EXPLANATORY MEMORANDUM TO

THE ADOPTION AND CHILDREN ACT 2002 (CONSEQUENTIAL AMENDMENT TO STATUTORY ADOPTION PAY) ORDER 2006

2006 No. 2012

1. This explanatory memorandum has been prepared by the Department of Trade and Industry and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 The Adoption and Children Act 2002 (Consequential Amendment to Statutory Adoption Pay) Order 2006 amends section 171ZL of the Social Security Contributions and Benefits Act 1992 (SSCBA). The amendment will apply to the adopters of children where the placement is expected to take place on or after 1 October 2006.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Background

4.1 The Order makes a consequential amendment to the SSCBA, pursuant to the coming into force of the Adoption and Children Act 2002 (the ACA). It is made under powers contained in the ACA. The Order amends section 171ZL of the SSCBA, which sets out the criteria for entitlement to statutory adoption pay (SAP).

4.2 The ACA makes new provisions about adoption so that unmarried couples, as well as married couples and civil partners, can jointly adopt a child (see paragraph 7.2 below). These provisions apply in England and Wales only: adoption law in Scotland and Northern Ireland permits adoption only by couples who are married. Section 171ZL of the SSCBA currently provides that, where two people jointly adopt a child, a pre-condition of eligibility for SAP is that the other member of the couple is not receiving SAP (see paragraph 7.5). However, the existing provisions only apply to married couples and, in England and Wales, civil partners. Civil partners cannot jointly adopt a child in Scotland or Northern Ireland – although this is currently not clear from the SSCBA. The Order amends the SSCBA, so that it applies not only to married couples and civil partners, but also to unmarried couples. This is necessary so that there is no double payment, whereby both members of an unmarried couple could be entitled to SAP.

5. Extent

5.1 This instrument applies to Great Britain.

6. European Convention on Human Rights

Alistair Darling, **t**he Secretary of State for Trade and Industry has made the following statement regarding Human Rights:

In my view the provisions of the Adoption and Children Act 2002 (Consequential Amendment to Statutory Adoption Pay) Order 2006 are compatible with the Convention rights.

7. Policy background

7.1 The Adoption & Children Act 2002 (ACA) came into force on 30 December 2005 and applies to England and Wales. The Act overhauled the outdated 1976 Adoption Act and modernises the pre-existing legal framework for domestic and inter-country adoption. It implements the proposals in the White Paper 'Adoption: A New Approach,' which require primary legislation and underpins the Government's drive to improve the performance of the adoption service and promote greater use of adoption.

7.2 The ACA includes provisions to enable married couples, two people who are civil partners of each other, single people or two people (whether of different sexes or the same sex) living as partners in an enduring family relationship) to apply to adopt jointly, thereby widening the pool of potential adoptive parents and ensuring that more vulnerable children have the chance of the family life that adoption can bring. It will be for adoption agencies, and ultimately the courts, to decide whether an individual or a couple is suitable to adopt. Unmarried couples are still unable to adopt jointly in Scotland and Northern Ireland.

7.3 The Government introduced new entitlements to statutory adoption leave and pay, and statutory paternity leave and pay from April 2003, which are broadly similar to the leave and pay available to birth parents when a child is born. Eligible adopters can take one year's adoption leave and receive Statutory Adoption Pay (SAP) for 26 weeks. Where a couple are to jointly adopt a child they are able to choose which of them, if eligible, will take adoption leave and receive SAP. The other partner, if eligible, may take one or two weeks' paternity leave and receive Statutory Paternity Pay (SPP) while they are on leave. Both SAP and SPP are paid at a standard rate, currently £108.85 or 90% of the employee's average weekly earnings if that is less. All employers are able to reclaim 92% of the SAP and SPP they pay to employees from monies due to Her Majesty's Revenue and Customs (HMRC). Small employers – those whose annual National Insurance liability is £45,000 or less – are able to reclaim 104.5% of the payments.

7.4 This instrument contains a technical amendment to the existing provisions on SAP which is needed in consequence of the new ACA provisions enabling unmarried couples to apply to adopt.

