

## Paternity Leave (Bereavement) Bill

### Memorandum from the Department of Business and Trade 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 Paternity Leave (Bereavement) Bill (“the **Bill**”), as brought from the House of Commons on 29 April 2024. This memorandum identifies the provisions of the Bill that relate to delegated powers. It explains in each case what provision for delegated powers is being made, why such provision is being made, and the parliamentary procedure which is to apply to the exercise of the relevant powers.
2. The Bill inserts provisions into the Employment Rights Act 1996 (the “**ERA**”), some of which concern delegated powers. Two of these provisions create additional powers and one is a commencement power; the rest affect existing powers that are amended in order to make suitable provision for the particular group of people within the scope of the Bill (bereaved fathers and partners).
3. The Department has considered the provision being made in relation to powers in the Bill as set out below and is satisfied that it is necessary and justified.

#### B. PURPOSE AND EFFECT OF THE BILL

4. The Paternity Leave (Bereavement) Bill is a Private Member’s Bill introduced by Chris Elmore MP on 6 December 2023. The short title of the Bill was initially the “Shared Parental Leave and Pay (Bereavement) Bill” and its original intention was to provide leave and pay to a father where a mother had died, regardless of prior service history.
5. Unlike the entitlement to Maternity Leave, which starts on the first day of a female employee’s employment, there is currently no ‘day one’ leave entitlement for employed fathers and partners. As such, if a mother dies in the first year of a child’s life, a father or partner who has not met continuity of service requirements for Paternity Leave or Shared Parental Leave will not have the statutory right to take leave so they can care for their child.
6. The same holds true for adoptive parents and employees who become parents through surrogacy arrangements (“**parental order parents**”). The member of a couple in these situations who elects to take Adoption Leave (“**Parent A**”) is entitled to that Leave on ‘day one’ of their employment, but the other parent is not entitled to take Paternity Leave or Shared Parental Leave unless they meet the prescribed continuity of service requirements. If Parent A dies, and the surviving parent cannot meet the continuity of employment test, they will have no statutory right to time off work to care for their child.
7. The Bill as introduced required the Secretary of State to make regulations which removed the continuity of employment conditions in respect of the entitlement of a father or partner to Shared Parental Leave and Pay, in cases where a mother had

died. However, an Instruction to the Bill Committee was approved on 5 March 2024 which permitted amendments to be made which could make provision about Paternity Leave not just in cases of maternal death, but also in cases where an adoptive parent or a parental order parent dies.

8. During Committee Stage on 20 March 2024, the Bill was amended so that the existing powers in the ERA to provide for Paternity Leave are modified, in the case of bereaved fathers / partners, such that:
  - (a) those powers are to be exercised by the Secretary of State to make regulations which permit surviving fathers / partners to take Paternity Leave without any condition as to duration of employment;
  - (b) the entitlement can be extended to adoptive and parental order parents as well as birth parents; and
  - (c) the regulations do not have to stipulate that someone who has already taken Shared Parental Leave cannot take Paternity Leave.
9. The reason that Paternity Leave was chosen, rather than Shared Parental Leave, was that the entitlement of a father / partner to Shared Parental Leave is contingent on the other parent (the mother or Parent A) having an existing statutory entitlement which can be 'curtailed' in order to trigger entitlements to Shared Parental Leave. By contrast, Paternity Leave is a right which the father / partner has, independently of any entitlement the other parent has or had. Whilst the regulations currently provide for an entitlement of two weeks only<sup>1</sup>, the Government proposes to exercise existing powers in the ERA to provide an enhanced entitlement for bereaved fathers / partners to be on Paternity Leave. It is envisaged that this entitlement will extend from the date of the death of the mother or Parent A until a year after the child's birth or placement for adoption.
10. The Bill was also amended at Committee Stage to remove a broad Henry VIII power which would have enabled the Bill to amend any Act of Parliament previously passed. After Committee Stage, the Bill was not further amended in the House of Commons.
11. In light of the creation of a much longer period of Paternity Leave than is currently the case, further consequential provisions in the Bill are needed which permit the regulations to make provision for:
  - (d) special protection in relation to redundancy *after* the employee's return to work;
  - (e) 'keeping in touch' days during the period of Leave; and
  - (f) in cases where the child also dies, allowing the employee to remain on Paternity Leave for a period of time after that, by disapplying the requirement that the Leave can only be taken for specific purposes.

