



# Spotlight

## The Decision of the Supreme Court in *Kerins v McGuinness* – Context and Implications

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### Abstract

This *Spotlight* aims to provide a comprehensive guide to the decision of the Supreme Court in *Kerins v McGuinness & Ors*. The *Spotlight* examines the history of Oireachtas committees, analyses the previous legal cases that informed the Supreme Court decision, before closely analysing the judgments themselves. The *Spotlight* will then explore some possible implications of the decision.

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## Executive Summary

The decision of the Supreme Court in *Kerins v McGuinness*, delivered in two parts in February and May of 2019,<sup>1</sup> has generated much comment and controversy. This Spotlight provides an overview of the decision, and is intended to assist Members in engaging with the decision in light of the implications of the decision for the Houses of the Oireachtas.

### History of committees, and previous legal challenges

Historically, the Oireachtas conducted relatively little business through its committees. This began to change in 1980s and 1990s, and reforms were enacted that saw an increasing role for committees. As a part of this, the 28<sup>th</sup> Dáil saw efforts to strengthen the capacity of committees of the Houses to inquire into matters of public concern. While the DIRT inquiry was an initial success in this regard, it was followed by the Abbeylara Inquiry. The Abbeylara Inquiry was held by the Supreme Court to have overstepped the legitimate function of the Houses of the Oireachtas.<sup>2</sup> The Supreme Court held that committees do not have the power to make findings of fact which impinge on the livelihood, good name or reputation of any person who is not a member of the Oireachtas. A referendum to amend the Constitution in a manner such as to effectively reverse the decision in *Abbeylara*, and to provide for wider powers to committees to conduct inquiries, was rejected in 2011. It was against this backdrop that *Kerins* was decided.

### The decision in *Kerins*

Angela Kerins was the CEO of the Rehab Group, a private charitable organisation. She was invited by the Public Accounts Committee to give evidence in relation to the expenditure of public funds by Rehab. Her appearance lasted for seven hours with one short break. It was noted in the High Court “that much of what was put to her...was damaging to her reputation personally and professionally”. Ms Kerins brought proceedings. The High Court refused her claim, holding that the constitutional immunity for Members in respect of utterances made in parliament prevented any judicial intervention.

The Supreme Court overturned, and held that the Constitution does not present an “absolute barrier” to bringing proceedings against a committee. This decision was based on a number of factors:

1. Delegated authority of committees

The Supreme Court held that Oireachtas committees are simply a guise of the Oireachtas itself, and therefore possess the same privileges and immunities under the Constitution. However, it held that the claim of committees to these immunities is significantly weakened where they act outside of the remit delegated to them. If a committee acts significantly outside its terms of reference, its immunity may effectively be lost.

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<sup>1</sup> [2019] IESC 11, and [2019] IESC 42.

<sup>2</sup> *Maguire v Ardagh* [2002] 1 IR 385.

## 2. Actions v utterances

The Supreme Court also drew a distinction between the actions of the committee as a whole and the utterances of individual Members. While it held that the actions of a committee as a whole can, in appropriate circumstances, be reviewed by the courts, individual Members have an absolute immunity for any utterance they make within the four walls of parliament.

## 3. Absence of internal remedies

The Supreme Court noted that there was no appropriate internal remedy available to Ms Kerins to vindicate her rights. The Court noted that if such a remedy were available, it would be significantly less likely to intervene.

## Limits of jurisdiction to intervene

While the Supreme Court therefore rejected that there exists an “absolute barrier” to the bringing of proceedings in respect of the actions of a committee, it emphasised that the Constitution “confers a wide scope of privilege and immunity on the Houses and their committees”.<sup>3</sup> Accordingly, it stated there were circumstances in which proceedings would not be entertained. The Court said that proceedings “cannot properly be brought” where it:

- (a) Would involve the Court in breaching the privileges and immunities expressly set out in Article 15 or in acting in a manner which would invoke a jurisdiction in respect of matters closely connected with those privileges or immunities; or
- (b) Would otherwise amount to an inappropriate breach of the separation of powers.

## Implications

While the judgment will certainly have implications for the work of committees, much of the impact of the decision will depend on the response of the Oireachtas to the decision, and in particular the comments of the Supreme Court in relation to the provision of internal remedies. The Court stated that it will only intervene where there is a significant and unremedied unlawful action on the part of a Committee. As the Court noted in the first judgment, “[i]f the Oireachtas provides some means of controlling the unlawful activities of its own committees then that fact would weight most heavily against it being appropriate for a court to intervene.”<sup>4</sup> In effect, the Supreme Court is suggesting that if the Oireachtas provides a mechanism through which a non-member could seek redress for the unlawful actions of committee, it would likely no longer be necessary or appropriate for a court to intervene to protect the rights of that non-member.

A Working Group has been set up to consider the judgment, and to identify how best to protect the rights of witnesses before committees in light of the decision.

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<sup>3</sup> *Kerins v McGuinness & Ors* [2019] IESC 11, para. 15.2(iii).

<sup>4</sup> *Kerins v McGuinness & Ors* [2019] IESC 11, para. 10.15.

**Box 1: Key takeaways from *Kerins*****Key takeaways from *Kerins***

- A committee of either or both Houses of the Oireachtas has the same constitutional privileges and immunities as the Oireachtas itself enjoys, where the committee concerned has had delegated to it a legitimate constitutional function of the Oireachtas.
- However, there is not an absolute barrier to taking judicial proceedings in respect of the actions of an Oireachtas committee.
- That being said, a court will not intervene if in doing so it would breach an express privilege in the Constitution (such as the privilege attached to official reports) or would be inappropriate having regard to the principle of the separation of powers as a whole.
- Neither will a court intervene if the Oireachtas itself provides for an adequate system of remedies for a person affected by the unlawful actions of a committee.
- No individual member can be made liable or answerable to a court for utterances made in the course of his or her parliamentary duties.
- The privilege attaching to utterances applies to non- Members before committees.
- However, the actions of a committee as a whole can be the subject of proceedings, and the court can declare an action taken by a committee to be unlawful.
- A court may declare the actions of a committee in the conduct of inquiry to be unlawful if, for example, it acts significantly beyond its terms of reference.
- A citizen who accepts an invitation to appear before an Oireachtas committee hearing is entitled to expect that that committee will act within the scope of its invitation. A court may declare the actions of a committee to be unlawful if, and insofar as, it acts significantly beyond the terms of an invitation to a witness.

## Introduction

Committees perform an important function in modern parliaments. They allow parliament to work on various issues simultaneously, and for parliamentarians to specialise in particular areas in the service of a particular committee. Some academic commentary suggests that they also reduce partisanship and encourage and facilitate cross-party collaboration on important issues.<sup>5</sup> At a general level, a strong committee structure reflects a parliament that does more than act as a pure legislature, voting yes or no to legislation proposed by the government. A strong committee system reflects a parliament that scrutinises and contributes to legislation, and holds the Executive to account.

This public accountability function is primarily pursued by Oireachtas committees, and by committee inquiries in particular. However, the scope of our parliament's constitutional authority to conduct committee inquiries has been a matter of debate and controversy since the Supreme Court's decision in *Maguire v Ardagh*, often known as '*Abbeylara*'.<sup>6</sup> In *Abbeylara*, the Supreme Court held that committees do not have the power to make findings of fact which impinge on the livelihood, good name or reputation of any person who is not a member of the Oireachtas. The decision is more nuanced than that bald statement, but in effect it seriously circumscribed the ability of Oireachtas committees to conduct inquiries that could lead to an adverse finding against a private citizen.

The decision was seen in political circles as limiting and regressive.<sup>7</sup> A referendum to amend the Constitution in a manner such as to effectively reverse the decision in *Abbeylara*, and to provide for wider powers to committees to conduct inquiries, was held in 2011. The proposal was rejected by a narrow margin. It was in this context that the Supreme Court delivered its decision in *Kerins v McGuinness & Ors* in 2019.<sup>8</sup> The judgment has implications for the work and procedures of Oireachtas committees, as well as for the constitutional principle of the separation of powers more widely. The judgment held that the Constitution does not provide an absolute barrier to the bringing of a case against a committee, where the committee acts unlawfully. It held that the PAC had acted beyond remit, and beyond the terms of the invitation issued to Ms Kerins, and hence unlawfully.

This *Spotlight* will primarily examine the following:

- The history of committees and committee inquiries in Ireland;
- The *Abbeylara* decision, and other background cases;
- The 2011 referendum and 2013 Inquiries Act;
- The decision in *Kerins*;
- The implications of *Kerins*.

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<sup>5</sup> Shane Martin, 'The Committee System' in MacCarthy and Manning (eds.) *The Houses of the Oireachtas: Parliament in Ireland* (IPA, 2010) p. 285, 287.

<sup>6</sup> *Maguire v Ardagh* [2002] 1 IR 385.

<sup>7</sup> Introducing the referendum Bill to reverse the decision, then Minister for Public Expenditure and Reform, Brendan Howlin TD, stated that "[t]he *Abbeylara* Supreme Court decision currently limits the ability of Dáil committees to hold full investigations into crucial issues of public concern" and went on to describe the power of the Oireachtas to conduct inquiries as "severely restricted" by the decision.

<sup>8</sup> [2019] IESC 11.

## History of Oireachtas committees

One of the primary functions of a parliament is to hold the Executive and its subsidiary bodies to account. This can be achieved in a somewhat all or nothing fashion by means of the facility of a no-confidence motion in the Government, or by the passage of legislation directing Government action. However, more responsive, everyday oversight of Executive functions can more effectively be achieved by procedures such as parliamentary questions and through parliamentary committees which are established for a particular purpose and which report to the House(s). Indeed, academic commentary suggests that the impact of a legislature on the actions of the Executive depends to a large extent on the strength of its committee system.<sup>9</sup> Committees also enable parliament to more effectively scrutinise legislation before it. Indeed, the National Democratic Institute for International Affairs defines parliamentary committees as “small groups of legislators who are assigned, on either a temporary or permanent basis, to examine matters more closely than could the full chamber.”<sup>10</sup>

The combination of a historically under-developed committee system, as well as the control exerted by the Executive over the legislature, has resulted in the Oireachtas being frequently characterised as a weak legislature. Historically, it has variously, and unflatteringly, been described as “emasculated”,<sup>11</sup> “a woefully inadequate institution”,<sup>12</sup> and “a puny parliament peopled by members who have a modest view of their functions.”<sup>13</sup>

Despite their many acknowledged virtues, parliamentary committees were not prominent for much of the history of the Oireachtas. Prior to the 1970s during which two policy-focused joint committees were established,<sup>14</sup> there were virtually no specialist subject committees allowing for detailed scrutiny of various aspects of Government work.<sup>15</sup> The few standing committees were primarily those dealing with procedural or housekeeping matters such as the Committee on Procedure and Privileges.<sup>16</sup>

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<sup>9</sup> Shaw, ‘Parliamentary Committees: a Global Perspective’ in L.D. Longley and R.H. Davidson (eds.) *The New Roles of Parliamentary Committees* (London, 1998) p. 229, quoted in MacCarthaigh, *Accountability in Irish Parliamentary Politics* (IPA, 2005) p. 140.

