

DÁIL ÉIREANN

AN ROGHCHOISTE UM CHAITEACHAS POIBLÍ AGUS ATHCHÓIRIÚ

SELECT SUB-COMMITTEE ON PUBLIC EXPENDITURE AND REFORM

Dé Céadaoin, 5 Meitheamh 2013

Wednesday, 5 June 2013

The Select Sub-Committee met at 5.30 p.m.

MEMBERS PRESENT:

Deputy Stephen S. Donnelly,	Deputy Heather Humphreys,
Deputy Sean Fleming,	Deputy Mary Lou McDonald.
Deputy Brendan Howlin (<i>Minister for Public Expenditure and Reform</i>),	

DEPUTY CIARÁN LYNCH IN THE CHAIR.

Business of Select Sub-Committee

Chairman: We will suspend the meeting until 6 p.m. to accommodate the Minister. Is that agreed? Agreed.

Sitting suspended at 5.35 p.m. and resumed at 6 p.m.

Houses of the Oireachtas (Inquiries, Privileges and Procedures) Bill 2013: Committee Stage

Chairman: I welcome the Minister for Public Expenditure and Reform, Deputy Brendan Howlin, and his officials. The purpose of the meeting is to consider the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Bill 2013. The Bill was referred to the select committee by Dáil Éireann on 23 May 2013. Is it agreed that we try to conclude the Bill tonight? Rather than putting a timeframe on it, we can check in later, but I am anxious to conclude it this evening if possible.

I remind members we are in public session and all telephones must be switched off. I also remind members that while there may have been some confusion with regard to the committee schedule, this meeting is being televised. Does the Minister wish to make a comment before we commence?

Minister for Public Expenditure and Reform (Deputy Brendan Howlin): I have proposed 26 amendments to the Bill but 17 of them relate to inquiries under Article 12.10° of the Constitution, which involves the unthinkable process of impeaching the President. I have been reflecting on this since the Bill was published. As the Bill is drafted, this process is anchored in a section dealing with the impeachment of other constitutional officeholders. It should be a unique section and not in with everybody else. We will mirror the constitutional provisions in the new section. There will be many technical amendments but that is the import of it.

Section 1 agreed to.

SECTION 2

Deputy Sean Fleming: I move amendment No 1:

In page 13, line 6 after “data” where it secondly occurs to insert the following:

“and includes cloud computing storage devices”.

This amendment is very simple. The section deals with various records and storage facilities. The Minister has often spoken about IT and cloud computing in the Department. I wish to have it confirmed that cloud computing, wherever it is and in whatever jurisdiction in the universe it operates, is covered by the Bill.

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Deputy Brendan Howlin: We considered this when drafting the Bill. Since cloud computing might be overtaken in a year or two, we have a definition which is future proofed by defining “electronic device” in section 2 to include any device which includes any electrical, digital, magnetic, optical, electromagnetic, biometric or photonic means or other forms of related technology or any combination of any forms of technology to store or transmit data. I am told this is as comprehensive as we can get.

Deputy Sean Fleming: I accept that.

Deputy Stephen S. Donnelly: The point is that it is digitally stored outside the jurisdiction. This is the key.

Deputy Brendan Howlin: That is encompassed.

Deputy Stephen S. Donnelly: It is in there also.

Amendment, by leave, withdrawn.

Chairman: Amendments Nos. 2 and 3 are related and may be discussed together.

Deputy Brendan Howlin: I move amendment No. 2:

In page 14, subsection (1), line 2, to delete “or *section 10* inquiry” and substitute “, *section 10* inquiry or *section 15* inquiry”.

These technical amendments are consequent on the substantial amendment No. 18, which I will deal with in due course. That amendment deals with a new section 15 on the President. These are the first of the technical consequential amendments in that regard.

Amendment agreed to.

Deputy Brendan Howlin: I move amendment No. 3:

In page 15, subsection (1), between lines 10 and 11, to insert the following:

“ “*section 15* inquiry” means an investigation referred to in *section 15(1)(a)*.”.

Amendment agreed to.

Chairman: Amendments Nos. 4 and 5 are related and may be discussed together.

Deputy Brendan Howlin: I move amendment No. 4:

In page 15, subsection (1), to delete lines 13 and 14 and substitute the following:

“ “terms of reference”, in relation to a *Part 2* inquiry which is not a *section 15* inquiry, means the terms of reference for the inquiry set under *section 12*.”.

These are technical amendments on the presidential issue, as are the previous two amendments.

Amendment agreed to.

Section 2, as amended, agreed to.

Sections 3 to 5, inclusive, agreed to.

NEW SECTIONS

Deputy Brendan Howlin: I move amendment No. 5:

In page 16, before section 6, but in Part 2, to insert the following new section:

“CHAPTER 1

Section 6, section 7, section 8, section 9 and section 10 inquiries, etc.

6.—A reference in this Chapter to a *Part 2* inquiry does not include a reference to a *Part 2* inquiry which is a *section 15* inquiry.”.

Amendment agreed to.

Deputy Sean Fleming: I move amendment No. 6:

In page 16, before section 6, but in Part 2, to insert the following new section:

“6.—A committee conducting an inquiry established under this Act shall consist of fifty per cent of members of the current Government party and fifty per cent of members of the opposition.”.

This straightforward amendment is clear in what it suggests. The current Government has an overwhelming majority. On this committee, the Opposition is outnumbered two to one. There is no basis for presuming that any committee of inquiry established under this legislation would not follow the same membership procedures as have been forced on the current Oireachtas by the Government. I accept that this committee’s composition is a result of the Parliament’s composition. It is possible that the referendum on the Seanad will be accepted, thereby removing a counterbalance. Often, there is a greater proportion of non-Government Members in the Seanad.

There should be equal numbers of Government and Opposition members on committees of inquiry. Memberships should not be weighted. By definition, the Government has a majority. It would be a poor start. Does the Minister understand the gist of what I am saying?

Deputy Brendan Howlin: I understand the Deputy’s intention. He made the same point when discussing the heads of the Bill and on Second Stage. There is always a much more democratic perspective when one is on the other side of the House. That rush of blood normally does not migrate to this side when one is in the majority.

In constructing this Bill, I considered the point that is being made. We are not constructing a normal committee. Section 16 confers on a committee of the House or on the Houses the power to issue guidelines in respect of the procedures of Part 2 inquiries. Section 16(2) outlines the types of guideline that may be included for the purpose of the consideration to be taken into account in promoting the objectives of fair procedures. Section 16(2)(g) provides that they may include guidelines, to the extent practicable, relating to achieving a balance between committee members as regards their respective political affiliations.

The principle underlying the Bill is, in so far as possible, to confer on the House as opposed to the Executive the autonomy to regulate and manage the conduct of inquiries. This is one such instance in which the House has significant pointers to make to the Bill under the guidelines.

I do not consider that the Whip system should not apply to Part 2 inquiries. When we set up what was to have been the inquiry committee had the referendum been passed, it had an Opposition Chairman. I am referring to the petitions committee. Obviously, that committee has been overtaken by events and the decision of the people.

We should not be prescriptive in law as regards this matter. We must take account of the democratic structure of the Dáil. However, robust guidelines should be made to ensure that fair procedures, including the prevention of an overwhelming balance one way or another, should apply to these types of inquiry. As I have repeatedly stated regarding Part 2 inquiries, when one weighs evidence objectively and asks questions of witnesses without coming to conclusions, the Whip system should not apply.

I do not intend to accept the amendment, but I have gone a fair distance in trying to incorporate Deputy Fleming's intent in the content of the Bill.

Deputy Sean Fleming: I always accept the Minister's good intentions, but life does not work out that way. The Oireachtas will do what the Oireachtas does, namely, go by its membership. It will claim that, had the primary legislation intended equal numbers, it would have included such a provision instead of remaining silent on the matter. The Oireachtas will conclude that no such requirement was intended and will not provide equality.

Under the legislation that fell with the referendum, there was to be an Opposition Chairman.

Deputy Brendan Howlin: When we created the committee in advance of the legislation, there was a Sinn Féin Chairman.

Deputy Sean Fleming: Is the Minister referring to the investigations committee?

Deputy Brendan Howlin: Yes. It was to be a-----

Deputy Sean Fleming: Ahead of Report Stage, is the Minister of a mind to provide that Part 2 inquiry committees should be chaired by Opposition Members? He seems to have been in favour of it-----

Deputy Brendan Howlin: No. What I had in mind was for the petitions committee to set and regulate the terms of reference. It was not for that committee to conduct an inquiry. In fact, it was forbidden to conduct inquiries. It was the regulator of inquiries.

Deputy Sean Fleming: I will revert to this matter on Report Stage, but the Minister would be making better legislation were he to include such a provision. The House's long-established practice is for the Chairman of the Committee of Public Accounts to be a Member of the Opposition, including former Deputy Jim Mitchell and other distinguished Deputies. It is probably the only committee to have stood the test of time. I have been a member of it a couple of times. Only once in its history since the Constitution was implemented has there been a vote on who would be the Chairman.

Deputy Brendan Howlin: The last time.

Deputy Sean Fleming: It was after the current Dáil formed. The Committee of Public Accounts is a good model. I do not know whether legislation sets it out, but the fact that the Opposition chairs the committee probably helps it quite a bit. With no disrespect to this committee's Chairman, who is his own man, Government members can often come under pressure from Ministers. It is less likely that Ministers would be able to have a word in an Opposition

Chairman's ear. This Bill would benefit from making it a statutory requirement for the Chairman to be a Member of the Opposition and it would look better in terms of independence. If the decision is just left to the Houses, they will not do it.

Deputy Stephen S. Donnelly: This is a sensible amendment in terms of what composition would give the public the most faith in these inquiries' being as independent as the Oireachtas can ever be. The Oireachtas is controlled by the Cabinet. At committee level, that control can be micro. For example, when the finance committee was sending an invitation to Professor Patrick Honohan, Deputy Mathews tried to get the wording of a sentence changed. The matter was forced to a vote and the Whip was applied.

Regardless of which Government is in power, this amendment will obtain for the next number of Dáileanna. A Government would concede something under this amendment as it would have more Members than the Opposition, yet a committee of inquiry's membership would be 50:50. The public would see that the committee could not be controlled by a Government. In matters such as this, one should not ask how the current Government would use a committee such as the ones in question, but how a mischievous Government would use it. There is much merit in Deputy Fleming's suggestion and it would give comfort to the public that the process is as "unpoliticised" as one can get in the Oireachtas.

Chairman: Perhaps I can add my tuppence worth with an observation that could be clarified. Doing the sums, the ratio in the House is approximately 69:31. There was a discussion earlier about trying to create a special committee. I am not too sure of the observation that a chair from the Opposition would be more impartial and the issue is subjective. Nevertheless, there is an issue of proportionality. Could it be a consideration as we move to Report Stage, given that we have a certain ratio, that in a given circumstance the ratio cannot be less than 60:40 if the proportionality of Government and Opposition is more skewed?

Deputy Brendan Howlin: I heard Deputy Donnelly speak about this issue before and his own amendment is yet to come. There is almost a view that the Government side is, by definition, "partial" and the Opposition, by definition, is "impartial". I can assure the Deputies that this is not my experience of 30 years in the House. There can be very partial and partisan Opposition members with a political agenda, and that does not necessarily lead to objective inquiry. We can all identify with that.

If there is a large number of Deputies, they should be represented with proportionality as they would be enthusiastic in their involvement. The rules of the House already give a disproportionate platform to the Opposition although I know members of the Opposition might disagree with that. With any opening debate, all the Opposition spokespersons would contribute before the second Government speaker. Many backbenchers would be frozen out of debate and do not have a profile. As an Independent Deputy, Deputy Donnelly can demand a fair degree of time in the Dáil and much more than a Government backbencher.

I am a passionate supporter of Parliament and we want to empower it in the reform agenda we are bringing forward. It must be a proportionate response as Parliament is the Chamber of the elected representative of the people. If 69% of the benches are taken up with Government Members, it is what the people decided at the last time of asking, so the fact must be in some way manifest. I do not accept just the general principle that the public would have more comfort in the Opposition, as Deputy Donnelly mentioned, whether those members either chaired or had a majority on the committee.

Having said that, it is important that the House sets guidelines, perhaps along the lines suggested by the Chairman, so that there would be decent proportionality in any significant inquiry where all groupings may be required to be represented, for example. That is a matter for the House, and I would like to have a much more active Committee on Procedure and Privileges to set out rules and guidelines. We are putting a requirement in the legislation to formulate rules and guidelines. As part of a reform agenda and if people determine we must have a unicameral system, there should be a much more robust Dáil system and a better resourced committee system. We must have such issues on the agenda.

Deputy Sean Fleming: We have made an interesting point. The Minister has indicated that if we have a unicameral Parliament, the committees must be better resourced. If we save money by eliminating the Seanad, there are already plans in place to spend more money on running the Dáil.

Deputy Brendan Howlin: I do not know about more money but the spending of money must be better in order to resource the committee system. That will require a change in mindset. There is an enormous volume of work undertaken at committee level that does not get a line anywhere but something abusive uttered in the plenary session would garner a headline. I do not have a simple solution to get attention for the grinding work of committee that often goes unreported. We must ensure that Deputies get some profile or they will not spend endless hours in a committee. As I have stated, I worked on a justice committee fadó that dealt with a number of pieces of legislation, with one criminal justice Bill taking months on end to get through. We were endlessly in committee and three of the Opposition spokespersons and the Whip of the committee lost their seats.

Deputy Stephen S. Donnelly: I am not suggesting that the Opposition is any less impartial than the Government, as it is not. There are two questions. What is the right composition of a committee in order to maximise public faith in the committee? Is whatever will be agreed as robust as possible in the face of abuse from a mischievous Government?

Deputy Brendan Howlin: What about a mischievous Opposition?

Deputy Stephen S. Donnelly: Yes, although the Opposition does not control a committee. We are not suggesting that the Opposition gets more representation; I support Deputy Fleming's suggestion of parity. The public would have more faith in a committee balanced at 50:50 only because they would know that the Whip cannot be imposed. The Whip has been imposed by this and the last Government. I imagine people being called to give evidence to the committee, particularly if they are political opponents of a Government. I am talking in this case about potential future Governments.

The question is whether the process is open to abuse and under current legislation, it is open to abuse. A mischievous Government controlling the House could have the House determine that there should be an inquiry controlled by the Government. The Taoiseach could make the decision and the Whip would be imposed. The House would determine terms of reference and the type of inquiry, and that would again be controlled by the Cabinet. The committee would do the work and it could make findings that would impugn a person's good name. That committee could be controlled, under current legislation, by the Cabinet. The entire process can be controlled by a Government, and people will not have faith in it. It is open to abuse, and one safeguard would be a 50:50 rule.

Deputy Brendan Howlin: The Deputy is an Independent in his first term and he does not

understand how political parties work if he believes the Cabinet controls Members of the House with such alacrity.

Deputy Stephen S. Donnelly: It is my experience of the last two years.

Amendment put and declared lost.

Deputy Sean Fleming: I move amendment No. 7:

In page 16, before section 6, but in Part 2, to insert the following new section:

“6.—A committee conducting an inquiry established under this Act may conduct an inquiry into the conduct of a member or former member who was a member of the House on the date of the commencement of that inquiry.”.

This is a subtle point I referred to on Second Stage. I know the explanatory memorandum has no legal standing but what I read there is not what I understood when I read the legislation. My understanding is that an inquiry can only make findings against a current Member and cannot investigate former Members of the Oireachtas. It can issue adverse findings on current Members or people accountable to the Oireachtas.

Let us take the example of a person who is a member of the current Government or a Member of the Oireachtas into whom an inquiry is going on for a number of years. The person feels that a very adverse finding is coming down the track and resigns his or her Dáil seat. As the person is no longer a Member of the Houses of the Oireachtas, the committee, despite having conducted an investigation for a number of years, cannot issue any adverse findings because that individual is no longer a Member of the current Dáil. My amendment provides that a committee conducting an inquiry established under this Act may conduct an inquiry into the conduct of a Member or former Member who was a Member of the House on the date of the commencement of that inquiry. That will prevent the situation arising whereby a person resigns his or her seat during the course of an inquiry and thus gets away scot free in terms of any adverse findings.

I hope the Minister understands the point I am trying to make. There is a lacuna in this Bill at present. The assumption would be that an inquiry could be conducted into Members of the current Dáil but that is not the case if the person resigns before the report of the inquiry is issued. The amendment is a valid closing-off of a potential loophole in the legislation as it stands. It would be a terrible waste of a committee's time if, having spent two years investigating particular actions by a Member or Members of the Dáil, the night before the committee issues its report the said Member or Members resign and no adverse findings can be issued.

Deputy Brendan Howlin: I understand the point the Deputy is making and I listened very carefully to his arguments on Second Stage. First, after the lack of success of the constitutional amendment we proposed last year, everything we are now doing must be anchored in constitutional authority. Article 15.10 of the Constitution, from which section 9 inquiries derive their constitutional authority, only regulates the running of the Houses and only applies to Members of the Houses. The advice I have been given is that to try to conduct an inquiry into somebody who is not a Member of the House, even if that occurs through resignation, is *ultra vires*. We have no constitutional authority to do that, no more than we have of any other citizen who is not a Member of the Houses.

Second, during the conduct of an inquiry, the evidence will be heard in public and people will draw their own conclusions if somebody resigns before a report is issued. In fairness, we

do not have a great tradition in this country of resigning from these Houses. In that context, it would be a fair achievement in itself if somebody, on foot of an inquiry of the House, felt compelled to resign. However, we do not have the constitutional authority to pursue them beyond membership of the Houses.

