EXPLANATORY MEMORANDUM TO

THE BEREAVEMENT BENEFITS (REMEDIAL) ORDER 2022

2022 No. XXXX

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

This Order extends eligibility for Widowed Parent's Allowance (WPA) and the higher rate of Bereavement Support Payment (BSP) to surviving cohabiting partners with dependent children who were not in a legal union with the deceased on the date of death. WPA was introduced in 2001 to replace Widowed Mother's Allowance and payable to working-age people whose spouse/civil partner died before 6 April 2017. BSP came into force on 6 April 2017, replacing the previous suite of bereavement benefits which included WPA.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England, Scotland, Wales and Northern Ireland.

4.2 The territorial application of this instrument is England, Scotland, Wales and Northern Ireland.

5. European Convention on Human Rights

5.1 The Minister for Lords, Baroness Stedman-Scott, at the Department for Work and Pensions (responsible for bereavement benefits policy), has made the following statement regarding Human Rights:

"In my view the provisions of the Bereavement Benefits (Remedial) Order 2022 are compatible with the Convention rights."

6. Legislative Context

6.1 The legislation on Widowed Parent's Allowance (WPA) and the higher rate of Bereavement Support Payment (BSP) has been declared, under section 4 of the Human Rights Act 1998[1], to be incompatible with Article 14 of the European Convention on Human Rights (ECHR) which prohibits discrimination.

6.2 Section 10 of the Human Rights Act[2] allows a Remedial Order to be used to amend primary and secondary legislation where there is an incompatibility in domestic law

[1] Section 4 of the Human Rights Act 1998. https://www.legislation.gov.uk/ukpga/1998/42/section/4
[2] Section 10 of the Human Rights Act. https://www.legislation.gov.uk/ukpga/1998/42/section/10

with a right under the ECHR. This approach can be used if there are compelling reasons to do so.

6.3 The Minister for Lords, Baroness Stedman-Scott, at the Department for Work and Pensions considers there are compelling reasons for using a Remedial Order and that the amendments proposed in the Remedial Order are necessary to remove the incompatibilities declared by the Supreme Court and the High Court. The Government takes a breach of the ECHR seriously. There are no appropriate Bills planned that could accommodate the changes to legislation and remedy these incompatibilities.

6.4 Using a Remedial Order to insert new provisions in the legislation will achieve a change in the law to extend WPA and the higher rate of BSP to surviving cohabiting partners with dependent children, who were not in a legal union with the deceased on the date of death. This will take effect from 30 August 2018.

6.5 The Minister believes that using a non-urgent Remedial Order is appropriate in this case, as it allows time for proper Parliamentary scrutiny.

7. Policy background

What is being done and why?

7.1 Following two court cases, the McLaughlin case (WPA) of 30 August 2018[3] and the Jackson case (BSP) of 7 February 2020[4], the legislation governing WPA and the higher rate of BSP was declared incompatible with Article 14, read with Article 8, of the ECHR. In both cases, the court found that, in restricting eligibility to people in a legal union, the current legislation discriminates between children on the grounds of the legal status of their parents' relationship.

This Order will remedy these incompatibilities. It amends the following primary legislation: the Social Security Contributions and Benefits Act 1992[5], the Social Security Contributions and Benefits (Northern Ireland) Act 1992[6], the Pensions Act 2014[7].

7.2 This Order has retrospective effect back to the date of the McLaughlin judgment in the Supreme Court on 30 August 2018.

7.3 WPA can currently only be paid to those who were in a legal union (marriage or civil partnership) with the deceased on the date of death. It can be paid for as long as there is entitlement to Child Benefit (up to 20 years in some cases), though the average length of award is approximately 6 years. Widowed Parent's Allowance (WPA) payments are paid weekly, and those eligible for these payments can choose to have it paid into their account either every 2 weeks, 4 weeks or 13 weeks.