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<sup>1</sup> See the Paternity and Adoption Leave Regulations 2002, regulations 5 and 9.

## C. DELEGATED POWERS

12. The Bill contains two clauses. Clause 1 contains all the provisions relating to delegated powers except the commencement power, which is in Clause 2(2).

13. The effect of the provisions in the Bill affecting delegated powers can be grouped into two categories:

- provisions which require or permit existing powers to be exercised in a different way; and
- provisions which create new powers.

14. We are satisfied that the powers are drawn as narrowly as possible, and we have set out below in as much detail as possible how Ministers envisage exercising those powers.

15. A summary of the delegated powers, in the order in which they will appear in the ERA, is captured in the table below.

<b>Reference</b>	<b>Power</b>
Clause 1(2): New subsection (6A) to s80A ERA	This amends an existing power so that a bereaved parent can take Paternity Leave (birth) without having to meet continuity of service requirements; after Shared Parental Leave has been taken; and (if the child also dies) for a different purpose.
Clause 1(3): New subsection (6C) to s80B ERA	This amends an existing power as above but for Paternity Leave (adoption).
Clause 1(4): New subsection (1A)(a) to s80D ERA	This creates a new power to allow a bereaved employee to do some work for the employer during a period of Paternity Leave, without that affecting their ongoing entitlement to be on that Leave.
Clause 1(4): New subsection (1A)(b) to s80D ERA	This creates a new power to make special provision for redundancy protection for a period after a bereaved employee has returned to work after Paternity Leave.
Clause 2(2)	This is a commencement power.

## **Modifications to existing powers in relation to bereaved parents**

### **Clauses 1(2) and 1(3)**

**80A(6A) – entitlement to Paternity Leave: birth**

**80B(6C) - entitlement to Paternity Leave: adoption**

*Powers conferred on:* Secretary of State

*Powers exercised by:* Regulations made by Statutory Instrument

*Parliamentary Procedure:* Affirmative resolution

### **Context and purpose**

#### Clause 1(2)

16. Clause 1(2) modifies the existing power to make regulations creating entitlements to Paternity Leave (birth), in situations where a child's mother dies. Three modifications are made.
17. First, section 80A(1)(a) currently requires the Secretary of State to make regulations entitling an employee who satisfies certain specified conditions to be absent from work on Paternity Leave. One of those conditions is a condition 'as to duration of employment' (section 80A(1)(a)). Paragraph (a) of new subsection (6A), inserted by Clause 1(2), provides that, where a child's mother dies, section 80A(1) will have effect as if the provision relating to duration of employment were removed. This means that, in cases of maternal bereavement, the Secretary of State is required to make regulations creating an entitlement to Paternity Leave which do not contain such a condition.
18. Secondly, section 80A(1)(4A) currently requires the relevant regulations to prohibit an employee from taking Paternity Leave if they have already taken Shared Parental Leave in relation to the same child. This is modified by paragraph (c) of new subsection (6A), inserted by Clause 1(2), so that, in cases of maternal bereavement, the prohibition is removed. This has the effect that the Secretary of State may make regulations which permit Paternity Leave to be taken after Shared Parental Leave.
19. Thirdly, section 80A(1) currently stipulates that the regulations are to create an entitlement to be absent on leave *for the purpose of caring for the child or supporting the mother*. Paragraph (b) of new subsection (6A), inserted by Clause 1(2), has the effect that, in cases of maternal death, if the child were also to die, regulations can still provide an entitlement to Paternity Leave, notwithstanding the fact that the leave granted to the employee would not be for either of those purposes.

#### Clause 1(3)

20. Clause 1(3) makes the same changes as Clause 1(2), in relation to Paternity Leave (adoption). It inserts new subsection (6C) into section 80B. This has the effect that, where 'Parent A' dies, regulations must be made entitling their bereaved partner to take Paternity Leave, without specifying a condition as to duration of employment; regulations may be made which do not prevent that person taking Paternity Leave after Shared Parental Leave has been taken; and regulations can provide for an entitlement to Leave in cases where the child dies or the adoption is disrupted, notwithstanding that the purpose of the Leave would be neither to care for the child nor support the mother.

