



Committee for the Economy

OFFICIAL REPORT (Hansard)

Parental Bereavement (Leave and Pay) Bill:
RaISe Briefing

15 September 2021

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Dr Caoimhe Archibald (Chairperson)
Ms Sinead McLaughlin (Deputy Chairperson)
Mr Keith Buchanan
Mr Stewart Dickson
Mr Stephen Dunne
Mr Mike Nesbitt
Mr John O'Dowd
Ms Claire Sugden
Mr Peter Weir

Witnesses:

Ms Orla Drummond	Northern Ireland Assembly
Ms Rachel Keyes	Northern Ireland Assembly
Mr Michael Scholes	Northern Ireland Assembly

The Chairperson (Dr Archibald): I welcome Michael Scholes, Rachel Keyes and Orla Drummond, who are research officers from the Assembly's Research and Information Service (RalSe). I will hand over to you to make an opening statement, and then we will open it up to members' questions.

Mr Michael Scholes (Northern Ireland Assembly): Thank you, Chair. I will make a start. I take it that you can hear and see me.

The Chairperson (Dr Archibald): We can indeed.

Mr Scholes: Great. Before I start, I want to thank Eleanor Murphy for her contribution to the paper. I will summarise the paper's key points, and then hand over to Orla, who will discuss the Bill's equality implications. Rachel will then discuss its financial implications. That should leave us plenty of time for questions.

The paper aims to support the Committee and, indeed, the wider Assembly, in its scrutiny of the Parental Bereavement (Leave and Pay) Bill. As we normally do in our papers, we have presented, in blue boxes, issues and questions for the Department, or, indeed, sometimes, other Departments.

Section 1 of the paper provides an overview of the Bill and the public consultation that was held last year. As you know, the Bill was introduced in June. It creates a statutory entitlement to leave and pay

for working parents who suffer the death or stillbirth of a child. The Bill mirrors provisions that are already in force in GB. It entitles employees to statutory bereavement leave and pay, and workers to statutory bereavement pay only. Individual employers are free to go beyond those specified entitlements and offer enhanced bereavement leave and pay benefits if they wish to do so. The Bill contains powers that allow for the introduction of regulations to implement the leave and pay entitlements. For example, such regulations are to define a "bereaved parent", reflecting the caring relationship between the individual and the child prior to the child's death. The Bill specifies that commencement powers are conferred not only to the Department for the Economy but to the Department for Communities. The Minister anticipates that the Department could introduce the leave and pay regulations by April 2022.

Section 2 of the paper concerns the parental bereavement leave provisions of the Bill. Bereavement leave is available to employees, not workers, from day one of their employment. It is offered only within 56 days of the child's death. It is to be taken in weekly blocks, not single days. It is provided up to a maximum number of days as specified under the regulations that the Department will bring forward. It is to be taken in accordance with specified notification requirements, which, again, are to be brought forward by regulations.

Section 3 concerns the pay elements of the Bill. The bereavement pay is offered to employees and workers after 26 weeks of employment. It is to be taken at a pay rate to be specified under regulations. In GB, that is currently £151.97 or 90% of an employee's average weekly earnings — whichever is lower. Employers can claim statutory bereavement pay, or a certain element of it, from HM Revenue and Customs.

Section 4 presents a summary of statutory pay and leave entitlements for working parents in countries outside the UK. For example, Australia, the Netherlands, Norway and Sweden all provide paid leave for the care of non family members. In New Zealand, the Holidays Act 2003 contains provisions that confer minimum statutory entitlements to bereavement leave and family violence leave. The Holidays (Bereavement Leave for Miscarriage) Amendment Act 2021 amended the 2003 New Zealand Act to include provisions relating to miscarriage. In the Republic of Ireland, despite previous attempts to legislate in this regard, there is no statutory entitlement to bereavement leave and pay, and those remain largely at the discretion of the employer.

Section 5 of the paper provides a discussion on equality and human rights considerations. For example, the criteria for entitlement could impact on low-paid families if they feel unable to take periods of unpaid absence. Orla will provide more detail on that and other equality considerations in her presentation. Section 5 also presents a consideration of the financial implications of the Bill. With the current financial arrangements under the devolution settlement, Northern Ireland can extend bereavement leave and pay entitlements beyond those that are offered in GB. However, doing so would depart from the parity principle, which could impact on the Northern Ireland block grant and, in turn, the Executive's Budget. There are also one-off and recurring costs to the public purse and for businesses. Rachel will give more details on those in her presentation.

