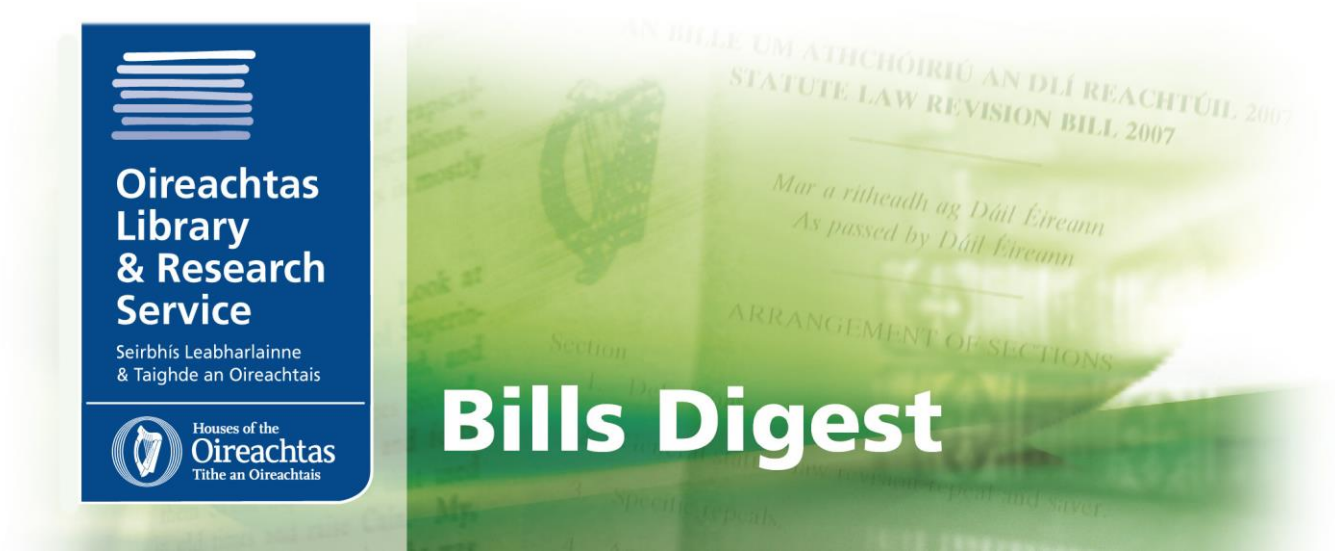


# Thirtieth Amendment of the Constitution (Houses of the Oireachtas Inquiry) Bill 2011

## 47 of 2011

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### Summary

The Bill proposes an amendment to Article 15.10 of the Constitution, giving the Houses of the Oireachtas the power to inquire into matters of general public importance.



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# Introduction

As a mechanism to investigate matters of urgent public importance, tribunals of inquiry have attracted widespread criticism for the perceived excess of their cost and duration, a view which reached its zenith following the recent publication of the final report in the Moriarty Tribunal, after fourteen years and estimated costs of over €113 million.[1] Alternative forms of public inquiry have emerged in the shape of Commissions of Investigation,[2] and the use of parliamentary inquiries.

Current case law would indicate that the Houses of the Oireachtas do not, as a matter of constitutional law, have an inherent power to inquire into matters of public importance, beyond the remit of their functions as a legislative body, and in the case of Dáil Éireann, holding the government to account.[3] Public inquiries into the banking crisis, and failings within state bodies such as Fás have thrown the spotlight on the need to express, at constitutional level, a broad power for parliament to inquire into matters of general public importance.

The *Thirtieth Amendment of the Constitution (Houses of the Oireachtas Inquiry) Bill 2011* ("the Bill") was published on 12th September 2011. Article 46.2 of the Constitution requires that:

> Every proposal for an amendment of this Constitution shall be initiated in Dáil Éireann as a Bill, and shall upon having been passed or deemed to have been passed by both Houses of the Oireachtas, be submitted by Referendum to the decision of the people in accordance with the law for the time being in force relating to the Referendum.

In line with this procedure, the Bill proposes an amendment to Article 15 of the Constitution, which deals with the 'constitution and powers' of the Houses of the Oireachtas. The following amendment will be put to the people via referendum on 27th October 2011:

[1] Office of the Comptroller and Auditor General, *Special Report 63: Tribunals of Inquiry*, December 2008, p. 16 available at http://www.audgen.gov.ie/
[2] See generally, *Commissions of Investigation Act 2004*
[3] Art. 28.4.1° "The Government shall be responsible to Dáil Éireann."

**Article 15.10**

2° Each House shall have the power to conduct an inquiry, or an inquiry with the other House, in a manner provided for by law, into any matter stated by the House or Houses concerned to be of general public importance.

3° In the course of any such inquiry the conduct of any person (whether or not a member of either House) may be investigated and the House or Houses concerned my make findings in respect of the conduct of that person concerning the matter to which the inquiry relates.

4° It shall be for the House or Houses concerned to determine the appropriate balance between the rights of persons and the public interest for the purposes of ensuring an effective inquiry into any matter to which subsection 2° applies.

The wording of the constitutional amendment is based on a set of recommendations made by the Joint Committee on the Constitution in its Fifth Report, published in January 2011, which advocated expanding the powers of the Oireachtas to include a broad power to inquire into matters of general public importance.

This Digest examines the current law and policy surrounding parliamentary inquiries, including a brief historical background, an explanation of the rationale behind inquiries and the constitutional framework currently in force. The Digest then examines the principal themes of the Bill:

- Constitutional justice
- The parliamentary power to inquire;
- Adjudicatory findings of face and non-office holders; and
- Balancing personal rights and the public interest in an effective inquiry.

This Digest may be read in combination with material previously drafted by the L&RS, including the Fifth Report of the Joint Committee on the Constitution, and a research paper on international comparisons in the area of parliamentary inquiries, published as Annex 3 to the Fifth Report.

In addition to the current Bill, the Department of Public Expenditure and Reform has published an Explanatory Note on the proposed referendum, and the general scheme of a bill implementing the proposed amendment. The general scheme is due to be published as a bill in early October, and will establish the procedural framework for a new parliamentary inquiry system.

This Digest focuses on the wording of the proposed amendment, and associated themes. It does not focus on the general scheme of implementing legislation. The detailed manner in which the inquiry system will work will be addressed by the Library

& Research Service upon publication of the *Houses of the Oireachtas (Powers of Inquiry) Bill 2011*.

## Background: The functions of public inquiries

In 2003 the Law Reform Commission (LRC) published a Consultation Paper on Public Inquiries,[4] which, as a preliminary matter looked at the functions served by public inquiries in society, and how they are juxtaposed with the functions of the courts. The Paper noted that the object of a public inquiry:

> "is simply to ascertain authoritatively the facts in relation to some particular matter of legitimate public interest, which has been identified by its terms of reference. In the light of those factors, it may also make a recommendation as to how the accident, mischief or evil under investigation may be rendered less likely to occur in the future. It should be emphasised that such an inquiry is usually set up when something major has gone wrong; often because someone has done wrong, acted unlawfully or failed to act."

The LRC goes on to emphasise that the fundamental character of public inquiries is that they **do not** settle legal rights. They are intended to make an authoritative finding of the facts in regard to a matter of public interest. It gives examples such as the cause of accidents, natural disasters or the performance of a public authority or big business. Public inquiries do not, in the phraseology of the Constitution, 'administer justice', a function left solely to courts of law.

**Box 1: Functions of Public Inquiries**

- ***Establish what happened***: Especially where facts are disputed or cause of events is unclear.
- ***Learn from what happened***: Shortcomings in law, regulations and oversight.
- ***Catharsis***: Providing an opportunity for reconciliation and resolution.
- ***Reassurance***: Rebuilding public confidence.
- ***Establish accountability, blame, retribution***: Holding people and organisations to account.
- ***Political considerations***: Part of a wider political agenda for government, showing that 'something is being done' or providing leverage for change.

