

Parental Bereavement (Leave and Pay) Bill

Memorandum from the Department of Business, Energy and Industrial Strategy to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee by the Department for Business, Energy and Industrial Strategy, to assist with its scrutiny of the Parental Bereavement (Leave and Pay) Bill (“the Bill”). The Bill was introduced in the House of Commons on 19 July 2017. This memorandum identifies the provisions of the Bill (as amended) that confer powers to make delegated legislation. It explains in each case why the power has been included and explains the nature of, and the reason for, the procedure selected.

The Bill contains 27 individual provisions concerning delegated powers, of which one is a Henry VIII power. All powers in this Bill mirror, insofar as is possible, existing family related leave and pay entitlements.

The Department has considered the use of powers in the Bill as set out below and is satisfied that they are necessary and justified.

B. PURPOSE AND EFFECT OF THE BILL

The Bill aims to support both employers and employees at a difficult time by providing a clear framework within which employers can operate in respect to time off for bereavement, and time off for an employee to grieve without having to negotiate this at a particularly stressful time.

The Bill will introduce a new statutory entitlement to 2 weeks’ leave and pay, to ensure all employed parents have the opportunity to take time away from work to grieve, in the event of the loss of a child.

Under the proposal, employed parents who suffer the bereavement of a child aged under 18, including stillbirths, will be entitled to two weeks’ leave paid at the statutory flat rate (currently £145.18 a week) or 90% of average weekly earnings, where that is lower. The entitlement to leave will be a day one right, and the entitlement to pay in respect of that leave will be subject to a 26 week qualifying period. This is in line with other statutory payments for family related pay, e.g. Statutory Maternity Pay (although the rate is different for the first 6 weeks) and Statutory Paternity Pay.

C. DELEGATED POWERS

This memorandum deals with the provisions for delegated legislation in respect of the policy themes in the Bill, leave and pay.

The Bill contains 2 clauses, and one schedule which is in 3 parts. Part 1 of the Schedule addresses Parental Bereavement Leave, Part 2 addresses Parental Bereavement Pay and Part 3 addresses further amendments to do with parental bereavement leave and pay.

Insofar as is practicable, the Bill has mirrored the powers in existing family related leave and pay provisions to make equivalent or similar provisions in relation to parental bereavement. Where both negative and affirmative powers have been taken in the past for similar provisions, the Bill has adopted a cautious approach and proposes that the power should be affirmative.

The Government recognises that this is a sensitive issue and that where draft regulations address substantive questions of providing entitlement to time off work and pay, Parliament would appreciate and expect the opportunity to debate and consider draft regulations.

The Bill's approach of closely following existing precedent is a deliberate one. Employees will naturally hope that they never need to rely on the Bill's provisions. Employers will come across them only rarely: much more rarely than existing provisions for paternity leave and pay or for maternity leave and pay, for example. Given that, the Bill is based on the view that it is clearer and easier for employees and employers if the new provisions mirror existing ones rather than reconsidering the approach from first principles. So wherever the Bill makes provision that is effected through delegated powers in existing legislation to achieve the equivalent or a similar effect, that provision is drafted in similar terms in this Bill.

As time progresses the finer details of the policy will need to be updated to keep the framework for parental bereavement leave and pay aligned with other family-related leave and pay entitlements.

Part 1.

80EA – Parental Bereavement Leave

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative resolution

80EA(1) Requires the Secretary of State to make regulations creating the entitlement for a bereaved parent to be absent from work on leave.

80EA (2) and (3) Provides for the Secretary of State to specify the conditions which will require fulfilment in order for an employee to qualify for the entitlement to leave following the death of a child. This will allow 'bereaved parent' to be defined either by reference to a person's family or legal relationship with a child, or by reference to a relationship of care, or a mixture of both, so long as that relationship is 'parental' in nature.

