



House of Commons

House of Lords

Joint Committee on Human  
Rights

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# Proposal for a draft Fatal Accidents Act 1976 (Remedial) Order 2019

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**Twenty-First Report of Session  
2017–19**

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

*Ordered by the House of Commons  
to be printed 10 July 2019*

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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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# Contents

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<b>Summary</b>	<b>3</b>
<b>1 Introduction</b>	<b>5</b>
The declaration of incompatibility	5
Role of the Joint Committee on Human Rights	6
Matters for consideration	6
Legislative history	7
The Government's approach	8
<b>2 Procedural requirements</b>	<b>9</b>
Compelling reasons and use of remedial power	9
Use of non-urgent procedure	10
Required information	10
<b>3 Remediating the incompatibility</b>	<b>11</b>
Does the proposed draft Order remedy the incompatibility?	11
<b>4 Other matters arising</b>	<b>13</b>
Language	13
Qualifying time period	13
Shared damages	14
Statutory list of eligible claimants	14
General approach to damages	15
Drafting	16
<b>Conclusions</b>	<b>17</b>
<b>Declaration of Interests</b>	<b>20</b>
<b>Formal minutes</b>	<b>21</b>
<b>Published written evidence</b>	<b>22</b>
<b>List of Reports from the Committee during the current Parliament</b>	<b>23</b>



## Summary

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

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

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

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

To remedy the incompatibility, the Government proposes to amend the provision governing the award of bereavement damages under section 1A of the FAA. The Government proposes to make two key changes: (i) to make bereavement damages available to claimants who cohabited with the deceased person for a period of at least two years immediately prior to the death; and (ii) where both a qualifying cohabitant and a spouse are eligible (e.g. a couple are separated but not divorced), the award would be divided equally. The provisions would only apply to causes of action which accrue on or after the day on which the Order comes into force.

We welcome the Government’s action in proposing the Remedial Order to remedy the incompatibility in the FAA with the Convention prohibition against discrimination and the right to private and family life. We consider that the procedural requirements of the Human Rights Act 1998 (“the HRA”) have been met and the Government’s reasons for proceeding by way of remedial order rather than by a Bill are sufficiently compelling for the purpose of section 10(2) of the HRA. Remedying the incompatibility by way of a non-urgent order strikes a reasonable balance between avoiding any further undue delay and the need for proper parliamentary scrutiny. The Committee does, however,

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

<sup>2</sup> *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2017] EWCA Civ 1916, paras 90–91

regret that it has taken twenty years following the Law Commission's report in 1999 which recommended reform, and a declaration of incompatibility in November 2017, before seeking to remedy the discrimination in May 2019.

In our view, the proposed draft Remedial Order adequately addresses the judgment of the Court of Appeal by extending the bereavement damages scheme to cohabiting couples (who have been living together for at least two years prior to the death), thereby removing the unlawful discrimination in section 1A of the FAA identified by the Court of Appeal.

Although the proposed Remedial Order addresses the specific discrimination identified by the Court of Appeal in *Smith*, we have various concerns with the bereavement damages scheme as a whole.

Firstly, the language used to define cohabiting couples should not be based upon an intimation of married couples and civil partners. We suggest that the FAA could adopt the definition of cohabiting couples as "two people living as partners in an enduring relationship".

Secondly, the qualifying time period of two years for cohabiting couples may not always be a fair indicator of a permanent and loyal relationship and we suggest that this should be reconsidered.

Thirdly, we are concerned that the equal division of damages between certain eligible claimants may, in some cases, lead to unfairness. For example, bereavement damages would be shared equally between a cohabiting partner (of at least two years) and a spouse who is not yet divorced. Given the purpose of the award is to compensate for grief following the loss of an intimate and long-term personal relationship, this could be unfair in circumstances where the deceased remained in the midst of a protracted divorce settlement but had re-settled in a new intimate relationship with a cohabiting partner of at least two years.

Fourthly, we are concerned that section 1A of the FAA remains stigmatising towards children. We recommend that references to children as illegitimate should be removed from the statute.

Fifthly, section 1A of the FAA is discriminatory against certain close family members. We therefore suggest that the Government should use this opportunity to look more broadly at the bereavement damages scheme and undertake a consultation with a view to reforming the scheme. The consultation should explore:

- a) whether entitlement to bereavement damages should be open to the following family members who have a genuine close relationship with the deceased: fathers grieving the loss of children born outside of wedlock; parents grieving the loss of adult or married children; children grieving the loss of a parent; and siblings grieving the loss of a brother or sister; and
- b) whether the Scottish model of assessing damages on a case-by-case basis is fairer than the fixed lump sum model in England, Wales, and Northern Ireland.