7.4 BSP provides support to working-age people who lose their spouse/civil partner by providing support to help with contributing to the immediate additional costs

[3] In the matter of an application by Siobhan McLaughlin for Judicial Review (Northern Ireland) [2018] UKSC 2018 https://www.bailii.org/uk/cases/UKSC/2018/48.html
[4] Jackson and others v Secretary of State for Work and Pensions [2020] EWHC 183 (Admin) https://www.bailii.org/ew/cases/EWHC/Admin/2020/183.html
[5] The Social Security Contributions and Benefits Act 1992 https://www.legislation.gov.uk/ukpga/1992/4/contents
[6] The Social Security Contributions and Benefits (Northern Ireland) Act 1992 https://www.legislation.gov.uk/ukpga/1992/7/contents
[7] The Pensions Act. https://www.legislation.gov.uk/ukpga/2014/19/part/5. It also amends the Pensions Act (Northern Ireland) 2015, which is not primary legislation

associated with bereavement. It can currently only be paid to those who were in a legal union with the deceased. Those without children receive the standard rate which includes an initial lump sum of £2,500 followed by up to 18 monthly payments of £100. Those with dependent children (or who are pregnant) receive a higher rate which includes a lump sum of £3,500 followed by up to 18 monthly payments of £350. This recognises the higher costs associated with having children.

7.5 This Order extends eligibility for WPA and the higher rate of BSP to surviving cohabiting partners with dependent children, who were not in a legal union with the deceased on the date of death. It is retrospective such that it applies to eligible claimants who would have been entitled to WPA or the higher rate of BSP from 30 August 2018 (date of the Supreme Court's judgment in McLaughlin) onwards.

7.6 Cohabiting partners are people who are living together as if married or in a civil partnership. For the purposes of entitlement to WPA and the higher rate of BSP under this Order, the claimant must have been cohabiting with their late partner (the deceased) on the date of their death.

7.7 In accordance with paragraph 3(1) of Schedule 2 to the Human Rights Act 1998[8] a proposed draft Remedial Order was laid for a 60 sitting day period on 15 July 2021, to allow for Members of both Houses and other stakeholders to make representations.

7.8 The Minister for Lords fully considered all the representations received on the proposal in preparing the draft Order for affirmative resolution (see paragraph 10).

7.9 The Minister agreed with the recommendation of the Joint Committee on Human Rights to amend the Order to ensure that the existing entitlement conditions that apply to pregnant WPA claimants who were in a legal union with the deceased apply in full to pregnant cohabiting WPA claimants.

7.10 The Minister also agreed with the recommendation to ensure implications of the retrospective effect of the Order on entitlement to means-tested benefits is taken into account. The Order now allows for retrospective payments (for deaths before the Order comes into force) of WPA and BSP up to the date of claim, to be disregarded as capital for 12 months or 52 weeks in Universal Credit and legacy means-tested benefits (Housing Benefit, Pension Credit, Income Support, Employment and Support Allowance, Jobseeker's Allowance).

7.11 The Order includes a number of technical amendments to ensure it properly reflects policy intent and in response to comments made by the Joint Committee on Human Rights, alongside minor changes including the correction of typographical errors, cross-referencing and the addition of footnotes. These are described in in the Government's response to representations received on the Order, including from the Joint Committee on Human Rights.

Payments

7.12 This Order makes surviving cohabiting partners with dependent children, who were not in a legal union with the deceased at the date of death, entitled to the same WPA or BSP payment as those who had been married or in a civil partnership with the deceased and who had dependent children. This means that, for BSP, cohabiting partners with dependent children will be eligible for the higher rate (rate outlined in

[8] Schedule 2 to the Human Rights Act http://www.legislation.gov.uk/ukpga/1998/42/contents)

paragraph 7.4). For WPA, the rate payable will be based on the claimant's late partner's National Insurance Contributions.

7.13 This Order has retrospective effect to 30 August 2018. Where a claimant's late partner died before this date, we will make a part payment of the higher rate of BSP, if the death was after 5th April 2017. This will be made up of all remaining monthly payments due between 30 August 2018 and the end of 18 full calendar months after the date of death of the claimant's late partner (provided that the claim is made within 12 months of the Order coming into force). For example, if a claimant's partner died on 30 January 2018 and the claim is made within 12 months of the Order coming into force, the claimant will be eligible for a payment comprising 12 monthly payments (running from 30 August 2018 – 30 July 2019). Claimants will be eligible for WPA where their late partner died before 6 April 2017 and they continue to meet the entitlement conditions on 30 August 2018.This Order entitles WPA claimants to the remaining payments due on or after 30 August 2018. Any entitlement going forward from the date this Order comes into force will be paid in the normal way (weekly payments for WPA, lump sums and/or monthly payments for BSP).

