

*These notes refer to the Work and Families Act (Northern Ireland)
2015 (c.1) which received Royal Assent on 8th January 2015*

Work and Families Act (Northern Ireland) 2015

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Shared Rights to Leave and Pay

Section 2: Shared parental leave

Section 2 inserts a new Chapter 1B into Part 9 of the Employment Rights (Northern Ireland) Order 1996 (“ERO”). This creates a new entitlement for employees to be absent from work on shared parental leave for the purposes of caring for a child.

Article 107E: Entitlement to shared parental leave: birth

Paragraphs (1) and (4) confer powers on the Department to make regulations entitling employees to be absent from work on leave for the purpose of caring for a child if they satisfy certain specified conditions.

Paragraphs (1) to (3) are about the conditions for eligibility of the mother of the child. The conditions that may be specified include conditions as to duration of employment, the mother's relationship with the child and as to caring with another person (“P”) for the child. *Paragraph (1)(f)* includes a condition relating to the giving of notice of intention to take shared parental leave; and *paragraph (3)* specifies what this notice may be required to be about. It may be about the amount of leave available to the mother; the amount of leave the mother intends to take; and whether and to what extent P will take leave or statutory shared parental pay. *Paragraph (1)(g)* specifies a condition relating to the consent of P to the amount of leave that the mother intends to take.

Paragraph (2) provides that the conditions of entitlement of the mother can include P meeting conditions in respect of P's employment or self-employment, P's earnings, P's relationship to the mother or the child and P's intention to care, with the mother, for the child. The effect of this provision is that one of the conditions of entitlement to shared parental leave for the mother can relate to the mother's sharing the care of the child with P and P satisfying conditions as to economic activity and relationship with the child or the mother.

Paragraph (4) specifies conditions that may be included in regulations to give entitlement to shared parental leave for another employee (the father or the mother's partner). These include certain conditions as to duration of employment, the employee's relationship with the child or with the child's mother and as to the employee caring, with the child's mother, for the child. *Paragraph (4)(d)* includes a condition relating to the giving of a notice of intention to take shared parental leave. *Paragraph (4)(e)* specifies a condition relating to the child's mother's consent to the amount of shared parental leave the employee intends to take.

Paragraph (5) provides that the conditions of entitlement for the employee can include the mother meeting conditions as to her employment or self-employment, her earnings, her caring, with the employee, for the child and her entitlement (or otherwise) to statutory maternity pay or maternity allowance and the exercise of these entitlements. The effect of this provision is that one of the conditions of entitlement to shared parental leave for an employee (the father or the mother's partner) can relate to the employee sharing care of the child with the mother and to the mother satisfying conditions as to economic activity.

Paragraph (6) specifies what the notice the employee is required to give under *paragraph (4)* is about. It may be required to be about the amount of leave available to the employee, the amount of leave the employee intends to take, and whether and to what extent the mother will take leave or shared parental pay.

Article 107F: Entitlement to leave under Article 107E: further provision

Article 107F is about the making of regulations to calculate the amount of shared parental leave available to an employee, to limit the amount of leave, to limit when it may be taken, to require the leave to be taken as a single period and to provide for the varying of the amount of shared parental leave that an employee may take and the times at which an employee takes this leave.

Paragraph (1) provides for regulations to determine the amount of shared parental leave and when it may be taken. In accordance with *paragraph (8)*, provision must be made for the taking of shared parental leave in a single period or in non-consecutive periods. The effect of this is to allow the leave to be taken more flexibly than in a single consecutive block.

Paragraph (2) deals with the maximum amount of shared parental leave as it relates to maternity leave and pay. This will be specified by regulations and is expected to be the total length of maternity leave (52 weeks) less the amount of maternity leave taken by the mother (where she returns to work without taking specified action to reduce her maternity leave period) or the amount by which the maternity leave period has been reduced. Where a mother is entitled to statutory maternity pay or maternity allowance only, the maximum amount of shared parental leave is again to be specified by regulations, and is expected to be 52 weeks less the number of weeks of statutory maternity pay or maternity allowance payable to the child's mother, or the number of weeks by which the maternity allowance period or maternity pay period has been reduced.

In accordance with *paragraph (4)*, the amount of shared parental leave to which an employee is entitled in respect of a child takes into account the amount of such leave taken by another person in respect of that child or the number of weeks of statutory shared parental pay received by another person in respect of that child (in the case where the other person is entitled to statutory shared parental pay in respect of the child but not to shared parental leave).

Paragraph (7) ensures that shared parental leave must be taken before the end of a period that may be specified.

Paragraph (9) provides that the regulations may enable an employer, in a case where an employee has proposed to take non-consecutive periods of shared parental leave, to require the employee to take that amount of leave as a single period of leave. This single period may start with a day proposed by the employee or, if no day is proposed, with the first day of the first period of leave proposed by the employee. This establishes a default position for when the shared parental leave can be taken if agreement cannot be reached between employer and employee.

Paragraph (10) provides that regulations made under *Article 107E* may enable an employee, subject to prescribed restrictions, to vary the period or periods of shared parental leave to be taken without varying the amount of leave, and to vary the amount of leave which the employee has notified an intention to exercise.

Paragraph (11) provides that variations to the period or periods may require the employer's consent in circumstances specified by regulations.

Paragraph (12) establishes that varying the amount of leave may require specified conditions to be met as to the giving of notice and securing the consent of the child's mother or P.

