SUBMISSION TO THE OIREACHTAS JOINT COMMITTEE ON CHILDREN, EQUALITY, DISABILITY, INTEGRATION AND YOUTH BY THE EMPLOYMENT BAR ASSOCIATION (EBA)

- The EBA is an association of senior and junior counsel who are members of the Bar of Ireland. Its members are practising barristers, both junior and senior counsel, who specialise in employment, equality and labour law and represent and advise employers and employees in litigation and workplace disputes in public and private sector employment.

- The EBA welcomes the opportunity afforded by the Joint Committee on Children, Equality, Disability, Integration and Youth to make a written submission on the provisions of the General Scheme of a Work Life Balance and Miscellaneous Provisions Bill, 2022.

General

- That the General Scheme proposes amending existing legislation rather than introducing new standalone legislation is to be welcomed.

- The Bill appears largely uncontroversial in terms of what it sets out to achieve and for the most part has not exceeded the obligations imposed by the Directive (EU) 2019/1158 of the European Parliament and of the Council of 20th June 2019 on Work Life Balance for Parents and Carers (hereinafter the EU Directive).

- While the Directive refers to "*carers' leave*", this is inconsistent with the reference to individual workers and also conflicts with the designation of the Carer's Leave Act already existing in Irish legislation. As the proposed Bill refers to and legislates for leave

for individual employees the reference to "*carers' leave"* should reflect the singular *"carer's leave"*.

- Where a numbered Head in the General Scheme document has not been commented on, that is because the amendments and/or explanation of the amendments are accepted and there are no issues arising from same.

Head 2: Interpretation

- It is queried whether it was intended that the definition of an employee would exclude members of An Garda Siochána and the Defence Forces, while including Civil Servants within the meaning of the Civil Service Regulation Act, 1956.

Head 3: Amendment of Part II of the Parental Leave Act, 1998 – Parental Leave and Force Majeure Leave – Right to Request Flexible Working Arrangements for Caring Purposes

- The provision of flexible working for those employees who have caring responsibilities pursuant to Article 9 of the EU Directive appears not to have the same limitations in terms of application which the Parental Leave Act 1998 and the Carer's Leave Act 2001 have. The proposed section 6A(2) provides that a person who provides personal care or support to a person who is in need of significant care or support for a serious medical reason may request changes to his or her working arrangements. The persons to whom the care is being provided is listed in sub-section (3), but is not limited by the age of any particular child (as the Parental Leave Act is currently) and nor does it identify that the employee needs to be a carer within the definition of the Carer's Leave Act.

- There is no requirement for an employee seeking flexible working arrangements for caring purposes to establish that the person being cared for is a relevant person as is the current requirement under the Carer's Leave Act.

- There also appears to be no time limit to the period for which flexible working can be sought/granted.

- There is no obligation imposed in the amendment that any evidence of the "*serious medical reason"* requiring care be provided by the employee to the employer so on what

basis is an employer to determine whether an employee is eligible for flexible working arrangements for caring purposes?

- The question arises as to whether it was intended to create a separate framework for the operation of these additional flexible working arrangements than currently exists for Parental or Carer's leave.

- In section 6A(10) consideration should be given to rewording the phrase "*An employer complies with this sub-section where he or she and the employee"* to state "*An employer complies with this sub-section where the employer and the employee"* to reflect that employers are often corporate entities rather than gendered individuals but also to remove the binary reference to gender connoted by "*he or she"*.

- In section 6A(10)(a) employees should have an apostrophe before the "s".

- In sub-section (13)(a) reference is made to the employer concerned "*or his or her successor"*, but in the Definitions section the definition of "Employer" includes the successor of the employer, so further reference in this sub-section is not necessary.

- In sub-section (13) where there is only a sub-paragraph (a) and no further sub-paragraphs arguably there is no need to create sub-paragraph (a) at all. The same comment applies in relation to sub-section (14)(a).

- In sub-section (14)(a) the amendment of the agreement to postpone the commencement of the arrangements to such time as the employee is no longer sick lacks clarity and certainty in circumstances where the employee's absence through sickness may be ongoing and of unknown duration. It may be preferable to consider that the commencement date will be deferred until a new commencement date can be agreed between the employer and the employee once the employee is no longer sick.

- Sub-section (15)(b) again refers to the successor of the employer which is not necessary, given the original definition of "Employer".

