



Ministry
of Justice

**The Government Response
to the twenty-first report from
the Joint Committee on Human
Rights, Session 2017-19
(HC 2225, HL paper 405):
Proposal for a draft Fatal
Accidents Act 1976 (Remedial)
Order 2019**

February 2020



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The Government Response to the twenty-first report from the Joint Committee on Human Rights, Session 2017-19 (HC 2225, HL paper 405): Proposal for a draft Fatal Accidents Act 1976 (Remedial) Order 2019

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

February 2020



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Statement of Summary of Representations on the Fatal Accidents Act 1976 (Remedial Order) 2019

Introduction

1. This paper presents a draft Remedial Order to Parliament, together with the Government's response to the Joint Committee on Human Rights' (JCHR) report of 10 July 2019, and representations received from the Association of Personal Injury Lawyers (APIL) on 1 July 2019.
2. On 8 May 2019, the Government laid a proposal for a draft Remedial Order in accordance with section 10(2) and paragraph 1(1) of Schedule 2 to the Human Rights Act 1998. The purpose of the Order is 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).
3. This summary of representations is made in accordance with the requirements of paragraph 3(2) of Schedule 2 to the Human Rights Act 1998.

Representations from the Association of Personal Injury Lawyers (APIL)

4. Representations to the Ministry of Justice from APIL, while welcoming the remedial order, expressed concern at the proposal to include a minimum two-year cohabitation period to qualify for an award of bereavement damages, and argued that no qualifying period should be imposed. APIL also argued that the law in relation to bereavement damages should be reformed more generally, and should reflect the law in Scotland.
5. APIL made similar points in its written evidence to the JCHR, and the Government's response to its representations is included in its response below to the JCHR's recommendations.

Response to recommendations in the JCHR's report of 10 July

- 6. We welcome the Government's action in proposing the Remedial Order to remedy the incompatibility in the Fatal Accidents Act 1976 ("the FAA") with the Convention prohibition against discrimination and the right to private and family life. (Paragraph 6)**
- 7. We consider that the procedural requirements of the Human Rights Act ("the HRA") have been met and the Government's reasons for proceeding by way of remedial order rather than by a Bill are sufficiently compelling for the purpose of section 10(2) of the HRA. Remedying the incompatibility by way of a non-urgent order strikes a reasonable balance between avoiding any further undue delay on the one hand, and the need for proper parliamentary scrutiny on the other. The Committee does, however, regret that it has taken twenty years following the Law Commission's report in 1999, and a declaration of incompatibility in November 2017, before laying the proposed draft Order in May 2019. (Paragraph 31)**
8. The Government welcomes the Committee's agreement that the relevant procedural requirements have been met and that the use of a Remedial Order through the non-urgent procedure is appropriate. It notes the Committee's other comments and hopes to complete the Parliamentary process in relation to the remedial order in a timely manner.
- 9. The proposed draft Remedial Order inserts "cohabiting partners" into section 1A of the FAA, as defined in section 1(3)(b) of the FAA. In our view, the draft Remedial Order adequately addresses the judgment of the Court of Appeal, by extending the bereavement damages scheme to cohabiting couples (who have been living together for at least two years prior to the death), thereby removing the unlawful discrimination in section 1A of the FAA identified by the Court of Appeal. (Paragraph 37)**
10. The Government welcomes the Committee's conclusion.
- 11. We recognise that the definition of "civil partners" in the proposed draft Order simply reflects the existing language in section 1 of the FAA, but we suggest that it would be preferable to review the language used in all provisions of the FAA to describe persons in cohabiting relationships to ensure that the language reflects the equality of their status. We suggest the language used in the Adoption and Children Act 2002, for example, is preferable. Section 144(4) defines a "couple" as a married couple, civil partners or "two people (whether of different sexes or the same sex) living as partners in an enduring family relationship." (Paragraph 40)**
12. The Government does not share the Committee's view that the wording used in the draft Remedial Order implies that cohabitation is an imitation of marriage or civil partnership rather than an equal alternative. The wording used ("living as husband and wife or civil partner") is a settled form of words to indicate the necessary level of settled cohabitation. As the Committee recognises, it also reflects the wording used

in section 1 of the FAA. Amending section 1 would in the Government's view go beyond the strict requirement that a Remedial Order may only be used to make the changes which are necessary to remove the incompatibility that has been identified. In that context, the Government is concerned that to adopt different definitions in section 1 and 1A of the FAA would introduce an unwelcome complexity and inconsistency into the legislation by adopting a definition from another Act (the Adoption and Children Act 2002), which was devised for use in a wholly different context – the placement of children - in which context it may have been more appropriate and proportionate to undertake a qualitative assessment of the endurance and stability of a relationship.