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

# 1 Introduction

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## The declaration of incompatibility

1. This proposal for a draft Remedial Order arises from a declaration of incompatibility made by the Court of Appeal in *Smith v Lancashire Teaching Hospitals NHS Foundation Trust*.<sup>3</sup> In this case, Ms Smith’s cohabiting partner (“the deceased”) died as a result of the negligence of the Lancashire Teaching Hospitals NHS Foundation Trust and Lancashire Care NHS Foundation Trust. Ms Smith had lived in the same household as her partner for 11 years. They were not married and had not entered into a civil partnership. It was recognised by the court that “their relationship was equal in every respect to a marriage in terms of love, loyalty and commitment.”<sup>4</sup>

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

3. Bereavement damages consist of a fixed lump sum payment (of £12,980) intended to compensate for grief where death is caused by the wrongful act or omission of another person. Under section 1A(2)(a) of the FAA, bereavement damages are only available to:

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

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

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

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

4 *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2017] EWCA Civ 1916 , p811

5 In the High Court, Edis J [2016] EWHC 2208 (QB) decided that bereavement damages did not fall within the ambit of Article 8, finding that the link to Article 8 must be “real rather than tenuous” and that the infringement must be “sufficiently serious” (paras 93–94).

caused by the death of a stable and long-term partner is equally and analogously present in relationships involving married couples and civil partners as unmarried and unpartnered cohabitants.<sup>6</sup>

**6. We welcome the Government’s action in proposing the Remedial Order to remedy the incompatibility in the Fatal Accidents Act 1976 (“the FAA”) with the Convention prohibition against discrimination and the right to private and family life.**

## Role of the Joint Committee on Human Rights

7. The Human Rights Act 1998 (“the HRA”) provides that, where a court has found legislation to be incompatible with a Convention right, Ministers may correct that incompatibility through a remedial order (which may be used to amend primary legislation).<sup>7</sup> There are special provisions in Schedule 2 of the HRA to ensure that this power is not used inappropriately. Under the non-urgent procedure, a proposal for a draft must be laid before Parliament for 60 days,<sup>8</sup> during which time representations may be made to the Government. If the Government decides to proceed with its proposal, it will then lay a draft order. This is accompanied by a statement responding to the representations and explaining what changes, if any, have been made to the draft as a result of the representations. A further 60 days must elapse after which, in order to be made, the draft order must be approved by each House of Parliament.

8. The proposed Remedial Order, together with the required information, was laid before both Houses on 8 May 2019.<sup>9</sup> 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.

9. 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).

10. We issued a call for evidence on the Government’s proposal on 16 May 2019 and are grateful for the two submissions we received.<sup>10</sup> We have been in contact with officials from the Ministry of Justice (“the Department”), who have been helpful throughout.

## Matters for consideration

11. In our consideration of remedial orders, we generally consider the following questions:

- Have the conditions for using the remedial order process (section 10 and Schedule 2 of the HRA) been met?
- Are there “compelling” reasons for the Government to remedy the incompatibility by remedial order?

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

7 Human Rights Act 1998, [section 10](#)

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

9 Ministry of Justice, [Guidance - Bereavement damages: draft remedial order](#), published 8 May 2019

10 ([FAA0002](#)) Thompson Solicitors; ([FAA0001](#)) Association of Personal Injury Lawyers

- Is the procedure adopted (non-urgent or urgent) appropriate?
- Has the Government produced the required information and effectively responded to other requests for information from the Committee?
- 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?

12. 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>11</sup>

## Legislative history

13. The FAA provides for civil claims for damages where a death is caused by the wrongful act or omission of another person.

14. Section 1 of the FAA requires the person who has caused the death (the tortfeasor) to pay dependency damages for the benefit of “dependants” of the deceased. The definition of “dependants” includes, amongst others, a spouse or former spouse, a civil partner or former civil partner, or a cohabitee of two years or more.

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

16. Section 1A was inserted into the FAA by the Administration of Justice Act 1982. This Act also expanded the definition of “dependants” to include cohabitees for the purpose of dependency damages (section 1, FAA), but did not include cohabitees for the purpose of bereavement damages (section 1A, FAA). Subsequent amendments extended both types of damages to civil partners.<sup>12</sup>

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

12 [Civil Partnership Act 2004](#)

17. When introducing the new claim for bereavement damages during second reading of the Administration of Justice Bill 1982, the Lord Chancellor announced that the changes followed the Law Commission's recommendation of 1973<sup>13</sup> to give a fixed sum to a spouse for the loss of the other spouse or to parents for the loss of a child. He further stated that the Government had rejected broader proposals which would have included, for example, the right of a child to claim for loss of a parent, on the basis that children will receive dependency damages. The Government also rejected the Scottish model, which allows for discretionary awards, unlimited in amount, to a broader class of beneficiaries, preferring instead a more "simple solution".<sup>14</sup>