Source: Law Reform Commission, *Report on Public Inquiries including Tribunals of Inquiry* (LRC 73-2005)

[4] Law Reform Commission, *Consultation Paper on Public Inquiries including Tribunals of Inquiry*, LRC CP 22-2003, March 2003, para. 1.03, p. 6.

In the context of the specific constitutional functions of the Oireachtas the LRC has commented that "relevant and comprehensive information is essential to its performance, whether in the field of law-making or controlling the Government."[5]

It points out that there are numerous channels by which such information may be obtained, from parliamentary questions, statements by Ministers, debates on legislation, adjournment debates, and the committee stage of the legislative process. One of these methods is the ad hoc investigatory committee which inquires into a discrete subject.

## Current Law and Policy

### Abbeylara: The Facts and Principles

The principal judicial precedent with regard to the powers of inquiry of the Oireachtas is the judgment of the Supreme Court in *Maguire v Ardagh*,[6] better known as the *Abbeylara* case. The case arose in the aftermath of a fatal shooting which occurred at Abbeylara, County Longford, in April 2000. A Chief Superintendent was appointed by the Garda Commissioner to investigate the circumstances surrounding the death. The report submitted to the Commissioner was in turn referred to the Minister for Justice, Equality and Law Reform, and subsequently published as an appendix to a formal report by the Oireachtas Joint Committee on Justice, Equality, Defence and Women's Rights.

In response to the public reaction to this report a sub-committee was established under the *Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997* (the 1997 Act) to investigate the incident further. The issues to be addressed by the Sub-committee included:

a) the effectiveness/appropriateness/reasonableness of the Garda operation; […]
b) the preparedness of the Gardaí for the situation;
c) the amount of force used;
d) the pathologist's findings, his evidence to the inquest and the implications of such evidence.[7]

A number of witnesses, including members of the Gardaí involved in the incident at Abbeylara, were called to give evidence before the Sub-committee. The work of the

[5] Ibid at p. 70
[6] [2002] 1 IR 447
[7] Ibid, at p. 481

Sub-committee attracted much media attention and its work was discussed on television and radio programmes by three of its members.

The Gardaí whose conduct was under investigation successfully sought judicial review in the High Court to prevent the inquiry from proceeding, a decision which was upheld by a five to two majority on appeal to the Supreme Court. The Gardaí claimed that:

- the procedures followed by the Sub-committee were flawed, given the terms of the 1997 Act;[8]
- the Sub-committee had failed to observe the rule of constitutional justice, that both sides should be heard (*audi alteram partem*);
- the Sub-committee had failed to observe the rule of constitutional justice, that there should be 'no bias' (*nemo iudex in causa sua*); and
- that the Sub-committee had no legal authority to mount such an investigation.

As highlighted in the Law Reform Commission's (LRC) *Consultation Paper on Public Inquiries*, of these four issues, the first two could be rectified in future inquiries by adhering properly to procedural requirements.[9] The third and fourth questions were the subject of the greater part of the courts' judgments, and each of these will be discussed in turn. First, however, it is worth pointing out that there were two principal aspects of the inquiry that the courts considered unlawful. Those were that:

e) the findings of the sub-committee would be 'adjudicatory'; and

f) the targets of the investigation were not Ministers or holders of constitutional office, but ordinary citizens, albeit employed as public servants.

**Adjudicatory Findings of Fact**

A notable aspect of the applicants' argument, which was reflected strongly in the judgments of the majority, was the novel concept of 'adjudicatory' conclusions. It appeared to the Court that, even though the inquiry did not amount to an 'administration of justice', restricted to a court of law by Article 34.1 of the Constitution, the Sub-committee was empowered to make a finding of fact which made an impact on an individual's right to his good name. The Sub-committee planned to consider the reasonableness of the force used by Gardaí, which could involve a finding of fact which would amount to "unlawful killing", akin to the definition of manslaughter.

[8] These included errors in the drafting of the terms of reference of the Sub-committee and defects in applications made to the Compellability Committee.

[9] Law Reform Commission, *Consultation Paper on Public Inquiries including Tribunals of Inquiry,* LRC CP 22-2003, March 2003.

There was nevertheless recognition by the Court that the taking of a definite view on the facts of a controversial issue may be required as a basis for policy-making by the Oireachtas. The important point left to interpret, according to the LRC, is the following question:

> where does the boundary run[…] between inquiries into policy, as distinct from an inquiry into culpability.[10]

The manner in which Oireachtas Committees have attempted to define this boundary to date is discussed in more detail below. Indeed Mr. Justice Geoghegan accepted that:

> [A]n Oireachtas Committee…may necessarily have to probe into management structures and there may consequentially be read into the report implied criticism of persons in existing management roles.[11]

**Holding non-office holders responsible**

The second essential point which the Court held to be unlawful was that the inquiry amounted to the assertion of a power to hold ordinary individuals responsible to the Oireachtas. The judgments differ in their reasoning for this conclusion. Mr. Justice Hardiman found that only the Government, i.e. Ministers, are directly responsible to the Oireachtas, not individual public servants, who are themselves subject to a chain of accountability. However, Mr. Justice Murray, as he then was, took a broader view:

> I do not see any reason why the Oireachtas cannot conduct inquiries of the nature which they have, for practical purposes, traditionally done including inquiries into matters concerning the competency and efficiency in departmental or public administration as well as such matters as those concerning the proper or effective implementation of policy and to make findings accordingly. Also, if a particular office holder, such as the chief executive of a semi-state body, is by virtue of his appointment, whether by statute or contract, answerable to the Houses of the Oireachtas different considerations arise and I do not consider that the order proposed to be made by this Court affects such a situation.[12]

The *Abbeylara* case involved the conduct of individual members of An Garda Síochána rather than office-holders such as those mentioned by Mr. Justice Murray. The difficulty for current Oireachtas Committees then has been in knowing how far this limitation goes. The LRC suggests that it is possible to say that the judgment allows:

- An Oireachtas inquiry into "the conduct of Ministers or other entities which are made responsible by statute, contract, etc;

[10] LRC CP, at para. 4.28
[11] *Maguire v Ardagh*, p. 741
[12] Ibid, p. 605

- In appraising the performance of Ministers or other principals, to bring in staff who are operating under their direction."[13]

At issue in *Abbeylara* was the "Committee's direct focus on the conduct of staff."[14] The Supreme Court clearly thought the Committee had departed from its policy ambit and veered into factual determinations which had no long term policy implications beyond disciplinary action for those individuals.

## Parliamentary Inquiries to date

The current legal framework surrounding parliamentary inquiries has developed in an incremental manner, with individual pieces of legislation reflected the exigencies of particular inquiries as they developed. It was not until 1997 that these miscellaneous measures were brought together definitively in one act, the *Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997.*

### *The Arms Crisis (1970)*

In late 1970 an Oireachtas inquiry into the Arms Crisis was launched. A Motion of the Dáil was passed requesting that the Committee on Public Accounts (PAC) investigate whether grant-in-aid money allocated for humanitarian relief in Northern Ireland was instead used to purchase armaments for the emerging Provisional IRA. In response to difficulties encountered by the PAC with regard to the application of privilege to Members and witnesses, the Oireachtas passed the *Dáil Éireann (Privilege and Procedure) Act 1970*. The Act provided that in the event that a witness refused to answer a question to which the Committee might legally require an answer, the Chairman had the power to certify the offence to the High Court, which could in turn punish the person as if he was in contempt of the High Court itself.[15]

Mr. Padraic 'Jock' Haughey was requested to appear before the Committee but he refused to answer questions, and on referral to the High Court was sentenced to six months imprisonment for contempt. Haughey appealed the decision, which was overturned by the Supreme Court in the landmark case of *In Re Haughey*,[16] on the grounds that his constitutional rights to natural justice had been infringed. The Supreme Court accepted Haughey's argument that he was entitled to be afforded 'reasonable means of defending himself' before the PAC, to which serious accusations

[13] LRC, p. 82.
[14] Ibid.
[15] See generally, MacCarthaigh, M., *Accountability in Irish Parliamentary Politics,* Dublin: IPA, (2005)
[16] [1971] IR 217.

about Haughey had been made. The *Haughey* judgment outlined the rights to which witnesses appearing before parliamentary committees are entitled, in order to protect their right to a good name, and remains the bedrock of natural justice rights in the area of administrative law. The so-called *Re Haughey* rights are a central theme to the current Bill, and will be discussed in detail below.

