

Neonatal Care (Leave and Pay) Bill

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

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Neonatal Care (Leave and Pay) Bill (“the Bill”), as introduced in the House of Lords on 23 January 2023. This memorandum identifies the provisions of the Bill that confer delegated powers. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.
2. The Bill contains 22 delegated powers, of which one includes a Henry VIII power. The powers in this Bill mirror, insofar as is possible, the approach in existing family related leave and pay entitlements legislation. These have been on the statute book for some time and are well understood by employers and the legal community, and a similar approach was taken in the Parental Bereavement Leave and Pay Private Members Bill.
3. At House of Commons introduction, the Delegated Powers Memorandum referred to 25 provisions concerning delegated powers within the Bill. This memorandum clarifies that the number of delegated powers is 22 (of which one is a Henry VIII power). This is because one of the delegated powers (for the Secretary of State to make regulations relating to Neonatal Care Leave in section 80EF) is referred to in multiple provisions including at sections 80EG, 80EH and 80EI.
4. The Bill was amended at Commons Committee Stage to remove a second Henry VIII power, changing this to a power to amend secondary legislation only.
5. 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

6. The Conservative Party Manifesto in 2019 stated that “we will legislate to allow parents to take extended leave for neonatal care, to support those new mothers and fathers who need it during the most vulnerable and stressful days of their lives”.
7. In March 2020, following a public consultation, Government committed to introducing a new entitlement to Neonatal Care Leave and Pay to allow parents to take additional time off work in circumstances where their child is admitted to neonatal care, ensuring they are no longer in the difficult position of having to choose between risking job loss and spending time with their baby.

8. The Bill will allow eligible parents to take up to 12 weeks of paid leave on top of their other parental entitlements such as Maternity and Paternity Leave. Under these proposals, Neonatal Care Leave will be a 'day one' right, meaning that it will be available to an employee from their first day in a new job. Statutory Neonatal Care Pay, like other family-related pay rights, will be available to those employees who meet continuity of service and minimum earnings tests and will be paid at the statutory flat rate (currently £156.66 a week or 90% of average weekly earnings, whichever is lowest). 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 six weeks) and Statutory Paternity Pay.
9. Statutory Neonatal Care Leave and Pay will be available to employed parents of babies who are admitted into hospital up to the age of 28 days, and who have a continuous stay in hospital of seven full days or more.

C. DELEGATED POWERS

10. This memorandum deals with the provisions for delegated legislation in respect of the policy themes in the Bill, leave and pay.
11. The Bill contains one schedule which is in three parts.
12. 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 neonatal care. 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.
13. 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 through the affirmative procedure.
14. The Bill's approach of closely following existing precedent is deliberate and carefully considered. It is to assist ease of understanding for those who will make use of the provisions. 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 deals with matters which are affected through delegated powers in existing legislation to achieve the equivalent or a similar effect, that provision is drafted in similar terms in this Bill.

15. Flexibility might also be needed in future in order to keep the framework for Neonatal Care Leave and Pay aligned with other family-related leave and pay entitlements. If Government included certain provisions that usually reside in secondary legislation on the face of the Bill, then it would limit our ability to respond to new evidence, particularly where it was identified that certain delegated provisions did not work well in dealing with a specific type of case. In this event, Government may also want to consider making changes to the equivalent provision across all relevant types of family-related leave and pay.

A summary of the delegated powers are:

