

Consultation Response

Make Work Pay: Consultation on Leave for Bereavement including Pregnancy loss

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors. We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Employment Law sub-committee welcomes the opportunity to consider and respond to the UK Government's Make Work Pay: Consultation on Leave for Bereavement including Pregnancy loss.¹ The sub-committee has the following comments to put forward for consideration.

¹ [Make Work Pay: Consultation on Leave for Bereavement including Pregnancy loss](#)

Consultation Questions

Part One: Eligibility

Question 1 – Which relationships between the employee and the person who has passed away should qualify for the bereavement leave entitlement? Please select all that apply.

- a) Immediate family members (including biological, adopted, step, half), for example, spouses, civil partners and partners in a committed long-term relationship, parents, adult children, siblings
- b) Grandparents and grandchildren
- c) Extended family members, for example, in-laws (mother/father/sibling/child), aunts, uncles and cousins, niece/nephew
- d) Title doesn't matter, it should be based on the importance that person played in their life (for example, foster carers or "chosen family" including close friends, kinship caregivers)**
- e) Another type of relationship not listed above

Question 2 – [if yes to option E] Please describe the types of relationships or roles that should be eligible

N/A

Question 3 – Should bereavement leave for pregnancy loss be restricted to the person who has physically experienced the pregnancy loss?

a) Yes

b) No

Question 4 – If your answer is no, who else should be able to take leave?

Please select all that apply and/or suggest others:

- a) A spouse, civil partner, the other parent, or partner (who is in a committed long-term relationship) with the person who physically experienced the pregnancy loss**
- b) The intended co-parent of the child who was expected to be born (who may not live with or be in a committed relationship with the pregnant woman or person) This could include ex-partners.**

c) Intended parents in a surrogacy arrangement

d) Another type of relationship not listed above (please specify)

We do not consider that bereavement leave should be restricted to the mother who has physically suffered the pregnancy loss. While there may be separate medical reasons for a mother to require to take leave following such a loss, this is not the intended purpose of the bereavement leave for pregnancy loss. This is for *anyone* who has experienced the loss and is suffering from the grief as a result of such a sad loss. We cannot think of another category of relationship, but if there was one that we are missing, then we are of the view that this should also be included. We do not think that there is a risk that such a right would be used more than is absolutely necessary to take time to grieve the loss of the pregnancy given that it is unpaid.

Question 5 – Do you agree that all the types of pregnancy loss listed above by the Government should be eligible for bereavement leave?

a) Yes

b) No

c) Not sure

Please explain your answer, including any suggestions for clarification.

Question 6 – Are there any additional forms of pregnancy loss that should be included?

a) Yes (please describe)

b) No

c) Not sure

Please explain your answer

We are of the view that *any* type of pregnancy loss should be included and do not see the basis for setting out categories of “forms of pregnancy loss”.

Part two: When and how Bereavement Leave can be taken

Question 7 – How long should unpaid bereavement leave be?

a) One week

b) Two weeks

c) An alternative leave length (please describe).

Please explain your answer.

We consider that unpaid bereavement leave should be *at least* two weeks. We consider that one week's leave is insufficient time in most cases to support an employee to manage the practicalities of funeral arrangements as well as the emotional or physical aspects of loss. Further, we do not believe there is a strong rationale for unpaid bereavement leave to be shorter in length than parental bereavement leave, which is currently two weeks.²

We would favour a longer leave entitlement for both parental bereavement leave, and unpaid bereavement leave of 4 weeks. We consider leave of 4 weeks would offer appropriate support for a grieving employee who needs it, whilst minimising potential disruption to employers.

We do not believe there is a high risk of abuse by employees of a longer bereavement leave entitlement. Given that bereavement leave is unpaid, employees are unlikely to take more leave than they need.