Following the investigation into the 'Arms Crisis' by the Committee of Public Accounts, which precipitated the *In Re Haughey* judgment, it was not until 1994 that a Committee was again called upon to perform an investigative inquiry.

***Fall of the Fianna Fáil/Labour government (1994)***

The 1994 inquiry was created by the incoming government of Fine Gael, the Labour Party and Democratic Left, and its primary role was to investigate the circumstances surrounding the fall of the previous Fianna Fáil/Labour government.[17] The two parties disagreed over the appointment of a High Court judge as well as a controversy over the extradition of a priest from Northern Ireland on child abuse charges.

The Select Committee on Legislation and Security (SCLS) was appointed to pursue the inquiry. In order to conduct its work the Sub-committee needed to be able to provide witnesses to the committee with immunity from prosecution and full privilege regarding evidence produced. This resulted in the passing of the *Select Committee on Legislation and Security of Dáil Éireann (Privilege and Immunity) Act 1994*. The Act was not of general application, and gave powers only to the SCLS.

The 1994 Act permitted witnesses to be granted privilege during evidence, but it did not provide for witnesses to be compelled to appear before the committee. The Sub-Committee reported that while it did not encounter difficulties in this regard "it cannot be assumed that such a degree of dependence on voluntary attendance by witnesses would be satisfactory for future inquiries by committees."[18] As commentators have pointed out, this was the first inquiry since 1935 to consider a series of political events. The inquiry concentrated solely on findings of fact and did not reach conclusions; it was "not given specific powers to make findings or recommendations based on the evidence given to it".[19] The inquiry was completed expeditiously, and this was attributed to a large extent to the absence of legal representation from hearings, in contrast to tribunals of inquiry in operation at that time.

[17] See MacCarthaigh, M., *Accountability in Irish Politics*, Dublin: IPA, (2005), p. 164
[18] Sub-Committee of the Select Committee on Legislation and Security (1995) *Report of the Sub-Committee*. Dublin: Stationery Office, p. 6
[19] MacCarthaigh, ibid, at p. 165

In the years following the SCLS Report, a number of additional tribunals of inquiry were established but were dogged by spiralling costs and a series of delays. The alternative option of increasing the use of Oireachtas Committees to inquire into matters of public concern became more attractive in the light of the beleaguered tribunal process. The successful pursuance of an Oireachtas inquiry necessitated general powers for Committees to compel the attendance of witnesses and to grant them privilege.

### *Compellability and the 1997 Act*

The *Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997* (the "1997 Act") represented the culmination of a number of legislative acts passed by the Oireachtas on an *ad hoc* basis to deal with difficulties which arose in the course of individual inquiries.

It built on the SCLS Act by extending the rights of privilege and evidence collection to all Oireachtas Committees with the power to send for persons, papers and records. To this was added the powers of compellability. A Committee to which powers of compellability have been granted may demand the attendance of persons, including civil servants, with the possibility of legal action in the event of refusal. The Attorney General and Director of Public Prosecutions and their staff are excluded, except in respect of PAC queries as to the administration of their offices. The Act was amended in 2004 to provide for the compellability of judges in the event of an inquiry arising under Article 35.4 of the Constitution regarding the removal a judge of the superior courts.[20]

Civil servants and members of An Garda Síochána or the Defence Forces are restricted in certain respects when giving evidence to a committee, under s. 9 of the 1997 Act. They must not:

> …question or express an opinion on the merits of any policy of the Government or a Minister or the Attorney General or the merits of the objectives of such a policy," nor send a document which includes such opinions.

Even despite these restrictions, which reflect the view of the civil service and Government as a 'corporation sole', commentators acknowledge that the 1997 Act provides Parliament with a mechanism to investigate the public administration without going through the appropriate Minister.[21]

[20] See s. 39 of the *Courts of Justice Act 1924*, and s. 20 of the *Courts of Justice (District Courts) Act 1946* in the case of Circuit and District Court judges respectively.
[21] MacCarthaigh, ibid, at p. 167

A number of procedures are included in s. 10 of the 1997 Act which allow persons who have been named or become identifiable in the course of Committee proceedings to correct misstatements, defend themselves against an allegation or charge, or vindicate their personal rights. These provisions went some way to helping the Oireachtas to overcome the judgment in *In Re Haughey*, and unlike earlier legislation, the 1997 Act was of general application.

The initial Bill was amended at Committee Stage to ensure that new powers of compellability were not automatically granted to committees. Instead a sub-committee wishing to utilise powers of compellability under the 1997 Act must apply to the Committee on Procedure and Privileges, established under the Act, and chaired by the Chief Whip (s. 3).

Evidence given to committees is not admissible in later criminal proceedings, but this immunity does not apply to information voluntarily sent by a person to a committee. Section 11 gives a witness who gives evidence to a committee, either written or oral, "the same privileges and immunities as if the person were a witness before the High Court" when they are acting "pursuant to a directive." Section 13 gives committees the power to sit "otherwise than in public."

**The DIRT Inquiry (1999/2000)**

Subsequent to the enactment of the 1997 Act, and in the wake of a media investigation reporting widespread evasion of Deposit Interest Retention Tax (DIRT), the Committee of Public Accounts (PAC) became the first parliamentary committee to apply for powers of compellability under the 1997 Act. The inquiry, popularly known as the DIRT Inquiry, was set up as a sub-committee of the PAC (The Sub-Committee on Certain Revenue Matters), to investigate the use of fake 'non-resident' accounts.

The PAC is unusual in comparison to other Oireachtas Committees in the sense that it has at its disposal the Office of the Comptroller & Auditor General (C&AG), which supports the PAC's role in scrutinising Government spending. The Dáil requested the C&AG to prepare a report for the Committee, as it had the requisite degree of technical expertise to investigate the facts. In order to do so, the remit of the C&AG was broadened by passing the *Comptroller and Auditor General and Committees of the House of the Oireachtas (Special Provisions) Act 1998*. The requirement for the C&AG Act, even after the passing of the 1997 Act, highlights the broad variety of subject-matter that may become subject to a public inquiry, and the somewhat inevitable need for specific *ad hoc* legislation.

The C&AG worked quickly, holding 59 hearings, and taking evidence from 76 witnesses between April and June 1999. It also commissioned independent auditors to go into financial institutions to examine the accounts and documents of private individuals. The hearings were in private, transcripts were made, and full rights to cross-examine etc. were not deemed necessary as the C&AG was concerned with gathering information, rather than 'taking evidence' in order to make findings. The identification of account-holders was forbidden by the 1998 Act.

The C&AG's subsequent report was considered pivotal to the success of the PAC's inquiry, as it allowed the PAC to focus on systemic failings rather than factual disagreements. In keeping with the tradition of the C&AG, its focus was on failures in institutional machinery, rather than on assigning blame to particular individuals. The work of the DIRT Inquiry was televised, attracted much public attention and published a series of reports. These reports included a large number of recommendations for parliamentary reform, many of which were subsequently acted upon, and resulted in the financial institutions involved agreeing to pay the amount of tax outstanding.

The Inquiry was widely regarded as having been successfully completed and commentators have noted that it provided an impetus to develop the committee system beyond considering legislation and hearing evidence from interest groups. Within a year of the DIRT Inquiry's final report two further inquiries had been established, one of which was the ill-fated *Abbeylara* Inquiry, as discussed above.

### *Limitations on Legitimate Inquiries following Abbeylara*

#### The Mini-CTC Signalling Inquiry

Attempts to replicate the success of the DIRT Inquiry failed. Following the decision in *Abbeylara*, a complex and lengthy judgment, a degree of confusion arose as to the parameters to be applied to ongoing and future parliamentary inquiries.