18. In response to a suggestion that the "common law wife" (i.e. cohabiting partner) should not be overlooked, the Lord Chancellor commented that the "common law wife presents a certain number of difficulties [ ... ] It is of course a phrase unknown to statute law as such. There are different degrees of permanence about relationships of this kind which obviously would present the courts with a very considerable difficulty which is not presented by the ordinary matrimonial relationship."<sup>15</sup>

19. On 7 November 2017, the Court of Appeal made a declaration, under section 4 of the HRA, that section 1A(2)(a) of FAA is incompatible with Article 14, in conjunction with Article 8, of the ECHR (the prohibition on discrimination and the right to private and family life).<sup>16</sup>

## The Government's approach

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

- a) To make bereavement damages available to claimants who cohabited with the deceased person for a period of at least two years immediately prior to the death; and
- b) Where both a qualifying cohabitant and a spouse is eligible (e.g. separated but not divorced), the award would be divided equally.

21. The provisions would only apply to causes of action which accrue on or after the day on which the Order comes into force. This means that, up until the date the law is amended by the Order to extend eligibility to cohabiting partners, those cohabiting partners who have been discriminated against will not be able to make a claim.<sup>17</sup>

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

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

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

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

17 Ministry of Justice, [A proposal for a Remedial Order to amend the Fatal Accidents Act 1976](#), May 2019, Explanatory memorandum to the proposed Remedial Order, p 8

## 2 Procedural requirements

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### Compelling reasons and use of remedial power

22. Since remedial orders are a type of delegated legislation which can be used to amend statutes, there are controls on their use. A Minister may only use the remedial power under the HRA if that Minister considers that there are “compelling reasons” to do so. The Government’s reasons for using a remedial order are set out in the statement of required information which accompanies the Remedial Order.<sup>18</sup>

23. The Government states that the Court of Appeal’s judgment in the *Smith* case must be implemented via an amendment to primary legislation due to the existing statutory limits on awards of bereavement damages under the FAA. The Government notes the current pressure on the legislative timetable and the unlikely prospect of finding suitable primary legislation to make the necessary amendment in the near future. Bearing in mind the need to respond to the breach as promptly as possible, whilst allowing for parliamentary scrutiny, the Government therefore considers that there are compelling reasons for making the necessary amendments by way of remedial order.<sup>19</sup>

24. We are grateful for the information provided by the Department as part of the ‘required information’ and consider that these are compelling reasons to use the remedial power. We strongly agree that it is important that the breach is responded to as promptly as possible. However, we note that the judgment was handed down by the Court of Appeal on 7 November 2017 and that the Remedial Order will only apply to causes of action which accrue on or after the day on which the Order comes into force. The Department states that “the number of individuals who are affected by this incompatibility is likely to be small”, although it has not provided any evidence on this point.<sup>20</sup> It is therefore unclear how many individuals have been denied their entitlement to bereavement damages following 7 November 2017. The longer the delay, the more individuals who will be denied their entitlement. Whilst we agree that the use of the Remedial Order will achieve a change in the law more quickly than primary legislation, it is regrettable that it has taken the Department this long to lay a proposal.

25. We also note that this reform is long overdue. In a report published in November 1999, the Law Commission concluded it was “unjustified that the award of bereavement damages, which compensates non-financial losses (such as grief and sorrow) is currently available only to the deceased’s spouse and parents.”<sup>21</sup> The Law Commission expressed the view that “the exclusion of cohabitants from the list of those able to recover damages was contrary to the premise that the damages should be available to those closest to the deceased, and most likely to be aggrieved by the death.”<sup>22</sup> The Law Commission’s proposals were included in a further consultation on a Draft Civil Law Reform Bill,

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18 Ministry of Justice, [A proposal for a Remedial Order to amend the Fatal Accidents Act 1976](#), May 2019, Explanatory memorandum to the proposed Remedial Order, p 8

19 Ministry of Justice, [A proposal for a Remedial Order to amend the Fatal Accidents Act 1976](#), May 2019, Explanatory memorandum to the proposed Remedial Order, p 8

20 Ministry of Justice, [A proposal for a Remedial Order to amend the Fatal Accidents Act 1976](#), May 2019, p 4

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

22 The Law Commission, [Claims for wrongful death - Item 1 of the Seventh Programme of Law Reform: Damages](#), November 1999, p 96

published in December 2009.<sup>23</sup> However, in January 2011, the coalition Government announced it would not proceed with the Bill.<sup>24</sup> It is unfortunate it has taken twenty years and a declaration of incompatibility to produce Government action to remedy this discrimination.

