

Public Service Pay Bill 2020

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Abstract

The [Public Service Pay Bill 2020](#) (the Bill) is a short Bill to provide for the existing restrictions on increases to public service pay, introduced by the [Financial Emergency Measures in the Public Interest \(FEMPI\) No. 2 Act 2009](#), to be amended to enable the Government to fulfil its ([Programme for Government](#)) commitment to implement a public-only [Sláintecare](#) consultant contract.



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Introduction

The [Public Service Pay Bill 2020](#) (the Bill) was published on Friday, 18 December 2020. As noted in the [Explanatory Memorandum](#) accompanying the Bill, the Bill's purpose is:

“To provide for an amendment of the restrictions on increases to public service pay introduced by the [Financial Emergency Measures in the Public Interest \(FEMPI\) No. 2 Act 2009](#)”.

Under FEMPI legislation, changes to public service pay for particular groups or individuals are only possible through:

1. An Act of the Oireachtas;
2. An order of a court (civil courts, Labour Court, etc.); and/or
3. A determination that there is a legal entitlement to a pay increase.

According to the Minister for Public Expenditure and Reform, Michael McGrath T.D., this “limits the Government’s ability to deliver key policy commitments as they arise”.¹ This Bill will allow the Minister to sanction increases in the pay or allowances of public servants. The objective of this change, according to the [press release](#) accompanying cabinet approval for the Bill’s publication (8 December 2020) specifically relates to the implementation of Sláintecare reforms, and will:

“enable progress on implementation of the Sláintecare Consultant Contract – a key element of the Sláintecare health reform agenda. The contract will require consultants employed by the State to focus 100 per cent of their time on public-only work within the public health system.”

The Minister has elsewhere described the objective of this Bill as “removing the FEMPI handcuffs to allow the Government to enter into a public-only Sláintecare Consultant Contract”.²

The [Explanatory Memorandum](#) does not refer to financial implications for the Exchequer arising from the Bill.³ However, the Department of Public Expenditure and Reform confirmed in correspondence with the Digest’s author that:

“There are no regulatory impacts associated with the proposed amendments. The legislation does not entail any additional expenditure nor result in any indirect costs.”

The Bill has not been subject to the pre-legislative scrutiny (PLS) process⁴ and no General Scheme was published to outline the heads of the Bill.

¹ MerrionStreet.ie (2020) ‘Cabinet approves publication of new Public Sector Pay Legislation’, 8 December 2020 – available at https://merrionstreet.ie/en/news-room/releases/cabinet_approves_publication_of_new_public_sector_pay_legislation.html

² As described by Minister McGrath during an interview on Newstalk radio (Newstalk Breakfast) on 9 December 2020 – available online at <https://www.newstalk.com/podcasts/highlights-from-newstalk-breakfast/new-public-service-pay-bill>

³ Typically, such implications are detailed in the ‘Explanatory and Financial Memorandum’.

⁴ See Library & Research Service (2017) *The legislative review loop of Government legislation [infographic]* for more information on the legislative process – available at https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2017/2017-04-10_the-legislative-review-loop-of-government-legislation_en.pdf

Principal provisions of the Bill

The Bill contains 6 sections, as summarised below:

Section	Title	Effect
1.	Definition	Defines <i>the Financial Emergency Measures in the Public Interest (No. 2) Act 2009</i> as the “Act of 2009”.
2.	Amendment of section 4 of Act of 2009	Amends section 4 of the Act of 2009 to provide that in addition to changes to pay arising from: <ul style="list-style-type: none"> ▪ an Act of the Oireachtas; ▪ an order of the civil courts; ▪ an order of the Labour Court, or ▪ a determination that there is a legal entitlement to a pay increase, the Minister for Public Expenditure and Reform may sanction increases in the pay or allowances of public servants.
3.	Amendment of section 5 of Act of 2009	Amends Section 5 of the Act of 2009 to provide for retrospective application , up to the date on which this proposed Act is enacted, of a provision allowing for amendment of contracts of employment to increase pay.
4.	Amendment of section 16A of Ministers and Secretaries (Amendment) Act 2011	Amends Section 16A of the <i>Ministers and Secretaries Act 2011</i> to ensure that where a contract of employment is amended in accordance with Section 4 of the Act of 2009 (as amended by this proposed Act), that no further Ministerial sanction is required under the <i>Ministers and Secretaries Act 2011</i> .
5.	Amendment of section 24 of Public Service Pay and Pensions Act 2017	Amends Section 24 (3) of the <i>Public Service Pay and Pensions Act 2017</i> to align the date for repeal of certain restrictions on increases to public service pay with the date on which this proposed Act is enacted.
6.	Short title	Provides for the short title which may be cited as the <i>Public Service Pay Act 2020</i> .

