



Ministry
of Justice

A proposal for a Remedial Order to amend the Fatal Accidents Act 1976

May 2019



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Presented to Parliament pursuant to paragraph 3(1) of Schedule 2 to the
Human Rights Act 1998

May 2019



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Background to the proposed Remedial Order

Introduction

This paper presents a draft of a proposed Remedial Order to amend section 1A of the Fatal Accidents Act 1976 (FAA) to allow an award of bereavement damages to a new category of claimant. This is to implement the judgment of the Court of Appeal in the case of *Jacqueline Smith v Lancashire Teaching Hospitals NHS Foundation Trust; Lancashire Care NHS Foundation Trust; and the Secretary of State for Justice* ([2017] EWCA Civ 1916). This section sets out the reasons for the proposed order – the “required information” of paragraph 3(1)(a) of Schedule 2 to the Human Rights Act 1998 (HRA).

The incompatibility

The FAA governs civil claims for damages where a death is caused by the wrongful act or omission of another person. The Court of Appeal held that the provisions of section 1A(2)(a) of the FAA are incompatible with Article 14 read with Article 8 of the European Convention on Human Rights (ECHR) because they deny an award of bereavement damages to an individual such as Ms Smith, who had lived with the deceased as his unmarried partner for a period of over two years immediately prior to his death.

Section 1A prescribes the award of bereavement damages and gives the Lord Chancellor power to set the level of the award by Order. The level of the award is currently £12,980. The award is currently only available to the wife, husband or civil partner of the deceased; and where the deceased was a minor who was never married or had a civil partner, to his or her parents, if he or she was legitimate; or to his or her mother, if illegitimate. These provisions apply to England and Wales only.

Reasons for amending the FAA

Legislative change is required to address the finding of an incompatibility with Article 14 read with Article 8 in *Smith* as it was the result of statutory limits on the award of bereavement damages under the existing section 1A FAA.

The Government proposes to implement the judgment by amending section 1A FAA to make bereavement damages available to claimants who cohabited with the deceased person for a period of at least two years immediately prior to the death. This is the most appropriate provision to amend, as it is where the incompatibility lies. The remedial order also provides that in instances where both a qualifying cohabitant and a spouse is eligible (i.e. where the deceased was still married and not yet divorced or separated but had been in a new cohabiting relationship for at least two years) the award should be divided equally between the eligible claimants.

Reasons for proposing a Remedial Order

A Remedial Order is an order made under section 10 HRA that amends primary or subordinate legislation that has been found by domestic courts or the ECtHR to be incompatible with Convention rights under the HRA, or the ECHR in specified circumstances.

Under section 10(2) HRA, the Government is required to have “compelling reasons” for making an amendment by way of a Remedial Order. As mentioned above, implementation of the *Smith* judgment must be done via an amendment to primary legislation due to the existing statutory limits on awards of bereavement damages under the FAA. We have considered the best way to do this taking into account likely timescales, the impact of any long delay and the nature of the breach identified by the Court of Appeal.

The breach of Article 14 identified by the Court of Appeal relates to the availability of bereavement damages under the FAA to cohabitants of at least two years’ duration. While the number of individuals who are affected by this incompatibility is likely to be small, we consider that the nature of the breach and the appropriateness of responding as promptly as possible to the *Smith* judgment contribute to there being compelling reasons for making the necessary legislative change swiftly.

The alternative approach to a Remedial Order would be to make the amendment by way of primary legislation. However, we consider that the current pressure on the legislative timetable means there is little prospect of finding suitable primary legislation to make an amendment in the near future.

For these reasons we consider that there are compelling reasons for making the amendments by way of Remedial Order. A Remedial Order is the most appropriate legislative vehicle for implementing this judgment promptly while allowing parliamentary scrutiny of the measures proposed.

The terms of the Remedial Order

The proposed Remedial Order would make a targeted amendment to the FAA which would have the effect that a claimant who cohabited with the deceased person for a period of at least two years immediately prior to the death would be eligible to receive an award of bereavement damages.

It would also provide that in instances where both a qualifying cohabitant and a spouse is eligible (i.e. where the deceased was still married and not yet divorced or separated but had been in a new cohabiting relationship for at least two years) the award should be divided equally between the eligible claimants.

The provisions would apply to causes of action which accrue on or after the day on which the Order comes into force.

This would ensure that bereavement damages would be available to individuals in situations similar to that of Ms Smith and would therefore satisfy the requirements of the judgment in *Smith*.

Reasons for using the non-urgent procedure

The Government does not consider it necessary to make use of the urgent procedure under paragraph 4 of Schedule 2 to the HRA to remedy the incompatibility more swiftly. The importance of the right affected by the incompatibility and the potential impact on individuals have been considered against the need to allow the opportunity for parliamentary scrutiny of the proposed changes and to legislate in an open and transparent manner. The bereavement damages award is token in nature, and the number of individuals affected by the incompatibility which this proposed Remedial Order would remove is likely to be small. We therefore consider that it is appropriate to allow the opportunity for parliamentary scrutiny of this proposal under the non-urgent procedure.

