



Kent Academic Repository

Grabham, Emily (2017) *Time and technique: the legal lives of the 26-week qualifying period*. *Economy and Society*, 45 (3-4). pp. 379-406. ISSN 0308-5147.

Downloaded from

<https://kar.kent.ac.uk/60133/> The University of Kent's Academic Repository KAR

The version of record is available from

<https://doi.org/10.1080/03085147.2016.1257257>

This document version

Publisher pdf

DOI for this version

Licence for this version

CC BY (Attribution)

Additional information

Versions of research works

Versions of Record

If this version is the version of record, it is the same as the published version available on the publisher's web site. Cite as the published version.

Author Accepted Manuscripts

If this document is identified as the Author Accepted Manuscript it is the version after peer review but before type setting, copy editing or publisher branding. Cite as Surname, Initial. (Year) 'Title of article'. To be published in *Title of Journal*, Volume and issue numbers [peer-reviewed accepted version]. Available at: DOI or URL (Accessed: date).

Enquiries

If you have questions about this document contact ResearchSupport@kent.ac.uk. Please include the URL of the record in KAR. If you believe that your, or a third party's rights have been compromised through this document please see our [Take Down policy](https://www.kent.ac.uk/guides/kar-the-kent-academic-repository#policies) (available from <https://www.kent.ac.uk/guides/kar-the-kent-academic-repository#policies>).

Time and technique: the legal lives of the 26-week qualifying period

Emily Grabham

Abstract

This paper aims to bring an appreciation of legal form, technicalities, and legislative drafting to growing interdisciplinary literatures on time and governance. Scholarship across politics, geography, science studies and anthropology continues to trace the productive force and specific qualities of diverse temporal horizons. At the same time socio-legal scholars increasingly focus on the work of making and negotiating law, engaging with the dogged, everyday work of legal experts and bureaucrats. Yet little attention has been paid, to date, to the work of legislative drafters. This paper follows the ‘legal lives’ of qualifying periods on family-friendly employment rights. As examples of legal technicalities that work with time, qualifying periods form an important part of the regulatory structure that separates precarious workers from ‘regular’ employees in UK law. Drawing on documentary research and interviews with policy experts, union activists and legislative drafters, this paper focuses on the formal qualities of qualifying periods, arguing that these legal technicalities conjure time and legal form as inextricable. Whenever law becomes relevant to conversations about time and governance, we could usefully pay attention to the idiosyncrasies and controversies occupying legal form and legislative drafting.

Keywords: time; technicality; qualifying periods; legal form; employment; family-friendly rights; legislative drafting.

An ethnography of technical legal expertise ... must acknowledge the centrality of technique – of the skill and the art, the aesthetics and the bricolage, the satisfaction of rehearsing and perhaps innovating upon or adding to a set of moves

Emily Grabham, Kent Law School, University of Kent, Canterbury, Kent CT2 7NS, United Kingdom. E-mail: e.grabham@kent.ac.uk

and postures one has observed, apprenticed, debated with other initiates. (Riles, 2011, p. 70)

It's a weird little universe that we inhabit, where you're trying to nail things down, trying to be unambiguous, but clear. (Legislative drafter)

An employee who has been continuously employed for a period of at least 26 weeks is entitled to make a flexible working application. (Regulation 3, Flexible Working Regulations 2014/1398)

1. Telling the story

1.1.1. Take the reader by the hand and lead him or her through the story you have to tell. Imagine that you are trying to explain something orally to an interested listener. Where would you start? What will they want to know first? (*Office of the Parliamentary Counsel Drafting Guidance*, August 2015)

It's late on a Friday in autumn. I'm sat in the office of a policy specialist; let's call her Jill. Jill's about to go home on her bike, and time is running short. I am interviewing Jill for a project on women's experiences of balancing precarious work alongside care for children or other adults. One of my aims is to understand whether and how these women become visible in legal debates about family-friendly rights. The sphere of family-friendly rights in UK employment law is replete with eligibility requirements, varying levels of protection and knotty thickets of primary and secondary legislation. Eligibility requirements limit access to rights to those people whose work most approximates 'standard employment', thereby often excluding precarious workers. Jill's a significant interlocutor for my research because, amongst other things, her interpretation of these technicalities can be found in a range of policy and advice publications.

Our conversation moves to qualifying periods. Qualifying periods limit employees' entitlements to some of the rights we are talking about: shared parental leave, for example, and the right to request flexible work.¹ Specifically, qualifying periods require employees to work for a particular period of time, here 26 weeks, before they can benefit from the right. I am interested in qualifying periods because many of the women I am interviewing speak of being repeatedly employed on a very short-term basis, making it very difficult for them to reach the required 26 weeks' work.

When Jill talks about qualifying periods, she exhibits a combination of technical precision, resignation and frustration. It's an old story, apparently. Occasionally, the unions have been consulted over the length of these periods. More recently, along with non-governmental organizations and advice agencies, unions have been arguing against the inclusion of qualifying periods in legislation on family-friendly rights. Jill highlights, in particular, the disproportionate temporal effects of these requirements. For example, employees wishing to claim their statutory allocation of two weeks' paternity

leave need to have been working for 26 weeks before the end of the fifteenth week before the expected week of childbirth. In other words, to obtain paternity leave of two weeks, one has to have been in continuous employment with the same employer for 41 weeks before a baby is born. Jill is incredulous at this:

I mean, my real frustration is that 26-week qualifying period when it's applied to paternity leave, because it's not, you know, you actually have to have about 40 weeks' service, I think, because it's 26 weeks by the fifteenth week before. (Policy specialist)

An initial reaction to Jill's point might be that qualifying periods are obfuscatory, purposefully bewildering, part of a hidden apparatus of employment rights mechanisms that somehow defy explanation or transparency. Yet these apparently obscure requirements reside in 'plain sight' within conversations about employment law reform, as Jill and I both know. Qualifying periods are raised, challenged and justified in government consultations, they are debated in Parliament and they are repeatedly targeted by unions, campaigning groups and activist organizations working on issues relating to precarious and low-paid work, care and poverty (see e.g., Mitchell, 2015; Working Families, 2013).

My ongoing research follows women's lived temporalities of work and care, tracing the multiple ways that women in precarious work cannot demonstrate the 'orderly career' imagined by family-friendly employment rights. If the women I am interviewing are excluded by qualifying periods, they are often unaware of this. Instead, these women describe a feeling of being 'too new' to the job to negotiate alternative work patterns or to claim leave (Grabham, *forthcoming*). Yet if qualifying periods have a hazy presence in the lives of working women, their persistence within family-friendly legislation and legal debates is much more evident. During my research, a parallel story has been unfolding, specifically through encounters with legal technicalities and the people who care about them.

Qualifying periods use time to limit rights. As such, I expected that deliberations over their length (e.g., 26 weeks) would have much to say about what these time-based limitations on rights are supposed to do. In turn, this assumption was based on the idea that time periods were somehow oriented at having an effect on social relations outside the legislation, so that introducing, deciding and changing the time period would always be uppermost within regulatory conversations. Instead, my research has found that technical deliberations to do with legal form are often inextricable from the length or substantive content of qualifying periods in many legal debates, raising questions about the significance of legal form to debates about time and governance.

In socio-legal analysis, form can refer to the *material* means by which law is 'made' and 'done': legal and bureaucratic practices that 'do things with' documents such as contracts, for example, forms, reports, legislative guidance in order to create legally binding norms. This is the 'form' we might find in

debates about legality, formalism, procedure and etiquette. Form can also refer to law's *sources and technicalities*. This encompasses distinctions between contract and tort, for example, such that particular areas of social life are subject to distinct domains of legal knowledge. It also includes the legal techniques, provisions and doctrines attached to these sources of law: contractual conditions, statutory provisions, the operation of precedent and the attention paid to drafting.