7.5 In order to ensure that only one member of an adopting couple receives Statutory Adoption Pay the SSCBA makes it a requirement of eligibility that the other member of the couple is not receiving SAP. This applies already to married couples and civil partners adopting jointly. Since the existing SSCBA provisions refer only to a spouse or civil partner, an amendment is needed to provide that where an unmarried couple adopt, an adopter is only eligible for SAP if the other member of the couple is not receiving SAP.

7.6 The ACA was closely scrutinised during its passage through Parliament having been referred to a Special Standing Committee to provide an opportunity for organisations and other outside Parliament to give their views. A free vote on backbench amendments to the Bill to enable unmarried couples to apply to adopt jointly was held and MPs from all sides of the House voted in favour of the proposed change.

7.7 This is a minor amendment consequential to the implementation of the provisions enabling unmarried couples to adopt jointly. It will close a potential loophole which would allow both members of an unmarried couple to receive SAP, ensuring that the entitlements to SAP of unmarried couples adopting jointly are the same as those of married couples adopting jointly and is required following the implementation of the ACA provisions.

7.8 Employers responsible for administering SAP will benefit from bringing the provisions for unmarried adopters into line with those for married couples and civil partners, but given the small numbers of eligible adoptions each year the numbers of employers likely to be affected is very small. There are around 4,000 adoptions eligible for SAP each year.

8. Impact

8.1 A Regulatory Impact Assessment covering the measures introduced by this Order, as well as amendments being made to maternity and adoption leave and pay provisions being made as a consequence of the Work and Families Act, is attached.

8.2 The impact on the public sector is expected to be in line with that on all employers, as set out in the RIA

9. Contact

Tom Ridge at the Department of Trade and Industry Tel: 020 7215 5041 or e-mail: tom.ridge@dti.gsi.gov.uk can answer any queries regarding the instrument.

Full Regulatory Impact Assessment

Employment Relations Directorate

The Maternity and Parental Leave (Amendment) Regulations 2006 and the Paternity and Adoption Leave (Amendment) Regulations 2006

June 2006

Introduction

1. In January 2006 the Government published draft regulations on Maternity and Adoption Leave[1], following commitments made in the Government's Response to the Work and Families Consultation in October 2005[2]. Draft regulations amending maternity and adoption pay were also published in draft[3]. The *Work and Families Bill RIA: Choice and Flexibility* in October 2005[4] set out the following proposals relating to maternity and adoption leave and pay.

(a) extend the period for payment of Statutory Maternity Pay (SMP), Maternity Allowance (MA) and Statutory Adoption Pay (SAP) initially from 26 to 39 weeks by April 2007;
(b) reform the period of notice to be given by an employee prior to returning to work after maternity or adoption leave;
(c) introduce measures to help employers with the administration of Statutory Payments and measures to encourage communication and contact during maternity and adoption leave ("keeping in touch days" and clarification that employers may make "reasonable contact";
(d) change the qualification requirement for Additional Maternity Leave (AML), to ensure mothers are able to take advantage of the extended period for payment of Maternity Allowance;

2. Following the consultation on the draft regulations which ended on 25th April 2006, this RIA updates the earlier analysis, especially in the area of Keeping in Touch (KIT) days, where some additional evidence has recently become available.

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[1] Work and Families: Choice and Flexibility, Draft Regulations on Maternity and Adoption Leave and Flexible Working, January 2006, URN 06/707, http://www.dti.gov.uk/files/file23932.pdf
[2] http://www.dti.gov.uk/files/file16317.pdf
[3] Statutory Maternity Pay and Maternity Allowance (Amendment) Regulations 2006 and the Statutory Paternity Pay and Statutory Adoption Pay (General) and the Statutory Paternity Pay and Statutory Adoption Pay (Weekly Rates) (Amendment) Regulations 2006
[4] For a full discussion of the costs and benefits as well as the underlying methodology used see Sections A to D of the Work and Families Bill: Choice and Flexibility RIA, October 2005, URN 05/1585: http://www.dti.gov.uk/files/file19314.pdf

Amending existing provisions on Statutory Adoption Pay

3. In addition to these proposals relating to maternity and adoption leave and pay, the Government is also making a technical amendment to the existing provisions on Statutory Adoption Pay (SAP) to take account of provisions of the Adoption and Children Act 2002 (ACA) which allow unmarried couples to adopt a child jointly. Though separate from the Work and Families package of measures, it is appropriate to assess the effects of this amendment here too.

