



## **TITHE AN OIREACHTAIS**

**An Comhchoiste um Airgeadas, Caiteachas Poiblí agus  
Athchóiriú**

**Tuarascáil maidir le An Bille um Thithe an Oireachtais  
(Fiosrúcháin, Pribhléidí agus Nósanna Imeachta), 2012**

**Feabhra 2013**

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## **HOUSES OF THE OIREACHTAS**

**JOINT COMMITTEE ON FINANCE PUBLIC EXPENDITURE AND  
REFORM**

**Report on Houses of the Oireachtas (Inquiries, Privileges and  
Procedures) BILL 2012**

**February 2013**

**31/FPER/014**

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## FOREWORD

On the 1<sup>st</sup> November 2012 the Minister for Public Expenditure and Reform wrote of the Joint Committee on Finance, Public Expenditure and Reform in relation to the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Bill 2012, which Minister Howlin advised was approved for priority drafting with a view to early enactment by the Government. The Minister advised that the Government agreed, in parallel with the drafting process, that the Heads of the Bill should be forwarded to the Committee, as the appropriate Oireachtas Committee in this regard, for pre-legislative scrutiny. Minister Howlin requested that the Committee would examine the relevant parts of the draft Bill as a matter of urgency and report its views so as to inform and assist the drafting process.

The Joint Committee, given the work load before the Committee with the approaching budget agreed to schedule, in private session, a comprehensive briefing from Officials from the Department which took place on 13 November. Following this it was agreed to put on the Oireachtas web site the Draft Heads of the General Scheme together with the explanatory memorandum with an invitation to the public to submit observations. This was expedited and in the context of the failed Oireachtas Inquiries referendum in October 2011 and concerns raised in the print media I, as Chairman of the Joint Committee, wrote and invited the editors of all national daily and Sunday newspapers to submit the observations and views that their newspaper may have. Finally, in regard to the Joint Committee, each party and individual members not associated with a party were invited to submit their views on the Draft Heads of the General Scheme.

Responses were received from Fianna Fáil, Sine Féin and the Labour Parties. This report, therefore, publishes the views submitted by the 3 parties who responded. This report is not proscriptive; it reproduces the submissions received which will, no doubt, be considered by Minister Howlin and reflected in the Bill when published. I would like to express my thanks to the members of the Joint Committee.



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Ciarán Lynch T.D.

Chairman

20 February 2013



## **1. BACKGROUND**

On the 1<sup>st</sup> November 2012 the Minister for Public Expenditure and Reform wrote of the Joint Committee on Finance, Public Expenditure and Reform in relation to the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Bill 2012, which Minister Howlin advised was approved for priority drafting with a view to early enactment by the Government (see Appendix III). The Minister advised that the Government agreed, in parallel with the drafting process, that the Heads of the Bill should be forwarded to the Committee, as the appropriate Oireachtas Committee in this regard, for pre-legislative scrutiny. Minister Howlin requested that the Committee would examine the relevant parts of the draft Bill as a matter of urgency and report its views so as to inform and assist the drafting process.

On 13 November members received, in private session, a comprehensive briefing from Officials from the Department (see Appendix IV). The Joint Committee agreed to put on the Oireachtas web site the Draft Heads of the General Scheme together with the explanatory memorandum with an invitation to the public to submit observations. This was expended and in the context of the failed Oireachtas Inquiries referendum last year and the influential and valid concerns raised by the media the Chairman of the Joint Committee, wrote on 20 November 2012 and invited the editors of all national daily and Sunday newspapers to submit the observations and views that their newspaper may have, a list of the Editors are at Appendix V. In regard to the Joint Committee, each party and individual members not associated with a party were invited to submit their views on the Draft Heads of the General Scheme.

Responses were received from Fianna Fáil, Sine Féin and the Labour Parties. The Irish Council for Civil Liberties indicated that it not wish to make a substantive comment on the General Scheme at this time, however, following publication of the final legislation the ICCL reserves a position whereby it may enter into correspondence with the Minister if this is considered necessary.

## **2. Submissions received**

### **A. Labour Party Pre-Legislative Submission: Houses of the Oireachtas (Inquiries, Privileges and Procedures) Bill, 2012 – Submission by Deputy Ciáran Lynch T.D.**

#### **1. Introduction**

The Committee on Finance, Public Expenditure and Reform is pleased to accept your invitation to examine the draft Houses of the Oireachtas (Inquiries, Privileges and Procedures) Bill 2012.

In order to expedite the work of the Committee I have requested each of the political groups to make submissions based on their study of the draft Bill. These submissions will form the basis of the Committee's examination of the Bill.

The following is the Labour Party submission.

#### *Overview.*

The Abbeylara judgment highlighted the fact that the Irish Constitution lacks a specific provision for the holding of Parliamentary Inquiries. Given the electorates' refusal to endorse the Government's attempt to make such a provision this Bill seeks to provide for Inquiries in accordance with the people's wishes.

The draft Bill appears to provide the necessary underpinning of the powers of the Houses of the Oireachtas to Inquire into the conduct of members, officeholders, and those who undertook tasks in the knowledge that they would be subject to Dáil scrutiny. It is very easy to anticipate, however, that any attempt to Inquire into the conduct of a Ministerial officeholder will quickly be covered with the blanket of cabinet confidentiality.

Inquiries proposed under Section 4 of the draft Bill are of limited value but the draft would appear to provide sufficient support mechanisms to complete such an Inquiry should it be required.

It is proposed that under the stratagem of the need for new legislation that it would be possible to undertake an in-depth Inquiry including for, instance, a Banking Inquiry. It appears likely that the Committee will examine this contention in some depth given the caveats embedded in the draft Bill regarding the rights of witnesses and the protections against bias by Inquiry members. The Committee will seek to evaluate whether or not such an Inquiry would be likely to withstand the almost inevitable legal challenge.

Prof David Gwynn Morgan in his submission to the *Committee on the Constitution: Oireachtas Power of Inquiry* referred to "The statement in many of the majority judgments that the Oireachtas lacked the authority to hold an Inquiry, at any rate of the Abbeylara type". Prof Morgan suggested that this lack could be corrected by a Constitutional amendment. Since this Government's attempt to make such a Constitutional adjustment was rejected by the people I am concerned that any Inquiry initiated under Section 5 of the proposed legislation would end up as "Abbeylara II"

There follows, section by section, the initial observations of the Labour Party regarding the draft Bill.

## **2. Questions**

### **2.1 – Heads 4 to 9, Inquiries**

#### **Section 4:**

An Inquiry limited to recording and reporting "facts" has been used once before. The Report of the Sub Committee on Legislation and Security recorded and reported on the fall of the Fianna

Fail-

Labour Government of 1994. The chairman Dan Wallace TD remarked "Neither I nor the other members of the sub-Committee are satisfied with the fact that we have not made findings or judgments but the unequivocal legal advice available to us was that we were precluded from doing so. Committees of the Houses of the Oireachtas should not be constrained in this way and there are a number of recommendations in Section 4 of the report which are intended to deal with this problem for the future."

The report concluded:-

1. There are major conflicts in the evidence taken during the Inquiry. The sub-Committee, in this instance, is advised that it is precluded, for legal and constitutional reasons, from making any findings in relation to the evidence.
2. Committees of the Houses of the Oireachtas should be in a position to conduct Inquiries of this nature and make findings and the fact that this sub-Committee was precluded from making findings should not be used as a precedent in relation to Committees in general.
3. Provided that the legal constraints on the making of findings are dealt with, the experience of this sub-Committee has demonstrated the untapped potential of Oireachtas Committees in conducting Inquiries at reasonable cost. It appears that on the only occasion on which this form of Inquiry was employed that the Oireachtas members were highly critical of its lack of teeth.

What constitutes a fact when witnesses make conflicting statements?

#### Section 5:

If an Inquiry such as the banking Inquiry were to be undertaken under the auspices of this Bill It would have to be held under this heading since section 4 Inquiries record only uncontested facts and Inquiries held under sections 5A, 6 and 7 relate to members of either House or those appointed under statute.

Section 5 purports to be forward-looking and to examine matters in relation to legislative functions and the need for new legislation.

