

EXPLANATORY MEMORANDUM TO

THE FATAL ACCIDENTS ACT 1976 (REMEDIAL) ORDER 2020

2020 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Human Rights.

2. Purpose of the instrument

- 2.1 To implement the Court of Appeal judgment in the case of *Jacqueline Smith v Lancashire Teaching Hospitals NHS Foundation Trust; Lancashire Care NHS Foundation Trust; and the Secretary of State for Justice* ([2017] EWCA Civ 1916) by amending the Fatal Accidents Act 1976 (FAA) to provide for claimants who have lived with the deceased person for at least two years immediately prior to the death to be eligible for an award of bereavement damages.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This Remedial Order is laid pursuant to the power in section 10 of the Human Rights Act 1998.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 This entire instrument applies to England and Wales only.
- 3.3 The instrument does not have any minor or consequential effects outside England and Wales.
- 3.4 In the view of the Department, for the purposes of Standing Order No. 83P of the Standing Orders of the House of Commons relating to Public Business, the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament.
- 3.5 The Department has reached this view because the subject of the remedial order concerns an aspect of the civil law, which is a devolved area in Scotland and Northern Ireland.

4. Extent and Territorial Application

- 4.1 The extent of this instrument is England and Wales.
- 4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

- 5.1 Chris Philp, Parliamentary Under Secretary of State at the Ministry of Justice has made the following statement regarding Human Rights:

“In my view the provisions of the Fatal Accidents Act 1976 (Remedial) Order 2020 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 This instrument is being laid in response to the judgment of the Court of Appeal in *Jacqueline Smith v Lancashire Teaching Hospitals NHS Foundation Trust; Lancashire Care NHS Foundation Trust; and the Secretary of State for Justice* ([2017] EWCA Civ 1916), which concerned the award of bereavement damages under the FAA. The Court held that the provisions of section 1A(2)(a) of the FAA are incompatible with Article 14 read with Article 8 of the European Convention on Human Rights (ECHR) because they deny an award of bereavement damages to an individual such as Ms Smith, who had lived with the deceased as his unmarried partner for a period of over two years immediately prior to his death.
- 6.2 Section 10 HRA provides that if a provision of legislation has been declared to be incompatible with a Convention right, and the Minister considers there are compelling reasons for doing so, the legislation may be amended by Remedial Order to remove the incompatibility.

7. Policy background

What is being done and why?

- 7.1 The FAA governs civil claims for damages where a death is caused by the wrongful act or omission of another person. The Court of Appeal held that the provisions of section 1A(2)(a) of the FAA are incompatible with Article 14 read with Article 8 of the European Convention on Human Rights (ECHR) because they deny an award of bereavement damages to an individual such as Ms Smith, who had lived with the deceased as his unmarried partner for a period of over two years immediately prior to his death.
- 7.2 The Remedial Order will have the effect that a claimant who cohabited with the deceased person for a period of at least two years immediately prior to the death will be eligible to receive an award of bereavement damages. The Government considers that it is reasonable to set a qualifying limit in relation to the duration of the cohabiting relationship which objectively evidences a relationship of permanence and commitment and at the same time avoids intrusive enquiries into the quality and durability of the relationship in individual cases. It is our view that a two-year period represents a reasonable duration for this purpose.
- 7.3 In instances where both a qualifying cohabitant and a spouse is eligible (i.e. where the deceased was still married and not yet divorced or separated but had been in a new cohabiting relationship for at least two years) the award will be divided equally between the eligible claimants. The Government considers it desirable to avoid the potential for intrusive enquiries into the quality and durability of an eligible relationship, or (in this particular situation) on the respective merits of two eligible claimants. Instances involving both a qualifying cohabitant and a spouse who is not yet divorced are likely to be rare, and in light of the desirability of avoiding intrusive

enquiries we consider that when such a situation does arise dividing the award equally is the fairest approach.

7.4 Under section 10(2) HRA, the Government is required to have “compelling reasons” for making an amendment by way of a Remedial Order rather than primary legislation. The current pressure on the legislative timetable means there is little prospect of using primary legislation. We consider that the nature of the incompatibility contributes to there being compelling reasons for making the necessary legislative change promptly. Therefore, we consider that a Remedial Order using the non-urgent procedure is the most appropriate legislative vehicle for implementing this judgment on a timely basis while allowing parliamentary scrutiny of the measures proposed.

7.5 The issue on cohabiting does not apply in the same way to welfare arrangements, as this issue stems from the explicit inclusion of cohabiting partners in section 1 of the relevant statute (the Fatal Accidents Act 1976).

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 The Government does not intend to consolidate the legislation.

10. Consultation outcome

10.1 The Government has not conducted a separate consultation exercise as it would not be proportionate to do so for a targeted amendment which is required to implement a court judgment.

11. Guidance

11.1 The Government will not be publishing guidance on this amendment.

12. Impact

12.1 There is likely to be some impact on the insurance industry in meeting claims for bereavement damages from the additional category of claimant under this amendment.

12.2 However, we have assessed the likely number of future awards for damages under this amendment to be low and the financial impact too small to justify preparing a full Impact Assessment for this instrument.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses. Small businesses may be liable to pay bereavement damages to the additional category of claimant under this amendment in circumstances where they are responsible for the death as a result of a wrongful act or omission.

13.2 However, the low level of the award (currently £12,980) and the limited number of those likely to be eligible as a result of this amendment mean that the financial impact on small businesses is likely to be very small.

14. Monitoring & review

14.1 The effect of this amendment will be monitored on an ongoing basis by the Ministry of Justice. Any declarations of incompatibility made by the domestic courts and judgments of the European Court of Human Rights on related matters will be included in the Government's annual reports to the Joint Committee on Human Rights

15. Contact

15.1 Anthony Jeeves at the Ministry of Justice, telephone: 07580 927398 or email: Anthony.jeeves@justice.gov.uk, can be contacted with any queries regarding the instrument.

15.2 David Parkin, Deputy Director for Civil Justice and Law at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 Chris Philp, Parliamentary Under Secretary of State at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