Reference	Power
Part 1, Clause 2 (1)	This power that enables the Secretary of State to make consequential amendments to secondary legislation.
Part 1, Clause 3 (3)	This power enables the Secretary of State to decide the appointed day that these regulations will be commenced.
<p>Schedule 1, paragraph 2, new section 80EF</p> <ul style="list-style-type: none"> <li data-bbox="256 1361 667 1435">• Schedule 1, paragraph 2, new section 80EG <li data-bbox="256 1872 667 1946">• Schedule 1, paragraph 2, new section 80EH 	<p>This provides that regulations must be made to create an entitlement to Neonatal Care Leave for employees who satisfy certain conditions. The regulations must also set out detail around the Neonatal Care Leave entitlement including in relation to eligibility, duration, extent and timing, as well as defining the term 'neonatal care'.</p> <ul style="list-style-type: none"> <li data-bbox="762 1361 1401 1704">• This provides that the regulations under section 80EF must provide for employers and employees to continue to be bound by terms and conditions of employment while they are on Neonatal Care Leave (for purposes, and to the extent, prescribed), and for employees to have the right to return to a job of a kind set out in the regulations. <li data-bbox="762 1906 1401 2134">• This allows regulations made under section 80EF to make provision for redundancy during or after, and dismissal during, a period of Neonatal Care Leave, and this can include requiring employers to offer alternative

<ul style="list-style-type: none"> Schedule 1, paragraph 2, new section 80EI (Including paragraph 80EI (h) – Henry VIII power) 	<p>employment and making provision for consequences for a failure to comply with the regulations.</p> <ul style="list-style-type: none"> This allows the regulations made under section 80EF to address multiple different scenarios including procedural requirements, the consequences of failing to follow requirements in this section, and how different circumstances may affect Neonatal Care Leave and Pay. This provides that the regulations may make provision applying, modifying or excluding existing legislation under certain conditions in relation to a person entitled to take leave.
<p>Schedule 1, paragraph 5, new section 171ZZ16(2) SSCBA.</p>	<p>This provides that regulations can be made prescribing conditions as to a parental or other personal relationship with a child which, if other conditions are also met, will entitle a person to Neonatal Care pay.</p>
<p>Schedule 1, paragraph 5, new section 171ZZ16(3) SSCBA.</p>	<p>This provides that regulations can be made specifying that a person would not be entitled to Neonatal Care Pay if they did not remain in the employment of the same employer from the end of the relevant week until the time at which they wish to claim pay.</p>
<p>Schedule 1, paragraph 5, new section 171ZZ16(4) SSCBA.</p>	<p>This allows regulations to define the phrase 'neonatal care'. Further detail on what these regulations can include is set out in new section 171ZZ16(5).</p>
<p>Schedule 1, paragraph 5, new section 171ZZ17(2) SSCBA.</p>	<p>This allows regulations to be made specifying the time by which notice must be given in order for a person to claim statutory Neonatal Care Pay.</p>
<p>Schedule 1, paragraph 5, new section 171ZZ17(4) SSCBA.</p>	<p>This allows regulations to be made addressing various other details of the entitlement to Neonatal Care Pay.</p>
<p>Schedule 1, paragraph 5, new section 171ZZ18(2) SSCBA.</p>	<p>This requires regulations to be made addressing circumstances in which a former employer will remain liable for statutory Neonatal Care Pay.</p>
<p>Schedule 1, paragraph 5, new section 171ZZ18(3) SSCBA.</p>	<p>This allows for regulations to be made specifying circumstances where liability for statutory Neonatal Care Pay will lie with HRMC.</p>

