



**Analysis & Recommendations
concerning the General Scheme
of the Social Welfare (Bereaved
Partner's Pension) Bill 2024**

Submission to the Oireachtas Committee
on Social Protection, Community and
Rural Development and the Islands

July 2024

About FLAC

FLAC (Free Legal Advice Centres) is an independent human rights and equality organisation, which exists to promote access to justice. Our vision is of a society where everyone can access fair and accountable mechanisms to assert and vindicate their rights, including economic, social and cultural rights. FLAC operates a telephone information and referral line (from which approximately 12,000 people receive basic legal information each year) and phone advice clinics (from which over 3,300 people received basic legal advice in 2023).

As an Independent Law Centre, FLAC takes on a number of cases in the public interest each year. As well as being important for the individual client, these cases are taken with the aim of benefiting a wider community. FLAC also operates a Roma Legal Clinic, Traveller Legal Service and LGBTQI Legal Clinic.

FLAC makes policy recommendations in relation to social welfare law, equality and anti-discrimination law, human rights and access to justice. This includes policy reports and submissions to national and international bodies, including Oireachtas Committees and human rights bodies.

FLAC is a member of the Department of Social Protection's Migrant Consultative Forum. We are also a member of the Chief Justice's Access to Justice Committee and the Review Group for the Department of Justice's current Review of the Civil Legal Aid Scheme.

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Introduction

FLAC welcomes the opportunity to make a submission to the Committee on Social Protection, Community and Rural Development and the Islands (“**the Committee**”) to inform their pre-legislative scrutiny of the General Scheme of the Social Welfare (Bereaved Partner’s Pension) Bill 2024 (“**the General Scheme**”).

This submission is informed by FLAC’s experience as an independent law centre. FLAC frequently acts on behalf of clients in social welfare matters, including cases heard by the Social Welfare Appeals Office and the courts. Since 2015, social welfare has consistently been one of the areas of law in which FLAC most frequently provides legal representation.¹

FLAC represented John O’Meara and his children Jack, Thomas and Aoife in their successful challenge to the existing survivor’s pension legislation which only provides for payments to bereaved families in circumstances where the parents had been married or in a civil partnership. In January this year, the Supreme Court declared that the legislation excluding the family from access to a survivor’s pension is unconstitutional by reference to the Constitution’s guarantee of equality before the law.² The purpose of the legislation outlined in the General Scheme is to give effect to the Supreme Court’s decision.

Throughout 2024, FLAC has regularly been contacted by families and representative organisations seeking information and advice on the implications of the *O’Meara* judgment on welfare rights.

We welcome the progression of legislation to provide clarity in this area. We look forward to engaging with the Committee and we would be happy to provide any further information which would be of assistance as they consider this important legislation.

¹ For example, Social Welfare cases constituted 18.2% of FLAC’s overall open case files in 2021 and 26.7% of new files opened in 2021. Social Welfare files constituted the largest category of case files dealt with on behalf of callers to FLAC’s Roma Legal Clinic and the largest number of new files opened by that service.

² [O’Meara & Ors v The Minister for Social Protection](#) [2024] IESC 1.

Summary

The legislation outlined in the General Scheme gives effect to the *O'Meara* judgment by expanding entitlement to social welfare schemes aimed at bereaved partners and families to qualified cohabitants and their children. We very much welcome the decision to include bereaved cohabitants who do not have children (albeit subject to a requirement to have lived together for a longer period of time) and the use of the pre-existing legal definition of "qualified cohabitant".

However, we have a number of concerns with the provisions outlined in the General Scheme:

Removal of Entitlement to Survivor's Pensions from Separated and Divorced People

At present, people who are separated or divorced from a spouse or civil partner may access a survivor's pension if that spouse or civil partner dies, provided that they (the surviving partner) have not remarried and are not cohabiting with someone else. The General Scheme would remove this entitlement and people currently claiming on this basis would lose their payment after the enactment of the amending legislation. There is no clear rationale for this change and it may run contrary to the principles underpinning the *O'Meara* decision.

In *O'Meara*, the Chief Justice placed an emphasis on "*the rights of all children, and obligations of their parents, irrespective of the status of their parents*" and the legislation which treated the children of cohabiting parents less favourably than the children of married parents or civil partners was declared unconstitutional. We do not see any objective justification for the introduction of legislation which distinguishes between the children of separated or divorced parents and children whose parents are married, in a civil partnership or cohabiting.