- 13. Bearing in mind the requirement to justify any differential treatment, the Government may wish to put forward official policy reasons for imposing a timeframe on cohabiting couples, which is not imposed on married or civilly partnered couples, in its response to this Report. This will mean this policy decision can be properly scrutinised. In our view, the application of any qualifying period will, to some extent, draw an arbitrary line, but will provide a necessary filter for identifying relationships of sufficient permanence and commitment. Whilst it is recognised that there must be objective criteria for cohabiting couples equivalent to that of the commitment shown by married couples and civil partners, we are concerned that the inclusion of a time period of two years may not always be the most appropriate qualifying factor. Without clear justification for treating cohabiting couples differently, we suggest that the definition of eligible cohabiting couples should be reconsidered. (Paragraph 43)**
14. In view of the fact that bereavement damages are simply a token award in acknowledgment of grief, in general terms the Government considers it desirable for the system governing the award to be as simple and straightforward as possible, and in particular to avoid the potential for intrusive enquiries into the quality and durability of an eligible relationship. The Government considers that it is reasonable to set a qualifying limit in relation to the duration of the cohabiting relationship which objectively evidences a relationship of permanence and commitment and at the same time avoids intrusive enquiries into the quality and durability of the relationship in individual cases. It is our view that a two-year period represents a reasonable duration for this purpose, and it is one which reflects the recommendation made by the Law Commission in its 1999 report "Claims for Wrongful Death" referred to by the Committee. Also, in view of the fact that a two-year period is applied under section 1(3)(b) of the FAA in relation to claims by cohabitants for dependency damages, we consider that unnecessary complexity would arise in a claim involving both types of damages if different definitions were used.
- 15. Whilst we agree that it is preferable to avoid intrusive enquiries into personal relationships, in circumstances where the deceased had settled with a new cohabiting partner of at least two years duration, but remained in the midst of a divorce settlement, there may be some cases where awarding damages to the spouse is unfair given the purpose of the award of damages is to compensate for grief following the loss of an intimate, stable and long-term personal relationship. (Paragraph 46)**

16. As stated above, and as agreed by the Committee, the Government considers it desirable to avoid the potential for intrusive enquiries into the quality and durability of an eligible relationship, or (in this particular situation) on the respective merits of two eligible claimants. That being so, prescribing for either party in such a situation to receive the entire award would deny the award to someone who would otherwise be eligible. The alternative of giving the full award to both eligible claimants would represent a fundamental change in the nature of the bereavement damages award, which is a single award paid in relation to a death, to mutually exclusive classes of person. Paying the full award to more than one person would mean that bereavement damages would be payable twice in relation to a single death. Instances involving both a qualifying cohabitant and a spouse who is not yet divorced are likely to be rare, and in light of the desirability of avoiding intrusive enquiries we consider that when such a situation does arise dividing the award equally is the fairest approach.
- 17. Whilst we recognise that the categories of eligible persons must be limited to those family members closest to the deceased, and therefore those most likely to suffer grief, the current list of eligible claimants is unprincipled, discriminates against other family members in analogous positions to existing eligible claimants and stigmatises children. Although no declarations of incompatibility have been made in respect of other family members, we consider that section 1A as currently drafted risks further legal challenge. (Paragraph 49)**
18. The Government does not accept that the current provisions on eligibility for bereavement damages are discriminatory. Bereavement damages are and were only ever intended to be a token payment payable to a limited group of people, and the limits imposed on the categories able to claim are not intended in any way to imply that people outside those groups would not grieve at the death in question. Different views can reasonably be held on the extent to which the bereavement damages award should be available. However, changes to extend availability to other family members whose relationship to the deceased person may in some cases be less close may require a fundamentally different approach which would permit enquiries into the nature of the relationship in individual cases. This could lead in some cases to intrusive and upsetting investigation of the claimant's relationship with the deceased person and could also increase the cost and complexity of the proceedings.
- 19. Although the proposed Remedial Order addresses the specific discrimination identified by the Court of Appeal in Smith, we have various concerns with the bereavement damages scheme as a whole. Wider reform of the FAA would fall outside of the scope of the Government's remedial order powers and would therefore require primary legislation. (Paragraph 52)**
- 20. Firstly, the language used to define cohabiting couples should not be based upon an intimation of married couples and civil partners. We suggest that the FAA could adopt the definition of cohabiting couples as "two people living as partners in an enduring relationship". Secondly, the qualifying time period of two years for cohabiting couples may not always be a fair indicator of a**

permanent and loyal relationship and we suggest that this should be reconsidered. Thirdly, the equal division of damages between separated spouses and cohabiting partners could lead to unfairness. Fourthly, we are concerned that section 1A of the FAA remains stigmatising towards children. We recommend that references to children as “not legitimate” should be removed from the statute. (Paragraph 53)

21. Fifthly, section 1A of the FAA is discriminatory against certain close family members. We therefore suggest that the Government should use this opportunity to look more broadly at the bereavement damages scheme and undertake a consultation with a view to reforming the scheme. The consultation should explore:

- a) whether entitlement to bereavement damages should be open to the following family members where there is a genuine close relationship: fathers grieving the loss of children born outside of wedlock; parents grieving the loss of adult or married children; children grieving the loss of a parent; and siblings grieving the loss of a brother or sister; and**
- b) whether the Scottish model of assessing damages on a case-by-case basis is fairer than the fixed lump sum model in England, Wales, and Northern Ireland. (Paragraph 54)**

22. In relation to the first three of the Committee’s points at paragraph 53 of its report, the Government considers that, as reflected in its responses to the Committee’s recommendations at paragraphs 40, 43 and 46 respectively, the terminology used to define cohabiting couples, the two-year qualifying period, and the equal division of the bereavement damages award between separated spouses and cohabiting partners are all reasonable and appropriate.