This is required to enable provision to be made to accommodate a less traditional family set up. For example where a person is not a biological parent or does not have legal parental responsibility, but for all intents and purposes was an active 'parent' figure in the deceased child's life and fulfilled the role of parent over a number of years, it may be appropriate for them to also be entitled to take parental bereavement leave. The Government is consulting publicly on how this power should be used if the Bill is passed in its current form. The consultation is due to close on 8 June.

Existing legislative precedents (cited below) also leave the detailed definition of eligibility conditions to be defined in secondary legislation. However, in this instance the Bill does not directly mirror the approach taken in existing legislation to defining the eligibility of parental figures to paternity leave and pay or shared parental leave and pay, for example, because of a crucial difference in the nature of the entitlement. Paternity leave and pay can be taken only in the first 8 weeks after a child is born (or placed for adoption), and shared parental leave and pay only in the first year.

At this early stage it is appropriate for the father / partner's eligibility to be determined by relationship with the child's mother (or primary adopter). In the case of shared parental leave and pay, that is particularly so since the entitlement is 'created' by the mother's curtailment of her maternity entitlement (or the primary adopter's curtailment of adoption leave and/or pay). By contrast, parental bereavement leave and pay is intended to be available to parents whose child dies at any age up to 18. In these cases there is much greater scope for parents' relationships and the family unit to have broken and reformed, once or more frequently, by the time of the child's death. For this reason the Bill allows a 'bereaved parent' to be defined not just narrowly according to the employee's relationship with the child's mother, but more broadly (if appropriate) by reference to the employee's relationship with the child itself.

The Government anticipates that the detailed eligibility criteria are likely to need to change over time. The make-up of family units and social attitudes towards different parental relationships will continue to evolve. As a particular example, legislation on fostering and adoption is likely to continue to change and to change differently for England, Scotland and Wales since this is an area of devolved competence. As the parental bereavement leave and pay provisions will apply across Great Britain, the provision needs to be able to adapt to reflect the fostering and adoption rules as they are set by the respective legislatures.

Precedent for similar delegation can be found in the Employment Rights Act 1996 Part VIII Chapter 3 Sections 80A&B – Paternity Leave, and Employment Rights Act 1996 Part VIII Chapter 1B Sections 75E&G, Shared Parental Leave.

80EA(4-6) Requires the Secretary of State to specify the duration of leave a parent can take in respect of a child, subject to a minimum of 2 weeks, and the period within which leave is to be taken, subject to a minimum of 56 days.

This provision mirrors existing leave entitlements as much as possible, and in this case paternity leave has the most similarities, although the reason for taking bereavement leave is distinctly different and therefore requires consideration of more factors when setting the time frame in which to take the leave. As set out in the Government's current consultation on this question, considerations include processes such as inquests, coroners' reports and delays in being able to bury the deceased child. These processes can take some months, so the way in which the power is exercised may need to be different from that taken so far for paternity leave and pay. These factors may change over time as the rules and operational practices governing these processes change and if there is evidence that circumstances have changed it may be necessary to increase the period of leave.

Precedent for this delegation can be found in the Employment Rights Act 1996 Part VIII Chapter 3 Sections 80A&B – Paternity Leave, and Employment Rights Act 1996 Part VIII Chapter 1B Section 75E, Shared Parental Leave.

80EA(7) Requires the Secretary of State to secure that, if someone becomes entitled to leave as a result of the death of more than one child, the leave entitlement applies in respect of each individual child. If two children died at the same time, for example in a car accident, a parent would be entitled to leave in respect of both children.

Precedent for this delegation can be found in the Employment Rights Act 1996 Chapter 3 Sections 80A&B – Paternity Leave (this measure has the opposite effect in that it only allows one lot of leave irrespective of the number of children born), and Employment Rights Act 1996 Chapter 1B Sections 75E&G Shared Parental Leave.