Schedule 1, paragraph 5, new section 171ZZ19(1) SSCBA.	This allows for regulations to specify the rate of statutory Neonatal Care Pay.
Schedule 1, paragraph 5, new section 171ZZ19(2).	This allows for regulations to specify when Neonatal Care Pay is payable. Further detail on what can and must be included in these regulations is set out at new section 171ZZ19(3) – (5).
Schedule 1, paragraph 5, new section 171ZZ19(8).	This allows for regulations to be made providing an exception to the rule that statutory Neonatal Care Pay is not payable during a week when a person works for another employer who is not liable to pay them Neonatal Care Pay.
Schedule 1, paragraph 5, new section 171ZZ19(9).	This allows for regulations to specify circumstances in which there will be no liability to pay statutory Neonatal Care Pay in respect of a particular week.
Schedule 1, paragraph 5, new section 171ZZ21(3).	This allows for regulations to be made addressing which payments should and should not be treated as contractual remuneration.
Schedule 1, paragraph 5, new section 171ZZ23(1).	This allows for regulations to be made modifying the regime for statutory neonatal care pay for those employed on board ships, vessels, hovercrafts or aircrafts, outside of Great Britain, or in prescribed employment in connection with continental shelf operations. Further detail on what these regulations can include is set out in new section 171ZZ23(2).
Schedule 1, paragraph 5, new section 171ZZ24(3).	This allows for regulations to be made excluding or including people in the definition of employee for the purposes of statutory Neonatal Care Pay.
Schedule 1, paragraph 5, new section 171ZZ24(4).	This allows for regulations to specify cases in which two or more employers or contracts of service are to be treated as one.
Schedule 1, paragraph 5, new section 171ZZ24(5).	This allows regulations to prescribe a different meaning of ‘week’ for particular cases or classes of cases.
Schedule 1, paragraph 5, new section 171ZZ24(7).	This allows for regulations to define the words ‘earnings’ and ‘relevant period’.
Schedule 1, paragraph 5, new section 171ZZ24(8).	This allows for regulations to set out how to calculate a person’s “normal weekly earnings”.
Schedule 1, paragraph 5, new section 171ZZ24(9)	This allows regulations to enable certain National Health Service contracts of employment, which under a scheme are divided to constitute two or more contracts, to be treated as one contract.

16. The powers are drawn as narrowly as possible, and we have clearly demonstrated the intentions of the Ministers when using them.

17. The divisions of these powers between the different sections of the Bill are:

Part 1, Clause 2 (1)

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative procedure.

Context and purpose

18. This is a power to make consequential amendments to secondary legislation.

Justification for taking the power

19. The purpose of this power is to enable the Secretary of State to amend existing legislation in order to ensure that this Bill, if successful in gaining Royal Assent, successfully works alongside existing legislation and achieves its policy aims.

Justification for the procedure

20. Regulations made under clause 2(1) will be subject to the negative procedure. The Department considers that this is appropriate due to the discrete issue covered by these regulations.

Part 1, Clause 3 (3)

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: No Parliamentary Procedure

Context and purpose

21. The purpose of this power is to decide the appointed day for the commencement of sections 1 and 2 of the schedule.

Justification for taking the power

22. This legislation amends other leave entitlements and so should be commenced when it can also be implemented. Implementation requires the development of a system for administering pay.

23. A delegated power to prescribe this date avoids the need to try and predict the date at this time as to when all the preparatory work for Neonatal Care Leave and Pay will be complete.

Justification for the procedure

24. The Department considers that the lack of procedure is appropriate. The effect of the regulations is to commence the legislation that Parliament will already have scrutinised.

Powers under Part 1 of the Schedule
80EF – Neonatal Care Leave

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative resolution

Context and Purpose

25. **80EF(1)** Requires the Secretary of State to make regulations creating the entitlement for an employee with a prescribed parental or personal relationship with a child who is receiving, or has received, neonatal care to be absent from work on leave.
26. It also provides for the Secretary of State to specify the conditions which require fulfilment in order for an employee to qualify for the entitlement to leave following their child receiving, or having received, neonatal care. This will allow the eligible 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' or 'personal' in nature. This is required to enable provision to accommodate all those who spend a proportion of their existing family leave rights caring for the baby in the hospital, for example Maternity, Paternity or Shared Parental Leave. Given this eligibility criteria, it may be appropriate for some employees who are not a biological parent to also be entitled to take Neonatal Care Leave and pay, such as adopters and intended parents in a surrogacy arrangement.
27. **80EF(2), (3) and (4)** require the Secretary of State to specify the duration of Neonatal Care Leave a parent can take and when leave is to be taken.
28. However, this power is limited as 80EF(3) requires the regulations to provide for a minimum of one week of leave and Clause 80EF(4) ensures that regulations allow at least a period of 68 weeks from a child's birth in which the leave can be taken. This provision takes into consideration many factors when setting the time frame in which to take the leave. These include that the employee must have finished their Maternity, and where possible, Paternity or Shared Parental Leave prior and any Parental Bereavement Leave before Neonatal Care Leave and Pay can be taken. A parent has up to 56 weeks to take their Parental Bereavement Leave, this entitlement adds 12 weeks to this to enable a parent to take the full 12 weeks of Neonatal Care Leave and Pay following the 56 weeks available to take any Parental Bereavement Leave they are eligible for.
29. **80EF(6) and (7)** enables regulations to specify what is meant by 'Neonatal Care'. This is limited in that it must be care of a medical or palliative nature, and must begin within 28 full days of the child's birth. The regulations may also specify a kind of care by reference to the kind of place at which care is

