

**Department for Business and Trade – Call for evidence: non-  
statutory flexible working**

- 1.1 The NASUWT welcomes the opportunity to respond to the Department for Business and Trade call for evidence in regards to non-statutory flexible working.
- 1.2 The NASUWT – The Teachers' Union – represents teachers and headteachers across the United Kingdom.

**GENERAL COMMENTS**

- 1.3 The NASUWT recognises that the questions in the consultation are significant and wide-ranging and warrant further discussion. The Union submission seeks to address these questions.
- 1.4 The NASUWT believes that employers have a duty to keep and retain staff in their employment, as well as to seek to recruit those who wish to return to work after a break in employment.
- 1.5 The Union welcomed the proposal to extend the right to request flexible working to all employees with 26 weeks' employment or more from 2014. The Union believes that this should have brought about an improvement in women's engagement with the labour market when they are caring for children, as it could have helped open up the number of vacancies advertised on a flexible work basis from day one.

- 1.6 Extending this right was seen as a way for employers to recruit, motivate and retain their employees, as well as enabling them to negotiate work patterns that granted them access to a pool of experienced and skilled staff.
- 1.7 The development of flexible working should have enabled greater gender equality in both the workplace and at home, as well as playing a role in promoting greater social mobility, by giving families a greater say in how and when they share their caring responsibilities.
- 1.8 In addition, it should have assisted in ensuring all men, including fathers, received the same treatment as all women in terms of the right to request flexible working.
- 1.9 There is a significant body of evidence which highlights the benefits of flexible working, including increased productivity, a more motivated workforce, greater employee engagement and greater diversity amongst the workforce.
- 1.10 For example, research has shown that employees consider flexible working to be a key factor in productivity and performance at work, including amongst parents and carers seeking to balance their work with other life responsibilities.<sup>1</sup>
- 1.11 In addition, those working flexibly are more likely to have a higher level of job satisfaction. They are also more likely to increase discretionary effort compared to those who do not work flexibly, because they are more willing to go the extra mile for their employer.<sup>2</sup>
- 1.12 The economic value of flexible working to the UK is estimated at £1.7 billion.<sup>3</sup>

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<sup>1</sup> [https://www.cipd.co.uk/Images/flexible-working-business-case\\_tcm18-52768.pdf](https://www.cipd.co.uk/Images/flexible-working-business-case_tcm18-52768.pdf)

<sup>2</sup> Ibid.

<sup>3</sup> [https://www.cipd.org/globalassets/media/knowledge/knowledge-hub/reports/megatrends-report-flexible-working-1\\_tcm18-52769.pdf](https://www.cipd.org/globalassets/media/knowledge/knowledge-hub/reports/megatrends-report-flexible-working-1_tcm18-52769.pdf)

- 1.13 Positive approaches towards flexible working have been shown to reduce the gender pay gap (GPG), as well as supporting more diverse talent pipelines within companies, which, it has been estimated, could add £150 billion a year to the UK economy by 2025.<sup>4</sup>
- 1.14 Furthermore, 99% of businesses surveyed reported that a flexible workforce was vital or important to competitiveness and the prospects for business investment and job creation.<sup>5</sup>
- 1.15 It has been argued that few labour market policies have more widespread support than flexible working. It is strongly supported by employers, employees, trade unions and campaigning bodies.<sup>6</sup>
- 1.16 Indeed, there is a strong, unmet demand for flexible working; 87% of people want to work flexibly, which rises to 92% for young people.<sup>7</sup>
- 1.17 It is therefore disappointing that flexible working is still inaccessible for many workers. A culture of presenteeism and a lack of creative thinking about job design are hampering progress towards flexibility as the norm. Too few employers are considering the benefits of offering jobs on a flexible working basis.
- 1.18 This is supported by research which shows that progress in regards to flexible working over the last 10-15 years has been extremely slow. For example, over the period 2005 to 2017, the share of workers with a flexible working arrangement, as defined by the Labour Force Survey (LFS), increased from just 23% to 27%.<sup>8</sup>
- 1.19 This is compounded by the fact that only 11% of jobs are advertised as being flexible,<sup>9</sup> despite the fact that research by the Government Equalities

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<sup>4</sup> Ibid.

<sup>5</sup> [https://www.cipd.co.uk/Images/flexible-working-business-case\\_tcm18-52768.pdf](https://www.cipd.co.uk/Images/flexible-working-business-case_tcm18-52768.pdf)

<sup>6</sup> [https://www.cipd.co.uk/Images/flexible-working\\_tcm18-58746.pdf](https://www.cipd.co.uk/Images/flexible-working_tcm18-58746.pdf)

<sup>7</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1019526/flexible-working-consultation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1019526/flexible-working-consultation.pdf)

<sup>8</sup> [https://www.cipd.co.uk/Images/flexible-working\\_tcm18-58746.pdf](https://www.cipd.co.uk/Images/flexible-working_tcm18-58746.pdf)

<sup>9</sup> [https://www.cipd.co.uk/Images/flexible-working-business-case\\_tcm18-52768.pdf](https://www.cipd.co.uk/Images/flexible-working-business-case_tcm18-52768.pdf)

Office found that jobs advertised on a flexible basis attracted 30% more applicants than those that were not.<sup>10</sup>

