



Report of the Forum on Parliamentary Privilege

As made to the Ceann Comhairle,
Mr Seán Ó Fearghaíl TD

21st December 2017



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Membership of Forum on Parliamentary Privilege¹



David Farrell, academic (Chair)

Professor David Farrell holds the Chair of Politics at UCD where he is Head of Politics and International Relations. He is a member of the Royal Irish Academy and a former President of the Political Studies Association of Ireland. His research focuses on the study of parties, elections and parliaments. He is currently the 'research leader' of the Irish Citizens' Assembly, and was a member of the Welsh Assembly's Expert Panel on Electoral Reform.



Mary Hanafin, former Government Chief Whip

Mary Hanafin was a TD from 1997 to 2011. She held a number of Ministerial appointments, including Government Chief Whip, where she developed knowledge of the rules and procedures of Dáil Éireann. She is currently a councillor on Dún Laoghaire-Rathdown County Council.



Conor Brady, writer and editor

Conor Brady was editor of the Irish Times from 1986 to 2003, having held senior roles in print and broadcast journalism. He was a founding commissioner of the Garda Síochána Ombudsman Commission and serves on a number of State boards. He writes weekly on current affairs and politics for the Sunday Times.



Conleth Bradley, senior counsel

Conleth Bradley SC is a practising barrister specialising in constitutional and administrative law.

¹ The Forum was assisted in its work by the Parliamentary Legal Advisor, Ms Mellissa English, and by Dr Catherine Lynch from the Oireachtas Library and Research Service.

Chair's Introduction

It has long been recognised that parliamentary freedom of debate (sometimes referred to as 'privilege') is a vital component of any democratic system. It allows members of parliament to raise matters which need to be raised without fear of being sanctioned by the courts.

The Forum on Parliamentary Privilege was set up by the Ceann Comhairle in summer 2017 to examine the operation of privilege in Dáil Éireann. In carrying out its work, the Forum examined the various factors impacting on the operation of privilege in the Dáil, including the provisions of the Constitution and the provisions of Standing Orders. The Forum also examined the operation of parliamentary privilege in other jurisdictions, and a range of submissions on the subject of privilege, made by parliamentarians and others.

The Forum has considered how privilege is necessary for TDs to fulfil their electoral mandate, but also how this has to be weighed up against the potentially adverse effects on people outside the House of things said in the Dáil chamber. In our deliberations we have examined the way in which these two factors should be balanced against each other, in a manner that supports the rights of TDs, while giving an opportunity to people outside the House to a 'right of reply'. Finally, given the seriousness of an abuse of privilege, the Forum has considered the need for sanctions for members who abuse it.

Recent political events have given parliament a status that it has rarely had previously. The recommendations contained in this report are designed to support and enhance the operation of our parliament, which can only benefit us all.

Professor David Farrell

Chair of the Forum on Parliamentary Privilege

December 2017

1. Summary of Recommendations

Recommendation 1 – timeframe under Standing Order 61

1. The timeframe for making a submission under Standing Order 61 ['Defamatory Utterances'] should be extended to three months, or the dissolution of the Dáil, whichever is the sooner.

Recommendation 2 – prominence of 'right of reply'

2. Increased prominence should be given to the 'right of reply' under Standing Order 61 by including the right of reply as an electronic link from the original utterance in the Official Report (i.e., the Dáil debates).

Recommendation 3 – historical abuses of privilege

3. In relation to historical findings of abuse of privilege, the original Committee on Procedure report (which will include any original submissions made on the matter) should be included as an electronic link in the relevant section of the debates.

Recommendation 4 – requirement to withdraw utterances

4. A member who has been found under Standing Order 61 to have abused privilege should be required to withdraw his or her utterances in the Dáil–
 - at an equally prominent time to the original utterance;
 - within a set period of time;
 - in a form of words contained in the report of the Committee on Procedure on the matter; and
 - with the withdrawal electronically linked in the Official Report to the original utterance.

Recommendation 5 – member who refuses to withdraw to be 'named'

5. Where a member who has abused privilege by making an utterance in the nature of being defamatory, does not withdraw the utterance within a set timeframe, the Ceann Comhairle should 'name' the member, and the question should be put to the House that the member stand suspended. If the House agrees, the member shall stand suspended for four sitting days.

Recommendation 6 – suspension to include Committees

6. Suspension from the service of the House should also include suspension from participation in Committees.

Recommendation 7 – form of prior notice to Ceann Comhairle

7. Prior private notice given under Standing Order 61 in relation to an utterance which may be defamatory in nature should be given in writing to the Ceann Comhairle and in good time.

Recommendations 8, 9 and 10 – guidelines and training on use of privilege

8. Members should receive guidelines on responsible use of freedom of debate.
9. Training on responsible use of freedom of debate should be included in the induction for new members.
10. Committee Chairs and temporary Chairs in the Dáil chamber should receive training on responsible use of privilege.

Recommendations 11 and 12 – highlighting of facility to make submission

11. The facility for making a submission under Standing Order 61 in relation to a Dáil utterance should be given more prominence on the Oireachtas website.
12. A programme in relation to the facility to make a submission should be broadcast on the Oireachtas channel as part of its regular cycles of broadcasts.

2. Background to the Forum

Parliamentary freedom of debate

- 2.1 Freedom of debate is essential for parliament to perform its role of holding the Government to account. Without freedom of debate, drawing full attention to matters which require regulatory or legislative intervention (and thereby exercising their democratic mandate) could be extremely difficult for TDs.²
- 2.2 However, while TDs have this constitutionally-guaranteed privilege of freedom of debate, in practice, debate in Dáil Éireann has always been regulated in a way that balances two key considerations against that privilege.
- 2.3 These two key considerations are as follows: (a) the separation of powers between parliament and the courts; and (b) the need to protect the constitutional rights of persons outside the House, who have no effective recourse in relation to charges made against them in the House, other than the recourse provided by Dáil Standing Orders (the written regulations of the House).

The Forum on Parliamentary Privilege

- 2.4 In summer 2017, Mr Seán Ó Fearghail TD, Ceann Comhairle of Dáil Éireann, set up the Forum on Parliamentary Privilege. The Forum was tasked with examining the parameters of parliamentary privilege, particularly in relation to freedom of debate and the responsible use of that freedom by TDs.
- 2.5 The Forum's membership (listed on page 2) brought a range of expertise, from the fields of academia, politics, the media and the law, to bear on the issue of freedom of debate.
- 2.6 It is timely for the Forum to consider the matter of parliamentary freedom of debate. The Dáil Standing Order in relation to defamatory utterances (Standing Order 61) has been in operation, essentially unchanged, for 20 years.
- 2.7 It is also timely to consider these matters given the increased profile of Dáil utterances in the age of the internet and social media, where, once an utterance is made, it is essentially available forever on the world-wide web.
- 2.8 The impact of what TDs say in the Dáil is greater than ever before. This report examines the regulation of TDs' privilege of freedom of debate, in order to ensure that it is both protected, and also used for the purpose for which it was intended, i.e., to hold the Government to account and to highlight gaps in legislation and public administration.

² As this report is intended for the Ceann Comhairle, and ultimately for the Dáil Committee on Procedure, it deals with Dáil Éireann, and members of Dáil Éireann, only.

3. The Forum's Work Programme

Forum's terms of reference

The Forum's terms of reference were to consider, and, where appropriate, make recommendations in relation to:

- the need to strike a fair balance between–
 - freedom of debate and the protection of the citizen's constitutional rights to his or her good name and to privacy, and
 - freedom of debate and the rights of the individual in the context of court proceedings; and
- the relevant provisions of the Constitution and Dáil Standing Orders, including–
 - the use of the power to ensure freedom of debate in Article 15.10 of the Constitution;
 - the operation of Dáil Standing Order 59 ('the *sub judice* rule');
 - the operation of Dáil Standing Order 61 ('Defamatory Utterances');
 - similar issues of privilege arising under Articles 15.12 and 15.13 of the Constitution;
 - avenues of redress for persons who have been found to have been adversely affected by statements made under privilege;
 - the sanctions which the Dáil may impose for abuse of privilege;

together with proposed changes to Dáil Standing Orders, and such other matters as the Forum thinks fit, in relation to the above.

- 3.1 As the Standing Order in relation to matters *sub judice* is presently before the Supreme Court, the Forum decided that any consideration of Standing Order 59 (previously Standing Order 57) should await the determination of the Supreme Court.
- 3.2 Between its formation and the presentation of this report to the Ceann Comhairle, the Forum met eight times.
- 3.3 Broadly, the Forum's work programme was organised around three areas:
- the provisions of the Constitution in relation to parliamentary privilege;
 - the operation of parliamentary privilege in other jurisdictions; and
 - submissions made to the Forum by parliamentarians and others in relation to the factors surrounding parliamentary privilege.

Forum's consultation

- 3.4 In carrying out its work, the Forum consulted with persons external and internal to the Dáil, and with former Dáil Chairs (Cinn Comhairligh).
- 3.5 The Forum also decided to consider the operation of, and the rules surrounding, freedom of debate in other countries' parliaments.
- 3.6 On 9th August 2017, the Forum advertised for submissions in three national daily newspapers (the Irish Times, the Examiner and the Irish Daily Star). The advertisement was also placed on the Houses of the Oireachtas website on that date. The deadline for receipt of submissions by the Forum was 11th September 2017.
- 3.7 In its advertisement, the Forum posed six questions to be answered, as follows:

- What constitutes a responsible use of freedom of debate in the Houses of the Oireachtas?
- How should freedom of debate in the Houses of the Oireachtas and the right of an individual to his or her good name be balanced against each other?
- How should freedom of debate in the Houses of the Oireachtas and the rights of the individual in court proceedings be balanced against each other?
- If a person's good name has been impugned in the Houses of the Oireachtas, or his or her privacy has been breached, what procedure should be in place (within the Oireachtas itself) to deal with the abuse of privilege?
- What recourse should the citizen have where his or her good name or privacy rights have been interfered with by the abuse of privilege? What measures to protect the good name of the citizen should be considered?
- What sanctions should be imposed on a member who has abused privilege?

- 3.8 The Forum also emailed members of the Dáil seeking submissions in relation to the six questions.

Submissions received

- 3.9 The Forum received 16 submissions in total (contained in **Appendix H**), from both political parties/groups in the Dáil, and from persons external to the Dáil.

Consultation with former Cinn Comhairligh

- 3.10 The Chair of the Forum also met with former Cinn Comhairligh Rory O'Hanlon, Séamus Kirk and Seán Barrett to discuss freedom of debate in Dáil Éireann.

4. Themes from submissions received³

- 4.1 Several of the submissions stated that there isn't a significant issue with abuse of privilege in Dáil Éireann, and, therefore, the *status quo* ought to be maintained. However, the matter of notice was also raised in the submissions – i.e., that a TD should give sufficient notice to the Ceann Comhairle where the TD intends to say something in the House which could be an abuse of privilege.
- 4.2 The following point was also made in the submissions in relation to the responsible use of freedom of debate – that although as a concept, responsible use is subjective in nature, certain benchmarks could be applied. These benchmarks could include:
- the context and impact of a speech;
 - whether it was made in good faith;
 - whether the public interest is served in making the utterances (or whether the utterances relate to the purely private affairs of private citizens); and
 - whether the Deputy concerned has exhausted all other parliamentary means of raising the matter, and has done his or her utmost to establish the veracity of what he or she is saying.
- 4.3 There was a reference in the submissions to the possible 'chilling effect' on TDs who wish to raise important matters on the floor of the House if the sanction in relation to abuse of privilege is augmented. However, by way of contrast, it was also argued in the submissions that existing provisions in relation to abuse of privilege do not provide a significant deterrent.
- 4.4 The submissions included proposals on avenues of appeal against findings of abuse of privilege by the determining Committee or body (including, for instance, that an appeals body could consist of a retired member of the judiciary).
- 4.5 Some submissions said that it is not Dáil Éireann's role to provide recourse for persons outside parliament who have been affected by what is said in the chamber; that Dáil Éireann's role in this regard is confined to regulating itself and the conduct of its members. However, elsewhere in the submissions, the idea of recourse was supported. It was proposed, for instance, that the timeframe for submissions on utterances be extended, and that any 'right of reply' should be highlighted in the Official Report (i.e., the Dáil debates).
- 4.6 Concern was expressed in the submissions in relation to the levels of awareness of the facility to make a submission under Standing Order 61.
- 4.7 The following was also raised in the submissions: historically, the right of reply, or even the determination of the Committee on Procedure that privilege had been abused, has not necessarily received the same level of awareness and visibility as the original utterance, because it has not normally appeared in the Official Report (i.e., the Dáil debates), but has only been laid in the Oireachtas library, in a report of the Committee on Procedure.
- 4.8 The submissions also referred to the need to deal with abuse of privilege in a timely manner, and the need to deal with possible abuses of privilege in Committees.

³ This section summarizes key points made in the submissions. The original submissions are included in **Appendix H** to this report.

Discussions with former Cinn Comhairligh

- 4.9 A theme which emerged from the discussions with former Cinn Comhairligh was the need to encourage members to use privilege responsibly, and to give them guidance in relation to same. The need for training in relation to privilege for temporary Chairs in the Dáil chamber was also raised as an issue.

5. The Constitution

Constitutional provisions

5.1 Articles 15.10, 15.12 and 15.13 are the relevant provisions of the Constitution⁴ in relation to parliamentary privilege:

15.10 *Each House shall make its own rules and standing orders, with power to attach penalties for their infringement, and shall have power to ensure freedom of debate, to protect its official documents and the private papers of its members, and to protect itself and its members against any person or persons interfering with, molesting or attempting to corrupt its members in the exercise of their duties.*

15.12 *All official reports and publications of the Oireachtas or of either House thereof and utterances made in either House wherever published shall be privileged.*

15.13 *The members of each House of the Oireachtas shall, except in case of treason as defined in this Constitution, felony or breach of the peace, be privileged from arrest in going to and returning from, and while within the precincts of, either House, and shall not, in respect of any utterance in either House, be amenable to any court or any authority other than the House itself.*

5.2 Freedom of debate has long been a cornerstone of parliamentary democracy. In England, for example, the term ‘parliamentary privilege’ is comprised of two concepts: (i) freedom of speech in parliament (which was placed on a statutory footing in Article IX of the Bill of Rights 1689), and (ii) exclusive cognisance (which refers to parliament’s right to determine its own rules and procedures when legislating and to regulate its own internal affairs).

Exclusive cognisance

5.3 Each House of the Oireachtas, in the words of Article 15.10 of the Constitution, ‘shall make its own rules and standing orders...’. The Dáil, therefore, is master of its own internal affairs and enjoys ‘exclusive cognisance’ in this regard.

5.4 The Forum is mindful, however, that there are limitations in placing too much reliance in comparisons with the parliamentary tradition in England in seeking to understand what might seem on an initial reading to be similar provisions in Ireland. For example, while there is no express equivalent in the Constitution which provides that ‘...the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament...’ (as per Article IX of the Bill of Rights 1689), arguably the application of the principle of the separation of powers, as provided for in the Constitution, achieves this objective. The Forum has, however, found the comparisons with other jurisdictions (in section 6 below) to be a useful benchmark in making recommendations for change.

⁴ Bunreacht na hÉireann is referred to throughout this document as ‘the Constitution’.

Freedom of debate

- 5.5 Consequently, in carrying out its work, the Forum examined the foundation of freedom of debate and the related privileges and immunities contained in the Constitution. The Forum's considerations were limited to the application of these matters to Dáil Éireann.
- 5.6 With the benefit of parliamentary freedom of debate, TDs can scrutinise the actions of Government, or highlight gaps or failures in relation to public administration, safe in the knowledge that they cannot be sanctioned by the courts in relation to what they say in the Dáil.

Articles 15.10, 15.12 and 15.13

- 5.7 It is a matter for the Superior Courts in Ireland – and a function of the administration of justice – to determine the proper scope of activity accorded by the Constitution to the Government and the legislature. The judiciary therefore are entrusted, by virtue of the separation of powers, to define the proper area of activity of the executive, the legislature and, equally, the courts themselves.
- 5.8 In interpreting Articles 15.10, 15.12 and 15.13, the courts have recognised the very extensive nature of the privileges and immunities afforded by the provisions of those articles, which are for the purpose of encouraging debate on matters of national importance.
- 5.9 The courts have also stated – having regard to the significance of the immunities contained in Articles 15.10, 15.12 and 15.13, and the potential consequences for ordinary citizens by their exercise – that this places an even heavier onus on the Houses of the Oireachtas to ensure that constitutional rights are respected.
- 5.10 Article 15.10 does not itself protect freedom of debate, but gives the House the 'power to ensure freedom of debate'.
- 5.11 Having regard to the guidance given by the courts, it would appear that the main purpose of Article 15.10 was to dispense with the necessity for legislation to secure the freedom and protections referred to therein (i.e., freedom of debate, the protection of official documents, and the protection of private papers of members), by allowing each House of the Oireachtas to make its own separate rules relating to them.
- 5.12 Thus the function of Article 15.10 is to ensure that each House – the Dáil and the Seanad – has the independent capacity to adopt its own rules, without having to acquiesce in rules formulated by any other body, including the other House or the President.
- 5.13 The privilege conferred by Article 15.12 is extensive and is not limited to privilege from defamation. It has, for example, been judicially recognised that there are a great variety of legal proceedings which could follow upon the making of an utterance over and above a claim for damages for defamation, were it not for the privilege and immunity granted by Article 15.12.
- 5.14 By virtue of Article 15.13, members of the House are not amenable to any court or authority other than the House itself for utterances made. This is an individual privilege in addition to the privilege attached to the utterance itself wherever published pursuant to Article 15.12.

- 5.15 The combination of Articles 15.10, 15.12 and 15.13 of the Constitution place members of the Houses of the Oireachtas in a distinct and special legal position, attaching very significant privileges in respect of their individual and collective utterances, together with significant exemption from criminal law in the form of privilege from arrest. This underscores the importance of their role in constituting two of the three component parts of our National Parliament.
- 5.16 In summary, therefore, there is an onus on Dáil Éireann: (a) to seek to achieve a balance which recognizes the paramountcy of freedom of debate to our democracy, but also the enormity of the immunities which this brings, and (b) to give effect to all of this by its own Standing Orders and rules.

Relevant Standing Orders

- 5.17 The Standing Orders which are of immediate relevance to the Forum's terms of reference are Standing Order 59 (which deals with matters *sub judice*) and Standing Order 61 (which deals with utterances in the nature of being defamatory).
- 5.18 As mentioned earlier, given that Standing Order 59 (previously Standing Order 57) is presently before the Supreme Court, the Forum decided that any consideration of Standing Order 59 should await the determination of the Supreme Court.
- 5.19 The objective of Standing Order 61, in relation to persons external to the House, is to give those persons a way to complain where they feel that a defamatory utterance has been made about them in the House, and possibly to allow them to place a rebuttal (or 'right of reply') on the Dáil record. A person who considers that a TD has made an utterance about them in the Dáil chamber which is in the nature of being defamatory, and who wishes to make a complaint (a 'submission'), can do so under the terms of the Standing Order.
- 5.20 Standing Order 61 seeks to balance the power of a member to refer to a person outside the House with the right of that person to his or her good name. The complaint (or 'submission') under Standing Order 61 may be considered by the Committee on Procedure under the provisions of the Standing Order, which provide for a range of factors which the Committee on Procedure must take into account when considering the submission.
- 5.21 These factors include the totality of the parliamentary record; whether the utterance was soundly based and made in good faith; whether the substance of the utterance was already in the public domain, etc.
- 5.22 The Standing Order also defines for its own purposes an 'utterance in the nature of being defamatory', as follows:

An 'utterance in the nature of being defamatory' shall mean an utterance which, in the opinion of the Ceann Comhairle or of the Committee, could be construed as being defamatory if made other than in the course of parliamentary proceedings whereby a person who has been referred to by name or in such a way as to be readily identifiable has been adversely affected in reputation or in respect of dealings or associations with others, or injured in occupation, trade, office or financial credit, or that the person's privacy has been unreasonably invaded, by reason of that reference to the person.

6. Parliamentary privilege in other jurisdictions

- 6.1 As mentioned above in paragraph 3.5, as part of its work programme, the Forum also decided to consider the operation of, and the rules surrounding, freedom of debate in parliaments in other countries.
- 6.2 A comparative analysis of 23 European and Commonwealth parliaments conducted for the Forum found that freedom of debate is a core parliamentary privilege in all parliaments consulted, although in some parliaments immunity for utterances made is not absolute and members may, under certain circumstances (set out in the respective national constitutions), be held accountable before the courts.⁵
- 6.3 In particular, the Forum concentrated on how the balance between the privilege of freedom of expression in parliament and a citizen's constitutional right to a good name and reputation is managed by different jurisdictions. In general, parliaments can be grouped into three categories in this respect:
- those where the offence of false accusation or libel is not covered by immunity;
 - those in which parliament may itself waive immunity (via procedures set out in Standing Orders) in connection with utterances made (either by a simple or an absolute majority of all members); and
 - those in which parliament can never waive immunity in connection with opinions expressed and utterances made by members in the course of performing their parliamentary duties (Dáil Éireann falls into this category).

These three categories are briefly described in **Appendix A**.

- 6.4 In the first two categories, while there are internal rules setting out the sanctions which may be applied for utterances and behaviour in breach of parliamentary procedure (including breaches of the rules on freedom of expression), the strongest deterrent against defamatory utterances is arguably the possibility that immunity can be waived.
- 6.5 Of most interest to the Forum was the type and range of sanctions available to parliament for breaches of the internal rules around how to exercise freedom of expression (and the procedure through which they may be applied).
- 6.6 All parliaments place some limits on how freedom of expression is exercised and these limits are generally laid out in Standing Orders.
- 6.7 In some parliaments, including Ireland and the Czech Republic, the limitations placed on freedom of expression set out in Standing Orders specifically refer to statements in the nature of being defamatory (or wording to that effect). In other parliaments, such as Canada, limitations on freedom of expression where utterances affect the good name of an individual are inferred from rulings of the Chair.⁶ In New Zealand, the 'deliberate misleading of the House' is listed in the formal definition of 'contempt' which was adopted by parliament in 1996.⁷ The Standing Orders of these

5 For a list of all parliaments consulted please see **Appendix B**.

6 *Canadian House of Commons Procedure and Practice* 2nd edition Chapter 3 (Section on limitations on freedom of speech).

7 The definition includes a long, non-exhaustive list of examples of 'contempt' including breach of privilege, disobedience of rules of the House, interference, obstruction, misconduct (which includes 'deliberately misleading the House' – the misleading of the House received explicit recognition in 1963). All instances of contempt are subject to sanctions by parliament. See McGee David, *Parliamentary Practice in New Zealand*, Auckland: Oratia Books, 2017: chs. 46 and 47.

parliaments also place other limits on how freedom of expression is exercised (e.g., *sub judice*, un-parliamentary/un-proper language).