Given the experience of the *Abbeylara* Inquiry it is hard to envisage that anything other than a "desk based" type of Inquiry could be employed to examine the banking crisis and its causes i.e. that the reports already completed by others would be used as a basis for re-examination of the issues. The Oireachtas Inquiry by coming to the same findings could lend weight to the original reports. The question then arises as to how valuable would that be and its standing as having elicited new information.

If contested facts were to be examined by an Inquiry it seems inevitable that, in the absence of a Constitutional grounding, that individuals who are asked to account for their stewardship would seek redress in the courts and that the Inquiry would be undermined by delays and challenges.

#### Section 7:

To whom does the responsibility of securing CEO consent (before the inquiry commences) fall?  
How feasible is it that a CEO may refuse to consent to an inquiry?

#### Section 8:

What time is allotted for debate on such a resolution?  
How soon after a resolution is passed must the inquiry begin?

## 2.2 – Heads 10 to 27, Fair Procedure

### Section 11:

Will the identities of non-members (of the Oireachtas) and of persons that are not the subjects of the inquiry if information that is potentially damaging to their reputations should be revealed during the inquiry? Is there a sufficient amount of protection for witnesses in the inquiry processes set out by this bill?

### Section 12:

Will there be a set time in which an inquiry must commence once a committee confirms its intention to proceed with said inquiry? Will it be possible for involved parties to delay proceedings? Can the bill establish that a resistant witness is engaging in behaviors or actions such as repeatedly entering a court listing but never acting upon same in order to avoid appearing before the committee?

### Section 14:

Is there too great a measure of subjectivity in this matter? What individual or body is to determine whether the integrity of the committee is upheld in regards to each inquiry?

### Section 16:

Will past behaviors and statements of individuals be considered in determining whether or not a committee member is biased? What is a reasonable perception of such bias?

### Section 17:

Is there — or will there be — a mechanism in place to provide legal counsel to witnesses unable to afford such a service? (Including witnesses that are not the subjects of the inquiry?). Under the provisions of this Bill, witnesses are required to see to their own legal costs in a number of situations. What procedures will be set in place for the cross-examination of witnesses?

### Section 18:

Can potentially damaging information be heard by the committee that is conducting the inquiry in private sessions if same information is not disseminated during or after the inquiry?

### Section 22:

This section speaks of findings being used against “any Persons” found to have been involved in wrong doings. Can information be released if it will damage the reputation of a member of the public that was not the subject of and/or who had not consented to the inquiry?

### Section 23:

What checks are put on Committee behaviors?

### Section 24:

(In reference to subsection [e]) Who issues the “relevant report[s]” and are said reports limited to works specifically created by and for inquiries, committees, and/or either one or both of the Houses?

### Section 27:

If information is released during an inquiry that could ‘harm the good name’ of a non-government witness that is also not the subject of the inquiry, will it be possible for this potentially damaging information to be released? (There are no measures in place to restrain non-Oireachtas witnesses). How does the bill set out to deal with potential situations where an established finding of fact could directly or indirectly have an adverse reputational affect for an individual? In light of the above how would the bill deal with a situation in which a witness makes a statement of fact that would have an adverse impact upon their own reputation? [Can



a witness incriminate him or herself?]. Whilst a witness cannot incriminate him or herself can they cause adverse reputational damage in giving evidence of fact?

### *2.3 – Heads 28 to 35, Reports*

#### Section 28:

Will a list of witnesses called upon in each inquiry be released to the public? What if a witness has legitimate reason to fear that his or her public association with the inquiry will be damaging to his or her reputation?

### *2.4 – Heads 36 to 48, Compellability, Privileges and Immunities*

#### Section 38:

Will witnesses be able to defray and costs related to the hiring or retention of legal counsel? Does compellability apply to retired civil servants/general secretaries and can they provide evidence in relation to advices they gave to ministers and other related matters?

### *2.5 – Heads 49 to 54, Miscellaneous and General*

#### Section 50:

In cases of inquiry into corporate behaviors, will it be necessary to secure the consent of all individuals that may be the subjects of the inquiries or to secure only the consent of the CEO?

### *2.6 – Heads 55 to 63, Privilege in Relation to Private Papers and Confidential Communications*

#### Section 56:

Are there to be mechanisms put in place to protect communications passed between non-Oireachtas members who are additionally not the subjects of the inquiry?

#### Section 59:

Is there a general set of rules that all inquiry-conducting committees must comply with to ensure some measure of uniformity across the proceedings held by separate bodies?

### *2.7 – Heads 72 to 83, Costs*

#### Section 72:

What individual or body will be able to track estimates and to ensure that all costs are correctly recorded? Should a committee spend beyond its original estimate, what will occur?

#### Section 74:

Is it possible for un-implicated witnesses to re-coup incurred costs (in part or in full)?

#### Section 78:

Will a single Taxing Officer handle all cases? Will said officer's workload be too heavy?

#### Section 80:

Will involved parties looking to recover costs incurred as a result of the inquiry be made aware of deadlines for cost recoupment applications?

#### Section 81:

Is there a timeframe that applies to this section? For example, how long a period must elapse for the involved party to be considered 'negligent' (see Section 81 [4] of the Bill Heads)

### *2.8 – Head 87, Offence of Intimidation of Witnesses*

#### Section 87:

What individual or body is responsible for addressing allegations of intimidation? What are the penalties for intimidation?

## 2.9 – General

- What would the costs incurred by the implementations of this bill be?
- How much would an average inquiry cost?
- What is the predicted volume of Inquiries?
- Where will funding for inquiries be drawn from?
- Are there any mechanisms to extend the various timeframes found throughout this legislation should extenuating circumstances arise for one or more key parties involved in an inquiry?
- What is the logic behind each timeframe set out in this bill? Is each suggested timeframe reasonable?
- What are the implications in terms of Members' Privilege when it comes to questions to witnesses?

## 3. Conclusion

Parliaments everywhere consider it a basic democratic right to be able to Inquire, on behalf of the people, into matters of public importance.

The Dáil lacks that right because it has been found that the Constitution does not give it that entitlement. The Bill coming before the committee is an attempt to make the best of the situation but it is nonetheless limited. Insofar as it deals with members of the house and those in public positions it is to be welcomed. The strengthening of the powers of the Dáil in regard to impeachments etc. will provide a mechanism for the examination of the conduct of members and officeholders and will facilitate appropriate sanctions.

This submission expresses concerns as to the legal standing in regards to Inquiries into the conduct of non-members and believes this will prove to be a very substantial challenge in the final drafting of the Bill.

The submission also reflects a view that to get the full and thorough investigation model required by Parliament that it will be necessary to convince the public to pass a Constitutional amendment at some future date, upon which Dáil Éireann would be provided with the robust form of Inquiry which is appropriate to a sovereign Parliament.

On behalf of Labour Party members of the Committee on Finance, Public Expenditure and Reform

**B. Fianna Fail Party Pre-Legislative Submission: Houses of the Oireachtas (Inquiries, Privileges and Procedures) Bill, 2012- Submission by Deputy Michael McGrath T.D.**

I would like to acknowledge the request from the Committee on Finance, Public Expenditure and Reform for submissions and observations from interested groups and individuals in relation to the draft Heads of the general Scheme of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Bill 2012.

However, it is unusual to be asked to give full consideration without the actual heads of the Bill being published. Minister Howlin did release a General Scheme on November 13<sup>th</sup> and this includes 120 pages of various sections and brief explanatory notes for each of them.

Before outlining specific reservations about the scheme Labour want to put on record that this scheme is the government's response to the referendum defeat in October 2011. Fianna Fáil believes that the Constitution is something that belongs to the people and we must respect their views.

It is important that the committee and government should learn from the referendum result and also be aware that the public unfortunately do not have adequate trust in the political system in these straitened economic times.

The public voted against the format of the Oireachtas Committee of Inquiry put to them by this government by a majority of 53.3% to 46% (116,000 votes).

This government actually decided to change the all-party Oireachtas committee wording from 2010 and added a Bill that actually frightened people as it gave the impression that people's homes could be entered in order to get access to documentation. There was debate about compellability and sanctioning and the public were frightened about the lack of due process.

