

PARENTAL BEREAVEMENT (LEAVE AND PAY) BILL

EXPLANATORY AND FINANCIAL MEMORANDUM

INTRODUCTION

1. This Explanatory and Financial Memorandum has been prepared by the Department for the Economy (“the Department”) in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.
2. The Memorandum needs to be read in conjunction with the Bill. It does not, and is not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause or Schedule does not seem to require an explanation or comment, none is given.

FURTHER CONSIDERATION STAGE

3. The OVERVIEW AND COMMENTARY ON CLAUSES sections have been updated to reflect amendments that were made to the Bill at Further Consideration Stage.

BACKGROUND AND POLICY OBJECTIVES

4. Following the introduction of Parental Bereavement Leave and Pay legislation in Great Britain in April 2020¹, the Minister for the Economy gave a commitment to introduce similar provision for working parents in Northern Ireland.
5. This Bill will provide the following:
 - Parental Bereavement Leave – the Department will be under a duty to provide, by regulations, a right for employed parents to be absent from work for a prescribed period (with at least two weeks leave to be set as the minimum entitlement) following the death of a child. All employed bereaved parents who meet the eligibility conditions, regardless of how long they have worked for their employer, will be entitled to this leave.
 - Parental Bereavement Pay – a right for those eligible parents who meet minimum requirements relating to continuity of employment to receive a fixed or earnings-related weekly rate of pay (which rate is to be prescribed by regulations). In line

¹ [Parental Bereavement \(Leave and Pay\) Act 2018](#)

with other entitlements to paid statutory leave, the Bill allows provision to be made for employers to reclaim payments from the Government.

- Employment protections – parents taking parental bereavement leave will have the same employment protections as those associated with other forms of family related leave (i.e. Maternity, Paternity, Adoption, Parental and Shared Parental Leave). This includes protection from dismissal or detriment as a result of having taken leave.
6. This Bill achieves this through the insertion of a number of provisions into the Employment Rights (Northern Ireland) Order 1996 and the Social Security Contributions and Benefits (Northern Ireland) Act 1992, and the consequential amendment of that Order, that Act and other statutory provisions.

CONSULTATION

7. The Department ran a public consultation between 15 June 2020 and 10 August 2020. The consultation focused on the four essential pillars of the Parental Bereavement Leave and Pay legislation that was introduced in GB in April 2020.
8. The four essential pillars were identified as:
- the definition of a ‘bereaved parent’;
 - defining how and when parental bereavement leave and pay can be taken;
 - identifying what level and length of notice period would be necessary;
 - establishing what evidence may be required to show that an employee is entitled to leave and pay.
9. The Department published its consultation response on 20 January 2021. The response detailed the leave and pay provisions that the Department wished to introduce by way of an Assembly Bill. The response affirmed that the NI provisions would mirror those that had been introduced in GB.

OPTIONS CONSIDERED

10. The consultation signposted the Department’s wish to mirror the leave and pay provisions that were introduced in GB in April 2020. Whilst there has been some deviation in employment legislation between NI and GB in recent years, this has not been the case for family related policy and legislation entitlements, where effort has been made to broadly maintain a parity between both jurisdictions.
11. In this case, consideration was given to the option of making parental bereavement pay (PBP) a Day 1 right rather than requiring a 26 week qualifying period of employment. The Department consulted with HMRC on this matter

and they confirmed that whilst making the change was technically possible, the change would result in a significant one off cost to the NI Budget.

12. It was determined that this upfront cost made the possibility of making PBP a Day 1 right disproportionate given the, thankfully, small number of parents who suffer the loss of a child in NI each year (average of 245 child deaths in NI over 5 years from 2014-2018²) and the even smaller number of bereaved parents who would not meet the 26 week qualifying provision.
13. In addition to this upfront cost, consideration was given to the fact that should PBP in NI be introduced as a Day 1 right, payroll software developers would need to consider reflecting this change within their payroll systems. This would have timing implications for the introduction of the entire Parental Bereavement Leave and Pay Bill and would have cost implications for payroll providers. It could also impact NI employers if payroll providers decided not to make adjustments to accommodate the change in NI. The current GB PBP system is already set up to include NI but only on an equivalent basis to GB.
14. Accordingly, it was decided that parental bereavement leave and pay provisions in NI would mirror the provisions in GB and that there would be no deviation.

