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House of Commons
Joint Committee on Human
Rights

Draft Fatal Accidents Act 1976 (Remedial) Order 2020: Second Report

Fourth Report of Session 2019–21

*Report, together with formal minutes relating
to the report*

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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Publication

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Summary

The Human Rights Act 1998 (“HRA”) provides that where a court has found legislation to be incompatible with a Convention right, Ministers may correct that incompatibility through a Remedial Order, which may be used to amend primary legislation. On 12 February 2020, the Government laid the draft Fatal Accidents Act 1976 (Remedial) Order 2020. When a draft Remedial Order is laid by the Government, the Standing Orders of the Joint Committee on Human Rights (JCHR) require us to report to each House our recommendation as to whether the draft Remedial Order should be approved.

This draft Remedial Order concerns the entitlement to bereavement damages under the Fatal Accidents Act 1976 (“the FAA”). Section 1A(2)(a) of the FAA currently provides that bereavement damages are only available to:

- i) the wife, husband, or civil partner of the deceased;
- ii) parents, where the deceased is a ‘legitimate’ unmarried/unpartnered minor; or
- iii) a mother, where the deceased is ‘not a legitimate’ unmarried/unpartnered minor.

This draft Remedial Order arises from a declaration of incompatibility made by the Court of Appeal in *Smith v Lancashire Teaching Hospitals NHS Foundation Trust*.¹ In this case, the claimant’s co-habiting partner of eleven years died as a result of NHS negligence, however, she was not eligible to claim bereavement damages as she was not the wife or civil partner of the deceased.

The Court of Appeal held that section 1A(2)(a) of the Act is incompatible with Article 14 in conjunction with Article 8 of the European Convention on Human Rights (ECHR), as it denies bereavement damages to cohabiting partners (who have been living together for at least two years prior to the death). The Court considered that as Parliament treated cohabitantes (of two or more years) as being in a stable and long-term relationship comparable to that of spouses and civil partners for the purpose of *dependency damages*,² there was no justification for treating cohabiting couples differently for the purpose of *bereavement damages*. The grief caused by the death of a stable and long-term partner is the same whether the couple had been married, civil partners, or cohabiting.³

In response to the declaration of incompatibility made by the Court of Appeal, the Government laid a proposal for a draft Remedial Order on 8 May 2019. The proposed draft Remedial Order sought to amend the provision governing the award of bereavement damages under section 1A of the FAA. The Government proposed to make two key changes: (i) 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; and (ii) where both a qualifying cohabitant and a spouse are eligible (e.g. a couple are

1 *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2017] EWCA Civ 1916

2 Section 1 of the FAA provides for dependency damages following death caused by a wrongful act, neglect, or default. These damages are for the benefit of the deceased’s dependants. Section 1 FAA provides that dependency damages are available to a much wider list of eligible claimants compared to bereavement damages.

3 *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2017] EWCA Civ 1916, paras 90–91

separated but not divorced, and the deceased cohabited with a new partner), the award would be divided equally. The provisions would only apply to causes of action which accrue on or after the day on which the Order comes into force (i.e. the Order will not apply to cases where the negligence or wrongful act which caused the death occurred before the change in the law).

The Joint Committee on Human Rights published its report on the proposed draft Remedial Order during the last Parliament, on 16 July 2019.⁴ The Committee welcomed the Government's action in proposing the draft Remedial Order to remedy the incompatibility in the 1976 Act with the prohibition against discrimination and the right to family life. The Committee assessed the proposal in accordance with its Standing Order and the requirements under the HRA. It considered that the procedural requirements of the HRA had been met and the Government's reasons for proceeding by way of remedial order rather than by a Bill were sufficiently compelling for the purpose of section 10(2) of the HRA. Further, remedying the incompatibility by way of a non-urgent order struck 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 concluded that the proposed draft Remedial Order adequately remedied the incompatibility of the 1976 Act identified in *Smith*, 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, as identified by the Court of Appeal.⁵ The Committee therefore recommended that the proposed Remedial Order be laid in draft.

However, the Committee expressed regret that despite the Law Commission's report in 1999 which recommended reform, it had taken a declaration of incompatibility in November 2017 before the Government had sought to remedy the discrimination twenty years later. Further, although the proposed Remedial Order addressed the specific discrimination identified by the Court of Appeal in *Smith*, the Committee expressed various concerns with the bereavement damages scheme as a whole, including other forms of discrimination which ought to be rectified.