Qualifying periods are alive with formal controversy in many of these senses. Dilemmas of form structure *conventions* of legislative drafting, for example: concerns about 'meshing' qualifying periods between legislative projects, and attention to the pace of reading, as we will see. The formal *legal expression* of qualifying periods is also the subject of heated political debates in Parliament, for example, about whether qualifying periods should be housed in primary or secondary legislation. This is a hot topic for many involved in reform conversations in employment law because with some exceptions only primary legislation is usually subject to Parliamentary debate, and this has implications for public scrutiny of access to rights, as we will see.²

The broader point here is that whenever law becomes relevant to conversations about time and governance, we could pay attention to the idiosyncrasies of legal form and legal drafting and the dilemmas that contribute to them. In making such an argument, then, this paper engages with two areas of academic enquiry. First, it contributes to work on the significance of time and temporal orientations across contemporary governance projects. Work in this vein is broadly characterized by attention to the enunciatory force of temporal rationales, and the material, aesthetic (Amoore, 2013) and technical means by which futures become real and significant to bureaucratic action. Scholars of techno-science have opened up new perspectives on governance by showing how promissory or prospective ideas of future action and innovations structure policy initiatives and frame viable outcomes (Brown & Beynon-Jones, 2012; Brown *et al.*, 2000). In turn, anticipatory logics of pre-emption (de Goede & Amoore, 2008), precaution and preparedness (Anderson, 2010) have been shown to construct horizons of future action in cultures of emergency (e.g. climate change) and threat (e.g., terrorism). Much of this work is grounded in critical interventions on risk (Amoore, 2004; O'Malley, 2004), uncertainty (Callon, 2009; Moreira *et al.*, 2009), expectations (Beynon-Jones, 2013; Braun, 2015) and speculation (de Goede, 2012).

Much of this scholarship traces the diffuse effects of law and legal thinking in politics and governance, and it opens up scope for paying increased attention to legal form itself. As such, my aim is to contribute perspectives about the form of time-related legal technicalities, specifically qualifying periods, to wider conversations about time and governance. Such a focus contributes to our understanding of the temporalities of governance not only because it helps to bring the analysis of time to a technical level, gesturing to the connections between conceiving of, and making, time, but also because it pays attention to what might be distinct about dilemmas of legal form – dilemmas of drafting, amongst other things.

Secondly, by analysing qualifying periods as a type of standardized legal technique that works with time, the paper contributes new material to emerging scholarship on legal technicalities. The challenge of working with and on legal technicalities has been that they are still commonly understood as being invisible, uninteresting or offensive (Riles, 2011). As Alain Pottage puts it, there is a tendency to think about technicalities as ‘excrescences of ordinary language’ (Pottage, 2014), which might imply that they have little to tell us about wider social dynamics. Nevertheless, studies of legal knowledges, and argumentation – the activities of producing law *as* law – have increasingly animated research on financial markets (Milyaeva, 2014; Riles, 2011), private international law (Riles, 2008), scale and jurisdiction (Valverde, 2009), the use of ‘spatial tactics’ in criminal proceedings (Sylvestre *et al.*, 2015), international labour rights for domestic workers (Kawar, 2014) and legal theory and Roman law (Pottage, 2014), to name just a few. These studies have uncovered the potential for following the engineering, discourse strategies and formalism of legal technicalities, and enquiring into whether and how they shape social action. Yet, little has been written on technicalities and time (with the notable exception of Riles, 2011). More specifically, by focusing on the hitherto understudied practice of legislative drafting, this paper contributes fresh perspectives to conversations about the ‘making of law’.

The task, then, is to understand qualifying periods on their own terms; to comprehend how they are fabricated, understood and circulated as law by those who have drafted them, negotiated them, argued against them, the people for whom they form part of a terrain of common knowledge and intervention. The direction of travel followed in this paper aims not to represent any inherent teleology or specific order. Instead, through a series of disjunctive vignettes, my aim is to give a sense of the interlinking and overlapping departmental and Parliamentary stages, conversations, dilemmas and turf wars that contribute to the average qualifying period on family-friendly rights, showing the strange mixture of time and formalism that renders them active and effective in regulatory debates.

2. Qualifying periods

Qualifying periods are time-related legal provisions requiring employees to work for a certain period before claiming rights. Despite their apparently marginal status, qualifying periods could be understood as part of the legal apparatus enabling what Jamie Peck and Nik Theodore term ‘the structural expansion of contingent employment’ (Peck & Theodore, 2012, p. 742). Qualifying periods help underpin the ‘standard employment relationship’, a haphazardly achieved yet strangely persistent model occupying labour and economic policy, which positions permanent, full-time work on a family wage as an achievable norm and the basis for fashioning current architectures of rights and protections (e.g., Freedland & Kountouris, 2011). Feminist labour lawyers have articulated

the gendered dimensions of the standard employment relationship in a range of jurisdictions and contexts (see e.g., Conaghan & Rittich, 2005; Fudge & Owens, 2006). In the United Kingdom one has to be an ‘employee’ to benefit from many rights, including, for the purposes of this paper, family-friendly rights (see also James & Busby, 2011). This requirement marginalizes anyone in precarious work (Fredman, 2004) because the question of employment status in UK law is fraught with uncertainty as a matter of law and often unclear to both employers and workers alike. Requiring a *period of time* in continuous employment is also understood formally to exclude people in many forms of short-term, interrupted, or otherwise precarious work (Working Families, 2013).

Qualifying periods have been recognized to have uneven effects on women, who found it more difficult to achieve time in work due to caring commitments (Barnes, 1996), and people living with HIV and AIDS, whose remaining time in work was, in the early years of the AIDS crisis, affected by extremely poor prognosis (Grabham, 2016). In the late 1990s, the two-year qualifying period on the right to claim unfair dismissal was subject to a sex discrimination claim under European law – the so-called *Seymour-Smith* claim.³ The House of Lords eventually decided that this qualifying period constituted indirect discrimination against women but that it benefited from an objective justification, advanced by the government, of increasing recruitment on the part of employers.

The *Seymour-Smith* litigation did not prevent ongoing use of qualifying periods in employment law, and they have proliferated in family-friendly legislation despite consistent opposition. In the run-up to the Children and Families Act 2014 (CFA), women’s and parents’ organizations, as well as trade unions, argued against the continued use of the 26-week qualifying period on requests for flexible work. The *Modern Workplaces* consultation acknowledged but did not take up these criticisms, stating that the government had no plans to remove the qualifying condition (Department of Business, Innovation & Skills, 2011, p. 40). During debate on the Children and Families Bill 2013, Labour MP Lucy Powell introduced a probing amendment aiming to remove the qualifying period on the basis that it presented a ‘barrier to job entry’ in the context of rising job insecurity, new welfare rules focused on work activation and the non-availability of jobs advertised as flexible from day one.⁴ Jo Swinson (Liberal Democrat Parliamentary Under-Secretary of State for Women and Equalities, and Business, Innovation and Skills) stated that the Coalition government had decided to retain the qualifying period because employers had expressed concern in consultations about retaining certainty over terms and conditions at the outset of employment. Echoing wording found in the government’s response to the consultation, Ms Swinson raised the spectre of employees taking a job ‘in the expectation that they can magically vary the hours to suit their needs immediately after they have started’, dropping out of the labour market as soon as they had entered it.⁵ Subsequently, even the 2016 Women and Equalities Committee inquiry into pregnancy and maternity discrimination, which again heard evidence from specialist lawyers groups and NGOs (the

Discrimination Law Association; Working Families) about problems with the qualifying period for women in precarious work, acceded to the logic of qualifying periods overall (Women and Equalities Committee, 2016, para. 57).

Hence, fresh qualifying periods have accompanied each new round of family-friendly rights. A 26-week qualifying period now applies to rights across a range of legislative instruments, delimiting rights to claim statutory maternity pay,⁶ statutory paternity and adoption leave,⁷ statutory paternity and adoption pay,⁸ shared parental leave⁹ and shared parental pay.¹⁰ An apparent side effect of this dynamic development of legislation and its attendant qualifying periods is a sense, for experts, of being left behind. Despite or perhaps because of the ubiquity of qualifying periods, those working with qualifying periods in a policy or legal setting often find the details difficult to retain:

R: The reality is that a lot of people just won't use [shared parental leave], and the qualifying periods and all of that ... I think will be off-putting quite apart from whether people can afford to take longer periods of leave and whether men are going to take longer periods of leave.

I: The qualifying periods, what do you think is going to be off-putting about them?