Changes to the Entitlements of People who suffer a Second Bereavement

The rules around access to the contributory version of the survivor's pensions currently provide for favourable treatment of people and families who have suffered multiple bereavements. This is reasonable and compassionate.

Under the provisions set out in the General Scheme, those who suffer the loss of a second partner before the enactment date will still be able to claim the pension (or rate of pension) that they were entitled to after the loss of their first partner. However, rather arbitrarily, those who suffer a second bereavement after the enactment date will not be able to avail of this exception to the general rule whereby remarriage extinguishes entitlement to the pension. Again, there is no clear rationale for the levelling-down of social welfare entitlements in this area.

Arrears & Retrospectivity

The General Scheme provides for the payment of Death Benefit and pensions for surviving qualified cohabitants with effect from 22 January 2024 i.e. the date the Supreme Court made its declaration of unconstitutionality in *O'Meara*. However, the extent to which this will give rise to any entitlement to arrears starting from 22 January 2024 is unclear in light of the strict rules around back-dating claims.

There may be many people whose entitlement to payments pursuant to the provisions set out in the General Scheme arises from the loss of a cohabiting partner long before 22 January 2024. The General Scheme makes no provision for payments to surviving qualified cohabitants in respect of the period prior to 22 January 2024.

Access to Justice & Awareness of Rights

The legislation outlined in the General Scheme would amend the social welfare code in a manner which could give rise to changes to the entitlements of thousands of individuals and families. The right of access to justice requires measures to ensure that people are aware of their legal rights and how changes in the law may impact them.

Rights & Equality for Diverse Families

The General Scheme is proof that rights and equality for diverse families (such as families based on cohabitation) can be effectively enhanced through ordinary legislation. We hope that this progress will be built upon in the future through the provision of practical supports for diverse families (including, for example, single parent families) in social welfare and other areas of law.

Recommendations

The Committee should recommend that the Social Welfare (Bereaved Partner's Pension) Bill 2024:

- ▶ Retain the current entitlement of divorced and separated partners to a survivor's pension and also expand it to surviving qualified cohabitants who were separated (rather than taking the 'levelling-down' approach suggested in the General Scheme).
- ▶ Retain the favourable treatment afforded to those who have lost two partners and expand it to include situations where the bereaved and the deceased were qualifying cohabitants in either or both instances.

The Committee should seek clarity from the Department of Social Protection on:

- ▶ The approach which will be taken to arrears and, in particular, whether it is intended to pay arrears beginning from 22 January 2024 to surviving qualified cohabitants whose entitlement to a pension arises from a bereavement prior to that date.
- ▶ The number of people who have previously been refused access to a survivor's pension on the basis that they were not married or in a civil partnership with their partner.
- ▶ Whether the Department intends to re-examine those decisions or provide compensation for the periods of time prior to 22 January 2024 during which survivor's pensions were unavailable to surviving qualified cohabitants.

The Committee should recommend that the Department:

- ▶ Carries out a targeted 'take-up' campaign and ensures that information and advice is available to those whose entitlements will be impacted by the General Scheme including, for example, through a 'help line'.
- ▶ Provides detailed guidance (and training) to decision-makers which specifically deals with decisions on whether an individual was a "qualified cohabitant" and with back-dating claims for survivor's pensions made by people who were previously excluded because they were a cohabitant.
- ▶ Collaborates with the Citizens Information Board and relevant representative organisations such as Treoir and One Family in promoting take-up and providing information and advice. These groups should also be provided with relevant training and guidance.

The Committee should engage with relevant representative organisations such as Treoir, One Family and the National Women's Council of Ireland about the General Scheme, as well as in relation to the treatment of diverse families (such as families based on cohabitation and single parent families) in the area of social welfare more broadly.

1. The *O'Meara* Case and its Implications

The decision of the Supreme Court in *O'Meara* provides the context for the General Scheme and it is the reason that legislation is being introduced in this area. The judgment puts in place important minimum standards which the proposed legislation should comply with and also provides guiding principles which should inform it.