FEMPI legislation

The Financial Emergency Measures in the Public Interest (FEMPI) legislation introduced public service pay-related⁵ and pension-related reduction measures which led to a reduction in the public sector pay and pension bill. There are four main Acts which constitute the FEMPI legislation as they relate to pay, as follows:

Table 1: Overview of the FEMPI ‘principal pay change’ legislation (2009-2013)

Legislation name	Purpose
<i>Financial Emergency Measures in the Public Interest Act 2009</i>	Introduce several emergency measures related to pay, including: <ul style="list-style-type: none"> ▪ Introduction, from 1 March 2009, of a new deduction from the wages/salaries of pensionable public servants (the Pension-related Deduction, PRD). The PRD has since been replaced by the Additional Superannuation Contribution (from 1 January 2019); ▪ Provides for public service bodies to reduce professional fees paid by them to external service providers;
<i>Financial Emergency Measures in the Public Interest (No. 2) Act 2009</i>	Apply reductions of between 5% and 20% in the gross pay levels of majority of public servants, effective from 1 January 2010. This was to facilitate a reduction in the gross pay bill cost of public servants by some €1 billion in 2010.
<i>Financial Emergency Measures in the Public Interest Act 2010</i>	Apply a reduction in the pay rates of members of the Government and a reduction to the National Minimum Wage.
<i>Financial Emergency Measures in the Public Interest Act 2013</i>	Implement a further reduction for public servants earning annual salaries of more than €65,000 and a reduction in public service pensions over €32,500.

Source: Gov.ie, [Financial Emergency Measures in the Public Interest \(FEMPI\) Acts](#) [accessed 13 January 2021]

In a related 2018 analysis⁶, the Oireachtas Parliamentary Budget Office (PBO) also refers to the the [Financial Emergency Measures in the Public Interest \(Amendment\) Act 2011](#).⁷ The subsequent [Financial Emergency Measures in the Public Interest Act 2015](#) commenced the gradual **unwinding** of the pay and pension measures. According to the [Gov.ie website](#):

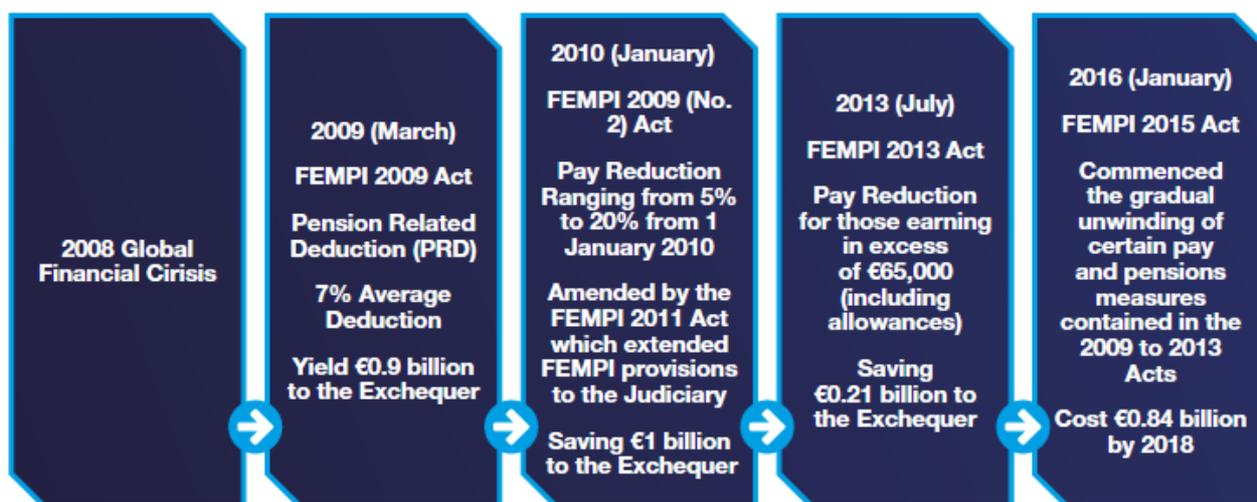
⁵ Changes to public service pay (alone) amounted to an exchequer saving of approximately €2.1bn over the period, directly attributable to the FEMPI legislation.

⁶ PBO (2018) Public Sector Pay and Pensions: Feature and Key Determinants, August 2018 – available at https://data.oireachtas.ie/ie/oireachtas/parliamentaryBudgetOffice/2018/2018-08-16_public-sector-pay-and-pensions-features-and-key-determinants_en.pdf

⁷ The purpose of this Act was/is to apply the *FEMPI Act 2009* and the *FEMPI (No.2) Act 2009* to the judiciary in line with the outcome of the referendum on the [29th Amendment of the Constitution](#) held on 28 October 2011.

