

# **Parliamentary Fellowship of The Houses of the Oireachtas**

## **Role of the Houses of the Oireachtas in the Scrutiny of Legislation**

**Dr. Brian Hunt**



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(2009 - 2010)**

Prepared in fulfilment of the award of the Inaugural Parliamentary Fellowship (2009 – 2010) at the Houses of the Oireachtas.

Submitted to the Houses of the Oireachtas on 17th December 2010.

Dr. Brian Hunt



### **Purpose of the Monograph**

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The scrutiny of legislation is arguably one of the most important roles discharged by the Houses of the Oireachtas. This monograph aims to examine, for the first time, the various elements and features of the political system which have some impact on the ability of the Houses to scrutinise legislation, and to assess whether the requirements of the Constitution, as regards scrutinising and enacting legislation, are fulfilled by the current arrangements.

In this way, it is hoped that this monograph contributes to scholarship on the Houses of the Oireachtas and advances the knowledge and understanding of the workings of the Houses, particularly in regard to their role in scrutinising legislation.

### **Outline of Monograph**

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The scrutiny of legislation is one of the key roles served by any legislature and its importance in an Irish context derives from Article 15.2.1 of the Constitution which provides that the sole and exclusive power of making laws is vested in the Oireachtas.

In view of the primacy of the Houses' role in making laws, this monograph seeks to examine the diverse factors which enhance or impede the ability of Members of the Houses to adequately scrutinise legislation. This monograph also examines a range of reforms and initiatives of recent years which have invariably served to enhance the ability of Deputies and Senators to scrutinise legislation more effectively. Separately, this monograph also examines the arrangements which are in place to scrutinise EU legislation and also secondary legislation.

In what is perhaps its most novel feature, through an analysis of parliamentary debates, this monograph seeks to shed some light on:

- The amount of parliamentary time which is spent scrutinising legislation;
- The length of time it takes for a Bill to move through the Houses;
- The extent to which opposition amendments are accepted/rejected;
- The degree to which members on all sides of the Houses actively participate in the task of scrutiny.

This monograph finds that, having regard to the requirements of the Constitution, the Standing Orders of the Houses, and current practice as evidenced by the record of parliamentary debates, the degree of scrutiny to which legislation is subjected by the Houses is not as effective as it could otherwise be. In that context, the monograph goes on to identify some initiatives which would enhance the ability of members of the Houses to scrutinise legislation.

### **Scope of the Monograph**

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This monograph is primarily concerned with the scrutiny of primary legislation by both Houses of the Oireachtas. There is some limited examination of the extent to which legislative measures emanating from the EU institutions are scrutinised and the scrutiny of secondary legislation is also addressed. The role of the Houses in scrutinising Private Members Bills is not examined, nor is the scrutiny of Private Bills. In several instances, the monograph seeks to reflect the practices and experiences of other comparable jurisdictions.

### **Methodology**

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This monograph is based on a reading of an extensive body materials including books, articles and official reports. A considerable degree of reliance has been placed on research conducted using the records of debates of both Houses. Data has been presented in Chapter 9 and is based on an examination of sample dates and a sample of Acts over a set period.

In addition, the monograph has been considerably enhanced through discussions and engagement which I have had with current and former members of the Houses, as well as with senior officials at the Houses.

The monograph also benefits from my knowledge of the parliamentary and legislative process gleaned whilst working in the Office of the Attorney General and more recently whilst working in Leinster House.

## **A Personal Note**

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Having previously studied legislation in great detail in the course of my PhD thesis - which focussed on the fruit of the legislative process - that I should then turn, in this monograph, to study how legislation is scrutinised and made, seems to complement my earlier research.

It has been a fascinating topic to examine and I am indebted to the Parliamentary Fellowship Committee of the Houses of the Oireachtas for awarding the Inaugural Parliamentary Fellowship on this, my chosen topic. It has been an honour to have been chosen and my only hope is that this monograph is seen as being true to the objectives of the Parliamentary Fellowship.

The preparation of this monograph has taken twelve months, and its completion would not have been possible without the assistance of many people. Firstly, I would like to thank Mr Justice Gerard Hogan who, up until his appointment to the High Court Bench in September 2010, acted as my supervisor for this monograph. I am particularly grateful to former Tánaiste and Minister for Justice, Michael McDowell S.C. who agreed to take over as my supervisor. The monograph has benefited greatly from their guidance and wisdom.

From the outset, former Taoiseach, the late Dr Garret FitzGerald, a member of the Parliamentary Fellowship Committee at the Houses, showed immense enthusiasm for the subject-matter of this monograph which was truly inspiring.

I am indebted to Maria Fitzsimons, Head of Research at the Houses of the Oireachtas who has expertly steered this project to completion. Thanks are also due to Madelaine Dennison, Head of Library and Research Service as well as the staff of the Library and Research Service at the Houses of the Oireachtas.

I would like to also thank the members of the Houses who gave so generously of their time to me in agreeing to be interviewed for the purpose of my research. They include: former Taoiseach Bertie Ahern; former Government Chief Whip and Minister of State, John Curran; former Government Chief Whip, Tom Kitt; former Fine Gael whip (now Government Chief Whip) Paul Kehoe TD; and Labour Party whip, Emmet Stagg TD. The Assistant Clerk of the Dáil, Dick Caffrey, was also of particular assistance.

As ever, renowned UK expert in statute law, Francis Bennion provided invaluable insights and I would also like to thank Gay Mitchell MEP and Professor William Binchy. I would also like to thank my colleagues at Zurich, in particular Arno Wicki and Chris Davidson, both of whom were very supportive of my involvement with the Fellowship.

I owe a particular debt of gratitude to Henry Murdoch whose forbearance has allowed me to defer my work on updating Murdoch's Dictionary of Irish Law so as to concentrate on completing this monograph.

I would also like to thank my parents for their continued support and encouragement.

I would like to thank my wife Natallia, who, as ever, has been so supportive of my involvement with the Fellowship and the inevitable time sacrifices required. Finally, in so far as it is appropriate to dedicate a monograph, this is dedicated to our wonderful children - Ryísa and Dara.

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**Legislation and the Requirement for Scrutiny****TASK OF LEGISLATIVE SCRUTINY****What Constitutes Scrutiny?**

In the context of the legislative process, at its most basic, scrutiny can mean reading and examining legislation. On another level, scrutiny can be taken to mean the raising of concerns or issues as regards the content of proposed legislation. Taken one step further, scrutiny can also mean the remedying of those concerns or issues, whether by securing an assurance or undertaking from the Minister or by securing the acceptance of an amendment.

From the opposition's perspective, the principal purpose of scrutinising legislation is to explore the sponsoring Minister's motive behind the introduction of the legislation; to tease out the policy thinking behind each provision of the legislation; to test whether the legislation as drafted will meet the stated objectives; and to table amendments which are aimed at addressing any gaps or weaknesses identified in the Bill.

**Article 15.2.1 of the Constitution**

Article 15.2.1 of the Constitution effectively stands as the bedrock of this monograph as it is that provision which dictates that "[t]he sole and exclusive power of making laws for the State is hereby vested in the Oireachtas". As if to place the matter beyond all possible doubt Article 15.2.1 goes on to emphatically state that "no other legislative authority has power to make laws for the State"<sup>1</sup> – thus serving to confirm that the legislative power of the Oireachtas may not be delegated.<sup>2</sup>

Article 15.2.1 is somewhat unique in the Irish constitutional framework in that the law-making power is exclusively conferred on the Oireachtas, whereas many of the other powers conferred by the Constitution are not so specifically delimited. Also unusual is the fact that the legislative process

which flows from the power conferred by Article 15.2.1, is only given further expression in the Standing Orders of both the Dáil and the Seanad which set down the specifics of the various stages of the legislative process.

But this seemingly extensive power is not without limitations. In *State (Walshe) v Murphy*<sup>3</sup>, Finlay P was of the view that the legislative power which had been conferred by Article 15.2.1 was "absolute and all-embracing" but was however subject to certain qualifications, principally the requirement that the legislative power of the Oireachtas be limited to the enactment of laws which are compatible with the Constitution. Therefore, responsibility for ensuring that legislation is compatible in all respects with the Constitution rests solely with the Oireachtas in discharging its role in scrutinising legislation<sup>4</sup>.

The reference in Article 15.2.1 to the Oireachtas is a reference to all three elements of the Oireachtas – the Dáil, the Seanad, and the President. It must follow then that any law which is made by both Houses alone, is not in conformity with the requirements of Article 15.2.1. This view has been affirmed by Johnson J in *Meagher v Minister for Agriculture*<sup>5</sup> where he stated that a mechanism which enabled the Houses to annul a statutory instrument could not be equated with the enactment of legislation as the President had no role in the former, but did have a role in the latter.

**Article 15.2.1 and the E.U.**

The absolutist terms of Article 15.2.1 of the Constitution have been dramatically modified as a result of Ireland's membership of the EU. The effect which this has on the dilution of Article 15.2.1 and the sole and exclusive law-making powers of the Irish legislature is recognised in Article 29.4.10<sup>6</sup> - which expressly acknowledges the power of the EU to make laws which are

1. In the 1922 Constitution, the equivalent provision is set out in the latter part of Article 12, which provided in slightly more detailed terms that "[t]he sole and exclusive power of making laws for the peace, order and good government of the Irish Free State is vested in the Oireachtas."

2. In *Pigs Marketing Board v Donnelly* [1939] IR 413, Hanna J stated that: "It is axiomatic that powers conferred upon the legislature to make laws cannot be delegated to any other body or authority. The Oireachtas is the only constitutional agency by which laws can be made." In *Cooke v Walsh* [1984] IR 710, O'Higgins CJ felt it necessary to interpret a provision of legislation in a way which would absolve the Oireachtas from "any intention to delegate its exclusive power of making or changing the laws".

3. [1981] IR 275.

4. As stated by the Supreme Court in *Cityview Press v An Comhairle Oiliúna* [1980] IR 381, the ultimate responsibility for ensuring first, that legislation is compatible with the Constitution and secondly, that the exclusive authority of the Houses as regards law-making is not eroded by an unauthorised delegation of legislative power – rests with the courts.

5. [1994] 1 IR 329; [1994] 1 ILRM 1.

6. No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State.

binding on the State. The significance of this was recognised by Keane J in *Murphy v Bord Telecom Éireann*<sup>7</sup> where he observed that:

*“The exclusive role of the making of laws assigned to the Oireachtas by Article 15 of the Constitution has been expressly modified by Article 29.4.10 so as to enable Community law to have the force of law in the State.”*

In addition to the EU dimension, the breadth of the legislature’s law-making powers under Article 15.2.1 are of course also rendered less exclusive by virtue of the fact that the making of secondary legislation by Ministers and certain regulatory bodies, is now commonplace.

### **Article 15.2.1 and Secondary Legislation**<sup>8</sup>

It is well established that the task of making secondary legislation may be delegated by the Oireachtas to a Minister or other body, such as a State agency. The case of *Cityview Press v An Comhairle Oiliúna*<sup>9</sup> is central to this issue. It concerned a challenge the making of a levy order (which had the effect of amending primary legislation) pursuant to a power contained in the Industrial Training Act 1967. The Supreme Court confirmed that it was acceptable for primary legislation to authorise the making of secondary legislation in this way.

However, the Court’s view was that in order to avoid being regarded as being an unconstitutional delegation of legislative power, secondary legislation must do no more than give effect to the “principles and policies which are contained in the statute itself”.<sup>10</sup> In other words, in order to be permissible, the secondary legislation must not venture into the territory of introducing new principles or new policies beyond those already expressed in its parent Act.

### **Article 15.2.1 and the Role of Judiciary in Law-Making**

The fact that members of the Houses alone have been bestowed with the “sole and exclusive power” for making laws in the State means that it is a power which ought to be discharged with great care and diligence. The clear terms of Article 15.2.1 of the Constitution preclude the judiciary from involving themselves in the task of law-making. As stated by Hardiman J in *Sinnott v Minister for Education*<sup>11</sup>:

*“... if judges were to become involved in ... designing the details of policy in individual cases or in general, and ranking some areas of policy in priority to others they would step beyond their appointed role.”*

And he went on to note one of the important considerations which distinguishes members of the Houses of the Oireachtas from members of the judiciary:

*“... the legislature and the executive, possessed of a democratic mandate, are liable to recall by the withdrawal of that mandate. That is the most fundamental, but by no means the only, basis of the absolute necessity for judicial restraint in these areas.”*

However, the judiciary does have an important role to play in the interpretation of legislation and they also serve an important role in developing common law and constitutional jurisprudence. In those instances in which the judiciary do become engaged in the task of developing law, the developments tend to be very much incremental and narrow in their scope<sup>12</sup>.

The role of the Houses in the scrutiny of legislation is protected by Article 15.2.1 and is underpinned by the doctrine of the separation of powers. The effect of this has been that the courts tend to demonstrate a healthy degree of reluctance when faced with a request to amend legislation or even infer amendments to legislation<sup>13</sup>.

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7. [1989] ILRM 53, 59.

8. The scrutiny of secondary legislation is addressed in Chapter 8.

9. [1980] IR 381.

10. As stated by the Court: “... the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits – if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body – there is no unauthorised delegation of legislative power.” - [1980] IR 381, 399.

11. [2001] 2 IR 545 at 711.

12. Writing in 2003, former Chief Justice, Ronan Keane was of the view that “[t]he tide of judicial lawmaking has somewhat receded in recent years in Ireland.” See Keane, “Judges as Lawmakers: The Irish Experience” 4(2)

(2004) Judicial Studies Institute Journal 1 at p.15.

13. For example, in *In Re Green Dale Building Co* [1977] IR 256 at 266, Henchy J in the Supreme Court refused to amend a subsection in an Act on the grounds that “amending the subsection ... is something beyond the constitutional competence of the courts.” In *The State (Murphy) v Johnston* [1983] IR 235, the Supreme Court declined to correct what was widely accepted as being an obvious mistake in legislation as to do so would encroach upon the role of the legislature. Of course the courts have traditionally had a role in developing common law, which Lardner J in *RT v VP* [1990] 1 IR 545 at 558 described as “a judicial activity which has occurred in Ireland for centuries” and which he said was not “an impermissible exercise of the legislative function”. In *Somjee v Minister for Justice* [1981] ILRM 324 at 327, Keane J stated: “The Court has no jurisdiction to substitute for the impugned enactment a form of enactment which it considers desirable or to indicate to the Oireachtas the appropriate form of enactment which should be substituted for the impugned enactment.”

As the elected representatives of the people, the members of the Houses are best placed to conduct the task of scrutinising and making laws on the electorate's behalf. The current electoral system serves to ensure in so far as is possible (in respect of the Dáil), that those who are elected are effectively a microcosm of society. Therefore, to the task of scrutinising legislation, they bring a diversity of backgrounds and opinions which is, to a good degree, reflective of the electorate. Their suitability as a body charged with the task of making laws has also been recognised by the courts<sup>14</sup>.

### NON-JUSTICIABILITY<sup>15</sup> AND THE SCRUTINY OF LEGISLATION

By virtue of the doctrine of the separation of powers which flows from Article 6 of the Constitution<sup>16</sup>, certain aspects of parliamentary affairs are beyond the reach of the courts. Such matters are then said to be non-justiciable<sup>17</sup>. The nature and scope of the principle of non-justiciability was highlighted by Geoghegan J in *TD v Minister for Education*<sup>18</sup>:

*“While it is true that out of respect for the separation of powers the courts will not interfere with the internal operations of the orders and rules of the Houses in respect of their own members, the non-justiciability principle stops there. If there is some essential procedural step which a house of the Oireachtas or a committee thereof has to take before rights of an outsider, that is to say a non-member of the House can be affected, then at the suit of that outsider the courts can give relief if that essential step is not taken.”*<sup>19</sup>

In the context of legislative scrutiny, a key question which arises here is whether the non-adherence to Standing Orders of the Houses in relation to the passage of legislation, in a way

which seems to undermine the primacy of the role of the Houses as the sole legislature would prove to be justiciable.

There is a significant body of jurisprudence in this area which would seem to suggest that there is a great reluctance on the part of the courts to interfere with the proceedings of the Houses. For example, in 1935, Johnston J in *O’Crowley v Minister for Justice*<sup>20</sup> was quite emphatic in his view that the court had “no authority to inquire how or by what process a public Act reached the statute book”<sup>21</sup>. When asked to intervene in a matter involving the legislative process in *Roche v Ireland*<sup>22</sup>, Carroll J in the High Court was equally emphatic in her refusal to do. In *Maguire v Ardagh*<sup>23</sup>, Keane CJ alluded to the established principle that aspects of the legislative process and the regulation of parliamentary affairs are beyond the reach of judicial scrutiny<sup>24</sup>.

On the question of the justiciability of matters involving the Standing Orders<sup>25</sup> of the Dáil, Hardiman J in *Ó Beoláin v Fahy*<sup>26</sup> affirmed this degree of deference, stating that the Standing Orders are “entirely a matter for the Dáil”. In relation to the framing of parliamentary questions, similar restraint was exercised by the courts in *O’Malley v An Ceann Comhairle*<sup>27</sup>, but significantly, O’Flaherty J did seem to envisage the possibility of some extreme circumstances in which the intervention of the courts might be warranted. The framing of parliamentary questions was described as being:

*“... such a matter concerning the internal workings of Dáil Éireann that it would seem inappropriate for the court to intervene except in some very extreme circumstances which it is impossible to envisage at the moment.”*

In a later case<sup>28</sup>, the Supreme Court seemed to envisage the Court intervening in certain circumstances:

14. For example, in *Hynes-O’Sullivan v O’Driscoll* [1988] IR 436, Henchy J stated that law reform is best effected by those who “are in a position to take a broad perspective as distinct from what is discernible in the tunnelled vision imposed by the facts of a single case”.

15. On non-justiciability, see McDermott “The Separation of Powers and the Doctrine of Non-Justiciability” (2000) 35 Ir Jur 280.

16. Article 6.1 of the Constitution provides: “All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.”

17. As stated by Hogan & Whyte, *Kelly - The Irish Constitution* (4th ed., Dublin, 2003) at para.3.2.93, the process of enacting legislation has been identified as being beyond the scope of judicial review. For a recent consideration of justiciability, see the decision of O’Neill J in *Callely v Moylan* [2011] IEHC 2.

18. [2002] 1 IR 419.

19. *ibid.* at 736.

20. [1935] IR 536.

21. *ibid.* at 549.

22. Unreported, High Court, 17th June 1983.

23. [2002] IR 385.

24. Similarly, in *Haughey v Moriarty* [1999] 3 IR 1, Geoghegan J refused to be drawn into determining whether the Seanad had been correctly convened on a particular occasion, stating that it is for the Dáil and Seanad to regulate their own procedures. Also, in *Crotty v An Taoiseach* [1987] IR 713, Barrington J stated: “... the Oireachtas is free to exercise its legislative powers without interference by the courts in the course of legislation.”

25. The precise status of standing orders of the Houses was considered by the Supreme Court in *In Re Haughey* [1971] IR 217 where the applicant had challenged their constitutional validity.

26. [2001] 2 IR 279. See *Cane v Dublin Corporation* [1927] IR 582, where it was held that inherent in the power of the Houses to make their own standing orders, was the power to set down the rules regarding the legislative process.

27. [1997] 1 IR 427.

28. *McDonnell v Brady* [2001] 3 IR 588.

“...it has been made clear on more than one occasion that the respect which each branch of government owes to the other branches will not inhibit the judicial branch from intervening where the Constitution is being violated by either or both of the other branches.”

Hogan & Whyte<sup>30</sup> express the view that “it seems perfectly conceivable that the High Court would, in a suitable case, assert its jurisdiction to review the process by which a particular Bill had passed the Houses...”. However, even in circumstances where a court feels utterly constrained by the separation of powers from making a finding of inadequacy in regard to an aspect of the legislative process relating to a particular Bill, a court could at the very least express its disdain regarding the adequacy of the legislative process in question, whilst avoiding making a formal declaration to that effect. Such an expression of disdain was adopted by the Divisional High Court in *Doherty v Government of Ireland*<sup>31</sup> where the Court found that there had been unreasonable delay in moving the writ for a by-election. The Court stopped short of compelling the Government to hold the by-election within a certain timeframe in the hope that the “clarification provided by this judgment would have that effect.”<sup>32</sup>

### ROLE OF THE PRESIDENT IN SCRUTINISING LEGISLATION

Once a Bill has passed all stages in both Houses, it is printed onto vellum and it is then sent to the President for her signature. The provisions of the Bill are then scrutinised by the President with a view to satisfying herself as to the constitutionality of the Bill. In contrast with the breadth of scrutiny to which legislation is subjected by the Houses, the extent of scrutiny engaged in by the President may perhaps be said to be simply one-dimensional – focusing solely on constitutionality.

The significance of the President’s role in scrutinising legislation derives from the fact that if, having considered the legislation, the President has doubts as to its constitutionality, she may decide to convene a meeting of the

Council of State to consider the matter further, following which she may decide to refer the Bill to the Supreme Court<sup>33</sup> for its adjudication of the constitutionality of the legislation.

While she is considering the constitutionality of a Bill, the President is open to receiving submissions from members of the public who may have views regarding the constitutionality of the Bill which has been presented to her for promulgation.<sup>34</sup>

## LEGISLATION

### What is Legislation?<sup>35</sup>

Domestic legislation is divided into two categories: primary legislation and secondary legislation.<sup>36</sup> The term primary legislation refers to Acts of the Oireachtas and the term secondary legislation encompasses regulations and orders, which are also collectively referred to as statutory instruments.

A Bill is the vehicle by which the policies of the Executive (or individual members of the Houses) requiring legislative authority are expressed and are presented to be debated and passed by the Houses of the Oireachtas and promulgated by the President. Every new government comes into office with a new mandate and a new set of promises or proposals which it must set about implementing. Whilst the implementation of government policy does not always require new legislation, many government policy proposals require some form of legislation.

One of the features which greatly distinguish one form of legislation from another is the level of scrutiny to which each is subjected. In order to acquire its authority as an Act, a Bill must be scrutinised by each House of the Oireachtas and once passed is then signed by the President. In contrast, statutory instruments<sup>37</sup> are made pursuant to an Act by a Minister acting alone and consequently they receive little or no scrutiny.

Once enacted<sup>38</sup> or made<sup>39</sup>, legislation forms part of the collective body of legislation which governs us - the Irish Statute Book. The Irish Statute Book is a significant body of law, now

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29. *ibid.*, at 600.

30. Hogan & Whyte, Kelly - *The Irish Constitution* a(4th ed., Dublin, 2003) at para. 4.5.10.

31. [2010] IEHC 369.

32. A similar approach was also adopted by Hamilton CJ in *McMenamin v Ireland* [1996] 3 IR 100 where he drew an injustice to the attention of the Houses but stopped short of making a formal declaration to that effect on the grounds that due to the doctrine of the separation of powers, he felt precluded from doing so.

33. Pursuant to Article 26 of the Constitution.

34. For example, it was reported that a lobby group had written to the

President urging her to convene a meeting of the Council of State with a view to referring a Planning and Development (Amendment) Bill 2009 to the Supreme Court to test its constitutionality, see *Irish Times*, 19 July 2010.

35. See generally, Hunt, *The Irish Statute Book: A Guide to Irish Legislation* (Dublin, 2007); Bennion, *Statutory Interpretation* (5th ed., London, 2009).

36. Legislative measures emanating from the institutions of the EU are considered in Chapter 7.

37. The scrutiny of secondary legislation is discussed in Chapter 8.

38. In the case of primary legislation.

39. In the case of secondary legislation.

consisting of approximately 3,449 Acts in force. This breaks down as 1,364 pre-1922 Acts<sup>40</sup> and 1,985 post-1922 Acts. In addition to primary legislation, there are approximately 26,000 statutory instruments which also form part of the Irish Statute Book.<sup>41</sup> As a result of a number of factors, principally the European Communities Act 1972, statutory instruments are having an increasing effect on the Irish Statute Book, which has effectively resulted in the creation of a third form of legislation: statutory instruments which have statutory effect.<sup>42</sup>

### **Policy Development and Scrutiny**

The initiative behind a piece of legislation may derive from a variety of sources, including:

- an obligation imposed by the EU<sup>43</sup>;
- a promise made in a Programme for Government<sup>44</sup>;
- a proposal contained in a Law Reform Commission Report<sup>45</sup>;
- a proposal contained in a White Paper<sup>46</sup>;
- a proposal advanced by a Government or Departmental working group<sup>47</sup>;
- the Report of an expert, or expert group<sup>48</sup>;
- an international Treaty or Convention<sup>49</sup>;
- a decision of a court<sup>50</sup>;
- a commitment given as part of a social partnership agreement<sup>51</sup>;
- a proposal contained in a private members' Bill<sup>52</sup>; and,
- an undertaking given to a lobby group<sup>53</sup>.

The parsing of policy ideas, the conduct of comparative analysis and the weighing up of the strengths and weaknesses of a particular

approach are all important steps in the policy development process and can strengthen the resultant legislation. Legislation which results from a report of an Oireachtas Committee, Law Reform Commission Report, a Green Paper or White Paper, or the report of an expert group, is more likely to have been preceded by a process of in-depth research and consultation than legislation which is developed on foot of a promise made in a programme for government. Former Taoiseach, Bertie Ahern is of the view that a more open, consultative approach to the development of policy is superior:

*“In my view, a far better way of devising policy and making laws is if the matters have first been addressed in a Green Paper and White Paper. Issues which are tackled in this way are far better thought out and received far better scrutiny than a Bill which just appears out of nowhere and gets pushed through the Houses.”<sup>54</sup>*

In his view, a more open approach to the development of legislation can mean that through their engagement with the policy development process, “... TDs and Senators become far more knowledgeable in the subject-matter and are then much better prepared to scrutinise the legislation when it is published in the Houses.”<sup>55</sup>

### **Government Priorities**

The type of legislation which is brought before the Houses will be determined by Government priorities of the day and will be based on commitments made in the Programme for Government. Of course prevailing Government priorities will also be influenced by the need to address or react to unforeseen events. In

40. These Acts were specifically retained by the Statute Law Revision Act 2007.

41. The accessibility of legislation is explored in Chapter 3.

42. Statutory instruments having statutory effect are the subject of further discussion in Chapter 8.

43. The Criminal Justice (Joint Investigation Teams) Act 2004 gives effect to an EU Council Framework Decision.

44. A commitment to introduce a ban on stag hunting was contained in the Renewed Programme for Government (Oct 2009) at p.25 and was enacted in the Wildlife (Amendment) Act 2010.

45. The Land and Conveyancing Law Reform Act 2009 is based on a draft Bill which had been prepared by the Law Reform Commission and was contained in its Report on the Reform and Modernisation of Land Law and Conveyancing Law (LRC 74-2005).

46. The Government's White Paper on legislation entitled Regulating Better (Jan 2004) pledged to implement a programme of statute law revision at p.36. This commitment led to the enactment of a series of Statute Law Revision Acts.

47. The Company Law Enforcement Act is an example of legislation which derived from proposals advanced by a Government working group - Working Group on Company Law Compliance and Enforcement which was chaired by Mr. Michael McDowell S.C.

48. Aspects of the Central Bank Reform Act 2010 are based on a Report which was prepared by Mazars.

49. The Criminal Justice (Terrorist Offences) Act 2005 gives effect to various international conventions on the taking of hostages, the suppression of terrorist bombings, and the suppression of the financing of terrorism. The Act also gives effect to an EU Framework Decision.

50. For example, the Enforcement of Court Orders (Amendment) Act 2009 was introduced as a consequence of issues raised by the High Court decision in *McCann v Judge of Monaghan District Court* (High Court, 18 June 2009).

51. The National Employment Rights Authority (NERA) was established on foot of a commitment in the Social Partnership Agreement entitled Towards 2016 and is to be given a statutory basis by the Employment Law Compliance Bill 2008.

52. The Child Trafficking and Pornography (Amendment) (No 2) Bill 2004 was tabled as a Fine Gael private members' Bill which was subsequently accepted by the Government and was enacted in the Criminal Law (Sexual Offences) (Amendment) Act 2007.

53. Intensive lobbying by interest groups appears to have influenced aspects of the Adoption Act 2010.

54. Interview with author, 13 October 2010.

55. *ibid.*,



each parliamentary session the Government priorities in the period ahead will be set out in the Legislation Programme. The formal business of each House is detailed in the Order Paper and it is that document which indicates the items of business which will be taken each day.

#### *Programme for Government*

The Programme for Government which has been agreed between the Government parties and which is published upon the formation of the Government gives a good indication of the Government's priorities which will prevail for the duration of its term. Many aspects of the Programme for Government will give rise to the need for legislation to be brought before the Houses whilst other aspects of the Programme will result in resolutions or motions being brought before the Houses for decision.

#### *Legislation Programme*

The Government's legislative plans as set out in the Programme for Government will then be reflected in its Legislation Programme over successive parliamentary terms. At the beginning of each parliamentary session, the Government Chief Whip publishes the Government's Legislation Programme which sets out the Government's legislation priorities over the coming session, and in particular highlighting legislation which it plans to initiate during that session as well as indicating legislation which is currently being drafted.

#### *Order Paper*

An Order Paper for each House is published on each sitting day. In accordance with Standing Orders<sup>56</sup>, the Order Paper governs the business of the House for that day and it sets out the following:

- (i) the business of the House in respect of that day;
- (ii) details of Committee meetings which have been scheduled for that day;
- (iii) details of Bills which are before the House generally and those which are before Committees;
- (iv) details of motions which are before the House generally;
- (v) details of Reports which have been submitted to the Dáil by Committee Chairs;
- (vi) votes in relation to expenditure; and

- (vii) details of the documents which have been laid before the Dáil.

A separate Order Paper is published in respect of the Seanad and it contains similar details.<sup>57</sup> The text of all questions which have been tabled in the Dáil for answering by Government Ministers are also set out in a separate paper.<sup>58</sup>

#### *Order of Business*

The Order of Business is taken shortly after the commencement of business and it consists of an announcement by the Taoiseach<sup>59</sup> (in the Dáil) and Leader (in the Seanad) of the items which are to be taken as part of the business of the House for that day and the time to be allocated to each item. Typically this will involve identifying the Bills to be debated and for how long; the motions to be taken and whether they will be taken with or without debate<sup>60</sup>; and, the allocation of time for questions tabled to Ministers.

#### *Preparation of Legislation*

*The Cabinet Handbook*<sup>61</sup> details the procedural steps which must be adhered to when the Cabinet's agreement to a proposal for legislation is being sought. Usually the first time that a legislative proposal is brought before the Cabinet is when it is presented by the relevant Minister, in the form of a Memorandum for Government which seeks the Cabinet's approval "for a decision in principle of the policy at issue".

Once the policy underlying the proposal has been approved, there then follows a further Memorandum for Government which seeks the Cabinet's approval for the drafting of the Bill. There is a requirement that this Memorandum should also include a Regulatory Impact Analysis as an appendix.

If Cabinet approval is granted, the sponsoring Department then begins to prepare the first draft of the Bill which is called the heads or general scheme of the Bill. Once the Bill reaches this stage, it must be circulated amongst the other government Departments with sufficient time for them to make observations.

The heads of the Bill are then submitted to the Cabinet seeking approval for drafting by the Office of the Parliamentary Counsel to proceed. Once this approval is granted, the heads are then sent to the Attorney General's office, where the text will be refined by Parliamentary Counsel.<sup>62</sup> This is also the appropriate time to conduct

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56. Standing Orders 26 and 31 of the Dáil.

57. See Standing Orders 23 and 24 of the the Seanad.

58. There has been a fairly dramatic rise in the number of parliamentary questions which are tabled in the Dáil - up from approximately 5,000 in 1975 to approximately 27,000 in 2004. However, over that period the number of PQs which have been answered orally has declined significantly - from approximately 4,300 in 1975 down to approximately 1,800 in 2004. This has ensured that the handling of parliamentary

questions do not consume a disproportionate amount of time in the Dáil schedule.