Legal & Factual Background to the Case

John O'Meara lived with Michelle Batey in a stable, intimate and committed relationship for almost 20 years. They had three children together (Jack, Thomas and Aoife) and they built a family home in Tipperary.

Mr O'Meara and Ms Batey had planned to marry after her recovery from breast cancer in 2020. However, in January 2021, Ms Batey tragically died after contracting Covid-19. Mr O'Meara applied for a Widower's Contributory Pension payment on behalf of his family after his partner's death.

The rules governing entitlement to that payment are set out in Chapter 18 of Part 2 (sections 123 to 129) of the Social Welfare Consolidation Act 2005 (as amended) ("**the 2005 Act**"). Section 124(1) of the 2005 Act provides that, subject to certain conditions, "a widow, widower or surviving civil partner shall be entitled to a pension..." The relevant definitions of "widow", "widower", "spouse" and "civil partner" in section 123 of the 2005 Act only refer to people who were married or in a civil partnership.

Mr O'Meara's application was refused solely on the basis that he and Ms Batey had never been married. The family were represented by FLAC in a challenge to that the decision and the legislation on which it was based. The initial negative decision of the High Court was overturned on appeal to the Supreme Court.

The Decision of the Supreme Court

The O'Meara family contended that the legislation was unconstitutional on two grounds:

- First, that their exclusion from access to the payment was unconstitutional discrimination, contrary to Article 40.1 of the Constitution (the Equality Guarantee).³
- Second, that the legislation was contrary to their rights under Article 41 of the Constitution ('The Family').

³ Article 40.1 of the Constitution states: "All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

It was on the basis of the first argument concerning equality that the Chief Justice found in favour of the applicants in his majority judgment. At paragraph 32 of his decision, the Chief Justice stated that:

“[T]here is no distinction, and certainly no relevant constitutional distinction, between children in a long-standing non-marital unit such as the O’Meara’s, and those of a comparable family whose parents were married. Significantly, nor is there any difference in the duties and obligations the parents married or unmarried owe to their dependent children.”

O’Meara is the first decision of the Irish Supreme Court which has found that legislation which distinguishes between marital and non-marital families cannot be justified and is contrary to the constitutional guarantee of equality.

Key Findings in the *O’Meara* Decision

The Chief Justice held that while the Constitution does allow for distinctions based on marital status in how families are treated under the law (i.e. in legislation), not all distinctions are allowed and some may give rise to unconstitutional discrimination. He stressed there is generally an extremely high threshold for establishing that legislation which concerns the allocation of resources (such as social welfare law) is discriminatory.⁴ However, there were two key factors which led to the declaration of unconstitutionality in *O’Meara*:

- The first was the nature and purpose of the payment in question and the fact that the rules dictating entitlement to the payment had an impact on the rights of children and families.⁵
- The second was the fact the distinctions drawn in the legislation were irrational and resulted “*in some people being treated as inferior for no justifiable reason*”.⁶

The Chief Justice described the Widower’s Contributory Pension and its purpose as follows:

⁴ See paragraph 22 of the majority judgment of the Chief Justice in *O’Meara*: “It is also to be remembered that social welfare provisions are matters where the Court has afforded the State a broad margin of appreciation because any particular provisions under scrutiny are only part of a larger legislative patchwork, and which involve broader decisions on raising revenue and spending it, which are generally considered to be a matter for the Executive and subject to specific scrutiny by the Legislature...”

⁵ See paragraph 15 of the majority judgment of the Chief Justice in *O’Meara*: “It is, in my view, manifest that it is permissible to distinguish on grounds of marital status, but also, that it does not follow that all such distinctions, particularly those consequential distinctions in respect of rights of families and children, will be consistent with the Constitution”

⁶ See paragraph 25 of the majority judgment of the Chief Justice in *O’Meara*: “...the challenge can only succeed if the legislative exclusion is grounded upon some constitutionally illegitimate consideration, and thus draws an irrational distinction resulting in some people being treated as inferior for no justifiable reason. The Constitution does not permit the court to determine that the plaintiff should be included simply because a more inclusive policy, assimilating more people sharing some relevant characteristic into the class, would be ‘fairer’.”