- 1.20 International comparisons suggest that whilst the UK's share of part-time work is high relative to other Organisation for Economic Co-operation and Development (OECD) countries, it drops when looking at countries where workers have some flexibility in working arrangements, such as Germany, Norway and Finland.<sup>11</sup>
- 1.21 The Chartered Institute of Personnel and Development (CIPD) reported that there are still barriers in workers accessing flexible working, including a hardening of employers' attitudes towards flexible working.<sup>12</sup>
- 1.22 Indeed, reports from the CIPD suggest that taking up flexible working was actively discouraged by managers and supervisors,<sup>13</sup> with research undertaken by the Trades Union Congress (TUC) showing that one in three requests for flexible working were turned down.<sup>14</sup>
- 1.23 Where flexible working is available, it is still seen as the preserve of the working mother, with fathers reporting that their workplace was unsupportive.<sup>15</sup> The differential uptake of flexible working by men and women has the potential to perpetuate the gender divide, both at home and in the workplace.
- 1.24 This contributes to women being more likely to work part time, to be in low-skilled jobs and making up approximately two thirds of the low paid. This motherhood penalty is at the heart of the GPG, currently 8.9% for full-time employees, a decline of only 0.6 percentage points since 2012.<sup>16</sup> Women

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<sup>10</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/966407/Encouraging\\_employers\\_to\\_advertise\\_jobs\\_as\\_flexible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/966407/Encouraging_employers_to_advertise_jobs_as_flexible.pdf)

<sup>11</sup> [https://www.cipd.org/globalassets/media/knowledge/knowledge-hub/reports/megatrends-report-flexible-working-1\\_tcm18-52769.pdf](https://www.cipd.org/globalassets/media/knowledge/knowledge-hub/reports/megatrends-report-flexible-working-1_tcm18-52769.pdf)

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> <https://www.tuc.org.uk/sites/default/files/2021-07/Flexibleworkingreport3.pdf>

<sup>15</sup> <http://www.acas.org.uk/media/pdf/o/7/Flexibility-in-the-Workplace.pdf>

<sup>16</sup> <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/genderpaygapintheuk/2019>

form the majority of part-time workers, yet the average hourly pay for part-time work is approximately 30% less than for full-time pay.<sup>17</sup>

- 1.25 A workplace stuck in the past, where gender stereotypes are still rife, means that gender divides within the workplace are perpetuated, and women, who are disproportionately more likely to take up flexible working, are likely to be less visible, less well-paid and less likely to be promoted.<sup>18</sup>
- 1.26 The association between flexible working and women looking to balance work and caring commitments through part-time working is therefore an important factor contributing to the persistence of the GPG.
- 1.27 The NASUWT believes this has implications for mothers staying in and returning to the workforce, as well as serious consequences for equal pay and representation of mothers at senior levels. It also has implications for fathers who want to be more involved.

### **The experiences of teachers**

- 1.28 The NASUWT is deeply concerned that, despite the obvious benefits, the uptake of flexible working in education remains low, with many employers refusing requests for flexible working made by teachers.
- 1.29 Flexible working policies should help to recruit, retain and motivate teachers. Unfortunately, the evidence collected by the Union suggests that the Government and the Department for Education (DfE) need to review flexible working, specifically by looking at teachers and the failure of schools/colleges to agree to flexible working requests.
- 1.30 Furthermore, detailed economic analysis and calculations show that the financial benefits of flexible working greatly outweigh any initial costs associated with it.

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<sup>17</sup> <http://multipleminds.co.uk/wp-content/uploads/2016/05/Parents-Work-and-Care-2016.pdf>

<sup>18</sup> <http://www.acas.org.uk/media/pdf/o/7/Flexibility-in-the-Workplace.pdf>

- 1.31 For example, the Pragmatix Advisory Flex Model, published as part of the *Flexonomics report* in November 2021,<sup>19</sup> calculated the estimated net benefit to the economy of increasing flexible working in the education<sup>20</sup> sector by 50% to be £5 billion.
- 1.32 In addition, the same report calculated that the cost to organisations in the education sector of employees leaving their job earlier than they would have is £300m. This includes the cost to replace staff that leave, as well as loss of productivity from losing more experienced staff. This cost is a real risk to schools that routinely reject requests for flexible working.
- 1.33 Furthermore, research by CooperGibson on behalf of the DfE found that enabling flexible working could help schools to retain teachers who would otherwise leave the role, or retire early.<sup>21</sup>
- 1.34 Indeed, the DfE's Working Lives of Teachers and Leaders Survey showed that those working flexibly were more likely to report feeling satisfied all/most of the time with their job and feeling valued by their school. It was noted that those who reported experiencing stress in their workplace were less likely to report working flexibly (36%).<sup>22</sup>
- 1.35 Given this, the NASUWT is seriously concerned that a significant proportion of teachers are being denied the right to flexible working by employers. The Union surveyed teachers who were parents in 2020 and discovered that, of the 3,298 teachers who responded, just over two fifths (42%) responded that they had asked their employers for flexible working because of their parental responsibilities.<sup>23</sup>
- 1.36 Disappointingly, three in ten teachers (30%) reported that their request to their employer for flexible working was rejected. Of those teachers: almost half (49%) stated that this was because their employer said it would be too

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<sup>19</sup> <https://www.srm.com/media/3369/2021-11-12-confidential-flexonomics-a-report-by-pragmatix-advisory-for-sir-robert-mcalpine-and-mother-pukka.pdf>

<sup>20</sup> The categorisation of 'education' is from the office for national statistics (ONS) UK standard industrial classification of Economic Activities.