Firstly, the Committee recommended that the language used to define cohabiting couples should not be based upon an intimation of married couples and civil partners. The Committee therefore suggested that the Government could consider adopting the definition of cohabiting couples as "two people living as partners in an enduring relationship".

Secondly, the Committee concluded that a qualifying time period of two years for cohabiting couples was not necessarily a fair indicator of a permanent and loyal relationship. No qualifying time period is applied to spouses or civil partners. The Committee suggested that this requirement should be removed.

Thirdly, the Committee was concerned that the equal division of damages between certain eligible claimants may, in some cases, lead to unfairness. For example, bereavement damages would be shared equally between a bereaved cohabiting partner (of at least two years) and a spouse who is not yet divorced. Given the purpose of the

4 Joint Committee on Human Rights, Twenty-First Report of Session 2017–2019, [Proposal for a draft Fatal Accidents Act 1976 \(Remedial\) Order 2019](#), HC 2225 / HL Paper 405

5 *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2017] EWCA Civ 1916

award is to compensate for grief following the loss of an intimate and long-term personal relationship, this could be unfair in circumstances where the deceased remained in the midst of a protracted divorce settlement, but had re-settled in a new intimate relationship with a cohabiting partner of at least two years.

Fourthly, the Committee was concerned that section 1A of the FAA remains stigmatising towards children and recommended that references to children as illegitimate (i.e. born outside of wedlock or civil partnership) should be removed from the statute.

Fifthly, section 1A of the FAA remains discriminatory against certain close family members, such as cohabiting fathers who lose a child. The Committee suggested 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 Committee suggested that a consultation should explore:

- a) whether entitlement to bereavement damages should be open to the following close family members: fathers grieving the loss of children born outside of marriage/civil partnership; 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.

The Government responded to the recommendations of the JCHR in their response in February 2020.⁶ The Government has not accepted any of the recommendations of the Committee, with the exception of an acknowledgement that references to children as illegitimate are inappropriate.

The Committee has considered the draft Remedial Order laid on 12 February 2020 and concludes, as before, that the procedural requirements of the HRA have been met and that the draft Remedial Order remedies the incompatibility identified by the Court of Appeal, by including cohabitants within the scheme. The Committee concludes that the special attention of each House is not required to be drawn to the draft Remedial Order on any of the relevant grounds, or on any other grounds, and recommends that the draft Remedial Order should be approved. However, we are disappointed that the Government has rejected all of the Committee's recommendations contained within its First Report. We urge the Government to reconsider its position in order to ensure the bereavement damages scheme is fully compliant with human rights law and does not perpetuate other forms of discrimination or stigmatisation.

6 Ministry of Justice, [A proposal for a Remedial Order to amend the Fatal Accidents Act 1976](#), May 2019, and [Government Response to Representations](#), February 2020

1 Introduction

The Declaration of Incompatibility

1. This draft Remedial Order arises from a declaration of incompatibility made by the Court of Appeal in *Smith v Lancashire Teaching Hospitals NHS Foundation Trust*.⁷ In this case, Ms Smith’s co-habiting partner (“the deceased”) died as a result of the negligence of the Lancashire Teaching Hospitals NHS Foundation Trust and Lancashire Care NHS Foundation Trust. Ms Smith had lived in the same household as her partner for 11 years. They were not married and had not entered into a civil partnership. It was recognized by the court that “their relationship was equal in every respect to a marriage in terms of love, loyalty and commitment”.⁸

2. Ms Smith claimed dependency damages under section 1 of the Fatal Accidents Act 1976 (“the FAA”), having lived as a cohabitee with the deceased for at least two years. However, she was not entitled to bereavement damages under section 1A(2)(a) of the FAA; such damages are restricted to married couples, civil partners or certain parents in limited circumstances. She therefore sought a declaration that section 1A(2)(a) of the FAA was incompatible with Articles 8 and 14 of the European Convention on Human Rights (ECHR).