“WCP addresses a particular need: the financial loss experienced by a spouse and children on the loss of a partner and parent, who may have been a financial provider for the family or did work that will otherwise have to be accounted for. It also recognises the desirability that the surviving spouse should be relieved of the financial obligation to work in the period following the death of a spouse and parent.”⁷

In his reasoning, he stated that “*it is relevant... that the [Widower’s Contributory Pension] is a social welfare benefit payable in the event of the occurrence of an event giving rise to a recognised need for support*”⁸ and noted that the payment may be increased in recognition of the fact that the surviving spouse or civil partner is a parent who incurs “*the additional costs and expenses associated with maintaining any dependent children*”.⁹ He then highlighted that:

- “*...bereavement and the impact of the death of a partner, both emotional and financial, is not in any way different whether the survivor is married or not. The loss of a loving parent has the same impact on children, whatever their parents’ marital status*”,¹⁰ and
- “*[the] costs, and the loss to the surviving parent and the children arising from the death of the deceased parent, do not differ by reference to the marital status of the parents.*”¹¹

The Chief Justice emphasised that:

“The Constitution as interpreted, recognises the rights of all children, and obligations of their parents, irrespective of the status of their parents... Significantly, [there is no] difference in the duties and obligations the parents married or unmarried owe to their dependent children. In the light of the essential equality of children under the Constitution vis-à-vis their parents, and the rights which they all have to look to their parents for support, both emotional and financial, and the loss which they all suffer on the death of a parent, the stark differential treatment in the 2005 Act requires particular justification.”¹²

In finding that no such justification exists, he noted the inconsistent and contradictory nature of the rules dictating entitlement to the Widower’s Contributory Pension:

⁷ Paragraph 34 of the majority judgment of the Chief Justice in *O’Meara*.

⁸ Paragraph 30 of the majority judgment of the Chief Justice in *O’Meara*.

⁹ Paragraph 31 of the majority judgment of the Chief Justice in *O’Meara*.

¹⁰ Paragraph 30 of the majority judgment of the Chief Justice in *O’Meara*.

¹¹ Paragraph 31 of the majority judgment of the Chief Justice in *O’Meara*.

¹² Paragraph 32 of the majority judgment of the Chief Justice in *O’Meara*.

“Perhaps particularly significantly, the differentiation [between who is entitled to the payment] is not even made on the basis of *present* marital status. The section refuses any payment by reference to a child of a non-marital couple no matter how well established they were at the time of death, but permits it in the case of children of a divorced couple who were, by definition, not married at the time of the death of one party and who may indeed have gone their separate ways many years before. Such a couple are by definition not married at the time of death, and the fact that they were married at one time is not in my view a sufficient basis for treating them *as parents* differently and better than otherwise comparable parents who had never married at all, and may have been together at the time of the death of one partner.”¹³

Further, the legislation provides that a person who was entitled to the Widower’s Contributory Pension (after the death of a spouse or civil partner) loses their entitlement if they begin to co-habit with another person. As a result, it can be said that the legislation “*recognises that an unmarried partner supplies the same benefits to a partner and children as a married partner does for the purpose of removing the benefit, but does the opposite when granting it*”.¹⁴

Taking these factors into account, the Chief Justice concluded that “*insomuch as the section permits payment of WCP to be made to a surviving spouse with dependent children, but refuses any such payment to a surviving partner of a non-marital relationship with dependent children, the section makes a distinction that is arbitrary and capricious and which is not reasonably capable when objectively viewed in the light of the social function involved of supporting the precise classification challenged and therefore fails to hold them as parents, equal before the law*.”¹⁵

Implications of the O’Meara Decision

The Supreme Court declared that section 124 of the 2005 Act is unconstitutional “*insofar as it does not extend to Mr O’Meara as a parent of the second, third and fourth appellants*” and quashed the decision to refuse the O’Meara’s access to the payment. The Chief Justice noted that:

“This is not a complete solution for the appellants since it would require a legislative amendment to positively provide for benefit in their case. It remains a matter for

¹³ Paragraph 33 of the majority judgment of the Chief Justice in *O’Meara*.

¹⁴ Paragraph 34 of the majority judgment of the Chief Justice in *O’Meara*.