<sup>21</sup> <https://www.gov.uk/government/publications/exploring-flexible-working-practice-in-schools>

<sup>22</sup> <https://www.gov.uk/government/publications/working-lives-of-teachers-and-leaders-wave-1>

<sup>23</sup> <https://www.nasuwt.org.uk/news/campaigns/being-a-teacher-and-a-parent-survey-2020.html>

difficult to accommodate; well over two fifths (43%) stated that it was because their employer said it would be too disruptive to pupils/staff; under one fifth (18%) stated that it was because their employer said it would be too difficult to recruit extra staff; and 13% stated that it was because their employer said it would be too expensive.<sup>24</sup>

- 1.37 Of even greater concern is the fact that over one in ten teachers (11%) reported that their employer had not provided a reason for refusing their request for flexible working.<sup>25</sup>
- 1.38 Furthermore, just over two thirds of teachers (67%) reported that they were not given the right to appeal the decision by their employer to reject their request for flexible working, despite this being good practice and recommended in the Acas guidance in relation to flexible working.<sup>26</sup>
- 1.39 This resonates with earlier research undertaken by the NASUWT which showed that a significant proportion of teachers are being denied the right to flexible working by employers, and that too many schools are still resistant to flexible working, specifically part-time working and job share, particularly for those teachers in leadership positions or with additional responsibilities.<sup>27</sup> Only 8% of teachers felt that flexible working requests were encouraged in their workplace.<sup>28</sup>
- 1.40 The Union analysed 3,000 cases of teachers requesting flexible working and found that nearly a third of these requests were turned down. For teachers in leadership positions, or with additional responsibilities, nearly all requests were denied.<sup>29</sup>
- 1.41 Some of those who requested flexible working were told that it would mean giving up any promoted post they held. Others were advised that working

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<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> [NASUWT, Flexible working - The Experiences of Teachers, Birmingham, 2016.](#)

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

part time showed a lack of dedication and commitment to the school and the pupils, despite DfE advice making it clear that this is not the case.<sup>30</sup>

- 1.42 Ninety per cent of the requests analysed by the NASUWT were from women teachers, who make up nearly three quarters of teachers. In primary schools, 85% of teachers are women.
- 1.43 Teachers reported that they did not bother to apply for flexible working, given the low success rates and the likelihood of their appeal being unsuccessful. One in five teachers said they had sought or would seek alternative employment at a school that was more conducive to flexible working or where they were able to work reduced hours.<sup>31</sup>
- 1.44 Unfortunately, those women who are successful in accessing flexible working are less likely to be promoted, have greater difficulty accessing career development and promotion, and are less likely to be paid as well as their counterparts.<sup>32</sup> This is often because they are less visible within the organisation.<sup>33</sup>
- 1.45 Furthermore, for those teachers successful in accessing flexible working, a significant proportion of requests were only granted on an informal basis. Approximately 30% of teachers reported that they were only granted flexible working on an informal basis because of the reluctance of employers to visibly support flexible working.<sup>34</sup>
- 1.46 The NASUWT believes that a key factor in the GPG in teaching is the difficulty of obtaining direct employment following career breaks, forcing many women into employment agency work. Moreover, the NASUWT regularly identifies, through its casework and other engagement with members, women teachers who are forced to resign from substantive

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<sup>30</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/593990/DFE\\_Flex\\_Working\\_Guidance\\_2017\\_FINAL.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/593990/DFE_Flex_Working_Guidance_2017_FINAL.pdf)

<sup>31</sup> [NASUWT, \*Flexible working - The Experiences of Teachers\*, Birmingham, 2016.](#)

<sup>32</sup> <http://www.acas.org.uk/media/pdf/o/7/Flexibility-in-the-Workplace.pdf>

<sup>33</sup> Ibid.

<sup>34</sup> [NASUWT, \*Flexible working - The Experiences of Teachers\*, Birmingham, 2016.](#)



contracts of employment because schools will not agree to flexible working arrangements following maternity leave, or because other carer commitments have arisen. Under these circumstances, women teachers frequently suffer career consequences as they are driven into part-time and low-paid employment agency work in order to secure flexible working.

- 1.47 Flexible working policies should help to recruit, retain and motivate teachers. Unfortunately, the evidence collected by the NASUWT suggests that the Government and the DfE need to review flexible working, specifically looking at teachers and the failure of schools/colleges to agree to flexible working requests and the types of flexible working that other professions take for granted.<sup>35</sup>
- 1.48 Disappointingly, the evidence available demonstrates that there are significant barriers to teachers wishing to access flexible working. As a consequence, many teachers, particularly women, have little option but to undertake supply teaching through an agency. Many report that, despite the pay and career penalty, it is the only way to combine teaching work with a family life.
- 1.49 The lack of flexible working thereby exacerbates gender inequalities in the workplace and the GPG. Part-time workers are paid less than full-time workers with equivalent qualifications and have fewer career pay and progression opportunities compared to full-time workers.
- 1.50 This is compounded for women teachers who are denied pay portability and the ability to return to work on the same salary scale as when they took a career break.
- 1.51 The very nature of employment by or through agencies is currently not pensionable for supply teachers under the Teachers' Pension Scheme (TPS). The lack of access to occupational pension provision is preventing many supply teachers, as well as other agency workers, from making prudent financial decisions for their future.

