

**EXPLANATORY MEMORANDUM TO**  
**THE BEREAVEMENT BENEFITS (REMEDIAL) ORDER 2021**

**2021 No. XXXX**

**1. Introduction**

- 1.1 This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

- 2.1 This Order extends eligibility for Widowed Parent's Allowance (WPA)<sup>1</sup> and Bereavement Support Payment (BSP) to surviving cohabiting partners with dependent children, who were not in a legal union with the deceased.
- 2.2 This follows two court cases, the McLaughlin case (WPA) of 30<sup>th</sup> August 2018 and the Jackson case (BSP) of 7<sup>th</sup> February 2020<sup>2</sup> where the legislation governing WPA and BSP was declared incompatible with the European Convention on Human Rights. In both cases, the court found that, in restricting eligibility to people in a legal union, the current legislation discriminates between children on the grounds of their parents' status.
- 2.3 This Order will remove these incompatibilities. It is a Remedial Order and amends the following primary legislation: the Social Security Contributions and Benefits Act 1992<sup>3</sup>, the Social Security Contributions and Benefits (Northern Ireland) Act 1992<sup>4</sup> and the Pensions Act 2014<sup>5</sup>.
- 2.4 The Order has retrospective effect back to the date of the McLaughlin decision in the Supreme Court on 30<sup>th</sup> August 2018.

**3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 None

*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 The territorial application of this Order includes Scotland and Northern Ireland.

**4. Extent and Territorial Application**

- 4.1 The territorial extent of this Order is England, Scotland, Wales and Northern Ireland.

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<sup>1</sup> In the matter of an application by Siobhan McLaughlin for Judicial Review (Northern Ireland) [2018] UKSC 2018. <https://www.bailii.org/uk/cases/UKSC/2018/48.html>

<sup>2</sup> Jackson and others v Secretary of State for Work and Pensions [2020] EWHC 183 (Admin). <https://www.bailii.org/ew/cases/EWHC/Admin/2020/183.html>

<sup>3</sup> The Social Security Contributions and Benefits Act 1992. <https://www.legislation.gov.uk/ukpga/1992/4/contents>

<sup>4</sup> The Social Security Contributions and Benefits (Northern Ireland) Act 1992. <https://www.legislation.gov.uk/ukpga/1992/7/contents>

<sup>5</sup> The Pensions Act. <https://www.legislation.gov.uk/ukpga/2014/19/part/5>. It also amends the Pensions Act (Northern Ireland) 2015, which is not primary legislation.

## **5. European Convention on Human Rights**

- 5.1 Minister for Lords, Baroness Stedman-Scott, at the Department for Work and Pensions (responsible for bereavement benefits policy), has made the following statement regarding Human Rights:

“In my view the provisions of the Bereavement Benefits (Remedial) Order 2021 are compatible with the Convention rights.”

## **6. Legislative Context**

- 6.1 The legislation on Widowed Parent’s Allowance (WPA) and Bereavement Support Payment (BSP) has been declared, under section 4 of the Human Rights Act 1998<sup>6</sup>, to be incompatible with article 14 of the European Convention on Human Rights (ECHR) Convention right, which prohibits discrimination.
- 6.2 Section 10 of the Human Rights Act<sup>7</sup> allows a Remedial Order to be used to amend primary and secondary legislation where there is an incompatibility in domestic law with a right under the ECHR. This approach can be used if there are compelling reasons to do so.
- 6.3 The Minister for Lords, Baroness Stedman-Scott, at the Department for Work and pensions considers there are compelling reasons for using a Remedial Order and that the amendments proposed in the Remedial Order are necessary to remove the incompatibilities identified by the Supreme Court and the High Court. The Government takes a breach of the ECHR seriously and has decided that the breach should be remedied quickly. There are no appropriate Bills planned that could accommodate the changes to legislation and remedy these incompatibilities.
- 6.4 Using a Remedial Order to insert new provisions in the legislation will achieve a change in the law to extend WPA and BSP to surviving cohabiting partners with dependent children, who were not in a legal union with the deceased, with effect from 30<sup>th</sup> August 2018. This will enable the financial support provided by WPA and BSP to be given to those people when it is most needed.
- 6.5 The Minister for Lords, Baroness Stedman-Scott, at the Department for Work and pensions believes that using a Remedial Order is appropriate in this case. Using the Remedial Order process allows time for proper Parliamentary scrutiny.