provided. The intention is to capture different types and environments where neonatal care may be received. Beyond inpatient admission to a hospital unit, this may include hospital outreach programmes, palliative care or at home care; or a combination of some of these forms of care.

30. **80EF (8)** enables regulations to make provisions on how the leave under this section may be taken, which may enable leave to be taken in non-consecutive week-long blocks.

Justification for taking the power

31. For **80 EF(1)** there are existing legislative precedents (cited below) which leave the detailed definition of eligibility conditions to be defined in secondary legislation. In this instance the Bill does directly mirror the approach taken in existing legislation to defining the eligibility of parental figures to Maternity Leave and Pay or Paternity Leave and Pay, for example, because of the nature of the entitlement. Neonatal Care Leave and Pay is intended to be available to parents whose child has received, or is receiving, neonatal care. For these reasons the definition must be linked to the employee's relationship with the child.
32. Furthermore, this issue needs to be dealt with through secondary legislation because 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, so the flexibility is needed for the statutory provision to adapt to these changes over time without recourse to further primary legislation – within the clear overall direction set in the Bill. 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 Neonatal Care 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.
33. Precedent for similar delegation can be found in the Employment Rights Act 1996 Part VIII Chapter 3 Sections 80A & 80B – Paternity Leave, and Employment Rights Act 1996 Part VIII Chapter 1B Sections 75E & 75G, Shared Parental Leave, Employment Rights Act, Chapter 4 Section 80EA Parental Bereavement Leave.
34. The provisions under **80EF(2), (3) and (4)** are factors that may change over time as the rules and operational practices governing these processes change. Therefore, the Department considers it necessary to build in the flexibility to reconsider the period in which leave can be taken at a later date if there is evidence that circumstances have changed. As noted above, this power is limited. However, if evidence emerges that a minimum of one week is

inadequate to meet the objectives of the measure, the flexibility may be necessary to increase the period of leave without further recourse to primary legislation. This may also be true if the maximum period of 68 weeks to take Neonatal Care Leave after the child's birth does not sufficiently meet the objectives of the measure.

35. 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, and Employment Rights Act, Chapter 4 80EA Parental Bereavement Leave.

36. The provisions under **80EF(6)** and **(7)** allow for the fact that over time, with modern advances in medicine and societal change in where and what care can be provided, the regulations will ensure that changes can be made to incorporate different qualifying care provisions.

37. The provision under **80EF(8)** mirrors the approach taken in Shared Parental Leave and Pay (12 – 16 of the Shared Parental Leave Regulations 2014). It ensures that Government has flexibility to respond to any new evidence on whether the approach may be limiting the impacts of the policy and amend how the leave can be taken to account for any new leave entitlements.

Justification for the procedure used

38. Regulations made under **80EF** will be subject to the affirmative resolution procedure. The Department considers that this is appropriate due to the level of detail that may be set out in the regulations and the impact this will have on the application of the leave entitlement.

39. The affirmative resolution procedure will ensure that Parliament has the opportunity to debate the matters as they are set out.

80EG Rights during and after neonatal care leave

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative resolution

Context and Purpose

40. **80EG(1)** establishes a requirement for regulations made under 80EF to provide for employees on leave to continue to benefit from and be bound by their terms and conditions of employment and for employees to be entitled to return from their leave to a job of a kind prescribed by the regulations.