“The Financial Emergency Measures in Public Interests (FEMPI) legislation provided the basis for the Public Service Pay and Public Service Pension reductions and the reforms that took place between 2009 and 2015. The implementation of the FEMPI Acts was supported through the [Croke Park Agreement](#) and [Haddington Road Agreement](#).”

A visual summary of the FEMPI Acts (pay measures) is provided below:



Source: Public Service Pay Commission (2017) [Report of the Public Service Pay Commission](#), May 2017.

In relation to the FEMPI Acts the PBO, in a 2018 analysis, identifies four phases:

1. **1998-2007**: Economic growth and increasing expenditure on public pay;
2. **2008-2009**: Tax revenues significantly decrease but expenditure on public pay continues to grow;
3. **2010-2014**: Financial Emergency Measures in the Public Interest (FEMPI) is introduced; and
4. **2015-2018**: Economic recovery and unwinding of FEMPI.

For further detailed information on FEMPI and related issues, see the [PBO analysis](#).

Review of FEMPI

FEMPI legislation is reviewed annually with a report published before June each year, as explained on the same site:

“Section 12 of the [Financial Emergency Measures in the Public Interest \(FEMPI\) Act 2013](#) obliges the Minister of Public Expenditure and Reform to carry out a review of the operation, effectiveness and impact of the Financial Emergency Measure in the Public Interest Acts, having regard to the overall economic conditions in the State and national competitiveness: Annual Reviews of the operation of the FEMPI Acts.”

The most recent Annual Review (2020) was published in [June 2020](#). It refers to the COVID-19 pandemic and its impact on the economy, employment and the public finances, noting that:

“The focus of the Government in the initial phase has been to respond to the immediate public health emergency, limiting the spread of the virus, equipping our Health Service to treat those infected, supporting individuals and businesses who have been adversely affected. In the first instance, the additional expenditure required to respond to the pandemic will be met through an increased Government deficit and national debt. Overall fiscal strategy will evolve as the restrictions are phased out and the economic impact becomes clearer.”

The review concludes [or more precisely, the then Minister for Public Expenditure and Reform concludes] that, due to the “unprecedented” nature of the impact of the pandemic, measures/provisions introduced (and/or amended) in the FEMPI legislation will “continue to be necessary”.

Sláintecare

The implementation of 100% public hospital only consultant contracts is a Government priority. Under the current [Programme for Government](#), Government parties agreed, under ‘*Mission: Universal Health Care*’, Structural Reform (p.44), that:

“We will finalise the new Sláintecare consultant contract and legislate for public-only work in public hospitals.”

Separately, the PfG also includes a commitment to increase the number of public-only consultants (p. 46).

The removal of private activity from public hospitals was a key recommendation of the All-Party Oireachtas Committee on the Future of Healthcare which was contained in its [May 2017 report](#) (also known as the Sláintecare Report). An Independent Review Group was subsequently established by the Government under chair Dr. Donal de Buitléir. The [report of the Independent Review Group](#) (also known as the ‘De Buitléir’ report) was published in February 2019. That report noted (p.7):

“Of existing consultants, the vast majority - about 2,500 consultants - have contractual rights to treat private patients in public hospitals. It will be necessary to enter into negotiations on the proposed “Sláintecare Consultant Contract”. Some consultants with existing private practice rights in their contracts may opt to retain these for some time in the future.”

“This does not mean that significant progress cannot be made. The Hanly Report (DOHC, 2003)¹ recommended that 3,600 consultants be employed by 2013 and we are still some way behind that number. As a result, there is scope to appoint a significant number of consultants, all of whom should be contracted under the new Sláintecare Consultant Contract we outline in this report.”

This means that serving consultants who move to the new Sláintecare ‘public only’ consultant contract will be public employees. All new consultants employed under the new Sláintecare consultant contract will be public (only) employees.

In terms of data, a report by the Irish Government Economic Evaluation Service (IGEES) [entitled 'Health Workforce Consultant Pay and Skills Mix, 2012-2017'](#) notes that (as of end-December 2017)⁸:

- There are **2,971 whole time equivalent (WTE) consultants** employed by the HSE in Ireland;
- Consultants **comprise a small percentage of the healthcare workforce (3%)** with general medical consultants the single largest group;
- The total basic salary costs for WTE consultants in the HSE is €474m per annum. Consultants also receive allowances estimates at €57m. Therefore, **the total pay bill is estimated at €531m per annum (an average of €178,727.70 per consultant)**.

No estimates for the cost of the changes to pay is publicly available and no costs were included in the Explanatory Memorandum accompanying the Bill⁹. The impact on the exchequer finances of removing private activity from public hospitals is referred to in the De Buitléir report (p. 9).

