

Briefing Note
for
Joint Oireachtas Committee on Social Protection, Communities,
Rural Development and the Islands

General Scheme of the Social Welfare (Bereaved Partner's Pension) Bill
2024

Background:

- Mr. John O'Meara lost his partner, and the mother of his three children, Michelle Batey, who had been seriously ill, to Cancer and COVID-19.
- The couple were not married, so Mr. O'Meara could not claim Widower's Contributory Pension (WCP). He, together with his children, brought a case seeking to have the law changed, so that he and his children could benefit from the WCP.
- In order to qualify for WCP, one of the criteria under section 124 of Social Welfare Consolidation Act 2005 is that you must be a legal widow, widower, or surviving civil partner. Therefore, Mr. O'Meara was ineligible for the payment.
- Mr. O'Meara applied for the WCP and was refused.
- The Government position was that the State in its laws relating to, for example, taxation, nationality, citizenship, criminal evidence, succession and inheritance distinguishes between the treatment of people in a marriage or civil partnership and those not in a marriage or civil partnership.
- This reflects that entering into a marriage or civil partnership is a legal act, which confers both rights and obligations on both parties which do not exist in law between cohabiting couples. Widows, widowers and surviving civil partners, who become bereaved, therefore, lose someone who had legal

duties towards them, and the social welfare code recognises this by providing a pension to them, subject to certain conditions.

- The matter was heard before in the High Court in July 2022. Mr Justice Heslin found in favour of the distinction as it was applied in social welfare law for the determination of eligibility to a WCP.
- Leave to appeal to the Supreme Court was granted on 20 February 2023.
- The case was heard in the Supreme Court in July and October 2023.
- The Supreme Court judgment overruled the High Court decision and found in favour of Mr. O'Meara and his children. The Court quashed the decision of the Minister for Social Protection to refuse Mr O'Meara a WCP.
- In simple terms the Court found that section 124 of the Social Welfare (Consolidation) Act 2005 (as amended) is inconsistent with the Constitution insofar as it excludes Mr O'Meara from the category of persons entitled to benefit from it.
- The Court reached that conclusion on the basis of the equality guarantee contained in Article 40.1 of the Constitution. The Court highlighted a number of anomalies in the legislation including the availability of the payment to divorced persons whose former spouse had died, and that while cohabitation would disqualify a person from receipt of the payment, that same status could not qualify them to receive it.
- The Supreme Court judgment recognises that resolving this issue requires a legislative amendment and it remains a matter for the Oireachtas to consider how best to make provision for the benefit to Mr. O'Meara.
- Since then, Officials in the Department have considered the judgment in detail in consultation with the Office of the Attorney General and prepared the draft Heads for approval by Cabinet.

Key Policy Objectives in the General Scheme

Key issues that flow from the Supreme Court decision, which have been considered in preparing the General Scheme and Heads of Bill are as follows:

Establishing eligibility

It is proposed to broaden the eligibility criteria for WCP to surviving co-habitants with or without children where they were in an intimate and committed relationship of (i) two years, where there were children of that relationship or (ii) five years where there were no children of that relationship.

The definition of a surviving cohabitant will be broadly analogous to qualifying cohabitants as defined in the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (“the 2010 Act”). The 2010 Act provides an existing framework for establishing the existence of cohabiting relationships of a particular form that provide rights and obligations to those cohabitants. The Supreme Court noted that the State had already defined cohabitation within the 2010 Act.

Therefore, reliance on the existing legal framework is a reasonable approach for the Oireachtas to adopt in regulating access to WCP.

The draft legislation sets out the evidence that will be required to prove the existence of such a relationship to the satisfaction of the Minister, which evidence is based on similar requirements set out in the 2010 Act.

While other payments operated by the Department may have regard to whether a couple are cohabiting, the introduction of the eligibility criteria for qualified cohabitants set out in the General Scheme does not have any implications for any other schemes (other than those set out in the General Scheme).

In recognition of the change in eligibility, the scheme name will be changed to the **Bereaved Partner’s Contributory Pension (BPCP)**.

Loss of Entitlement to BPCP

Under section 124(2) of the 2005 Act, any person in receipt of WCP shall be disqualified for receipt of WCP “*if and so long as he or she is a cohabitant*”. The definition of cohabitant for these purposes (as set out in section 2 of the 2005 Act) is based on section 172(1) of the 2010 Act. This means that the temporal requirements for a qualifying cohabitant are not required. As a result, WCP payments cease immediately when the recipient begins cohabiting with another person but recommence once the person stops cohabiting.