An inquiry by a Sub-committee of the Joint Committee on Public Enterprise and Transport into cost overruns on a signalling project was taking place in parallel to the *Abbeylara* debacle, using the powers conferred by both the 19997 Act, and the C&AG Act 1998 (the Mini-CTC Signalling Inquiry). Following the High Court decision in *Abbeylara* however, the Sub-Committee concluded that it should adjourn as the procedures it had followed were close to those in the *Abbeylara* inquiry. By the time the more nuanced Supreme Court judgment was delivered a general election was approaching and the inquiry wound up its work with an interim report.

The *Commissions of Investigation Act 2004* removed many of the most laborious elements of the tribunal process, allowing evidence to be taken in private and requiring time limits for completion to be set at the outset. These elements are aimed at making the process of inquiries into matters of public concern more efficient and cost-effective. Commissions established under the 2004 Act include the Commission of Investigation into the Archdiocese of Dublin, the Dean Lyons Commission of Investigation, and the Commission of Investigation into the Banking Sector.

**Curtin (2006)**

This inquiry was carried out on the basis of the *Courts of Justice Act 1924*, reflecting a specific constitutional provision, Article 35.4, which provides for the impeachment of judges of the superior courts by the Houses of the Oireachtas on the grounds of stated misbehaviour. A joint Oireachtas Preparatory Committee was established to hear and assess evidence in relation to a Circuit Court judge. Court proceedings arose out of the inquiry,[22] which were eventually discontinued, as was the Oireachtas inquiry. While this inquiry was a milestone in itself, being the first of its kind, it was based on narrow and express constitutional power, and is not therefore directly comparable to a broad general power to the Oireachtas to inquire into pertinent matters.

**Labour Party Bill (2010)**

In early 2010 the Labour Party published a Private Members' Bill, the *Committees of the Houses of the Oireachtas (Powers of Inquiry) Bill 2010*, which provided for a general statutory power for committees to inquire in accordance with their terms of reference, and report thereon, falling short of "findings or opinions on any individual's civil or criminal liability, or … findings which could be reasonably be seen to attribute civil or criminal liability to any individual." The Bill gave committees the power to appoint an investigator, expert in the relevant field, to compile a preliminary report and an 'assessor' to act as an advisor to the committee. The Bill was defeated at the early stages however.

**Callely (2010)**

The most recent inquiry to be carried out by an Oireachtas committee was by the Select Committee on Members' Interests of Seanad Éireann and concerned complaints made in relation to travel expenses claimed by then-Senator Ivor Callely. Proceedings were brought challenging the validity and procedures of the inquiry and a judgment of

[22] *Curtin v Dáil Éireann* [2006] 2 ILRM 99.

the High Court was issued in January 2011.[23] An argument was raised by the Select Committee that Article 15.10 allowed the Houses of the Oireachtas to regulate their own sphere of activity (through rules and standing orders), and thus the inquiry was not subject to judicial review, as it dealt with a Member of the Oireachtas rather than a private citizen. The Court held that, as a citizen's constitutional rights (in this instance, the right to a good name) was effected, judicial review could not be excluded, even if that citizen is a Member of the Oireachtas.

### The Fifth Report of the Joint Committee on the Constitution

The Fifth Report of the Joint Committee on the Constitution was published in January 2011, on foot of submissions from a number of academic experts in the field of constitutional law. It made a series of recommendations, with cross-party support, which included a constitutional amendment and accompanying legislation upon which the current Bill, and its accompanying 'general scheme' are based. For a full discussion of all the issues and varying options for reform considered by the Committee, see its final report.

## Principal Themes of the Bill

The principal themes of the Bill will each be discussed in turn, and reflect each sub-section of the proposed amendment:

- Constitutional Justice;
- Parliament and the power to inquire;
- Adjudicatory findings and non-office holders;
- Balancing rights and effectiveness.

## Constitutional Justice

One of the principal challenges in any attempt at reforming the law in relation to public inquiries is the fact that, while they are not courts of law, they frequently and very publicly delve into allegations of wrongdoing which, even if they do not lead to any kind of civil or criminal liability, can irreparably damage the good name of an individual.

[23] *Callely v Moylan* [2011] IEHC 2

### The Right to a Good Name

**Article 40.3**

**1° 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.**

**2° 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…good name…of every citizen."**

One's good name is a constitutional right enshrined in Article 40.3. The Constitution obliges the State to protect a citizen's good name from unjust attack. In the realm of the courts, and beyond the courts to the field of public inquiries, it is the observance of fair procedures which guarantee that any attack is not 'unjust'.

Referred to alternately as the principles of constitutional or natural justice, the twin concepts that 'each side should be heard' (*audi alteram partem*) and that 'no-one should be a judge in his own case' (*nemo iudex in causa sua*) are realised by the obligation on courts and public authorities to ensure that fair procedures are observed. They exist beside specific principles which have been enumerated under Article 28.1 of the Constitution that "no person shall be tried on any criminal charge save in due course of law." As Kelly, Hogan & Whyte have pointed out, constitutional justice, or fair procedures, is a:

> "fine-mesh catch-all notion, intended to fill with the general instinct of fair play whatever interstices may be left between more traditional rules and principles of criminal justice […]"[24]

### *1. The 'No Bias' Principle*

The first strand of the constitutional justice principles is the rule that there should be 'no bias.' In practical terms this means that a person should be entitled to an independent adjudicator, rather than an adjudicator who has a personal interest in the outcome of a decision.

While the case in *Abbeylara* was not decided on the basis on the 'no bias' rule, it was accepted by all of the Supreme Court judges, even the two minority opinions, that this general rule of constitutional justice would apply to an Oireachtas inquiry. The no-bias rule has two strands:

[24] Kelly, Hogan & Whyte, JM Kelly: The Irish Constitution, (4th ed.), Dublin: Tottel, (2006), at p. 1121

- institutional (or structural) bias; and
- objective (or individual) bias.

**Institutional Bias**

Institutional, or structural bias, refers to a situation where, irrespective of the circumstances of a particular case, a specific body may, of its nature, be inherently biased. The argument has particular relevance to parliamentary inquiries as it may be asked whether a body of public representatives, each elected by a constituency and subject to a strong party whip, involved in ongoing engagement with the media, can achieve the requisite degree of independence in facilitating an inquiry. Most judges rejected this argument or declined to rule on it. Mr Justice Geoghegan stated however that:

> It would only be in rare circumstances that a body composed in that way would be perceived by reasonable members of the public as capable of independent arbitration. [25]

In contrast, it was also pointed out by then-Chief Justice Keane that the Constitution entrusts the task of adjudication by the Oireachtas in "two of the most solemn cases imaginable": the impeachment of the President under Article 12, and the removal of judges of the Superior Courts from office under Article 35.4.

The perception of institutional bias has tarnished the history of parliamentary inquiries in the United Kingdom for over a century. A number of noteworthy inquiries in the early days of parliamentary democracy, involving such high-profile figures as the famous diarist Samuel Pepys, and later, Charles Stewart Parnell, were severely tainted by perceptions of political bias. It was, however, the Marconi scandal in 1912 which lead to the conclusion that select committee was a flawed forum for investigating allegations of political wrongdoing, one more appropriately carried out by an independent tribunal. Chief Justice Keane, as he then was, described the situation in his dissenting judgment in *Abbeylara*:

> That inquiry was the sequel to allegations that a number of prominent politicians, including David Lloyd George, had profited from the purchase of shares in the company which had been awarded the contract for the erection of a chain of State owned wireless telegraph stations throughout the then British Empire. The ministers involved were all members of the liberal administration and the committee produced both a majority report (reflecting the views of the liberal members) and a minority report (reflecting those of the conservative members.) The latter report alone found that there had been 'grave impropriety' on the part of the ministers.[26]

[25] Ibid at 11.
[26] *Maguire v Ardagh*, at p. 506

Such a strongly visible division of opinion along strictly party lines resulted in the passing of the *Tribunal of Inquiry (Evidence) Act 1921*, under which tribunals were established, and similar to this jurisdiction, usually composed of one or more judges. The passing of this act represented a death knell for parliamentary inquiries in the UK. Broad powers to inquire are still held by Parliament, though in practice they were, and are still deemed politically unacceptable.