59. In the Dáil, the Order of Business is usually taken by the Tánaiste on Thursdays.

60. See Standing Order 26(2) of the Dáil.

61. Available at [www.taoiseach.gov.ie](http://www.taoiseach.gov.ie).

62. Formerly known as parliamentary draftsmen.

meaningful pre-legislative scrutiny<sup>63</sup> or other process of public consultation.

Once the drafting process has been completed, the Bill is again circulated amongst other Government Departments for final observations before being formally presented to Cabinet. Once the Cabinet signals its approval, the Bill is then ready to be initiated in either House and begins its journey through the legislative process.

### **Role of the Bills' Office**

The Bills' Office of the Houses of the Oireachtas plays a crucial role in the legislative process in that it ensures that the legislative journey undertaken by each piece of legislation is procedurally correct. The Bills' Office is responsible for arranging the publication of each Bill. It also receives and processes amendments proposed to each Bill in advance of Committee Stage and Report Stage and in doing so is responsible for ensuring that each amendment which has been proposed is "in order" i.e. permissible under the Standing Orders.<sup>64</sup> In preparation for Committee and Report Stages, the Bills' Office also carries out an exercise which is referred to as the grouping of amendments.<sup>65</sup> The Bills' Office also arranges for the publication of new versions of the Bill incorporating amendments and it is the Bills' Office which transmits each Bill to the President for her signature.

The current approach taken to the scheduling of legislation means that the Bills' Office often receives very little advance notice of the proposal to advance a Bill to the next stage of the legislative process. A 2002 benchmarking review of the services provided to the Houses (as against those provided in other jurisdictions) noted the effect which the current approach to the scheduling of legislation has on the Bills' Office:

*"... the absence of any long or medium term scheduling of Government legislative business contributes significantly to the unpredictable workload."*<sup>66</sup>

Previously the Bills' Office's remit was in

respect of Bills which were being considered in the Dáil, but in recent years it has also assumed responsibility for Bills which are being considered in the Seanad.<sup>67</sup>

### **Legislative Process and Standing Orders**

The nature of the Irish Constitution is that it uses broad brush-strokes to paint the landscape which would make-up the State. Therefore, as noted by Keane CJ in *Maguire v Ardagh*<sup>68</sup>, the Constitution is devoid of detail on many important issues, the legislative process being just one of them:

*"The Constitution is a political charter, using the adjective in its broadest sense. One does not expect to find in it the level of detail which, in our legislative tradition, we associate with Acts, regulations and byelaws. This is striking[ly] apparent in the provisions concerning the national parliament. They constitute a small, carefully landscaped promontory behind which lies a vast hinterland of unwritten conventions, custom, precedents and modes of behaviour derived from our history and experience."*

This is particularly apparent in relation to the absence of detail concerning the legislative process. Of course by the time the 1937 Constitution had been endorsed by the people, the Houses of the Oireachtas had been operating for almost fifteen years (or even longer since the establishment of the first Dáil in 1919) – so this ought to have afforded ample time to build up and develop the conventions, customs and precedents to which Keane CJ referred.

This led Keane CJ to go on to remark that the Constitution is:

*"... virtually silent as to how [the] uniquely important power [of scrutinising legislation] is to be exercised ... The traditional machinery of first and second reading, committee stage, report stage and final reading does not achieve even a mention and was clearly intended to be dealt with solely by means of standing orders."*<sup>69</sup>

The Standing Orders of the Dáil and Seanad<sup>70</sup> require that each Bill must undergo five stages of

63. Pre-legislative scrutiny is the subject of discussion in Chapter 6.

64. Restrictions on the nature and form of amendments are considered in Chapter 4.

65. The grouping of amendments is discussed in more detail in Chapter 4.

66. Houses of the Oireachtas, Staffing and Grading – International Benchmarking Review (2002) at para. 4.4.

67. Responsibility for Bills which were before the Seanad was previously the responsibility of the Seanad Office.

68. [2002] IR 385.

69. *ibid.* at 504. As stated by Hogan & Whyte in Kelly - The Irish Constitution

(4th ed., Dublin, 2003) at para. 4.5.05. "The constitution does not prescribe any particular procedure, e.g. the number or nature of the stages in the legislative process through which a Bill must pass in respect of either House. These matters are, by virtue of Article 15.10, regulated by the Standing Orders of each House."

70. Standing Orders of the Dáil Relative to Public Business (2007) – Standing Orders 120 – 134. The legislative process which a pure consolidation Bill must undergo is set out in Standing Order 129 – 148. Standing Orders of the Seanad Relative to Public Business (2007) – Standing Orders 109 – 130.

the legislative process in each House.<sup>71</sup> It is these various stages of the legislative process which actually provide the members of each House with an opportunity to scrutinise legislation.

First Stage involves seeking the permission of the House to initiate the Bill.<sup>72</sup> Government Bills do not require the consent of the House in order to be initiated and therefore Government Bills effectively begin life at Second Stage. Private Members' Bills must undergo First Stage and consequently they do require the consent of the House in order to be initiated.<sup>73</sup>

Second Stage<sup>74</sup> involves a debate on the entire Bill which is opened by the sponsoring Minister. In accordance with the Standing Orders, the debate at Second Stage should "be confined to the general principle of the Bill".<sup>75</sup> In the Dáil, the debate is opened with the words "I move: that the Bill be now read a second time."<sup>76</sup> Having opened the Second Stage debate, the sponsoring Minister will explain the need for the Bill and will give an overview of the various Parts of the Bill, perhaps explaining some of its key provisions in a little more depth. The Minister's speech is then followed by several contributions from the opposition as well as Government backbenchers.<sup>77</sup> The opposition will invariably be critical of the Bill, highlighting particular provisions of concern, focusing on gaps or weaknesses in the Bill as well as indicating their intention to table amendments in certain areas. Contributions from Government backbenchers will invariably be praising of the Bill and the Minister for having introduced the Bill.<sup>78</sup>

In the Dáil and Seanad, the Second Stage debate is brought to a conclusion by a voting upon the proposal which was put at the outset of the debate, namely "That the Bill now be read a second time".

Once the Bill is passed at Second Stage, it then moves to Committee Stage. One commentator<sup>79</sup> was of the view that Second Stage is "the most important stage" in the parliamentary life of a Bill on the basis that the entire principle of the Bill is at issue. However, from the point of view of scrutiny, it seems quite clear that Committee and Report Stages are of far greater significance.

Third Stage is more commonly referred to as Committee Stage and it involves section-by-section scrutiny of the Bill and it is at this stage that Government and opposition amendments may be formally tabled.<sup>80</sup> As with Second Stage, the sponsoring Minister will usually attend Committee Stage.<sup>81</sup> Except for some rare exceptions, Committee Stage of the Dáil takes place in a Committee room<sup>82</sup>, and not in the Dáil chamber, whereas Committee Stage in the Seanad is taken on the floor of the chamber. In theory the entirety of the Bill can potentially be amended at Committee Stage. Members are free to propose amendments to the existing text and in addition they may propose entirely new sections or text.<sup>83</sup> However, one exception to this rule is that the Seanad may only make recommendations, rather than amendments, to a Money Bill.<sup>84</sup>

In order to be eligible to be tabled, amendments must be relevant to the subject-matter or provisions of the Bill and must not be "in conflict with the principle of the Bill".<sup>85</sup> It is also possible for members to propose amendments to each other's proposed amendments – though in practice this facility is only ever availed of by members of the opposition wishing to propose an amendment to a Government amendment. Proposed amendments tend to be grouped<sup>86</sup> by topic and thus debated collectively so as to minimise the

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71. A Bill (except for a Money Bill) may be initiated in either House, but irrespective of where it is initiated, it must be passed by both Houses.

72. Standing Order 120(1) of the Dáil and Standing Order 109 of the Seanad.

73. It is customary that members of the Government do not oppose leave to introduce a Private Members' Bills which are proposed by the opposition.

74. Also referred to as Second Reading.

75. Standing Order 121(1) of the Dáil and Standing Order 114 of the Seanad.

76. The language of such a motion seems somewhat odd, particularly as the Bill has not formally been read in the House on a previous occasion. However, the language seems to reflect the fact that a Bill other than a Government Bill may not be initiated without the prior leave of the Houses – perhaps suggesting that the Bill would receive a first reading prior to its introduction.

77. The duration of contributions is limited pursuant to Standing Order 121(3) of the Dáil.

78. As stated by Government Chief Whip, Minister John Curran: "It is the case that when Government backbenchers speak on a Bill, they do tend to be supportive of the legislation. They tend not to be overtly critical of a Bill and the furthest they might go is to suggest that the sponsoring Minister might consider ABC." – Interview with author, 17 November 2010.

79. May, *Parliamentary Practice* (18th ed., London, 1971) at p.485.

80. See Standing Orders 122 – 128 of the Dáil and Standing Orders 115 – 120 of the Seanad. There are certain restrictions upon the types of amendments which may be tabled and those restrictions are considered in Chapter 4. Pursuant to Standing Order 136 of the Dáil, the Clerk of the Dáil is empowered to make minor corrections to a Bill during its passage through the House. A similar power exists in Standing Order 131 of the Seanad.

81. A Sponsoring Minister who attends the Select Committee is for the duration of his/her attendance deemed to be an ex officio member of that Committee: Standing Order 92(1) of the Dáil.

82. The re-location of Dáil Committee Stage from the Dáil chamber to dedicated Committee Rooms is discussed in Chapter 5.

83. Standing Order 124 of the Dáil and Standing Order 117 of the Seanad.

84. Article 20.1 of the Constitution provides - "Every Bill initiated in and passed by Dáil Éireann shall be sent to Seanad Éireann and may, unless it be a Money Bill, be amended in Seanad Éireann and Dáil Éireann shall consider any such amendment." The procedure applicable to the Dáil's consideration of recommendations made by the Seanad is provided for in Standing Order 166 of the Dáil.

85. Standing Order 127 of the Dáil and Standing Order 119 of Seanad.

86. The grouping of amendments is discussed in Chapter 4.

repetition of debate on that topic.

During Committee Stage, the member tabling the amendment explains the rationale behind the amendment, other members supporting or opposing the amendment may contribute and then the Minister responds by indicating whether he or she proposes to accept or reject the amendment. A member who wishes to press an amendment may call a vote. Committee Stage progresses on a section by section basis when the Chair of the Committee proposes “that section x stand part of the Bill”.<sup>87</sup> In respect of both Houses, once Committee Stage has concluded, the Bill is then re-printed incorporating all of the amendments which have been made during Committee Stage and the Bill is then ready to commence Fourth Stage.

Fourth Stage is more commonly referred to as Report Stage and it is somewhat similar to Committee Stage in that amendments are tabled and debated. However there are important differences, such as the fact that Report Stage is taken on the floor of the Dáil chamber (and also the Seanad chamber). Another important difference is that amendments proposed at Report Stage must arise from matters which were discussed at Committee Stage or changes made at Committee Stage. Amendments which have been rejected at Committee Stage may not be tabled at Report Stage<sup>88</sup> and amendments which impose a charge on the Exchequer are also precluded.<sup>89</sup> In addition, the debate at Report Stage is more restrictive in that members may only contribute twice<sup>90</sup> in respect of an amendment. As the focus is solely on proposed amendments, members are precluded from engaging in a general discussion on sections of the Bill. The effect of these restrictions are that the debate is less free-flowing than that which takes place at Committee Stage and thus tends to be shorter.

As regards Fifth Stage, this mainly relates to the actual passing of the Bill. Whilst in theory oral amendments are permissible at this stage, except in the case of pure consolidation Bills<sup>91</sup>, Fifth Stage is not treated as a distinct stage. When a Bill moves to Report Stage it is always referred to as “Report and Final Stage” so in effect both Fourth and Fifth Stages are taken together and only one vote is held to confirm that the vote has passed both Stages. Once it is proposed “that the Bill do now pass” and that is affirmed, the Bill’s journey in that House is completed.<sup>92</sup>

Once the Bill has completed all five stages in the House in which it was initiated, the Bill

is then ready to begin its journey through the other House where all five stages are repeated.<sup>93</sup> However, a Bill which has been initiated in the Dáil and subsequently been amended in the Seanad, must be returned to the Dáil for final consideration.<sup>94</sup> Only when a Bill has passed all five stages in each House may it then be deemed to have been passed by the Houses and then be sent to the President for her signature.<sup>95</sup> The text of the signed vellum copy of the Act is then enrolled in the Office of the Supreme Court.<sup>96</sup>

87. Pursuant to Standing Order 125(2) of Dáil and Standing Order 118(2) of the Seanad.

88. Pursuant to Standing Order 131 of the Dáil and Standing Order 124 of the Seanad.

89. Pursuant to Standing Order 132 of the Dáil and Standing Order 125 of

Seanad. This restriction applies to members of the Government and opposition.

90. The second contribution must not exceed two minutes: pursuant to Standing Order 129(3) of the Dáil.



## Electoral System and its Impact Upon the Level of Scrutiny

### INTRODUCTION

Political theorists are very fond of speaking about what they term “the decline of parliament” - a proposition which argues that the Executive branch of government has primacy over the legislative branch<sup>1</sup>. Various features of the political system, such as the political party system, the whip system and the way in which decisions are taken in the Houses has, it seems fair to say, led to a situation where the Houses are dominated by the wishes of the Executive. In many respects, the Executive may come to regard the Houses as being an obstacle to its planned achievements and for that reason seeks to restrict the power and influence of the Houses.

With no power to enact laws independently of the Executive, the Houses have in many respects become a creature of the Executive. This is sometimes referred to by members as the “sidelining”<sup>2</sup> of the Houses and can be a cause of considerable annoyance to those who are at a remove from the centre of power, namely members of the opposition<sup>3</sup>, and to a lesser extent, Government backbenchers<sup>4</sup>.

Various other practices and developments within the Houses have brought about a situation where the Executive’s control over the Houses has increased. These practices and developments have an impact on the legislative process and, in-turn, have an impact on the ability of the Houses to adequately scrutinise legislation.

In this Chapter and the following two Chapters, the various features of the political systems which either enhance or in some way diminish the ability of the Houses to scrutinise legislation are examined.

### ROLE OF TDS AND SENATORS

Such is the primacy of the task of making laws, that it is from this role that members of the Houses, and the Houses themselves, derive their name<sup>5</sup>. Looking more closely at the term “legislator”, the first part of the word, legis, is the genitive of lex, meaning law. The second part of the word lator means carrier or proposer<sup>6</sup>. We refer to members of the Houses as legislators and as forming part of the legislature. In *Attorney General v Hamilton (No 2)*<sup>7</sup>, O’Flaherty J gave his own view of how he saw the role of a parliamentarian:

*“... while, undoubtedly, the essential function of deputies ... is to legislate it should be emphasised that it is not their only function. They are also representatives of those who elect them. Deputies have an obligation to air the concerns of the constituents and to draw attention to anything that is a matter of public unease or concern and they must be allowed to do so in freedom but each not neglecting to bring his individual judgment to bear on the issue in debate.”*

As alluded to by O’Flaherty J, members of the Houses have a diverse range of roles and responsibilities. However, it seems that for many members, acting as a legislator is no longer the primary motivator.

The roles of members of the Houses can be divided into two types of activity: parliamentary activity and constituency activity. In terms of parliamentary activities, the roles of TDs and Senators involve reviewing legislation; devising proposed amendments; participating in debates on legislation; questioning members of the Government<sup>8</sup>; participating in debates on other important matters, and participating in the work of Committees. Those on the Government side of each House will also be responsible for

1. For example, see Bryce, *Modern Democracies* (London, 1921) as reproduced in Norton, *Legislatures* (Oxford, 1990); Foot, *Parliament in Danger!* (London, 1959); and, Crick, *The Reform of Parliament: An Interpretation of the British System of Government by an Advocate of Change* (London, 1965). According to the All Party Oireachtas Committee on the Constitution in its Seventh Progress Report – Parliament (Mar 2002), “there is a widespread and powerful sense that the two Houses are not fulfilling their functions as effectively as they should, and that their standing and relevance are in decline” (at p.9).

2. Speaking during Second Stage of the Criminal Procedure (Amendment) Bill 2007, Deputy Charles Flanagan stated: “Over the past ten years, Fianna Fáil and its Government partners have proven to be very adept at sidelining Parliament and the Legislature as much as possible, thereby allowing the Executive and the Minister of the day to have virtual free rein.” 640 Dáil Debates Col. 149.

3. For example, Deputy Brian Hayes complained: “This place has been a doss house, effectively, for the past ten years or so, where people

cannot speak their minds. Everyone one of us is elected in our own right but there is a dreadful centralisation of power on the other side of the House and on this side.” 720 Dáil Debates (28 October 2010).

4. For example, Deputy Barry Andrews, stated: “I look forward to a time when we as Government backbenchers will have a much greater role to play and be consulted more widely.” 584 Dáil Debates (22 April 2004).

5. The doctrine which states that law-making was the principal and defining function of a legislature was devised by Montesquieu along with other theorists. See Montesquieu, “Of the Laws which Establish Political Liberty with Regard to the Constitution” as reproduced in Norton, *Legislatures* (Oxford, 1990).

6. See Norton, *Legislatures* (Oxford, 1990) at p.3.

7. [1993] 3 IR 227 at 295.

8. The tabling of parliamentary questions is the preserve of TDs.

defending Government policy and its actions whilst those on the opposition side of each House will see it as their duty to scrutinise and question, and even obstruct, government policies and actions. In terms of constituency-related activities, a significant portion of a TD's time is consumed by constituency work. As a result of the survey conducted by the Oireachtas Joint Committee on the Constitution<sup>9</sup> much more is known about the role played by TDs in constituency work, as compared with that of Senators<sup>10</sup>.

## ELECTORAL SYSTEM

The electoral systems pursuant to which members are elected to the Houses have a significant level of influence over the priorities of members, including their level of commitment to the scrutiny of legislation. The current Dáil electoral system<sup>11</sup> engenders a high degree of competition amongst those who aspire to being elected and indeed those who have been elected. Satisfying the electorate therefore becomes the *raison d'être* for most national politicians. It is for this reason that TDs, and perhaps to a lesser extent, Senators, are widely regarded as being interlocutors for people who encounter difficulty in dealing with an office or agency of the State.

## Current Electoral System

The current electoral system which is used in Ireland is termed Proportional Representation, Single Transferable Vote (PR-STV)<sup>12</sup>. Under this system, which has been in use in Ireland since

1919<sup>13</sup>, voters cast one vote but then express their preference as to how that vote is to be transferred from one candidate to the next<sup>14</sup>. In respect of general elections, PR-STV is a system which is generally regarded as electing TDs in a manner which is highly proportionate<sup>15</sup> to their share of the votes cast. The system has also produced a succession of stable governments, including coalition governments<sup>16</sup>.

## Proportionality

The Table below demonstrates that under the PR-STV system there is a good degree of proportionality between the percentage of votes won and the percentage of seats won. In contrast, the UK's first past the post system has given rise to seat gains or losses for parties which bear little or no relation to the percentage of votes won<sup>17</sup>.

Furthermore, it can be said that the PR-STV system is easy to use, and having rejected two referenda<sup>18</sup> which, if passed, would have resulted in a change to the voting system, Irish voters are clearly comfortable with it at this stage.

Table No. X: 2007 General Election Results

Party	% of Votes Won	% of Seats Won
Fianna Fáil	41	46
Fine Gael	27	30
Labour	10	12
Progressive Democrats	2	1
Greens	4	3
Sinn Féin	6	2
Independents	5	3

9. Joint Committee on the Constitution, Third Report - Results of Survey of Members of Both Houses of the Oireachtas (Feb, 2010).

10. As Senators are not directly elected, it seems reasonable to expect that the level of constituency related work in which they engage is somewhat less than that of TDs. However, the fact that many Senators are aspirant TDs also has to be factored into any assessment of the level of constituency work in which they engage.

11. The impact of the Seanad electoral system on the priorities of members of the Seanad is not considered in any detail.

12. An insightful history of PR-STV in Ireland is set out in Joint Committee on the Constitution, Fourth Report - Review of the Electoral System for the Election of Members to Dáil Éireann (Jul, 2010) at p.23 et seq.

13. In Ireland, PR-STV was first used in an election to Sligo Corporation in 1919: Joint Committee on the Constitution, Fourth Report - Review of the Electoral System for the Election of Members to Dáil Éireann (Jul, 2010) at p.24.

14. The use of PR-STV is provided for in Article 16 of the Constitution. Article 16.2.5 of the Constitution provides: "The members shall be elected on the system of proportional representation by means of the single transferable vote." Article 26 of the 1922 Constitution provided that "members shall be elected upon the principle of Proportional Representation."

15. The degree of proportionality is directly linked to the number of

seats within a constituency. A five-seater constituency will yield a greater degree of proportionality than a three-seater.

16. This view was echoed by the Joint Committee on the Constitution, Fourth Report - Review of the Electoral System for the Election of Members to Dáil Éireann (Jul, 2010) at p.104. Over half (10 of 18) of the governments formed since 1948 have been coalition governments: Joint Committee on the Constitution, Fourth Report - Review of the Electoral System for the Election of Members to Dáil Éireann (Jul, 2010) at p.77.

17. One of the principal reasons for the disconnect between votes cast and seats gained by parties under the first past the post system is the fact that constituencies can greatly differ in size. The results of the 2010 general election held in the UK shows the disproportionality of the first past the post system: Conservatives won 47% of the seats on 36% of the vote; Labour won 39% of the seats on 29% of the vote; and Liberal Democrats won 8% of the seats on 23% of the vote.

18. In 1959 – 48% voted for change and in 1968 – 39% voted for change. The proposal was that Ireland adopt a first past the post system. At that time the electorate also rejected the proposal that single-seat constituencies be adopted in place of the current multi-seat constituencies.

## Connectivity

Importantly, through its fostering of constituency service, the current electoral system delivers a significant degree of connectivity between the electorate and their elected representatives. To a large degree, the elected representatives also facilitate and encourage this degree of connectivity by being visible in their constituencies, by holding clinics and by being generally accessible.

From the perspective of the parliamentarian, this degree of connectivity is sometimes seen as a burden, but of course due to the parliamentarian's need to secure acceptance from the electorate at election time, it is also seen as a benefit. From a more neutral perspective, it is possible to view this level of connectivity as serving as a distraction from other important responsibilities which rest on the shoulder of the parliamentarian – such as the scrutiny of legislation. However, Professor Gallagher has argued that closeness to constituents and constituency work itself can leave a parliamentarian better informed when it comes to scrutinising legislation<sup>19</sup>. But of course, as an alternative, parliamentarians could also become better informed through pre-legislative scrutiny and consultation processes which would serve as a more efficient way for members to become more familiar with the electorate's views on a piece of legislation.

## Turnover

It seems reasonable to suggest that the current electoral system does deliver change – change in terms of the persons who succeed in getting elected and that change is perhaps to be welcomed. For example, the 2011 election resulted in the election of 76 first-time TDs. The 2002 election resulted in 55 TDs losing their seats, meaning of course that 55 new TDs were elected.

### ELECTORAL SYSTEM & FOCUS OF MEMBERS

A criticism which is frequently levelled at the Dáil electoral system is that it encourages clientelism and a disproportionate focus on trivial and local issues to the detriment of national issues such as the scrutiny of legislation. However, the localised focus of politicians

is by no means new. Writing in 1921, Bryce expressed the view that this tendency towards constituency-related work was problematic:

*“The politicians have become discredited ... partly by the brokerage of places to individuals and favours to localities in which deputies act as intermediates between ministers and local wire-pullers ... The same kind of brokerage is rife in Italy also. The deputy holds his place by getting grants or other advantages for his district, and is always busy in influencing patronage by intrigue.”*<sup>20</sup>

Bryce went so far as to argue that there was a clear conflict between the legislator's roles of representing constituents, party and nation<sup>21</sup>. That a similar type of patronage is a tendency common to politicians at national level in Ireland was recognised by a Joint Oireachtas Committee which remarked:

*“... critics claim that the excessive concentration of TDs on their constituency work leads them to neglect their legislative duties, and that it leads to deputies ‘clogging up the system’ with useless correspondence and deputations.”*<sup>22</sup>

It is arguable that the focus of politicians at national level ought to be primarily upon national issues, and therefore the scrutiny of legislation should rank highly. However in spite of that, for reasons which will be touched upon later, the focus of our elected representatives at national level tends to be dominated by local, constituency issues which have little or no connection with a TD's role in the Dáil.

In essence, the question to be posed is whether our elected representatives are to be regarded as being politicians or parliamentarians; the politician being concerned with constituency and party interests; the parliamentarian being concerned with national issues. The notion that the primary focus of our national politicians should be with legislation and participating in parliamentary debates and committees i.e. discharging their role as members of the legislature, is said to arise from the Burkean philosophy which suggests that national politicians should consider themselves as servants of the nation by whom they were elected.

Chubb's assessment of the role played by members of the Houses was that they were concerned first with assisting individuals within their constituencies, and a parliamentarian:

19. Joint Committee on the Constitution, Fourth Report - Review of the Electoral System for the Election of Members to Dáil Eireann (Jul, 2010) at p.66. A similar point was made by Deputy Jimmy Devins who was said to have argued that contact with constituents informed a TD's legislative role (at p.87 *ibid*).

20. Bryce, *Modern Democracies* (London, 1921) at p.367 as reproduced in Norton, *Legislatures* (Oxford, 1990) at p.47.

21. Bryce, *Modern Democracies* (London, 1921) at p.390.

22. Joint Committee on the Constitution, Third Report - Results of Survey of Members of Both Houses of the Oireachtas (Feb, 2010) at p.22.



*“...will, if asked, give advice on any problem, help prepare applications to public authorities, and make inquiries, submissions, representations or appeals not only for those who vote for him but anyone in the constituency and particularly in his own district ... [P]eople expect their T.D.s to be at their service.”<sup>23</sup>*

In addition, Chubb pointed out that members of the Houses played an important role as regards attending to issues and concerns within the constituency itself:

*“... the representative will also be assiduous in pressing the claims of his district for better health service facilities, roads, drainage, housing and other amenities.”<sup>24</sup>*

However, despite the significance of this aspect of a TD’s role, in *O’Donovan v Attorney General*<sup>25</sup>, Mr Justice Budd pointed out that the constituency-focused role played by TDs is not expressly recognised in the Constitution:

*“the most important functions were positively assigned to Deputies by the Constitution, the paramount duty being that of making laws for the country. The Constitution did not anywhere in the Articles relating to the functions of Deputies recognise or sanction their intervention in administrative affairs.”*

### **Constituency Work & Legislative Scrutiny: Members’ Perspectives**

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Though expressed quite some time ago, Chubb’s perception that “[t]he role of the contact man ... is one that most members accept ungrudgingly” probably remains quite true today. There seems to be a general acceptance amongst politicians on the national stage that an inappropriate portion of their time is dedicated to localised, constituency issues. However, there is a small but increasing tendency of members to question the appropriateness and necessity for them to fulfill this role<sup>26</sup> and some politicians have been quite vocal in their views. When he appeared before the All-Party Oireachtas Committee on the Constitution, former Minister Noel Dempsey stated:

*“We constantly declare that Ireland elects people to legislate, to provide rigorous opposition to the*

*legislators of the time, and yet shrug off the fact that the overwhelming majority of those elected spend vast amounts of time as inefficient messenger boys.”<sup>27</sup>*

As to why members engage in such a high degree of constituency work, several years later the then Minister Dempsey offered the view that:

*“We do so partly because of the electoral system and partly because the multi-seat constituencies in the electoral system foster such inter and intra-party rivalry.”<sup>28</sup>*

On a different occasion, the former Minister Dempsey expressed views to the effect that the only hope of overcoming excessive localism lay in changing the electoral system. He said that it was important to serve one’s constituents, but in his view, the more important part of the job was serving the national good<sup>29</sup>.

Some members of the Houses seem to value their role as national politicians in the sense of being concerned with national policy issues, including legislation. The view of one member of the Dáil on the role of her fellow members was articulated as follows:

*“People continually cite the need for Deputies and Senators to act as legislators, which of course is a highly valuable part of their work. Members should be doing more in this regard and should spend more of their time in the House as legislators. ... I have always considered that the most valuable contributions I have made in this House have been when dealing with legislation.”<sup>30</sup>*

Senator Paul Bradford remarked that “as politicians, we have various duties, sometimes very far removed from the legislative side of the equation. However, our primary duty, as legislators, is to reflect on, amend, if necessary, and propose legislation.”

However, others would be more cynical of the value of dedicating significant amounts of time to the scrutiny of legislation: “There are no votes to be gained from dealing with legislation, at least no direct votes anyway.”<sup>32</sup> This view is, to some extent, shared by former Government Chief Whip and Minister of State John Curran, who stated: “It’s true to say that a member who

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23. Chubb, “Going About Persecuting Civil Servants: the Role of the Irish Parliamentary Representative” 11(3) Irish Political Studies 272 at p.276.

24. *ibid.*,

25. [1961] IR 114; (1962) 96 ILTR 121. Also, referred to in Chubb, “Going About Persecuting Civil Servants: the Role of the Irish Parliamentary Representative” 11(3) Irish Political Studies 272 at p.286.

26. Chubb, “Going About Persecuting Civil Servants: the Role of the Irish Parliamentary Representative” 11(3) Irish Political Studies 272 at p.283.

27. All Party Oireachtas Committee on the Constitution, Seventh Progress Report – Parliament (Mar 2002) at p.20.

28. Joint Committee on the Constitution, Fourth Report - Review of the Electoral System for the Election of Members to Dáil Eireann (Jul, 2010) at p.67.

29. Minister Dempsey speaking at the MacGill Summer School as reported in Irish Times, 20 July 2010.

30. As stated by Deputy Joanna Tuffy during the Second Stage debate on the Statute Law Revision Bill 2009 - 690 Dáil Debates (Second Stage, September 24, 2009).

invests a lot of time in the Houses dealing with legislation is not going to secure extra votes come election time – but that is not what motivates us. An awful lot of the work that members of the Houses do is not attractive or beneficial in the eyes of the electorate, but that is not to say that the work is not of value or worthwhile.”<sup>34</sup>

### **Constituency Work & Legislative Scrutiny: Survey Results**

As part of its wider work programme which involved a review of the electoral system, during 2009 the Joint Committee on the Constitution conducted a comprehensive survey amongst members of the Dáil and Seanad. The survey looked very closely at the way in which TDs apportioned their time between dealing with constituency matters and legislative matters. According to the Joint Committee, the survey constituted “... one of the most in-depth investigations to date of what TDs do with their time, and how they balance their roles as constituency representatives and legislators.”

The results of the survey reveal that TDs report that they spend 53% of their working time on dealing with constituency related matters; 38% of their time in dealing with parliamentary matters; and, 9% of their time

spent on legislative matters breaks down, it reveals that 26% of that time was spent on Committee work; 22% was spent researching legislation preparing amendments; 22% was spent participating in Dáil debates; 16% was consumed by parliamentary party meetings; and 13% of the time was spent in tabling parliamentary questions.<sup>35</sup>

Such was the extent of Deputies’ commitment to prioritising constituency work, the Report found that out of nine activities<sup>36</sup> considered, the three most important to TDs were all constituency-based activities. In terms of priority activities, preparing and researching amendments to legislation was ranked seventh most important by respondents.<sup>37</sup> A similar commitment towards constituency oriented activity was in evidence when TDs were asked what group they believed that a TD should represent.

Having considered the results from the survey, the Joint Oireachtas arrived at the conclusion that the results: “... point to deputies who perceive themselves as constituency workers and representatives first and foremost, but who legislatively place more importance on representing party policy, as well as their own opinions, than on representing constituency opinion.”<sup>38</sup>

### **Constituency Work & Legislative Scrutiny: Other Countries**

The level of constituency work carried out by politicians in Ireland and its perceived impact on the time available to national politicians to scrutinise legislation must be viewed in the context of the roles played by national politicians in other countries.