In contrast, if a person in receipt of WCP marries another person they lose their entitlement to WCP until they are again widowed (even if the relationship breaks down). Therefore, under the current rules a person loses their entitlement to WCP on a temporary basis while cohabiting, but remarriage leads to a more permanent loss of entitlement.

To address this anomaly, it is proposed that under BPCP if the period of cohabitation meets the conditions of a “qualified cohabitant” i.e. two years with children of that new relationship and five years if otherwise, then this results in a permanent loss of entitlement to the payment based on the death of the former/previous partner. If the period of cohabitation is less than that specified to be a “qualified cohabitant” then the loss will remain for the period of cohabitation and entitlement will be reinstated on the cessation of the cohabitation.

Effective Date for BPCP Eligibility

It is proposed that deaths before the date of the Supreme Court judgment would be considered for eligibility for BPCP. If this were not the case, Mr O’Meara would not qualify for the payment. It is not proposed to provide a restriction on when the death occurred as this would likely raise further issues around discrimination and the arbitrary nature of any date relied upon. However, it is proposed that payment of BPCP will commence only from the date of judgment in the case of a death that occurred prior to that date, and from the date of death for claims after 22nd January 2024.

Eligibility after Relationship Breakdown, Separation or Divorce

Under current legislation, a person may retain eligibility for WCP after divorce. This anomaly was noted by the Supreme Court as a consideration in the ruling. It is proposed to address this anomaly by removing eligibility of divorcees to BPCP. Therefore, it is proposed that eligibility to BPCP would end upon divorce, similar to the loss of entitlement due to remarriage or on becoming a “qualified cohabitant” again. A saver is provided in this General Scheme for those divorcees already in receipt of a WCP.

In the case of a qualified cohabitation relationship, eligibility for the BPCP will cease two years after the breakdown of the relationship, in line with similar provisions in the 2010 Act.

In the case of a married couple who separate, a similar rule will apply. Hence eligibility for the BPCP will cease two years after separation.

Approach to the Widow’s, Widower’s or Surviving Civil Partner’s (Non-Contributory) Pension

A Widow’s, Widower’s or Surviving Civil Partner’s (Non-Contributory) (WNCP) Pension is a means-tested payment payable to a widow, widower or surviving civil partner who does not qualify for a contributory widow’s, widower’s or surviving civil partner’s payment.

While WNCP was not the subject of the Supreme Court decision, for consistency it is proposed to expand eligibility to WNCP to surviving cohabitants with the same rules as apply to widows, widowers or surviving civil partners, including the date of payment.

In recognition of the change in eligibility, the scheme name will be changed to the Bereaved Partner’s Non-Contributory Pension (BPNCPP).

Widowed or Surviving Civil Partner Grant

The Widowed or Surviving Civil Partner Grant is a one-off payment to widows, widowers or surviving civil partners with dependent children. While this payment was not at issue before the Supreme Court, for consistency it is proposed to expand the eligibility criteria of the grant to include surviving cohabitants on the same terms as proposed for the BPCP. However, it is proposed that this payment would be available only for surviving cohabitants who meet the eligibility criteria after commencement of the Act.

This means that while the payment for a BPCP may be based on a death that occurred before the Act commenced, the Grant will only be payable for deaths on or after the commencement of the Act. The Grant is paid where there are dependent children at the date of death (and the rate of payment has changed over the years since its introduction). Therefore, attempting to back-date this payment may result in payments for children who are no longer dependent and where the grant was intended to meet the expenses in the immediate aftermath of the death.

In recognition of the change in eligibility, the scheme name will be changed to the **Bereaved Parent Grant**.

Occupational Injury Benefit Schemes

Under section 81 of the 2005 Act, the Death Benefit Scheme under the Occupational Injuries Scheme provides for a Widow's, Widower's or Surviving Civil Partner's Pension to those whose spouse or civil partner died as a result of a workplace accident or disease connected with their work. This payment also excludes surviving cohabitants from eligibility. Payment is only made under the WCP or the Death Benefit Scheme, not both. While this payment was not the subject of the Supreme Court decision, for consistency, it is proposed to expand the eligibility criteria of the pension to include surviving cohabitants on the same terms as proposed for the BPCP including payments for deaths that occurred before the 22nd January 2024 but with payment from 22nd January 2024.

Summary of Draft Heads

While many of the Heads required are to provide for technical amendments to the Act, the following set out those Heads containing key objectives of the measures to be introduced:

Head 1

This Head provides for the introduction of definitions for the purposes of the Bill to give effect to the changes required to allow for eligibility to the bereaved partners contributory pension for qualifying cohabitants. It also introduces the new scheme names.