R: Off the top of my head, I need to get the legislation in front of me and remember exactly what all the different qualifying periods are.
(Gender rights specialist)

Qualifying periods can pop up in apparently unexpected places, reasserting themselves just when experts or advice organizations might otherwise assume that employees have so-called 'day one' rights. For example, the new right to shared parental leave, which allows a mother to share her maternity leave with her partner or co-parent, features a particularly tricky and onerous cross-cutting qualifying period of 26 weeks for both parties, whereas if she just used all the leave herself she would have the right from day one of employment.¹¹

Yet for all their apparently surprising effects, qualifying periods also have certain common characteristics, rendering them, in some senses, a standard tool or distinct legal phenomenon, the use of which can be more generally followed or discerned, and which is amenable to analysis as a 'legal technicality'. For instance, an initial decision has been whether to express qualifying periods in primary or secondary legislation. The consequences of this decision are understood by many labour activists and lawyers to be crucial: they relate to the type and level of Parliamentary scrutiny accorded to limitations on rights and to any subsequent amendments, raising heated political as well as legal questions over the use and extent of executive action. More specifically, the prevailing practice with leave rights and the right to flexible work is that primary legislation will grant the Secretary of State the power to enact regulations concerning eligibility requirements of different types, which can include time-related limitations. It is then up to the Secretary of State to decide whether and how to bring qualifications into effect. This mechanism also allows the

Secretary of State to alter the length of any qualifying periods found in secondary legislation usually without further recourse to debate in Parliament, the significance of which will be covered in more detail below.¹² What emerges amongst other things is a story about legislative drafting, the people who practise it and the dilemmas and problems these people encounter.

3. 'Part of the nerdy fun of it'

We do operate with quite a stripped-down vocabulary. Low on metaphor. (Laughs). (Legislative drafter)

Annelise Riles has proposed that legal technicalities encapsulate politics and are thus worthy of attention in themselves (Riles, 2005). According to Riles, legal technicalities can be understood as packages of 'contradictory subjects and practices' containing specific conceptual and ideological approaches, categories of experts, problem-solving tactics and forms of reasoning (such as reasoning by analogy) (Riles, 2011, p. 64). In turn, studying technicalities also prompts a set of dilemmas about how such technicalities relate to the 'social'; whether and how they express wider relations of power. Technicalities are at least as important to the critical study of law as are other power relations that form and animate legal debate (Valverde, 2009, p. 154). Following technicalities allows us to perceive legal knowledge as having a similar sort of agency as technical instruments, shaping and speaking back to human action and social arrangements (Riles, 2011, p. 73). Embodied as legal texts, technicalities can be understood as non-human actors 'in a chain of elements, which, when disputed, reveal themselves under the term "legal culture"' (Milyaeva, 2014, p. 212). Thus, what we come to understand as legal culture can be understood as at least partly conjured through the non-human (or not-strictly-human) agencies of technicalities. This allows an analysis of where and how qualifying periods live in family-friendly legislation, how they travel and the shades of action they exert in creating new meanings about time and work.

Yet the analysis should not be all about the technicalities themselves; we can also follow the humans who deliberate them (see also Riles, 2005, p. 1033). Given the diverse research into legal technicalities, it has been surprising to note a relative paucity of critical or socio-legal research on those whose job it is to 'write the law': legislative drafters.¹³ Working in the United Kingdom's Office of the Parliamentary Counsel, these government lawyers draft primary legislation, producing amendments as required when bills then make their way through Parliament. As such, the dogged and careful work of legislative drafters in fabricating law ends up providing not only what we understand as legal technicalities themselves, but material, also, for wider socio-legal analysis. This is a process of legal creation of a very different order to the work of the Conseil d'État, covered in Latour's *The making of law* (Latour, 2010), being instead a non-judicial, technical routine of creating legal knowledge, crafting the form of legislation as law.

In conversations with legislative drafters, it became apparent that they believe themselves to have specific knowledge and skills, instantiating into a precise and legally effective written form the policy proposals coming from government departments. In what they describe as something akin to a circular or recursive moment, drafters receive ‘instructions to Parliamentary Counsel’ from lawyers in government departments. These instructions appear in their inboxes as large email attachments. Drafters then work through the instructions methodically (‘in a quiet room’), reading, noting and drafting as they go along, until they produce a tentative first draft of the legislation that can be discussed with the originating department. Drafters’ expertise lies somewhere between translating instructions, legal innovation and a kind of legal ‘weaving’, producing new legislative provisions that ‘align’ with the fabric of what already exists (a point to which I return later on). This also involves a certain ‘testing’ attitude, questioning instructions and departmental lawyers over the practicability of the proposed legislation. Emerging from practices of drafting is an artefact: the text and form of law as legislation, produced in conjunction with a style of writing, or more specifically ‘problem-solving’, which enunciates and activates specific, pre-tested, propositions. The language used is precise and ‘scientific’, yet also, somehow, creative:

Drafter 1 (hereafter R1): It’s a precise read. It’s a sort of scientific read, really. Having said that, there is room for creativity in terms of how you’re trying to express it ... I guess that’s part of the nerdy fun of it. You are problem-solving, and if you can solve a problem with words in a neat, tidy and precise way, it’s quite satisfying. Until someone picks a hole in it. (Laughs)

Drafter 2 (hereafter R2): Except at that point, you say – I’m very glad you did that! (Laughs)

Drafters pay attention to the voice of the legislation itself, aiming for what they call a ‘moderate tone’, which deploys brevity but not brusqueness. One drafter described it as not being ‘discursive’ in the sense that it should not contain what is not needed. As Office of the Parliamentary Counsel (OPC) drafting guidance puts it: ‘Legislation should speak firmly but not shout’ (Office of the Parliamentary Counsel, 2015, p. 1). Yet, even as it uses a modulated voice, this form of writing is not expressive as such. The draft provision or bill must contain within itself everything it needs to subsist, unless it is defined or affected by other existing provisions either in the bill or in secondary legislation.

R1: We have got a history and an ethos of being consistent and pursuing things to the nth degree.

R2: There’s less room to hide. You can’t have ... ‘and therefore it’s alright!’ as a sort of a connecting ... You have to have a logical sequence ...

R1: It’s not discursive, is it?

R2: Yes, you do pursue details because it’s not a detail any more, because it’s now a proposition that you need to deal with in order to move on.

The fact that propositions are not ‘details’ for long indicates that every element of a set of instructions has a legal consequence to which attention must be paid before the drafter can move on. This point is significant to how we might understand the inter-relationship of legal form and time, as I argue later on. Yet at the same time, drafters and drafting guidance refer to the many external factors that can influence drafting, from the Interpretation Act 1978, to case law, to provisions in other legislation.¹⁴ This epistemological stance is logically precise and to a certain degree intended to be self-reliant, but also inter-textual to the extent that it is in conversation with other legislation or with the common law.

In the meantime, attention to detail is coupled with a concern for ‘clarity,’ which in turn pays attention to the *pace* of reading legislation. One of the most important principles contained in recent OPC drafting guidance is to ‘get to the point as quickly as you can’:

Get to the point

1.1.9 Get to the point as quickly as you can. Ideally the opening subsection of a clause will contain the main proposition or at least give the reader some idea of what the clause is about. Don’t bury the main proposition away in the middle of the clause if you can possibly avoid it. (Office of the Parliamentary Counsel, 2015, p. 1)

‘Getting to the point’ is concerned with aiding the reader’s capacity to comprehend legal meaning and effect through what could be termed ‘unfussy’ drafting. According to this principle, it is possible to achieve clarity by paying attention to, and paring down, the internal technical structure of a clause. Clarity, here, is about deploying the architecture and pace of the clause in a general effort to be upfront; not obscuring meaning through decisions about the placing of key information.

Practices of problem-solving, scientific language, non-discursive writing, moderate tone and ‘getting to the point’ structure much of the daily work of legislative drafters and indicate concern for the reader, whoever the reader may be. In the following sections, I turn to the formal qualities of qualifying periods themselves as legislative provisions, outlining some generic and some rather more specific issues to do with how qualifying periods are drafted. The aim here is to illustrate how deliberations over form affect the ways in which time is expressed and mobilized within family-friendly rights.

3.1. Hurdles, sandwiches and conjunctions

As a matter of primary legislation, provisions in relation to leave and flexible work, for example, are found in the Employment Rights Act 1996. These provisions enable eligibility requirements relating to ‘duration of employment’. For example, concerning the introduction of the new right to shared parental leave,

the Children and Families Act 2014 introduced into the Employment Rights Act 1996 the following enabling power:

75E: Entitlement to shared parental leave: birth

- (1) The Secretary of State may make regulations entitling an employee who satisfies specified conditions –
 - (a) as to duration of employment,
 - (b) as to being, or expecting to be, the mother of a child,
 - (c) as to caring or intending to care, with another person ('P') for the child,

[...]