## Use of non-urgent procedure

26. Remedial orders can be made by urgent or non-urgent procedure. The Government's reasons for proceeding by way of the non-urgent procedure are that "the bereavement damages award is token in nature, and the number of individuals affected by the incompatibility which this proposed Remedial Order would remove is likely to be small." The Government concludes that it is appropriate to allow the opportunity for parliamentary scrutiny under the non-urgent procedure.<sup>25</sup>

27. We have no evidence regarding the likely numbers of individuals affected by this Remedial Order and are concerned that there are an unknown number of people who have suffered grief who have not yet been granted a remedy. Nevertheless, we are content that the non-urgent procedure has been used, but trust there will be as little delay as possible between conclusion of proceedings on the proposal for an order and laying the draft Order itself and implementing its provisions.

28. We are satisfied that that this is a valid use of the remedial order powers.

## Required information

29. Pursuant to Schedule 2, paragraph 3(1), of the HRA, the Government must lay before Parliament "required information" alongside a proposed draft order. "Required information" is (a) an explanation of the incompatibility which the order (or proposed order) seeks to remove, including particulars of the relevant declaration, finding or order; and (b) a statement of reasons for proceeding under section 10 and for making the order in those terms.<sup>26</sup>

30. We consider that the Government has provided the required information in accordance with the provisions of Schedule 2. We are also grateful to the Department's officials for providing timely and helpful responses to requests for further information.

**31. We consider that the procedural requirements of the Human Rights Act ("the HRA") have been met and the Government's reasons for proceeding by way of remedial order rather than by a Bill are sufficiently compelling for the purpose of section 10(2) of the HRA. Remedying the incompatibility by way of a non-urgent order strikes a reasonable balance between avoiding any further undue delay on the one hand, and the need for proper parliamentary scrutiny on the other. The Committee does, however, regret that it has taken twenty years following the Law Commission's report in 1999, and a declaration of incompatibility in November 2017, before laying the proposed draft Order in May 2019.**

23 Civil Law Reform— A Draft Bill, [Cm 7773](#), December 2009

24 HC Deb, 10 January 2011, [col8WS](#)

25 Ministry of Justice, [A proposal for a Remedial Order to amend the Fatal Accidents Act 1976](#), May 2019, p 5

26 Human Rights Act 1998, schedule 2, [para 5](#)

### 3 Remediating the incompatibility

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

32. Having assessed whether the Remedial Order complies with the procedural requirements, we must also assess whether the Order will remedy the incompatibility of the legislation with Convention rights.

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

34. As recognised by the Court of Appeal, it is well established that if a State provides a positive measure which falls within the ambit of Article 8, it must provide that measure without discrimination in compliance with Article 14.<sup>29</sup> Therefore, having provided the positive measure of the bereavement damages scheme, the question is whether the State has discriminated unlawfully in the application of that scheme contrary to Article 14.

35. When assessing unlawful discrimination, it must first be established that the complainant is in an analogous position to the other beneficiaries of the positive measure. Whether or not a cohabiting couple are in an analogous position to spouses and civil partners for the purpose of Article 14 depends on the precise context. In the case of bereavement damages, the Court held that “it is the intimacy of a stable and long-term personal relationship, whose fracture due to death caused by another’s tortious conduct will give rise to grief which ought to be recognised by an award of bereavement damages, and which is equally and analogously present in relationships involving married couples and civil partners and unmarried and unpartnered cohabitants.”<sup>30</sup>

36. Furthermore, the Court noted that Parliament treated cohabitants (of two or more years) as being in a stable and long-term relationship comparable to that of spouses and civil partners for the purpose of *dependency* damages and that there was no justification for treating cohabiting couples differently for the purpose of *bereavement* damages. The Court further pointed to the increasing proportion of cohabiting couples, noting that for a significant population of the UK there is, in terms of social acceptance, no material difference between marriage and civil partnership and cohabitation.<sup>31</sup>

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

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

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

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

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

**37. The proposed draft Remedial Order inserts “cohabiting partners” into section 1A of the FAA, as defined in section 1(3)(b) of the FAA. In our view, the draft Remedial Order adequately addresses the judgment of the Court of Appeal, by extending the bereavement damages scheme to cohabiting couples (who have been living together for at least two years prior to the death), thereby removing the unlawful discrimination in section 1A of the FAA identified by the Court of Appeal.**

38. There are, however, some other matters arising and two points of drafting to which we draw the attention of the Department.