Deputy Sean Fleming: I know the Minister agrees with me that the House should be able to conduct an inquiry into its own Members and my amendment allows that to happen once the individual is a Member of the House when the inquiry is set up. Otherwise, all the work will be set to nought. The Minister is arguing that there would be a victory of sorts if the person resigns his or her Dáil seat-----

Deputy Brendan Howlin: That would be a fair victory, would it not?

Deputy Sean Fleming: It would be a victory in itself. That is the point with which I am dealing.

Deputy Brendan Howlin: It is a big penalty.

Deputy Sean Fleming: Yes, it may well be, but it might also be the lesser of two evils for the individual concerned. I am just making that point because a Dáil career might not be everything-----

Deputy Brendan Howlin: If the committee drew up a report and found-----

Deputy Sean Fleming: I am talking about when a committee is just about to issue its findings.

Deputy Brendan Howlin: If the committee came to a conclusion and found adversely, what would be demanded of the individual concerned? The resignation of the individual would be demanded. That would be the penalty demanded on foot of adverse findings. If that resignation came in advance of the issuing of the findings-----

Deputy Sean Fleming: What penalties are contained in this legislation? Is that penalty contained in the Bill?

Deputy Brendan Howlin: No. One cannot, constitutionally, dismiss a Member of the House. All we can do, as we have done, is censure a Member.

Deputy Sean Fleming: We can ask a Member to resign.

Deputy Brendan Howlin: Yes, we can censure and ask the Member to resign. In the Deputy's scenario, if somebody resigns before the findings are issued, then the inquiry has succeeded in extracting the maximum penalty that could be achieved through exhortation.

Deputy Sean Fleming: I understand the limitations of the Abbeylara judgment as they relate to Members of the House. However, there is an escape hatch in this Bill. My amendment draws attention to a gap in the system as I see it.

I will withdraw the amendment for now but reserve the right to reintroduce a version of it at a later stage.

Amendment, by leave, withdrawn.

Deputy Sean Fleming: I move amendment No. 8:

In page 16, before section 6, but in Part 2, to insert the following new section:

“6.—No new Oireachtas committee shall be established under this Act other than a committee of inquiry.”.

This amendment is very straightforward. The Minister will probably explain to me now how the legislation is not as it appears and that it does not do what it says on the tin, so to speak. However, when I read this legislation, I see numerous new committees being set up. I read them all into the record on Second Stage and counted at least half a dozen. At least six committees are referred to in this legislation which can be set up depending on the nature of the inquiry. There will be a committee to examine the issue, another to set the terms of reference and another to advise on procedures, while another will be set up under the Part 10 procedures, and so forth. A whole range of committees must be established before an inquiry can get up and running. Taking the legislation at face value, there are too many committees being set up. My amendment provides that no new Oireachtas committee shall be established under this Act other than a committee of inquiry. There are enough committees in existence as it is and we should not be setting up a raft of new ones. Even if such committees only sit a few times, on a temporary basis, there must be a better way of doing business than what is proposed here. During the Second Stage debate, the Minister told me that the Bill is not as it looks but I can only go by what it says on the tin. The tin says, as is clear from the legislation, that a raft of extra committees will be established. I believe these are unnecessary and we should not be doing this. I am also worried about the associated costs of setting up new committees, in terms of procedures, staffing and so forth.

Deputy Brendan Howlin: The Bill sets out a number of statutory functions which a committee must carry out. It certainly is not the intention that one would need a separate committee to carry out each function. For example, all of the functions set out in Parts 10 and 11, relating to private papers, confidential communications, official documents and so forth, would all be done, I would imagine, by the Committee on Procedure and Privileges. We must state, in the legislation, that such a function must be assigned to a committee. In terms of the actual amendment, I believe it is bad law for a Minister to propose to a committee, in statute, that no Oireachtas committee can be established. That is a matter for the Oireachtas to determine. That should not be done in statute.

It is not my intention that the functions to which the Bill refers would require the setting up of new committees. The functions are to be assigned to committees, as the Oireachtas sees fit.

Deputy Sean Fleming: The Minister must accept that is not the way it reads, even if it is the Minister’s intention that the tasks be assigned to existing committees. I accept the Minister’s point that the Oireachtas should be able to run its own affairs, as far as possible, but there is primary legislation relating to this specific aspect----

Deputy Brendan Howlin: The salient point is that we are talking about functions, not committees. The Bill provides that new statutory functions must be carried out in order to comply-----

Deputy Sean Fleming: Does the Minister accept the point that, on reading the legislation, one sees reference after reference to “a committee” under various sections of the Bill-----

Deputy Brendan Howlin: Absolutely, but I did not want to set in stone that function X must be assigned to the CPP, while function Y must be assigned to the Joint Committee on

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Public Service Oversight and Petitions, and so forth. The functions should be farmed out to the relevant committees by the Oireachtas.

Deputy Sean Fleming: I accept that the Minister does not want to be prescriptive in the legislation, but what is his understanding of how it would work out in practice? Is there a need for numerous new committees, other than the committee of inquiry?

Deputy Brendan Howlin: No, I do not think so.

Deputy Sean Fleming: The Minister does not think establishing new committees is necessary and I accept his word on that, but the legislation leaves that question open.

Deputy Brendan Howlin: I have talked to the Parliamentary Counsel about this issue and the advice was that we must say that these functions must be assigned to “a committee”. There is no reference to a new committee. The functions must be assigned to a committee of the House. It is for the Oireachtas to determine how many committees will be involved and to dissolve or create new committees, as it sees fit. Under the Constitution, the House is master of itself.

Chairman: How stands the amendment?

Deputy Sean Fleming: I will withdraw it.

Amendment, by leave, withdrawn.

SECTION 6

Question proposed: “That section 6 stand part of the Bill.”

Deputy Mary Lou McDonald: On the section itself, I wish to return to the issue of committees making findings of fact. When we initially looked at these matters and considered the *Abbeylara* judgment, that was one of the key concerns. Obviously, the failure of the referendum meant that additional powers required by the Oireachtas are not available. In that context, I ask the Minister to give some reassurance to the committee that the provision to allow for findings of fact is firmly couched within the current constitutional provisions. It was very clear that when the question was put to the people in the referendum, they were not minded to expand the powers of the Oireachtas in respect of inquiries. The *Abbeylara* judgment made clear that making findings of fact is not without problems for the Oireachtas. I have raised this issue with the Minister before and I still have lingering concerns about the legislation.

Deputy Brendan Howlin: Section 6 makes provision for an inquiry limited to recording and reporting evidence and making findings of uncontested fact. The witnesses are called and the evidence presented is reported. We must remain within the confines of the *Abbeylara* judgment. We cannot find adverse facts against somebody who is not constitutionally amenable to the Oireachtas. The view is that this is as far as we can go. I think the provisions of the section are constitutionally robust.

Deputy Mary Lou McDonald: When we come to section 7, will the Minister clarify whether there is scope to make findings of fact in cases in which the facts are contested? I know I am straying.

Question put and agreed to.

SECTION 7

Question proposed: “That section 7 stand part of the Bill.”

Deputy Mary Lou McDonald: I have the same issue with section 7.

Deputy Brendan Howlin: We are looking at the grounds of constitutional authority for inquiries. These relate to the legislative function. In essence the findings that would be permissible under this section would be systems issues as opposed to findings against an individual. The findings that could be made in a section 7 inquiry are that certain functions do not operate well.

Deputy Sean Fleming: Somewhere along the line the Minister stated that a banking inquiry would be a hybrid inquiry. Sections 6 to 10, inclusive, provide for five separate types of inquiry. However, the Minister stated the banking inquiry would not fit neatly into any of the five types and would be a hybrid inquiry with elements of section 6 and section 7 inquiries. Why is the Minister defining the five separate types of inquiry in a way that does not fit the first task the Government would like the Oireachtas to conduct?

Deputy Brendan Howlin: Through the Chair, Deputy, that is a very sensible question. I am now thinking out loud. I said there would probably be two parts to the inquiry. First, we inquire into what happened. Since one cannot make adjudicatory decisions on the conduct of an individual, that will be an “inquire, record, report”-type inquiry. I believe there is a possibility - but this depends on the view of the Oireachtas - of a legislative follow-on to inform what further legislation is required on foot of the proceedings and the evidence that was adduced before the committee. It is a matter for the Oireachtas to determine the nature, scope and sections that will apply to any inquiry. It is my view that a banking inquiry will be well encompassed in both. I believe such an inquiry would be partially under the “inquire, record, report” model and partially under the legislative reform model. That would be the anchor of the constitutionality of the inquiry.

Deputy Sean Fleming: Does the Minister see the need for other hybrid types of inquiry? The inquiry to impeach a judge or the President is specific. Should we not have had a section 6 inquiry which can incorporate the provisions of section 7?

Deputy Brendan Howlin: No. The Deputy has raised an interesting point and I should have explained it. The process is to find out what is constitutionally permissible. Each of the sections outlines the legal advice, the external legal advice and all the discussion we have had on what is constitutionally permissible in the types of inquiry laid out in the Bill. It is not legally permissible to have a real hybrid that does a bit of both. If one is to have an inquiry limited to recording and reporting evidence, one would have to conclude it and report on it and then embark on the next bit of it. Legally, one cannot intersperse the two types of inquiry because one has to have a constitutional grounding for each bit of it.

Deputy Sean Fleming: Is the Minister saying in that situation the Oireachtas will set up an inquiry under section 6 and another under section 7?

Deputy Brendan Howlin: Separately. It will be the same committee, but it will do one module of work under the relevant section and then the other bits.

Deputy Sean Fleming: Will the same committee be charged with responsibility for each type of inquiry?

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Deputy Brendan Howlin: It is a matter for the House, of course, but that is what I had envisaged.

Deputy Sean Fleming: The committee could conduct an inquiry under section 6 and section 7, if it chooses to do so.

Question put and agreed to.

SECTION 8

Chairman: Amendment No. 9 is in the name of the Minister. Amendments Nos. 9 and 11 are related and may be discussed together.

Deputy Brendan Howlin: I move amendment No. 9:

In page 18, subsection (1), line 12, to delete “*subsection (6) and*”.

Amendments Nos. 9 and 11, again, are consequential on the substantial amendment No. 18, the new section on the presidential issue.

Amendment agreed to.

Deputy Brendan Howlin: I move amendment No. 10:

In page 18, subsection (4), line 38, to delete “*section 7 inquiry*” and substitute “*section 8 inquiry*”.

This is a technical amendment to ensure that cross-referencing in the Bill is accurate.

Amendment agreed to.

Deputy Brendan Howlin: I move amendment No. 11:

In page 19, lines 1 to 12, to delete subsection (6).

Amendment agreed to.

Chairman: Amendments Nos. 12, 17 and 18 are related and may be discussed together.

Deputy Brendan Howlin: I move amendment No. 12:

In page 19, subsection (7), line 14, to delete paragraph (a).

In the published Bill, the provisions dealing with an inquiry relating to impeachment of the President are set out in section 8. This group of amendments allows for the creation of a distinct provision in the Bill relating to the impeachment of the President pursuant to Article 12.10 of the Constitution. The amendment does not alter the approach in the Bill with regard to the types of statutory inquiry that may be conducted. They merely reposition and expand on the provisions dealing with an inquiry under Article 12.10 of the Constitution in light of the detailed and specific procedures that are outlined in that Article. I consider it preferable to reflect these procedures fully in the text of the Bill. The approach adopted aims to mirror the constitutional provisions. Unlike the impeachment processes for other constitutional officeholders, which are not prescribed, the impeachment process for the President is

set out. I want to capture that in a standalone section and mirror what is in the Constitution.

Deputy Sean Fleming: In essence, five sections - sections 6 to 10, inclusive - set out the ground for inquiry. This amendment is now making provision for another form of inquiry. I know it is specific to the President.

Deputy Brendan Howlin: Rather than have-----

Deputy Sean Fleming: Uachtarán na hÉireann is in Croatia. Should he be worried that we are discussing this topic?

Deputy Brendan Howlin: I think he should be much more at ease because we are not corraling him in with others but are giving him due deference, status and prominence as a standalone entity. The President is elected by the people under our Constitution. That is very important. When I thought about the office of the President, the idea was that other constitutional officeholders that are appointed by the Cabinet, or even judges, should not be in the same position as somebody elected by popular vote of the people.

Deputy Sean Fleming: There is no implication that the President did not sign the Financial Emergency Measures in the Public Interest Act.

Deputy Brendan Howlin: The Deputy should not be drawing any such awful conclusions about the high office of the President, who should not in any way be adversely referred to.

Chairman: We will retain that ruling for the remainder of the evening.

Amendment agreed to.

Section 8, as amended, agreed to.

SECTION 9

Question proposed: "That section 9 stand part of the Bill."

Deputy Mary Lou McDonald: Section 9 provides a power of inquiry relating to the conduct of a Member of either House of the Oireachtas. I recall the public commentary and angst at the time of the referendum. There was a sense that committees could become Star Chambers or a facility for a witch hunt against a Member of either House. The scenario around the judgment in the case of Ivor Callely was very fresh in people's minds. On this section of the legislation, will the Minister take this opportunity to set out the types of safeguard and the checks and balances that exist within the provision in respect of fair procedures for Members of the Oireachtas, specifically safeguards against anything that could be, whether by design or accident, a Star Chamber or a witch hunt?

Deputy Brendan Howlin: The Deputy makes a very fair point. I have said publicly that there was a reluctance among people to vote to give additional powers to committees. They looked at the way some witnesses had been treated and said, "Hmm, I don't want to give additional powers to the Oireachtas in that regard". When this Bill was published I said there would be some element of proofing, by us, so that as an Oireachtas we are capable of holding fair procedures, and this is mirrored in every section. Constitutional rights are in no way diminished because a person is either a Member of the House or an officeholder. Fair procedures are afforded to every citizen under the Constitution and that will continue to be the case. I have

laid out how there might be safeguards against bias by Members. Similarly to all citizens, every Member of the House will have full rights to vindicate his or her own good name and rights.

Deputy Mary Lou McDonald: I thank the Minister for that information. He helpfully used the term “bias”, and there is a concern in that regard. We have talked about the potential for bias in respect of, for example, any potential banking inquiry concerning what Members may have said publicly and on the record. Equally, there is a concern around a kind of institutional bias or naked party political bias entering into this process. Will the Minister again take the opportunity to set out the checks and balances in this regard?

Deputy Brendan Howlin: We will see when we reach section 18 that a Member may not be a committee member where a perception of bias may arise. In section 18, we lay out how that perception might arise by way of utterance or any other relevant circumstance that could give rise to an objective position whereby a person would be biased coming to an inquiry.

Deputy Mary Lou McDonald: I am sure the Minister can understand the additional complication that enters into the whole area of bias when it is politicians who are inquiring into a fellow politician, irrespective of whether they are of the same party-political persuasion. I accept there are provisions in the legislation with regard to bias, which strike me as fairly robust. However, there is a particular concern about politicians investigating each other and, whether by accident or design, using this process as a means of political one-upmanship rather than as a robust procedure to investigate a legitimate matter.

Chairman: Is Deputy Donnelly indicating?

Deputy Stephen S. Donnelly: Inquiries under section 9 are those which are most open to political abuse. They will never be used on a Government Deputy and will be used only on Opposition Deputies and Senators. Assuming that my coming amendments will be rejected, as no doubt they have been, section 9 inquiries will only be possible under a majority vote in the House. That will never be done for a Government Deputy.

Deputy Brendan Howlin: That is not true.

Deputy Sean Fleming: Ivor Callely was investigated while he was a Member of the Seanad.

Deputy Stephen S. Donnelly: Right. In my opinion, however, and from what I have seen, this is not going to happen.

Deputy Brendan Howlin: There were the former Members, Ivor Callely and Raphael Burke, who were members of the party in Government at the given times.

Deputy Sean Fleming: Raphael Burke resigned before the inquiry.

Deputy Stephen S. Donnelly: Let me rephrase that. I can see this procedure being much easier to use to investigate Opposition Deputies and Senators than to investigate those in Government parties.

Deputy Brendan Howlin: I assure the Deputy that the meat in pursuit is much richer when the pursuit in these matters is of a Government Member than of an Opposition Member.

Deputy Stephen S. Donnelly: Sure, but it will be much easier to get a majority Government vote to inquire against an Opposition Deputy or Senator - at least, based on my observa-

tion of the House over the past two years. We can go through section 18, which the Minister states is the one that provides the safeguards.

Chairman: We will leave section 18 until we arrive at it.

Deputy Stephen S. Donnelly: I understand; that is my point. What is to stop somebody under investigation from going to the High Court to seek an injunction? Section 9 inquiries specifically allow for findings that impugn a good name. What is to stop somebody from saying “This is a witch hunt; this is a Star Chamber. I am going straight to the High Court and I am stopping this inquiry.”?

Deputy Brendan Howlin: To reiterate, every proposal we have is grounded in constitutional provision. Under the Constitution, Members of the House and officeholders are made accountable to the House, so there is a constitutional anchoring for that. The Deputy asked what will stop people from going to the High Court. Thankfully, nothing. Any citizen, in regard to any issue, can go and look for a judicial review, but we are very confident there is a constitutional safeguard for the rights of the Oireachtas to hold such inquiries.

If I may, I will respond to Deputy McDonald on two points. We need to be clear, when we say we have to avoid the perception of bias, that there is an expectation that although Members of the Oireachtas have strong and robust views on policy issues, they will not be debarred having expressed those strong policy views. What is being discussed here is a situation in which a person who is going to be a witness or whose good name is at stake - obviously, we will not make conclusions on this - would be cross-examined or made amenable to a committee member who is demonstrably biased towards that person, or who has drawn conclusions in advance of an inquiry into any matter. Who will make that determination? In much of the legislation’s provisions the Oireachtas will make the first determination, but of course it will ultimately be for any individual who feels the conclusion made is not satisfactory to test it in the courts. The criterion we have set out in the Bill is the conclusion a fair-minded person would come to in regard to the bias or otherwise of an individual Member. That is the process we have set out.

