Committee of Social Rights, European Social Charter, Conclusions XIX-4 (2011) (United Kingdom), Articles 7, 8, 16, 17 and 19 of the Charter, p. 8.

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