



House of Commons

House of Lords

Joint Committee on Human  
Rights

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# **Proposal for a draft Bereavement Benefits (Remedial) Order 2021: discrimination against cohabiting partners**

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**Eighth Report of Session 2021–22**

*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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## Summary

The proposed draft Remedial Order (“the Remedial Order”) concerns entitlement to two bereavement benefits payable to bereaved partners with dependent children: widowed parent’s allowance (WPA) and higher rate bereavement support payment (BSP). The legislation governing these benefits in England, Wales and Scotland and in Northern Ireland currently provides that they are payable only to the spouse or civil partner of the deceased.

In the case of *In the matter of an application by Siobhan McLaughlin for Judicial Review (Northern Ireland)* (“*McLaughlin*”) the Supreme Court made a declaration of incompatibility in respect of WPA and later in *Jackson and others v Secretary of State for Work and Pensions* (“*Jackson*”) the High Court made a declaration of incompatibility in respect of higher rate BSP. In both cases the declaration was based on the finding that, by denying the bereavement benefits to cohabiting partners (i.e. those who are not married or in a civil partnership) with dependent children, the legislation unjustifiably discriminated against them in breach of Article 14 of the European Convention on Human Rights (ECHR) (the prohibition on discrimination) in conjunction with Article 8 ECHR (the right to respect for private and family life) and Article 1 of the First Protocol to the ECHR (the right to peaceful enjoyment of possessions). The courts concluded that the purpose of the benefits was to provide financial support to families with children who have lost a parent, the need for which was the same whether or not the parents were married to, or in a civil partnership with, one another. There was therefore no justification for treating cohabiting partners differently.

To remedy the incompatibility, in accordance with section 10 of the Human Rights Act 1998 the Government proposes amending the legislation governing these bereavement benefits by extending them to cohabiting partners - defined as “two persons... living together as if they were married or civil partners”. Only one person would be entitled to claim either benefit in respect of a death. The change would have limited retrospective effect, applying from 30 August 2018 (the date of the Supreme Court’s judgment in *McLaughlin*).

We welcome the Government’s action in proposing the Remedial Order to amend the Social Security Contributions and Benefits Act 1992, the Social Security Contributions and Benefits (Northern Ireland) Act 1992, the Pensions Act 2014 and the Pensions Act (Northern Ireland) 2015 to remedy their incompatibility with the Convention prohibition on discrimination in the enjoyment of other Convention rights.

We are satisfied that the procedural requirements for the making of a remedial order have been met, although we would have been interested to hear more on why the reasons for using the remedial order process were ‘compelling’ and why the non-urgent procedure was chosen.

We are also satisfied, subject to one exception, that the proposed changes would address the identified incompatibilities with Article 14 ECHR, as they would essentially result in cohabiting partners with children being treated in the same way as married couples and civil partners with children. The Remedial Order must, however, be amended to ensure that pregnant cohabiting partners would be treated the same as pregnant

spouses and civil partners. We also recommend that in circumstances where there are two potential benefit claimants who meet the conditions for WPA or higher rate BSP, it would be fairer to split the benefit between them rather than to confine the full benefit to one individual.

We welcome the retrospective effect of the Remedial Order, although more victims of discrimination in breach of Article 14 ECHR would benefit if the Remedial Order were to be given effect from the date of the High Court's original declaration of incompatibility in *McLaughlin*. It is important that individuals who have already been refused bereavement benefits, including those that have appealed against a refusal, are not prevented from benefitting in full as intended. The Remedial Order should be amended to ensure this does not happen.

More widely, we continue to recommend that the Government moves away from defining cohabitation by way of analogy with marriage or civil partnership, as this approach implies that cohabitation is an imitation of marriage or civil partnership, rather than an equal alternative. There is also a risk that the legislation governing BSP will remain incompatible with Article 14 ECHR, as read with Article 8 and Article 1 of the First Protocol, as it continues to discriminate between those partners without children who are in legal unions and those who are not.

To safeguard the efficacy of the Remedial Order, the Government must ensure that those who could benefit from it are aware of the change in the law, and that those who become entitled to bereavement benefits as a result are not deprived of the financial assistance it would provide as a result of taxation or loss of other benefits.

Finally, there are some minor drafting points to which we draw the Government's attention.

# 1 Introduction

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## The Declarations of Incompatibility

1. This proposed draft Remedial Order (“the Remedial Order”) seeks to address discrimination in the provision of both widowed parent’s allowance (WPA) and higher rate bereavement support payment (BSP) which has been identified as incompatible with Article 14 of the European Convention on Human Rights (ECHR). The Remedial Order arises from two declarations of incompatibility made under section 4 of the Human Rights Act 1998 (HRA), first in the Supreme Court *In the matter of an application by Siobhan McLaughlin for Judicial Review (Northern Ireland)*<sup>1</sup> (“*McLoughlin*”) and later in the High Court in *Jackson and others v Secretary of State for Work and Pensions* (“*Jackson*”)<sup>2</sup>
2. The case of *McLaughlin* concerned WPA, a contributory bereavement benefit available for any person of working age whose “spouse or civil partner” died before 6 April 2017 and who was eligible for child benefit (or pregnant). The claimant was refused WPA when her partner, with whom she had lived for 23 years and with whom she had 4 children, died, because they had not been married or in a civil partnership. The Supreme Court concluded that this amounted to unjustified discrimination, based on the marital status of the claimant and the consequential status of her children, in breach of Article 14 ECHR,<sup>3</sup> taken together with Article 8 (the right to respect for private and family life) and Article 1 of Protocol 1 (the right to peaceful enjoyment of property). The Supreme Court made a declaration of incompatibility in respect of the relevant statutory provisions.
3. The case of *Jackson* concerned BSP, a contributory benefit that was brought into force on 6 April 2017 and replaced a suite of bereavement benefits including WPA. BSP is payable to working age people whose “spouse or civil partner” dies. A higher rate BSP is payable if the recipient has children. The High Court concluded, in light of the Supreme Court judgment in *McLoughlin*, that the refusal to pay the higher rate BSP to the claimants because they had not been married or in a civil partnership violated Article 14 ECHR, taken together with Article 8 and Article 1 Protocol 1. A declaration of incompatibility was made in respect of the relevant statutory provisions.
4. Since a declaration of incompatibility does not affect the validity or continuing operation of the legislation in question,<sup>4</sup> following *McLaughlin* and *Jackson* it was then for Government to decide whether and how to remedy the incompatibilities identified.
5. **We welcome the Government’s action in proposing the Remedial Order to amend the Social Security Contributions and Benefits Act 1992, the Social Security Contributions and Benefits (Northern Ireland) Act 1992, the Pensions Act 2014 and the Pensions Act (Northern Ireland) 2015<sup>5</sup> to remedy their incompatibility with the Convention prohibition on discrimination in the enjoyment of other Convention rights as guaranteed by Article 14 ECHR.**

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1 [\[2018\] UKSC 48](#)

2 [\[2020\] EWHC 183 \(Admin\)](#)

3 Article 14 ECHR guarantees that: “*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*”

4 [Section 4\(6\) HRA 1998](#)

5 [The Pensions Act \(Northern Ireland\) 2015](#) is an Act of the Northern Irish Assembly.

## Role of the Joint Committee on Human Rights

6. The HRA provides that, where a court has made a declaration that legislation is incompatible with a Convention right, Ministers may correct that incompatibility through a remedial order where there are compelling reasons to do so.<sup>6</sup> Given that a remedial order permits the amendment of primary legislation, Schedule 2 of the HRA provides parameters and safeguards designed to ensure that this power is not used inappropriately. Schedule 2 provides for both an urgent and a non-urgent procedure. Under the non-urgent procedure, which has been used on this occasion, a proposal for a draft remedial order must be laid before Parliament for 60 days,<sup>7</sup> during which time representations may be made to the Government.