Question 8 – Do you think employees should be offered the same amount of leave for all types of scenarios, and all relationships to the deceased, that you have selected above?

a) Yes

b) No

We consider employees should be offered the same amount of leave for all types of scenarios, and all relationships to the deceased. Aside from the complexity which would ensue for both employers and employees from different leave arrangements, we do not consider there to be any robust basis on which rational distinctions can be drawn. Responses to loss are often unpredictable with bereavement affecting different people in different ways. Whilst the relationship to the deceased might be relevant to the bereavement experience in some cases, it will not be relevant in all cases.

Question 9- If you have selected “no”, what types of bereavement might require different leave arrangements? Please select all that apply and/or suggest others:

a) Bereavement leave for other loved ones should vary depending on the type of relationship (e.g. longer for close family than for grandparents or extended family)

² The Parental Bereavement Leave Regulations 2020, SI 2020/249

b) Bereavement leave for other loved ones should be different from bereavement leave for pregnancy loss

c) Bereavement leave for pregnancy loss should vary depending on the relationship of

the bereaved person to the child who had been expected to be born

d) Other

Please give options for longer or shorter leave durations.

N/A

Question 10 – For Bereavement leave, which of the following options for the leave entitlement to begin would be most appropriate?

a) From the date of death or pregnancy loss

b) The date of knowledge of the death or pregnancy loss

c) An alternative arrangement (please describe).

[For options A and B] Please explain your answer.

We consider that bereavement leave should begin on the date of knowledge of the death or pregnancy loss. It is from this date that the employee requires the support of the bereavement leave entitlement, not the earlier date of death or pregnancy loss. Further, determining the date of death is not straightforward in every case, and may be particularly difficult to determine in relation to pregnancy loss before 24 weeks. We note that parental bereavement leave runs from the date of death of the child³: we would suggest an amendment to parental bereavement leave so that the window for taking leave in the case of the death of a child only opens on the date the parent has knowledge of the death.

Question 11 – Which of the following options for taking bereavement leave would be most appropriate?

a) Leave must be in one continuous block

b) Leave can be taken discontinuously, in blocks of one week

c) Leave can be taken discontinuously, in units of one day

³ as set out in the UK Government's statutory guidance implementing the Parental Bereavement Leave Regulations 2020 (SI 2020/249), which states that leave "*can start on or after the date of the death or stillbirth.*"

d) An alternative arrangement (please describe).

Please explain your answer.

We consider that employees ought to be permitted to take leave discontinuously, in units of one day. We consider this more closely meets the needs of those who are to benefit from the leave provisions whilst also not placing an undue burden on employers. As noted above, bereavement affects different people in different, and often, unpredictable ways. Some days may be more challenging for employees who have suffered a bereavement to attend work than others and these will not necessarily coalesce in a continuous period of one week. An employee may, for example, need leave for emotional support on a loved one's birthday or the date of an anniversary. They may not need leave the following day, and may benefit from being at work. Many employers, we believe, would prefer to provide cover for an absent employee in units of one day, as and when required, rather than provide cover for blocks of one week which may prove more disruptive to their operations.

Indeed, inflexible bereavement leave arrangements which require employees to take bereavement leave in blocks of one week may impact negatively on employers who are likely to find grieving employees requiring additional sick leave in units of a day for bereavement purposes.

We note that parental bereavement leave must be taken in discontinuous blocks of one week.⁴ For the reasons noted above, we consider that leave which can be taken in discontinuous units of one day is preferable for parental bereavement leave as well as for unpaid bereavement leave.

Question 12 – Which of the following windows for taking bereavement leave would be most appropriate?

a) Eight weeks (56 days)

b) 52 weeks (one year)

c) 56 weeks

d) Other – please specify.

Please explain your answer.

We consider that a 56-week window for taking bereavement leave is most appropriate. This would align the window for taking unpaid bereavement leave with the window for taking parental bereavement. We do not consider there is any strong rationale for differentiating between the two leave entitlements in this respect.

⁴ Parental Bereavement Leave Regulations 2020 (SI 2020/249),

As noted above, bereavement affects different people in different, and often unpredictable, ways and – importantly – at different times. Whilst some employees will need leave for practical reasons and for physical, as well as emotional, support in the weeks following the death or loss, other employees will require support at a much later stage.