In his submission to the Joint Oireachtas Committee on the Constitution, Professor Gallagher pointed out that high levels of constituency service are expected of parliamentarians around the world<sup>39</sup>. He also revealed that “MPs in nearly every parliament say they have an incessant flow of constituency demands and coping with them requires a substantial portion of their time.”<sup>40</sup> Whilst TDs in Ireland do spend a significant portion of their time dealing with constituency matters – 53%

**Table: Level of Constituency Work by Reference to Electoral System**

Country	Percentage of Time Spent on Constituency Matters	Type of Electoral System	Percentage of Time Spent on Constituency Matters
Belgium	50% (approx) <sup>43</sup>	Party list system	Multi-seat
Germany	33% (approx) <sup>44</sup>	Mixed-member proportional	Single-member (principally)
Ireland	53% <sup>45</sup>	PR-STV	Multi-seat
UK	47% <sup>46</sup>	First Past the Post	Single-member
Malta	50% <sup>47</sup>	PR-STV	Multi-seat

on other matters. According to the Report, this means that for every hour the average TD spends on legislative matters, 1 hour and 25 minutes is spent dealing with constituency related matters.

Looking more closely then at how the time

31. As stated by Senator Paul Bradford during the Second Stage debate on the Statute Law Revision Bill 2009 - 199 Seanad Debates (Second and Subsequent Stages, December 10, 2009).

32. Interview with author, 27 October 2010.

33. Interview with author, 17 November 2010.

34. Joint Committee on the Constitution, Third Report - Results of Survey of Members of Both Houses of the Oireachtas (Feb, 2010) at p.21. The response rate to the survey was 44% across both Houses.

35. *ibid.*, at p.37.

36. *ibid.*, at p.14.

37. *ibid.*, at p.38.

38. *ibid.*, at p.26.

39. *ibid.*, at p.50.

40. Joint Committee on the Constitution, Fourth Report - Review of the Electoral System for the Election of Members to Dáil Éireann (Jul, 2010) at p.65. Some comparative international studies have looked at the role of parliamentarians in carrying out constituency work, for example, see: Wood & Young, “Comparing Constituency Activity by Junior Legislators in Great Britain and Ireland” 22(2) Legislative Studies Quarterly 217. See also Muller & Saafeld, *Members of Parliament in Western Europe: Roles and Behaviour* (London, 1997).

according to the results of the survey conducted by the Joint Committee of the Houses<sup>41</sup> and 59% according to research conducted by Woods & Young<sup>42</sup> – Ireland is not grossly out of line with the level of constituency service provided in other jurisdictions, as is demonstrated by the table below.

It can also be noted that Welsh and Scottish parliamentarians reported spending 44% of their time on constituency matters.<sup>48</sup> In his evidence to the Joint Committee, Professor Gallagher noted that MPs in Canada spend more time dealing with constituency matters than they do in dealing with other matters.<sup>49</sup>

### REASONS FOR SIGNIFICANT LEVEL OF CONSTITUENCY WORK

According to the Joint Oireachtas Committee on the Constitution, “the electoral system alone cannot be said to determine the levels of constituency service provision observed in Ireland”<sup>50</sup>. As to what the other influential factors might be, the Committee alluded to the factors cited by Gallagher and Komito<sup>51</sup>, such as: political culture in Ireland; the relatively small size of society; administrative structures within the civil service; and, weak local government structures. It is also helpful to look to what Chubb saw as factors which were, in the past at least, conducive to a significant level of constituency related work:

*“In the past, oligarchic rule, under-employment and poverty all led most Irish people to view government, even though it was alien, as a potential source of help, jobs or favours, provided one knew how to tap it. By most people public authorities were thought to be best approached via some intermediary or notable.”<sup>52</sup>*

Chubb attributes this to a mindset which suggested that dealings with government authorities were “still needing the intervention or good offices of a man ‘in the know’ or a person of affairs.”

There now follows a brief examination of various factors to which the current high-levels of constituency work amongst national politicians in Ireland may perhaps be attributed.

### Re-Election

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Election is the ultimate public endorsement of a candidate, from which flows a degree of authority and an entitlement to have his or her concerns, or those of her or her constituents, taken on board. Therefore, the first task of any politician is to get elected and once elected to retain his or her seat. As stated by one Deputy in his evidence to a Joint Committee:

*“Deputies must get re-elected because if one is not re-elected one cannot continue to work. We must concentrate on the constituency and part of the issue is the balance between the two.”<sup>53</sup>*

According to one commentator, legislators tend to be most concerned with securing re-election and for that reason they feel that they must be responsive to the needs of their electorate<sup>54</sup>. As will be touched upon later, constituents do not seem to value the role of politicians on the national stage, preferring instead to judge them on their record of achievement at local, or even personal level<sup>55</sup>. In his submission to the Joint Committee, Professor Marsh drew the Committee’s attention to the mindset amongst voters to the effect that this

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41. Joint Committee on the Constitution, Third Report - Results of Survey of Members of Both Houses of the Oireachtas (Feb, 2010) at p.15.  
42. Wood & Young, “Comparing Constituency Activity by Junior Legislators in Great Britain and Ireland” 22(2) Legislative Studies Quarterly 217.  
43. Research cited by Professor Michael Gallagher in his submission to the Joint Oireachtas Committee - Gallagher, Constituency Service, the Role of the TD and the Electoral System (2009).  
44. Research cited by Patzelt in Muller & Saalfield, Members of Parliament in Western Europe: Roles and Behaviour (London, 1997). The 33% figure rose to 40% in respect of regional assemblies.  
45. Joint Committee on the Constitution, Third Report - Results of Survey of Members of Both Houses of the Oireachtas (Feb, 2010) at p.15.  
46. Wood & Young, “Comparing Constituency Activity by Junior Legislators in Great Britain and Ireland” 22(2) Legislative Studies Quarterly 217.  
47. Joint Committee on the Constitution, Third Report - Results of Survey of Members of Both Houses of the Oireachtas (Feb, 2010) at p.16.  
48. Research cited by Dr Thomas Carl Lundberg in his submission to the Joint Oireachtas Committee – Lundberg, An Alternative to STV ? MMP and the Constituency Role of Representatives (2009). He found that those elected by a list system performed marginally less constituency work as compared with those elected from single-member constituencies.  
49. Joint Committee on the Constitution, Fourth Report - Review of the

Electoral System for the Election of Members to Dáil Eireann (Jul, 2010) at p.66.  
50. Joint Committee on the Constitution, Third Report - Results of Survey of Members of Both Houses of the Oireachtas (Feb, 2010) at p.33.  
51. Gallagher & Komito in Coakley & Gallagher, Politics in the Republic of Ireland (4th ed., London, 2005).  
52. Chubb, “Going About Persecuting Civil Servants: the Role of the Irish Parliamentary Representative” 11(3) Irish Political Studies 272 at p.272.  
53. Joint Committee on the Constitution, Fourth Report - Review of the Electoral System for the Election of Members to Dáil Eireann (Jul, 2010) at p.96.  
54. Mayhew, Congress: The Electoral Connection (New Haven, 1974). In a paper on this issue, Martin argues that a key feature in the relationship between electoral systems and the shape of the legislature is what he terms mechanisms used [by members] to cultivate a personal vote: Martin, Role Orientation, Electoral Institutions and the Internal Organisation of Legislatures (Rennes, April 2008).  
55. However, the 2011 general election may have signalled a change in how the public assess national politicians, with the focus of the campaign having been very much on issues of national (rather than local) importance.

candidate or that candidate is “good for the area” and noted that the electorate rarely think in terms of whether this candidate is “good in the Dáil”<sup>56</sup>.

A further reason why legislators are less committed to the task of scrutinising legislation than they might otherwise be may be because they believe that from a re-election point of view, constituency work is a better use of their time. There is also a deep rooted belief that the work of the Houses, and in particular work done at Committees is under-reported: “The media just aren’t interested in covering what happens at Committee and Report Stages of Bills. And the knock-on effect of this is that Deputies then start to question the value of committing a lot of their time to those Stages.”<sup>57</sup>

### **Transferable Vote**

One of the reasons why PR-STV is so conducive to a greater degree of constituency work is because even where an elected representative knows he or she cannot secure a number 1 vote from a person, there is always the possibility of securing a number 2 or number 3 and so on – meaning that there is always some degree of voter preference to compete for. This factor was recognised by Chubb as contributing in a significant way to the tendency of national politicians to become engaged in an excessive level of constituency service: “The importance of personal and local factors ... is enhanced by the opportunities which the single transferable vote system gives to the voters to place candidates in order of their choice.”<sup>58</sup>

### **Centralised Model of Power**

Perhaps a further reason why constituents are so heavily reliant upon national politicians rather than just local ones is because “when compared to systems of local government in other EU states, the Irish system can be regarded as one of the more centralised, with many local services such as policing, education and health controlled and administered by the government

departments.”<sup>59</sup> One of the consequences of this is that local government in Ireland is quite weak. This means that members of the public have quite a high degree of engagement with agencies of central government and it is in that process of engagement that many constituents seek the assistance of TDs and, to a lesser degree, Senators. During his appearance before the All Party Committee on the Constitution, Minister Noel Dempsey TD seemed to suggest that the “local ombudsman role” which is currently discharged by TDs in dealing with the queries of constituents, could be better preformed by local councillors.<sup>60</sup>

### **Intra-Party Competition**

According to the results of a survey conducted by a Joint Oireachtas Committee<sup>61</sup>, intra-party competition plays a significant role in influencing the amount of time which TDs dedicate to constituency-related matters. In his submission to the Joint Committee, Professor Michael Marsh<sup>62</sup> indicated that of those TDs who lose their seat, 33% of them lose it to members of their own party. The Joint Committee found that TDs who face competition within their constituency from fellow party members appear to spend a greater proportion of their time engaged in constituency work. A similar tendency was said to be evident amongst TDs who had in the past lost their seats to party colleagues.<sup>63</sup>

### **Public Expectation**

It seems that a major driver of TDs’ commitment to constituency work is public expectation that this is one of the core tasks of a TD. Writing in 1963 Chubb stated:

*“Whether an intervention is useful or not, whether it speeds up a decision or not, or even if it is obviously unnecessary or futile, it has to be made. The favour is asked because the applicant thinks it is necessary or advantageous to his interests and it must be done.”*<sup>64</sup>

56. Joint Committee on the Constitution, Third Report - Results of Survey of Members of Both Houses of the Oireachtas (Feb, 2010) at p.51.

57. Former Taoiseach Bertie Ahern in interview with the author, 13 October 2010.

58. Chubb, “Going About Persecuting Civil Servants: the Role of the Irish Parliamentary Representative” 11(3) Irish Political Studies 272 at p.284.

59. MacCarthaigh, Government in Modern Ireland (Dublin, 2008) at p.114.

60. All Party Oireachtas Committee on the Constitution, Seventh Progress Report – Parliament (Mar 2002) at p.20.

61. Joint Committee on the Constitution, Third Report - Results of Survey of Members of Both Houses of the Oireachtas (Feb, 2010) at p.17.

62. Marsh, Intra Party Conflict (2009) – submission to the Joint Committee

on the Constitution as referred to in Third Report - Results of Survey of Members of Both Houses of the Oireachtas (Feb, 2010) at p.28.

63. Political parties are likely to view intra-party rivalry as being beneficial. For example, in his evidence to the Joint Committee on the Constitution, the General Secretary of Fine Gael noted: “Competition within party tickets is frequently credited for increasing a party’s first preference vote ...” - Joint Committee on the Constitution, Fourth Report - Review of the Electoral System for the Election of Members to Dáil Eireann (Jul, 2010) at p.50.

64. Chubb, “Going About Persecuting Civil Servants: the Role of the Irish Parliamentary Representative” 11(3) Irish Political Studies 272 at p.278 – 279.

A survey carried out in 2007<sup>65</sup> amongst voters revealed that over 60% of respondents felt that providing a local service formed part of the role of a TD. This suggests that the emphasis which TDs place on constituency work is in response to a very real public expectation and demand.

It is possible that the clientelism which is endemic in our political system can be traced back to the fact that many of our national politicians began their political careers as local politicians. In its Report, the Joint Committee of the Oireachtas seemed to endorse the view of Professor Michael Gallagher in stating: "... Irish political culture is supportive of the idea that working for individual constituents is a normal and natural part of a TD's role."<sup>66</sup>

Prior to the abolition of the dual-mandate, concurrent membership of a local authority in conjunction with membership of the Dáil or Seanad was seen as vital. Whilst concurrent membership is no longer possible, many TDs and Senators still begin their political careers as local authority members, using it as a springboard to national politics. According to former Tánaiste and Minister for Justice, Michael McDowell S.C., if the current rules regarding eligibility for Oireachtas elections remain unchanged, "former local authority members (who are primarily concerned with servicing the day-to-day needs of local communities) will predominate in our parliament. The result will be that their instincts will always remain clientelist at heart. They will always feel compelled to attend the local residents association meetings, or whatever. This is not why we elect national parliamentarians."<sup>67</sup>

That this propensity to meet the needs of constituents needs to change is recognised by some members of the Houses. For example, Fine Gael whip (now Government Chief Whip), Deputy Paul Kehoe is of the view that "[t]he electorate needs to have higher expectations of politicians from the point of view of legislation."<sup>68</sup> As stated by former Tánaiste and Minister for Justice, Michael McDowell SC, "If we, as voters, demand and reward clientelism, TDs behave in a clientelist way. If, by our votes, we reward statesmanship and statecraft, perhaps our public representatives will be motivated to act accordingly."<sup>69</sup>

## Gap in the Market

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The public expectation that all types of constituency matters are to be dealt with by TDs may be symptomatic of a problem with the existing public services, in particular their accessibility. It may be that the public services and application processes can be made more accessible and transparent so that the need, or perceived need, for the involvement of a TD or Senator does not arise. There have already been important developments to this end, such as the establishment of the Citizens Advice Bureaus; the development of informative websites by Government Departments and other State-agencies; the development of customer care charters as well as dedicated customer-care helplines etc. However, despite these developments, as was noted by Joint Committee, the demand for the intervention of TDs continues:

*"... this role appears to persist in spite of civil service reform that has taken place with an emphasis on putting in place mechanisms to allow citizens to address their grievances through more user-friendly channels than existed in the past."<sup>70</sup>*

Former Taoiseach, Bertie Ahern has alluded to the need for further progress to be made in making these services more accessible to members of the public:

*"The abolition of the dual mandate has helped a lot in freeing up TD's time. The burden of constituency work is not as great as it has been. Dealing with various State agencies is a large part of a TD's constituency work and if those agencies were more accessible and more approachable, people wouldn't feel the need to have a TD or a Councillor speak on their behalf."<sup>71</sup>*

There may well be some scope for additional developments in this regard so as to minimise the need for constituents to invoke the assistance of TDs but there is probably also a need to address the often misconstrued perception of constituents that they require the assistance of a TD in the first instance.

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p.18.

70. *ibid.*, at p.24.

71. Interview with author, 13 October 2010.

65. Irish National Election Survey, 2007.

66. Joint Committee on the Constitution, Third Report - Results of Survey of Members of Both Houses of the Oireachtas (Feb, 2010) at p.24.

67. McDowell, "That the Oireachtas is in Dire Need of Reform" a paper delivered at the Liber Society Debate, Dublin 29 June 2010 at p.3.

68. Interview with author, 27 October 2010.

69. McDowell, "That the Oireachtas is in Dire Need of Reform" a paper delivered at the Liber Society Debate, Dublin 29 June 2010 at

## ELECTORATE'S NON-RECOGNITION OF ACHIEVEMENT ON NATIONAL STAGE

The principal reason why TDs are elected is to provide a voice at national level for their constituents on issues of national scope, such as new legislation. However, in spite of that, there is clear evidence to suggest that when it comes to casting their vote, the electorate places little value the work done by their politicians on the national stage. The number of politicians who have had a track-record of achievement on the national stage and who then went on to lose their seat seems to demonstrate this.

Just to take a two examples: Denis O'Donovan was elected as a TD in the 2002 general election, and subsequently became the Chair of an Oireachtas Committee which was aiding the Houses in discharging, for the first time, a specific power provided for in the Constitution concerning a member of the judiciary. His reward at the next general election for his central role in leading the work of the Committee was the loss of his seat. A further example relates to the late Jim Mitchell who was first elected as a TD in 1977. He became Chair of the Public Accounts Committee during which time it established the DIRT Inquiry – a high-profile investigation into tax evasion which was widely seen as having been groundbreaking in terms of its success. Despite this, Jim Mitchell lost his seat at the 2002 election.

## USING THE ELECTORAL SYSTEM TO ENHANCE LEGISLATIVE SCRUTINY

There seems to be some level of consensus amongst political commentators that the electoral system does have some role to play in causing members to dedicate such a large portion of their time to constituency-related matters. Writing several years ago, Chubb was firmly of the view that the electoral system is what “underpins” the level of constituency work which is undertaken and that it causes members to “vie with one another in serving their constituents”.<sup>72</sup> Therefore, a question which necessarily arises is whether a re-calibrated electoral system is likely to enhance the scrutiny of legislation by the Houses, principally in this instance, the Dáil.

## Other Electoral Systems

It would appear that other electoral systems which are proposed as an alternative to our current system have some distinct advantages over our current system, but equally, have some distinct disadvantages too. In the course of giving this matter some consideration, a Joint Oireachtas Committee<sup>73</sup> received several submissions, including one from a political scientist<sup>74</sup> who emphasised that there are numerous criteria by reference to which an electoral system may be judged and he is said to have pointed out that there is no system currently in existence that fulfills all desirable criteria perfectly.

Other systems are believed to also engender some level of intra-party competition which contribute to the level of constituency work engaged in. For example, the open list PR system which allows voters to choose between party members is conducive to intra-party rivalry. Such rivalries can also arise in single-seat constituencies particularly in the context of securing nominations. Therefore, it seems difficult to envisage an electoral system in which intra-party rivalry will not have some degree of presence.

## Views of Members of the Houses

When asked how they regarded the current PR-STV based electoral system, 67% of members of the Houses stated that they are extremely or somewhat satisfied with the current system, whilst 25% indicated that they are somewhat or extremely dissatisfied.

When asked if the system should be changed, 57% of respondents were opposed. When this question was previously asked of members in 1999<sup>75</sup>, 73% of respondents were opposed. This suggests that amongst parliamentarians, the resistance to changing the electoral system is reducing. However, caution must be exercised in attributing too much weight to these statistics as parliamentarians' views of the electoral system will be coloured by a variety of factors. For example, those who have managed to retain their Dáil seat might be supportive of the retention of the system because they have optimised their approach to ensuring that the system works for them and any new system would be a great unknown. Equally, those who lost their Dáil seat and currently sit in the Seanad might tend to be favourable towards a proposal that the electoral system be changed.

72. Chubb, “Going About Persecuting Civil Servants: the Role of the Irish Parliamentary Representative” 11(3) Irish Political Studies 272 at p.284.

73. Joint Committee on the Constitution, Third Report - Results of Survey of Members of Both Houses of the Oireachtas (Feb, 2010) at p.17.

74. Professor David Farrell.

75. All Party Oireachtas Committee on the Constitution, Seventh Progress Report – Parliament (2002).

In terms of an alternative electoral system<sup>76</sup>, those in favour of adopting a new system expressed a preference for a mixed system which would combine single-seat constituencies with proportional list elements<sup>77</sup>. One of the key benefits of a list system is that it would, in theory at least, enable political parties to nominate experts in particular sectors who might not otherwise be interested in elective office and whose expertise could add significant value to the task of scrutinising legislation. Keeping on top of the demands of constituents, means that politicians must make themselves available to members of the public on a regular basis and often outside of what would be regarded as normal business hours. This consideration makes the world of politics unattractive to many and is possibly a factor which perhaps makes a stint in politics unattractive to those who have developed careers in other areas. Consequently, under the current electoral system, the Houses are not able to benefit from the additional expertise and experience which those people might bring.

### **Options for Change**

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Recalling that the people twice rejected a proposal to change our electoral system, the question as to which electoral system would be best suited to the political landscape in Ireland has been considered on several occasions by a number of parliamentary and other committees. For example, the Oireachtas Committee on the Constitution which reported in 1967<sup>78</sup>, considered the possibility of adopting the Alternative Vote system for use in single-seat constituencies. The Constitution Review Group<sup>79</sup> which reported in 1999 evaluated PR-STV as against electoral systems<sup>80</sup> used in other jurisdictions and concluded that the current system has popular support and should not be changed without careful consideration of the possible effects of such a change. The matter was given further consideration by the All Party Oireachtas Committee on the Constitution<sup>81</sup>

in 2002. The Committee considered that the only real alternative to the current electoral system was the Additional Member System, but concluded that change to the electoral system was not desirable.

The matter was most recently considered by the Joint Committee on the Constitution which in its 2010 Report<sup>82</sup> expressed the view that “the electoral system did not hinder the ability of members ... to participate fully in the life of the Dáil.”<sup>83</sup> The Committee concluded that there was not a compelling case for recommending a complete replacement of the PR-STV electoral system<sup>84</sup> and instead favoured the reform of Dáil procedures on the basis that they are “the major obstacle to the fuller participation of TDs in the work of the Dáil”.

### **Whether a New Approach Would Enhance Scrutiny**

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Whilst it is of course interesting to learn the views of parliamentarians on the electoral system, they are just one of two key operatives of the electoral system - the first and most important of those being the electorate<sup>85</sup>. But some really important questions must be posed in considering whether a change to the electoral system is required. For example, some key questions include: whether any new system being proposed will enhance the scrutiny of legislation; whether there is evidence that the proposed system has delivered such results in another jurisdiction and, whether there are grounds for believing that such a system will deliver the same results if utilised in the State. In view of the long-standing effectiveness of the current electoral system (including its faults), any proposals for change of the electoral system should only be implemented in circumstances where there are clear, stated objectives against which the proposed changes have been tested – one very important objective being the reduction in the level of constituency-related work which should ultimately bring about circumstances in which

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76. In Germany, in Bundestag elections 50% of the candidates are elected in “first past the post” constituencies and 50% are elected on the basis of a proportional rule from lists drawn up on a Lander basis. Mixed member proportional systems/additional member systems are also utilised in New Zealand, Scotland and Wales. The additional member system was ranked as being the most preferable by academics who were asked to identify their preferred type of electoral system. This finding is cited in Joint Committee on the Constitution, Fourth Report - Review of the Electoral System for the Election of Members to Dáil Éireann (Jul, 2010) at p.37. See Lundberg, “Second-Class Representatives? Mixed-Member Proportional Representation in Britain” 59 *Parliamentary Affairs* 60.

77. Joint Committee on the Constitution, Third Report - Results of Survey of Members of Both Houses of the Oireachtas (Feb, 2010) at p.19.

78. Oireachtas Committee on the Constitution, Report of the Committee on the Constitution (1967).

79. Constitution Review Group, Report (1996).

80. The most viable alternatives to PR-STV being: closed list PR systems or Mixed Member systems.

81. All Party Oireachtas Committee on the Constitution, Seventh Progress Report – Parliament (2002).

82. Joint Committee on the Constitution, Fourth Report - Review of the Electoral System for the Election of Members to Dáil Éireann (Jul, 2010).

83. *ibid.*, at p.104.

84. *ibid.*, at p.160.

85. Interestingly, in his submission to the Joint Committee, Professor Keith Benoit asserted that “[i]ncumbent legislatures and legislators usually have their interests tied to the status quo.” - Joint Committee on the Constitution, Fourth Report - Review of the Electoral System for the Election of Members to Dáil Éireann (July, 2010) at p.153.

the scrutiny of legislation is enhanced.

Importantly, it must be borne in mind that the “nature and course of politics in a country is not a direct consequence of the particular electoral system in use.”<sup>86</sup> The electoral system is but one component in the democratic architecture. This point was echoed by Professor Gallagher in his evidence to the Joint Committee where he concluded that “... PR-STV could not be regarded as the main determinant of the level of constituency service in Ireland.”<sup>87</sup>

It is not clear what a new electoral system would bring, but what is clear is that the current system delivers proportionality. It is quite possible that an electoral system which fails to deliver proportionality may come to be viewed as one which disenfranchises the electorate and causes them to disengage. A change which creates a distance between the electorate and the politicians is unlikely to be welcomed, particularly as the strong link which is created between voters and their elected representatives is in fact widely regarded as being one of the strengths of the PR-STV electoral system.<sup>88</sup>

It seems that for as long as local, constituency issues require, or are perceived as requiring, the assistance of an elected representative, the electorate are going to rely principally on national politicians to be their interlocutor and will then judge the electoral worth of that politician based on their track-record at constituency level rather than national level. It may be that the solution to the significant degree of constituency work may lie in the empowerment of local government. During the course of hearings of the Joint Committee which examined options for reform of the electoral system, it was proposed that if local authorities were given greater powers, then councillors rather than TDs would be called upon to assist constituents with local issues.<sup>89</sup> The prospect of devolving greater powers to the level of central government led one interviewee to suggest the following:

*“If more power were to be vested at local government level, this would mean that constituents would be more likely to approach their local councillor rather than their TD. However, at the next election the TD would lose his or her seat and would be replaced by the councillor who will be seen to have been more effective in the eyes of the constituents.”*<sup>90</sup>

However, similar arguments were made in response to the proposed abolition of the dual mandate and the predictions of doom for sitting TDs have proven to be unfounded. Whilst there has been some small progress towards devolving more powers to local government level, much of the power still rests at central government level. This seems to be just one of the causes of a high degree of constituency work, as explored earlier.<sup>91</sup>

What is perhaps most concerning about the level of constituency-related work engaged in by politicians on the national stage is the fact that time spent dealing with constituency matters invariably means that there is less time available to dedicate to parliamentary and in particular, legislative matters. Concerns in this regard were expressed by an All Party Oireachtas Committee on the Constitution which observed:

*“... the need constantly to sustain and reinforce a constituency base can lead to an obsessive focus on local issues, at the expense of broader legislative and policy questions, and to activity which is by any yardstick trivial or superfluous. This may indeed have the potential to weaken the overall quality of the Dáil’s scrutinising and legislative performance.”*<sup>92</sup>

For the moment therefore, Gallagher and Komito’s<sup>93</sup> characterisation of the constituency-based roles played by TDs as being: (i) local promoter; (ii) local dignitary; and (iii) welfare officer, seems to reflect the persisting reality for many national politicians in Ireland. It is clear therefore that there is little or no relationship between the criteria which are used by the electorate at election time in assessing the worth of a TD or potential TD and the role or achievements which is then served by that TD on the national stage. Surgeons are not selected on the basis of their ability to play golf, and a question which must arise then is why our electorate is, in a sense, conditioned to judge the worth of TDs based solely on their work at local level.

Attending to the needs of constituents is just one of the matters to be attended to by members of the Houses and the fact that this function consumes over 50% of our parliamentarians’ time does seem to suggest that this is somewhat disproportionate, especially as there are several other important matters for parliamentarians to

86. *ibid.*, at p.33.

87. *ibid.*, at p.66.

88. This point was recognised by the Joint Committee on the Constitution in its Third Report - Results of Survey of Members of Both Houses of the Oireachtas (Feb, 2010) at p.48.

89. Joint Committee on the Constitution, Fourth Report - Review of the Electoral System for the Election of Members to Dáil Eireann (July, 2010) at p.151.

90. Interview 1, 12 October 2010.

91. As stated by Professor David Farrell in his evidence to the Joint

Committee on the Constitution, “institutional reform in other areas of political life might deal with those shortcomings in politics that are attributed to the electoral system.” - Joint Committee on the Constitution, Fourth Report - Review of the Electoral System for the Election of Members to Dáil Eireann (Jul, 2010) at p.38.

92. All Party Oireachtas Committee on the Constitution, Seventh Progress Report – Parliament (Mar 2002) at p.26.

93. Gallagher & Komito, “The Constituency Role of Dáil Deputies” in Coakley & Gallagher, Politics in the Republic of Ireland (4th ed., London, 2005).



be concerned with, in particular the scrutiny of legislation.

The current dynamic of the political system in Ireland seems to indicate that our elected representatives are politicians rather than parliamentarians. Whilst the contention that the current PR-STV electoral system is not conducive to a good degree of legislative scrutiny is something which was recognised by some members of the Houses in both the 2009 and also 1999 surveys<sup>94</sup>, the experiences in other countries have shown that it is by no means inevitable that changing the electoral system will necessarily lead to an enhanced degree of legislative scrutiny in the Houses.

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94. Joint Committee on the Constitution, Third Report - Results of Survey of Members of Both Houses of the Oireachtas (Feb, 2010) at p.50.

# Features of the Parliamentary System Which Impact Upon Scrutiny

## INTRODUCTION

There are a number of features of the parliamentary system which have a very significant bearing upon the workings of the Houses. This Chapter seeks to chart the effect which these features have on the degree to which legislation is scrutinised.

## POLITICAL PARTIES

Political parties are the cohesive units around which aspirant and elected representatives who share common values and a common purpose gather and then place themselves before the electorate.<sup>1</sup> Political parties now constitute a very important feature of the political and parliamentary system in Ireland<sup>2</sup>. It appears that their development has had a significant impact on the level of scrutiny to which legislation is subjected.

In the days of the State's infancy, aside from a small contingent which made up the Labour Party, there were no organised political parties to speak of<sup>3</sup>. The practice of establishing party structures in the Houses did not seem to manifest itself until after the general election in 1928. In the absence of party structures and consequently a whip system, members of the Houses were in a position to vote freely and in accordance with their conscience.

Yet despite their significance in the political system today, as noted by Keane CJ in *Maguire v Ardagh*<sup>4</sup>, the important role which political parties play in the Houses of the Oireachtas is not addressed in the Constitution:

*“Political parties, although many people would regard them as an essential feature of a functioning modern democracy, do not achieve as much as a passing mention in the Constitution. Their organisation, the status accorded to their leaders, and the machinery associated with them of the whips’ office are not referred to in any way.”*

Even the current code of conduct for Members of the Dáil speaks of members as being required to act in a manner which is consistent with “their roles as public representatives and

legislators” and does not seem to explicitly recognise the fact that party interests are the primary driver of parliamentary conduct.

## WHIP SYSTEM

The development of the whip system very much arises from the evolution of the political party system and in today's terms is almost inseparable from the party system. Its development system has also served to secure the executive's dominance over the legislature.

Each political party appoints a whip in each House, each of whom is responsible for ensuring the attendance of party colleagues in their respective House. Party whips also inform members as to how their vote on a matter is to be cast. In addition, party whips are responsible for allocating speaking slots in respect of debates on legislation, motions etc. At parliamentary committees, the appointment of convenors ensures that the party stance is also adhered to at committee meetings.

The Government Chief Whip attends Cabinet meetings and in addition to chairing the Government's Legislation Committee, he or she is also responsible for providing updates to the Taoiseach on the progress of legislation which is currently being drafted. The Government Chief Whip is also responsible for devising the parliamentary schedule for each House following some engagement with the opposition whips. The process seems to be built more around consultation rather than consensus, because ultimately it is the Government Chief Whip who has the final say on the scheduling of business. One area where the whips tend to cooperate is in arranging for what are known as pairings so as to facilitate the absence of members from both sides of the House for divisions.

As regards legislation, one of the core functions of the whip system is to impose the party line in relation to a particular Bill. In all instances, the government whip will be requiring his or her party colleagues to vote in favour of the government's legislation and invariably, the opposition whips will be requiring their respective members to oppose government

1. In Lane and Ersson's view, political parties “want two things, which in the end are contradictory: on the one hand they wish to have stable support from a set of loyal voters, but on the other hand they also wish to attract new voters.” - Lane & Ersson, *Politics and Society in Western Europe* (London, 1999) at p.109.

2. Bryce identified the “multiplication of parties” as being one of the “chronic ailments” which had, in his view, undermined representative

assemblies - Bryce, *Modern Democracies* (London, 1921) at p.390.