41. **80EG(2)** provides additional prescription for what should be included in regulations made under 80EG(1). This includes ensuring that absence on leave under section 80EF includes continuous leave where another family-related leave entitlement is taken before or after Neonatal Care Leave. Other types of family-related leave specified are Maternity Leave, Paternity Leave, Adoption Leave, Shared Parental Leave, Parental Leave and Parental Bereavement Leave. 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.
42. **80EG (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 Neonatal Care Leave do not include terms and conditions relating to remuneration.
43. **80EG(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.

Justification for taking the power

44. The provisions under **80EG** are likely to be extensive and similar to those for other family-related leave entitlements. This will ensure that employers and employees have consistency across similar leave rights which will in turn help to ensure their understanding.
45. It is also important that employees and employers are 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.
46. There is precedent for this delegation in other family-related leave entitlements. These can be found in the Employment Rights Act 1996 Part VIII, Chapter 1 Section 71-73, Maternity Leave, Chapter 1A Section 75A & 75B, Adoption Leave, Chapter 3 Paternity Leave Section 80C, Chapter 1B Section 75I Shared Parental Leave and Chapter 4 Section 80EA & 80EB, Parental Bereavement Leave.

Justification for the procedure used

47. Regulations made under 80EF around matters covered in this section will be subject to the affirmative resolution procedure. The Department considers that this is appropriate due to the level of detail that may be set out in the

regulations and the impact this will have on the application of the leave entitlement.

48. The affirmative resolution procedure will ensure that Parliament has the opportunity to debate the matters as they are set out.

80EH Special Cases

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative resolution

Context and Purpose

49. **80EH(1) and (2)** allow regulations made under section 80EF to make provision for redundancy and dismissal during a period of Neonatal Care 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.

Justification for taking the power

50. 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.

51. 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 & 75B, Adoption Leave and Chapter 3 Section 80D, Paternity Leave and Chapter 1B Section 75J, Shared Parental Leave and Chapter 4 Section 80EC Parental Bereavement Leave.

Justification for procedure used

52. Regulations allowed under **80EF** will be subject to the affirmative resolution procedure. The Department considers that this is appropriate due to the level of detail that may be set out in the regulations and the impact this will have on the application of the leave entitlement.
53. The affirmative resolution procedure will ensure that Parliament has the opportunity to debate the matters as they are set out.

80EI Supplemental

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative resolution

Context and Purpose

54. **80EI (1)** allows regulations made under section 80EF to provide for multiple different scenarios.
55. 80EI (1) (a) allows the ability for neonatal care to be regarded as continuous despite an interruption, in specific circumstances, allowing exceptions to the idea that a period in neonatal care must be continuous to qualify.
56. The other provisions in 80EI also include the ability for regulations 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. It also enables regulations to make provision for cases where an employee has parallel contractual and statutory rights to leave, calculation of a week's pay, consequential provision and different provision for different cases or circumstances.
57. **80EI(1) (h)** also allows regulations made under section 80EF to apply, modify or exclude an enactment, in circumstances and under conditions to be specified, in relation to a person entitled to statutory Neonatal Care Leave (Henry VIII power).
58. **80EI(2)** sets out that provisions under 80EI(1) – where regulations may make different provision in different cases or circumstances – include where there is more than one child receiving neonatal care and where a child received neonatal care on two or more separate occasions. More broadly, this allows for specific provision to be made for the applicability and extent of the entitlement in these circumstances.

Justification for taking a power

59. **80EI(1)** sets out a broad range of areas where regulations could set out additional provision. The Government is not expecting the provision for Neonatal Care Leave and Pay to be especially susceptible to fraud or abuse. But flexibility 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. It also allows for regulations to be made setting out exceptions to the requirement that the leave is continuous in specific circumstances.