3. Bereavement damages consist of a fixed lump sum payment intended to compensate for grief where death is caused by the wrongful act or omission of another person. On 19 March 2020, the Government laid before Parliament the Damages for Bereavement (Variation of Sum) (England and Wales) Order 2020, which increases the lump sum amount from £12,980 to £15,120 in respect of causes of action that arise on or after 1 May 2020.⁹ Under section 1A(2)(a) of the FAA, bereavement damages are only available to:

- a) the wife, husband or civil partner of the deceased;
- b) parents, where the deceased is a “legitimate” unmarried/unpartnered minor; or
- c) a mother, where the deceased is “not a legitimate” unmarried/unpartnered minor.

4. Ms Smith therefore sought a declaration that section 1A(2)(a) of the FAA was incompatible with Articles 8 and 14 of the Convention as it discriminated against cohabiting couples. Article 8 provides that everyone has the right to private and family life. Article 14 provides that Convention rights must be enjoyed without discrimination.

5. The Court of Appeal held that section 1A(2)(a) of the FAA is incompatible with Article 14 in conjunction with Article 8 on the basis that it denies bereavement damages to cohabiting partners (who have been living together for at least two years prior to the death). The Court considered that Parliament treated cohabitees (of two or more years) as being in a stable and long-term relationship comparable to that of spouses and civil partners for the purpose of dependency damages and that there was no justification for treating cohabiting couples differently for the purpose of bereavement damages. The grief

7 [Smith v Lancashire Teaching Hospitals NHS Foundation Trust \[2017\] EWCA Civ 1916](#)

8 [Smith v Lancashire Teaching Hospitals NHS Foundation Trust \[2017\] EWCA Civ 1916](#), p 811

9 [Damages for Bereavement \(Variation of Sum\) \(England and Wales\) Order 2020](#)

caused by the death of a stable and long-term partner is equally and analogously present in relationships involving married couples and civil partners as unmarried and unpartnered cohabiters.¹⁰

6. The draft Remedial Order considered in this report is the Government's response to the declaration of incompatibility made by the Court of Appeal in the case of Smith. The purpose of the draft Remedial Order is to remedy this incompatibility with Article 14 in conjunction with Article 8 by extending entitlement to the scheme to cohabiting couples.

7. We welcome the Government's action in laying the draft Remedial Order to remedy the incompatibility in the Fatal Accidents Act 1976 with the Convention right to a family life and the prohibition against discrimination, and to make the necessary consequential amendments that follow from those changes.

Role of the JCHR

8. The HRA provides that where a court has found legislation to be incompatible with a Convention right, Ministers may correct that incompatibility through a Remedial Order, which may be used to amend primary legislation.¹¹ There are special provisions to ensure that this power is not used inappropriately. Under the non-urgent procedure, a proposal for a draft must be laid before Parliament for 60 days,¹² during which time representations may be made to the Government. If the Government decides to proceed with their proposal, it will then lay a draft Remedial Order, accompanied by a statement responding to the representations and explaining what changes, if any, have been made to the draft as a result of the representations. A further 60 days must elapse after which, in order to be made, the draft Order must be approved by each House of Parliament.¹³

9. The proposal for a draft Remedial Order, together with the required information, was laid before both Houses on 8 May 2019. On 16 July 2019, the Committee reported to each House its recommendation that a draft Order in the same terms as the proposal should be laid before Parliament, although the Committee made several recommendations to ensure that the bereavement damages scheme was fully compliant with human rights law.¹⁴ The Government laid the draft Remedial Order together with the Government's Response to the JCHR's report on 12 February 2020.¹⁵

10. In its consideration of draft remedial orders, the Committee must consider whether the special attention of the House should be drawn to the draft remedial order on any of the grounds specified in Standing Order No. 151 (Joint Committee on Statutory Instruments).¹⁶ In particular, the Committee must report to the House its recommendation whether the draft Remedial Order should be approved, and any other matters arising from its consideration.