- 6.8 In other parliaments, the limits placed on freedom of expression may not explicitly refer to utterances which are in the nature of being defamatory, but do prohibit un-parliamentary language, language which is offensive to certain groups in society (such as racist comments) or incites violence, ‘un-proper’ language, continued repetition, etc.
- 6.9 In all parliaments, whether or not the restrictions placed on freedom of expression specifically include defamatory comments (or comments which are *sub judice*), there are procedures and sanctions at the disposal of the Speaker, and of parliament, for cases where a member breaches internal rules on how freedom of expression should be operated (i.e., abuses of privilege).
- 6.10 It is important to note that most of the sanctions at the disposal of parliaments (e.g., suspension for a day or for longer, fines, deduction of salary) are not specific to a breach of the privilege of freedom of expression. This is because, in the first instance, the response to such a breach tends to be to ask the member to stop speaking, and, in some cases, to withdraw comments (on the spot or subsequently), or, more severely, to retract and make an official apology (this varies depending on the parliament). Further sanctions tend to apply if a member refuses to cooperate with such an order and then, as in Dáil Éireann, the matter becomes a matter of disorder/misconduct. This is delineated in the table (**Appendix F**) which outlines the types of limitations placed on freedom of expression in a number of parliaments and the sanctions at the disposal of the Speaker and parliament to deter members from breaching these rules.
- 6.11 The Forum also considered the citizen’s right to respond where he or she perceives an abuse of privilege by a member has affected his or her good name. In many jurisdictions, a citizen may bring a case to court requesting that the member’s immunity be waived so that he or she may be held accountable in the courts (see **Appendix F**).
- 6.12 Of jurisdictions where privilege is absolute, only in Dáil Éireann, the Australian federal and state parliaments and the New Zealand parliament is there a ‘citizen right of reply’. The Forum noted that:
- a citizen has between three and six months to raise such an issue in the Australian and New Zealand parliaments; and
 - if the parliament, through its relevant Committee, considers that the citizen’s submission should be considered and published, its publication is linked to the official Hansard record as an appendix to the record of debate for the next day’s sitting (rather than in a Committee report).

7. Forum's recommendations

Submissions timeframe under SO61

Recommendation 1

- 1. The timeframe for making a submission under Standing Order 61 ['Defamatory Utterances'] should be extended to three months, or the dissolution of the Dáil, whichever is the sooner.**

- 7.1 Currently, under Dáil Standing Order 61, a person who wishes to make a submission in relation to an utterance made in Dáil Éireann must do so within two weeks of the utterance being made.
- 7.2 It is proposed that the timeframe for submissions on utterances be extended (so that it is more in line with the timeframe provided by the Australian parliaments at national and state level).
- 7.3 The purpose of this recommendation is to give persons affected by what is said in the House the greatest opportunity to make a submission on the matter.

Recommendation 2

- 2. Increased prominence should be given to the 'right of reply' under Standing Order 61 by including the right of reply as an electronic link from the original utterance in the Official Report (i.e., the Dáil debates).**

Right of reply in debates

- 7.4 Currently, where the Committee on Procedure finds under Standing Order 61 that a member's utterance is an abuse of privilege, it can decide that a response by the person affected (effectively a 'right of reply' and a form of recourse) can be incorporated into the official record, either by publishing it in the Official Report (i.e., the Dáil debates), or laying it before Dáil Éireann in the Oireachtas library.
- 7.5 The Forum has made this recommendation about linking the 'right of reply' in the Official Report, in order that the prominence given to the right of reply may be as great as the prominence given to the original utterance.

Historical findings of abuse of privilege

Recommendation 3

- 3. In relation to historical findings of abuse of privilege, the original Committee on Procedure report (which will include any original submissions made on the matter) should be included as an electronic link in the relevant section of the debates.**

7.6 Following the introduction of the Standing Order in the 1990s, findings of abuse of privilege in relation to defamatory utterances have been made under Standing Order 61⁸. In respect of these historical findings, the Forum does not recommend that a right of reply facility be afforded, but does recommend that an electronic link from the original utterance in the Official Report be made to the Committee on Procedure report on the matter. (The Committee on Procedure report will contain any original submissions made by affected persons on the matter.)

Recommendation 4

- 4. A member who has been found under Standing Order 61 to have abused privilege should be required to withdraw his or her utterances in the Dáil—**
- **at an equally prominent time to the original utterance;**
 - **within a set period of time;**
 - **in a form of words contained in the report of the Committee on Procedure on the matter; and**
 - **with the withdrawal electronically linked in the Official Report to the original utterance.**

Requirement to withdraw utterances

7.7 Currently, Standing Orders do not place an automatic obligation on members who have been found under Standing Order 61 to have abused privilege to withdraw what they have said.

7.8 The Forum's view is that a member who has been found under Standing Order 61 to have abused privilege should make a statement in Dáil Éireann withdrawing the utterance concerned within a set period of time and according to a form of words, to be contained in the Committee on Procedure's report on the finding of abuse of privilege.

7.9 The withdrawal of the utterance by the member would be electronically linked in the Official Report to the original utterance (which, as indicated in Recommendation 2 above, would have an electronic link to the right of reply).

⁸ For example, see the following reports of the Committee on Procedure (all available on the Oireachtas website, via the Oireachtas Library catalogue): (i) Report of the Committee on Procedure and Privileges on Complaint made by Mr. Tom Reddy under Standing Order 58 [now 61] (2004); (ii) Report of the Committee on Procedure and Privileges on Complaint made under Standing Order 59 [now 61] (2013); and (iii) Report of the Committee on Procedure and Privileges on Utterances made by Deputy Mary Lou McDonald in Dáil Éireann on 3rd December 2014 (2015).

- 7.10 The member would be required to withdraw the utterance at a point in the Dáil schedule which would be determined by the Committee on Procedure, but which would, in any case, be at an equally prominent time to the original utterance.
- 7.11 Following the Committee on Procedure's finding of abuse of privilege, the Ceann Comhairle would announce the finding in the House, along with the period of time in which the member who made the utterance had to withdraw it.

Four-day suspension where member does not withdraw utterance

Recommendation 5

- 5. Where a member who has abused privilege by making an utterance in the nature of being defamatory, does not withdraw the utterance within a set timeframe, the Ceann Comhairle should 'name' the member, and the question should be put to the House that the member stand suspended. If the House agrees, the member shall stand suspended for four sitting days.**

- 7.12 Currently, the only sanction provided under Standing Orders for abuse of privilege is that provided under Standing Order 61. This sanction is applied as follows: where a member has been required by the Committee on Procedure to withdraw an utterance which is in the nature of being defamatory, and has not done so, he or she is reprimanded in the Dáil by the Ceann Comhairle.
- 7.13 The Forum proposes that the sanction relating to refusal to withdraw abuse-of-privilege utterances should be contained within the existing regime of Standing Order sanctions for disorder. In this regard, the reference to attaching penalties for infringement of rules and Standing Orders pursuant to Article 15.10 confirms that each House has a disciplinary function in respect of members of the Oireachtas, and is empowered to deal with internal matters of procedure and discipline and provide for breaches of its rules and Standing Orders by its members. In addition, Article 15.13 *inter alia* provides that the members of each House shall not, in respect of any utterance in either House, be amenable to any court or any authority other than the House itself.
- 7.14 This would mean that where the relevant member will not withdraw his or her utterances, a sanction of suspension from the service of the Dáil may be applied, by decision of the House.
- 7.15 If the member does not withdraw the utterance in accordance with the wording stipulated by the Committee on Procedure, and within the set period of time, he or she will be guilty of disorder, and the Ceann Comhairle will 'name' him or her.
- 7.16 The member will have one last opportunity immediately before being 'named' to withdraw his or her utterances in the manner outlined above. If he or she does not withdraw, the question will then be put to the House that the member be suspended from the service of Dáil Éireann.
- 7.17 The Forum is of the view that having such suspension for four days is proportionate, in order to reflect the seriousness of the matter of abusing privilege.

7.18 In this regard, the Forum is cognisant of the fact that there will be procedural issues to be resolved where a member who has received a suspension for disorder at the time of his or her making an utterance, being then subject to another suspension later on in relation to a refusal to withdraw the same utterance.

7.19 The Forum considers that an appeals process in relation to this penalty is not necessary, given that the penalty applies to the disorder of not withdrawing the utterance (rather than applying to the original making of the utterance), and a member can always avoid being disorderly (in this instance, by making the withdrawal, as required by the Committee on Procedure).

Recommendation 6

- 6. Suspension from the service of the House should also include suspension from participation in Committees.**

**Suspension
from House
to include
Committees**

7.20 Currently, suspension from the service of the Dáil means that a TD may not speak or vote in the Dáil, or have any Parliamentary Questions answered. It does not currently include suspension from participation in Committees. The Forum considers that it should.

**Form of prior
private notice in
relation to
utterances**

Recommendation 7

- 7. Prior private notice given under Standing Order 61 in relation to an utterance which may be defamatory in nature should be given in writing to the Ceann Comhairle and in good time.**

7.21 Currently, under Standing Order 61, a member who 'considers that it is in the public interest for him or her to make an utterance which could be construed as being in the nature of being defamatory, may give prior private notice to the Ceann Comhairle of his or her intention to make such an utterance and the reasons therefor'. Such prior private notice is taken into account if the utterance concerned is later considered under the provisions of Standing Order 61.

7.22 The Forum is of the view that such prior private notice must be given in a set form, i.e., that the content of the utterance must be given in writing and in good time to the Ceann Comhairle, in order that he or she may give timely consideration to the matter.

Recommendations 8, 9 and 10

8. **Members should receive guidelines on responsible use of freedom of debate.**
9. **Training on responsible use of freedom of debate should be included in the induction for new members.**
10. **Committee Chairs and temporary Chairs in the Dáil chamber should receive training on responsible use of privilege.**

Training and guidance on responsible use of privilege

- 7.23 Given the importance of the responsible use of freedom of debate, the Forum considers that members should be given guidance in relation to the responsible use of freedom of debate and what can and cannot be said in relation to utterances in the nature of being defamatory.
- 7.24 Accordingly, the Forum recommends that the guidelines contained in **Appendix C** be considered by the Committee on Procedure for adoption in relation to the responsible use of freedom of debate.
- 7.25 The Forum also recommends that training in relation to the use of privilege be contained in the induction given to new members following an election.
- 7.26 The Forum recommends that Committee Chairs be given training in relation to the use of privilege, given their responsibility for regulating debate in Committees, which are also subject to Standing Order 61. Such training should also be given to temporary Chairs in the Dáil chamber.

Recommendations 11 and 12

11. **The facility for making a submission under Standing Order 61 in relation to a Dáil utterance should be given more prominence on the Oireachtas website.**
12. **A programme in relation to the facility to make a submission should be broadcast on the Oireachtas channel as part of its regular cycles of broadcasts.**

Awareness of facility to make submissions under SO61

- 7.27 To ensure that members of the public are made aware of their right of reply, the Forum is of the view that the facility for making a submission in relation to a Dáil utterance be given more prominence on the Oireachtas website, for instance, by having its own page, to be signposted on the home page.
- 7.28 The Forum also proposes that the Oireachtas Communications Unit make a short programme to draw attention to the facility to make a submission under Standing Order 61.

8. Matters not recommended for change by the Forum

The forum in which determinations are made in relation to abuse of privilege

8.1 The Forum's view is that the Committee on Procedure (i.e., the Committee which currently has responsibility for considering matters of privilege under Standing Order 107) should continue to be the entity which determines whether or not a member has abused privilege, without the facility of any kind of appeals mechanism (see paragraph 8.3 in this regard below).

Three-quarters agreement still required in Committee on Procedure for finding of abuse of privilege

8.2 In order that any system of determination of abuse of privilege by the Committee on Procedure does not adversely impact on smaller parties and groups, the Forum proposes that it should continue to be the case that a positive decision of three-quarters of the members of the Committee on Procedure present and voting be required for a finding of abuse of privilege (as is currently provided for under Standing Order 61(6)).

Appeals mechanism against a finding of abuse of privilege

8.3 The Forum is of the view that the current system of consideration by the Committee on Procedure is fair – it does not favour the introduction of an appeals mechanism for members who have been found to have abused privilege. If such an appeals mechanism were to be created, the question arises as to how it would interact with the Committee on Procedure, and of whom it would be comprised. (For instance, if it were comprised of fewer TDs than the Committee on Procedure, in what way would those TDs be selected, to ensure balance and confidence in the process?) The Forum is of the view that the possibility of the inclusion of persons external to parliament on any such appeals mechanism would not be permissible, as only a member's peers (i.e., other members) can make a determination in relation to a member's behaviour in parliament.

Financial sanction for abuse of privilege

8.4 The Forum is not proposing a financial sanction for abuse of privilege.

8.5 As set out earlier, the Forum proposes that the sanction relating to refusal to withdraw abuse-of-privilege utterances should be contained within the existing regime of Standing Order sanctions for disorder.

8.6 It is the view of the Forum that the sanction it has proposed is proportionate, fair and sufficient.

Extension of privilege beyond the floor of the House and/or Committee

8.7 The Forum is not of the view that privilege should be extended beyond the floor of the House and/or Committees as appropriate.

Appendix A: Procedure in Other Parliaments

Three groups of parliaments, grouped according to the way in which the privilege of freedom of expression is balanced with the right of the individual to a good name

1. In the first group of parliaments the offences of defamation, false accusation, libel and other similar offences **are explicitly not covered by the immunity** provided in the Constitution (so statements in the nature of making false accusation, or libellous utterances are not an ‘abuse of the privilege of freedom of expression’ because the constitutional protection does not extend to these offences). In these cases the sanction for making utterances which are defamatory is that a member may be held accountable before the courts if the affected person, or an authority with the power to do so, brings a case. This is the case in the **Austrian, German, Lithuanian** and **Greek** parliaments, for example. While these parliaments also have the power to make internal rules which can place limits on freedom of expression (e.g., about what may and may not be said), and to sanction for breaches of them, the key sanction for utterances which are in the way of being defamatory is the possibility that a member will be held accountable before the courts. However, because defamation is a criminal offence in these countries, and because members are immune from arrest (except when caught in the act) without the permission of parliament, for a member to be held accountable before the courts for utterances in the nature of being defamatory, parliament must waive immunity. In effect, parliament – generally through its immunity committee and with a final decision by parliament (in some cases by a super majority) – decides whether to waive immunity.
2. In the next group of parliaments, the privilege of freedom of expression applies to all utterances, including utterances in the nature of being defamatory, *except* that **it may be waived by parliament itself**, i.e., parliament may decide that a member can be held accountable in the courts for an utterance made. This is the case in **Finland, Denmark** and **Poland**, for example, though the precise rules differ in each case. In the Finnish case, the Constitution sets out that immunity may be waived for opinions expressed or conduct in the consideration of a matter if 5/6 of parliament consents to it. As such, if an affected citizen requests it, parliament will consider waiving immunity so the citizen can take a case. In the Polish parliament, under the Constitution, if a member ‘violates the rights of other persons’ when making an utterance, he or she may be held accountable before the courts *with the consent* of the parliament (lower or upper House). Applications are made by the ‘relevant authority’ (such as public prosecutor), or, in the Finnish case, may be made by the affected citizen (who requests that parliament waive immunity so that a case can be taken to court). In these cases, the sanction for a breach of privilege by way of being defamatory is the possibility that parliament will waive immunity and allow the member to be held accountable in the courts. In the Danish and Polish cases, immunity can be waived by a majority; in Finland, the support of 5/6 of members is necessary. Each parliament sets up its own procedures for preparing a decision on whether or not to waive immunity. The decision is taken by the House and not by a Committee.
3. In a third group of parliaments, **immunity may not be waived by parliament in connection with utterances or opinions expressed**. In these cases, only parliament, through its own internal rules and procedures, can ensure that the privilege of freedom of expression is operated in a way that protects the good name of individuals (for example, in **Ireland, the UK, the Netherlands, Portugal, New Zealand** and **Canada**).

Appendix B: *Parliaments Examined*

1. Austrian National Council
2. Belgian Chamber of Deputies
3. Croatian Parliament
4. Czech Republic Chamber of Deputies
5. Danish Parliament
6. Estonian Parliament
7. Finnish Parliament
8. French National Assembly
9. German Bundestag
10. Greek Parliament
11. Hungarian Parliament
12. Italian Chamber of Deputies
13. Lithuanian Parliament
14. Dutch Tweede Kamer (Lower House)
15. Polish Parliament (Sejm and Senate)
16. Portuguese Assembly
17. Slovakian Parliament
18. Slovenian Parliament (National Council and Assembly)
19. Spain (Congress of Deputies – Lower House)
20. Canadian House of Commons
21. UK House of Commons
22. New Zealand Parliament
23. Australian Federal Parliament⁹

⁹ For all parliaments with the exception of the New Zealand and the Australian Federal Parliament, the Oireachtas Library and Research Service conducted a comparative survey via the European Centre for Parliamentary Research and Documentation and, where necessary, conducted follow-up conversations with officials in each parliament. The information for the New Zealand and Australian parliaments was sourced from websites and edited volumes, in particular, McGee David, (2017) *Parliamentary Practice in New Zealand* Oratia Books, Auckland.

Appendix C: *Draft Guidelines on the Use by Members of their Constitutional Privilege of Freedom of Debate*

1. Members should, wherever possible, avoid naming persons outside the House, or referring to them in such a way as to make them identifiable.
2. A matter may be raised where it is, in the opinion of the Ceann Comhairle, relevant to parliamentary activities, soundly based, and in the public interest. When raising matters, members should act responsibly, in good faith, and in a fair manner, in view of the possible adverse consequences for persons outside the House arising from utterances made by members in the chamber.
3. In relation to gaps in public administration, members should raise issues in the context of holding the Government to account, and should wherever possible do this in a substantive manner (i.e., with prior written notice) by way of:
 - Parliamentary Questions;
 - topical issues; or
 - a motion taken during private members' time.
4. In holding the Government to account, members may call on the Government to perform actions that are within the Government's remit, e.g., Ministerial or Cabinet decisions, the making of secondary legislation, assignment of State funding, etc. (The Government also has within its remit such actions as the establishment of a commission of investigation. Members may also call on the Government to propose to the House the establishment of a tribunal of inquiry.)
5. If a member feels that it is necessary to refer to the actions of a specific individual or company in relation to a matter of public administration, the member should do that by way of substantive (i.e., written) motion, with prior written notice of the motion to the Ceann Comhairle.
6. Members should not raise matters in the House which are more properly within the remit of another body, e.g., allegations of criminal wrongdoing should be brought to an Garda Síochána.

Appendix D: *Standing Order 61*

Privilege: utterances in the nature of being defamatory.

61(1) A member shall not make an utterance in the nature of being defamatory and where a member makes such an utterance it may be *prima facie* an abuse of privilege, subject to the provisions of this Standing Order.

(2)(a) If the defamatory nature of the utterance is apparent at the time it was made during the course of proceedings, the Ceann Comhairle shall direct that the utterance be withdrawn without qualification.

(b) If the member refuses to withdraw the utterance without qualification the Ceann Comhairle shall treat the matter as one of disorder: Provided that the member may claim that the matter be referred to the Committee on Procedure in which case no further action shall be taken thereon by the Ceann Comhairle at that point.

(3) If the defamatory nature of the utterance is not apparent at the time during the course of proceedings and at the earliest opportunity but not later than two weeks after the making of the utterance–

(a) the alleged abuse of privilege is raised by a member with a request that it be considered by the Ceann Comhairle or referral to the Committee on Procedure directly is sought by a member by way of motion, or

(b) where a person who has been referred to by name, or in such a way as to be readily identifiable, in the Dáil, makes a submission in writing to the Ceann Comhairle–

(i) claiming that the person has been adversely affected by the making of an utterance in the nature of being defamatory within the meaning of this Standing Order,

(ii) setting out the reasons why the person claims the said utterance was in the nature of being defamatory and why the said utterance *prima facie* constitutes an abuse of privilege,

(iii) requesting that the person be able to incorporate an appropriate response in the parliamentary record,

if the Ceann Comhairle is satisfied that–

(c) the member's request or the subject of the submission is so obviously trivial or the submission so frivolous, vexatious or offensive in character as to make it inappropriate that further action be taken or that it be considered by the Committee, or

(d) it is not practicable for the Committee to consider the member's request or the submission under this Standing Order, or

(e) taking into account the totality of the parliamentary record (including any rebuttal of the utterance concerned by other members), *prima facie* no abuse of privilege has occurred,

the Ceann Comhairle may decide that no action shall be taken in respect of the member's request or the submission.

In any other case the Ceann Comhairle may–

(i) require the member who made the utterance to make a personal explanation to the House in effect to withdraw without qualification the utterance made or to clarify otherwise the circumstances that gave rise to the utterance as may be deemed appropriate, provided that the

- member may claim that the matter be referred to the Committee on Procedure in which case no further action shall be taken thereon by the Ceann Comhairle at that point, or
- (ii) refer the member's request or the submission to the Committee.
- (4) Where the request or submission is referred to the Committee–
- (a) the Committee may decide not to consider the request or submission referred to it under this Standing Order if the Committee considers that the subject of the request or submission is not sufficiently serious or is frivolous, vexatious or offensive in character, and such a decision shall be reported to the Dáil;
- (b) if the Committee decides to consider a request or submission under this Standing Order–
- (i) the Committee may invite the member who made the utterance and such other members as the Committee may deem appropriate to appear before the Committee to put his or her case,
- (ii) in considering a request or submission and reporting to the Dáil the Committee shall not consider or judge the truth of any statements made in the Dáil or of the submission;
- (c) the Committee shall have discretion to publish a submission referred to it under this Standing Order or its proceedings in relation to such a submission, and may lay minutes of its proceedings and all or part of such submission before the Dáil.
- (5) In any report which it may make to the Dáil on a request or submission under this Standing Order, the Committee may make any of the following recommendations–
- (a) that *prima facie* no abuse of privilege has occurred and that no further action be taken by the Dáil or by the Committee in relation to the submission; or
- (b) if the Committee decides that a member has made an utterance in the nature of being defamatory and that *prima facie* an abuse of privilege has occurred–
- (i) that a response by the person who made the submission, in terms specified in the report, following consultation with such person, be published in the Official Report or be laid before the Dáil or recorded in such a manner as may be deemed appropriate by the Committee, or
- (ii) that the member who made the utterance be required to make a personal explanation to the House in effect to withdraw without qualification the utterance made or to clarify otherwise the circumstances that gave rise to the utterance as may be deemed appropriate: Provided that, if the member refuses to make a personal explanation on foot of such recommendation, the Ceann Comhairle shall at the commencement of business on the next sitting day, or at the earliest convenient opportunity, on which the member is present, reprimand the member in his or her place.
- (6) Any decision taken by the Committee under paragraph (5)(b) of this Standing Order shall require the support of three-quarters of the members present and voting.