OVERVIEW

15. At present, there is an entitlement to unpaid time off to deal with an emergency involving a dependant. However there is no specific parental entitlement to time off work (paid or otherwise) following the death of a child or a miscarriage. Some employers allow parents to take compassionate leave. This is at the discretion of the employer and there is therefore no minimum standard observed by all employers.
16. Employed parents who lose a child from 24 weeks' gestation or whilst already accessing an existing family related leave and pay right, for example maternity or paternity leave, are entitled to take or remain on that leave for its duration. This Bill would not change this entitlement but would give employed parents an additional right to time away from work following the death of a child aged under 18 or following a miscarriage.
17. It provides for regulations to give employed parents a right to a minimum of 2 weeks of leave away from work should they wish to take it.
18. Employed parents would also be entitled to a fixed or earnings-related weekly rate of pay in respect of the two weeks' leave. This entitlement is modified so that it is subject to a requirement that the employee has worked for their employer continuously for at least 26 weeks by the end of the week before the week of the child's death. This modification will cease to have effect once the Department makes regulations removing it. The Bill states that this must be by no later than April 2026.

² https://www.nisra.gov.uk/sites/nisra.gov.uk/files/publications/deaths_by_age_1955_2019.xls

19. The introduction of a specific, statutory entitlement to parental bereavement leave and pay will set a minimum standard for employees and employers. The intention of the policy is to provide certainty for employed parents and employers in relation to parents' right to time off from work following the death of a child.

COMMENTARY ON CLAUSES

Clause 1 Parental Bereavement Leave

Clause 1 of the Bill amends Part 9 of the Employment Rights (Northern Ireland) Order 1996 by inserting a new Chapter 4, consisting of Articles 112EA to 112EF, which will result in the provision of entitlement to parental bereavement leave and miscarriage leave.

Article 112EA - Parental Bereavement Leave

Article 112EA requires the Department to make regulations to give an entitlement to employed parents to time off work following the death of a child. It provides for the conditions of entitlement to be defined in regulations by reference to the employee's relationship with the child who has died, including by reference to caring for the child prior to the child's death.

Regulations must set the duration of leave and when the leave can be taken. The leave entitlement must be a period of at least 2 weeks; and the regulations must establish a period within which the leave may be taken, which must extend to at least 56 days after the child's death. The regulations must also specify that, where more than one child dies, the employee is entitled to leave in respect of each child.

In addition, regulations can make provision for how the leave is to be taken.

A child is defined as being under the age of 18 years and a week is any 7 day period.

Article 112EB - Rights during and after Parental Bereavement Leave

Article 112EB requires the regulations made under Article 112EA to set out:

- the employee's rights in relation to retaining their existing terms and conditions of employment, whilst taking parental bereavement leave;
- the employee's obligations in relation to those terms and conditions;
- the employee's right to return to work once their leave period has concluded and the nature of the job to which they are entitled to return, as well as the terms and conditions applicable on return, and matters such as seniority, pension and similar rights.

The reference to ‘terms and conditions’ in this context is not limited to contractual terms and conditions, but does not include remuneration. Regulations can specify what things should, or should not be, seen as ‘remuneration’ for this purpose.

Article 112EC - Special Cases

Article 112EC allows the regulations to make special provision for the redundancy and dismissal of employees during a period of parental bereavement leave, including whether an employer is required to offer alternative employment, and the consequences of failing to comply with the regulations.

Article 112ED - Chapter 4 Supplemental

Article 112ED allows the regulations made under Article 112EA to set out what notices and evidence must be given by an employee to their employer, and what procedures are to be followed, in order to take parental bereavement leave as well as any requirements for record keeping. They can also set out the consequences of not complying with any of these requirements or procedures.

The regulations can also make provision for situations where an employee also has a non-statutory right to take parental bereavement leave (for example, a right arising under their contract of employment).

Regulations can also modify the way in which a week’s pay is calculated in Chapter 4 of Part 1 of the Employment Rights (Northern Ireland) Order 1996 to take account of periods of parental bereavement leave. The concept of ‘a week’s pay’ is widely used in that Order, for example in Article 153 which sets out how the basic Industrial Tribunal award for unfair dismissal should be calculated.