... to be absent from work on leave under this subsection for the purpose of caring for the child.

The power in s75E Employment Rights Act, once exercised by the Secretary of State in regulation 35 of the Shared Parental Leave Regulations 2014/3050, has resulted in the following qualifying period for those wishing to take shared parental leave:

- (1) For the purposes of entitlement to shared parental leave ... an employee satisfies the continuity of employment test if the employee –
 - (a) has been continuously employed with an employer for a period of not less than 26 weeks ending with the relevant week (see paragraph (3)); and
 - (b) remains in continuous employment with that employer until the week before any period of shared parental leave taken by the employee.

As drafters review their practice in the service of clarity, some of the more generic formal features of qualifying periods in family-friendly rights legislation remain subject to ongoing internal deliberation. For example, qualifying periods are often drafted as one of a longer list of 'hurdles' that people need to face in order to claim the right. The common practice of making a list of 'hurdles to jump' can clarify for a reader the steps they need to follow in order to claim a right, or the restrictions that might prevent them from accessing the right. As this legislative drafter puts it:

It's not uncommon for us to think in those terms of ... hurdles to jump or conditions to be met and if you can express them nice and clearly then it's quite obvious to people. What I quite like doing is making it clear if people have ruled themselves out. So you go down the list: I'm not that, I'm not a one of those, therefore, ping, don't get the right. (Legislative drafter)

We can see an example of hurdles both in the enabling power in section 75E Employment Rights Act 1996 above and to a different extent in the secondary

legislation. Textually, the hurdles in section 75E Employment Rights Act (the enabling power for qualifying periods, amongst other things) have been expressed by the use of an alphabetical list system. The repeated use of the words ‘as to’ mark the beginning of each new paragraph or hurdle, setting out sequentially the conditions that the Secretary of State may specify for parental leave. The drafters’ intention presumably has been that a person contemplating the enabling power (perhaps a departmental lawyer in charge of drafting the secondary legislation) could follow the conditions down the page.

So far, so good. But when a clause containing hurdles is also a ‘sandwich’, there is trouble. A ‘sandwich’ is a clause or provision in which an important part of what is being covered is left to the end, after the list of ‘hurdles’. Sandwiches would appear to offend against the OPC’s concern with ‘getting to the point’. Section 75E is a sandwich. Here, a significant aspect of what section 75E covers is the proposition that these conditions can allow a person ‘to be absent from work’ on leave, and this proposition has been left to the end. Since this legislation came into force, the OPC has discouraged the use of sandwiches for the reason that ‘this structure does not always help the reader, especially if the main proposition is at the end’ (Office of the Parliamentary Counsel, 2015, p. 21). Instead, the OPC suggests moving the words at the end to the beginning of the clause, unless the opening words and the ending words are only separated by two or three paragraphs. The implication here is that despite aiding clarity, hurdles can slow down the reader if they have to wait for the main content of the clause.

Another manifestation of the preoccupation over waiting can be found in debates about conjunctions. As OPC drafting guidance puts it, clarity about whether paragraphs are meant to work cumulatively or as alternatives can usually be resolved by putting the relevant conjunction (‘and’, ‘or’) after the penultimate paragraph. But this also ‘makes the reader wait’:

‘And’ and ‘or’

3.7.1 Ensure that it is clear whether paragraphs are intended to operate cumulatively or instead as alternatives.

3.7.2 Often it will be sufficient to put the appropriate conjunction at the end of the penultimate paragraph and rely on the implication (in the absence of a contrary indication) that each of the preceding paragraphs is separated by the same conjunction.

3.7.3 However, *this makes the reader wait* until then to know whether the paragraphs are cumulative or alternative and may be unhelpful with a long list of paragraphs. (Office of the Parliamentary Counsel, 2015, p. 22; emphasis added)

In the enabling power for qualifying periods on recent family-friendly rights, conjunctions act alongside hurdles to give the Secretary of State clarity about the scope of any future action he or she wishes to take. In section 75E a conjunction (‘and’) after the penultimate paragraph indicates that the Secretary of State can specify all of the listed conditions if she or he wishes, or any one or number of them. Making the reader wait by using a conjunction also gives the Secretary of State a wider scope of action.

In this way, qualifying periods bristle with dilemmas of form, clarity and legal effect. Whilst sequential paragraphs (hurdles) allow a reader to work their way down the page, the role of paragraphs in facilitating clarity can be undermined by sandwiches and conjunctions, both of which slow down the reader's comprehension of the main legal content of the clause. Whoever 'the reader' is, qualifying periods are formally structured according to the envisioned effect of particular drafting devices on reading and on understanding its legal meaning. These technical devices engage drafters' preoccupation with 'getting to the point as quickly as you can' and not 'making the reader wait', which in turn suggests an attention to the pacing of legislation, an attention which is also oriented at how the reader encounters the text. The subject of internal controversy and deliberation amongst drafters, then, the formal characteristics of qualifying periods deploy pace in the service of clarity.

3.2. *Twenty-six weeks*

Qualifying periods appear in the overall legislative matrix of family-friendly rights in the regulations, and not in the primary legislation, as such. Their technical form as regulations raises considerations about matters such as the length of the qualifying period and the use of weeks in the regulations to express a time period, which in the primary legislation appears only as an unspecified 'duration'. The length of the qualifying period tends to be the subject of some clarifying probing on the part of drafters:

If somebody said, well we expect the qualifying period to be 2 weeks, I would probably go back to them and say, well how would you know? Somebody's hardly in the door, how would you know when they had started? But 26 weeks, you'd know if someone was there or not. It would be much more easy to prove. (Legislative drafter)

As regulations are drafted within the relevant government department, and not by legislative drafters in the OPC, interviews with lawyers in the Department for Business, Innovation and Skills and the Department for Work and Pensions could provide more insight here as to how 26 weeks first became the measure of the qualifying period, and why it has been used since. In the following section, however, we see that because of a felt need for qualifying periods to 'mesh', substantive deliberations about the length of these periods in any case often get lost alongside arguments about formal consistency, about the need to replicate time periods across legislative fields. Untangling what is *substantively intended* from what is *formally replicated* about these qualifying periods, then, becomes quite difficult and contributes to the need to understand form on its own terms.

Legal drafters are also concerned with how the time period is measured; in other words, with decisions about whether to use days, weeks, months or years. As the OPC drafting guidance puts it: 'Which unit of time to use will sometimes depend on the policy and sometimes on the drafter's decision'

(Office of the Parliamentary Counsel, 2015, p. 54). In the case of the 26-week qualifying period, it is possible that weeks have been used instead of months in order to avoid the corresponding date rule. According to the House of Lords decision in the case of *Dodds v Walker*,¹⁵ a month should be measured from one day in the first reference month to the ‘corresponding date in the appropriate subsequent month’. This legally ratifies a situation in which the length of time expressed by, say, a notice period of a month in legislation might vary significantly. In order to avoid creating a ‘trap for the user’ the OPC recommends considering whether a period that one would normally draft in months would be better expressed in weeks or days, noting, however, that ‘the periods expressed in these ways will not be identical, but whether this matters will depend on the context’ (Office of the Parliamentary Counsel, 2015, p. 54). The fact that the qualifying period on many leave rights in family-friendly legislation is expressed as 26 weeks and not, for example, six (or more accurately 6.5) months is at least partly an effort to render the measurement of the time period easier and less variable for readers through a pragmatic assumption that weeks are more standard than months.

4. Consistency; alterability

If we follow the actions of legislative drafters as legal technicians, therefore, we can discern a wide range of practices that evidence the formal qualities of legal time, or what might be termed the relative lack of ‘metaphor’ that goes into drafting qualifying periods as time-related technicalities. Put simply, time becomes a matter of legal form. Drafters act as translators, innovators and problem-solvers, weaving new provisions into existing legislation and using what they feel is scientific language. In turn, this requires using a moderate tone and following the details to their logical conclusion.

All of these considerations affect qualifying periods. Generally speaking, qualifying periods exhibit a number of formal features that engage debates over pace, such as hurdles, sandwiches and conjunctions. More specifically, by focusing on what we might assume to provide the time-related content to qualifying periods – the use of a period of 26 weeks to delimit rights – we can see how even this is affected by formal considerations (avoiding the corresponding date rule, for one). Having set out some of the common formal features of qualifying periods and their attendant controversies, the paper now turns to consider how qualifying periods appear within debates over family-friendly rights more generally and what this might have to say about time and legal form.