Question put and agreed to.

Section 10 agreed to.

SECTION 11

Chairman: Amendment No. 13 is in the name of Deputy Stephen Donnelly. Amendments Nos. 13 to 15, inclusive, are related and will be discussed together.

Deputy Stephen S. Donnelly: I move amendment No. 13:

In page 23, between lines 5 and 6, to insert the following subsection:

“(5) Notwithstanding any rules referred to in this section, one quarter of the members of a committee shall constitute a sufficient number of committee members to deem a proposal to have been proposed by a committee.”.

After this we will deal with amendment No. 16, which, although it was tabled by Deputy Thomas Pringle, is in my name as I am a member of the committee.

Chairman: We will leave it until then.

Deputy Stephen S. Donnelly: It deals with the same kind of issue. To me, this is the most serious flaw in the legislation, which has many good points. The context is that the Minister has suggested I do not appreciate how little control Cabinet holds over Government Deputies and Senators. I do not have his 30 years in the Oireachtas but I have read political scientists who agree we have the most centralised control in the developed democratic world in terms of Cabinet control. It is the opinion of independent experts that the Irish Cabinet is the most controlling Cabinet in the developed world.

Deputy Brendan Howlin: It must be right, then.

Deputy Stephen S. Donnelly: We have that opinion, and I have the benefit of having come in here for two years with new eyes and seen what I have seen. For example, the Technical Group cannot speak on the Order of Business. We asked for a single word to be changed in Standing Orders but we cannot have this done and, as we saw, Deputy Catherine Murphy was ejected from the Chamber last week for trying to make a point. The Houses of the Oireachtas Commission is meant to be completely independent but neither Sinn Féin nor the Technical Group has any representation on it, even though it has 11 members. I was refused permission even to address it on a particular issue. In addition, there are guillotines all the time, as in the fiasco of last week. In my view, there is considerable Cabinet control over both Government Deputies and the House.

The reason this is relevant is that the amendment seeks to reduce the number of votes to a quarter of Members of the House, although I do not really care if the figure is a quarter or a third.

We know from the Library and Research Service that in seven or eight EU member states the equivalent number is between one fifth and one third. The legislation implicitly provides for half of Members. It does not specify 50% but it states there must be a vote of the House, which implicitly means 50% plus. Germany specifies one quarter, so I went with one quarter in my amendment. I am not stuck on one quarter and I do not believe it matters because the amendment will not be accepted anyway, but based on what I have seen, I do not believe this legislation would be used to investigate a sitting member of Cabinet, because the Cabinet will apply the Whip, which it does to every vote and every proposed amendment if we press it to a vote. Therefore, I believe this is a reasonable amendment which is in line with good practice throughout Europe and which gets over the public perception, regardless of whether the Minister agrees with me, about Cabinet control of the Oireachtas.

Let us play this out. The Government has one Taoiseach - in no way do I attribute this to our current Taoiseach, but previous Taoisigh I have seen were capable of abusing it. The position relates back to the 50% figure for committees and it echoes Deputy Fleming's point. The Government applies a Whip. The sitting Cabinet members are essentially immune from this legislation because it requires a majority vote in the House. They can, however, use it against an Opposition leader, for example. They control the terms of reference, the inquiry, the committee and the report because they can vote through anything they want. The point of the amendment is to make it at least possible, or easier, for the House, even where the Government is trying to apply a Whip, to investigate a sitting Cabinet member.

Chairman: Amendments Nos. 13 to 15, inclusive, are being discussed together, Deputy, if you wish to discuss them as well.

Deputy Stephen S. Donnelly: Essentially, they are all the same.

Deputy Sean Fleming: I understand what Deputy Donnelly is saying but I do not believe the history in the House backs it up, except perhaps in the past two years. I can think of a member of my party who was investigated. My party was involved in setting up the beef tribunal, which went after Fianna Fáil Ministers and former leaders. Our party set up the McCracken tribunal and went after one of our former Taoisigh. Our party set up the Flood tribunal, which resulted in one of the current members of the Cabinet resigning. I had better stop before I say too much.

(Interruptions).

Deputy Sean Fleming: There was an inquiry into Mr. Callely, who was a member of the Government party at the time. I have never seen an inquiry set up other than into a member of the current or a former Government. I have never seen an inquiry set up into a member of the Opposition. I understand what Deputy Donnelly is saying, but let us reflect on it. Political circumstances often dictate when a Government must put one of its own out to be examined. I have yet to see it occur in the opposite direction. Deputy Donnelly may say it is counterintuitive but that is what has always happened.

Chairman: Before I invite Deputy Mary Lou McDonald to speak I will offer some observations. Any committee report that requires a vote to get over the line is diminished. I have never been involved in a committee process, either in Opposition or in Government, in which we have voted something through. Perhaps the Minister will clarify the position. It is not that there are recommendations as such, but a statement of fact. One cannot vote on whether something is a matter of fact. I do not see a situation arising in which one would be voting on a matter of fact.

Deputy Stephen S. Donnelly: For the purpose of clarification, under the legislation statements can be shown to be matters of fact even if there is disagreement. If the committee decides something is a fact, then it is a fact. Therefore, if the Taoiseach of the day decides it is a fact, then it is a fact.

Deputy Brendan Howlin: That is extraordinary.

Chairman: You would be open to-----

Deputy Stephen S. Donnelly: The legislation says as much.

Deputy Brendan Howlin: No.

Chairman: I will bring the Minister back in after Deputy Mary Lou McDonald.

Deputy Mary Lou McDonald: There is merit in Deputy Donnelly's amendments. He pointed out that in other jurisdictions one does not need the 50%-plus-one rule within the process. Whether it is 25% or one third, the point is that, as currently structured, for an inquiry to be completed a majority vote must be achieved. I assume the concern that has triggered these amendments is that one could have matters entirely worthy of inquiry and consideration which would hit the bar because of that requirement. Will the Minister explain why he is so fixed on the 50%-plus-one figure? What is the problem with a 25% threshold, for example?

Chairman: I wish to add my tuppence worth again. I remember when I and Deputy Fleming were on a committee that he chaired. There were diverging views on a particular recommendation, which was to do with the personal public service number registration system.

Everyone had strong views on it but they were not views of the same bent. In that case the committee's recommendation noted that there was no unanimous position among the committee members and that was reflected in the report. As soon as any committee makes a vote on any recommendation, the report is invalid. That is my view in terms of someone chairing the process. It would be madness for anyone acting as chairman and steering any inquiry to force a vote, because as soon as that vote is called the work put in by the committee members is over and has no standing.

Deputy Stephen S. Donnelly: I wish to clarify my position. I was referring to the 50:50 set-up in the committee. This amendment refers specifically to the vote in the House to set up an inquiry. I take the point on the previous amendment. This amendment specifically relates to a government being able to use its majority. I am not having a go at this Government in any way. I am referring to a government using its majority to block something that a sizable portion of the Oireachtas deems worthy of doing. It is standard and successful practice in many other countries.

Deputy Brendan Howlin: I find the proposal extraordinary, because to cure the problem of an overweening majority Deputy Donnelly is proposing to have an overweening minority that can overturn the majority view. That is an extraordinary state of affairs. Deputy Donnelly is proposing that one quarter of the members of the committee should constitute a sufficient number to deem a proposal to be proposed by a committee. Let us consider the detail of the Bill.

Deputy Stephen S. Donnelly: I am sorry for cutting across the Minister. He is referring to amendment No. 15. I should have said at the start that amendment No. 15 refers to a vote of 25% of the committee. That amendment is an error. I beg the pardon of the committee. I am withdrawing amendment No. 15. The substantive amendment for me relates to the vote in the House.

Chairman: I will note it as withdrawn when we come to it.

Deputy Brendan Howlin: We are considering the other two amendments. That is fine. I will not refer to it. Let us consider amendments Nos. 13 and 14. Amendment No. 13 states: "Notwithstanding any rules referred to in this section, one quarter of the members of a committee shall constitute a sufficient number of committee members to deem a proposal to have been proposed by a committee." Is that what Deputy Donnelly is referring to? Is that what he is withdrawing?

Chairman: Amendment No. 15 is being withdrawn.

Deputy Brendan Howlin: No; amendment No. 13 states: "Notwithstanding any rules referred to in this section, one quarter of the members of a committee shall constitute a sufficient number of committee members to deem a proposal to have been proposed by a committee." Is Deputy Donnelly standing over that?

Deputy Stephen S. Donnelly: Bear with me for one moment. Let me explain it. Amendments Nos. 13 and 14 are essentially parallel rules. Section 11 deals with a proposal for an inquiry by a committee. That is dealt with in amendment No. 13. Section 12 deals with a proposal for an inquiry by the House. Amendments Nos. 13 and 14 provide for the application of the same rule, that a vote of one quarter of the House is sufficient to propose an inquiry. Similarly, if a committee is doing it, rather than the House, which is possible under the legislation, it is simply the same rule. That is not a vote for findings because I agree with the Minister that

would be preposterous. It concerns the establishment of an inquiry.

Deputy Brendan Howlin: Section 11 of the Bill is a proposal by a committee to conduct a Part 2 inquiry. That is a big step. The Deputy is saying that a quarter of the members of the committee can determine that against the wishes of three-quarters. Taken with the evidence that Deputy Fleming has already given, the notion that the Deputy is curing what he perceives to be a bias by virtue of a majority being able to inquire into or withhold something, by giving an extraordinary power to a quarter of the committee to overrule three-quarters and proceed with an inquiry-----

Deputy Stephen S. Donnelly: Or the House. I would be willing to concede on the committee. The point I am most interested in is a vote of the House.

Deputy Brendan Howlin: That is amendment No. 13. Is the Deputy proceeding with that amendment?

Chairman: Amendment No. 13 stands. Amendment No. 15 will be withdrawn.

Deputy Brendan Howlin: We were talking about amendment No. 13 but Deputy Donnelly seems to be resiling from that.

Deputy Stephen S. Donnelly: No, I am not resiling from that. I am saying that the same logic applies. As I said in my opening remarks I do not really care whether it is a quarter or a third.

Deputy Brendan Howlin: The Deputy is saying that a quarter of a committee should overrule three-quarters.

Deputy Stephen S. Donnelly: It is good practice in other jurisdictions.

Deputy Brendan Howlin: Can we deal with the amendment that is before us?

Chairman: We are dealing with amendments Nos. 13, 14 and 15 which are related so we are discussing them together. I understand that amendment No. 15 will be withdrawn when we reach it.

Deputy Brendan Howlin: I am dealing exclusively with amendment No. 13 in Deputy Donnelly's name, to amend section 11 which concerns the power of a committee to make a proposal to conduct a Part 2 inquiry. The amendment, which I find extraordinary, is that one quarter of a committee can make that determination, overruling three-quarters of the committee. That is fundamentally wrong. It is a tyranny. The Deputy is curing what he perceives to be a frailty that a majority could block something by giving a minority the right to be very partisan and hold committees of inquiry into any Minister any time it likes. That would be an extraordinary situation.

Chairman: Theoretically one partner in government could call an inquiry into another partner in government.

Deputy Brendan Howlin: That could happen anyway but the notion that a quarter of a committee would overrule three-quarters strikes me as fundamentally flawed.

Deputy Sean Fleming: I presume that Deputy Donnelly had this clear in his own mind. It reminds me of the grouping system in local authorities where a group of a quarter can come

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together to get a seat on a committee. In this situation there could be three different groups, each of more than a quarter coming out with three different proposals from the committee. I do not follow how-----

Deputy Stephen S. Donnelly: As I said in my opening remarks, I am not hung up on whether it is a quarter or a third. I am hung up on the fact that a government can use a majority to block anything it wants at committee and House level. That is the basic point.

Chairman: I will take that as the Deputy's final comment on the amendment. How stands the amendment?

Deputy Stephen S. Donnelly: I am pressing the amendment.

Amendment put and declared lost.

Section 11 agreed to.

SECTION 12

Deputy Stephen S. Donnelly: I move amendment No. 14:

In page 23, subsection (1)(a), to delete lines 7 to 11 and substitute the following:

“(a) subject to subsection (3), the one quarter of the members of the House have, in accordance with the rules and standing orders made by the House pursuant to subsection (2), voted to pass the resolution in respect of the inquiry (in this section referred to as “the terms of reference resolution”) specifying—”.

Deputy Brendan Howlin: The same logic applies here except that the amendment refers to the whole House. The notion that a quarter would overrule three-quarters would be a source of great mischief.

Deputy Stephen S. Donnelly: How does the Minister think that this is done so successfully in so many other countries?

Deputy Brendan Howlin: They obviously do not have Article 15.1.1° of our Constitution, which states:

All questions in each House shall, save as otherwise provided by this Constitution, be determined by a majority of the votes of the members present and voting other than the Chairman or presiding member.

The Deputy's amendment is unconstitutional.

Amendment put and declared lost.

Deputy Stephen S. Donnelly: I move amendment No. 15:

In page 23, subsection (1), lines 23 to 25, to delete paragraph (b) and substitute the following:

“(b) if the committee is a joint committee, one quarter of the members of each House vote to pass the resolution with identical terms passed in each House.”.

Amendment, by leave, withdrawn.

Deputy Stephen S. Donnelly: I move amendment No. 16:

In page 23, after line 46, to insert the following subsection:

“(4) Each House shall make rules and standing orders to provide that a vote in favour of the conducting of an inquiry shall pass if no less than two thirds of the designated opposition Deputies vote in favour of the conducting of the inquiry by a committee.”.

This was tabled by Deputy Thomas Pringle. It is essentially a different version of the same point.

Amendment put and declared lost.

Section 12 agreed to.

Section 13 agreed to.

NEW SECTIONS

Deputy Brendan Howlin: I move amendment No. 17:

In page 24, before section 14, but in Part 2, to insert the following new section:

“CHAPTER 2

14.—Section 15 applies when—

(a) a notice of motion referred to in Article 12.10.3 of the Constitution has been signed subject to and in accordance with the provisions of that Article,

(b) a resolution referred to in Article 12.10.4 of the Constitution has been supported subject to and in accordance with the provisions of that Article,

and

(c) a charge under Article 12.10 of the Constitution has been preferred subject to and in accordance with the provisions of that Article.”.

Amendment agreed to.

Deputy Brendan Howlin: I move amendment No. 18:

In page 24, before section 14, but in Part 2, to insert the following new section:

15.—(1) (a) Subject to *paragraph (b)* and *subsection (4)*, when this section applies, a committee may investigate the charge under Article 12.10 of the Constitution by virtue of which this section applies.

(b) The other provisions of this Act shall, with all necessary modifications, apply to a *section 15* inquiry in a manner consistent with and in adherence to Article 12.10 of the Constitution.

(2) The committee, in exercise of the power to conduct a *section 15* inquiry, may—

(a) record evidence,

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(b) report the evidence, and

(c) make findings of fact (if any) of misbehaviour referred to in Article 12.10 of the Constitution.

(3) Subject to *section 63*, the committee shall not have the power to send for persons, papers or records unless that power has been conferred upon it pursuant to the applicable rules and standing orders.

(4) (a) Where the charge under Article 12.10 of the Constitution has been preferred by Dáil Éireann, the committee conducting the *section 15* inquiry shall be Seanad Éireann or a committee appointed by Seanad Éireann.

(b) Where the charge under Article 12.10 of the Constitution has been preferred by Seanad Éireann, the committee conducting the *section 15* inquiry shall be Dáil Éireann or a committee appointed by Dáil Éireann.”.

Amendment agreed to.

SECTION 14

Deputy Brendan Howlin: I move amendment No. 19:

In page 24, subsection (1), lines 35 to 38, to delete paragraphs (d) and (e) and substitute the following:

“(d) if the inquiry is a *section 9* inquiry, make such a finding pursuant to the relevant provisions of *section 9*,

(e) if the inquiry is a *section 10* inquiry, make such a finding pursuant to the relevant provisions of *section 10*, and

(f) if the inquiry is a *section 15* inquiry, make such a finding pursuant to the relevant provisions of *section 15*.”.

This is a technical amendment which is consequential on amendment No. 18 and allows for the insertion of a reference to a section 15 inquiry in section 14 which currently deals with a finding of fact.

Amendment agreed to.

Section 14, as amended, agreed to.

SECTION 15

Question proposed: “That section 15 stand part of the Bill.”

Deputy Mary Lou McDonald: This section has the full spectrum of almost court-like protections and I recognise that the procedure guarantees immunities, privileges and so on and that incrimination may not be invoked as a reason to refuse to co-operate with an inquiry by declining to answer a question or furnish a document. Can the Minister reassure me that section 15(2) does not affect the existing constitutional right, under Article 38.1, not to incriminate oneself?

Deputy Brendan Howlin: The Bill is crafted on the advice of the Attorney General and I am advised that it is constitutional. It is important that we are able to get access to any docu-

ment and that a person cannot simply refuse access on the grounds that the document might incriminate himself or herself. There is no criminal sanction in the Bill so the mere furnishing of a document would not lead to a criminal sanction and it cannot be used in a subsequent court action. I think we are on safe ground and that is the advice that I have from the Attorney General.

Deputy Mary Lou McDonald: I appreciate the Minister's answer and I accept it. I was not asking about sanctions but about self-incrimination which I know often has the consequence of a sanction. I have raised this issue with the Minister in the past. I recognise that it is not the practice to make available the advice of the Attorney General but there are circumstances in which it would be extremely helpful not least to those of us in opposition as we try to grapple with complex and potentially very contentious issues within, for instance, this legislation. The Minister and his Department are clearly satisfied with the advice they have received. I would feel more assured in dealing with all Stages, particularly Committee Stage, if we had sight of that legislation. In exceptional circumstances the Government might consider accommodating Opposition Deputies with the legal advice to which it has access through the Office of the Attorney General. The Minister recognised my substantive and important point, namely, that we cannot afford to get this legislation wrong. I make that point in a spirit of co-operation.