¹⁵ Paragraph 35 of the majority judgment of the Chief Justice in *O’Meara*.

the Oireachtas to consider how best to make provision for benefit consistent with the provisions of Article 40.1 of the Constitution.”¹⁶

Accordingly, legislation is needed to amend the Widower’s Contributory Pension scheme and other social welfare schemes which extend to bereaved spouses, civil partners and their children but which exclude surviving co-habitants and their children. These schemes must be augmented, at a minimum, to include families such as the O’Meara’s who are described in the judgment as a “*long-standing non-marital unit*” (paragraph 32) and a “*committed, stable, and long-term family unit*” (paragraph 1).

2. Overview of the General Scheme

In light of the *O’Meara* decision, the General Scheme proposes amendments to the social welfare schemes which are currently payable to widows, widowers and surviving civil partners, but not to surviving cohabitants. These payments are:

- The Widow’s, Widower’s or Surviving Civil Partner’s Contributory Pension (as discussed above). The pension is a weekly payment made to an individual on the death of their spouse or civil partner with increases available in respect of qualified children. Entitlement is based on the PRSI contributions of either the bereaved or their deceased partner.
- The means-tested Widow’s, Widower’s or Surviving Civil Partner’s (Non-contributory) Pension which is provided for in Chapter 6 of Part 3 (sections 162 to 167A) of the 2005 Act. The scheme does not provide for dependent children and there are special rules around the entitlement of bereaved partners to One Parent Family Payment.
- Death Benefit under the Occupational Injuries Scheme which is provided for in section 81 of the 2005 Act. The payment is made to the surviving partner of a person who died as a result of an accident at work, an occupational disease or who was in receipt of a Disablement Pension concerning a loss of faculty of 50% or more at the time of their death.
- The Widowed or Surviving Civil Partner Grant which is provided for in Chapter 21 of Part 2 (section 137) of the 2005 Act. The grant is once-off payment to widows, widowers or surviving civil partners with dependent children. The payment is available to individuals in receipt of the contributory survivor’s pension, Death Benefit and One Parent Family Payment.

¹⁶ Paragraph 159 of the majority judgment of the Chief Justice in *O’Meara*.

Each of these payments are currently available to individuals who were separated or divorced from their deceased spouse or civil partner. The changes the General Scheme would bring about are as follows:

Head 1 (Introducing “Qualified Cohabitants” & Renaming the Survivor’s Pension Schemes)

Head 1 makes changes to section 2 of the 2005 Act to introduce the term “qualified cohabitant” and to facilitate the renaming of the two versions of the survivor’s pension as the Bereaved Partner’s Contributory Pension and Bereaved Partner’s Non-Contributory Pension.

Head 2 (Renaming the Contributory Pension & the Bereavement Grant)

Head 2 updates section 39 of the 2005 Act to refer to the renamed “bereaved parent grant” (formerly the Widowed or Surviving Civil Partner Grant) and the “bereaved partner’s (contributory) pension”.

Head 3 (Amendments to the Death Benefit scheme)

Head 3 replaces section 81 of the 2005 Act and updates the rules around entitlement to Death Benefit. Relying on the definitions set out in the proposed new sections 123 and 123A (set out in Head 4), it expands entitlement to bereaved partners who were ‘qualified cohabitants’. The adoption of these new definitions also means that, after the date of enactment, people who were separated or divorced from their partner when they died will no longer be entitled to Death Benefit.

The proposed new section 81(9) provides that Death Benefit will be payable to surviving qualified cohabitants with effect from 22 January 2024.

Head 4 (Bereaved Partner’s Contributory Pension)

Head 4 makes significant amendments to Chapter 18 of Part 2 of the 2005 Act to include surviving qualified cohabitants in the contributory version of the survivor’s pension scheme, now titled the Bereaved Partner’s Contributory Pension.

In section 123(1), new definitions of ‘widow’, ‘widower’, and ‘civil partner’ would exclude people who have been separated from their deceased partner for at least two years immediately prior to the date of the death or who were divorced from their deceased partner from access to the payment.

The proposed section 123A adopts the same definition of “qualified cohabitants” as section 172 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (as amended) (**“the 2010 Act”**). “Qualified cohabitant” is defined as one of two adults who lived as *“an exclusive couple in an intimate and committed relationship within the State”*. Further,

in order to be considered a qualified cohabiting couple, the two individuals must have lived together for a period of at least two years in cases where there are dependent children, or at least five years in all other cases. In assessing whether an individual is a qualified cohabitant, regard will be given to the following factors: the duration of the relationship, the living arrangements of the couple, the degree of financial dependence on either partner, the presence of dependent children, the degree to which the adults present themselves to others as a couple and the caring duties towards the children of the other partner. Documentary proof to demonstrate the nature, extent and duration of the relationship of qualified cohabitation will be required.