Purpose and intended effect

Objective

4. The overall objective of this package of measures is to give children the best start in life, parents more choice about how to balance their work and family responsibilities and to support employers in recruiting and retaining the best people.

5. The purpose and intended effect of the individual elements of the package are as follows:

(a) <u>Extending the period for payment of SMP, MA and SAP initially from 26 to 39 weeks from April 2007</u>

6. These measures are intended to enable mothers and adopters to take longer off work following the birth or placement for adoption of their child should they choose to do so. The evidence confirms the value of consistent one-to-one care in the first year of a child's life.

7. Currently, expectant mothers who are working and meet qualifying conditions based on length of service and average earnings are entitled to receive up to 26 weeks' Statutory Maternity Pay. This consists, for the first 6 weeks, of 90 per cent of the mother's average weekly earnings (with no upper limit); and, for the remaining 20 weeks, of a flat rate payment (currently, £108.85 per week[5]) or the 90 per cent rate if that is lower than the flat rate. For the purposes of this RIA we envisage that this flat rate will rise to around £111 a week in 2007/08.

8. Mothers who are not entitled to Statutory Maternity Pay but who meet qualifying conditions based on recent employment and earnings records receive Maternity Allowance. This is paid for 26 weeks at £108.85 per week or at 90 per cent of the mother's average weekly earnings if that rate is lower than the flat rate. For the purposes of this RIA we envisage that this rate will rise to around £111 in 2007/08.

9. Qualifying adopting parents are entitled to leave of 26 weeks paid at the prevailing flat rate.

10. The effect of this measure would be to increase the entitlement to payment to cover an additional 13 weeks for SMP, MA and SAP.

[5] With effect from April 2006

(b) Reforming the period of notice to be given by an employee prior to returning to work after maternity leave

11. This measure is intended to give more time to employers to plan for a mother's return to work following the birth. Currently, a mother going on maternity leave will agree with her employer the date when she expects to return to work. If subsequently she intends to return to work earlier or later than agreed, she must give her employer at least 28 days' notice of her date of return.

12. The Government response to the 2005 consultation set out the Government's intention to increase the current 28-day notice period to two months and the RIA examined the costs and benefits of this option as well as those set out in the consultation document: to retain the current period or to extend it to three months.

(c) Measures to help employers with the administration of Statutory Payments and measures to encourage communication and contact during maternity leave

13. The first of these measures aims to help employers with the administration of statutory payments by allowing women to start their maternity pay on the day their leave begins. Second, administration for business would also be eased by the introduction of a provision allowing for the calculation of SMP at a daily rate. The third would enable employers to initiate contact with women on maternity leave to reduce uncertainty regarding the date of return to work and to discuss other aspects relating to her leave or return to work. Fourth, the regulations also introduce 'keeping in touch' days to allow employees to carry out a limited number of days' of paid work under their contract of service without losing the right to any statutory pay for that week or bringing maternity leave to an end.

14. As the Government has set out in *Success at Work: Protecting Vulnerable Workers, Supporting Good Employers*[6] once the measures in the Work and Families Bill have been introduced we will consider the case for further simplification of the way in which employers administer SMP.

(d) Changing the qualification requirement for Additional Maternity Leave (AML)

15. This is primarily an enabling measure to ensure mothers who will be entitled to nine months' maternity pay, as proposed above, are also able to take nine months' maternity leave. Without changing the qualification requirement for Additional Maternity Leave, some mothers would be entitled to nine months' Maternity Allowance but only six months' maternity leave.

The Small Employers' Exemption

16. Women on maternity leave currently have the right to return to the same or an equivalent job under the Maternity and Parental Leave Regulations 1999. However, where an employer has five or fewer employees, it does not currently constitute

[6] http://www.dti.gov.uk/employment/employment-legislation/success-at-work/index.html

automatic unfair dismissal if the woman or adopter is not allowed to return at the end of Additional Maternity Leave (AML) or Additional Adoption Leave (AAL) because the employer regards this as not reasonably practicable. A woman in this position could still make an unfair dismissal claim, and more significantly, a sex discrimination claim. Case law has established that an employer who denies a woman a post on her return from maternity leave is likely to be in breach of the provisions of the Sex Discrimination Act 1975 (SDA).