7. The Standing Orders of the Joint Committee on Human Rights (JCHR) require us to report to each House our recommendation as to whether a draft order in the same terms as the proposal should be laid before Parliament, and any other matters arising from our consideration of the proposal.<sup>8</sup> We may also report on the technical compliance of any remedial order with the HRA and note whether the special attention of each House should be drawn to the order on any of the grounds specified in the Standing Orders relating to the Joint Committee on Statutory Instruments (JCSI).

8. If the Government decides to proceed with its proposal, it will then lay a draft order. This must be accompanied by a statement summarising the representations that have been made over the 60 days and explaining what changes, if any, have been made to the draft as a result of those representations.<sup>9</sup> A further 60 days must elapse after which, in order to be made, the draft remedial order must be approved by each House of Parliament.

9. The proposal for a draft Bereavement Benefits (Remedial) Order 2021 was laid before both Houses on 15 July 2021. We issued a call for evidence on the Government's proposal on 22 July 2021 and are grateful for the helpful written submissions we received.

## Matters for consideration

10. In our consideration of remedial orders, the Joint Committee on Human Rights generally considers the following questions:

- Have the conditions for using the remedial order process (under section 10 and Schedule 2 of the HRA) been met?
- Are there “compelling” reasons for the Government to remedy the incompatibility by remedial order?
- Is the procedure adopted (non-urgent in this case) appropriate?
- Has the Government produced the required information and effectively responded to other requests for information from the Committee?

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6 [Section 10 HRA 1998](#)

7 For how the period of sixty days is calculated, see [Schedule 2, para 6 HRA 1998](#)

8 See House of Commons Standing Orders, Public Business 2019, HC 315, [152B](#) and the House of Lords Standing Orders, Public Business 2021, HL Paper 232, [73\(c\)](#)

9 [Schedule 2, para 3\(2\) HRA 1998](#)

- Does the proposed order remedy the incompatibility with Convention rights and is it appropriate?
- Are the criteria of technical propriety applied by the Joint Committee on Statutory Instruments (JCSI) satisfied?

11. The relevant grounds on which the JCSI can draw a statutory instrument to the special attention of each House are:

- that it imposes a charge on the public revenues or requires payments to be made to a public authority;
- that there appears to have been unjustifiable delay in the publication or laying of the order before Parliament;
- that there appears to be a doubt whether it is *intra vires* or that it appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made;
- that for any special reason its form or purport calls for elucidation; or
- that its drafting appears to be defective.<sup>10</sup>

## Legislative history

12. Bereavement benefits provide additional support to people of working age when their spouse or civil partner dies. From the introduction of widows' pensions in 1925<sup>11</sup> until 2001 only women received bereavement benefits.<sup>12</sup> In 2001 a new set of bereavement benefits were introduced that were payable to both men and women whose spouse had died, with the intention of eliminating gender-based discrimination.<sup>13</sup> The Civil Partnership Act 2004 extended the reach of these benefits to civil partners as well as a spouses, intending to eliminate discrimination on the basis of sexuality.

### *Widowed Parent's Allowance*

13. The new benefits introduced in 2001 were:

- a) Bereavement Payment—a one-off tax-free lump sum of £2,000;
- b) Bereavement Allowance—a taxable weekly benefit payable for 52 weeks to persons aged 45 or over; and
- c) Widowed Parent's Allowance (WPA)—a taxable weekly benefit payable to “a person whose spouse or civil partner dies” if that person was responsible for a child for whom they were eligible to receive child benefit.

10 See House of Commons, [Standing Order No.151](#); some of the grounds which the JCSI examines are not relevant to this Order.

11 Widows', Orphans' and Old Age Contributory Pensions Act 1925

12 A state of affairs that was the subject of numerous applications to the European Court of Human Rights arguing that the benefits discriminated against men.

13 Inserted into the Social Security Contributions and Benefits Act 1992 by the [Welfare Reform and Pensions Act 1999](#) and by statutory instrument ([1999/3147 \(NI 11\)](#)) into the [Social Security Contributions and Benefits \(Northern Ireland\) Act 1992](#).

14. WPA was a contributory benefit, meaning it was only available if the deceased spouse or civil partner had made the necessary National Insurance contributions. The payments continue until the bereaved spouse or civil partner is no longer eligible for child benefit, or they reach State Pension age, or they remarry, enter into a civil partnership or start living with another person as if they were husband and wife or civil partners.

### ***Bereavement Support Payment***

15. The bereavement benefits scheme was substantially changed once again under the Pensions Act 2014 (and the Pensions Act (Northern Ireland) 2015). In respect of deaths occurring on or after 6 April 2017, all of the existing bereavement benefits were discontinued and a new Bereavement Support Payment (BSP) was introduced in their place. Nevertheless, WPA continues to be payable to bereaved persons whose spouse or civil partner died before 6 April 2017 and who are still entitled to child benefit (which may be available for up to 20 years).

16. BSP is payable to a person under pensionable age whose “spouse or civil partner dies”.<sup>14</sup> The payment consists of an initial lump sum, followed by monthly instalments for up to 18 months. Like WPA it is dependent on the deceased having made the necessary national insurance contributions, but unlike WPA it is payable even where the couple did not have children. The legislation provides, however, that if the bereaved spouse or civil partner was pregnant or entitled to child benefit, regulations may provide for a higher rate of BSP to be payable. The higher rate for those with responsibility for dependent children is set out in the Bereavement Support Payment Regulations 2017, increasing both the initial lump sum and the monthly payments.<sup>15</sup>

17. It is noteworthy that in the December 2011 to March 2012 consultation process that preceded these changes, some respondents called for the extension of bereavement benefits to cohabitants. The Government responded that “there are still no plans to extend eligibility for bereavement benefits to those who are not married or in a civil partnership.”<sup>16</sup>

## **Litigation history**

### ***Widowed Parent’s Allowance***

18. On 9 February 2016 the High Court in Northern Ireland handed down judgment in *McLaughlin’s (Siobhan) Application* [2016] NIQB 11. Ms McLaughlin challenged decisions of the Department for Social Development to refuse her both Bereavement Payment and WPA after the death of her partner, John Adams. She had lived with her partner for 23 years and they had four children together. She was refused Bereavement Payment and WPA on the sole ground that she had not been married.

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14 [Section 30\(1\)\(a\) Pensions Act 2014](#)

15 [SI 410/2017](#)

16 [Government response to the public consultation “Bereavement Benefit for the 21st Century”](#), Cm 8371, at page 21

19. The High Court concluded that the refusal to pay Bereavement Payment<sup>17</sup> was not discriminatory, but found that the refusal to pay WPA was a breach of Article 14 ECHR in conjunction with Article 8 ECHR.<sup>18</sup> The High Court therefore made a declaration of incompatibility under section 4(2) HRA.

20. The Court of Appeal in Northern Ireland disagreed and overturned the High Court's decision.<sup>19</sup> Ms McLaughlin therefore appealed to the Supreme Court.