10 Smith v Lancashire Teaching Hospitals NHS Foundation Trust [2017] EWCA Civ 1916, paras 90–91

11 Human Rights Act 1998, [Section 10](#)

12 For the definition of sixty days, see Human Rights Act 1998, Schedule 2, [para 6](#)

13 For the definition of sixty days, see Human Rights Act 1998, Schedule 2, [para 6](#)

14 Joint Committee on Human Rights, Twenty-First Report of Session 2017–2019, [Proposal for a draft Fatal Accidents Act 1976 \(Remedial\) Order 2019](#), HC 2225 / HL Paper 405

15 Ministry of Justice, [A proposal for a Remedial Order to amend the Fatal Accidents Act 1976](#), May 2019, and [Government Response to Representations](#), February 2020

16 Joint Committee on Statutory Instruments, [Standing Order](#)

11. We issued a call for evidence on the Government’s draft Remedial Order on 19 March 2020. We are grateful for the two submissions we received from the Association of Personal Injury Lawyers¹⁷ and Professor Helen Fenwick and Dr. Daniel Fenwick.¹⁸

Legislative history

12. The FAA provides for civil claims for damages where a death is caused by the wrongful act or omission of another person. Section 1 of the FAA requires the person who has caused the death (the tortfeasor) to pay dependency damages for the benefit of “dependants” of the deceased. The definition of “dependants” includes, amongst others, a spouse or former spouse, a civil partner or former civil partner, or a cohabitee of two years or more.¹⁹

13. Section 1A of the FAA requires the tortfeasor to pay bereavement damages to certain categories of claimant. This is a fixed sum of damages to be awarded in the event of a fatal accident caused by a wrongful act, neglect or default. Bereavement damages are only available to the spouse, civil partner or parent of the deceased in some limited circumstances. They are not available to a cohabitee of two years or more.

14. Section 1A was inserted into the FAA by the Administration of Justice Act 1982. This Act also expanded the definition of “dependants” to include cohabitees for the purpose of dependency damages (section 1, FAA), but did not include cohabitees for the purpose of bereavement damages (section 1A, FAA). Subsequent amendments extended both types of damages to civil partners.²⁰

15. When introducing the new claim for bereavement damages during second reading of the Administration of Justice Bill 1982, the Lord Chancellor announced that the changes followed the Law Commission’s recommendation of 1973 to give a fixed sum to a spouse for the loss of the other spouse or to parents for the loss of a child.²¹ He further stated that the Government had rejected broader proposals which would have included, for example, the right of a child to claim for loss of a parent, on the basis that children will receive dependency damages. The Government also rejected the Scottish model, which allows for discretionary awards, unlimited in amount, to a broader class of beneficiaries, preferring instead a more “simple solution”.²²

16. In response to a suggestion that the “common law wife” (i.e. cohabiting partner) should not be overlooked, the Lord Chancellor commented that the “common law wife presents a certain number of difficulties [...] It is of course a phrase unknown to statute law as such. There are different degrees of permanence about relationships of this kind which obviously would present the courts with a very considerable difficulty which is not presented by the ordinary matrimonial relationship.”²³

17 [FAA002](#) [Association of Personal Injury Lawyers (APIL)]

18 [FAA001](#) [Professor Helen Fenwick, Dr Daniel Fenwick]

19 Fatal Accident Act 1976, [Section 1](#)

20 [Civil Partnership Act 2004](#)

21 The Law Commission, Report No. 56, [Report on Personal Injury Litigation Assessment of Damages](#), HC 373, 1973

22 HL Deb, 8 March 1982, [cols 27–28](#)

23 HL Deb, 8 March 1982, [cols 46–47](#)

17. On 7 November 2017, the Court of Appeal made a declaration, under section 4 of the HRA, that section 1A(2)(a) of FAA is incompatible with Article 14, in conjunction with Article 8, of the ECHR (the prohibition on discrimination and the right to private and family life).²⁴

The Government's approach

18. To remedy the incompatibility, the Government proposes to amend the statutory list of claimants which limits eligibility for an award of bereavement damages under section 1A of the FAA. The Government proposes to make two key changes:

- a) 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; and
- b) Where both a qualifying cohabitant and a spouse is eligible (e.g. separated but not divorced), the award would be divided equally.

19. The provisions would only apply to causes of action which accrue on or after the day on which the Order comes into force (i.e. where the wrongful act or negligence causing the death occurred before the change in the law). This means that, up until the date the law is amended by the Order to extend eligibility to cohabiting partners, those cohabiting partners who have been discriminated against will not be able to make a claim.²⁵

24 [Smith v Lancashire Teaching Hospitals NHS Foundation Trust \[2017\] EWCA Civ 1916](#)

25 [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](#)

2 Procedural requirements

Compelling reasons and use of remedial power

20. Since remedial orders are a type of delegated legislation which can be used to amend statutes, there are controls on their use. A Minister may only use the remedial power under the HRA if that Minister considers that there are “compelling reasons” to do so. The Government’s reasons for using a remedial order are set out in the statement of required information which accompanies the draft Remedial Order.²⁶

21. Firstly, the Government is of the view that the current pressure on the legislative timetable means there is little prospect of using primary legislation. Therefore, the Government considers that a Remedial Order using the non-urgent procedure is the most appropriate legislative vehicle for implementing this judgment in a timely manner while allowing parliamentary scrutiny of the measures proposed.