That is a summary of the key points. I will hand over to Orla to discuss the potential equality and human rights implications of the Bill. Thank you.

Ms Orla Drummond (Northern Ireland Assembly): Thank you, Michael. I will cover three key issues that are documented in section 5 of the paper, which starts at page 70 of your pack: human rights and equality; the employment status of claimants; and parental bereavement pay and the parity principle.

On human rights and equality, there are a few issues that could require further consideration and exploration. One such issue is the need for clarity in identifying who is eligible to claim. Essentially, a lack of clarity could impact on the rights that are enshrined in the European Convention on Human Rights, particularly at article 8, which guarantees protection of the right to respect for private and family life, and at article 14, which prohibits discrimination. There are also potential impacts for section 75 of the Northern Ireland Act 1998 in respect of race, religion and gender.

During the consultation process, respondents called for recognition of different definitions of parenthood and family. In particular, they highlighted the need to ensure that there are equal rights for unmarried parents, those in same-sex relationships and those in informal kinship care arrangements. As noted in the paper, kinship care is the full-time care of a child by kin other than a parent; it could be a sibling, a grandparent, an aunt or an uncle. Those informal arrangements are often borne from crisis in the family setting; they are not recognised foster carers and the arrangements may not be known to social services.

It is important to note that there have been recent judicial review cases for other bereavement benefits. For example, the McLaughlin case of 2018 related to the widowed parents' allowance. That was a social security benefit that was payable to men and women who had been widowed and had dependent children. Ms McLaughlin had three children when her partner died, but she was deemed ineligible for the allowance as they were not married. She sought a judicial review. It went the whole way to the Supreme Court, and it found that the decision was contrary to article 14 of the European Convention on Human Rights when read with articles 8 and 1. That case highlights why it is so important to scrutinise who is eligible to claim. Clarification helps to provide guidance for employees and employers, but it also helps to limit the potential for judicial review cases. It could be beneficial to examine whether that has given rise to any consideration in GB.

Another area for consideration is race and religious discrimination, which was raised as a potential problem by a number of GB law firms. They noted that certain religions have specific observances on the death of a child. That would have greater weight in the law here due to section 75 of the Northern Ireland Act and, therefore, could require additional scrutiny.

Another consideration is gender and the socio-economic impact of the Bill, and particularly of the qualification for parental bereavement pay to commence only following 26 weeks of employment. That could be particularly impactful on low-paid families, who may feel that they are unable to afford an unpaid period of absence. It may also have an inequitable impact on women, who are more likely to be in low-paid employment. The Living Wage Foundation notes:

"Women make up nearly two thirds ... of workers ... struggling to make ends meet on less than the real Living Wage".

Women may be unable to avail themselves of unpaid leave due to caring or financial responsibilities, which may indirectly impact on the gender equality provision of section 75. During the consultation process, a suggestion was made for the provision of a statutory payment for bereaved parents who fall outside of the 26-week qualifying period. Making that available could mitigate the impact on section 75.

Very briefly, it is also important to note the difference in employment status between an employee and a worker. By definition, a worker is a hybrid of an employee and a self-employed person. Workers generally have fewer protections in domestic employment law. Therefore, in the enactment of this Bill, workers could be treated differently in bereavement leave entitlement. Even looking within our environment, we can make a comparison between those who are employed by the Northern Ireland Assembly directly as employees and those who are agency staff. Employees have entitlement to annual leave from day one, whereas agency staff have to accrue it. That is also something to keep in mind.

Finally, I will chat about parental bereavement pay and the parity principle. The consultation highlighted the desire to mirror the leave and pay provisions that were introduced in GB in April. That aim is in keeping with the parity principle for social security, child support and pensions, as set out in section 87 of the Northern Ireland Act. Section 87 requires the Northern Ireland Minister and the Secretary of State for Work and Pensions to consult and ensure that relevant legislation achieves a single system across the UK. However, it does not explicitly place a requirement to always maintain parity, and there have been cases in which there has been a disparity in approach. An example of that is the provision of supplementary welfare payments to mitigate the bedroom tax and the benefit cap, the funding for which is derived from the NI block grant.