It is important that we manage expectations and realise that the Oireachtas is not a court system and nor should it be. Most importantly this Bill should not jeopardise or belittle the work of any of the other Oireachtas Committees. The Committee system serves the people and still holds credibility amongst the public.

We want the Bill to stand up to scrutiny and to be fair. Fianna Fáil believe in a properly functioning parliamentary system provided it respects our Constitution and in particular the functions of Ireland's court system. Any Bill that is published must acknowledge due process and fair procedure. Impartiality is crucial so that all people who are called to the Committees are treated fairly.

Part 1

We agree that the title of the Bill should be shortened significantly. It is too convoluted as it stands. It is not clear in Head 3 what exact legislation regulating the Houses now is being repealed and/or being enacted in this Bill. More information is required in this area particularly as it may impact on other Committees.

Part 2

Even though the (new) Committee will only record, and report evidence and may make recommendations it is not clear why there needs to be agreement by the House(s) to undertake such an enquiry.

It is outlined in these heads that the inquiry will be precluded from making findings except in relation to uncontested facts and failures of a person or persons to co-operate with the inquiry or facts which do not affect the good name of any person.

Fianna Fáil has reservations about the need for such a Bill when the other Committees could easily do what is outlined without any new legislation.  
The present Committee system allows for recommendations for new legislation if deemed necessary.

Head 5 (a) deals with impeachment and lists 12 articles/sections of legislation already in place that allows the removal of an officer. What is being proposed allows this new committee of inquiry to conclude findings of contested fact and to make recommendations arising.

Fianna Fáil has reservations about the vagueness of this particular head particularly when it is dealing with potentially very serious issues of impeachment.

Head 6 Fianna Fáil has reservations about this Head as outlined as again findings of fact and recommendations are envisaged about an Oireachtas member following an inquiry into "conduct or capacity as a member". We have serious concerns about how impartiality can be assured in relation to any member of the Oireachtas.

Head 7 As outlined in the scheme this Head outlines how the power of inquiry similar to that of the PAC would be extended to this committee under Article 28.4.1 and Article 33.4 (C&AG) of the Constitution. Fianna Fáil would question the need for this duplication when the PAC already has the powers and is already serving its purpose.

Head 7A This head purposes to address the prevention of duplication and to ensure clear terms of reference. This "gateway mechanism"; will this be done through the Dáil or Seanad or both? With the Whip system how can the Oireachtas ensure that impartiality will be applied and that overlap will be prevented? Is there need to examine where the present Committee system is failing?

Head 8 This Head is meant to outline the requirement of the inquiry and the procedural and organisational aspects of the inquiry proposed. This will include reference to whether an inquiry would be prejudicial to proceedings before a court. This in our view hits the nub of the question of why we actually need this "Inquiries Bill" at all.

If what is outlined in this head is to be determined before an inquiry is to commence it will take considerable time of the Oireachtas and may not even result in an issue being investigated by this new committee. There could be numerous requests by all members of the House to have what they believe to be issues of "national importance" and the Houses may end up spending a huge amount of time to debate whether it deserves an inquiry or not.

Head 9 It is ironic given our above concerns that there is power to wind up the committee of inquiry if there is a delay in the time period. There is also a suggestion that the Houses may also determine to by passing a resolution to terminate an inquiry. There are no circumstances outlined about what would lead the House to come to this determination and we believe this is too vague and could be open to misinterpretation.

### Part 3

Heads 10-27 In these Heads it is outlined that the new committee of inquiry cannot make findings which are:

- Adverse to the good name of any person
- Make findings of civil or criminal liability or
- Attach blame or exonerate any person

It can only make a finding on systems, procedure or policy arrangements or management thereof, and if a person failed to fully co-operate with the inquiry. This is similar to the other Oireachtas Committees so why therefore is it necessary at all.

The area of privilege and immunities are similar to those for proceedings before a court. There is also a suggestion that a person who appears before the new committee will have qualified privilege in relation to defaming another party during his/her evidence unless the Chair withdraws the direction. The scheme actually outlines how the person may apply to Court if they do not comply with the direction of the Chair and then the committee is suspended while the Court considers whether the direction is obeyed or not.

There are sections included allowing a person to apply for a judicial review through the Chair of the committee if there is a breach of requirements.

This we believe will turn into a legal quagmire and will reflect poorly on the Oireachtas itself. The Oireachtas is not a courts system and should not try to aspire to be being such.

Head 12 actually outlines the procedures around compliance and again it is "court like" and includes reference to cross examination yet it is only in Head 17 where legal representation is mentioned and that persons called before this new committee will have to incur their own expenses. This is unprecedented in the Oireachtas. Will the committee members have legal representation during the "cross examination" that is envisaged in this Bill? Does there need to be a possible cost assessment done on this possibility? If there is need for legal representation would the courts not be the most suitable venue for this type of an investigation/inquiry?

Head 14 there is a sweeping reference to the general duties of committee members to "uphold the integrity of the committee maintaining the confidentiality of deliberations and documents". This will be impossible to measure and there are no sanctions outlined for when or if a leak occurs. Again Fianna Fáil would have reservations about what is being proposed here.

Head 16 attempts to outline how to prevent bias from occurring and tries to define how a "reasonable perception of bias" may arise. This we believe is impossible when the Oireachtas has political parties that have policies on most issues.

Head 19 outlines where "the committee is entitled to make a finding adverse to good name" and goes outlines that a person has to get advance notice of this finding, be enabled to counter the finding both before the Committee and in writing. Again this will require legal advice both on the committees' part and in particular the person involved. Again there is potential here for becoming a pseudo court and we believe it is not being thought through and we have not learnt from mistakes of the past.

Head 22 outlines the need for a "burden of proof" where the committee finds against the name of a good person and it must be "on the balance of probabilities". Again we believe this is too legalistic and will actually cause the committee to spend more time before the Courts then doing Oireachtas business.

Why this is entirely necessary if the Inquiries Bill is only meant to be "inquire report and record" is hard to fathom.

Heads 23 – 28 cover areas about informing those who participate and about preservation of documentation.

Again this is overly legalistic in nature for an Oireachtas Committee. It is the government's intention to hold these inquiries in public "except where the Chair or committee. The Commission of Inquiry Act 2004 allows for a speedy investigation and we believe the Finance Committee should review this Act once more as it illustrates that this Bill is not in reality necessary.

Heads 28 – 48 all deal with confidentiality and compellability and there are so many caveats in what is outlined that it is very hard to believe that the committees will have any speedy responses and will have to seek legal advice at every turn particularly in relation to obtaining evidence. This will prove very costly.

There are offices that are excluded for example the Office of the DPP and Attorney General. Offices that are being considered by the Committee of Public accounts may be included. In Head 39 the scheme outlines applying to the High Court where a person disobeys a direction and perjury is also dealt with.

Again Fianna Fáil has reservations about this quasi-judicial process. It is interesting that the government is proposing to exempt a foreign diplomat and we need to see the actual heads of the bill to comment further on this.

Fianna Fáil would have serious reservations about Head 39 where the government plans to provide for the President and Members of the Judiciary to attend a committee in a matter arising under Article 35.4 of the Constitution.

Head 43 the government plan to enable declarations from Garda, Ministers the DPP where security of the state may be in jeopardy if a certain person or documents are released to a committee. This we believe is open to interpretation and again questions the need for this Bill at all.

Head 46 there is a twin track approach outlined to address the evidence of civil servants, members of the army or An Garda Síochána. This allows for “special arrangements” for this new committee but the status quo remains for the other committees. Again this is similar to a court and we have serious reservations about this format.

Heads 49 -54 deal with offences, sanctions and costs. It seems ludicrous that the government are proposing a fine of up to €500,000 or a term of 5 years imprisonment or both for offences under this Bill if enacted. The remaining Heads deal with intimidation of witnesses and laying of documents.

In conclusion Fianna Fáil in this submission are making it clear that we have serious reservations about numerous aspects of the General Scheme of the Inquiries, Privileges and Procedures Bill 2012 as it is now outlined.