22. **We are grateful for the information provided by the Department as part of the “required information”. We note that since the draft Remedial Order was laid, the outbreak of the Covid-19 pandemic has resulted in delays to the legislative agenda. We consider that the pressures on the legislative timetable are compelling reasons for using the remedial order powers.**

23. **However, we reiterate our regret that reform has taken so long. The Smith judgment was handed down by the Court of Appeal on 7 November 2017 and the Remedial Order will only apply to causes of action which accrue on or after the day on which the Order comes into force. The longer the delay, the more individuals who will not receive bereavement damages due to discrimination. We also note that, in a report published in November 1999, the Law Commission expressed the view that “the exclusion of cohabitants from the list of those able to recover damages was contrary to the premise that the damages should be available to those closest to the deceased, and most likely to be aggrieved by the death.”²⁷ We reiterate that it is unfortunate it has taken twenty years and a declaration of incompatibility to produce Government action to remedy this discrimination.**

Use of non-urgent procedure

24. Remedial orders can be made by urgent or non-urgent procedure. The Government’s reasons for proceeding by way of the non-urgent procedure are set out in the required information accompanying the draft Remedial Order. The Government notes that the use of the non-urgent procedure allows time for proper parliamentary scrutiny.

25. **We consider that the procedural requirements of 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. Further, 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.**

26 Ministry of Justice, [A proposal for a Remedial Order to amend the Fatal Accidents Act 1976](#), May 2019, page 8

27 The Law Commission, [Claims for wrongful death - Item 1 of the Seventh Programme of Law Reform: Damages](#), November 1999

3 Remediating the incompatibility

26. Having assessed whether the draft Remedial Order complies with the procedural requirements, we must also assess whether the Order will remedy the incompatibility of the legislation with Convention rights as identified by the Court of Appeal.

27. Article 14 of the ECHR provides that Convention rights and freedoms shall be secured without discrimination on any ground. Article 14 does not exist independently, but rather it complements the other substantive provisions of the Convention. The facts in issue must therefore fall within one of the other Convention rights. In this case, the bereavement damages scheme falls within the scope of Article 8 of the ECHR, which provides that everyone has the right to respect for his private and family life. The Court of Appeal concluded: “It is apparent from the very fact that bereavement damages are limited in section 1A(2)(a) to the spouse or civil partner of the deceased that bereavement damages are specifically intended to reflect the grief that ordinarily flows from the intimacy which is usually an inherent part of the relationship between husband and wife and civil partners.”²⁸ Consequently, the Court held that the bereavement damages scheme is a positive measure by which the State has shown respect for family life, which is a core value of Article 8.²⁹

28. As recognised by the Court of Appeal, it is well established that if a State provides a positive measure which falls within the ambit of Article 8, it must provide that measure without discrimination in compliance with Article 14.³⁰ Therefore, having provided the positive measure of the bereavement damages scheme, the question is whether the State has discriminated unlawfully in the application of that scheme contrary to Article 14. When assessing unlawful discrimination, it must first be established that the complainant is in an analogous position to the other beneficiaries of the positive measure. Whether or not a cohabiting couple are in an analogous position to spouses and civil partners for the purpose of Article 14 depends on the precise context. In the case of bereavement damages, the Court held that “it is the intimacy of a stable and long-term personal relationship, whose fracture due to death caused by another’s tortious conduct will give rise to grief which ought to be recognised by an award of bereavement damages, and which is equally and analogously present in relationships involving married couples and civil partners and unmarried and unpartnered cohabitants”.³¹

29. Furthermore, the Court noted that Parliament treated cohabitants (of two or more years) as being in a stable and long-term relationship comparable to that of spouses and civil partners for the purpose of dependency damages and that there was no justification for treating cohabiting couples differently for the purpose of bereavement damages. The Court further pointed to the increasing proportion of cohabiting couples, noting that for a significant population of the UK there is, in terms of social acceptance, no material difference between marriage and civil partnership and cohabitation.³²

