



NEW ZEALAND  
LAW SOCIETY

NZLS EST 1869

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# Holidays (Bereavement Leave for Miscarriage) Amendment Bill (No. 2)

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*11/02/2020*

## **Submission on the Holidays (Bereavement Leave for Miscarriage) Amendment Bill (No. 2)**

### **1 Introduction**

1.1 The New Zealand Law Society welcomes the opportunity to comment on the Holidays (Bereavement Leave for Miscarriage) Amendment Bill (No. 2) (**the Bill**), which is a member's bill.

### **2 Summary of submission**

2.1 The objective of the Bill is to remove any existing ambiguities by making it clear that "the unplanned end of a pregnancy by miscarriage or still-birth constitutes grounds for bereavement leave for the mother and her partner or spouse and that the duration of the bereavement leave should be up to 3 days (in line with other deaths in the immediate family)."<sup>1</sup> The Bill amends the bereavement leave provision in the Holidays Act 2003 (**the Act**) to provide for this.

2.2 The objective is commendable. However, the Law Society recommends that the Bill's interaction with existing legislative leave provisions and the drafting of the proposed amendments are given further consideration. If the Bill is to proceed, it is recommended the select committee obtains technical drafting advice from officials and experienced parliamentary drafters to ensure the Bill's objective is attained.<sup>2</sup>

2.3 The Law Society does not seek to be heard but is happy to assist further if the select committee has any queries about matters raised in this submission.

### **3 Other leave entitlements**

3.1 In addition to the bereavement leave provided by the Bill, an employee who suffers a miscarriage or still-birth may have a number of other legislative leave entitlements, including:

- (a) sick leave under the Holidays Act 2003;
- (b) unpaid leave for reasons connected with the pregnancy, pursuant to the Parental Leave and Employment Protection Act 1987 (PLEPA); and
- (c) paid and unpaid parental leave pursuant to the PLEPA.

3.2 Care needs to be taken to ensure that the bereavement leave, sick leave and parental leave entitlements for employees suffering a still-birth or miscarriage are clear, particularly during what will be a period of vulnerability for the employee and (where relevant) their spouse or partner.

### **4 Bereavement leave and sick leave**

4.1 The Bill does not deal with how bereavement leave and sick leave can be taken, or whether the employee can elect which type of leave best fits their circumstances at the time. For example, an employee may need sick leave to manage the immediate medical impacts of a miscarriage. Would that employee then be entitled to take bereavement leave following the sick leave, in order to grieve the loss?

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<sup>1</sup> Holidays (Bereavement Leave for Miscarriage) Amendment Bill, Explanatory Note, p 1.

<sup>2</sup> Legislation Act 2012, s 59; Legislation Act 2019, s 130 (Attorney-General direction to PCO to provide drafting assistance in relation to members' bills).

## 5 Parental leave

5.1 It is also unclear whether an employee would be entitled to take both bereavement leave and parental leave. There is no prohibition, but the interaction between the two is not specifically identified.

5.2 We note that it is not clear that the entitlements pursuant to the PLEPA apply to a miscarriage or still-birth. For example:

(a) The PLEPA defines a primary carer as including *“a female (the biological mother) who is pregnant or who has given birth to a child”* (section 7, emphasis added). This defines a person, even while still pregnant, as the primary carer.

(b) “Child” is not defined in the PLEPA, but the PLEPA provides for an employee on parental leave to end that leave early *“... if the employee or the employee’s spouse or partner suffers a miscarriage; or ... if the child is stillborn or dies”* (section 45), which assumes that those employees would be entitled to take parental leave. “Miscarriage” and “still-born/birth” are not defined in the PLEPA.

## 6 Entitlement of parents using a surrogate

6.1 Surrogacy is not mentioned in the Bill. The death of a foetus carried by a surrogate could also be considered a bereavement, for the biological or intended mother of the child.

6.2 The definition of “primary carer” in the PLEPA refers to *“a female (the biological mother) who is pregnant or who has given birth to a child”*. The “biological mother” may not always be the person pregnant with the child in a surrogacy or donor egg situation. This might be a wider issue to be considered separately.

## 7 Meaning of “confirmed pregnancy”

7.1 There is no definition in the Bill of a *“confirmed pregnancy”*. It is unclear whether formal confirmation from a medical practitioner would be required, or whether the employee is able to provide this confirmation personally, for example from a home pregnancy test.

## 8 Application of entitlement to multiple births

8.1 The Bill does not indicate how multiple births would be treated. For example, the Act provides that if the employee suffers more than one bereavement at the same time, they may take the appropriate period of bereavement leave for each bereavement (section 70). However, the PLEPA provides that if a person gives birth to more than one child then for the purposes of the Act they are treated as though they have given birth to only one child (section 2B). This should be considered.



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