Head 2

This Head makes consequential amendments to section 39 (Description of Benefits) to amend the name of the scheme to “bereaved partner’s contributory pension” from “widow's (contributory) pension, widower's (contributory) pension and surviving civil partner's (contributory) pension” and to “bereaved parent grant” from “widowed or surviving civil partner grant”.

Head 3

This Head provides for the substitution of Section 81 “Death benefit for widows and widowers and increases for qualified children”. The change is required as eligibility for the scheme is now expanded to include qualifying cohabitants. The Head also provides for the introduction of three new definitions “bereaved partner”, “deceased partner” and “qualified cohabitation”.

There are also amendments for the conditions of cohabitation in section 81(4) so that subsequent periods of qualifying cohabitation will exclude a person from BPCP and to align the rules for qualification with BPCP where a relationship has ended.

Qualified cohabitants who qualify for this scheme will be eligible for payments for deaths that occurred before the 22nd January 2024 but with payment from 22nd January 2024.

Head 4

This Head provides for the substitution of the title of the scheme in Chapter 18 to “Bereaved Partner’s (Contributory) Pension”. It also provides for changes to the Chapter to expand eligibility for the scheme to “qualified cohabitants”.

The Head provides for new and amended definitions in section 123. The definitions that are amended are to exclude a person who is divorced or separated for more than two years from now having eligibility for the scheme. The new definitions introduced are to include “qualified cohabitant” in the scheme. The Head also amends section 124 in order to establish entitlement to the payment for qualified cohabitants.

A new section 124A is inserted which is a saver clause to ensure that the eligibility criteria for divorcees or those separated and who are already in receipt of WCP will continue to exist on enactment of the legislation.

There are also some consequential amendments where “bereaved partner” replaces “widow, widower or surviving civil partner” and “deceased partner” replaces “deceased spouse” or “deceased civil partner”.

Qualified cohabitants who qualify for this scheme will be eligible for payments for deaths that occurred before the 22nd January 2024 but with payment from 22nd January 2024.

Head 5

This Head provides for the substitution of Chapter 21 to allow for the changing of the scheme name to “Bereaved Parent Grant” and to expand eligibility to the scheme for “qualified cohabitants”.

Section 137(1) updates the schemes a person must be in receipt of to be eligible for this grant by deleting “widow’s, widower’s or surviving civil partner’s contributory pension” and replacing it with the new scheme name “bereaved partner’s (contributory) pension”. Section 137(2) provides for new and amended definitions to exclude a person who is divorced or separated for more than two years from now having eligibility for the scheme and to include “qualified cohabitant” in the Scheme,

A new section 137(3) is inserted as a saver clause to ensure that the eligibility criteria for divorcees or those who are separated and are in receipt of the grant will continue to exist on enactment of the legislation.

It is proposed that this payment would be available only for qualified cohabitants who meet the eligibility criteria after commencement of the Act, therefore the Grant will only be payable for deaths on or after the commencement of the Act.

Head 6

This Head has consequential amendments to section 139 (Description of Assistance) by amending the name of the scheme to “bereaved partner’s (non-

contributory) pension and guardian's payment (non-contributory)" from "widow's (non-contributory) pension, widower's (non-contributory) pension, surviving civil partner's (non-contributory) pension and guardian's payment (non-contributory)".

Head 7

This Head provides for changes to Chapter 6 of Part 3 of the Act which contains the rules for the widow's (non-contributory) pension, widower's (non-contributory) pension, surviving civil partner's (non-contributory) pension and guardian's payment (non-contributory) and to expand eligibility to the scheme for "qualified cohabitants".

The Chapter title is changed to reflect the new scheme name, "Bereaved Partner's (Non-Contributory) Pension, Guardian's Payment (Non-Contributory)".

The Head provides for new and amended definitions in Section 162 to exclude a person who is divorced or separate for more than two years from now having eligibility for the scheme and to include "qualified cohabitant" into the Scheme.

A new section 162A is inserted as a saver clause to ensure that the eligibility criteria for divorcees or those who are separated for more than two years and who are in receipt of WNCP will continue to exist on enactment of the legislation.

Sections 163 and 167 have consequential changes to include the definition of "qualified cohabitant".

Qualified cohabitants who qualify for this scheme will be eligible for payments for deaths that occurred before the 22nd January 2024 but with payment from 22nd January 2024.

Head 8

This Head has consequential changes to Part 1 of Schedule 2 to the Act to provides for "Bereaved Partner's (Contributory) Pension" as the new scheme name.

Head 9

This Head has consequential changes to Part 1 of Schedule 4 to the Act to provide for "Bereaved Partner's (Non-Contributory) Pension" as the new scheme name.

Additional Material

*Section 172 of the Civil Partners and Rights and Obligations of Cohabitants
Act 2010*

Department of Social Protection

28 June 2024