Employment Rights Bill Call for Evidence. Submitted by Dr Michelle Weldon-Johns, Senior Lecturer in Law at Abertay University (26th November 2024)

Executive Summary

- Many of the proposed amendments are very welcome and, if enacted, will produce significant positive changes to employment rights for many.
- The proposals to amend flexible working should address the previous imbalance of power in the law by requiring the employer to justify their decisions and enabling the reasonableness of those decisions to be reviewed by the Employment Tribunal.
- The changes to Statutory Sick Pay (SSP) will make it easier for more people to access and could particularly benefit those with disabilities, long-term conditions and those undergoing treatment, such as fertility treatment.
- Creating a day-one right to paternity and ordinary parental leave will enable more working parents, particularly fathers, to take time off to care for their children.
- Extending parental bereavement leave to all bereaved persons will help support many people dealing with the loss of a loved one.

Key Recommendations

- The grounds for refusing flexible working should be streamlined to encourage employers to facilitate flexible working.
- Greater clarity on requests for temporary changes to working arrangements should be included in the legislation and/or guidance.
- The earnings-related limit on SSP should be no less than 90% of earnings.
- The qualifying conditions for shared parental leave should also be revised to make this a day-one right to leave. This would create greater consistency between all forms of childcare-related leave and make it easier for employers and parents to navigate.
- Paternity leave should be extended and enhanced rights to statutory paternity pay should be enacted, mirroring the entitlements to statutory maternity and adoption pay.
- The definition of a 'bereaved person' should be broad enough to not only include family members and those who reasonably relied on the employee for care, but other persons with whom they have had an 'enduring personal relationship with'.
- The extension of bereavement leave should also include those experiencing miscarriage before 24 weeks.
- The minimum periods of bereavement leave should be consistent at a minimum of 2 weeks' leave. This would provide greater certainty and clarity for employers and employees alike.

Introduction

1. In this response, I focus on the proposals to amend flexible working, statutory sick pay and family friendly rights. I am a Senior Lecturer in Law at Abertay University and have been

publishing research on work-family rights and the new and emerging boundaries of work-life conflict since 2010. This response draws from my research expertise and interest in this area. It also draws from the research that I am currently undertaking for the book I am writing on 'Regulating the Boundaries of Work-Life Conflict',[1] which includes an examination of the development and future of work-family rights employment rights and work-life conflict in the UK.

Flexible working

2. One of the enduring challenges of the existing right to request flexible working has been that it is relatively easy for an employer to refuse a request given the wide-ranging grounds for refusal.[2] This is coupled with the limited remedies available since the decision to refuse the request cannot be challenged.[3] This results in a significant imbalance of power within the framework that does not require employers to evidence that they have genuinely considered flexible working requests. The proposed amendments to s.80G(1)(b) of the Employment Rights Act 1996 (ERA 1996) will be a significant positive change and will help remedy this.[4] This amendment will help to redress this imbalance, while still providing employers with a wide range of discretion to refuse requests, if they genuinely have reasons for doing so.

3. However, if the intention is to make it easier to request and receive flexible working, reducing the grounds of refusal in proposed s.80G(1ZA) ERA 1996 should also be considered.[5] Even with the requirement to evidence their reasoning, employers are still likely to be able to

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[1] Forthcoming, 2026.

[2] Employment Rights Act 1996 (ERA 1996), s.80G(1)(b). As noted in my response to the House of Lords Children and Families Act 2014 Select Committee Inquiry. Written Evidence from Dr Michelle Weldon-Johns, (CFA0084) (May 2022), https://committees.parliament.uk/writtenevidence/108158/pdf/, paras 10-11; Mitchell, Lynsey and Weldon-Johns, Michelle (2021) 'Law's invisible women: The unintended gendered consequences of the COVID-19 lockdown' 3(2) *Amicus Curiae* 188-217, https://doi.org/10.14296/ac.v3i2.5410, p.194; James, Grace (2006) 'The Work and Families Act 2006: Legislation to Improve Choice and Flexibility?' 35(3) *Industrial Law Journal* 272-278, https://doi.org/10.1093/indlaw/dwl020, p.276; Anderson, Lisa (2003) 'Sound Bite Legislation: The Employment Act 2002 and New Flexible Working "Rights" for Parents' 32(1) *Industrial Law Journal* 37-42, https://doi.org/10.1093/ilj/32.1.37.

[3] Weldon-Johns, Michelle (2022) 'The future of work-family rights in the UK: the case for flexible working' presented at the International Conference of Gender Research, University of Aveiro, Portugal, 28th-29th April 2022 and published as part of the conference proceedings: https://papers.academic-conferences.org/index.php/icgr/article/view/89, p.261; Mitchell and Weldon-Johns (2021), ibid, p.194; James (2006), ibid, pp.276-277.