“Most of the costs of implementing the proposal arise under two headings. The first is the removal of income from statutory charges for those who opt for private treatment in a public hospital. The Oireachtas Committee on the Future of Healthcare recommended that this be done over a period of 5 years at a cost of €626 million per annum (although current income from private activity is estimated at €524 million for 2018). It should be noted that because private activity in public hospitals would not cease overnight, this amount will initially be quite low but will increase over time as more patients are treated publicly. This increased cost will be partly offset by the lower cost of tax relief on medical insurance premiums as the cost of premiums will fall as fewer people access private services in public hospitals with a consequent drop in payments for services by insurers. In addition, increased numbers of patients will now be liable for public charges. The second relates to increases in the pay of consultants (both newly appointed and those who opt to change to the new public only contract) which may be necessary to ensure these posts are attractive. We have identified a number of options to meet these costs.”

The Minister for Health, Stephen Donnelly noted, in his response to a recent [Parliamentary Question \(Tuesday, 8 September 2020\)](#) on the topic, also confirmed that:

“It is not envisaged that the introduction of the Sláintecare Contract would involve backpayments”

⁸ The IGEES paper notes (p.14) that there is some variance and gaps in the data but that the dataset used in the author’s analysis “is the best national dataset currently available to undertake this analysis”.

⁹ However, the Department of Public Expenditure and Reform confirmed in correspondence with the Digest’s author that “There are no regulatory impacts associated with the proposed amendments. The legislation does not entail any additional expenditure nor result in any indirect costs.”

Key provisions of this Bill

This section of the Digest examines the key provisions of the Bill.

Amendment of section 4 of *Act of 2009*

Section 2 of this Bill amends [section 4](#) of the *Financial Emergency Measures in the Public Interest (FEMPI) No. 2 Act 2009* (Act of 2009) to provide that the Minister for Public Expenditure and Reform may sanction increases in the pay or allowances of public servants. Currently, changes to public service pay for groups and individuals is only possible through:

- an Act of the Oireachtas;
- an order of a court (i.e. civil courts, Labour Court etc), or
- a determination that there is a legal entitlement to a pay increase,

Section 4 therefore has the effect of restricting pay increases to public servants with three exceptions (as listed above). Section 1 of the *Act of 2009* defines a public servant as:

“a person who is employed by, or who holds any office or other position in, a public service body”.

A ‘public service body’ is defined under Section 1 of the Act of 2009 as:

“a body (other than a body specified or referred to in the Schedule) that is wholly or partly funded directly or indirectly out of money provided by the Oireachtas or from the Central Fund or the growing produce of that Fund and in respect of which a public service pension scheme exists or applies or may be made”.

Amendment of section 5 of *Act of 2009*

Section 3 of this Bill amends [section 5](#) of the Act of 2009 to provide for retrospective application, up to the date on which this proposed Act is enacted, of a provision allowing for amendment of contracts of employment to increase pay.

Section 5 confirms that where the rate of remuneration has been reduced under the Act of 2009, a public servant has no entitlement to receive a higher rate than that provided for under the legislation and the person or body responsible for paying the remuneration of a public servant has no entitlement to pay a higher rate. Section 5 also states that any overpayment should be recovered by the public service body concerned or may otherwise be deducted from any funding provided to the body concerned.

Amendment of section 16A of *Ministers and Secretaries (Amendment) Act 2011*

Section 4 of this Bill amends [section 16A](#)¹⁰ of the [Ministers and Secretaries Act 2011](#) to ensure that where a contract of employment is amended in accordance with [section 4](#) of the Act of 2009 (as amended by this proposed Act), that no further Ministerial sanction is required under the *Ministers and Secretaries Act 2011*.

Section 16A of the *Ministers and Secretaries (Amendment) Act 2011* refers to the control of terms and conditions of public servants. It provides the Minister for Public Expenditure and Reform with the power to preclude public servants from receiving unsanctioned remuneration. More favourable terms, being in excess the amount payable under the approved term or condition, are considered an “unapproved term or condition”. Overpayments, under section 16A, are held in trust by the public servant, to be recovered by the relevant public service body and the unapproved contractual terms is rendered void.

Amendment of section 24 of *Public Service Pay and Pensions Act 2017*

Section 24 of the *Public Service Pay and Pensions Act 2017* repealed certain provisions of the Act of 2009. Section 24(3) specified that subsection (1)(b) (i.e. the repeal of [section 5\(1\)](#) of the Act of 2009) “shall come into operation on 1 January 2021”.

Section 5 of this Bill amends section 24(3) of the [Public Service Pay and Pensions Act 2017](#) to align the date for repeal of certain restrictions on increases to public service pay with the date on which this proposed Act is enacted.

¹⁰ Section 16A was inserted by the [Financial Emergency Measures in the Public Interest Act 2015](#) (No. 39 of 2015), ss. 1(2), 12. The L&RS Bill Digest on that Bill is available at http://vhlms-a01/AWData/Library2/Bills_Digest_FinancialEmergencyMeasuresinthePublicInterestBill2015_FINAL_114226.pdf

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