7.14 For Universal Credit (UC), WPA is considered in full as income, with a £10 disregard applied for legacy benefits. These legacy benefits are income-related Employment and Support Allowance (ESA), income-based Jobseeker's Allowance (JSA), Income Support (IS), Pension Credit (PC) and Housing Benefit (HB). Retrospective payments of WPA will be assessed at the point of award for these income-related benefits; but given the size of these payments, some claimants could lose all entitlement to income-related benefits and passported benefits such as free school meals. This Order therefore provides for all retrospective WPA payments up to the date of claim, to be treated as capital and disregarded for a period of 12 months or 52 weeks in UC, ESA, JSA, IS, PC and HB. This Order also introduces a disregard for the same period for retrospective BSP payments made under the order. The usual rules will apply to future BSP and WPA entitlements.

Conditions of entitlement

7.15 This Order extends existing WPA and the higher rate of BSP eligibility criteria to surviving cohabiting partners with dependent children who were not in a legal union with the deceased at the date of death. The criteria includes being pregnant or entitled to Child Benefit, satisfying the National Insurance contribution conditions and being under State Pension age.

7.16 To qualify for WPA or the higher rate of BSP under this Order, claimants must have been cohabiting with their late partner (the deceased) on the date of their death. Further information on the claim process, including any evidence requirements, will be provided on GOV.UK in due course.

Claim time limits

7.17 The Order sets the time limits within which a claim must be made.

7.18 For Widowed Parent's Allowance (WPA), where a claimant becomes entitled as a result of this Order, the claim has to be made within 12 months of the date this Order comes into force to receive payment. As WPA is only payable for deaths before 6 April 2017, all deaths will have occurred before the Order comes into force. Any claimant who becomes entitled to WPA as a result of the Order, and who submits a claim within the 12-month period, will receive a payment for the retrospective period

of entitlement. They may also be entitled to an ongoing payment if they continue to meet the WPA eligibility criteria.

7.19 For Bereavement Support Payment (BSP), which is payable for deaths on or after 6 April 2017, the time limit for claiming depends on when the death occurred.

7.20 If the death occurred after the Order comes into force, there is no change from the current position. That is, the claim has to be made within 3 months of the death to get the full amount of BSP (lump sum and all 18 monthly payments). The claim has to be made within 12 months of the death to get the lump sum, and each monthly payment has a three-month claiming window.

7.21 If the death occurred before the Order comes into force, and retrospective payments are due, the time limits for claiming are as follows:

- If the claim is received *within* 12 months of the Order coming into force, the claimant will receive the full amount of BSP that is due to them, irrespective of whether the claim is received within 12 months of the death.
- If the claim is received *after* 12 months of the Order coming into force, the claimant will receive up to 3 backdated monthly payments, plus any remaining monthly payments that are due to them. No lump sum will be payable. The claim must be made within 21 months of the Order coming into force for any BSP (higher rate) to be payable.

7.22 The time limits for both WPA and the higher rate of BSP will apply in the same way in Northern Ireland, so that anyone entitled from 30 August 2018 (date of the Supreme Court judgment in McLaughlin), who submits a claim within the required time limits, will be entitled to receive a payment.

Payment where there is more than one claimant

7.23 Currently, WPA and the higher rate of BSP can only be paid to survivors who were in a legal union with the deceased. Extending these benefits to surviving cohabiting partners with dependent children, who were not in a legal union with the deceased, means there will be a small number of cases where more than one person may have reason to claim in respect of the same death.

7.24 The position remains that only one claimant can be entitled per death. This Order provides which claimant will be entitled where more than one claimant has reason to claim. The claimant who was living with the deceased on the date of death would be entitled. This also means that only one claimant per household is entitled.

7.25 Where this still results in the potential for multiple payments, the claimant who is entitled is determined as follows:

Where two prospective claimants were living with the deceased on the date of death, the person in a legal union with the deceased would be entitled (if they had entitlement to Child Benefit or were pregnant).

If neither prospective claimant was in a legal union with the deceased (or the person in a legal union did not have dependent children), the person with entitlement to Child Benefit, or the person who is pregnant, would be entitled.

If neither prospective claimant was in a legal union with the deceased and more than one prospective claimant had entitlement to Child Benefit, or was pregnant,

the person who had cohabited with the deceased for the longest on the date of death would be entitled.

In the very rare case where this leaves more than one potential claimant, the Secretary of State must determine who is entitled. A policy statement will be issued on how determinations will be made in these circumstances.