The Salmon Commission reviewed the system of public inquiries in the UK and reported in 1966. Noting that select parliamentary committees of inquiry had been discredited by the Marconi scandal, Lord Salmon believed that a return to such methods of inquiry would be a "retrograde step". Although select committees were useful, and even indispensable, for many purposes, "the investigation of allegations of public misconduct is not one of them. Such matters should be entirely removed from political influences."[27]

The recent high-profile inquiries by a number of House of Commons select committees into allegations of phone-hacking at the News of the World, interviewing prominent figures from News International, and the London Metropolitan Police were closely followed in the media worldwide.

While the issue was not definitively addressed by the Supreme Court in *Abbeylara*, most judges seemed to reject the assertion that an inquiry by Parliament must, by its very nature, be biased.

**Objective Bias**

This leaves the less extreme form of the rule, which is known as objective bias, as explained by Ms. Justice Denham:

> A committee member in such an inquiry as in issue may not sit if in all the circumstances a reasonable person would have a reasonable apprehension of bias, and apprehension that the committee member might not bring an impartial and unprejudiced mind to the hearing. This would refer to considerations relating to matters prior to the establishment of the committee and during the hearings of the committee. Thus, indications of a view being held by a committee member whilst the hearing is proceeding would be contrary to the concept of fairness. [28]

Objective bias would usually include some sort of financial or other personal interest which would put at risk, or be seen to put at risk the independence of an individual

[27] See generally, House of Commons Library Standard Note, "Investigatory inquiries and the Inquiries Act 2005", SN/PC/02599, June 2009, available at http://www.parliament.uk/briefingpapers/commons/lib/research/briefings/snpc-02599.pdf
[28] Ibid at 573.

Committee Member. Declarations of interest usually mitigate this risk, as well as the possibility of a person recusing himself, or being recused.

In the *Abbeylara* case, the Court was particularly concerned that Members of the Sub-Committee commented openly in the media, both on radio and television, on the inquiry, both prior to and during its operation. It was argued that such comments, in addition to interventions made during hearings of the committee, demonstrated that they had already come to conclusions on the matters which the committee had to consider, leading, to use the words of the Court, to a legitimate apprehension of bias in the mind of a reasonable person.

The public role of a parliamentarian in contrast to that of a judge is stark. While judges are treated by the media with a degree of detachment and deference, politicians are expected by the media and the public alike to engage in public discourse and actively pursue policy goals. Balancing the role of an Oireachtas Member in public political life and any duty to approach an inquiry with the degree of detachment required to avoid any apprehension of bias is a challenge. It would likely require a willingness on the part of Members to exercise a certain amount of restraint with regard to public comments on issues subject to an inquiry, and to exclude themselves where appropriate. Members are already required, for instance, to declare any financial interests.

## 2. The Principle that Each Side Must be Heard (*audi alteram partem*)

As mentioned above, the principal ruling in this jurisdiction on fair procedure rights is the landmark case of *In Re Haughey.*[29] Where a person's good name is likely to be damaged, the appropriate means of defence were understood by the Court as:

(a) the provision of a copy of the evidence reflecting on his good name;

(b) leave to cross-examine, by counsel, his accuser or accusers;

(c) permission to give rebutting evidence;

(d) leave to address the Committee by counsel.

The PAC's procedures did not allow leave to cross-examine, or to address the Committee by counsel. Chief Justice O'Dálaigh, as he then was, stated:

> Without these two rights, no accused…could hope to make any adequate defence of his good name […] Article 40.3…is a guarantee to the citizen of basic fairness of procedures… The provisions of Article 38.1… apply only to trials of criminal charges in accordance with Article 38; but in proceedings before any

[29] [1971] IR 217.

> tribunal where a party to the proceedings is at risk of having his good name or his person or property, or any of his personal rights jeopardised, the proceedings may be correctly classed as proceedings which may affect his rights, and in compliance with the Constitution the State, either by its enactments or through the courts, must outlaw any procedures which will restrict or prevent the party concerned from vindicating these rights.[30]

As the LRC has pointed out, "these protections, which, it should be noted, **implicitly include the right to legal representation**, are classically the protections necessary to allow a person to make his case as best he may."[31] Subsequent judicial decisions have noted that a tailored approach to the *In Re Haughey* principles is required, and they are "not a ritual or a formula requiring a slavish adherence."[32] The constitutional rights entitlement of a particular individual will vary according to the position in which he is placed, one's rights, such as their privacy or good name, must be at risk.

The person must not be in the position of a mere witness but in that of a person accused of serious offences, whose conduct is the subject matter of the inquiry.

## Art. 15.10.2° -Parliament and the Power to Inquire

One of the major findings of the Supreme Court in *Abbeylara* was that the Oireachtas had no inherent power to carry out inquiries of the kind it did in that case. The 1997 Act did not provide for an express statutory power to inquire. While the Oireachtas does have specific express powers in the Constitution to hold Government responsible and to legislate, which could be said to amount to a broad base upon which to review policy failings, in the eyes of the Supreme Court this did not extend to a general power to investigate matters of importance not directly related to the legislative process, and potentially findings that involve personal culpability for alleged wrongdoing.

**Article 15.10.2°**

Each House shall have the power to conduct an inquiry, or an inquiry with the other House, in a manner provided for by law, into any matter stated by the House or Houses concerned to be of general public importance.

This contrasted to the express and solemn power to remove a judge of the superior courts from office, which led the Courts to exercise a restrained level of review in the Curtin case.

[30] *In Re Haughey*, at pp. 263-264.
[31] LRC CP, at para. 7.15.
[32] *Lawlor v Flood*, [1999] 3 IR 107, at 138-139, *as per* Mr. Justice Murphy.

The proposed amendment expresses a wide power to inquire, beyond the strictly legislative or policy sphere. This follows the recommendation of the Joint Committee on the Constitution that such a power should be expressed at constitutional rather than legislative level. If expressed at legislative level, which as a matter of law is subordinate to the provisions of the Constitution, a power of inquiry could be interpreted only within the existing constitutional powers of the Oireachtas, and would likely be "limited to inquiring into matters strictly related to its primary legislative function."[33]

The phrase 'in a manner provided for by law' necessitates the introduction of implementing legislation to introduce a framework in which parliamentary inquiries will operate. It is this requirement that the 'general scheme' published by the Department of Public Expenditure and Reform seeks to fulfil.

In order to be worthy of inquiry, a matter must be 'stated' by the House/Houses to be of general public importance, presumably by way of resolution. This wording contrasts with that of the *Tribunals of Inquiry Bill 2005*, which specifies matters of 'urgent and significant public importance'.

It is not clear what criteria would be applied in order to establish that a matter fulfilled the notion of 'general public importance', whether it should involve a widespread loss of confidence in society in an institution of the State, a service of the State, or extending to private institutions, or individuals.

An express power to inquire also removes concerns in relation to perceptions of institutional bias, which will be discussed in more detail below. Institutional, or structural bias, refers to a situation where, irrespective of the circumstances of a particular case, a specific body may, of its nature, be inherently biased. This argument has particular relevance to parliamentary inquiries as it may be asked whether a body of public representatives, each elected by a constituency and subject to a strong party whip. Such concerns emanate from historical experience, and the judgments in *Abbeylara* made reference to the invidious operations of the US House of Representatives committee on un-American activities, and its anti-communist investigations under the stewardship of Senator Joe McCarthy during the 1930s and 1940s.

An express power within the Constitution removes such concerns, as it vests such a power in the Oireachtas, putting its institutional power to inquire beyond doubt. This

[33] Fifth Report of the Joint Committee on the Constitution, p. 35.

does not remove the prohibition of objective bias, however, which requires that each Member of an inquiry be free of any conflict of interest which would affect their ability to act impartially.

**International Comparisons - Common Law Jurisdictions**

One of the strongest arguments for constitutional reform in the area of parliamentary inquiry is the ubiquity of this power in the vast majority of comparable jurisdictions. It appears that, on examination, the fact that no express power to inquire was included in the Constitution may have more to do with the influence of the unwritten nature of the British Constitution, rather than an active omission.[34]

A number of general points may be made about the common law jurisdictions. The constitutional frameworks within which they operate all take, as their starting point, the position of the Houses of Parliament of the United Kingdom, as ex-colonies and members of the Commonwealth. That starting point is the view that Parliament has an unfettered right to inquire into any matter.