21. On 30 August 2018, by a majority of 4 to 1, the Supreme Court upheld the decision of the High Court.<sup>20</sup> The Supreme Court concluded that the requirement for a recipient of WPA to have been in a marriage or civil partnership with the deceased unjustifiably discriminates against the survivor and the children on the basis of their marital or birth status. They found this was contrary to Article 14 ECHR when read with either Article 8 ECHR or Article 1 of the First Protocol, on the following basis:

- a) Article 14 is not a free-standing right not to be discriminated against. For any measure to violate the prohibition on discrimination in Article 14 it must come “within the ambit” of one of the other Convention rights. For the Supreme Court in *McLaughlin* there was no question that WPA came within the ambit of Article 1 of the First Protocol, as it has long been uncontroversial that the denial of a contributory social security benefit falls within the protection of the right to peaceful enjoyment of property.<sup>21</sup> But the Court also found that WPA came within the ambit of Article 8, because WPA “is a positive measure which, though not required by Article 8, is a modality of the exercise of the rights guaranteed by Article 8.”<sup>22</sup>
- b) Unlike the Court of Appeal, the Supreme Court also accepted that, for the purposes of WPA, which is paid because the survivor is responsible for the care of children, unmarried cohabiting partners with children and married/civil partners with children were in an analogous position. Crucially, whether the parents were in a legal union or not “makes no difference to the children.”<sup>23</sup>
- c) It was already well established that being unmarried amounts to “other status”, i.e., one of the grounds upon which it is unlawful to discriminate without justification, under Article 14 ECHR.
- d) The Government argued that the difference in treatment pursued the legitimate aim of promoting the institutions of marriage and civil partnership, which the Supreme Court readily accepted. The Supreme Court did not accept, however, that there was a rational connection between the aim pursued and the means employed—the ends did not justify the means:

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17 Not to be confused with Bereavement Support Payment, which was not introduced until 2017.

18 The High Court judgment, in fact, states that “the impugned restriction is a violation of Art 8 when read with Art 14 of the Convention” (see para 73) but the finding was one of discrimination and thus a breach of Article 14.

19 [\[2016\] NICA 53](#)

20 [\[2018\] UKSC 48](#). Lord Hodge gave a dissenting judgment.

21 See [Willis v United Kingdom \(Application no. 36042/97\), 11 June 2002](#). Indeed, the ECtHR has for some time recognised that non-contributory social security benefits also fall within the protection of A1P1 - see [Stec and Others v. the United Kingdom \(dec.\) \[GC\], \(Applications nos. 65 731/01 and 65900/01\) ECHR 12 April 2006, § 51](#)

22 See the lead judgment of Baroness Hale at [22]

23 See the lead judgment of Baroness Hale at [27]

“38 ... .Is it a proportionate means of achieving the legitimate aim of privileging marriage to deny Ms McLaughlin and her children the benefit of Mr Adams’ contributions because they were not married to one another?

39. In my view, the answer to that question is manifestly “no”, at least on the facts of this case. The allowance exists because of the responsibilities of the deceased and the survivor towards their children. Those responsibilities are the same whether or not they are married to or in a civil partnership with one another. The purpose of the allowance is to diminish the financial loss caused to families with children by the death of a parent. That loss is the same whether or not the parents are married to or in a civil partnership with one another.”<sup>24</sup>

22. The Supreme Court therefore made a declaration that “section 39A of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 is incompatible with Article 14 of the ECHR, read with Article 8, insofar as it precludes any entitlement to WPA by a surviving unmarried partner of the deceased.”<sup>25</sup> Since the legislation governing WPA in the rest of the UK is identical in all material respects, the declaration had the effect of establishing that the Social Security Contributions and Benefits Act 1992 was also incompatible with the ECHR.

### ***Bereavement Support Payment***

23. In January 2020 the case of *Jackson and others v Secretary of State for Work and Pensions* was heard by the High Court of England & Wales. The adult Claimants had both lived with their partners for many years and had children together with them. However, they had not been married or in a civil partnership with their partners, and had been refused BSP upon the death of their partners on this basis alone. They claimed that there was no material distinction between the payment of higher rate BSP and the payment of WPA and therefore the High Court should follow the Supreme Court in *McLaughlin* and make a declaration of incompatibility in respect of Section 30(1)(a) of the Pensions Act 2014 (read together with the regulations that provide for the higher rate of BSP).

24. The High Court accepted that WPA and higher rate BSP were different, the former was designed to replace the earnings of the deceased parent while the latter is a short-term payment covering the additional costs involved in adjusting to a partner’s death. Nevertheless, the Court rejected the Government’s submission that higher rate BSP, payable only to those with children, is not intended to benefit the relevant child or children. On this basis the High Court concluded that there was no greater justification for the discrimination in relation to higher rate BSP than there was in relation to WPA. The difference in treatment was “manifestly without reasonable foundation”.

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24 See the leading judgment of Baroness Hale at [39]. It should be noted that Baroness Hale considered the conclusion to be “reinforced by the international obligations to which the United Kingdom is party and which inform the guarantees contained in the ECHR even though they have not been directly incorporated into United Kingdom law”, citing, in particular, Articles 2, 3 and 26 of the UN Convention on the Rights of the Child and Article 10 of the International Covenant on Economic, Social and Cultural Rights 1966.

25 As noted in the [Jackson judgment](#) at [4], this ‘shorthand’ declaration is not entirely accurate as WPA can be paid to someone who is unmarried but in a civil partnership. The Supreme Court must be understood to have meant “...insofar as it precludes any entitlement to widowed parent’s allowance by a surviving...partner of the deceased [who was neither married nor in a civil partnership].”

25. Since it was agreed between all parties that it was not possible to read “spouse or civil partner” compatibly with the Convention (i.e., as including cohabitantes who were neither married nor in a civil partnership), the court made the following declaration of incompatibility:<sup>26</sup>

“Section 30(4)(a) of the Pensions Act 2014, read with section 30(1), is incompatible with Article 14 of the European Convention on Human Rights read with Article 8 in so far as it empowers the Secretary of State to order by regulations that Bereavement Support Payment be paid at a higher rate in the case of a person who is pregnant or entitled to child benefit, only if they are a spouse or civil partner of the deceased.”

26. The declaration of incompatibility did not apply to section 30(1)(a) generally, because the intention was to cover only those who receive *higher rate* BSP. As the Court noted: “Whether or not section 30(1)(a), standing alone, is discriminatory and incompatible even in the case of a surviving cohabitee who does not have any child, is not raised or in point in the present case, and is not the subject of this judgment.”

27. The Government chose not to appeal against the High Court’s ruling.

## The Government’s approach

28. To remedy the incompatibilities identified in *McLaughlin* and *Jackson* the Government proposes to amend the legislation that currently restricts WPA and higher rate BSP to spouses and civil partners. The Government proposes to make the following changes to the law:

- a) WPA and higher rate BSP will become available to surviving cohabiting partners with dependent children, who were not in a legal union with the deceased, on the same terms as it is available to surviving spouses and civil partners;
- b) The change will have limited retrospective effect, as it will apply to claimants who would have been entitled to WPA or higher rate BSP from 30 August 2018 (the date of the Supreme Court’s judgment in *McLaughlin*) but for them not having been in a legal union with the deceased.
- c) In respect of WPA, claimants entitled to claim as a result of the Remedial Order would have to make their claims within 12 months of the Order coming into force (rather than within 3 months of entitlement arising, as is the usual position). We welcome this more generous time limit.
- d) In respect of higher rate BSP, the time limit for making a claim would depend on whether the death takes place before or after the Remedial Order comes into force. For deaths after it comes into force, the current position, that a claimant must claim within 3 months of the death to obtain the full benefit, would apply.<sup>27</sup> For deaths that occurred before the Remedial Order comes into force: claims brought within 12 months of it coming into force would result in a full payment

26 Under [section 3 HRA 1998](#) the courts are required “so far as it is possible to do so” to read and give effect to legislation in a way that is compatible with the Convention rights.

27 If the claim is made within 12 months of the death the lump sum will still be paid, but each monthly payment needs to be made within a 3 month window.

of BSP (lump sum and monthly payments); claims brought more than 12 months after the Remedial Order comes into force would receive a substantially reduced payment (no lump sum, 3 backdated monthly payments plus any remaining monthly payments that are due).

- e) Only one claimant can be entitled per death, so where more than one claimant is eligible to claim either benefit in respect of the same death the law will provide for which claimant will receive the benefit.<sup>28</sup> Persons currently receiving WPA or BSP who would not be eligible once the law changes will not lose the payments they are receiving.