It is unfortunate that the actual Heads of the Bill are not yet published but we acknowledge that Minister Howlin has invited submissions prior to drawing them up. It is important that our serious reservations are taken on board as we do not want this Bill to do more harm than good to the Committee procedures in the Oireachtas that has served it so well over many years. There is no point in having a quasi-judicial system in place in the Houses of the Oireachtas.

On behalf of Fianna Fail Party members of the Committee on Finance, Public Expenditure and Reform

**C. Sinn Féin Party Pre-Legislative Submission: Houses of the Oireachtas (Inquiries, Privileges and Procedures) Bill, 2012 – Submission by Deputy Mary Lou McDonald T.D.**

**1 Oireachtas Inquiries Referendum 2011**

The proposed constitutional amendment sought to restore the pre-Abbeylara position whereby an Oireachtas committee could have the same powers of inquiry as any other statutory inquiry. In the Abbeylara case (*Maguire v Ardagh* [2002] IR 385) a joint committee of the Houses of the Oireachtas proposed that a sub-committee should inquire into an incident where a man was shot dead by the gardaí. The committee issued directions to persons to attend and to give evidence subject to cross examination. Member of the gardaí objected.

The Supreme Court held that the Oireachtas could hold enquiries to better direct its purposes, but not of the type envisaged at Abbeylara, because this would have significant effects on the rights of those appearing before it. This was the exercise of a quasi-judicial function. Murray J opined that “an inquiry cannot be compared to a simple search for knowledge to adjudicate on the culpability of citizens in their conduct and cannot in my view be equated with the everyday search for knowledge of facts. That is a governmental power which it seems to me can only be exercised by virtue of power conferred by the Constitution. That power is conferred by the constitution on the judiciary”.

Whilst Sinn Féin supported amending the Constitution to reverse the Supreme Courts Abbeylara judgment we expressed concern with what we felt was a significant shortfall of the proposition. We stated that the initial wording as presented by Government was ambiguous with regard to the position of the Oireachtas in determining natural justice. On that basis we submitted an additional subsection to the legislation – 5°. The conduct of such inquiries shall be regulated in accordance with the law and principles of natural justice.

Following an engagement by Deputy McDonald with the Minister for Public Expenditure and Reform the Government amended the proposed legislation at Report Stage by inserting the following wording into subsection 4 °; ‘with due regard to the principles of fair procedures’. Sinn Féin supported the referendum.

It is not uncommon or indeed unprecedented for parliaments to have such powers of inquiries. The US, Britain and Australia are just a few examples of countries where such powers are regarded as an important thread in the fabric of democracy. The Oireachtas is the peoples’ parliament and politicians are democratically elected to serve and represent their interest. We are also elected to hold to account those who work against the public interest. The Constitutional amendment would have enabled members to fully fulfill this role.

The proposed 30<sup>th</sup> amendment to the Constitution was put to the people on the 27<sup>th</sup> of October 2011 and was defeated with 53% of voters rejecting the proposition.

UCD Professor of Politics David Farrell wrote just days have the defeated referendum “The failure of the referendum on Oireachtas enquiries by 47%/53% is, to say the least, a ‘disappointment’ for the government. But is the result all that surprising? Quite apart from the intense debates over the merit of the proposal (including in a series of posts on this forum), the plain fact is that this referendum fell foul of the well-worn adage: ‘if you don’t know vote no’. It also didn’t help that citizens were not given a greater say in the process leading up the defining the referendum question: the rationale for and design of the referendum question was imposed from the top without any effort to engage with citizens in advance.”<sup>1</sup>

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<sup>1</sup> [www.politicalreform.ie](http://www.politicalreform.ie), Prof. David Farrell, Article ‘The referendum decision: if you don’t know (& if you’re not consulted) vote no’, 30 October 2011

## 2 Opposition to the Oireachtas Inquiries Referendum

The Irish Council of Civil Liberties (ICCL) led the No Campaign under the banner 'Reject Kangaroo Courts'. The organisation stated in October 2011<sup>2</sup> that, 'This amendment would shift power from the courts to the Oireachtas, enabling parliamentary committees to tarnish the good name of people appearing before them, with no certainty that fair procedures would be observed. As the Referendum Commission itself has made clear, there is no guarantee the Courts would have any role in reviewing the procedures adopted by the Houses of the Oireachtas. In the view of the NO Campaign, the proposed 30<sup>th</sup> amendment to the Constitution is capable of turning Oireachtas Committees into kangaroo courts. Oireachtas Committees do need to be overhauled and improved, but only after mature consideration, and in a way that strikes a far better balance between the public interest and the rights of the individual'

Dr. Eoin O'Malley, lecturer in political science in the School of Law and Government at Dublin City University, wrote,<sup>3</sup> "the amendment at the moment seems both ineffectual in achieving its stated goals and dangerous in its curtailment of individual rights. The government has inserted a clause that gives so much power to the Oireachtas (government) that the Oireachtas will not have to think as carefully as it might about future inquiries.

The draft Bill [DRAFT HOUSES OF THE OIREACHTAS (POWERS OF INQUIRY) BILL 2011] published two weeks ago and the associated memorandum set out the circumstances in which inquiries could happen in Ireland. These show that only a majority in the Oireachtas will cause an inquiry and the wording of the amendment make it possible that the Oireachtas could not even legislate to allow a minority cause a parliamentary inquiry. Now why would any government allow the Oireachtas investigate it? We saw the last government's investigations of the Banking crisis which produced three very useful reports (using the recent Commissions of Inquiry legislation) specifically ruled out looking at the government's decisions on the Bank Guarantee Scheme".

Donncha O'Connell, Law Lecturer in NUI Galway and part-time Commissioner at the Law Reform Commission wrote<sup>4</sup> "It is proposed to insert into Article 15 of the Constitution an explicit power for the Houses of the Oireachtas to conduct inquiries into matters of "general public importance" with a clear power to make findings in respect of the conduct of individuals. Somewhat controversially, sub-section 4 of the proposed amendment provides: 'It shall be for the House . . . to determine the appropriate balance between the rights of persons and the public interest for the purposes of ensuring an effective inquiry. . .' It is clear, even from the explanatory memorandum, that the purpose of this sub-section is to minimise the degree to which the courts can 'impede' parliamentary inquiries in challenges that might be taken by individuals affected by such inquiries.

When judicial review is viewed as an intrinsic impediment there is cause for concern. No doubt a benign spin will be put on this by proponents. They will suggest it is intended to prevent well-heeled bankers and other high net-worth malefactors from evading scrutiny. In the current climate such a presumption of guilt is brutally seductive."

Of particular note Mr. O'Connell writes, "But what about mendacious politicians who decide to abuse the inquiry processes of parliament for bad political ends? This kind of thing is not at all unknown in parliamentary systems with long-established systems of parliamentary inquiry. US Senator Joseph McCarthy of Wisconsin is now better known by the "ism" that his parliamentary inquiries into 'Un-American activities' spawned. McCarthyism is an unfortunately Irish-sounding byword for parliamentary moral panics and consequential witch-hunts.

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<sup>2</sup> Irish Council of Civil Liberties. Press Release, 21 October 2011

<sup>3</sup> [www.politicalreform.ie](http://www.politicalreform.ie), Dr. Eoin O'Malley, Article 'Inquiries referendum is lazy measure that won't empower Oireachtas', 24 October 2011

<sup>4</sup> Irish Times, Article 'Proposed inquiry amendment needs careful scrutiny', 16 September 2011



Should the courts not be able to step in to protect against and, if necessary, prevent such abuses? A parliamentary inquiry may be an ordeal but it is not a trial. However, it should not follow that 'due course of law' ought to be jettisoned.

To be fair, the proposal contained in the 30<sup>th</sup> Amendment is more subtle than that. Parliamentary inquiries will adopt and apply natural and constitutional justice principles but, crucially, it shall be a matter for such inquiries to determine what that means in practice. Some commentators are already concerned that this will be interpreted to mean the courts have a very attenuated or even negligible role in reviewing parliamentary inquiries. But just because judicial deference is signalled or perhaps required does not mean deference will be shown. It is difficult to imagine the courts standing idly by as the constitutional right to a good name is unfairly traversed or if due process rights are abrogated by politicians with a keen eye for tomorrow's news headline".