- (7) Notwithstanding the provisions of this Standing Order (save the provisions of paragraph (6), which shall continue to apply), the Committee, following consideration of a request or submission under this Standing Order, may make such recommendations as appear to it to be required in the interests of all concerned.
- (8) A document laid before the Dáil under this Standing Order–
- (a) in the case of a response by a person who made a submission, shall be succinct and strictly relevant to the questions at issue and shall not contain anything offensive in character; and
 - (b) shall not contain any matter the publication of which would have the effect of–
 - (i) unreasonably adversely affecting or injuring a person, or unreasonably invading a person's privacy, in the manner referred to in paragraph (11) of this Standing Order,
 - (ii) unreasonably adding to or aggravating any such adverse effect, injury or invasion of privacy suffered by a person.
- (9) In considering a matter under this Standing Order the Ceann Comhairle or the Committee, as the case may be, shall take into account the following–
- (a) whether the member who made the utterance did so in a responsible manner, acted in good faith, and ensured, as far as is practicable, that the utterance reflecting adversely on a person was soundly based,
 - (b) the totality of the parliamentary record, including any rebuttal of the utterance concerned by other members,
 - (c) that the said member made a personal explanation in effect to withdraw the defamatory nature of the utterance, and
 - (d) the extent to which–
 - (i) the substance of the utterance was already in the public domain by way of reports in the media; or
 - (ii) the member had reasonable excuse or otherwise for making the utterance.
- (10) Notwithstanding the provisions of this Standing Order–
- (a) any member who considers that it is in the public interest for him or her to make an utterance which could be construed as being in the nature of defamatory, may give prior private notice to the Ceann Comhairle of his or her intention to make such an utterance and the reasons therefor; and such notice shall be taken into account in the consideration of the application of the provisions of this Standing Order,
 - (b) the Ceann Comhairle may at any time on his or her own volition refer an utterance in the nature of being defamatory to the Committee.

(11) For the purposes of this Standing Order–

An “utterance in the nature of being defamatory” shall mean an utterance which, in the opinion of the Ceann Comhairle or of the Committee, could be construed as being defamatory if made other than in the course of parliamentary proceedings whereby a person who has been referred to by name or in such a way as to be readily identifiable has been adversely affected in reputation or in respect of dealings or associations with others, or injured in occupation, trade, office or financial credit, or that the person’s privacy has been unreasonably invaded, by reason of that reference to the person;

“Committee” shall mean either the Dáil Committee on Procedure or a sub-Committee thereof;

“Proceedings” shall mean parliamentary proceedings of the Dáil, a Standing, Select or Special Committee or a sub-Committee thereof.

Appendix E: *Standing Order 59*

Debate: matters *sub judice*.

59. Subject always to the right of Dáil Éireann to legislate on any matter (and any guidelines which may be drawn up by the Committee on Procedure from time to time), and unless otherwise precluded under Standing Orders, a member shall not be prevented from raising in the Dáil any matter of general public importance, even where court proceedings have been initiated: Provided that–
- (1) the matter raised shall be clearly related to public policy;
 - (2) a matter may not be raised where it relates to a case where notice has been served and which is to be heard before a jury or is then being heard before a jury;
 - (3) a matter shall not be raised in such an overt manner so that it appears to be an attempt by the Dáil to encroach on the functions of the courts or a judicial tribunal;
 - (4) members may only raise matters in a substantive manner (i.e. by way of Parliamentary Question, matter raised under Standing Order 29A, motion, etc.) where due notice is required; and
 - (5) when permission to raise a matter has been granted, there will continue to be an onus on members to avoid, if at all possible, comment which might in effect prejudice the outcome of proceedings.

Appendix F: Rules in other parliaments

| PARLIAMENT | TYPE OF LIMITS PLACED ON FREEDOM OF EXPRESSION ¹⁰ | SANCTIONS AVAILABLE, WHO APPLIES THEM AND PROCEDURE USED |
|-----------------------|--|--|
| Czech Republic | <p>Limits on defamatory utterances:</p> <p>Act on the Rules of Procedure of the Chamber of Deputies states that 'disciplinary proceedings shall be held against any Deputy whose speech in either House or its committees is 'characterised as an act that would otherwise result in criminal prosecution' '.</p> | <p>When such a matter occurs, the Mandate and Immunity Committee initiates disciplinary proceedings, either on a motion of the President of the Chamber, or at its own instance. The Committee, having considered it, decides to impose a disciplinary measure or to discontinue the proceedings. The affected Deputy has the right to state his or her opinion and be heard by the Committee during the proceedings.</p> <p>Possible sanctions include:</p> <ul style="list-style-type: none"> ■ Ordered to apologise for statement within a specified time limit (or to pay a fine totalling up to his or her monthly salary); ■ Time limit and method of apology is specified in the resolution imposing such disciplinary measures; ■ Within 15 days after receiving the sanction, the member may appeal it and, if he/she does, the Chamber decides following a debate whether to confirm, amend or cancel the sanction; ■ If the deputy refuses to apologise, the Committee decides on a suitable way to publicise the measure or shall impose a fine. All fines are regarded as revenues of the state budget. |
| Finland | <p>Under the Constitution (Article 31), members have the right to speak freely on all matters. The same Article states that a member 'shall conduct himself with dignity and decorum and not behave offensively to another person and that if a member is in breach of such conduct, the Speaker has the power to point this out and the parliament the power to caution a member who has repeatedly breached the order or suspend him for a maximum of two weeks'.</p> | <p>Process for disciplining a member for this or other breaches of the rules on freedom of expression:</p> <ul style="list-style-type: none"> ■ Speaker may point out or prohibit member from continuing to speak; ■ Speaker may reprimand the member; ■ The Parliament (plenary) (on proposal from the Speaker) may caution a member who has repeatedly breached the order, or ■ Suspend him/her from sessions of parliament for up to two weeks. Salary or allowances are not affected. <p>This has happened (suspension) in seven cases; there have been 20 disciplinary cases.</p> |

¹⁰ This is not an exhaustive list.

| PARLIAMENT | TYPE OF LIMITS PLACED ON FREEDOM OF EXPRESSION ¹⁰ | SANCTIONS AVAILABLE, WHO APPLIES THEM AND PROCEDURE USED |
|---------------|---|--|
| Canada | <p>The Canadian House of Commons Compendium of Procedure¹¹ states that the House is intolerant of apparent misuse by its members of the freedom of speech and that... Speakers have dealt decisively with members... and caution members not to unfairly or needlessly attack the reputation of citizens or groups. Several rulings of the Chair on a question of privilege involving an individual who is not a member of the House have urged members not to name or identify individuals in utterances. Speaker Frazer said that the House should consider 'restraining itself in making comments about someone outside this chamber that would be defamatory if made outside this House'.¹²</p> | <p>Sanctions for breach of the rules and conventions of the House on how to exercise freedom of expression are the same sanctions for disorder.</p> <ul style="list-style-type: none"> ■ Speaker calls upon a member to retract the offending words or otherwise apologise without qualification; ■ Speaker may name a member for disregarding the authority of the Chair (naming) and order his or her withdrawal for the remainder of that sitting day (Standing Order 11); ■ After naming, the Speaker may propose that the House apply supplementary disciplinary sanctions, and possible sanctions include suspension from the service of the House. The House may decide that a member should not receive a salary for the duration of suspension. The Speaker may also order the Sergeant-at-Arms to take the necessary steps to remove a member who refuses to leave the chamber. |

11 See section entitled 'Limitations on freedom of speech'.

12 Canadian House of Commons Procedure and Practice 2nd edition [Chapter 3 \(Section on limitations on freedom of speech\)](#).

| PARLIAMENT | TYPE OF LIMITS PLACED ON FREEDOM OF EXPRESSION ¹⁰ | SANCTIONS AVAILABLE, WHO APPLIES THEM AND PROCEDURE USED |
|---------------------------|--|---|
| <p>New Zealand</p> | <p>In 1996 the House adopted a general definition of ‘contempt’ of parliament based on Erskine May’s definition of any act or omission which: (a) obstructs the House; (b) obstructs or impedes any member or officer in discharging their duties; (c) has a tendency to result, directly or indirectly, in (a) or (b). It includes a long list of examples of contempt including mis-conduct under which ‘Members deliberately misleading the House’ is listed. Also included is breach of privilege and disobedience of rules of House, and premature publication of a Select Committee report or proceeding.</p> | <p>There is a three-stage process where an utterance may be one of contempt:</p> <ol style="list-style-type: none"> 1. The Speaker initially decides if an utterance is a matter of contempt and if it warrants investigation by a Committee; 2. Committee investigates and reports to the House; 3. House endorses or rejects the Committee’s report and recommendations. While the Committee may make recommendations, only the House can apply punishment or sanctions.¹³ Sanctions available include: (a) directing the member to apologise publicly; (b) censures; (c) suspension. <p>Consequences of suspension</p> <p>Suspension means no vote, no Committee work, no motions or questions and no entry into parliament buildings.</p> <p>Disciplinary measures are also provided for under Standing Orders relating to <i>‘Disorderly Conduct’</i> which can apply to situations of disobedience of the rules of the House:</p> <ol style="list-style-type: none"> 4. The Speaker may ask the member to withdraw for a time of up to that full day; 5. If the disorder takes place during oral question time, the member may not return to question time nor may any member ask a question in his or her place, regardless of time he or she is ordered to withdraw; 6. If a member continues with the behaviour, the Speaker can ‘name’ the member and call on the House to judge his or her conduct; 7. After a member has been ‘named’, the House votes on a motion from the Speaker that the member be suspended (this motion may not be amended by the House); 8. Under SO91, the time for suspension is as follows: on the first occasion – 24 hours; the second – 7 days (excluding first 24 hours); third occasion – 28 days (excluding first 24 hours). 9. If a member refuses to obey the direction of the Speaker, the member is suspended for the remainder of the calendar year. |

13 David McGee (cited above) Chapter 46.

| PARLIAMENT | TYPE OF LIMITS PLACED ON FREEDOM OF EXPRESSION ¹⁰ | SANCTIONS AVAILABLE, WHO APPLIES THEM AND PROCEDURE USED |
|------------|---|---|
| Croatia | As well as general decorum and order, Standing Orders stipulate that a member who advocates violence and hatred, insulting the Croatian people, religious, national and other communities, sexual, gender and other minorities, foreign states and international organisations and their representatives, shall be called to order and denied the right to speak. | <p>Disciplinary measures that may be imposed by the Chair against deputies in case of abuse of authority (including breach of rules on how to exercise freedom of expression):</p> <ul style="list-style-type: none"> ■ Call to order; ■ Call to order and denial of the right to speak; ■ Exclusion from the session.¹⁴ <p>The above sanctions are set out in the provisions of the Standing Orders. Monetary sanctions are not regulated by the Standing Orders. However, part of deputy's lump sum can be deducted if he/she is absent from a session of the Parliament ("other cases") as regulated by the Act on the Rights and Duties of the Members of the Croatian Parliament.</p> |
| Hungary | Standing Orders set out that sanctions apply for utterances which potentially offend the reputation of the National Assembly or any person or group, especially a nationality or an ethnic, racial or religious community. | <p>Reprimand the member and warn of the consequences of repeating/continuing with the utterance;</p> <p>If he/she continues, the Speaker withdraws the right to speak in that debate;</p> <p>Even without reprimand or warning, the Speaker may <i>propose</i> to exclude the member from the remaining part of the sitting day and that the remuneration payable may be decreased (with the application of s.51/A of the Act of the National Assembly);</p> <p>The National Assembly decides <i>without debate</i> on the proposal for exclusion;</p> <p>The House Committee makes the decision about pay deduction. Upon the motion of any of its members, the House Committee may, within 15 days of the conduct specified in section 48(3), section 49(4) and section 50(1) being shown, (which includes offending reputation of individual or groups), order the decreasing of the remuneration payable to the member. In its decision, it must set out the cause of it and, in the case of an infringement of the provisions of the Rules of Procedure pertaining to the order of discussions, demonstration or the vote, the provision of the Rules of Procedure that has been infringed;</p> <p>If the member does not agree with the decision to suspend his or her salary, he/she can appeal it (within 5 days of being informed) to the Committee on Immunity, Incompatibility, Discipline.</p> |

14 There are two annual sessions of parliament, one between 15 January and 15 July, and the second between 15 September and 15 December. [Standing Orders of the Croatian Parliament](#). It is not clear if session, in this sense, means a full session or one day.

| PARLIAMENT | TYPE OF LIMITS PLACED ON FREEDOM OF EXPRESSION ¹⁰ | SANCTIONS AVAILABLE, WHO APPLIES THEM AND PROCEDURE USED |
|--------------------|---|--|
| Greece | In case of using offensive/un-parliamentary language during the parliamentary procedure. | <p>The Speaker may impose disciplinary measures on the offender (Art. 77-81 Standing Orders). These measures include:</p> <ul style="list-style-type: none"> ■ recall to order, ■ denial of speech, ■ motion of censure for unparliamentary conduct, <p>This is proposed by the Speaker and the member has five minutes to explain his or her behaviour. The House votes and if the motion is accepted there is an automatic reduction of one fourth (1/4) of the monthly remuneration of the MP;</p> ■ temporary exclusion from sittings, <p>On a motion proposed by the Speaker (or by a proposal of 1/20 of members). If approved by the House it results in the denial of speech in the sittings of the Plenum, the Recess Section and the Committees and the reduction of a half (1/2) of the monthly remuneration.</p> |
| Netherlands | Under Standing Orders (SO58 and 59) if a member or Minister uses offensive language, causes a disturbance, violates his or her duty of secrecy as referred to in chapter XIII, fails to observe confidentiality as referred to in chapter XII, or signifies his or her approval of, or incites, the commission of unlawful acts, he/she may be reprimanded. | <p>In the first instance, he/she is reprimanded by the President and given the opportunity to withdraw the words that have given rise to the warning.</p> <p>Where a member does not comply with SO58, under SO59:</p> <ol style="list-style-type: none"> 1. The Speaker may issue a warning and member is given opportunity to withdraw words (SO59); 2. If member does not take this opportunity, and continues with the behaviour, the Speaker may order him/her to yield the floor and he/she may no longer take part in the debate; 3. Speaker may, if these disciplinary measures have been applied, decide to exclude the member from the meeting. <p>There is no appeal to the House against these decisions and no committee involved in this process.¹⁵</p> |

¹⁵ The Human Rights Commission of the Council of Europe advocated the establishment of a parliamentary committee that would decide how parliamentary inviolability was applicable in the Netherlands.

| PARLIAMENT | TYPE OF LIMITS PLACED ON FREEDOM OF EXPRESSION ¹⁰ | SANCTIONS AVAILABLE, WHO APPLIES THEM AND PROCEDURE USED |
|-----------------|---|--|
| Portugal | Utterances which stray from the subject under discussion or which become insulting or offensive. | <p>For utterances which breach rules, members are liable only to disciplinary measures by the Speaker or the House. Under SO89 the Speaker may:</p> <ul style="list-style-type: none"> ■ caution any speaker who breaches these rules on the exercise of freedom of expression; and ■ may withdraw the floor from him/her; ■ call to order; ■ censure. |
| Denmark | Utterances which the Speaker considers to be <i>improper</i> . This means not only utterances which may fall within the scope of provisions in the legislation but also unparliamentary utterances such as the use of offensive language. | <p>Under Article 29(2), if the Speaker considers the statements of a member <i>improper</i>, the Speaker may call the member to order.¹⁶</p> <p>If the member does not obey the directions of the Speaker, the Speaker may ask the member to discontinue his or her speech and the Speaker may also decline to call upon the member to speak once more during the same sitting.</p> <p>Where a member is called to order, the Standing Orders Committee may decide to exclude that member from the sittings of the Danish Parliament for up to 14 sitting days. For the duration of the exclusion, the member in question is not allowed to take part in Committee meetings either.¹⁷ However, pay and allowances are not affected by the suspension.</p> <p>This is on the initiative of the Standing Orders Committee (but the matter may be brought to its attention by an ordinary member). This Committee is composed of the Presidium and other members of parliament (21 in total). Its membership is set out in Standing Orders and it does not automatically include all groups – any group not on it may appoint a member to attend and speak, but not to vote.</p> <ul style="list-style-type: none"> ■ Decides by simple majority and the Chair has a vote. ■ Where the abuse is related to an alleged defamatory statement, there are no specific criteria laid down for the Committee (e.g., nothing to prevent it from considering the veracity of the statements). |

¹⁶ Only the Speaker can call a member to order (though an ordinary member may request the Speaker to do so).

¹⁷ There have been no cases in the history of the Folketing of declining the member to speak once more during a sitting according to Article 29(2) or excluding a member from sittings for up to fourteen sitting days.

Appendix G: *Terms of reference, etc.*

Terms of Reference of the Forum on Parliamentary Privilege

1. The Ceann Comhairle has engaged persons to form a group to be known as the Forum on Parliamentary Privilege (hereinafter referred to as 'the Forum') to ensure that a fair balance is struck between freedom of debate for members of the Dáil and the rights of individuals. The Forum will offer advice and recommendations to the Ceann Comhairle, who will bring the Forum's report to the Dáil Committee on Procedure for its consideration and to decide whether Dáil Standing Orders need to be amended.
2. The Forum shall consider and make recommendations on how to strike a fair balance in relation to:
 - (i) freedom of debate and protection of the citizen's constitutional rights to his or her good name and to privacy, and
 - (ii) freedom of debate and the rights of the individual in the context of court proceedings.

In particular the Forum shall consider the relevant provisions of the Constitution and Dáil Standing Orders, including–

- the use of parliamentary privilege under Article 15.10 of the Constitution, specifically the privilege arising from each House's power to ensure freedom of debate under that Article, and what amounts to a responsible use of this privilege;
- the operation of Dáil Standing Order 59 ('the *sub judice* rule');
- the operation of Dáil Standing Order 61 ('Defamatory Utterances');
- similar issues of privilege arising under Articles 15.12 and 15.13 of the Constitution;
- avenues of redress for persons who have been found to have been adversely affected by statements made under privilege;
- the sanctions which the Dáil may impose for abuse of privilege;

together with proposed changes to Dáil Standing Orders, and such other matters as the Forum thinks fit, in relation to the above.

3. The Forum shall include the following persons:
 - Professor David Farrell, Chair of Politics at University College Dublin and Head of the School of Politics and International Relations;
 - Councillor Mary Hanafin, former Government Chief Whip;
 - Mr Conor Brady, writer and former editor of the Irish Times; and
 - Mr Conleth Bradley, Senior Counsel.

4. The chair of the Forum shall be Professor Farrell.
5. The Forum shall agree its own operating procedures, and shall hear and/or consider such submissions as it thinks fit, either verbal or written, as relate to its remit. The Forum may publish submissions on its website and it may include submissions received in its report under paragraph 7 of this proposal.
6. The Forum may prepare interim reports addressed to the Ceann Comhairle for transmission to the Dáil Committee on Procedure as it thinks fit.
7. The Forum shall make a final report to the Ceann Comhairle, for transmission to the Dáil Committee on Procedure, not later than 30th November 2017.
8. Any extension of the deadline for submission of the final report shall be approved by the Ceann Comhairle.

Dublin, Tuesday, 01 August 2017

Houses of the Oireachtas Service Call for Written Submissions on Freedom Of Debate and Members' Privilege

Freedom of debate is a cornerstone of our democracy and is a fundamental feature of our parliament. Under the Constitution of Ireland, members of the Houses of the Oireachtas have freedom to debate any issue. This privilege ensures that members can speak freely and raise important issues without fear of being sued in the courts. These wide-ranging privileges are constitutionally protected under Articles 15.10, 15.12 and 15.13 of the Constitution. Only the Houses of the Oireachtas themselves can hold members to account for what they say in parliamentary debate.

For that reason, the Houses of the Oireachtas make the rules governing their own members, and members' use of privilege. The Standing Orders of the Dáil regulate privilege, for example, in relation to making statements in the nature of being defamatory, or commenting on ongoing court proceedings.

The Ceann Comhairle has convened the Forum on Parliamentary Privilege to consider the current rules regarding privilege; the Forum wishes to hear from interested members of the public and is seeking written submissions addressing the following six questions as applicable in Dáil Éireann.

1. What constitutes a *responsible* use of freedom of debate in the Houses of the Oireachtas?
2. How should freedom of debate in the Houses of the Oireachtas and the right of an individual to his or her good name be balanced against each other?
3. How should freedom of debate in the Houses of the Oireachtas and the rights of the individual in court proceedings be balanced against each other?
4. If a person's good name has been impugned in the Houses of the Oireachtas, or his or her privacy has been breached, what procedure should be in place (within the Oireachtas itself) to deal with the abuse of privilege?
5. What recourse should the citizen have where his or her good name or privacy rights have been interfered with by the abuse of privilege? What measures to protect the good name of the citizen should be considered?
6. What sanctions should be imposed on a member who has abused privilege?

Submissions should be sent by email to privilegeforum@oireachtas.ie (email attachments will not be accepted), or by post to the Journal Office, Houses of the Oireachtas Service, Leinster House, Dublin 2, D02 XR20.

The deadline for receipt of written submissions is 11 September 2017 at 1800.

Written submissions received after this date will not be considered.

Rules on the receipt of submissions can be accessed at www.oireachtas.ie/parliamentaryprivilege, or obtained by post from the Journal Office, Houses of the Oireachtas Service, Leinster House, Dublin 2, D02 XR20.

Rules on the Receipt of Submissions by the Forum on Parliamentary Privilege

1. The Forum on Parliamentary Privilege welcomes submissions from all interested parties.
2. Submissions should be clear and concise and address the questions included in the advertisement.
3. The Forum on Parliamentary Privilege reserves the right not to accept a submission, or any part thereof, if it considers it to be irrelevant, offensive, inappropriate or defamatory. Persons making submissions should not refer to ongoing court cases.
4. We intend to publish all accepted submissions in the final report, displayed with a full name (first name, surname)/name of organisation, if appropriate.
5. Anonymous submissions will not be accepted. You must include your full name, and a telephone contact number for verification purposes.
6. In the case of submissions containing sensitive personal information, all personal data and related identifiable details may be removed or redacted if you request it. If this happens, these submissions will be listed online as 'Name with Forum Secretariat', or 'NWFS'. In certain circumstances the submission itself may not be published.
7. Submissions in email attachments will not be accepted.
8. Our data protection policy regarding these submissions is accessible at www.oireachtas.ie/parliamentaryprivilege, or is available by post from the Journal Office, Houses of the Oireachtas Service, Leinster House, Dublin 2, D02 XR20.
9. The Forum may decide to hear oral submissions once they have considered all of the written submissions.

Data Protection Policy

The Ceann Comhairle has engaged a group which is known as the Forum on Parliamentary Privilege (hereinafter referred to as 'the Forum') to examine the operation of the current rules of the Dáil ensuring freedom of debate for members, the privileges ensuring that freedom, and the sanctions available where there has been an abuse of that privilege.