Deputy Brendan Howlin: I fully accept it in that spirit. I recheck any point raised. We would not propose anything that had not been stamped by the Attorney General. Any legislation comes with a stamped copy which shows that it is, on the advice of the Office of the Attorney General, constitutional. We would not propose it otherwise. By long-standing practice, it is not the norm to give the formal advice of the Attorney General to the Cabinet to anyone else. As the Deputy knows, constitutionally the Attorney General has two roles - to be the law officer to the Government and give formal advice, particularly on constitutional matters, to the Cabinet, and to protect the citizen in terms of constitutionality. No Attorney General is the legal adviser to the Oireachtas; it has its own legal advice available to it.

Chairman: I appreciate the long-standing tradition that the Attorney General's advice is not laid before the House. The Minister has clarified that these questions have been put to the Attorney General.

Deputy Brendan Howlin: Yes.

Deputy Mary Lou McDonald: I am not questioning that and I work on that assumption. I made the point that it would be helpful when we are asked to scrutinise legislation such as this, particularly given that, as the Minister correctly said, the Attorney General fulfils a dual role and there is an onus on all of us to ensure the constitutionality, as best we can, of the laws we enact.

Question put and agreed to.

SECTION 16

Question proposed: "That section 16 stand part of the Bill."

Deputy Sean Fleming: I have two small points. The first line of section 16 refers to the committee and there is a definition of "committee" in the section. Perhaps the Minister or somebody else can send a message to the parliamentary draughtspersons. There is a definition in the middle of page 27. Definitions should be at the beginning of the section. We should all be able to read and understand them. It might be standard practice for definitions to crop up at

the end of sections, but if that is the case it is a bad practice.

The section states the House can draw up its procedures and guidelines in regard to any committee. Section 16(2)(b) states that guidelines drawn under the section may include guidelines relating to “any distinction that may be drawn between procedures applicable to all witnesses and those against whom allegations are made”. I ask the Minister to explain that. An inquiry might be set up to investigate allegations in respect of an individual, but as it progresses it might move on to investigate persons who have questions to answer about a particular issue, whereas others simply provide evidence. Where is the distinction drawn between a witness and a person against whom an allegation is made? If that is to be done when guidelines are established, it sounds as if somebody has already made some preliminary assessment against a person before an inquiry commences.

Deputy Brendan Howlin: The Deputy has raised a number of issues. I take his point on definitions.

In terms of his general point, this is a catch-all set of guidelines. We will not be prescriptive about every eventuality. On the particular question raised by the Deputy on subsection (2) (b), there will be occasions when a scoping exercise will be done, whether it is a report of the Comptroller and Auditor General, a report from another committee of the House, an existing committee finding, a report of the Ombudsman-----

Deputy Sean Fleming: A public report.

Deputy Brendan Howlin: -----or another report that finds there is an issue to be looked at. Somebody in that report might require more robust protections if there were to be a formal inquiry, such as the right to attend all sessions, cross-examine and so on, but the panoply of legal rights will not be distributed in the same way to everybody. If somebody is a casual witness he or she should not be allowed to bring in lawyers, for example, because costs will be involved. It will be a matter for the Houses, when they are considering an inquiry such as this, to ensure they can discriminate between witnesses and persons against whom allegations are made.

Deputy Sean Fleming: Okay.

Question put and agreed to.

SECTION 17

Chairman: Amendments Nos. 20 and 21 are related and may be discussed together.

Deputy Brendan Howlin: I move amendment No. 20:

In page 27, subsection (6), line 37, to delete “in any way” and substitute “for that reason alone”.

Section 17 deals with the power of the Chairman to give directions. Subsection (3) provides that the House may, by resolution, remove a committee member from a committee for contravening a direction given to him or her pursuant to the section or who has otherwise contravened a requirement of the Bill. Subsection (6) of section 17 provides that the removal of committee members shall not in any way invalidate the proceedings of a Part 2 inquiry up to the point of such a removal.

Section 18 of the Bill deals with perceptions of bias. It provides in subsection (3) that a

committee member shall recuse him- or herself from the Part 2 inquiry by reason of his or her connection with any matter in the subject of the inquiry or by his or her utterances on that subject matter. Under subsection (4), where the member fails to recuse him- or herself, the member may be removed from the committee in accordance with the rules and Standing Orders of the House. Subsection (5) of section 18 provides that the removal of a committee member shall not in any way invalidate the proceedings of a Part 2 inquiry up to the point of removal.

The purpose of these amendments is to clarify the wording of sections 17(6) and 18(5) of the Bill. The wording of these two subsections in the published Bill states that the removal of a member for contravening the bias provisions or not complying with direction “shall not in any way invalidate the proceedings”. I have been advised that the wording might be interpreted as suggesting that the proceedings will not be invalidated even if that member’s prior conduct might give rise to genuine doubts about the fairness of the proceedings up to that point. I hope I am being clear. In essence, if somebody is removed in the middle of inquiry we want it to proceed unless, objectively, the person has been so contaminated that it would not be fair for the inquiry to proceed. I am advised that the phrasing in the published Bill might mean that we would not be able to stop an inquiry. The new phrasing gives clarity in providing that an inquiry may proceed unless, objectively, the proceedings have been completely contaminated by the utterances of the member.

Deputy Sean Fleming: I understand that.

Deputy Brendan Howlin: I hope that is clear.

Deputy Sean Fleming: It is. When we previously discussed the section I said we would be a bit like a jury in the event of a member standing down, whereby a reserve juror who is familiar with the evidence would be available. A person who has had no involvement cannot step in to an inquiry that has been in place for 18 months. The Bill deals with a member’s having to step down for whatever reason, and the fact that that would not invalidate the inquiry. How many members could stand down before the work of the committee would be invalidated? If an inquiry took place during a Dáil term, one could easily find two members are promoted to Minister of State roles. There could be a bereavement or Opposition roles could change. A committee could start with ten people and by year three, five of them might be gone for a variety of reasons. Some form of a quorum should be required from among the original members of the committee to ensure they are in place at the conclusion of the hearings and for the issuing of a report. In theory, this provision could allow for a complete change in the committee membership before the hearings have concluded with the result that people who have not sat through any of the evidence would issue the final report. I do not see anything in the legislation to guard against this possibility.

Deputy Brendan Howlin: I refer the Deputy to the provision for an additional member under section 17:

(5) A member who has been added to the committee after the committee has started conducting the *Part 2* inquiry shall have regard to—

(a) each interim report (if any) of the committee made by the committee before he or she became a committee member, and

(b) evidence received by the committee before he or she became a committee member.

Deputy Sean Fleming: They would still have to bring themselves up to speed.

Deputy Brendan Howlin: Exactly.

Deputy Sean Fleming: I accept that.

Deputy Brendan Howlin: One cannot make law for every eventuality. If sufficient numbers are removed for whatever reason, then the inquiry itself will collapse.

Deputy Sean Fleming: Of course, and that should be provided for. For example, if several members of a jury-----

Deputy Brendan Howlin: As I have indicated, that is a matter for the rules of the House.

Deputy Sean Fleming: Natural justice must be taken into account.

Deputy Brendan Howlin: The House would have to have regard for natural justice. The House sets up the committee and its terms of reference. It sets who is to conduct the committee and the number of members on the committee and it will determine what is to be the critical mass.

Deputy Sean Fleming: That is not mentioned in the guidelines on procedure. The Minister did not deal with that point in the discussion on section 16. We will come back to it on Report Stage.

Amendment agreed to.

Section 17, as amended, agreed to.

SECTION 18

Chairman: Amendment No. 21 has been discussed with amendment No. 20.

Deputy Brendan Howlin: I move amendment No. 21:

In page 28, subsection (5), line 31, to delete “in any way” and substitute “for that reason alone”.

Amendment agreed to.

Question proposed: “That section 18, as amended, stand part of the Bill.”

Deputy Mary Lou McDonald: I understand the test of the reasonable person. As I said earlier, the complication arises when it is an inquiry into a Member of the Oireachtas. That is where, in my view, it gets a bit messy. We operate within an adversarial system and there are all sorts of things said in the cut and thrust of political debate. How can the Minister assure us that this sense of institutional or party political bias is adequately catered for in the provisions? Arguably, in the minds of reasonable people, politicians investigating another politician in and of itself would perhaps sound alarm bells. I have raised this concern before.

Deputy Brendan Howlin: There are two points. Constitutionally, Members of the House are made accountable to the House and not to any external person. For example, for utterances in the House they cannot be hauled before the courts or held to account elsewhere. Therefore, they must be held to account here. The Bill establishes the rules and procedures to ensure this is done in a fair way. The full panoply of normal constitutional rights has been determined repeatedly by the courts in some of the cases we have mentioned, such as the case of former Senator

Callely and others. There are many recitals where this robust set of privileges and rights accrue to everyone. I am confident that this will happen.

As Deputy Fleming has repeatedly said, it is much more likely that the person who will be inquired into will be a Member on the Government side rather than on the Opposition side. That will be the case if custom and practice teaches us anything.

Deputy Stephen S. Donnelly: I ask the Minister to walk us through how it works. I am interested in finding out who makes the call. Is it the chairman of the committee of inquiry? For example, who suggests that a certain member may need to step away, based on the provisions in section 18? I agree with section 18, by the way; I am just curious as to how it will work in reality.

Deputy Brendan Howlin: In the first instance, the House will set up the committee and will make that determination. If the committee is established with a member who carries a perception of bias, a witness or a person subject to the inquiry will have access to the courts to vindicate his or her good name. Once the inquiry is established, a role is afforded to the chairman of the committee to maintain the procedures that will be laid down in this Act, to maintain the procedures of the House and to give directions to a member where he or she oversteps the mark. These directions must be legally complied with. Ultimately, a person can be removed who repeatedly refuses to either comply with legitimate directions from the chair or who has compromised themselves objectively and that will be a matter for the committee to determine.

Deputy Stephen S. Donnelly: It is essentially the chair who will make the call.

Deputy Brendan Howlin: Once the committee has been set up. For clarity I refer to a situation where there is a doubt. The issue of bias will be returned to the House for a determination.

Deputy Stephen S. Donnelly: There would be a vote in the House.

Deputy Brendan Howlin: Ultimately, if the person challenged the direction of the committee in that regard.

Chairman: The censure is with the Parliament.

Deputy Brendan Howlin: There is no censure; this is simply to remove someone who is biased.

Deputy Stephen S. Donnelly: On the same issue, let us say the committee has been set up and the Standing Orders of the House are that each party nominates a certain number of people. How does it work? For example, what is the procedure if one of the parties - it does not matter from which side - proposes a person who should not be on the committee because of bias? Who makes the call to say that this person is not suitable and that the party needs to propose someone else?

Deputy Brendan Howlin: That is a very good question. It will be a matter for the House itself to determine. I imagine that people will look at the composition of a committee. For instance, as with the jury system, if a person is of the view that the proposed member might not be objectively impartial and would put any finding of the committee or the work of the committee at risk of challenge in the courts, this would be determined by the Oireachtas. I presume there would be a discussion with the person in the first instance. If the person wished to proceed, then there would be a decision of the House. If the decision of the House is that the person is not bi-

ased but some third party is of the view that bias exists, then it will be a decision for the courts.

Deputy Stephen S. Donnelly: What is the mechanism for raising this in the House? For example, will the House be presented with a proposed list of committee members to debate or agree?

Deputy Brendan Howlin: That is the normal practice. I refer to section 17(4) which states: “The House may by resolution remove a committee member from, or add a member of the House to, the committee in accordance with the rules and standing orders of the House.” This is a matter on which the House will have to seize itself. The normal way in which a committee is constructed is that the numbers are fixed and then each party is asked to nominate people to it. I imagine that the Committee on Procedure and Privileges might be the forum where this would be determined. However, I do not think we need to be prescriptive in the Bill other than to say in section 17(4) that this is a matter for the House.

Question put and agreed to.

Sections 19 to 30, inclusive, agreed to.

SECTION 31

Deputy Sean Fleming: I move amendment No. 22:

In page 35, subsection (1)(a), to delete line 10, and substitute the following:

“31.—(1) The committee shall, at any time before it gives the final report to the House, give the House three monthly interim reports in writing in accordance with rules and standing orders.

(2) (a) Subject to *subsection (3)*, the House may, at any time”.

The legislation, as drafted, provides for interim reports. In the event of the House being dissolved at the end, or close to the end, of its normal term, or suddenly if the Government of the day lost its majority or some of those in government were not to remain in government, the work of a committee, which could have spent considerable time, energy and resources conducting an inquiry during the term of that Government would be lost and such work could not be reactivated by an incoming Government in terms of the resumption of that work. Only the work that would have been included in an interim report would be protected for future reference. An incoming Government could rely on the work of a previous interim report, if one had been done, but the work conducted after the issuing of an interim report, having regard to all the time, energy and resources involved, up the time of the collapse of a Dáil would be lost. In this amendment I seek to protect the taxpayer and the integrity of these committees and not to bring the process into public ridicule in that a committee could have spent 12 months inquiring into a matter and all that work would be down the drain, even though many people may have made a great deal of money from it. I propose the insertion of this provision to protect the work of a committee by requiring it to complete three monthly interim reports. They need not be fact-finding rather they could be progress reports. Such a measure would protect the work done every three months to ensure that it would not be lost in the event of the sudden dissolution of a Dáil. It would protect the taxpayers’ interests and the integrity of the committee process.

Deputy Brendan Howlin: Deputy Fleming has made this point previously and it is a valid one. He will note from the section that I have provided that “the House may, at any time

before it is given the final report request the committee to give it interim reports in writing in accordance with rules and standing orders”. Therefore, it is for the House to determine in this respect. I do not want to be prescriptive and require that this be done every three months because a committee could be dealing with a module the duration of which could continue for six months or for six weeks. The committee should be able to feed in the information as it determines and the House would have the right to respond in that respect. Obviously if there is a natural termination, a date will be fixed before the natural termination. I presume the Deputy’s concern in this respect would only arise in the event of there being a sudden termination of the Dáil. This matter is best left to the House. If I were to require this to be done every three months, a committee could be in the middle of a process and it would be an onerous task, or a disruptive requirement, for it to give an interim report before the end of the process. It would be better to leave it to committee to determine when interim reports should be made. Provision is contained in the section for the submission of interim reports.

Deputy Sean Fleming: I understand that. The only point I would make and I will not labour it is that a committee could be dealing with a module, the duration of which could extend for six or eight months, and there is nothing to prevent it from deciding at the end of 90 days work to log the work that has done, put it in writing and lodge it as an interim report and that could then be superseded by a report at the end of the module.

Deputy Brendan Howlin: It might be a very unbalanced view, for example, if only one side of the argument is set out.

Deputy Sean Fleming: It would be an interim report and there would be caveats.

Deputy Brendan Howlin: I felt it was a very unsatisfactory part of the tribunal system where evidence was adduced and presented and the rebuttal was presented months later.

Deputy Sean Fleming: I still think there is merit in protecting the taxpayer where in the case of a long module-----

Deputy Brendan Howlin: I believe that-----

Deputy Sean Fleming: The Minister agrees with the principle.

Deputy Brendan Howlin: Yes, but I believe the section captures what the Deputy seeks to achieve.

Deputy Sean Fleming: The Minister is saying that this can be done by way of the rules of the House.

Deputy Brendan Howlin: I am saying that the law provides for it. The section provides that “the House may, at any time before it is given the final report, request the committee to give it ... [an interim report]”. If the Deputy was engaged in the middle of a process, he could ask for this as a Member of the House.

Deputy Sean Fleming: I am thinking of some of the tribunals whose work continued for eight or nine years which produced only two interim reports during that period. The House to which the Minister is referring in this context had the same authority to seek interim reports more regularly, but the Houses tend not to interfere with the work of a committee when it is involved in a matter that is ongoing. In any event, I will move on.

Chairman: Given that any proposal to have an inquiry would require the permission of a

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House, my view is that any person's request for a proposed investigation, the duration of which might remotely extend for two years, would not even get off the floor of the House. Even if an Administration fell, it would be within the gift of the new Administration to recommence an investigation by seeking the papers from the previous Administration under Standing Orders.

Deputy Sean Fleming: They would have to start the work again.

Chairman: Yes, because the Government would have collapsed and those who were members of the committee may not be re-elected, but the facility is in place for the new Administration to seek the papers from the previous Administration and recommence the investigation. I am advised that was done by the committee previously in the case of an Ombudsman report. How stands the amendment?

Deputy Sean Fleming: I think it is a good amendment.

Chairman: I cannot put the question in the form of whether we think this is a good amendment.

Deputy Sean Fleming: It would be the first time.

Amendment put and declared lost.

Section 31 agreed to.

Sections 32 to 39, inclusive, agreed to.

SECTION 40

Chairman: Amendments Nos. 23 and 24 are related and they will be discussed together.

Deputy Brendan Howlin: I move amendment No. 23:

In page 40, subsection (1), line 20, after "inquiry" to insert the following:

"(or, in the case of a *Part 2* inquiry which is a *section 15* inquiry, as soon as may be after *section 15* applies and the committee that is to conduct the *section 15* inquiry is identified)".

Amendment No. 23 provides for the insertion of a reference to section 15. Amendment No. 24 is a technical amendment consequent on the insertion of text as a result of amendment No. 23. They are two technical drafting amendments.

Amendment agreed to.

Deputy Brendan Howlin: I move amendment No. 24:

In page 40, subsection (2), lines 26 and 27, to delete "of a *Part 2* inquiry" and substitute "is identified)".

Amendment agreed to.

Section 40, as amended, agreed to.

Sections 41 to 43, inclusive, agreed to.

SECTION 44

Deputy Stephen S. Donnelly: I move amendment No. 25:

In page 41, subsection (1), line 29, to delete “Oireachtas Commission” and substitute “Independent Judicial Panel”.