17. In September 2005 the Government published its response to the consultation "Equality and Diversity: Updating the Sex Discrimination Act"[7] about changes which will be made in order to implement the amended Equal Treatment Directive (2002/73/EC) (ETAD). One of the requirements of ETAD is that a woman or adopter returning to work after maternity or adoption leave must be able to return to her job or to an equivalent post. The response to the consultation on "Equality and Diversity: Updating the Sex Discrimination Act" explained that the Government intends to remove the small employers' exemption alongside the other changes to maternity leave and pay which are set out in this RIA.

Amending existing provisions on Statutory Adoption Pay

18. The Adoption and Children Act 2002 (ACA) came into force in England and Wales on 30 December 2005. The Act overhauled the outdated 1976 Adoption Act and modernises the pre-existing legal framework for domestic and inter-country adoption.

19. Following the introduction of the ACA, and its new provision of enabling unmarried couples or couples not in a Civil Partnership to apply to adopt, a (minor) technical amendment is required for the existing provisions on Statutory Adoption Pay. The SAP provisions allow only one member of the adopting couple to receive SAP. While the current SAP provisions ensure that only one member of a couple can receive SAP when a married couple or civil partners adopt, the provisions do not explicitly cover unmarried adopters[8] and this raises the possibility of both members of the couple being able to receive SAP. This technical amendment seeks to correct this and ensure that SAP provisions for all couples adopting jointly are brought into line.

Rationale for government intervention

20. These measures actively address a number of policy goals:

- **To help mothers and fathers take leave to care for their children in the first year**. Extending Statutory Maternity Pay and similar entitlements initially to 39 weeks (from April 2007) will further encourage parental care for children during their first year. It will not be obligatory for parents to take such entitlements, but their greater availability should encourage greater take up;

[7] http://www.dti.gov.uk/files/file13952.pdf

[8] The ACA includes provisions to enable married couples, two people who are civil partners to each other, single people or two people (regardless of gender) living as partners in an enduring family relationship to apply to adopt.

- **To improve staff morale, retention and recruitment.** Extending maternity pay and, where necessary, leave, will address the risk of significant staff turnover, skills loss and disruption to businesses and enable employers and employees to come to mutually acceptable arrangements; and
- **To support business planning.** Extending the period of notice of return is one of a number of measures to encourage more communication and dialogue between employer and employee during maternity leave, which will help protect businesses from undue disruption.

Consultation

(1) Following the Work and Families: Choice and Flexibility Consultation, 2005

(i) Within Government

21. The RIA has been developed in consultation with various Departments including the Department for Work and Pensions, the Department for Education and Skills, HM Treasury, HM Revenue and Customs and the Small Business Service.

(ii) Public consultation

22. There was some initial consultation leading to the proposals set out in the 2004 Pre-Budget Report and Ten Year Childcare Strategy. The Small Business Service brought together employers to talk to the DTI about the impact on their business of the current legislation, including statutory maternity and paternity leave and pay and the right to request flexible working.

23. The DTI also carried out a formal consultation exercise from 28 February to 25 May 2005. It received over 200 formal responses to the *Work and Families: Choice and Flexibility* consultation[9].

(2) Consultation responses on 'Keeping in Touch Days', 2006

24. A recent consultation (31 January – 25 April 2006) on the draft maternity and adoption leave regulations sought stakeholders' views on the cap that should be applied to the maximum number Keeping in Touch Days. Most were welcoming of the proposal. The majority of responses agreed that a cap should be placed on the total number of Keeping in Touch days available. Of those who suggested a number, the majority suggested a limit in the region of 5 – 15 days. The Government has decided to fix the limit at 10 days. A cap of 10 days will allow sufficient flexibility for employers and employees to benefit from these kinds of activities, without allowing excessive amounts of work to be carried out during the maternity leave period. It also has the advantage of being a readily memorable round figure, and is the equivalent of two working weeks for many employees.