<sup>10</sup> NDI, *Committees in Legislatures: A Division of Labor*, quoted in MacCarthaigh and Manning (eds.) *The Houses of the Oireachtas: Parliament in Ireland* (IPA, 2010) p. 286.

<sup>11</sup> Gallagher, ‘Parliament’ in Coakley and Gallagher (eds.) *Politics in the Republic of Ireland* (4<sup>th</sup> ed. Routledge) p. 211, quoted in Martin and Vanberg, *Parliaments and Coalitions: The Role of Legislative Institutions in Multiparty Governance* (Oxford, 2011) p. 42

<sup>12</sup> Dinan, ‘Constitution and Parliament’ in Girvin and Sturm (eds.) *Politics and Society in Contemporary Ireland* (Aldershot, 1986) p. 76, quoted in Martin and Vanberg, *Parliaments and Coalitions: The Role of Legislative Institutions in Multiparty Governance* (Oxford, 2011) p. 42

<sup>13</sup> Chubb, *The Government and Politics of Ireland* (3<sup>rd</sup> ed. Stanford, 1982) p. 205.

<sup>14</sup> Joint Committee on State Sponsored Bodies and Joint Committee on Secondary Legislation of the European Communities

<sup>15</sup> Then Senator Mary Robinson noted this fact in an academic article in 1974, observing that it was a “serious defect”, particularly as regards the inability to oversee the work of the increasing number of semi-state bodies. Robinson, ‘The Role of Irish Parliament’ (1974) Vol. 22 *Administration* No.1.

<sup>16</sup> Muiris MacCarthaigh, *Accountability in Irish Parliamentary Politics* (IPA, 2005) p. 137.

An important exception to the historic absence of committees is the Public Accounts Committee, which has been established since the 1920s,<sup>17</sup> and has long held a reputation in Irish politics for impartiality and influence.<sup>18</sup>

While endeavours to embed a formal committee system were made by the Fine Gael-Labour Government in the 1980s, and by the Fianna Fail-Labour Government in the early 1990s, the modern system of committees whereby upwards of a dozen specialised committees broadly mirror the structure of the Government's departments was not fully established until 1997.<sup>19</sup> Under this system, which has largely been retained by subsequent Dáileanna, committees monitor specific departments and/or policy areas; hold government to account in the policy area by scrutinising policy, the administrative system and the Estimates; play a formal role in the legislative process (including pre-legislative scrutiny<sup>20</sup>) and act as forums for discussion and advice on policy issues.<sup>21</sup>

The 28<sup>th</sup> Dáil also saw efforts to strengthen the right and capacity of committees of the Houses to inquire into matters of public concern. Using new powers created by the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997, the DIRT inquiry by the PAC (1999) was recognised as an effective method to investigate matters of public concern. However, it was followed by the Abbeylara Inquiry (2001) and the Abbeylara judgment (2001) which effectively ended the development of the committee inquiry model of investigation for over a decade.

## Box 2: Explainer: The separation of powers

### The separation of powers

The separation of powers is a constitutional doctrine that provides for the division of the organs of government; between the executive, the judiciary, and the legislature. The doctrine requires each organ to carry out its functions independently, and free from the interference of the others. The separation of powers has been a fundamental value of liberal government since the time of the French Revolution. It ensures that there is a system of checks and balances maintaining the stability and good governance of the State.

There has been a noticeable trend (since the 1980s) in parliaments globally towards conducting a greater volume of its work through committees.<sup>22</sup> Ireland has followed this trend and committee scrutiny has become a more fundamental part of the work of parliament in recent decades. As of

<sup>17</sup> Interim report and final report of the Committee of Public Accounts : together with proceedings of the Committee, minutes of evidence and appendices : (appropriation accounts, 1924-25).

<sup>18</sup> Muiris MacCarthaigh, *Accountability in Irish Parliamentary Politics* (IPA, 2005) p. 161.

<sup>19</sup> Micheal Gallagher, 'The Oireachtas: President and Parliament' in Coakley and Gallagher (eds.), *Politics in the Republic of Ireland 5<sup>th</sup> Edition* Dublin: IPA (2010) .

<sup>20</sup> The L&RS published in December 2017 a piece of commissioned research on the impact of pre-legislative scrutiny on legislation and policy. Dr Shane Martin, [The impact of pre-legislative scrutiny on legislative and policy outcomes](#) (2017).

<sup>21</sup> Martin and Vanberg, *Parliaments and Coalitions: The Role of Legislative Institutions in Multiparty Governance* (Oxford, 2011) p. 42.

<sup>22</sup> Longley and Davidson (eds.), *The New Roles of Parliamentary Committees* (London, 1998) p. 2.

2009, Ireland was ranked mid-table in a study of the strength of committee systems in advanced industrial democracies.<sup>23</sup> Parliamentary reforms introduced in the 31<sup>st</sup> and 32<sup>nd</sup> Dáil were intended to further strengthen the capacity of committees to scrutinise and oversee government. For example, the introduction of the D'Hondt system for apportioning committee chairs has seen the appointment of more opposition TDs as chairpersons, and the Government exerting less control over committees.<sup>24</sup>

It is also arguable that “new politics”<sup>25</sup> and the strengthened and emboldened Oireachtas it has generated, has given rise to a new impetus behind committee work and committee inquiries. While a Government-controlled Dáil would be less likely to initiate an investigation into failures of public administration committed on the Government’s watch, a more independent Dáil could be much more inclined to do so.

### Box 3: Benefits of parliamentary committees<sup>26</sup>

#### Benefits of Committees

1. **Economy of operation** – Committees can allow parliament to work on a number of different issues at once, and more efficiently. Former Taoiseach Garret Fitzgerald once said that one of his principal motivations for establishing a committee system in 1983 was “because things were not happening as there was not enough time in the Dáil” (Macarthaigh, 2005, p. 155)
2. **Gains from trade** – The concentration of members from particular policy backgrounds into the committee most relevant to that background potentially increases the overall efficiency and efficacy of parliament. It allows parliament to better channel the specialisation of its members.
3. **Partisan co-ordination** – Work in committees can increase cross-party cooperation, and reduce partisanship.
4. **Information acquisition** – Through greater specialisation, and greater time devoted to one committee, committee members gain expertise in a particular area.

<sup>23</sup> Martin and Depauw, ‘Parliamentary Committees and coalition government’ (2009), quoted in MacCarthaigh and Manning (eds.) *The Houses of the Oireachtas: Parliament in Ireland* (IPA, 2010) p. 301.

<sup>24</sup> The L&RS has published a Note on this issue. [L&RS Note: D'Hondt system for allocation of parliamentary positions](#), (March 2016). For an in-depth analysis of how parliamentary reform since 2011 has affected the committee system see Catherine Lynch ‘The effect of parliamentary reforms (2011-2016) on the Oireachtas Committee system’ (2017) *Administration* Vol.65 no.2 pp. 59-89.

<sup>25</sup> “New politics” refers to the political situation brought about by the election of the 32<sup>nd</sup> Dáil. The 32<sup>nd</sup> Dáil features a minority Fine Gael Government that governs by virtue of a “confidence and supply” agreement with the main opposition party, Fianna Fáil. This means that Fianna Fáil has agreed to support the Government on any confidence motion in the House, and on any budget or appropriation measure. A Government must win a confidence motion to remain in office, and similarly it is a long-standing convention that a Government must be able to pass a budget to maintain the confidence of the House. However, Fianna Fáil reserves the right to cast its vote against any other Bill or motion before the House. This has resulted in the Government having a much weaker control over the Oireachtas, and a large increase in the number of Private Members’ Bills being considered by the Oireachtas. A useful overview of the impact of “new politics” can be found at Harry McGee, [‘The new politics: 10 changes it has brought to the Oireachtas’](#) *The Irish Times* (February 29, 2017).

<sup>26</sup> This summary of the benefits of parliamentary committees is drawn from Longley and Davidson (eds.), *The New Roles of Parliamentary Committees* (London, 1998) pp. 24- 27.

## Committees in the courts: *Abbeylara* and other cases

While it is generally recognised that Oireachtas committees should have the powers to investigate into matters of major public concern, public inquiry by committee is the most controversial aspect of committee work. *Kerins* is not the first time that the actions of an Oireachtas committee have been challenged in the courts and the *Kerins* decision must be understood in the light of these cases that have come before it. These previous decisions have outlined the scope of Oireachtas committee powers and of the related question of scope of parliamentary privilege. These decisions substantially informed both the course of argument in the *Kerins* hearings, and the ultimate decision of the Supreme Court.

### *Re Haughey*<sup>27</sup> (1971): Rights of witnesses before committees

One of the first interventions of the courts into the conduct of Oireachtas committees was in the *Re Haughey* case. In 1971, a sub-committee of the Public Accounts Committee conducted an inquiry into the expenditure of a grant-in-aid scheme for Northern Ireland, substantial amounts of which had found its way into the hands of the Provisional IRA. During the course of the hearings, a senior Garda made serious allegations of arms smuggling against Padraig “Jock” Haughey, brother of former Taoiseach Charles Haughey. For his part, Mr Haughey read a prepared statement to the sub-committee and refused to answer subsequent questions. Mr Haughey was convicted under section 3(4) of the *Committee of Public Accounts of Dáil Éireann (Privilege and Procedure) Act 1970*, for refusing to answer the committee’s questions and was sentenced to a 6 month term of imprisonment.

In *Re Haughey*, the Supreme Court struck down section 3(4) of 1970 Act. Section 3(4) provided that the committee could “certify” to the High Court that an offence had been committed under the Act (in this case a refusal to answer questions), and direct the High Court to sentence the offender as though he or she were guilty of contempt against that Court. Importantly, the person was not sent to the High Court for trial; the legislation provided that the committee could itself “certify” that the offence had been committed, and be sent to the High Court for the sentence to be imposed. The High Court merely performed a “rubber stamping” function under the legislation, effectively rendering the Oireachtas the trial court.

The Supreme Court held that it was not constitutionally permissible for the Oireachtas to try someone for a criminal offence, a power reserved to the courts under Articles 34 and 38 of the Constitution. The Supreme Court further held that the Oireachtas, or indeed any public body, had to afford certain basic protections of constitutional justice to a witness before it, where its proceedings may have an adverse effect on the reputation of that person. This collection of protections, which include a right to cross-examine one’s accuser and to speak in one’s own defence, are now known as “Re Haughey Rights”. These rights provide that a person before any adjudicative body be:<sup>28</sup>

- (a) Furnished with a copy of the evidence which reflected on his [or her] good name;

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<sup>27</sup> [1971] IR 217.