The issue here is around costs and who decides whether a witness will have costs. As we all know, the legal costs for these kinds of matters can be astronomical and can be used as a weapon in unscrupulous hands. Even the threat of somebody having to get the services of a senior counsel and put himself or herself under huge financial pressure and risk can be a very effective and unpleasant threat. I would like the Minister to first walk us through how this will work and then I will outline my concern about it.

Deputy Brendan Howlin: Subsection (1) provides that a witness whose good name is or maybe directly impugned in an inquiry may apply for costs in a Part 2 inquiry. The focus in relation to the recoupment of legal costs is on persons whose good name is at issue rather than other witnesses. The Oireachtas commission does not have a role in relation to the quantum of legal costs under the Bill. It does not make that decision. In accordance with section 48, a party who is due legal costs will apply to the Oireachtas commission for an adjudication on such costs by the parliamentary legal costs adjudicator. That adjudicator is somebody drawn from a panel of legal costs accountants willing to act as parliamentary cost adjudicators under section 41. This panel will be drawn up by the Minister and the process therefore is independent of the Oireachtas commission. The parliamentary legal costs adjudicator has similar powers to the Taxing Master in the courts under section 42 of the Bill. In essence, a person whose good name is being impugned and who wishes to apply for costs will apply to the Oireachtas commission, which will refer the matter to the legal costs adjudicator. The legal costs adjudicator is that person drawn from a professional panel of legal cost accountants drawn up by me as Minister. Section 44(4) provides that a person may apply to the committee for a determination as to whether he or she is a person whose good name is likely to be at issue in the inquiry. This will enable people to make a preliminary assessment as to whether he or she is likely to be entitled to recoup expenses or costs.

Deputy Stephen S. Donnelly: I refer to a scenario in which one gets word from a committee that one will be called but one thinks one’s good name may be impugned in this process. At the outset, I agree with the Minister that the provision of legal costs should be limited and that costs should not be provided to everyone. However, I wish to walk through this process just to be satisfied that it cannot be used in a mischievous manner. For instance, one gets word that one is being summoned and one thinks one’s good name may be impugned in the process. Does one write to the Oireachtas commission at that point to state one’s good name may be impugned and therefore, one needs counsel and would like the commission essentially to state whether it intends to pay for it?

Deputy Brendan Howlin: The procedure will be that once a committee is established, if one believes one will be a witness to the committee and one’s name is likely to be at issue, one applies to the committee stating one’s desire to have legal representation.

Deputy Stephen S. Donnelly: Does one apply to the commission or to the committee?

Deputy Brendan Howlin: One applies to the committee established, which will make the

preliminary determination in that regard. If one then considers this determination to be not correct, one of course then has access to the courts to overrule the committee's view.

Deputy Stephen S. Donnelly: Okay, so the first step is that one has been called and one then writes to the committee's Chairman to express one's belief that the committee potentially will impugn one's good name and to ask the committee to award one costs in advance to enable one to get counsel. Is this correct?

Deputy Brendan Howlin: Not quite. First, one should remember the scoping in this regard will be done by the committee. It will meet in advance and is likely to determine the list of witnesses. It is likely to know, from the matters to be inquired of, who really is on the hazard in respect of his or her good name. Consequently, I do not think it will come as any shock to the committee to receive an application of the sort. It will make the decision and-----

Deputy Stephen S. Donnelly: Sorry, what decision will the committee make? Is it that yes, it may impugn one's good name?

Deputy Brendan Howlin: Yes. While obviously it will not determine that, the committee will make a determination that in accordance with the terms of reference and the rules of the House, the person concerned would be entitled to legal representation.

Deputy Stephen S. Donnelly: On the basis that the committee may impugn one's good name.

Deputy Brendan Howlin: I do not envisage any committee will write to say incidentally, it may be impugning one's good name but-----

Deputy Stephen S. Donnelly: Right. However, these are the only grounds under which people can be awarded legal costs.

Deputy Brendan Howlin: Yes.

Deputy Stephen S. Donnelly: Okay, so witness X writes to the Chairman and the case is discussed by the committee, which decides witness X may be entitled to legal costs. This decision then is sent to the commission. Is that correct?

Deputy Brendan Howlin: Once the committee determines this, one would be so entitled as that is a final determination. My understanding is the commission itself will not be obliged to vouch for it. Sorry, there are two steps involved in this process. First, the committee will determine that one is to be legally represented. The decision on the amount to be paid will be made at the end of the inquiry and the person so represented will apply to the commission in the first instance. The latter will then refer the application to the parliamentary legal costs adjudicator, who will have the same powers as the Taxing Master to determine what are appropriate and proper legal costs.

Deputy Stephen S. Donnelly: Therefore, the commission is not applying any judgment. Is that correct? It's simply is saying, "Here you go". My understanding is that first, the committee decides, before one appears before it, that one is entitled to legal representation.

Deputy Brendan Howlin: Yes, if one applies for such. Alternatively, one could apply in the middle of proceedings.

Deputy Stephen S. Donnelly: Okay, so before or during proceedings, at some point I pre-

sume one can tell the Chairman that one seeks legal representation. The committee will then say “Yes” or “No”. If the committee says “Yes”, is it implicit that one’s costs therefore will be covered?

Deputy Brendan Howlin: Yes.

Deputy Stephen S. Donnelly: Okay. Thereafter, at the end of the whole thing, one will be faced with a big legal bill because one has had legal representation. One goes to the commission, which does not apply any judgment but simply assigns a legal costs adjudicator to one.

Deputy Brendan Howlin: The committee has determined that one is entitled to costs. What is determined subsequently is the quantum of the cost to be paid.

Deputy Stephen S. Donnelly: Okay. That sounds fine.

Chairman: I have one additional question. In respect of tribunals, for instance, there was a forewarning that if someone was going to act in a belligerent manner, the costs would be waived and the person concerned would be obliged to meet them him or herself. In such a scenario, the costs then would be picked up by the person who sought legal advice. The Minister should clarify this point.

Deputy Brendan Howlin: Yes, that is covered in the Bill.

Deputy Stephen S. Donnelly: Who decides that?

Deputy Brendan Howlin: The provision is in section 45(1). If one goes through section 45, one will see this matter is covered properly.

Deputy Stephen S. Donnelly: Okay, that sounds fine. While I will withdraw the amendment, this point applies to section 45 and I will speak to the section when it comes up.

Amendment, by leave, withdrawn.

Section 44 agreed to.

SECTION 45

Chairman: Amendments Nos. 26 and 27 are related and will be discussed together.

Deputy Brendan Howlin: I move amendment No. 26:

In page 44, subsection (9)(d), line 18, after “commenced” to insert the following:

“or, in the case of a *Part 2* inquiry which is a *section 15* inquiry, after *section 15* applies and the committee that is to conduct the *section 15* inquiry was identified but before the *section 15* inquiry commenced”.

As the Chairman indicated, amendments Nos. 26 and 27 are to be taken together. These amendments are consequent on the insertion of the new section 15, again as a result of the acceptance of amendment No. 18. Amendment No. 26 allows for the insertion of a reference to a section 15 inquiry. It ensures that the Oireachtas commission will be empowered, in appropriate circumstances, to request a person to pay Part 2 inquiry legal costs, which arose after section 15 applied and once a committee had been selected to conduct a section 15 inquiry but before the inquiry had commenced. Amendment No. 27 allows for the insertion of the same reference to a section

15 inquiry regarding a direction by the Oireachtas commission to pay Part 2 inquiry expenses.

Amendment agreed to.

Question proposed: “That section 45, as amended, stand part of the Bill.”

Deputy Stephen S. Donnelly: This point arose in respect of amendment No. 25 to section 44, which I tabled but it applies to section 45. I thank the Minister for the clarification regarding section 44. My concern is that the Oireachtas commission is not representative of the House. There is no representation for Sinn Féin or the Technical Group. The Houses of the Oireachtas Commission has 11 members of whom one is non-political, two each are from Fianna Fáil and the Labour Party and six are from Fine Gael. My dealings in trying to get a reasonable hearing on an issue from the commission were utterly unsatisfactory. Therefore, I do not believe the commission to be a suitable body to make such judgments. Specifically, this matter pertains to the threat of legal costs and the commission will be empowered in this regard. Incidentally, I believe someone must make such determinations and have no problem with the mechanism. I believe this is fair enough for those who have not been co-operating properly. However, I do not believe the commission is representative. In amendment No. 25, I provided for an independent judicial panel and I included that because I did not know what else to put in. The point is that I am not satisfied with the Houses of the Oireachtas Commission doing this because this is a serious threat for any group to be able to use. It can state that while one has incurred quarter of a million euro in senior counsel fees, it has now decided one was non-co-operative with the inquiry and therefore, one will be obliged to pay the fees oneself. This is my concern and I do not know what is the right answer. I used “independent judicial panel” as a sort of holding phrase but this is my concern.

Chairman: I will revert to the Minister to see whether he has the right answer.

Deputy Brendan Howlin: My understanding is the Deputy accepts the section but simply does not accept the vehicle for making the decision.

Deputy Stephen S. Donnelly: Yes, I have a concern in that regard.

Deputy Brendan Howlin: We probably need to revisit the issue, albeit not of the Oireachtas commission being the appropriate body. However, the Deputy rightly has instanced issues in respect of the Oireachtas commission. It is part of the ongoing discussion regarding other legislation I am having with the Ceann Comhairle on having a representative Oireachtas commission. I do not want to say any more about that now as is not appropriate to this legislation. We need to have somebody to make the decision, however. There is no more appropriate body currently. I am mindful of the Deputy’s point that we need to make a more representative commission. We will deal with that on another day.

Question put and agreed to.

Sections 46 to 51, inclusive, agreed to.

SECTION 52

Deputy Brendan Howlin: I move amendment No. 27:

In page 48, subsection (6)(d), line 29, after “commenced” to insert the following:

“or, in the case of a *Part 2* inquiry which is a *section 15* inquiry, after *section 15* applies and the committee that is to conduct the *section 15* inquiry was identified but before the *section 15* inquiry commenced”.

Amendment agreed to.

Section 52, as amended, agreed to.

Section 53 agreed to.

SECTION 54

Deputy Brendan Howlin: I move amendment No. 28:

In page 50, subsection (4), line 21, to delete “land” and substitute “property”.

I imagine that Deputies opposite read this amendment and wondered what it was about. I will explain. It is not actually essential to the legislation but it is a vehicle that I wanted to use. As the members will know, a private Bill is a Bill promoted for the particular interest or benefit of a person or which interferes with the private property of a person, otherwise than in the interests of the public generally or as a matter of public policy. Normal Bills are not private because they have general application and are a matter of general public policy. Private Bills, which are rare enough in the Houses, have a particular focus. Examples of recent private Bills dealt with include The Royal College of Surgeons in Ireland (Charters Amendment) Act 2003 – the original charter set up by an Act of Parliament needed to be amended – and The Trinity College Dublin (Charters and Letters Patent Amendment) Act 2000.

A petitioner of a private Bill means a person who submits to the House or committee a petition opposing the private Bill or a provision in the Bill. Subsection (4) provides that a petitioner who owns an interest in land and who opposes a private Bill which proposed the acquisition of all or part of that interest shall not be liable to pay legal costs to the promoter under this section. This subsection is based on section 2 of the Parliamentary Costs Act 1865, as applied by section 5 of the Private Bills Costs Act 1924.

I am proposing to delete the word “land” in the original legislation and replace it with the word “property”. The word “land” is taken directly from the 1865 Act. However, I am concerned that the word “land” may be unduly narrow in today’s context. To bring the wording up to date, I would like to broaden the scope of this provision to encompass “property” generally, as opposed to “land”. The amendment is to improve the mechanism with regard to the bringing of private Bills before the House.

Amendment agreed to.

Section 54, as amended, agreed to.

Sections 55 to 64, inclusive, agreed to.

NEW SECTION

Deputy Stephen S. Donnelly: I move amendment No. 29:

In page 57, before section 65, to insert the following new section:

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65.—(1) A committee may authorise such and so many persons as it may determine (referred to in this Act as “inquiry officers”) to perform the functions conferred on inquiry officers by this section.

(2) Whenever so requested by a committee, an inquiry officer shall, for the purpose of assisting it in the performance of its functions, carry out a preliminary inquiry into a *Part 2* inquiry by requesting a person whose evidence would or might, in the opinion of the officer, be relevant to the inquiry, at the option of the person, to—

(a) provide him or her with a statement in writing of the evidence that the person would give to the committee in relation to the matter at a *Part 2* inquiry, or

(b) make a statement of the evidence aforesaid at a meeting with him or her which the officer shall write down,

within such reasonable period as may be specified by the officer.

(3) Following an inquiry pursuant to *subsection (2)*, the inquiry officer concerned shall prepare a report in writing of the results of the inquiry and shall furnish the report and the statement or statements under *subsection (2)* and any relevant documents to the committee.

(4) An inquiry officer may request the production by a person of any document in the possession or control of the person that the officer considers relevant to his or her inquiry.

(5) Where a document is produced by a person to an inquiry officer pursuant to a request under *subsection (5)*, the officer may, with the consent of the person, retain the document in his or her possession for a reasonable period for the purpose of examining and copying it.

(6) A person being interviewed pursuant to *subsection (2)* may decline to answer any question asked, or refuse a request to produce a document made, by the inquiry officer concerned and may terminate the interview at any time and a person to whom a request is made under *subsection (2)* or (4) may refuse to comply with the request.

(7) An inquiry officer shall be furnished with the authorisation under *subsection (1)* relating to him or her and, when exercising a power under this section, shall, if so requested by a person affected, produce the authorisation or a copy of it to the person.”.

This amendment is also in the name of Deputy Pringle. It is the second of two tabled by him. Unfortunately, he cannot be here. The Deputy is trying to ensure that committees of inquiry can appoint investigators to assist in the gathering of evidence. In going through the Bill, he could not find anything that would allow them to do that. He has said the amendment is lifted from the Standards in Public Office Act 2001. He has modelled it on that Act’s wording. He is chairman of the Members’ interests committee. They cannot appoint investigators. The Deputy believes this is hindering that committee in investigating complaints.

Deputy Brendan Howlin: I understand the point made. A committee of inquiry may engage outside expertise to do the scoping work I referred to or to assist it in the preparation of its work. The Committee of Public Accounts, for example, engaged outside legal experts last

year in preparing its report on a possible banking inquiry. It is not necessary to provide specifically for this in the Bill. I note that Deputy Donnelly is not proposing any particularly strong statutory powers for inquiry officers. Under the proposed amendment, a person may decline to answer any questions asked or refuse a request to produce a document. This is in the amendment tabled.

The second observation I would make is that one of the very positive features of the Oireachtas inquiry model, as opposed to a tribunal or a commission of investigation, is that its proceedings will mostly be conducted in public and will probably be televised. This is a very important aspect of the democratic process where Members of the Oireachtas are seen to be conducting such work. This, however, does not preclude a scoping exercise, be it by the Ombudsman, the Comptroller and Auditor General or an expert appointed by a committee.

Deputy Stephen S. Donnelly: I am second-guessing Deputy Pringle to an extent. He is probably making a distinction between expert help and an inquiry. The proposed subsection (4) states: “An inquiry officer may request the production by a person of any document in the possession or control of the person that the officer considers relevant to his or her inquiry.” That is obviously a specific power over and above an expert review or input. I imagine that the Deputy is keen to ensure that the committee of inquiry will be able to appoint a person to expedite proceedings.

Chairman: In certain investigations in the House of Commons, the Comptroller and Auditor General may sit in on committee meetings and almost act in the capacity of a member. He or she may even ask questions directly of witnesses that appear before the committee. One can have an expert resident in that case. With a view to being as neutral as possible, let us assume that the balloons of a balloon manufacturing company are bursting and upsetting children all over the country, resulting in our having an investigation. I am trying not to mention any subject that might not come before us so I thought of something as remote as I could. I do not want to create dilemmas further down the line. If a committee, in making its proposal to refer a matter to the Committee on Procedure and Privileges, were to carry out a scoping exercise, what would the position be? The terms of reference, resource requirements and timeframe of an inquiry would have to be agreed by the Houses. Is there a facility in the legislation, as presented, such that proposals made to the Committee on Procedure and Privileges would allow for the inclusion of an expert or other resources?

Deputy Brendan Howlin: Within the inquiry system, it would be envisaged that there would be expertise available to the committee. If it was a health issue there would obviously be a health expert, while if it was a financial issue one might need a forensic cost accountant or whatever the required person was.

Chairman: Under the legislation, the proposal process will accommodate such an individual.

Deputy Brendan Howlin: Yes. For example, I was a member of the Joint Committee on Health and Children. It was felt that in drawing up the report concerning the constitutional amendment on children, each party and political group on the committee should have legal advice available to it. The Oireachtas paid for a legal adviser to be available to each group. There is therefore ample scope for that. It goes back to the point I made earlier, which Deputy Sean Fleming picked up on. My view is that we need to have a much better resourced committee system which, as a matter of routine, would have access to a panel of experts.

The Chairman referred to the Comptroller and Auditor General, who has a constitutional role which is prescribed under Article 33 and is prohibited from being a Member of either House. The Comptroller and Auditor General is circumscribed in what he can do.

Deputy Stephen S. Donnelly: Perhaps we could consider something for Report Stage. Let us take the banking inquiry, for example. There are probably an awful lot of documents that would be useful for the committee to see. To help expedite that sort of inquiry, Deputy Pringle is suggesting that, rather than having the committee meet in a group of nine or 15 members who try to figure out the required documentation, one could appoint an expert investigator who knows what is needed. In addition, that investigator would have the power vested in them by the committee to demand documentation from the banks involved. I will withdraw the amendment, but the Minister might consider that point.