Paragraph (13) specifies that notifications of variation of the amount of leave may need to include notice about the amount of shared parental leave the employee has taken or plans to take. Notifications may also be required to include the amount of shared parental leave or statutory shared parental pay that the other person, who may be entitled to such leave or pay in respect of the child has taken, or intends to take.

Paragraph (14) provides that regulations may specify the things which are and are not to be taken as done for the purpose of caring for the child; the minimum amount of shared parental leave that may be taken and provision about how this leave may be taken; the circumstances in which an employee may work for an employer during a period of shared parental leave without bringing the leave or entitlement to an end (comparable to "keeping in touch days" under existing provisions) and the circumstances in which the employee may be absent on shared parental leave other than for the purpose of caring for a child without bringing entitlement to an end. The latter provision might be relevant to situations where an employee has an entitlement to shared parental leave but whose child subsequently dies. The regulations may also make provision to

exclude the right to be absent on shared parental leave in respect of a child where more than one child is born as a result of the same pregnancy.

Paragraph (16) allows regulations to provide for situations where a mother dies before entitlement to shared parental leave has arisen for herself or her partner.

Article 107G: Entitlement to shared parental leave: adoption

Paragraphs (1) and (4) confer powers on the Department to make regulations entitling employees who are adopters to be absent from work for the purpose of caring for a child if they satisfy certain conditions.

Paragraphs (1) to (3) are about the conditions of eligibility of the person with whom a child is to be, or is expected to be, placed for adoption (the “primary adopter”). These include certain conditions as to the primary adopter’s duration of employment, relationship with the child and as to caring with another person (“P”) for the child. *Paragraph (1)(g)* specifies a condition relating to the consent of P to the amount of leave the primary adopter intends to take. *Paragraph (1)(f)* includes a condition relating to the giving of notice of intention to take shared parental leave; and *paragraph (3)* specifies what this notice may be about, such as the maximum amount of leave available to the primary adopter, the amount of leave the primary adopter intends to take and the extent to which P intends to exercise entitlement to the leave or to statutory shared parental pay.

Paragraph (2) provides that the conditions of entitlement of the primary adopter can include P meeting certain conditions in respect of employment or self-employment, earnings, relationship to the primary adopter or the child and having caring responsibility for the child. The effect of this provision is that one of the conditions of entitlement to shared parental leave for the primary adopter can relate to the primary adopter sharing the care of the child with P and P satisfying conditions as to economic activity and relation with the child or the primary adopter.

Paragraphs (4) to (6) specify conditions that may be included in regulations to give entitlement to shared parental leave to another employee (other than the primary adopter). These include certain conditions as to duration of employment, the employee’s relationship with the child and with the primary adopter and as to the employee caring with the primary adopter for the child. *Paragraph (4)(d)* includes a condition relating to the giving of a notice to the employer of intention to take shared parental leave. *Paragraph (4)(e)* specifies a condition relating to the consent of the primary adopter to the amount of leave that the other employee intends to take.

Paragraph (5) provides that the conditions for entitlement for the employee can include the primary adopter meeting conditions as to employment or self-employment and earnings; the primary adopter caring with the employee for the child; the primary adopter’s entitlement (or otherwise) to adoption leave or statutory adoption pay, and the extent of the primary adopter’s exercise of such entitlement.

Paragraph (6) specifies what the notice the employee is required to give under *paragraph (4)* is about. It may be about the maximum possible extent of their entitlement to leave, the amount of leave the employee intends to take, and whether and to what extent the primary adopter will exercise an entitlement to shared parental leave or statutory shared parental pay.

Article 107H: Entitlement to shared parental leave: prospective adopters with whom looked after children are placed

Article 107H concerns entitlement to shared parental leave for prospective adopters in fostering for adoption (“FFA”) situations. These are situations where a child is placed with a foster parent where there is a significant likelihood that the placement will result in that foster parent adopting the child.

Paragraph (1) specifies that regulations will include provision, in set circumstances, for shared parental leave entitlement where a child is placed by a competent authority (a Health and Social Care Trust) with an approved foster parent who is also an approved prospective adopter.

In accordance with *paragraph (2)*, these circumstances are where either a decision is pending or has already been taken that adoption is in the child’s best interests. Regulations may specify that certain conditions must also be satisfied in order for shared parental leave to be available. It is anticipated that this will allow the regulations to set a specific point at which entitlement will be triggered.

Paragraph (3) provides for regulations to include adaptations to appropriate references in relevant provision to placements for adoption made under the law of any part of the United Kingdom; this will convert references in relevant provisions to fit FFA cases.

Article 107I: Entitlement to leave under Article 107G: further provision

Article 107I is about the making of regulations to calculate the amount of shared parental leave available to the employee, to limit the amount of leave, to limit when it may be taken, to require the leave to be taken as a single period and to provide for the varying of the amount of shared parental leave that an employee may take and the times at which an employee takes this leave.

Paragraph (1) provides for regulations to determine the amount of shared parental leave and when this leave may be taken. In accordance with *paragraph (8)*, provision must be made for the taking of shared parental leave in a single period or in non-consecutive periods. The effect of this is to allow the leave to be taken more flexibly than in a single consecutive block.

Paragraph (2) deals with the maximum amount of shared parental leave as it relates to adoption leave and pay. This will be specified by regulations and is expected to be 52 weeks less the amount of adoption leave taken by the primary adopter (where the primary adopter returns to work without taking specified action to reduce the adoption leave period) or the amount by which the adoption leave period has been reduced. Where a primary adopter is entitled to statutory

adoption pay only, the maximum amount of shared parental leave is again to be specified by regulations, and is expected to be 52 weeks less the number of weeks of statutory adoption pay payable to the primary adopter, or the number of weeks by which the adoption pay period has been reduced.