### Justification for taking the powers

21. Instead of creating a new tranche of powers which could be exercised in order to create a new parental leave entitlement, the Bill takes the approach of adjusting existing powers, in order to allow the extension of existing Paternity Leave entitlements to accommodate the particular problem addressed by the Bill.
22. The purpose of the first modification in each case (the removal of the requirement that the regulations stipulate a continuity of service requirement) facilitates regulations which enable surviving parents to take leave from their first day in a new job.
23. The reason for the second modification (provision for a parent who took Shared Parental Leave before the death of their partner to still be able to take Paternity Leave) is that the Government intends to use the existing powers in section 80A(2)(a) and (3) to provide for a significantly lengthier period of leave, in cases of maternal death, than the current entitlement in the relevant regulations to two weeks' Paternity Leave. As a result, the prohibition on taking Paternity Leave after Shared Parental Leave is not appropriate, and could undermine the objective of the Government's policy, as it could result in an employee being unable to access that extended Paternity Leave entitlement in circumstances where they were not expecting to need to do so.
24. The third modification (allowing Paternity Leave entitlement to continue following the death of the child) is also made in order to facilitate a lengthier period of leave. In other circumstances where parental leave is available for a potentially lengthy period, provision has been made in regulations for the entitlement to leave to continue for a period after the death of the child (or the disruption of adoption or caring arrangements in relation to the child). This allows employers and employees who have made arrangements to accommodate an employee's expected absence (for example, by the employer engaging temporary staff to cover that absence) enough time to adjust those arrangements to facilitate the termination of that leave entitlement earlier than had been expected<sup>2</sup>. As the Government's intention is to provide for a lengthy period of Paternity Leave for bereaved fathers / partners, the same flexibility may be needed to be able to allow an employee to stay on Paternity Leave for a period, despite the fact that they would not be taking the leave for the required purposes of supporting the mother or caring for the child.

### Justification for the procedure

25. Regulations made under section **80A(6A)** and **80B(6C)** will be subject to the affirmative resolution procedure<sup>3</sup>. The Department considers that this is appropriate given that the existing powers in sections 80A and 80B are subject to that procedure.
26. The affirmative resolution procedure will ensure that Parliament has the opportunity to debate the detailed provision made in the regulations.

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<sup>2</sup> See for example, in relation to Adoption Leave, the Paternity and Adoption Leave Regulations 2002, regulation 22; and in relation to Shared Parental Leave, the Shared Parental Leave Regulations 2014, regulations 18 and 33 and paragraphs 5 and 10 of the Schedule. See also, in relation to Paternity Leave, regulation 11A of the Paternity and Adoption Leave Regulations 2002, which was made at the same time as amendments to regulation 5(2) and 9(2) (extending the period in which Paternity Leave can be taken from 8 weeks after the birth / placement for adoption of the child, to 52 weeks after that date).

<sup>3</sup> By virtue of section 236(3) of the Employment Rights Act 1996.

## **New powers in respect of bereaved parents**

**80D(1A)(a) – KIT days**

**80D(1A)(b) – redundancy protections**

**Clause 2(2) – commencement power**

*Powers conferred on:* Secretary of State

*Powers exercised by:* Regulations made by Statutory Instrument

*Parliamentary Procedure:*

- Affirmative resolution - s80D(1A)(a), s80D(1A)(b)
- Not applicable - Clause 2(2)

### **Context and purpose**

Clause 1(4) – new subsection 80D(1A)(a)

27. Clause 1(4) will insert new powers into section 80D of the ERA to allow a bereaved employee to work for their employer for a set number of days (“Keeping in Touch (KIT)” days) during their Paternity Leave, without that affecting their ongoing entitlement to be on that Leave.

Clause 1(4) – new subsection 80D(1A)(b)

28. The Bill also extends the existing powers, in section 80D(1) and (2), to make special provision for redundancy protection so that they can be exercised in relation to a period after the bereaved employee has returned to work from Paternity Leave. Currently special provision may only be made while an employee is absent on Leave (see section 80D(1)(a)).