<sup>28</sup> *Ibid*, 263-264.

- (b) Be allowed to cross-examine (where appropriate by counsel) his [or her] accuser or accusers;
- (c) Be allowed to give rebutting evidence;
- (d) Be permitted to address (where appropriate by counsel) the Committee in his [or her] own defence.

For the Supreme Court, the actions of the committee in *Re Haughey* represented a trespass on the judicial realm. The Oireachtas sought to effectively try a citizen for a criminal offence, without the benefit of basic fair procedures, including the right to speak in one's own defence, and directed that a court rubber stamp a prison sentence for the offender. *Re Haughey* is a landmark case, and the rights it identified are a central plank of modern administrative law.

### *Attorney General v Hamilton (No. 2)*<sup>29</sup> (1993): Extent of parliamentary privilege

This case concerned the question as to whether parliamentary privilege extended to a privilege in relation to non-disclosure of sources informing the content of a member's utterances in the Oireachtas. The case arose when a Tribunal of Inquiry sought to question a member of the Oireachtas about allegations he had made in the Chamber regarding fraud and malpractice in the beef processing industry. In particular, the Tribunal sought to inquire into the source of the Member's information. The Member invoked parliamentary privilege in refusing to answer the Tribunal's questions.

Mr Justice Hamilton, chair of the Tribunal, took the decision to accept this position. The Attorney General took a judicial review of this decision in the High Court. The High Court held that the non-amenability protections in Article 15 of the Constitution only applied where some penalty or legal sanction was sought to be applied against a Member of the Oireachtas.<sup>30</sup>

This was appealed to the Supreme Court, which allowed the appeal. The Supreme Court interpreted Article 15 as creating a much wider sphere of non-justiciability than that set out by the High Court, and held that Members could not be compelled, under threat of sanction, to disclose the source of information revealed in utterances in Dáil Éireann. The Court had regard to the overriding purpose of Article 15, which the Court characterised as being to ensure that "legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation".<sup>31</sup> The Court determined that in order to fully reflect this broader principle, the privilege must be interpreted such as to extend to the protection of a Member's sources. This case illustrates the strength of the immunity for utterances in Article 15, as it was interpreted prior to *Kerins*.<sup>32</sup>

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<sup>29</sup> [1993] 3 IR 227.

<sup>30</sup> Article 15 of the Constitution provides for the powers and privileges of the Oireachtas. Articles 15.10, 15.12 and 15.13 establish certain privileges surrounding documents and utterances made by the Houses or its Members. Particularly relevant in this case was Article 15.13, which provides that a Member of the Oireachtas "shall not, in respect of any utterance in either House, be amenable to any court or any authority other than the House itself."

<sup>31</sup> [1993] 3 IR 227, 243.

<sup>32</sup> The authors of *Kelly*, writing prior the Supreme Court decision in *Kerins*, suggested that "All indications to date suggest that the parliamentary privilege is extremely strong." Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* (5<sup>th</sup> ed. Bloomsbury, 2018) p. 363.

## *Abbeylara (2002): Extent of power of Oireachtas committees to conduct inquiries*

In *Maguire v Ardagh*,<sup>33</sup> the Supreme Court considered the conduct of an Oireachtas inquiry into the fatal shooting of a man by An Garda Síochána in Abbeylara, County Longford. The case is widely referred to ‘the Abbeylara case’, or simply ‘Abbeylara’. The decision is one of the most significant Supreme Court decisions of recent times and has defined the conduct of Oireachtas inquiries ever since.

In April 2000, John Carthy, a 27 year-old man with a history of psychiatric illness, barricaded himself into his home with a shotgun. When Gardaí arrived to the house, they heard shots discharged and retreated to a safe distance and called for back-up. Over a period of 25 hours, Gardaí surrounded the house and engaged in negotiation with Mr Carthy. They ultimately failed to persuade him to leave the house peacefully. When he emerged from the house wielding a shotgun, and failed to respond to exhortations to drop the weapon, he was fatally wounded by armed Gardaí.

Following a Government report, the Joint Committee on Justice Equality, Defence and Women’s Rights established a sub-committee to inquire into the circumstances of the shooting and the conduct of gardaí involved. When the sub-committee sought to hear evidence from a number of gardaí, the Garda members made an application for Judicial Review in the High Court, claiming that the Houses of the Oireachtas were acting *ultra vires* (beyond their powers) in purporting to conduct such an inquiry. They were successful in the High Court, and the sub-committee appealed to the Supreme Court.

The Supreme Court held that while the Oireachtas has inherent authority to conduct inquiries in relation to its own internal affairs,<sup>34</sup> this situation changes when the rights of non-members stand to be affected. **Where the rights of non-members stand to be affected, the inquiry must be justified by reference to the legitimate functions of the Houses.** Such legitimate functions include the House informing itself on matters of policy, public administration, and public expenditure. In this case, the Court held that the making of a findings of fact such as a determination of “unlawful killing” against a private citizen could not be justified by reference to the inherent functions of the Oireachtas. As McGuinness J stated:

“In what way would the making of recommendations for future policy or legislation in these matters be assisted by making findings of individual culpability as to which shot actually killed Mr Carthy and as to which garda actually fired that shot... in what possible way would a finding [of unlawful killing] assist in any of the constitutional functions of a joint committee of the Oireachtas?”<sup>35</sup>

In essence, the Court rejected that there exists an inherent power in the Oireachtas to conduct adjudicative proceedings into the conduct of a non-Member. Importantly, the Court said that it was open to an Oireachtas Committee to conduct an inquiry into defective processes or structures in a

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<sup>33</sup> [2002] 1 IR 385.

<sup>34</sup> In relation to inquiries into the conduct of particular Members, the Supreme Court held in *Callely v Moylan* [2014] IESC 26 that it could not review the application by a committee of standing orders, but could do so if the committee sought to apply the provisions of a statute, such as the *Standards in Public Office Act 2001*.

<sup>35</sup> [2002] 1 IR 385, 624.

public body that could implicitly cast blame on particular persons, provided the attribution of blame on a particular person was not the objective of the inquiry. This is potentially significant, though the Court did not go into any detail as to the kind of implicit findings of blame that would be acceptable. Accordingly, the Supreme Court made a declaration in the following terms:<sup>36</sup>

“the conducting by the sub-committee of an inquiry into the fatal shooting at *Abbeylara* on 29<sup>th</sup> April, 2000, capable of leading to adverse findings of fact and conclusions (including a finding of unlawful killing) as to the personal culpability of an individual not a member of the Oireachtas so as to impugn his or her good name was ultra vires in that the holding of such an inquiry was not within the inherent powers of the Houses of the Oireachtas.”

The judgment effectively held that committees do not have the power to make findings of fact that impinge on the right to a good name or reputation of any person who is not a member of the Oireachtas. Moreover, committees cannot conduct an inquiry that is likely to lead to such a finding of fact against a private citizen, unless such a finding is merely incidental to a broader inquiry that is relevant to a proper function of the Oireachtas. For the Supreme Court, the power to investigate and adjudicate is a governmental power, not a legislative one:<sup>37</sup>

“To adjudicate in the sense that the term is use here, on the culpability of citizens in their conduct cannot in my view be equated with the everyday search for knowledge of facts or expert opinion. That is a governmental power which can only be exercised by virtue of a power conferred by the Constitution...[T]his is a very great power capable of affecting the rights of citizens with potentially disastrous consequences. I would note in passing that the courts themselves do not have such extensive power, there being no investigatory role attributed to them.”

This division of authority for conducting of investigations and inquiries under the separation of powers is a fundamental feature of the decision. The attribution of an inherent authority to investigate and adjudicate to one branch of government, the Executive, and not to another, the legislature, is not expressly mandated by the text of Constitution. It is the Supreme Court’s interpretation of the principle of the separation of powers that led it to establish this division.<sup>38</sup>

Importantly, as the decision in *Abbeylara* effectively pre-empted and prevented the holding of the inquiry, no question as to the potential liability of the Oireachtas, its constituent Houses, or its members came to be decided. This left open the question of how the various privileges and immunities given to the Houses under the Constitution would apply in the case of a Committee acting beyond jurisdiction. The decision also left it open to Committees to make adverse findings against non-members where such findings were merely implied by or incidental to its findings in

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<sup>36</sup> *Maguire v Ardagh* [2002] 1 IR 385, 573.

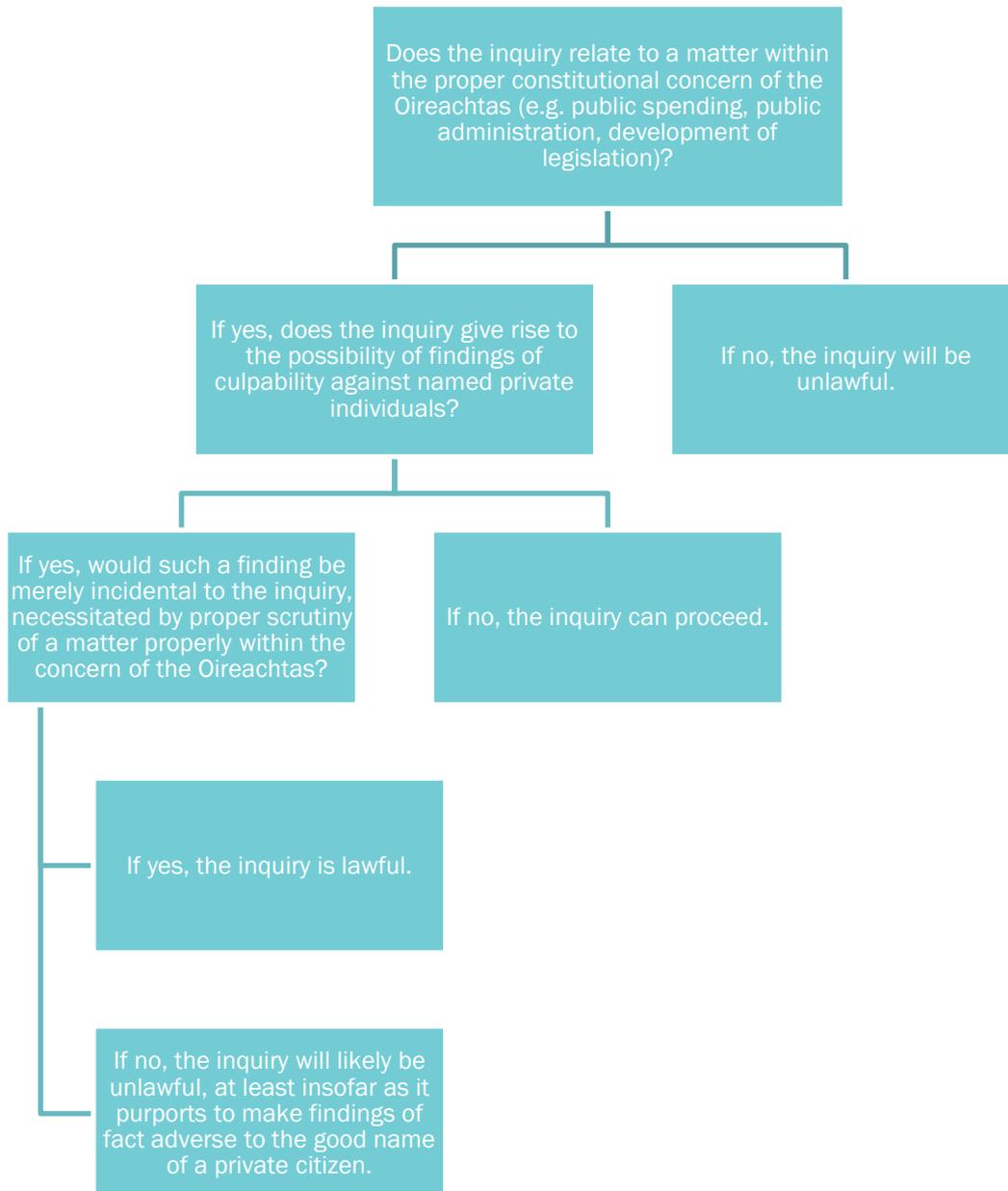
<sup>37</sup> *Ibid*, 595.