During consultation on the Bill, responses called for a change to the parental bereavement pay that is provided in GB, namely that it should be available from the first day of employment and parents should not have to wait until the end of the 26-week qualifying period. Deciding to do that would impact on the Executive's block grant as Treasury would seek to recover additional costs. There was a consultation with HMRC on this matter. HMRC identified that that change would have a significant one-off cost to the NI Budget and that there would be cost implications for payroll providers and potential employers. It decided that the pay provisions should mirror those in GB. That is something to keep in mind when you consider the creation of the statutory payment to mitigate the section 75 impact that was discussed earlier.

That covers section 5. Rachel will take over from this point. Thanks, Rachel.

Ms Rachel Keyes (Northern Ireland Assembly): Thank you. I will briefly discuss the estimated costs that are associated with implementation of the Bill. "Review of Bill Costs" is section 5.4 of the paper,

on page 82 of your pack. The estimated costs are identified by the Department at paragraphs 19 and 20 of the Bill's explanatory and financial memorandum (EFM). Within that, the Department has proposed four estimations: a one-off cost to the public purse of £73,000, a one-off cost to businesses of £279,000, recurring costs to the public purse of £100,000, and recurring costs to businesses of £85,000. I will discuss only those costs that are associated with the public purse.

No explanation was detailed in the EFM for those costs. However, we contacted the Department for further information on its estimations. The Department advised that the assumptions and associated methodology that underpin the estimations of costs were based on those that were used in the impact assessment that was undertaken during the GB parental bereavement leave and pay Bill process in 2018.

I will look first at the one-off costs. The GB impact assessment identified one-off costs of £2.1 million. That estimation was provided by HMRC. Those costs are associated with setting up IT systems, resource costs and telephone costs. The Department advised the RalSe public finance scrutiny unit that the £73,000 estimation for Northern Ireland is based on the assumption of an approximate 3.5% share of that GB estimation. Scrutiny points 51 to 55 on page 83 relate to that estimation.

Recurring annual costs were estimated to be £100,000. As above, the Department advised that those costs were extrapolated from the 2018 impact assessment in GB. That impact assessment had a number of assumptions, which I will go through quickly. The first is assumption the number of eligible parents. The Department advised that the calculation for the number of parents was based on 225 child deaths per annum. That figure was calculated using two data sets that were published by the Northern Ireland Statistics and Research Agency. The data is taken from 2018, and the two data sets that are used are the Northern Ireland deaths by age and the stillbirth and infant death numbers. In 2018, that equated to 146 deaths between the ages of zero and 17, and 79 stillbirths. At the time of writing, 2019 data was available, and, just for comparison's sake, that equates to 215 child deaths per annum.

The estimate assumes, however, that there are two parents or legal guardians for each child who dies. The estimate accounts for the less traditional family set-up, where the biological parents or adoptive parents of the child can be separated and have new partners. The GB impact assessment uses data from 2012 that was published by the Department for Work and Pensions. It states that one third of children in the UK live in a separated family. The estimate, therefore, assumes that approximately one third of parents who experience child bereavement may be separated. The estimate also assumes that all those parents have a new partner. The impact assessment acknowledges that that is a high estimation. However, that is the estimation that it has gone with: that 100% of separated parents will have a new partner within the child's lifetime. Scrutiny points 56 and 57 on page 85 of your pack relate to that assumption.

The next thing to consider is parents' employment status, because that has an impact on whether they are eligible to make a claim. The impact assessment for the GB legislation uses data on the employment rate, self-employment rate and duration of employment to estimate the number of eligible parents. That is UK-based data from the Office for National Statistics. Scrutiny points 58 and 59 on page 86 of your pack deal with that assumption.

The next assumption relates to take-up. The Department advises us that it has assumed a take-up rate of 87.5% and that this is based on the GB take-up rate. Scrutiny points 60 to 64 relate to that assumption.

Orla discussed the Northern Ireland parity principle in section 5.3 of the paper. The EFM states:

"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".

It further states that the Department consulted with HMRC and that, whilst it is technically possible to do this, it would have significant cost implications. We have done an illustration of these costs. HMRC stated that the cost implication would be a one-off cost of around £180,000 for setting up IT systems. However, it should be noted that the GB impact assessment assumed that 9% of employees would have insufficient employment tenure to qualify for parental bereavement pay, so we now assume that every employed parent qualifies for parental bereavement pay. We put together an illustration — it is on page 88 of your packs — that shows that, if all these parents earned enough per week to hit the £150 threshold, an additional 36 parents would be eligible for payment. That would mean a cost of around £11,000, which is disproportionate to the £180,000 that it would cost HMRC to set up all the

systems. It was suggested that these parents could use the Department for Communities' existing support scheme. Scrutiny points 65 to 69 on page 89 of your packs relate to this. Thank you.