Finally the ICCL also criticised the Government for not facilitating adequate time for the public debate, 'The Referendum Commission leaflet dropped through letterboxes only a week before polling day and there has been no adequate public debate or consultation on these measures'.

### 3 Houses of the Oireachtas (Inquiries, Privileges and Procedures) Bill 2012

The first question must be to ask why the Minister for Public Expenditure and Reform has decided to push ahead with this Bill and indeed why the public scrutiny stage of the legislative continues to be managed in such a rushed fashion.

The Committee has allowed just 13 working days for submissions and observations from interested groups and individuals in relation to the Draft Heads of the General Scheme of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Bill 2012. This is not an adequate timeframe to facilitate even the most proficient legal experts to scrutinise a piece of legislation such as this. I have raised this matter with both the Minister and the Committee Chair on a number of occasions.

The Committee has not scheduled public hearings, even in a limited a form. I formally proposed to the Committee that the Irish Council for Civil Liberties, Dr. Eoin O'Malley and the eight former Attorney Generals who spoke out against the Oireachtas Inquires Referendum last year be invited to present their opinion on the draft heads of the Bill. I await the Committees decision on this matter.

The Government is to announce its Budget 2013 measures next week. In this context it is astonishing that the Committee and the Minister is seeking to rush the public scrutiny stage of the legislation at such a pace at this time. The Finance, Public Expenditure and Reform Committee has significant budget related responsibilities at this time of the year, as do many of the organisations we should be seeking submissions and observations from.

Juxtapose the speed at which the Minister is progressing this legislation against the Departments failure to progress priority legislation such as the Construction Contracts Bill, which is waiting six months now to reach Committee Stage.

The Minister confirmed last week that the Government's indicated amendments to the Bill have yet to be even presented to cabinet.<sup>5</sup> So we are waiting six months for the Department to present to cabinet amendments to legislation first introduced in 2010 yet the Minister has requested the Committee to complete the public scrutiny stage of the Bill within just one month.

It is my strong view that insufficient time has been allowed for the public scrutiny stage of this legislation. This is a controversial Bill, and it is my view that it has come too soon after the peoples' rejection of the Oireachtas Inquiries Referendum.

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<sup>5</sup> PQ51554

It would be helpful to know if the Department and/or the Committee Chair made contact with any organisations, individuals and/or legal experts following its announcement seeking observations and submissions. In turn it would be helpful if the Committee Secretariat would provide a list of the same to Committee members.

#### 4 Earning citizens confidence

The Programme for Government commits to 'amend the Constitution to give Dáil committees full powers of investigation'. The Government delivered on this commitment in October 2011. The people voted against the proposed 30<sup>th</sup> amendment to the Constitution to give the Houses of the Oireachtas the power to conduct an inquiry of general public importance. In voting down the amendment the citizens clearly told the Government that they were not minded to extend such powers to politicians. It may not be the intent but the Minister's decision to move this legislation so soon after a failed referendum may be interpreted as an effort to undermine the recent opinion of our people. The Ministers insistence that the legislative process for this Bill be rushed may only serve to reinforce such a view.

#### 5 Advice provided by the Attorney General

The Minister has stated that the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Bill 2012 proposals were drafted in close consultation with the Office of the Attorney General 'in order to ensure that they fully respected the constitutional parameters on parliamentary inquiries set down by the Supreme Court in the Abbeylara case.'

Just days before the Children's Rights Referendum the Supreme Court ruled that the Government's referendum information booklet and website was 'not fair, equal or impartial' and that 'extensive passages in the booklet and on the website' did not conform to the McKenna principles. Following the judgment it was confirmed by a Spokeswoman for the Department of Children that the booklet and website had been thoroughly examined for compliance with the McKenna judgment by the office of the Attorney General.<sup>6</sup>

In the context of the Supreme Court judgment and the expected concerns of citizens it is our strong view that the Minister must make public all legal opinion provided to him by the Attorney General on this legislation. We believe it is simply not reasonable to ask that this legislation proceed without doing so.

#### 6 Outside Legal Consultation

It would also be useful to know if the Minister and his officials sought outside legal opinion in addition to the Attorney General's advice, particularly from those who were critical of the Oireachtas Inquiries provisions.

If this legislation is to be advanced citizens must be assured that it is in fact constitutionally permissible.

#### 7 Power to investigate individuals

The Explanatory Memorandum of the new Bill states 'It is anticipated that this Bill would facilitate a Banking Inquiry'. However as noted in the Joint Committee on the Constitution Fifth Report on Article 15 of the Constitution Review of the Parliamentary Power of Inquiry notes,<sup>7</sup> 'It would appear therefore that the option is open to the Oireachtas of legislating for a statutory power to inquire, though the limits set down in Abbeylara would apply. The witnesses were strongly of the opinion that in order to go beyond these limits, for example to investigate private individuals, a constitutional amendment would be required.'

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<sup>6</sup> Irish Times Article 'Children's referendum to go ahead despite critical Supreme Court ruling' 9<sup>th</sup> November 2012

<sup>7</sup> Joint Committee on the Constitution Fifth Report on Article 5 of the Constitution review of the Parliamentary Power of Inquiry, 3. Options for Reform, Point 37

## 8 Single Inquiries Committee

The Committee of Public Accounts is the public spending watchdog. 'It has a key role to play in ensuring that there is accountability and transparency in the way Government agencies allocate, spend and manage their finances and in guaranteeing that the taxpayer receives value for money for every euro spent.'<sup>8</sup> It is one of the most powerful committees in the Oireachtas and perhaps more importantly it has the confidence of citizens.

The Programme for Government proposes 'an Investigations, Oversight and petitions Committee of the Oireachtas. It would be a powerful committee constructed on the lines of the Public Accounts Committee, bi-partisan in structure and chaired by a senior member of the opposition.'

We believe consideration should be given to a single Investigations Committee for the reasons provided for in the Programme for Government and the success of the Public Accounts Committee.

## 9 Role of the Ceann Comhairle

The General Scheme of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Bill 2012 provides for a gateway mechanism to determine if and how an inquiry proceeds.

As presented by Officials from the Department of Public Expenditure and Reform on the 13<sup>th</sup> of November 2012 in an 'Inquiry 2' scenario, 'Having considered the proposal and results of consultations the Ceann Comhairle and/or Cathaoirleach report to the Houses(s) concerned their views and proposals as to how the matter should be progressed or not as appropriate'.

However the role and responsibilities of the Ceann Comhairle include that he or she 'is neutral, above party politics and controversy of the day.'

It would appear that there may be a clash between the responsibilities of the Ceann Comhairle and the provisions of the Bill.

10 Abbeylara Judgment, holding to account of non-office holders/public servants, findings of fact and 'findings of uncontested facts'. The Law Reform Commission's (LRC) Consultation Paper on Public Inquiries notes 'There is another point which will be especially important, when we come to consider drafting [legislation]. This is an issue as to whether the area, which the [Abbeylara] judgment held to be excluded from the remit of an Oireachtas Committee, included the taking of a definite view on the facts of a controversial issue, as a basis for policy-making.'

The Consultation paper then goes on to ask '....where does the boundary run between an inquiry into policy, as distinct from an inquiry into culpability?'

It appears the judgment believed traditional Oireachtas Inquiries would not be affected and it cited approvingly a number of such Inquiries and 'the powers of the 1997 Compellability Act to obtain necessary evidence and information.'

The problem arises when an Oireachtas Inquiry attempts to make findings of fact, particularly against those who are not office holders or those public servants working under the instruction of an office holder, or as Hardiman J described disapprovingly as 'a new form of direct personal accountability to Politicians of ordinary citizens or at least such of them as are public servants.'