[4] As I argued in Weldon-Johns (2022), ibid, p.262.

[5] Ibid, pp.261-262. As previously discussed in the Department for Business, Energy & Industrial Strategy (BEIS), *Making Flexible Work the Default Consultation*, (September 2021), pp.17-18 and pp.22-23 and BEIS, *Consultation on Making Flexible Work the Default Consultation: Government Response*, (December 2022), pp.10-12, https://www.gov.uk/government/consultations/making-flexible-working-the-default.

easily justify their decision to refuse the request. Reducing the potential reasons could help to encourage employers to think more meaningfully about accepting a request and could help to genuinely make flexible working the default.

4. The requirement to provide written reasons for a refusal which state the ground(s) of refusal and why the employer thinks that the refusal is reasonable (proposed s.80G(1ZB) ERA 1996), is welcome. It is necessary to ensure that the amendments to s.80G ERA 1996 operate effectively in practice since the employer will have to identify and justify their reasons for refusal in writing. This will make it easier for employees to challenge the reason(s), if required.

5. The possibility for the Secretary of State to outline the steps that an employer must take to comply with the requirement to consult with the employee before rejecting an application (proposed s.80H(1E) ERA 1996), is also welcome. This could provide greater clarity on what would be considered a meaningful consultation and could help facilitate compromise. However, these should not be too prescriptive, otherwise it might seem more like a box-ticking exercise rather than a genuine and meaningful consultation.

6. One of the issues that has not been addressed in the Bill, and previous amendments to the flexible working framework, is the issue of temporary changes.[6] While it is possible to request such a change under the existing legislation, this is not well known or understood in practice.[7] This means that most requests result in permanent changes when a temporary change may be more appropriate,[8] and easier to facilitate. Greater clarity on this point would be welcome either within the legislation,[9] or relevant guidance. It would also be useful to allow such employees to request that their flexible working arrangements be reviewed periodically, to enable their changing circumstances to be considered.

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[6] As I previously recommended in Weldon-Johns, (May 2022), op. cit. (n.2), paras 12-13.

[7] BEIS (September 2021), op. cit. (n.5), pp.22-23 and BEIS (December 2022), op. cit. (n.5), p.18. A point I suggested previously in: Mitchell and Weldon-Johns (2021), op. cit. (n.2), p.197; Weldon-Johns (2022), op. cit. (n.3), pp.262; Weldon-Johns, Michelle (2019) *Assisted Reproduction, Discrimination and the Law* (Routledge), pp.107-108; Weldon-Johns, Michelle (2015) 'From modern workplaces to modern families–re-envisioning the work–family conflict' *Journal of Social Welfare and Family Law*, 37(4) 395-415, https://doi.org/10.1080/09649069.2015.1121964, p.407.

[8] Weldon-Johns, Michelle (2021) 'EU work-family policies revisited: Finally challenging caring roles?' 12(3) *European Labour Law Journal* 301-321, https://doi.org/10.1177/2031952520966613, pp.317-318.

[9] Weldon-Johns (2019), op. cit. (n.7), pp.107-108 in the context of assisted reproduction treatments.

7. Guidance could be drawn here from Article 9(3) of the EU Work-life Balance Directive 2019,[10] which includes the right to make a temporary change and then to return to previous working arrangements at the end of the agreed period. An employee can also request to return to their previous working arrangements earlier, where it is justified because of a change of circumstances. This allows for some flexibility and recognises that people's circumstances may change, resulting in the need to reconsider their working arrangements. While it is limited to those caring for young children and carers,[11] and it does not cover extending the period of the temporary change, it at least recognises that temporary changes may be more appropriate and that circumstances can change.

8. While it should be possible to make such requests under the current legislation, there is a lack of clarity around temporary changes and no guarantee or right to return to your previous working arrangements. Instead, this kind of flexibility would have to be negotiated when the request is made. Including specific provisions on this in the legislation and/or guidance would clarify the position and provide certainty and protection for employees seeking such requests. This may also make it more accessible to working fathers.[12]

Statutory sick pay

9. The proposed amendments to the Social Security Contributions and Benefits Act 1992 (SSCBA 1992) will enable more people to qualify for statutory sick pay (SSP). In particular, removing the requirement for four consecutive days of incapacity for work will ensure that many more people are able to take paid time off work when they need to. While this will be of general benefit to all employees, it could also be particularly useful to those with chronic conditions, disabilities and those undergoing a period of treatment, including fertility treatment.[13]

10. The amendments to Schedule 11 SSCBA 1992 to include those whose earnings are below the lower earnings limit in s.5(1)(a) SSCBA 1992 is positive as it will enable all eligible employees

[10] DIRECTIVE (EU) 2019/1158 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019L1158.