28 Smith v Lancashire Teaching Hospitals NHS Foundation Trust [2017] EWCA Civ 1916, para 72

29 Smith v Lancashire Teaching Hospitals NHS Foundation Trust [2017] EWCA Civ 1916, para 72

30 Petrovic v Austria (1998) EHRR 14, paras 22–29; Smith, para 42

31 Smith v Lancashire Teaching Hospitals NHS Foundation Trust [2017] EWCA Civ 1916, para 90

32 Smith v Lancashire Teaching Hospitals NHS Foundation Trust [2017] EWCA Civ 1916, para 93

30. The Court of Appeal made a “declaration of incompatibility with Article 14 (ECHR) in conjunction with Article 8 in respect of section 1A of the FAA in that it excludes 2 years + cohabitees”.³³ The 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 identified by the Court of Appeal. However, the Government has adopted a narrow approach to remedying the incompatibility. In our previous report, we raised a number of other matters for the Department’s consideration. We are disappointed to see that the Government has rejected each of our recommendations, particularly where we have identified persisting discrimination against cohabiting couples. We reiterate our key concerns below and ask the Government to reconsider its position.

Language

31. Section 1A(2A)(c) defines cohabiting couples as persons living “as the husband or wife or civil partner of the deceased.” The language used to define cohabiting couples should not be based upon an imitation of married couples and civil partners. The Committee therefore suggested that the FAA could adopt the definition of cohabiting couples as “two people living as partners in an enduring relationship”, which has been used in other statutes.³⁴ We do not agree with the Government’s response that amendments to this definition would go beyond the strict requirement that a remedial order may only be used to remedy the incompatibility identified by the courts. A remedial order may also be used to make incidental, supplemental, consequential, or transitional provisions as the person making it considers appropriate.³⁵ By extending the bereavement damages scheme to cohabitees, it is a necessary consequence of this amendment to define ‘cohabitees’. It would, therefore, have been open to the Government to adopt a definition of ‘cohabitees’ which avoids the implication that cohabitation is an imitation of marriage or civil partnership.

Qualifying time period

32. Secondly, the Committee concluded that a qualifying time period of two years for cohabiting couples was not necessarily always a fair indicator of a permanent and committed relationship. We note that this two-year requirement is not imposed on married couples, civil partners, nor on cohabitees in Scotland. The Committee suggested that this should be reconsidered. However, the Government has retained the two-year minimum requirement for cohabiting couples. This approach would exclude certain bereaved individuals who were in a permanent and loyal relationship from entitlement to damages. The Association of Personal Injury Lawyers brought to our attention the case of Amelia, who had lived with her partner, Jordan, for 18 months when he was killed in a car crash. She was 29 weeks pregnant at the time of his death. She was not entitled to bereavement damages under the current law.³⁶ The amendment to the law would still not have afforded her any entitlement to damages as her status as a cohabitee would not have

33 Smith v Lancashire Teaching Hospitals NHS Foundation Trust [2017] EWCA Civ 1916 para 104

34 Adoption and Children Act 2002, [Section 144\(4\)](#)

35 Human Rights Act 1998, Schedule 2, [para 1\(1\)\(a\)](#)

36 [FAA002](#) [Association of Personal Injury Lawyers (APIL)], para 6

fulfilled the minimum timeframe of two years. The Government’s desire for the scheme to be “as simple and straightforward as possible” is understandable, but this does not provide an adequate justification for imposing additional requirements on cohabittees compared to spouses and civil partners.

Shared damages

33. Thirdly, the Committee was concerned that the equal division of damages between certain eligible claimants may, in some cases, lead to unfairness. For example, bereavement damages would be shared equally between a cohabiting partner (of at least two years) and a spouse who is not yet divorced. Given the purpose of the award is to compensate for grief following the loss of an intimate and long-term personal relationship, this could be unfair in circumstances where the deceased remained in the midst of a protracted divorce settlement, but had re-settled in a new intimate relationship with a cohabiting partner of at least two years. Whilst we understand the Government’s desire to avoid “intrusive enquiries into [...] the respective merits of two eligible claimants”,³⁷ this approach could lead to an unjust outcome which does not reflect the intent and purpose of the scheme.