A window of 56 weeks would also allow an employee to take leave on or around the anniversary of the death of the loved one or pregnancy loss.

Part three: Notice and Evidence Requirements

Question 13 – Do you think employees should be required to provide notice they intend to take bereavement leave to their employer?

I. If the leave is taken very soon after the bereavement (e.g. within the first few days or weeks)

a) Yes

b) No

To allow employers to remain updated as to their employee's whereabouts and to allow them to keep accurate records, we would agree that an employee intending to take bereavement leave should notify their employer.

II. If the leave is taken at a later period (e.g. several weeks or months after the bereavement):

a) Yes

b) No

Please explain your answer.

As above

Question 13a – (For those that answered 'yes' to I): How much notice should employees be required to give to their employer that they intend to take bereavement leave straight away?

a) Before the employee starts work on the day they intend to take leave, or as soon as is reasonably possible thereafter

b) Other

Please explain your answer.

Given the highly sensitive nature of this leave, our view is that notice requirements should be minimal. Where an employee is seeking to take bereavement leave very soon after a bereavement, it is unlikely that this can be scheduled far in advance. Therefore, we would agree that before they start work that day, or as soon as reasonably possible thereafter, would be a suitable proposal.

Question 13b – (For those that answered ‘yes’ to II): What is a reasonable notice period employees should give for leave taken at a later period?

a) Before the employee starts work on the day they intend to take leave, or as soon as is reasonably possible thereafter

b) One week’s notice before the leave is due to start

c) Two week’s notice before the leave is due to start

d) Other

Please explain your answer

As above, this type of leave is highly sensitive, notice requirements should be minimal. Those taking leave at a later period (e.g. weeks or months after a bereavement) may be able to provide more notice to their employer (e.g. seeking to take leave on important dates). However, given the unpredictable nature of grief, we feel it would not be appropriate to require more notice. If a longer period of notice was required, this may lead to employees taking sick leave to cover a day where they would have preferred to take bereavement leave.

Question 14 – If you think that notice should be given for bereavement leave, in what form should it be given?

a) The same as Parental Bereavement Leave (any form of notice is acceptable)

b) Any form of written communication (e.g., text, WhatsApp, Teams, Slack, but not a phone call)

c) Formal written notice should be sent via e-mail

d) Other (please state)

Please explain your answer.

As expressed previously, given the sensitive nature of this leave, we would suggest that requirements for notice be minimal. Therefore, in our view, not requiring notice in a particular form would be proportionate. This is also in line with

the requirements for Parental Bereavement Leave, which should be familiar to employers.

Question 15 – For bereavement leave do you think that employees should be required to provide evidence of a bereavement to their employer?

- a) Yes, for the death of a loved one
- b) Yes, for pregnancy loss
- c) Evidence should not be required but an employer should have the right to request evidence if they feel it is necessary
- d) No, but they should be required to sign a declaration that they are eligible to take bereavement leave, and the reason they are taking leave is due to a bereavement or pregnancy loss

e) No

- f) Not sure
- g) Another option not listed here

Please explain your answer.

As highlighted in the consultation paper, it may be impractical or very difficult for an employee to obtain evidence of a bereavement. As this is unpaid leave, our view is that it is unlikely to be utilised in circumstances where an employee is not entitled to take the leave.

Question 16 – If you think an employee should provide evidence, or an employer should be allowed to request it, in order to take bereavement leave, what evidence would it be reasonable for an employee to provide? (Please state)

Please explain your answer.

N/A

Question 17 – Do you have a view on timescales in which an employee should be required to provide evidence? (Please state)

Please explain your answer

N/A



Question 18 - Do you have views on other steps the Department could take to help employers implementing the new statutory bereavement leave and support their employees?

It may be useful for Acas to publish guidance for employers on statutory bereavement leave and supporting employees through bereavement. We would propose that a wide a range of sources are used to ensure employers are aware of the new statutory bereavement leave and the rules governing this. We would also wish to see publicity aimed at employees to ensure they are aware of the new bereavement leave.

For further information, please contact:

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