Transitional provisions

7.26 For the period between 30 August 2018 and when this Order comes into force, there will be transitional protection to ensure that those claimants already in receipt of Widowed Parent's Allowance or Bereavement Support Payment before the date this Order comes into force do not lose their entitlement for the duration of their award as a result of this Order. For example, a claimant might have been entitled to benefit before this Order comes into force as a result of the death of their spouse or civil partner. When this Order comes into force, the deceased's cohabiting partner may become entitled for the same period (e.g. because they were living with the deceased on the date of death and there had been no divorce in respect of the spouse). The transitional provisions enable both claimants to get benefit. This means that benefit already paid to the claimant can continue and is not recovered as a result of any new entitlement arising from the retrospective provisions in the Order.

Explanations

What did any law do before the changes to be made by this instrument?

7.27 Prior to the changes in this instrument, WPA and BSP legislation provided that only those claimants who had been married to, or in a civil partnership with, their deceased partner would be eligible for WPA or BSP.

Why is it being changed?

7.28 The Supreme Court in McLaughlin (2018) and the High Court in Jackson (2020) found that WPA and BSP legislation was incompatible with Article 14 (prohibition of discrimination), read with Article 8, of the ECHR. This was on the basis that WPA and BSP discriminated between children based on the legal status of their parents' relationship, by not giving entitlement to surviving cohabitees with dependent children.

What will it now do?

7.29 This Order remedies the incompatibilities identified in McLaughlin and Jackson, by extending eligibility to WPA and the higher rate of BSP to surviving cohabitees with dependent children, who were not in a legal union with their late partner on the date of death.

8. European Union Withdrawal and Future Relationship

8.1 This Order does not relate to withdrawal from the European Union.

9. Consolidation

9.1 Informal consolidated text of benefits legislation is available to the public free of charge via the 'National Archive' website: www.legislation.gov.uk[9].

[9] www.legislation.gov.uk. http://www.legislation.gov.uk/

10. Consultation outcome

10.1 The proposed draft Remedial Order was laid before Parliament on 15 July 2021 to enable representations from Members of both Houses and other stakeholders.

10.2 The Joint Committee on Human Rights (JCHR) scrutinised the proposed draft Order, sought views from stakeholders and advised Government and Parliament on the appropriateness of the proposed draft Order by publishing their Report on 12 November 2021[10].

10.3 Overall, the JCHR welcomed the proposals and considered that the procedural requirements for making a remedial order had been met. They also considered the draft proposed Order remedied the identified incompatibilities, apart from in how the draft proposed Order extended WPA eligibility to pregnant cohabitees. The Department has now clarified this position in this Order to ensure cohabiting WPA claimants are not treated less favourably than their married counterparts, or those who were in a civil partnership.

10.4 The JCHR also asked for the tax and benefit implications of retrospective payments to be considered. This Order consequently allows for a 12-month/52 weeks capital disregard for retrospective payments of WPA and BSP (for deaths before the Order comes into force) up to the date of claim, for the purposes of determining entitlement to income-related benefits (UC, IS, ESA, JSA, PC, HB). Such payments will also not count towards the Benefit Cap.

10.5 The Department received few representations directly from stakeholders, which mirrored those of the JCHR. Representations were also received from members of the public, who were mainly interested in when the Order was coming into force.

10.6 The Government Response to representations received is laid in Parliament with the draft Order in accordance with paragraph 3(2) of Schedule 2 to the Human Rights Act 1998.

11. Guidance

11.1 The Department will provide internal guidance for staff and issue guidance to local authority staff who administer Housing Benefit.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector. A full Impact Assessment has not been prepared for this Order because there will be no significant impact on businesses.

12.3 These proposals have an estimated Annually Managed Expenditure cost of up to £200 million up to and including 2025/26. This funding has been agreed with the Treasury.

This is the cost to extend Widowed Parent's Allowance and Bereavement Support Payment to cohabitees, which will increase the caseload by an estimated 4-5 thousand each year to 2025/26.

[10] JCHR report Proposal for a draft Bereavement Benefits (Remedial) Order 2021: discrimination against cohabiting partners - Joint Committee on Human Rights - House of Commons (parliament.uk)

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is that once the Order comes into force the Department will monitor and review the effect of the measures.

15. Contact

15.1 Anila Naseem at the Department for Work and Pensions, Telephone: 01132324899 or email: caxtonhouse.bereavementbenefitspolicy@DWP.GOV.UK can be contacted with any queries regarding the Order.

15.2 Helen Walker, Deputy Director for Bereavement Benefits, at the Department for Work and Pensions can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Minister for Lords, Baroness Stedman-Scott, at the Department for Work and pensions can confirm that this Explanatory Memorandum meets the required standard.