4.1. *Form as fabric*

It’s May. I’m sitting at my desk, reading Hansard reports on Parliamentary debates about the Employment Bill 2001, hoping to trace the means by which a qualifying period was first attached to the right to request flexible work.

The right to request was brought into effect by the Employment Act 2002, which amended the Employment Rights Act 1996. In turn, the qualifying period was brought into effect by regulations made by the Secretary of State for Trade and Industry exercising a power contained in the Employment Act 2002. Through the autumn of 2001, the Bill works its way through successive House of Commons debate and committee stages. Debate on the Bill does cover limitations on eligibility for rights, just not the ones I had hoped to see.¹⁶ There is only one mention of qualifying periods. Alan Johnson (Minister for Employment and the Regions) states in his concluding speech at the second reading of the Bill in the House of Commons that the Labour government has made sure to *align* qualifying periods for maternity leave with those for maternity pay. This, he states, makes it ‘much easier for employees ... [to] benefit from the measures’.¹⁷ He doesn’t raise the very existence, length or ubiquity of qualifying periods, which already litter family-friendly rights with surprising effects.

Alan Johnson’s brief comments during the second reading indicate that, for now, the entire logic of qualifying periods is understood to be one of a certain type of equivalence and repetitive ordering. Qualifying periods express alignment as a regulatory desire. Another approach to alignment comes up later on when I’m speaking with Jill about shared parental leave. Jill mentions what she terms a ‘copying’ effect intended at reassuring employers and the business lobby. As she puts it:

There was always a kind of trading off, and so they will have copied the 26 qualifying week qualifying period that they’d had for years under the maternity leave regs. And that would have been kind of like, you know, all these little things that they thought might reassure business. (Policy expert)

For Jill, the length of the qualifying period is an example of ‘all these little things’ that government can do within the details of an overarching legislative programme. On this reading, the existence and length of qualifying periods is about burying reassurances for business within the marginal technical details of the legislation; they could be merely part of a process of ‘trading off’.

Whether conceptualized as ‘alignment’ or as ‘copying’, replicating the formal characteristics of qualifying periods between different provisions or pieces of legislation is common within the framework of family-friendly rights. Legislative drafters play their role in this process of replication with one eye on the history:

Part of this is the history, because you can look at it and you can say, what is it replacing? ... So you’re in this world of – there is a qualifying period of so many weeks, then, really, you start off by saying well I assume it’s going to be the same period now. Because why would you have a different qualifying period for maternity pay as opposed to parental pay? There’s a history and you would expect to be consistent with that. (Legislative drafter)

The theme of consistency ('I assume it's going to be the same period now') is significant within drafters' accounts. To some extent, the felt need for consistency is driven by questions of legal coherence across already existing case law and legislative standards, which create conventions of legal interpretation and expectations on the part of the wider public, as the following exchange indicates:

R1: A lot of what we do is amending existing legislation. If something's particularly antiquated in style we will try and restructure it maybe. But if it's used particular words, there's usually a lot of case law on these things, so we will want it to be interpreted in exactly the same way. So that's a factor in choice of words.

R2: And something like this is being administered by employers who will have figured out how to deal with this and won't want to have to figure it out all over again. We don't want to be *making* more work for them. (Interviewee's emphasis)

This passage evidences a wish to create legislative provisions that neither disturb established legal principles nor make 'more work' for employers. As such, displaying the technical adeptness and distinct skills of legislative drafting also involves a capacity to create something that seamlessly merges with other provisions. To those who experience the legislation from the outside – the 'readers' – this comes across as 'copying' or at best as 'alignment'. Yet drafters see themselves as problem-solvers whose solutions should become almost invisible because they fit with what is already there. As one drafter put it: 'It's across a policy field that rights should mesh'.

The 'meshing' quality of legal provisions suggests an understanding of legislation as fabricated – as fabric, even, and this relates to my earlier point about drafters' combination of logical precision with attention to something that could be termed a type of legal intertextuality. It is only by paying attention to the formal as well as substantive characteristics of these provisions that the 'meshing' can take place:

R1: We will try within an Act to be consistent, because people will compare and if we were to say even 'how long the employment has lasted', which is a kind of translation, people would say, well doesn't that mean something different to duration? If not, why is that section there different to that one? We're into: are we casting doubt – that's one of the questions we ask – in the words we choose? Are we casting doubt on what's already there? In this Act or in other comparable Acts. We won't parrot things for the sake of it.

R2: But we won't gratuitously change them either.

In this exchange, the idea of 'gratuitously changing' provisions indicates a sense of thoughtlessly stepping outside the boundaries of already-established formal conventions for drafting time periods. In turn, 'not parroting things for the sake of it' suggests that in each case, replication or alignment of key terms happens with attention to what is meant or achieved by the term. 'Meshing'

is the result of this attention; it denotes a conscious use of replication, aiming to avoid doubt through formal consistency.

4.2. *Technical pluralism*

Importantly, though, formal consistency does not always result in identical qualifying period lengths. The one-year qualifying period for the right to what is now called ‘ordinary parental leave’ – 18 weeks of unpaid leave that can be taken before a child’s eighteenth birthday – stands out as quite distinct in expression and length from what is otherwise normally a 26-week period.¹⁸ It is possible that this longer qualifying condition was simply carried over from the Parental Leave Directive, which specified a maximum qualifying period of one year.¹⁹ Yet the *formal* means by which this qualifying period has been achieved, via an enabling power in the Employment Rights Act 1996 inserted by a provision in the Employment Rights Act 1999 and subsequently through regulations, is no different.²⁰

It appears that formal consistency is not exactly the same thing as technical precision, nor is it necessarily only about replication. Instead, legislative drafters produce qualifying periods using a sort of pluralistic precision – or *technical pluralism* – which not only allows diverging approaches to technical challenges but also exercises pragmatism with regard to hurried drafting across different government departments. I expected that the 26-week qualifying period, when it appeared in legislation, would be exactly replicated across family-friendly rights. In other words, I assumed that because concerns about consistency are inherently to do with form, then the kind of consistency achieved would involve a technical precision that would be about exact reproduction of details in different legislative locations. This view is supported by a passage in the OPC drafting guidance, which focuses on the technical details of delineating time periods through the use of diverging approaches: ‘within’ and ‘before the end of’. As the guidance points out, limiting action to ‘within’ a period means that the action can only take place after the start date and before the end date. Stating that action can take place ‘before the end of’ does not specify a start point at all.

‘Within’, ‘before the end of’

8.1.16 Legislation often requires something to be done ‘within’ a particular period or ‘before the end of’ a particular period.

8.1.17 A requirement to take an action ‘before the end of 3 weeks beginning with [a particular date]’ would apparently allow the action to be taken at any time up to the end of those 3 weeks, including at any time before the 3 weeks began. A requirement to take the action ‘within’ those 3 weeks would limit the time in which the action may be taken to those 3 weeks.

8.1.18 In some cases, the effect of either wording will in practice be the same. An example would be where a copy of a document is required to be given within/before the end of 3 weeks beginning with the date when the document comes

into existence. But in other cases, the different wordings may produce materially different results. (Office of the Parliamentary Counsel, 2015, pp. 53–54)

In this way, expressing the start and end points of action can become technically fraught. With this in mind, I was interested to see the wording of qualifying periods varying between requiring ‘at least’ 26 weeks’ work for claiming statutory maternity pay in s.164 of the Social Security Benefits and Contributions Act 1992 and ‘not less than’ 26 weeks’ work for claiming paternity and adoption leave.²¹ Regarding such distinctions as in any way significant is normally seen to be only the purview of ‘pernickety lawyers’, but the subject matter made the variable drafting surprising.

I asked the drafters whether conversations took place about such variations across qualifying periods. The resulting explanation, whilst diplomatic, expressed something of the ‘inexact science’ of drafting, especially as it is practised by rushed government lawyers in different locations:

It’s difficult because it’s not an exact science. There are play-offs between ‘we need this done, you’ve got this afternoon to do it, I just need you to get some words on the page’ ... [N]ot many people have the time to do a comprehensive trawl and probably if they did, they would find that there are half a dozen slightly different variations out there on how you express that time period ... It may be that someone switched jobs half way through it or whatever, it may not be intentional, it’s just the sort of human factor. (Legislative drafter)

This suggests that the technical form of the qualifying period does not subsist in its precision in each case, or in precise replication across a range of legislative provisions, but in its suitability to express a certain time limitation on claiming rights *well enough* across a legislative field.