However the LCR notes that Murray J took a broader view stating 'I did not see any reason why the Oireachtas cannot conduct inquiries of the nature which they have, for practical purposes, traditionally done including inquiries into matters concerning the competency and efficiency in

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<sup>8</sup> [www.oireachtas.ie](http://www.oireachtas.ie)

departmental or public administration as well as such matters as those concerning the proper or effective implementation of policy, and to make findings accordingly. Also if a particular officeholder, such as the chief executive of a semi-state body, is by virtue of his appointment, whether by statute or contract, answerable to the Houses of the Oireachtas different considerations arise and I do not consider that the order proposed to be made by this Court affects such a situation.'

There are differing views within the judgment but the point of commonality is that they deal with Ministers and public servants, but not 'ordinary citizens'. What impact will this have on an inquiry into the banking crisis?

One of the proposed 5 principle inquiry types will include an 'Inquire, Record and Report' style inquiry 'whose major function would be simply to record and report evidence and making findings of uncontested facts in particular with a view to establishing a factual narrative of particular events.'<sup>9</sup> Head 4 of the Bill sets out the parameters for findings of uncontested fact. The Explanatory Memorandum states 'Such inquiries will be precluded from making findings except in relation to uncontested facts and the failure of a person or persons to co-operate with the inquiry or facts which do not affect the good name of any person.' We need to see the Attorney General's advice on this point, and indeed seek an alternative legal opinion for further discussion.

#### 11 Right to a Good Name

The Draft Heads of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Bill 2012 states, 'Head 7 provides a power of inquiry in relation to conduct in his or her capacity as an office holder or Chief Executive Officer of a state body subject to PAC scrutiny or any other person who has consented to Dáil scrutiny by contract or statutory appointment. Similar to Head 5, 5A and 6, the power of inquiry under this head allows the making of findings of facts and recommendations.

Head 7 proposes that findings of fact and recommendations can be made in relation to the conduct of current and former office holders (including Civil Servants). However this is subject to certain restrictions as regards findings that reflect on the good name of officials.

Head 10 provides that findings can be made that could adversely reflect on the good name of current Government officeholders, Secretary Generals or CEOs subject to PAC scrutiny, any person who has consented to Dáil scrutiny or any person whose removal from office requires the consent of the House or Houses.'

In the context of concerns raised in advance of the Oireachtas Inquiries Referendum it is my strong view that the Committee and indeed the public must have sufficient time to debate and discuss these provisions to ensure it strikes the correct balance between the public interest and the rights of the individual.

On behalf of Sinn Féin members of the Committee on Finance, Public Expenditure and Reform

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<sup>9</sup> Minister for Public Expenditure and Reform, Press Statement, 31 October 2012

## JOINT COMMITTEE ON FINANCE, PUBLIC EXPENDITURE AND REFORM

**List of Members**

<b>Chairman:</b>	Ciarán Lynch (LAB)*****
<b>Deputies:</b>	Richard Boyd-Barrett (IND)
	Michael Creed (FG)
	Pearse Doherty (SF)
	Stephen Donnelly (IND)
	Timmy Dooley (FF)*
	Seán Fleming (FF)
	Simon Harris (FG) *****
	Joe Higgins (IND)
	Heather Humphreys (FG)
	Kevin Humphreys (LAB)
	Peter Mathews (FG)
	Mary Lou McDonald (SF)
	Michael McGrath (FF)
	Dara Murphy (FG)*****
	Kieran O'Donnell (FG)
	Aodhán Ó'Ríordáin (LAB)*****
	Arthur Spring (LAB)
	Brian Stanley (SF)*****
	Billy Timmins (FG)
	Liam Twomey (FG) (Vice-Chair)
<b>Senators:</b>	Sean D. Barrett (IND)
	Thomas Byrne (FF)
	Paul Coghlan (FG)*****
	Michael D'Arcy (FG)
	Aideen Hayden (LAB)
	Tom Sheahan (FG)

## Notes:

1. Deputies appointed to the Committee by order of the Dáil on 9 June 2011
2. Senators appointed to the Committee by order of the Seanad on 16 June 2011
3. \*Deputy Timmy Dooley appointed on 21 June 2011 in place of Deputy Seán O' Fearghaíl
4. Deputy Alex White elected as Chairman on 23 June 2011
5. Deputy Liam Twomey elected as Vice Chairperson on 23 June 2011
6. \*\*Deputy Michael McNamara appointed on 8 December 2011 in place of Deputy Thomas P. Broughan
7. \*\*\*Deputy Pádraig Mac Lochlainn appointed on 14 December 2011 in place of Deputy Jonathan O'Brien
8. \*\*\*\*Senator Denis O'Donovan appointed on 10 May 2012 in place of Senator Katherine Zappone
9. \*\*\*\*\*Senator Paul Coghlan appointed on 14 June 2012 in place of Senator Denis O'Donovan
10. \*\*\*\*\*Deputy Dara Murphy appointed on 19 July 2012 in place of Deputy Olivia Mitchell
11. \*\*\*\*\*Deputy Brian Stanley appointed on 25 September 2012 in place of Deputy Pádraig Mac Lochlainn
12. \*\*\*\*\*Deputy Alex White promoted Minister of State 2 October 2012, Deputy Ciarán Lynch replaced Deputy White by order of the Dáil on 10 October 2012 and was elected Chairman 10 October 2012
13. \*\*\*\*\*Deputy Simon Harris appointed on 28 November 2012 in place of Deputy Jim Daly
14. \*\*\*\*\*Deputy Aodhán Ó'Ríordáin appointed on 28 November 2012 in place of Deputy Michael McNamara

## Orders of Reference of the Joint Committee on Finance, Public Expenditure and Reform

### **a. Functions of the Committee – derived from Standing Orders [DSO 82A; SSO 70A]**

- (1) The Select Committee shall consider and report to the Dáil on—
  - (a) such aspects of the expenditure, administration and policy of the relevant Government Department or Departments and associated public bodies as the Committee may select, and
  - (b) European Union matters within the remit of the relevant Department or Departments.
- (2) The Select Committee may be joined with a Select Committee appointed by Seanad Éireann to form a Joint Committee for the purposes of the functions set out below, other than at paragraph (3), and to report thereon to both Houses of the Oireachtas.
- (3) Without prejudice to the generality of paragraph (1), the Select Committee shall consider, in respect of the relevant Department or Departments, such—
  - (a) Bills,
  - (b) proposals contained in any motion, including any motion within the meaning of Standing Order 164,
  - © Estimates for Public Services, and
  - (d) other matters

as shall be referred to the Select Committee by the Dáil, and

  - © Annual Output Statements, and
  - (f) such Value for Money and Policy Reviews as the Select Committee may select.
- (4) The Joint Committee may consider the following matters in respect of the relevant Department or Departments and associated public bodies, and report thereon to both Houses of the Oireachtas:
  - (a) matters of policy for which the Minister is officially responsible,
  - (b) public affairs administered by the Department,
  - © policy issues arising from Value for Money and Policy Reviews conducted or commissioned by the Department,
  - (d) Government policy in respect of bodies under the aegis of the Department,

- © policy issues concerning bodies which are partly or wholly funded by the State or which are established or appointed by a member of the Government or the Oireachtas,
  - (f) the general scheme or draft heads of any Bill published by the Minister,
  - (g) statutory instruments, including those laid or laid in draft before either House or both Houses and those made under the European Communities Acts 1972 to 2009,
  - (h) strategy statements laid before either or both Houses of the Oireachtas pursuant to the Public Service Management Act 1997,
  - (i) annual reports or annual reports and accounts, required by law, and laid before either or both Houses of the Oireachtas, of the Department or bodies referred to in paragraph (4)(d) and © and the overall operational results, statements of strategy and corporate plans of such bodies, and
  - (j) such other matters as may be referred to it by the Dáil and/or Seanad from time to time.
- (5) Without prejudice to the generality of paragraph (1), the Joint Committee shall consider, in respect of the relevant Department or Departments—
- (a) EU draft legislative acts standing referred to the Select Committee under Standing Order 105, including the compliance of such acts with the principle of subsidiarity,
  - (b) other proposals for EU legislation and related policy issues, including programmes and guidelines prepared by the European Commission as a basis of possible legislative action,
  - © non-legislative documents published by any EU institution in relation to EU policy matters, and
  - (d) matters listed for consideration on the agenda for meetings of the relevant EU Council of Ministers and the outcome of such meetings.
- (6) A sub-Committee stands established in respect of each Department within the remit of the Select Committee to consider the matters outlined in paragraph (3), and the following arrangements apply to such sub-Committees:
- (a) the matters outlined in paragraph (3) which require referral to the Select Committee by the Dáil may be referred directly to such sub-Committees, and
  - (b) each such sub-Committee has the powers defined in Standing Order 83(1) and (2) and may report directly to the Dáil, including by way of Message under Standing Order 87.
- (7) The Chairman of the Joint Committee, who shall be a member of Dáil Éireann, shall also be the Chairman of the Select Committee and of any sub-Committee or Committees standing established in respect of the Select Committee.