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<sup>28</sup> For example, where the deceased was cohabiting with a different partner while still married or in a civil partnership, the person who was living with the deceased at the date of death will be entitled; and if both potential claimants were living with the deceased at the time of death, the person entitled to child benefit and who was in a legal union with the deceased would be eligible ahead of the person entitled to child benefit who was not in a legal union. For further detail, see 4(3) and 5(2)(d) of the proposed [draft Remedial Order](#).

## 2 Procedural requirements

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### Use of remedial power and “compelling reasons”

29. By using a remedial order, primary legislation can be amended by delegated legislation.<sup>29</sup> This is exceptional, and a Minister may only use the remedial order power under the HRA where there are “compelling reasons” to do so.

30. The draft explanatory memorandum states that the amendments in the Remedial Order are “necessary to remove the incompatibilities identified by the Supreme Court and the High Court”; that the Government takes breaches of the ECHR seriously and has decided that the incompatibilities “should be remedied quickly”; and that “there are no appropriate Bills planned that could accommodate the changes to legislation” needed to remedy the incompatibilities.

31. While the explanation given by the Government is brief, we agree that there are compelling reasons to use the remedial power. We agree that any legislation that is incompatible with Convention rights is a serious matter that should be remedied quickly. It is understood that there is significant pressure on the legislative timetable and waiting for an appropriate Bill under which these changes could be made would be likely to result in delay. The more the delay, the more individuals will be denied support as a result of discrimination in breach of their human rights. We would, nevertheless, have been interested to know more about the reasoning for the use of the remedial order process being “compelling” rather than convenient.

32. Furthermore, we note that the Supreme Court judgment in *McLaughlin* was handed down on 30 August 2018—almost three years before the proposed Remedial Order was published. The Government could have accepted then that if refusing WPA to bereaved cohabiting partners was discriminatory then refusing higher rate BSP to them was also discriminatory. Moreover, the declaration of incompatibility in *Jackson* establishing that this was the case was still made more than 15 months before the Remedial Order was published.

33. While it is recognised that the Government, along with the whole nation, has faced a very difficult period as a result of the covid-19 pandemic, the response to which took up a large part of the legislative agenda, it remains regrettable that the Department of Work and Pensions has taken so long to lay its proposal to remedy what is a relatively straightforward issue of incompatibility. The retrospective effect of the Remedial Order will go some way to make up for the effects of this delay, but it cannot alter the fact that many bereaved families faced additional distress and hardship over the past three years as they continued to be denied access to bereavement benefits on a discriminatory basis.

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29 A remedial order may also amend subordinate legislation – see [Schedule 2, paragraph 1\(2\)\(b\) HRA 1998](#).

## Non-urgent procedure

34. The Government has chosen to use the non-urgent procedure rather than the urgent procedure that is available under Schedule 2 of the HRA, but has not set out its reasons for doing so. It would be helpful for the Government to address the reason for choosing the non-urgent procedure in its response to representations made on the proposed Remedial Order.

35. Despite the lack of reasons, and despite our concerns over the time it has taken the Government to bring forward its proposed draft Remedial Order, we agree that there is insufficient justification to proceed by way of the urgent procedure. While remedying the discrimination in the payment of bereavement benefits is extremely important, it is not sufficiently urgent to justify a process that limits Parliament's opportunity to effectively scrutinise the Government's proposals before primary legislation is amended.

## Required information

36. Under Schedule 2, paragraph 3(1), of the HRA, when following the non-urgent procedure, the Government is required to provide Parliament with the "required information" alongside any proposed draft remedial order. The "required information" is (a) an explanation of the incompatibility that the order (or proposed order) seeks to remedy and (b) a statement of reasons for proceeding under section 10 and for making the order in the terms proposed.<sup>30</sup>

37. The Government has provided this information in the form of a draft explanatory memorandum.<sup>31</sup> The explanation of the incompatibility that the Remedial Order seeks to remedy and the explanation of the proposed draft Order itself are both detailed and helpful. We are also grateful to the Department's officials for providing helpful and prompt responses to our queries. The statement of reasons for proceeding under section 10 HRA is adequate but, as noted above, rather brief. In respect of future uses of the Remedial Order power, we would ask the Government to consider providing more detail as to why remedying the incompatibility through primary legislation is not possible.

**38. Overall, we consider that the procedural requirements for the making of a Remedial Order have been met.**

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30 See Schedule 2, [paragraph 3\(1\)\(a\)](#) and [paragraph 5](#) HRA 1998.

31 [Draft Explanatory Memorandum: Draft Bereavement Benefits \(Remedial\) Order 2021](#)

## 3 Remediating the incompatibility

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### Does the proposed draft Remedial Order remedy the incompatibility?

39. The Committee has to consider whether the Remedial Order would remedy the incompatibility with Convention rights identified in *McLaughlin* and *Jackson*.

40. The courts found that the refusal to provide WPA or BSP to a bereaved person with a child on the basis that they had not been in a legal union with the deceased violated Article 14, since the benefits fell within the ambit of Article 8 and Article 1 of Protocol 1 ECHR. Therefore, to remedy the incompatibility, the Remedial Order must eliminate the difference in treatment between those couples with children who are in legal unions and those who are not when it comes to the payment of WPA and higher rate BSP.

### Key amendments

41. In respect of WPA, under the Remedial Order, section 39A of the Social Security Contributions and Benefits Act 1992<sup>32</sup> would be amended so that all references to “spouse or civil partner” would become “spouse, civil partner or cohabiting partner”. Other consequential amendments are also proposed.

42. These proposals would achieve the aim of placing cohabiting partners in the same position as spouses and civil partners in all respects except one. Section 39A(2)(b) of the 1992 Act would remain unamended by the Remedial Order, with the apparent effect that a pregnant cohabiting partner would not be entitled to WPA unless she is pregnant as a result of artificial insemination or embryo transfer. We presume that this was not the intention, as it would perpetuate discrimination in breach of Article 14 in this limited area without any obvious justification. We expect the Remedial Order to be amended to ensure that all pregnant cohabiting partners are properly included.

43. In respect of higher rate BSP, the Remedial Order would remedy the core incompatibility by amending section 30(1)(a) of the Pensions Act 2014.<sup>33</sup> The provision currently states that the first condition that must be satisfied for a person to be eligible for BSP is if that person’s “spouse or civil partner dies”. The Remedial Order would add “or cohabiting partner” to this condition, but only where the surviving partner is pregnant or entitled to child benefit (thereby limiting the effect of the amendment to *higher rate* BSP only). The proposed Remedial Order would also amend regulation 4 of the Bereavement Support Payment Regulations 2017 to add “or cohabiting partner” to the conditions for eligibility for higher rate BSP.

**44. Subject to one exception, we are satisfied that the proposed changes would address the identified incompatibilities with Article 14 ECHR, as they would essentially result in cohabiting partners with children being treated in the same way as married couples and civil partners with children. The one exception is that the Remedial Order would appear to not extend WPA fully to pregnant cohabiting partners. *The proposed draft Remedial Order must be amended to ensure that pregnant cohabiting partners would be treated the same as pregnant spouses and civil partners.***

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32 And the equivalent legislation for Northern Ireland: [section 39A of the Social Security Contributions and Benefits \(Northern Ireland\) Act 1992](#).