4.3. *Alterability*

It’s December 2001 in the Hansard record. Skipping the Christmas break, as I can do by clicking on the next record, I come to the committee stages of the Employment Bill in January 2002. The Work and Family Taskforce has issued its report in November 2001, formally recommending the introduction of the right.²² In either a show of audacity or a hot last minute scramble, the right to request flexible work is introduced into the Bill at the very end of the committee stage in January 2002. Introducing the right at this stage has the effect of bouncing the standing committee into a relatively swift debate over the right. By the time I reach January 2002 in the Hansard reports, the standing committee is really moving. During this newly speeded-up discussion, MPs briefly address the provision containing the qualifying period on the right to request flexible work.

It would be surprising if a qualifying period proposed by what is (at the moment of the debate) a Labour government were subject to vigorous challenge

by members of the (then) Conservative opposition. Qualifying periods de-limit rights, and, as Jill has reminded me, these delimitations reassure business. However, a skirmish does take place in committee over the use of secondary legislation to determinate the existence, form and length of the qualifying period. In the first draft of the flexible work provision considered by the committee in January 2002, a power exists for the Secretary of State to ‘specify conditions as to duration of employment’, providing for the use of secondary legislation to determine any qualifying condition attached to the right.²³ In effect, the first draft provides for a qualifying period in principle and enables the Secretary of State to fill in the detail, should she or he choose to do so. The Conservative opposition then tables amendments, and these amendments are addressed in committee on 22 and 24 January 2002. Amendment (o) removes the power to make regulations on the qualifying period and, instead, writes the qualifying period *into the text of the Bill itself*. This would effectively remove the Secretary of State’s capacity to decide whether a qualifying period should exist and prevent her or him from determining its features:

Amendment (o), in proposed new section 80F(8)(a), leave out sub-paragraph (i) and insert—

- (i) has been continuously employed by his employer for a period of 26 weeks.²⁴

Explaining the amendment on 22 January, Philip Hammond argues that it should not be left to the Secretary of State to regulate who would be eligible for the right to request flexible work by virtue of continuous employment. The proposed amendment, he states, would make the qualification period ‘crystal clear’ by putting it on the face of the Bill itself instead of making it subject to delegated powers:

Amendment (o) would ensure that the Bill specified the continuous period of employment requirement. It is not satisfactory for the Secretary of State to regulate who shall and shall not be eligible by virtue of their continuous period of employment. The notes make it clear that 26 weeks is the intended period, but the Bill gives us rather mixed signals about whether the continuous employment period should be in the Bill or in regulations ... The amendment suggests that the employment period needs to be specified in the Bill to make it crystal clear.²⁵ (Philip Hammond)

Alan Johnson, by contrast, argues that it would not be appropriate for the period to be expressed as 26 weeks and defined, as such, on the face of the Bill. He refers to a need to ‘leave ourselves some flexibility’ about the existence and length of the period through the use of regulations. His reasoning evidences the by-now familiar desire to establish consistency between qualifying periods for different rights by ‘bringing them together’ through the use of secondary legislation:

As for amendment (o), the hon. Member ... said that proposed section 80F(a)(i) is not suitable. It is not appropriate for the Bill to refer to a period of 26 weeks. That could be written into regulations, but we want to leave ourselves some flexibility because there may be an opportunity in the future to bring different qualifying periods together, which employers are keen to do. It is not something that we have in mind at present, but there should be some flexibility because different pieces of employment legislation involve different qualifying periods.²⁶ (Alan Johnson)

That this skirmish happens at all is a reminder of time's legal and technical expression and dimensions. It should also turn our attention to the fact that these formal decisions are explicitly understood to be political. This clash over whether to use primary or secondary legislation to determine the existence and length of the qualifying period for flexible work appears to have raised fraught questions relating to formal consistency, executive power and future action. On Philip Hammond's own account, the opposition is registering 'mixed signals about whether the continuous employment period should be in the Bill or in regulations'. In attempting to address these mixed signals, Hammond positions 'clarity' as the rationale for specifying the qualifying condition in the Bill itself. It seems as if managing the length of the qualifying period through secondary legislation would create too much uncertainty for those concerned about changes, such as the opposition itself and possibly also employers. Perhaps what is really spooking Philip Hammond is that this or a future Labour Secretary of State might not enact a qualifying period at all or might use their powers under the Act as eventually passed to improve coverage for workers, and constrain business, in other ways.

As Alan Johnson replies, however, clarity achieved in this way would prevent the Labour government from being able to change or align the qualifying period in response to new legislative developments. Secondary legislation allows the government first to 'leave ourselves some flexibility' in what he positions as a dynamic policy and legislative environment, and second to harmonize qualifying conditions across different rights. Alan Johnson's apparent concern is with a shifting and highly complex regulatory arena in which the effects of new provisions on existing provisions is not fully understood, or perhaps not even capable of being fully comprehended as new legislation is drafted across interacting spheres of employment and social security law. The existence of a power to use secondary legislation can be a vital means of resolving tensions after the fact:

In effect, such a power enables us to consider the interaction between the new rights that we are introducing and provisions in existing and future law. Any tension or conflict in the detail of the two areas of law enables us to deal with the issue through regulation. It is clear that it could be disproportionate to use primary legislation to deal with matters that might prove relatively trivial.²⁷ (Alan Johnson)

Having the power to use regulations to address problems raised by new provisions, in other words, is an essential means of rationalizing potentially

‘trivial’ standards and requirements without resorting to ‘disproportionate’ primary legislation.

This committee skirmish indicates that legal technical deliberations about qualifying periods and other time-related provisions can be part of the common currency of political debate and legislative work. But more specifically, it suggests that time and form are intertwined in these legal technical deliberations; Parliamentary debate engages the *form* of the proposed qualifying period as much as its existence or length. In another related interpretation, however, this technical and pragmatic difference is about how each party, in deliberating over employment legislation, manages its own relationship to a fabricated set of regulatory futures. The stakes are different for each, and arguments over the technical expression of a qualifying period precisely embody these concerns.

With these considerations in mind, we can begin to discern where qualifying periods, as time-related provisions, appear in the overall legislative framework of family-friendly rights. Another way of putting this is to say that qualifying periods on leave are technically alive in the realm of secondary legislation only, despite being widely discernable and standardized within the overarching framework of family-friendly employment rights. Keeping the power to draft qualifying periods with the executive means that the power to legislate remains within the control of the governing party. And indeed, successive Secretaries of State have subsequently used similar powers gradually to expand the people and situations covered by the right to request flexible work and other family-friendly rights. Jill refers to this as a process of ‘incremental improvements’:

So the fact that things have been in secondary legislation have enabled the incremental improvements to happen more easily. Things like the expansion of the right to request, the increase in the upper age limit for the child and then it being given to everyone, the expansion of the paid period of leave or the extension of leave rights generally. (Policy expert)

As a sort of technical lubricant, then, qualifying periods provide a means for easing what are perceived to be complex dynamics in a shifting regulatory field. More specifically, it is largely through the formal characteristics of qualifying periods that they become useful to regulatory deliberations. Defining and bringing into force qualifying periods on leave through secondary legislation allows the executive to achieve things that they would not be able to do with primary legislation, including swiftly changing the periods if required. Time periods in secondary legislation can resolve complex policy issues, or provide the means for such issues to be resolved in the future, precisely because they can be more easily changed than provisions in primary legislation.

This is about the technical means by which secondary legislation works, and the powers available to the Secretary of State. But it is also about a prevailing view that time periods themselves are more amenable to change, more radically alterable, and that this quality of alterability has specific policy and pragmatic

uses. As this legislative drafter puts it, time periods expressed in weeks can be varied to meet policy and pragmatic concerns:

It's one thing that lends itself to variation. If something says the cooling off period will be 8 weeks, somebody could say, well I don't think consumers are adequately protected by that, therefore the cooling off period should be 12 weeks. Or somebody might say, well, 8 weeks is absurdly long, and people need certainty sooner than that, so it should be 4. (Legislative drafter)

In this drafter's account, shifting the time period itself directly responds to the problem of achieving a 'cooling off period' in consumer contracts. A quality or feature of time periods therefore seems to be that no matter how they are legally expressed, they reference a kind of alterability or sliding scale. Yet the capacity of the Secretary of State to change the time period without primary legislation gives the sliding scale its use, and this requires qualifying periods to be drafted as regulations.