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<sup>35</sup> [https://timewise.co.uk/wp-content/uploads/2019/07/Timewise-Now-Teach-Report\\_2019.pdf](https://timewise.co.uk/wp-content/uploads/2019/07/Timewise-Now-Teach-Report_2019.pdf)

- 1.52 The NASUWT is therefore rightly concerned that the increased use of agency and casual employment is not conducive to parents raising families in a safe and secure environment, especially given the precarious nature of such employment and the levels of pay.
- 1.53 The National Audit Office (NAO) report examining the DfE's initiatives shows that 90% of school leaders reported that they had not employed anyone returning to teaching in 2015/16. One of the reasons cited was the reluctance of schools to offer flexible working.<sup>36</sup>
- 1.54 The DfE's recruitment and retention recognises that there is an unmet demand for flexible working or part-time work in schools. Only 28% of female teachers work part time, compared to an average of 40% of women in the UK.<sup>37</sup> This is significantly lower than would be expected, given that teaching is a female-dominated profession.
- 1.55 In addition, research has shown that, among secondary school teachers who leave the profession, the proportion who subsequently go on to work part time after leaving the profession increases by 20 percentage points.<sup>38</sup>
- 1.56 Furthermore, 46% of teacher returners say that lack of flexible and part-time opportunities was a barrier to returning to teaching for those teachers who had taken a career break.<sup>39</sup>
- 1.57 Indeed, in the secondary sector, it is rare to find a school which is proactive in offering part-time and flexible roles, either to existing staff or potential recruits.<sup>40</sup> This explains why just 17% of secondary school teachers work part time,<sup>41</sup> compared to a national figure of 27% of workers working part time.

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<sup>36</sup> <https://www.nao.org.uk/wp-content/uploads/2017/09/Retaining-and-developing-the-teaching-workforce.pdf>

<sup>37</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/773930/Teacher\\_Return\\_Strategy\\_Report.PDF.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/773930/Teacher_Return_Strategy_Report.PDF.pdf)

<sup>38</sup> <https://www.nfer.ac.uk/blogs/part-time-teaching-what-can-secondary-schools-learn-from-the-most-flexible-schools/>

<sup>39</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/720366/Evaluation\\_of\\_the\\_Return\\_to\\_Teaching\\_pilot\\_programme.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/720366/Evaluation_of_the_Return_to_Teaching_pilot_programme.pdf)

<sup>40</sup> [https://timewise.co.uk/wp-content/uploads/2019/07/Timewise-Now-Teach-Report\\_2019.pdf](https://timewise.co.uk/wp-content/uploads/2019/07/Timewise-Now-Teach-Report_2019.pdf)

<sup>41</sup> <https://files.eric.ed.gov/fulltext/ED599372.pdf>

- 1.58 Given the evidence outlined above, it is clear that there is a pressing need for the DfE to raise awareness and promote the importance and benefits of flexible working, which is why the NASUWT welcomed the publication of the DfE's flexible working toolkit that includes a range of resources to provide practical support to implement flexible working in schools.<sup>42</sup>
- 1.59 However, raising awareness and promoting the importance and benefits of flexible working are not the same; they will not necessarily result in more schools and colleges granting more requests for flexible working. In fact, it could have a detrimental effect if a teacher has greater awareness of something they are unable to access.
- 1.60 The Union is clear that there should be the broadest definition of 'flexible working' in schools to enable more teachers to access flexible working arrangements, as the Union believes that flexible working makes a positive contribution to supporting employees to achieve a better work/life balance.
- 1.61 The NASUWT is concerned that without significant change, both within education and across other sections of public life, there will continue to be systematic challenges to implementing flexible working and making it a reality for teachers.
- 1.62 The Union strongly believes that fundamental to the cultural change in workplaces is a clear, unequivocal and stated commitment by employers to flexible working. This is integral to addressing the systematic challenges to implementing flexible working.

## **2. SPECIFIC COMMENTS**

### **Non-statutory (ad hoc) flexible working**

- 2.1 The NASUWT welcomes this call for evidence regarding ad hoc and informal flexible working arrangements, particularly given the evidence

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<sup>42</sup> <https://www.flexibleworkingineducation.co.uk/dfе-toolkit>

cited above highlighting the experiences of teachers in regards to informal flexible working arrangements.

- 2.2 However, the Union is concerned that the call for evidence is quite poorly designed and provides little opportunity for stakeholders other than employers to provide detailed evidence to enable the Government to develop its evidence base on non-statutory flexible working.<sup>43</sup>
- 2.3 As such, the call for evidence is in danger of being one-sided and skewed, which will do very little to improve the evidence base in order to inform the Government's future flexible working strategy.
- 2.4 Ad hoc flexibility, including working arrangements which are occasional, time-limited and irregular in nature, can benefit employees in the workplace if it avoids a situation where some individuals have to draw upon annual leave or unpaid leave in order to address or manage events in their lives.
- 2.5 Research undertaken by the CIPD shows that 35% of employers cite 'family/home/caring responsibilities' as one of the top five causes of short-term absence.<sup>44</sup>
- 2.6 Indeed, Carers UK found that 38% of carers had used annual leave for their caring responsibilities, while 22% used sick leave.
- 2.7 Furthermore, disabled workers are also disadvantaged – with many having to take annual leave, sick leave or unpaid leave to attend appointments, rehabilitation, assessments, treatment or counselling.
- 2.8 Without appropriate access to ad hoc flexibility or appropriately consulted-upon policies (e.g. leave for dependants; leave for domestic crises), NASUWT notes that some employees are placed a disadvantage, as they

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<sup>43</sup> <https://www.gov.uk/government/calls-for-evidence/call-for-evidence-non-statutory-flexible-working/call-for-evidence-non-statutory-flexible-working>

<sup>44</sup> <https://www.familyandchildcaretrust.org/holding-or-moving-supporting-carers-and-parents-employment>

are losing out on rest days via annual leave, or having to take unpaid leave, resulting in financial implications during the cost-of-living crisis.

