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Re: Commdt. [REDACTED] & RACO
Ref: TM/SL/RAC101002

Dear Tom,

Your letter dated the 8th December 2011 refers and many thanks for your instructions in relation to this matter.

My opinion and advices in relation to the Public Service Pensions (Single Scheme) and Remuneration Bill 2011 (the 2011 Bill) are as follows.

Public Service Pensions (Single Scheme) and Remuneration Bill 2011

The main purpose of the Bill is to provide for a Single Public Service Pension Scheme to be established and to apply to new entrants into the Public Service. However, the 2011 Bill also includes other provisions including, *inter alia*, provisions to "modernise the law relating to the abatement of pensions in certain circumstances".

For the purposes of the Bill a "public servant" is a person who is employed by, or who holds any office or other position in, a public service body; a "public service body" includes the Permanent Defence Force and the term "Superannuation Acts" includes the Defence Forces (Pensions) Acts 1932 to 2004.

Chapter 4 of Part 2 of the 2011 Bill contains provisions applicable to all Public Service Pension Schemes. Section 51(1) deals with abatement of pensions and provides that where a pension is payable by a public service body to a public service pensioner and the pensioner receives any remuneration from any public service body, then during this time no more of the pension shall be paid than so much as, with that remuneration, equals the pensionable remuneration which the pensioner would have received if he or she was once again working in the position in which he or she served in the public service.

Section 50 operates in tandem with section 51 by imposing certain duties to make declarations. Subsection 1 of section 50 provides that any person who takes up employment in a public service body and has an entitlement to retirement benefits under a pre-existing public service pension scheme must provide a declaration to that effect to

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the relevant authority. Subsection 3 provides that any person to whom section 51 applies must, when applying for a public service pension from any public service body, make a declaration as to whether or not they are in receipt of any remuneration from any public service body.

Abatement of Pensions

The principle of abatement of pensions is well established in relation to the public service generally and the main provisions are to be found in the Pensions (Abatement) Act, 1965, as amended ("the 1965 Act"). Section 1 of the 1965 Act provides for abatement of the pensions of pensioners who are re-employed in the civil service. Section 3 of the 2011 Bill proposes to repeal the 1965 Act in full. The enactment of section 51 will then operate so as to replace the abatement provisions in the 1965 Act.

It appears that heretofore the abatement provisions only applied to pensioners who are re-employed in the civil service and that abatement under the 1965 Act does not apply to employment elsewhere in the public service. The 1965 Act deals with the abatement of allowances of superannuation payable under the Superannuation Acts, the Local Government (Superannuation) Acts and the pensions of members of some semi-State Boards, Ministers, Parliamentary Secretaries and the President. There may be further abatement provisions applicable to other areas of the public service but a full review of all such provisions is outside of the scope of this Opinion.

Defence Forces Pension Schemes

The Defence Forces Pension Schemes made under the Defence Forces (Pensions) Acts 1932 to 2004 are a distinct superannuation code and are different from the codes applicable elsewhere in the public service. Article 15 of the Defence Forces (Pensions) Scheme 1937 (S.I. 249/1937) did provide for abatement of pensions but that article was revoked by the Defence Forces (Pensions) (Amendment) Scheme 1965 (S.I. 154/1965). In the circumstances it appears that the abatement provisions do not currently apply to Defence Forces personnel, save that Officers in receipt of a service pension who are also granted a disability pension have their service pension abated under article 38 of the Defence Forces (Pensions) Scheme, 1937 i.e. where a disability pension is paid in addition to an occupational pension the occupational pension is reduced by a portion of the disability pension.

I also note that abatement of pension provisions applied in relation to persons availing of the Incentivised Scheme of Early Retirement (ISER) – see Circular 12/09. However, it appears that the ISER Circular did not apply to the Defence forces because Officers (who are not new entrants under the Public Service Superannuation (Miscellaneous Provisions) Act 2004) can already retire with immediate pension after 12 years service regardless of age and similarly enlisted personnel may retire with immediate pension after 21 years service also regardless of age.

Applicability and Commencement of the 2011 Bill

Section 3 and Parts 2 (other than subsections (5) and (6) of section 51) and 3 of the Bill are subject to commencement Orders by the Minister for Public Expenditure and Reform. schemes. Section 51 dealing with abatement of pensions is contained in chapter 4 of Part 2 and will therefore come into operation when the Minister makes a Commencement Order for Part 2.

Section 6(2) of the 2011 Bill specifically indicates that chapter 2 (which provides for the new single pension scheme for all new entrants to the public service) does not apply to pre-existing public service pension schemes. However, section 51 which deals with abatement is contained in chapter 4.

