

Written submission from 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)

1. We welcome the proposal of the draft Remedial Order presented by the Government to Parliament and this Committee. It corrects, for future purposes, the legislative incompatibility as highlighted by both the Supreme Court case of *McLaughlin* and the High Court case of *Jackson/Simpson*. In the future, more bereaved families will be able to claim vital financial support during a particularly difficult and uncertain time.
2. We regret though that it has taken almost 3 years (in the case of Widowed Parent's Allowance) and almost 18 months (in the case of Bereavement Support Payment) for the proposed draft Remedial Order to be published and that the final Remedial Order will be unlikely to come into force until early 2022.
3. Furthermore, in reviewing the proposal of the draft Remedial Order, we are aware of two key issues:
 - The incompatibility will be removed from the legislation for families bereaved after the Remedial Order becomes law but not for all families bereaved before that date.
 - The DWP's stated intention is that, in relation to BSP, the effect of the Remedial Order for those parents whose partner died before 30 August 2018 is that they will only receive a proportional amount of full entitlement and would not receive the £3,500 lump sum.).

The incompatibility will be removed for future families but not for all currently bereaved families

4. The introduction of Widowed Parent's Allowance ('WPA') and, more recently, Bereavement Support Payment ('BSP') were a continuing acknowledgement of the impact of the death of a parent in a long-term relationship, including the financial stability of the remaining family. Both benefits are founded on that family's entitlement to claim, based on the National Insurance contributions of the deceased parent.
5. The proposed draft Remedial Order addresses the incompatibility found by the Supreme Court and High Court for those unmarried couples with children where one parent dies after the Order comes into force. However, it does not ensure that the Article 14 rights of all those previously bereaved are respected, since the proposed draft Remedial Order is only retrospective to 30 August 2018 and not to the introduction of both WPA (9 April 2001) and BSP (6 April 2017) respectively.
6. Providing that the Order has retrospective effect to 30 August 2018, the Order acknowledges and partially addresses the breach of the Article 14 ECHR rights of

cohabiting partners and their children bereaved before the Order comes into force. However, we do not consider that it goes far enough and the amendments should be made fully retrospective to the dates that WPA and BSP were introduced.

7. Alternatively, we consider that, at the very least, the amendments should have retrospective effect to the date of the judgment of the High Court of Northern Ireland in respect of *McLaughlin*, as this was the date that the Government was first made fully aware of the incompatibility. (A question over the use of the Supreme Court rather than the earlier High Court date has already been raised by the Upper Tribunal in an interim decision on a separate appeal).¹ Families otherwise entitled to WPA should not lose out any further financially solely because the High Court judgment was appealed nor should families who would otherwise be entitled to BSP lose out because the Government chose to proceed with the introduction of BSP with a ‘marriage/civil partnership’ requirement, despite ongoing litigation concerning the human rights compatibility of such a requirement.
8. The date of the High Court of Northern Ireland judgment was 9 February 2016. Retrospectivity to that date would mean, in practice, that the amendments to the s39A Social Security Contributions and Benefits Act 1992 were retrospective to that date while the amendments to s30 Pensions Act 2014 and the Bereavement Support Regulations 2017 were retrospective to the date that legislation originally came into force i.e. 6 April 2017.
9. The case of Siobhan McLaughlin illustrates the impact of an earlier retrospective date. If the amendments were made retrospective to the introduction of WPA, she would receive the full amount of WPA from January 2014, the month she became entitled to the benefit. If the amendments were made retrospective to 9 February 2016, any compensation received would be reduced by 2 years’ worth of payments. However, with any amendments only retrospective to 30 August 2018, Ms McLaughlin would receive compensation reduced by 4.5 years’ worth of payments.

DWP’s stated intention is that those families entitled to BSP as a result of the amendments, but where the death occurred before 30 August 2018, will only be entitled to a pro-rated amount.