In accordance with *paragraph (4)*, the amount of shared parental leave to which the employee is entitled in respect of a child takes into account the amount of such leave taken by another person in respect of that child or the number of weeks of statutory shared parental pay received by another person in respect of that child (in the case where the other person is entitled to statutory shared parental pay in respect of the child but not to shared parental leave).

Paragraph (7) ensures that shared parental leave must be taken before the end of a period that may be specified.

Paragraph (9) provides that the regulations may enable an employer, in a case where an employee has proposed to take non-consecutive periods of shared parental leave, to require the employee to take that amount of leave as a single period of leave. This single period may start with a day proposed by the employee or, if no day is proposed, with the first day of the first period of leave proposed by the employee. This establishes a default position for when the shared parental leave can be taken if agreement cannot be reached between employer and employee.

Paragraph (10) provides that regulations made under *Article 107G* may enable an employee, subject to prescribed restrictions, to vary the period or periods of shared parental leave to be taken without varying the amount of leave, and to vary the amount of leave which the employee has notified an intention to exercise.

Paragraph (11) provides that variations to the period or periods may require the employer's consent in circumstances specified by regulations.

Paragraph (12) establishes that varying the amount of leave may require specified conditions to be met as to the giving of notice and securing the consent of the primary adopter or P.

Paragraph (13) specifies that notifications of variation of the amount of leave may need to include notice about the amount of shared parental leave the employee has taken or plans to take. Notifications may also be required to include the amount of shared parental leave or statutory shared parental pay that the other person, who may be entitled to such leave or pay in respect of the child, has taken or intends to take.

Paragraph (14) provides that regulations may specify the things which are and are not to be taken as done for the purpose of caring for the child; the minimum amount of shared parental leave that may be taken and provision about how this leave may be taken; the circumstances in which keeping in touch days may be taken; and the circumstances in which the employee may be absent on shared parental leave other than for the purpose of caring for a child

without bringing entitlement to an end. The latter provision might be relevant to situations where an employee has an entitlement to shared parental leave but whose child subsequently dies. The regulations may also make provision to ensure that an employee cannot take more than one period of shared parental leave in circumstances where more than one child is placed for adoption as part of the same arrangement.

Paragraph (16) enables regulations to make provision in a case where the person who is taking adoption leave or is entitled to be paid statutory adoption pay dies before another person has become entitled to shared parental leave in respect of the relevant child. This is to enable the other person to be able to become entitled to shared parental leave after the death of the primary adopter.

Article 107J: Power to apply Articles 107G and 107I to other cases

Paragraph (1) allows the regulations under *Articles 107G and 107I* to provide for cases where a child has been adopted under the laws of a jurisdiction outside the United Kingdom.

Paragraph (2) makes similar provision in relation to cases involving an employee who has applied, or intends to apply, with another person, under section 54 of the Human Fertilisation and Embryology Act 2008 for a parental order in respect of a child. This will allow some parents in surrogacy arrangements to be entitled to shared parental leave in the same way as certain adoptive parents. *Paragraph (3)* provides that the Department can prescribe that eligible intended parents in surrogacy arrangements who wish to take shared parental leave must make a statutory declaration as to their eligibility and intention to apply for a parental order.

Article 107K: Rights during and after shared parental leave

Paragraph (1) provides for regulations to specify the rights and responsibilities of employees whilst on and after shared parental leave.

Paragraph (1)(a) states that employees who are absent on shared parental leave will be entitled, as far as prescribed, to the benefit of the same terms and conditions of employment which would have applied if the employee had not been absent. *Paragraph (2)(b)* specifies that “terms and conditions of employment” as referenced in *paragraph (1)(a)* does not include remuneration.

Paragraph (1)(b) further stipulates that whilst on shared parental leave the employee will continue to be bound, as far as prescribed, by the obligations that would arise from those terms and conditions, whilst they are compatible with the taking of shared parental leave.

Paragraph (1)(c) provides for an employee who has been absent on shared parental leave to have the right to return to a kind of job as specified in regulations. *Paragraph (5)* provides for regulations to make provision about seniority, pension and other similar rights and terms and conditions of employment on return. *Paragraph (3)* stipulates that, where appropriate, the type

of absence that gives rise to the right to return referenced in *paragraph (1)(c)* may be a continuous period of absence attributable to a combination of shared parental leave, maternity leave, paternity leave, adoption leave and parental leave.

Paragraph (4) provides that regulations may specify matters which are or are not to be treated as remuneration for the purpose of entitlement to shared parental leave (for birth and adoption).

Article 107L: Redundancy and dismissal

Article 107L provides that regulations under *Article 107E* or *107G* may make provisions about redundancy or dismissal during a period of shared parental leave.

Paragraph (2) states that such provisions may include a requirement for an employer to offer alternative employment, and provision for the consequences of failure to comply with the regulations.

Article 107M: Chapter 1B: supplemental

Article 107M allows regulations to be made about notices, evidence, procedures to be followed and other supplementary matters.