Remedial Order process

Schedule 2 to the HRA sets out the parliamentary process for Remedial Orders. Under the non-urgent procedure, a proposal for a draft order is laid before Parliament for 60 days during which time representations may be made. Following this the draft order, with any revisions the Government wishes to make in light of any representations received, must be laid for a further 60 days. It then needs to be approved by a resolution of each House of Parliament before it can be made.

Draft of the proposed Remedial Order

S T A T U T O R Y I N S T R U M E N T S

2019 No.

DAMAGES, ENGLAND AND WALES

The Fatal Accidents Act 1976 (Remedial) Order 2019

Made - - - - - ***
Coming into force - - - - - ***

The damages that may be awarded in respect of a claim for bereavement under section 1A of the Fatal Accidents Act 1976(a) have been declared(b) under section 4 of the Human Rights Act 1998(c) to be incompatible with a Convention right(d).

The Secretary of State considers that there are compelling reasons for proceeding by way of remedial order(e) to make such amendments to the Fatal Accidents Act 1976 as the Secretary of State considers necessary to remove the incompatibility.

In accordance with paragraph 2(a) of Schedule 2 to the Human Rights Act 1998, a draft of this instrument was laid before Parliament and was approved by resolution of each House of Parliament, a document containing a draft of this instrument having previously been laid before Parliament in accordance with paragraph 3(1) of that Schedule.

Accordingly, the Secretary of State makes the following Order in the exercise of the powers conferred by section 10(2) of, and paragraph 1(1)(a) and (d), (2) and (3) of Schedule 2 to, the Human Rights Act 1998.

Citation, commencement and extent

1.—(1) This Order may be cited as the Fatal Accidents Act 1976 (Remedial) Order 2019 and comes into force on the 21st day after the day on which it is made.

-
- (a) 1976 c.30. Section 1A was inserted by the Administration of Justice Act 1982 (c.53), s 3 and amended by the Civil Partnership Act 2004 (c.33), s 83(1),(7), and S.I. 2013/510.
 - (b) By the Court of Appeal in the case of *Jacqueline Smith v Lancashire Teaching Hospitals NHS Foundation Trust and others* [2017] EWCA Civ 1916.
 - (c) 1998 c.42.
 - (d) See section 1(1) of the Human Rights Act 1998 for the definition of “the Convention rights” and section 21(1) of that Act for the definition of “the Convention”.
 - (e) See section 21(1) of the Human Rights Act 1998 for the definition of “remedial order”.

(2) The amendments made by this Order apply only to causes of action which accrue on or after the day on which this Order comes into force.

(3) Any amendment made by this Order has the same extent as the provision which it amends.

Amendments to the Fatal Accidents Act 1976

2.—(1) Section 1A of the Fatal Accidents Act 1976 is amended as follows.

(2) After subsection (2)(a) (and before the “and”) insert—

“(ab) of the cohabiting partner of the deceased;”.

(3) After subsection (2) insert—

“(2A) In subsection (2) “cohabiting partner” means any person who—

- (a) was living with the deceased in the same household immediately before the date of the death; and
- (b) had been living with the deceased in the same household for at least two years before that date; and
- (c) was living during the whole of that period as the husband or wife or civil partner of the deceased.”.

(4) In subsection (4)—

- (a) for “this section” substitute “subsection (2)(a) or (ab) or under subsection (2)(b)”; and
- (b) for “both the parents of the deceased” substitute “more than one person”.

Address	<i>Name</i>
Date	Parliamentary Under Secretary of State Department

EXPLANATORY NOTE

(This note is not part of the Order)

Section 1A of the Fatal Accidents Act 1976 (c.30) (the “Act”) provides for a fixed sum of bereavement damages to be awarded to a limited category of persons in the event of a fatal accident caused by wrongful act, neglect or default.

This Order amends section 1A of the Act to provide that a cohabiting partner may be eligible for bereavement damages, in addition to the wife, husband or civil partner of the deceased (or, in the case of a minor who has never married or been a civil partner, the parents of the deceased). For these purposes cohabiting partner means any person who, immediately prior to the deceased’s death, had been living as husband, wife or civil partner of the deceased for a period of at least 2 years.

Article 2(4) amends section 1A(4) of the Act to provide that, where more than one person is entitled to an award of bereavement damages, the award must be shared equally between them. Previously this provision applied only where both parents may be entitled to an award under section 1A(2)(b), because there was no possibility of an award being payable to more than one person under section 1A(2)(a) or an award being payable under both section 1A(2)(a) and (2)(b). Such a possibility now exists as a result of the amendments made by article 2(2) and (3), and the amendment made by article 2(4) caters for that possibility.

A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sector is foreseen.