80EA(8) Allows the Secretary of State to specify how the leave should be taken. The intention is to create a framework which can respond to the changing needs of parents, but without creating significant disruption to the business. The regulations will therefore determine whether the leave should be taken in a single block, or two individual blocks of a single week. It will be necessary to adapt the details of this framework in future. For example, one of the factors to be considered on this issue involves the practicalities of employers reclaiming pay from HM Revenue & Customs through the National Insurance system. It may be that future developments in the IT and wider system supporting National Insurance could make it easier to offer more support to parents.

Precedent for this delegation can be found in the Employment Rights Act 1996 Part VIII Chapter 1B Sections 75F(8)&75H(8) Shared Parental Leave and Chapter 1B Section 80A(5)(c) and 80B(5)(d) Paternity Leave.

80EB(1) enables regulations made under section 80EA to prescribe (a) the purposes and extent of protection, (b) the purposes and extent of maintaining employee's obligations and (c) the kind of job to which the employee can return after leave.

80EB (4) allows the regulations to specify things which do, or do not, constitute 'remuneration' for the purposes of 80EB(3), which provides that the 'terms and conditions' which are protected during bereavement leave do not include terms and conditions relating to remuneration.

80EB(5) allows the regulations to make provision for what protection is to be given in relation to seniority, pension and similar rights, and terms and conditions on an employee's return to work.

The intention is to ensure that the employee is afforded an equivalent level of protection as is given in relation to existing similar leave rights e.g. paternity leave or shared parental leave, without unduly favouring those exercising one entitlement over those exercising another. For example, if the parental bereavement leave is taken in a single block of two weeks as a stand-alone provision, an employee would expect to return to the job they had before the leave. If however, the leave is taken

immediately following additional maternity leave, for example, it would be more logical for the same rule to apply as for additional maternity leave, i.e. that the mother is entitled to return to the same *or a similar* job.

The rules here will depend partly on length of the window within which to take the leave, which is currently subject to consultation and is also subject to a delegated power.

Precedent for this delegation can be found in the Employment Rights Act 1996 Part VIII, Chapter 1 Section 71-73, Maternity Leave, Chapter 1A Section 75A&B, Adoption Leave, Chapter 3 Paternity Leave Section 80C and Chapter 1B Section 75I Shared Parental Leave.

80EC (1) & (2) allow regulations made under section 80EA to make provision for redundancy and dismissal during a period of bereavement leave, and this can include requiring employers to offer alternative employment and making provision for consequences for a failure to comply with the regulations. This will also allow regulations to provide for a dismissal as a result of taking leave under these circumstances to be treated as automatically unfair for the purposes of the law on unfair dismissal.

Taking a power to set this out through secondary legislation is consistent with existing family leave entitlements. Again, the Government's intention is to ensure that the employee is afforded an equivalent level of protection as is given in relation to existing similar leave rights e.g. paternity leave or shared parental leave, without unduly favouring those exercising one entitlement over those exercising another.

Precedent for this delegation can be found in the Employment Rights Act 1996 Part VIII, Chapter 1 Section 71-73, Maternity Leave, and Chapter 1A Section 75A&B, Adoption Leave and Chapter 3 Section 80D, Paternity Leave and Chapter 1B Section 75J, Shared Parental Leave.

80ED – Supplemental

80ED allows regulations made under section 80EA to set out specifics about notice periods, evidence to be produced, record keeping and other procedures to be followed by both employer and employee in respect of the leave. Regulations may also set out the consequences in respect of failing to adhere to the requirements created under this section.

As explained in the Government's consultation document, setting the rules here in respect of notice requirements before taking parental bereavement leave will be heavily dependent on how the regulations deal with the window within which to take the leave. The sooner after the death of the child that the leave is taken, the less justification there is to require the employee to give notice in advance to the employer – and *vice versa*. The Government is not expecting the provision for parental bereavement leave and pay to be especially susceptible to fraud or abuse. The power to tweak the scheme in relation to these requirements may be needed in future to close particular loopholes if evidence emerges that they are being used to abuse the entitlement.

80ED also allows regulations to make provision for cases where an employee has parallel contractual and statutory rights to leave, for a week's pay and consequential provision and different provision for different cases or circumstances.