Section 123A(3) states that an individual will not be considered a qualified cohabitant (and will not be entitled to a pension) if they ceased to be qualified cohabitant two years prior to the date of the death of their deceased partner.

The proposed new section 124(6) provides that: *“A pension, in the case of a bereaved partner whose claim for pension is based on being a surviving qualified cohabitant, shall be payable from 22 January 2024.”*

The proposed new section 124(4) concerns instances where an individual has become a bereaved partner twice. It replicates the existing provisions which provide that after the second bereavement, such persons are entitled to receive the pension (or rate of pension) that they were entitled to after the death of their first partner. The proposed new section 124(5), however, provides that section 125(4) will cease to apply after the enactment of the legislation outlined in the General Scheme. This is subject to a new saver clause at section 124A(2) which provides that: *“In the case of a person to whom section 124(4) would have applied before the date of enactment of section 124(5), then notwithstanding its enactment, subsection (5) shall not operate so as to prevent the application of section 124(4) in respect of a claim made after said date of enactment”*. The combined effect of these provisions will be that:

- After the date of enactment, the new section 124(5) will remove the entitlement of people who have suffered a second bereavement to the pension (or rate of pension) to which they were entitled after the loss of their first partner on becoming a bereaved partner again.
- However, people currently in receipt of their original pension (or rate of pension) on the basis of the rule in section 124(4), as well as those who can establish they have/had an entitlement on that basis before the date of enactment will still be entitled to the pension (or higher rate of pension) on an ongoing basis.

There is another saver clause at the proposed new section 124A(1) which provides that the existing definitions which include bereaved ex-partners (i.e. divorced and separated spouses

and civil partners) will continue to apply until the date of enactment. However, such people will no longer be entitled to the payment after the date of enactment and people currently in receipt of the payment will lose their entitlement after that date.

Head 5 (Bereaved Parent Grant)

Head 5 amends the Widowed or Surviving Civil Partner Grant scheme (Chapter 21 of Part 2 of the 2005 Act) which would be renamed the Bereaved Parent Grant.

Under the proposed new section 137(2), the grant would be made available to surviving qualified cohabitants with children and the entitlement of surviving ex-spouses and ex-civil partners with children would be removed.

These changes would take effect from the date of enactment of the legislation outlined in the General Scheme. There is a saver clause at the proposed new section 137(3) which preserves the previous definitions which include ex-partners until the date of enactment. However, it does not appear that such people could be awarded the grant post-enactment, even in circumstances where they are retrospectively awarded a pension for a period before enactment.

Head 6 (Renaming the Non-Contributory Pension & the Bereavement Grant)

Head 6 amends section 139(1) of the 2005 Act to reflect the new scheme titles of “Bereaved Partner’s Non-Contributory Pension” and “Bereaved Parent Grant”.

Head 7 (Bereaved Partner’s Contributory Pension)

Head 7 amends Chapter 6 of Part 3 of the 2005 Act to make the non-contributory version of the survivor’s pension (now titled the Bereaved Partner’s Contributory Pension) available to qualified cohabitants. The proposed new section 163(4) provides that Bereaved Partner’s Non-Contributory Pension will be payable to surviving qualified cohabitants with effect from 22 January 2024.

Again, those who are separated or divorced from their deceased partner would lose their entitlement to the payment and the saver clause at the proposed new section 162A(1) only applies until the date of enactment.

Heads 8 & 9 (Consequential Name Changes)

Heads 8 and 9 update schedules to the 2005 Act to reflect the new names for the survivor’s pensions.

3. Analysis of the General Scheme

The legislation outlined in the General Scheme gives effect to the *O'Meara* judgment by expanding entitlement to social welfare schemes aimed at bereaved partners and families to qualified cohabitants and their children. The choice to include bereaved cohabitants who do not have children (albeit subject to a requirement to have lived together for a longer period of time) is most welcome.