## **7. Policy background**

### *What is being done and why?*

- 7.1 WPA is one of a suite of bereavement benefits which was introduced in 2001 to replace Widowed Mother’s Allowance. It is payable to working age people whose spouse/civil partner died before 6<sup>th</sup> April 2017 and who were entitled to Child Benefit for at least one child (or were pregnant). It can therefore currently only be paid to those who were in a legal union (marriage or civil partnership) with the deceased. It can be paid for as long as there is entitlement to Child Benefit (up to 20 years in some cases), though the average length of award is approximately 6 years.
- 7.2 BSP came into force on 6<sup>th</sup> April 2017, replacing the previous suite of bereavement benefits which included WPA. BSP provides support to working age people who lose

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<sup>6</sup> Section 4 of the Human Rights Act 1998. <https://www.legislation.gov.uk/ukpga/1998/42/section/4>

<sup>7</sup> Section 10 of the Human Rights Act. <https://www.legislation.gov.uk/ukpga/1998/42/section/10>

their spouse/civil partner by contributing to the immediate additional costs associated with bereavement. It can currently only be paid to those who were in a legal union with the deceased. Those without children receive the standard rate which includes an initial lump sum of £2,500 followed by up to 18 monthly instalments of £100. Those with children receive a higher rate which includes a lump sum of £3,500 followed by up to 18 monthly payments of £350. This recognises the higher costs associated with having children.

- 7.3 This Order extends eligibility for Widowed Parent's Allowance (WPA) and higher rate Bereavement Support Payment (BSP) to surviving cohabiting partners with dependent children, who were not in a legal union with the deceased. It is retrospective such that it applies to eligible claimants who were entitled to WPA or the higher rate of BSP from 30<sup>th</sup> August 2018 (date of the Supreme Court's judgment in McLaughlin) onwards.
- 7.4 Thus, this Order ensures that the legislation governing the payment of WPA and BSP to married couples/civil partners makes reference to cohabiting partners with dependent children as well.
- 7.5 Cohabiting partners are people who are living together as if married or in a civil partnership. Cohabiting partners are only covered if they have dependent children.

#### Payments

- 7.6 This Order makes surviving cohabiting partners with dependent children, who were not in a legal union with the deceased, entitled to the same WPA or BSP payment as those who had been married or in a civil partnership with the deceased and who had dependent children. This means that, for BSP, cohabiting partners with dependent children will be eligible for the higher rate (rate outlined in paragraph 7.2).
- 7.7 As this Order has retrospective effect to 30<sup>th</sup> August 2018, some claimants will be entitled to retrospective payments. These payments will be made as a single one-off payment. Any entitlement going forward from the date this Order comes into force will be paid in the normal way (weekly payments for WPA, lump sums and/or monthly payments for BSP).

#### Conditions of entitlement

- 7.8 This Order makes amendments which provide that a surviving cohabiting partner with dependent children, who was not in a legal union with the deceased, has the same conditions of entitlement as those in a legal union. These include being pregnant or entitled to Child Benefit, satisfying the National Insurance contribution conditions and being under State Pension age.

#### Claim time limits

- 7.9 The Order sets the time limits within which a claim must be received by the Department for Work and Pensions from surviving cohabiting partners with dependent children, who were not in a legal union with the deceased.
- 7.10 For WPA, a claim before this Order comes into force has to be made within 3 months of the claimant becoming entitled. Where a claimant becomes entitled as a result of this Order, the claim has to be made within 12 months of the date this Order comes into force. As WPA is only payable for deaths before 6<sup>th</sup> April 2017, any claimant who becomes entitled to WPA as a result of the Order, and who submits a claim

within the 12-month period, will receive a payment for the retrospective period of entitlement.

- 7.11 For Bereavement Support Payment (BSP) the time limit for claiming depends on when the death occurred.
- 7.12 If the death occurred after the Order comes into force, there is no change from the current position. That is, the claim has to be made within 3 months of the death to get the full amount of BSP (lump sum and all 18 monthly payments). The claim has to be made within 12 months of the death to get the lump sum, and each monthly payment has a three month claiming window.
- 7.13 If the death occurred before the Order comes into force, and retrospective payments are due, the time limits for claiming are as follows:
- If the claim is received *within* 12 months of the Order coming into force, the claimant will receive the full amount of BSP (lump sum and all 18 monthly payments), irrespective of whether the claim is received within 12 months of the death.
  - If the claim is received *after* 12 months of the Order coming into force, the claimant will receive 3 backdated monthly payments, plus any remaining monthly payments that are due within 18 months following the date the Order comes into force. No lump sum will be payable.
- 7.14 The time limits for both Widowed Parent's Allowance (WPA) and BSP would apply in the same way in Northern Ireland, so that anyone entitled from 30<sup>th</sup> August 2018 (date of the Supreme Court judgment in McLaughlin), who submits a claim within the required time limits, will be entitled to receive a payment.