<sup>38</sup> This aspect of the decision has been the subject of criticism. O’Dowd queries “Why exactly that inherent power is assumed to be vested only in the executive and not also in the legislature branch of government is not made clear.” He further observes that “[t]he default assignment to the executive of the governmental function of investigating matters of public interest is an example of the tendency...to assign to the category of executive power any function of the State that does not fit obviously either into the legislative or the judicial category.” John O’Dowd, ‘Knowing how way leads on to way: Some reflections on the *Abbeylara* decision’ 38(1) *The Irish Jurist* (2003) 162.

relation to an investigation of system or Government body, but appeared to leave it open to future courts to determine just what level of implicit blame would be constitutionally tolerable.<sup>39</sup>

The flow chart below provides a means of determining whether a committee inquiry is constitutionally legitimate or not, following the decision in *Abbeylara*.<sup>40</sup>

**Figure 1: Legality of committee inquiries after *Abbeylara***<sup>41</sup>



<sup>39</sup> Hardiman J did provide some guidance in the *Abbeylara* decision, noting that “So long as this is genuinely incidental, and not a mere device, this incidental overlap does not, in my view, even potentially invalidate [an exercise of inquiry power].” *Maguire v Ardagh* [2002] 1 IR 385, 659.

<sup>40</sup> The *Kerins* decision has not altered the fundamental position represented by the flow chart.

<sup>41</sup> This flow chart adopts the structure of a similar chart in O’Leary, ‘Committee Inquiries’ in MacCarthyagh and Manning (eds.) *The Houses of the Oireachtas: Parliament in Ireland* (IPA, 2010) p. 311.

### *Callely v Moylan*<sup>42</sup> (2014): Justiciability of decisions of committees

In this case, Senator Ivor Callely was accused of improper filing of expenses. The Committee on Members' Interests of Seanad Éireann conducted a hearing and concluded that Senator Callely had misrepresented his normal place of residence for the purposes of claiming expenses. The committee censured him and a resolution was passed that Senator Callely be suspended for 20 days with no salary. Senator Callely sought judicial review of the decision of the Committee.

The Supreme Court was split in various ways on different issues, and the decision is somewhat complex. A majority of the Court held that the internal disciplinary proceedings of the Houses, where implemented by Standing Orders, are not amenable to judicial review and fall entirely within the sphere of non-justiciability established by the Constitution.<sup>43</sup> However, a separate majority of the Court held that this area of non-justiciability could not extend to the application of legislative provisions, as the interpretation of statute is an inherent judicial power.<sup>44</sup> This was relevant to Senator Callely's case as the Committee was empowered to conduct its disciplinary procedure under the *Ethics in Public Office Act 1995*, and sought to determine that he had engaged in a "specified act" under that legislation. Notwithstanding, the finding that this brought the proceedings theoretically within the jurisdiction of the courts, a majority of the Court held that there had in fact been no breach of fair procedures and found against Senator Callely.

The Court also observed that even if the actions of the Committee fell within the zone of non-justiciability (i.e. it was a validly constituted committee supporting a core legislative function, applying the relevant standing orders), there was a very narrow set of circumstances in which a Court could still intervene; namely if there had been a significant, unremedied breach of a constitutional right and intervention was necessary to restore balance in the constitutional order.<sup>45</sup> This is an extremely limited jurisdiction and would only come into play if a committee engaged in a "fundamental departure from the dictates of the Constitution."<sup>46</sup>

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<sup>42</sup> [2014] IESC 26, [2014] 4 IR 112.

<sup>43</sup> Clarke and O'Donnell JJ judgment, concurred with by Denham CJ, and partly concurred by Fennelly J. Clarke and O'Donnell JJ and Denham CJ were of the view that this area of non-justiciability should extend to rules under legislation applied internally within the Houses but Fennelly J disagreed, and joined with a separate majority on the Court to hold the application of legislative provisions justiciable. Hardiman J dissented.

<sup>44</sup> Fennelly, Hardiman, McKechnie, and Murray JJ.

<sup>45</sup> [2014] IESC 26, para. 81, per Clarke and O'Donnell JJ "Accordingly, proceedings which amounted to a fundamental departure from the dictates of the Constitution, which was neither prevented nor remedied by the Oireachtas itself ... the Courts could be obliged to act to maintain the Constitutional balance."

<sup>46</sup> [2014] IESC 26, para. 81.

## Summary of legal position prior to *Kerins*

In summary, the cases prior to *Kerins* had established the following key matters:

- When a committee hearing has the potential to affect the right to a good name of a witness, the committee must apply fair procedures (*Re Haughey*);
- Committees do not have the power to make findings of fact which impinge on the livelihood, good name or reputation of any person who is not a member of the Oireachtas (*Abbeylara*)
- Parliamentary privilege is absolute; a Member cannot be called to answer for his or her comments in the Oireachtas before any court or authority, even if there is no threat of sanction. (*AG v Hamilton*)

## 2011 Referendum

On 27<sup>th</sup> October 2011, the Irish electorate was asked to approve the *Thirtieth Amendment of the Constitution (Houses of the Oireachtas Inquiries) Bill 2011* in a referendum. The Bill proposed to amend the Constitution so as to provide for extensive powers on the part of Committees to conduct inquiries, and to effectively reverse the decision of the Supreme Court in *Abbeylara*. The referendum was rejected by a narrow margin. The proposal came about against the backdrop of public outcry about the conduct of financial institutions in the lead up to the financial crisis in 2008, and a desire to investigate and hold people to account.

The Bill was drafted on the basis of recommendations made by a special Joint Committee on the Constitution. The Committee considered the *Abbeylara* judgment to have seriously impaired the ability of committees to conduct inquiries, which the Committee considered ought to be a core function of parliament.<sup>47</sup> The Committee considered that a constitutional amendment was necessary to reverse the effects of the *Abbeylara* decision. The Committee considered two possible approaches to such an amendment: a “median” amendment; and a “robust” amendment.<sup>48</sup> The median amendment would simply clarify that Oireachtas committees have the power to conduct inquiries into matters of public importance. The “robust” amendment proposed to go further and to specifically empower committees to make findings of wrongdoing in respect of private individuals. It was this latter “robust” amendment that the report recommended, and the Bill adopted.

The amendment to the Constitution put forward in the Bill proposed to add three sub-articles to Article 15.10. The bolded text indicates the new text proposed by the Bill:

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

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

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

**4<sup>o</sup> It shall be for the House or Houses concerned to determine, with due regard to the principles of fair procedures, the appropriate balance between the rights of persons and the public interest for the purposes of ensuring an effective inquiry into any matter to which subsection 2<sup>o</sup> applies.**

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<sup>47</sup> Joint Committee on the Constitution, *Fifth report : Article 15 of the Constitution : review of the Parliamentary power of inquiry* (2011) p. 3.

<sup>48</sup> *Ibid*, p. 33.

The referendum was defeated, with 928,175 (53.34%) votes against and 812,008 (46.66%) in favour. The arguments of those that opposed the referendum suggested that the revised constitutional wording would allow politicians to act in a judicial manner; to act as judges of the behaviour of individual citizens.<sup>49</sup> It was also suggested that the wording would exclude the possibility of judicial review of the actions of an inquiry, even if it breached the constitutional rights of a citizen.<sup>50</sup> An open letter written by eight previous Attorneys-General opposing the referendum published in *The Irish Times* on the week of the referendum was thought to have been influential in the outcome of the vote.<sup>51</sup> Subsequent debate on the causes of the result also suggested that the vote had been rushed, and that the people did not have time to fully digest the issues.<sup>52</sup>

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<sup>49</sup> UCD School of Law, [A Guide to the referendum on the 30<sup>th</sup> Amendment to the Constitution](#) (2011) p. 5.

<sup>50</sup> Ibid.

<sup>51</sup> The Irish Examiner, [‘Electorate ‘confusion’ not to blame for defeat of inquiries referendum’](#) (October 31 2011). Brendan Howlin TD suggested that the Government had not had sufficient time to respond to the open letter, and that this was a factor in outcome of the vote.

<sup>52</sup> Dearbhail MacDonald, [‘We need a proper debate before voting on handing over our rights’](#) *Irish Independent* (October 17, 2011).

## The Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013

The *Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013* was enacted in response to the failure of the 2011 referendum to reverse the *Abbeylara* decision, and was designed to clarify the powers and procedures of Oireachtas inquiries. The Act provides for 5 main types of inquiries that may be conducted.<sup>53</sup> These different inquiries are provided for in Part 2 of the Act, sections 7 through 11.

### 1. Section 7 – Inquire, Record and Report Inquiry

This form of inquiry is a limited one. It is permitted only to record and report evidence and to make only uncontested findings of fact.

### 2. Section 8 – Legislative Inquiry

This form of inquiry allows a committee to conduct an inquiry relevant to the legislative functions of the House or Houses, including whether there is a need for new legislation. The inquiry allows for the making of contested findings of fact.

### 3. Section 9 – Inquiry into the removal of certain officeholders

This section provides for inquiries into the removal of certain public officeholders. However, the power to conduct such inquiries is limited to situations in which a committee is empowered by a relevant piece of legislation to do so.<sup>54</sup>

### 4. Section 10 – Inquiry into the conduct of a member

This section provides for an inquiry into the conduct of a member of either House, and included the power to make findings of fact adverse to the good name of the member.