Chairman: On a point of clarification, Standing Order 83 on the powers of select committees notes that the committee has the power to engage, subject to the consent of the Houses of the Oireachtas Commission, the services of persons with specialist or technical knowledge to assist it, or any of its sub-committees, in considering particular matters. Basically, therefore, we do not need legislation. We can expand Standing Orders to accommodate the committee.

Deputy Stephen S. Donnelly: I appreciate that we can get an expert to give us a report, but the nuance at the heart of Deputy Pringle's suggestion is that that person would have additional powers and could demand documentation. Obviously, an expert hired by a committee could not do so. Perhaps the Minister could consider that point to see if it would be useful for Oireachtas inquiries.

Chairman: The person can demand information on the committee's behalf. The Standing Order states that a select committee is empowered to send for persons, papers and records, and may report its opinions and observations together with the minutes of evidence taken before the Dáil and also make a special report on that. Therefore, the committee actually has that power. The person working for the committee is subservient to the committee, not superior to it. As I understand it, any instructions for pulling in documentation would be on behalf of the committee, not on behalf of the appointed person.

Deputy Stephen S. Donnelly: Deputy Pringle chairs the Committee on Members' Interests, so perhaps it does not have that power as it is not a select committee. He may be seeking to ensure that the committee of inquiry will have the power that his committee does not have and which the select committees appear to have. That is the crux of it.

Chairman: I think he is drawing on his experience of that structure, but it does not apply in this case.

Deputy Brendan Howlin: The committee of inquiry will obviously have that power. I was also a member of the Committee on Members' Interests and I remember that we also had legal advice. We did the inquiry concerning the former Deputy Foley and we had legal advice during that period. He was represented legally as well.

Deputy Stephen S. Donnelly: I will read out Deputy Pringle's note:

As Chair of the Committee on Members' Interests, we cannot appoint investigators and this hinders us in investigating complaints. I feel this Bill should include that.

Deputy Brendan Howlin: The appointment of investigators is a different concept. I do

not think one can franchise the work of the Oireachtas itself. Looking at the amendment, subsection (6) refers to a person being interviewed pursuant to subsection (2) who may decline to answer any question or refuse a request by the inquiry to produce any document, and may terminate the interview at any time. Also, a person to whom a request is made may refuse to comply with the request. While one is giving power, one is actually taking the power back so the person is being given a very limited scope.

Amendment, by leave, withdrawn.

Section 65 agreed to.

SECTION 66

Chairman: Amendments Nos. 30 and 31 are related and may be discussed together.

Deputy Brendan Howlin: I move amendment No. 30:

In page 58, line 3, to delete “Article 12.10 of the Constitution,”.

Amendments Nos. 30 and 31 are technical amendments providing for a greater alignment of the provisions of the Bill with the constitutional provisions concerning the President. Reference to the compellability of the President has been removed from the Bill.

Amendment agreed to.

Chairman: Amendment No. 31 has already been discussed with amendment No. 30.

Deputy Brendan Howlin: I move amendment No. 31:

In page 58, line 7, to delete “(a),”.

Amendment agreed to.

Section 66, as amended, agreed to.

Section 67 agreed to.

NEW SECTION

Chairman: Amendments Nos. 32 to 34, inclusive, are related and may be discussed together.

Deputy Sean Fleming: I move amendment No. 32:

In page 58, before section 68, to insert the following new section:

“68.—Any inquiry or committee of inquiry established under this Act shall have the power to request the Government to waive Cabinet confidentiality in relation to matters being inquired into by that committee.”.

This amendment is essentially to give the inquiring committee power to request the Government to waive Cabinet confidentiality in relation to matters being inquired into by that committee. It is not saying that the Government should waive Cabinet confidentiality, or that Cabinet confidentiality should not exist. It is just giving the committee power to make such a request. This amendment does no more than allow the committee to write a letter to the Secretary General to the Government asking the Government to waive Cabinet con-

fidentiality. The Government can choose not to do so and the Attorney General can say it is not allowed. However, I believe that for a committee not to be able to ask this question would show it in a very weak light. If a government chooses not to provide information, that decision should be part of the committee's proceedings. It is important that the Government should be able to assist a committee in matters that are being inquired into.

I would like a response to that first point, which I will develop subsequently when I hear the Minister's reply.

Deputy Stephen S. Donnelly: My amendments deal with the same issue. It might be useful, particularly for matters such as the banking inquiry, to be able to access Cabinet materials. I suppose the Attorney General would have an opinion on this, but we are certainly coming close to the constitutional article on this issue. Article 28.4.3° states:

The confidentiality of discussions at meetings of the Government shall be respected in all circumstances save only where the High Court determines that disclosure should be made in respect of a particular matter -

i in the interests of the administration of justice by a Court, or

ii by virtue of an overriding public interest, pursuant to an application in that behalf by a tribunal appointed by the Government or a Minister of the Government on the authority of the Houses of the Oireachtas to inquire into a matter stated by them to be of public importance.

The latter provision is the relevant one here. There is an issue where the High Court may need to determine it, but my reading of this Article as a lay person is that where the Houses of the Oireachtas have deemed an inquiry is in the public interest - which, hopefully, any of these committees would be - Cabinet or Government confidentiality would be waived.

Deputy Brendan Howlin: Deputy Donnelly has read out the new constitutional provision. Article 28.4.3° was inserted in the Constitution following the judgment of the Supreme Court in the Attorney General v. Hamilton case, deriving the principle of Cabinet confidentiality from the general principle of collective responsibility in Article 28.4.2°. Up to that point, there was an absolute prohibition on giving any information on discussions or papers at Cabinet. The purpose of the amendment was to establish exceptions to the absolute principle identified in the Supreme Court judgment to allow for disclosure of Cabinet discussions in the two instances referred to, rightly, by Deputy Donnelly. This is a constitutional issue and it is not open to us to vary or amend the provision. The High Court can only make a determination in a case where it is in the interests of the administration of justice by a court. Obviously, this does not meet that criterion. The High Court can also make a determination by virtue of the overriding public interest pursuant to an application in that behalf by a tribunal appointed by the Government or a Minister of the Government. This will not be a tribunal so appointed and we would need to amend the Constitution to capture what the Deputy intends. That is the formal advice I have.

Chairman: I want to get my head around this. Let us say there was a proposal to investigate an issue relating to a particular disability and to ask what the policy thinking was and what Cabinet consideration was given. What is the constitutional position with regard to calling in the Minister for health who was in office at the material time to discuss the Cabinet or depart-

mental thinking? Does one have to distinguish specifically between Department thinking and Cabinet thinking?

Deputy Brendan Howlin: I have been involved in a number of tribunals of inquiry, including, for example, the tribunal on blood contamination. There is no issue with going through all the policy issues and what was done in a Department in relation to such matters. There would not be an issue either with regard to the issues the Chairman mentions. What is protected is Cabinet documentation and Cabinet discussions. It is an important principle upon which we should not trample readily. The Cabinet must be free to discuss. As the Constitution provides that the decisions of Cabinet are the collective decisions of every member, the fact that one trenchantly opposed something at Cabinet cannot be exposed subsequently. It should not be exposed subsequently because the Cabinet decision is one's own decision unless one resigns. That allows for the robustness of real Cabinet debate, which is why the protection is there. There will be no impediment, however, to conducting the type of inquiry referred to by the Chairman as a result of that particular rule.

Deputy Sean Fleming: I understand what is in the Constitution, from which Deputy Donnelly read. It refers to discussions only and not to papers. We are very clear that the amendment to the Constitution set out in Article 28.4.3° refers to the confidentiality of discussions and does not protect papers to the same extent. There is an exception where there is an application by a tribunal appointed by the Government or a Minister of the Government on the authority of the Oireachtas. It does not cover inquiries, but it covers tribunals. We are saying before we start that an inquiry carried out under the legislation will have fewer powers than a tribunal, by definition.

Deputy Brendan Howlin: No. Only in so far as-----

Deputy Sean Fleming: In relation to Cabinet. The banking inquiry is about Government discussions.

Deputy Brendan Howlin: We cannot change the Constitution.

Deputy Sean Fleming: Then we are agreed on that.

Deputy Brendan Howlin: No. It is different from a tribunal of inquiry but certainly not in any way less robust, in my judgment. Nothing that is required will not be furnished by Ministers in relation to matters that are subject to inquiry. That is my view.

Deputy Sean Fleming: I tabled the amendment in a bit of a rush last week. It deals with Cabinet confidentiality but what I mean to get at is the legal privilege normally claimed in respect of the Attorney General's advice. That cannot be discussed now and I will come back to it on Report Stage. I am thinking of a specific case. I looked with disquiet at an aspect of the draft report of the Moriarty tribunal into the mobile phone licence. At that tribunal, Ministers, including John Bruton, Deputies Hogan and Quinn and others, gave evidence. I am a bit scathing of civil servants on this - the permanent government, as I call them. The permanent government had no problem with all politicians being hung out to dry. When the draft report was produced and certain public officials did not come out in a good light on foot of a bit of criticism, the permanent government managed to get the elected Government to waive the legal privilege of the Attorney General's advice as set out in the Nesbitt opinion. That was covered extensively. The purpose was to allow the officials who were not coming out in a good light in the draft report to say they were following the Nesbitt opinion, which was privileged legal advice. They

would not have dreamed of asking the Government to waive legal privilege in respect of the Attorney General's advice had it been to protect a member of the Government. Once it was affecting a member of the permanent, unelected Government, they were very quickly able to get the elected Government to waive the legal privilege.

I want the same procedures to be available, at a minimum, in respect of tribunals of inquiry that we saw exercised before the Moriarty tribunal. It will not conflict with anything here. I will be coming back with a refined amendment dealing with the waiving of privilege in respect of the legal advice from the Attorney General, as we saw happen in the interests of protecting public servants.

Chairman: Let us cleave this issue into two separate things. We are dealing with the nub of the referendum that was not passed last year. This is the type of issue that orbits around that. I return to the earlier hypothetical situation of the investigation of an issue concerning a particular disability by an Oireachtas committee, which would ask questions of the Minister of the day. Departmental decisions of the Minister and Cabinet decisions reflective of the issue will have been made. Would it be admissible to ask a Minister what information was available to him in the making of a decision? That is not a question of Cabinet confidentiality as I understand it. If the information available to the Minister ends up before the Cabinet, does it become subject to Cabinet confidentiality?

Deputy Brendan Howlin: Most Ministers will answer questions very frankly.

Chairman: I am trying to tease out the detail, as this is going to be a very-----

Deputy Brendan Howlin: We see a difficulty where none will arise. Cabinet confidentiality is a privilege that must be invoked. There will be a very great reluctance to invoke it on the part of any Minister. We cannot interfere with it, however, because it is a constitutional provision.

Chairman: Is it the default position that a person ends up pleading the fifth and saying that he or she cannot answer a question as to do so would breach Cabinet confidentiality?

Deputy Brendan Howlin: It would draw more light upon the individual who did it.

Chairman: That is not the question I am asking, with respect. If a Minister or former Minister were to come in here under an investigation or inquiry, is it within his or her discretion to answer a question with regard to what actually happened in Cabinet? While he or she can invoke Cabinet confidentiality, is the default position that even if he or she might like to tell the committee what happened, he or she cannot?

Deputy Brendan Howlin: It is not constitutionally permissible, unless the High Court makes a determination in accordance with the amended Article, for a member to say "This is what happened at Cabinet".

Deputy Mary Lou McDonald: The more significant difficulty is not the revelation of discussions but rather the documentation and the paper trail. Let us imagine a sequence of events in whatever scenario is being pieced together. One will be trying to get under the skin of what happened and why. That will be hugely problematic. The legislation represents a vigorous assertion of confidentiality, particularly when one reads section 68, which provides that a committee shall not direct a person to give evidence or a document relating to discussions at a meeting of the Government or a committee appointed by Government. It is very restrictive. It

says the committee shall not direct a person to give evidence or a document. It then goes on to talk of discussions at a meeting of the Government or a committee appointed by Government. It is very restricted.

Deputy Brendan Howlin: That is simply to reflect the constitutional position.

Deputy Mary Lou McDonald: I understand, but-----

Deputy Brendan Howlin: The general view is that once the Cabinet has disposed of an issue, all the documentation that emerges from Cabinet is public.

Deputy Mary Lou McDonald: The reason I raised this issue is that in the course of the discussion the Minister pointed to the fact that Cabinet confidentiality must be invoked, but no invoking is required here under section 68. It is very prescriptive and tells any inquiry exactly where it cannot go.

Deputy Brendan Howlin: That is a general prescription that any inquiry must deal with under the constraints of the Constitution.

Deputy Mary Lou McDonald: That is a problem for-----

Deputy Brendan Howlin: No; we need to lay out the ground rules to say this is what one cannot do. The scope that is not circumscribed here is huge and I have no difficulty with this.

Deputy Stephen S. Donnelly: I do not understand how Cabinet confidentiality must be invoked if the default position is that one is not allowed talk about it. Perhaps I am misunderstanding it, but my understanding is that it does not have to be invoked because the Minister, as a member of Government, could not share information regardless of whether he wanted to. Therefore, it does not have to be invoked. It is the default position.

Deputy Brendan Howlin: I cannot imagine any skilled parliamentarian asking me who supported something at Cabinet or what we discussed at Cabinet. He or she would ask the question in a much more skilful way that would not fall foul of that.

Deputy Stephen S. Donnelly: So the default position is that they cannot tell one anyway, rightly or wrongly. Therefore, the question is why this section is in here. As I read the constitutional section, it refers to the High Court determining that disclosure should be made by virtue of an overriding public interest pursuant to an application on that behalf by a tribunal appointed by a Government or a Minister of the Government on the authority of the Houses of the Oireachtas to inquire into matters stated by them to be of public importance. One can read that in two different ways. One can read it as pursuant to an application from a tribunal appointed by either a Government or a Minister of Government on the authority of the Houses of the Oireachtas or as pursuant to an application from the tribunal or a Minister of the Government. That is a technical issue and I am sure there is legal opinion-----

Deputy Brendan Howlin: There is nothing technical about it. One cannot rewrite it. It does not refer to a tribunal, full stop, or a Minister. It refers to an application on that behalf by a tribunal appointed by the Government or a Minister of the Government.

Deputy Stephen S. Donnelly: Yes, and one can read it as pursuant to an application on that behalf by a tribunal appointed by the Government or a Minister of the Government on the authority of the Houses of the Oireachtas.

Deputy Brendan Howlin: It is a tribunal. That is crystal clear. I remember the discussion of the amendment. The only two cases which were put to the people in the referendum that could weaken the total protection of Cabinet confidentiality under the Constitution were where the administration of justice by a court required it or pursuant to an application by a tribunal of inquiry established by a Minister or the Government. Those are the two ways in which a tribunal of inquiry can be established.

Deputy Stephen S. Donnelly: That is helpful.

My final question is this: if the default position is clearly that a member of Government says he or she cannot answer a question, what is the point of section 68?

Deputy Brendan Howlin: It is reciting the constitutional constraints within which tribunals operate. That is everything we have done. We have replicated lots of constitutional provisions in this because we want to set out the clear constitutional framework of what is and is not permissible in one single Act.

Chairman: It is a bit like “Countdown” at 3.30 p.m. on Channel Four. I get the advice and then I talk about proper English. It is not a conjunctive clause. It does not have two commas so the Minister can only engage in this with the permission of the House and cannot do it at his or her own instigation. If the Deputy reads it as a conjunctive clause, it will say that the Minister can do it on his or her own, but it is not a conjunctive clause. I will give credit to somebody else sitting beside me, as that is not my own wisdom, but if that job on “Countdown” comes up, I will put in an application.

Amendment, by leave, withdrawn.

SECTION 68

Amendments Nos. 33 and 34 not moved.

Deputy Brendan Howlin: I move amendment No. 35:

In page 59, subsection (1)(f)(iii), to delete lines 25 and 26 and substitute the following:

“prejudice the tax and duty collection, audit and enforcement systems, and”.

Subsection (1)(f) provides that a committee shall not direct a person to provide information kept for the purposes of assessing the liability of any person in respect of a tax, duty or other payment due to the State. This section is based on subsection (5)(1)(f) of the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act, 1997. However, while there was a blanket exemption in the 1997 Act, the current Bill provides for a number of tests to be met, including the weighing of the public interest, in determining whether the information should be provided to the committee. I am proposing an amendment to section 68(1)(f)(iii) to further clarify the prejudicial effect that section seeks to protect.

Amendment agreed to.

Deputy Brendan Howlin: I move amendment No. 36:

In page 59, subsection (2), line 31, to delete “or (f)” and substitute “or (b)”.

This is a technical amendment.

Amendment agreed to.

Question proposed: "That section 68, as amended, stand part of the Bill."

Deputy Sean Fleming: The point I am making here-----

Deputy Brendan Howlin: Where are we?

Deputy Sean Fleming: We are dealing with section 68. It concerns the points we have been talking about, namely, confidentiality and waiving legal advice. I have a difficulty with subsection (1)(d), which states that a person shall not attend if the evidence or document could, if given to the committee, reasonably be expected to adversely affect the security of the State to be prejudicial to the State in its relations with other states. The bank guarantee had major implications. When one is part of the eurozone, any decision one makes about banks in the eurozone has implications for our relations with other states. I believe this section is wrong because, by including that provision, it could close down an inquiry into anything concerning any bank, or it could close down any inquiry that has an impact on matters relating to other states. I am making my point quite clear.

Could the Minister explain his argument regarding subsection (1)(f), under which the committee cannot seek information for the purpose of accessing the liability of a person to pay tax, such as the property tax? If somebody owes money due to an outstanding accident and emergency bill, why can we not know about it? Why is that listed there?

I am against the provision on the basis that it is too broad-ranging, as anything could be said to affect our relations with some state. One could close down everything in the country under this subsection.