Section 15 of the 2011 Bill is headed "Application of certain provisions in Acts relating to pre-existing public service pension schemes". The Explanatory Memorandum to the 2011 Bill gives the following interpretation of section 15 of the 2011:-

Section 15 (Application of certain provisions of Act to pre-existing public service pension schemes): this section is for the avoidance of doubt and provides that **this Bill will not affect pre-existing scheme members except with regard to pension adjustments (increases) this being subject to the Minister making an order and to the general abatement provisions.**

In my view this is not a correct interpretation of section 15 as it stands. As I read it section 15 relates to the application of provisions in pre-existing public service pension schemes to the new Scheme to deal with corresponding matters or circumstances i.e. it allows the Minister to apply by way of regulation an existing statutory provision (in a pre-existing public service pension scheme) to the new Scheme so long as the existing statutory provision is not inconsistent with the new Scheme.

In any event, I can find nothing in the Bill to prevent the abatement provisions being applied to pre-existing scheme members. The explanation of section 15 in the Explanatory Memorandum (even if it is incorrect in its interpretation of section 15) does indicate a general intention that the abatement provisions will apply to pre-existing scheme members. In this regard I also note that during the second stage reading of the 2011 Bill, Minister Howlin stated as follows:

"Chapter 4 also provides that pension abatement should apply whenever a retired public servant is rehired in the public service, regardless of the sector of the public service into which the person is rehired. At present, contractual or sectoral abatement provisions generally apply but this provision extends the principle to all."

The fact that the Pensions (Abatement) Act 1965 is being repealed also gives a clear indication that section 51 is to apply to existing pensioners.

Comdt. ██████████

I note that Comdt. ██████████ intends to retire from the Permanent Defence Forces and to take employment with ██████████ Institute of Technology. The definition of a "public service body" includes bodies in respect of which a pre-existing public service pension scheme exists or applies. It appears that the Local Government Superannuation Scheme applies to the Institutes of Technology but is branded as the "Education Sector Superannuation Scheme" - see article 3(4) of the Education Sector Superannuation Scheme (Transfer of Departmental Administration and Ministerial Functions) Order 2001 (S.I. No. 14 of 2001).

In the circumstances, because ██████████ Institute of Technology is classed as a public service body, the abatement provisions contained in section 51 of the 2011 Bill may apply depending on the level of remuneration paid to Comdt. ██████████ and the level of pension which he will receive in respect of his service with the Defence Forces.

RACO – Retired Army Officers

It further appears that, once commenced, section 51 will also apply to existing retired Army Officers who are working with public service bodies while in receipt of pensions from their former employment.

The only provision I can find that indicates that section 51 might not apply to existing pensioners is the fact that section 50(3) which refers to the duty to make disclosures refers to the declaration (in relation to remuneration from another public service body) being made *upon application* for a public service pension. Existing pensioners will have already applied for their pensions and there appears to be no provision which specifically requires existing pensioners to notify the relevant authority that they are in receipt of remuneration from a public service body. However, section 48, which is more general in nature, provides that any person who is in receipt of a pension under a pre existing public service pension scheme shall give to a relevant authority such information as is necessary for the proper operation of the pre existing public service pension scheme in respect of the pension scheme concerned. "Information" in this context could be construed as including information regarding receipt of remuneration from a public service body.

If the abatement provisions are applied to existing pensioners that will have the effect of altering the terms and conditions of pension payments to Officers who took up their posts under clearly defined and understood terms and conditions. If the new abatement provisions are applied to existing pensioners that will affect their vested rights. This raises issues such as legitimate expectations; the right to earn a livelihood (which includes associated rights (such as the right to a pension); and the possible retrospective effect of the legislation. While the abatement provisions will apply prospectively, it can be argued that the provisions amount to an unjust interference with the existing right to a pension. In this regard, depending on the level of the remuneration paid by the public

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service body, the abatement provisions may operate to completely wipe out the pension of an existing pensioner.

It should be noted that the public service pension reductions which became law via the Financial Emergency Measures in the Public Interest Act 2010 have, to some extent, established a precedent whereby public service pensions can be reduced in order to urgently address the serious position of the public finances. At the time when the public service pension reductions were introduced the Minister for Finance argued that the measures were not retrospective in nature because the actual calculation of the public service pension entitlement was not affected.

I note that the Croke Park Agreement does not appear to contain any specific provisions or guarantees regarding pension levels. In the context of redeployment there are various references to the retention of existing pay and pension terms. Paragraph 1.17 makes reference to the new single pension scheme and indicated that "Discussions will take place on the method of determining pension increases for existing public service pensioners and current public servants in the context of the review of pay policy in Spring 2011." I am not aware whether or not any such discussions took place?

In summary, it appears that clarification should be sought, perhaps at the Committee Stage of the Bill, as to the applicability of the abatement provisions to existing pensioners, in particular their applicability to Defence Forces personnel, who have heretofore not been subject to the general abatement provisions. If necessary, amendments to the Bill should be proposed to ensure that the abatement provisions do not affect existing Defence Forces pensioners. Needless to say the matter will be complicated by the fact that the pensions of some existing public service pensioners are already subject to abatement and the Minister will, no doubt, want to maintain that position.

Trusting this is of assistance and I can advise further in due course, if required.

Yours sincerely,

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