33 And the equivalent legislation for Northern Ireland: [section 29 of the Pensions Act \(Northern Ireland\) 2015](#).

## Identifying the sole recipient

45. Given the current requirement for the applicant to have been married to or in a civil partnership with the deceased on the date of death, only one person can be entitled to receive either benefit. Despite the possibility that a deceased person may have been in a cohabiting relationship with one person while still married to or in a civil partnership with another, or in a cohabiting relationship with more than one person, the Remedial Order would maintain the current position of permitting only one person to receive the benefit. This approach would result in some surviving spouses or partners with children being deprived of any bereavement benefits. An alternative approach would be to split the WPA or higher rate BSP equally between potentially eligible persons (e.g., where there is a surviving spouse and a surviving cohabiting partner who both meet the relevant conditions of entitlement), which was the method adopted by the Government when remedying similar discrimination against cohabiting partners in respect of bereavement damages under the Fatal Accidents Act 1976.<sup>34</sup>

46. We consider that where there are two persons who both have a prima facie entitlement to either WPA or higher rate BSP (i.e., where both are either a spouse, civil partner or cohabiting partner of the deceased and both have children or are pregnant) it would be preferable to split the award between them. The intention of these benefits is to support bereaved partners and children. While splitting the benefit would reduce the amount received by each partner, it would ensure that no child of a bereaved partner or spouse was left unsupported.

47. The Remedial Order would provide for an exception to the single recipient rule in relation to those persons currently in receipt of bereavement benefits, allowing them to continue receiving their benefit even if the effect of the proposed Remedial Order would be to entitle another person to also receive it. This proposed provision would favour a limited group of existing recipients, but we consider it to be a fair response intended to prevent bereaved families currently in receipt of bereavement benefits being plunged into difficult financial circumstances as a result of a change in the law (a consequence that could itself raise issues under Article 1 of the First Protocol to the ECHR).

48. The specific provisions of the Remedial Order that would identify which particular individual is entitled to the payment of WPA and higher rate BSP largely indicate a reasonable attempt to ensure that the benefit is payable, firstly, to the person in the closest relationship with the deceased and, secondly, to the person with responsibility for the deceased's children.<sup>35</sup> This reflects the purpose of the benefit and largely remains consistent with the requirements of Article 14 ECHR. It is, however, surprising that in the rare circumstance in which there are two potential recipients of bereavement benefits in the same household as the deceased who are pregnant or have children, the Remedial Order would favour the deceased's spouse or civil partner over their cohabiting partner. This could be seen to be perpetuating the same discrimination that the Remedial Order seeks to remedy. It is an issue that could be avoided if the award were split between the two potential recipients.

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34 [The Fatal Accidents Act 1976 \(Remedial\) Order 2020](#)

35 See article 4(3); article 5(2)(d); article 7(3) and article 8(2)(d).

49. In the very rare circumstance that the list of factors to be used to determine the recipient does not identify which individual is entitled, the Remedial Order states only that “the Secretary of State must do so.”<sup>36</sup> This is a broad discretion that would need to be exercised carefully to ensure fairness, in a situation where it is by definition very difficult to identify who should receive the benefit. Once again, this difficulty could be avoided if the award were split.

**50. While allowing just one person to be entitled to claim WPA or higher rate BSP in respect of death is consistent with the current approach, it is liable to create unfairness where there are two or more potentially eligible claimants. *The proposed draft Remedial Order should be amended so that, where there is more than one person who satisfies the conditions of entitlement for WPA or higher rate BSP, the award should be split between them.***

## Retrospective effect

51. The Remedial Order states that the legislative changes made “are to be treated as having had effect from 30th August 2018.” This is the date that the Supreme Court upheld the declaration of incompatibility made in the High Court in *McLaughlin*.

## Bereavement Support Payment

52. In respect of claimants who would have been entitled to higher rate BSP, but for them not being in a legal union with their deceased partner, the retrospective effect would entitle them to the maximum payment in respect of a death that occurred after 30 August 2018. For a death that occurred prior to 30 August 2018, however, the intention of the Government appears to be that while they will still be entitled to a back payment of higher rate BSP, they will only be entitled to a pro-rated amount reflecting payments arising after that date.<sup>37</sup> Thus, if the death occurred on 30 December 2017, the claimant would not be eligible for payments covering months that preceded 30 August 2018, so would receive only 10 months of BSP payments rather than the full 18 months.

53. This intended outcome is not, however, the apparent effect of the Remedial Order as drafted. The Remedial Order would amend the existing legislation so that any person who could satisfy the basic entitlement conditions on or after 30 August 2018 could make a claim for higher rate BSP. It would also amend the Bereavement Support Regulations so that any person who could satisfy the basic entitlement conditions on or after 30 August 2018 will be eligible for a period of 18 months from when the Remedial Order came into force (as long as their claim is made within 12 months of the Remedial Order coming into force).<sup>38</sup> There is no restriction on or reduction in the amount to be provided based on when the death occurred. Thus, it appears that claims in respect of deaths that occurred between the introduction of BSP on 6 April 2017 and 30 August 2018 would still be paid in full.

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36 Or, in the Northern Ireland legislation, “the Department must do so”.

37 The Explanatory Memorandum makes clear that retrospective payments will be made as a single one-off payment.

38 See articles 6(2)(b) and 9(2)(c) of the proposed [draft Remedial Order](#). 18 months is the longest period for which BSP payments can be made.

### ***Widowed Parent's Allowance***

54. For WPA, the position is more straightforward. A claimant would be entitled to WPA if they would have been entitled on 30 August 2018 (the date of the Supreme Court's judgment in *McLaughlin*) or later, but for them not being in a legal union with the deceased. Yet they will only become entitled to monthly payments arising from 30 August 2018 onwards. The consequence of this is that bereaved families whose entitlement to WPA, but for the discrimination in the legislation, arose after 30 August 2018 will receive the same benefit as would have been paid to them if they were married or in a civil partnership. However, those whose entitlement arose prior to 30 August 2018 will receive less than they would have done had they been married or in a civil partnership. Individuals whose entitlement to WPA, but for the discrimination in the legislation, would have arisen *and concluded* prior to 30 August 2018 will receive nothing.

55. It is notable that Ms McLaughlin herself, who brought the legal challenge that resulted in the declaration of incompatibility that, in turn, resulted in the Remedial Order, would have been entitled to WPA from January 2014 had she been married. Under the Remedial Order she would receive payments from 30 August 2018 only, meaning her family would lose out on approximately 4 ½ years of payments.<sup>39</sup>

### ***Alternative retrospective effect***

56. One potential alternative, which was suggested in a number of submissions to us, would be to provide a full entitlement to WPA to anyone who would have been entitled to the benefit, but for their lack of legal union, since WPA was introduced in 2001. The Government is not, however, obliged in proposing a remedial order to remedy all historical discrimination. Furthermore, the DWP has explained that such a change would considerably increase not only the cost to the public purse but also the complexity of tracking claimants. We recognise these concerns.

57. An alternative date from which the Remedial Order could take effect would be 9 February 2016—the date on which the High Court of Northern Ireland first declared the legislation governing WPA to be incompatible with Article 14. This date, while not necessary, could be appropriate because (a) it would provide greater compensation to those who have suffered as a result of the discriminatory effect of the WPA regime and (b) it would accord with when the legislation was first recognised as incompatible, not when the Government's appeal was found to be unsuccessful.

58. A further potential alternative would be for the DWP and the Northern Ireland Department for Communities to establish an *ex-gratia* payment scheme for those who have suffered as a result of discrimination in the payment of bereavement benefits prior to 30 August 2018.

**59. We welcome the proposal to give retrospective effect to the changes introduced to remedy the incompatibility with Article 14. We consider that the apparent effect of the Remedial Order as drafted, providing full payments in respect of deaths occurring between the commencement of BSP on 6 April 2017 and 30 August**

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<sup>39</sup> It is worth noting that if Ms McLaughlin had brought a successful claim before the ECtHR in Strasbourg she would likely have been provided with a remedy designed to put her in the position she would have been in but for the violation of her rights – i.e. she would have been fully compensated for the WPA she would have received if married.