[11] Article 9(1).

[12] Weldon-Johns (2021), op. cit. (n.8), p.310.

[13] Weldon-Johns (2019), op. cit. (n.7), pp.105-107. This is part of Chapter 5 'A right to time off work to undergo ART treatments', which is available from: https://rke.abertay.ac.uk/admin/files/17124152/Weldon_Johns_ARightToTimeOffWork_Accepted_2019.pdf.

to receive SSP, irrespective of their earnings. This will particularly benefit lower earners, who have been previously excluded.

11. The amendments to the rate of payment in s.157 SSCBA 1992 to include the lower of the statutory amount or a percentage of earnings, is necessary given the inclusion of lower earners to the right to SSP. This reinforces the need to include the cap for earnings below the SSP amount, otherwise employers would have to pay more when an employee is sick than they would if they were in work. This would appear to strike the right balance between employers and employees, even for lower earners, but it will depend on the proposed percentage of earnings that is included here. As existing forms of earnings-related benefits, such as statutory maternity[14]/paternity[15]/adoption[16] pay, are paid at 90% of earnings or the statutory amount, I would propose that a similar model be used here. This would make it easier for employers and employees to understand and for employers to implement.

Family leave – removing the qualifying period for paternity leave and ordinary parental leave.

12. The proposals to remove the qualifying periods for paternity and ordinary parental leave (clauses 11 and 12) are significant and would be a fundamental step forward in recognising and valuing the rights of both parents.[17] These changes would bring these rights in line with the rights to maternity and adoption leave and would remove the two-tier system of rights that currently exists, which is heavily weighted towards mothers as primary, non-negotiable, caregivers.[18] This

[14] SSCBA 1992, s.166(2).
[15] Statutory Paternity Pay and Statutory Adoption Pay (Weekly Rates) Regulations 2002/2818, reg.2.
[16] SSCBA 1992, s.171ZN(2F).
[17] As I previously recommended in Weldon-Johns (May 2022), op. cit. (n.2), para 8; Weldon-Johns (2022), op. cit. (n.3), p.264.
[18] Weldon-Johns (2022), op. cit. (n.3), pp.263-264; Busby, Nicole and Weldon-Johns, Michelle (2019) 'Fathers as Carers in UK Law and Policy: Dominant Ideologies and Lived Experience' 41(3) *Journal of Social Welfare and Family Law* 280-301, https://doi.org/10.1080/09649069.2019.1627085, pp.294-296 and 298-299; Weldon-Johns, Michelle 'The Additional Paternity Leave Regulations 2010: a new dawn or more 'sound-bite' legislation?', (2011) 33(1) *Journal of Social Welfare and Family Law* 25-38, https://doi.org/10.1080/09649069.2011.571468, pp.29-30; James, Grace (2009) 'Mothers and Fathers as Parents and Workers; Family Friendly Employment Policies in an Era of Shifting Identities' 31(3) *Journal of Social Welfare and Family Law* 271-283, https://doi.org/10.1080/09649060903354597; James (2006), op. cit. (n.2), p.275.

would help to challenge the notion that fathers are secondary caregivers,[19] and may encourage greater sharing of care.[20]

13. However, limiting this to paternity and ordinary parental leave and not also including the right to shared parental leave means that parents wishing to share leave may still be unable to do so. I would recommend creating alignment between all these rights and equally making shared parental leave a day-one right to leave.[21] This should be a key consideration in any subsequent review of shared parental leave.

14. Enabling an employee to postpone paternity leave until after utilising shared parental leave (clause 13) will make this much more flexible and will enable employees to exercise greater choice in arranging their care responsibilities.

15. I would also recommend further changes to paternity leave and shared parental leave to better enable parents to share caring responsibilities. For instance, the paternity leave period should be increased to 2 months.[22] This would ensure that fathers have stronger rights to time off during the child's first year. Furthermore, the right to statutory paternity pay should be enhanced to mirror the rights to statutory maternity and adoption pay with a period of enhanced pay followed by the statutory amount. Given that this is currently 6 weeks at 90% of earnings for maternity and adoption pay,[23] the rights to statutory paternity pay could equally be extended to 6 weeks at 90% of earnings with the remaining 4 weeks being paid at the statutory amount. Such an earnings-related element would be welcome, irrespective of any increase to the length of paternity leave. This would recognise that fathers similarly need to have an adequate level of

[19] Weldon-Johns (2011), ibid, pp.28-29; Caracciolo di Torella, Eugenia 'New Labour, new dads – the impact of family friendly legislation on fathers', (2007) 36(3) *Industrial Law Journal* 318– 328, https://doi.org/10.1093/indlaw/dwm018; James (2006), op. cit. (n.2), p.275.