### 5. Section 11 – Inquiry to hold the Government to account

Inquiries under section 11 provide for an inquiry related to the constitutional duty of the Oireachtas to hold the Government to account. It also empowers the committee to hold to account any person who is liable to Dáil scrutiny by virtue of the terms of his or her contract or statutory appointment. The committee is permitted to make contested findings of fact, including a finding adverse to the good name of a citizen, provided that it is incidental rather than the essence of the inquiry.

In an attempt to distil the *Abbeylara* judgment into a simple statutory provision, section 17(3) provides that a committee can “make a finding that any matter relating to systems, practices, procedures or policy or arrangements for the implementation of policy which fall within the subject of the [Part 2](#) inquiry ought to have been carried out in a different manner”.

The Act also provides, under section 67, for a power to compel the attendance of witnesses before Committee. The Oireachtas does not possess an inherent authority to compel the attendance of a

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<sup>53</sup> There is also a 6<sup>th</sup>, under section 16 of the Act, but this is for the sole purpose of impeaching a sitting president, under Article 12.10 of the Constitution, and as such stands alone to some extent.

<sup>54</sup> Section 9(6) lists the various relevant enactments, including, among others, the *Ethics in Public Office Act 1996* and the *Garda Síochána Act 2005*.

non-member witness and as such the power is conferred by statute. The power does not vest automatically in any committee who wishes to secure the attendance of a witness. A committee seeking to compel a witness must make an application to the Committee on Procedures, who determine whether compellability powers are appropriate in the case.<sup>55</sup>

#### **Box 4: Compellability of witnesses**

##### **Compellability of witnesses before committee inquiries**

The Oireachtas does not possess an inherent power to compel the attendance of non-Members before committees, though it has conferred such powers on itself by statute. By contrast, the Westminster Parliament not only has such an inherent power but can itself punish those who do not attend as being in contempt of Parliament. It uses such a power sparingly however: Dominic Cummings, an advisor to Prime Minister Boris Johnson, was in March 2019 found guilty of contempt of Parliament but received only a formal admonishment.

It has been suggested that such a power (for the Oireachtas to itself punish witnesses who fail to attend) would not be compatible with Article 38.1 of the Constitution, which provides for a trial “in due course of law” for any criminal charge, in this jurisdiction. (*Kelly: The Irish Constitution*, [4.2.149])

The 2013 Act has been subject to criticism. One academic article, published in response to the first Oireachtas inquiry following the enactment of the 2013 Act, the Banking Inquiry, argued that “strict structure” adopted by the Act is “an unhelpfully constricted translation of the *Ardagh* decision.”<sup>56</sup> It is further suggested that section 17(3) is an over-cautious assertion of the permitted scope of Oireachtas inquiries post-Abbeylara and, more widely, that “[t]he Oireachtas’ reaction to the Supreme Court judgment has been a practical timidity, which is fed by a rhetoric of institutional defeatism”.<sup>57</sup> By contrast, the final report of the Banking Inquiry was more sanguine about the efficacy of the 2013 Act. The Report noted that the inquiry had “road-tested the legislation and set out the framework for future parliamentary inquiries.”<sup>58</sup> The Report went on to observe that “the Banking Inquiry has proved that our public representatives have the ability to play a valuable inquisitorial role while respecting the judicial process”.<sup>59</sup>

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<sup>55</sup> Standing Order 107(2)(f).

<sup>56</sup> Donson & O’Donovan, ‘Designing Effective Parliamentary Inquiries: Lessons Learned from the Oireachtas Banking Inquiry’ (2016) 39(2) *Dublin University Law Journal* 303, 313.

<sup>57</sup> *Ibid.*, at 315.

<sup>58</sup> [Report of the Joint Committee of Inquiry into the Banking Crisis](#) (2016), p. 5.

<sup>59</sup> *Ibid.*

## Other institutions of public accountability

This *Spotlight* is primarily concerned with the function of Oireachtas committees in exercising their oversight of public administration. However, it should also be noted the extent to which functions of public accountability have been outsourced to a variety of public bodies. These include, among others: Tribunals of Inquiry; Commissions of Investigation; and Ombudsmen. Understanding the role and function of these bodies is important as they are often compared and contrasted with the role of Oireachtas inquiries.

There are multiple reasons for the dislocation of public accountability from parliament. The answerability of Government Ministers to parliament has long been the cornerstone of public accountability. However, it has been necessary, owing to the huge expansion of the apparatus of state, to break the single link between Ministerial responsibility and parliament. Previously, as a corporation sole, the Minister was responsible for everything falling under his or her aegis, and he or she was to answer, not his or her civil servants.<sup>60</sup>

However, given the vast remit of modern government departments and associated state and semi-state agencies, and the increasingly specialised nature of much of their operations, it is no longer feasible nor effective to police their activity through the individual responsibility of the Minister. It has also been suggested that the great expansion of new institutions of public accountability is in part attributable to increasing public scepticism of public representatives and of government institutions, and the need to placate same.<sup>61</sup> New institutions of public accountability are introduced, it is argued, as a “social and political panacea” often without joined-up thinking, resulting in “myriad channels of oversight and responsibility.”<sup>62</sup>

A great variety of alternative organs of public accountability have developed, including ombudsmen, regulators, watchdogs and Commissions of Investigation. However, pre-dating all of these institutions is the Tribunal of Inquiry, itself established in response to the perceived failings of committee inquiries.

### Tribunals of Inquiry

Tribunals of Inquiry are empowered to investigate matters of significant public importance and are usually set up in the aftermath of a public controversy or scandal. This type of tribunal has been described by the Law Reform Commission as “the Rolls Royce of tribunals”.<sup>63</sup> Their significant statutory powers are provided by the *Tribunals of Inquiry (Evidence) Acts 1921-2004*.

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<sup>60</sup> The *Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013* changed this position. The Act now provides for the power to call civil servants to account for their actions, though it is not permitted to make findings of fault against them.

<sup>61</sup> Muiris MacCarthaigh, *Accountability in Irish Parliamentary Politics* (IPA, 2005) p. 20.

<sup>62</sup> *Ibid.*

<sup>63</sup> Law Reform Commission, *Consultation Paper on Public Inquiries Including Tribunals of Inquiry* (LRC CP 22 – 2003), p. 2

They were originally established in response to perceived failings of a Westminster committee inquiry, convened in 1912, into alleged political corruption in the 'Marconi Scandal'.<sup>64</sup> The committee returned what has been described as a "blatantly partisan verdict",<sup>65</sup> absolving various UK government ministers of blame. Such was the loss of faith in committee inquiries that when another political controversy arose in 1921, it was deemed necessary to establish a new form of independent investigative body.<sup>66</sup> The 1921 Act,<sup>67</sup> as amended, provides for substantial powers for such Tribunals including that it "shall have, in relation to their making, all such powers, rights and privileges as are vested in the High Court or a judge of that Court in respect of the making of orders."<sup>68</sup>

However, an important point of difference between a Tribunal of Inquiry and a court is that a Tribunal of Inquiry is inquisitorial in nature and cannot determine criminal or civil liability. It is also not subject to the strict rules of evidence applicable in a court setting, though layers of procedural protections have added to tribunals over the years. As the Law Reform Commission observes:<sup>69</sup>

"While intended as purely investigatory rather than adjudicative, the implication of the right to a good name of those under investigation has necessitated the provision of extensive fair procedures. This has seen such tribunals become significantly adversarial, with both sides represented by counsel and subject to relatively stringent procedural rules."

Since the 1990s Tribunals of Inquiry have occupied a prominent place in the Irish political landscape. However, concerns about the legal costs they generate has resulted in their falling out of favour to some extent, and the introduction of an alternative form of public inquiry in the form of Commissions of Investigation.

## Commissions of Investigation

Commissions of Investigation perform a similar function to Tribunals of Inquiry, but differ in the crucial respect that its proceedings are almost always conducted in private. The *Commissions of Investigation Act 2004* directs that the Commission sit in private except in exceptional cases.<sup>70</sup> This is in part due to the political background that informed the establishment of Commissions of Investigation, namely scandals relating to child sexual abuse in the Catholic Church. The sensitive nature of investigations into such matters was considered inappropriate for Tribunals of Inquiry, which are held in public and are highly adversarial in nature.

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<sup>64</sup> The Marconi Scandal concerned allegations of insider trading against members of the Liberal government. It was alleged that members of the Government, having advance knowledge that a lucrative government contract was to be awarded to the Marconi Company, had bought shares in an American subsidiary of Marconi prior to the announcement of the contract.

<sup>65</sup> Muiris MacCarthaigh, *Accountability in Irish Parliamentary Politics* (IPA, 2005) p. 188-189.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Tribunals of Inquiry Act 1921*. This is an Act of the Westminster Parliament, carried over into Irish law at the foundation of the State. The Act was repealed in the UK in 2005.

<sup>68</sup> *Tribunals of Inquiry (Evidence) (Amendment) Act, 1979*, section 4.

<sup>69</sup> Law Reform Commission, *Report on Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117 – 2016), Appendix B: Rules of Evidence in Bodies other than Courts.

<sup>70</sup> Where either the witness requests it or the commission is satisfied that it is in the interests of both the investigation and fair procedures

Commissions of Investigation have, on the whole, proved less costly than Tribunals of Inquiry.<sup>71</sup> However, they have not necessarily been more time efficient; with a number of extant Commissions of Investigation currently running for in excess of four years.<sup>72</sup> It has been suggested that this is due, at least in part, to the fact that proceedings are held in private, and that some witnesses are less likely to be fully cooperative outside of the public glare.<sup>73</sup>

## Office of the Ombudsman

The Office of the Ombudsman was established by statute in 1980,<sup>74</sup> though budgetary constraints meant that it did not emerge as a prominent force until the 1990s.<sup>75</sup> Hogan and Morgan describe the two primary functions of the Ombudsman as follows:<sup>76</sup>

“The first is to secure redress when an individual suffers harm or loss, through some act of government maladministration. The other task is to act as a champion of good administrative practice, and as a repository of information and wisdom on the subject.”

Under the Act of 1980, the Ombudsman has the power to demand documents and records from government departments. The Ombudsman has the authority to investigate an action of a public body where it appears to the Ombudsman:<sup>77</sup>

- “(b) that the action was or may have been—
- (i) taken without proper authority,
  - (ii) taken on irrelevant grounds,
  - (iii) the result of negligence or carelessness,
  - (iv) based on erroneous or incomplete information,
  - (v) improperly discriminatory,
  - (vi) based on an undesirable administrative practice, or
  - (vii) otherwise contrary to fair or sound administration.”