Paragraph (1)(a) provides for regulations to make provision for notices to be given, evidence to be produced and other procedures to be followed by employers, employees and relevant persons. *Paragraph (2)* defines “relevant person”. *Paragraph (1)(b)* makes provision requiring such persons to keep records. *Paragraph (1)(c)* provides for the consequences of failure to give notices, produce evidence, keep records or comply with other procedural requirements. *Paragraph (1)(d)* provides for the consequences of failure to act in accordance with such a notice. *Paragraph (1)(e)* makes special provision for cases where an employee has a right which corresponds to a right to shared parental leave and which arises under the employee’s contract of employment or otherwise. *Paragraph (1)(f)* and *(g)* allow for regulations to modify provision in the ERO relating to the calculation of a week’s pay and to modify, apply or exclude statutory provisions in relation to a person entitled to shared parental leave.

Paragraphs (3) to (5) ensure that the conditions of economic activity which may be specified under *Articles 107E(2) or (5)* and *107G(2) or (5)* in relation to the person with whom care of the child is shared can include conditions relating to that person being an employed earner or a self-employed earner. They also ensure that the power to make provision about procedures to be followed by an employer of this other person includes, as far as this concerns an employed earner, the secondary contributor (in relation to secondary Class I National Insurance contributions).

Section 3: Exclusion or curtailment of other statutory rights to leave

Section 3 amends the ERO to allow regulations to be made which will enable a birth mother or primary adopter to bring their ordinary maternity or adoption leave to an end early. This will allow the person and/or their partner to access the new system of shared parental leave and pay.

The section allows regulations to be made which will set out the circumstances in which the birth mother or adoptive parent can change their mind about a decision to end their ordinary maternity or adoption leave early. It is intended that the birth mother or adopter will be able to revoke a decision made before the birth or placement until a point to be specified in regulations. It is also intended that the birth mother or adopter will be able to revoke a decision if it becomes apparent (within a certain period of time) that the mother/primary adopter and the person with whom care of the child is shared do not meet the qualifying requirements to access shared parental leave and/or pay.

The section provides that these regulations may only allow a birth mother or adoptive parent to bring ordinary maternity or adoption leave to an end if the mother/primary adopter and the person with whom they share care of the child take certain steps in relation to the taking of shared parental leave or pay which will include giving notice to their employers where relevant.

The section also allows regulations to be made which will enable a birth mother or primary adopter to bring additional maternity or adoption leave to an end early. It mirrors the provisions for ordinary maternity leave which are described above.

Subsection (2) deals with ordinary maternity leave; *subsection (3)* with additional maternity leave; *subsection (4)* with ordinary adoption leave; and *subsection (5)* with additional adoption leave.

Finally, regulations must be made which will provide that the taking of shared parental leave prevents an employee from exercising the right to take any remaining ordinary paternity leave. This applies in both birth (*subsection (6)*) and adoption (*subsection (7)*) cases.

Section 4: Abolition of additional paternity leave

Section 4 removes the statutory right to additional paternity leave.

Section 5: Statutory shared parental pay

Section 5 inserts a new Part 12ZC into the Social Security Contributions and Benefits (Northern Ireland) Act 1992 (“SSCBA”), enabling regulations to be made to create new entitlements to shared parental pay for qualifying birth parents, adopters and intended parents in surrogacy arrangements.

Section 167ZU: Entitlement: birth

Subsections (1) and (3) confer power to make regulations to provide that where the respective conditions in *subsections (2) and (4)* are satisfied, the mother of a child (the “claimant mother”) and another person (the “claimant”) are entitled to payments to be known as “statutory shared parental pay”.

Subsection (2) deals with the conditions the claimant mother must meet.

Subsection (2)(a) is that the claimant mother and another person (“P”) must satisfy certain prescribed conditions as to caring or intending to care for the child.

Subsection (2)(b) specifies that P must meet certain prescribed conditions as to employment status, earnings and relationship with the claimant mother or child.

The conditions in *subsection (2)(c) and (2)(d)* require the claimant mother to have met prescribed conditions regarding length of service and earnings. The condition in *subsection (2)(e)* is that, if regulations so provide, the claimant mother continues in employed earner’s employment until such a time as specified.

The condition in *subsection (2)(f)* is that the claimant mother became entitled to receive statutory maternity pay in respect of the child.

Subsection (2)(g) relates to the reduction of the maternity pay period.

The condition in *subsection (2)(h) and (2)(i)* is that the claimant mother has given notice of the total number of weeks for which she would be entitled to claim statutory shared parental pay, the number of weeks she intends to claim the pay and the number of weeks P intends to claim the pay and the periods during which the claimant mother intends to claim the pay. *Subsection (2)(j)* relates to the timing, form and content of such notices.

P’s consent to the amount of statutory shared parental pay the claimant mother intends to claim is the condition in *subsection (2)(k)*.

The condition in *subsection (2)(l)* is that it must be the claimant mother’s intention to care for the child during each week in which statutory shared parental pay is paid to her.

The conditions in *subsections (2)(m) and (2)(n)* are that the claimant mother must be absent from work for each week that statutory shared parental pay is paid to her. Where she is an employee, she must be absent from work on shared parental leave.

Subsection (4) deals with the conditions that the claimant must meet.

The condition in *subsection (4)(a)* is that the claimant and another person who is the mother of a child satisfy certain prescribed conditions as to caring or intending to care for the child.

Subsection (4)(b) requires that the claimant must satisfy certain conditions as to the relationship with the child or the child's mother.

Subsection (4)(c) provides that the child's mother must meet certain employment status and earnings criteria.

The conditions in *subsection (4)(d)* and *(4)(e)* relate to continuous service and earnings. The condition in *subsection (4)(f)* is that the claimant, if so prescribed, must continue in employed earner's employment until such a time as specified in regulations.