## 4 Other matters arising

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### Language

39. We consider that the fundamental principle underlying the Court of Appeal’s judgment is that cohabiting partners are analogous to married and civil partners in the context of the bereavement damages scheme. We note, however, that the language of proposed section 1A(2A)(c) of the Order, and the existing provision dealing with dependency damages (section 1, FAA), intimates a differential hierarchy between the different forms of relationship. Section 1A(2A)(c) defines cohabiting couples as persons living “as the husband or wife or civil partner of the deceased.” This definition implies that cohabitation is an imitation of marriage or civil partnership, rather than an equal alternative.

40. **We recognise that the definition of “civil partners” in the proposed draft Order simply reflects the existing language in section 1 of the FAA, but we suggest that it would be preferable to review the language used in all provisions of the FAA to describe persons in cohabiting relationships to ensure that the language reflects the equality of their status. We suggest the language used in the Adoption and Children Act 2002, for example, is preferable. Section 144(4) 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>32</sup>**

### Qualifying time period

41. The proposed draft Remedial Order imposes a qualifying time period of two years on cohabiting couples. This reflects the position of cohabiting couples in section 1(3) of the Act which provides for eligibility to claim dependency damages. There is no such qualifying time period requirement for married couples or civil partners.

42. We note that the law in Scotland allows a claim for bereavement damages by a cohabitee without the need for a minimum cohabitation period.<sup>33</sup> Given the opportunity to look at this legislation afresh, the policy grounds for the length of qualifying period need to be justified. We are grateful to Department officials who have clarified that they consider that it is reasonable to set a limit which objectively evidences a relationship of permanence and commitment and avoids intrusive enquiries into the quality and durability of the relationship in individual cases.<sup>34</sup>

43. **Bearing in mind the requirement to justify any differential treatment, the Government may wish to put forward official policy reasons for imposing a timeframe on cohabiting couples, which is not imposed on married or civilly partnered couples, in its response to this Report. This will mean this policy decision can be properly scrutinised. In our view, the application of any qualifying period will, to some extent, draw an arbitrary line, but will provide a necessary filter for identifying relationships of sufficient permanence and commitment. Whilst it is recognised that there must be objective criteria for cohabiting couples equivalent to that of the commitment**

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32 Adoption and Children Act 2002, [section 144\(4\)](#)

33 Damages (Scotland) Act 2011, [section 14](#)

34 Correspondence between JCHR lawyers and Department Officials, June 2019 [not available online]

**shown by married couples and civil partners, we are concerned that the inclusion of a time period of two years may not always be the most appropriate qualifying factor. Without clear justification for treating cohabiting couples differently, we suggest that the definition of eligible cohabiting couples should be reconsidered.**

## Shared damages

44. The proposed draft Order provides for bereavement damages to be shared when there is more than one eligible claimant. This issue was not considered by the Court of Appeal in the *Smith* case. This provision is not necessary for the purpose of remedying the incompatibility; it is, however, a consequential provision and may therefore be made under Schedule 2, paragraph 1(1), of the HRA.

45. Whilst this approach may make sense in some cases, the equal division of damages between certain eligible claimants may arguably lead to unfairness. For example, the required information states that bereavement damages will be divided equally between a cohabiting partner (of at least two years) and a spouse who is not yet divorced.<sup>35</sup> The policy rationale for this provision has not been addressed in the Explanatory Memorandum or required information. However, we are grateful to Department officials for clarifying their position. Firstly, the Department considers it desirable to avoid the potential for intrusive enquiries into the quality and durability of an eligible relationship, or the respective merits of two eligible claimants. Secondly, the Department considers that cases involving both a qualifying cohabitant and a spouse who is not yet divorced are likely to be rare; when such a situation does arise, dividing the award equally is the fairest approach.<sup>36</sup>

**46. Whilst we agree that it is preferable to avoid intrusive enquiries into personal relationships, in circumstances where the deceased had settled with a new cohabiting partner of at least two years duration, but remained in the midst of a divorce settlement, there may be some cases where awarding damages to the spouse is unfair given the purpose of the award of damages is to compensate for grief following the loss of an intimate, stable and long-term personal relationship.**

## Statutory list of eligible claimants

47. Whilst the proposed draft Remedial Order addresses the specific discrimination against cohabiting couples, the Government may wish to take this opportunity to consider the wider problems of discrimination within the bereavement damages scheme. It is noted that the list of eligible claimants is narrowly drawn. At present, only the following persons are eligible:

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

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

36 Correspondence between JCHR lawyers and Department Officials, June 2019 [not available online]

48. There are numerous problems with the current eligibility restrictions to bereavement damages:

- a) Firstly, the reference to children as “legitimate” or “not legitimate” is archaic and stigmatising. Children should not be referred to as illegitimate and labelled differently based on the marital status of their parents.
- b) Secondly, where a child is deemed “not legitimate”, only the mother is eligible to claim bereavement damages. This restriction discriminates against fathers whose children were born outside of wedlock. The death of a child will be the source of profound grief irrespective of the marital status of the parents.
- c) Thirdly, whilst parents are eligible to claim bereavement damages following the death of a child, children are not eligible following the death of a parent. Children are likely to suffer grief following the death of a parent.
- d) Fourthly, the right of the parents to claim bereavement damages following the death of a child is restricted to unmarried/unpartnered children who are minors. The grief of a parent will be no less following the loss of a child who is over the age of 18, or a child who has married or entered a civil partnership.
- e) Fifthly, if it is accepted that those closest to the deceased are those who should be compensated for grief following wrongful death, the omission of siblings, who are also immediate family members, appears unjustified.
- f) Sixthly, there may be couples in a relationship of permanence and commitment who are engaged to be married but who have chosen not to cohabit prior to marriage, for personal, familial or religious reasons, whose grief would be equivalent to that of cohabiting couples.

**49. Whilst we recognise that the categories of eligible persons must be limited to those family members closest to the deceased, and therefore those most likely to suffer grief, the current list of eligible claimants is unprincipled, discriminates against other family members in analogous positions to existing eligible claimants and stigmatises children. Although no declarations of incompatibility have been made in respect of other family members, we consider that section 1A as currently drafted risks further legal challenge.**

## General approach to damages

50. Finally, the extent and territorial application of this instrument is limited to England and Wales. We note that bereavement damages differ across the various jurisdictions. For example, in Northern Ireland, the same eligibility criteria apply as in England and Wales but the amount in Northern Ireland is £15,100 compared with £12,980 in England and Wales.<sup>37</sup> Conversely, in Scotland, the Damages (Scotland) Act 1976 and the subsequent consolidating Damages (Scotland) Act 2011 provide that each claim should be treated individually.<sup>38</sup> The amounts awarded in Scotland are determined by legal precedent and an examination of the relationship, to ensure that any payments are fair.<sup>39</sup>

37 Made SIs: Damages for Bereavement (Variation of Sum) Order (Northern Ireland) 2019 ([SI 2019/80](#))

38 [Damages \(Scotland\) Act 1976](#); [Damages \(Scotland\) Act 2011](#)

39 ([FAA0002](#)) Thompson Solicitors; ([FAA0001](#)) Association of Personal Injury Lawyers

51. The Government may wish to use this opportunity to review the level of the award for bereavement damages and consider whether such damages should be assessed on a case-by-case basis, in the same way as other forms of general damages, such as the award for pain, suffering and loss of amenity made in non-fatal personal injury cases.

52. **Although the proposed Remedial Order addresses the specific discrimination identified by the Court of Appeal in Smith, we have various concerns with the bereavement damages scheme as a whole. Wider reform of the FAA would fall outside of the scope of the Government’s remedial order powers and would therefore require primary legislation.**

53. **Firstly, the language used to define cohabiting couples should not be based upon an intimation of married couples and civil partners. We suggest that the FAA could adopt the definition of cohabiting couples as “two people living as partners in an enduring relationship”. Secondly, the qualifying time period of two years for cohabiting couples may not always be a fair indicator of a permanent and loyal relationship and we suggest that this should be reconsidered. Thirdly, the equal division of damages between separated spouses and cohabiting partners could lead to unfairness. Fourthly, we are concerned that section 1A of the FAA remains stigmatising towards children. We recommend that references to children as “not legitimate” should be removed from the statute.**

54. **Fifthly, section 1A of the FAA is discriminatory against certain close family members. We therefore suggest that the Government should use this opportunity to look more broadly at the bereavement damages scheme and undertake a consultation with a view to reforming the scheme. The consultation should explore:**

- a) **whether entitlement to bereavement damages should be open to the following family members where there is a genuine close relationship: fathers grieving the loss of children born outside of wedlock; parents grieving the loss of adult or married children; children grieving the loss of a parent; and siblings grieving the loss of a brother or sister; and**
- b) **whether the Scottish model of assessing damages on a case-by-case basis is fairer than the fixed lump sum model in England, Wales, and Northern Ireland.**

## Drafting

55. Finally, there are two drafting points for the Department to note:

- a) The preamble should cite the full conditions precedent from section 10 of the 1998 Act including, in this case, the expiry for the time for bringing an appeal and the absence of an appeal.<sup>40</sup>
- b) The correct numbering for an insertion between section 1A(2)(a) and section 1A(2)(b) is “(aa)” and not “(ab)”.<sup>41</sup>

40 For precedent see the Made SIs: Asylum and Immigration (Treatment of Claimants etc) Act 2004 (Remedial) Order. (SI 2011/1158). The National Archives, [Statutory Instrument Practice](#), 5th Edition, November 2019, para 3.11.28.