- 2.9 Of even greater concern is the fact that some employees drop out of the labour market altogether because they are unable to reconcile the demands of the job and the need for ad hoc flexibility to manage temporary or emergency care.
- 2.10 The need for ad hoc flexibility is therefore critical in addressing this. Indeed, research has shown that employees with a mixture of formal *and* informal flexible are more satisfied than those who operate only formal *or* informal arrangements on a range of work-related areas, including their work/life balance.<sup>45</sup>
- 2.11 However, the NASUWT is concerned about the way in which ad hoc flexibility could be subject to abuse if there is no consideration given to the fact that the current balance of benefits between worker and employer is skewed significantly in favour of the employer, as evidenced in the significant levels of requests for flexible working that are denied.
- 2.12 Furthermore, the Union maintains that discussions around ad hoc flexibility should not come at a detriment to the worker, in the form of the ‘one-sided flexibility’ referred to and evidenced in the *Taylor Review of Modern Working Practices*.<sup>46</sup>
- 2.13 As such, the Union maintains that employers must ensure that there are appropriate systems and protocols in place which address issues associated with the requirement for ad hoc flexibility.
- 2.14 This is why the NASUWT has successfully engaged with a number of schools, local authorities and multi-academy trusts (MATs) to ensure that there are appropriate policies and procedures which seek to address

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<sup>45</sup> [https://www.cjpd.org/globalassets/media/knowledge/knowledge-hub/reports/flexible-hybrid-working-practices-report\\_tcm18-108941.pdf](https://www.cjpd.org/globalassets/media/knowledge/knowledge-hub/reports/flexible-hybrid-working-practices-report_tcm18-108941.pdf)

<sup>46</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf)

circumstances where ad hoc flexibility is likely to be drawn upon, such as carers leave, parental leave and disability leave (often as part of sickness absence management).

- 2.15 In doing so, this should remove any discretion associated with some informal ad hoc arrangements which can be seen to lead to discrimination, disadvantage and/or unequal access, particularly if such policies are subject to annual monitoring, including by those with protected characteristics.

### **Non-statutory (regular) flexible working**

- 2.16 Non-statutory (regular) flexible working arrangements involve those which are regular, recurring and/or standardised and sit outside the statutory Right to Request Flexible Working, yet reflect either an agreement between the individual and their line manager or an agreed approach to working adopted by an employer.<sup>47</sup>
- 2.17 The detail presented throughout this call for evidence has emphasised the numerous benefits of flexible working for both employers and employees.
- 2.18 However, for those employees who do not yet have the 26 weeks' continuous service, the right to request flexible working is no right at all. As such, one of the key benefits of an employer offering non-statutory regular flexible working is that it enables these employees to access flexible working.
- 2.19 In fact, TUC analysis of the LFS shows that the percentage of employees on flexitime (the most popular form of flexible work) with between 6-12 months' service was just 1.7% greater (11%) than those with less than three months' service (9.3%).<sup>48</sup>

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<sup>47</sup> <https://www.gov.uk/government/calls-for-evidence/call-for-evidence-non-statutory-flexible-working/call-for-evidence-non-statutory-flexible-working>

<sup>48</sup> <https://www.tuc.org.uk/sites/default/files/2021-07/Flexibleworkingreport3.pdf>

- 2.20 In addition, and as pointed out in the consultation, the current qualification period of 26 weeks can have a detrimental impact on sections of the workforce, including those who may be forced to drop out of the labour market because their length of service prohibits a request for flexible working.<sup>49</sup>
- 2.21 For example, research by the TUC has shown that 42% of working mums said they would not feel comfortable asking about flexible working in a job interview, mainly because they think they would be discriminated against and not appointed to the post because of their request.<sup>50</sup>
- 2.22 These fears are not unfounded, as research undertaken by the Equality and Human Rights Commission (EHRC) and the Department for Business, Energy and Industrial Strategy (BEIS, now known as the Department for Business and Trade) showed that over half of mothers (51%) had experienced discrimination or disadvantage as a direct result of having a flexible working request approved.<sup>51</sup>
- 2.23 Furthermore, it means that employees do not have to go through the process of making a statutory request, and, as such, can have their request granted more quickly without the need to go through the bureaucracy which can be argued to be associated with a statutory right to request.
- 2.24 In addition, the 26 weeks' qualifying period fails to address those on atypical employment contracts, such as supply teachers as agency workers, who struggle to achieve six months' continuous service, given the nature of their contracts.
- 2.25 However, the lack of something in writing in regards to non-statutory requests for flexible working means that they the employer can just

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<sup>49</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1019526/flexible-working-consultation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1019526/flexible-working-consultation.pdf)

<sup>50</sup> <https://www.tuc.org.uk/sites/default/files/2021-10/Report.pdf>

<sup>51</sup> <https://www.equalityhumanrights.com/sites/default/files/consultation-response-beis-flexible-working-1-december-2021.docx>

withdraw the offer without recourse to any policy and procedure, including the right to appeal if such a situation occurs.

- 2.26 The employer could then seek to impose another variation which works best for them, whereas under the statutory right to request, if granted, there is a contractual change which cannot be varied unless it is agreed by both the employer and the employee.
- 2.27 As such, the Union believes that the call for evidence should examine the extent to which informal arrangements prevent access to more formal flexible working arrangements that workers may want, as well as whether informal flexibility leads to flexibility being revoked at short notice.
- 2.28 Furthermore, non-statutory requests can just be dismissed out of hand, whereas statutory requests can only be rejected for one or more of eight business reasons, including that the extra costs will damage the business and/or that flexible working will affect quality and performance.<sup>52</sup>
- 2.29 Furthermore, the informal nature of non-statutory requests means that there is often no right to trade union representation, which places the individual making the request at a particular disadvantage when considering the power imbalance that exists between an employee and employer.
- 2.30 Given the evidence, the NASUWT believes that the right to request flexible working should be a day-one right, as opposed to a right that a worker is eligible for after a period of 26 weeks' employment, particularly given that life events make no such distinction for workers with differing lengths of service. As such, the Union welcomes confirmation that this is something the Government has committed to do.<sup>53</sup>
- 2.31 Indeed, the Union advocates that the statutory presumption should be based on a single worker test to determine access to all statutory

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<sup>52</sup> <https://www.gov.uk/flexible-working/after-the-application>

<sup>53</sup> <https://www.gov.uk/government/news/millions-to-benefit-from-new-flexible-working-measures>



employment rights, based on the presumption that everyone has access to such rights by default.