Stigmatising of “illegitimate” children

34. The Committee was concerned that section 1A of the FAA remains stigmatising towards children by distinguishing between “legitimate” and “not legitimate” children. The Committee therefore recommended that references to children as illegitimate should be removed from the statute. The Government has accepted that the language used in relation to the legitimacy of children could be regarded as stigmatising and inappropriate. We welcome the Government’s commitment to consider the merits of amending the provision when a suitable opportunity arises.³⁸ However, we regret that this inappropriate language remains in the statute. We consider that the retention of this distinction between “legitimate” and “not legitimate” children not only stigmatises children, but perpetuates the discrimination against cohabittees, as discussed below.

List of eligible claimants remains discriminatory

35. Section 1A of the FAA remains discriminatory against certain close family members. Whilst the Committee recognised 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 discriminates against other family members in analogous positions to existing eligible claimants. In particular, the scheme continues to discriminate against fathers who are unmarried/unpartnered: where a child is deemed “not legitimate” (i.e. born outside of marriage or civil partnership), only the mother is eligible to claim bereavement damages.³⁹ This perpetuates another layer of discrimination against male cohabittees.

37 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](#), para 16

38 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](#), para 23

39 Fatal Accidents Act 1976, [Section 1A\(2\)\(b\)](#)

36. We are disappointed that the Government does not accept that there are other forms of discrimination within the scheme.⁴⁰ Although no further declarations of incompatibility have been made in respect of the scheme to date, we consider that section 1A as currently drafted risks further legal challenge on the basis of Article 14 in conjunction with Article 8. In response to our First Report, it would have been preferable for the Government to consider using its remedial order powers to ensure that cohabittees are put on an equal footing with spouses and civil partners, not only where a cohabitee loses a partner (as per the facts in *Smith*), but also where a cohabiting father loses a child.⁴¹

Consultation on wider reforms

37. The Committee suggested 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 close family members: 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.

38. It is disappointing that the Government has rejected the recommendation for a consultation on the bereavement damages scheme. We note the Government's concern that an extension of the scheme could lead "in some cases to intrusive and upsetting investigations of the claimant's relationship with the deceased person." However, we are grateful to APIL for providing evidence of their experience in Scotland, where bereavement damages are awarded on a case-by-case basis: "defendants rarely challenge the closeness of a relationship. Only where the relationship is challenged and has to be proven can it become intrusive, and those occasions are rare."⁴²

39. Whilst we consider the draft Remedial Order adequate to remedy the specific incompatibility identified in the case of *Smith*, we are disappointed that the Government did not choose to use its remedial order powers to make further consequential, supplemental, or incidental amendments to ensure that the bereavement damages scheme does not perpetuate further discrimination or stigmatisation in relation to cohabittees and their children. We are particularly concerned that section 1A of the FAA will continue to make a distinction between "legitimate" and "illegitimate" children. Not only is this language inappropriate, it perpetuates the discrimination against cohabiting fathers who will not be eligible for bereavement damages following the death of their child, simply because this child was born outside of wedlock or civil partnership. We trust that the Government will remedy the outstanding discrimination at the earliest opportunity. Finally, we recognise that a number of our recommendations fall outside of remedial order powers and would require primary

40 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](#), para 18

41 Schedule 2 para 1(1)(a) of the Human Rights Act 1998 provides that a remedial order may contain such incidental, supplemental, consequential or transitional provision as the person making it considers appropriate.

42 [FA0001](#) [Association of Personal Injury Lawyers (APIL)], para 7

legislation. We reiterate our recommendation that the Government should undertake a consultation on wider reform to this scheme to ensure it is fully compliant with human rights law and reflects the reality of modern family life.