The condition in *subsection (4)(g)* is that the mother of the child must have been entitled as a result of the birth of the child to receive either maternity allowance or statutory maternity pay. The condition in *subsection (4)(h)* relates to the reduction of the maternity pay period or the maternity allowance period applying to the mother.

In accordance with *subsection (4)(i)* and *(4)(j)*, the claimant must have given notice of the number of weeks for which he or she would be entitled to claim statutory shared parental pay, the number of weeks he or she intends to claim the pay and the number of weeks the child's mother intends to claim the pay and the periods during which the claimant intends to claim the pay. *Subsection (4)(k)* relates to the timing, form and content of such notices.

The condition in *subsection 4(l)* is that the mother of the child must consent to the amount of statutory shared parental pay that the claimant intends to claim.

Subsection (4)(m) provides that it must be the claimant's intention to care for the child during each week in which statutory shared parental pay is paid to the claimant.

The condition in *subsection (4)(n)* and *(4)(o)* is that the claimant must be absent from work for each week that statutory shared parental pay is paid to the claimant. If the claimant is an employee, the claimant must be absent from work on shared parental leave.

Section 167ZV: Extent of entitlement and when payable: birth

Subsection (1) of *section 167VZ* provides for the Department to make regulations to determine the extent of a person's entitlement to statutory shared parental pay in respect of a child, and when it is to be paid.

Under *subsections (2)* and *(3)*, the extent of a person's entitlement to statutory shared parental pay cannot exceed the length of the maternity pay period (currently 39 weeks) less the number of weeks that maternity allowance or maternity pay is payable until the mother's return to work or the number of weeks by which the maternity pay period or maternity allowance period has been reduced (where the mother reduces these periods before returning to work).

Subsection (6) is to ensure that where two people are both entitled to statutory shared parental pay in respect of the same child, the total number of weeks taken by both does not exceed the number of weeks calculated under *subsection (2)*.

Subsection (7) is to ensure that payments of statutory shared parental pay cannot be made to a person after a prescribed period. *Subsection (8)* secures that no payment of statutory shared parental pay may be made before the end of the mother's maternity pay period.

Subsection (9) allows for provision enabling a person who is entitled to statutory shared parental pay to vary the period or periods during which that person intends to claim the pay without varying the overall amount the person intends to take, provided certain conditions are satisfied. These conditions are specified in *subsection (10)*. They require the intending claimant to give notice of intention to vary to the person who will be liable to make the payment. The notice must satisfy certain prescribed conditions as to time, form and content.

Subsection (11) makes clear that regulations may provide for a person who is entitled to statutory shared parental pay to vary the number of weeks for which he or she intends to claim. In order to do so he or she must, in accordance with *paragraph (12)*, notify the person liable to make the payment of the extent to which he or she and another person have used pay entitlement to date and the extent to which both individuals plan to use it in future. The consent of the other person must be obtained and the notice must adhere to certain conditions as to timing, form and content.

Subsection (13) specifies that a person's entitlement to statutory shared parental pay under *sections 167ZU and 167ZV* is not affected by the birth of more than one child as a result of the same pregnancy.

Section 167ZW: Entitlement: adoption

Subsections (1) and (3) confer power to make regulations to provide that where the respective conditions in *subsections (2) and (4)* are satisfied, a person with whom a child is, or is expected to be, placed for adoption ("claimant A", the primary adopter) and another person ("claimant B") are to be entitled to payments to be known as "statutory shared parental pay".

Subsection (2) deals with the conditions claimant A must meet.

Subsection (2)(a) specifies that claimant A and another person ("X") must satisfy certain prescribed conditions as to caring or intending to care for the child.

Subsection (2)(b) specifies that X must meet certain prescribed conditions as to employment status, earnings and relationship with claimant A or the child. In practice, X may also be the person who is claimant B for the purposes of *subsection (3)*.

The conditions in *subsection (2)(c) and (2)(d)* require claimant A to have met certain prescribed conditions regarding length of service and earnings. The

condition in *subsection (2)(e)* is that, if regulations so provide, claimant A must continue in employed earner's employment until such a time as specified.

The condition in *subsection (2)(f)* is that claimant A became entitled to receive statutory adoption pay in respect of the child.

Subsection (2)(g) relates to the reduction of the adoption pay period.

The condition in *subsection (2)(h)* and *(2)(i)* is that claimant A has given notice of the total number of weeks for which he or she would be entitled to claim statutory shared parental pay, the number of weeks for which he or she intends to claim the pay, the number of weeks X intends to claim the pay and the periods during which claimant A intends to claim the pay. *Subsection (2)(j)* relates to the timing, form and content of such notices.

X's consent to the amount of statutory shared parental pay claimant A intends to claim is the condition in *subsection (2)(k)*.

The condition in *subsection (2)(l)* is that it must be claimant A's intention to care for the child during each week in which statutory shared parental pay is paid to claimant A.

The conditions in *subsection (2)(m)* and *(2)(n)* are that claimant A must be absent from work for each week that statutory shared parental pay is paid to him or her. Where claimant A is an employee, that person must be absent from work on shared parental leave.

Subsection (4) deals with the conditions that claimant B must meet.

The condition in *subsection (4)(a)* is that *claimant B* and another person ("Y") who is a person with whom a child is, or is expecting to be, placed for adoption satisfy certain prescribed conditions as to caring or intending to care for the child.

Subsection (4)(b) requires that claimant B must satisfy certain conditions as to the relationship with the child or Y. In practice, Y may also be the same person who is claimant A for the purposes of *subsection (1)*.