23. In relation to the Committee’s fourth point, the Government accepts that the language used in relation to the legitimacy of children could be regarded as stigmatising and inappropriate. Amending this provision would go beyond the scope of the Remedial Order, which must be strictly focused on the incompatibility identified by the Court of Appeal. However, we will consider the merits of amending the provision when a suitable opportunity arises.

24. In relation to the Committee’s fifth point, as noted above the Government does not accept that the existing provisions on bereavement damages are discriminatory. It believes that the existing system involving a fixed level of award and clear eligibility criteria represents a reasonable, proportionate and practical approach, and does not have any plans for wider consultation on the bereavement damages regime or the FAA more generally. However, it considers that an adjustment to the level of the bereavement damages award is appropriate to reflect inflation in the period since the previous increase in April 2013, and will take steps to lay the appropriate Order before Parliament in due course.

Annex A: The Remedial Order

STATUTORY INSTRUMENTS

2020 No.

DAMAGES, ENGLAND AND WALES

The Fatal Accidents Act 1976 (Remedial) Order 2020

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 time for bringing an appeal has expired and no appeal was made within that time.

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.

^(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. Section 4 was amended by paragraph 66(2) of Schedule 9 to the Constitutional Reform Act 2005 (c. 4); paragraph 156 of Schedule 16 to the Armed Forces Act 2006 (c. 52); paragraph 43 of Schedule 6 to the Mental Capacity Act 2005 (c. 9) and paragraph 5(5) of Schedule 14 to the Crime and Courts Act 2013 (c. 22).

^(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”.

Citation, commencement and extent

1.—(1) This Order may be cited as the Fatal Accidents Act 1976 (Remedial) Order 2020 and comes into force on the 21st day after the day on which it is made.

(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—

“(aa) 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 wife or husband or civil partner of the deceased.”.

(4) In subsection (4)—

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

Address
Date

Name
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.

In the case of *Jacqueline Smith v Lancashire Teaching Hospitals NHS Foundation Trust and others* [2017] EWCA Civ 1916, the Court of Appeal made a declaration of incompatibility in relation to section 1A of the Act, on the basis that limiting the category of persons eligible for bereavement damages 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) was contrary to Article 14, in conjunction with Article 8, of the European Convention of Human Rights.

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 wife, husband 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). A possibility now exists for an award to be payable to more than one person under subsection (2)(a) and (2) (aa) 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 FATAL ACCIDENTS ACT 1976 (REMEDIAL) ORDER 2020
2020 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.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 This entire instrument applies to England and Wales only.
- 3.3 The instrument does not have any minor or consequential effects outside England and Wales.
- 3.4 In the view of the Department, for the purposes of Standing Order No. 83P of the Standing Orders of the House of Commons relating to Public Business, the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament.
- 3.5 The Department has reached this view because the subject of the remedial order concerns an aspect of the civil law, which is a devolved area in Scotland and Northern Ireland.

4. Extent and Territorial Application

- 4.1 The extent of this instrument is England and Wales.
- 4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

5.1 Chris Philp, Parliamentary Under Secretary of State at the Ministry of Justice has made the following statement regarding Human Rights:

“In my view the provisions of the Fatal Accidents Act 1976 (Remedial) Order 2020 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 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.
- 6.2 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.

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. The Government considers that it is reasonable to set a qualifying limit in relation to the duration of the cohabiting relationship which objectively evidences a relationship of permanence and commitment and at the same time avoids intrusive enquiries into the quality and durability of the relationship in individual cases. It is our view that a two-year period represents a reasonable duration for this purpose.
- 7.3 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. The Government considers it desirable to avoid the potential for intrusive enquiries into the quality and durability of an eligible relationship, or (in this particular situation) on the respective merits of two eligible claimants. Instances involving both a qualifying cohabitant and a spouse who is not yet divorced are likely to be rare, and in light of the desirability of avoiding intrusive enquiries we consider that when such a situation does arise dividing the award equally is the fairest approach.

- 7.4 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.
- 7.5 The issue on cohabiting does not apply in the same way to welfare arrangements, as this issue stems from the explicit inclusion of cohabiting partners in section 1 of the relevant statute (the Fatal Accidents Act 1976).

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

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

10. Consultation outcome

- 10.1 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.

11. Guidance

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

12. Impact

- 12.1 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.
- 12.2 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.

13. Regulating small business

- 13.1 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.
- 13.2 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.

14. Monitoring & review

- 14.1 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.

15. Contact

- 15.1 Anthony Jeeves at the Ministry of Justice, telephone: 07580 927398 or email: Anthony.jeeves@justice.gov.uk, can be contacted with any queries regarding the instrument.
- 15.2 David Parkin, Deputy Director for Civil Justice and Law at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Chris Philp, Parliamentary Under Secretary of State at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

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