- In sub-section (17) "*employees needs"* should read "*employee's needs"*. Where reference is made to "*his or her needs"* it may be better phrased as the "*the employer's needs"*. Likewise the response in writing should reflect it being signed for or on behalf of the employer rather than by "*him or her"* to aid clarity.

Head 4: Amendment of Part II of the Parental Leave Act, 1998 – Parental Leave and Force Majeure Leave – Leave for Medical Care Purposes

- It is noted that the leave for medical care purposes is in addition to the *force majeure* leave already provided for by section 13 of the Parental Leave Act, 1998.

- However, it is also noted that the leave for medical care purposes is intended to be unpaid, unlike *force majeure* leave.

- It is noted in the addition of section 13A, unlike section 6A dealt with in Head 3, that there is a necessity for the employee to provide medical certification of the serious medical issue of the person in respect of whom the leave for medical care purposes is sought. This would seem appropriate but does raise the question whether it will cause difficulties for low paid employees and/or the person in need of medical care potentially having to incur the cost of medical certification in order to obtain leave for which the employee will not be paid.

Head 5: Amendment of Part III of the Parental Leave Act, 1998 – Employment Rights – Protection of Employment Rights – Leave for Medical Care Purposes

- Section 6(3) of the Parental Leave Act, 1998, provides that a period of parental leave shall not commence before a time when the employee concerned has completed one year's continuous employment with the employer from whose employment the leave is taken. Should this service requirement be applied in respect of the leave for medical care purposes or flexible working arrangements for care purposes or is it the view that the provision in the Directive that only a service qualification of six months may be provided for prevents this?

Head 8: Amendment of Part IV of the Parental Leave Act, 1998 – Resolution of Disputes – Decision under section 41 or 44 of Workplace Relations Act, 2015 – Leave for Medical Care Purposes and Flexible Working Arrangements for Care Purposes

- Each reference to section 6A.(x) should more properly read section 6A(x).

Head 9: Amendment of Part V of the Parental Leave Act, 1998 – Miscellaneous – Amendment of Enactments – Leave for Medical Care Purposes and Flexible Working Arrangements for Care Purposes

- While the retention of records is obviously appropriate and the period of retention is not particularly onerous, the proposed insertion into the existing section 27 of the 1998 Act is not understood given how section 27 is currently worded following its amendment by section 8 of the Workplace Relations Act, 2015.

Head 10: Amendment of section 2 of Maternity Protection Act, 1994 – Interpretation – Employee who is Breastfeeding

- The extension of time for employees breastfeeding from six months to two years is to be welcomed.

- It is noted that the intention of the language used in inserting *"his or"* before *"her"* is to provide for transgender males who may be breastfeeding and require the protections afforded by the Maternity Protection Act, 1994.

- The issue arises as what *"condition"* is intended to reference when the aforementioned employee who is breastfeeding informs their employer of their *"condition"*. It is not understood how breastfeeding might be considered a *"condition"*. While it is accepted that this is the existing language in the Maternity Protection Act, 1994 it may be an issue which the Joint Committee could consider in the context of this Bill.

Head 11: Amendment of section 7(2) of Maternity Protection Act, 1994 – Interpretation of Part II – References to an Employee for the Purposes of Entitlement to Maternity Leave are References to a Female Employee Only

- The deletion of section 7(2) of the Maternity Protection Act, 1994, is appropriate and consistent with other language changes designed to ensure that the legislation provides protection to pregnant transgender males.

Head 12: Amendment of section 16(1) of Maternity Protection Act, 1994 – Reference to "Woman" for the Purposes of Entitlement to Maternity Leave

- The replacement of "*woman"* with "*person"* in section 16(1) is appropriate in order to include pregnant transgender males, but raises the question of whether the subsequent

reference to "*the father of the child"* should be amended to refer to "*the child's other parent"* in circumstances where the remaining parent may not be male.

Head 13: Amendment to section 7(3) of the Adoptive Leave Act, 1995 – Notification of Employer

- While there is no issue with the amendment of section 7(3) by the insertion of "*his or"* before "*her employer"*, the retention of reference to "*the sole male adopter*" is not understood. It seems that the Adoptive Leave Act, 1995, does not reflect circumstances where there may not be an adopting mother, other than in circumstances where the adopting mother has died, which is provided for. This would appear to be an oversight, albeit potentially outside the scope of the General Scheme for Work Life Balance, 2022.

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