60. Taking a power to set this out through secondary legislation is consistent with existing family leave entitlements. Flexibility would be valuable to amend these provisions in future if evidence were to emerge that they did not work well in some cases.
61. 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, Chapter 3 Section 80E, Paternity Leave and Chapter 4 Section 80ED, Parental Bereavement Leave.
62. **80EI(1)(h)** replicates the 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.
63. In relation to Maternity, Adoption, Paternity, Shared Parental Leave, and Parental Bereavement Leave the power at **80EI(1)(h)** 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 Neonatal Care Leave as for other types of family-related leave and pay.
64. The approach to the drafting of these provisions has been to mirror insofar as possible, the scheme adopted by the five 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 80EI(f) – then this might be interpreted as an intentionally substantive departure from the scheme adopted in 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 (f) did not provide sufficient vires to make equivalent provision.
65. **80EI(2)** ensures that regulations can provide for a range of circumstances. As our understanding of the impact of these circumstances on the intended outcome of the legislation increases, having flexibility here will ensure that we can be responsive.

66. 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 and 80EA Parental Bereavement Leave.

Justification of Procedure

67. Regulations allowed under **80EF** will be subject to the affirmative resolution procedure. The Department considers that this is appropriate due to the level of detail that may be set out in the regulations and the impact this will have on the application of the leave entitlement.

68. The affirmative resolution procedure will ensure that Parliament has the opportunity to debate the matters as they are set out.

Schedule: Part 2 of the Schedule **171ZZ16– Neonatal Care Pay**

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative resolution

Context and Purpose

69. **171ZZ16(2)** provides for the Secretary of State to set the conditions a person needs to meet in order to qualify for Neonatal Care Pay with respect to the relationship that person has with the relevant child.

70. **171ZZ16(3)** allows regulations to provide that a person would not be entitled to pay for a week or period of consecutive weeks unless they are in employed earners employment which satisfies certain conditions, and employment has been continuous from the end of the relevant week.

71. **171ZZ16(4) and (5)** allows for regulations to specify which care is covered by this provision, including by reference to the place where the care is given. The intention is to capture different types and environments where neonatal care may be received.

Justification for taking the power

72. **171ZZ16(2)** mirrors the power earlier in the Schedule (at new section 80EF(1) and (5) of the Employment Rights Act 1996) in relation to leave.

The same reasons for needing a delegated power apply. It is also important that where the regulations under 80EF change, these regulations relating to pay can reflect them.

73. Precedent for this delegation can be found in the Social Security Contribution and Benefits Act 1992 Part XIIZC Sections 171U&V Shared Parental Pay, Part XIIZA Sections 171ZA&B Paternity Pay and Part XIIZD 171ZZ6 Parental Bereavement Pay.))

74. **171ZZ16(3)** allows regulations to be made to provide that the claimant must remain in employed earner's employment until they claim their pay. There could be a significant length of time between an employee accruing a right to Neonatal Care Pay and taking it, due to the fact that the period of time for taking Neonatal Care Leave and Pay will be at least 68 weeks from birth. Therefore, flexibility on this matter will ensure we can respond to evidence on whether there is a disproportionate burden on businesses arising from employees moving roles during the period of entitlement (at least 68 weeks) after they have accrued a right to Neonatal Care Pay in a previous role.

75. **171ZZ16(5)** provide for the Secretary of State to define care by reference to the place where the care is provided. As advances in medical treatment occur, types of medical care may change, therefore, it is necessary to allow a power here so that future types of Neonatal Care are covered by the entitlement.

Justification for the procedure

76. Regulations made under **171ZZ16** will be subject to the affirmative resolution procedure. The Department considers that this is appropriate due to the level of detail that may be set out in the regulations and the impact this will have on the application of the pay entitlement.

77. The affirmative resolution procedure will ensure that Parliament has the opportunity to debate the matters as they are set out.

171ZZ17 Entitlement: supplementary

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative resolution

Context and Purpose

78. **171ZZ17(2)** allows the Secretary of State to set the timings a person will be required to adhere to in respect of the notice required in respect of any pay for the entitlement.

79. **171ZZ17(4)** allows the Secretary of State to make regulations dealing with a number of general provisions relating to an employee's entitlement to statutory neonatal 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.