The legislation adopts the existing definition of “qualified cohabitant” from the 2010 Act (where it is used for the purpose of determining whether cohabitants have ongoing financial obligations to each other after the end of their relationship). The use of that definition for the purposes of the relevant sections of the 2005 Act ensures consistency in the legal framework concerning the rights and obligations of cohabitants. An added benefit of this approach is that precedent which emerges from the courts concerning the definition of “qualified cohabitant” for the purposes of the 2010 Act may guide decision-makers applying the definition for the purposes of the 2005 Act.

Aside from these overarching positives, FLAC has a number of concerns with the provisions outlined in the General Scheme:

Removal of Entitlement to Survivor’s Pensions from Separated and Divorced People

At present, people who are separated or divorced from a spouse or civil partner may access a survivor’s pension if that spouse or civil partner dies, provided that they (the surviving partner) have not remarried and are not cohabiting with someone else. The General Scheme would remove this entitlement. This will exclude future claims by people who are divorced or who were separated from their partner for two years before their death and result in the cessation of ongoing claims.

The explanatory notes in the General Scheme do not provide any rationale for the effective levelling-down of the social welfare entitlements of this particular category of bereaved individuals and families. The *O'Meara* decision does not suggest that the inclusion of surviving separated and divorced partners in the existing survivor’s pension schemes is, of itself, irrational. Rather, the inclusion of such individuals and families in the contributory pension scheme was highlighted to emphasise that the scheme is not solely for the benefit of families which are based on marriage or civil partnership at the time when a bereavement occurs. The fact that those families were included while other families which are not based on marriage or civil partnership (such as co-habiting families) were excluded was deemed irrational.

In fact, the judgment emphasised the importance of the payment for all families in light of the financial impact the death of a parent may have. Separated or divorced partners often pay

maintenance to their former partner or in respect of their children. The death of an ex-partner could, as a result, bring about the loss of financial support or maintenance in many cases.

In *O'Meara*, the Chief Justice placed an emphasis on “*the rights of all children, and obligations of their parents, irrespective of the status of their parents*” and the legislation which treated the children of cohabiting parents less favourably than the children of married parents or civil partners was declared unconstitutional. We do not see any objective justification for the introduction of legislation which distinguishes between the children of separated or divorced parents and children whose parents are married, in a civil partnership or cohabiting.

Changes to the Entitlements of People who suffer a Second Bereavement

There is also no clear justification for the rule changes concerning the entitlements of those who have suffered a second bereavement. Under the provisions set out in the General Scheme, those who suffer the loss of second partner before the enactment date will continue to be able to claim the pension (or rate of pension) that they were entitled to after the loss of their first partner (on becoming a bereaved partner again). However, rather arbitrarily, those whose suffer a second bereavement after the enactment date will not be able to avail of this exception to the general rule whereby remarriage extinguishes entitlement to the pension.

The current rules provide favourable treatment to people and families who have suffered multiple bereavements. This is reasonable and compassionate. Again, there is no clear rationale for the levelling-down of social welfare entitlements in this area.

Retrospective Entitlement of Cohabitants who were Previously Excluded

The General Scheme provides for the payment of Death Benefit and pensions for surviving qualified cohabitants with effect from 22 January 2024 i.e. the date the Supreme Court made its declaration of unconstitutionality in *O'Meara*.

We would highlight, however, that the social welfare legislation requires people to claim their entitlements within a specific period from the date their entitlement arises. This period is referred to as the ‘prescribed time’.¹⁷ In cases where a claim is made after the prescribed time, a statutory disqualification is incurred, and payment may not be made for the period of disqualification.¹⁸

¹⁷ Time limits are set out in article 182 of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007.

¹⁸ The prescribed periods of disqualification are set out in section 241 of the 2005 Act.

<i>Payment</i>	<i>Prescribed Time</i>	<i>Disqualification for periods prior to...</i>
Widow's Widower's or Surviving Civil Partner's (Contributory) Pension	Within three months of first entitlement	Six months before the date of claim
Widow's Widower's or Surviving Civil Partner's (Non-Contributory) Pension	Within three months of first entitlement	Date of claim
Death Benefit	Within three months of the death of the deceased	Three months before the date of claim

There may be many people whose entitlement to payments pursuant to the provisions set out in the General Scheme arises from the loss of a co-habiting partner long before 22 January 2024. However, the rules around the prescribed time for making claims and disqualifications may prevent them from accessing arrears in respect of their entitlement to the payment from 22 January 2024 until the time their claim is awarded after the enactment date. Further, the General Scheme makes no provision for payments to surviving qualified cohabitants in respect of the period prior to 22 January 2024.

