
**COMMITTEES OF THE HOUSES OF THE OIREACHTAS
(POWERS OF INQUIRY) BILL 2010**

EXPLANATORY MEMORANDUM

Purpose of Bill

The purpose of this Bill is, in general terms, to address a pressing need to restore the status of the Oireachtas vis-à-vis the Executive.

In particular, it is necessary to address the view that the Supreme Court decision in the *Abbeylara* case (*Maguire v. Ardagh* [2002] 1 IR 385) has put an end to any possibility of inquiry by Oireachtas committee.

The proponents of this Bill reject the view that, short of constitutional change, there is now no lawful means of holding a parliamentary inquiry, as a result of that decision. We do accept, however, that legislation is required to address the defects identified by the court in that case: hence this Bill.

In the *Abbeylara* case the Supreme Court ruled that the conducting by an Oireachtas committee of an inquiry into the fatal shooting at Abbeylara on the 20th April 2000, capable of leading to adverse findings of fact and conclusions (including a finding of unlawful killing) as to the personal culpability of an individual not a member of the Oireachtas so as to impugn his or her good name, was *ultra vires* in that the holding of such an inquiry is not within the inherent powers of the Houses of the Oireachtas.

In other words, the court found that there is no inherent power in the Oireachtas to make adverse findings of fact and conclusions as to the personal culpability of an individual not a member of the Oireachtas.

The difficulty is that previous legislation – the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997 – seems clearly to have been drafted and then passed precisely upon an assumption that the power to inquire was an inherent one and that all that was necessary for statute to do was to equip the Houses with powers of compellability to enable its inquiries become more effective..

To quote from the judgment of Mr Justice Hardiman in *Abbeylara*: “[i]t was not argued by the applicants in the present case that the proposed activities of the Committee would be an administration of justice. The quite different point is made that the proposed activities of the Committee are simply without legal authority”.

So far as the fundamental decisive factor in those judgments can be discerned, the objection to parliamentary inquiries was not that they could make findings of a sort that only a court can make – after all, tribunals of inquiry make findings adverse to the interests of individuals but have withstood repeated constitutional challenge. The explicitly stated basis for the decision in that case was that that parliamentary inquiries sought to inquire and to make findings relying on “inherent” powers and without ever having received a statutory grant of authority to inquire in the first place.

So, the first defect to be remedied in this Bill is to confer a statutory power to inquire and report.

Of course, there are other possible arguments that can be made against the constitutionality of inquiry by Oireachtas committee. Some of these were made by the applicants in *Abbeylara*. But they were not the arguments relied on by the court in arriving at its decision.

It is not appropriate for the Oireachtas to anticipate arguments which may or may not be relied upon successfully in some future litigation. The only way we will know whether the courts would agree to potential future arguments is to pass a Bill like this first. If it is rejected, on additional grounds that could not be cured by legislation, then the Houses of the Oireachtas would have to either abandon the exercise or seek to change the Constitution. At that stage, there would be no middle way.

Provisions of Bill

By its long title, the Bill is described as being an Act to confer on each House of the Oireachtas and on both of them acting jointly, through committees, a power to appoint inquiries into and to commission reports upon matters relevant to the exercise of the legislative power of the State; such reports could include ones relevant to defects in social, economic or administrative systems and systems of governance within the State, for the purpose of proposing legislation to remedy any defects so identified and to make recommendations for the better regulation and governance of the State.

In common with a number of recent Acts, the Bill includes a series of recitals after the long title but before the substantive provisions, that spell out in greater detail the object and purpose of the Bill. In this case the recitals state that:

- the Government, its members, their officers and all others given responsibility for administering the public services of the State are trustees and servants of the people;
- public administration in the State must accordingly be capable of being held to account by the elected representatives of the people in their House of Representatives, Dáil Éireann (being the rulers of the State designated as such, pursuant to Article 6 of the Constitution, by the people);
- both Dáil and Seanad Éireann have functions in relation to the making of laws, including Private Acts that directly affect the rights and obligations of natural and legal persons;
- in furtherance of their legislative functions, the power of the Houses of the Oireachtas must be as ample as is necessary in order to enable them to conduct surveys and inquiries concerning defects in the social, economic or administrative systems of the State, for the purpose of enabling the Houses fully to be informed in considering proposed legislation for the remedy of those defects and the betterment of systems so found;
- Dáil Éireann has additional functions under the Constitution in relation to the approval and oversight of measures for taxation and for expenditure and the holding of the Government to account, which additional functions must of necessity include –
 - (a) the oversight of public administration by the bodies to which public monies are supplied by the Dáil from public revenues,