3. O'Sullivan, *The Irish Free State and its Senate* (London, 1940) at p.266. Also, in the first Seanad there were however a number of loose alliances of Senators who consulted each other from time to time.

4. [2002] IR 385.

legislation. How this works in practice is that each party whip circulates a document referred to as “the Whip” which indicates the various events taking place during the parliamentary day at which each member must attend for the purpose of voting. Whilst prima facie the opposition will offer reasons as to why it is against government legislation, the reality is that, in most cases, government legislation is opposed by the opposition, not on merit, but simply because the legislation originates from the benches across the chamber.

It is for these reasons that it may be said that the whip system reinforces the party system and serves to emphasise the divisions between the parties. As it effectively pitches one side against the other, it leads to entrenched and often directly opposing positions, which renders a more adversarial atmosphere to the debates on legislation. Of course an entrenched debate can be viewed as facilitating a more in-depth level of scrutiny covering the land which spans between both sides of the debate.

The whip system also gives rise to what may be termed blind loyalties on both sides of the Houses where favour and opposition to legislation arises not from a process of scrutiny of the legislation in question, but solely from the directive issued by the party whips. This undoubtedly has an impact on the degree to which legislation is scrutinised. As they are required to favour their own legislation, members on the government side are unlikely to raise any issues or questions which are seen to be critical of the legislation, whilst at the other end of the scale, the opposition members are likely to highlight the negative aspects of the legislation, primarily focusing on newsworthy issues, perhaps to the detriment of less interesting aspects of the Bill which may be in greater need of scrutiny.

A former long-standing member of the Dáil, Gay Mitchell MEP, is of the view that the whip system has had a damaging effect:

*“At the centre of [the] failure [of the Houses of the Oireachtas] is the Whip system necessitated by all-pervasive adversarial politics.”<sup>5</sup>*

Some evidence of the impact which the whip system has upon individual TDs was revealed in the results of a survey carried out by a Joint Committee of the Houses.<sup>6</sup> When asked how a TD should cast his or her vote in circumstances where he or she disagrees with party policy on

the issue, 83% of respondents indicated that the TD should vote in accordance with party policy.

## OPPOSITION

Essentially the role of those in opposition is to oppose government, to question its proposals, to scrutinise its legislation and to generally hold government to account.<sup>7</sup> The opposition’s role in providing a resistance to the path chosen by government is an important part of any democratic system of governance. Generating controversy and publicity on certain aspects of a piece of legislation is a much utilised tactic. A questioning opposition tends to cause government to think through and develop policy proposals to the greatest extent possible prior to presenting them in the Houses.

As discussed earlier, both the Dáil and the Seanad tend to be dominated by the government parties. This means that the business of the Houses is largely dictated by the government and it retains a virtual monopoly on the production and passage of legislation. This means that the opposition is left with little choice but to largely serve as observers of government action. This undoubtedly has a significant bearing upon the degree to which members of the opposition can have a meaningful impact during the process of scrutiny.

Therefore the Irish system is what political theorists describe as a majoritarian and centralised system<sup>8</sup> which places Ireland in the company of countries like Luxembourg, France and Greece – all being countries with the most powerful executives in Europe. As highlighted by MacCarthaigh, these parliaments are “associated with strong centralised governments, weak committee systems and little opposition input into government work.” MacCarthaigh<sup>9</sup> also alludes to what might be described as the relatively powerless position of the opposition as regards the passage of legislation:

*“For the opposition successfully to halt the passage of a Bill or question the motivations of the government in proposing a new law, it must successfully engage with extra-parliamentary forces such as the media, public opinion or even the courts.”<sup>10</sup>*

The relatively powerless position of the opposition when compared with that of the

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5. Mitchell, *By Dáil Account: Auditing of Government, Past, Present and Future* (Dublin, 2010) at p.149. See also Mitchell, “Seven Steps to a More Accountable Government” *Irish Times*, 26 October 2010.

6. Joint Committee on the Constitution, *Third Report - Results of Survey of Members of Both Houses of the Oireachtas* (Feb, 2010) at p.14.

7. On the obstructionist role of the opposition, see Humphreys, “Legislative Obstruction: How to Do It” 39(1) (1991) *Administration* 55.

8. Lane & Errson, *Politics and Society in Western Europe* (London, 1999) at p.235.

9. MacCarthaigh, *Accountability in Irish Parliamentary Politics* (Dublin, 2005) at p.45.

10. *ibid.*, at p.109.

government-side of the Houses, is largely attributable to the way in which decisions are taken in the Houses. However, one commentator has sought to argue that the opposition and government backbenchers have, through their relative powerlessness, much in common with each other on the basis that the opposition “lacks all the things that government backbenchers lack – information, expertise, day-to-day involvement in governing, moral authority – and much else besides.”<sup>11</sup>

## NUMBER OF TDS

It seems de rigeur to criticise the number of TDs in the Dáil and propose that the number be reduced. For example, former Minister John Gormley, Leader of the Green Party has advocated that the number of TDs be reduced to 100<sup>12</sup>. During his appearance at the hearings of the All Party Oireachtas Committee on the Constitution, former Minister Noel Dempsey TD expressed the view that there were too many TDs.<sup>13</sup> Former Taoiseach, Bertie Ahern has advocated a very significant reduction in the number of TDs, arguing that fewer TDs with a greater complement of support staff would be more conducive to enhanced scrutiny:

*“The task of scrutinising legislation could be greatly improved if there were less TDs. We could do with far less TDs, a system with 70 or 80 single seat constituencies, with each TD perhaps having a support staff of say five, one of whom would be dedicated to the task of scrutinising legislation.”<sup>14</sup>*

However, what is often forgotten is the fact that without a substantial number of TDs, the current systems of committees could not function effectively. And it follows that if Select Committees cannot function effectively, the scrutiny of legislation would ultimately suffer. A reduction in the number of TDs would naturally mean that either the number of committees would have to be reduced, or that each of the remaining members of the House would have to sit on several committees, thus meaning that they would have less time to commit to each.

The Constitution Review Group was of the view that “the high level of representation in the Dáil makes for greater democratic participation at the centre of government” and believed that “it gives visibility to public representation”.<sup>15</sup> In its Report on the Parliament, the All-Party Oireachtas Committee on the Constitution<sup>16</sup> was of the view that in the context of government formation, the current number of TDs in the Dáil “is adequate rather than generous”. More recently, the Joint Committee on the Constitution concluded that no change should be made to the number of TDs which are elected to the Dáil.<sup>17</sup>

## SCHEDULING OF LEGISLATION

As outlined above, scheduling legislation for debate in the Houses is determined by the Government Chief Whip following his or her engagement with the opposition whips.<sup>18</sup> Invariably the schedule for the coming week is published to members of the Houses on Thursday afternoon and to the wider public on Friday afternoon. This means that legislation is scheduled for debate less than one week in advance.

Another consequence of this short-term approach is that a piece of legislation can fall off the agenda just as quickly as it arrived on the schedule, only to suddenly re-appear again at a later stage accompanied by a requirement to table amendments within a very restrictive timeframe. Each time a particular Bill is revived, Members have to re-familiarise themselves with its terms and this is invariably a cause of frustration for members of both Houses. This on-again-off-again approach to the lifecycle of a Bill often means that a Bill meanders its way through the Houses over a prolonged period of time. A Bill which is initiated today might become law next month, next year, in two or three years, or perhaps never.

Whilst the government publishes its *Legislation Programme*<sup>19</sup> at the start of each parliamentary term, members of the Houses (on all sides) are left in the dark as to when a particular Bill is likely to come onto the floor of the Houses. This approach prevails because

11. King, “Modes of Executive-Legislative Relations” in Norton, *Legislatures* (Oxford, 1990) at p. 217.

12. Joint Committee on the Constitution, Fourth Report - Review of the Electoral System for the Election of Members to Dáil Éireann (July, 2010) at p.139.

13. See Seventh Progress Report – Parliament (Mar 2002) at p.20.

14. Interview with author, 13 October 2010.

15. Constitutional Review Group, Report (1996) at p.40.

16. All Party Oireachtas Committee on the Constitution, Seventh Progress Report – Parliament (Mar 2002) at p.13.

17. Joint Committee on the Constitution, Fourth Report - Review of the Electoral System for the Election of Members to Dáil Éireann (July,

2010) at p.171.

18. The whips meet every Wednesday at 5.00pm to discuss the following week’s business. At the whips meeting, the government presents a draft schedule and seeks the agreement of the party whips to what is being proposed.

19. One interviewee was deeply sceptical of the value of the *Legislative Programme*: “The *Legislative Programme* which is published by the government is a complete work of fiction. They will deliver about half of it and many of the pieces of legislation which will be enacted in six months time are right now just a twinkle in someone’s eye.” Interview 1, 12 October 2010.

formal, long-term scheduling of Bills is not a feature of our parliamentary and legislative process. In the view of one Member of the Dáil:

*“There should be a programme of legislation for the year and not simply a list of Bills issued by the Chief Whip, which sometimes ends up being essentially an aspirational document that bears no resemblance to reality in respect of the introduction of legislation. Members should know when they are going to deal with blocs of legislation in this House. Deputies should have plenty of time to prepare for debating on such legislation.”*<sup>20</sup>

Similar sentiments have been expressed by the Assistant Clerk of the Dáil, Dick Caffrey, who is of view that:

*“The scheduling of legislation is something which is done quite successfully in other countries. The introduction of scheduling would mark a real improvement on the current system here, where routinely a sizeable proportion of the year’s legislation is passed in the weeks leading up to the summer recess. Of course the advance scheduling could only work if there was some degree of flexibility so that changes could be made to the schedule where necessary.”*<sup>21</sup>

Former Government Chief Whip, Tom Kitt is in favour of a move towards more advanced planning of the parliamentary schedule but recognises the obstacles to such an approach:

*“I would be in favour of the advance scheduling of the business of the Houses, but it is not easily achievable. This is especially the case where a Department is working on legislation, sometimes getting them to sign off on it so that it can be initiated in the Houses, can be difficult. So this and various other factors make advance scheduling difficult.”*<sup>22</sup>

The feasibility of advance planning of the parliamentary schedule was also questioned by former Government Chief Whip, and former Minister of State John Curran:

*“A difficulty with advance planning is that the time required to draft a Bill can often change because in some instances, it is only when a Bill is being drafted that problems or complexities which have not previously been identified, then come to light and the resolution of these issues can consume additional time, and therefore delay the publication of a Bill.”*<sup>23</sup>

Whilst supporting the idea of planning the parliamentary schedule in advance, former Fine Gael whip (and current Government Chief Whip), Deputy Paul Kehoe also recognised the need for flexibility: “I would favour the advance planning of the business of the Houses, but there has to be flexibility to deal with urgent matters which arise.”<sup>24</sup>

As the current approach does not enable members to research and plan for the debating of legislation in advance, the absence of advance planning of the business of the Houses does little to enhance the efficiency of the legislative process and, in particular, the effectiveness of legislative scrutiny.

## DECISIONS OF THE HOUSES

Decisions of the Houses are determined in accordance with Article 15.11.1 of the Constitution, which provides:

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

Accordingly, a simple majority in the Dáil requires 84 members and a majority in the Seanad requires 31.<sup>25</sup> This means that in order to ensure the existence of a stable majority government, a number of seats in excess of the minimum required for a simple majority, will be required in each House.

The fact that the Seanad elections are held shortly after the Dáil elections, combined with the Taoiseach’s power to nominate eleven of the Seanad members, serves to ensure that the incumbent government always has a stable majority in the Seanad. Having a stable government majority in both Houses and a strictly administered whipping system ensures that the government has control over each and every decision that is put to a vote. The net effect of this is that parliamentary politics in Ireland is a “winner takes all” game – where the incumbent government holds all of the power and the opposition are consigned to the role of critics and interested observers.<sup>26</sup> This is in contrast with the system which operates in certain other countries, such as, Switzerland whereby the executive tends to consist of members drawn

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20. As stated by Deputy Joanna Tuffy during the Second Stage debate on the Statute Law Revision Bill 2009 - 690 Dáil Debates (24 Sept 2009).

21. Interview with author, 12 October 2010.

22. Interview with author, 4 November 2010.

23. Interview with author, 17 November 2010.

24. Interview with author, 27 October 2010.

24. Electronic voting within the Dáil and Seanad was introduced in 2002.

Before a vote is taken, the division bells of the Houses usually ring for six minutes in respect of the Dáil and eight minutes in respect of the Seanad.

26. As stated by Lane and Ersson: “election results are based upon a zero-sum game, where the gains of one party are offset by the losses of another party ...” - Lane & Ersson, *Politics and Society in Western Europe* (London, 1999) at p.109.

from the major parties on a grand coalition basis; a similar dynamic is said to exist in the European Parliament.

It matters little whether the Dáil has a role in setting the government agenda, or whether the Seanad has the power to veto or merely delay the passing of legislation – because the reality is that both Houses are invariably dominated by a government majority and decisions on the exercise of powers will be determined by that majority in favour of the government.

The executive's dominance or stranglehold<sup>27</sup> over virtually all aspects of the activities of the Houses, particularly the initiation of legislation, the acceptance of amendments and the passing of legislation means that the Houses (and particularly members of the opposition) largely fulfill a reactive role.

## PARLIAMENTARY GUILLOTINE

### Introduction<sup>28</sup>

The effect of the parliamentary guillotine is to impose a time referenced deadline on a stage or several stages of the debate on a Bill, at which time the debate will be brought to an end and all amendments to the legislation which have been tabled by the government, but not yet reached, will be deemed to be accepted and all of those amendments tabled by the opposition, but not yet reached, will be deemed to have been rejected.<sup>29</sup> Therefore, the guillotine can be said to be a fairly blunt tool to bring about the speedy passage of legislation. Writing on the use of closure motions in the House of Commons, Bryce expressed the view that: “[T]he use of the closure to overcome obstruction [has] reduced the value of the debates and affected the quality of legislation ...”<sup>30</sup> The parliamentary debates are rich with examples of the deployment of the guillotine, not only in the Dáil but also in the Seanad, some examples of which are detailed below.

### Danger of Rushed Legislation<sup>31</sup>

Rushed legislation is an occasional feature in most legislatures and sometimes a high price is to be paid where a debate has been greatly truncated. Legislation tends to be rushed for a number of reasons such as to remedy an emergency which has arisen, or to ensure the passage of the legislation before the end of a parliamentary session, or legislation may be rushed simply out of political expediency. The devices used to rush a debate can involve the application of the parliamentary guillotine to each stage of the Bill leaving little or no time between the stages, or it can involve the taking of all stages consecutively or concurrently on the same day in one or both Houses.

Irrespective of the justifying factors, there are inherent dangers in the rushing of legislation. Experience of rushed legislation led a House of Lords Committee to sound a warning in the following terms:

*“While we accept that from time to time exceptional circumstances may arise requiring the Government to prepare, and Parliament to deliberate on, a bill according to an expedited timetable there are obvious risks, especially where the bill deals with a complex social and legal problem.”*<sup>32</sup>

The rushing of legislation frequently gives cause for complaint by members of the Dáil and Seanad. For example, during the course of Committee Stage of the Liability for Defective Products Bill 1991, Senator Costello objected to the taking of all Stages of the Bill in one day, asserting that he had “basic objections to all Stages of a Bill being taken on the same day. It is most appropriate that we should not discuss Committee and Report Stages on the same day. When dealing with legislation we need time for reflection to ensure that further amendments arising out of existing amendments can be put down and discussed. It is a bad precedent to start taking all Stages of legislation on the same day. It is the equivalent of imposing the guillotine. I regard this as an unsatisfactory procedure.”<sup>33</sup>

27. “Stranglehold” as so described by Whelan, “Our Electoral System and Political Culture Have to be Changed” paper delivered at MacGill Summer School (July 2010).

28. See generally Humphreys, “Legislative Obstruction: How to Do It” 39(1) (1991) Administration 55.

29. The wording of a motion which proposes the imposition of a guillotine at Second Stage would be as follows: “the proceedings on the Second stage shall, if not previously concluded, be brought to a conclusion at 9pm tonight”. A motion which proposes the imposition of a guillotine at Committee Stage and Report Stage might read as follows: “the proceedings on the Committee and Remaining Stages shall, if not previously concluded, be brought to a conclusion at 10.30pm tonight by one question which shall be put from the Chair

and which shall, in relation to amendments, include only those set down or accepted by the Minister ...”

30. Bryce, *Modern Democracies* (London, 1921) as reproduced in Norton, *Legislatures* (Oxford, 1990) at p.47. Examples of instances in which the parliamentary guillotine have been deployed in the House of Commons are detailed by Griffith, *Parliamentary Scrutiny of Government Bills* (London, 1974) at p.15.

31. See generally, Select Committee on the Constitution, *Fast-Track Legislation: Constitutional Implications and Safeguards* (Jul 2009).

32. House of Lords, 9th Report – *Criminal Evidence (Witness Anonymity) Bill* (HL 147) at para.19.

33. 130 Seanad Debates Col.865 (20 November 1991).

## **Early Examples of the Guillotine's Use**

The deployment of the parliamentary guillotine is by no means a recent innovation in Ireland. In the years after the foundation of the State, the parliamentary guillotine was imposed on Bills which were said to have been of some urgency. For example, in 1928, controversy arose over the proposal to impose a parliamentary guillotine in respect of three Bills to amend the Constitution, the effect of which was to limit the Committee Stage of each Bill in the Dáil to four hours and the Report Stages to two hours. Having read out the wording of the guillotine motion, Deputy Blythe uttered, with perhaps some degree of trepidation: "I venture to hope that this motion will commend itself to all parties."<sup>34</sup>

Opposing the motion proposing the imposition of the guillotine, Deputy Little argued that curtailing debate in this way was incompatible with Article 20 of the Free State Constitution. In support of this argument, Deputy Flinn argued that the vires of the motion should be referred to the courts and he also made the point that the Constitution overrides anything contained in Standing Orders. Deputy MacEntee argued that if a guillotine were to be imposed it could only be imposed pursuant to a Standing Order and that a motion of this nature was not permissible under the current Standing Orders. Deputy Aiken also strenuously opposed the motion:

*"Surely there is no freedom in a debate which is going to be limited beforehand without knowing how much time it will require to debate the motion under discussion in a proper manner. That is not securing the freedom of debate that is guaranteed to all Deputies under the Constitution."*<sup>35</sup>

Deputy de Valera added his voice to the swathe of opposition to the motion proposing the imposition of the guillotine:

*"It is a vicious motion, vicious in its purpose and equally vicious in the manner in which it proposes to effect its purpose. The purposes, of course, is to prevent adequate discussion in the Committee Stage of these three named Bills. It is completely at variance with the whole spirit of the Standing Orders with reference to the stages of Bills and the discussion of Bills. It is altogether unnecessary if the purpose was to confine debate within reasonable limits, because the Standing Order dealing with the closure proposes a method of doing that which I hold is quite sufficient and is not at all open to the abuses which the method proposed by the Minister for Finance is."*<sup>36</sup>

He felt that the imposition of a guillotine was entirely contrary to the *raison d'être* of the Dáil:

*"... if these tactics are going to be used it seems to me that being here and calling this a deliberative assembly is all a farce, and I will begin to agree with Deputy Aiken that they might as well do what they did before, and bring in a Bill to suppress the Dáil, and constitute themselves dictators ... If one section of this House is going to be deprived of its rights to put forward amendments and to discuss in detail everything put forward by the government, then this House ceases to be in any sense a representative assembly."*<sup>37</sup>

## **Recent Examples of its Use**

There are many, many examples of the use of the parliamentary guillotine in recent years. The following is an example which arose in 1991. During the Order of Business, a member of the opposition – Deputy Barry – strenuously objected to the proposal to apply the guillotine to the debate on the Housing (Miscellaneous Provisions) Bill 1992:

*"I protest at the way in which these two measures are being guillotined. It appears to be the policy of this government to guillotine all legislation going through the House. Not alone are those two Bills being guillotined today but they were also guillotined on Committee Stage."*<sup>38</sup>

This opposition was reiterated by Deputy Barry during the Order of Business on the following day:

*"The Taoiseach cannot expect the co-operation of this party and this House if he continues to guillotine both Committee Stages and Report Stages of measures. There are over 40 amendments to this Housing Bill and an hour and a half to deal with them; that is about a minute and a half to two minutes to deal with each one."*<sup>39</sup>

When speaking during Second Stage of the Personal Injuries Assessment Board (Amendment) Bill 2007, Deputy Charles Flanagan objected to the imposition of the guillotine:

*"I have been five years out of this House and this place has changed. Deputies' rights have been diluted to the extent that since we came back here two weeks ago almost every item of legislation has been guillotined."*<sup>40</sup>

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34. 24 Dáil Debates Col.1020 (20 June 1928).

35. *ibid.*, at Col.1069.

36. *ibid.*, at Col.1070.

37. *ibid.*, at Col.1072.

38. 421 Dáil Debates Col.1993 (1 July 1992)

39. 422 Dáil Debates Col. 4 (2 July 1992).

40. 637 Dáil Debates Col.1940 (5 July 2007).

A more recent example, dating from 2009, arose when Deputy Eamon Gilmore, expressed his party's opposition to the guillotining of a debate on the Criminal Justice (Miscellaneous Provisions) Bill 2009:

*“Yesterday we had one and three quarter hours allocated for the debate on the Health Insurance (Miscellaneous Provisions) Bill 2008 to which there were 84 amendments on Report Stage. Three and a half hours were allocated for the debate on the Land and Conveyancing Law Reform Bill 2006, to which there were 41 amendments on Report Stage. Today, it is proposed to allocate two to two and a half hours for the debate on the Criminal Justice (Miscellaneous Provisions) Bill 2009, to which there are 18 amendments on Report Stage. It is then proposed to allocate one and a half hours for the debate on Report and Final Stages of the Companies (Amendment) Bill 2009 to which there is one amendment. Finally, it is proposed to allocate four and three quarters hours to deal with all Stages of the European Parliament (Irish Constituency Members) Bill 2009, relating to the method of payment to Members of the European Parliament, to which, I understand, no amendments have been tabled.”<sup>41</sup>*

In recent years, some Leaders of the Seanad have prided themselves on the non-use of the guillotine during their term. For example, speaking during the Order of Business in the Seanad, the then Leader of the Seanad, Senator Donie Cassidy stated: “... when I was Leader of the House from 1997 to 2002, no Bill was guillotined or rushed through the House”<sup>42</sup> Senator Cassidy reiterated that point in a debate in 2009, where he said: “this House does not guillotine legislation. This House never rushes through a Bill. As much time as is possible and required is made available.” And he later added: “I will not guillotine a Bill in this House for anybody or any party.”<sup>43</sup> Senator Mary O’Rourke was also proud of the non-use of the guillotine whilst she was Leader of the Seanad. For example, during the course of one Seanad debate, she stated: “When I was in my office, I heard the word ‘guillotine’ being used ... the word ‘guillotine’ was never mentioned in this House. I ask Senator Higgins to withdraw his remark, which is a slur on me as Leader of the House.”<sup>44</sup> However, despite this, there are instances in which time limits upon the conclusion of a stage of a Bill have been imposed and other instances in which all stages of Bills have been taken together in the Seanad.

The recent financial and banking crisis

necessitated the enactment of several pieces of legislation, some of which underwent a curtailed legislative process. For example, the Anglo Irish Bank Corporation Act 2009 which necessitated the recall of the Houses from their Christmas break was published as a Bill on 20 January and was passed by the Dáil that same afternoon and was passed by the Seanad later that evening. A further piece of emergency legislation which arose as a result of the financial crisis was the Financial Emergency Measures in the Public Interest Bill 2009 which was passed by the Dáil within three days of its publication and was passed through all stages in the Seanad in two further days.

### **Reasons for Using the Guillotine**

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The principal reason for the application of the guillotine is to ensure that the legislation in question will be not be “impeded” by the opposition members’ appetite to endlessly dissect and comment upon its terms. In many respects the parliamentary guillotine is a device which counters the effect of the “talking it out” obstructionist strategy which is on occasion deployed by the opposition.

When seeking to justify the deployment of the guillotine in 1928, Deputy Blythe stated that there was no provision in the Standing Orders for “dealing with such a thing as deliberate obstruction or members speaking at great length or with great frequency for the purpose of taking up the time of the Dáil.”<sup>45</sup> Deputy Blythe went on to add:

*“The fixing of a definite time is in itself an advantage as it restores freedom of debate. While obstruction is going on Deputies who are anxious to have the business discussed as quickly as possible feel bound to refrain from intervention and sometimes they are unable to put the point of view which they desire to put and which they ought to have a reasonable opportunity of putting. When a definite time has been fixed as is proposed by this motion, every Deputy who wishes to intervene and to take part in the debate, as soon as the previous speaker has sat down can take his chance of catching the Speaker’s eye.”<sup>46</sup>*

Former Government Chief Whip and former Minister of State John Curran has made it clear that Ministerial requests for the application of the guillotine are tested with a view to seeing whether the use of the guillotine is genuinely required:

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41. 687 Dáil Debates Cols. 3 – 4 (2 July 2009).

42. 187 Seanad Debates Col. 1878 (4 December 2007).

43. 196 Seanad Debates (7 July 2009).

44. 180 Seanad Debates Col.2181 (28 June 2005).

45. 24 Dáil Debates Col.1020 (20 June 1928).

46. *ibid.*, at Col.1024.



*“When a Minister approaches me with a Bill and he tells me that it needs to be enacted quickly, I don’t necessarily take it on face value that the Bill needs to be pushed through on an emergency basis. I tend to test out the Minister’s reasoning to determine if the Bill really does need to be dealt with urgently.”<sup>47</sup>*

Former Taoiseach, Bertie Ahern pointed to what he saw as being reasons for the deployment of the guillotine:

*“Departments frequently hold back Bills and vast numbers of amendments until close to the end of a session, then they produce the Bill or the amendments and insist that the Bill be passed before the end of the session, this then requires the use of the guillotine.”<sup>48</sup>*

Former Government Chief Whip, Tom Kitt advanced several reasons why the guillotine was required:

*“The need to use it arises for a number of reasons, firstly because there is so much time wasted in the Dáil, and debates, particularly at Second Stage can become repetitive. Secondly, because there comes a point where you have to seek to deliver on your legislation programme and that means getting legislation through the system. The third reason why it arises is for vote management purposes. It’s a device which gives certainty as to when a vote will take place and, as a Whip, that ensures that you to have all your Government colleagues available to vote.”<sup>49</sup>*

Former Minister of State, Martin Mansergh TD stated during the Seanad debate on the National Asset Management Agency Bill 2009:

*“The danger of open-ended debate is that it encourages Members, Ministers included I hasten to add, to divert from the main subject. [A deadline] does, however, impose a certain degree of self-discipline and this was observed in this House.”<sup>50</sup>*

This point of view was previously expressed in relation to the House of Commons by Griffith<sup>51</sup>, where he stated: “It is noticeable that when a guillotine is in operation, debate often tightens, and speeches become shorter and more to the point.” Speaking during the course of the Seanad debate on the Garda Síochána Bill 2004, the then Minister for Justice, Michael McDowell alluded to what he saw as being the reason for the imposition of a guillotine on the Dáil debate on the same Bill, where he said: “The guillotine was needed in circumstances of massive time-wasting.”<sup>52</sup>

Such considerations led one interviewee to suggest that “[s]hortening the legislative process does impact on members’ ability to scrutinise. However, its use is not always a bad thing because not all scrutiny is valuable - a debate which runs for ten days is invariably not going to give rise to scrutiny which is 10 times better than a debate which runs for one day. Often when debates run on, there is repetition and time-wasting.”<sup>53</sup>

### **Abridged Legislative Process**

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There are of course certain circumstances in which the expedition of the legislative process is expressly permitted under the Constitution and Dáil Standing Orders.<sup>54</sup> Firstly, and perhaps most significantly, there is effectively a deadline of 90 days within which the Seanad must consider all Bills which it has received from the Dáil.<sup>55</sup> Secondly, the Constitution specifies a deadline of one year for the enactment of legislation to give effect to financial resolutions.<sup>56</sup> Thirdly, there is a 21 day deadline within which the Seanad must consider a Money Bill.<sup>57</sup>

In addition, there exists a mechanism for the abridgment of the legislative process in the Seanad as provided for in Article 24.1<sup>58</sup> of

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47. Interview with author, 17 November 2010.

48. Interview with author, 13 October 2010.

49. Interview with author, 4 November 2010.

50. 198 Seanad Debates (12 November 2009).

51. Griffith, *Parliamentary Scrutiny of Government Bills* (London, 1974) at p.22.

52. 180 Seanad Debates Col.2179 (28 June 2005).

53. Interview 1, 12 October 2010.

54. Standing Order 117(2) of the Dáil provides that the Second Stage debate on a Private Members Bill must not exceed six hours in aggregate.

55. Article 23.1.1 of the Constitution provides: “Whenever a Bill to which this Article applies is within the stated period defined in the next following subsection either rejected by Seanad Éireann or passed by Seanad Éireann with amendments to which Dáil Éireann does not agree or is neither passed (with or without amendment) nor rejected by Seanad Éireann within the stated period, the Bill shall, if Dáil Éireann so resolves within one hundred and eighty days after the expiration of the stated period be deemed to have been passed by both Houses of the Oireachtas on the day on which the resolution is passed.”

56. Article 17.1.2 of the Constitution provides: Save in so far as may be provided

by specific enactment in each case, the legislation required to give effect to the Financial Resolutions of each year shall be enacted within that year.

57. As stipulated by Article 21.2.1 which provides: “Every Money Bill sent to Seanad Éireann for its recommendation shall, at the expiration of a period not longer than twenty-one days after it shall have been sent to Seanad Éireann, be returned to Dáil Éireann, which may accept or reject all or any of the recommendations of Seanad Éireann.”

58. Article 24.1 of the Constitution provides: “If and whenever on the passage by Dáil Éireann of any Bill, other than a Bill expressed to be a Bill containing a proposal to amend the Constitution, the Taoiseach certifies by messages in writing addressed to the President and to the Chairman of each House of the Oireachtas that, in the opinion of the government, the Bill is urgent and immediately necessary for the preservation of the public peace and security, or by reason of the existence of a public emergency, whether domestic or international, the time for the consideration of such Bill by Seanad Éireann shall, if Dáil Éireann so resolves and if the President, after consultation with the Council of State, concurs, be abridged to such period as shall be specified in the resolution.”

the Constitution. Article 24.1 provides that when a Bill has been passed by the Dáil and the Taoiseach certifies to the President, the Ceann Comhairle and the Cathaoirleach that the Bill is urgent, the Seanad's time for the consideration of the Bill may, with the approval of the Dáil and also the President, be abridged to a stated period. Despite the existence of this mechanism, it seems that in the many instances in which the parliamentary guillotine has been deployed in the Seanad, this mechanism has not in fact been invoked.<sup>59</sup> Therefore, the availability of such a mechanism and the application of the guillotine in the Seanad without invoking the mechanism provided for in Article 24.1 is somewhat curious.

### **Rushing of Legislation at the End of a Session**

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Invariably as the Houses prepare to adjourn for the Christmas and Summer recesses, there is a rush to enact (with or without recourse to the guillotine) as many pieces of legislation as possible. This often gives rise to complaints from the opposition on the grounds that there is insufficient time available to discuss the legislation. Interestingly, this is by no means a recent phenomenon; members of the first Seanad frequently protested at the rush of legislation in advance of the recesses. In 1924, the then Cathaoirleach of the Seanad, Lord Glenavy, gave a real sense of the pace at which legislation was being shunted through the Seanad:

*“Now in regard to our business, I wish to inform the Seanad that there are nineteen Bills for our consideration when we meet to-morrow. Twelve months ago it would have occurred to me that that would mean two days’ protracted sitting of the Seanad. But seeing that we have dispatched fifteen Bills to-day in the space of an hour I see no limit to the speed and the powers of this House. Therefore, I think we will be quite able to dispose of these nineteen Bills to-morrow.”*<sup>60</sup>

This led O’Sullivan to refer to this practice as the “sausage-machine method of enacting legislation”.<sup>61</sup> With a view to redressing this problem to some extent, a new requirement was introduced into the Standing Orders so that at least three days must elapse between the passage of a Bill in the Dáil and its inclusion in the Seanad Order Paper. However, in order to facilitate the passage of the Treaty (Confirmation

of Amending Agreement) Bill 1925 the day after its passage by the Dáil, the Government suspended the Standing Orders of the Seanad so as to allow all stages of this Bill to be passed by the Seanad.