- 2.32 In doing so, *all* working parents would have access to the same suite of family-related leave and flexible working rights and entitlements.
- 2.33 Furthermore, the Union maintains that the Government needs to take a much stronger approach in regards to the right to request, opting instead for a ‘right to have’, particularly if it is intent on making flexible working the default.
- 2.34 For example, Dutch workers have the legal right to request changes to the hours they work (*Wet Aanpassing Arbeidsduur*), as well as the right to request flexible working (*Wet Flexibel Werken*).<sup>54</sup>
- 2.35 The House of Commons Women and Equalities Committee recommended that all jobs should be available to work on a flexible basis unless an employer can demonstrate an immediate and continuing business case against doing so,<sup>55</sup> a recommendation that has become even more prescient, given the gendered impacts of the Covid-19 pandemic.<sup>56</sup>
- 2.36 Disappointingly, the Union notes that the Government has failed to take forwards proposals contained in the *Good Work Plan: Proposals to support families* to require an employer to say whether a job is open to flexible working in the advert, citing the fact that this would ‘*drive the wrong response*’.<sup>57</sup>
- 2.37 The NASUWT believes this demonstrates a disconnect with the evidence provided, given the fact that an overwhelming majority (99%) of respondents agreed that the publication of key information in respect to

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<sup>54</sup>[https://wafproject.org/wp-content/uploads/sites/16/2017/06/BT\\_1224371\\_WAF\\_report\\_Final.pdf](https://wafproject.org/wp-content/uploads/sites/16/2017/06/BT_1224371_WAF_report_Final.pdf)

<sup>55</sup> [https://www.cipd.co.uk/Images/flexible-working\\_tcm18-58746.pdf](https://www.cipd.co.uk/Images/flexible-working_tcm18-58746.pdf)

<sup>56</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1019526/flexible-working-consultation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1019526/flexible-working-consultation.pdf)

<sup>57</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1019526/flexible-working-consultation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1019526/flexible-working-consultation.pdf)

flexible working in a job advert would influence a job applicant's decision to apply.<sup>58</sup>

- 2.38 Advertising jobs at all levels on a flexible basis could increase access to employment for a significant number of workers, including those looking to return to work, the majority of which are women.
- 2.39 Coupled with this is the fact that TUC polling shows that 63% of people believe this should be the case.<sup>59</sup>
- 2.40 However, it should be noted that a 'requirement to say' is limited and does little to shift the balance of power between employer and worker because it lacks teeth and will not produce the fundamental cultural change in workplaces that a clear, unequivocal commitment by employers to flexible working for all workers would.
- 2.41 The Government must therefore go beyond the 'requirement to say' and introduce a duty on employers to advertise all jobs on a flexible basis as a day-one right or provide substantive evidence to justify why a job cannot be done flexibly.
- 2.42 Such a move would demonstrate the seriousness of the role that flexible working has to play in the inclusion and diversity plans and workforce strategy of the Government going forwards.

### **3. ADDITIONAL COMMENTS**

- 3.1 The evidence suggests that the legislation has failed to bring about the changes intended. Flexible working is still inaccessible to many workers due to a range of factors, including employer discretion over whether a request is accepted or rejected, employment status, or simply a lack of awareness of flexible working in the workplace.

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<sup>58</sup> Ibid.

<sup>59</sup> <https://www.tuc.org.uk/sites/default/files/2021-07/Flexibleworkingreport3.pdf>

- 3.2 The Government needs to act if it is to achieve a world-class approach to flexible working as part of its ambition to ‘build back better’ following the Covid-19 pandemic,<sup>60</sup> as well as achieving the 2019 Conservative Party Manifesto commitment to encourage more flexible working in the workplace.<sup>61</sup>
- 3.3 Indeed, there is a chance to ‘seize the moment’ and make flexible working – in all its forms – part of business DNA.<sup>62</sup> Without this, the Union is concerned that the Government’s commitment to make employment practices more flexible and family-friendly will fail to deliver the necessary changes in the workplace which will help parents achieve a better balance between work and family life, whilst tackling gender pay inequality and challenging gender stereotypes.
- 3.4 The NASUWT believes that a significant barrier to flexible working is that it is currently too easy for the employer to refuse a request for flexible working due to any one or more of eight business reasons.
- 3.5 Coupled with this is the fact that there is no compunction on the employer to provide any further details or to have the business reason independently scrutinised.
- 3.6 Furthermore, there is no requirement on the employer to provide any further details or to suggest possible alternatives, a situation which results in more people dropping out of the labour market, specifically women who are forced into an impossible situation in looking to balance the need to earn a living and care for their children.
- 3.7 In such circumstances, it is not surprising that research cited above shows that teachers did not seek to appeal refusals for flexible working based on the presumption that it was unlikely to be successful.<sup>63</sup>

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<sup>60</sup> <https://www.lexology.com/library/detail.aspx?g=9b0e0c88-af3b-414e-aa87-35dcda7dd937>