Article 112EE - Power to extend Chapter to stillbirths

The entitlement to parental bereavement leave under Articles 112EA to 112ED applies on the death of a child under 18. Article 112EE enables regulations to extend this provision to include parents of children stillborn after 24 weeks of pregnancy.

Article 112EF – Application in relation to miscarriage

Article 112EF requires the Department, by regulations, to provide that regulations under Chapter 4 apply in relation to a person who has experienced a miscarriage as they apply in relation to a bereaved parent, with such modifications, if any, as specified in regulations. The Department may also provide that regulations extend to a person who satisfies conditions as to their relationship with the person who has experienced a miscarriage. This enables the right to be extended to, for example, the father or the persons’ partner.

Clause 2 - Parental Bereavement Pay

Clause 2 of the Bill adds Part 12ZD (containing sections 167ZZ9 to 167ZZ19) to the Social Security Contributions and Benefits (Northern Ireland) Act 1992 which creates an entitlement to parental bereavement pay and will result in the provision of an entitlement to miscarriage pay.

Section 167ZZ9 - Entitlement

Section 167ZZ9 provides that a person who is a bereaved parent (because they meet the conditions to be set in regulations as to their relationship with the child) and who meets the weekly earnings threshold will be eligible for parental bereavement pay.

The weekly earnings threshold is met if the person's normal weekly earnings for any continuous 8 weeks, falling within the relevant 16 week window which precedes and follows the death of the child, is not less than the lower earnings limit in force at the end of the relevant week. Section 167ZZ17 allows provision to be made within regulations for assumed earnings for the weeks following the death of the child.

Section 167ZZ9 specifies that the pay entitlement is applicable for each deceased child in the event of the death of more than one child.

Section 167ZZ10 - Entitlement: Supplementary

Section 167ZZ10 specifies that, in order to receive payments, a person must give notice to their employer of the week or weeks they are intending to take leave. This must be in writing if the employer requires it.

Regulations may provide for when that notice must be given, and can disapply or modify the requirement for notice in specified circumstances. They can also set out requirements for evidence relating to proof of entitlement.

Subsection (4)(a) provides that the Department may, by regulations, subject section 167ZZ9(2)(b) or (c) and (5) to (7) to prescribed modifications in certain prescribed cases.

The regulations can specify how earnings are to be calculated or estimated for the purposes of deciding whether an employee meets the earnings threshold. This includes being able to identify particular types of payments which are to be excluded from the calculation. The regulations may also provide for amounts earned from the same employer under two separate contracts to be aggregated for this purpose.

Section 167ZZ11 - Liability to make payments

Section 167ZZ11 sets out certain conditions under which an employer is liable to pay a person parental bereavement pay.

Regulations must make provision for liability for parental bereavement pay in the event that the employer terminates their employee's contract to avoid making this payment.

Regulations may also specify conditions where this liability will shift to HM Revenue and Customs.

Section 167ZZ12 - Rate and period of pay

Section 167ZZ12 states that the weekly statutory rate of parental bereavement pay will be set in regulations, which may include provisions for different rates for different situations.

Regulations will specify the number of weeks' entitlement (which must be a minimum of two weeks), and the 'qualifying period' within which the pay must be claimed (which must be a minimum of 56 days starting from the child's death). The employee will be able to choose the week or weeks for which pay is claimed, in accordance with the regulations, and the regulations may allow pay to be claimed for non-consecutive periods, which must be blocks of a week or weeks.

Statutory parental bereavement pay is not payable if, during the week for which the statutory pay is claimed, the employee works for the employer who is liable to pay the statutory pay. This is regardless of whether or not the work is performed under an existing contract of service, or a new one. It is also not payable if the employee has worked for another employer who is not liable to pay statutory pay, but regulations can prescribe situations where this does not apply for weeks taken as leave.

Regulations may specify further circumstances in which an employer is not required to pay statutory parental bereavement pay.

Employees may choose the start and end point of their statutory pay week. A week is any period of 7 days. If it is necessary to calculate a daily rate of statutory parental bereavement pay (for the purposes of these provisions, or any regulations), this should equal one seventh of the weekly rate.