### **View from the Houses**

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One area which members of the Houses seem to agree on is that the parliamentary guillotine is damaging to the task of legislative scrutiny. Former Taoiseach, Bertie Ahern is of the view that:

*“In an ideal world it would be better if we didn’t have the guillotine. It’s not good that sections of legislation are not reached during a debate, it’s clearly not a good process.”*<sup>62</sup>

Former Government Chief Whip, Tom Kitt “did not like having to resort to the guillotine, I tried my best not to use it” and recognised the dangers associated with its deployment:

*“It can be a very dangerous instrument as it prevents aspects of the legislation from being debated in a thorough way and I have seen situations where we imposed a guillotine and at the request of the opposition, extended the duration of the debate and during that extended debate important issues were raised which then needed to be addressed by the opposition.”*<sup>63</sup>

While accepting that the guillotine will be required “on some occasions ... where certain legislation needs to be passed urgently” the former Fine Gael whip, Deputy Paul Kehoe objected to the guillotine in circumstances where “a Bill has been around for a long time, moving slowly from one stage to another. In those instances the Bill is guillotined not out of urgency, but simply because the government want to cross it off their list as having been completed.”<sup>64</sup> The Labour Party whip, Deputy Emmet Stagg was deeply critical of the use of the guillotine:

*“The parliamentary guillotine is widely abused by government. It was supposed to be only used in exceptional circumstances and where there was consensus regarding its use, but now it is being resorted to on an everyday basis, especially towards the end of a session.”*<sup>65</sup>

One interviewee accepted that “the use of the parliamentary guillotine is certainly damaging from the point of view of the scrutiny of

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59. According to Hogan & Whyte, this mechanism has in fact never even once been invoked. Hogan & Whyte, Kelly - The Irish Constitution (4th ed., Dublin, 2003) at para. 4.5.21.

60. 3 Seanad Debates Col.894 (16 July 1924).

61. O’Sullivan, The Irish Free State and its Senate (London, 1940) at

p.122.

62. Interview with author, 13 October 2010.

63. Interview with author, 4 November 2010.

64. Interview with author, 27 October 2010.

65. Interview with author, 20 October 2010.

legislation” but went on to observe that the use of the guillotine is also exploited by members of the opposition for their own ends:

*“Where the guillotine is being applied at Committee or Report Stages, as a tactic, members of the opposition will sometimes table a wide-ranging amendment to an early section of the Bill and when that amendment is reached they will drag out the debate to consume time and when the guillotine is applied, they will point to the vast number of amendments which have not been reached as a consequence of the guillotine being applied.”*<sup>66</sup>

## Legal Position

Hogan & Whyte,<sup>67</sup> ponder “whether an attempt by a majority in either House to stifle or curtail debate on a particular Bill might be justiciable by the courts on the ground that the imposition of such a guillotine on parliamentary debate infringed Article 20.” They go on to say that this is something which they feel is unlikely and in support of that view they cite the dictum of O’Flaherty J in *O’Malley v An Ceann Comhairle*<sup>68</sup> where he said that as regards matters concerning the internal workings of the Dáil, “it would seem inappropriate for the court to intervene except in some very extreme circumstances...”. However, Hogan & Whyte subsequently seem to leave open the possibility of such an intervention, conceding that the jurisdiction of the courts to consider a question such as this “has not yet been fully explored”.<sup>69</sup>

However, even taking those views into account, a question arises on the extent to which the principle of non-justiciability is capable of being extended or stretched so as to insulate the internal workings of the Houses from scrutiny by the courts in circumstances where what is being done is so gravely out of step with what is envisaged by the Constitution. Whilst the Constitution is by no means prescriptive as to the detail of the legislative process which a Bill must undergo, it is clear that the Constitution does envisage that an integral part of the legislative process is the amendment of legislation or at least the opportunity for exploring proposed amendments to legislation.<sup>70</sup> Therefore, it is arguable that the deployment of the parliamentary guillotine is at variance with the “terms and spirit of the Constitution”<sup>71</sup> which clearly envisage a legislative process

which facilitates the discussion of proposed amendments. The decision of the High Court in *Doherty v Government of Ireland*<sup>72</sup> (a case which focused on the failure of the then government to hold a by-election) seems to suggest that the possibility of a court intervening has increased.

On that basis, some might argue that it is possible to envisage circumstances in which the courts might feel compelled to say that the severely curtailed legislative process which a particular Bill has undergone, is not sufficient to discharge the requirements imposed on the Houses pursuant to Article 15.2.1 of the Constitution. For example, a twenty section Bill which is introduced at short notice and is pushed through all stages in one hour before moving to the next House to undergo the same rash process can, in the absence of some extreme emergency, hardly be said to have undergone a legislative process which is compatible with that envisaged by the Constitution.

## ACCESSIBILITY OF LEGISLATION

That legislation should be accessible – accessible in the sense that its language and form are reasonably comprehensible and accessible in the sense that identifying what constitutes the current law ought not be a difficult task - is important in several respects. First and foremost, it is important that legislation is accessible to the members of the legislature who are making the laws because if the legislators are unable to identify and understand the current law, they are not well placed to amend or add to the existing body of law. Secondly, it is important that legislation be accessible to some degree by those members of the public who wish to examine it, be that in the context of pre-legislative scrutiny, or in terms of understanding the Bill so that they are in a position to highlight any areas of concern.

The difficulties which can be encountered in grappling with inaccessible legislation have been expressed many times, however, none so evocative as the words of Harman L.J.<sup>73</sup>:

*“To reach a conclusion on this matter involved the court in wading through a monstrous legislative morass, staggering from stone to stone and ignoring the marsh gas exhaling from the forest of schedules lining the way on each side. I regarded it at one time, I must confess, as a Slough of Despond through which the court would never drag its feet but I have,*

66. Interview 2, 12 October 2010.

67. Hogan & Whyte, Kelly - The Irish Constitution (4th ed., Dublin, 2003) at para. 4.5.05.

68. [1997] 1 IR 427 at 431.

69. Hogan & Whyte, Kelly - The Irish Constitution (4th ed., Dublin, 2003) at para. 4.5.09.

70. For example, Article 20.1 provides - “Every Bill initiated in and passed

by Dáil Éireann shall be sent to Seanad Éireann and may, unless it be a Money Bill, be amended in Seanad Éireann and Dáil Éireann shall consider any such amendment.” Article 23.1.1 also envisages amendments to legislation, as does Article 24.2

72. See *Doherty v Government of Ireland* [2010] IEHC 369; High Court, unreported, 3 Nov 2010.

73. [2010] IEHC 369; High Court, unreported, 3 Nov 2010.

*by leaping from tussock to tussock as best I might, eventually, pale and exhausted, reached the other side ...”*

The body of primary and secondary legislation in Ireland is collectively referred to as the Irish Statute Book; individual pieces of legislation are the building blocks which together constitute the Statute Book. It is a body of law which is, in many respects, inaccessible.

### **Accessibility of Legislation and Members of the Houses**

The renowned UK expert on statute law, Francis Bennion, has consistently argued that laypersons should not busy themselves with the task of seeking to understand legislation without seeking the assistance of experts. Writing in 1994, Bennion argued:

*“No law can be directly comprehensible by non-experts because law is and has to be an expertise. It needs to be explained to the lay person, whether by officials or professionals in private practice.”<sup>74</sup>*

He reiterated these views the following year in another article:

*“... the man, or woman, in the street should not attempt to interpret legislation. I refer, of course, to legislation still in the form which it was enacted. What the lay person needs is explanations and summaries.”<sup>75</sup>*

In view of the fact that most of TDs and Senators are not legal experts, are they, pursuant to Bennion’s rationale, to be regarded as being ill-equipped to scrutinise legislation? Having put this contention to Mr Bennion, he responds that:

*“Special considerations govern the case of a lay person who is acting as a legislator ... Mixed with the lay members are a considerable number of persons with legal expertise, and the members also have officials with such expertise to advise them.”<sup>76</sup>*

In Bennion’s view, the responsibility for ensuring that a Bill is accessible to the members of the Houses rests firmly on the shoulders of the legislative drafter:

*“The drafter ... must accept primary responsibility for ensuring that it is both possible and credible for lay parliamentarians to assist lawyer members in devising, debating and enacting parliamentary laws. The drafter is joined in this task by officials employed by the legislature and, in the case of bills initiated or supported by the executive, by civil servants and others employed or consulted by it.”<sup>77</sup>*

Bennion observes that: “It was the advent of democracy that made lay persons into legislators; and we need to remember what a paradox this is – even if a necessary one under modern conditions.” This recognises one of the key pillars of democracy, namely that those who are elected to make the laws are true representatives of the electorate, in all respects including their backgrounds and areas of expertise, and it is this quality which makes them eminently qualified to scrutinise legislation.

### **Accessibility of Legislation and Members of the Public**

Whilst it is especially important that members of the Houses are in a position to understand the legislation which is placed before them, it is also important that members of the public can understand the effect of the legislation which is being considered by their elected representatives, so that they can express their own views in relation to that proposed legislation. As stated by former Taoiseach, Bertie Ahern:

*“It’s actually important that the public engage with the contents of a Bill once it has been published, because without the stimulus of public interest, it’s very difficult for members of the Houses to go through a Bill and identify gaps or weaknesses, and the language used in legislation certainly does not help them in this task.”<sup>78</sup>*

The accessibility of legislation to members of the public is also important in view of the principle of Ignorantia Juris Neminem Excusat – ignorance of the law is no defence - which, by necessity, plays such an important part in the Irish legal system and indeed in many other legal systems throughout the world.

74. Davy v Leeds Corporation [1964] 1 W.L.R. 1218, 1224.

75. Bennion, The Times, 1 February, 1994.

76. Bennion, “Don’t Put the Law into Public Hands” The Times, 24 December, 1995.

77. In communication with the author, 14 October 2010. These exchanges with Francis Bennion gave rise to the publication of the following article: Bennion, “Should Non-Lawyers Have Power to Change the

Law?” 19 The Commonwealth Lawyer (Dec 2010) 22-26. See also www.francisbennion.com

77. *ibid.*,

78. Interview with author, 13 October 2010.

## **Principal Causes of Inaccessibility**

The inaccessible nature of our legislation, and in turn the Statute Book, may be attributed to several factors. However, for the purposes of this work, the examination of the relevant factors is limited to what are viewed as being the key factors which are responsible for the current inaccessible state of the Statute Book to members of the Houses, those being: the approach utilised to publish legislation; the approach utilised to amend legislation and, the language used in legislation.

### *Approach to the Publication of Legislation*

The publication of legislation has traditionally been viewed as being secondary and ancillary to the task of enactment. Once legislation is enacted or made, it is published in its “as enacted” or “as made” form. Where a new law amends a pre-existing law, save for some rare exceptions<sup>79</sup>, there is no effort made to publish the law in its “as amended” or “in force” state.

Very few Acts form a stand-alone, definitive statement of the law on a particular topic. Invariably the content of an Act is supplemented by secondary legislation. So to understand the law on a given topic, it is necessary to look beyond the Act and to extend the search to cover secondary legislation. As a consequence, it falls to the members of the Houses and other users of legislation to piece the new legislation together with the old.

Successive governments have obviously taken the view that once a law has been enacted or made, their task has been completed and its publication is merely an offshoot. It is clear that the neglect of the publication of the legislation has contributed significantly to the poor state of the statute book. Bentham had a strongly held view that the legislature had a responsibility to see to it that once enacted, legislation receives the widest possible publication amongst the public. He was scathing in his criticism of the legislature for what he saw as its failure to fulfil this responsibility and compared the legislature to an ostrich who buries its eggs in the sand, not caring about whether they are crushed under the foot of a passer by.

The difficulties which arise as a result of the current approach to the publication of legislation is exacerbated by, and is very closely connected with, the current approach to the amendment of legislation.

### *Approach to the Amendment of Legislation*

Another serious impediment to the accessibility of legislation to members of the Houses is the approach taken to the amendment of legislation, whereby “amendment is heaped upon amendment” as a preferred means of amending the existing body of statute law. New Acts are piled up on top of old ones without any effort to repeal or revamp the earlier ones, but instead are designed to amend and supplement the ones which have gone before. As a consequence, each new Act stands independent of the other. This process gets repeated over and over until the older Acts become impervious to even the most diligent legislator.

### *Language of Legislation*

It is beyond question that the language of legislation is inherently turgid and complex. In fact some would go so far as to suggest that the language is turgid and something more fitting to the 19th Century, and not the 21st. Various commentators have crossed swords on the question as to whether such complexity is warranted<sup>80</sup>. However, what is clear is that the use of complex language can sometimes make legislation inaccessible to the members of the Houses who are charged with the task of scrutinising legislation.

It would seem that there is an established need for the adoption of more reader friendly, modern and simplified language in legislation to the extent that it will not give rise to uncertainty. This need was recognised by the Law Reform Commission which has put forward a series of recommendations which are designed to make legislation more accessible<sup>81</sup>.

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79. Consolidations, Statute Law Restatements and Statute Law Revision continue to be rare features on the legislative landscape.

80. See generally, Stark, “Should the Main Goal of Statutory Drafting be Accuracy or Clarity”, (1994) 15 Stat. L.R. 205; Hunt “Plain Language in Legislative Drafting: Is it Really the Answer?” (2002) 23 Stat. L.R. 24; Sullivan, “Some Implications of Plain Language Drafting” paper delivered at “Legislative Drafting – Emerging Trends” conference 6th October, 2000 Dublin; Nugee, “Legislation from the User’s Perspective” a paper delivered at Clarity/Statute Law Society Conference, Cambridge 12 – 14 July 2002; Butt & Castle, *Modern Legal Drafting: A Guide to Using Clearer Language* (Cambridge, 2001); Cutts, *Unspeakable Acts? Clarifying the Language and Typography of an Act of Parliament*, a discussion paper published

under the auspices of Words at Work in (January, 1993); Kimble, “Answering the Critics of Plain Language” (1994-1995) 6 *Scribes J. Legal Writing*.

81. In its report entitled *Statutory Drafting and Interpretation: Plain Language and the Law* (LRC 61-2000), the Commission proposed a series of moderate reforms, including a recommendation that a programme of reform of Irish law be embarked upon with a view to expressing the law in plain language. It also advocated the use of familiar vocabulary and the use of shorter sentences. However, fundamental to the Commission’s recommendations in this regard is its caveat that “Plain language should never be utilised at the expense of legal certainty ...”

**Features of the Parliamentary System Which Impact Upon Scrutiny****INTRODUCTION**

This Chapter seeks to examine a number of additional factors which have a considerable influence over the ability of members of the Houses to scrutinise legislation.

**INFORMATION ASSISTING SCRUTINY****Information Underpinning the Legislation**

During the course of a debate on legislation, the presence or absence of information can impinge on the quality of the ensuing debate and process of scrutiny. Of course the development of the internet has proven to be a great research tool for members of the Houses and the Library and Research Unit of the Houses has clearly enhanced the level and quality of information available to those contributing to debates on legislation. In relation to virtually all pieces of legislation there will exist some official documents which explore or at least expand upon and justify the need for the legislation in question. For example, the rationale behind an obligation which is imposed by the EU institution will invariably be expanded upon in accompanying explanatory materials. Equally, the purpose of and background to legislation which emanates from a Law Reform Commission Report or a Government Green Paper or White Paper will invariably be much more apparent than legislation which emanates from a commitment which arises from the partnership process or a budgetary announcement. Members of the Houses who are seeking to scrutinise the ensuing legislation will have access to those Reports and other published papers.

However, in some instances there may be little background information available which sheds any light on the rationale behind the proposed legislation. The dearth of information in those circumstances is not helped by the secrecy inherent in government departments which means that the principal working papers associated with legislation are never shared with members of the Houses.

In addition to being concerned with the letter of the law, members of the legislature will also be concerned with the motive and purpose behind the proposed law. It seems reasonable to state that in all instances, it would be of assistance to members on all sides of the Houses who are engaged in the task of scrutinising proposed legislation if the Minister sponsoring the legislation were to make available copies of his or her Department's travaux préparatoires, or principal working papers. Ultimately such a move is likely to enhance the process of scrutiny on all sides of the Houses.

**Explanatory Memoranda**

Upon their initiation, most Bills are accompanied by an Explanatory Memorandum which is intended to highlight the existing law, explain the reasons for the Bill and explain in plain terms the effect of each provision of the proposed Bill<sup>1</sup>. At present, explanatory memoranda are principally prepared for use by members of the Oireachtas. Whilst members of the Houses and indeed the wider public rely on the terms of the relevant Explanatory Memorandum to explain the content of the legislation, the reality is that Explanatory Memoranda can greatly vary in quality.<sup>2</sup> The Law Reform Commission has noted concerns that both the quality and content and also the length of the memoranda varied and was of the view that the quality had in fact declined over the years:

*“... some judges have remarked that explanatory memoranda were of more assistance to interpretation in previous times, when they were published more selectively with some Bills. A factor to be noted is the variation in quality and content of memoranda; this may result from the fact that memoranda are drafted in the various Departments of State, rather than by the Office of the Parliamentary Counsel to the Government.”<sup>3</sup>*

Despite these criticisms, Explanatory Memoranda still serve as a very important source of information for members of the

1. The requirement to publish an explanatory memorandum with a Bill exists by virtue of Order 101 of the Seanad. See also Ch.4.22 of the Cabinet Handbook.

2. One of the earliest critics of explanatory memoranda was the late John Kelly whose words carry added weight given that he spoke as a Dáil Deputy and also as one of the finest lawyers of his time: “I have had reason to complain about the expense of printing explanatory memoranda and the uselessness of them because very often they

did not tell one what the Bill was about, the reasons which lead to its introduction or the reasons behind a particular section. The first thing a Deputy or a member of the public wants to know about new law is the reason for it. In the past, explanatory memoranda have all too often been silent on that point.” 339 Dáil Debates Col. 1279 (8 February 1983).

3. Statutory Drafting and Interpretation: Plain Language and the Law (LRC 61-2000) at par 6.36.

Houses who are considering the accompanying legislation. The omission of a matter from the Explanatory Memorandum or the characterisation of an issue in a particular way can have a bearing upon whether that particular issue is scrutinised and the extent to which it is scrutinised. It is for this reason that the content, informativeness and in particular the accuracy of Explanatory Memoranda are of the utmost importance to members of the Houses.

### **Regulatory Impact Analysis<sup>4</sup>**

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One of the principal measures advocated in the Government's White Paper on regulation<sup>5</sup>, was the adoption of regulatory impact analysis (RIA). A systematic process of RIA has since been rolled out across all Departments. The purpose of RIA is to subject certain proposals for legislation to a detailed analysis, with a view to assessing the likely impact which that legislation will have. Therefore, RIA reports can be of real assistance to members of the Houses who are scrutinising the associated piece of legislation. However, RIA reports<sup>6</sup> are not available on a coordinated or systematic basis. Problems regarding the availability and publication of RIA reports were highlighted in an assessment of the RIA process conducted in 2008. The unavailability of some RIAs means that the value which they might otherwise add to the legislative process is lost.<sup>7</sup>

### **Research Papers**

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As part of its Legislative Analysis Service, the Library and Research Service<sup>8</sup> of the Houses of the Oireachtas produces one of two types

of research papers which provide valuable information relating to each Government Bill – a Debate Pack and a Bills Digest. A Debate Pack comprises carefully selected and edited secondary sources on the Bill in question. For example, a Debate Pack might include extracts of media coverage on the subject matter of the Bill, parliamentary questions relating to the subject matter of the Bill; summaries or commentaries on the Bill made by interested parties.

A Bills Digest seeks to provide more specific information on the Bill to members in advance of the Second Stage debate on that legislation and it might typically include information such as the background to the Bill, a statement of the current legal position, a summary of the key principles of the Bill, and an examination of comparative legislation.<sup>9</sup>

A testament to the accuracy and impartial nature of the information provided by the Oireachtas Library and Research Service is the fact that the records of debates in the Houses show that members on all sides of the House rely on the Debate Packs and Bill Digests during the course of debates on legislation.

### **Statements of Assurance**

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Statements of assurance from the sponsoring Minister to the effect that a piece of legislation is urgently required, or that its introduction is required upon the advice of the Attorney General, or that it is only being introduced as a temporary measure are all assurances which are invariably accepted in good faith by members of the Houses. Therefore, assurances such as this can, in certain circumstances, significantly influence the degree to which a piece of

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4. Regulatory Impact Analysis is the subject of greater discussion in Chapter 6. On RIA, see generally, Ferris, "The Increasing Importance of Regulatory Impact Analysis", *Public Affairs Ireland Journal*, Issue No. 49, July 2008.

5. *Regulating Better* (January 2004).

6. In July 2008, the Taoiseach published a Review of the Operation of Regulatory Impact Analysis which examined the implementation of Government policy on the conduct of Regulatory Impact Assessments since their rollout in 2005.

7. The publication of RIAs and the apparent difficulty in accessing the reports of completed RIAs was the subject of discussion in the Dáil. Deputy Denis Naughten criticised the failure of most Departments to establish a dedicated webpage for RIAs. By way of response, the Taoiseach stated: "... the overriding co-ordination role of my Department means we must try to ensure there is better uniformity of presentation." The Taoiseach undertook to take the matter up with the various Departments (673 Dáil Debates (3 February 2009)).

8. The development of the Library and Research Service is discussed in Chapter 6.

9. For example: "I must pay a compliment to the Oireachtas Library and Research Service for providing debate packs so that we can have a more informed debate" as stated by Senator David Norris (194 Seanad

Debates (5 March 2009)). "I also acknowledge the very helpful document published by the Oireachtas Library and Research service, which was an invaluable source for me, in particular, in seeking to interpret the legislation." as stated by Deputy Sean Sherlock (681 Dáil Debates (29 April 2009)); "I thank the Oireachtas Library for the Bills Digest which provides an excellent resumé of many parts of this Bill that I do not have time to go through. It is an excellent document." as stated by Deputy Paul Connaughton (681 Dáil Debates (30 April 2009)); "In passing, I compliment the Oireachtas Library & Research Service on its wonderful work on the Bills Digest on this item of intended law ..." as stated by Senator Paul Coghlan (195 Seanad Debates (7 May 2009)); "I am grateful to the Oireachtas Library and research service, which is very helpful in providing information on our discussions, particularly the more complicated ones, for putting together a digest." as stated by Senator Alex Whyte (196 Seanad Debates (18 June 2009)); "I commend the work of the library and research team, which has started preparing summaries on the background to legislation. This is very valuable work by the library and research section, which I used when preparing to speak on this Bill. The document that it produced was very informative about the background to this Bill." as stated by Deputy Joanna Tuffy (690 Dáil Debates (24 Sept 2009)).

legislation is scrutinised. For example, during the passage of the Defence Forces (Temporary Provisions) Act 1923, the sponsoring Minister informed the Houses that the Bill was being introduced as a temporary measure. Despite that, the Act remained on the statute book until 1954.

This experience perhaps exemplifies the need for a good degree of scrutiny irrespective of the circumstances which lead to the introduction of the legislation as well as any assurances associated with it.

## CONTRIBUTIONS TO DEBATES

### Party Spokespersons

Flowing directly from the development of party structures is the practice amongst opposition parties, of appointing party spokespersons with responsibility for particular portfolios – effectively serving as shadow Ministers. Among other things, a party spokesperson is responsible for devising the party’s stance in relation to a Government Bill. It is the party spokesperson who shadows the Government Minister who is sponsoring a particular Bill and therefore it is his or her responsibility to lead their party’s response to a Bill during the legislative process. It is for this reason that party backbenchers may firstly, feel that there is little point in them contributing to a debate on the legislation as their party’s formal position has already been determined and secondly, they may feel that the priority and primacy given to the role of the party spokesperson means that there is little point in them contributing their own views on the legislation.

Perhaps in contrast with Second Stage, one interviewee has suggested that members may feel less constrained from contributing during Committee Stage in the Dáil:

*“Committees give Government backbenchers an opportunity to contribute, perhaps this is because at this forum they see themselves not as members of the Government but members of the committee. They may feel freer to express their views in Committee rather than in the more formal forum of the Dáil.”*<sup>10</sup>

Whilst the appointment of party spokespersons is a necessary part of the organisation and workings of political parties, the lead role which party spokespersons play in relation to a Bill may nonetheless be a

consideration which discourages other members of the party from participating in the process of the scrutiny of legislation in any meaningful way. However, it is important to add that party members, other than the designated spokesperson, virtually always contribute to the debates on Government Bills.

### Channels Available to Government Backbenchers

Griffith<sup>11</sup> alludes to the so called “vow of silence” which Government backbenchers seem to adopt in relation to the scrutiny of legislation. As claimed by former Government Chief Whip and Minister of State John Curran, this vow of silence cannot be attributed to the belief that any consequences might befall a dissident backbencher.<sup>12</sup> Bennion cites the scarcity of parliamentary time as being one of the principal reasons why Government backbenchers may appear to be less enthusiastic participants in the task of legislative scrutiny:

*“Every government wishes to get its programme through, and there is nearly always a shortage of time available for this. If Government backbenchers are on their feet they are taking up this precious time, so the Government whips regard it as their duty to discourage them.”*<sup>13</sup>

The Assistant Clerk of the Dáil offers another reason as to why Government backbenchers may be reticent about tabling amendments:

*“One possible reason why Government backbenchers do not table amendments is because the Minister might not always agree with the purpose of their amendment and this could potentially be a source of embarrassment to them. There is also a procedural reason for this, as once an amendment has been moved it may only be withdrawn with the leave of the Houses. There are precedents in the past where the motion for leave to withdraw was opposed and the Deputy then had to vote to withdraw, and in effect nullify, his own amendment.”*<sup>14</sup>

However, one of the reasons why government backbenchers may appear not to participate in the process of scrutiny may derive from the fact that their views on a particular piece of legislation may be made known to the sponsoring Minister in a place other than the floor of the Houses, such as for example during a meeting of the parliamentary party or in a private conversation with the Minister. As

10. Interview 1, 12 October 2010.

11. Griffith, *Parliamentary Scrutiny of Government Bills* (London, 1974) at p.42.

12. As stated by Minister Curran: “As Chief Whip I can say that there are no

repercussions for Government backbenchers who speak out against a Government Bill.” – Interview with author, 17 November 2010.

13. In communication with the author, 14 October 2010.

14. Interview with author, 12 October 2010.



stated by former Government Chief Whip and Minister of State John Curran:

*“Once a Bill is published, Government backbenchers have the benefit of a briefing on the Bill which is given by the sponsoring Minister at a meeting of the Parliamentary Party and that gives them an opportunity to raise questions or express concerns directly to the Minister.”<sup>15</sup>*

This view was echoed by former Taoiseach Bertie Ahern:

*“One of the major differences between Government backbenchers and opposition members relates to what they do when they have an issue with legislation or have been lobbied in relation to it. Government backbenchers will usually raise the issue with the Minister whereas the opposition member will choose to raise the matter in the Houses.”<sup>16</sup>*

Government backbenchers will also serve what may almost be characterised as a passive role in deterring Ministers from introducing legislation which the sponsoring Minister knows will give rise to discontent amongst the ranks of backbenchers. This is what Blondel<sup>17</sup> characterised as “preventive action of the legislature”. There was, he stated, no way of knowing “how many bills are not presented by the government because the government realizes ... that these Bills would not be passed ...”<sup>18</sup>

This seems to suggest that despite their apparent silence, government backbenchers may in fact play a role in influencing the ultimate content of a piece of legislation. However, the fact that there is no formal mechanism in place for seeking the views of government backbenchers in relation to legislation means that, in some instances, their views may well go unheard. Perhaps this consideration led former Deputy Michael Kennedy to suggest that “the role of the backbencher had to be enhanced in the legislative process, and that participation by backbenchers in forming legislation should be encouraged.”<sup>19</sup>

## Sharing of Speaking Time

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It is the responsibility of the party whips to allocate speaking slots for the Second Stage

debate. A speaker list is maintained by the party whips for that purpose. In circumstances where the number of members wishing to speak exceeds the amount of time available, speakers may opt to share speaking time. This is a common occurrence and is a practice which enables a greater number of individuals to contribute to the debate – thus enhancing the degree of scrutiny to which the legislation is subjected.

## Talking Out a Bill

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On occasion, a party whip may be eager to keep the debate going, or “talk out” a Bill for as long as is possible. The motivation behind this is that by lining up a lot of speakers, the opposition delays the passage of the Bill. As stated by former Government Chief Whip, Tom Kitt, this leads to a situation where “people are asked at short notice to go in and speak on a Bill. It’s a bit of a conveyor belt ...”<sup>20</sup>

Former Fine Gael whip, Deputy Paul Kehoe made it clear that delaying the passage of a Bill is not on his party’s agenda:

*“It’s every member’s right to speak on a Bill, that is what they are elected by the people to do. However, as a Party, we do not see any benefit to having members speak on a Bill just for the sake of it or for the sake of delaying or obstructing the passage of a Bill.”<sup>21</sup>*

Labour Party whip, Deputy Emmet Stagg rejects the notion that the opposition seek to “talk out” debates: “There’s no question of us putting forward speakers for the sake of it, in fact often we have more members seeking to speak than we have speaker slots for.”<sup>22</sup>

Even in circumstances where causing delay is identified as being the objective of a speaker, there is a facility whereby the Ceann Comhairle or Cathaoirleach may direct the discontinuance of a speech which is being made “for the purpose of obstructing business.”<sup>23</sup>

## Use of Scripts in Chamber

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Also impinging on the flow of debates is the use of scripts by members during debates on legislation. Speeches during Second Stage of

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15. Interview with author, 17 November 2010.

16. Interview with author, 13 October 2010.

17. Blondel “Legislative Behaviour: Some Steps Towards a Cross-National Measurement” as published in Norton, Legislatures (Oxford, 1990) at p.186.

18. *ibid.*, at p.199.

19. Joint Committee on the Constitution, Fourth Report - Review of the Electoral System for the Election of Members to Dáil Eireann (July, 2010) at p.98.

20. Interview with author, 4 November 2010. Tom Kitt also added: “Even if a member has no interest in a particular Bill, they will generally speak on it when asked to do so by the whip, so in some instances members speak on a Bill out of a sense of duty. Occasionally you might hear a member say that they need to get their speaking time up, so they will speak on a Bill simply for that reason.”

21. Interview with author, 27 October 2010.

22. Interview with author, 20 October 2010.

23. Standing Order 58 of the Dáil and Standing Order 48 of the Seanad.

a Bill in the Houses are invariably made from pre-prepared scripts. Whilst it is not usually possible to detect this from an analysis of the official record of debates, it can be seen from the observation of proceedings.

One Deputy has asserted that “[t]he Dáil Chamber has become a place where people read scripts to each other.” Citing his experience of what happens on the adjournment debates in the House, he stated:

*“a Minister of State ... arrives into the Chamber and reads out a pre-prepared script. It should not be called a debate; that is a misnomer. The script has been pre-prepared and the comments of the Member have been anticipated ... There is no way in which to have any interaction or debate on the issue.”*<sup>24</sup>

In the opinion of a former Government Chief Whip, debates in the Houses suffer from what he termed the “tyranny of the script”:

*“Much of what passes for debate in Leinster House is uninspiring and unenlightening. Our debates are often too structured, too formal and too contrived.”*<sup>25</sup>

Another former Government Chief Whip, Tom Kitt alluded to the practice of Government TD’s being provided with scripts which have been prepared by the Minister’s office.<sup>26</sup>

In summarising proposals which had been put forward by other Members of the House, the Chairman of the Joint Committee on the Constitution stated:

*“... the whole question of readings scripts [in the House] is against Standing Orders but it is done. It is boring, people do not listen to what is being said and the television audience is turned off by it.”*<sup>27</sup>

One difficulty with strict adherence to a script is that unless the speaker is willing to depart from the script from time to time, it does not allow a speaker comment on or react to points made by previous speakers and in that way inhibits a more free-flowing lively debate on the core issues. On the other hand, it is arguable that the use of scripts allows speakers to express their views on the legislation in question in a very detailed and pre-planned way.