The Chairperson (Dr Archibald): Thank you for that. Is your presentation complete?

Mr Scholes: Yes, Chair. We are ready to take questions now.

The Chairperson (Dr Archibald): That is great. Thank you. I will start where you finished, Rachel, on the costs. Is the £180,000 that HMRC say that it would cost to set up the system to make it a day-one right additional to the £73,000 one-off cost to the public purse of setting up the system in general?

Ms Keyes: That cost has already been taken up. The system was set up in 2018 for the original GB version, but it is open to Northern Ireland. However, modifying that for Northern Ireland to have a different start date would cost an additional £180,000.

The Chairperson (Dr Archibald): Did they set out a rationale as to why that is the case?

Ms Keyes: No. That figure came directly from HMRC, so we do not have any detail on it.

The Chairperson (Dr Archibald): OK. It is useful to be aware of that. One of the main issues that has been highlighted to the Committee in our consultation responses and other engagements that we have had is the issue of making it a day-one right so that people do not have to have a 26-week qualifying period. We will want to take that up with the Department in greater detail.

Orla raised some very interesting points on the section 75 implications. Some of those things may not be completely obvious in the first instance, particularly the religious observations. Again, we will want to look at that in a bit more detail.

Mr Nesbitt: Thank you, all, for the presentation. I have two points. You note that miscarriage is included in the legislation in New Zealand. Are there any other jurisdictions where miscarriage is included?

Mr Scholes: Our research did not show up other examples. The New Zealand example, as you can see from the paper, is quite new and up-to-date. In the research that we looked at, there were some references to certain states in India. Unfortunately, the sources for that were not really available; a lot of them were not in English and others proved quite difficult to get hold of. Our research showed that those were the only cases that we could find. We can come back to the Committee on that and do some more digging, but, up to the point of the paper's publication, New Zealand was the only jurisdiction that had provision for miscarriage in its legislation.

Mr Nesbitt: OK, that is useful; thank you. The other point is that one respondent to the survey was the Coalition of Bereaved Workers, which wants a scheme for workers who have lost a close relative or a partner. Is there any research on the implications of such a scheme?

Mr Scholes: No, in section 4 of the paper, we use the OECD Family Database Survey to look at statutory provision for working parents across OECD countries. That shows up quite positive recommendations for different countries, as I alluded to in my presentation. A lot of them do provide statutory benefits for the care of non-family members, which is quite forward-thinking when we think of the traditional family changes over the years. The paper does not cover that specific element, but, again, it is something that we could come back to the Committee on.

Mr Nesbitt: There was mention of human rights and article 8 of the European Convention on Human Rights. This may be one for the lawyers rather than yourself, but is there a possibility that the Coalition of Bereaved Workers could take some sort of case against a "parental" Bill in that it favours one group over another?

Mr Scholes: Can I pass that over to Orla, please?

Ms Drummond: From my legal knowledge, I do not think that they would do that and nor would they have legal grounds to do so, because it is a specific Bill that tackles the issue of parental bereavement

leave and pay. It is something that they could use as a lobbying tool to expand the rights that have been acknowledged in the Bill.

Mr Nesbitt: OK, that is useful. Thank you very much, indeed.

Mr K Buchanan: Rachel, you touched on one-off costs for the Government. The one-off cost for business, which is referred to in the paper as being for familiarisation, is £279,000. What is that? Can you give me a breakdown of what familiarisation is and where those costs are incurred by businesses? How is that figure calculated?

Ms Keyes: We do not look at costs for business; we just look at the cost to the public purse. That figure was based on the GB impact assessment, but I do not have any further details on it.

Mr K Buchanan: Fair enough, OK. That is all that I wanted to ask, thank you.

The Chairperson (Dr Archibald): Is the additional £11,000 to make it a day-one right the recurring cost to the public purse?

Ms Keyes: Yes, that is based on the other estimation that we have used that there would be an additional 36 parents eligible for the payment each year. In Northern Ireland, there is quite a low number of deaths per year. If we take 9% of deaths, there would be an additional 36 parents eligible for the payment, and that would be a recurring cost.