Taking a power to set this out through secondary legislation is consistent with existing family leave entitlements.

Precedent for this delegation can be found in the Employment Rights Act 1996 Part VIII, Chapter 1 Section 75, Maternity Leave, Chapter 1A Section 75D, Adoption Leave, Chapter 1B Section 75K, Shared Parental Leave and Chapter 3 Section 80E, Paternity Leave.

80ED also allows regulations made under section 80EA to apply, modify or exclude an enactment, in circumstances and under conditions to be specified, in relation to a person entitled to statutory parental bereavement leave (Henry VIII power). This replicates the same power which exists in the statutory provisions relating to maternity leave, adoption leave, paternity leave and shared parental leave (sections 75(1)(f), 75D(1)(f), 80E(1)(g) and 75K(1)(g) of the Employment Rights Act 1996, respectively) and is of course subject to the affirmative procedure.

In relation to maternity, adoption, paternity and shared parental leave, the power has been exercised in relation to situations where an employee is simultaneously entitled to both the statutory right and a corresponding contractual right. In those circumstances, an employee cannot exercise the rights separately but is entitled to take advantage of whichever right is, in any particular respect, the more favourable right. While this approach has so far been consistently applied to existing entitlements, the regulations might need to change in future if evidence emerged that it was either unclear or somehow ineffective in the case of employees with particular contractual entitlements. If so, then it would be important to be able to reflect the same changes in parental bereavement leave as for other types of family-related leave and pay.

The approach to the drafting of these provisions has been to mirror insofar as possible, the scheme adopted by the four existing family leave right provisions. Consistency with a long standing and familiar set of statutory provisions reduces the burden on businesses of familiarisation and compliance with new employment law obligations. If a different drafting approach were taken in order to avoid the need for a Henry VIII power – for example, relying exclusively on draft new sub-section 80ED(e) – then this might be interpreted as an intentionally substantive departure from the scheme adopted in the four existing family leave rights which must therefore have different effect. This could leave the provision vulnerable to challenge at Tribunal, based on an argument that subsection (e) did not provide sufficient vires to make equivalent provision.

Part 2.

Parental Bereavement Pay

171ZZ6 - Entitlement

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative resolution

171ZZ6 (3) and (4) provide for the Secretary of State to set the conditions a person needs to meet, in respect of their relationship to the child prior to the child's death, in order to qualify for parental bereavement pay. Those conditions can be framed, either completely or partially, by reference to a relationship of care between the bereaved person and the child.

This delegation mirrors the power earlier in the Schedule (at new section 80EA(2-3) of the Employment Rights Act 1996) in relation to leave. The same reasons for needing a delegated power apply.

Precedent for this delegation can be found in the Social Security Contribution and Benefits Act 1992 Part XII ZC Sections 171U&V Shared Parental Pay, and Part XII ZA Sections 171ZA&B Paternity Pay.

171ZZ7 – Entitlement: supplementary

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative resolution

171ZZ7(2) allows the Secretary of State to set the timings a person will be required to adhere to in respect of the notice needing to be given in respect of any pay for the entitlement.

This is intrinsically linked to the question of whether the employee is required to give notice before taking leave, which is part of the delegated power earlier in the Schedule (at new section 80ED of the Employment Rights Act). The same reasons apply for needing a delegated power.

Precedent for this delegation can be found in the Social Security Contribution and Benefits Act 1992 Part XII Section 171U&V Shared Parental Pay, and 171ZC Paternity Pay.

171ZZ7(4) allows the Secretary of State to make regulations dealing with a number of general provisions relating to an employee's entitlement to statutory parental bereavement pay. It allows for:

- the conditions relating to earnings and employment to be modified in particular circumstances;
- the requirement for notice to be modified or disapplied in set circumstances;
- requirements to be imposed about evidence of entitlement or procedures to be followed;
- a person to be treated as having a continuous period of employment and to aggregate periods of service accrued under separate contracts;
- aggregation of amounts earned under separate contracts with the same employer for the purpose of meeting the earnings condition; and

- specification of the manner or basis on which a person's earnings are to be calculated or estimated for the purposes of meeting the earnings condition.