Explanatory memorandum to the proposed Remedial Order

EXPLANATORY MEMORANDUM TO THE FATAL ACCIDENTS ACT 1976 (REMEDIAL) ORDER 2019 2019 No. [XXXX]

Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Human Rights.

2. Purpose of the instrument

- 2.1 To implement the Court of Appeal judgment in the case of *Jacqueline Smith v Lancashire Teaching Hospitals NHS Foundation Trust; Lancashire Care NHS Foundation Trust; and the Secretary of State for Justice* ([2017] EWCA Civ 1916) by amending the Fatal Accidents Act 1976 (FAA) to provide for claimants who have lived with the deceased person for at least two years immediately prior to the death to be eligible for an award of bereavement damages.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Human Rights

- 3.1 This Remedial Order is laid pursuant to the power in section 10 of the Human Rights Act 1998.

Other matters of interest to the House of Commons

- 3.2 The territorial application of this instrument is England and Wales.

4. Legislative Context

- 4.1 This instrument is being laid in response to the judgment of the Court of Appeal in *Jacqueline Smith v Lancashire Teaching Hospitals NHS Foundation Trust; Lancashire Care NHS Foundation Trust; and the Secretary of State for Justice* ([2017] EWCA Civ 1916), which concerned the award of bereavement damages under the FAA. The Court held that the provisions of section 1A(2)(a) of the FAA are incompatible with Article 14 read with Article 8 of the European Convention on Human Rights (ECHR) because they deny an award of bereavement damages to an individual such as Ms Smith, who had lived with the deceased as his unmarried partner for a period of over two years immediately prior to his death.

- 4.2 Section 10 HRA provides that if a provision of legislation has been declared to be incompatible with a Convention right, and the Minister considers there are compelling reasons for doing so, the legislation may be amended by Remedial Order to remove the incompatibility.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is England and Wales.
- 5.2 The territorial application of this instrument is England and Wales.

6. European Convention on Human Rights

- 6.1 The Secretary of State for Justice has made the following statement regarding Human Rights:

“In my view the provisions of the Fatal Accidents Act 1976 (Remedial) Order 2019 are compatible with the Convention rights.”

7. Policy background

What is being done and why

- 7.1 The FAA governs civil claims for damages where a death is caused by the wrongful act or omission of another person. The Court of Appeal held that the provisions of section 1A(2)(a) of the FAA are incompatible with Article 14 read with Article 8 of the European Convention on Human Rights (ECHR) because they deny an award of bereavement damages to an individual such as Ms Smith, who had lived with the deceased as his unmarried partner for a period of over two years immediately prior to his death.
- 7.2 The Remedial Order will have the effect that a claimant who cohabited with the deceased person for a period of at least two years immediately prior to the death will be eligible to receive an award of bereavement damages. In instances where both a qualifying cohabitant and a spouse is eligible (i.e. where the deceased was still married and not yet divorced or separated but had been in a new cohabiting relationship for at least two years) the award will be divided equally between the eligible claimants.
- 7.3 Under section 10(2) HRA, the Government is required to have “compelling reasons” for making an amendment by way of a Remedial Order rather than primary legislation. The current pressure on the legislative timetable means there is little prospect of using primary legislation. We consider that the nature of the incompatibility contributes to there being compelling reasons for making the necessary legislative change promptly. Therefore, we consider that a Remedial Order using the non-urgent procedure is the most appropriate legislative vehicle for implementing this judgment on a timely basis while allowing parliamentary scrutiny of the measures proposed.

Consolidation

- 7.4 The Government does not intend to consolidate the legislation.

8. Consultation outcome

- 8.1 The Government has not conducted a separate consultation exercise as it would not be proportionate to do so for a targeted amendment which is required to implement a court judgment.

9. Guidance

- 9.1 The Government will not be publishing guidance on this amendment.

10. Impact

- 10.1 There is likely to be some impact on the insurance industry in meeting claims for bereavement damages from the additional category of claimant under this amendment.
- 10.2 However, we have assessed the likely number of future awards for damages under this amendment to be low and the financial impact too small to justify preparing a full Impact Assessment for this instrument.

11. Regulating small business

- 11.1 The legislation applies to activities that are undertaken by small businesses. Small businesses may be liable to pay bereavement damages to the additional category of claimant under this amendment in circumstances where they are responsible for the death as a result of a wrongful act or omission.
- 11.2 However, the low level of the award (currently £12,980) and the limited number of those likely to be eligible as a result of this amendment mean that the financial impact on small businesses is likely to be very small.

12. Monitoring & review

- 12.1 The effect of this amendment will be monitored on an ongoing basis by the Ministry of Justice. Any declarations of incompatibility made by the domestic courts and judgments of the European Court of Human Rights on related matters will be included in the Government's annual reports to the Joint Committee on Human Rights.

13. Contact

- 13.1 Anthony Jeeves at the Ministry of Justice, telephone: 07580 927398 or email: Anthony.jeeves@justice.gov.uk, can answer any queries regarding the instrument.

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