

Written evidence from Northern Ireland Human Rights Commission (DBB0006)

Introduction

1. The Northern Ireland Human Rights Commission (the Commission), pursuant to Section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights. In accordance with this function the following statutory advice is submitted to the Joint Committee on Human Rights (Joint Committee) in response to its call to submissions for its Inquiry into the proposal for a draft Bereavement Benefits (Remedial) Order 2021.
2. The Commission bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), as incorporated by the HRA, and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems.
3. This submission follows the format proposed by the Joint Committee, dealing with each posed question in turn.

Does the proposed Remedial Order meet the procedural conditions for making a Remedial Order?

4. The Commission submits that the procedural conditions for making a remedial order are met. The Supreme Court in *McLaughlin* made a declaration of incompatibility under Section 4(2) of the Human Rights Act 1998. It is right that this incompatibility with Article 14 ECHR should be rectified by way of a remedial order.

Does the proposed Remedial Order address the legislative incompatibility with Article 14 ECHR?

5. The proposed Remedial Order addresses the legislative incompatibility identified by the cases of *McLaughlin* and *Jackson* in part. A number of concerns remain which are addressed below.

Transitional provisions

6. The Commission welcomes the 12-month window for claiming after the remedial order comes into force, but it is crucial that steps are taken by the Department to ensure that prospective claimants are made aware of the changes.
7. **The Commission recommends that the DWP and DfC take steps to identify and notify eligible families and to ensure, by way of a public awareness campaign, that people are aware that the rules have changed and of how to apply.**

Retrospectivity

8. While the Commission welcomes that the proposed Remedial Order is retrospective, and therefore provides some families with a remedy, it is concerned that this is not sufficient to provide full remedy for those families bereaved before 30 August 2018. The most notable example being Siobhan McLaughlin, who endured the time and burden of challenging the discriminatory provisions and yet, unlike those bereaved after her, will not receive a full remedy.
9. Siobhan McLaughlin's partner died in January 2014. Her claim for widowed parents allowance was refused, which she challenged by way of judicial review. If the Order only applies back to August 2018, it will be some four years of payments short of a full remedy. The Commission submits that in her case, retrospectivity should be to the date of her partner's death in January 2014.
10. Under Schedule 2, para 1(1)(d) of the Human Rights Act 1998, a remedial order may "make different provision for different cases". The Commission considers that there are good reasons for providing different dates of retrospectivity in order to ensure that those, such as Ms McLaughlin are able to access a full remedy.
11. **The Commission recommends that for Siobhan McLaughlin, a full remedy is provided to her and the payment is retrospective from her partner's death in January 2014.**
12. The Commission is aware that there may be other families who were bereaved before August 2018. Such families might have claimed this benefit, following the High Court judgment in 2016 and might therefore have expected to have been eligible for the benefit from that date.
13. **Whilst the Commission welcomes the retrospective nature of the proposed Remedial Order, the JCHR should consider those families bereaved before 2018. In particular the JCHR might consider that retrospectivity from the date of the High Court judgment to be a more fair and just outcome for families who made their claims based on the judgment.**
Delay
14. The Commission is concerned at the continuing implications of delay in rectifying the incompatibility; also shared by the Work and Pension Committee.¹ The purpose of the benefit is to alleviate the financial burden on a family with children following the death of a parent. The inability of families to access this benefit, in a timely manner, continues to have a detrimental impact upon bereaved children.
15. **The JCHR may wish to recommend allowing early payments for families, particularly where there is a pressing financial need.**

¹ UK Parliament, 'Work and Pensions Committee: [Report into Bereavement Support Payment](#)', 22 October 2019, at para 64.

Would the legislation governing Widowed Parent’s Allowance and Bereavement Support Payment be compatible with Article 14 ECHR if the changes proposed in the Remedial Order were made?

16. The Commission considers that the legislation governing these payments will be compatible with Article 14 ECHR as, once enacted, it will no longer discriminate against the children of unmarried, cohabiting parents. We are aware that the legislation may be open to further challenge in respect of unmarried cohabiting partners without children, and children of parents who are neither married, civil partnered nor cohabiting.

Unmarried, cohabiting partners without children

17. The case of unmarried cohabiting partners may also give rise to a challenge under Article 14 ECHR. This is especially notable in the context of the Covid-19 pandemic, during which marriage ceremonies were restricted and in some cases prohibited, and a couple who wished to marry were legally precluded from doing so. Where one of the couple is now deceased, the surviving partner may be financially disadvantaged in not being eligible to claim bereavement support payment. Such a couple will suffer the same consequences as a couple who had been married or civil partnered. 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.
18. **The Commission recommends that consideration is given to extending the benefit to co-habiting partners who do not have children, or to those whose children have reached majority.**

Children of parents who were neither married, civil partnered nor cohabiting

19. It is also possible that a claim may succeed on behalf of a child of parents who were not cohabiting, married or in a civil partnership at the date of a parent’s death. For example, a child whose parents may be divorced, in circumstances where the deceased parent made some contribution to their upkeep, for example by way of child maintenance payments. This was hinted at by the High Court in *McLaughlin*:

“Parents are under the same or similar financial obligations regarding the maintenance of their children irrespective of whether they are married, in a civil partnership or cohabiting. The complete exclusion of the applicant on the grounds of her marital status from a benefit whose purpose is to alleviate the financial burden on a family resulting from the death of a parent cannot be justified. The rationale for the benefit applied equally to persons in the applicant’s position as it does to married widows with children. The purpose of the benefit was to diminish the financial hardship on families consequent upon the death of one of the parents. Even allowing for the State’s margin of appreciation I do not consider

that the exclusion of the applicant from Widowed Parent's Allowance on the grounds of her marital status can be justified. Indeed, it may seem somewhat strange to rely, as a justification for the restriction, on the contention that it promotes the institution of marriage and civil partnership when parents, whatever the status of the relationship, owe the same or similar financial or legal duties towards their children. The restriction appears to be inimical to the interests of children."²

20. As Lady Hale pointed out 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.”³

21. This has also been considered by the Work and Pensions Committee, in its suggestion to make children directly eligible and removed the issue of cohabitation.⁴

22. The Commission recommends that the JCHR consider extending the benefit to all children, including those parents might be divorced or live apart, to ensure that children are not discriminated against on the basis of parental marital status.

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² Re Siobhan McLaughlin (2016) NIQB 11, at paras 69- 72.

³ In the matter of an application by Siobhan McLaughlin for Judicial Review (Northern Ireland) [2018] UKSC 48 at para 30.

⁴ UK Parliament, 'Work and Pensions Committee: Report into Bereavement Support Payment', 22 October 2019, at para 66.