The Data Protection Act 1988 and the Data Protection (Amendment) Act 2003 safeguard the privacy rights of individuals with regard to personal data, i.e., data relating to them which is held on computer files or in manual files which are structured or searchable by reference to individuals.

The Forum Data Protection Policy outlines how we will comply with the Data Protection Acts 1988 and 2003 that govern the collection, processing, retention, use and disclosure of information relating to individuals.

Data Protection Principles

The Forum shall perform its responsibilities under the Data Protection Acts in accordance with the following eight data protection principles–

- Obtain and process information fairly;
- Keep it only for specified, explicit and lawful purposes;
- Use and disclose data only in ways that are compatible with these purposes;
- Keep data safe and secure;
- Keep data accurate, complete and up-to-date;
- Ensure that data is adequate, relevant and not excessive;
- Retain data for no longer than is necessary for the purpose(s) for which it is acquired;
- Give a copy of his/her personal data to the relevant individual on request.

Responsibility

The Forum seeks the considered opinions of interested persons on this important question. The Forum's conclusions will form the basis of a report that will be submitted to the Committee on Procedure of Dáil Éireann for further debate by our elected representatives.

All staff and those contracted to work with or provide a service to the Forum are firmly committed to ensuring personal privacy and compliance with data protection legislation.

We have also clearly outlined our policy on the publication of personal details in respect of the submissions process on our website [www.oireachtas.ie/parliamentaryprivilege].

- In the case of submissions containing sensitive personal information, all personal data and related identifiable details may be removed or redacted if you request it. If this happens, these submissions will be listed online as 'Name with Forum Secretariat', or 'NWFS'. In certain circumstances the submission itself may not be published.
- Anonymous submissions will not be accepted.
- Submissions not accepted will be deleted from our Forum server.

Personal information provided by experts, speakers and other contributors to the Forum's deliberations will only be published with their knowledge and/or permission.

Review

This Policy will be reviewed regularly in light of any legislative or other relevant developments.

Appendix H: *Submissions*

No. 1 – Mr Kieran Fitzpatrick

Submission on freedom of debate and members' privilege

From: Kieran Fitzpatrick [REDACTED]

Dated: 6 September 2017

Tel: [REDACTED]

Summary of main points made in my submission:

- i. House rules cannot be used to dock TDs' pay or expenses, as these moneys are regulated by statute passed by both Houses, and must be so regulated because of Art.15.15.
- ii. Any statute which seeks to dock members' salaries is judicially reviewable. However, as penalties for abuse of privilege are not amenable to the courts, a conundrum is created whereby a sanction needs to be reviewable, but is simultaneously not reviewable. The only way to avoid this dilemma is to not pass a statute to dock salaries for abuse of privilege.
- iii. The Abbeylara Conundrum – If the Dáil (or a sub-committee) were to adopt the stance of a tribunal to assess a claim of abuse of privilege, and if they find no abuse, this risks defaming the person who is the subject of the alleged inappropriate statement; this then could violate the person's 'Abbeylara' rights.

My response is primarily focused on Question number 6, related to sanctions. I also respond to the other five questions; the framework outlined in my response to Question 6, which I answer firstly, will facilitate much briefer answers to the other five questions.

My submission regarding Q.6:

(What sanctions should be imposed on a member who has abused privilege?)

I understand that consideration is being given to the curtailment of Oireachtas privilege, by imposing fines, in the form of reductions of Dáil salary and/or expenses.

Privilege is a vital part of democracy, and a necessary part of the checks and balances which underpin the separation of powers.¹⁸

Any dialling back of privilege risks undermining its purpose. Privilege has many similarities with Diplomatic Immunity, which is recognised internationally. Diplomatic Immunity ensures that diplomatic missions are not compromised by threats of prosecution for various offences, regardless as to whether such offences are

¹⁸ The South African Constitutional Court in *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at 252H- 253A, stated the following regarding privilege in a constitutional democracy: "Immunitising the conduct of members from criminal and civil liability during council deliberations is a bulwark of democracy. It promotes freedom of speech and expression. It encourages democracy and full and effective deliberation. It removes the fear of repercussion for what is said. This advances effective democratic government."

trumped-up or real; the idea is that a foreign state is not seen to be sufficiently independent in determining whether an offence is a real one or a trumped-up offence. To avoid any doubt, most offences are unprosecutable without the consent of the home-state of a diplomat, which can waive immunity. This immunity sometimes results in injustice, when abused (such as the case of the shooting dead of a UK police-woman, outside the Libyan embassy in 1984); however, the system of immunity is retained and respected internationally, to ensure more effective communication between states.¹⁹

Democracy is as important to citizens as inter-governmental-discourse is between states.

Interestingly, in a 2002 case taken against the UK to the ECHR²⁰, on the issue of abuse of privilege, the Irish government intervened and submitted that, “parliamentary immunity has developed throughout the world... as a fundamental liberty” and that “**the importance of the legitimate objectives pursued by parliamentary immunity is difficult to overstate** and that it is for the national authorities to seek to balance the right of individual citizens to a good name with the right of free parliamentary expression.”²¹ The ECHR court agreed.²²

Hence, any watering-down of privilege creates huge risks. This is particularly so in Ireland, due to inadequate protections for public-interest commentary enshrined in the Defamation Act 2009.²³

Ireland also severely restricts access to the courts, which should be an important accountability mechanism, by maintaining a prohibitive legal costs regime that prevents 90%(+) of the population from accessing the courts (in civil matters), and hence curtails judicial review of governmental actions. In this context, any encroachment on Oireachtas privilege risks undermining one of the last bastions of free speech and accountability still available in the country, even though this forum is limited to Oireachtas members. Hence, proposed restrictions must be viewed in the overall context of the legislative and constitutional framework.²⁴

Minimal Safeguards

Even, in the absence of penalties, there are some minimal safeguards in place already: first, the public is on notice, that a controversial statement made in the Dáil, under privilege, is often made, because the speaker may not have the relevant ‘proof’, and hence, the statement carries with it a certain level of uncertainty, as a result.²⁵

19 <http://www.telegraph.co.uk/news/2017/05/16/suspect-yvonne-fletcher-murder-goes-free-home-office-blocks/>

20 *A v United Kingdom* ECHR (App.no.- 35373/97). [http://hudoc.echr.coe.int/eng#{"appno":\["35373/97"\],"itemid":\["001-60822"\]}](http://hudoc.echr.coe.int/eng#{)

21 *A v UK* admissibility decision – <http://freecases.eu/Doc/CourtAct/4545134>

22 *A v UK* (fn 3) See para 83: “the Court believes that a rule of parliamentary immunity, which is consistent with and reflects generally recognised rules within signatory States, the Council of Europe and the European Union, cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1 (see, *mutatis mutandis*, *Al-Adsani*, cited above, § 56).” A similar outcome occurred in the case of *Young v Ireland* (App. No. 25646/94) 17/11/1996. <http://echr.ketse.com/doc/25646.94-en-19960117/view/>

23 Ireland retains one of the most oppressive defamation law regimes of any western democracy. Russia has a similarly oppressive regime (with numerous ECHR findings), while Greece, another free-speech restrictor, at least up till recently, has recently reformed its defamation laws significantly.

24 See comments of the Supreme Court in the *Bederev v Ireland* [2016] IESC 34, [2016] 2 I.L.R.M. 340 decision on delegated legislation, regarding the 1977 Drugs Act.

25 Similarly, witnesses in court enjoy privilege in giving testimony, subject only to a potential charge of perjury, which is difficult to establish.

Second, TDs can be sanctioned by their constituents, in any subsequent election, if they are deemed to have regularly abused their privilege; this may seem to be an inadequate mechanism, but it is a key foundation of democratic governance.

Third, affected parties can seek to have the Dáil record amended to reflect the Dáil's disapproval of a defamatory statement or a statement in breach of privacy. (It is important, in this regard, that the Dáil record is not redacted, but rather is just annotated to the effect that a particular statement was disapproved of by the Dáil.)²⁶

It is accepted that these safeguards do not reach the level of protection of Ireland's defamation laws, but caution needs to be exercised to avoid undoing the historically recognised benefits of parliamentary privilege. I submit that financial penalties should not be considered.

The Constitution

A number of provisions of the Constitution need to be "put on the table" in assessing the constitutionality of any financial penalties. Article 15.10 states:

"Each House shall make its own rules and standing orders, with power to attach penalties for their infringement, and shall have power to ensure freedom of debate, to protect its official documents and the private papers of its members, and to protect itself and its members against any person or persons interfering with, molesting or attempting to corrupt its members in the exercise of their duties."

This provision envisages that TDs²⁷ need to be protected in exercising their duties; one of those duties is to inform the public of matters of public concern, using privilege if necessary to do so. Any significant fines which may be imposed, risk undermining TDs' duty to the public. Privilege, is the privilege of the public, not of TDs, and is simply exercised by TDs on behalf of the wider public.

Salary/Expenses deductions appear to be unconstitutional

Article 15.13 of the Constitution states:

"The members of each House of the Oireachtas shall, except in case of treason as defined in this Constitution, felony or breach of the peace, be privileged from arrest in going to and returning from, and while within the precincts of, either House, and shall not, in respect of any utterance in either House, be amenable to any court or any authority other than the House itself."

It appears from this provision, that a TD can be made amenable to the House, (i.e., the Dáil in regard to TDs), which would appear to require a majority of TDs, in a vote. It appears that any authority, such as a Committee on Privileges, other than the relevant House, cannot impose any sanctions. Hence any recommendations of sanctions would need to be approved by the Dáil in a vote.

²⁶ If the statement was redacted, this would undermine the ability of persons to cite the particular comment, armed with the proof of it being a privileged statement. If the statement were to be redacted, then persons' ability to report such statements would be undermined, and this would constitute interference in the absolute constitutional privilege of persons outside of the Dáil, to report statements made within the Dáil.

²⁷ I refer generally to TDs, for ease of reference, though most of my comments apply to senators also.

Article 15.10 states, “*Each House shall make its own rules ...*”; I have to suggest that there is a difference between “rules” and “laws”, in this context.

The rules here are authorised by the Constitution, and appear to be limited to the domain of the applicable House. The rules can be passed by either House (Dáil or Seanad), but do not extend beyond their respective Houses, and do not need bi-cameral approval which most laws require.²⁸

On the other hand, all pay and expenses payable to TDs need the approval of both Houses²⁹ as such payments must be sanctioned by law (passed by the 3-tier Oireachtas). I refer to Article 15.15, which states:

*“The Oireachtas may **make provision by law** for the payment of allowances to the members of each House thereof in respect of their duties as public representatives and for the grant to them of free travelling and such other facilities (if any) in connection with those duties as the Oireachtas may determine.”*

There appears to be a potential conflict between sub-articles 15.10 and 15.15: while, 15.10 suggests that the Dáil *might* be able to dock a TD’s pay, 15.15 suggests that any such interference has to be imposed by the Oireachtas. So, if the Oireachtas were to pass a law to empower it, or either of its Houses, to impose salary reductions, would such a law be constitutional?

A literal interpretation

In 2010, a Seanad Committee made adverse findings against Senator Ivor Callely, relating to expenses, and imposed a one month salary suspension, using section 28 of the 1995 Ethics in Public Office Act (as amended). Callely won a judicial review of the penalties in the High Court, in 2011, but this decision was reversed in a 4 to 3 decision of the Supreme Court in 2014.³⁰

It appears that the case primarily revolved around the issue of fair procedures. It is unclear whether the constitutionality of the 1995 Act was itself challenged, but it appears not. The 1995 Act sets a maximum suspension-period of one month, and a corresponding limit to the level of salary reduction, which can be imposed. It appears constitutionally questionable as to whether the Seanad can impose salary reductions, in the context of where the constitution calls for the regulation of such salaries by the Oireachtas. There is a general principle of law, that one cannot sub-delegate to another that which one is authorised only to do oneself (*Delegatus non potest delegare*).³¹

For example, Justice McKechnie said in his dissenting opinion, in Callely:

“There is a further ancillary reason which supports the conclusion which I have reached. In my view it must be doubtful whether the question of expenses was ever intended to be covered in ‘rules and standing orders’ as envisaged in Article 15.10.”³²

28 The Constitution prescribes the Oireachtas to be the sole law-making authority, but House rules do not need bicameral approval.

29 Salary legislation may be presented as a Money Bill, which restricts Seanad involvement, but little appears to turn on this.

30 Callely v Moylan [2014] IESC 26

31 *ESB and EirGrid v Killross Properties Ltd* [2016] IECA 210

32 Callely (fn 13) Para 154.

The impermissibility of the delegation of salary-docking powers is also supported by the articles of the Constitution dealing with Money Bills.³³ The Seanad is specifically precluded from initiating³⁴ or amending Money Bills, and can only make recommendations. Money Bills include charges on public moneys or the variation or repeal of any such charges. Hence, as it appears that members' salaries are charges on public moneys, the Seanad, in particular, is precluded from 'varying such charges'. (It would also be an incoherent interpretation of the Constitution to suggest that the Dáil could impose sanctions on its members, which the Seanad could not similarly do, resulting in less robust privilege for Dáil members.)

The High Court found that the statutory regulation of salaries is reached "by Article 34(3) of the Constitution", implying that Seanad-imposed deductions are subject to judicial review. A majority of the Supreme Court (4 to 3) found that fair procedures were not breached by the Seanad, and thus reversed the High Court's finding on this issue. However, a majority (also 4 to 3) agreed with the High Court that statutorily based sanctions were judicially reviewable.

This is significant. If the Seanad or the Dáil seeks to impose statutorily based sanctions, then the Callely case suggests that such sanctions are judicially reviewable. However, if sanctions, such as statutorily based salary reductions, are imposed for abuse of privilege, then it seems inevitable that the issue of privilege would be dragged before the courts; this appears irreconcilable with the requirement that privilege not be amenable to the courts. Hence, the range of penalties available to either House do not include financial ones.

It appears implicit in the Constitution that sanctions for defamation within the House should not exceed those which can be imposed by each House itself within its own domain. Such sanctions could, at the most extreme, include expelling a member from the House for a short period (but allowing them to still partake in votes³⁵), or might involve restricting their speaking time within the House to below a normal level.³⁶ A failure to accede to such a restriction could then be construed as a breach of the peace which would allow the engagement of external authorities.

For example, in the US, the courts have held that any penalties for 'contempt' of Congress are limited to the protection of its exercise of its legislative authority.³⁷

33 ARTICLE 22 1 1° "A Money Bill means a Bill which contains only provisions dealing with all or any of the following matters, namely, the imposition, repeal, remission, alteration or regulation of taxation; the imposition for the payment of debt or other financial purposes of **charges on public moneys or the variation or repeal of any such charges**; supply; the appropriation, receipt, custody, issue or audit of accounts of public money;..." The only exception outlined to moneys not englobed by the term Money Bills, are moneys raised by local authorities.

34 ARTICLE 21 1 1° "Money Bills shall be initiated in Dáil Éireann only."

35 The non-arrest provision in Art. 15.13 needs to be viewed from a purposeful perspective – it is designed to prevent the Government from obstructing TDs from voting. Suspending a TD from the Dáil, if not accompanied with an exemption for votes, would have an equivalent effect to an arrest, and should be avoided.

36 Norway and the Netherlands limit a member's suspension period to one day's sitting (See – *A v UK* (fn 3)).

37 See: Louis Fisher, *Congressional Investigations: Subpoenas and Contempt Power* – Report for Congress, April 2003, p 4-6 (available at www.senate.gov).

House rules alone cannot overrule an Oireachtas mandated payment to a TD; at least a (Oireachtas passed) statute is required. If the Dáil alone sought to instruct a civil servant to dock a TD's salary, then any such action would be *ultra-vires* the power of a civil servant, as a House rule, or a subsequent direction (by the Speaker, for example), cannot overrule a statutory obligation to pay a salary.³⁸

Hence, both a statutory or a rules approach to salary reductions appear unviable.

Abbeylara – possible implications

In *Maguire v Ardagh* (the Abbeylara case), members of the Houses were specifically excluded from the order sought by the applicants, in terms of persons against whom adverse findings of a criminal nature could not be made. The case indicates that speech within the Oireachtas has limits. It appears that should a TD state that she believes a person acted in a criminal manner, that such a statement enjoys privilege. However, if a group of TDs form a Committee and review evidence, engage in deliberations and issue findings alleging criminal conduct by persons (outside of the Oireachtas, at least), then such a process is illegal.

The difference between one TD making a statement of opinion of criminal conduct, and a group of TDs issuing an opinion of criminal conduct after a Committee investigation, appears to be that the latter is effectively *adopting the stance of a tribunal*. This suggests that because a Committee engages in detailed deliberation following the hearing of evidence, the weight of its opinion is greater than the spontaneously expressed opinion of one TD and is therefore potentially more damaging of the reputation of persons against whom adverse findings may be made.

This distinction may have implications for any Oireachtas Committees which may investigate allegations of abuse of privilege (or the House itself). If such a Committee issues an opinion that a TD has abused their privilege following a cursory review of available information, then such an undetailed assessment could be characterised as a group opinion formed for the purpose of expressing disapproval of a TD's action, accompanied by a verbal reprimand. However, if the Committee engages in detailed examination of all available evidence, with cross-examination of witnesses, etc., then the danger exists that should the Committee make a 'finding' that a TD had not abused her privilege, then such a finding might give the impression that the Committee had concluded that the TD's contested statement might be true, thus exacerbating the alleged defamation. This impression may be created despite the Standing Orders requiring that no consideration be given to the truth of a contested statement.³⁹

Hence a conundrum could be created by empowering a Committee to impose sanctions other than a mere verbal reprimand; if a Committee seeks to impose significant sanctions on TDs, such as significant fines, then the procedures used by the Committee need to be more formal and to thus reflect those of

38 See: comments of the Supreme Court in the case of *O'Brien v The PIAB (Board) & AG* [2005] IEHC 100: "Nor can extraneous policy factors, (e.g. the conviction that solicitors are "unnecessary" to the process) justify attempts (whether direct or indirect) to merely tolerate the presence of solicitors, still less attempts to frustrate solicitors as they try to ensure that their clients' interests are protected, or attempts to exclude lawyers from the process entirely. If this could be done by policy **it would amount de facto to an unconstitutional amendment of the law through administrative action**, (see the comments of Keane C.J. in *Dunne v Donohoe* [2002] 2 I.R. 533 at 543)."

39 See s.61(4)(b)(ii) – "in considering a request or submission and reporting to the Dáil the Committee shall not consider or judge the truth of any statements made in the Dáil or of the submission;"

an investigative tribunal.⁴⁰ However, if the procedures are made more robust, then the Committee risks *adopting the stance of a tribunal* in the *Abbeylara* sense, and any findings of non-violation of privilege risks reflecting badly on the reputation of the person about whom the contested statement (under investigation) was made by a TD.

Additionally, if a person's *Abbeylara* (constitutional) rights are infringed by the Oireachtas, then a person could sue the Dáil/Seanad (or a sub-Committee) for compensation.⁴¹

Separation of powers

One of the principles of separation of powers is the avoidance of arbitrary decision making: the idea is that laws are implemented in general form (by legislators) to serve the public, implemented by the Executive (overseen by the legislature/courts/media/public) and to be interpreted, when disputed, by independent courts.

Bills of Attainder are seen to be undemocratic as they are laws which target specific individuals and are not general in their form; such laws can cause legislatures to morph into biased courts. Bills of Attainder are explicitly outlawed by some constitutions, such as the US constitution, because of their historically pernicious history. While the Irish constitution does not explicitly outlaw them, the Supreme Court effectively condemned them as unconstitutional in the case of *Buckley v AG* (1950) (where the Government sought to seize Sinn Féin funds, by using legislation).

If the Dáil were to be empowered to impose financial penalties on TDs for alleged abuse of privilege, such a vote, in each particular instance where it might occur, would bear all the hallmarks of a Bill of Attainder. Any claims of seeking to protect the reputation of others could not undo the substantive reality that the Dáil would be using its 'legislative' powers to grab money from 'condemned' TDs.⁴²

The fairness of the imposition of fines by a political body⁴³ (the Dáil) would also interfere in TDs' property rights but could not be subject to judicial oversight, as this would mean that the issue of parliamentary privilege would have to be amenable to the courts, which the Constitution outlaws. The Supreme Court said in *Dellway v NAMA*: "If anything, the scale of the NAMA statutory discretion and statutory powers, and the fact that there is no appeal from its decision, emphasises the importance of scrupulous adherence to the rules of natural justice."⁴⁴ In the context of various judges' commentary relating to the potential bias of TDs as outlined in the *Abbeylara* case, it is difficult to see how natural justice could be scrupulously adhered to, by a financial-penalty imposing Dáil tribunal.

40 In *Flanagan v University College Dublin* [1988] IR 724, the court held that one body should not be accuser, prosecutor, jury and judge at the same time, and that procedures should be proportional to the seriousness of the matter under review. See – also the concerns expressed by some of the Supreme Court judges in the *Abbeylara* case, regarding the objective bias of TDs as finders of fact.

41 See: *Kennedy and Arnold v Attorney General* [1987] IR 587. (Note: the *Abbeylara* judgement does not provide for any exceptions where the person potentially affected by adverse Committee findings, consents to the process.)

42 The outward façade of a division of process into two steps, one being the passage of a sanctions enabling law, and two, the imposition of a sanction, does not undo its repugnancy, as the two steps are taken by the same group of persons (the respective House). It differs only from a Bill of Attainder, in not being retrospective law; however, if the imposition of a fine is disproportionate, then the decision regains most of the objectionability of a Bill of Attainder, due to a lack of any judicial oversight.

43 See – Ohio State Bar Association – 'Why Judges Sometimes Need to Step Aside' – "Legislators, mayors, governors and other officials are at least in part advocates for the values and interests they proclaim as their own and on behalf of their voters, and we expect these officials to be partial to the programs, policies and agendas which led to their election. In contrast, judges are sworn to provide independent, objective and impartial judgments about what the law requires in individual situations." – Available here – <https://www.ohioabar.org/ForPublic/Resources/LawYouCanUse/Pages/LawYouCanUse-216.aspx>

44 *Dellway v NAMA* [2011] 4 IR 1

The Dáil should be reluctant to get involved in judging the guilt or innocence of a TD as regards the alleged offence of abusing privilege – judging is the natural preserve of the courts, in line with separation of powers doctrine. Whereas, the Dáil must balance constitutional rights in the passage of laws; this differs from the application of such laws to specific cases, which is generally the domain of the courts⁴⁵. Hence, the balancing of conflicting rights of citizens with the public benefit of parliamentary privilege, is a somewhat incongruous activity for parliamentarians. Such activity, within current operational limits, is itself arguably facilitated by Dáil privilege, as condemnatory statements (reprimands of alleged privilege abusers) by Dáil members, are simply an exercise of free-speech by members within the (respective) House. The ECHR court has also questioned the objective independence of adjudicators who play a dual legislative/adjudicative role.⁴⁶

Conclusion (Q.6):

1. Dáil salaries (and expenses) are mandated by primary Oireachtas legislation.
2. Administrators cannot dock TDs' salaries/expenses on the basis of House rules; they can only do so on the basis of Oireachtas laws, as otherwise, they would be acting *ultra vires*.
3. Any legislation seeking to empower the Dáil to impose financial penalties contravenes a literal interpretation of the Constitution and a harmonious interpretation of the Constitution, as well as the separation of powers doctrine.
4. Any fines which may be imposed by the Dáil on foot of such legislation, would be subject to judicial review, creating an unresolvable dilemma.
5. Any sanction should be limited to either a verbal reprimand, and/or a minor restriction of speaking time.