[20] Weldon-Johns (2021), op. cit. (n.8), pp.309 and 314-315, with reference to the day-one right to paternity leave in the EU Work-life Balance Directive 2019.

[21] As I previously recommended in Weldon-Johns, (May 2022), op. cit. (n.2), para 9; Weldon-Johns (2022), op. cit. (n.3), p.264; Mitchell and Weldon-Johns (2021), op. cit. (n.2), p.199.

[22] Reflecting the non-transferable period of parental leave in the EU Work-life Balance Directive (2019), Article 5(2). While this was previously enacted in the UK as original parental leave, a similar approach could be adopted here which focuses on the immediate post-birth period.

[23] SSCBA 1992, s.166(1) and s.171ZN(2E) respectively.

earnings replacement to enable them to take leave in the first place.[24] Such changes would begin to recognise that fathers' rights to childcare leave should also be viewed as non-negotiable.[25]

Expanding eligibility for bereavement leave.

16. The proposed expansion of parental bereavement leave to all 'bereaved persons' (clause 14) is a positive change, which recognises the significant impact of grief on all persons, not just parents of children under 18. However, there will still be limitations to this in practice as the regulations will define the relationships that are included here in order for an employee to be a 'bereaved person' under the legislation (proposed s.80EA(2) ERA 1996). Care must be taken not to draw these relationships too narrowly and with sole reference to traditional nuclear family models. Instead, the regulations should also include other persons and relationships that should equally be protected here. This would reflect the reality that many such relationships will not be limited to those with familial ties. Some consideration could be given to the kinds of caring relationships already included within the legislation relating to dependant care leave and carers leave,[26] particularly persons who reasonably rely on the employee for care.[27] However, this approach will also be limited because there will be many instances where persons are bereaved suddenly, without having previously provided care, which should equally be covered here. Thus, the definition of a 'bereaved person' should be drawn more broadly to include those persons with whom the employee has had an 'enduring personal relationship with'. Further guidance could be given on this, but it would be better not to be too prescriptive here. Furthermore, the proposed changes still do not include early miscarriage within the scope of the legislation.[28] Further consideration should be given to its inclusion here too.

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[24] Mitchell and Weldon-Johns (2021), op. cit. (n.2), p.200; Busby and Weldon-Johns (2019), op. cit. (n.18); Atkinson, Jamie (2017) 'Shared Parental Leave in the UK: Can It Advance Gender Equality by Changing Fathers into Co-Parents?' 13(3) *International Journal of Law in Context* 356-368, https://doi.org/10.1017/S1744552317000209; Mitchell, Gemma (2015) 'Encouraging fathers to care: the children and families act 2014 and shared parental leave' 44(1) *Industrial law Journal* 123-133, https://doi.org/10.1093/indlaw/dwu034.

[25] Weldon-Johns (2021), op. cit. (n.8), p.313; Caracciolo di Torella, Eugenia (2017) 'An emerging right to care in the EU: a "New Start to Support Work-Life Balance for Parents and Carers"' 18 *ERA Forum* 187–198, https://link.springer.com/article/10.1007/s12027-017-0477-0, p.192, in the context of the EU Work-life Balance Directive (2019).

[26] ERA 1996, ss.57A(3)-(5) and 80J(2).

[27] ERA 1996, ss.57A(4)-(5) and 80J(2)(a)(iii).

[28] ERA, s.80EE only includes stillbirths after 24 weeks of pregnancy. As previously discussed in Weldon-Johns, Michelle (2020) 'The future of work-family regulation – emerging boundaries of work and private life' paper presented at the SLS Virtual Conference 2020, University of Exeter (3rd-4th September 2020).

17. The proposed entitlement to bereavement leave is a minimum of one weeks' leave for all cases not involving children, (proposed s.80EA(5A)). The rationale behind this approach is understandable, particularly given the significant impact that the loss of a child has on a parent. However, it might have been easier for both employees and employers to make the period of leave consistent with the right to parental bereavement leave (minimum of 2 weeks).[29] Nevertheless, it is a positive step forward in ensuring that employees have adequate, and protected, time off when grieving the loss of a loved one.

[29] ERA 1996, s.80EA(5).