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> <https://www.nasuwt.org.uk/uploads/assets/uploaded/6fd07ce3-6400-4cb2-a8a87b736dc95b3b.pdf>

- 3.8 In order to remedy this, the NASUWT believes that there should be an obligation placed on employers to consider alternatives put forward by workers rather than the other way around, particularly given that employers are not always best placed to understand what alternatives are available and which one is best suited to the needs of those making such a request.
- 3.9 If flexible working is going to be the catalyst for greater gender equality, then the unfettered ability of employers to refuse requests must be replaced with the presumption that flexible working is the default unless the employer can provide substantive evidence as to why it cannot be accommodated.
- 3.10 In extreme cases where an employer believes that flexible working cannot be accommodated, the NASUWT believes that this should be open to scrutiny and challenge by someone who has not previously been involved in the request.
- 3.11 This would ensure that there is genuine negotiation where an informed decision is reached, following discussion between the worker and the employer.
- 3.12 The Union maintains that this should be predicated on the basis that any alternatives suggested by the worker can only be refused if the employer can provide substantive evidence as to why all of the alternatives proposed cannot be accommodated.
- 3.13 Furthermore, this must be backed up with the statutory right of appeal. It cannot go unnoticed that there is currently no statutory right of appeal when a flexible working request is refused.
- 3.14 Indeed, the Acas Code of Practice on the Right to Request Flexible Working references the fact that *'the law does not require an employer to allow an appeal'*.<sup>64</sup> This has resulted in a situation where employers can unilaterally decide whether or not to hear an appeal.

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<sup>64</sup> <https://www.acas.org.uk/responding-to-a-flexible-working-request/if-your-employee-appeals-your-decision>

- 3.15 The Union believes that the lack of a right to an appeal process undermines public confidence in the system, as well as undermining workers who seek to challenge decisions made by employers, and this is a situation that is unacceptable and must be addressed as a matter of urgency.
- 3.16 Whilst appreciating that there is recourse to an employment tribunal, it should be noted that this often places significant demands on a worker in terms of the time required and the stress of the situation. As such, many workers are put off by the process.
- 3.17 It is therefore essential that any reforms to flexible working ensure that workers can effectively enforce their rights. If workers cannot access the rights entitlements afforded them, then it is questionable whether these rights truly exist.
- 3.18 Furthermore, the NASUWT believes that the current administrative process underpinning requests for flexible working needs to be more responsive to changes in an individual's circumstances.
- 3.19 Currently, employees are only allowed to make one request every 12 months. So, if they get turned down, they have to wait a year before they can use it again. There is also a possibility that an employee's circumstance could change, with something unforeseen occurring such as a relative becoming disabled, existing childcare arrangements being disrupted, or the need for working arrangements to manage an illness.
- 3.20 Workers should therefore have no restrictions placed on the number of requests that can be made for flexible working, including seeking a temporary contractual change, rather than just a permanent one, to reflect the dynamic and fluid situation many workers find themselves in.
- 3.21 In addition, a lack of transparency suggests that many workers are unaware of their employment rights and entitlements.

- 3.22 The Union is therefore disappointed that the Government has decided not to pursue proposals contained within the *Good Work Plan: Proposals to support families*<sup>65</sup> to introduce a new requirement for large employers (250+ employees) to publish their flexible working policies, particularly given the absence of any compelling evidence to exemplify the ‘*legal and technical issues*’ associated with the proposals, or what the precise concerns are from an enforcement perspective.<sup>66</sup>
- 3.23 If employers are obliged to publish such policies on their websites, this should produce greater transparency and increased detail and clarity. This should help workers to make informed choices by allowing them to compare and benchmark employers.
- 3.24 In doing so, potential job applicants and existing workers would be better placed to make informed decisions about job opportunities and access the range of family-related leave and flexible working rights and entitlements which enable them to enter and remain in the labour market.
- 3.25 The Union is clear that this should be supplemented with an obligation on employers to monitor and evaluate the effectiveness of its family-related and flexible working policies.
- 3.26 Such systems should annually report on the take-up of family-related and flexible working policies, together with the number of appeals and outcomes, and produce a comprehensive report broken down by workforce composition, particularly those groups with protected characteristics under the Equality Act 2010,<sup>67</sup> as well as contract type.
- 3.27 The Union maintains that any such annual report should be shared with and consulted upon by both the workforce and the recognised trade unions, and include details of any action plans to tackle issues, such as

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<sup>65</sup> <https://www.gov.uk/government/consultations/good-work-plan-proposals-to-support-families>

<sup>66</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1019526/flexible-working-consultation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1019526/flexible-working-consultation.pdf)

<sup>67</sup> <http://www.legislation.gov.uk/ukpga/2010/15/contents>

how the employer intends to tackle the barriers faced by working parents and those wishing to access flexible working.

- 3.28 The NASUWT believes that the EHRC is the appropriate entity to have responsibility for monitoring how employers are complying with their duties and obligations in respect of family-related and flexible working policies. However, the Government must ensure that the EHRC is adequately funded in order to have sufficient resources and capacity to enforce any new duties and carry out this function meaningfully.
- 3.29 The Government accepted in *Good Work – A response to the Taylor Review of Modern Working Practices* that all work should be fair, decent and underpinned by five principles: worker satisfaction; wellbeing safety and security; voice and autonomy; participation and progress; and good pay.<sup>68</sup>
- 3.30 In addition, it should be noted that there are potential benefits to flexible working, notably: the likelihood of mothers remaining in the workforce in the longer term, coupled with their contributions to taxation; mothers' longer-term financial security and decreased likelihood of poverty in later life; and the wider societal benefits for children's health and development.