10. As set out above, we consider that the final Remedial Order should have retrospective effect to an earlier date than the Supreme Court judgment in *McLaughlin*. If, despite the compelling reasons for greater retrospectivity, the date remains 30 August 2018, we have concerns about DWP’s stated intention (as communicated in direct correspondence with us) that for those bereaved between 6 April 2017 and 30 August 2018, they will only receive a pro-rated amount of BSP and would not receive the £3,500 lump sum award.
11. We do not read the proposed draft Remedial Order as achieving this aim. Article 4 of the proposed draft Remedial Order amends s30 Pensions Act to include reference to ‘cohabiting partner’, with those amendments taking effect from 30 August 2018 i.e. a

¹ JG -v- Secretary of State for Work and Pensions (BB) [2021] UKUT 194 (AAC) at para 12. Available at https://assets.publishing.service.gov.uk/media/6123b664e90e07053d90ded4/CG_1616_2019_interim.pdf

person is entitled to higher rate BSP from 30 August 2018 if their cohabiting partner dies (including deaths before that date).

12. Article 6 in turn amends the Bereavement Support Regulations, inserting new subparagraphs (4)-(6) into regulation 2 concerning the period for which BSP is payable. These amendments provide that, where a person becomes entitled to BSP as a result of the Order, on or after 30 August 2018 but before the date the Order comes into force then, provided that a person makes a claim for BSP within 12 months of the Order coming into force, they are entitled to BSP for an 18-month period.
13. We therefore read the proposed draft as providing that, if a person meets the entitlement conditions to BSP (as amended) in s30 Pensions Act on or after 30 August 2018 but before the Remedial Order comes into force, they will be entitled to the full 18 months' payment, irrespective of when their partner died, provided that they claim within 12 months of the Order coming into force. We would wish for this approach to be maintained in any final draft, as it ensures that all those whose partner died on or after 6 April 2017 but before 30 August 2018 will in fact get the full amount of BSP, provided that they put in a claim within the requisite timeframe.
14. We recognise that this approach in relation to BSP is somewhat different to that for WPA. In respect of both benefits, it means that it does not matter when the death occurred as long as the conditions for entitlement are met on 30 August 2018. However, for WPA, a claimant will only be entitled to payments from 30 August 2018 onwards, while for BSP they will get the full 18 months of payments including the lump sum. We consider that this difference in approach is justifiable given that BSP is paid at a lower rate and is for a considerably shorter period of time.
15. We would resist any amendments to the proposed draft to achieve DWP's stated aim, as this would mean that the amount of BSP that somebody whose partner died before the Order comes into force is entitled to depends on whether or not their partner died before 30 August 2018. Therefore, in relation to Mr Jackson and Mr Simpson (who were both claimants in the *Jackson* litigation), the Jackson family would get the full amount of BSP, as Mr Jackson's partner died on 7 October 2018, whereas the Simpson family would lose out on 5 months of payments i.e. £1,750 (and would not receive the £3,500 lump sum) as Mr Simpson's partner died on 7 March 2018.
16. Finally, we highlight the potential tax and related benefit implications for bereaved families receiving these payments, either as a lump sum or as a continuing payment and would strongly recommend that the Joint Committee considers the evidence submitted by the Low Incomes Tax Reform Group of the Chartered Institute of Taxation.
17. This submission has been prepared by the Childhood Bereavement Network on behalf of the following organisations and supporters.

Yours sincerely,

Ann Chalmers, Chief Executive, Child Bereavement UK

Alison Penny, Director, Childhood Bereavement Network

Sara Ogilvie, Director of Policy, Research and Advocacy, Child Poverty Action Group

Steven Wibberley, Chief Executive, Cruse Bereavement Care

Dr Shelley Gilbert, MBE, Founder & Lifetime President, Grief Encounter

Chris James, Director of External Affairs, Motor Neurone Disease Association

Lindesay Mace, Down to Earth Manager, Quaker Social Action

Heidi Travis, Chief Executive, Sue Ryder

Joanna Sedley-Burke, Chair of WAY Widowed and Young

Fergus Crow, Chief Executive, Winston's Wish

John Birrell, Independent Bereavement Consultant, Scotland

Dr Anne Corden, retired

16/09/2021