Clause 2(2)

29. The commencement power at Clause 2(2) gives the Secretary of State the power to commence the Bill in regulations.

### **Justification for taking the powers**

30. These new powers mirror powers which already exist in relation to those forms of statutory family leave which can potentially be for significant periods of time (Maternity, Adoption and Shared Parental Leave).
31. The power to make provision for KIT days has been in place since 2006, and it is designed to provide a degree of flexibility for employees to remain connected to their workplaces whilst absent for a significant time on statutory family leave.
32. The power to provide for enhanced redundancy protection in situations where there is a redundancy situation while an employee is on family leave was extended by the Protection from Redundancy (Pregnancy and Family Leave Act) 2023 to a period after someone returns from Maternity, Adoption or Shared Parental Leave. Since the Government intends, in regulations, to provide that Paternity Leave will be available, for bereaved parents, for a period which could be as long as 52 weeks, it will also therefore be a potentially lengthy period of leave, along with Maternity/Adoption and Shared Parental Leave. The inclusion of these powers would allow this to be applied to the extended form of Paternity Leave if required.

33. The commencement power is a standard provision whereby a power is taken to provide for a Statutory Instrument to commence the Bill in regulations.

#### Justification for the procedure

34. Regulations under new subsections **80D(1A)(a)** and **80D(1A)(b)** will be subject to the affirmative resolution procedure. The Department considers that this is appropriate given that the existing powers in section 80D are subject to that procedure.
35. The affirmative resolution procedure will ensure that Parliament has the opportunity to debate the detailed provision made in the regulations.
36. As is common with commencement powers, **Clause 2(2)** is not subject to any parliamentary procedure.

#### Henry VIII powers

37. There are no fresh Henry VIII powers in this Bill. However, those powers which already exist in Part VIII Chapter 3 of the ERA will be capable of being exercised, in relation to bereaved fathers and partners, within the new parameters set out above. Those powers are:
- (a) the power in section **80B(8)** to apply, with modifications, the provisions in section 80B to make provision for parents adopting children from abroad;
  - (b) the power in section **80B(9)** to do the same thing in relation to 'parental order' parents (ie those who have applied, or intend to apply, for a parental order as part of a surrogacy arrangement); and
  - (c) the broad power in section **80E(g)** to make provision applying, modifying or excluding an enactment.
38. With respect to sections **80B(8)** and **(9)**, these powers have already been exercised to make provision for parents adopting children from abroad, and for parental order parents<sup>4</sup>. It is intended that they will be exercised again, once the Bill's provisions are in force, in order to ensure that these two groups of parents benefit from the new entitlements for bereaved fathers / partners in the same way that birth parents, and parents in domestic adoptions, will.
39. The power in section **80E(g)** is a standard power included in all of the family leave entitlements<sup>5</sup>. It has been exercised previously in relation to situations where an employee is simultaneously entitled to both the statutory right, as well as a corresponding contractual right. In those circumstances, an employee cannot exercise the rights separately but is entitled to take advantage of whichever right is,

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<sup>4</sup> The Employment Rights Act 1996 (Application of Section 80B to Adoptions from Overseas) Regulations 2003/920; the Employment Rights Act 1996 (Application of Sections 75A, 75B, 75G, 75H, 80A and 80B to Parental Order Cases) 2014/3095.

<sup>5</sup> Most recently in the Carers Leave Act 2023 and the Neonatal Care Leave and Pay Act 2023.

in any particular respect, the more favourable right. The power has been used to specify that the provisions of the Employment Rights Act which relate to the statutory right apply also to the exercise of the composite right, subject to any modifications which are necessary to give effect to any more favourable contractual terms<sup>6</sup>.

#### Justification for the procedure

40. Regulations made under sections **80B(8)**, **80B(9)** and **80E(g)** are subject to the affirmative resolution procedure.
41. The affirmative resolution procedure will ensure that Parliament has the opportunity to debate the matters as they are set out.

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<sup>6</sup> See regulation 30 of the Paternity and Adoption Leave Regulations 2002/2788.