### **Other family-friendly policies**

- 3.31 The Union believes that it is important not to recognise flexible working in isolation to other family-related policies, such as maternity leave and pay, paternity leave and pay, and the provision of affordable childcare. For example, a system that moves towards the development and support of more equal parenting roles will be part of a solution to enable more parents to access flexible working and play a role without a damaging financial penalty.

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<sup>68</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/679767/180206\\_BEIS\\_Good\\_Work\\_Report\\_Accessible\\_A4.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/679767/180206_BEIS_Good_Work_Report_Accessible_A4.pdf)

- 3.32 For example, changes to maternity leave would assist women to return to schools on a flexible basis if the law allowed those on additional maternity leave to return to exactly the same job.
- 3.33 The Government must do more to ensure that women feel they are able to return to work following maternity leave, in order to counter some of the detriments suffered. For example, women taking maternity leave should be entitled to the right to return to the same job in which they were employed prior to their leave, irrespective of the length of time away from work and whether or not they wish to return in either a full-time or part-time capacity (e.g. flexible working).
- 3.34 Currently, this right is reserved for those who have taken a period of 26 weeks' leave or less. Without this reassurance, it is unlikely that the provisions will be used. This is because the employer can offer suitable alternative work on their return, rather than the work they were doing prior to their leave. Furthermore, the NASUWT would argue that it does not make good business sense to risk losing skilled and experienced workers who would otherwise have returned to work.
- 3.35 It should be noted that any such revisions to maternity leave and pay are predicated on the level at which Statutory Maternity Pay (SMP) is addressed. It is currently paid at the rate of £151.97 (as of April 2021) or 90% of the normal weekly earnings, whichever is lower.
- 3.36 SMP levels have fallen well below average earnings. The NASUWT therefore believes that they should be substantially increased, in order to promote more women returning to work, especially in teaching.
- 3.37 Discussing flexible working prior to maternity leave, appointing a maternity coach, encouraging limited but specific contact, and supporting women to make the transition back after maternity leave are all strategies which the Union believes will support women during their break and after their return to work.



- 3.38 Of particular significance are the skills of the line manager, as they are often the first port of call, particularly during maternity leave and in the run-up to a return to work. The NASUWT believes that line managers must therefore have the appropriate skills and training to manage a smooth transition for someone wishing to return to work following maternity leave.
- 3.39 This is especially prescient given the fact that flexible working has been seen as the preserve of working mothers looking to accommodate their role as the primary caregiver and that research has highlighted significant levels of discrimination and disadvantage experienced by women who are pregnant or on maternity leave.<sup>69</sup>
- 3.40 In addition, the provision of good-quality childcare is critical to enabling teachers as parents to return to work and re-enter the labour market. Childcare costs for many families are significant, so it is important for the Government to consider what action can be taken to ensure that teachers are able to access affordable and high-quality childcare.
- 3.41 However, the Government's current approach to childcare, which sees England languishing at the bottom of the international league in terms of hours offered,<sup>70</sup> is depriving many teachers, particularly women, of the ability to utilise their skills and professional expertise in the workplace.
- 3.42 Evidence from the OECD suggests that good-quality, affordable childcare is a key driver in achieving better female labour market participation. There was a positive correlation between the provision of childcare services for parents of children under three years old and female participation in the labour market.<sup>71</sup>

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<sup>69</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/509500/BIS-16-145-pregnancy-and-maternity-related-discrimination-and-disadvantage-summary.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/509500/BIS-16-145-pregnancy-and-maternity-related-discrimination-and-disadvantage-summary.pdf)

<sup>70</sup> <https://www.theguardian.com/money/2017/jun/21/tories-30-hour-free-childcare-plan-fails-poor-families-oecd>

<sup>71</sup> [http://praha.vupsv.cz/fulltext/ul\\_1594.pdf](http://praha.vupsv.cz/fulltext/ul_1594.pdf)

3.43 Indeed, the United Nations Children’s Fund (UNICEF) report, analysing family-friendly policies across 41 high and middle-income countries, ranked the UK 28 out of 31 European countries.<sup>72</sup>

### **The vital role of trade unions**

3.44 The right to work and the right to representation are also key concerns for the NASUWT. The right to trade union representation and the right to withdraw labour, free from victimisation, is a vital and fundamental principle that should apply to all workers, including agency workers.

3.45 The consultation must recognise the vital role played by trade unions as a legitimate voice of the workforce. Freedom of association, collective bargaining and the right to strike are fundamental social rights, binding in international law.

3.46 Trade unions have a vital role to play in ensuring that workers are better informed and empowered in respect of their employment rights, including in respect of flexible working.

3.47 It cannot go unnoticed that the Post-Implementation Review (PIR) of the impact of the Flexible Working Regulations 2014<sup>73</sup> reported that the take-up of flexible working was greater among workplaces where there was a recognised trade union compared with the economy overall.

Dr Patrick Roach

**General Secretary**

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<sup>72</sup> [https://www.unicef-irc.org/publications/pdf/Family-Friendly-Policies-Research\\_UNICEF\\_%202019.pdf](https://www.unicef-irc.org/publications/pdf/Family-Friendly-Policies-Research_UNICEF_%202019.pdf)

<sup>73</sup> [https://www.legislation.gov.uk/ukxi/2014/1398/pdfs/ukxi0d\\_20141398\\_en.pdf](https://www.legislation.gov.uk/ukxi/2014/1398/pdfs/ukxi0d_20141398_en.pdf)

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