This is in large part due to the traditional view that, as the Mother of Parliaments, the Houses of Parliament of the United Kingdom collectively form 'the Grand Inquisitor of the Nation', "the High Court of Parliament, which is without question not merely a Superior but *the Supreme Court in this country, and higher than the ordinary Courts of Law*."[35] This Digest does not focus on the procedural aspects of the inquiry process, but the sources of the power to inquire in comparable jurisdictions.

The UK experience is also important in that its position, as asserted in *Howard v Gosset,* forms the theoretical basis upon which most other common law jurisdictions view the powers of inquiry of their own parliaments. New Zealand,[36] Australia[37] and Canada,[38] in their written constitutions take the powers of their national parliament to be those held by the UK Houses of Parliament at a given date.

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[34] See David Gwynn Morgan, "Parliamentary Inquiries: the context of the Joint Oireachtas Committee's Proposals" [2011] *COLR*, available at http://corkonlinelawreview.com/
[35] *Howard v Gosset*, (1845) 10 QB 359 (emphasis added)
[36] Section 242 of the *Legislatures Act, 1908* of New Zealand provides that the privileges of the House of Representatives shall be the same as the UK House of Commons in 1865.
[37] Section 49 of the Constitution of Australia declares that, until the Commonwealth Parliament declares otherwise, the privileges of the Senate and House of Representatives shall be the same as those of the UK House of Commons at the time of the establishment of the Commonwealth in 1901.
[38] Section 4 of the *Parliament of Canada Act* provides that the Canadian Houses of Parliament: "hold…such and the like privileges, immunities and powers as, at the time of the passing of the *Constitution Act, 1867*, were held enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof, in so far as is consistent with this Act;"

However, while parliamentary supremacy, even when limited by constitution, grants investigative powers of a broad scope, the exercise of these powers have been heavily influenced by historical and political factors and the reluctance of parliamentary committees to test the boundaries of such powers either in procedure and practice, or before the courts, as the case may be.

An additional common element amongst such jurisdictions remains the reluctance of the courts to intrude upon the parliamentary domain. As a result, there is little in the way of definitive examinations of such powers analogous to that which was carried out by the Supreme Court in *Abbeylara*. Boundaries are somewhat undefined because they remain either untested by committees or unchallenged by potential litigants.

***United Kingdom***

In the seminal case of *Howard v Gosset*, the court of the Queen's Bench outlined the inherent jurisdiction of, in that case, the House of Commons, to conduct an inquiry. Lord Denman, Chief Justice, stated:

> "It would be difficult to define any limit by which the subject matter of their inquiries can be bound; and it is unnecessary to attempt to do so now; and I would be content to state that they may inquire into everything which concerns the public weal for them to know, and they themselves, I think, are intrusted with determining with what falls within that category. Coextensive with their jurisdiction to inquire, must be their power to cause the attendance of witnesses, and to enforce it by arrest, when disobedience makes that necessary, and when attendance is required and refused."[39]

Parliament has always been held therefore to have the power:

- To inquire;
- To cause the attendance of witnesses (expanded to include papers and records, and the administration of oaths); and
- To sanction the refusal to appear before Parliament (or to provide documentation).

The conclusions of a number of early parliamentary inquiries, which divided along strictly party lines, led to a loss of confidence in the mechanism, ultimately resulting in the passing of the *Tribunal of Inquiry (Evidence) Act, 1921*, under which tribunals were established, and similar to this jurisdiction, usually composed of one or more judges. The passing of this act represented a death knell for parliamentary inquiries in the UK. Broad powers to inquire are still held by Parliament, though in practice they were deemed politically unacceptable.

[39] Ibid, at 379-80

[The issue was examined again in detail in the context of the revision of the 1921 legislation, leading to the *Inquiries Act 2005*. The UK Government's position was that the duty to investigate matters of public concern, particularly in areas where it has either direct or indirect responsibility, rests properly with government ministers

> "…both because they have the ultimate responsibility for investigation and because they are responsible for deciding what is needed in the public interest as a result of their accountability to Parliament and the electorate." [40]

The Public Administration Select Committee (PASC) in its 2005 Report entitled *"Government by Inquiry",*[41] was of the opinion that such an approach was not sufficient, as a government may choose not to exercise that responsibility "…when there is a strong, but perhaps politically inconvenient, case for doing so." In addition, the PASC noted the view of certain witnesses that "it was not appropriate for judges to be involved in the inquiry process when politically contentious matters were being considered, due to concerns about the possible politicisation of the judiciary."[42]

Despite the wide formal powers of Parliament to inquire into any subject, and send for persons, papers etc., the Report noted the reasons for which select committees were still tainted by the perception that they were not ideally suited to conduct specialised investigations into particular events. Witnesses to the PASC, many of them chairs of former tribunals or commissions of inquiry, pointed to the following:

- A perception of partisanship resulting from the political composition of select committees. Lord Butler[43] stated:

  > "I think there is a difficulty for select committees in this respect and that is […] that select committees inevitably bring in the party political aspect and governments are less confident about revealing very sensitive papers to select committees that contain members of other political parties";

- Limits on the cooperation to be expected from government. While the report noted that no government could provide unrestricted access to persons and papers and continue to work effectively, it stated that "attempts to investigate into particular matters have been frustrated or blunted by the Government's refusal to cooperate fully." A particular example cited was that of the Foreign Affairs Committee's inquiry into the decision to go to war in Iraq. That Committee concluded, in a special report, that its powers to send for persons,

[40] *Ibid*
[41] *Ibid*
[42] *Ibid*
[43] Chair of the Butler Inquiry, on the Review of Intelligence on weapons of mass destruction (2004)

papers and records "are, in practice, unenforceable in relation to the executive"[44];

- Evidence-taking procedures are not well suited to drawing out the truth from witnesses through the application of a consistent line of questioning, as a witness is questioned by "twelve competing interrogators".[45]

The PASC pointed out however, that despite this reticence, a number of highly effective *ad hoc* inquiries have been carried out by committees of Privy Counsellors[46] outside the statutory framework of the 1921 Act, including the *Butler Inquiry* into the Review of Intelligence on weapons of mass destruction (2004), and the *Franks Inquiry* into the actions of the UK government leading up to the invasion of the Falkland Islands (1982). The majority of both committees were composed of MPs.[47]

The PASC insisted on the importance of a continuing and expanded role for Parliament and recommended that:

> "in future, inquiries into the conduct and actions of government should exercise their authority through the legitimacy of Parliament in the form of a Parliamentary Commission of Inquiry composed of parliamentarians and others, rather than by the exercise of the prerogative of the Executive."[48]

The strength of the party whips across Parliament, however, would make it difficult to establish a Parliamentary Commission of Inquiry without the consent of the governing party. The PASC's follow-up report in 2008 addressed a number of these practical issues, including possible options for the instigation, composition, and the operation and powers of such commissions. One of the suggestions made to the PASC in that report was that the powers of select committees be extended in the case of a Parliamentary Commission of Inquiry to include "the ability to grant witnesses immunity from disciplinary proceedings."[49]

It appears therefore that despite the formally broad and unfettered powers of the 'Grand Inquisitor of the Nation' to inquire into any subject, and the lack of a

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[44] Foreign Affairs Committee, First Special Report of Session 2003-04, *Implications for the Work of the House and its Committees of the Government's Lack of Co-operation with the Foreign Affairs Committee's Inquiry into the Decision to go to War in Iraq*, HC 440, para 13.
[45] "Government by Inquiry", ibid
[46] Members of the Privy Council are appointed by the Queen on the advice of the Government and mostly comprise senior politicians and judges.
[47] The same cannot be said for the current Privy Council Committee inquiring into the war in Iraq, known as the Chilcot Inquiry.
[48] *Government by Inquiry*, ibid
[49] House of Commons Public Administration Select Committee, *Parliamentary Commissions of Inquiry*, HC 473 2007-08, available at http://www.publications.parliament.uk/pa/cm200708/cmselect/cmpubadm/473/473.pdf

constitutional document limiting the powers of Parliament similar to this jurisdiction – or indeed the jurisdiction for the courts to review its actions - the experiences and proposed reforms of the UK system reveal a significant dissonance between theory and practice. This dissonance reflects issues, which while not discussed in court judgments in the UK, reflect concerns which were central to the *Abbeylara* case – issues of structural bias, particularly in a parliamentary democracy dominated by a party whip system, the practical limitations on the power to send for witnesses and papers and the appropriateness of Parliament as a forum for investigating misconduct by individuals.