This follows the same process used for defining these points for other family leave entitlements and setting this out through secondary regulation is a consistent approach. To ensure that the scheme keeps pace with other changes in the statute book, practices in the workplace and society, the power is necessary to ensure the provision for family bereavement pay stays aligned with other entitlements whenever

Precedent for this delegation can be found in the Social Security Contribution and Benefits Act 1992 Part XII Section 171ZW Shared Parental Pay, and 171ZC Paternity Pay.

171ZZ8 – Liability to make payments

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative resolution

171ZZ8 (2) requires the Secretary of State to make provision about a former employer's liability in the event they terminate an employee's contract as a way to try to avoid paying statutory bereavement pay and try to avoid liability through that action.

171ZZ8 (3) allows the Secretary of State to set the conditions under which Her Majesty's Revenue and Customs Commissioners will be liable to make payments of statutory parental bereavement pay.

Setting this out through secondary regulation is an approach consistent with existing family leave entitlements. If in the future the approach taken with existing entitlements proved to be insufficiently effective in preventing avoidance, then it would be important to be able to amend the provisions without recourse to primary legislation, in line with other family pay entitlements.

Precedent for this delegation can be found in the Social Security Contribution and Benefits Act 1992 Part XII Section 171ZX Shared Parental Pay, and 171ZD Paternity Pay.

171ZZ9 – Rate and Period of Pay

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative resolution

171ZZ9 (1) allows the Secretary of State to set the rate of pay, either as a fixed or an earnings-related amount, as well as prescribe different rates for different cases, in respect of parental bereavement pay.

This enables the rate of pay to be amended on a regular basis to reflect changing prices, as is the case with existing entitlements. It is also necessary to ensure that should a policy change be made in terms of the rate of pay, for example in the light of new evidence, the rate of statutory bereavement pay as well as for other statutory payments can be amended without the need for primary legislation.

Precedent for this delegation can be found in the Social Security Contribution and Benefits Act 1992 Part XII Section 171ZN Adoption Pay, 171ZY Shared Parental Pay, and 171ZE(1) Paternity Pay.

171ZZ9 (2) and (3) provide for the Secretary of State to specify the number of weeks for which statutory parental bereavement pay is payable and set out that this should be not less than two weeks.

This is necessary to align with the equivalent provision for leave (new section 80EA(4)(b) and(5) of the Employment Rights Act 1996). The same reasons apply as to the need for a delegated power.

Precedent for this delegation can be found in the Social Security Contribution and Benefits Act 1992 Part XII Section 171ZU&V Shared Parental Pay, and 171ZE Paternity Pay.

171ZZ9 (4) and (5) allow the Secretary of State to specify that a person eligible for statutory parental bereavement pay, may choose to receive the payments for non-consecutive weeks, and to set the period within which pay must be claimed, which must be a minimum of 56 days from the date of the death of the child.

This will be required to complement the provision on how and when bereavement leave can be taken (new section 80EA(4)(b), (6) and (8) of the Employment Rights Act).

Precedent for this delegation can be found in the Social Security Contribution and Benefits Act 1992 Part XII Section 171ZE Paternity Pay.

171ZZ9 (8) allows the Secretary of State to specify exceptions to the rule that a person cannot continue to claim statutory parental bereavement pay while performing work for an employer who is not liable to make payments of parental bereavement pay to them.

171ZZ (9) allows the Secretary of State to specify circumstances where there will be no liability for payment of statutory bereavement pay in respect of a statutory pay week.

Setting out this and the other provisions under 171ZZ9 through secondary regulation is an approach consistent with existing family leave entitlements. As elsewhere, it is important to be able to change the provision for family bereavement pay at the same time as making any changes to the regulations in relation to existing entitlements, for example in response to evolving practices in the workplace.