- (8) The following may attend meetings of the Select or Joint Committee, for the purposes of the functions set out in paragraph (5) and may take part in proceedings without having a right to vote or to move motions and amendments:
- (a) Members of the European Parliament elected from constituencies in Ireland, including Northern Ireland,
  - (b) Members of the Irish delegation to the Parliamentary Assembly of the Council of Europe, and
- © at the invitation of the Committee, other Members of the European Parliament.

**b. Scope and Context of Activities of Committees (as derived from Standing Orders [DSO 82; SSO 70])**

- (1) The Joint Committee may only consider such matters, engage in such activities, exercise such powers and discharge such functions as are specifically authorised under its orders of reference and under Standing Orders.
- (2) Such matters, activities, powers and functions shall be relevant to, and shall arise only in the context of, the preparation of a report to the Dáil and/or Seanad.
- (3) It shall be an instruction to all Select Committees to which Bills are referred that they shall ensure that not more than two Select Committees shall meet to consider a Bill on any given day, unless the Dáil, after due notice given by the Chairman of the Select Committee, waives this instruction on motion made by the Taoiseach pursuant to Dáil Standing Order 26. The Chairmen of Select Committees shall have responsibility for compliance with this instruction.
- (4) The Joint Committee shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Committee of Public Accounts pursuant to Dáil Standing Order 163 and/or the Comptroller and Auditor General (Amendment) Act 1993.
- (5) The Joint Committee shall refrain from inquiring into in public session or publishing confidential information regarding any matter if so requested, for stated reasons given in writing, by—
  - (a) a member of the Government or a Minister of State, or
  - (b) the principal office-holder of a body under the aegis of a Department or which is partly or wholly funded by the State or established or appointed by a member of the Government or by the Oireachtas:

Provided that the Chairman may appeal any such request made to the Ceann Comhairle/Cathaoirleach whose decision shall be final.



1 November 2012

Mr. Ciarán Lynch  
Chairman  
Committee on Finance, Public Expenditure and Reform  
Leinster House  
Dublin 2

Dear Ciarán

I am writing to you as chairman of the Committee on Finance, Public Expenditure and Reform in relation to the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Bill 2012, which was approved for priority drafting with a view to early enactment by the Government at its meeting of 31 October 2012.

The Government also agreed that in parallel with the drafting process that the Heads of the Bill should be forwarded to your Committee, as the appropriate Oireachtas legislative/policy Committee in this regard, for pre-legislative scrutiny. It is planned that the Bill would be published before the end of the year and enacted as soon as possible thereafter once it has been fully considered by the Oireachtas.

Since, it is my intention that the Bill would be published and enacted as soon as possible, I would appreciate if the Committee would examine the relevant parts of the draft Bill as a matter of urgency and report its views no later than the end of this month so as to inform and assist the drafting process.

I acknowledge that this is a very demanding timetable and I am cognisant of the other pressures and demands placed on Committees, you will, however, understand the importance of the putting a comprehensive statutory framework for Oireachtas inquiries in place as soon as possible.

If you, or other members of your Committee, would wish to receive a detailed briefing in relation to the contents and proposed operation of the draft Bill I would be happy to arrange for officials from my Department to provide same.

Yours sincerely

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Brendan Howlin T.D.  
Minister for Public Expenditure and Reform

## List of Editors and Newspapers

<i><b>Newspaper</b></i>	<i><b>Editor</b></i>
Evening Echo	Mr. Maurice Gubbins Editor, Evening Echo
Irish Examiner	Mr. Tim Vaughan Editor, Irish Examiner
The Irish Daily Mail	Mr. Eric Bailey Editor, The Irish Daily Mail and the Irish Mail on Sunday
The Irish Mail on Sunday	
The Irish Independent	Mr. Gerard O'Regan Editor, The Irish Independent
The Irish Times	Mr. Kevin O'Sullivan Editor, The Irish Times
Metro Herald	Mr. Alan Caulfield Editor, Metro Herald
The Irish Mirror	Mr. John Kierans Editor, The Irish Mirror
The Irish Daily Star	Mr. Gerard Colleran Editor, The Irish Daily Star
The Irish Sun	Mr. Michael McNiffe Editor, The Irish Sun
Sunday Business Post	Mr. Cliff Taylor Editor, Sunday Business Post
The Irish Sunday Mirror	Mr. Paul Martin Editor, The Irish Sunday Mirror
The Sunday Independent	Ms. Anne Harris Editor, The Sunday Independent
The Sunday Times	Mr. Frank Fitzgibbon Editor, The Sunday Times
Sunday World	Mr. Colm MacGinty Editor, Sunday World
The Evening Herald	Mr. Stephen Rea Editor, The Evening Herald

**Presentation from the Department of Public Expenditure and Reform**

# General Scheme of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Bill 2012

**Department of Public Expenditure and Reform**

**13 November 2012**

**Confidential**



## Purpose of Bill

- To establish a statutory framework for the Oireachtas to conduct inquiries within the current constitutional framework as set down by the Supreme Court in *Maguire v Ardagh* [2002] 1 IR 385 (The Abbeylara judgment). .



# Abbeylara Issues

## **Inherency**

:legal or constitutional authority for the Oireachtas to conduct inquiries

## **“No Bias” Rule**

:Individual (i.e. reasonable perception of strong prior views or fixed opinions into matters being inquired into)

:Institutional (i.e. specific body inherently biased and cannot be relied upon to assess evidence and form judgements in an objective and unbiased fashion)

## **Balancing of Rights**

:all normal rules of natural and constitutional justice involving fair procedures would apply to protect individual's good name

**“Adjudicatory Findings”**: inquiries leading to findings of fact potentially adverse to the good name of an individual (who is not a Member of the Houses) incompatible with the Constitution.

## **Procedures**

:Flawed procedures followed by Committee



## Summary overview of legal assessment informing the General Scheme

- unconstitutional for the Oireachtas to legislate to create a power for the Houses of the Oireachtas to conduct inquiries that would have implications for the reputations of individuals, unless a specific constitutional authorisation for such a power can be identified.
- permissible for the Oireachtas to conduct inquiries that have no implications for the reputations of individuals.
- ‘forward-looking’ Parliamentary inquiries oriented to policy / legislation are constitutionally authorised.



## Summary overview of legal assessment informing the General Scheme

- Dáil has an implicit constitutional power to conduct inquiries in order to hold the Government responsible, even if this affects the reputations of individuals – does not extend to investigating the activities of past Governments.
- Permissible to conduct parliamentary inquiries into public administration under the supervision of persons who have consented to taking up a position that makes them accountable in this way.
- Provided an inquiry is a *bona fide* attempt to operate within constitutional constraints, it is not constitutionally problematic that inferences adverse to people's reputations may be drawn.





# The Necessity for Legislation

- It would provide legal certainty in this area;
- It would provide the necessary framework for an inquiry operating under proper constitutional authority to carry out its functions;
- It would address all ancillary powers, procedures and the creation of offences necessary for the conduct of an inquiry;
- It would effectively balance the public interest in the investigation of matters of importance with the protection of the right to the good name of the individual in a manner that would be robust and withstand potential constitutional challenge.