Subsection (4)(c) provides that Y must meet certain employment status and earnings criteria, the details of which will be prescribed in regulations.

The conditions in *subsection (4)(d)* and *(4)(e)* relate to continuous service and earnings. The condition in *subsection (4)(f)* is that claimant B, if so prescribed, must continue in employed earner's employment until such a time as specified in regulations.

The condition in *subsection (4)(g)* is that Y must have been entitled to receive statutory adoption pay by reference to the child. The condition in *subsection (4)(h)* relates to the reduction of the adoption pay period applying to Y.

In accordance with *subsection (4)(i)* and *(4)(j)*, claimant B must have given notice of the number of weeks for which claimant B would be entitled to claim

statutory shared parental pay, the number of weeks claimant B intends to claim pay and the number of weeks Y intends to claim the pay and the periods during which claimant B intends to claim the pay. *Subsection (4)(k)* relates to the timing, form and content of such notices.

The condition in *subsection (4)(l)* is that Y must consent to the amount of statutory shared parental pay that claimant B intends to claim.

Subsection (4)(m) provides that it must be claimant B's intention to care for the child during each week in which statutory shared parental pay is paid to claimant B.

The condition in *subsection (4)(n)* and *(4)(o)* is that claimant B must be absent from work for each week that statutory shared parental pay is paid to claimant B. If claimant B is an employee, claimant B must be absent from work on shared parental leave.

Section 167ZX: Extent of entitlement and when payable: adoption

Subsection (1) provides for the Department to make regulations to determine the extent of a person's entitlement to statutory shared parental pay in respect of a child, and when it is to be paid.

Under *subsections (2)* and *(3)*, the extent of a person's entitlement to statutory shared parental pay cannot exceed the length of the adoption pay period (currently 39 weeks) less the number of weeks that adoption pay is payable until the claimant's return to work or the number of weeks by which the adoption pay period has been reduced (where the claimant reduces these periods before returning to work). *Subsection (3)* defines the meaning of "relevant week".

Subsection (5) is to ensure that when two people are entitled to statutory shared parental pay in respect of the same child, the total number of weeks taken by both cannot exceed the number of weeks calculated under *subsection (2)*.

Subsection (6) is to ensure that payments of statutory shared parental pay cannot be made to a person after a prescribed period. *Subsection (7)* secures that no payment of statutory shared parental pay may be made before the end of a person's adoption pay period.

Subsection (8) allows for provision enabling a person who is entitled to statutory shared parental pay to vary the period(s) during which that person intends to claim the pay without varying the overall amount the person intends to take, provided certain conditions are satisfied. These conditions are specified in *subsection (9)*. They require the intending claimant to give notice of intention to vary to the person who will be liable to make the payment. The notice must satisfy certain prescribed conditions as to time, form and content.

Subsection (10) makes clear that regulations may provide for a person who is entitled to statutory shared parental pay to vary the number of weeks for which he or she intends to claim. In order to do so he or she must, in accordance with *subsection (11)*, notify the person liable to make the payment of the extent to

which he or she and another person have used pay entitlement to date and the extent to which both individuals plan to use it in future. The consent of the other person must be obtained and the notice must adhere to certain conditions as to timing, form and content.

Subsection (12) specifies that if a person adopts more than one child as part of the same arrangement, he or she will not be entitled to take any more shared parental pay than that to which he or she would have been entitled if only one child was adopted.

Section 167ZY: Entitlement etc.: prospective adopters with whom looked after children are placed

Section 167ZY provides for the making of regulations extending entitlement to statutory shared parental pay to FFA arrangements.

Subsection (1) specifies that regulations are to provide for statutory shared parental pay in respect of a child placed by a competent authority (a Health and Social Care Trust) with an approved foster parent who is also an approved prospective adopter.

In accordance with *subsection (2)*, such provision is to be made in circumstances where either a decision is pending or has already been taken that adoption is in the child's best interests. Regulations may specify that certain further conditions must also be satisfied, allowing the regulations to set a specific point at which entitlement will be triggered.

Subsection (3) provides for regulations to include adaptations to appropriate references in relevant provision to placements for adoption made under the law of any part of the United Kingdom; this will convert references in relevant provisions to fit FFA cases.

Section 167ZZ: Entitlement: general

Section 167ZZ makes further provision about a person's entitlement to statutory shared parental pay (whether in relation to birth or adoption).

Subsection (1)(a) empowers the Department to provide that the entitlement conditions for statutory shared parental pay do not have effect, or have effect subject to prescribed modifications in such cases as may be prescribed. *Subsection (1)(b)* deals with requirements about evidence of entitlement and *subsection (2)* specifies persons on whom those requirements may be imposed. *Subsection (1)(c) to (f)* provides power for the Department to make provision relating to continuous employment and the calculation of earnings.

Section 167ZZ1: Liability to make payments

Subsection (1) provides for employers to be liable for the payment of statutory shared parental pay. (However, under *Article 8* of the Employment (Northern Ireland) Order 2002, as amended by *Schedule 1*, provision is made for the funding of employers' liabilities to pay statutory shared parental pay).

Subsection (2) requires the Department to make regulations about the liability of a former employer to pay statutory shared parental pay where the employee has been dismissed by the employer to avoid liability for payment.

Subsection (3) provides power for the Department, with the concurrence of the Commissioners for Her Majesty's Revenue and Customs, to specify in regulations circumstances in which liability for paying statutory shared parental pay is to fall on the Commissioners.

Section 167ZZ2: Rate and period of pay

Section 167ZZ2 deals with the rate at which statutory shared parental pay is payable and the period for which it is payable (whether in relation to birth or adoption).