Deputy Brendan Howlin: Basically, we are repealing the 1997 Act, which is the base Act regarding the compellability powers that all committees have. Everyone refers to it as the 1997 Act. All this does is to replicate what was done in 1997.

Deputy Sean Fleming: I still oppose it.

Deputy Stephen S. Donnelly: I have not seen it, but this is a fantastic point concerning the bank inquiry. There is documentation I would love to see that one could reasonably argue would really annoy the Germans.

Deputy Brendan Howlin: I am sure the Deputy could craft a suitable amendment between now and Report Stage.

Deputy Stephen S. Donnelly: I could, but it would not be accepted. Were the Minister to craft one, it would be accepted. Seriously, it is a fantastic point. Will the Minister take it under consideration?

Deputy Brendan Howlin: I will reflect on the point made.

Question put and declared carried.

Chairman: I propose that we take a break for five to ten minutes after we complete consideration of section 69.

Deputy Sean Fleming: Is it possible to complete our consideration of the Bill tonight?

Chairman: It is.

Deputy Sean Fleming: We have completed most of the amendments. It would be preferable to finish rather than come back tomorrow morning.

Deputy Brendan Howlin: We could be finished in five minutes.

Deputy Sean Fleming: There is 30 minutes of work remaining. We can take the break and then complete our consideration.

Chairman: We will take a ten minute break.

SECTION 69

Question proposed: "That section 69 stand part of the Bill."

Deputy Sean Fleming: I oppose section 69 on the same basis as my opposition to section 68. I am concerned about the provision allowing a person to refuse to give evidence or supply information if he or she believes it impacts on section 68(1)(d) or (e). If the person refuses, the committee shall, if necessary, adjourn proceedings. The person can get a letter from a Minister to back up his or her point and the committee is stopped in its tracks. Under paragraph (b), the same can happen in respect of a Garda inquiry if the DPP or the Commissioner issues a letter. There is no mechanism for appeal by the committee to the Minister. We have seen this on two occasions recently in the Committee of Public Accounts. The Minister advises us this provision replicates those of previous Acts. I am worried about that because I have seen the previous Acts being abused on two occasions this year. One one occasion when a Secretary General did not want to speak about the Dublin Docklands Development Authority she simply sent a letter backed by the Minister and we were stopped in our tracks. On another occasion, we were investigating a case of over-expenditure on an office for the Probation Service in north Dublin and a dispute with a landlord. The Chief State Solicitor was due to appear before the committee but was not happy to discuss the issue even though it had been in a public forum since the Comptroller and Auditor General had issued a report on it last September. The night before she was to appear before the committee she commenced legal proceedings and then told us she could not discuss the issue on that basis. She contrived to frustrate the committee.

Deputy Brendan Howlin: The Deputy should be careful in what he says.

Deputy Sean Fleming: I am very careful because I said it to her directly. Fortunately, the Secretary General of the Department, who was present, took a slightly more balanced view of the matter and we got some information. I have seen this type of provision being abused by officials of the State, thereby preventing the Committee of Public Accounts from doing its legitimate work. If this section replicates the existing powers, the same thing can happen. A committee could be 18 months into an inquiry when a Secretary General decides he or she does not want to co-operate and gets a Minister to sign a letter in order to close the inquiry. I am not happy with this section.

Deputy Brendan Howlin: The Deputy will be aware that we must make provision to protect the security of the State, international agreements and the conduct of legal proceedings. There are clear separations of power and if somebody is in the midst of legal proceedings, we cannot conduct a parallel investigation. The issue arising is whether the exercise of that power is to be reviewed. I will reflect on that issue between now and Report Stage.

Question put and declared carried.

Sitting suspended at 8.45 p.m. and resumed at 8.55 p.m.

Sections 70 to 82, inclusive, agreed to.

SECTION 83

Question proposed: "That section 83 stand part of the Bill."

Deputy Sean Fleming: This section replicates section 68. Maybe it is to do with an inquiry under a different section. Could the Minister clarify that for me? I oppose the section for the exact same reason I opposed section 68, which was about upsetting our foreign neighbours. Sections 83 and 84 seem very similar to sections 68 and 69.

Deputy Brendan Howlin: The previous section dealt with Part 2 inquiries; this deals with normal inquiries.

Deputy Sean Fleming: What does the Minister mean?

Deputy Brendan Howlin: Normal Oireachtas business.

Deputy Sean Fleming: So this applies to every other current committee as well. We are saying the committee of inquiry established under that will flow from this. We will not have one scintilla more power than any of the other Oireachtas committees.

Deputy Brendan Howlin: No; that is not true. It sets out procedures and sets out how an inquiry will be conducted. This is just the constraint on-----

Deputy Sean Fleming: It is the same constraint that applies to others, by definition.

Deputy Brendan Howlin: Yes; the constraints are the same.

Deputy Sean Fleming: Okay.

Question put and declared carried.

SECTION 84

Question proposed: "That section 84 stand part of the Bill."

Deputy Sean Fleming: I oppose this for the same reason I opposed section 69.

Question put and declared carried.

Sections 85 to 89, inclusive, agreed to.

SECTION 90

Chairman: Amendments Nos. 37 to 39, inclusive, are related and will be discussed together.

Deputy Stephen S. Donnelly: I move amendment No. 37:

In page 72, subsection (1)(b)(i), line 39, to delete "not".

What I am trying to achieve with these amendments is to allow civil servants to ex-

press an opinion on policy. For the future, for committees such as those we are discussing, it is very important. I appreciate it is long-standing, and presumably legal, practice that State employees do not give opinions at committees on Government policy.

I see why this is the case but, specific to committees of inquiry, an interesting case can be made to waive this and allow them give opinion. I am sure it applies to many, but I have in mind in particular the banking inquiry. It would be very useful, in the public interest and in the interest of the Oireachtas, for us to be able to ask State employees for their opinion on the policy that was being pursued at the time.

Deputy Brendan Howlin: In drafting the programme for Government both parties determined that we needed to ease the restriction on civil servants, and this section reflects what was agreed. It permits a civil servant to give evidence for the purpose of establishing facts and giving the committee a factual account of a matter. Deputy Donnelly wants to go further and allow civil servants give their views on policy. Civil servants are not accountable for policy. If one is sitting with a group of civil servants one might get a variety of contradictory or countervailing views. Bluntly, and with all due respect to senior civil servants, their policy views do not matter because they are not elected. The only person whose policy view matters is the relevant Minister whose policy can be implemented and who is accountable to the House for this policy position. I remember a former colleague of Deputy Fleming's was very strong in this regard. There was a view that if one did not implement a civil servant's policy platform one was somehow at fault. Civil servants are entitled to a viewpoint and to have robust discussion, and this strong policy debate should properly happen in a ministerial office and in a Department, but ultimately a Minister decides and is accountable for this decision. It is hit and miss. One could have three different assistant secretaries with different views on an issue but it does not matter. What is important is that they are required and enabled to give a factual account of matters and give evidence on how policy was formulated, but not give their view on policy.

Deputy Stephen S. Donnelly: I appreciate this but I disagree that their opinion does not matter. To give the banking inquiry as an example, some State employees were present and had expert opinion and inside opinion. A committee of inquiry might call an expert and ask his or her opinion and it would be argued his or her opinion matters. I understand what the Minister stated but I see no downside to a committee of inquiry being able to ask for the opinion of a State employee. I fully accept that this would not be about holding State employees accountable for this policy, which is the crux of what the Minister stated, as the Government of the time would be held accountable.

Deputy Sean Fleming: In law the Minister is the Department. A Department does not have two heads so one cannot have a Minister with one view and somebody else in the Department with a different view. I accept this and it makes for common sense. If an inquiry is being held and we accept civil servants cannot comment on the policy, how can they help the committee in its consideration of what went on? Surely they would have put various policy options. They may not have agreed with the options, and they may not have reflected their individual positions, but they may have tabled them as being worth considering. For me it would be important to know what was presented to the Minister by way of options and not which was the favourite option of a civil servant. I would like to see how they provide information. It comes back to the paper trail. Depending on its nature, some of this information is obtainable under the freedom of information legislation. There is nothing wrong with the public seeing the documents sent to a Minister in the run-up to a budget outlining various approaches that could be considered. This would help us, and not just the elected Government, understand the preparedness of senior State officials at the Department of Finance, the Central Bank and the Financial Regulator. If it

transpired they had no options to offer the Government at a key point it would be an observation in its own right, or if they tabled several options, some of which were valid but were ignored, it would give us a better understanding of how the system operated.

Deputy Mary Lou McDonald: My reading of section 90 is that it would enable civil servants, who are the permanent government, to give a full and factual sequential account of what happened, including - and I ask the Minister to confirm this - the options that may have been considered and what was communicated by any person during the course of events. I understand the concern the Minister has with regard to witnesses coming before an inquiry who are shut down and unable to give full information. The clarification is with regard to where this factual account of options ends and where an expression of opinion as to whether the right or wrong option was selected begins. This is the issue.

Chairman: I will summarise and reinterpret this point. The responsibility for a decision is with the Government, and this section deals with the advice provided by senior civil servants and Secretaries General, as opposed to their opinions on the decision. It is about the advice they gave a Minister on an issue.

Deputy Brendan Howlin: Deputy McDonald is absolutely right, and it is clear in section 90. A civil servant, a member of the Permanent Defence Force or a garda may, if asked by a committee, gave a factual account of a matter, including evidence of anything said or communicated by any person during the course of events of which an account has been given. In essence, what informed the decision, which is what we really want to know, is fully available, and this includes the options. All that is prohibited is for a civil servant to state what his or her preferred view was or that the Minister was quite wrong. Information on all the background to the decision-making - who submitted evidence, who was present and what options were discussed - is perfectly available.

Deputy Stephen S. Donnelly: I understand this and my question is what is the downside. I can see the advantage of giving opinion. What is the downside of allowing civil servants give opinion?

Deputy Brendan Howlin: It is not the role of civil servants to decide what is good policy or not; their role is to advise the Minister and once the Minister makes a decision it becomes the departmental view. One can disaggregate all that went into it and cross-examine the Minister on how he or she came to the conclusion when he or she had various other options, but one cannot ask a civil servant what he or she thought of it because it would fundamentally sunder the normal relationship between the Civil Service and the Government of the day, which is one of our strengths of democracy. I have served in Administrations where the immediately preceding Administration had a completely different policy, and I will give a small example of this. In 1993 I became Minister for Health. Within a month I deregulated condoms and repealed the daft legislation requiring a doctor's prescription. One month earlier, the official departmental line in answer to parliamentary questions had been to provide robust reasons one could not possibly have access to a condom without a doctor's certificate; one month later, the official policy was different and all of the replies to parliamentary questions and official utterances were in line with the new policy. This is what we need. Policy is determined democratically by the elected Government on the vote of the people and not by civil servants.

Amendment put and declared lost.

Deputy Stephen S. Donnelly: I move amendment No. 38:

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In page 73, subsection (1)(b)(ii), line 5, to delete “not”.

Amendment put and declared lost.

Deputy Stephen S. Donnelly: I move amendment No. 39:

In page 73, subsection (2)(a), lines 10 to 17, to delete all words from and including “and” in line 10 down to and including “policy,” in line 17.

Amendment put and declared lost.

Question, “That section 90 stand part of the Bill”, put and declared carried.

Section 91 agreed to.

SECTION 92

Question proposed: “That section 92 stand part of the Bill.”

Deputy Sean Fleming: The essence of this section is that, where a committee is of the opinion that the publication of a report could be expected to prejudice criminal proceedings, it can apply to the court for support or an injunction.

Deputy Brendan Howlin: Clearance.

Deputy Sean Fleming: Yes. The report would be published with the protection of the court. If someone commenced proceedings one or one and a half years after the committee started its work, the inquiry would be left swinging in the wind.

Deputy Brendan Howlin: No. For the sake of clarity, this section only refers to criminal proceedings. They could not be initiated by someone who wanted to thwart the inquiry deliberately. They could only be initiated by the Director of Public Prosecutions, DPP.

Deputy Sean Fleming: Is the Office of the Director of Corporate Enforcement comprehended under this section?

Deputy Brendan Howlin: No. The Director of Corporate Enforcement would apply to the DPP, who determines whether prosecutions should be taken.

Deputy Sean Fleming: Can the Revenue Commissioners take criminal proceedings?

Deputy Brendan Howlin: Only the DPP can take criminal proceedings.

Question put and agreed to.

Sections 93 to 100, inclusive, agreed to.

SECTION 101

Chairman: Amendments Nos. 40 and 43 are related and may be discussed together.

Deputy Brendan Howlin: I move amendment No. 40:

In page 81, subsection (2), lines 39 and 40, to delete all words from and including “or” in line 39 down to and including “both” in line 40 and substitute the following:

“(and irrespective of whether the definition of “private paper” provided for in such rules and standing orders overlaps, whether in whole or in part, with the definition of “private paper” in this Part)”.

Section 101 deals with qualified privilege in respect of the private papers of Members and confidential communications with Members. Section 109 deals with qualified privilege in respect of official documents of the Houses. Sections 101(2) and 109(2) clarify that nothing in Part 10 or 11 of the Bill shall be construed to prejudice the power of each House to make rules and Standing Orders pursuant to Article 15.10 of the Constitution to create a protection for private papers referred to in that article.

The purpose of the proposed amendments is to clarify further the power of each House to make such rules and Standing Orders irrespective of whether the definitions provided for in rules and Standing Orders overlap with the definitions in this Bill.

I felt strongly about this matter. Members may be aware that I journeyed my way through the Morris tribunal to the High and Supreme Courts. I was anxious to protect the private papers of Members, which are protected under the Constitution. We are restating that protection in this Bill. For the avoidance of doubt, that restatement in these sections is without prejudice to the constitutional right of the Houses to create whatever privileges they are entitled to under Article 15.10.

Deputy Sean Fleming: Does the Minister also mean Senators?

Deputy Brendan Howlin: Yes.

Deputy Sean Fleming: What are the implications if the Seanad no longer exists? The Minister cannot see down the road, but will Senators’ papers still be protected or will that provision be relevant?

Deputy Brendan Howlin: It will not be relevant after that.

Deputy Sean Fleming: Is it only relevant to the confidential papers of Members of the Dáil that exists at the time?

Deputy Brendan Howlin: Yes. The Constitution provides a privilege protecting those papers, but it does not amplify that privilege. As section 106(1) states: “Subsections (1)(a) and (3)(a) of section 102 shall apply to a former member who has not died as if the references in those subsections to “member” were references to “former member”.”

Deputy Sean Fleming: In layman’s English, will the Minister explain what he means by “papers”? Do they include representations to my constituency office, communications via the Oireachtas e-mail system, etc.? The Minister and former Deputy Jim Higgins received some documents.

Deputy Brendan Howlin: Yes. All documents that come to the Oireachtas are privileged unless they are set aside as not being privileged. The uniqueness of Oireachtas Members is that they have the right to receive communication from citizens without putting those citizens under hazard unless that communication interferes with the administration of law or criminal proceedings or is required by an investigation. This provision is not germane to the investigations, but it establishes the legal right to implement the protection of papers of Members of either House of the Oireachtas.

Deputy Sean Fleming: If a Member issued a defamatory letter, would it be legally protected?

Deputy Brendan Howlin: No. If a Member wrote to someone defaming him or her, the Member would have no protection. However, if the Member defamed him or her in the Chamber, the Member would be protected.

Amendment agreed to.

Section 101, as amended, agreed to.

SECTION 102

Chairman: Amendments Nos. 41, 42 and 44 are related and may be discussed together.

Deputy Brendan Howlin: I move amendment No. 41:

In page 82, subsection (2), lines 10 to 20, to delete paragraphs (b) to (d) and substitute the following:

“(b) the rights and interests of any member affected,

(c) the rights and interests of any other person who provided information to the member,

(d) the rights and interests of any other person to whom the paper relates,”.

Sections 102(2) and (4) and 111(2) set out the matters to which the court shall have regard in determining the disclosure of a private paper, confidential communication or official document to a court, tribunal or commission of inquiry. Under these subsections, the courts shall have regard to the rights and interests of certain persons.

The published Bill goes on to specify a list of examples of rights and interests that have already been determined by the courts, such as innocence at stake, the right to due process, the right to privacy and the operation of the democratic process. It would be preferable not to include such a non-exhaustive list in the Bill, but to leave it to the discretion of the courts to determine the appropriate rights and interests to be considered in each case. I am, therefore, proposing an amendment to the wording of section 102(2) and (4) and section 111(2) to give effect to this change.

Amendment agreed to.

Deputy Brendan Howlin: I move amendment No. 42:

In page 82, subsection (4), lines 43 to 47 and in page 83, lines 1 to 6, to delete paragraphs (b) to (d) and substitute the following:

“(b) the rights and interests of any member affected,

(c) the rights and interests of any other person who provided information to the member,

(d) the rights and interests of any other person to whom the communication relates,”.

Amendment agreed to.

Section 102, as amended, agreed to.

Sections 103 to 108, inclusive, agreed to.

SECTION 109

Deputy Brendan Howlin: I move amendment No. 43:

In page 85, subsection (2), lines 34 and 35, to delete all words from and including “or” in line 34 down to and including “both” in line 35 and substitute the following:

“(and irrespective of whether the definition of “official document” provided for in such rules and standing orders overlaps, whether in whole or in part, with the definition of “official document” in this Part)”.

Amendment agreed to.

Section 109, as amended, agreed to.

Section 110 agreed to.

SECTION 111

Deputy Brendan Howlin: I move amendment No. 44:

In page 86, subsection (2), lines 29 to 39, to delete paragraphs (b) to (d) and substitute the following:

“(b) the rights and interests of any person affected,

(c) the rights and interests of any other person who provided information to the House,

(d) the rights and interests of any other person to whom the document relates.”.