Justification for the power taken

80. **171ZZ17(2)** 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.

81. Precedent for this delegation can be found in the Social Security Contribution and Benefits Act 1992 Part XII Section 171U&V Shared Parental Pay, 171ZC Paternity Pay and 171ZZ7 Parental Bereavement Pay.

82. **171ZZ17(4)** follows the same process to define these points for other family-related leave entitlements and setting this out through secondary regulation is a consistent approach. As elsewhere, it would be important to have the flexibility to change the provision for Neonatal Care Pay to stay aligned with other entitlements whenever new regulations are passed in relation to those – which may be in response to evolving practices in the workplace.

83. These regulations also cover making different arrangements for Neonatal Care Pay i.e. where there is more than one child in neonatal care in the same 28 day period, or more than one admission to neonatal care for the same child.

84. Precedent for this delegation can be found in the Social Security Contribution and Benefits Act 1992 Part XII Section 171ZW Shared Parental Pay, 171ZC Paternity Pay and 171ZZ7 Parental Bereavement Pay.

Justification for the procedure

85. Regulations made under **171ZZ17** will be subject to the affirmative resolution procedure. The Department considers that this is appropriate due to the level of detail that may be set out in the regulations and the impact this will have on the application of the pay entitlement.

86. The affirmative resolution procedure will ensure that Parliament has the opportunity to debate the matters as they are set out.

171ZZ18 Liability to make payments

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative resolution

Context and Purpose

87. **171ZZ18(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 Neonatal Care Pay and try to avoid liability through that action.

88. **171ZZ18(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 Neonatal Care Pay.

Justification for the power taken

89. **The approach used in 171ZZ18(2) and (3)** is to set this out through secondary regulation is consistent with existing family-related 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.

90. Precedent for this delegation can be found in the Social Security Contribution and Benefits Act 1992 Part XII Section 171ZX Shared Parental Pay, 171ZD Paternity Pay and 171ZZ8 Parental Bereavement Pay.

Justification for the procedure

91. Regulations made under **171ZZ18** will be subject to the affirmative resolution procedure. The Department considers that this is appropriate due to the level of detail that may be set out in the regulations and the impact this will have on the application of the pay entitlement.

92. The affirmative resolution procedure will ensure that Parliament has the opportunity to debate the matters as they are set out.

171ZZ19 Rate and period of pay

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative resolution

Context and Purpose

93. **171ZZ19(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 Neonatal Care Pay. This reflects similar provisions in other family-related pay legislation.
94. **171ZZ19(2) and (3)** provide for the Secretary of State to specify the number of weeks for which statutory Neonatal Care Pay is payable and set out that this should not exceed a period of at least twelve weeks. This is in line with the policy which is that Neonatal Care Leave and Pay is available to eligible employees for a maximum of 12 weeks.
95. **171ZZ19(4) and (5)** allow the Secretary of State to specify that a person eligible for statutory Neonatal Care 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 68 weeks from the date of the birth of the child.
96. This flexibility is required to complement the provision on how and when Neonatal Care Leave can be taken (new section 80EA(4)(b), (6) and (8) of the Employment Rights Act).
97. **171ZZ19(8)** allows the Secretary of State to specify exceptions to the rule that a person cannot continue to claim statutory Neonatal Care Pay while performing work for an employer who is not liable to make payments of Neonatal Care Pay to them.
98. **171ZZ19(9)** allows the Secretary of State to specify circumstances where there will be no liability for payment of statutory Neonatal Care Pay in respect of a statutory pay week.

Justification for taking the power

99. **171ZZ19(2) and (3)** are necessary to align with the equivalent provision for leave (new section 80EF(3) and (4) of the Employment Rights Act 1996). The same reasons apply as to the need for a delegated power in these cases.