2018, is preferable to the pro-rata payments that appear to have been intended. It would provide a retrospective remedy for all those who have been the subject of discriminatory treatment in relation to higher rate BSP. *While not necessary to ensure the incompatibility is remedied, we also consider that 9 February 2016, the date that the High Court of Northern Ireland handed down its declaration of incompatibility in McLaughlin, could be an alternative date from which the amendments made by the Remedial Order should be treated as having effect. Alternatively, the DWP and the Northern Ireland Department for Communities might consider establishing a scheme to provide ex gratia payments to past victims of discrimination.*

## Finality of decisions and appeals

60. We received submissions from Child Poverty Action Group (CPAG) raising concerns about how the social security decision and appeals regime could impact on the efficacy of the retrospective effect of the Remedial Order for bereaved cohabiting partners who have already made a claim for WPA or higher rate BSP which has been refused.<sup>40</sup>

### *Refusal with no appeal*

61. The difficulty for those who have already had an application refused *but have not appealed* arises from the fact that, under section 17 of the Social Security Act 1998, any decision of the Secretary of State for Work and Pensions (SSWP) on a claim for benefits including WPA and BSP is final unless successfully appealed.<sup>41</sup> The exception is that the SSWP does have powers to revise or supersede an earlier decision, but CPAG submitted that neither power was available in the circumstances.<sup>42</sup>

62. The SSWP's power to supersede arises when there has been a relevant change of circumstances but only in respect of an existing reward - not a refusal of a benefit.<sup>43</sup> So this power to supersede could not assist an applicant who was denied a bereavement benefit as a result of not being in a legal union. The power to supersede also arises where there has been an error on point of law, but where a decision is superseded on this basis it would only have effect from the date of the supersession (and thus be no better than a new decision).<sup>44</sup>

63. The SSWP's power to revise allows for replacement of the original decision, and thus can have retrospective effect, but is only available for present purposes where there has been an "official error". CPAG raised concerns that "official error" would not include a situation in which a decision was consistent with an Act of Parliament at the time it was taken, but becomes inconsistent with the law as a result of the retrospective effect of the Remedial Order.

64. If neither supersession with retrospective effect nor revision is available to an individual who has made a claim for WPA or higher rate BSP and been refused, there will exist a final decision by the SSWP concerning the period up to the date on which that

40 Child Poverty Action Group (DBB0003)

41 Under [sections 12 to 14 of the Social Security Act 1998](#) (SSA 1998)

42 The power to revise an earlier decision comes from [section 9 SSA 1998](#) and the power to supersede a decision from [section 10 SSA 1998](#).

43 [Section 8\(2\) of the SSA 1998](#) and [Regulation 6\(2\)\(a\) of The Social Security and Child Support \(Decisions and Appeals\) Regulations 1999](#)

44 [Regulation 6\(2\)\(b\)](#) and section 10(5)

decision was made and the SSWP will not be able to retake that decision. The individual would be able to make a fresh application for the benefit, but that could not disturb the period covered by the previous decision made. To illustrate by way of example: consider a bereaved person 'X' who made a claim for BSP following their partner's death on 1 January 2019 and had that claim refused on 1 April 2019, on the basis that they were unmarried. Under the Remedial Order, X could make a new claim and receive BSP for the period from 1 April 2019, but could not receive BSP in respect of the first three months because the previous decision would still stand.

65. This unfortunate consequence of the finality of SSWP decisions could result in bereaved families losing a substantial portion of the bereavement benefit to which they should be entitled, and thus undermine the Remedial Order by perpetuating the discrimination that they have faced.

### ***Refusal and appeal***

66. For refusals that have been appealed unsuccessfully, the concern is similar, but in this case arises from the additional fact that the SSWP has no power to alter or revise, and limited powers to supersede, the decision of a tribunal regarding a particular period. It is therefore arguable, to continue the example given above, that if X had appealed the refusal of her claim for higher rate BSP and had that refusal upheld by the First Tier Tribunal, under the Remedial Order she could make a new claim but the tribunal's decision would stand. This would mean X would again be entitled to BSP from 1 April 2019 only.<sup>45</sup>

67. We have fewer specific concerns about applicants with ongoing appeals, because we would anticipate the DWP advising those applicants to discontinue the appeal and make a new claim in reliance on the Remedial Order.<sup>46</sup>

**68. Applicants for WPA or higher rate BSP who have already had their claims refused, including those who have unsuccessfully appealed against that refusal, may not be able to obtain the full benefit they are intended to receive. Consequential amendments should be made to the Remedial Order to ensure that individuals are not prevented from benefiting from it as a result of them having previously had claims refused.**

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45 This concern was raised by the Upper Tribunal (Administrative Appeals Chamber) in the case of [JG v Secretary of State for Work and Pensions \[2021\] UKUT 194 \(AAC\)](#), which described it as "a possible flaw in the draft Remedial Order."

46 This would put them in the same position as other applicants whose claims have been refused, discussed above.

## 4 Other matters arising

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### Meaning of “cohabiting partner”

69. The Remedial Order uses the term “cohabiting partner” and would insert into the legislation governing both WPA and BSP the definition: “two persons are cohabiting partners if they are not married to, or civil partners of, each other but are living together as if they were married or civil partners.”<sup>47</sup>

70. This definition gives us some cause for concern for the following reasons:

- a) It reflects an arguably outdated approach: to define cohabitation in statute in relation to marriage and civil partnership. As recognised in a former Joint Committee on Human Rights’ Report on the Proposal for a draft Fatal Accidents Act 1976 (Remedial) Order 2019, this approach “implies that cohabitation is an imitation of marriage or civil partnership, rather than an equal alternative.”<sup>48</sup> Such an implication appears particularly inappropriate in legislation designed to eliminate discrimination between those in legal unions and those in non-formal relationships.
- b) It lacks precision. The definition does not give a clear indication of what characteristics make two people living in the same property a ‘cohabiting partnership’. For example, how long should a couple have been living together before they would be considered to be living together “as if they were” in a legal union? Since marriage and civil partnership is not premised on any particular duration of relationship the comparison offers no assistance on this point. Indeed, the only factor that defines a marriage or civil partnership is the existence of a legally binding agreement - a factor that is expressly absent in a cohabiting partnership. The lack of precision gives rise to uncertainty and a risk of certain couples falling outside the definition and being deprived of bereavement benefits in continuing breach of Article 14.

71. We have considered whether an alternative definition might be more effective and more respectful to those who choose to cohabit rather than marry or enter into civil partnerships. Section 144(4) of the Adoption and Children Act 2002 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.”<sup>49</sup> In 2007 the Law Commission reported on “Cohabitation: The Financial Consequences of Relationship Breakdown” and came to the view that a more “certain, clear cut” eligibility requirement was needed in the context of financial relief on separation than that used in the context of adoption.<sup>50</sup> They suggested that the problems associated with the “marriage analogy”, particularly its potential to support the public’s confusion over the existence of such a thing as a

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47 Or “in a civil partnership” for the purposes of WPA. It is not clear why this very minor difference in definition, which has no obvious effect, has been used for the two different benefits.

48 [21st Report of session 2017–19](#); HC 2225; HL Paper 405 at para 39

49 The definition of cohabiting partnership could include a requirement for a relationship to have lasted for a particular period (see [SSI 358/2019](#) which requires a relationship “that has continued, to the exclusion of any other relationship, for a period of at least 2 years”). However, we consider that this would impose an additional hurdle for partners who are unmarried and not in a civil partnership to overcome and thus perpetuate the discrimination the proposed draft Remedial Order is designed to eliminate.

50 [Law Com No. 307](#); Cm 7182

“common-law marriage”, outweighed its advantages. The Law Commission proposed that cohabitants should be those people who are “living as a couple in a joint household” but are neither married nor civil partners.

72. An alternative, more radical solution in respect of bereavement benefits like WPA and higher rate BSP would be to make the children of the deceased directly eligible, rendering the precise nature of the relationship between the deceased and the other parent irrelevant. This is a common approach in other European jurisdictions,<sup>51</sup> and has been recommended as an option for consultation by the Work and Pensions Committee.<sup>52</sup> It has the advantage of also eliminating the need for parents to be cohabiting before children receive support from the State when they lose a parent.