The Chairperson (Dr Archibald): How would we get the information on the cost to businesses?

The Committee Clerk: In the paper, there are a number of scrutiny points. The plan is, with members' approval, to refer those to the Department to get any further detail that it has. The research team has highlighted that a number of variables have been plugged in using DWP data or HMRC data, which is not necessarily up to date. It is really a case of trying to find out how the Department has arrived at its conclusions. The scrutiny points will help us to do that. When we get those back from the Department, we can go through them and, where there are gaps in the data, hopefully, ask for further information. That should show up the Department's methodology and where it got its figures from.

Ms McLaughlin: Thank you very much for the briefing and the update. I dropped out for a moment or two, so I want Orla to go over a couple of things for clarity. On the issue of parity across the UK and the implications of our going in a different direction on the day-one right, what impact could that have on the block grant? Can you explain that a little bit more? Thanks.

Ms Drummond: That is more of a financial question that Rachel would be able to answer for you. I do not have details on the specifics. Rachel, would you mind answering that?

Ms Keyes: Yes, sure. That is in the last section of the paper, and there are a couple of scrutiny points related to it. HMRC put together an estimated cost of updates to its systems, telephone costs and the resource costs to change the system. The current system includes Northern Ireland, but, if we were to have a slightly modified system, it would cost £180,000 to get that off the ground and to change forms and IT systems. We put together an illustration of the estimated recurring costs per year to Northern Ireland, which I talked about, but perhaps you dropped out at that point. That was found to be quite low: only £11,000 per year, so it would take a number of years to take back the initial set-up cost of £180,000.

Ms McLaughlin: I thought that those were the figures. As I said, I dropped out. Those are not gigantic figures. In the Economy Committee, we often deal with millions. For example, for the high street voucher scheme, we are spending £149 million. Therefore, a recurring cost of £11,000 to support parents at the most distressing moment in their entire life is not an awful lot of money, nor is the £180,000, for it to be a day-one right. That is not *[Inaudible owing to poor sound quality]* at all. Obviously, it is up to the Committee to scrutinise all the issues that you have raised today. Thank you very much for the details.

Mr Scholes: Chair, may I add to that, please? On the macro public finance picture, the issue of diverging and offering more enhanced payments to Northern Ireland recipients than to those in GB would have a block grant and public finance consequence, as Orla mentioned in her discussion on

parity. In effect, putting in place a day-one right would break parity in certain circumstances. There are scrutiny points in the paper about that. Negotiations with Treasury would have to happen, because social security payments are an annually managed expenditure. Again, those questions are more for the Department of Finance, as opposed to the Department for the Economy, to work through.

Mr O'Dowd: I fully appreciate that all those things have to be worked through and investigated, but experience tells me that the usual answer from Treasury is no and that the usual answer from HMRC is, "No, we cannot do that". It needs to be further explored and examined. The costs thus far do not seem to be crippling. As was said, if we can assist more bereaved parents, we should explore every option to do so.

Mr Weir: I want to tease out — this might be done through further exploration — the difference between the figures suggested for adopting the GB model and for providing day-one entitlement. We will need to wait to see what that is. Is there any indication — again, this may be an unfair question for the researchers — of what would happen if we were to agree to extend it to day one and beyond? Obviously, it has particular implications in these circumstances. Would that have any potential knock-on implications for any level of entitlements, or at least leave an opportunity to press for other entitlements, if that was adopted in that case maybe compared with other forms of potential benefits or entitlements that accrue? At the moment, there is a barrier with the requirement to be in employment for 26 weeks.

Mr Scholes: That is a very good question, but it could perhaps be directed to officials from the Department for Communities. We certainly did not cover that area in the paper. That went beyond its scope. That question would perhaps be better put to officials in the Department for Communities.

Mr Weir: I know that we are doing various lines of enquiry and finding out information. I suppose that the issue is that there may be a different implication if we are in a situation in which, for example, ongoing costs would mean an extra £11,000 per year. I think that anybody would see that as fairly insignificant. If it had no implications elsewhere, it may be a different situation than saying, "Well, because of this, it will cost an extra £5 million a year in such and such an area". It is maybe about trying to tease out where things are with the positions.

The Chairperson (Dr Archibald): No other member wants to ask a question. Thanks very much for the briefing; it was really useful. If we have any questions, hopefully, you will be able to come back to us at a later date.

Mr Scholes: Thank you very much.