Conclusions

Introduction

1. We welcome the Government's action in laying the draft Remedial Order to remedy the incompatibility in the Fatal Accidents Act 1976 with the Convention right to a family life and the prohibition against discrimination, and to make the necessary consequential amendments that follow from those changes. (Paragraph 7)

Procedural requirements

2. We are grateful for the information provided by the Department as part of the "required information". We note that since the draft Remedial Order was laid, the outbreak of the Covid-19 pandemic has resulted in delays to the legislative agenda. We consider that the pressures on the legislative timetable are compelling reasons for using the remedial order powers. (Paragraph 22)
3. However, we reiterate our regret that reform has taken so long. The Smith judgment was handed down by the Court of Appeal on 7 November 2017 and the Remedial Order will only apply to causes of action which accrue on or after the day on which the Order comes into force. The longer the delay, the more individuals who will not receive bereavement damages due to discrimination. We also note that, in a report published in November 1999, the Law Commission expressed the view that "the exclusion of cohabitants from the list of those able to recover damages was contrary to the premise that the damages should be available to those closest to the deceased, and most likely to be aggrieved by the death." We reiterate that it is unfortunate it has taken twenty years and a declaration of incompatibility to produce Government action to remedy this discrimination. (Paragraph 23)
4. We consider that the procedural requirements of 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. Further, 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. (Paragraph 25)

Remedying the incompatibility

5. The Court of Appeal made a "declaration of incompatibility with Article 14 (ECHR) in conjunction with Article 8 in respect of section 1A of the FAA in that it excludes 2 years + cohabitants". The 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 identified by the Court of Appeal. However, the Government has adopted a narrow approach to remedying the incompatibility. In our previous report, we raised a number of other matters for the Department's

consideration. We are disappointed to see that the Government has rejected each of our recommendations, particularly where we have identified persisting discrimination against cohabiting couples. We reiterate our key concerns below and ask the Government to reconsider its position. (Paragraph 30)

6. Whilst we consider the draft Remedial Order adequate to remedy the specific incompatibility identified in the case of Smith, we are disappointed that the Government did not choose to use its remedial order powers to make further consequential, supplemental, or incidental amendments to ensure that the bereavement damages scheme does not perpetuate further discrimination or stigmatisation in relation to cohabitees and their children. We are particularly concerned that section 1A of the FAA will continue to make a distinction between “legitimate” and “illegitimate” children. Not only is this language inappropriate, it perpetuates the discrimination against cohabiting fathers who will not be eligible for bereavement damages following the death of their child, simply because this child was born outside of wedlock or civil partnership. We trust that the Government will remedy the outstanding discrimination at the earliest opportunity. Finally, we recognise that a number of our recommendations fall outside of remedial order powers and would require primary legislation. We reiterate our recommendation that the Government should undertake a consultation on wider reform to this scheme to ensure it is fully compliant with human rights law and reflects the reality of modern family life. (Paragraph 39)

Declaration of Interests⁴³

Lord Brabazon of Tara

- No relevant interests to declare

Lord Dubs

- No relevant interests to declare

Baroness Ludford

- No relevant interests to declare

Baroness Massey of Darwen

- No relevant interests to declare

Lord Singh of Wimbledon

- No relevant interests to declare

Lord Trimble

- No interests declared

43 A full list of Members' interests can be found in the Register of Lords' Interests: <http://www.parliament.uk/mpslords-and-offices/standards-and-interests/register-of-lords-interests/>

Formal minutes

Wednesday 13 May 2020

Members present:

Ms Harriet Harman MP, in the Chair

Fiona Bruce MP	Lord Brabazon of Tara
Ms Karen Buck MP	Lord Dubs
Joanna Cherry MP	Baroness Ludford
Mrs Pauline Latham MP	Baroness Massey of Darwen
Dean Russell MP	Lord Singh of Wimbledon
	Lord Trimble

After consulting all Members of the Committee, the Chair was satisfied that the Report represented a decision of the majority of the Committee and reported it to the House. (Order of the House of 24 March 2020).

[Adjourned till 18 May at 2.00pm.]

Published written evidence

The following written evidence was received and can be viewed on the [inquiry publications page](#) of the Committee's website.

- 1 Association of Personal Injury Lawyers (APIL) (FAA0001)
- 2 Professor Helen Fenwick, Dr Daniel Fenwick (FAA0002)

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the [publications page](#) of the Committee's website.

Session 2019–21

First Report	Draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2019: Second Report	HC 149 HL 37
Second Report	Draft Human Rights Act 1998 (Remedial) Order: Judicial Immunity: Second Report	HC 149 HL 41
Third Report	Human Rights and the Government's Response to Covid-19: Digital Contact Tracing	HC 343 HL 59
First Special Report	The Right to Privacy (Article 8) and the Digital Revolution: Government Response to the Committee's Third Report of Session 2019	HC 313