Precedent for this delegation can be found in the Social Security Contribution and Benefits Act 1992 Part XII Section 171ZE Paternity Pay, and 171ZY Shared Parental Pay.

171ZZ11 – Relationship with contractual remuneration

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

171ZZ11 (3) allows regulations to specify payments made to an employee which are to be treated as contractual remuneration for the purposes of statutory parental bereavement pay, and payments which are not.

Taking a power to set this out through secondary regulation is an approach consistent with existing family leave entitlements. Litigation on the meaning of 'remuneration' in relation to existing entitlements appears to have created some uncertainty among employers.

Precedent for this delegation can be found in the Social Security Contribution and Benefits Act 1992 Part XII Section 171ZG Paternity Pay, and 171ZZ1 Shared Parental Pay.

171ZZ13 – Special classes of person

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

171ZZ13 - allows the Secretary of State, with the concurrence of the Treasury, to make special provision in relation to those who are, have been or are to be employed on board any ship, vessel, hovercraft or aircraft; are outside of Great Britain at any time or in any prescribed circumstance; or are in prescribed employment in connection with continental shelf operations. In relation to these categories of employees, the Secretary of State can modify any provision of this Part as is thought proper. He can also apply or disapply any provision in this Part where, unless specified, it would, or would not, otherwise apply; and he can except from the application of any provision those employees within these categories who are not domiciled or have no place of residence in any part of Great Britain. He can also make provision for consular officials, or other designated people, to take evidence abroad for the purposes of deciding any question arising out of those provisions.

This is necessary to ensure that the rights afforded to those working offshore and in other special circumstances remain in step with other aspects of employment law. This is a complicated area in which practice in industry changes over time. Taking a power to set this out through secondary legislation is an approach consistent with existing family leave entitlements and will allow changes where necessary in the future without the need for further primary legislation.

Precedent for this delegation can be found in the Social Security Contribution and Benefits Act 1992 Part XII Section 171ZI Paternity Pay, and 171ZZ3 Shared Parental Pay.

171ZZ14 – Supplementary

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

171ZZ14 (3) allows regulations to specifically exclude a person who would ordinarily fit into the category of employee from the entitlement to parental bereavement pay, or to include one who would not.

171ZZ14 (4) allows regulations to specify cases where two or more employers are to be treated as one, and two or more contracts of service in respect of an employee are to be treated as one, for the purposes of all or part of the provisions on parental bereavement leave.

171ZZ14 (5) defines a ‘week’ as beginning on a Sunday, but gives the Secretary of State the power to modify this in particular cases.

171ZZ14 (7) and (8) allows the meaning of ‘earnings’ and ‘relevant period’, which are used to calculate someone’s ‘normal weekly earnings’ for the purposes of meeting the earnings condition for eligibility, to be defined in regulations, and for the calculation of a person’s normal weekly earnings to be prescribed in regulations.

171ZZ14 (9), (10) and (11) allows regulations to be made which enable a person whose contract of employment has been divided following the establishment of an NHS Trust in Wales to elect for all their contracts to be treated as one for the purposes of parental bereavement pay. The regulations may set out the conditions to be satisfied before a person is allowed to make such an election, and can specify when and how an election can be made; who should be notified of it and how; the information which must accompany such an election and to whom it should be given; and the time periods within which these things must be done. They can also specify the time for which an election has effect, and which of the employers is to be regarded as the employer for the purposes of parental bereavement pay

The powers in 171ZZ14(4), (5), and (7)-(10) must all be exercised with the concurrence of the Commissioners for Her Majesty’s Revenue and Customs. Taking powers to set these provisions out through secondary regulation is an approach consistent with existing family leave entitlements. It enables the provisions to be updated in light of wider statutory changes or evolving employment practice.

Precedent for these delegations can be found in the Social Security Contribution and Benefits Act 1992 Part XII Section 171ZJ Paternity Pay, and 171ZZ4 Shared Parental Pay.

Department for Business, Energy and Industrial Strategy

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