My response to the first five questions:

1. What constitutes a *responsible* use of freedom of debate in the Houses of the Oireachtas?

The term "responsible" is deeply subjective, particularly as it applies to the use of privilege; it should be left to the decision of TDs (or senators), subject to the provision that any sanctions are limited.

2. How should freedom of debate in the Houses of the Oireachtas and the right of an individual to his or her good name be balanced against each other?

The Oireachtas should avoid balancing these conflicting rights. Each House of the Oireachtas should only seek to impose minor sanctions (non-financial) on TDs/senators for abuse of privilege.

⁴⁵ See: *Buckley v AG* 1950 IESC.

⁴⁶ *McGonnell v United Kingdom*, (2000) 30 EHRR 289. – See para 55 – "...the Court considers that any direct involvement in the passage of legislation, or of executive rules, is likely to be sufficient to cast doubt on the judicial impartiality of a person subsequently called on to determine a dispute over whether reasons exist to permit a variation from the wording of the legislation or rules at issue."

3. How should freedom of debate in the Houses of the Oireachtas and the rights of the individual in court proceedings be balanced against each other?

It should be generally not seen to be prejudicial for TDs to speak on legal cases, where juries are not involved in deciding a case; judges should be seen to be sufficiently robust in their independence not to be influenced by Dáil commentary. When juries are involved, caution needs to be exercised. However, opinions of guilt or innocence by TDs, of persons being tried by a jury, should not be seen to be overly influential – it should be a matter for a court to decide to delay a trial to allow any particularly prejudicial comments, to fade, in the public mind. When comments are made which are exculpatory, it should be left to the DPP's office to decide whether to seek a delay of a trial. In certain instances, it may be appropriate and proportionate for TDs as well as the media to express their opinion on matters of public importance, regardless as to the potential prejudicial effects on a legal case.⁴⁷

4. If a person's good name has been impugned in the Houses of the Oireachtas, or his or her privacy has been breached, what procedure should be in place (within the Oireachtas itself) to deal with the abuse of privilege?

I submit that the current system may be appropriate, subject to my earlier commentary (I'm not totally familiar with the detail of current procedures, other than that the sanctions are minimal).

5. What recourse should the citizen have where his or her good name or privacy rights have been interfered with by the abuse of privilege? What measures to protect the good name of the citizen should be considered?

In severe cases of abuse, the Oireachtas record could be annotated (not redacted) to reflect the opinion of the Dáil regarding the occurrence of such abuse. However, no serious sanctions should be imposed on the Oireachtas member held to have abused privilege. The ECHR court has held, "that a rule of parliamentary immunity, which is consistent with and reflects generally recognised rules within signatory States, the Council of Europe and the European Union, cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1".⁴⁸

End of submission.

Kieran Fitzpatrick⁴⁹
6 September 2017

⁴⁷ See: *The Sunday Times v UK* (App No 6538/74) ECHR [1979].

⁴⁸ *A v UK* (fn 5 above).

⁴⁹ BCL, LLM (Public Law).

No. 2 – Dr Jennifer Kavanagh

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Submission to Forum: Dr. Jennifer Kavanagh

Parliamentary privilege is an important cornerstone of Irish democracy. There are constitutional protections for what is said in the Dáil and statements made in the chamber are covered by absolute privilege in defamation law. Recent cases have upheld this privilege.

However, there are instances where statements made in the Dáil may harm the reputation of others and cast aspersions on their character and profession. Ireland is one of the few democracies in the Westminster parliament model that allow for individuals to seek redress through the provisions of Standing Order 61 (see in particular my journal article in Irish Political Studies for an examination of 15 years of the practical use of this measure <http://dx.doi.org/10.1080/07907184.2013.838223>). On the basis of the research that I have conducted I wish to add my thoughts to the issues currently before the Forum on Parliamentary Privilege.

1. What constitutes a *responsible* use of freedom of debate in the Houses of the Oireachtas?

The concept of responsible can be regarded as quite subjective. There is not an objective or reasonable element to the concept of responsible. Also the context and impact of the speech in question must be considered. Throwaway comments about an individual that impact on their reputation may not be considered to be responsible but the reason for the privilege is to allow matters of public interest and importance to be freely debated without any chilling effect where members may refrain from debating issues due to a fear of potential litigation.

2. How should freedom of debate in the Houses of the Oireachtas and the right of an individual to his or her good name be balanced against each other?

The current system used by the Committee on Procedure works well. However, my research has shown that it is not widely known of as demonstrated by the amount of individuals that apply outside of the time limits. I would suggest that the current time limit be extended to one month to allow for those who have been affected to submit their complaints. By placing a report and the correspondence on the Dáil record, it allows for both sides of the debate to be reflected.

3. How should freedom of debate in the Houses of the Oireachtas and the rights of the individual in court proceedings be balanced against each other?

The procedures under Standing Order 61 allow for a balanced approach. It is convention that courts do not enter into the debates of members in a judicial setting. Any oversight of the courts into debates could be viewed as overstepping the boundaries of the well recognised doctrine of the separation of powers.

4. If a person's good name has been impugned in the Houses of the Oireachtas, or his or her privacy has been breached, what procedure should be in place (within the Oireachtas itself) to deal with the abuse of privilege?

From my perspective the procedures contained in Standing Order 61 are sufficient to deal with the abuse of privilege.

5. What recourse should the citizen have where his or her good name or privacy rights have been interfered with by the abuse of privilege? What measures to protect the good name of the citizen should be considered?

The provisions contained in Standing Order 61 are sufficient to allow for a constitutionally balanced approach to protecting the good name and privacy rights of the individual without transgressing the doctrine of the separation of powers by allowing the court to review statements made in the Dáil.

6. What sanctions should be imposed on a member who has abused privilege?

The committee should be cautious of recommending any measures which may impose serious sanctions on members for abusing privilege. If there was to be a system that excluded members for a period of time from the chamber it would have to be balanced against their role as representatives for their area. Also, if the sanctions were overly harsh it may be viewed as a 'badge of honour' to be excluded for a long period of time. Apart from the current mechanisms in Standing Order 61 it could be possible for the Committee to fine a member for abusing privilege in as similar manner to the clocking-in provisions for expenses. This is as draconian a sanction that could be considered in my opinion and should be saved for the most serious breaches of privilege.

In conclusion, the Standing Order 61 mechanisms are more than what many other Westminster style parliaments have. Such a mechanism is not available in Westminster for example. There could be more done in spreading awareness of the procedures, and when it is used effectively, as has been done in the past, it allows for the record to be maintained but balanced by the individual that has been harmed by the statement. If the committee wishes to see my research on the operation of the Standing Order I am happy to provide a copy of this article. Also, I would be happy to answer any further questions of the Committee either by further correspondence or by oral submission.

Dr Jennifer Kavanagh

Lecturer in Law

No. 3 – Deputies Clare Daly and Mick Wallace

SUBMISSION ON FREEDOM OF DEBATE AND MEMBERS' PRIVILEGE

1. Importance of Parliamentary Privilege

The Dáil and the Seanad are the places where those in Government are called upon to account for their decisions and their expenditure of public money. Grievances, irrespective of their scale, can be aired, regardless of the power or wealth of those criticised. The freedom of debate enjoyed by the Houses of the Oireachtas offers an opportunity to discuss matters of public interest and devise a plan of action to mitigate the negative impact of matters on society.

Accordingly, it is a necessity that the Oireachtas benefit from certain rights and immunities in order to be able to address matters of public importance in a public domain. These rights and immunities, provided by means of 'parliamentary privilege', are supported by strong constitutional protection, existing legislation, and case law, as a vital tool in a healthy democracy.

We have used Dáil privilege in a way that has forced the authorities to take action on issues of major public concern, such as the functioning of An Garda Síochána, the HSE, and the workings of NAMA, by bringing into the public domain information which vested interests sought to ignore. We believe that the right to use Dáil privilege must be protected in the public interest. However, defending the use of Dáil privilege does not mean that we do not recognise that it can be abused and in instances where this occurs there needs to be a mechanism to correct any untrue information which has entered the Dáil record, and some form of sanction for the member responsible.

Of course, there is no doubt that if a member has either deliberately or recklessly caused untruths to be put on the Dáil record and into the public domain, then the person whose name has been impugned, has the right to have these matters corrected. Clearly, the court of public opinion is the final arbiter and a member who has been found to have misled the House will find their utterances being dismissed and ignored on repeat attempts which in and of itself is a form of sanction. That said, we are not opposed to clear-cut procedures being put in place to deal with these matters, provided it is in the context of protecting and strengthening parliamentary privilege.

2. The Constitution, existing legislation and case law, all strongly support parliamentary privilege

Article 40.6.1.i of the Irish Constitution states the State guarantees liberty for the rights of the citizens to express freely their convictions and opinions, subject to public order and morality. We note that this is a much more liberal stance than Article 10 of the European Convention on Human Rights which is devoted to freedom of expression and freedom of information. It states:

"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ... The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society..."

In other words, freedom of speech enhances the social good by promoting the discovery of truth, but this must be exercised responsibly.

Privilege by its definition is a special advantage, immunity, permission, right, or benefit granted to or enjoyed by an individual, class, or caste. In relation to parliamentary privilege, the Supreme Court has ruled in **Attorney General v Hamilton (No 2) [1993] 3 I.R. 227** that this privilege is wide ranging and extends “to any form of legal proceedings” and is not merely confined to defamation. Justice Geoghegan held that the purpose of Article 15.10 and privilege is so “*legislators are free to represent the interests of their constituents without fear that they will later be called to task in the courts for that representation*”.

The wide ranging privileges enjoyed by the Oireachtas are constitutionally protected under Articles 15.10, 15.12 and 15.13 of the Irish Constitution.

a) Constitutional Protection

Article 15.12 of the Irish Constitution provides the Oireachtas with the fundamental right to parliamentary privilege. It states:

“All official reports and publications of the Oireachtas or of either House thereof and utterances made in either House wherever published shall be privileged.”

We support the protection afforded by Article 15.12 to protect the freedom of debate in the Oireachtas.

b) Legislative Protection

Section 2(1) of the Committees of the Houses of the Oireachtas (Privilege and Procedure) Act 1976 states:

“A member of either House of the Oireachtas shall not, in respect of any utterance in or before a committee, be amenable to any court or any authority other than the House or the Houses of the Oireachtas by which the committee was appointed.”

Section 92 of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013 mirrors the Constitutional position, providing that:

“A member of a House shall not, in respect of any utterance in or before a committee, be amenable to any court or any authority other than the House.”

Both Acts provides those who are involved in Oireachtas Committees and inquiries with the same freedom of debate and parliamentary privilege. Neither pieces of legislation (a) limit the scope of such immunity or (b) set out the sanctions for breach of parliamentary privilege.

We are not in favour of either a constitutional referendum or legislative changes to curtail parliamentary privilege.

c) Case Law

In **Re Haughey [1971] IR 217**, the Supreme Court identified a number of procedural safeguards that apply where a public inquiry is taking place that may affect a citizen’s rights to a good name. O’Dálaigh CJ stated that a person had the following rights:

- (a) That he should be furnished with a copy of the evidence which reflected on his good name;
- (b) That he should be allowed to cross-examine, by counsel, his accuser or accusers;
- (c) That he should be allowed to give rebutting evidence;
- (d) That he should be permitted to address, again to counsel, the Committee in his own defence.

In the case of **Angela Kerins and John McGuinness and Ors [2014] No 431 JR**, the court ultimately found that the concept of parliamentary privilege had to trump Ms Kerins' claims for damages. The key findings are as follows:

- a) As Ms Kerins attended the Public Accounts Committee (PAC) voluntarily, the question of her not being afforded Haughey rights to defend herself could never arise as she had the right to decline cooperation at any stage.
- b) The court did not believe the issue of jurisdiction arose in the proceedings. The PAC was not making findings of fact but rather forming expressions of opinion based on the facts. These expressions of opinions made by the PAC were no more than utterances and as such Article 15.13 has the effect of ousting the court's jurisdiction.
- c) The court also cited the words of Johnson J. in the decision of **Cane v Dublin Corporation [1972] IR 582** which basically stated that it would be strange for the judiciary to have the power to pass evidence to the Oireachtas. One could infer that the judge was making reference to the existence of the separation of powers and the fact he is aware of the boundaries in place. What Ms Kerins was asking the court to do in terms of analysing the utterances of the Committee was to ignore the separation of powers and adjudicate on matters of the executive. That meant that damages could not be awarded: *"The essence of the applicant's case is a claim for damages arising from those utterances which seeks to make the Oireachtas respondents amenable to the jurisdiction of the court. That cannot be done."*
- d) Parliamentary privilege is a matter of fundamental importance: *"For upwards of four centuries it has been recognised in common law jurisdictions throughout the world that the courts exercise no function in relation to speech in parliament. This is fundamental to the separation of powers and is a cornerstone of constitutional democracy."*

While noting that this case is under appeal to the Supreme Court, and a separate case is being considered by Denis O'Brien to the Supreme Court, as it stands from a review of case law, it is obvious that the courts have taken the view that such is the importance of freedom of debate where a Committee is making inquiries into matters of public concern, that freedom of debate trumps the rights of an individual whose name and reputation are involved. We support this view.

Given that the Constitution, existing case law, and legislation, all strongly support parliamentary privilege, we do not believe that the outcome of the present review should be a curtailment of parliamentary privilege and its use. Rather it is about the steps that can be taken when privilege is either deliberately or recklessly abused by the dissemination of untruths.

3. What is an abuse of privilege and what procedures should be in place to deal with the abuse of privilege?

Given the strong legal protection for parliamentary privilege, abuse of same, must be carefully considered. Just because utterances in parliament might cause upset to an individual, or damage their reputation, does not constitute an abuse of privilege if the points are accurate and were clearly being raised in the public interest. An abuse of privilege is a scenario where an untruth is placed on the record. We also believe that leaks of draft reports or unreported evidence can have a hugely disruptive effect on the work of an Oireachtas Committee or the Oireachtas itself and should be treated as an abuse of privilege and dealt with accordingly.

The current Standing Order procedures implemented by the Oireachtas are ineffective to deal with such abuses of privilege. There are no strict prescribed sanctions for breach of Standing Orders other than what the Ceann Comhairle or the Committee of Procedure (CoP) deems necessary.

Therefore we would propose that the Standing Orders are changed to reflect the following:

1. Where a member of either house of the Oireachtas determined by the Ceann Comhairle to have either leaked a draft report or unreported evidence, or carelessly, recklessly or deliberately made an untrue statement in the Oireachtas or its Committees in relation to any person who is not a member of the Oireachtas and which untrue statement damages or could potentially damage in a material way the affected person, on receipt of a written complaint to the Ceann Comhairle the issue will be dealt with in the following manner:
 - a) The Ceann Comhairle shall consider the complaint within seven days of receipt of the written complaint and issue his/her decision;
 - b) If the Ceann Comhairle decides that an Untrue Statement has been made, or a draft report or unreported evidence leaked, the relevant member shall be issued with a written notice of their sanction from the Ceann Comhairle;
 - c) Within the written sanction, the member will be required to make a public apology in the relevant House of the Oireachtas, which will be listed on the agenda to be taken immediately before the next Leaders' Questions and in doing so correct the record;
 - d) The apology shall be published in two national newspapers, at the member's expense, within two days of the public apology being made.
2. An appeal against the decision of the Ceann Comhairle in relation to an Untrue Statement may be brought by the member or the affected person within seven days setting out in writing the grounds of appeal to an Oireachtas Appeals Authority, who shall be a former member of the High Court or Supreme Court and who is appointed for a three-year term. The decision of the Oireachtas Appeals Authority in the matter shall be final.

3. In addition to the review of the Ceann Comhairle's decision, the Oireachtas Appeals Authority shall also determine whether or not the directions in relation to the Untrue Statement have been complied with. If the Oireachtas Appeals Authority decides that the sanction directions have not been adhered to, including without limitation, as to whether the apology has been made or if made is not complete or accurate, then the member of the Oireachtas shall be subject to one or more of the following sanctions at the determination of the Oireachtas Appeals Authority:
 - i. restriction of attendance at either of the Houses of the Oireachtas for a specified period;
 - ii. restriction on submitting or receiving replies to Parliamentary Questions for a specified period;
 - iii. restriction from attendance at one or more Oireachtas Committee(s) for a specified period.

Submitted by Clare Daly and Mick Wallace

No. 4 – Mr Kieran Coughlan

Submission to the Forum on Parliamentary Privilege

This submission deals with the issue of freedom of speech and a person's right to his/her good name from a procedural perspective, as in my view, a workable solution need go no further than procedural change in the *intra mural* affairs of each House of the Oireachtas. In that sense my submission does not, in real terms, address broader issues addressed in the first five of the Forum's questions. An attempt is made to respond to the last question (six) on penalties. The submission suggests a procedure primarily based on a test of the public interest, which of necessity – to allow for acceptance and ease of implementation – must be relatively straightforward and familiar to members by utilising features of other related Standing Orders (SOs) such as preview by the Ceann Comhairle and prior notice. The prospect of success of any new procedure would depend on broad political acceptance in-House. On the very rare occasions in the past when privilege was raised as a House issue (see below) the Taoiseach was the proposer. Moreover, the practice that has developed around a parallel procedure on defamatory utterances (SO61) is instructive, as is the fact that the common-law type parliamentary system – namely, precedent rather than rule-led – has traditionally been more successful in implementing more sustainable change to parliamentary procedures. The submission deals with the Dáil but the suggested procedural change could be applied to the Seanad as well.

Question 1. What constitutes a responsible use of freedom of debate in the Houses of the Oireachtas?

Responsible use of freedom of speech, in my view, would be when it has been clearly established it is in the public interest: the Deputy concerned having exhausted all other parliamentary means of raising the subject matter of the issue without naming or readily identifying a person, in a way which could be in the nature of being defamatory or a breach of his or her privacy. For example a basic parliamentary test for a Ceann Comhairle would be, when a Deputy is advocating a change in policy, legislation or seeking accountability, "could the same purpose not have been achieved by the Deputy without naming or readily identifying individuals?". Generally naming or readily identifying an individual to make a point reflects a paucity of argument and raises questions of the *bona fides* of a Deputy in raising the issue in the first place. A procedure needs to be put in place to test the public interest to ensure the use of freedom of speech by a Deputy is responsible and reasonable in the given set of circumstances.

Question 2. How should freedom of debate in the Houses of the Oireachtas and the right of an individual to his or her good name be balanced against each other?

In my view this question is a key one among the six posed and it is necessary to touch on the context, as I see it, in order to underpin and give clarity to this submission.

Context

The Constitution in its wisdom confers rights and duties, provides checks and balances across the whole spectrum of State governance, encapsulated in the separation of powers between the executive, parliament and the courts. It is the members of the Houses of the Oireachtas who have been bestowed with the privilege of freedom of speech in each House and Committees, as is common with most, if not all, parliamentary democracies. The starting point must be one of positivity: the right of free speech is a unique privilege bestowed on members of parliament to allow them to fulfil their constitutional duty and democratic mandate as parliamentarians and public representatives without being answerable to any court while being accountable to the Dáil itself.

In parliamentary debate, a basic premise is that it is reasonable to assume the exercise of freedom of speech is in the public interest. The right to an individual's good name therefore must be seen in that context: it is not an equal right. But because the Dáil is effectively the sole regulator of its own internal parliamentary affairs, which contains this unique privilege of freedom of speech, it is up to the Dáil alone to regulate how that privilege is exercised. In essence the emphasis is on how the Dáil should regulate freedom of debate while affording *proportionate* protection for a person's good name. While this particular interpretation of where the competing rights lie in the spectrum would not be highlighted, in reality they would, in my view, underpin the parliamentary attitude and explain why the only Standing Order dealing with defamatory utterances (SO61, '*Privilege: utterances in the nature of being defamatory*'), has struggled to deliver a coherent and consistent remedy – even of the modicum of redress afforded under the Standing Order – to a person whose name had been impugned. This aspect will be dealt with in more detail later as the practice as it has evolved under that Standing Order is illustrative and may be of relevance in drawing up any new procedure by the Forum under its terms of reference.

While acknowledging that the right to freedom of speech and the right to a person's good name are not on parity in the parliamentary context, each House of the Oireachtas must act in conformity with the Constitution and thus is obliged to regulate freedom of speech, and throughout its history generally (albeit with some exceptions) has done so with reasonable success. The protection of a person's good name is or was regulated by interventions by the Chair during proceedings and there are a large body of precedents in that regard in '*Rulings of the Chair*' which complement the application of Standing Orders. It is significant that bearing in mind the primacy given to freedom of speech, up to the introduction of SO61 (see below) there was no specific Standing Order to protect a person's right to her/his good name, mainly I believe, because of the explicit nature of the constitutional privilege, and regulation was left to the relatively softer option of a ruling by the Chair, using even less threatening language as a 'convention' depending on how charged the atmosphere was in the House and how serious the allegation made was⁵⁰.

50 Examples of standard rulings would be:

"There is a convention that, if they can be avoided, names should not be mentioned, and persons outside House or officials should not be so referred to as to be identifiable". (Rulings of the Chair, 1991)

"Members should not comment on, criticise or make charges against a person outside House or an official, either by name or in such a way as to make him identifiable, as he is defenceless against accusations made under privilege of House".

(Salient Rulings of the Chair, 4th edition 2011)

Right of reply: Defamatory utterances: Standing Order 61

I will now turn to the practice that has evolved under the only Standing Order which deals with defamatory utterances as it may be of benefit to the Forum in devising any new procedure.

The procedure was brought in by the Dáil on 31st May, 1995, as a sessional order and subsequently made a Standing Order on 15th October, 1996, its purpose being threefold–

- (a) to provide a form of a right of reply to persons outside the House;
- (b) to regulate utterances in the nature of being defamatory and to establish whether *prima facie* an abuse of privilege may have occurred;
- (c) to fulfil in a formal way the Dáil's obligation to have a means where a member is answerable to the House in respect of remarks made in the nature of being defamatory.

The Standing Order was primarily aimed at utterances which were perceived subsequently to be in the nature of being defamatory. However, significantly, if the import of the remarks were known at the time the Chair (presiding member at the time) can treat them as disorder in the Dáil Chamber. This feature in Standing Orders was a progression from the 'softer option' of a ruling of the Chair referred to above. This has never been invoked, as far as I am aware, and at face value the Ceann Comhairle has tended to treat all such utterances, regardless of whether their significance is known at the time or not, in the same way. At face value the Ceann Comhairle has rarely dealt with the issue under his own powers under the SO in more recent Dála but has referred the matter to the Dáil CPP.