5. Recipes for time

Following the 26-week qualifying period from policy debates through union activism to legislative drafters to MPs debating in Parliament, the question might be: how temporally alive are legal technicalities? What role, if any, does legal form have in the fabrication of new social experiences of time? To what extent can legal technicalities and legal form assist in enunciating new temporal genres through their non-human capacities to 'speak' (following Milyaeva, 2014) to human action, for example? In the worlds of legislative drafters, legal experts and politicians that have appeared in this paper so far, the question of whether qualifying periods have social effects is very difficult to distinguish from the formal dilemmas these people encounter with expressing law in such a way as to shape social relations. Drafters describe a world of intertextual precision, in which all avenues to meaning and interpretation must exist within the legislation itself or be present in an identifiable external source (such as another piece of legislation or in case law). The pace of reading becomes all-important to clarity. They speak of having to ensure that qualifying periods, like other provisions, *mesh* across legislation, evidencing the supreme importance of formal consistency to the continued reproduction of qualifying periods. Alongside concerns about the substantive rationale for qualifying periods, we find debates in standing committee over their replication between different legislative initiatives. Alongside differences over the length of the time period itself, we find debates about whether qualifying periods should be expressed in primary or secondary legislation, which in turn reference anxiety over the executive's capacity for future action.

The question of law's social effects often arises in conversations about whether law can be a 'means to an end', and, depending on the position one takes on this question, in turn, it is possible to have quite distinct views of law's temporal effects or role in social ordering. Annelise Riles engages with the Realist critique of law, which proposes that laws are tools for achieving goals *outside of* law itself (Riles, 2005, p. 1020). Counter-posing the Realist critique with an ethnographic vignette from her own experience teaching skills of legal argumentation, Riles shows that the idea that law is a means to an end (or tool) *itself* has become a specific tool that occupies legal practice (Riles, 2005, p. 1021). In conversation with Riles, Alain Pottage has proposed that scholarship on legal form and technique increasingly appreciates the aesthetics and expertise of legal technical work as an object of enquiry in itself, instead of merely a hurdle to explaining the social issues that law apparently expresses (Pottage, 2014, p. 149). Some legal anthropologists are engaged in what Pottage terms an 'ethnology of legal rhetoric'. Referencing and drawing on Marilyn Strathern's contributions to anthropology, Pottage describes this as an attention to the "non-epistemological" mobilization of knowledge as a tool or device' (Pottage, 2014, p. 149).

This direction of analysis resonates with legislative drafters' own understanding of many of their technical challenges. It is possible to understand qualifying periods as legal devices which act in ways that need not *solely* be characterized in terms of 'having social effects'. In the drafting and legislative processes constituting family-friendly rights, we can perceive something akin to a 'technical performance' (Pottage, 2014, p. 157), but specifically, here, a performance of *time*. As we have seen, legislative drafters conceive of time periods as inherently alterable and thus particularly capable of responding to changing social dynamics. Something about the time period allows drafters and the executive to imagine and create a system in which including a qualifying period within a broader legislative project renders the project more responsive to social dynamics. Yet this is where form comes in. Qualifying periods are subject to similar formal controversies as any other type of legal provision. More specifically, it is almost impossible to untangle the useful alterability of qualifying periods from the fact that they come into being as secondary legislation, which generally has a different relationship to Parliamentary scrutiny than does primary legislation. Both the alterability of time periods and the use of secondary legislation, therefore, are needed to achieve an adaptable stance to future executive dilemmas. In this sense, qualifying periods are something akin to what Pottage has termed 'recipes' (Pottage, 2014, pp. 152–153) for time, recipes that deploy specific legal forms and techniques, such as attention to pace of reading, the use of specific measures of time (weeks and not months) and consistency, alignment or 'meshing' (depending on one's perspective) across the legislation as a whole. Somewhere in these recipes, at the interface of 'making and knowing', qualifying periods conjure time and legal form as inextricable.

6. Concluding remarks

As a matter of law, time and timely considerations are just as much about form as anything else. Legal technicalities relating to time could be described as non-epistemological – i.e. they need not necessarily refer to time as a social effect of or context for law, instead conceiving of time as inextricable from legal form. Yet my argument is that these formal ‘recipes’ for time can and do travel and have effects. In turn, arguing that time is formal within legal conversations about family-friendly rights does not mean to say that this type of formalism is monolithic or static. As we have seen, the generic and even the more specific formal qualities of qualifying periods are the focus of controversy and deliberations by a range of legal technicians including legislative drafters, legal experts and MPs, few of whom appear consistently to agree with each other. For example, the reproduction of qualifying periods across larger legislative projects is variously interpreted as alignment, repetition, consistency and ‘meshing’ depending on one’s perspective and can be achieved in technically pluralist ways.

Following qualifying periods across their legal lives has much to tell us about the significance of time to the law of the standard employment relationship. In the area of family-friendly rights, at least, qualifying periods might appear less significant to the reproduction of norms of standard employment than, say, employment status, at least partly because qualifying periods tend to live in the secondary legislation and not in the primary legislation. Yet both the generic temporal openness of ‘duration’ in the enabling power and the more concrete delineation of a period of weeks in regulations opens the door to new executive horizons through a progressive move, through the legislation, from abstract to specific. Scattered across legislative projects, these apparently marginal yet uniquely alterable legal technicalities deploy time and form in the constant generative move to imagine, and remain open to, diverse regulatory futures.

Acknowledgements

Sincere thanks to Kate Bedford, Judy Fudge, Lydia Hayes, Leila Kavar, the interviewees and the anonymous reviewers for *Economy & Society* for extensive and very helpful comments on previous drafts. Any errors are my own.

Disclosure statement

No potential conflict of interest was reported by the author.

Funding

This work was supported by the Economic and Social Research Council [grant number ES/K001108/1].

Notes

1 Shared parental leave allows a couple or the parents of a child to share a mother's maternity or adoption leave. The right to request flexible work allows an employee to make a request to change their terms and conditions to accommodate flexing working.

2 Thank you to Judy Fudge for her clarifying feedback on this point.

3 *R (Seymour-Smith) v Secretary of State for Employment* (2000) UKHL; (1999) C-167/97. (See further Townshend-Smith, 2000.)

4 Public Bill Committee 23 April 2013, col 741.

5 Public Bill Committee 23 April 2013, col 743.

6 s164 Social Security Contributions and Benefits Act 1992.

7 Regulation 4 Paternity and Adoption Leave Regulations 2002/2788.

8 s171ZA Social Security Contributions and Benefits Act 1992.

9 Regulation 35 Shared Parental Leave Regulations 2014/3050.

10 Regulation 30 Statutory Shared Parental Pay Regulations 2014/3051.

11 Normally maternity and adoption leave do not feature a qualifying period, but if leave is shared then the period re-appears. See regulation 35(1)(a), Shared Parental Leave Regulations 2014/3050. If the mother (M) and the mother's partner or father of the child (P) intend to take shared parental leave (SPL) then they must each and both satisfy conditions. This means that if M takes SPL, she must satisfy conditions on her own behalf and P must also satisfy conditions for M to take leave. This applies vice versa for P. One of the conditions that both M and P must satisfy each on their own behalf to take SPL is that they must satisfy the continuity of employment test in regulation 35:

(1) For the purposes of entitlement to shared parental leave ... an employee satisfies the continuity of employment test if the employee—

(a) has been continuously employed with an employer for a period of not less than 26 weeks ending with the relevant week (see paragraph (3)); and

(b) remains in continuous employment with that employer until the week before any period of shared parental leave taken by the employee.

12 Although note that recent attention has been paid to the status of secondary legislation in the Strathclyde Review 2015 (Chancellor of the Duchy of Lancaster, 2015). Many thanks to a legislative drafter for clarifying this point.

13 A new legal journal considers various technical aspects of legislative drafting: *The International Journal of Legislative Drafting and Law Reform*. (See also McLeod, 2009.)

14 Thank you to a legislative drafter for clarifying this.

15 (1981) 1 WLR 1027.

16 For example, it covers the requirement of employment status to access rights relating to fixed-term work (HC Deb 27 November 2001, vol 375, col 865; 883).

17 HC Deb 27 November 2001 vol 375 col 930.

18 Many thanks to an anonymous reviewer for *Economy & Society* for pointing this out to me and pushing me to further consider its implications for the overall argument.