Section 167ZZ13 - Restrictions on contracting out

Section 167ZZ13 specifies that parental bereavement pay rights cannot be diluted or denied in an employee's contract, nor can an employee be required to contribute to the costs. This does not affect the validity of any agreement allowing the employer to make deductions from statutory pay, if the employer is also authorised to make the same deductions from any contractual remuneration which the employer is obliged to pay during the period (or would be authorised to make those deductions if there was an obligation to pay contractual remuneration).

Section 167ZZ14 - Relationship with contractual remuneration

Section 167ZZ14 states that the entitlement to statutory parental bereavement pay does not affect an employee's rights to payments associated with their contract of service.

However, it allows an employer to set off any contractual remuneration paid to an employee during a period in which they are entitled to statutory pay, against the liability to make statutory payments to that employee, and vice versa.

Regulations can specify particular types of payments which are to be regarded (or not regarded) as contractual remuneration.

Section 167ZZ15 - Crown employment

Section 167ZZ15 provides that bereaved parents employed by the Crown will have the same entitlements to parental bereavement pay as those who work for other employers.

Section 167ZZ16 - Special classes of person

Section 167ZZ16 allows regulations to set, with the agreement of HM Treasury, how the right to parental bereavement pay applies to bereaved parents who are, have been or will be outside NI, employed on board any ship, vessel, hovercraft or aircraft, or employed in continental shelf operations.

Section 167ZZ17 - Supplementary

Section 167ZZ17 provides definitions for Part 12ZD and other supplementary provisions. This includes the definition of an employer as someone who is paying secondary Class 1 National Insurance contributions in relation to any of the earnings of the bereaved parent (or who would be paying such contributions but for the condition in section 6(1)(b) of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 or the fact that the employee is under 16).

An employee is defined as someone who is employed in Northern Ireland, either under a contract of service or in an office, with earnings.

Regulations can set out exceptions to this, and also circumstances where individuals who would not be classed as employees according to this definition are nevertheless to be treated as employees for the purposes of parental bereavement pay.

Regulations may set out when two or more employers, or two or more employment contracts, should be treated as a single employer or contract.

A week is defined as a calendar week, except in relation to section 167ZZ12 which deals with the weeks in which statutory pay can be claimed; in that case a 'week' can start or end on any day of the week.

An employee's normal weekly earnings are calculated as the average weekly earnings that have been paid to them over a set period (to be specified in

regulations) under their employment contract with the employer liable for parental bereavement pay. Regulations may provide for assumed earnings and - can also set a different method for calculating normal weekly earnings in designated circumstances.

Regulations will also specify what is meant by ‘earnings’.

Regulations can make provisions for employees working for certain National Health Service (NHS) bodies whose contracts of employment have been treated as ‘divided’ into more than one contract, following the establishment of Health and Social Care trusts, to elect for all their contracts to be considered as one for the purposes of parental bereavement pay e.g. determining eligibility and pay rate.

Regulations may also set the conditions that must be satisfied in order for an employee to be entitled to make this decision. Regulations may also include the time within which an employee must make this decision, how notice of this choice must be given and to whom, as well as how the information that must be provided alongside the notice should be given.

Regulations can also specify which one of the person’s employers, under these circumstances, is liable to pay their employee parental bereavement pay.

Section 167ZZ18 - Application in relation to stillbirths

The entitlement to parental bereavement pay under sections 167ZZ9 to 167ZZ17 applies on the death of a child under 18. Section 167ZZ18 enables regulations to extend this provision to include the parents of children stillborn after twenty-four weeks of pregnancy.

Section 167ZZ19 – Application in relation to miscarriage

Section 167ZZ19 requires the Department, by regulations, to provide that Part 12ZD and regulations under it apply in relation to a person who has experienced a miscarriage as they apply in relation to a bereaved parent, with such modifications, if any, as specified in regulations. The Department may also provide that regulations extend to a person who satisfies conditions as to their relationship with the person who has experienced a miscarriage. This enables the right to be extended to, for example, the father or the persons’s partner.

Clause 3 – Temporary provision: qualifying employment period for parental pay

Clause 3 provides that the provisions inserted by Clause 2 have effect with modifications and that these modifications will remain in place until no later than 2026. The modifications are that, in order to be entitled to statutory parental bereavement pay, the person must have been continuously working for their employer for at least 26 weeks by the end of the week immediately before the one in which the child dies, that the person is still employed by this employer at the time of their child’s death and that the person’s normal weekly earnings for the

period of 8 weeks ending with the relevant week are not less than the Lower Earnings Limit in place at the end of the relevant week.