However, it is easy to be critical of how a well-structured procedure may not be as effective as intended when it comes to implementation in the Dáil. This is understandable given the variable factors at play on the floor of the Dáil at any one time, such as context, public perception, how charged the atmosphere is and so on.

The Standing Order, based on an Australian Senate procedure, was drawn up to meet significant unease held in Government and leading circles in the opposition by the ongoing allegations being made about named parties in the lead-in to the establishment of the Beef Tribunal. The impetus for reform came from the Taoiseach of the day and the detailed procedure was drawn up through the regular CPP channels via a special sub-Committee on privilege. Would the reform have seen the light of day if it had been on the initiative of the Ceann Comhairle? For example, such matters in the past, in addition to SO61, have been initiated by the Taoiseach of the day but significantly have never even got off the ground or anywhere near to being implemented⁵¹. While one can speculate, I would say it was probably unlikely and points to the need for any new procedure to be seen to derive from as broad a parliamentary base as possible.

51 "In the period that the Constitutional provisions enshrined in Article 15.10 have been in force four unsuccessful attempts have been made by the Government to have clearly defined powers that the Houses have and how they can be enforced. These were:

- (1) Resolution of the Dáil of 11th March, 1947 that it was expedient to set up a Joint Committee to examine and report generally on the position. There was no corresponding resolution in the Seanad.
- (2) Motion set down on Dáil Order Paper by Taoiseach on 22nd October, 1952 which did not come up for discussion.
- (3) Motion moved by Taoiseach in the Dáil on 19th July, 1963, and
- (4) Motion set down by Taoiseach on Dáil Order Paper on 23rd October, 1963 which did not come up for discussion."

(Report on the Committee on the Constitution, December, 1967 p. 64-65)

Operation of the Standing Order

While no hard data on its operation is available to the public, such information would be available to the Forum which may illustrate practices that could shape their approach to devising new or reviewing existing procedures.

Some of these factors would include the degree to which–

Of the number of complaints made the proportion dealt with directly by the Ceann Comhairle or referred by him to the CPP (now CP) and the number upheld or rejected in both cases.

The number of times when utterances were referred by the Ceann Comhairle to CPP when their import was known at the time they were made in debate.

Whether there is any discernible pattern in those complaints upheld or rejected between those made by Deputies or members of the public.

In the case of complaints upheld the number of times the remedial actions set out in the Standing Order were recommended and implemented.

An examination of the data would have to be undertaken before any definitive conclusions could be drawn but at face value, it has to be said the perception would be that the Standing Order has not achieved its purpose in regulating defamatory remarks or providing some form of redress for those persons whose good name may have been impugned. The public awareness of some form of redress is not well known nor promoted in or by the Dáil and one could be forgiven for thinking that the acceptance of the procedure itself to regulate freedom of speech, despite some exceptions, is lukewarm at best. The debate on the introduction of the then sessional order (31st May, 1995) is instructive in that regard.

Thus what can be learned from that experience and be of relevance for the Forum today is that any proposal for a new procedure must be relatively straightforward and be implementable by the Ceann Comhairle in the Dáil without any peer review in a Committee. To achieve simplicity it should be close to existing procedures in other relevant areas to allow for familiarity and ease of acceptance by members. The Dáil has traditionally operated on a common-law type system which is primarily precedent-driven rather than new elaborate procedures being introduced by Standing Order. This distinction is not absolute of course but in the latter case the implementation in the past has rarely lived up to expectations as could be said for example with the ‘right of reply: defamation’ Standing Order 61.

Suggested new procedure

A new procedure to reflect the benefit of the experience of the ‘right of reply: defamation’ Standing Order would not be a major change but relatively minor and would draw on other existing procedures.

When a Deputy exercises freedom of speech, it is generally accepted that he or she is implicitly doing so in the public interest. A new procedure should place the public interest to the forefront and provide that a Deputy who wishes to exercise freedom of speech, which would name or readily identify a person in a defamatory manner, to give prior notice to the Ceann Comhairle who would then apply a public interest test under guidelines established by the Dáil (via the CP). Requiring notice to the Ceann Comhairle provides a “pause/delay mechanism” which is a protection used by the media for live broadcasts. The pause here would not be momentary but long enough to allow the Ceann Comhairle to assess the import of remarks made *vis-a-vis* the public interest in the given situation.

Notice is key

Prior notice and review by the Ceann Comhairle is established in other procedures. The Ceann Comhairle already performs a somewhat similar role in adjudicating on the contents of a member's proposed personal explanation under SO46, which cannot be made by a member until the text of the statement has been submitted in advance, and has been approved by the Ceann Comhairle. Notice is also referenced in Standing Order 61 as an ameliorating factor in defence by a Deputy against a charge of an abuse of privilege. Finally prior notice is a key requirement of Standing Order 59 on *sub judice*. The reason then given for its conclusion would be equally relevant to the operation of the public interest test–

“It is important that the Chair should not be placed in a position which requires him to make instant rulings during the course of a debate on the admissibility or otherwise of matters sub judice. The Chair should have adequate opportunity to become aware that a matter to be raised is relevant within the context of the motion and to decide whether or not the matter is of general public importance.”
Government Chief Whip Noel Dempsey, Dáil, 4th May, 1993.

The requirement of notice provides a clear-cut divide for a Ceann Comhairle to rule whether the Deputy, in exercising freedom of speech, is in order or otherwise, unlike the present. If a Deputy has neglected to give prior notice and proceeds to make a reference in the nature of being defamatory, s/he would not be in order and the Ceann Comhairle can deal authoritatively with it as disorder⁵². The power of the Ceann Comhairle should also be enhanced to swiftly close down the proceedings of the particular procedure (such as Leaders' Questions) that the Deputy has used to make the defamatory utterances which the Ceann Comhairle does not have at present. While it can be problematical to deal with a disorderly member, for example, who remains in the Dáil chamber after being suspended, these are issues that can be dealt with, but should not detract or deflect from the Chair exercising his authority to ensure that utterances in the nature of being defamatory are not made in the Dáil unless it has been established to be in the public interest.

To summarise, the public interest test approach is, I believe, relatively straightforward and workable, would have an ease of familiarity for Deputies as it reflects other existing procedures and would also allow the Ceann Comhairle to give the Deputy concerned an opportunity to make his or her case as to why s/he should be allowed to exercise freedom of speech in the public interest, thereby allowing for a more measured approach than the instantaneous way in which the Ceann Comhairle has to deal with such utterances at present.

The added advantage in utilising existing procedure is that the new procedure would be relatively straightforward to implement.

While there may be a temptation to seek a more elaborate new procedure which could be perceived to be a more fitting response, given the serious issues that in all probability gave rise to the Ceann Comhairle establishing the Forum, it should be recalled that the Law Reform Commission in its Contempt of Court, 1991 section on Immunity of Parliamentary Proceedings (pages 42 and 43) dropped its provisional proposal

52 Dealing with disorder usually would commence with the Ceann Comhairle asking the Deputy to withdraw the offending remark which would mean a defamatory utterance could be put on record no matter how swiftly a Ceann Comhairle acted, even if he dispensed with the preliminary seeking a withdrawal which would be justified under the proposed procedure. In those cases Standing Order 61 would still be open to the offended party which, if given a higher profile with the public, could be more readily pursued.

for the Chair of each House of the Oireachtas *"to prohibit publication of any specific portion of the proceedings on the basis that it might offend against the sub judice rule..."* on the basis that *"We were also satisfied on further consideration of the proposal that it is probably inappropriate to entrust powers of this nature to politicians who, however experienced they may be in questions of parliamentary procedure, are not necessarily equipped with legal training..."*.

Question 3. How should freedom of debate in the Houses of the Oireachtas and the rights of the individual in court proceedings be balanced against each other?

I refer to the reply to question 2. If a new procedure incorporating the public interest test along the lines outlined, was implemented authoritatively, combined with the equally authoritative application of Standing Order 59 on *sub judice*, then a more proportionate balance between both rights would be capable of being achieved.

Question 4. If a person's good name has been impugned in the Houses of the Oireachtas, or his or her privacy has been breached, what procedure should be in place (within the Oireachtas itself) to deal with the abuse of privilege?

I refer to the reply to question 2 above and in particular the part under suggested new procedure.

Question 5. What recourse should the citizen have where his or her good name or privacy rights have been interfered with by the abuse of privilege? What measures to protect the good name of the citizen should be considered?

Standing Order 61 provides some form of recourse to an individual whose name has been impugned, namely to incorporate an appropriate response in the parliamentary record. That provision could be made to have more impact and a higher profile, if it was required to be read into the record by the Clerk or by the offending Deputy (although in real terms that maybe a step too far for a Deputy).

However, given the seriousness of the issue, some form of damages could be considered which would be set independently within a prescribed range. Section 6 of Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997 allows for an application by a Committee to the High Court "in a summary manner" to determine whether a proposed witness can disobey a direction to attend. Similarly the Ceann Comhairle could apply for the level of damages to be determined by the High Court in a summary manner. The High Court would have no role on whether an abuse of privilege occurred as it has no jurisdiction in that area, but there are perceived benefits in terms of having the High Court determine the level of damages, which would be set in legislation, as would the role of the court based on the provision of the 1997 Act. It would strengthen compliance with the procedure and give it a necessary high profile and would show that while undoubtedly the Dáil takes the impugning of a person's good name seriously, it is now prepared to back it up in real terms.

Question 6. What sanctions should be imposed on a member who has abused privilege?

The existing sanctions provided for in Standing Order 61 are in reality no more than reprimands and while they have their place there is scope to have a more severe sanction proportionate to the abuse of privilege. The question of damages as referred to above would be recognised as a standard sanction in society generally and is the best option in my view. Suspension from the service of the House could be considered but it would have to be proportionate and within the range of the terms of suspension in existing Standing Orders. It would be problematical, in my view, if a longer extended period of suspension was imposed as it could be unduly punitive and deprive a member from being able to attend and vote in the Dáil for a considerable period, which Kelly's definitive work 'The Irish Constitution' (4th Edition pp 295-296) casts doubt upon, particularly when a member of the Government is involved, given his or her right to attend and be heard in the Houses of the Oireachtas under Article 28.8. Thus any sanction of an extended suspension of a member in these circumstances would appear to be high risk and open to successful challenge in the courts.

It may be possible to ameliorate the effects of any longer period of suspension than provided currently in Dáil SOs, if one is contemplated by the Forum, by drawing a distinction between votes in the Dáil on ordinary business and 'confidence and supply' issues. Any Dáil vote on the latter could have a direct impact on the life of that particular Dáil and a suspended member, whose suspension arises out of the implementation of a new procedure on the exercise of freedom of debate and defamatory utterances, should be allowed to attend and vote in such circumstances. Denying a Deputy her/his right to vote would be more likely to be subject to a successful challenge in the courts in my view, when such denial was directly instrumental in prolonging the life of the Dáil and allowing a Government to stay in office. It could be said that such issues, *inter alia*, had a bearing on the court judgement (*Doherty-v-Government [2010] IEHC 369*) where essentially the capacity of a Dáil majority to interminably postpone the filling of a casual vacancy by voting down the motion on the bye-election writ, though not prominent, undoubtedly formed a key backdrop in upholding the case against the Government and led subsequently to a change in the electoral law whereby a bye-election has now to take place within six months of a vacancy occurring.

Kieran Coughlan,

*Former SG of the Houses of the Oireachtas Service and Clerk of the Dáil;
Adjunct Professor, Dept. of Government, UCC.*

No. 5 – Deputy Mattie McGrath

Submission – Deputy Mattie McGrath

What constitutes a responsible use of freedom of debate in the Houses of the Oireachtas?

I take the view that what constitutes a *responsible* use of freedom of debate is encapsulated by a synonym of the word itself, i.e., a *responsible* use of freedom is an *accountable* use of freedom. Where a member's contribution to a specific debate is accountable, the presumption is in place that freedom is not to be confused with mere licence. The privilege afforded to members by the Constitution, specifically in those instances where there is a clear awareness that its protections are about to be invoked, should only occur after a member has engaged to the best of his or her ability in a process of verification with respect to the facts. Anything else is manifestly irresponsible.

I am conscious however that given the nature of political debate and the urgency with which some matters may need or deserve to be highlighted, engaging in a protracted process of verification may not always be the most appropriate course of action. Nevertheless, I would hold the view that once a fair analysis of any given issue or claim has been made, then privilege can still be invoked even if there is a probability that the analysis may prove to be faulty to some degree.

This highlights the link between a responsible and accountable use of freedom and the implied good faith of the member making the contribution to any given debate. I am convinced that the vast majority of members contribute to debates in the absence of vexatious motives or the desire to use privilege as a shield with which to freely impugn or damage the reputation or interest of another party.

How should freedom of debate in the Houses of the Oireachtas and the right of an individual to his or her good name be balanced against each other?

My answer to this is reflected to some degree in the comments I have already made with regard to question 1. It seems to me that the balance referred to here requires some process of verification or authentication. Balance, by its very nature, demands a weighting of options, a commitment to principles of fairness, but also an assessment of risk. While balance is the goal, it can also be abused if it is invoked as a kind of rhetorical or procedural strait jacket. To my mind this also raises questions about the authority we may or may not give to anecdotal evidence with respect to a person's good name. For example, many members by the confidential nature of their work, will have had the experience of being privy to 'behind the scenes' information regarding certain persons. It is here that the need or demand to make 'a judgement call' is often required even at the risk of damaging a person's 'good name'. What I also find challenging here is the ambiguity or ambivalence that can exist around the very term 'good name'. What exactly does this entail? Does it entail the complete absence of even the hint of 'damage'?

I would also suggest that the Forum investigate the ways in which this balance may be harder to achieve as our society continues to become increasingly multicultural. If we imagine a scenario where what may be a perfectly 'reasonable' practice carried out by persons of one community may be entirely unacceptable to another we can see some of the challenges that might arise.

Would the highlighting of this hypothetical practice constitute damage to those persons' good names even if that damage was limited to other communities excluding their own?

How do we balance appropriate levels of cultural sensitivity, respect, and the application of existing norms with freedom of debate and the protection of persons' good names?

Is the concept of a 'good name' inherently relative? For example, if during the course of a debate on a contentious topic such as the Middle East, one member referred to an individual as 'freedom fighter' but another referred to that individual as a 'terrorist', how does one make the judgement that the person's good name has been impugned?

How should freedom of debate in the Houses of the Oireachtas and the rights of the individual in court proceedings be balanced against each other?

The existing legal and constitutional arrangements/process appears sufficiently robust to achieve this balance.

If a person's good name has been impugned in the Houses of the Oireachtas, or his or her privacy has been breached, what procedure should be in place (within the Oireachtas itself) to deal with the abuse of privilege?

Recourse to the existing Committee process with a possibility for the individual to appear before the Committee and engage in a pre-legal mediation process in order to find some resolution.

What recourse should the citizen have where his or her good name or privacy rights have been interfered with by the abuse of privilege? What measures to protect the good name of the citizen should be considered?

Recourse and access to improved parliamentary Committee procedures and the courts.

What sanctions should be imposed on a member who has abused privilege?

I find that this question is dependent on the amount of damages that can be verified as having occurred due to the abuse of privilege. For vexatious or malicious abuses, then clearly the sanctions must be more substantial. However, as mentioned above, if the member genuinely acted in good faith then the sanctions should also reflect that.

No. 6 – Deputy Josepha Madigan

SUBMISSION – Deputy Josepha Madigan

One of our most important freedoms is under attack. The freedom of politicians to discuss matters openly in Dáil debates is under insidious threat from a number of sources. This freedom is known as Dáil privilege, and is an important factor in the make-up of a modern parliamentary democracy. In my view, it is vital we defend its use.

Mattie McGrath TD recently said he was not willing to use Dáil privilege to name Sinn Fein TDs Martin Ferris and Dessie Ellis in relation to the murder of prison officer Brian Stack. In the end, my Fine Gael colleague, Alan Farrell TD, did so. This was not the first time Ferris had been named under Dáil privilege; in 2005 then Minister for Justice Michael McDowell used it to say he was a member of the IRA's army council.

Clare Daly TD was relying on Dáil privilege last October when she accused a district court judge of causing problems in the administration of justice. Denis O'Brien is taking legal action as a result of comments about his affairs with IBRC by two TDs, claiming these were an abuse of Dáil privilege. The State is defending these actions in order to protect the freedom of parliamentary debate.

There are a number of Dáil privileges which allow us to carry out our job. They can be found in Article 15 of our Constitution, which says all official reports of the Oireachtas and utterances made in either house wherever published "shall be privileged". Another privilege is that TDs and senators cannot be arrested going to and returning from, and while within the precincts of, either House.

These privileges are designed to protect democracy and date from a time when our freedoms were not as assured as they are now. The privilege against arrest is designed to prevent a tyrant from being able to stop the Dáil passing laws he dislikes by arresting TDs on their way to the Oireachtas.

Perhaps the most important privilege is the freedom of speech in debates. This protects TDs and senators from any form of civil or criminal liability based on their statements in parliament. They should be free to speak openly and say things others can't. This leads to open debate and ensures citizens are properly represented by their politicians.

Parliamentary sources are also protected by Dáil privilege. No TD or senator can be forced to reveal the sources of information they rely on in parliamentary debates, nor can they be penalised for refusing to do so. This privilege does not extend beyond the Dáil and its use is regulated by the House.

Of course if I voluntarily, consciously and deliberately repeat a privileged statement outside the Dáil then I am not protected. Traditionally if someone felt they were defamed by a privileged statement, they would challenge the person making it to repeat it outside where they could be sued. If the TD does not do this, it shows they are not prepared to stand over the statement.

There are safeguards in place to prevent abuses. For example, the Committee on Procedure and Privileges (CPP) found that Sinn Fein's Mary Lou McDonald abused Dáil privilege in 2015 when she alleged six former politicians had offshore Ansbacher accounts. The public can use this Committee to have the Dáil record corrected if they believe an incorrect remark has been made. The CPP found McGrath abused Dáil privilege in 2013 in remarks he made about an abuse victim. However, the severity of sanctions available to the CPP should be strengthened.

Abuse of privilege is entirely different from the use of privilege. TDs and senators should not be afraid to invoke it, nor should they be prevented from doing so by people outside the chamber. It allows us to speak on important issues without fear of repercussions. We should be able to speak in parliament without having to keep looking over our shoulders. If freedom of speech is restricted in our parliament then where would it exist?

No. 7 – Sinn Féin

SUBMISSION – Sinn Féin

Seán Ó Fearghail TD
Ceann Comhairle
Leinster House
Kildare Street
Dublin 2

8 September 2017

Seán a chara,

Further to Professor David Farrell's invitation for submissions to the Forum on Parliamentary Privilege and having discussed the matter with my parliamentary colleagues, I wish to express Sinn Féin's concern at your decision to establish the Forum in the first instance.

Its establishment, whilst a related case is currently before the courts, is an extraordinary decision to have taken.

Both the timing of the Forum's establishment and its intent are in the view of Sinn Féin inappropriate, unnecessary and not in the public interest.

Parliamentary privilege, as per Bunreacht na hÉireann, coupled with Standing Orders 59 and 61, have proved to serve the public interest well.

Current Standing Orders are in our view more than adequate and we see no reason for either to be tampered with; potentially impeding the constitutional right of members to privilege in respect of utterances in the Dáil.

Is mise le meas,

Aengus Ó Snodaigh TD

Aoire Shinn Féin

Cc: Professor David Farrell, Chair,
Forum on Parliamentary Privilege,
Journal Office,
Houses of the Oireachtas Service,
Leinster House,
Dublin 2.

No. 8 – Deputy Catherine Murphy

Submission – Deputy Catherine Murphy

Parliamentary privilege is widely recognised for its vital importance in allowing elected members of the Oireachtas to raise issues of significant public interest without fear of litigation. The ability to raise issues in this way is understood by members to be a privilege which is not to be taken lightly and is generally treated with the utmost respect by members. I would contend that it is a rare occurrence where anyone uses privilege without first considering the implications of their utterances and in doing so members exercise discretion in their judgement. I believe that privilege should only ever be used to raise issues of utmost public interest when to raise them in any other forum would pose a danger to the member.

I feel that the questions posed to those wishing to submit to this review process are quite directional and are designed to elicit a response which is based on a premise which I reject – namely that parliamentary privilege has been abused on a regular basis. Parliamentary privilege comes with great responsibility and all members must continue to be acutely aware of that responsibility when making the decision to raise an issue which is likely to put the name of an individual into the public domain.

Parliamentary privilege is a constitutionally protected right and as such I believe it should be protected to the fullest extent as intended by the Constitution. If the common good is to be paramount then parliamentary privilege must be recognised as one of the most important mechanisms for ensuring that the common good always supersedes individual rights.

Catherine Murphy TD

September 2017

No. 9 – Deputy Danny Healy Rae

Submission on Parliamentary Privilege

As an Independent Deputy elected by the people of Kerry to represent them in Dáil Éireann I ask that the same privileges be maintained into the future as in the past so that I can continue to vocally represent all of my constituents in Dáil Éireann without being impeded by any new rules or regulations. I ask that the *status quo* be maintained.

Danny Healy Rae TD

No. 10 – Solidarity-People Before Profit

Solidarity – People Before Profit submission to ‘Forum on Parliamentary Privilege’

Paul Murphy TD

Bríd Smith TD

Introduction

Solidarity-People Before Profit is extremely concerned about the public discourse surrounding the establishment of this Forum, which points to a fictitious widespread abuse of parliamentary privilege in order to justify the need to restrict it. We believe that parliamentary privilege is an important right, which has been used effectively to expose corruption and exploitation, and which allows for the protection of minority voices in the Dáil. While we recognise the importance of the protection of the right of a person to his or her good name, we believe that this right can be appropriately vindicated without infringing on parliamentary privilege.

Context of establishment of this Forum

The context of the establishment of this Forum on parliamentary privilege and the make-up of the committee will rightly raise suspicions about the motivation behind it.

The political landscape in Ireland, as in many other European countries, has been dramatically altered in the decade following the capitalist economic crisis which began in 2007. The traditional two-and-a-half party system has been significantly undermined, with the rise of independents and small parties, including of the radical left, such as Solidarity-People Before Profit.

The consensus around essential political issues such as how the economy should be structured, the position of the hierarchy of An Garda Síochána and social issues such as abortion rights that previously existed in the Dáil has thus been shattered. The result is a parliament that has a wider array of voices, and more vigorous debate.

In that context, we believe privilege has been used to very good and valuable effect by Deputies from outside the traditional establishment parties. This has included raising vital matters with regard to the Siteserv controversy, in relation to NAMA and Project Eagle, the whole question of the treatment of Garda whistleblowers and other scandals in An Garda Síochána including in relation to the late Shane O’Farrell. Going back further in time, it was used to vital effect to expose the gross exploitation of Gama’s Turkish workers, who were being paid €2.20 an hour.