The use of scripts by members is prohibited under the rulings of the Chair.<sup>28</sup> However, it would seem that this ruling is very rarely enforced and consequently, members on all sides of the Houses continue to be heavily reliant upon the use of scripts when debating legislation at Second Stage.

## **Absence of Members**

The relatively strict adherence to the time allocated to speakers in the Houses and the reliance upon speaker lists means that speakers who have been scheduled to contribute during a later point in the debate do not have to maintain a presence in the chamber in the expectation that they might be called upon to speak. Instead members can accurately predict when they will be called upon and tailor their presence to that moment. This often means that unless members have been following the debate on the monitor in their offices, members will be unaware of the issues raised by previous speakers and this inhibits the spontaneity and free flow of debates and ultimately is not conducive to the enhanced scrutiny of legislation. As stated by one Deputy:

*“As a result of the speakers’ list, Members arrive in the Chamber five minutes before they are due to speak, something we have all done, read out a script and walk out again. Nobody listens to anybody else.”*<sup>29</sup>

The tendency of members to absent themselves from the Houses in this way led a former Government Chief Whip to comment that on the occasion of the one-day staff strike in the Houses during which the speakers list was unavailable, TDs “had to come into the Dáil chamber and nearly take their chances as to when they would be called.”<sup>30</sup> The improved level of interaction brought about by the absence of the speaker list was also observed by another Deputy who noted that “speakers were selected at random by the Chair as they indicated they wanted to speak. It worked extraordinarily well. Everybody listened to each other and there was proper interaction.”<sup>31</sup> Fine Gael whip, Deputy Paul Kehoe concedes that the maintenance of a speaker list is not conducive to an enhanced level of scrutiny: “The timings of speaking slots is

24. Deputy David Stanton - Joint Committee on the Constitution, 10 March 2010.

25. Carey, “Parliamentary Reform is Long Overdue” Paper delivered at MacGill Summer School (Jul 2010).

26. Where he stated: “...often Government TD’s will be relying on scripts provided by the Minister’s office.” - Interview with author, 4 November 2010.

27. Joint Committee on the Constitution, Fourth Report - Review of the Electoral System for the Election of Members to Dáil Eireann (July, 2010) at p.149.

28. Houses of the Oireachtas, Salient Rulings of the Chair (3rd ed., 2006). On the use of scripts, see also Humphreys, “Legislative Obstruction: How to Do It” 39(1) (1991) Administration 55 at 65.

29. Deputy David Stanton - Joint Committee on the Constitution, 10 March 2010.

30. Joint Committee on the Constitution, Fourth Report - Review of the Electoral System for the Election of Members to Dáil Eireann (July, 2010) at p.98.

31. Deputy David Stanton - Joint Committee on the Constitution, 10 March 2010.

necessary, but I accept that the speakers list does have a negative effect on the flow of debate.”<sup>32</sup>

Members might feel more encouraged to be present in the House during the course of a debate if they could avail of the opportunity to intervene and have a more spontaneous and interactive debate with other members of the House. As a debate of this nature is not currently permissible under Standing Orders, it would seem that members see little value in sitting in the chamber listening to one Deputy after another breeze in to read a script only to leave again after it has been completed, with no scope for the patient Deputy to express his or her views on the points which have been made by colleagues. To counter this practice, a former Government Chief Whip has proposed:

*“Our debates should be less rule-bound and should allow for interested members to come into the chamber and intervene where necessary ... Members should have more freedom to intervene than is currently the case in a system where opportunities to speak are strictly allocated. More freedom would lead to greater engagement ...”*<sup>33</sup>

This call has been echoed by a political commentator who has called for a radical overhaul of speaking rules, including reforms to allow “greater interruption and interaction.”<sup>34</sup> It seems likely that the dynamic and quality of debates in the Houses, particularly at Second Stage, could be altered significantly if those proposals were to be reflected in Standing Orders.

### **Presence of the Minister**

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Invariably the Minister who is sponsoring a Bill will attend for the duration of the debates as the Bill journeys through the Houses. However, on occasion a Minister may be indisposed and may have to absent himself or herself for part of the debate and another Minister or a Minister of State will stand in.

A question arises as to the impact, if any, which the presence or absence of the Minister with responsibility for the Bill in question has on the extent to which the Bill is scrutinised. The presence of the Minister with direct responsibility for the Bill should serve to ensure

that all or most of the points raised during the debate can be satisfactorily addressed by the Minister when he or she is responding to the issues raised by members. This may not always be possible in circumstances where the stand-in Minister is not as familiar with the subject-matter and detail of the legislation.

One interviewee suggested that there may be a correlation between the seniority of the Minister in attendance and the degree to which opposition amendments are accepted:

*“Less experienced Ministers and Ministers of State will tend to be reluctant to agree to accept amendments, and this may be because they are very conscious of the fact that the Bill as presented to Committee has already been approved by Cabinet and they are reluctant to take on board amendments which might in some way dilute or unseat that approval.”*<sup>35</sup>

In addition, the non-attendance of the Minister sponsoring the legislation may deny those present of the opportunity to really test the Minister’s thinking and motivation behind the Bill as a whole as well as its individual provisions.

### **Parliamentary Privilege**

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Parliamentary privilege attaches to the official documents of the Houses as well as to the private papers of its members in accordance with Article 15.10 of the Constitution.<sup>36</sup> In addition to the cloak of parliamentary privilege, the private papers of a member of either House are shielded from the scope of the Freedom of information Acts.<sup>37</sup> Utterances of members of the Houses enjoy the protection of parliamentary privilege. This is principally set out in Article 15.12, which provides that: “utterances made in either House wherever published shall be privileged” and also Article 15.13 which provides that: “[t]he members of each House 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.”

These provisions confer a great degree of freedom on members of both Houses when

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32. Interview with author, 27 October 2010.

33. Carey, “Parliamentary Reform is Long Overdue” Paper delivered at MacGill Summer School (Jul 2010).

34. Whelan, “Our Electoral System and Political Culture Have to be Changed” paper delivered at MacGill Summer School (Jul 2010).

35. Interview 1, 12 October 2010.

36. Article 15.10 provides: “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.”

37. Freedom of Information Act 1997, s.46(1)(e) - a record relating to any of the private papers (within the meaning of Article 15.10 of the Constitution) of a member of either House of the Oireachtas or an official document of either or both of such Houses that is required by the rules or standing orders of either or both of such Houses to be treated as confidential.

scrutinising legislation. As stated by Geoghegan J in *Attorney General v Hamilton (No 2)* these provisions of the Constitution ensure that “legislators are free to represent the interests of their constituents without fear that they will later be called to task in the courts for that representation”. In particular, it seems fair to state that these provisions of the Constitution provide a very good basis for members to engage in a fulsome debate on legislation which is before them.

### **Courts’ Use of Parliamentary Debates**

Except in very limited circumstances, the courts are effectively precluded from examining parliamentary debates as an aid to the interpretation of legislation. In common with many other key principles concerning the interaction between the judiciary and the legislature, this principle stems from the doctrine of the separation of powers. Despite some deviations from the general rule, the Supreme Court effectively reaffirmed this principle in *Crilly v TJ Farrington Ltd*.<sup>39</sup> It may be that if the courts were permitted to have recourse to parliamentary debates, then this might sharpen the focus of parliamentary scrutiny, causing members to focus on areas of ambiguity and ask probing questions of the Minister with a view to ensuring that the principles and also the details of the legislation were clear, all in the knowledge that the detail of the debates might be of assistance to members of the public and also the judiciary in interpreting the legislation.

One may speculate that if the debates on the floors of the Houses were less party-political and less partisan, they might serve as a more valuable and useful resource for anyone seeking to ascertain the true intent behind a particular legislative provision. There are many examples of debates in which the participants do little more than engage in political point-scoring or use the occasion to focus on local issues arising in their respective constituencies. As stated by Fine Gael whip, Deputy Paul Kehoe: “Members of the House do have a tendency to localise debates on legislation, they like to relate a topic to their own constituency or their own experiences.”<sup>40</sup> But equally there are many other examples of debates on legislation which elucidate the terms of the legislation and shed light on areas which were otherwise ambiguous.

## **AMENDMENTS**

### **Tabling of Amendments**

The tabling of amendments affords the opposition an opportunity to propose changes to the Government’s legislation by suggesting new wording or by simply proposing the deletion of existing text. The opportunity for tabling and discussing amendments arises at both Committee Stage and Report Stage in each House. This provides members with four distinct opportunities to advance their proposals. Amendments will invariably be tabled by the sponsoring Minister and also by the relevant spokesperson from each opposition party.

Whilst the tabling of amendments may be viewed as an opportunity to obstruct and prolong the passage of the legislation, it seems reasonable to say that the opportunity to table amendments is valued by opposition members for the opportunity which it affords them to advance their proposals with a view to improving the legislation.

Amendments tabled by members of the opposition are invariably drafted by the party legal advisers in conjunction with the relevant party spokesperson. There is a widely held belief that once a set of amendments has been devised by the opposition for tabling at Committee Stage in the first House, that same set of amendments will be tabled at all subsequent Stages of that Bill’s journey through the Houses. However, an analysis of this contention (in Chapter 9) has proven this not to be the case.

### **Restriction on the Effect of Amendments**

#### *Expenditure*

In relation to the tabling of amendments which impose a charge on the Exchequer, different rules exist in respect of each House. In the Dáil, members of the opposition are prohibited from tabling a Bill which is likely to impose a charge on the people or the appropriation of revenue<sup>41</sup>. A very restrictive approach is taken towards the Seanad, which itself is constitutionally precluded from introducing legislation which involves expenditure.<sup>42</sup>

Furthermore, in both the Dáil and the Seanad, members of the opposition are prohibited from tabling an amendment which is likely to impose

38. [1993] 3 IR 227.

39. [2001] 3 IR 251.

40. Interview with author, 20 October 2010.

41. Standing Orders 150(1) and 151(1) of the Dáil.

42. Article 20.2.1 of the Constitution provides: “A Bill other than a Money Bill may be initiated in Seanad Éireann, and if passed by Seanad Éireann, shall be introduced in Dáil Éireann.”

a charge on the people or a charge upon the revenue.<sup>43</sup> This rule greatly restricts the scope of opposition amendments and some might argue that in a democracy it seems somewhat odd that there exists a rule which prohibits a matter from being even discussed.

Article 17.2 of the Constitution imposes a restriction on the right of the Dáil to pass resolutions or laws which involve the expenditure of public monies by providing that there must first be a recommendation regarding such expenditure which has been signed by the Taoiseach. The All-Party Oireachtas Committee on the Constitution expressed the view that Article 17.10 is used “unjustifiably to support standing orders which prohibit the taking of amendments by the opposition which include even an incidental charge on public funds”.<sup>44</sup> The provision is also used to justify the prohibition of private members’ Bills on the same grounds.

As a result of these restrictions, in order to advance a proposal which would otherwise impose a charge on the Exchequer, on occasion, members of the opposition table amendments which propose the establishment of a working group for the purposes of discussing a proposal to do ABC or discussing a proposal to establish ABC, rather than simply proposing that ABC be done or established. An amendment which is couched in those terms is not usually regarded as offending the terms of the Standing Orders.

As suggested by the Assistant Clerk of the Dáil, one means of easing the current, restrictive approach would be to “only prohibit amendments which involved ‘a substantial charge.’”<sup>45</sup>

#### *Relevance & Consistence with the Bill*

In order to be eligible to be tabled at Committee Stage in the Dáil, amendments must “be relevant to the provisions of the Bill” and must not be “in conflict with the principle of the Bill”.<sup>46</sup>

#### *Consolidation Bills*

The legislative process which a pure consolidation Bill must undergo is somewhat different from that prescribed in respect of an ordinary Bill.<sup>47</sup> Consequently the scope for the tabling of amendments is greatly restricted. Examples of the type of amendments which are permissible at Committee and Report Stages are those which provide for “the removal of ambiguities and inconsistencies” or the “adaptation to existing law and practice”.<sup>48</sup>

## **Deadline for the Submission of Amendments**

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Members of the Houses who wish to formally table amendments to a Bill are required to submit those amendments to the Bills Office before 11.00am four days prior to the commencement of Committee or Report Stage. This deadline can sometimes cause difficulty for members, and is usually disapplied in circumstances where a Bill moves swiftly from one Stage to another. When this occurs, it leaves very little time for the members to take advice, develop a stance and formulate amendments in respect of a Bill.

## **Understanding Ministerial Amendments**

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A further difficulty for members is that the shortage of time available combined with the absence of any explanation as to the purpose of Ministerial amendments, makes it difficult for members of the opposition to give adequate consideration to Ministerial amendments. This point has been reflected upon by the Assistant Clerk of the Dáil, Dick Caffrey:

*“Short notice of amendments means that members do not have the time to fully understand them and much parliamentary time is taken up with teasing out the meaning and effect of amendments. If Ministerial and opposition amendments were published along with accompanying explanatory notes in sufficient time in advance of the Committee and Report Stage debates, that would afford members an opportunity to fully understand them. By altering Standing Orders, time could be saved by allowing members to express their agreement to certain amendments which would therefore not require to be debated, and in this way they could indicate which amendments are the source of disagreement or contention and thus require to be debated during parliamentary time.”*<sup>49</sup>

This approach, he suggests, would ensure that better use is made of parliamentary time. In addition, advance notice of amendments which are accompanied by explanatory notes would ensure that when they turn up to debate the legislation, members would be likely to be much better informed as regards the purpose of the amendments.

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43. Standing Order 150(3) of the Dáil and Standing Order 40 of the Seanad.

44. All Party Oireachtas Committee on the Constitution, Seventh Progress Report – Parliament (Mar 2002) at p.70.

45. Interview with author, 12 October 2010.

46. Standing Order 127 of the Dáil.

47. See Standing Orders 129 – 148 of the Dáil.

48. Standing Orders 145 and 147 of the Dáil.

49. Interview with author, 12 October 2010.

## **Grouping of Amendments**

Once proposed amendments to a Bill have been submitted to the Bills Office, the amendments are grouped by subject-matter in the Bills Office so that when the first amendment related to that subject-matter is reached, all of the amendments touching upon that subject are discussed collectively, even though some of the amendments may relate to a section of the Bill which has not yet been reached. The list of the groupings is usually circulated to members in advance of the commencement of the debate.

Any practice which has the effect of limiting or curtailing debate is not ideal from the point of view of enhancing the scrutiny of legislation. However, pragmatism and the scarcity of parliamentary time dictate that there must be some control or limit on the extent to which a point may be debated. In that context, the grouping of amendments in a way which facilitates the discussion of an issue whilst avoiding the repetition of discussion on that topic, on-balance, is likely to be seen as ensuring that parliamentary time is used wisely. In the absence of the grouping of amendments, there is always a risk that the repeated discussion of one or two topics might consume a disproportionate amount of parliamentary time, leaving a shortage of time for the discussion of other important issues.

## **Development of a Bill Prior to Initiation**

Save for instances where a Bill is introduced prematurely, or in an emergency situation, a Bill tends to be introduced to the parliamentary environment at a point when the principles and policies of the Bill have largely been finalised. Before a Bill is initiated in the Houses, it will have already been through a number of stages of development. For example, the original idea for a Bill may be founded in a programme for Government, a White Paper or a Law Reform Commission Report. The idea will have been committed to a Memorandum for Government and will have received the Government approval at a Cabinet meeting. The idea will then have been developed by Departmental officials into the form of the Heads of a Bill. The Heads of the Bill will have benefited from the input of various Government Departments. In some instances the Heads of the Bill will have been the subject of a process of consultation with members of the public or a number of stakeholders. The Bill will then have been finessed by the legislative drafter and may also have had the benefit of the input of

the advisers to the Attorney General before again securing Cabinet approval clearing the Bill for initiation in the Houses.

This serves to demonstrate that a considerable degree of thought, and indeed scrutiny, will have already been invested in the proposals contained in a Bill before the Bill even reaches the floor of the Houses. Therefore, key principles of the Bill will already have been tied down, and the Minister will be anxious to ensure that the Bill which emerges after the completion of its journey through the Houses will be as close as possible to the Bill in its as-initiated form. This may be one of the reasons why Ministers are notoriously reluctant to take on board the suggestions for amendment which are advanced by the opposition. This could suggest that as regards the legislative process which a Bill undergoes, the Executive tends to be more concerned about easing the swift passage of a Bill whose content has been predetermined, rather than ensuring that the Bill benefits from wider input and is adequately scrutinised. In circumstances where a defensive and closed mindset does prevail, this means that the scope for the opposition to really scrutinise a Bill and to have some meaningful role in its shaping, are severely limited.

However, it is of course important to note that the very prospect of the opposition exposing some weaknesses or flaws in the Bill will have weighed heavily on the minds of those responsible for devising the policy behind the Bill as well as the parliamentary counsel who drafted the Bill. Therefore it may fairly be said that the opposition does have what may be termed a docile impact on the shaping of legislation even before that legislation is published.

## **Premature Introduction of a Bill**

A further symptom of the shortage of parliamentary time is the premature introduction of a Bill before its provisions have been fully refined. This can happen where a window for the introduction of new legislation arises and the Minister agrees to introduce the legislation in question even though the drafting of the Bill has not, in a proper sense, been completed. However, there is an increasing tendency of Ministers to extensively amend their own Bills, upon their own initiative, during that Bill's passage through the Houses.<sup>50</sup> One notable example relates to the Criminal Justice Bill which was initiated as a 38 section Bill in 2004. It was the subject of 187 Ministerial amendments at Committee Stage in the Dáil and was enacted

50. Of course one further reason why a Bill might be the subject of extensive amendment is where, since the introduction of the Bill,

Government policy may have changed, thus necessitating significant changes to the Bill's terms.

in 2006 as a 197 section Act. This consumed 12 days of parliamentary time.

Former Government Chief Whip and Minister of State John Curran expressed his disapproval of such an approach:

*“It’s a big mistake for a Minister to table extensive amendments to his or her own Bill, particularly where the amendments are proportionately greater than the size of the Bill itself. In those situations it’s always better to withdraw the Bill and publish a new one, otherwise you run the risk of producing what I term a ‘mongrel’ Bill rather than a ‘pedigree’ one.”*<sup>51</sup>

This view is also shared by former Fine Gael whip (and current Government Chief Whip), Deputy Paul Kehoe:

*“I strongly disagree with the practice of Ministers introducing vast numbers of amendments at a very late stage in the legislative process, because the end result is an entirely new Bill, much of which has not been debated during the earlier Stages of the process.”*<sup>52</sup>

In addition to needlessly consuming valuable parliamentary time, this approach also serves to deprive members of the opportunity to comment on the revised state of the Bill as they normally would at Second Stage. In those circumstances, the better course of action would seem to be the withdrawal of the Bill from the Houses and its redrafting outside the Houses. This course of action was adopted by Dermot Ahern TD, Minister for Justice when he withdrew the Immigration, Residence and Protection Bill 2008 in May 2010 even though the Bill had just completed Committee Stage<sup>53</sup> in the Dáil, citing the need for hundreds of further amendments to be made to the Bill had it advanced to Report Stage.

The premature introduction of legislation has the effect of radically altering the purpose of the legislative journey of a Bill from being one which is focussed on improving and refining the detail of the Bill to one which is focused on the development of the principles and policies of the Bill. In such circumstances, the parliamentary debate tends to be one-sided, with the Minister concentrating on getting his or her proposals into the Bill, rather than being open to taking on board proposals which are being advanced by members of the opposition.

## **Non-Acceptance of Opposition Amendments**

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In the cut and thrust of parliamentary debates, parties of government, irrespective of their shade have been consistently reluctant to be seen to be acceding to any amendments proposed by the opposition.<sup>54</sup> One reason for this reluctance is, as already mentioned, the fact that each Bill will have already undergone a lot of development prior to its initiation. Another reason why governments may not be willing to accept amendments which have been tabled by the opposition is because they may be of view that it is not good practice to be seen to be recognising that the opposition just might have one good idea. One interviewee has suggested that even in circumstances where opposition amendments are accepted, “those amendments tend to be of little or no consequence”.<sup>55</sup>

Clearly then, if the acceptance of an opposition amendment is to be seen a win for the opposition and a defeat for the government, that has real implications for the process of scrutiny. Such a mindset has the potential to have opposition amendments dismissed on a wholesale basis, not on the grounds that they lack merit, but merely on the grounds of their origin.

Of course it is accepted that not all opposition amendments are tabled with the intent that they be accepted. In some instances amendments are tabled to probe the Minister’s intent behind a particular provision or to tease out an issue. The tendency of the government side to decline to take on board opposition amendments may mean that the opposition will favour tabling amendments which are likely to be newsworthy, controversial or even ones which seek to place the government in a difficult position.<sup>56</sup>

Leaving aside the merits of opposition amendments, the effect of the government’s routine rejection of opposition amendments appears to suggest that the text of a Bill is largely set in stone once it is initiated in the Houses and that has consequences upon the extent to which the process of scrutiny can yield meaningful and valued results.

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51. Interview with author, 17 November 2010.

52. Interview with author, 27 October 2010.

53. During Committee Stage in the Dáil, the Bill had been the subject of 271 Government amendments.

54. Ireland is by no means unique in this regard. The same characteristics are a feature in many other countries, including England. See Power, *Parliamentary Scrutiny of Draft Legislation 1997 – 1999* (London, 2000).

55. Interview 2, 12 October 2010.

56. Blondel takes the view that: “... amendments presented by the opposition ... are presented for propaganda purposes and the opposition knows that they will be rejected...” - Blondel, “Legislative Behaviour: Some Steps Towards a Cross-National Measurement” in Norton, *Legislatures* (Oxford, 1990) at p. 201.

**Table: Finance Bill Timetable<sup>57</sup>**

Date	Task	Section	Notes
21 Jan	Arrangement of Sections		
	Final Drafts to OPC <ul style="list-style-type: none"> <li>• Proof Reading</li> <li>• Agree all drafts with OPC</li> <li>• Receive stamped copy from OPC</li> <li>• Collation of explanatory memorandum</li> <li>• Finalise explanatory memorandum</li> </ul>		
27 Jan	Bill items to go to Government		
	Dáil resumes Preparation: <ul style="list-style-type: none"> <li>• Speaking Notes for Minister</li> <li>• Briefs for Minister</li> <li>• Supplementary Brief</li> <li>• Statistical Brief</li> </ul> Examine for Financial Resolutions		
3 Feb	Government approval for Bill <ul style="list-style-type: none"> <li>• Printing and final proof reading of Bill</li> </ul>		
4 Feb	Publication of Finance Bill		
11 Feb	Dáil Second Stage Monitor Dáil Debates for Committee Stage Amendments Finalise: <ul style="list-style-type: none"> <li>• Minister's Speaking Notes</li> <li>• Minister's Briefs</li> <li>• Supplementary Briefs</li> <li>• Statistical Brief</li> </ul> Prepare Committee Stage Amendments drafts for OPC Prepare proposed amendment briefs for Committee Stage Briefs to Minister Prepare Financial Resolutions		
24 Feb	Dáil Committee Stage Check proofs after Committee Stage (Bills Office) Prepare proposed amendment briefs for Report Stage		
10 Mar	Dáil Report and Final Stages Check final Dáil proofs Prepare revised Explanatory Memo for Seanad stages		
24 Feb	Seanad 2nd and Final Stages Check final Oireachtas proofs Finalise publicity material Finalise Staff Instructions, SPOS & Information Leaflets		
1 Apr	Deadline for signing by the President		

### **Role of Officials in the Legislative Process**

Departmental officials play a very important role in the development of legislation and their role endures as the legislation undergoes each Stage of the legislative process. The Table below sets out an example of the various milestones in preparing the Finance Bill:

During all Stages of the legislative process, the sponsoring Minister will usually be accompanied by at least two key officials. These will usually be the officials who oversaw the Bill's development and now have direct responsibility for the Bill. During the course of the debates, the officials will usually note any significant points which are made by those participating in the debate. The officials will guide the Minister as to whether proposals advanced by other members are appropriate or feasible. Their participation at this stage also enables the officials to anticipate the amendments which are likely to be tabled by the opposition and examine the issues further with a view to devising the Minister's likely stance on those matters. Points which are raised at one Stage may be the subject for further consideration by the Minister and his or her officials prior to the taking of the next stage.

It is this feature of the process which means that in the next stage of the Bill's journey, the Minister will be in a position to inform the contributors that he or she has considered the points which they raised at the preceding stage and indicate whether or not he or she is taking their points on board.

## **CONTENT OF LEGISLATION**

### **Structure of a Bill**

The various individual elements which make up a piece of legislation, particularly how they are drafted and in what sequence they appear, can have some level of influence over the degree of scrutiny to which that legislation is subjected.

In the not too distant past, the sequence of the Bill was of political importance, so much so that political considerations significantly influenced how the drafter shaped the Bill. The belief was that the principal features should be at the beginning of the Bill, subordinate matters should be at the end of the Bill and matters of detail were to be placed in schedules. In England, in particular, consideration had to be given to reducing the opportunities for debate on the "Clause stand part" aspect of the debate. To circumvent this, drafters were encouraged to cram the contents of the Bill into the least number of clauses possible. Thring gives us an indication of the thinking on the issue:

*"Such questions must be determined by the Minister, rather than by the draftsman, but it is impossible to overrate their importance, as an Act not unfrequently is lost or won according as a division is taken on*

57. This Table was prepared by the Revenue Legislation Service of the Revenue Commissioners and features in its Guide to the Legislative Process (Dublin, 2007) at p.61.



*the right point and at the right time, on a simple or complicated issue.*<sup>58</sup>

On occasion, a Bill might be arranged for purposes other than good drafting practice. For example, the officials might want the Bill to be structured in such a way so as to deflect attention from a particular feature of it. This might require a controversial section to be subsumed into another section so as to disguise its real significance. Equally, certain aspects of the Bill may be relegated to a schedule found at the end of the Bill where it is less likely to attract attention. Conversely, the drafter might be asked to review the Bill's structure where it is desired to highlight the more popular aspects of it.

The sequence of the sections can also be of importance. At the best of times, legislation presents a challenging read and it seems reasonable to suggest that as with all documents, there is a danger that as the reader progresses through the Bill, his or her attention might wane and there is potential for the significance of provisions which are located towards the end of the Bill to be overlooked.

The location of significant provisions towards the end of a Bill becomes of special relevance in relation to Bills which are the subject of the parliamentary guillotine, particularly as there is rarely sufficient time to debate all provisions of the Bill. This means that the location of key or controversial sections towards the end of such Bills is likely to ensure that they do not become the focus of parliamentary debate as they are unlikely to be reached.

### **Mixing Subject Matters**

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Because of the shortage of parliamentary time, members of government often compete for parliamentary time for their Bills. On occasion this may mean that a Minister who was seeking time for two Bills is only afforded time for one of them. This means that the Minister must either accept that there will be a delay in the introduction of the second Bill, or alternatively, it may result in him or her seeking to include the provisions of the second Bill in the first Bill – thus combining two very different topics in one Bill. This occurs on occasion and is somewhat unhelpful for those who seek to adequately scrutinise the resulting legislation.

## **PROCEDURAL MATTERS**

### **Order of Business**

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The business of the Houses is determined by the Government Chief Whip following (i) discussions with the various Ministers and Government Departments, and (ii) consultations with the opposition whips.

The parliamentary schedule for the coming week is circulated to members of the Houses on a Thursday and is published more widely a Friday. Each day in the Dáil and Seanad the schedule of parliamentary business for that day, called the Order of Business, is announced. The Order of Business will identify the motions and Bills to be taken that day and it will stipulate whether matters are to be decided with or without debate, and whether a guillotine is being imposed.

The Order of Business is generally a fairly combative affair with the opposition vehemently opposing any proposal to apply the parliamentary guillotine<sup>59</sup>; frequently calling for more time to be allocated to certain matters, and opposing proposals to have motions determined without debate. A further reason why matters can become controversial is because the opposition invariably feel that they have little say in determining the business of the Houses. This problem has been addressed in other jurisdictions by the establishment of a committee which is tasked with agreeing the business of parliament on a consensus basis.

In the UK, consideration has been given to the possibility of establishing a committee in the House of Commons for the purpose of overseeing the management of parliamentary business such as the parliamentary timetable<sup>60</sup>. The Scottish Parliament has its own business committee called the Parliamentary Bureau which is charged with agreeing the business of the Parliament on the basis of consensus. Similar arrangements are in place in the German Bundestag whose Altstenrat (Council of Elders) effectively serves as a forum for agreeing the business of the Parliament. The New Zealand Parliament also has a Business Committee which fulfils a similar role and seeks to achieve unanimity in its decision-making. In many instances, the business committees in the various countries mentioned are also responsible for agreeing and publishing a parliamentary calendar for the year.

The Order of Business has an important bearing on the scrutiny of legislation, particularly as it is the Order of Business which determines how

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58. Thring, *Practical Legislation* (London, 1902) at p. 38.

59. The parliamentary guillotine is discussed in Chapter 3.

60. Russell & Paun, *Managing Parliament Better? - A Business Committee for the House of Commons* (London, 2006). At the time of writing

(Dec 2010), a Backbencher Business Committee is in place and a Government Business Committee is envisaged.

much time is allocated to debate each piece of legislation and whether or not a guillotine will be imposed. It is during the Order of Business in the Dáil<sup>61</sup> that opposition TDs have the opportunity to ask the Taoiseach about the planned introduction of new legislation. This facility is widely used by Deputies who are seeking to gain a greater insight into the content of anticipated legislation and the timing of its publication. In some respects this facility fills a gap which exists by virtue of the fact that there is no advance legislative programming<sup>62</sup> to speak of. Therefore, it may be that responses secured during the Order of Business regarding planned legislation perhaps enable members to begin the task of researching the issues to be addressed by the proposed legislation.

### **Calling of a Quorum**

In order for a debate to be sustained in the Dáil, Standing Order 19 of the Dáil requires the presence of at least 20 members. A member who notes that there are less than 20 members present during the course of a debate may rise and draw that fact to the attention of the Ceann Comhairle. The Ceann Comhairle must, in accordance with Standing Order 20<sup>63</sup>, cause the Dáil bell to ring for at least three minutes so as to notify Deputies of the calling of a quorum and affording them sufficient time to take their seats in the chamber. Once a further three minutes elapses and there are twenty members in the chamber, the debate can resume. If twenty members are not present, the Ceann Comhairle must suspend the sitting<sup>64</sup>. In respect of the Seanad, the required quorum is 12 Senators<sup>65</sup>.

There have been instances where a quorum could not then be fulfilled and the adjournment of a debate on legislation was necessitated. For example in June 2003, Deputy Gilmore called for a quorum during the Second Stage debate on the

Protection of the Environment Bill.<sup>66</sup> A further example relates to the calling of a quorum which resulted in the Second Stage Dáil debate on the Criminal Justice Bill 2007 being adjourned.<sup>67</sup>

The calling of a quorum is a device which is utilised by the opposition to delay the passage of legislation and frustrate the Government. It may be suggested that the greater the number of members in the chamber when a debate is taking place the greater prospect there is of a more effective process of scrutiny. But it is a device, with obstruction and delay at its heart. Humphreys describes the calling of a quorum as “[a] prime method of interruption” of debates on legislation.<sup>68</sup> However, it comes at a high price in that each time a quorum is called, several minutes of valuable parliamentary time which could have been used for scrutinising legislation are lost without any appreciable benefit accruing as a result.