19 See article 3(b) Parental Leave Directive 96/34/EC and Explanatory Notes to the Employment Relations Act 1999.

20 See section 76 Employment Rights Act 1996, inserted by schedule 4 of the Employment Relations Act 1999. The qualifying period of one year was brought into force by the Maternity and Parental Leave etc. Regulations 1999 SI 1999/3312.

- 21 Regulation 4, Paternity and Adoption Leave Regulations 2002/2788.
- 22 In the context of what the Labour government could have provided (and what Hansard debates show was previously on the table) – a right to work *reduced* hours based on EU law – the technique of legislating to allow negotiation over *flexible* work was viewed by many as a missed opportunity, at best, and, at worst, an ill-defined compromise. As labour law scholars Claire Kilpatrick and Mark Freedland argued, the result was ‘a toothless right for a narrowly defined group’ (Kilpatrick & Freedland, 2004, p. 342).
- 23 The original proposed provision read as follows:
- (8) For the purposes of this section, an employee is—
- (a) a qualifying employee if he—
- (i) satisfies such conditions as to duration of employment as the Secretary of State may specify by regulations, and
- (ii) is not an agency worker;
- (b) an agency worker if he is supplied by a person (‘the agent’) to do work for another (‘the principal’) under a contract or other arrangement made between the agent and the principal.
- HC Deb 22 January 2002, col 578.
- 24 HC Deb 22 January 2002, col 581.
- 25 HC Deb 22 January 2002, col 608.
- 26 HC Deb 24 January 2002, col 625.
- 27 HC Deb 8 January 2002, col 403.

References

- Amoore, L. (2004).** Risk, reward and discipline at work. *Economy and Society*, 33(2), 174–196.
- Amoore, L. (2013).** *The politics of possibility: Risk and security beyond probability*. Durham, NC: Duke University Press.
- Anderson, B. (2010)** Preemption, precaution, preparedness: Anticipatory action and future geographies. *Progress in Human Geography*, 34(6), 777–798.
- Barnes, E. (1996).** NOTES: Public law, EC law and the qualifying period for unfair dismissal. *Industrial Law Journal*, 25(1), 59–63.
- Beynon-Jones, S. M. (2013).** Expecting motherhood? Stratifying reproduction in 21st-century Scottish abortion practice. *Sociology*, 47(3), 509–525.
- Bowker, G. C. & Star, S. L. (2000).** *Sorting things out: Classification and its consequences*. Cambridge, MA: MIT Press.
- Braun, B. (2015).** Governing the future: The European Central Bank’s expectation management during the Great Moderation. *Economy and Society*, 44(3), 367–391.
- Brown, N. & Beynon-Jones, S. M. (2012).** ‘Reflex regulation’: An anatomy of promissory science governance. *Health, Risk & Society*, 14(3), 223–240.
- Brown, N., Rappert, B. & Webster, A. (2000).** *Contested futures: A sociology of prospective techno-science*. Aldershot: Ashgate.
- Callon, M. (2009).** *Acting in an uncertain world: An essay on technical democracy*. Cambridge, MA: MIT Press.
- Chancellor of the Duchy of Lancaster. (2015).** *Strathclyde Review: Secondary legislation and the primacy of the House of Commons* (Cm 9177) [Electronic version]. London: HMSO.
- Conaghan, J. & Rittich, K. (Eds.). (2005).** *Labour law, work, and family: Critical and comparative perspectives*. Oxford: Oxford University Press.
- Department of Business, Innovation & Skills. (2011).** *Consultation on modern workplaces*. HM Government.

- Fredman, S. (2004).** Women at work: The broken promise of flexicurity. *Industrial Law Journal*, 33(4), 299–319.
- Freedland, M. R. & Kountouris, N. (2011).** *The legal construction of personal work relations*. Oxford and New York, NY: Oxford University Press.
- Fudge, J. & Owens, R. J. (2006).** *Precarious work, women and the new economy: The challenge to legal norms*. Oxford: Hart Publishing Limited.
- de Goede, M. (2012).** *Speculative security: The politics of pursuing terrorist monies*. Minneapolis, MN: University of Minnesota Press.
- de Goede, M. & Amooore, L. (2008).** Transactions after 9/11: The banal face of the preemptive strike. *Transactions of the Institute of British Geographers*, 33(2), 173–185.
- Grabham, E. (2016).** *Brewing legal times: Things, form and the enactment of law*. Toronto: University of Toronto Press.
- Grabham, E. (forthcoming).** What time (s) for resistance? ‘Newness’ and ‘fate-playing in precarious work’.
- James, G. & Busby, N. (2011).** *Families, care-giving and paid work: Challenging labour law in the 21st century*. Cheltenham: Edward Elgar.
- Kawar, L. (2014).** Making the machine work: Technocratic engineering of rights for domestic workers at the International Labour Organization. *Indiana Journal of Global Legal Studies*, 21(2), 483–511.
- Kilpatrick, C. & Freedland, M. R. (2004).** The United Kingdom: How is EU governance transformative? In *Employment policy and the regulation of part-time work in the European union: A comparative analysis* (pp. 299–357). Cambridge: Cambridge University Press.
- Latour, B. (2010).** *The making of law: An ethnography of the Conseil d’Etat*. Cambridge: Polity.
- McLeod, I. (2009).** *Principles of legislative and regulatory drafting*. Oxford: Hart Publishing Limited.
- Milyaeva, S. (2014).** Tipping the balance. *Journal of Cultural Economy*, 7(2), 209–225.
- Mitchell, G. (2015).** Encouraging fathers to care: The Children and Families Act 2014 and shared parental leave. *Industrial Law Journal*, 44(1), 123–133.
- Moreira, T., May, C. & Bond, J. (2009).** Regulatory objectivity in action: Mild cognitive impairment and the collective production of uncertainty. *Social Studies of Science*, 39(5), 665–690.
- Office of the Parliamentary Counsel. (2015).** Drafting Guidance.
- O’Malley, P. (2004).** *Risk, uncertainty and government*. London: Routledge.
- Peck, J. & Theodore, N. (2012).** Politicizing contingent work: Countering neoliberal labor market regulation ... from the bottom up? *South Atlantic Quarterly*, 111(4), 741–761.
- Pottage, A. (2014).** Law after anthropology: Object and technique in Roman law. *Theory, Culture & Society*, 31(2–3), 147–166.
- Riles, A. (2005).** New agenda for the cultural study of law: Taking on the technicalities. *Buffalo Law Review*, 53(3), 973–1033.
- Riles, A. (2008).** The anti-network: Private global governance, legal knowledge, and the legitimacy of the state. *American Journal of Comparative Law*, 56(3), 605–630.
- Riles, A. (2011).** *Collateral knowledge: Legal reasoning in the global financial markets*. Chicago, IL: University of Chicago Press.
- Sylvestre, M.-E., Damon, W., Blomley, N. & Bellot, C. (2015).** Spatial tactics in criminal courts and the politics of legal technicalities. *Antipode*, 47(5), 1346–1366.
- Townshend-Smith, R. (2000).** Recent case: Seymour-Smith – the closing stages. Case C-167/97. R v Secretary of State for Employment ex parte Seymour-Smith and Perez. *Industrial Law Journal*, 29(3), 296–304.
- Valverde, M. (2009).** Jurisdiction and scale: Legal ‘technicalities’ as resources for theory. *Social & Legal Studies*, 18(2), 139–157.
- Women and Equalities Committee. (2016).** Pregnancy and maternity discrimination, First Report of Session 2016–17.
- Working Families. (2013).** Children and Families Bill – Second reading briefing.

Emily Grabham is a Reader in Law at the University of Kent, United Kingdom. Her research interests include labour law, law and time, labour and value, and feminist legal theory. She pursues an interdisciplinary approach to legal studies, drawing on methods and perspectives from feminist legal theory, social anthropology, sociology and science and technology studies. She is the author of *Brewing legal times: Things, form and the enactment of law* (University of Toronto Press, 2016). With Dr Sian Beynon-Jones (sociology, York), Emily Grabham co-ordinates the *Regulating Time* AHRC (Arts and Humanities Research Council) scholarly network which investigates how law and regulation are shaped by dominant concepts of time. She has published in a wide range of journals including *Australian Feminist Studies*, *Body & Society*, *Social & Legal Studies*, *Oxford Journal of Legal Studies* and *Canadian Journal of Law & Society*.