25. Stakeholders' views were also sought on whether to restrict the period in which Keeping in Touch Days should be taken. The overwhelming view from the consultation was that there should be no such restriction, other than to exclude the two weeks immediately following the birth (which in any case is already a period of compulsory maternity leave during which it is not possible to work). Accordingly the regulations do not restrict the period other than for these two weeks. This would not affect the prohibition under health and safety legislation on factory employees working within a longer period after giving birth, and this could be made clear in guidance.

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[9] For full details of the consultation response see the *Work and Families Bill: Choice and Flexibility RIA*, http://www.dti.gov.uk/files/file19314.pdf

Options

26. The *Work and Families Bill: Choice and Flexibility* RIA of October 2005 set out both the full range and recommended options for these proposals. In addition to this, as discussed above, the 2006 Consultation on the draft regulations asked for stakeholder views on the number of Keeping in Touch Days and whether or not the opportunity to take them should be subject to a limited time period.

Estimated Costs and Benefits: Summary

27. The estimated detailed costs and benefits for each are summarised in the tables below

28. For those costs and benefits that are quantifiable these are presented in 2007 prices and are based on estimates of the coverage of people for each proposal in 2007. In some cases it is difficult to put a figure on the benefits of improved workforce morale and better employee/employer relations - both of which are intended effects of these measures.

29. **Summary table 1**: Costs and benefits of extending the period of Statutory Maternity Pay, Maternity Allowance and Statutory Adoption Pay initially from 26 to 39 weeks:

Summary Table 1: Costs and benefits of extending the period of SMP, MA and SAP from 26 to 39 weeks

Description	Additional Costs	Benefits
1. Extend SMP from 26 weeks to 39 weeks	Additional costs: to Exchequer: £296 m/yr. Direct cost to employers (net): £22m/yr Indirect cost (cost of absence) to employers: £22m-£36m/yr Implementation costs: negligible.	The child will benefit from greater support for parents to stay at home. Parents will benefit from being able to spend more time with their children and mothers will have more choice about when they return to work, as well as having longer to secure other childcare arrangements. For employers, the estimated reduction in recruitment costs as a result of increasing the number of mothers staying on after return to work is: £13.2m/yr.
2. Extend MA from 26 weeks to 39 weeks	Additional costs: to Exchequer: £93 m/yr.	
3. Extend Statutory Adoption Pay - initially from 26 weeks to 39 weeks	Additional costs: to Exchequer and to employers: negligible.	

Source: DTI/DWP estimates

30. **Summary table 2**: Costs and benefits of increasing the period of notice to be given by an employee prior to changing the return to work date after maternity leave.

Summary Table 2: Costs and benefits of increasing notice periods

Description	Additional Costs	Benefits

Extend the notice of return period from 28 days to 2 months	Very minor costs of informing employees of new rules.	To employers: £3.5m-3.7m/yr.

Source: DTI estimates

31. **Summary table 3**: Costs and benefits of introducing measures to help employers with the administration of statutory payments and measures to encourage communication and contact during maternity leave

Simplification measures (Payroll)

Summary Table 3.1: Costs and benefits of introducing measures to help employers with the administration of statutory payments

Description	Additional Costs	Benefits
Measures to help employers with the administration of Statutory Payments	Negligible costs to adapt payroll systems	Eases the administrative burden on employers

Source: DTI estimates

Simplification measures (keeping in touch)

Summary Table 3.2: Costs and benefits of introducing measures to encourage communication and contact during maternity leave

Description	Additional Costs	Benefits
Measures to Encourage Communication and Contact During Maternity Leave	Negligible costs to employers.	Savings in recruitment costs for employers through higher staff retention, as more mothers return to work after completing their maternity leave[10]. In general, better communication between employers and mothers

Source: DTI estimates

32. **Supplementary table**: Costs and benefits of amending SAP provisions to ensure that only one member of unmarried adopter couples receives SAP payments.

[10] Around a quarter of employers operated a 'keeping in touch' scheme in 2005. The existence of a specific scheme resulted in a greater likelihood of a mother returning to work after maternity leave – 87% compared with 80% of all mothers. Source: Smeaton, D and Marsh, A, *Maternity and Paternity Rights and Benefits: Survey of Parents 2005*, DTI Employment Relations Research Series No. 50, URN 06/836.