Nevertheless, the popularity of recent inquiries by a number of House of Commons select committees into allegations of phone-hacking at the News of the World, may pave the way for more engagement by parliament in the type of investigations generally delegated to judge-led inquiries.]

**International Comparisons - Civil Law Jurisdictions**

A comprehensive survey of European jurisdictions in the civil law traditions was carried out by O'Dowd in the context of the *Abbeylara* judgment.[50]

Indeed it was remarked upon by Mr Justice Murray, as he then was, in the *Abbeylara* judgment that such a survey had been neglected in the parties' submissions:

> "The popular representative parliamentary tradition is not solely the creature or tradition of countries whose internal legal system derives from the common law. No attempt was made to demonstrate that countries, other than the few mentioned enjoyed such inherent powers as a necessary adjunct to the functioning of their parliaments."[51]

O'Dowd examined the old EU15,[52] as they were at that time, and excluding Ireland and the UK, found that some form of parliamentary investigation was to be found in 12 of the 13 EU Member States, and that this was generally in the form of an express constitutional provision. Sweden was the only state of those surveyed which did not appear to have any general constitutional or legislative grant of investigative powers or functions to parliamentary committees. It nevertheless has a strong parallel forum for investigations in the form of a powerful network of ombudsmen.

[50] O'Dowd, J., "Knowing How Way Leads on to Way: Some Reflections on the *Abbeylara* Decision", [2003] *Irish Jurist*, 172.
[51] *Maguire v Ardagh*, p. 606
[52] Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom.

O'Dowd found that, most frequently, there is a constitutional statement regarding the right to hold a parliamentary inquiry, or to establish committees of inquiry. Most contained no explicit restriction as to the subject matter (Austria, Belgium, Netherlands, Finland, Germany, Greece, Luxembourg, Portugal), while others specify matters of public interest (Italy, Spain) or general importance (Denmark).

In Austria, Luxembourg and the Netherlands, there is a provision qualifying the right by the requirement that it be regulated by law. In a number of countries the power to compel testimony and the production of documents is explicitly referred to in the Constitution (Austria, Denmark, Germany, Spain).

The constitutions of Italy and Portugal specify that parliamentary committees of inquiry are to have the same powers of investigation and to be subject to the same legal limitations on those powers as the courts. In the cases of Germany and Spain, the constitution states that the findings of a parliamentary inquiry are not binding on the courts, though the findings themselves may not be subject to judicial review.

## Art. 15.10.3° Adjudicatory Findings & Non-Office holders

As mentioned above, the central findings of illegality in the Abbeylara case were that the inquiry:

- Made adjudicatory findings of fact (i.e. findings of culpability), and
- Made such findings in respect of non-office holders.

**Article 15.10.3°**

In the course of any such inquiry the conduct of any person (whether or not a member of either House) may be investigated and the House or Houses concerned my make findings in respect of the conduct of that person concerning the matter to which the inquiry relates.

The proposed Article 15.10.3° serves to address each of these points.

### Adjudicatory findings of fact

The Oireachtas may currently make findings of culpability against the Comptroller and Auditor General (Art. 33.5.1), judges (Art 35.4) and the President (Art. 12.10), but the Constitution is silent on whether it has any further investigative power in respect of private citizens. It was for this reason, in the context of the high level of protection given by the Constitution to the right to a good name, that the majority in Abbeylara held that there was no inherent power to inquire, where such inquiry involved findings

of personal culpability for wrongdoing, which could seriously affect that good name. It should be recalled that in the *Abbeylara* case, that finding was potentially one of 'unlawful killing', which in the criminal law amounts to a finding of manslaughter.

It has been questioned, as a matter of policy, whether a broad power to make findings concerning 'any person', potentially outside of the sphere of public service and State institutions is one which the Oireachtas would wish to take, and it was a question considered in detail by the Joint Committee on the Constitution in its Fifth Report.

The point was made in a number of submissions to the Joint Committee on the Constitution that this contrasts, for example, with the ability of the Ombudsman in her reports to remark on failings in the conduct of individuals. In addition, the point was raised that, in the course of Oireachtas inquiries, what is said in public session is covered by parliamentary privilege under section 17(2)(1) of the *Defamation Act 2009*, though that privilege does not extend to written reports. In practice this means that findings of culpability are made against individuals orally, under absolute privilege, but written reports reflect this only in findings that systemic failings took place, such as in the recent inquiry by the PAC into Fás.

The Explanatory Note of the Dept. Public Expenditure and Reform states:

> "This formulation ensures that the Oireachtas could not be inhibited in the performance of any of its functions in relation to powers of inquiry by any likelihood of liability being inferred from its deliberations."[53]

The Explanatory Note draws a line between 'determining' civil or criminal liability, which is the function solely of the courts, and the fact that civil or criminal liability could be inferred from a finding, which, for example, related to individual misconduct, wrongdoing or incompetence.

It is for the forthcoming legislation implementing the proposed amendment, currently in the form of a 'general scheme', to make provision for a framework which protects the integrity of ongoing or future criminal investigations and/or trials.

**Non-office holders**

One of the central findings of illegality in the *Abbeylara* case was that the inquiry amounted to the assertion of a power to hold ordinary individuals responsible to the Oireachtas, beyond those with a direct line of accountability as office-holders.

[53] At p. 14.

The wording of the proposed Article 15.10.3 allows an inquiry to make findings in respect of 'any person', removing the idea that only office-holders, or indeed only public servants, are potentially accountable to inquiries by Oireachtas committees. The phrase 'any person' would seem sufficiently broad to potentially include those employed in the private sector, resident either in Ireland or abroad (though powers of compellability would likely be limited where a person is outside the jurisdiction), and indeed any individual citizen to whom an inquiry relates.

The phrase 'whether or not a member of the Oireachtas' seeks to clarify the position of members *vis à vis* investigation by the Houses, following the case of *Callely v Moylan*, though given the reference to 'any person' it may be somewhat redundant.

Current powers of compellability allow the Houses of the Oireachtas to compel any individual to appear before it if their evidence would be relevant to the proceedings of the Committee. It is the ability to make findings in respect of such persons, irrespective of their status as an office-holder, public servant or otherwise that moves away from one of the central elements of illegality in *Abbeylara*.

The power to inquire and to make findings relating to the conduct of private individuals has been treated elsewhere, notably in New Zealand. The issue of whether the Health Committee had the power to investigate an identifiable individual was questioned during an inquiry into allegations against Dr. Parry of mistreatment and negligence of his female patients.

Standing Order 199 of the New Zealand Parliament states that committees cannot inquire into allegations of criminal activity by a recognisable individual *without the express authority of the House*. This is in marked contrast to the position of the Court in *Abbeylara*, for example, which appeared to completely rule out such inquiries. While such inquiries in New Zealand are limited, they are not precluded. The terms of reference of the inquiry were carefully framed not to inquire into the treatment itself, but rather its resulting "adverse effects on women".

A number of other high-profile investigations into Dr. Parry had taken place, all the subject of much media comment, and he sought assurance that his constitutional rights would be respected, in particular, the requirements of natural justice, and the *sub judice* requirement.

The New Zealand *Bill of Rights Act 1990* sets out the right to the observance of the principles of natural justice, and specific processes are also included in the Standing Orders for following natural justice principles, and these were observed. The nature of

the inquiry, however, meant it was clear from the outset that allegations would be made which would be harmful to the reputation of Dr. Parry. As Lambert puts it:

> "The inquiry was instigated in full knowledge of the likelihood of sustained allegations damaging to Dr. Parry's reputation. The sustained succession of allegations meant that any response had little hope of deleting the negative perception formed in the public consciousness." [54]

This highlighted what commentators have called an inherent weakness in the provision of natural justice by committees.