The jurisdiction of the Ombudsman is usually triggered by a complaint from a member of the public about an action taken by a public body, though he/she does have the power to consider such an action of his/her own accord as well. As a result of this focus on individual complaints in relation to a particular action taken by a public body, the role of the Ombudsman has been characterised as “a form of alternative dispute resolution in the public law field.”<sup>78</sup>

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<sup>71</sup> The 11 Commissions of Investigations established to date have cost an estimated €28.6 million. By contrast, the six Tribunals established between 1997-2006 cost an estimated €340 million.

<sup>72</sup> Mother and Baby Homes, IBRC.

<sup>73</sup> Christopher Oonan, [‘Ireland must reconsider its use of commissions of investigation’](#) *The Irish Times* (23 July, 2019).

<sup>74</sup> *Ombudsman Act 1980*.

<sup>75</sup> Muiris MacCarthaigh, *Accountability in Irish Parliamentary Politics* (IPA, 2005) p. 239-240.

<sup>76</sup> Hogan and Morgan, *Administrative Law in Ireland* (4<sup>th</sup> ed. Bloomsbury, 2010) p. 389.

<sup>77</sup> Section 4(2)(b) of the *Ombudsman Act 1980*.

<sup>78</sup> Hogan and Morgan, *Administrative Law in Ireland* (4<sup>th</sup> ed. Bloomsbury, 2010) p. 434.

## Other bodies

The model of the Office of the Ombudsman has been followed in the establishment of sector-specific ombudsmen across the public sector. The Garda Síochána Ombudsman Commission was established by the *Garda Síochána Act 2005*. It is an independent body, chaired by a judge. It provides oversight of the conduct of members of An Garda Síochána, and investigates complaints made against members of the force.

The Information Commissioner is empowered to investigate and adjudicate upon refusals by public bodies to release information pursuant to a request under the Freedom of Information Act. While this arguably reflects a pursuit of transparency rather than accountability *per se*, the FOI regime can bring to light information about the internal working of public bodies that may trigger an exercise in accountability.

Other important bodies exercising a public accountability function include:

- The Data Protection Commission;
- The Standards in Public Office Commission;
- The Comptroller and Auditor General.

## The decision in *Kerins*

### Background

Angela Kerins was the Chief Executive Officer of the Rehab Group, a private charitable organisation in receipt of significant public funds.<sup>79</sup> In early 2014, there was significant public interest and controversy surrounding transparency in the charity sector. Ms Kerins was invited by the Public Accounts Committee (PAC) to give testimony in relation to the expenditure of the public funds provided to Rehab. It should be noted that this was merely an invitation and Ms Kerins was under no legal compulsion to attend.

The invitation stated that:

“I wish to inform you that the Committee has set aside Thursday 27th February 2014...for examination of the following matter:-

- Payments made by the HSE to Rehab under s. 39 of the Health Act, 2004.
- The operation of the Charitable Lottery Scheme and payments made to Rehab from the vote of the Department of Justice and Equality.
- Payments made by Solas to Rehab for the provision of specialist vocational training.”

Ms Kerins attended the PAC on 27<sup>th</sup> February 2014 and her appearance lasted for seven hours with one short break. The High Court stated “that much of what was put to her...was damaging to her reputation personally and professionally”. The High Court noted that, in the course of the questioning “it was suggested to her that she was grossly overpaid and ‘on a different planet’...she was criticised for making a ‘song and dance’ about her appearance before PAC... and told that she needed to ‘get a grip on herself’.<sup>80</sup> The questioning went significantly beyond the terms of the invitation issued to her.

Following the hearing, Ms Kerins suffered from shock and anxiety and on 14<sup>th</sup> March 2014 she was admitted to hospital following a suicide attempt. The PAC issued an invitation for her to attend a second time, which Ms Kerins, through her lawyer, declined. The PAC then sought permission from the Committee on Procedure and Privileges (CPP)<sup>81</sup> to use compellability powers to secure Ms Kerins’ attendance.<sup>82</sup> The CPP rejected this request, stating that PAC was acting *ultra vires*

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<sup>79</sup> The Rehab Group was in receipt of approximately €80 million in public funds at the time. Irish Independent, [‘PAC entitled to ask about Rehab salaries due to €80m public funding’](#) (13 August 2016).

<sup>80</sup> *Kerins v McGuinness & Ors* [2017] IEHC 34, para. 23.

<sup>81</sup> The name of this committee was changed to the Committee on Procedure (CP) in June 2016. Standing Order 107(1) provides that the CP “is a continuation in being of the Committee under its former title, namely, the Committee on Procedure and Privileges.”

<sup>82</sup> The *Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013* confers on Oireachtas committees powers to compel the attendance of witnesses. However, these powers must be specifically invoked and authorised by the Committee on Procedures. See Standing Order 107.

(beyond their powers) as Rehab was not a body audited by the Comptroller and Auditor General, and hence not within the scope of the PAC's authority to investigate.<sup>83</sup>

## The High Court judgment

Ms Kerins issued proceedings in the High Court seeking a number of reliefs, including a declaration that PAC acted outside of jurisdiction, a declaration that the proceedings were unfair, and a claim for damages. The High Court dismissed her claim, holding that Article 15.13 of the Constitution provides a robust immunity to the Houses of the Oireachtas and its Members.

### Box 5: The Articles of the Constitution relevant to the case

#### The Articles of the Constitution relevant to the case

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

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

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

An important aspect of the High Court judgment was the fact that the Court took the view that the question as to whether the PAC was acting outside of jurisdiction simply did not arise. The High Court took the view that, as Ms Kerins attended voluntarily, the PAC was not exercising any legal power or jurisdiction.

Counsel for Ms Kerins had relied strongly on the judgments of the Supreme Court in *Re Haughey* and *Abbeylara*, discussed above, where the Court held that the relevant committees exceeded jurisdiction by acting as an adjudicative body making determinations potentially adverse to the good name of a non-Member, as supporting Ms Kerins' case.

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<sup>83</sup> Standing Order 186 establishes the Public Accounts Committee. It defines its functions as to report to the Dáil on: "...the accounts showing the appropriation of the sums granted by the Dáil to meet the public expenditure and such other accounts as they see fit... which are audited by the Comptroller and Auditor General and presented to the Dáil, together with any reports by the Comptroller and Auditor General thereon."

However, the Court distinguished that line of Supreme Court authority:<sup>84</sup>

“... it seems to us that in reality, the issue of jurisdiction, when properly analysed, simply does not arise because none was being exercised. This is what distinguishes this case from *Haughey* and *Abbeylara* where the court’s jurisdiction was engaged by virtue of the adjudicative and determinative processes being undertaken in those cases pursuant to powers purportedly vested in the relevant committees.”

**For the High Court, the fact that the committee was not exercising any compellability powers rendered the question of jurisdiction not applicable.** The Court took the view that “the exercise of jurisdiction involves the exercise of a power” and as no such power was exercised, no question of jurisdiction arose. Thus, for the Court, it was not sufficient that the words of parliamentarians to “trench upon the good name of a citizen who is not a Member of the Houses”<sup>85</sup> to render them justiciable; there must be some adjudication or determination affecting the good name of the citizen.

The High Court held that the effect of the relevant constitutional articles (see Box 4 above) is that the courts have no jurisdiction to examine and adjudge the speech of parliamentarians within the four walls of the Oireachtas. The High Court stated that:<sup>86</sup>

“For upwards of four centuries it has been recognised in common law jurisdictions throughout the world that the courts exercise no function in relation to speech in parliament. This is fundamental to the separation of powers and is a cornerstone of constitutional democracy ... The constitutional order requires that speech in parliament remain unfettered by considerations such as jurisdiction. If members of either House were constrained in their speech in the manner contended for by the applicant, the effective functioning of parliament would be impaired in a manner expressly forbidden in absolute terms by the Constitution.”

The Supreme Court took a markedly different view on these issues.

## The Supreme Court judgment

Considering it a case of “general public importance”,<sup>87</sup> the Supreme Court granted leave for a “leapfrog” appeal.<sup>88</sup> The Supreme Court issued two judgments: the first judgment determined the question of the justiciability of the case i.e. whether it would be proper for a Court to consider the actions of the PAC at all. In this first judgment, the Supreme Court held that the actions of PAC were, as a matter of constitutional principle, justiciable. It then invited counsel for both sides to give argument on the substantive question; whether the PAC had in fact acted beyond the terms of the invitation. Having heard these arguments, the Court handed down a second judgment in May

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<sup>84</sup> *Kerins v McGuinness & Ors* [2017] IEHC 34, para. 61.

<sup>85</sup> *Ibid* at para. 103.

<sup>86</sup> *Kerins v McGuinness & Ors* [2017] IEHC 34, para. 111.

<sup>87</sup> Article 34.5.4 of the Constitution allows for the Supreme Court to hear a direct appeal from the High Court, bypassing the Court of Appeal, in “exceptional circumstances”, one element of which must be that the cases raises “a matter of general public importance” or that the interest of justice otherwise warrant the direct appeal or both.

<sup>88</sup> *Kerins v McGuinness & Ors* [2017] IESCDET 77.

2019, which determined that PAC had in fact acted unlawfully and beyond jurisdiction. The two judgments will be discussed in turn.

## The first judgment

### Delegated authority of committees

In the first judgment, the Supreme Court characterised the High Court judgment as establishing an “absolute barrier” to consideration of the legality of the actions of a parliamentary committee.<sup>89</sup> The Supreme Court approached the matter differently. While it agreed with the characterisation of Oireachtas committees as simply a guise of the Oireachtas itself, and therefore possessing the same privileges and immunities under the Constitution, it held that the claim of committees to these immunities is significantly weakened where they act outside of the remit delegated to them:<sup>90</sup>

“The underlying principle identified by the Court is that a committee doing the business of a House enjoys the same privileges and immunities as the House which entrusted it with doing that business in the first place. But a question potentially arises as to the applicability of the principle in a case where a committee acts outside the scope of its remit. In such circumstances the argument that the committee enjoys the same privileges and immunities as the House is undoubtedly weakened, for it is not carrying out a task entrusted to it...but rather has exceeded its remit and is dealing with matters which are, in fact, none of its business.”

That is, if a Committee significantly exceeds the remit delegated to it by the House or Houses, the constitutional immunity may in effect be lost. The Supreme Court, in finding that the PAC had in fact exceeded its remit, relied strongly on the fact that the Oireachtas itself, acting through the CPP, had already determined that the PAC was acting significantly beyond remit.<sup>91</sup>

### Invited v. compelled witnesses

The Supreme Court also rejected the very firm distinction the High Court drew between witnesses attending voluntarily and those attending under compulsion. The Supreme Court held that the courts could intervene to protect the constitutional rights of non-Members irrespective of whether they are giving evidence on foot of an invitation or under a coercive power. While the High Court noted that Ms Kerins was free to walk out of the hearing at any time without facing legal sanction, the Supreme Court took “a real world view”<sup>92</sup> of the reality of the situation of someone invited to give evidence to a Committee. The Court noted the reputational damage that would inevitably be occasioned by someone simply walking out of an Oireachtas Committee. The Court seemed to characterise this soft power of Committees as meaning that even invitees would consider their attendance before the committee not entirely voluntary. As the Court observed:<sup>93</sup>

“If it were to be established that a person was invited to appear before a Dáil committee on one basis but the committee proceeded to act in a manner wholly inconsistent with the

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<sup>89</sup> *Kerins v McGuinness & Ors* [2019] IESC 11, para. 6.3.