Consistency & Clarity of the Proposed Legislation

The General Scheme would add complex amendments to already heavily amended and convoluted provisions of the social welfare legislation. We would highlight a number of technical and minor errors:

- The proposed new section 81(10) under Head 3 appears to be extraneous in that it repeats the new rule around ex-partners not being entitled to the pension which is already provided for in the definitions which apply to that section.
- Under Head 4, the word “shall” is missing from the third line of section 124(4).
- Despite making some updates, the General Scheme would leave in place several references to the former titles of the three renamed schemes throughout the 2005 Act.

4. Access to Justice & Awareness of Rights

FLAC understands access to justice as a continuum which encompasses access to legal information, advice and advocacy, access to the legal aid/legal representation, access to the courts and tribunals, fair procedures, effective remedies, just outcomes, and fair and just laws.

In our submission to the current review of the civil legal aid scheme, FLAC highlighted a number of access to justice issues in relation to welfare rights in Ireland and noted that the right of access to justice must be vindicated from the time of initial entitlement to payments

and during all social welfare adjudication processes.¹⁹ Achieving this requires the provision of various forms of legal assistance, including legal information and advice regarding welfare rights, advocacy, public education, training and legal representation.

The right of access to justice also requires measures to ensure that people are aware of their legal rights and how changes in the law may impact them. The legislation outlined in the General Scheme would amend the social welfare code in a manner which could give rise to changes to the entitlements of thousands of individuals and families. The Department of Social Protection should collaborate with the Citizens Information Board and relevant representative organisations such as Treoir to ensure that information and advice is available to those whose entitlements will be impacted by the General Scheme (including, for example, through a ‘help line’) and in carrying out a targeted ‘take-up’ campaign.

It is also incumbent on the Department to provide detailed guidance (and training) to decision-makers which specifically deals with decisions on whether an individual was a “qualified cohabitant” and with back-dating claims for survivor’s pensions made by people who were previously excluded because they were a cohabitant. Any written guidance should be made available to the public and training should also be provided to the Citizens Information Board and relevant representative organisations such as Treoir.

5. Promoting Rights & Equality for Diverse Families

The enactment of the General Scheme would be a significant step towards equality in the social welfare treatment of cohabitants and their families. However, as the Chief Justice highlighted in *O’Meara*, “...*the Statute Book is replete with provisions which distinguish on grounds of marital status...*”²⁰ In fact, his judgment included a list of the “*more significant provisions*”²¹ which make distinctions between married and unmarried persons in areas such as taxation, inheritance and immigration law.²² FLAC’s telephone information and referral line often hears from members of unmarried couples who are experiencing disparate treatment in these areas. The disparities in how diverse families are treated under the law were again brought to the fore in the run-up to the recent referendum concerning the constitutional definition of “the Family”. An Inter-Departmental Committee established to prepare for that referendum undertook a significant ‘mapping exercise’ of the legislation which makes

¹⁹ FLAC (2023), [Stakeholder Submission to the Review of the Civil Legal Aid Scheme](#), Section 11.1: The Potential of a New Approach to Access to Justice for Welfare Rights.

²⁰ Paragraph 153 of the majority judgment of the Chief Justice in *O’Meara*.

²¹ Paragraph 149 of the majority judgment of the Chief Justice in *O’Meara*.

²² His judgment ultimately reaffirmed that entitlement of the Oireachtas to draw such distinctions save in circumstances such as *O’Meara* where the difference in treatment gives rise to unconstitutional discrimination.

distinctions between different kinds of couple and families across all areas of law (but no report on that work has been published to date).

The General Scheme, and the 2010 Act before it, are proof that rights and equality for diverse families (such as families based on cohabitation) can be effectively enhanced through ordinary legislation. We hope that this progress will be built upon in the near future through the provision for practical supports for diverse families (including, for example, single parent families) in social welfare and other areas of law.