**73. While the concept of living together “as if” married (or in a civil partnership) has been recognised in law for many years (see, for example the Rent Act 1977, as amended in 1988) we recommend that the Government should move away from the marriage analogy as a way of defining cohabitation. We would prefer the form of words recommended by the Law Commission in a similar context in 2007: “living as a couple in a joint household”. The Government should also consider more substantial reform by making children directly eligible for the bereavement benefits designed to support them.**

### Discrimination against cohabiting partners without children?

74. The Remedial Order concerns only higher rate BSP, as the Article 14 ECHR incompatibility identified in *Jackson* concerned the difference in treatment between couples with children who were married/in civil partnerships and couples with children who were cohabiting partners. Cohabiting partners without children would remain ineligible for BSP under the Remedial Order. We received submissions proposing that consideration be given to the Remedial Order being extended to cover couples without children. The Northern Ireland Human Rights Commission stated that:

“Although the incompatibility in *McLaughlin* and subsequently *Jackson* were identified in relation to the rights of children, the Commission considers that in certain circumstances a court may find a violation of Article 14 in relation to unmarried, cohabiting partners without children.”<sup>53</sup>

75. The key questions for the purposes of Article 14 are whether, for the purposes of BSP and absent children, married couples/those in civil partnerships are in an analogous position to those who are not in a legal union, and the related question of whether any difference in treatment between them is justified. In *McLaughlin* the High Court rejected the claim that the refusal of the ‘bereavement payment’ benefit, which did not depend on the claimant having children, was discriminatory. This was essentially because there was no “public contract” between cohabiting partners, governing their financial arrangements, as there is between married couples and those in civil partnerships. This conclusion, which was not appealed, appeared consistent with the Grand Chamber of the European Court of Human Rights’ acceptance in *Burden v United Kingdom* that marriage conferred a special

51 Baroness Hale in *McLaughlin*: “in the great majority of Council of Europe states children of the deceased are directly eligible for bereavement benefits up to a certain age. The United Kingdom is unusual in channelling benefits for children through their parents.”

52 Work and Pensions Committee, First Report of Session 2019, [Bereavement Support Payment](#), HC 85

53 Northern Ireland Human Rights Commission ([DBB0006](#))

status.<sup>54</sup> In that case, however, the Grand Chamber was comparing marriage with a more clearly distinct relationship, that of sisters who had lived together all their adult lives. The Court concluded that the sisters were not in an analogous situation to married couples or civil partners for the purpose of inheritance tax relief.

76. It remains the case that couples who marry or enter into civil partnerships enter into formal legal relationships, something that distinguishes them from those in enduring relationships without legal union. However, the aim of the BSP is to provide support to a bereaved individual during a period when they will suffer grief and personal turmoil, as well as financial instability, as a result of their partner's death. These consequences depend not on the existence of a legal relationship between the couple but on the existence of an emotional relationship and, perhaps, some degree of financial interdependence; which are features of cohabiting partnerships as much as marriages and civil partnerships. Thus, in respect of the purpose of BSP it is certainly arguable that married couples/those in civil partnerships are in an analogous position to those who are cohabiting partners. It is equally arguable that the encouragement of marriage or civil partnership as a model for relationships does not justify a clear disparity in the treatment of those who are not in such relationships in the context of the provision of BSP.

**77. We consider that there is a real risk the legislation governing BSP will remain incompatible with Article 14 ECHR, as read with Article 8 and Article 1 of the First Protocol, as it continues to discriminate between partners without children who are and are not in legal unions.**

## Taxation

78. A number of technical concerns regarding the implications of the Remedial Order for tax liability and other benefit entitlements were raised in the submission of the Low Incomes Tax Reform Group of the Chartered Institute of Taxation.<sup>55</sup> There is potential for unfairness between those who would receive retrospective bereavement benefits<sup>56</sup> as a result of the Remedial Order and those who received their payments at the time, depending on how retrospective payments are taken into account for the purposes of tax, tax credits, Universal Credit and other benefits.

**79. It would be unacceptable if payments made to remedy past discrimination were rendered ineffective as a result of reductions caused by taxation or diminution of benefits. We advise that the Government should consider carefully and be clear about the implications of the Remedial Order for taxation, tax credits and Universal Credit, ensuring that those who would receive retrospective payments under the Remedial Order are not disadvantaged.**

## Communication

80. When the Remedial Order comes into force, many individuals who are currently ineligible will become entitled to claim for WPA and higher rate BSP. For the discriminatory effect of the previous regime to be effectively remedied, it is crucial that those who are no

54 [Application no. 13378/05, 29 April 2008](#)

55 Low Incomes Tax Reform Group of the Chartered Institute of Taxation ([DBB0004](#))

56 Particularly WPA, which is taxable as social security income: see [sections 577 to 579 of the Income Tax \(earnings and Pensions\) Act 2003](#)

longer excluded from claiming either of these bereavement benefits on the basis that they are neither married nor in a civil partnership are made aware that this exclusion no longer applies.

81. *We recommend the Government carries out an effective publicity campaign to ensure that those who become eligible for WPA or higher rate BSP as a result of the Remedial Order are made aware of this.*

## Drafting

82. Finally, there are some minor and technical drafting points for the Department to note:

- a) The preamble should cite the full conditions precedent from section 10(1)(a) of HRA.<sup>57</sup>
- b) In article 4(3) (inserting a new subsection (1D) into section 30 of the Pensions Act 2014) and in article 7(3) (inserting a new subsection (1D) into section 29 of the Pensions Act (Northern Ireland) 2015) the references to subsection “(2)(aa)” should be to subsection “(1)(aa)”.
- c) Footnote (e) and (f) on page 1: “See” is in italics.
- d) Footnote (c) on page 2: if this is to repeat the content of footnote (a) on page 1, it will not be necessary.
- e) Footnote (d) and (e) on page 2: before the amendments insert the instrument year and number.

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57 For precedent see the Made SI: [Asylum and Immigration \(Treatment of Claimants etc\) Act 2004 \(Remedial\) Order \(SI 2011/1158\)](#)

# Conclusions and recommendations

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## Introduction

1. We welcome the Government's action in proposing the Remedial Order to amend the Social Security Contributions and Benefits Act 1992, the Social Security Contributions and Benefits (Northern Ireland) Act 1992, the Pensions Act 2014 and the Pensions Act (Northern Ireland) 2015 to remedy their incompatibility with the Convention prohibition on discrimination in the enjoyment of other Convention rights as guaranteed by Article 14 ECHR. (Paragraph 5)

## Procedural requirements

2. Overall, we consider that the procedural requirements for the making of a Remedial Order have been met. (Paragraph 38)

## Remedying the incompatibility

3. Subject to one exception, we are satisfied that the proposed changes would address the identified incompatibilities with Article 14 ECHR, as they would essentially result in cohabiting partners with children being treated in the same way as married couples and civil partners with children. The one exception is that the Remedial Order would appear to not extend WPA fully to pregnant cohabiting partners. *The proposed draft Remedial Order must be amended to ensure that pregnant cohabiting partners would be treated the same as pregnant spouses and civil partners.* (Paragraph 44)
4. While allowing just one person to be entitled to claim WPA or higher rate BSP in respect of death is consistent with the current approach, it is liable to create unfairness where there are two or more potentially eligible claimants. *The proposed draft Remedial Order should be amended so that, where there is more than one person who satisfies the conditions of entitlement for WPA or higher rate BSP, the award should be split between them.* (Paragraph 50)
5. We welcome the proposal to give retrospective effect to the changes introduced to remedy the incompatibility with Article 14. We consider that the apparent effect of the Remedial Order as drafted, providing full payments in respect of deaths occurring between the commencement of BSP on 6 April 2017 and 30 August 2018, is preferable to the pro-rata payments that appear to have been intended. It would provide a retrospective remedy for all those who have been the subject of discriminatory treatment in relation to higher rate BSP. *While not necessary to ensure the incompatibility is remedied, we also consider that 9 February 2016, the date that the High Court of Northern Ireland handed down its declaration of incompatibility in *McLaughlin*, could be an alternative date from which the amendments made by the Remedial Order should be treated as having effect. Alternatively, the DWP and the Northern Ireland Department for Communities might consider establishing a scheme to provide *ex gratia* payments to past victims of discrimination.* (Paragraph 59)