### **Obstructionist Tactics<sup>69</sup>**

One of the key roles played by the opposition is to provide a path of resistance to Government legislation. Obstruction can be achieved in various ways such as: providing an extensive array of speakers who wish to contribute to the Second Stage debate; the tabling of voluminous amendments; the tabling of motions to postpone the taking of a Stage or motions for the re-committal of a Bill to an earlier stage<sup>70</sup>; the calling of a vote on amendments<sup>71</sup>; the calling of a quorum during a debate, as well as other devices.

Writing in 1921, Bryce<sup>72</sup> was of the view that parliamentary obstruction was one of the “chronic ailments” which had undermined representative assemblies. Obstruction can be viewed in different ways, depending on one’s perspective. For example, those on the government benches might contend that the obstructionist tactics of the opposition only

61. In accordance with Standing Order 26(3) of the Dáil.

62. Legislative programming and the scheduling of legislation is discussed in Chapter 3.

63. In respect of the quorum required where Committee Stage is taken in the Dáil chamber, see Standing Orders 77 and 78 of the Dáil Standing Orders.

64. The calling of a quorum during a meeting of a Select Committee is dealt with slightly differently - as is detailed in Standing Order 95(2) of Dáil Standing Orders.

65. Standing Orders of the Seanad Relative to Public Business (2007), Standing Orders 19 and 64. The procedures to be followed in the absence of a quorum are set down in Standing Orders 20 and 21.

66. 568 Dáil Debates (13 June 2003).

67. 634 Dáil Debates (23 March 2007).

68. Humphreys, “Legislative Obstruction: How to Do It” 39(1) (1991) Administration 55 at 61.

69. On the tactics used to obstruct legislation, see generally, see Humphreys, “Legislative Obstruction: How to Do It” 39(1) (1991) Administration 55.

70. On occasion, Government Ministers table motions to recommit aspects of a Bill to Committee Stage. For example, former Minister for Communications, Energy and Natural Resources, Eamon Ryan, tabled a motion to recommit aspects of the Communication Regulation (Premium Rate Services) Bill 2009 to Committee Stage. See 697 Dáil Debates (8 Dec 2009).

71. The calling of a vote can consume a significant amount of parliamentary time. As stated by former Government Chief Whip, Tom Kitt: “An awful lot of parliamentary time is wasted on votes, and electronic votes can sometimes be followed by a walk-through vote on the same issue and you would have to question the value of that.” – Interview with author, 4 November 2010. The amount of time consumed by votes has led former Tánaiste and Minister for Justice, Michael McDowell SC to suggest that: “The voting procedures in parliament should be speeded up dramatically. The fact that it takes between 15 and 25 minutes to decide any issue is ridiculously wasteful.” - McDowell, “That the Oireachtas is in Dire Need of Reform” a paper delivered at the Liber Society Debate, Dublin 29 June 2010 at p.3.

72. Bryce, *Modern Democracies* (London, 1921) at p.390.

serve to waste precious parliamentary time and ultimately demeans the legislative process. Whilst those on the opposition benches might contend that obstructionism is a tactic of last resort. As characterised by Humphreys, “Government supporters are apt to see obstruction where opposition members see only normal and legitimate debate.”<sup>73</sup> This is borne out by the views of former Tánaiste and Minister for Justice, Michael McDowell SC who has an unfavourable view of how legislative scrutiny is conducted in the Dáil:

*“In the Dáil, by contrast [with the Seanad], there was quite often endless obstruction, and tabling and re-tabling of amendments designed to score political points rather than to make a genuine contribution to the improvement of the legislation. These tactics were frequently used to create the political impression that legislation was being rushed through without adequate debate and such time as the Government permitted was routinely frittered away in the Dáil by a combination of tactics contrived to create in the public’s mind an impression that far more time was needed for each piece of legislation.”<sup>74</sup>*

The Labour Party whip, Deputy Emmet Stagg is insistent that his party does not pursue obstructionist tactics:

*“The Labour Party does not seek to be obstructive in its dealings with the Government.”<sup>75</sup>*

This appears to be accepted by other members of the Houses. Rather than labelling the tactics of the opposition as being obstructionist, former Taoiseach, Bertie Ahern felt that what the opposition were often doing was seeking a means to bring current issues to the fore:

*“What happens in the Dáil is that the opposition seek to use every available mechanism to raise and debate current issues. This all consumes time which could otherwise be used for scrutinising legislation.”<sup>76</sup>*

Other persons interviewed for the purpose of this monograph did not seem to be of the impression that the opposition were focused on being obstructive. In fact, Dr Richard Humphreys SC who penned the 1991 article on parliamentary obstruction<sup>77</sup> is now of the view that obstructionism as a policy of the opposition no longer applies:

*“Obstruction in the 19th century, Irish Parliamentary Party sense is certainly over at the moment. That was an ongoing parliamentary tactic based on long term constitutional grievances. Such obstruction would require a Party with a constitutional objection to the existing regime ... On the other hand, every so often there will be a specific item of legislation that the opposition might wish to ‘obstruct’ and some of the techniques of obstruction can still be used in those very limited and case specific contexts.”<sup>78</sup>*

This seems to suggest that obstructionist tactics are resorted to less frequently today than in years gone by and may indicate that the opposition have moved towards being more constructive and more responsible when it comes to discharging their duties.

### **Motions to Postpone Stages or Recommit Legislation**

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A device which is sometimes used by the opposition is the tabling of a motion to postpone the taking of the stage of a Bill.<sup>79</sup> Such a facility exists under the Standing Orders of the Dáil<sup>80</sup> and this allows a member to propose that the taking of Second Stage be delayed for a period of time or until some specified date.

In the Dáil, it is possible for members to propose that a Bill or specified sections of a Bill be recommitted to a previous stage of the legislative process so that it can receive further scrutiny. A motion to recommit is likely to be tabled by a Minister or member of the opposition in circumstances where a number of very substantive amendments have been made to the Bill at Committee or Report Stage and which, in the opinion of the member, ought to be the subject of a greater degree of debate and scrutiny.<sup>81</sup>

### **SCRUTINY BY SILENT PARTICIPANTS**

It is perhaps sometime forgotten that legislation is also scrutinised, both prior to and following initiation, by persons who are outside the mainstream parliamentary process by what can be termed silent participants.

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73. Humphreys, “Legislative Obstruction: How to Do It” 39(1) (1991) Administration 55 at 57.

74. McDowell, “That the Oireachtas is in Dire Need of Reform” a paper delivered at the Liber Society Debate, Dublin 29 June 2010 at p.7.

75. Interview with author, 20 October 2010.

76. Interview with author, 13 October 2010.

77. Humphreys, “Legislative Obstruction: How to Do It” 39(1) (1991)

Administration 55.

78. In communication with the author, 6 December 2010.

79. The Standing Orders governing the tabling of motions are set out in Standing Orders 49 et seq of the Dáil.

80. Standing Order 121(1) of the Dáil.

81. Standing Order 130 of the Dáil.

## **Pre-Initiation Scrutiny**

At the pre-initiation stage, a Bill is principally scrutinised by the Departmental officials who prepared the initial drafts of the legislation, the lawyers in the Attorney General's Office who prepared the final drafts, the officials in each government Department who were asked to provide observations on a draft of the Bill, as well as members of the Cabinet who approved the drafting and initiation of the Bill. As stated by the UK statute law expert, Francis Bennion:

*“Most Parliamentary bills are devised by the executive, who also have legal staff to advise them in so doing. Such bills are drafted by legally-qualified staff, who have a responsibility to ensure that they are correctly drawn from a legal viewpoint.”<sup>82</sup>*

The scrutiny which is conducted by the officials in the sponsoring Department provides a very strong, first layer of scrutiny with the emphasis being on policy. The scrutiny which is conducted by the officials in other Departments who provide observations in relation to a Bill serves to provide a second layer of scrutiny which is also from a policy perspective. The scrutiny which is conducted by the Parliamentary Counsel and possibly also Advisory Counsel at the Office of the Attorney General provides a strong degree of scrutiny from a legal perspective.

## **Post-Initiation Scrutiny**

Post initiation, a Bill is likely to be scrutinised by some of the individuals and businesses who will be affected by the legislation, as well as lawyers and lobbyists engaged on their behalves. As stated by Bennion:

*“The texts of bills are widely publicised and come under the notice of lawyers and legal bodies such as the Bar Council and the Law Society. All these factors constitute safeguards against the production of legislation that is defective from a legal viewpoint.”<sup>83</sup>*

The scrutiny which a Bill receives from members of the public and businesses, as well as professionals engaged by them, serves to provide one further layer of scrutiny from a policy and also a legal perspective. Former Taoiseach, Bertie Ahern particularly saw the benefits which flow from this engagement by the business sector and members of the public:

*“TDs receive a lot of correspondence from people outside the system who have studied the legislation in great detail, such as industry bodies, lobby groups, professional lobbyists and businesses. So most of the Bills which go through the Houses are in fact being scrutinised in considerable detail by people outside the Houses. That's clearly a very good thing.”<sup>84</sup>*

In addition to providing an opportunity for those outside the Houses to engage with the parliamentary and legislative processes, scrutiny by businesses and members of the public gives those inside the Houses a far better sense of the likely impact of the legislation. Former Taoiseach Bertie Ahern alluded to this when he stated that: “... without the stimulus of public interest, it's very difficult for members of the Houses to go through a Bill and identify gaps or weaknesses ...”<sup>85</sup> The opportunities which members of the public have to scrutinise a Bill are of course enhanced in circumstances where a Bill is published in draft form for the purpose of consultation or where a structured process of pre-legislative scrutiny takes place.

82. In communication with the author, 14 October 2010.

83. *ibid.*,

84. Interview with author, 13 October 2010.

85. *ibid.*,



**Reforms Which Impact Upon the Level of Scrutiny****INTRODUCTION**

The Houses of the Oireachtas can never be accused of having introduced rafts of radical reforms of their own structures and procedures. Instead, the reforms to date have been incremental, but occasionally of some significance. Invariably, any meaningful reforms have only been introduced after much discussion and thought. As stated by MacCarthaigh<sup>1</sup>:

*“Parliamentary reforms in Ireland have mostly tended to come about many years after they were first proposed: indeed, proposals for reform that originated in the 1960s did not come to fruition until the mid-1990s.”*

Talk of Dáil and Seanad reform has been a constant feature of the political agenda for many years and yet it is this longevity which perhaps has meant that the very task of reform has in some respects become discredited.

The purpose of this Chapter is to outline some of the initiatives introduced as part of past reforms, whilst looking a little more closely at those reforms which have facilitated or inhibited the scrutiny of legislation.

**PROPOSALS FOR REFORM****Debates on Reform**

Over the years there have been numerous debates on the issue of Dáil and Seanad reform. The direction of the debates usually involves the opposition calling for reforms which will lead to a greater role for the opposition in setting the parliamentary agenda, with the response from the government usually expressing a willingness to introduce reforms whilst citing the need for consensus in relation to any proposed reforms<sup>2</sup>.

Little by way of tangible, immediate progress emerged from these debates. However, it seems reasonable to suggest that such debates have enabled parties to develop their thinking and to

gradually influence reforms which took place incrementally in subsequent years.

**Opposition Calls for Reform**

For many years, the main opposition parties have advanced proposals which are focused on parliamentary reforms<sup>3</sup> and calls to increase the power and influence of the opposition has tended to be a consistent feature. As alluded to by MacCarthaigh<sup>4</sup>, parties in opposition who call for reforms do not always demonstrate the same appetite for reform when they take office themselves:

*“Notwithstanding two three-year periods in Government between 1948 and 1957, the main opposition parties failed to give Dáil Éireann the means to hold future governments and political parties successfully to account.”*

However, that is not to say that those in Government never take steps towards delivering the reforms which they called for when they were in opposition. For example, in the early 1980s, a Fine Gael-led Government appointed a member with special responsibility for Dáil reform.<sup>5</sup>

The dominance of the Executive over the Houses is something which the parties of Government seem anxious to retain. As acknowledged by MacCarthaigh<sup>6</sup>:

*“Typically, the power imbalance between the executive and legislature is not one that governments are prepared to address, principally because they wish to pursue their work programme with as few obstacles as possible.”*

But another factor, which is perhaps often forgotten by those who make valiant calls for reforms from the relative comfort of opposition, is that an increased role for the opposition in influencing the business and organisation of the Houses means that the opposition would then have to bear their share of the responsibility for participating in decision-making.

1. MacCarthaigh, *Accountability in Irish Parliamentary Politics* (Dublin, 2005) at p.73.

2. For example, Dáil reform was the focus of an extensive debate in October 1996 – 469 Dail Debates (9 October 1996). The issue of Dáil reform was also the subject-matter of a Dáil debate in February 2004 – 579 Dáil Debates (10 Feb 2004). A further debate took place in May 2010 – 709 Dáil Debates (18 May 2010).

3. It is beyond the scope of this monograph to consider proposals for parliamentary reform in any detail. However, a helpful analysis of parliamentary reform proposals advanced by the main opposition

parties since 1968 is set out in MacCarthaigh, *Accountability in Irish Parliamentary Politics* (Dublin, 2005) at pp. 301-303.

4. *ibid.*, at p.71.

5. *ibid.*, at p.81. On 14 December 1982, Deputy John Bruton was appointed as Minister for Industry and Energy with special responsibility for Dáil reform. The resultant reforms included reforms to question time and the introduction of Priority Questions. The select committee system was also developed around this time.

6. *ibid.*, at p.57.

## **Committees on Dáil Reform<sup>7</sup>**

Over the years, various committees have examined the question of reform of the Houses. For example, an Informal Committee on Reform of Dáil Procedure was established in 1971.<sup>8</sup> There is a requirement in the Standing Orders of the Dáil that a Sub-Committee on Dáil reform be established after each general election.<sup>9</sup> The Sub-Committee primarily consists of party whips and it reports directly to the Dáil. Its work occasionally gives rise to reforms.<sup>10</sup>

In 2009, the Government established a working group on Dáil reform, comprising the Minister for Transport, the Minister for Justice, Equality and Law Reform, a Green Party Senator and the Government Chief Whip. Following a number of meetings, this group submitted a set of proposals to the Cabinet for discussion and agreement. It could be argued that the very existence of a Sub-Committee of this nature reaffirms the belief that Dáil reform is taking place on a piecemeal, incremental basis. In the traditional sense, reform is usually understood as meaning substantial changes which are implemented, following which the process of reform is said to have been completed. But in relation to the Houses, the process of reform seems to endure.

## **Proposed Reforms of Sitings**

A review exercise which benchmarked various aspects of the Irish parliamentary system against other jurisdictions considered the arrangements in place for Dáil sittings. In the ensuing report, it was proposed that “the Dáil should sit in plenary for three weeks in four and that the fourth week should be given over to committee meetings.”<sup>11</sup> The authors of the report stated that this proposal would:

*“[H]ave the effect of concentrating the existing 4-week schedules of House business and committee business into 3 and 1 week schedules respectively with House business increasing by 33% in each of the three House sitting weeks and Committee business increasing by 300% in one committee sitting week.”<sup>12</sup>*

The report also proposed changes to the duration of a Dáil sitting day. For example, it proposed that on Tuesdays, the Dáil would commence 2.5 hours earlier and conclude 1 hour later than normal; on Wednesdays that the Dáil would commence 1 hour earlier and conclude 1 hour later than normal; and on Thursdays that the Dáil would commence 1 hour earlier and conclude 1.5 hours later than normal.

## **DEVELOPMENT OF THE COMMITTEE SYSTEM**

### **Role of Committees<sup>13</sup>**

In brief terms, the purpose of a committee is to provide a small forum whereby a modest number of members of one House or both Houses may gather to discuss or examine a particular matter, including a Bill and also proposals for legislation. In discharging its functions, a committee might invite written submissions, invite persons to make oral presentations, take evidence, meet in public or in private, and may establish sub-committees.

Committees now play a very important role in the work of the Houses, especially from the perspective of legislative scrutiny. As pointed out by O’Halloran<sup>14</sup>, the role of Oireachtas Committees barely merited mention in the Standing Orders of the Houses prior to 2002, whereas in the Standing Orders published in subsequent years, extensive reference is made to Committees.

However, not all committees and not all of the business of the various committees is concerned with the scrutiny of legislation. Nonetheless, the scrutiny of legislation during Dáil Committee Stage is a very important part of the work of the Committees. Of increasing importance is the examination of legislation in advance of Committee Stage through the hearing of presentations from witnesses as part of that process.

7. Committees on Seanad Reform and the proposals advanced by them are discussed later in this Chapter.

8. Informal Committee on Reform of Dáil Procedure, Final Report (1972).

9. The Sub-Committee is established pursuant to Standing Order 99(3) of Dáil Standing Orders.

10. Standing Sub-Committee on Dáil Reform, First Report on Reform of Dáil Procedure (1996); Standing Sub-Committee on Dáil Reform, Consensus Positions on Areas for Reform of Dáil Procedure (1997); First Report of the Standing Sub-Committee on Dáil Reform on Establishment of Committees in the 28th Dáil (6 November 1997).

11. Houses of the Oireachtas, Staffing and Grading – International Benchmarking Review (2002) at p.49.

12. *ibid.*, at p.49.

13. On Oireachtas Committees, see generally: O’Halpin, “Oireachtas Committees: Experience and Prospects” 7(2) *Seirbhís Phoiblí* 6; Zimmerman, “An Oireachtas Innovation: Backbench Committees” 36(3) *Administration* 271. See also Lees & Shaw, *Committees in Legislatures* (Oxford, 1979); Shaw, “Committees in Legislatures” in Norton, *Legislatures* (Oxford, 1990) p.236 et seq.

14. O’Halloran, *The Dáil in the 21st Century* (Cork, 2010) at p.164.

15. The sequence in which various committees have been established is charted by MacCarthaigh, *Accountability in Irish Parliamentary Politics* (Dublin, 2005) pp.136 – 147.

## **Background to the Development of Committees<sup>15</sup>**

Until relatively recent times, the Committees as we know them today did not exist. This is in spite of the fact that over the years there had been calls for the establishment of Committees. For example, members of the first Dáil made clear their dissatisfaction at the absence of an effective committee system. In 1920, Deputy James J Walsh tabled a motion which was designed “to bring this Constitution to harmony with the American idea of Committees elected by the whole House and clothed with similar powers.”<sup>16</sup> In subsequent years calls for the development of a committee system were repeatedly made by political parties in their proposals for parliamentary reform, but did not materialise.<sup>17</sup>

Even though committees had not yet been established on a systematic basis, in the decades following the foundation of the State, committees were occasionally used for the purpose of devising proposals on specific issues.<sup>18</sup>

Less frequently over that period of time, committees had been used for the purpose of scrutinising legislation. An early example dates from 1973, when a committee comprising members drawn from both Houses was established for the purposes of scrutinising legislation emerging from the EEC.<sup>19</sup>

One of the first set of Committees established to systematically examine legislation were five ad-hoc Committees established by Barry Desmond TD and John Kelly TD for the purpose of examining pieces of legislation which were considered to be of major importance.<sup>20</sup> Interestingly, Fianna Fáil at that time in opposition, did not wish to participate in these committees. When asked, in the aftermath of his electoral success in 1987, if he would re-establish the committees which previously existed, the then Taoiseach Charles Haughey responded in positive terms:

*“Yes, it is the intention to enter immediately into discussions with the parties to see how these committees should be reconstituted, in the light of our experience of the way they operated in the last Dáil.”*<sup>21</sup>

Despite these positive noises, the Select Committees were not re-established by the Fianna Fáil government and were only revived when the Labour Party coalesced to form a Government with Fianna Fáil in 1992. It re-established a number of Joint Committees whose remit mirrored that of Government Departments. In effect, it is these committees which continue in existence today.

## **Relocation of Dáil Committee Stage**

Up until 1983, a Bill which was taken at Committee Stage in the Dáil was taken in the Dáil chamber and was said to be taken by a Committee of the whole House. The relocation of Dáil Committee Stage from the Dáil chamber to dedicated committee rooms formed part of the wider reforms which also included the establishment of the committee system.

From the point of view of scrutiny of legislation, this was an important development as it significantly altered the dynamic of Committee Stage of the legislative process in respect of the Dáil. The usual adversarial and combative style of proceedings which is de rigeur in the Dáil chamber tends to be largely absent during Committee Stage debates on legislation which take place in the committee rooms. It seems that the dynamic of committee rooms creates an atmosphere which is conducive to a more collaborative and open means of discussing the merits or pitfalls of the legislation as well as proposed amendments. One interviewee is of the view that:

*“The relocation of Committee Stage from the Dáil chamber into dedicated committee rooms has made a huge difference because it gave the parliamentary system time and space to scrutinise legislation properly.”*<sup>22</sup>

Another interviewee has expressed a directly opposing view:

*“Relocating Committee Stage has not, in my view, changed the nature of the debates. If you look at the Committee Stage debates from some years ago and look at the nature of debates have not changed significantly – party politics still plays a major part.”*<sup>23</sup>

16. As referred to in Farrell, “A Note on the Dáil Constitution, 1919” (1969) Irish Jurist 127 and also noted by Denham J in *Maguire v Ardagh* [2002] 1 IR 701.

17. Labour Party in 1968 and 1975 and Fine Gael in 1980 and 1990.

18. For example, in 1928 a Joint Committee was established to report on the constitution of the Seanad - Report of the Joint Committee on the Constitution of Seanad Éireann (1928). A further example arose in 1966, when a Committee on the Constitution was established by the then Taoiseach Seán Lemass for the purpose of conducting a general review of the Constitution. Another example relates to 1972, when a Committee charged with devising proposals on Dáil reform was

established - Informal Committee on Reform of Dáil Procedure, Final Report (1972).

19. Joint Committee on the Secondary Legislation of the European Communities.

20. MacCarthaigh, *Accountability in Irish Parliamentary Politics* (Dublin, 2005) p.77.

21. In response to a question put by Gay Mitchell TD – 371 Dáil Debates Col. 130 (24 March 1987).

22. Interview 1, 12 October 2010.

23. Interview 2, 12 October 2010.



Whilst it is true that Ministers rarely agree to accept amendments which have been tabled by the opposition, the success of Committee Stage and the impact which the opposition has in the scrutiny of legislation should not be judged solely by the number of their amendments which are accepted by a Minister.<sup>24</sup> Often a Minister may reject an opposition amendment, only to table a similar amendment himself or herself at a later point. Where an opposition tabled amendment raises an important point which has been well argued, Ministers will often agree to consider the matter further, undertaking to revisit the issue at the next stage or in the next House.

The holding of Dáil Committee Stage in dedicated committee rooms has also meant that the Dáil and its Committees can now sit concurrently, thus increasing the amount of parliamentary business which can be dealt with each day. In the Seanad, Committee Stage continues to be taken on the floor of the House.<sup>25</sup>

## **Types of Committees**

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In the Houses there are currently a number of different types of committees whose scope and membership vary considerably. These committees are now examined.

### *Standing Committees*

Standing Committees are automatically established after the formation of a new Dáil. The following are examples of Standing Committees: Committee on Procedures and Privileges; Committee on Procedures and Privileges; Sub-Committee on Dáil Reform; Sub-Committee on Members' Services; Working Group of Committee Chairs; Committee on Members' Interests; Joint Houses Services Committee and perhaps most notable of all, the Committee of Public Accounts.

The Committee of Public Accounts<sup>26</sup>, or the PAC, as it is more commonly known, was first established shortly after the foundation of

the State.<sup>27</sup> The Committee is responsible for scrutinising the expenditure of public monies, principally by government Departments and offices of the State. It has conducted some very successful and high profile and successful inquiries, including an inquiry into the collection and payment of deposit interest retention tax.<sup>28</sup>

Whilst the work of the PAC has little or no bearing upon the role of the Houses in the scrutiny of legislation, there are certain features of the PAC which if replicated in relation to other committees, could have an impact upon the scrutiny of legislation. For example, breaking with the practice of other Oireachtas Committees, the PAC is always Chaired by a member of the opposition and significantly, the Committee seeks to achieve consensus amongst its membership, and this helps members to leave aside party differences when adjudicating on an issue.

### *Special Committees*

In former years, Bills which had reached Committee Stage could be sent to a special committee. However, beyond the technical meaning of that term, special committees have in the past been established for specific purposes – such as the committee which was established to consider the allegations made against former Judge Brian Curtin.<sup>29</sup>

### *Joint Committees*

Joint Committees consist of members of both the Dáil and the Seanad. In the 30th Dáil (2007 – 2011) there were 19 Joint Committees. Whilst their focus and remit was generally in-line with that of government Departments, the remit of some Committees concerned issues which spanned a number of government Departments. Their membership tended to be reflective of the strength of parties within the Houses and the primary function of Joint Committees is to hold hearings on certain subjects at which experts, various groups and members of the public make presentations. For this purpose, Joint Committees have the power to invite

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24. The acceptance of legislative amendments which have been tabled by members of the opposition are considered in more detail in Chapter 4.

25. Some members of the Houses are of the view that the work of Committee does not receive the level of media coverage that is deserved. For example, Deputy Joanna Tuffy has suggested that the Committee Stage of Bills should be taken on the floor of the Dáil and not in committee rooms on the grounds that “the media pay no attention to the legislative work carried out by the Dáil in committee rooms.” - As stated by Deputy Joanna Tuffy during the Second Stage debate on the Statute Law Revision Bill 2009 - 690 Dáil Debates (24 Sept 2009).

26. Standing Order 158 of the Dáil.

27. As recounted by Jim Mitchell TD: “The Committee of Public Accounts was first established in 1868 at Westminster, following the enactment

of the Exchequer and Audit Department Act, 1866, promoted by the then Chancellor of the Exchequer, Mr. William Gladstone. On achieving independence, Dáil Éireann established as one of its earliest actions a Committee of Public Accounts for the new State. Every successive Dáil, almost immediately after each general election, appointed a new Committee of Public Accounts which, therefore, has existed in unbroken succession since the foundation of the State. It is now a required Standing Committee of the Dáil.” – Committee of Public Accounts, Sub Committee on Certain Revenue Matters, 19 July 1999.

28. See Public Accounts Committee, Sub-Committee on Certain Revenue Matters: Parliamentary Inquiry into DIRT – Final Report (2001). See MacCarthaigh, *Accountability in Irish Parliamentary Politics* (Dublin, 2005) pp. 168 – 174.

29. 586 Dáil Debates Col. 1501 – 1511 (2 June 2004).

submissions on a matter and to hear the evidence of witnesses<sup>30</sup> and may also appoint a sub-committee. The work of Joint Committees in this area is of special relevance to the scrutiny of legislation as it means that these Committees are well-placed to engage with the wider public in relation to draft legislation.<sup>31</sup>

### *Select Committees*

In effect, Select Committees are the very similar to Joint Committees except their membership consists only of TDs.<sup>32</sup> In the 30th Dáil there were 17 Select Committees and each Committee had approximately 12 members. The primary function of Select Committees is to serve as the forum at which legislation is scrutinised at Dáil Committee Stage in the legislative process. Naturally, the work of these Committees is of particular relevance to the scrutiny of legislation and their impact in that context is considered more fully later in this Chapter.

## **Committee Membership**

By virtue of the fact that Ministers and Ministers of State do not have sufficient time to dedicate to obligations which arise from committee membership, committee members drawn from the government side of the Houses tend to be backbenchers. Committee members drawn from the opposition side of the Houses tend to be a mix of party spokespersons as well as backbenchers.

Each political party is allocated a certain number of committee places based on the number of seats which they hold in the Houses. Therefore, in their composition, committees are quite reflective of the Houses and as a result, the governing parties usually have a majority on committees. Committees tend to be chaired by members drawn from the Government ranks, the main exception to this rule being the chair of the Committee on Public Accounts which is always held by a member of the opposition.

## **Restrictions on Committees**

Standing Order 82(3) directs that no more than two Select Committees may meet each day to consider legislation. This means that

even in circumstances where a number of pieces of legislation are ready to be taken at Committee Stage by different Committees, those Committees may not sit on the same day. As the restriction does not appear to specifically refer to the concurrent sittings of Committees, Standing Order 82(3) would serve to prevent a situation where two Committees considering legislation sit and conclude in the morning and two further Committees considering legislation sit in the afternoon.

## **Quorum**

Where a member of a Select Committee notes that a quorum is not present, he or she may bring that fact to the attention of the Chair who is then required to allow a period of eight minutes to pass. If a quorum is not present within that time, the Chair is required to suspend the meeting.<sup>33</sup> This requirement can serve to ensure that there are sufficient members present to adequately scrutinise legislation. On the other hand, the calling of a quorum can consume precious time which could otherwise be used to scrutinise legislation.

## **Role of Committees in Formulating Legislation**

Pursuant to Standing Order 83(4) of the Dáil, the Dáil may confer upon a Select Committee, the power to draft recommendations for legislative change. One example of this in practice relates to the Joint Committee which was established to devise proposals on the protection of children in the context of the Constitution.<sup>34</sup> A further, more recent example arose when a Joint Committee published its own Bill on climate change.<sup>35</sup>

## **Role of Committees in Evidence-Taking**

Whilst strictly speaking it does not constitute pre-legislative scrutiny<sup>36</sup>, the Joint Committees of the Oireachtas do on occasion hold hearings in relation to individual Bills, or discrete aspects of such Bills, before those Bills reach Committee Stage.<sup>37</sup> Where they occur, such hearings tend to

30. Pre-legislative scrutiny of this nature is the subject of further discussion in Chapter 6.

31. For example, in 2009, over 1500 members of the public appeared before Joint Committees.

32. Pursuant to Standing Order 83(5) of the Dáil, the Dáil may confer upon a Select Committee, the power to seek the attendance of a Minister to discuss policies in respect of which the Minister has responsibility.

33. See Standing Order 95(2) of Dáil Standing Orders.

34. Joint Committee on the Constitutional Amendment on Children,

Proposal for a constitutional amendment to strengthen children's rights - Final Report (18 February 2010).

35. "All Party Committee PreEmpts Climate Change Legislation", Irish Times, 14 October 2010.

36. Pre-legislative scrutiny is the subject of discussion in Chapter 7.

37. Hearings of this nature conducted by Select Committees are envisaged in Standing Order 82 of the Dáil Standing Orders. Pursuant to Standing Order 83(1) and (3) the Dáil may confer upon a Select Committee the power to take evidence and invite and receive submissions.

take place shortly after the Bill has been initiated or in the interval between the conclusion of Second Stage and the commencement of Committee Stage.

However, the number of Bills which are the subject of hearings of this nature is minimal. Recent examples include the Building Control Bill which was the subject of hearings by the Joint Committee on the Environment<sup>38</sup> in advance of the taking of Committee Stage. The Student Support Bill was the subject of hearings before the Joint Committee on Education & Skills<sup>39</sup>, and the Wildlife (Amendment) Bill was the subject of hearings before the Joint Committee on the Environment.<sup>40</sup>

In the UK steps have been taken to formalise the practice of holding exploratory committee hearings into particular Bills before they begin their journey through the parliament. The Modernisation Committee at Westminster<sup>41</sup> proposed that most Government Bills would at the beginning of their journey through parliament, be sent to a Public Bills Committee which would receive submissions and hold hearings in relation to each Bill. This initiative is viewed as having been successful. According to Levy<sup>42</sup>:

*“The appearance of expert witnesses before Public Bills Committees, and to a lesser extent their submissions of informed and concise written evidence, have significantly enhanced both the quality and quantity of information available to committee members.”*

This view is supported by the very positive comments of MPs cited in Levy’s report. The work of the Public Bills Committees was seen as a good way of encouraging members of the public to become more engaged with the legislative process. A quote contained in the report which is attributed to an MP is perhaps equally applicable in relation to the situation in Ireland:

*“Committee stages of bills usually pass by and very rarely impact on anyone, and I think having a committee take evidence ... engaged the committee with the outside world and the outside world with the committee.”<sup>43</sup>*

The experience of the Public Bills Committees in the UK suggests that greater engagement with experts and the wider public stimulates a greater level of interest in the legislation being examined which leads to a better and more informed debate on the legislation – and ultimately a greater degree of scrutiny.