# Main Features of Bill

***(A) In relation to Inquiries, provide:***

- (a) Statutory underpinning for 5 categories of Inquiries:
- (b) Statement powers of compellability etc.
- (c) Provisions providing for fair procedures
- (d) Criteria to guide development of terms of reference;
- (e) Provisions in relation to costs;
- (f) Change in the Restrictions of Evidence of Civil Servants
- (g) Provisions on behaviour to avoid any perception of bias;

***(B) In relation to Private Papers, Confidential Communications and Official Documents, provide:***

- (a) qualified privilege for private papers, confidential communications to Members and official documents of the Houses;



# Types of Inquiries

- “**Inquire Record and Report**” style inquiries (Head 4);
- “**Forward-looking**” inquiries (Head 5);
- Inquiries relating to the **removal of certain office holders** e.g.; President, C&AG, Judges etc. (Head 5A);
- Inquiries in relation to the **conduct of a Member of the House(s)** (Head 6);
- Inquiries for the purpose of **holding the current Government to account** (Head 7).



# Inquire Report Record

- Limited to recording and reporting evidence.
- Precluded from making findings except in relation to:
  - uncontested facts, and;
  - the failure of a person or persons to co-operate with the inquiry, or;
  - facts which do not affect the good name of any person.
- No power to make adjudicatory findings



## An Inquiry Related to a Legislative Function

- Appropriate where information on past events is believed to be directly relevant to a forward looking issues (e.g. the case for new legislation).
- Would have potential to make findings of fact which could indirectly have an adverse reputational effect for an individual.
- Would **not** be permitted to make findings having direct adverse effect on the reputation of an individual.



## Other types of Inquiries

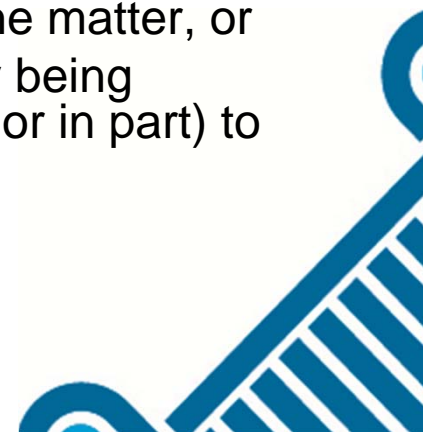
- Inquiries Relating to the Removal of Certain Officeholders
  - Inquiries Relating to the Conduct of a Member
  - Inquiries to Hold the Current Government/Public Administration to Account
- Such inquiries may make findings of fact and recommendations arising therefrom



# Terms of Reference (Head 8)

The House may in determining terms of reference consider:

- (a) whether the matter relates to the function of the House or Houses;
- (b) whether the matter is of significant public importance
- (c) the specific purpose of the inquiry
- (d) the potential of the inquiry to assist in causing significant public policy benefits, and
- (e) if an inquiry were held into the matter the likelihood of the inquiry
  - (i) to prejudice proceedings currently before a court in the State which related (whether in whole or in part) to the matter, or
  - (ii) to prejudice or impair an investigation currently being conducted in the State which related (in whole or in part) to the matter



# Inquiry Process (1)

The ‘**gateway mechanism**’ provided for in the Bill ensures that the Oireachtas determines if and how any inquiry is to proceed including deciding the most appropriate committee to conduct any inquiry

Any Committee of the House(s) can make a proposal that an inquiry be conducted under this Bill to the Ceann Comhairle of the Dáil or to the Cathaoirleach of the Seanad, as appropriate (or to both in the case of a joint committee)

The proposal must specify:

- the matter to be inquired into and the reasons it warrants inquiry;
- which House or Committee shall conduct the inquiry and the reasons therefore;
- any issues relating to the terms of reference





## Inquiry Process (2)

Having received a proposal to hold an inquiry the Bill assigns a decision-making role for the Ceann Comhairle and/or Cathaoirleach following consultation with:

- the CPP of the relevant House,
- relevant Ministers, and;
- other relevant parties

Having considered the proposal and results of consultations, the Ceann Comhairle and/or Cathaoirleach report to the House(s) concerned their views and proposals as to how the matter should be progressed or not as appropriate.



## Inquiry Process (3)

The final decision on the holding of any inquiry under this legislation is subject to the endorsement of the Houses by way of a resolution (which would include detailed terms of reference).

When consenting by way of resolution to the holding of an inquiry under this legislation a House or Houses may confer upon a committee of the House(s) the power to send for persons, papers and records.



# Fair Procedures (1)

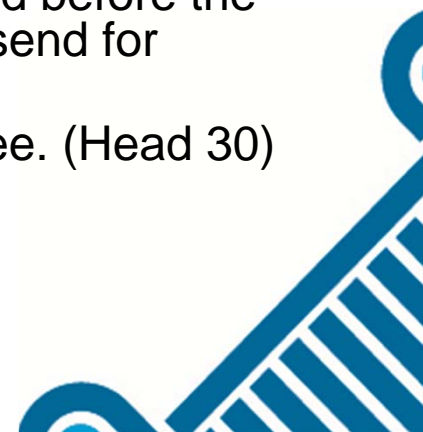
- The legal advice is that full compliance with provisions on fair procedures are required by any inquiry is essential, particularly:-
  - where the good name of a person has the potential to be adversely affected by the findings of an inquiry even by inference; or
  - in relation to the conduct of an inquiry, full procedural fairness is essential notwithstanding that the inquiry may have no scope to make findings that could have an adverse effect on the reputation of individuals;
- Unfettered access to the courts in relation to all procedural aspects of the inquiry process remains open at all times.



## Fair Procedures (2)

There are extensive requirements in the Bill to safeguard the constitutional rights of any person participating in an inquiry including the right to:

- challenge proceedings where they believe that an inquiry is being conducted in breach of this Bill (Head 15)
- be given advanced notice of the evidence proposed to be given against him. (Head 19)
- cross-examine the witness for the purpose of challenging the allegation. (Head 19)
- give evidence to the inquiry to answer the allegation. (Head 19)
- make a submission at the close of evidence. (Head 19)
- request the committee to direct specified persons to attend before the committee to give evidence or to direct the committee to send for specified documents. (Head 19)
- be provided with a copy of the draft report of the committee. (Head 30)



# Evidence of Civil Servants

- When called to give evidence to an Oireachtas inquiry operating under this legislation, a civil servant will **no longer** be restricted from providing evidence on:
  - what **policy options** were proposed, and;
  - what **advice** the civil servant gave at the time in relation to those options in order to ensure that the inquiry can establish a full factual narrative of events.
- This will only apply in relation to inquiries undertaken under this Bill.
- The existing restrictions on Civil Servants commenting directly on the merits of Policy will remain.



# Provisions Regarding Bias

- Head 16 provides that there should be no reasonable perception of bias on the part of an inquiry committee or any of its members in relation to the matters which are the subject of inquiry.
- Committee Members would be expected to abide by any guidelines issued in respect of bias in accordance with Head 12, and to avoid any perception of bias in their interactions with the media.
- The provisions regarding bias apply to all types of inquiries that may be conducted under the Bill.



# Provisions for Costs

The focus of the Bill is to provide for application for costs where the good name of a witness may be at issue and includes:

- Provisions for the Oireachtas Commission to prepare **guidelines** in respect of payment of costs.
- A requirement for an **estimate** of costs to be incurred in conducting an inquiry to be placed before the House(s)
- The making of an award of costs against a third party who fails to comply with a direction or requirement or otherwise **obstructs** an investigation



# Privilege of Members

- The Bill provides for qualified privilege for:
  - private papers of Members including Ministers, confidential communications to Members, and;
  - official documents of the Houses.
- Envisages that in cases of deceased Members that the privilege reverts to the Committee of the relevant House of which the person was a member at the time he or she came into possession of the material concerned.





## Summary of Legal Position on Privilege

- Legislation may create a privilege for members' papers and other communications.
- Standing Orders under Article 15.10 may create a privilege for members' papers, but constitutional implications need full examination.
- Privilege should be qualified.
- The courts must have the role of deciding if the privilege can be invoked.
- The privilege should be capable of being invoked or waived by the member concerned.
- The person who creates the information should retain the freedom to share that information in any way, subject to any other legal rules that might apply.
- The protection of the official documents of the House could be achieved in a broadly similar way. However, the invoking and waiving of any privilege in respect of officials documents would have to rest with the House as a whole.