Clause 5 – Commencement

Clause 5 provides that commencement powers (for Part 2 of the Schedule (and clause 4 in so far as it relates to that Part)) are also conferred upon the Department for Communities. This is to allow for the fact that there are provisions (Article 68) within the Welfare Reform (NI) Order 2015 that make reference to a person's entitlement to work, as it relates to family related statutory payments, that have yet to be commenced. Responsibility for commencing these provisions rest with the Department for Communities. Through giving the commencement powers for Part 2 of the Schedule (and clause 4 in so far as it relates to that Part) to the Department for Communities, this enables the Department for Communities to commence this condition for the full range of family related statutory payments simultaneously, including parental bereavement leave and pay.

The Department that makes a commencement Order (under clause 5(1) the Department for the Economy, and under clause 5(2) the Department for Communities), may make transitory or transitional provisions, or savings.

Clause 5 also specifies that regulations under the provisions inserted by Clauses 1 and 2 must come into operation by no later than 6 April 2023 and that application in respect of miscarriage must apply by no later than April 2026.

Schedule - Further Amendments to do with Parental Bereavement Leave and Pay

The Schedule makes consequential amendments to other legislation, including the insertion of references to parental bereavement Leave and Pay where relevant.

It includes amendments to the following Orders and Acts:

- Social Security (Northern Ireland) Order 1989
- Social Security Contributions and Benefits (Northern Ireland) Act 1992
- Social Security Administration (Northern Ireland) Act 1992
- Pensions (Northern Ireland) Order 1995
- Employment Rights (Northern Ireland) Order 1996
- Social Security Contributions (Transfer of Functions, etc.) (Northern Ireland) Order 1999
- Employment (Northern Ireland) Order 2002
- Pensions (No.2) Act (Northern Ireland) 2008

FINANCIAL EFFECTS OF THE BILL

20. Introductory one-off costs, such as familiarisation, were originally estimated at £279k for business. It is possible that these familiarisation costs could increase. One off costs for Government are estimated at £1.5m.
21. Recurring annual costs for business were estimated at £85k. It is possible that these recurring annual costs for business could increase. Recurring annual costs for Government are estimated at £2.94m.
22. There is a risk of repercussive costs for Government resulting from the Bill. The value of these potential costs is unknown.

HUMAN RIGHTS ISSUES

23. No adverse human rights issues or impacts have been identified in relation to this Bill.

EQUALITY IMPACT ASSESSMENT

24. Parental Bereavement Leave and Pay will support bereaved working parents who experience the loss of a child. Statutory provision for this targeted group will not impose a negative impact on those that do not have children or do not have children under 18. No particular section 75 group will be disproportionately negatively affected by Parental Bereavement Leave and Pay.

SUMMARY OF THE REGULATORY IMPACT ASSESSMENT

25. Two options were considered. The first was to do nothing and maintain the status quo. This was ruled out on the basis of a Ministerial commitment to introduce Parental Bereavement Leave and Pay in NI akin to that in GB.
26. The second option was to introduce legislation in NI that is broadly in line with the Parental Bereavement Leave and Pay legislative provisions introduced by the UK Government in April 2020.
27. No alternative to legislation was considered to be appropriate. Ensuring that employees would receive this support from their employers could only be achieved through regulatory underpinning.

DATA PROTECTION IMPACT ASSESSMENT/DATA PROTECTION BY DESIGN

28. Data protection principles have been followed in the consideration and design of these proposals.

RURAL NEEDS IMPACT ASSESSMENT

29. There is no evidence to suggest a greater or lesser prevalence of childhood deaths among rural parents. There is also no evidence to suggest that the social and economic needs of parents from rural areas who experience the death of a child differs from the social and economic needs of parents from non-rural areas.

LEGISLATIVE COMPETENCE

30. At Introduction, the Minister for the Economy, Mrs Diane Dodds, had made the following statement under Section 9 of the Northern Ireland Act 1998:

“In my opinion the Parental Bereavement (Leave and Pay) Bill would be within the legislative competence of the Northern Ireland Assembly.”

SECRETARY OF STATE CONSENT

31. The Secretary of State had consented under section 8 of the Northern Ireland Act 1998 to the Assembly considering this Bill.