Subsection (1) provides for the weekly rate to be set by regulations. *Subsection (2)* provides for payments on a weekly basis. *Subsection (3)* provides that statutory shared parental pay is not generally payable except in connection with a person's intention to care for the child; and *subsection (4)* provides that it is not generally payable during a week in which a person works. *Subsection (5)* empowers the Department to specify when there is no liability to pay. *Subsection (6)* specifies how the daily rate can be calculated. *Subsection (7)* specifies when a week falls within the pay period.

Section 167ZZ3: Restrictions on contracting out

Subsection (1) provides that an agreement is void to the extent that it purports to exclude, limit or otherwise modify any provision of the Part of the Act dealing with statutory shared *parental* pay, or to require a person to contribute (whether directly or indirectly) towards any relevant costs incurred by that person's employer or former employer.

Subsection (2) contains a provision which ensures that certain agreements with an employee authorising deductions from shared parental pay are not void.

Section 167ZZ4: Relationship with contractual remuneration

Section 167ZZ4 deals with the way in which statutory shared parental pay interacts with contractual remuneration.

Subsection (1) provides that, subject to *subsections (2)* and *(3)*, any entitlement to statutory shared parental pay is not to affect any right of any person in relation to contractual remuneration. *Subsection (2)* specifies that payment of contractual remuneration can be counted as discharging a liability of the employer to pay statutory shared parental pay. Also payment of statutory shared parental pay can be counted as discharging an obligation of the employer to pay contractual remuneration. *Subsection (3)* makes provision for regulations to provide which payments are to be treated as contractual remuneration for the purposes of *subsections (1)* and *(2)*.

Section 167ZZ5: Crown employment - Part 12ZC

Section 167ZZ5 ensures that the remaining provisions of this Part of the Act, namely those dealing with statutory shared parental pay, apply to those in Crown employment as well as those not in Crown employment.

Section 167ZZ6: Special classes of person

Section 167ZZ6 provides a regulation making power for modifying any provision of the Part of the Act dealing with statutory shared parental pay as it applies to special classes of person, namely those employed on board any ship, vessel, hovercraft or aircraft; persons outside Northern Ireland in prescribed situations; and in prescribed employment in connection with continental shelf operations.

Section 167ZZ7: Part 12ZC: supplementary

Subsection (3) allows regulations to modify application of the definition of “employee” contained in *subsection (2)*. *Subsection (4)* provides that, in accordance with regulations, two or more employers and two or more contracts of service in respect of the same employee may be treated as one. *Subsection (6)* deals with the calculation of weekly earnings and *subsection (8)* provides as to calculation of a person’s normal weekly earnings. *Subsections (9) to (11)* make special provision as to the treatment of contracts of employment within the Northern Ireland Health and Social Care trusts.

Section 167ZZ8: Power to apply Part 12ZC to other cases

Subsection (1) enables provision to be made so that shared parental pay regulations may have effect in relation to cases involving the adoption of a child from outside the United Kingdom. *Subsection (2)* makes like provision in relation to intended parents in surrogacy arrangements who meet certain conditions. *Subsection (3)* enables regulations to require that intended parents in surrogacy arrangements who wish to take shared parental pay must make statutory declarations as to their eligibility and intention to apply for a parental order.

Section 6: Exclusion or curtailment of other statutory rights to pay

Section 6 amends the SSCBA, allowing regulations to be made that will enable the reduction of a person's maternity allowance period, maternity pay period or adoption pay period subject to prescribed conditions. The purpose is to allow the individual to access the new system of shared parental leave and pay.

Subsection (2) makes relevant amendments to section 35 of the SSCBA concerning the maternity allowance period. *Subsection (3)* further amends section 35 to ensure that a woman is not entitled to maternity allowance in respect of a week during which she would have been entitled to statutory maternity pay had she not reduced her statutory maternity pay period.

Subsection (4) makes relevant amendments to section 161 of the SSCBA concerning the maternity pay period and *subsection (6)* similarly amends section 167ZN in respect of the adoption pay period.

Subsection (5) inserts provisions into section 167ZE of the SSCBA to specify that statutory paternity pay will not be payable in respect of a child where the person has been paid statutory shared parental pay or is due to be paid statutory shared parental pay for that week.

Section 7: Abolition of additional paternity pay

Section 7 removes the statutory right to additional statutory paternity pay.

Section 8: Other statutory rights to leave of prospective adopters with whom looked after children are placed

Section 8 inserts provisions in the ERO which facilitate the extension of existing paternity and adoption leave rights to include FFA arrangements.

Subsections (2) and *(3)* amend the ERO, including the insertion of a new *Article 107AB*, to make relevant provision in respect of ordinary adoption leave. The amendments provide that regulations may include conditions as to being an approved foster parent, being an approved prospective adopter and being notified by a competent authority (a Health and Social Care Trust) that a child is to be placed or is likely to be placed with the employee in circumstances where a decision is pending or has already been taken that adoption is in the child's best interests. The regulations may also prescribe further conditions which, it is envisaged, will allow a specific point to be set at which entitlement will be triggered. The Department may, by order subject to the draft affirmative resolution Assembly procedure, amend certain definitions deriving from other legislation if changes are made to the definitions in that legislation.

Subsections (4) and *(5)* make comparable changes to the ERO, including the insertion of a new *Article 112BA*, so that paternity leave is available for the employed partners of adopters who have or expect to have a child placed with them in the circumstances referred to above. *Subsection (4)* deals with regulations to ensure that the employee, having taken paternity leave in respect of a FFA placement, has no entitlement to take paternity leave when the same child is formally placed for adoption.