<sup>90</sup> *Ibid*, para. 7.21.

<sup>91</sup> *Ibid*, para. 10.11.

<sup>92</sup> *Kerins v McGuinness & Ors* [2019] IESC 11, para. 11.2(h).

<sup>93</sup> *Ibid*.

basis on which the invitation was issued and accepted, then it would be little solace to the individual concerned to be told that they could walk out without any legal consequences.”

This is at odds with the High Court judgment, which viewed the exercise of some coercive legal power as necessary to establish the existence of some jurisdiction exercised by the committee. For the Supreme Court, the committee is exercising a power or jurisdiction over the witnesses irrespective of whether or not there is a formal legal sanction for non-compliance with the committee.

### Not an absolute barrier

While the Supreme Court therefore rejected that there exists an “absolute barrier” to the bringing of proceedings in respect of the actions of a committee, it emphasised that the Constitution “confers a wide scope of privilege and immunity on the Houses and their committees”.<sup>94</sup> Accordingly, it stated there were circumstances in which proceedings would not be entertained. The Court said that proceedings “cannot properly be brought” where it:

- (a) Would involve the Court in breaching the privileges and immunities expressly set out in Article 15 or in acting in a manner which would invoke a jurisdiction in respect of matters closely connected with those privileges or immunities; or
- (b) Would otherwise amount to an inappropriate breach of the separation of powers.

The Court also held that it would not intervene where the conduct complained of was technical or insufficiently serious to justify judicial intervention.<sup>95</sup>

The Court appears to hold that while Article 15 does not, as a whole, create an absolute shield of non-justiciability, the Court will hold as absolute any immunity specifically enumerated in the Article e.g. the privilege given to reports or publications of either House in Article 15.12 and utterances in Article 15.13. The Court also invokes a general principle of restraint; namely that a court should consider whether it is appropriate to intervene given the overarching principle of the separation of powers.

In this aspect of the judgment, the Supreme Court appears to adopt a somewhat narrower, more literal reading of Article 15 than the High Court. The High Court spoke at length about the historical patrimony of Article 15 and its jurisprudential ancestor in Article 9 of the Bill of Rights 1689,<sup>96</sup> and appeared to use this as a basis for interpreting Article 15 as establishing a somewhat broader sphere of non-justiciability than did the Supreme Court. By contrast, the Supreme Court engages in a closer, more literal reading of the text of the relevant articles in determining that they do not establish an absolute shield of non-justiciability.

### Actions v utterances

The Supreme Court drew a distinction between the actions of the committee as a whole and the utterances of individual Members. While it held that the actions of a committee as a whole can, in

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<sup>94</sup> *Kerins v McGuinness & Ors* [2019] IESC 11, para. 15.2(iii).

<sup>95</sup> *Kerins v McGuinness & Ors* [2019] IESC 11, para. 9.28.

<sup>96</sup> Article 9 of the Bill of Rights 1689 provides “That the Freedom of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.” It was repealed in this jurisdiction by the Schedule to the *Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013*.

appropriate circumstances, be reviewed by the courts, individual Members have an absolute immunity for any utterance they make within the four walls of parliament. The Court was very clear in stating that it was not concerned with the tone or oppressiveness of the questioning:<sup>97</sup>

“The Court has emphasised that what requires to be assessed, before a court can intervene, is the actions of a committee as a whole and not a consideration of individual utterances of members of the committee concerned.”

### Appropriate defendants

The Court determined for related reasons that it was not appropriate to name individual members of the committee as defendants. The Court instead determined that it was the House or Houses themselves that are the appropriate defendants in actions of this nature.<sup>98</sup> That is, Dáil Éireann, as a constitutionally recognised body is the appropriate defendant in an action concerning the conduct of a committee established by that House. While the Court did not elaborate, it stands to reason that Seanad Éireann would be the appropriate defendant in an action concerning the conduct of a one of its committees, and both Houses of the Oireachtas the appropriate defendants in respect of the conduct of a joint committee.

### The second judgment

In the first judgment, the Court determined the issue of constitutional principle i.e. whether it would be constitutionally permissible for a Court to declare the actions of a committee of the Oireachtas to be unlawful. Having determined that question of principle, the Court invited arguments from counsel on the question of fact; whether it can be said that the actions of PAC, when looked at as a whole, can be said to have been in significant breach of the invitation issued? Having considered the arguments of counsel, the Court issued a second judgment on this question of fact.

The Court found that the PAC had acted significantly outside of jurisdiction, and also beyond the terms of its invitation to Ms Kerins, and as such had acted unlawfully. It granted a declaration in the following terms:<sup>99</sup>

“A declaration that, by conducting a public hearing in a manner which was significantly outside of its terms of reference and which also departed significantly from the terms of an invitation by virtue of which a citizen was requested to attend, the Public Accounts Committee of Dáil Éireann acted unlawfully.”

In reaching this determination, the Court had regard to four factors;

1. The fact that the committee acted *significantly* outside its terms of reference.
2. The fact that the committee had departed *significantly* from the terms of the invitation issued to Ms Kerins.
3. That the unfair conduct of the hearing, in going beyond terms of reference and invitation represented the actions of the committee as a whole, rather than any individual member.
4. That there was no appropriate internal remedy available to Ms Kerins.

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<sup>97</sup> Ibid, para. 15.2(viii).

<sup>98</sup> Ibid, para. 15.2(vi).

<sup>99</sup> *Kerins v McGuinness & Ors* [2019] IESC 42, para. 6.3.

In relation to the first of these factors, the Court observed that it is entirely open to the Oireachtas to widen the terms of reference of its committees in order to account for a proposed line of inquiry, provided those terms of reference remain within the constitutional remit of the Houses. The Court stressed that that remit is “very wide”.

In relation to the second of these factors, the Court held that a committee’s questioning must stay within the bounds of the invitation. It was observed that “questioning on areas well outside the terms of [the] invitation did represent a significant part of the hearing”.<sup>100</sup> The Court also stated that the terms of an invitation can be altered, as long as it is not at such a late stage as to be unfair. It also stated that discussions between an invitee and the committee or its representatives prior to the hearing could be taken into account in assessing the scope of the invitation. It also set out how such invitations are to be interpreted. It stated that an invitation is not a “formal legal document” and would not be parsed by a court as if it were a statute. Rather, the court said, “it is a letter of invitation which should be interpreted as a reasonable recipient of the letter concerned might be expected to read it.”<sup>101</sup>

In relation to the third of these factors, the Court, reaffirming what it said in its first judgment, stated that it was not concerned with assessing the individual comments of any of the committee member. Rather, it said that it would assess whether the actions of the committee as a whole in the conduct of the hearing represented a departure from its terms of reference, or the terms of its invitation to the witness. In this regard, the Court stated that it would assess whether the committee was acting “in unison”. The Court also noted that the conduct of the Chairman of the committee, who himself asked a number of questions significantly beyond the scope of the invitation, would be important in assessing whether the unfair conduct of the hearing could be attributed to the committee as a whole.<sup>102</sup>

In relation to the fourth of these factors, the Court stated that it will only intervene where there is a significant and unremedied unlawful action on the part of a Committee. As the Court noted in the first judgment, “[i]f the Oireachtas provides some means of controlling the unlawful activities of its own committees then that fact would weight most heavily against it being appropriate for a court to intervene.”<sup>103</sup> In effect, the Supreme Court is suggesting that if the Oireachtas provides a mechanism through which a non-member could seek redress for the unlawful actions of committee, it would likely no longer be necessary or appropriate for a court to intervene to protect the rights of that non-member.

These four factors, and the clarity with which the Supreme Court has set them out, provide significant guidance to the Houses of the Oireachtas as to how it can remedy its own processes and procedures such that the rights of witnesses are protected, and to prevent further litigation in the courts.

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<sup>100</sup> *Ibid*, para. 5.24.

<sup>101</sup> *Ibid*, para. 4.6.

<sup>102</sup> *Ibid*, para. 5.5 – 5.9.

<sup>103</sup> *Kerins v McGuinness & Ors* [2019] IESC 11, para. 10.15.

## The case goes on

The *Kerins* case is still ongoing before the courts. The Supreme Court was only concerned with the question of justiciability, and whether the PAC had acted unlawfully. This is due to the fact that the High Court at an early stage divided the claim into two separate modules. The first module was to determine the jurisdictional issues raised by the claim and the second module, which would only come to pass in the event of a ruling in Ms Kerins' favour in the first module, would deal with the issue of damages. The second module will now be heard before the High Court.

### Box 6: Explainer: *O'Brien v Clerk of Dáil Éireann*<sup>104</sup>

#### *O'Brien v Clerk of Dáil Éireann*

The Supreme Court handed down its judgment in *O'Brien v Clerk of Dáil Éireann & Ors* just six days after the first judgment in *Kerins*. The two cases raised similar constitutional issues relating to the separation of powers and the scope of parliamentary privilege. Due to these common issues, an identical panel of the Supreme Court considered the two appeals in tandem.

The *O'Brien* case concerned statements made in Dáil Éireann in 2015 by Deputies Murphy and Doherty in relation to Mr O'Brien's personal banking affairs. Mr O'Brien had secured a temporary injunction against RTÉ in respect of the information disclosed by the Deputies. The effect of the disclosure by the deputies was to render largely ineffective the High Court's injunction, and continuing proceedings moot. Mr O'Brien wrote to the Ceann Comhraile, alleging that the disclosures constituted an abuse of parliamentary privilege. The comments of the deputies were considered by the Committee on Procedures and Privileges (CPP), who determined that neither deputy had abused privilege. Mr O'Brien issued proceedings in the High Court seeking declaratory relief.

The High Court found against Mr O'Brien and he pursued an appeal to the Supreme Court. On appeal, he did not seek to challenge the utterances themselves but rather the decision of the CPP not to sanction the deputies. He argued that the CPP's decision was based on an erroneous interpretation of the relevant standing order, and was made without evidence to support it.

The Supreme Court dismissed the appeal. The Court held that, while, as per *Kerins*, there is no absolute barrier to such proceedings, the Court cannot intervene where in doing so it would breach an express privilege contained in the Constitution, such as the privilege in respect of utterances in the Houses. Mr O'Brien argued that he was not seeking relief in respect of the utterances themselves, but rather the decision of the CPP not to sanction the deputies. The Court rejected this argument, holding that this would "necessarily amount to an indirect or collateral challenge to the utterances themselves".

