

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

Member's Bill

As reported from the Education and Workforce Committee

## **Commentary**

### **Recommendation**

The Education and Workforce Committee has examined the Holidays (Bereavement Leave for Miscarriage) Amendment Bill (No 2) and recommends that it be passed with the amendments shown.

### **Introduction**

This is a Member's bill in the name of Ginny Andersen MP. It would amend the Holidays Act 2003 to remove some ambiguity in the Act around bereavement leave entitlements. The bill seeks to make it clear that employees are eligible for bereavement leave following the unplanned end of a pregnancy by miscarriage or still-birth. The mother and their spouse or partner would be entitled to 3 days' bereavement leave. This period of leave is consistent with the bereavement leave entitlement that the Holidays Act provides for employees who experience the death of a family member.<sup>1</sup>

At present, the Holidays Act provides for bereavement leave after an employee experiences the death of a child. However, it does not make clear whether this provision includes unborn children or developing embryos. This ambiguity may lead to disputes between employees and employers over entitlement to leave. This bill seeks to clarify this by providing specific provisions related to bereavement suffered from the unplanned end of a pregnancy.

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<sup>1</sup> Holidays Act 2003 Section 69.

## **Proposed amendments**

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

### **Mother's knowledge of pregnancy**

We recommend amending clause 4(2) to make it clear that the mother does not need to have known they were pregnant. Miscarriages can occur before a person is aware of the pregnancy.

As introduced, the clause refers to the unplanned end of a “confirmed pregnancy”. The word “confirmed” implies that the person should have prior knowledge of their pregnancy. People can suffer bereavement due to the end of a pregnancy even if they had not known beforehand that they were pregnant. We believe it would not be consistent with the intent of the bill to stop people from taking bereavement leave because they had been unaware of their pregnancy.

Our recommendation would remove the word “confirmed” from clause 4(2)(c) to make clear that the intent of the bill is to provide people with access to bereavement leave after experiencing the end of a pregnancy, whether or not they had prior knowledge of the pregnancy.

### **Proof of a pregnancy**

We recommend amending clause 4(2) to clarify that proof of pregnancy would not be required for an employee to take bereavement leave.

As introduced, clause 4 provides for employees to take leave if they suffer a bereavement because of the end of a confirmed pregnancy. The term “confirmed” could suggest that proof of a pregnancy would be required for leave to be granted. As discussed above, we are recommending that the term “confirmed” be deleted from the bill. This is another reason for doing so. We do not want the term “confirmed” to be misunderstood and cause uncomfortable exchanges between employers and employees.

It could be difficult for employees to produce proof of having had a pregnancy. We note that the duty of good faith found in section 4 of the Employment Relations Act 2000 would still apply to any application for bereavement leave. This duty requires employees and employers to behave in a way that fosters a responsive and communicative employment relationship. We note that other types of leave sometimes require proof. For example, employees may be required to provide proof of sickness or injury when they take three or more consecutive days of sick leave. However, these proof requirements are often confined to specific circumstances, or do not specify what types of proof an employer can accept.

### **The definition of “miscarriage”**

We recommend amending the definition of “miscarriage” to clarify that bereavement leave could be sought for the unplanned end of a pregnancy, no matter how far along that pregnancy was.

The bill as introduced uses the definition of miscarriage found in the Births, Deaths, Marriages, and Relationships Registration Act 1995. This definition includes the term “foetus”, which often refers to a pregnancy of at least eight weeks’ gestation. This could imply that a person who experiences the unplanned end of a very early pregnancy would not be eligible for bereavement leave under this provision.

We recommend changing the definition of the term miscarriage in clause 4(3). This definition would define miscarriage as “the end of a pregnancy in the first 20 weeks of a pregnancy other than as a result of abortion”. Any pregnancy that ends after 20 weeks would be defined as a still-birth for the purposes of this bill. This would ensure that all employees were eligible for bereavement leave after the unplanned end of a pregnancy no matter the stage of gestation that pregnancy reached.

### **The relationship requirement**

We recommend expanding the definition of who would be eligible for bereavement leave under this bill. We believe that parents planning to adopt a child and parents having a baby through surrogacy should also be entitled to bereavement leave on the unplanned end of the relevant pregnancy. We also believe that the former spouse or partner of the pregnant person should be entitled to bereavement leave on the unplanned end of a pregnancy, if they would have been a biological parent of the child.

As introduced, the bill would allow only the person who experiences the unplanned end of a pregnancy, and their spouse or partner, to take bereavement leave. In certain situations people other than the spouse or partner could be affected by the end of a pregnancy. The parents waiting to adopt a child or parents using a surrogate would be adversely psychologically affected by the end of the relevant pregnancy. A pregnant person’s former spouse or partner who would have been the biological parent of the child would also be adversely affected by the end of the pregnancy.

Our recommendation would amend clause 4(2)(d), inserting four new subparagraphs into section 69(2) of the Holidays Act. New subparagraph 69(2)(d)(i) confirms a provision that was included in the bill as introduced; a person’s spouse or partner would also be eligible for leave. New subparagraph (ii) would provide for the former spouse or partner of the biological parent to take bereavement leave after the end of the relevant pregnancy. New subparagraphs (iii) and (iv) would ensure that the parents who had undertaken to be the primary carer, if the pregnancy had come to term, also qualify for bereavement leave.