> "If the provision for natural justice in Standing Orders was meant to redress imbalances arising from situations beyond a committee's control, and to discourage comments damaging to the reputation of individuals, the committee's own actions as the instigator of the inquiry were inconsistent with this intent."[55]

This difficulty is naturally mirrored in the conduct of inquiries across jurisdictions, in the public political sphere, and the cultural differences between the interaction of the media with politicians, and the more distanced and reverential attitude taken to reporting the business of the courts and the role of judges. In the *Abbeylara* case, for example, the fact that a number of Members had commented on the inquiry in the media, putting a question mark over their impartiality, drew ire from the Supreme Court. This is a matter to be resolved in implementing legislation, which will establish rules by which fair procedures are to be observed.

## Art. 15.10.4° - Balancing rights and effectiveness

**Article 15.10.4°**

It shall be for the House or Houses concerned to determine the appropriate balance between the rights of persons and the public interest for the purposes of ensuring an effective inquiry into any matter to which subsection 2° applies.

It is the cost of providing full *Re Haughey* rights, particularly in relation to cross-examination, that has generated much of the cost and duration associated with public inquiries and related perceptions of inefficiency. Similar to the reforms recommended by the LRC in relation to tribunals of inquiry, and contained in the *Tribunals of Inquiry Bill 2005*, the proposed Article 15.10.4° aims to emphasise the fact that the *Re Haughey* rights are not absolute, but shaped by the subjective position of each witness, and the potential damage to their good name in the circumstances of the inquiry.

[54] Lambert, K., "Limits to select committee investigations – A New Zealand Perspective," (2004) *ANZACATT Parliamentary Law Practice and Procedure* 1
[55] Ibid

The application of a rather relaxed standard as a prerequisite for the application of the *In re Haughey* rights has lead in the past to extraordinary cost. The Beef Tribunal, for example, granted legal representation to "[e]very witness who was likely to be affected by the findings of the tribunal."[56] This included a number of Oireachtas Members who had made allegations that were being inquired into by the tribunal. The test was a more stringent one, however, when it appeared before the courts. In *Boyhan v Beef Tribunal*[57] Ms. Justice Denham, then in the High Court, noted that despite the fact that the applicant, the United Farmers' Association (UFA), was not satisfied with the limited representation granted to it in the course of the tribunal, allegations had not been made against the UFA, and its rights were "not in jeopardy in any way at all."

### *In Re Haughey* Principles in Practice

The implications of the *In Re Haughey* judgment have been borne out primarily in the field of tribunals of inquiry. Unlike the courts, which have a standard set of procedures, it is for each individual tribunal to establish its own set of procedures. The proposed amendment notes that "it shall be for the House or Houses concerned to determine the appropriate balance between the rights of persons and the public interest…" Each of the *In Re Haughey* rights will be examined briefly.

In terms of the right to **advance notice of any allegations** that are likely to be made or potential criticism that is likely to take place, the practice of tribunals of inquiry has been to serve copies of parts of the proposed evidence on the relevant parties. The LRC has pointed out that some non-statutory inquiries carried out in the United Kingdom have extended this aspect of procedural fairness to the provision of "notices of potential criticism" to certain witnesses, where it appeared that they may be criticised in the course of the inquiry.[58] Another way to meet this obligation has been for an inquiry to give notice to witnesses of the areas in which they are to be examined.

The **examination and cross-examination of witnesses** reflect the adversarial nature of courtroom proceedings, the arena in which those terms originate. The second of the *In Re Haughey* rights is the "leave to cross-examine, by counsel, his accuser or accusers".[59] In court, a witness is called by one party to give evidence in support of that party's arguments. The cross-examination is the interrogation of that witness by lawyers for the opponent party. In the context of inquisitorial, rather than adversarial, inquires, a witness is examined by the inquiry (or their legal representatives), then may

[56] *Report of the Tribunal of Inquiry into the Beef Processing Industry* (1994, Pn. 1007) at 9
[57] [1993] 1 IR 210, 222
[58] LRC Consultation Paper, at para. 7.46.
[59] Ibid

be cross-examined by the legal counsel of other interested parties (i.e. those likely to be affected by the evidence), and possibly the witness' own lawyer, and then re-examined by legal counsel for the inquiry. These steps will not be appropriate in the case of each witness however. To date, it is the cross-examination of witnesses that has traditionally taken up the majority of time in an inquiry's hearings, generating considerable legal costs. Cross-examination will only be a significant issue however, where facts are disputed by two or more parties.

The third of the *In Re Haughey* constitutional justice protections as listed by then-Chief Justice O'Dálaigh is that a person affected by the inquiry should be allowed to give **rebutting evidence**. This is particularly the case where evidence given may seriously affect a person's good name. The fourth protection, **leave to address the inquiry**, envisages the making of oral and/or written submissions. The LRC suggests that in the interests of efficacy, it is reasonable that, similar to court proceedings, such submissions should be limited in length.

In addition to the nuanced application of the rights arising from the principles of constitutional justice, the wording of the proposed amendment acknowledges the competing concern in the public interest of effectively progressing an inquiry and the making and publication of findings, in a timely and cost-effective manner.

The proposed wording vests the power to strike the balance between personal rights and the public interest in effectiveness in the inquiring House (in practice, a parliamentary committee). This is in contrast to the requirement in Article 15.10.2° that the power to inquire is to be conducted "in a manner provided for by law."

This wording would indicate either that each inquiry determines the balance to be struck, on a case-by-case basis, or that the balance should be laid down within the Standing Orders of the Houses.

The balancing of personal rights which are not absolute, but compete with the public interest, are, as a matter of international human rights law generally struck along a test of proportionality. Where a personal right is not absolute, an interference must be both necessary and proportionate in the circumstances, though whether an appropriate balance is struck is generally a matter for interpretation by the courts.

Such a balance must take into account the fact that a person's right to a good name, and their consequent right to fair procedures, is enshrined in the Constitution, and while these may be nuanced by requirements of effectiveness, this nuance must be proportionate.

It will be for implementing legislation to adjudicate whether any right of appeal exists where a person appearing before an inquiry feels the balance has not been fairly struck, though precedent for the effectiveness/fair procedures balance is found in the current *Tribunals of Inquiry Bill 2005*, which provides in a number of ways for the tempered use of legal representation, and the costs relating to such representation.

Discussion of these reforms is contained in the Bills Digest on the *Tribunals of Inquiry Bill 2005*, available on the L&RS intranet homepage.

It will be for implementing legislation to adjudicate whether any right of appeal exists where a person appearing before an inquiry feels the balance has not been fairly struck.

The 'general scheme' indicates that it will be for the new Oversight Committee to draw up rules relating to fair procedures for witnesses. As pointed out by O'Dowd in his submission to the Joint Committee on the Constitution, the case law of the European Convention on Human Rights will have a bearing on the balance to be struck, as Article 8 of the Convention clearly recognises rights such as respect for home or correspondence that could be infringed by the way in which a parliamentary inquiry is conducted. Ireland is also a party to the International Covenant on Civil and Political Rights, which protects privacy and reputation under Article 17.

Any interpretation of the proposed amendment would, therefore, have to provide for a level of protection against arbitrary attacks on privacy and reputation that at least meets that international standard.

**Article 17 ICCPR**

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks..

## Conclusion

The proposed amendment addresses the lacuna identified in the *Abbeylara* judgment by giving an express power to Oireachtas committees to inquire into matters of general public importance. It also removes the limitations on the power to inquire expressed in that judgment, giving Oireachtas inquiries the ability to make adjudicatory findings of fact in respect of 'any person' concerned by the terms of reference of the inquiry. The proposed amendment also allows the Oireachtas to decide on the legitimate balance to be struck between the person rights of individuals, to their good name and the fair

procedures required to vindicate that right, and the public interest in an effective inquiry.