41 The National Archives, [Statutory Instrument Practice](#), 5th Edition, November 2019

# Conclusions

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## Introduction

1. We welcome the Government's action in proposing the Remedial Order to remedy the incompatibility in the Fatal Accidents Act 1976 ("the FAA") with the Convention prohibition against discrimination and the right to private and family life. (Paragraph 6)

## Procedural requirements

2. We consider that the procedural requirements of the Human Rights Act ("the HRA") have been met and the Government's reasons for proceeding by way of remedial order rather than by a Bill are sufficiently compelling for the purpose of section 10(2) of the HRA. Remedying the incompatibility by way of a non-urgent order strikes a reasonable balance between avoiding any further undue delay on the one hand, and the need for proper parliamentary scrutiny on the other. The Committee does, however, regret that it has taken twenty years following the Law Commission's report in 1999, and a declaration of incompatibility in November 2017, before laying the proposed draft Order in May 2019. (Paragraph 31)

## Remedying the incompatibility

3. The proposed draft Remedial Order inserts "cohabiting partners" into section 1A of the FAA, as defined in section 1(3)(b) of the FAA. In our view, the draft Remedial Order adequately addresses the judgment of the Court of Appeal, by extending the bereavement damages scheme to cohabiting couples (who have been living together for at least two years prior to the death), thereby removing the unlawful discrimination in section 1A of the FAA identified by the Court of Appeal. (Paragraph 37)

## Other matters arising

4. We recognise that the definition of "civil partners" in the proposed draft Order simply reflects the existing language in section 1 of the FAA, but we suggest that it would be preferable to review the language used in all provisions of the FAA to describe persons in cohabiting relationships to ensure that the language reflects the equality of their status. We suggest the language used in the Adoption and Children Act 2002, for example, is preferable. Section 144(4) 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." (Paragraph 40)
5. Bearing in mind the requirement to justify any differential treatment, the Government may wish to put forward official policy reasons for imposing a timeframe on cohabiting couples, which is not imposed on married or civilly partnered couples, in its response to this Report. This will mean this policy decision can be properly scrutinised. In our view, the application of any qualifying period will, to some extent, draw an arbitrary line, but will provide a necessary filter for identifying relationships of sufficient permanence and commitment. Whilst it is recognised that there must

be objective criteria for cohabiting couples equivalent to that of the commitment shown by married couples and civil partners, we are concerned that the inclusion of a time period of two years may not always be the most appropriate qualifying factor. Without clear justification for treating cohabiting couples differently, we suggest that the definition of eligible cohabiting couples should be reconsidered. (Paragraph 43)

6. Whilst we agree that it is preferable to avoid intrusive enquiries into personal relationships, in circumstances where the deceased had settled with a new cohabiting partner of at least two years duration, but remained in the midst of a divorce settlement, there may be some cases where awarding damages to the spouse is unfair given the purpose of the award of damages is to compensate for grief following the loss of an intimate, stable and long-term personal relationship. (Paragraph 46)
7. Whilst we recognise that the categories of eligible persons must be limited to those family members closest to the deceased, and therefore those most likely to suffer grief, the current list of eligible claimants is unprincipled, discriminates against other family members in analogous positions to existing eligible claimants and stigmatises children. Although no declarations of incompatibility have been made in respect of other family members, we consider that section 1A as currently drafted risks further legal challenge. (Paragraph 49)
8. Although the proposed Remedial Order addresses the specific discrimination identified by the Court of Appeal in *Smith*, we have various concerns with the bereavement damages scheme as a whole. Wider reform of the FAA would fall outside of the scope of the Government's remedial order powers and would therefore require primary legislation. (Paragraph 52)
9. Firstly, the language used to define cohabiting couples should not be based upon an intimation of married couples and civil partners. We suggest that the FAA could adopt the definition of cohabiting couples as "two people living as partners in an enduring relationship". Secondly, the qualifying time period of two years for cohabiting couples may not always be a fair indicator of a permanent and loyal relationship and we suggest that this should be reconsidered. Thirdly, the equal division of damages between separated spouses and cohabiting partners could lead to unfairness. Fourthly, we are concerned that section 1A of the FAA remains stigmatising towards children. We recommend that references to children as "not legitimate" should be removed from the statute. (Paragraph 53)
10. Fifthly, section 1A of the FAA is discriminatory against certain close family members. We therefore suggest that the Government should use this opportunity to look more broadly at the bereavement damages scheme and undertake a consultation with a view to reforming the scheme. The consultation should explore:
  - a) whether entitlement to bereavement damages should be open to the following family members where there is a genuine close relationship: fathers grieving the loss of children born outside of wedlock; parents grieving the loss of adult or married children; children grieving the loss of a parent; and siblings grieving the loss of a brother or sister; and