### **Cause of a pregnancy ending**

We recommend clarifying that employees who experience the end of a pregnancy by way of an abortion would not be eligible for bereavement leave.

We understand that the intent of this bill is to provide bereavement leave to those who experience a miscarriage or still-birth, not an abortion. However, the bill as introduced uses the term “unplanned end of a pregnancy” which did not convey the intended meaning with sufficient clarity.

Our recommendation would remove the word “unplanned” from clause 4(2)(c) and (d) to make it clear that all employees who experience a miscarriage or still-birth, as those terms are usually understood, would be covered under this clause.

We also recommend amending the definitions of miscarriage and still-birth to make it clear that abortions would be excluded from this bill. We have already recommended the definition of miscarriage be amended to include all stages of gestation, and confirming the exclusion of abortions is another reason for amending it. Our recommendation would insert new definitions of the terms miscarriage and still-birth into clause 4(4). Our definition would define miscarriage as “the end of a pregnancy in the first 20 weeks of a pregnancy other than as a result of abortion services provided in accordance with the Contraception, Sterilisation, and Abortion Act 1977”. Still-birth would be defined as “a still-birth within the meaning of the Births, Deaths, Marriages, and Relationships Registration Act 1995 other than as a result of abortion services provided in accordance with the Contraception, Sterilisation, and Abortion Act 1977”. These definitions would better align with the intent of the bill and make it clear abortions would not be covered by this bill.

## **Appendix**

### **Committee process**

The Holidays (Bereavement Leave for Miscarriage) Amendment Bill (No 2) was referred to the committee on 10 December 2019. The closing date for submissions was 14 February 2020. We received and considered 37 submissions from interested groups and individuals. We heard oral evidence from 10 submitters at hearings in Wellington and via videoconference.

We received advice from the Ministry of Business, Innovation and Employment.

### **Committee membership**

Dr Parmjeet Parmar (Chairperson)

Dan Bidois (from 27 May 2020)

Simeon Brown (until 27 May 2020)

Hon Clare Curran

Paulo Garcia (from 3 June 2020)

Golriz Ghahraman

Hon Nikki Kaye (until 27 May 2020)

Denise Lee (until 27 May 2020)

Marja Lubeck

Jo Luxton

Mark Patterson

Erica Stanford (from 27 May 2020)

Jan Tinetti

Nicola Willis



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**Key to symbols used in reprinted bill**

**As reported from a select committee**

text inserted unanimously

~~text deleted unanimously~~





*Ginny Andersen*

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### **The Parliament of New Zealand enacts as follows:**

#### **1 Title**

This Act is the Holidays (Bereavement Leave for Miscarriage) Amendment Act (No 2) **2019**.

#### **2 Commencement**

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This Act comes into force on the day after the date on which it receives the Royal assent.

#### **3 Principal Act**

This Act amends the Holidays Act 2003 (the **principal Act**).

#### **4 Section 69 amended (Bereavement leave)**

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(1) In section 69(2)(b), replace “result of the death.” with “result of the death; or”.

(2) In section 69(2), after paragraph (b), insert:

(c) on the ~~unplanned~~ end of an employee's ~~confirmed~~ pregnancy by way of a miscarriage or still-birth; or

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- (d) on the ~~unplanned end of an employee's spouse or partner's confirmed another person's pregnancy,~~ by way of a miscarriage or still-birth, ~~if the employee—~~
- (i) ~~is the person's spouse or partner; or~~
  - (ii) ~~is the person's former spouse or partner and would have been a biological parent of a child born as a result of the pregnancy; or~~ 5
  - (iii) ~~had undertaken to be the primary carer (as described in section 7(1)(c) of the Parental Leave and Employment Protection Act 1987) of a child born as a result of the pregnancy; or~~
  - (iv) ~~is the spouse or partner of a person who had undertaken to be the primary carer of a child born as a result of the pregnancy.~~ 10

(3) After section 69(3), insert:

(4) In this section,—

~~**miscarriage** has the same meaning as in section 2 of the Births, Deaths, Marriages, and Relationships Registration Act 1995 means the end of a pregnancy in the first 20 weeks of pregnancy other than as a result of abortion services provided in accordance with the Contraception, Sterilisation, and Abortion Act 1977~~ 15

~~**still-birth** has the same meaning as in section 2 means a still-birth within the meaning of the Births, Deaths, Marriages, and Relationships Registration Act 1995 other than as a result of abortion services provided in accordance with the Contraception, Sterilisation, and Abortion Act 1977.~~ 20

**5 Section 70 amended (Duration of bereavement leave)**

In section 70(1), replace paragraph (a) with:

- (a) 3 days' bereavement leave for each type of bereavement described in section 69(2)(a), **(c), and (d)**; and 25

**Legislative history**

27 June 2019  
10 December 2019

Introduction (Bill 159–1)  
First reading and referral to Education and Workforce  
Committee