The political establishment is uncomfortable with the entry of ‘outsiders’ into the parliament and with the usage of the Dáil as a political platform to expose corruption and scandals. This is the context of the discussion around the demands to restrict parliamentary privilege.

The timing of the establishment of this Forum and media commentary around it, would suggest that it has been prompted by statements of Deputy Paul Murphy in the Dáil on 12 July in relation to the perjury of Gardaí in the so-called Jobstown trial. If that is the case, it is extremely worrying, given that, as explained below, those statements did not represent a use of parliamentary privilege, never mind an abuse of it.

That is because that allegation was made previously outside of the Dáil and was repeated outside of the Dáil afterwards – meaning that anybody who felt their right to a good name was infringed upon by the allegation of perjury had the right to take legal action against him. To date, no such actions have been forthcoming.

An article published on the *Irish Examiner* website on 5 July 2017, headlined ‘Paul Murphy accuses Gardaí of perjury’ contains quotes from Deputy Paul Murphy accusing the Gardaí of perjury made outside of the Dáil, a week before the debate in the Dáil, where these allegations were repeated.

One particularly erroneous and disturbing argument that has been advanced is that parliamentary privilege should be restricted in relation to referring to people who are not present to defend themselves. Since there are only 158 Deputies in the Dáil such a restriction puts 99.99% of the population and almost all State officials and members of civil society off limits. Applied consistently it would totally undermine the role of elected representatives.

The establishment of this Forum appears to us to be part of a worrying trend to try to silence left Deputies and those who challenge the established order.

Composition of Forum

In correspondence between Deputy Bríd Smith and the Ceann Comhairle, we raised objections to the membership of this Forum and we raise those objections again here.

The chair of the forum, Professor David Farrell, was interviewed on Morning Ireland on 13 July, where he stated that Deputy Paul Murphy abused parliamentary privilege the previous day. That interview alone, which suggests a predetermined and incorrect view on Deputy Paul Murphy’s use of privilege, should have disqualified Professor Farrell from participating in this Forum, never mind chairing it.

The other members of the Forum unfortunately give us no further cause for confidence. Mary Hanafin is a former Fianna Fáil Deputy and Minister. She is a sitting County Councillor for Fianna Fáil, is a member of their senior internal bodies and a likely candidate in the next general election for the party. She therefore continues to be an active and leading member of what was traditionally the favoured party of the capitalist establishment in Ireland. Conleth Bradley SC appears to have donated €1,000 to Mary Hanafin in 2002 and was appointed as chair of the Dormant Accounts Disbursements Board by a Fianna Fáil government in the same year. The remaining member, Conor Brady, former editor of the *Irish Times*, could not reasonably be described as coming from outside the establishment.

These points about the members of the Forum are not made to suggest that they will be consciously biased against the left or in favour of the political establishment. However, people carry unconscious biases with them. It seems clear that the unconscious biases of the membership of this Forum are likely to lean in the direction of the traditional establishment and against those who are seen to be disrupting that establishment, including through the appropriate use of parliamentary privilege.

Importance of parliamentary privilege

Essential for holding Government to account and scrutiny of legislation

The right of a member of a parliament to speak freely without any risk of being sued or prosecuted for what is said is a very important democratic right that has been long established. The practice exists to allow the government of the day be questioned and held to account and to allow for full frank debate on legislation.

Members of the Dáil and Seanad have this privilege so that they can question ministers and hold the Government to account. If a member of the Oireachtas is inhibited in what can be said many crucial matters of public importance would likely not be exposed, and the government and its agencies would not be held to account for actions and inactions. Sanctions imposed on a Deputy by political opponents should not be put in place.

As mentioned above in 2005 the scandal of GAMA paying staff wages as low as €2.20 per hour was exposed in the Dáil during questions to the Taoiseach. This was a matter of great public importance, especially to migrants and construction workers, and was a landmark industrial dispute in the early part of this century. The facts of the case could not be published in the media given the defamatory nature of accusing a company and some professionals of such an abuse of the law. The matter struck to the heart of the Government's industrial relations policies, public procurement policies, and labour law enforcement. If robust parliamentary privilege did not exist this matter may never have been debated in the national parliament despite its importance.

Similarly a range of matters related to the policies and practices of the Government and State agencies have emerged in the Dáil and Seanad that would not otherwise have been raised. In recent years the issue of penalty points, financial practices in the Garda Síochána, practices in the banks and their relationship with leading businessmen, incidents that occurred during the Troubles, and social welfare and tax fraud have all been raised by members of the Oireachtas.

In addition to holding the Government to account, the other role of Dáil Éireann is to make and amend law. Members of the Oireachtas should be free to frankly debate a Bill that is before the House and draw on examples of bad practice that may be taking place or has taken place in the past. Not having privilege would result in the State's laws not being fully debated and scrutinised.

Protection of minority voices

Parliamentary privilege protects minority voices in the parliament and there is a danger to minority rights if there is any weakening of parliamentary privilege or creation of more harsh sanctions against Deputies.

Deputies are elected by voters to speak on their behalf. The mandate they receive relates to the priorities, platform and programme they put before the electorate in their constituency and they received support on the basis of this. Deputies may express views and opinions that are not supported by others in the House, and may raise questions with Government policy and practice that are deeply unpopular with a majority in the House. However, it is their right to do so and it comes from the mandate they received from voters in a constituency.

A more strict sanctions regime could result in the silencing of minority voices by a majority in the House. In the current Dáil there is not an overall majority for any party; however, any change in the Standing Orders will carry on into future Dáils where the Government majority may be large and parties in power may use abuse of privilege sanctions to prevent and silence a minority voice.

According to the report of the Inter-Parliamentary Union's Committee on the Human Rights of Parliamentarians, 459 cases of violation of human rights were laid before the Committee in 2016.

Quite often the individuals likely to be named under parliamentary privilege are people of very considerable influence, power and wealth in society – Denis O'Brien is a good example – who are well able to use their power and wealth, through litigation and other means, to silence their critics. Frequently the critic or whistleblower will lack the resources to defend themselves against such measures. In these circumstances parliamentary privilege is of crucial importance.

Any attempt to restrict or limit parliamentary privilege raises the question of who will decide that privilege is being abused. But the whole point of parliamentary privilege, the whole reason for its existence, is to allow matters to be raised which those in positions of power in Government and in the political, state and social establishment wish to keep off limits. Any restriction will almost certainly result in the power of arbitration being given to certain members of that establishment. We will of course be told that they are totally 'independent' and 'unbiased'. But in these matters very few are really totally unbiased.

The recent history of the Irish State is replete with examples of corruption, cruelty and abuse on an industrial scale which it was enormously difficult to speak about or expose in any way. Silence and secrecy were ingrained in the culture. The existence of independent voices willing to speak out and raise issues in the Dáil and Seanad is an important safeguard against any return to the days of either the Magdalen Laundries or the Galway Tent. Restricting parliamentary privilege would be a step backwards in the direction of that reprehensible past.

Democracy – ultimately voters to make judgement

Under the present Standing Orders the final judge on matters debated in the Dáil are members of the public. Voters are free to support or not support Deputies and parties based on what they say and do.

A point has been made that the current sanction is seen by members of the public as being a 'badge of honour'. This line of argument holds that in the past the current provisions were satisfactory but we now have Deputies raising issues in a way that was not done in the past. However, the existing sanctions which are outlined below do represent a significant penalty for the TD in question.

It is ultimately the right of the public to make their own judgement on what is said in the Dáil and Seanad. One voter may support what a Deputy says and others will not. They will make that judgement at election time. If a voter believes that the Ceann Comhairle and the Committee on Procedure finding against a Deputy for a remark is a poor reflection on a Deputy, that is that voter's political judgement. If a voter looks at what was said in the House and believes that a sanction is unwarranted, that is that voter's political judgement. That is the nature of democracy. Voters are allowed make political judgements on what takes place in the national parliament, indeed they are the ultimate judge of what takes place and what is said and done.

Protection of good name

Clearly the Dáil must have ways and means to allow a person, whether a Deputy or a private individual, who feels they have been defamed to seek redress and have appropriate measures taken to restore their good name. Under existing Standing Orders, the Dáil does have quite extensive power to do just this. The rules on defamation are outlined in Standing Order 61.

Under this Standing Order the Ceann Comhairle has the power to seek a Deputy to withdraw remarks and also to make a personal statement to withdraw or clarify remarks. The Ceann Comhairle can also refer cases to the Committee on Procedure for further adjudication. The Committee then has the power, if supported by two-thirds of Deputies, to compel a Deputy to make a personal statement. If the Deputy fails to comply then the Ceann Comhairle can reprimand the Deputy.

Standing Order 61(5) also outlines how the Committee on Procedure can take steps to uphold the good name of a person defamed. It is within the existing Standing Orders that a person can be invited to put a written submission on the official record or can clear their name in another way deemed appropriate by the Committee; although this is not outlined in detail in the Standing Orders, this could include the reading out of a statement from an injured party or inviting the injured party to address the Dáil or a Committee of the Dáil.

The Dáil already has the power to sanction Deputies which can include being named and excluded from the Dáil for up to eight sitting days. This is a serious reprimand which is very disruptive to any Deputy affected, and their party, as it prevents a Deputy from engaging in debate, putting oral questions, being present in the chamber and fully representing their constituents.

We would strongly oppose any attempt to introduce more punitive measures such as fines on Deputies. This would be a significant increasing of potential sanctions and, even if not used, this could lead to a 'chilling effect' with Deputies being reluctant to raise matters of public importance or to engage fully in a debate. This would also be out of line with practice in the majority of comparable parliaments.

The Dáil's sanctions already in place, such as temporary exclusion or the ordering to apologise, for abuse of privilege are very much in line with international practice.⁵³

Where fines do exist, such as in France, Belgium and the European Parliament, they are a last resort and are capped. In the case of the European Parliament they relate to expenses linked with attendance and are generally levied in conjunction with a temporary exclusion.

Conclusion

Parliamentary privilege is an important democratic right. There is no evidence to suggest that it has been subject to widespread abuse. In that context, any attempt to restrict it must be interpreted as an attempt to restrict democratic rights, in particular of minority voices in the Parliament. Solidarity-People Before Profit will vigorously oppose any attempt to do so.

53 **Notes:** 1. Van Der Hulst, Marc (2000): The Parliamentary Mandate A Global Comparative Study; Inter Parliamentary Union, Geneva http://www.ipu.org/PDF/publications/mandate_e.pdf

No. 11 – Deputy Lisa Chambers

Submission – Lisa Chambers TD

1. What constitutes a responsible use of freedom of debate in the Houses of the Oireachtas?

Responsible use of freedom of debate is in my view the raising of matters or issues of public importance in circumstances where you may not freely be in a position to say certain things outside of the Dáil chamber for fear of potential legal action against you. This must be done with the utmost good faith and good intent, solely for the purposes of acting in the public interest and you are doing so in your capacity as a publicly elected representative with a mandate from the people. One must consider the potential negative impact of raising a particular matter in the chamber or the effect of mentioning a person or persons by name, and conclude, after careful consideration, that on balance the public interest is best served by raising the matter and/or mentioning a particular name or names.

2. How should freedom of debate in the Houses of the Oireachtas and the right of an individual to his or her good name be balanced against each other?

This will always be difficult to balance and there is no option available to us which is perfect. We have two competing interests and it is inevitable that on rare occasions the individual rights of one or more citizens may be infringed upon where a TD abuses parliamentary privilege. However, it is my belief that such an occurrence is rare and the majority of parliamentarians appreciate that freedom of debate is a privilege and not one to be abused. We have to decide if, whether on balance, we believe that freedom of debate is of such importance in terms of serving the public interest and in underpinning our democracy, that we are prepared to accept that on rare occasions it may be abused. In my opinion there is no system we can put in place that absolutely protects freedom of debate, which I believe we must do, and at the same time ensures the absolute protection of an individual as to his or her good name; I do not think this is possible. We have to also accept that parliamentarians are human beings and will make mistakes but if freedom of debate is used responsibly and careful consideration is given to any potential Dáil utterance which may harm the good name of a citizen, then mistakes should be minimised. It is worth remembering that there is already a check in place to ensure the balancing of these competing interests in so far as that is possible and that is free elections held in our State. Every time there is an election public representatives are held to account by the people, who can remove a member from office if they are seeking re-election. If the public feel that a member of the Oireachtas has abused parliamentary privilege then the ballot box is where that individual is held to account.

3. How should freedom of debate in the Houses of the Oireachtas and the rights of the individual in court proceedings be balanced against each other?

It is my strongly held view that the judiciary can have no role in reprimanding a member of the Oireachtas for anything he or she may have said in the chamber; this cannot be allowed to happen or else we will have removed the very essence of what it means to have freedom of debate. How can you have freedom of debate if you have fear of potential legal action before our courts? If a member is deciding whether or not to raise a difficult issue in the Dáil, it will absolutely have a chilling effect on that member's decision whether or not to raise that matter in the Dáil; put simply, the public interest is not served by this. We must protect freedom of debate in order to protect our democracy. I can think of one particular case in recent times where this was challenged very strongly and freedom of debate won out in the end. The courts acknowledged the existence of parliamentary privilege, despite immense pressure and resources being put behind the case; I dread to think what could have happened had the courts been in a position to do more, even if they did not want to.

4. If a person's good name has been impugned in the Houses of the Oireachtas, or his or her privacy has been breached, what procedure should be in place (within the Oireachtas itself) to deal with the abuse of privilege?

I would be against the limiting of any member's ability to do their job. Whilst I appreciate the need to address this issue, I cannot see a sound solution to the problem without either limiting freedom of debate in some way or reducing a member's capacity to do their job, which they have a mandate from the people to do. I would refer to answer no. 2 above. In the context of this question I do not think it is sufficient to show simply that a person's good name has been impugned or privacy has been breached; I think we must also establish malicious intent on the part of the member, showing they he or she knew or ought to have known that what they were saying were false and/or damaging to an individual and clearly abused parliamentary privilege. There has to be space for a member to make a genuine mistake where he or she believed that the matter was of such importance that it had to be raised in the chamber and that what they were doing was in the public interest.

Sometimes a simple apology can go a long way to rectifying a matter like this and a member can perhaps be directed by the Ceann Comhairle to correct the Dáil record if such a situation arises.

5. What recourse should the citizen have where his or her good name or privacy rights have been interfered with by the abuse of privilege? What measures to protect the good name of the citizen should be considered?

Perhaps an annual CPD for members of the Oireachtas on the issue of freedom of debate and parliamentary privilege to ensure every member is fully educated on the issue and reminded of their responsibilities.

6. What sanctions should be imposed on a member who has abused privilege?

Again I have to reiterate that I do not believe we should limit freedom of debate in any way or limit a member's ability to do their job.

No. 12 – Deputy Brendan Howlin, Labour Party Leader

Submission – Deputy Brendan Howlin

The Forum is, in essence, concerned with the operation of Standing Order 61. The Standing Order was introduced in 1995, as S.O. 53A, as part of a generally liberalising package of reforms. It was seen as a price to be paid for liberalising debate in the Houses.

No one now would argue that the Dáil and Seanad should revert to the rules that prevailed before the Order was adopted. Before then, the two assemblies that purportedly enjoyed absolute constitutional freedom of debate were in practice more restricted in terms of what they could talk about than any other gathering, formal or informal, in the country.

Nonetheless, the new Standing Order was not adopted unanimously. In the Dáil debate of the 31st May 1995, it was opposed in forthright terms by the Progressive Democrats party. From their perspective, the question would not be whether the Standing Order can now be improved but whether it should not be completely rescinded.

A number of lines of argument were raised in that debate. Broadly, some relate to the fact that the Standing Order sets out a mechanism that requires a member to answer to the complaint of someone outside the House, while others relate to the fact that a member is required to answer inside the House to his or her party political opponents.

First, to the argument that the procedures make members amenable to persons outside the House, a nit-picker might reply that in point of fact members are being made amenable to the House itself, albeit on foot of a process initiated by a non-member.

However, to any observer it very much seems to be the case that the efforts of Mr Denis O'Brien, most recently, were directed at making Catherine Murphy TD amenable – at having her called to account and to answer his complaints against her.

In his contribution to the May 1995 debate, then Deputy Michael McDowell stressed his belief that the new procedure would be of benefit to powerful individuals and interests rather than ordinary citizens.

“When this order comes into effect it will not be the practice, in my view, that the ordinary Joe Soap will get justice. What will happen will be equivalent to what happened at the time of the Goodman inquiry when the newspapers and RTÉ went down on their knees to apologise to the Goodman organisation but we found out later, of course, that the bulk of the accusations made in respect of that organisation were substantially proven. The tax fraud uncovered by the Tribunal of Inquiry into the Beef Processing Industry, and not by the Revenue Commissioners, was massive. I have no doubt that if I had said a massive tax fraud was being perpetrated on the Irish people by top management in the Goodman group – as Mr. Justice Hamilton eventually found – there would have been a complaint to the Ceann Comhairle within minutes and I would have been brought before the Committee and asked to substantiate my arguments about Goodman’s tax evasion. How could I substantiate them? Would I be given access to that company’s records and would I be able to prove that millions and millions of pounds had been handed out in cash to employees of that organisation? ... This measure will not protect small people but will aid the big and powerful and those who abuse privacy and confidentiality and fear any legislative or other forum in which they can be brought to account.”

Second, allied to that consideration is the argument that a process that can be initiated by complaint from outside the House is misconceived at the level of basic principle. Parliamentary privilege belongs to the members collectively, for the benefit of the House. And an abuse of privilege is a wrong done to the House itself.

The House's function should accordingly be a disciplinary one, to identify and sanction members who wrong the House, not a remedial one, to receive and adjudicate on complaints from non-members and then provide remedies to those aggrieved.

This is not to say that either House or their members should be careless of the interests of those outside the House. But it is to argue that offering to provide recourse for the redress of wrongs is based on a misunderstanding of the function of the Houses.

In a number of court cases starting with *Abbeylara* case (*Maguire v. Ardagh* [2002] I.R. 385) what is now S.O. 61 has been referred to in argument as something that purports to offer a remedy to non-members who believe they have been wronged in the course of debate. And the procedures under the Standing Order do convey that impression. The Standing Order has been critiqued accordingly.

However, it is important to point out that the Houses are under no constitutional or sub-constitutional duty to offer a forum for the resolution of complaints by third parties against its members.

There is nothing in our system of separation of powers and checks and balances that either requires or even envisages that the Houses of the Oireachtas will offer a remedy to those who claim to have been wronged by debate in the Houses. It follows that neither the existence nor the adequacy of such a procedure is appropriate for argument or comment in court proceedings.

After all, to take a close analogy, the courts themselves subjugate the rights of individuals, including their right to a good name, when they become caught up in court proceedings.

Thus, there is no complaints mechanism nor forum nor remedy for innocent, uninvolved witnesses caught up in court cases who may find their reputations assaulted by ruthless cross-examination. Their rights go unvindicated, because of the courts' insistence that the greater public interest in free and fearless litigation trumps the rights of witnesses. There is no question, therefore, of a court seeking to 'balance' the parties' right to litigate against the right of a witness to his or her good name.

Additionally, it seems wrong for the Houses to contemplate undertaking procedures to identify and rectify injustices done to third parties when, quite simply, the Houses are not equipped for such a task. The maintenance of order in the Houses requires rules of debate that can be applied in real time and it requires sanctions that can be imposed in a relatively summary manner. The Houses and their Committees are not equipped to arrive at the truth of contested claims about the behaviour of third parties – at least not in a timeframe that is in any way relevant to arriving at timely determinations about the propriety of statements made in the course of debate.

It is rare enough that a court of law can by its order rectify wrongs and return parties to the *status quo*. It would be impossible for a House of the Oireachtas to do so. The Houses should accordingly disclaim any pretence that they are in a position to do it.

References to this Standing Order in litigation subsequent to its adoption seems to demonstrate that the Houses have simply made a stick to beat themselves up with, by claiming to provide a remedy which does not – and which could not – work. And the important point worth repeating is that there is no constitutional requirement for the Houses to attempt such a thing in the first place.

It follows, in our submission, that the question framed by the Forum – “how should freedom of debate and the individual’s right to a good name be balanced against each other?” – is the wrong place to start. The Houses are not, and should not seek to be or claim to be, in the business of balancing constitutional rights. It is not the function of Standing Orders to provide procedural recourse or remedies to complainant citizens. The Houses are not courts, they cannot identify wrongs and they cannot provide remedies.

It seems to us that the jurisdiction the Houses can legitimately claim in the matter is not a restorative one but rather the power to impose sanctions on members who act in breach of the duty the members owe to the Houses themselves – the duty to speak fearlessly but not recklessly.

Standing Order 61, if it is retained, should be reframed and confined so as to give effect to this legitimate purpose – the insistence by the House on the observing of appropriate standards and sanctioning those who fail to do so.

But one must then recognise the other major stumbling block, which is the party political composition of the Houses and the fact that a member is required to answer to those who are party political opponents.

Claims and accusations made in debate in the Houses will have, or will very quickly acquire, a party political flavour and other members will respond accordingly. Whether one approves of or deprecates a statement will very often depend on one’s own position in the chamber.

Committees of the Houses are, of necessity, politically composed. They are capable of acting unanimously but, if they divide, it is very often along party political lines. Such divisions are not calculated to inculcate public trust in the integrity of the process.

In this regard it is worth remembering that in *Attorney General v. Hamilton (No. 2)* [1993] 3 I.R. 227 the Supreme Court had held that TDs, because they are not amenable to legal process in relation to utterances made by them in the Dáil, could not be compelled by court or tribunal order to reveal their sources of information for their speeches.

It would seem highly peculiar that a court in administering justice would respect without question the confidentiality of information given to a member on a matter of public importance but that the same member could be called upon to reveal that source to a Committee made up of or including political opponents seeking political advantage. We believe this is not just peculiar but wrong in principle.

Further, the imposition of heavier sanctions than are currently possible increases the risk that those found in breach will accuse the majority of witch-hunting and of trying to muzzle their opponents. And while the Progressive Democrats may have been the first party to announce that any sanction imposed on foot of the order would be worn “as a badge of honour” and to warn bluntly that “we will not adhere to these procedures”, the same stance has been adopted subsequently by others, as the occasion arose.

As regards the inherent risk of bias in policing the rules, we note the British Government proposals for weighted majorities and for the involvement of non-members in Committee determinations against members. (See, e.g., ‘Parliamentary Privilege’, Presented to Parliament by the Leader of the House of Commons and Lord Privy Seal, April 2012, Cm 8318.) While we do not have a concluded view on these, they are worth further consideration.