- (b) the oversight of the manner of administration of existing laws and
- (c) the oversight of probes into Government Departments and other public bodies in relation to which Ministers of the Government are responsible to the Dáil,

in order to identify the potential under existing laws for maladministration, inefficiency or waste and the need to reform those laws;

- oversight of public administration and the holding of the Government to account constitute a distinct and legitimate area of parliamentary activity, and an essential parliamentary task, under a constitutional framework where the Government is accountable to the Dáil and through it to the public, in relation to the administration of the laws and the public services of the State.

The recitals conclude by stating that the most appropriate means by which the Houses of the Oireachtas can perform such functions is through the appointment of committees of their members; that legislation is required in order to give effect to this; and that the Oireachtas has had, in enacting this legislation, due regard to the constitutional rights of all persons liable to be thereby affected.

Section 1 sets out standard definitions. “The Acts” means the Committees of the Houses of the Oireachtas Acts 1976 to 2004; “committee” means a committee appointed by either House or appointed jointly by both Houses; and includes a subcommittee of such a committee; and “House” means House of the Oireachtas.

Section 2 provides that the Bill applies to a committee on which, pursuant to the rules and standing orders of the House or Houses concerned, a power to send for persons, papers or records has been conferred. However, the Committee on Members’ Interests of Dáil Éireann and the Committee on Members’ Interests of Seanad Éireann are excluded from the ambit of the Bill since they operate under separate statutory provisions.

Section 3 provides that a committee has power to inquire into, and report to either or both Houses upon, any matter for purposes –

- appropriate to the order of reference by which it was appointed and any other applicable standing or other orders, and
- appropriate to the functions of the House or Houses by which it was appointed, referred to in the recital to the Bill, including in particular the power of making laws for the State exercisable by the House or Houses that appointed it.

In addition, in the case of a committee appointed by Dáil Éireann, it has power to inquire and report for purposes appropriate to –

- the function of holding the Government responsible to the Dáil, in accordance with Article 28.4 of the Constitution, and
- the function of controlling taxation and supply and scrutinising public expenditure, in accordance with Articles 17 and 33 of the Constitution.

The section makes it clear that the power of making laws for the State includes the power to make Private Acts affecting the rights and obligations of specified persons.

It is also made clear that a committee may inquire into and report upon matters that arose before the passing of this Bill.

Section 4 provides that a committee must not consider, and has no power to decide or report upon, findings or opinions on any individual's civil or criminal liability or to make findings which could reasonably be seen to attribute civil or criminal liability to any individual.

Furthermore, a report of a committee is in its entirety an expression of the opinion of the committee and has the same status for every purpose in law as is given to a report of a tribunal of inquiry appointed pursuant to the Tribunals of Inquiry (Evidence) Acts 1921 to 2004.

Finally, the section states that a committee is not to be inhibited in the performance of its functions by the possibility of liability being inferred from any matter in relation to which it express an opinion or from any recommendations that it makes appropriate to the purposes for which it conducted an inquiry and report.

Section 5 makes it clear that the power of compellability of witnesses, and associated powers, conferred by previous Committees of the Houses of the Oireachtas Acts are exercisable in aid of the power to inquire and report conferred on committees by this Bill.

The section also provides that, in any application to the High Court to which those Acts relate, and in any appeal from such an application to the Supreme Court –

- the court shall bear in mind the public interest in securing on behalf of the people by and through their elected public representatives, to the greatest extent possible consistent with the separation of powers and the rule of law, a proper degree of openness, accountability and transparency in the public administration of the State, bearing in mind the democratic and therefore ultimately accountable nature of the State and its organs and institutions;
- all other relevant considerations, including the safeguarding to an appropriate degree of constitutional rights of persons liable to be thereby affected, shall be weighed against that consideration and the purpose and spirit of this Bill.