However, in the absence of further data on the usage and operation of Keeping in Touch Days, it is not possible to quantify accurately the costs and benefits at this stage.

Supplementary Table: Costs and benefits of amending SAP provisions		
Description	**Additional Costs**	**Benefits**
Amend provisions to allow only one member of unmarried adopter couple to receive SAP	Small cost to individuals through loss of double-payments	Minor saving by Exchequer due to eradication of double-payment under SAP Greater clarity in SAP provisions and ensure equality with other adopter couples.

Source: DTI estimates

Impact on small business

33. The impact of each measure on small businesses will vary, both in terms of costs and benefits. The Government has consulted small businesses to gain a clearer picture of those effects. Current initial estimates indicate that the impact on small businesses of each proposal may be as follows:

- **Extending the period of Statutory Maternity Pay, Maternity Allowance and Statutory Adoption Pay initially from 26 to 39 weeks.** Small businesses paying £45,000 or less in national insurance in the previous tax year can recover all of these entitlements and may be able to do so in advance, plus an additional 4.5 per cent to compensate them for the employers' National Insurance Contributions (NICs) paid. In addition, small businesses like larger businesses should benefit from increased employee motivation and retention, with reduced recruitment costs.
- **Increasing the period of notice to be given by an employee prior to changing the return to work date after maternity leave.** Small firms are particularly vulnerable to short-term disruption where a member of staff is absent and are less able to adjust to changes of plan than large firms with greater resource flexibility. This proposal should be particularly beneficial to small firms.
- **Introducing measures to help employers with the administration of Statutory Payments and measures to encourage communication and contact during maternity leave.** Measures to ease the administrative complexities in the calculation and payment of statutory payments are more likely to have a positive impact on smaller firms, especially where there is no designated HR function. Measures to encourage communication and contact during maternity leave are not considered to impact disproportionately on small firms.

Race Equality Impact Assessment

34. A Race Equality Impact Assessment (REIA) was carried out for the *Work and Families Bill: Choice and Flexibility* RIA[11]. As the Maternity Leave Regulations simply extend what was presented in the Work and Families Bill, the assessment conducted at that time remains unchanged.

[11] The Race Equality Impact Assessment can be found here: http://www.dti.gov.uk/files/file26943.pdf

Competition assessment

35. Initial conclusions are that a detailed competition assessment is not necessary for any of these proposals. The issue of market share is not relevant because the regulations affect all sectors of the economy. Some sectors of the economy such as certain public sector services are more intensive in female labour supply, but in these sectors market share is also not relevant. The maternity regulations will not affect market structure or the potential of new firms to enter markets nor are the regulations expected to have an impact on firms' production decisions.

Enforcement, sanctions and monitoring

Guidance

36. What came out clearly in the responses to the 2005 consultation is that employers and employees would value more cohesive and comprehensive guidance about the law and how it applies to them. The Government acknowledges there is a need to review and revise the guidance and information it provides to ensure it is accessible, comprehensive and appropriate for purpose. The Government's recent publication, Success at Work: Protecting Vulnerable Workers, Supporting Good Employers[12] includes a commitment to do so. It will ensure that this guidance covers both current rights and those introduced by the new legislation.

Enforcement

37. Under existing legislation on maternity and adoption leave, employees can seek redress through an employment tribunal, for example in cases of detriment or dismissal.

38. Similarly, employees will be able to seek redress through an employment tribunal for infringements of any new rights.

Post implementation review

39. The DTI, with the DWP, will monitor information on take-up rates of extended maternity leave and pay. In consultation with the Office for National Statistics, the DTI will also consider the feasibility of monitoring extended maternity pay and leave through questions in the LFS. The DTI will continue informal discussions with parents, employees and employer representatives to assess qualitatively the response to the introduction of any new measures.

[12] http://www.dti.gov.uk/employment/employment-legislation/success-at-work/index.html

Declaration

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Signed by the responsible minister

Jim Fitzpatrick
Parliamentary Under-Secretary of State for Employment Relations and Postal Services

Date 25th June 2006

Contact Details

Any comments on the regulatory impact assessment should be addressed to:

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