In summary, it seems to us that, if the Standing Order is to be retained in some form, it must be on the basis that–

- Oireachtas committees are not well equipped routinely to determine the truth or otherwise of contested factual claims arising in the course of debate;
- the Houses should respect members’ right and duty to protect the confidentiality of their sources of information;
- there cannot be anything even remotely approaching a rule that a member must say nothing in the House unless he or she is in a position to discharge the onus of proving it;
- the Standing Order should not be seen as a complaints procedure offering a remedy to non-members but as a means of sanctioning egregious misbehaviour;
- given the restrictions referred to, the sanction would chiefly apply in relation to allegations known to be false or made in reckless disregard of their truth.

So far as a failure to observe the terms of a court order is concerned, we do not see room for an absolute prohibition. We do not believe there would be general consensus, for example, that a member should be sanctioned for breaching an interim injunction protecting the duty of confidentiality between a banker and its business client. (It seems that in the case of Catherine Murphy TD, the CPP agreed that she had not breached Standing Orders or abused parliamentary privilege, while also holding that they could not assess whether her speech was in breach of a court order as that would require a judicial determination and they were not a court.)

It would on the other hand be easier to find consensus that the purely private affairs of private citizens (even celebrities like Mr Ryan Giggs) should not be disseminated in the Houses where no conceivable claim of public interest can be made. This should hold true regardless as to whether a ‘super injunction’ was in place and regardless of the truth or otherwise of the claims.

And there would be general agreement that the public interest could not justify the publication of information from *in camera* sittings of the Children’s Court or the family courts.

In conclusion, we do appreciate the argument that an irresponsible debating free-for-all, with allegations thrown around like snuff at a wake, would bring the Houses into disrepute. But there is a judgment to be made. Is it in fact the public perception that Oireachtas privilege is routinely abused? Is the corrective action being proposed proportionate to the scale of perceived abuse?

On balance, we believe that a regime which seeks to go beyond the minimum we have proposed runs not just the risks outlined above but of being – and being seen to be – unworkable and therefore unworked and therefore, far from restoring and enhancing the image of the Houses, as bringing them into greater disrepute.

No. 13 – Deputy Eamon Ryan

Submission – Deputy Eamon Ryan

1. What constitutes a *responsible* use of freedom of debate in the Houses of the Oireachtas?

It is welcome that our Constitution provides protection for freedom of debate in Dáil Éireann and the guarantee of privilege in relation to what is said within the speaking chambers. Such protection has been further enhanced by recent court decisions which more clearly define such constitutional provisions.

The members also have the responsibility to use such powers to ensure that the quality of debate is maintained and that privileges are not abused. Rather than looking to restrict our freedoms in this regard we might consider how Dáil debates could be enhanced by the adoption of a more experimental, participative and deliberative culture of political communications and engagement. Such an approach might provide a better ethical framework for questioning both within and without the political system.

2. How should freedom of debate in the Houses of the Oireachtas and the right of an individual to his or her good name be balanced against each other?

It is interesting to consider how other similar jurisdictions have come to address this issue. In the House of Commons the parliamentary privilege was one of the first powers granted in the 1689 bill of rights but their [code of conduct](#) has little to say on how it should be applied.

They have established the Seven Principles of Standards in Public Life, which are Selflessness, Objectivity, Integrity, Accountability, Openness, Honesty and Leadership and in 2016 they initiated a [review](#) on the code of conduct which included the question: *'Should there be new rules: a) clarifying the expectation that members will treat others, whom they meet in the course of their work, with courtesy and respect; and/or b) emphasising the responsibility which members have for the actions and behaviour of their staff.'*

The Commissioner on Ethics in Public Life in Scotland replied to that consultation question as follows: *'The obligation to treat others with respect is a feature of other codes with which I am familiar, and a regular source of complaints, which suggests that it is an issue of importance to those with whom elected representatives interact.'*

On 6 April 2017 the review was completed and proposals for revisions to the Code of Conduct for Members were forwarded for their consideration. It would be useful to get our Forum on Parliamentary Privilege to review those recommendations and to look at how other jurisdictions manage the same issue. The Forum might consult with [Lord Paul Bew](#), Chair of their Committee on Standards in Public life, on what lessons can be learnt from the UK in this regard.

3. How should freedom of debate in the Houses of the Oireachtas and the rights of the individual in court proceedings be balanced against each other?

The balancing of such rights can only be judged on a case by case basis but this should not preclude an attempt to improve the overall performance of all members of the Oireachtas in the conduct of parliamentary duties. A recent paper by [Reform Scotland](#) outlines how we might move to a better environment for policy making. It cites the argument made in Vaclav Havel's essay 'Politics, Morality and Civility' that economic improvement was dependent on civility. It also calls for formal, structured and systematic skills-based training for members of parliament, which might include effective methods for preparation and analysis of policy and strategy, working collaboratively in Committees, use of language and contemporary tools for risk analysis and problem-solving together with effective decision making.

Perhaps the Forum might consider inviting John Sturrock, the author of that report to outline how an 'in-service' training programme for the Oireachtas might be established.

4. If a person's good name has been impugned in the Houses of the Oireachtas, or his or her privacy has been breached, what procedure should be in place (within the Oireachtas itself) to deal with the abuse of privilege?

I believe that the current location in the Committee on Procedure is the appropriate forum for the the hearing of such cases.

5. What recourse should the citizen have where his or her good name or privacy rights have been interfered with by the abuse of privilege? What measures to protect the good name of the citizen should be considered?

I refer to my response to question 4 above.

6. What sanctions should be imposed on a member who has abused privilege?

I believe that again this is a matter for the Committee on Procedure to decide what sanctions might apply.

No. 14 – Fianna Fáil

Submission – Fianna Fáil

Ceann Comhairle,

Thank you for your email requesting submissions from every Deputy and senator in relation to parliamentary privilege. I am submitting a short submission to your recently formed Forum from the Fianna Fáil party. Other members may have also submitted individual observations.

I wish you, the Chair and members of the Forum well in your endeavours.

It is not an easy task as a very delicate balance has to be struck between the member's rights to privilege as outlined in Articles 15.10, 15.12 and 15.13 of the Constitution and indeed the constitutional rights of citizens.

Parliamentary privilege is a core principle of our democracy and elected members are very protective of it normally. Most of our members would define it as 'sacrosanct'. Any changes to Standing Orders or to sanctions being suggested should only be introduced when agreed by members of the Houses.

In the recent past the Dáil had a member who was found to have abused privilege by colleagues. However, there were no consequences. We accept this is not best practice.

Fianna Fáil believes it is not acceptable for members to selectively abuse parliamentary privilege and a sanction such as a fine would be more preferable as a deterrent rather than actually removing a member from the parliament for a period of time.

It is important that if a member is found by his or her fellow members to be in breach of privilege that there are consequences. This should be included in Standing Orders.

There have been high profile controversies latterly that have been covered by the media and this has brought parliamentary privilege into focus.

All members of parliament have a duty to protect the Houses' reputation as much as possible and also have a duty to protect rather than abuse parliamentary privilege.

At various times over the past few decades other parliaments across the EU and the globe have reviewed their own systems and the vast majority of parliaments have held to the principle that originated in the middle ages.

As you are aware there was also a Discussion Paper on Canadian Parliamentary Privilege in the 21st century published in June 2015 and it had some very interesting conclusions. It concludes that "*despite its importance parliamentary privilege is an area of law often ignored or misunderstood by lawyers, legislators and the Canadian public*".

Maybe the Forum could consider a public information campaign on parliamentary privilege so that the Irish public has a full understanding of its significance.

Fundamentally parliamentary privilege allows the Oireachtas to maintain a very important balance when dealing with parties of government; it enshrines a more democratic approach to public discourse, and with it comes responsibility.

Since the passage of the Bill of Rights in the UK in 1689 there have been many attempts to change it. This is also true in Canada, New Zealand and across the Commonwealth but with very little effect.

In the UK Defamation Act 1996 the privilege of free speech was modified and it caused major controversy at the time. This led to a Select Committee reviewing privilege in 1999.

It concluded that *“the overall guiding principle is that the proper functioning of parliament lies at the heart of a healthy parliamentary democracy. It is in the interests of the nation as a whole that the two Houses of Parliament should have the rights and immunities they need to function properly....But the protection afforded by privilege should be no more than parliament needs to carry out its functions effectively and safeguard its constitutional position”*.

It is well known and accepted that being elected to Dáil and Seanad Éireann allows members to be given the utmost privilege to represent their constituents but it also gives the members elected constitutional protection to mention issues on the floor of the Houses without impediment.

This privilege is not legally acceptable in any other fora. In the UK case law has led to the previous government producing a Green Paper in 2012. It actually made very similar conclusions to the 1999 Select Committee.

Since Ireland’s independence parliamentary privilege has largely been respected and it is our party position that every effort must be made to ensure that it is continued to be protected. It is at the core of our democracy.

However, we recognise the need to introduce a mechanism to reprimand members that are deemed by the Ceann Comhairle and other members to have abused privilege.

This would have to include an appeal mechanism for members who disagree with the findings of their colleagues. These mechanisms should be included in Standing Orders.

Fianna Fáil agrees with Standing Order 59 and has no difficulty in clarifying our position on any suggested improvements to it, if required. As a party we do our utmost to comply with same. *Sub judice* matters are most likely to be dealt with by the courts. If you need any more specifics on this we can provide it.

I sincerely hope that a consensus can be found on how best to preserve the well-held principle of parliamentary privilege while at the same time protecting citizens' rights and also to agreeing certain deterrents to prevent intentioned or non-intentioned abuse.

If you need any further clarification or wish to meet any member of our party to discuss the Forum's deliberations please do not hesitate to contact my office so same can be arranged.

Yours sincerely,

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No. 15 – AGSI

Submission – Association of Garda Sergeants and Inspectors

September 2017

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Introduction

The Association of Garda Sergeants and Inspectors (AGSI) consider the matter of freedom of debate and members' privileges in the Dáil an important issue. We make our submission having considered the need for–

- (a) balanced, fair, reasonable and open debate on matters of public interest in the Dáil and Seanad, and
- (b) the rights of our members, Garda Sergeants and Inspectors, to fair, open and transparent procedures which allow them an opportunity for defence of their good name, for actions undertaken in the course of their duty.

Context

The protection contained in Bunreacht na hÉireann to utterances in the Dáil allows Teachtaí Dála to make statements which are unchallengeable outside the Dáil.

The protections were introduced to ensure courts and tribunals would not be involved in analysing and pronouncing upon either the content of parliamentary speech or the motivation of the speaker.

Such protections are reasonable and just in situations where there is no other opportunity to have matters of public concern addressed or where reasonable steps have been taken and are frustrated.

The question must be asked as to whether it is reasonable and fair to take a course of action by naming, or providing such detail as to leave no doubt as to the identity of a person, when there are other avenues open to having the matter examined but these avenues have not been used.

Additionally, the privilege rule was introduced at a time when reporting on Dáil debates was confined to national newspapers or radio news broadcasts. Indeed not all matters would have been reported on and by the nature of media not many people would be aware of reports where people were named in any event. Mainstream media is now not the only method of reporting matters from the Dáil or indeed elsewhere. The current phenomenon of instant news means information is communicated through social media and via the internet, sometimes by people promoting a particular agenda or their followers. This information is picked up and re-sent many hundreds and thousands of times, practically instantly.

Once circulated through social media and the internet the information can be accessed for time immemorial. Having information removed from the internet is practically impossible as there is always a trace somewhere.

The net effect of this instant news on a national and international scale means that it impossible to control the spread of information. Even where a record is corrected there are traces of the original allegation.

The authors of the privilege rules could not have foreseen the developments in technology that would accommodate matters reported in the Dáil being circulated to the scale it is currently. The pervasive nature of social media means it is impossible to control information. Consequently the rules in the Dáil to safeguard the good name of people must be stringent and strictly enforced. This is necessary so as to prevent widespread circulation of information where the person named had no redress process. It must be remembered, naming a person has far-reaching consequences; in the case of naming a Garda the person

themselves are impacted but so also is their families, the colleagues they work with, the Garda organisation. Utterances can negatively impact on the good reputation of the Garda organisation and impact on public confidence in the policing service.

AGSI were conscious of the competing demands and changes on how information is reported and circulated when drafting our submission.

Questions to be addressed for the Forum

1. What constitutes a responsible use of freedom of debate in the Houses of the Oireachtas?

AGSI note that Article 15.12 of Bunreacht na hÉireann provides that:

“all official reports and publications of the Oireachtas or of either house thereof and utterances made in either house wherever published shall be privileged”.

Standing Order 59 of the 2016 Standing Orders relative to Public Business provides:

“...a member shall not be prevented from raising in the Dáil any matter of general public importance, even where court proceedings have been initiated”,

and it goes on then to provide for certain instances which must be satisfied. One matter of course is that it must relate to public policy.

Article 40 section 3 subsection 1 of Bunreacht na hÉireann states:

“The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.”.

This then proceeds at subsection 2 and provides that the State shall in particular:

“by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen”.

What has to be determined is what can be considered a reasonable balance between these two competing entitlements.

2. How should freedom of debate in the Houses of the Oireachtas and the right of an individual to his or her good name be balanced against each other?

AGSI is not canvassing for a removal of the privilege contained in the Constitution. Debate and freedom of speech should not be hindered in a democratic society. What AGSI is seeking is an appropriate oversight process to prevent the abuse of privilege where there are, as in the case of Gardaí performing their duty, other mechanisms through which allegations can be reported and independently examined.

How should freedom of debate in the Houses of the Oireachtas and the right of an individual to his or her good name be balanced against each other? This is the kernel of this issue; balancing the rights of individuals without stifling an open and necessary debate on relevant matters in the Oireachtas.

AGSI as the representative body for Sergeants and Inspectors in An Garda Síochána will attempt to address the balancing of rights of TDs and AGSI members. The issue of balancing individual citizens' rights may be impacted by our views but it is not the focus of our observations.

As stated above, AGSI believe there should be strict oversight of Dáil privilege where there are other mechanisms available to TDs to report matters of public interest and have the matters properly examined.

In the case of the Gardaí there are a number of opportunities to have matters of public interest examined by a competent authority and to have the facts established in a transparent and accountable way, where the Garda member has the opportunity and the right of response.

Where information comes into the possession of TDs and the matter is of such import that it needs to be investigated the TD can, in the case of criminal wrongdoing, report the matter to the Garda authorities or the Garda Síochána Ombudsman Commission for investigation.

Breaches of the Criminal Code reported to the Garda Authorities

The Garda authorities will initiate and carry out thorough and detailed investigations of wrongdoings by Gardaí where the matter is reported to them. An Garda Síochána have a record of investigating and prosecuting members of the Garda organisation who are in breach of the criminal law.

Breaches of the Criminal Code reported to the Garda Síochána Ombudsman Commission

The Garda Síochána Ombudsman Commission can independently of the Garda authorities examine and bring prosecutions against Gardaí. This avenue is available where a TD may have concerns the Garda organisation might not carry out a thorough, fair and independent investigation.

In both these cases a file will be prepared for the Director of Public Prosecutions and where there is sufficient evidence a prosecution will be brought and on conviction the appropriate sanction imposed.

Breaches of Police Procedures

In the case of breaches in police procedural matters a TD can similarly report the matter to the Garda Síochána Ombudsman Commission for examination. Alternatively a breach of police procedures can be raised with the Garda authorities.

In this instance the matter will be examined under the Garda discipline regulations. Where there is a breach of any of the discipline regulations a sanction up to and including dismissal can be recommended depending on the severity of the breach.

Confidential Disclosures

In the case of confidential disclosures brought to the attention of a TD the matter can be appropriately dealt with under the protected disclosures legislation as it applies to An Garda Síochána.

AGSI contend that it is wrong for a TD or senator to name a Garda member, regardless of rank, in the Dáil under privilege without having referred the matter to an appropriate authority for independent investigation. Even then naming should only be permitted where criminal wrongdoing has been identified and any and all proceedings concluded and where naming a member would be in the public interest.

3. How should freedom of debate in the Houses of the Oireachtas and the rights of the individual in court proceedings be balanced against each other?

There are various judgments relating to utterances in each House of the Oireachtas confirming it is an 'absolute immunity' unanswerable to tribunals or the courts.

This is most notably endorsed in the most recent High Court decision in O'Brien versus The Clerk of Dáil Éireann and others, Judgment 31st March, 2017.

See also the decision in Kerins –v– McGuinness and Others under the divisional High Court 2017. This case arose out of the plaintiff's attendance at a hearing of the Public Accounts Committee. The court ultimately held that, notwithstanding the undoubted damage done to her good name and the personal injury suffered by her, that the matter was 'non-justiciable' in the courts.

The effect of this is essentially that the absolute immunity conferred in the parliamentary proceedings 'ranks ahead' of the personal rights of the individual.

Privilege is protected in the Constitution and upheld by court determination. Considering this it has to be that this immunity should not be abused and should be regulated. Appropriate policing processes should be implemented within the Dáil and Seanad chambers.

4. If a person's good name has been impugned in the Houses of the Oireachtas, or his or her privacy has been breached, what procedure should be in place (within the Oireachtas itself) to deal with the abuse of privilege?

For any politician to name and accuse an individual of wrongdoing in a House of the Oireachtas essentially is to deny their right to their good name and therefore it is an imperative that in order to balance absolute immunity that members of the Oireachtas enjoy in these circumstances that sanction should apply to those members of the Oireachtas who abuse same.

A speedy and transparent process of investigation of the matter should be put in place. This process should be invoked immediately on receipt of a complaint from the person named or a person representing that person or any person who feels another's name has been impugned.

Once a complaint has been lodged the TD concerned should be made aware and an investigation carried out to establish the facts. The TD should be compelled to cooperate fully with the investigations and while information collected during the course of the investigation would not be disclosable it would form the basis for a determination as the *bona fides* of the utterances and assist in determining an appropriate sanction.

Non-cooperation with any investigation under this process should result in suspension of a TD until such time as they cooperate.

The investigation process should be time-lined to ensure the person impugned and the TD are not disadvantaged by the passage of time.

5. What recourse should the citizen have where his or her good name or privacy rights have been interfered with by the abuse of privilege? What measures to protect the good name of the citizen should be considered?

The good name and reputation of members of An Garda Síochána is essential to ensure there is confidence in the individual and by extension the organisation.

Where a person's good name has been taken, and particularly where that person is a member of An Garda Síochána, the remedy should be a declaration concerning the matter at hand issue from the Oireachtas, rectifying the record of the Dáil.

While this would not fully balance the rights of the individual who was wronged it would go some way in restoring the individual's reputation. The process of rectifying the record should be swift and should be communicated directly to the member from the Ceann Comhairle in writing.

6. What sanctions should be imposed on a member who has abused privilege?

There is a raft of avenues open to TDs/senators to have allegations against Gardaí investigated. Considering this, where a TD/senator fails to avail of these mechanisms and brings a matter to the Dáil/Seanad in the first instance there should be an effective and severe sanction imposed on that individual. The sanction should be measured but proportionate.

Where a TD spoke in a manner that could be proved to be malicious, i.e., in bad faith, then the removal of the immunity should be an option available to the Oireachtas.

Where the utterances can be proven to merit examination and are not maliciously spoken the following sanctions should be available to the Oireachtas:

1. a reprimand, where the breach is minor and a first offence,
2. a withdrawal of certain privileges as a member of the Oireachtas for a period of time,
3. suspension from the House for a certain period of time,
4. financial sanction,
5. a combination of 2, 3 and 4 above as considered appropriate.

Conclusion

AGSI members perform their duty in a conscientious and diligent manner. They are subject to rigorous oversight from within and outside the Garda organisation and can be investigated, prosecuted, criminally, or dismissed if they act contrary to the criminal law of the Garda Discipline regulations.

Considering the opportunities available to have alleged wrongdoing investigated independently where members have a right of reply and a right to present evidence in their defence AGSI see no requirement for TDs to use the cover of Dáil privilege to bring matters to the public attention.

AGSI would of course not be opposed to TDs bringing systemic wrongdoing or bad practice on the part of the Garda organisation to the attention of the public for examination and debate, where such disclosure does not name or identify individual employees.

All members of Irish society are entitled to their good name. Gardaí in particular, who work in the service of the community and who come under scrutiny because of their roles are equally, if not more entitled, to be protected from allegations which do not need to be substantiated and for which they have no recourse.

AGSI would welcome an adjustment to Standing Orders relative to Public Business in the Dáil to safeguard Gardaí in the performance of their duty. The rules should prevent any member of either House from naming or identifying a Garda without first having referred their allegations to one of the appropriate authorities for appropriate investigation and determination. Naming should only be permitted where criminal wrongdoing has been identified and any and all proceedings concluded and where naming a member would be in the public interest.

No. 16 – Fine Gael

Fine Gael submission to the Forum on Parliamentary Privilege

In recent years the Dáil has seen a significant number of incidents where TDs have been accused of using Dáil privilege to make statements that have been seen as an abuse of that privilege.

In recognition of the problem the Ceann Comhairle has established a Forum on Parliamentary Privilege to ensure that a fair balance is struck between freedom of debate for members of the Dáil and the rights of individuals.

An Taoiseach Leo Varadkar TD, Government Chief Whip Minister Joe McHugh TD and the Chairman of the Fine Gael Parliamentary Party, Martin Heydon TD were anxious that the full Fine Gael Oireachtas membership had an opportunity to discuss the issue in advance of any submission.

The submission was discussed, at length, during a Fine Gael parliamentary party meeting on the 27th September 2017.

On the basis of that discussion the Fine Gael party submission:

- recognises the importance of retaining parliamentary privilege and allowing Oireachtas Members the freedom to debate issues without fear and the protection regarding what they say in the course of such debates as long as that privilege is not abused;
- welcomes the establishment of the Forum and the Ceann Comhairle's recognition that a serious problem does exist where parliamentary privilege is being abused and his commitment to take steps to address this;
- accepts that in recent years there has been a marked increase in the number of incidents of abuse of parliamentary privilege;
- is gravely concerned about the impact that comments made in the Dáil may have on the members of the public mentioned in such comments, who are not in the chamber to challenge such comments, especially in the current 24 hour news and social media age;
- acknowledges that allegations of abuse of parliamentary privilege and a perceived inability to tackle proven abuse and penalise those responsible has a serious negative impact on the public perception of the Oireachtas and all members of the Oireachtas;
- is concerned that the coverage surrounding such comments when made is not balanced by the coverage of any later finding that the comments were an abuse of privilege;
- believes that the issue of abuse is not limited to the Dáil but that the same issue exists at Oireachtas Committee level, especially in high profile Committees such as the Public Accounts Committee, where the procedures to address such abuse are even less enforceable and asks the Forum to also consider how the procedures in Oireachtas Committees can be improved to help Oireachtas Committee Chairs and Oireachtas Committee officials to tackle this;
- accepts that the current procedures around the reporting and investigating of allegations of abuse of parliamentary privilege need to be more efficient and more responsive;
- accepts that the current sanctions that the Ceann Comhairle, Committee on Procedure and Oireachtas have where it has been accepted that a member abused privilege are not sufficient, are of no significant deterrent and do not carry the weight that they would have in the past and need to be reviewed.