Section 6 borrows from section 15 of the Comptroller and Auditor General and Committees of the Houses of the Oireachtas (Special Provisions) Act 1998, which allows for the appointment of assessors to assist an Oireachtas committee. The section provides that, if a committee considers that it requires the advice, guidance or assistance of experts in respect of any matter arising at or in connection with the performance of its functions, it may, upon such terms and conditions as it may determine, appoint such number of assessors having expertise in relation to that matter as it may determine to provide it with such advice, guidance or assistance.

In addition, a committee may appoint a barrister or solicitor of not less than 12 years' standing to act as legal assessor. The function of a legal assessor is to advise and assist the committee in deciding all matters of procedure, in order to ensure compliance with relevant rules and orders of the House or Houses that appointed the committee, compliance with relevant enactments and the safeguarding of the constitutional rights of persons affected.

Section 7 allows for the appointment by a committee of investigators to carry out preliminary investigations. The section applies only to committees on which powers of compellability have been conferred under the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997. Further, the exercise of the powers conferred by this section requires the prior approval of the House or Houses that appointed the committee.

Following such approval, the committee may appoint a person or persons of appropriate knowledge, experience or expertise to act as investigators to carry out a preliminary investigation of any matter material to the inquiry and report of the committee.

Section 8 relates to the report of an investigator and provides that the investigator must not consider, and has no power to decide or report upon, findings or opinions on any person's civil or criminal liability or to make findings which could reasonably be seen to attribute civil or criminal liability to any individual.

However, an investigator is not to be inhibited in the performance of his or her functions by the possibility of liability being inferred from any matter in relation to which he or she express an opinion or from any recommendations that he or she makes appropriate to the purposes for which the investigation was conducted.

The investigator may make use of his or her knowledge, experience and expertise, as well as the information gathered in the course of his or her investigation, to provide an expert opinion and recommendations to the committee in relation to the matters the subject of the investigation. This includes the manner in which relevant laws, regulations, administrative systems, procedures and practices have been employed and applied, identifying in particular:

- any defects in planning, information-gathering and information-analysis on the part of public authorities,
- any other defects in systems of regulation and oversight on the part of public authorities,
- any systematic default on the part of regulated persons or bodies in their duty to comply with relevant regulations,
- any defects in relevant laws or regulations.

The report of an investigator may be published by a committee and its contents may be made use of for the purposes of its inquiry and report.

Section 9 deals with the power of an investigator and is modelled on section 6 of the Tribunals of Inquiry (Evidence) (Amendment) Act 2002, which allowed for the appointment of investigators to assist tribunals of inquiry (the Morris Inquiry in particular).

The section provides that an investigator may, for the purposes of a preliminary investigation, require a person to give information, send documents or other things and attend before him or her to answer questions.

An investigator has power to examine a person in relation to any information, documents or things and may reduce the answers of the person to writing and require the person to sign the document containing them.

Where a person mentioned fails or refuses to comply with a requirement made to the person by an investigator, the High Court may, on application to it in a summary manner in that behalf made by the investigator with the consent of the committee concerned, order the person to comply with the requirement and make such other order as it considers necessary and just to enable the requirement to have full effect.

The section goes on to provide that a person to whom a requirement is made is entitled to the same immunities and privileges as if he or she were a witness before the High Court.

An investigator must not, without the consent of the committee, disclose other than to the committee any information, documents or things obtained by him or her in the performance of his or her functions.

An investigator must be given a warrant of appointment and must produce it if so requested by a person affected.

A statement or admission made by a person before an investigator is not admissible as evidence against the person in any criminal proceedings.

Finally, the section provides that a person who, without reasonable cause, by act or omission obstructs or hinders an investigator in the performance of his or her functions, or fails or refuses to comply with a requirement, is guilty of an offence and is liable on summary conviction to a fine not exceeding €5,000 or imprisonment for a term not exceeding 12 months or both.

Section 10 provides for the short title of the Bill and the collective citation of the Committees of the Houses of the Oireachtas Acts.

The section also deals, in standard terms, with the commencement and cessation by resolution of the Houses of the Oireachtas of legislation that applies to the internal workings of the Houses.

Pádraig Ó Coinín
Eanáir, 2010