100. Precedent for this delegation can be found in the Social Security Contribution and Benefits Act 1992 Part X11 Section 171ZU&V Shared Parental Pay, 171ZE Paternity Pay and 171ZZ9 Parental Bereavement Pay.
101. **171ZZ19(4)** and **(5)** will be required to complement the provision on how and when Neonatal Care Leave can be taken new section 80EF(2)(b), (4) and (8) of the Employment Rights Act).
102. Precedent for this delegation can be found in the Social Security Contribution and Benefits Act 1992 Part XII Section 171ZE Paternity Pay and 171ZZ9 Parental Bereavement Pay.
103. Setting this out and the remaining provisions under **171ZZ19** through secondary regulation is an approach consistent with existing family-related leave entitlements.
104. 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 or evolving work practices, the rate of statutory Neonatal Care Pay as well as for other statutory payments can be amended without the need for primary legislation.
105. Powers under this provision also ensure that where there are changes made to the leave entitlement, these can be mirrored in the pay regulations to ensure they remain coherent.

Justification for the procedure

106. Regulations made under **171ZZ19** will be subject to the affirmative resolution procedure. The Department considers that this is appropriate due to the level of detail that may be set out in the regulations and the impact this will have on the application of the pay entitlement.
107. The affirmative resolution procedure will ensure that Parliament has the opportunity to debate the matters as they are set out.

171ZZ21 Relationship with contractual remuneration

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and Purpose

108. **171ZZ21(3)** allows regulations to specify payments made to an employee which are to be treated as contractual remuneration for the purposes of statutory Neonatal Care Pay, and payments which are not.

Justification for the power

109. The power at **171ZZ21(3)** provides for 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. That helps to illustrate why the flexibility is needed to change the law in future without the need for primary legislation, for Neonatal Care Pay as well as existing family related pay rights, if it became essential to provide greater clarity on the issue.
110. Precedent for this delegation can be found in the Social Security Contribution and Benefits Act 1992 Part XII Section 171ZG Paternity Pay, 171ZZ1 Shared Parental Pay and 171ZZ11 Parental Bereavement Pay.

Justification for the procedure

111. Regulations made under **171ZZ21** will be subject to the negative resolution procedure. The Department considers that this is appropriate due to the discrete issue covered by these regulations. These regulations are technical seeking to define what constitutes contractual remuneration and as such should not require the level of scrutiny which takes place in an affirmative resolution.

171ZZ23 Special classes of person

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and Purpose

112. **171ZZ23(1) and (2)** 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.

Justification for taking the power

113. The power in 171ZZ23 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.
114. Precedent for this delegation can be found in the Social Security Contribution and Benefits Act 1992 Part XII Section 171ZI Paternity Pay, 171ZZ3 Shared Parental Pay and 171ZZ13 Parental Bereavement Pay.

Justification for the procedure

115. Regulations made under **171ZZ24** will be subject to the negative resolution procedure. The Department considers that this is appropriate due to the discrete issue covered by these regulations.

171ZZ24 Supplementary

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and Purpose

116. **171ZZ24(3)** allows regulations to specifically exclude a person who would ordinarily fit into the category of employee from the entitlement to Neonatal Care Pay, or to include one who would not.
117. **171ZZ24(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 Neonatal Care Leave.
118. **171ZZ24(5)** defines a 'week' as beginning on a Sunday but gives the Secretary of State the power to modify this in particular cases.
119. **171ZZ24(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.

120. **171ZZ24(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 Neonatal Care 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 Neonatal Care Pay.

121. The powers in 171ZZ24(4), (5), and (7)-(10) must all be exercised with the concurrence of the Commissioners for Her Majesty's Revenue and Customs.

Justification for taking the power

122. 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 without the need for primary legislation.

123. Precedent for these delegations can be found in the Social Security Contribution and Benefits Act 1992 Part XII Section 171ZJ Paternity Pay, 171ZZ4 Shared Parental Pay and 171ZZ12 Parental Bereavement Pay.

Justification for the procedure

124. Regulations made under **171ZZ24** will be subject to the negative resolution procedure. The Department considers that this is appropriate due to the discrete issue covered by these regulations.