6. Applicants for WPA or higher rate BSP who have already had their claims refused, including those who have unsuccessfully appealed against that refusal, may not be able to obtain the full benefit they are intended to receive. *Consequential amendments should be made to the Remedial Order to ensure that individuals are not prevented from benefiting from it as a result of them having previously had claims refused.* (Paragraph 68)

### Other matters arising

7. While the concept of living together “as if” married (or in a civil partnership) has been recognised in law for many years (see, for example the Rent Act 1977, as amended in 1988) we recommend that the Government should move away from the marriage analogy as a way of defining cohabitation. We would prefer the form of words recommended by the Law Commission in a similar context in 2007: “living as a couple in a joint household. *The Government should also consider more substantial reform by making children directly eligible for the bereavement benefits designed to support them.* (Paragraph 73)
8. We consider that there is a real risk the legislation governing BSP will remain incompatible with Article 14 ECHR, as read with Article 8 and Article 1 of the First Protocol, as it continues to discriminate between partners without children who are and are not in legal unions. (Paragraph 77)
9. It would be unacceptable if payments made to remedy past discrimination were rendered ineffective as a result of reductions caused by taxation or diminution of benefits. *We advise that the Government should consider carefully and be clear about the implications of the Remedial Order for taxation, tax credits and Universal Credit, ensuring that those who would receive retrospective payments under the Remedial Order are not disadvantaged.* (Paragraph 79)
10. *We recommend the Government carries out an effective publicity campaign to ensure that those who become eligible for WPA or higher rate BSP as a result of the Remedial Order are made aware of this.* (Paragraph 81)

## Declaration of interests

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**Lord Brabazon of Tara**

No relevant interests to declare

**Lord Dubs**

No relevant interests to declare

**Lord Henley**

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

# Formal minutes

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**Wednesday 3 November 2021**

## **Hybrid Meeting**

### **Members present:**

In the absence of the Chair, Joanna Cherry MP was called to the chair.

Lord Brabazon of Tara

Lord Dubs

Lord Henley

Baroness Ludford

Baroness Massey of Darwen

Angela Richardson MP

David Simmonds MP

Lord Singh of Wimbledon

Draft Report *Proposal for a draft Bereavement Benefits (Remedial) Order 2021: discrimination against cohabiting partners*, proposed by the Chair, brought up and read.

*Ordered*, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 82 read and agreed to.

Summary agreed to.

*Resolved*, That the Report be the Eighth Report of the Committee to both Houses.

*Ordered*, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till 3 November at 4.00pm.]

## Published written evidence

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

- 1 Anonymous ([DBB0001](#))
- 2 Child Bereavement UK, Child Poverty Action Group, Childhood Bereavement Network, Cruse Bereavement Care, Grief Encounter, Motor Neurone Disease Association, Quaker Social Action, WAY Widowed and Young, Winston's Wish ([DBB0005](#))
- 3 Child Poverty Action Group ([DBB0003](#))
- 4 Low Incomes Tax Reform Group (LITRG) ([DBB0004](#))
- 5 Northern Ireland Human Rights Commission ([DBB0006](#))
- 6 Sue Ryder ([DBB0002](#))

# List of Reports from the Committee during the current Parliament

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

## Session 2021–22

Number	Title	Reference
1st	Children of mothers in prison and the right to family life: The Police, Crime, Sentencing and Courts Bill	HC 90 HL 5
2nd	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 3 (Public Order)	HC 331 HL 23
3rd	The Government's Independent Review of the Human Rights Act	HC 89 HL 31
4th	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill (Part 4): The criminalisation of unauthorised encampments	HC 478 HL 37
5th	Legislative Scrutiny: Elections Bill	HC 233 HL 58
6th	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill (Parts 7 and 8): Sentencing and Remand of Children and Young People	HC 451 HL 73
7th	Legislative Scrutiny: Nationality and Borders Bill (Part 1) – Nationality	HC 764 HL 90
1st Special Report	The Government response to covid-19: fixed penalty notices: Government Response to the Committee's Fourteenth Report of Session 2019–21	HC 545
2nd Special Report	Care homes: Visiting restrictions during the covid-19 pandemic: Government Response to the Committee's Fifteenth Report of Session 2019–21	HC 553
3rd Special Report	Children of mothers in prison and the right to family life: The Police, Crime, Sentencing and Courts Bill: Government Response to the Committee's First Report	HC 585
4th Special Report	The Government response to covid-19: freedom of assembly and the right to protest: Government Response to the Committee's Thirteenth Report of Session 2019–21	HC 586
5th Special Report	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 3 (Public Order): Government Response to the Committee's Second Report	HC 724
6th Special Report	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 4 (Unauthorised Encampments): Government Response to the Committee's Fourth Report	HC 765

**Session 2019–21**

<b>Number</b>	<b>Title</b>	<b>Reference</b>
1st	Draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2019: Second Report	HC 146 HL 37
2nd	Draft Human Rights Act 1998 (Remedial) Order: Judicial Immunity: Second Report	HC 148 HL 41
3rd	Human Rights and the Government's Response to Covid-19: Digital Contact Tracing	HC 343 HL 59
4th	Draft Fatal Accidents Act 1976 (Remedial) Order 2020: Second Report	HC 256 HL 62
5th	Human Rights and the Government's response to COVID-19: the detention of young people who are autistic and/or have learning disabilities	HC 395 (CP 309) HL 72
6th	Human Rights and the Government's response to COVID-19: children whose mothers are in prison	HC 518 (HC 518) HL 90
7th	The Government's response to COVID-19: human rights implications	HC 265 (CP 335) HL 125
8th	Legislative Scrutiny: The United Kingdom Internal Market Bill	HC 901 (HC 901) HL 154
9th	Legislative Scrutiny: Overseas Operations (Service Personnel and Veterans) Bill	HC 665 (HC 1120) HL 155
10th	Legislative Scrutiny: Covert Human Intelligence Sources (Criminal Conduct) Bill	HC 847 (HC 1127) HL 164
11th	Black people, racism and human rights	HC 559 (HC 1210) HL 165
12th	Appointment of the Chair of the Equality and Human Rights Commission	HC 1022 HL 180
13th	The Government response to covid-19: freedom of assembly and the right to protest	HC 1328 HL 252
14th	The Government response to covid-19: fixed penalty notices	HC 1364 HL 272
15th	Care homes: Visiting restrictions during the covid-19 pandemic	HC 1375 HL 278
1st 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
2nd Special Report	Legislative Scrutiny: Covert Human Intelligence Sources (Criminal Conduct) Bill: Government Response to the Committee's Tenth Report of Session 2019–21	HC 1127

<b>Number</b>	<b>Title</b>	<b>Reference</b>
3rd Special Report	Legislative Scrutiny: Overseas Operations (Service Personnel and Veterans) Bill: Government Response to the Committee's Ninth Report of Session 2019–21	HC 1120
4th Special Report	Black people, racism and human rights: Government Response to the Committee's Eleventh Report of Session 2019–21	HC 1210
5th Special Report	Democracy, freedom of expression and freedom of association: Threats to MPs: Government Response to the Committee's Third Report of Session 2019	HC 1317