Section 9: Other statutory rights to pay of prospective adopters with whom looked after children are placed

Section 9 inserts provisions in the SSCBA which facilitate the extension of existing rights to statutory paternity and adoption pay to include FFA arrangements.

Subsection (2) inserts *section 167ZBA* into the SSCBA, relating to entitlement to statutory paternity pay. *Subsection (4)* inserts *section 167ZLA* into the SSCBA, relating to entitlement to statutory adoption pay.

Inserted *section 167BA(1)* and *(2)* specify that relevant cases are those involving a competent authority (a Health and Social Care Trust) placing, or expecting to place, a child with a foster parent who is also an approved prospective adopter in a situation where a decision is pending or has already been taken that adoption is in the child's best interests. The regulations may also prescribe further conditions which, it is envisaged, will allow a specific point to be set at which entitlement will be triggered. Inserted *section 167ZLA(1)* and *(2)* has a comparable effect in relation to statutory adoption pay entitlement.

Sections 167BA(3) and *167ZLA(3)* respectively provide that regulations may prescribe how entitlement to statutory paternity pay and statutory adoption pay are to be extended to cover situations of this kind.

Sections 167BA(4) and *167ZLA(4)* respectively specify that a person who becomes entitled to statutory paternity pay or statutory adoption pay in a FFA context has no later entitlement to claim that statutory pay when the same child is formally placed for adoption.

Subsections (3) and *(5)* respectively ensure that regulations may adapt references to the rate and period of statutory paternity pay and statutory adoption pay to ensure that FFA arrangements are included.

Section 10: Other statutory rights to leave of applicants for parental orders

Section 10 makes provision for intended parents in surrogacy arrangements, who are entitled and intend to make an application for a parental order under section 54 of the Human Fertilisation and Embryology Act 2008, to be entitled to paternity leave and to adoption leave in respect of the child who is the subject of the order.

Subsection (2) inserts *Article 107AC* into the ERO to enable the Department by regulations to apply the provisions for ordinary adoption leave (in Article 107A) to cases involving an employee who has applied or intends to apply, with another person, for a parental order under section 54 of the Human Fertilisation and Embryology Act 2008 in respect of the child who is the subject of the parental order. *Subsection (3)* inserts *Article 107BA* into the ERO to enable the Department by regulations to apply the provisions for additional adoption leave (in Article 107B) to the employee and child in like manner.

Subsection (4) amends Article 107D of the ERO to enable the Department, when making regulations about ordinary or additional adoption leave which concern cases involving an application for a parental order, to require the employee to make a statutory declaration as to his or her eligibility, with another person, to apply for the order and his or her intention to make such an application.

Subsection (5) inserts *Article 112BAA* into the ERO to enable the Department to make regulations to provide that ordinary paternity leave following birth may apply to intended parents in surrogacy cases where an employee, with another person, is eligible and intends to apply for a parental order in respect of the child who is the subject of such an order.

Section 11: Other statutory rights to pay of applicants for parental orders

Section 11 makes provision for intended parents in surrogacy arrangements, who are entitled and intend to make an application for a parental order under section 54 of the Human Fertilisation and Embryology Act 2008, to be entitled to statutory paternity pay and to statutory adoption pay in respect of the child who is the subject of the order.

Subsection (2) amends section 167ZK of the SSCBA concerning ordinary paternity pay so that regulations may apply ordinary paternity pay to qualifying intended parents in surrogacy arrangements.

Subsection (3) amends section 167ZT of the SSCBA concerning statutory adoption pay. New *section 167ZT(2)* enables regulations to be made to apply statutory adoption pay to qualifying intended parents in surrogacy arrangements. New *section 167ZT(3)* enables the regulations in those cases to impose requirements on intended parents in surrogacy arrangements to provide statutory declarations as to their eligibility and intention to apply for a parental order.

Section 12: Statutory paternity pay: notice requirement and period of payment

Subsection (2) amends section 167ZC of the SSCBA to require a person to give notice in order to take statutory paternity pay and provides a power for the Department to set the amount of notice which the person must give.

Subsection (3), which amends section 167ZE of the SSCBA, gives the Department power to set the number of weeks of statutory paternity pay in regulations subject to a minimum of two weeks. It also allows regulations to be made to enable paternity pay to be taken in non-consecutive periods of not less than one week. This will allow for potential future changes to the way in which the right operates.

Section 13: Rate of statutory adoption pay

Subsection (2) amends section 167ZN of the SSCBA, providing for statutory adoption pay to be paid at an earnings related level for the first six weeks and the lower of an earnings related rate or a prescribed weekly rate for the remaining weeks of statutory adoption pay. This modifies the current requirement, which does not require any specific treatment of pay during particular weeks.

It also sets the earnings related rate to be the equivalent of 90% of a person's normal weekly earnings for the eight weeks ending with the week in which the person was notified of the adoption match. The prescribed weekly rate must not be lower than the highest weekly rate that has been set for statutory sick pay.

Section 14: Further amendments

Section 14 gives effect to *Schedule 1*. It also indicates how references to "ordinary statutory paternity pay" and "statutory paternity pay" in instruments,

*These notes refer to the Work and Families Act (Northern Ireland)
2015 (c.1) which received Royal Assent on 8th January 2015*

documents and statutory provisions are to be read once “ordinary statutory paternity pay” is renamed as “statutory paternity pay”.