Amendment agreed to.

Section 111, as amended, agreed to.

Section 112 agreed to.

SECTION 113

Question proposed: “That section 113 stand part of the Bill.”

Deputy Sean Fleming: Will the Minister explain this? It indicates that if an inquiry is completed and the House is dissolved, this will not stop any ongoing legal proceedings.

Deputy Brendan Howlin: Section 113 contains offences relating to Part 11. Subsection (1) creates the offence of knowingly or recklessly disclosing an official document of the House in breach of the provision of this part. The offence may be committed by any person other than a Member. Subsection (2) makes it an offence for any person to publish an official document that has been disclosed in breach of this part. A person who publishes such a document is guilty

of an offence regardless of how he or she acquires the document. Subsection (3) sets out the sanctions, which are a class A fine in accordance with the Fines Act 2010. A fine not exceeding €5,000 is the penalty.

Deputy Stephen S. Donnelly: That is a fine of €500,000.

Deputy Brendan Howlin: That would be on conviction or indictment. A fine on conviction would be €5,000 and a conviction on indictment would be €500,000.

Deputy Stephen S. Donnelly: Will the Minister explain that?

Deputy Brendan Howlin: It would be if a person is prosecuted before a jury in the Circuit or High Court.

Deputy Stephen S. Donnelly: For this offence.

Deputy Brendan Howlin: Yes. It would have to be an extraordinary breach that would have a catastrophic result or damage. That an act would merit prosecution at that level would be determined by the Director of Public Prosecutions.

Deputy Stephen S. Donnelly: The fine and prison sentence are pretty steep. Are these standard with other similar offences?

Deputy Brendan Howlin: There are categories of offences under the Fines Act 2010.

Deputy Stephen S. Donnelly: So it is in line with other similar offences.

Question put and agreed to.

SECTION 114

Question proposed: "That section 114 stand part of the Bill."

Deputy Sean Fleming: This deals with evidence on oath but what is meant in this respect? With somebody who does not believe in swearing on the Bible, what alternative mechanisms are provided for? I can think of a Member who recently had to swear something other than an oath.

Deputy Brendan Howlin: Section 2 deals with definitions, including that of an oath, which includes an affirmation. I am informed it is in the Bill but I cannot see it myself. In any event, it is carried by the definition of "oath" in the Interpretations Act.

Chairman: Perhaps for drafting purposes it could be corrected on Report Stage.

Deputy Brendan Howlin: I do not know if we can move definitions, as they may appear in certain sections. I agree it is not the easiest to read.

Deputy Stephen S. Donnelly: It seems quaint. What is the point of being able to compel people to take an oath?

Deputy Brendan Howlin: For many people it is rather important and it means much for a significant number of people to put their hand on the Bible and swear on it. We have all seen cases where people could put their hands on a stack of Bibles and be unaffected but the process

is still done in the courts.

Deputy Stephen S. Donnelly: I understand it is still in the courts but it seems bizarre to do it in a committee. Are there precedents where people have come to the Oireachtas and sworn on Bibles?

Deputy Brendan Howlin: I cannot think of one. The Abbeylara inquiry was a sworn inquiry and it is the norm for tribunals of inquiry. It underscores the seriousness of what is being embarked upon; it is not a conversation but rather formal evidence giving.

Deputy Stephen S. Donnelly: What happens if somebody does not recognise-----

Chairman: I am sure there will be a Koran-----

Deputy Stephen S. Donnelly: Yes. In all seriousness, does a witness get to choose a holy book?

Deputy Brendan Howlin: Yes, and one can affirm if he or she has no religious affiliation.

Deputy Stephen S. Donnelly: What happens in that case?

Deputy Brendan Howlin: The person would promise to tell the truth under the Constitution.

Deputy Stephen S. Donnelly: Okay. I thank the Minister.

Deputy Mary Lou McDonald: Unlike Deputy Donnelly, I see the merit in that tried and tested formula. Section 115 indicates that a witness before a committee may be required by the committee to give his or her evidence to the committee on oath. The committee would make that decision on the basis of the gravity or centrality of the evidence being brought. How is the distinction made?

Deputy Brendan Howlin: It is an open issue. The committee could determine that for a particular module, all witnesses would be required to swear up, to use a legal term. It underscores the gravity of the matters to be investigated and the testimony being given by somebody. There is levity about the matter but it is important and it is normal in the courts.

Deputy Mary Lou McDonald: What happens if a witness refuses to take the oath or give evidence in that respect? There are sanctions for taking the oath and giving wrong information.

Deputy Brendan Howlin: It is a legal imperative and the indication is that a witness before a committee may be required by the committee to give his or her evidence under oath. I presume there is a sanction for somebody who obstructs the process. Part of this would arise from a determination on the quality of evidence, legal representation and costs etc., as well as anything regarded as an obstruction of the work of the committee.

Deputy Mary Lou McDonald: Will the Minister clarify if there is a sanction?

Deputy Brendan Howlin: I am sure there is.

Deputy Mary Lou McDonald: I imagine that for inquiries where an oath is required by the committee, it would underscore the seriousness of the matter.

Deputy Brendan Howlin: I will write to the Chairman in advance of Report Stage with the

answer to the question.

Question put and agreed to.

Section 115 agreed to.

SECTION 116

Question proposed: "That section 116 stand part of the Bill."

Deputy Stephen S. Donnelly: Section 114 becomes very serious because section 116 says that if one has taken an oath and then knowingly or recklessly gives evidence which is false or misleading, one can suffer very serious consequences, including the possibility of a fine of €0.5 million and/or five years in prison. There is nothing quaint about that. In that context, Deputy McDonald's point is even more pertinent.

Deputy Brendan Howlin: I shall respond to the point made by Deputy McDonald later.

Deputy Stephen S. Donnelly: If the sanction is light-----

Deputy Brendan Howlin: To put it bluntly, if somebody says he or she is not swearing up, that is not as damaging to the committee's work as somebody who swears up and then tells a pack of lies.

Deputy Stephen S. Donnelly: Hence, the Minister is applying the potentially very serious sanctions under section 116 to someone who is under oath but-----

Deputy Brendan Howlin: They will apply to somebody who swears up and then tells a pack of lies. It would be a matter for the DPP to determine whether a summary case should be taken, which would imply a fine in the lower court, that is, the District Court or whether the evidence was so egregious and the damage done so horrendous that it would require a jury trial before the Circuit or High Court, implying a term of imprisonment or a very substantial fine.

Chairman: How would that work in practice, given that a committee can only make findings of fact? To find that someone had been disingenuous or baldly lying before the committee is a value judgment. Is it that the committee would make a recommendation to the DPP that the matter needs to be investigated and that the DPP would make the value judgment?

Deputy Brendan Howlin: Yes.

Deputy Stephen S. Donnelly: This is a serious issue. I find it a little odd that if one promises to tell the truth and then misleads the committee, one can find oneself in jail but if one does not make that promise - it is merely implicit that one is going to tell the truth - one will not face the prospect of jail or a hefty fine. I find it odd that the consequences are so different, based on whether one promises to tell the truth and does not, as against not promising and also not telling the truth. Is there any offence if a person knowingly or recklessly gives evidence which is false or misleading if he or she has not taken an oath?

Deputy Mary Lou McDonald: I think it is similar.

Deputy Brendan Howlin: It is the same thing.

Question put and agreed to.

Sections 117 to 119, inclusive, agreed to.

SECTION 120

Question proposed: "That section 120 stand part of the Bill."

Deputy Sean Fleming: This section deals with offences by a body corporate, namely a business or a company. Lots of banks, for example, are companies and, in that context, how strong is this section? Perhaps the issue is dealt with in other sections of the legislation, but the references to banks and corporate organisations in the Bill seem to be very light, in terms of sanctions. A fine of €500,000 for an individual is very serious but for one of the major banks, a fine of that magnitude might represent 33 minutes worth of interest on a loan account. It is not very severe. I would suggest body corporates should be dealt with far more seriously than individuals because for many big businesses €500,000 is a drop in the ocean.

The DIRT inquiry uncovered the biggest tax fraud in the history of the State by AIB, involving deliberate falsification of customer account information. AIB bank ended up paying almost €100 million in unpaid DIRT but it used its corporate power to prevent Revenue from pursuing it for interest and penalties, which Revenue was entitled to do, by threatening to go to court and all the way to Europe, if necessary. In that way, Revenue faced the prospect of years of legal battles with no guarantee that it would get the money in the end. AIB ended up getting away with paying a relatively small amount in interest and penalties. If a company is before a committee of inquiry which is guilty of tax fraud to the tune of millions, potentially, a fine of €500,000 is buttons. I ask the Minister to consider this. A fine of that level is of no consequence to many large businesses. I would like to see far more serious sanctions.

As I understand it, the sanctions for individuals are a fine of €500,000 and/or a period in jail-----

Deputy Brendan Howlin: Five years.

Deputy Sean Fleming: There needs to be a parallel sanction for companies. I would say, for example, that a bank should lose its licence for five years. If a person is going to go to jail for five years for falling foul of this legislation, he or she is being taken out of commission, so to speak. A body corporate should suffer similar consequences and forfeit its tax clearance, its licence or some such for the same period of time, in lieu of going to jail. A body corporate cannot be sent to jail. There should not be one rule for the small people and another for the big guys.

Chairman: The difficulty with a bank losing its licence, for example, is that it would have very serious repercussions for staff, customers-----

Deputy Sean Fleming: I understand that it is very serious but-----

Chairman: Staff would lose their jobs. It might be possible to do something regarding the board of directors-----

Deputy Sean Fleming: Perhaps we could disqualify the entire board of directors and top levels of management-----

Deputy Brendan Howlin: We need to be clear on this issue. Deputy Fleming is talking

about two different things. These penalties are for obstructing a proper inquiry. They are not penalties for being a tax defaulter, for example. There is tax law in place to deal with tax defaulters and tax defaulters must be prosecuted through the courts in the normal way. The penalties and the creation of offences here refer only to the obstruction of the work of the Oireachtas in conducting inquiries. The penalties for corporate bodies parallel the individual penalties. Section 120 provides that “if the offence is attributable to any wilful neglect, of a person who was a director, manager, secretary or other officer of the body corporate, or a person purporting to act in that capacity, that person, as well as the body corporate, is guilty of an offence and may be proceeded against and punished as if he or she were guilty of the first-mentioned offence”. The directors, secretary or officers of a corporate body would be acted upon if that corporate body wilfully gave wrong evidence or obstructed the work of the committee in the way we have outlined in the Bill. If there was a consequent discovery of tax fraud or any other criminal activity, that would be pursued in the normal way by the DPP.

Deputy Stephen S. Donnelly: What sort of offence under this Act could a corporate body commit, as opposed to an individual from that corporate body?

Deputy Brendan Howlin: There could be a decision within a corporate body to frustrate us and send out various officers of that body to give corroborating, false evidence. That would be an offence by the corporate body itself.

Deputy Stephen S. Donnelly: Would it not just be an offence by the officers?

Deputy Brendan Howlin: It would be an offence by every individual who did it but it might not only be an offence by the person who is the witness, if that person was acting on the directions of the board of directors to give false information or to submit false documentation.

Deputy Stephen S. Donnelly: So the inquiry would make two findings - first, that the person who gave false evidence had committed an offence and second, that the corporate body had also committed an offence.

Deputy Brendan Howlin: Yes.

Question put and agreed to.

Sections 121 to 123, inclusive, agreed to.

SECTION 124

Question proposed: “That section 124 stand part of the Bill”.

Deputy Sean Fleming: Earlier we had a discussion with the Information Commissioner. In this legislation, the Minister proposes to exclude records in respect of inquiry into the business of the committee. Will the Minister talk through this section for me, given that although he is an exponent of freedom of information he is seeking here to restrict it?

Deputy Brendan Howlin: This proposes to exclude from freedom of information investigation the processes of the actual inquiry, namely, the records or documentation created for the purposes of an inquiry. This is parliamentary business.

Deputy Sean Fleming: Is it the Minister’s opinion that FOI should extend to everybody bar us?

Deputy Brendan Howlin: The workings of an inquiry will have a wide range of data, etc., some of which will be excluded from consideration, and be weighed, parsed and analysed by the Oireachtas *qua* Oireachtas. I am certainly of the opinion that such process work should not be subject to FOI.

Deputy Sean Fleming: Even after the completion of a report and the dissolution of the Dáil?

Deputy Brendan Howlin: Once the report is completed, that is the official record and not its component parts. It would be an undermining of the parliamentary process for that to have to undergo the FOI process, be trawled through and so on. That is my judgment but we will hear the Deputy's views on Report Stage. He may wish to attack it.

Question put and agreed to.

Sections 125 and 126 agreed to.

SECTION 127

Question proposed: "That section 127 stand part of the Bill."

Deputy Sean Fleming: It is the same issue again, the directing of FOI. Does the Minister have a separate note on this section?

Deputy Brendan Howlin: I was strongly of the view, and argued it in the Supreme Court and the High Court, that the private papers should be protected. This measure protects the private papers of Members from FOI unless it is determined by a court that they are required for the administration of justice.

Deputy Sean Fleming: We have no problem with this. There was a report in the newspapers on our attendance, gained from the fobs or electronic attendance papers, which record our mileage and every time we use the fobs. Many records are published-----

Deputy Brendan Howlin: That is procedural and those are not private papers. It is up to the Oireachtas to determine what qualifies as private papers but there will be communications that should be privileged, as well as some that should not be determined to be private papers. The Oireachtas will set those rules.

Question put and agreed to.

SECTION 128

Question proposed: "That section 128 stand part of the Bill."

Deputy Stephen S. Donnelly: Will the Minister explain the section? What is it doing?

Deputy Brendan Howlin: This section provides that nothing in this Act prevents the giving of or compliance with a direction under section 3 of the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997 - the 1997 Act - or the possession, distribution, printing, publication or showing by either House of the Oireachtas a committee, within the meaning of that Act, or any person of child pornography for the purposes of, or in connection with, the performance of any function conferred by the Constitution or by law on the Houses of the Oireachtas or conferred by resolution of either of those Houses or resolutions of both Houses.

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In essence, we have very strict laws on showing child pornography. If, however, there was, for example, an inquiry into these matters, it might be an important part of the evidence to have seen very jarring evidence of that kind. The measure is to ensure it is permitted.

Chairman: That is understandable.

Question put and agreed to.

SECTION 129

Question proposed: "That section 129 stand part of the Bill."

Deputy Stephen S. Donnelly: Again, I ask for clarification. I realise we have almost finished.

Chairman: He is like Columbo - "Just one more thing."

Deputy Brendan Howlin: I am told this is consequential on repealing the 1997 Act. I can read the-----

Deputy Stephen S. Donnelly: The short version is fine.

Deputy Heather Humphreys: Read it all.

Deputy Brendan Howlin: This section provides that in section 17, subject to section 11(2) of the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997, and without prejudice to the generality, it shall be a defence to a defamation action for the defendant to prove that the statement in respect of which the action was brought was made in either House of the Oireachtas by a Member of either House of the Oireachtas - because Members have absolute privilege; contained in a report of a statement, to which paragraph (a) applies; made in the European Parliament by a Member of that Parliament; contained in a report of a statement, to which paragraph (c) applies; contained in a judgment of a court established by law; made by a judge, or other person, performing a judicial function; made by a party, witness, legal representative or juror in the course of proceedings presided over by a judge, or other person, performing a judicial function; made in the course of proceedings involving the exercise of limited functions and powers of a judicial nature in accordance with Article 37 of the Constitution, where the statement is connected with those proceedings; a fair and accurate report of proceedings publicly heard before, or decision made public by a court; established by law in the State or established under the law of Northern Ireland; a fair and accurate report of proceedings to which a relevant enactment referred to in section 40 of the Civil Liability and Courts Act 2004 applies; a fair and accurate report of proceedings publicly heard before, or decision made public by, any court or arbitral tribunal established by an international agreement to which the State is a party including the Court of Justice of the European Communities, the Court of First Instance of the European Communities, the European Court of Human Rights and the International Court of Justice; or made in proceedings before a committee appointed by either House of the Oireachtas or jointly by both Houses.

Deputy Stephen S. Donnelly: Now, is everybody not glad I asked the question? What is the short version? What is this in essence?

Chairman: When a committee meeting begins, the Chairman will say, "I wish to advise the witnesses that by virtue of section such and such, bracket 2, bracket, or (2)(1)..." That is what we are talking about.

MESSAGE TO DÁIL

Deputy Stephen S. Donnelly: Right. It allows that statement-----

Chairman: It sets out rules of privilege and the framework-----

Deputy Stephen S. Donnelly: Is it setting out rules of privilege during an inquiry?

Deputy Brendan Howlin: We are repealing the 1997 Act and are restating what privilege means.

Deputy Sean Fleming: We are repeating the 1997 Act in this Act. If we did not restate what we had deleted it would be lost.

Deputy Brendan Howlin: Correct.

Deputy Stephen S. Donnelly: Therefore, it allows for privilege in committees of inquiry.

Deputy Brendan Howlin: In the circumstances stated.

Deputy Stephen S. Donnelly: I thank the Minister.

Question put and agreed to.

Section 130 agreed to.

Schedule agreed to.

Title agreed to.

Bill reported with amendments.

Chairman: I thank the Minister's officials for attending the committee, the members for their co-operation in ensuring we concluded business today and the committee secretariat for facilitating us so late into the evening. I am sure tomorrow morning we will read about ourselves on the front pages in regard to all the parliamentary work we did today.

Message to Dáil

Chairman: In accordance with Standing Order 87 the following message will be sent to the Clerk of the Dáil:

The Select Sub-committee on Public Expenditure and Reform has completed its consideration of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Bill 2013 and has made amendments thereto.

The select sub-committee adjourned at 9.50 p.m. until 2 p.m. on Wednesday, 12 June 2013.