- b) whether the Scottish model of assessing damages on a case-by-case basis is fairer than the fixed lump sum model in England, Wales, and Northern Ireland. (Paragraph 54)

# Declaration of Interests<sup>1</sup>

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## Interests declared:

### **Lord Brabazon of Tara**

- No relevant interests to declare

### **Lord Dubs**

- Former Chair of Liberty

### **Baroness Ludford**

- No Interests declared

### **Baroness Massey of Darwen**

- No relevant interests to declare

### **Lord Singh of Wimbledon**

- No relevant interests to declare

### **Lord Trimble**

- No relevant interests to declare

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<sup>1</sup> A full list of Members' interests can be found in the Register of Lords' Interests: <http://www.parliament.uk/mpslords-and-offices/standards-and-interests/register-of-lords-interests/>

# Formal minutes

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**Wednesday 10 July 2019**

Members present:

Ms Harriet Harman MP, in the Chair

Fiona Bruce MP    Lord Brabazon of Tara  
Ms Karen Buck MP    Lord Dubs  
Scott Mann MP    Baroness Ludford  
                                 Lord Singh of Wimbledon  
                                 Lord Trimble

Draft Report (*Proposal for a draft Fatal Accidents Act 1976 (Remedial) Order 2019*), 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 55 read and agreed to.

Summary read and agreed to.

*Resolved*, That the Report be the Twenty-first Report of the Committee.

*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 Wednesday 17 July 2019 at 3.00pm

## 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.

FAA numbers are generated by the evidence processing system and so may not be complete.

- 1 Association of Personal Injury Lawyers ([FAA0001](#))
- 2 Thompsons Solicitors ([FAA0002](#))

# List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the [publications page](#) of the Committee's website. The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

## Session 2017–19

First Report	Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis	HC 774 HL 70
Second Report	Proposal for a Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018	HC 645 HL 86
Third Report	Legislative Scrutiny: The Sanctions and Anti-Money Laundering Bill	HC 568 HL 87
Fourth Report	Freedom of Speech in Universities	HC 589 HL 111
Fifth Report	Proposal for a draft British Nationality Act 1981 (Remedial) Order 2018	HC 926 HL 146
Sixth Report	Windrush generation detention	HC 1034 HL 160 (HC 1633)
Seventh Report	The Right to Freedom and Safety: Reform of the Deprivation of Liberty Safeguards	HC 890 HL 161
Eighth Report	Freedom of Speech in Universities: Responses	HC 1279 HL 162
Ninth Report	Legislative Scrutiny: Counter-Terrorism and Border Security Bill	HC 1208 HL 167 (HC 1578)
Tenth Report	Enforcing Human Rights	HC 669 HL 171
Eleventh Report	Second Legislative Scrutiny Report: Counter-Terrorism and Border Security Bill	HC 1616 HL 195 (HC 1827)
Twelfth Report	Legislative Scrutiny: Mental Capacity (Amendment) Bill	HC 1662 HL 208
Thirteenth Report	Proposal for a draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2018	HC 1451 HL 209
Fourteenth Report	Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018	HC 1547 HL 227
Fifteenth Report	Proposal for a draft Human Rights Act 1998 (Remedial) Order 2019	HC 1457 HL 228
Sixteenth Report	Immigration Detention	HC 1484 HL 279
Seventeenth Report	Human Rights Protections in International Agreements	HC 1883 HL 310 (HC 2199)

Eighteenth Report	Legislative Scrutiny: Immigration and Social Security Co-ordination (EU Withdrawal) Bill	HC 569 HL 324
Nineteenth Report	Youth detention: solitary confinement and restraint	HC 994 HL 343
Twentieth Report	Good Character Requirements: Draft British Nationality Act 1981 (Remedial) Order 2019 - Second Report	HC 1943 HL 397
First Special Report	Human Rights and Business 2017: Promoting responsibility and ensuring accountability: Government Response to the Committee's Sixth Report of Session 2016–17	HC 686
Second Special Report	Mental Health and Deaths in Prison: Interim Report: Government Response to the Committee's Seventh Report of Session 2016–17	HC 753
Third Special Report	Legislative Scrutiny: Counter-Terrorism and Border Security Bill: Government Response to the Committee's Ninth Report of Session 2017–19	HC 1578
Fourth Special Report	Windrush generation detention: Government Response to the Committee's Sixth Report of Session 2017–19	HC 1633
Fifth Special Report	Second Legislative Scrutiny Report: Counter-Terrorism and Border Security Bill: Government Response to the Committee's Eleventh Report of Session 2017–19	HC 1827
Sixth Special Report	Human Rights Protections in International Agreements: Government Response to the Committee's Seventeenth Report of Session 2017–19	HC 2199