#### Payment where there is more than one claimant

- 7.15 Currently, WPA and BSP can only be paid to survivors who were in a legal union with the deceased. Extending these benefits to surviving cohabiting partners with dependent children, who were not in a legal union with the deceased, means there will be a small number of cases where more than one person may have reason to claim in respect of the same death.
- 7.16 The position remains that only one claimant can be entitled per death. This Order provides which claimant will be entitled where more than one claimant has reason to claim. The claimant who was living with the deceased on the date of death would be entitled. This also means that only one claimant per household is entitled.
- 7.17 Where this still results in the potential for multiple payments, the claimant who is entitled is determined as follows:
- Where two prospective claimants were living with the deceased on the date of death, the person in a legal union with the deceased would be entitled (if they had entitlement to Child Benefit or were pregnant).
  - If neither prospective claimant was in a legal union with the deceased (or the person in a legal union did not have dependent children), the person with entitlement to Child Benefit, or the person who is pregnant, would be entitled.
  - If neither prospective claimant was in a legal union with the deceased and more than one prospective claimant had entitlement to Child Benefit, or was

pregnant, the person who had cohabited with the deceased for the longest on the date of death would be entitled.

- If all prospective claimants had been living with the deceased for the same amount of time and all had entitlement to Child Benefit and/or were pregnant, the claimant who had the eldest child would be entitled.
- In the very rare case where that leaves two or more prospective claimants, entitlement would be determined by exercise of the Secretary of State's discretion.

### Transitional provisions

7.18 For the period between 30<sup>th</sup> August 2018 and when this Order comes into force, there will be transitional protection to ensure that those claimants already in receipt of Widowed Parent's Allowance or Bereavement Support Payment before the date this Order comes into force do not lose their entitlement for the duration of their award as a result of this Order. For example, a claimant might have been entitled to benefit before this Order comes into force as a result of the death of their spouse. When this Order comes into force, the deceased's cohabiting partner may become entitled for the same period (e.g. because they were living with the deceased for the whole period and there had been no divorce in respect of the spouse). The transitional provisions enable both claimants to get benefit. This means that benefit already paid to the claimant can continue and is not recovered as a result of any new entitlement arising from the retrospective provisions in the Order.

## **8. European Union Withdrawal and Future Relationship**

8.1 This Order does not relate to withdrawal from the European Union.

## **9. Consolidation**

9.1 Informal consolidated text of benefits legislation is available to the public free of charge via the 'National Archive' website: [www.legislation.gov.uk](http://www.legislation.gov.uk)<sup>8</sup>

## **10. Consultation outcome**

10.1 No consultation has been carried out on this Order before it was laid before Parliament for the first 60-day period under paragraph 3(1) of Schedule 2 to the Human Rights Act 1998<sup>9</sup>. The reason for this is that representations can be made on the draft Order as part of the 60-day period. Any representations made during this period by Members, Peers, committees, stakeholders, the Joint Committee on Human Rights and others will be considered. Amendments to the Order can be made before it is laid before Parliament for the second 60-day period under paragraph 2 of Schedule 2 to the Human Rights Act 1998<sup>10</sup>. The Explanatory Memorandum for the second laying will be updated accordingly with details of the representations received.

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<sup>8</sup> [www.legislation.gov.uk](http://www.legislation.gov.uk). <http://www.legislation.gov.uk/>

<sup>9</sup> Paragraph 3(1) of Schedule 2 to the Human Rights Act 1998.  
<https://www.legislation.gov.uk/ukpga/1998/42/schedule/2>

<sup>10</sup> Paragraph 2 of Schedule 2 to the Human Rights Act 1998.  
<https://www.legislation.gov.uk/ukpga/1998/42/schedule/2>

## **11. Guidance**

- 11.1 This is a proposal for an Order which is subject to change following representations received (mentioned in paragraph 10.1) so this is not the time to provide guidance on how these provisions will operate. However, in due course the Department will provide internal guidance for staff such that when the Order comes into force they will be able to operate these provisions in practice.

## **12. Impact**

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 These proposals have an estimated Annually Managed Expenditure cost of up to £320 million up to and including 2025/26. This funding has been agreed with the Treasury. This is the cost to extend Widowed Parent's Allowance and Bereavement Support Payment to an estimated 22,500 cohabitants with children. These figures are estimates and assume that backdated payments are made to anyone who would have been eligible from 30th August 2018, the date of the McLaughlin judgment.
- 12.4 An Impact Assessment has not been prepared for this Order because there will be no significant impact on businesses.

## **13. Regulating small business**

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

## **14. Monitoring & review**

- 14.1 The Department will monitor and review the effect of the measures contained in the Remedial Order once it comes into force.

## **15. Contact**

- 15.1 Anila Naseem at the Department for Work and Pensions, Telephone: 01132324899 or email: [anila.naseem@dwp.gov.uk](mailto:anila.naseem@dwp.gov.uk) can be contacted with any queries regarding the Order.
- 15.2 Helen Walker, Deputy Director for Bereavement Benefits, at the Department for Work and Pensions can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Minister for Lords, Baroness Stedman-Scott, at the Department for Work and pensions can confirm that this Explanatory Memorandum meets the required standard.