Thus, the key difference between *O'Brien* and *Kerins* is that the Court considered that Mr O'Brien's action directly concerned the utterances of a Member, something that attracts an express privilege under the Constitution. The Court stated that to make a deputy amenable to a court in the manner sought by Mr O'Brien would "be a breach of Article 15.13 and would amount to an impermissible departure from the separation of powers."

<sup>104</sup> [2019] IESC 12.

## The implications of *Kerins*

The full consequences and implications of major judgments often take many years to reveal themselves, and *Kerins* is likely to be no different. Its contribution to the jurisprudence relating to the separation of powers will be further explored and refined in subsequent cases, just as *Kerins* explored and refined the principles enumerated in previous cases. However, there are some implications of the judgment that are clearer, including the proposals in train for a review of internal Oireachtas procedures.<sup>105</sup>

### Reaction to the judgment

The judgment was something of a surprise in legal and political circles, perhaps in part due to how emphatically the High Court had rejected the claim. In this surprise, much of the initial reaction to the judgment characterised it as a further encroachment on the Oireachtas' authority to conduct committee inquiries. Dr Tom Hickey described the judgment as "likely to compound the damage done by the *Abbeylara* decision" and observed that, as a result of the decision, "the spectre of litigation hovers more menacingly over our parliamentarians".<sup>106</sup> Dr David Kenny observed that the decision "could create a chilling effect, where fear of litigation and court oversight hampers the freedom of parliamentary speech".<sup>107</sup> David Gwynn Morgan, professor of law at UCC, was perhaps the most critical, arguing that "the outcome in this case will lead on to either a docile, confused parliament or to a torrent of litigation".<sup>108</sup>

These comments reflect a view that the decision marked the crossing of a constitutional Rubicon; by opening the possibility that a court could declare the actions of an Oireachtas committee unlawful, the Court may have made inevitable a flood of litigation that will paralyse committees and their valuable work.

### Analysis of the judgment

However, while the judgment will certainly have implications for the work of committees, much of the impact of the decision will depend on the response of the Oireachtas to the decision, and in particular the comments of the Supreme Court in relation to the provision of internal remedies.

While the finding that there is no absolute barrier to the bringing of proceedings presents challenges, the Court is clear that the Oireachtas can effectively immunise itself against this threat by providing for a proper system of remedies for those affected by its conduct.

As the Court noted in the first judgment, "[i]f the Oireachtas provides some means of controlling the unlawful activities of its own committees then that fact would weight most heavily against it being appropriate for a court to intervene."<sup>109</sup> In effect, the Supreme Court is suggesting that if the

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<sup>105</sup> A Working Group to examine such proposals has been established and is discussed below.

<sup>106</sup> Tom Hickey, '[Spectre of litigation now hovers over our parliamentarians](#)' *The Irish Times* (March 2, 2019).

<sup>107</sup> David Kenny, '[The fear is that Oireachtas committees will now be fearful](#)' *The Irish Examiner* (March 4, 2019).

<sup>108</sup> David Gwynn Morgan, '[Why Angela Kerins won and Denis O'Brien lost](#)' *The Irish Times* (March 6, 2019).

<sup>109</sup> *Kerins v McGuinness & Ors* [2019] IESC 11, para. 10.15.

Oireachtas provides a mechanism through which a non-member could seek redress for the unlawful actions of committee, it would likely no longer be necessary or appropriate for a court to intervene to protect the rights of that non-member. All of this substantially diminishes the potential for a “chilling effect” on the work of Oireachtas committees.

In the course of discussing the implications of the judgment before Public Accounts Committee, Mellissa English BL, the Chief Parliamentary Legal Adviser to the Oireachtas, rejected the characterisation of the judgment as creating a “chilling effect”:

“[T]here have been messages out there about this chilling effect on parliamentary committees, which is absolutely incorrect...the court is asking Parliament to set up a system that will rebalance the rights of non-Members when they appear in front of committees. It is stating that if we put procedures in place to provide an avenue of redress for people who believe they have been unfairly treated... the courts will give Parliament a very wide margin of appreciation in how it runs its business. It is far from a chilling effect.”

The Court also observed, in relation to the issue of committees going beyond their remit, that it is entirely open to the Oireachtas to widen the terms of reference of its committees in order to account for a proposed line of inquiry, provided those terms of reference remain within the constitutional remit of the Houses. The Court stressed that that remit is “very wide”.

The Court is also stressed the limited nature of its jurisdiction to intervene, stating that it will not do so if it would breach an express privilege in the Constitution (such as the privilege attached to official reports) or would be inappropriate having regard to the principle of the separation of powers as a whole.

## Impact of the decision on political and institutional culture

Notwithstanding some evidence that the *Kerins* decision may not, in fact, impose an excessive burden on the conduct of committee inquiries, the impact of this decision is perhaps not limited to its precise legal effect. The cultural impact of decisions can be as significant as their legal effect; cultural both in the sense of impact on political culture and on institutional culture. These are discussed in turn.

### Impact on political culture

In relation to political culture, it is evident that the *Kerins* decision has been seen in some circles as a censure of the PAC, and as imposing further constraints of committee work more generally.<sup>110</sup> While the Supreme Court did not in any sense impugn the integrity and positive contribution of committee work as a whole, the decision has arguably already resulted in a certain loss of the “soft power” of committees. This was in evidence in John Delaney’s appearance before a Committee shortly after the first judgment. Mr Delaney refused to answer any questions in relation to FAI finances at a committee hearing, citing the *Kerins* judgment.<sup>111</sup> While in reality the *Kerins*

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<sup>110</sup> John Downing and Denise Calnan, [“Chilling’ Angela Kerins case will continue to shake the foundations of Oireachtas’](#) *Irish Independent* (10 June, 2019).

<sup>111</sup> The Irish Times, [‘John Delaney says he cannot answer questions about €100,000 payment’](#) (April 10, 2019). Mr Delaney, the Executive Vice President of the Football Association of Ireland (FAI), attended voluntarily a meeting of the Joint Committee on Transport, Tourism and Sport. He refused to answer

judgment did not pose any legal constraint on Mr Delaney in answering the questions put to him, the episode raised concerns about the manner in which the judgment has been interpreted; and arguably misinterpreted.<sup>112</sup>

### Impact on institutional culture

Perhaps the most interesting aspect of the judgment, and what may turn out to be the most significant in the long term, will be the effect on the institutional culture of the Oireachtas. The questions raised by the Supreme Court has already given rise to the establishment of a Working Group to consider and implement the Court's recommendations. This will endeavour to establish a change in institutional procedures and the institutional culture of committee inquiries in light of the *Kerins* decision.<sup>113</sup> The Working Group sought submissions on issues such as the establishment of new remedies and the conduct of hearings. Submissions closed on September 9<sup>th</sup> 2019.

#### Box 7: Working Group on Parliamentary Privilege and Citizens' Rights

##### Working Group on Parliamentary Privilege and Citizens' Rights

The Dáil Committee on Procedure and the Seanad Committee on Procedure and Privileges have established a Working Group on Parliamentary Privilege and Citizens' Rights. The Working Group will consider how the Oireachtas is to respond to the judgments of the Supreme Court in *Kerins*. The function of the Working Group was set out in a press release:<sup>1</sup>

"Following the two judgments of the Supreme Court in *Kerins v McGuinness and Ors* ..., the Houses of the Oireachtas are conducting a review of their procedures, in particular their Standing Orders (Rules of Procedure) , to ensure that the rights of citizens are respected throughout the parliamentary process. In this context, the Dáil Committee on Procedure and the Seanad Committee on Procedure and Privileges ('the Committees') have established a working group of parliamentary officials to consider solutions and responses to the judgments and to report back to the Committees at an early date in respect of the following matters:

- House and Committee procedures,
- Oversight mechanisms,
- Citizens' rights, and also remedies and sanctions, and
- The role of the Houses of the Oireachtas Service."

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questions about irregularities in the accounts of the FAI, citing legal advice and in particular the decision of the Supreme Court in *Kerins*, which had been delivered a month earlier.

<sup>112</sup> Dr David Kenny reflected these concerns in comments to *The Irish Times*, stating that "What we saw was a script for avoiding questions you don't want to answer, and I think we're going to be seeing it a lot more in future" *The Irish Times*, '[Kerins case hovers over work of committee examining Delaney](#)' (10 August, 2019).

<sup>113</sup> Oireachtas Press Release available at <https://www.oireachtas.ie/en/press-centre/press-releases/20190725-working-group-on-parliamentary-privilege-and-citizens-rights-calls-for-written-submissions/> .

Thus, while there was an initial sense that *Kerins* was the culmination or end-point of encroaching judicial intervention in the legislative realm, further analysis suggests that the Court's invitation (that the Oireachtas establish a proper remedial system) provides a means of averting further judicial intervention in parliamentary affairs. An Oireachtas committee system, once enhanced with proper dispute resolution systems and increased remedies for persons affected by its conduct, can forestall judicial intervention in its affairs in all but the most exceptional of circumstances.

However, notwithstanding the Court's insistence on the limited nature of its jurisdiction to intervene, the very acknowledgement of any such jurisdiction is not without difficulty. It is certainly possible that this finding could lead to a more litigious culture surrounding Oireachtas inquiries. Much depends on the response of the Oireachtas and its Members to the judgment, as well as on the manner in which the decision is applied by subsequent courts. If the effect of the decision is such a diminution of committee influence and authority, greater reliance may have to be placed on the alternative institutions of public accountability (discussed above) in order to secure accountability and transparency in the public sphere.

The decision provides firm guidance to the Oireachtas as to how it can structure its affairs such as to prevent such an outcome, and to preserve the distinct contribution made by Oireachtas committees to public accountability as a whole.

## Conclusion

The Supreme Court's decision in *Kerins v McGuinness* is complex and multi-layered. It seeks to strike a delicate balance between competing constitutional imperatives; a duty to preserve the separation of powers, and to uphold the rights of individuals. There is, and will continue to be, much debate about whether the Supreme Court was correct in where it struck this balance. However, perhaps the most important aspect of the judgment for the Oireachtas and its Members to engage with is the challenge the Court has set the legislative branch. The Court has invited the Oireachtas to revise and reform its procedures in such a way as to make future judicial intervention less likely. The Oireachtas has responded to this invitation with the establishment of a Working Group to consider reforms that address the Supreme Court's concerns that the rights of witnesses are not adequately protected by current Oireachtas procedures.

This *Spotlight* has sought to set out the decision, its rationale, its context and its implications. The *Spotlight* has also sought to place the decision in its legal, political and historical context; setting out the history of Oireachtas committees, the various previous cases that considered the scope of committee powers and parliamentary privilege, and the how the role of Oireachtas committees interacts with other institutions of public accountability.



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