It seems reasonable to suggest that the holding of exploratory hearings in this way at the very beginning of a Bill’s journey through the Houses is, provided that there is an appropriate interval between stages, likely to make the ensuing debates at Second, Committee and Report Stages much more informed. This should ultimately enhance the quality of legislative scrutiny.<sup>44</sup>

Of course the necessity for evidence-taking in this way would not arise in circumstances where a process of pre-legislative scrutiny has already been engaged in prior to the Bill’s initiation in the Houses.

### **Impact of Select Committees**

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As already mentioned, the development of the committee system has been a positive experience from the point of view of the scrutiny of legislation, particularly as it is conducive to a more collaborative and less confrontational approach towards the discussion of proposed amendments. Importantly, the committee system also encourages the involvement of backbenchers from all sides of the House in the task of scrutinising legislation. However, altogether different is the question as to whether committees have diluted the highly centralised and partisan mode of decision-making.<sup>45</sup>

The dominance which the Government parties retain over every committee seems to suggest that despite the existence of a committee system, a highly centralised and partisan mode of decision making endures in both Houses in Ireland. A relatively tight rein is kept on committees through the practice of ensuring that a majority of members on each committee are drawn from the government side, along with the fact that many of the committee chairs are also from the government side.

Another factor which severely limits the committees’ scope for amending the legislation is the fact that a Bill is only presented to committee at a late stage in its development.

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38. Joint Committee on Environment & Local Government, 26 April 2006.

39. Joint Committee on Education & Skills, 24 April 2008.

40. Joint Committee on the Environment, Heritage & Local Government, 25 May 2010.

41. Modernisation Committee, *The Legislative Process (2005-2006)* (HC 1097).

42. The effectiveness of the initiative is considered in Levy, *Strengthening Parliament’s Powers of Scrutiny?* (London, 2009) at p.27.

43. *ibid.* at p.30.

44. Pre-legislative scrutiny refers to the practice of engaging in consultations with members of the public and experts when the Bill is in draft form – long before its initiation in the Houses.

45. According to MacCarthaigh: “It is considered that the use of parliamentary committees in Western European legislatures reduces the highly centralised and partisan mode of decision-making associated with many legislatures.” MacCarthaigh, *Accountability in Irish Parliamentary Politics* (Dublin, 2005) at p.140.

When a Bill reaches Committee Stage, it will have already been signed-off on by the Attorney General, the Cabinet, the sponsoring Minister and a majority of the House at Second Stage. The difficulties which this presents were outlined by one Deputy who also pointed to an alternative approach:

*“The role of committees in many countries is paramount. However, in Ireland the plenary meeting decides on the principles before Committee Stage and this leaves little room for substantial change. Ireland, Spain and the UK stand alone in this regard ... whereas in a list of other countries in Europe, including Austria, Belgium, Finland, France, Germany, Greece, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Sweden and Switzerland, Committee Stage is taken before consideration in plenary session presents a final solution. Draft Heads of Bills come before committees and the committees discuss and debate the principles. Only then does the legislation go to plenary session.”<sup>46</sup>*

A further obstacle at Committee Stage is the fact that each political party will also have nominated a member of each committee to be a convenor (whip) and this too strengthens the position of the Executive vis-à-vis the various committees. Commenting on similar developments in the UK, Levy<sup>47</sup> states:

*“The presence of whips on standing committees and whip influence over membership selection made these committees inflexible both in terms of timing and cross-party cooperation.”*

As the government side retains control over the work of the committees, this undoubtedly has a real impact on the level of scrutiny to which its own legislation is subjected.

### **Contribution of Committees to Legislative Scrutiny**

Whilst it would appear that the Committees do not have a significant role in rewriting legislation, both Joint and Select Committees have brought about improvements in the task of legislative scrutiny. Joint Committees have

enhanced the process of scrutiny through the holding of hearings to facilitate presentations from persons who wish to express views on proposed legislation.

The establishment of Select Committees and the re-location of Dáil Committee Stage to committee rooms has undoubtedly changed the dynamic of Committee Stage to that of a more collaborative and less combative forum for scrutinising legislation. Whilst opposition amendments are not accepted in any significant numbers, the debates which take place at Committee Stage are now a valuable part of the task of legislative scrutiny.

## **SEANAD REFORM<sup>48</sup>**

### **Making its Presence Felt**

Typically a bicameral parliamentary system tends to characterise federal states – such as Australia, Germany and Austria. Being a unitary state which operates under a bicameral parliamentary system, some political theorists have singled out Ireland as being quite unusual.<sup>49</sup> For example, MacCarthaigh<sup>50</sup> has expressed the view that the Seanad is a misplaced feature on the Irish political landscape:

*“As a small, unitary and largely ethnically homogenous state, most of the conventional reasons for having a second parliamentary chamber do not apply to Ireland.”*

Whilst it may be unusual for a unitary state such as Ireland to have two houses of parliament, it is by no means unique. Other unitary states which have two houses of parliament include UK<sup>51</sup>, France<sup>53</sup>, Switzerland<sup>53</sup>, Italy<sup>54</sup> and Spain<sup>55</sup>. Under our system, the Seanad is subservient to the Dáil<sup>56</sup>.

The issue of Seanad reform merits deeper consideration here, not simply because the issue may be topical but because of its role in the task of scrutinising legislation.

Almost since it was first established, the Seanad has made its presence felt in relation to the scrutiny of legislation.<sup>57</sup> In fact the Seanad refused to pass one of the first Bills presented

46. Deputy David Stanton - Joint Committee on the Constitution, 10 March 2010.

47. Levy, *Strengthening Parliament's Powers of Scrutiny?* (London, 2009) at p.13.

48. The matter of proposed electoral reforms are considered separately in Chapter 2.

49. For example, see Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-one Countries* (Yale, 1984).

50. MacCarthaigh, *Accountability in Irish Parliamentary Politics* (Dublin, 2005) at p.297.

51. House of Lords (upper House) and House of Commons (lower house).

52. Sénat (upper house) and Assemblée Nationale (lower house).

53. Standerrat (upper house) and Nationalrat (lower house).

54. Senato (upper house) and House of Deputies (lower house).

55. Senado (upper house) and Congreso de los Diputados (lower house).

56. However it is not always the case in bicameral jurisdictions that the Houses have unequal power, as in some countries, such as Switzerland, both Houses have equal power.

57. The first national assembly established following the Act of Union was a unicameral body - Dáil Éireann which convened in January 1919. It was not until the establishment of the Seanad in 1922 that our system became bicameral.

to it – the Bill which became the Indemnity Act 1923, one of the principal purposes of which was to indemnify the British military for acts committed by the Black and Tans. But equally, the Dáil became resistant to the efforts of the Seanad to encroach upon its territory. This concern came to the fore when in December 1923 the Dáil sought to reject a Seanad amendment to the Local Government Electors Registration Bill. This incident led to the amendment of Standing Orders so as to make provision for a conference of the Houses – a device designed to avoid deadlock. Such was the extent of the Seanad’s active role in effecting amendment to Bills that this new conference mechanism was utilised on a number of occasions.<sup>58</sup>

However, it was a combination of this activism combined with a dislike of the composition of the Seanad which ultimately led to its dissolution.

### **Dissolution of Seanad**

Éamon de Valera had a severe dislike of the Seanad and once of that mindset, he seemed to avail of every opportunity to undermine and diminish the Seanad, not only in terms of its role but critically, its very existence. For example, when the Seanad resolved to establish a Joint Committee to examine the composition and powers of the Seanad in February 1928, de Valera opposed the establishment of the Committee on the grounds that the Seanad ought to be abolished:

*“We think that the proper thing to do is to end the Senate and not to attempt to mend it. It is costly, and we do not see any useful function that it really serves.”*<sup>59</sup>

But as was revealed by Deputy Sean Lemass who supported de Valera’s stance, there were factors other than the work of the Seanad, which were the real motives behind this dislike of the Seanad:

*“I would like to support the attitude adopted by the leader of this Party, and to urge the House to vote against the setting up of this Committee, the purpose of which is obviously to try to put some life into a moribund body. I think that the public feeling throughout the country is very strongly in favour of the abolition of the Senate, not to patch it up in a way so as to give it even a semblance of reality. It is*

*a body created . . . not to improve the machinery of administration in this country, but to give political power to a certain class that could not get that power if they had to go before the people at a free election and get the people to vote them into office. The Senate was set up to put a certain section of the community into a position where they could influence the course of legislation—a section of the community that was always hostile to the interests of Irish nationalism, and that was always hostile to the Irish nation. And we think that this bulwark of imperialism should be abolished by the people’s representatives on the first available opportunity that they get.”*

Deputy de Valera went on to become a member of the Joint Committee and in O’Sullivan’s<sup>60</sup> view, he sought to use his position to bring about “not a better Senate but a worse one”. After the Joint Committee produced its report in May 1928, its recommendations were subsequently implemented in various amendments to the Constitution. Whilst the Seanad had survived its first sustained attack upon its very existence, opposition to its continued existence remained in some quarters.

Evidencing disdain and contempt for the Seanad, Deputy Flinn spoke of Senators in rather vicious terms:

*“The procedure is that the bell rings for prayer. They come in, they ask what division they are to go into: then they ask what it is about, and then they legislate with their feet. It is the only part of their bodies or minds which they are accustomed to use...”*<sup>61</sup>

The 1922 Constitution had provided that for a period of eight years, the Constitution could be amended without the need for a referendum. The Seanad was abolished at the behest of de Valera in 1936 by the Constitution (Amendment No 24) Act 1936 which was not put to the people in a referendum as was permissible pursuant to the Constitution (Amendment No 16) Bill.<sup>62</sup>

This means that for a relatively short period of time, our parliamentary system operated as a unicameral system. During that time, no alternative arrangements were put in place with a view to ensuring that legislation was scrutinised by any substitute body. Following the Seanad’s abolition in 1936, the new Constitution of 1937 provided for the establishment of a new Seanad, this time as a forum which could provide vocational representation.

The dissolution and re-establishment of the Seanad supports the contention that de Valera’s

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58. For example in relation to Intoxicating Liquor (General) Bill 1924; Shop Hours (Drapery Trades, Dublin and Districts) Bill 1926; and, Game Preservation Bill 1929.a

59. 22 Dáil Debates Col.140 (22 February 1928).

60. O’Sullivan, *The Irish Free State and its Senate* (London, 1940) at

p.233.

61. 28 Dáil Debates Col.1302 (13 March 1929).

62. This Bill extended from 8 to 16, the number of years within which amendments to the Constitution could be effected by legislation, without the need for a referendum.

dislike of the Seanad was motivated more by his dislike of its composition rather than its role in Irish political life. It perhaps also demonstrates that, to de Valera's mind at least, reform of the Seanad was not achievable and that in order to achieve changes on the scale which he was so desirous, dissolution and re-establishment was the only viable option.

### **Decline of the Seanad?**

In view of the role which the Seanad plays in scrutinising legislation, a question which arises is what features of the Seanad have caused doubts about the value of the Upper House.

Without delving into this issue in too much detail, it is possible to point to the systems of electing Senators as being a major factor in contributing to the view that the Seanad is in some way disconnected from the electorate. The fact that the electoral system is cumbersome, complex and that the right to vote in the election of Senators is only open to certain sections of society, compounds the feeling of detachment and irrelevance of the Seanad. Another factor which feeds into the notion that the Seanad is no longer of relevance is the fact that the Seanad is subservient to the Dáil. Despite the fact that this is how the role of the Seanad has been prescribed by the constitutional framework of the State, some may see it as rendering the Seanad powerless.

A further feature which gives rise to cynicism as regards the role of the Seanad is the fact that the Seanad has become a forum for former TDs who failed to secure a seat at the last general election, or aspiring TDs who wish to bolster their national profile in preparation for the next general election. It is this consideration which has led former Tánaiste and Minister for Justice, Michael McDowell SC to describe the Seanad as "a cross between a political convalescent home and crèche". He also stated: "I had in my own mind formed the view that, apart from the university senators, Seanad Éireann was being largely used as an ante room to Dáil Éireann to house would be new-comers, temporary absentees, and as a consolation prize for those who had lost their seats."<sup>63</sup>

Of the members comprising the 23rd Seanad, quite a number of them sought and failed to secure a seat in the 2007 general

election. Therefore, save for some very notable exceptions, it can be said that the Seanad is regarded by several of its members as being a means to an end - a stepping stone to something better. Very few members see Seanad membership as being an honorable end in itself.

Somewhat surprisingly, when considering the merits of adopting a list system for elections to the Seanad, the All-Party Committee on the Constitution seemed to view the Seanad's role in this context as being desirable:

*"The current roles of the Seanad as a proving ground for up-and-coming young politicians, and as a means of ensuring the continued participation of senior politicians who might be in danger of losing their Dáil seats, might also continue [under a proposed List system]..."<sup>64</sup>*

Some would argue that the factors outlined above have contributed to the diminution of the currency of the Seanad. But even accepting that proposition, a question which arises is whether those concerns are so grave and irreversible as to leave the abolition of the Seanad as being the last option on the table.

### **Proposals for Seanad Reform**

Perhaps no other issue concerning parliamentary affairs has been the subject of so many reports as the reform of the Seanad has. The role of the Seanad has also been the subject-matter of many parliamentary debates in recent years.<sup>65</sup> It is apparent from those debates that very many Senators appreciate the need for the House to be reformed and there seems to have been a recognition of the need for the Seanad to have a role in scrutinising EU legislation as well as monitoring and reporting on secondary legislation. That the Seanad should have a significant role in these two areas was a proposal advanced by the All-Party Committee on the Constitution in its Second Progress Report on the Seanad<sup>66</sup> and its *Seventh Progress Report on Parliament*.<sup>67</sup>

Probably the most comprehensive analysis of the role of the Seanad with a view to its reform was that carried out by the Sub-Committee on Seanad Reform whose Report was published in 2004.<sup>68</sup> The work of the Committee involved an analysis of eleven previous reports on the Seanad and also involved an assessment of over 160 written submissions. The report advanced a

63. McDowell, "That the Oireachtas is in Dire Need of Reform" a paper delivered at the Liber Society Debate, Dublin 29 June 2010 at p.5.

64. All Party Oireachtas Committee on the Constitution, *Seventh Progress Report – Parliament* (Mar 2002) at p.39.

65. For example, see: 149 Seanad Debates (30 January 1997); 149 Seanad Debates (5 February 1997); 156 Seanad Debates (24 June 1998); 161 Seanad Debates (3 December 1999).

66. All Party Oireachtas Committee on the Constitution, *Second Progress*

*Report – Seanad Éireann* (1997). The Committee felt that it would be more beneficial if the Seanad were to focus on developing medium and long term perspectives on all areas of government policy.

67. All Party Oireachtas Committee on the Constitution, *Seventh Progress Report – Parliament* (Mar 2002) at pp.35-36.

68. Seanad Sub-Committee on Seanad Reform, *Report on Seanad Reform* (May 2004).

range of proposals which it asserted “should be implemented in their totality as a package”<sup>69</sup> and the Sub-Committee clearly recognised that real reform was an imperative:

*“... we believe that there is an urgent need to accept the political reality that Seanad Éireann really must be reformed if it is to make a viable and distinctive contribution to the economic, social and political affairs of our country.”*<sup>70</sup>

The report recommended that the Seanad should have 65 members, 32 of whom should be directly elected. The Report goes on to identify four key areas in which it was felt that the Seanad should have a major role, those areas are:

1. responsibility for holding public consultations on proposed legislation;
2. assessing legislative proposals emerging from the EU;
3. responsibility for reviewing government policy in several areas; and,
4. responsibility for scrutinising senior public appointments.

In its efforts to pinpoint the reasons as to why the Seanad does not have a distinctive role in the Irish political system, somewhat surprisingly, the Sub-Committee focused on the fact that the Seanad is “totally subordinate to the Dáil” - suggesting that the path to a more effective Seanad lay in some form of equality of arms between the two Houses.

As to why Seanad reform has never taken place, former Government Chief Whip, Tom Kitt suggests that reform of the Seanad might not be in the best interests of the Government of the day “fears the loss of control of the House and that would impact on its ability to have legislation passed.”<sup>71</sup>

### **Seanad and the Scrutiny of Legislation**

The Constitution Review Group saw the Seanad as fulfilling two important roles, one of which was “the need to take account of political interests that may not be adequately represented in the main house” and the second was “the need for some final review of legislative

proposals before they become binding on all.”<sup>72</sup> According to philosopher Henry Sidgwick, “the main need for which a Senate is constructed is that all legislative measures may receive a second consideration by a body different in quality from the primary representative assembly and, if possible, superior or supplementary in intellectual qualifications.”<sup>73</sup> In this regard Lane and Ersson<sup>74</sup> expressed the view that the Seanad “operates as a conservative moderating force on the popularly elected Dáil.”

The impact and effectiveness of the first Seanad in scrutinising legislation is explored in great detail by O’Sullivan<sup>75</sup> in his seminal work on the Seanad, in which he exposes the relatively significant impact which the Seanad had on the shape of legislation at that time. He cites several examples of significant amendments which were proposed by the Seanad and which were taken on-board by the government of the day, including the proposal to change the name of the State’s police force from the Civic Guard to An Garda Síochána.<sup>76</sup> He also refers to Senators having tabled 212 amendments to the Local Government Bill 1924, 109 of which were accepted. In addition, he makes reference to an 18-month period within which over sixty non-money Bills were passed, incorporating approximately 300 Seanad amendments.<sup>77</sup>

In the formative years of the Free-State, several really significant pieces of legislation were enacted, and in O’Sullivan’s view, these pieces of legislation received “critical attention” in the Seanad which is clearly evident from amendments which were made as a direct consequence.<sup>78</sup> In fact, it could be argued that the very abolition of the Seanad in 1936 was itself testament to the effectiveness of the Seanad as a constituent part of the legislative process. In advance of its abolition, the Seanad had succeeded in delaying, for almost one year, the passing of legislation to remove the oath of allegiance. Also at that time, the Seanad had rejected a Bill to extend the local government franchise to persons aged over 21, and had also rejected a Bill which proposed to abolish the element of university representation in the Dáil.

Research cited in the Report of the All Party Oireachtas Committee indicates that in the period 1938 to 1995, 18% of Bills were amended in the Seanad<sup>79</sup>, down from 37% in the period 1922 to 1936. Former Senator James Dooe<sup>80</sup>

69. *ibid.*, at p.4.

70. *ibid.*, at pp.4 – 5.

71. Interview with author, 4 November 2010.

72. Constitution Review Group, Report (1996).

73. Sidgwick, *The Elements of Politics* (1891) at 445, available at: <http://www.laits.utexas.edu/poltheory/sidgwick/elempol/index.html>

74. Lane & Ersson, *Politics and Society in Western Europe* (London, 1999) at p.205.

75. O’Sullivan, *The Irish Free State and its Senate* (London, 1940).

76. *ibid.*, at 119.

77. *ibid.*, at 230

78. O’Sullivan, *The Irish Free State and its Senate* (London, 1940) at p.123.

79. All Party Oireachtas Committee on the Constitution, *Second Progress Report – Seanad Éireann* (1997) at p.5 where the research is attributed to Coakley & Laver.

80. See, Lynch & Meenan, *Essays in Memory of Alexis Fitzgerald* (Dublin, 1997).

attributes the decline in the rate of amendments to improvements in the quality of legislative drafting.<sup>81</sup> As for the contribution of the Seanad of today to the scrutiny of legislation, in MacCarthaigh's<sup>82</sup> view "Senators can often bring new and important perspectives to legislation that might otherwise not be heard in the more pressurised Dáil chamber."

Whilst much criticism is leveled at the method by which members of the Seanad are elected and nominated<sup>83</sup>, there seems to be wide acceptance that by virtue of the differing perspectives and backgrounds of its members, the Seanad make a valuable contribution to the scrutiny of legislation. Former Taoiseach, Bertie Ahern sees the Seanad as making a valuable contribution to the scrutiny of legislation:

*"The Seanad has always been a good place to take a Bill to because the debates which take place there tend to be better, more relaxed and less adversarial."*<sup>84</sup>

These views are echoed by Former Government Chief Whip, Tom Kitt:

*"Having initiated Bills in the Seanad, I can say that there are individual Senators there who bring real expertise in certain areas and that can influence the degree of scrutiny which a Bill receives ... I think that there is a need to make greater use of the Seanad as regards legislation, and initiating Bills there is something which should take place more often."*<sup>85</sup>

Despite being critical of certain aspects of the Seanad, former Tánaiste and Minister for Justice, Michael McDowell SC is strongly in favour of its retention and as Minister, he valued the Seanad's contribution to the scrutiny of legislation:

*"It was my experience as Minister for Justice, Equality and Law Reform that the Seanad considered legislation in a much more bipartisan spirit or perhaps more correctly, a non-partisan spirit ... Having initiated major legislative reforms in both Houses of the Oireachtas, I have to say that it was my experience that the better legislative work by far was done in the Seanad."*<sup>86</sup>

Labour Party whip, Deputy Emmet Stagg also values the Seanad's contribution to the parliamentary system in Ireland:

*"It is important that we have a Second House, it certainly should be retained. I think that the business of the Seanad has even improved since its proposed dissolution was mooted."*<sup>87</sup>

In its 2004 Report, the Sub-Committee on Seanad Reform noted that of the 161 submissions which the Sub-Committee had received from the public, "very few people indeed called for the abolition of the Seanad".<sup>88</sup> Some leading lawyers have warned that efforts to abolish the Seanad may prove to be complex and difficult. For example, prior to his appointment to the High Court bench, Mr Justice Gerard Hogan warned:

*"The Seanad is of systemic importance to the Constitution as there are several references to the Seanad. There are a number of references to the Seanad that are all interlocked. So, to use a dental analogy, to abolish the Seanad would not be a constitutional filling and more a full root canal treatment with a few extractions."*<sup>89</sup>

Former Tánaiste and Minister for Justice, Michael McDowell SC has indicated that "approximately 75 amendments would have to be made to the Constitution if Seanad Éireann were to be abolished. These 75 amendments include repeal of entire articles of the Constitution as well as more detailed consequential amendments."<sup>90</sup> This he says led him, and others to conclude "that it would be simpler, given the extent of the amendments involved, to draft an entirely new constitutional document."

One commentator has argued that "at least one attempt at substantial Seanad reform should be made before the case for abolition is finally made out."<sup>91</sup> However, in the event that the Seanad were to be abolished, a major question which arises is, in view of the importance of the role currently played by the Seanad during the legislative process, what is to take its place? Is the

81. The development of legislative drafting capabilities since the foundation of the State is considered in Hunt, *Irish Statute Book: A Guide to Irish Legislation* (Dublin, 2007).

82. MacCarthaigh, *Government in Modern Ireland* (Dublin, 2008) at p.28.

83. As stated by former Taoiseach Bertie Ahern: "The way in which members are elected to the Seanad certainly could be improved." - Interview with author, 13 October 2010. Former Tanaiste and Minister for Justice, Michael McDowell SC "believe[s] strongly that the system of election to Seanad Éireann should be radically reformed." and he described the current electoral system as being "indefensible" - McDowell, "That the Oireachtas is in Dire Need of Reform" a paper delivered at the Liber Society Debate, Dublin 29 June 2010 at pp.3 & 10.

84. Interview with author, 13 October 2010.

85. Interview with author, 4 November 2010.

86. McDowell, "That the Oireachtas is in Dire Need of Reform" a paper delivered at the Liber Society Debate, Dublin 29 June 2010 at p.6.

87. Interview with author, 20 October 2010.

88. Seanad Sub-Committee on Seanad Reform, Report on Seanad Reform (May 2004) at p.4.

89. As reported in Sunday Tribune, 18 October 2009.

90. McDowell, "That the Oireachtas is in Dire Need of Reform" a paper delivered at the Liber Society Debate, 29 June 2010.

91. Whelan, "Our Electoral System and Political Culture Have to be Changed" paper delivered at MacGill Summer School (Jul 2010).



Seanad is to be replaced by another entity<sup>92</sup> and if yes, is this not reform by another route (and somewhat reminiscent of de Valera's actions in relation to the Seanad in the early years of the State's history). Perhaps most critically, if the Seanad is not to be replaced by some other legislative forum, a question arises as to whether the legislative process in the remaining House<sup>93</sup> will be enhanced and lengthened in some way.

## OTHER SIGNIFICANT REFORMS OR DEVELOPMENTS

### Initiation of Bills in the Seanad

In the early years of the Seanad's life, the policy of the Executive was that no Bills would be initiated in the Seanad. This often meant that there were fallow periods in the Seanad's schedule as it had to await the passage of a Bill in the Dáil before it could deal with that Bill. This policy often meant that Bills were sent from the Dáil to the Seanad "in heaps" and the Seanad was required to deal with those Bills "hurriedly".<sup>94</sup> On one occasion, this approach led the then Cathaoirleach, Lord Glenavy to indicate that there would be no need for the Seanad to convene in the following week:

*"With regard to next week, there is not at present more business than would occupy the House for a comparatively brief time—that is, anything from an hour to an hour and a half. I have had inquiries made, and we are not likely to have any fresh legislation ripe for introduction into this House next week. In that view it seems to me that it would probably not be necessary for me to ask the Seanad to meet next week."*<sup>95</sup>

In that instance, the Seanad did not reconvene until approximately two weeks later at which time it was faced with several pieces of legislation to be passed within that week. This led the Cathaoirleach to express his deep frustration at the Government's policy of refusing to initiate Bills in the Seanad:

*"I express my regret that the Executive Council has not seen its way to introduce some of those Bills into this House. I see no reason why some of those Bills should not have been introduced into this House weeks ago, and by this they would have been passed into law. I have thrown out that suggestion already to the Executive Council, but evidently this House has been divorced, so far as the Government is concerned, from the initiation of Government Bills. That, of course, may be their policy. I think, myself, it would be more in the interests of, certainly the efficiency of, this House, and also the dispatch of public business, if many of those not very contentious Bills were originated and passed in their first stages here. I have nothing more to say in that matter."*<sup>96</sup>

Therefore, the decision to initiate Bills in the Seanad as well as the Dáil was an important development in that it meant that there was a greater balance in the workload of the two Houses.

Former Tánaiste and Minister for Justice, Michael McDowell SC saw considerable merit in initiating certain Bills in the Seanad: "I also found as a Minister that the practice of initiating major reforming legislation in the Seanad and then bringing it to the Dáil often had the effect of defusing the adversarial atmosphere in the Dáil because many of the more contentious issues had either been explained or resolved in an amicable way in the Seanad."<sup>97</sup>

### Ending of the Dual Mandate

Membership of local authorities has proven to be quite attractive to members of the Houses of the Oireachtas, principally because involvement with the business of the local authority tended to increase one's profile within the locality and enabled a member to be involved in local affairs – all of which was believed to enhance one's prospects of success at the next general election. Consequently, a large portion of members of the Houses of the Oireachtas have traditionally held seats at local authority level.<sup>98</sup>

However, membership of a local authority<sup>99</sup>

92. In some countries, the judiciary have an important role in the legislative process to such an extent that they can almost be regarded as an extra-legislative chamber. For example, in France, the Conseil d'État reviews laws for constitutionality prior to enactment and in Germany and also Italy, the laws are scrutinised by the judiciary following their enactment. According to Lane & Ersson, *Politics and Society in Western Europe* (London, 1999) at p.226 the judicialisation of politics is strong in countries with a harsh memory of fascism and nazism, but is weak in countries which adhere to the principle of the legislative supremacy of parliament such as Nordic countries and those countries which adhere to a Westminster style system.

93. The Constitution Review Group cautioned that in the event of the abolition of the Seanad, the ratio of TDs to constituency population as provided in the Constitution would have to be reviewed – presumably with the

intention that the number of TDs should be increased: Constitution Review Group, Report (1996) at p.40.

94. 7 Seanad Debates Col.30 (28 April 1926) per Senator O'Farrell.

95. 7 Seanad Debates Col.550 (16 June 1926).

96. 7 Seanad Debates Col.554 (30 June 1926).

97. McDowell, "That the Oireachtas is in Dire Need of Reform" a paper delivered at the Liber Society Debate, Dublin 29 June 2010 at p.7.

98. For example, writing in 1963, Basil Chubb stated that at that time 62% of members of the Houses were also members of a local authority: Chubb, "Going About Persecuting Civil Servants: the Role of the Irish Parliamentary Representative" 11(3) *Irish Political Studies* 272 at p.275.

99. On the role of local authorities, see generally MacCarthaigh, *Government in Modern Ireland* (Dublin, 2008) Chapter 12.

also came to be regarded as distracting members of the Houses from their work on the national stage. The first concrete recognition of this came with the enactment of the Local Government Act 1991 which precluded Ministers and Ministers of State from retaining a local authority seat following their appointment as a Minister. This was a significant step towards ensuring that those who served on the national stage were in a position to commit all of their time to that task. This was ultimately a precursor to a similar restriction being imposed on all members of the Houses which was introduced by the Local Government Act 2001.<sup>100</sup>

The ability of TDs and Senators to the concurrently hold membership of local authorities was viewed by some of them as being a burden and was viewed by others as being a real asset. It was perhaps the latter sentiment which caused one TD to mount a legal challenge to the 2001 Act.<sup>101</sup>

From the point of view of members' ability to scrutinise legislation, the abolition of the dual-mandate was quite a significant development in that it should have resulted in much of the burden of localised constituency work being lifted from the shoulders of TDs and Senators. In the opinion of a former Government Chief Whip, the ending of the dual-mandate:

*"... led to a radical shift in parliamentary focus, ending the existence of the 'part-time TD' and freeing our elected representatives to engage with matters more befitting of a national parliament."*<sup>102</sup>

However, there are grounds to suggest that the level of constituency work has in fact not reduced dramatically.<sup>103</sup> The abolition of the dual-mandate has however led to the development of a body of councillors who have more time to commit to the work of their respective local authorities and are well placed to take on the role of interlocutor in relation to local issues.

## IMPACT OF THE REFORMS

As mentioned at the outset of this Chapter, Dáil and Seanad Reform has, been incremental and slow. Dáil reform is a permanent feature on the parliamentary agenda which never seems to progress, with governments invariably pointing to the absence of consensus as the reason for

inaction. As stated by the Joint Oireachtas Committee on the Constitution, the pace of parliamentary reform has been "lamentably slow" and many reform ideas had "been on the political agenda for many years but had not been implemented."<sup>104</sup>

Almost against the odds, some reforms which have enhanced the scrutiny of legislation have been implemented. For example, the development of the committee system and the taking of Dáil Committee Stage debates in dedicated committee rooms has changed the dynamic of Committee Stage and has resulted in an atmosphere which is collaborative and constructive. Also significant from a scrutiny of legislation perspective has been the abolition of the dual-mandate which has lightened to some degree the burden which national politicians bear in the form of constituency-related work. However, as has been shown by the results of the survey published by the Joint Committee on the Constitution<sup>105</sup>, national politicians continue to engage in a substantial level of localised, constituency-based work which inevitably intrudes upon time which might otherwise be dedicated to the task of scrutinising legislation.

To conclude, it seems fair to suggest that in recent years, the parliamentary reform agenda in Ireland has been more notable for its failure to deliver any truly significant reforms which enhance the task of legislative scrutiny, rather than its successes.

100 .The restriction became fully effective in 2004.

101. Ring v Attorney General [2004] 1 IR 185; [2004] 2 ILRM 378 in which the High Court affirmed the abolition of the dual mandate.

102. Carey, "Parliamentary Reform is Long Overdue" Paper delivered at MacGill Summer School (Jul 2010).

103. For example, see Joint Committee on the Constitution, Third Report - Results of Survey of Members of Both Houses of the Oireachtas

(Feb, 2010). The level of constituency work carried out by TDs is discussed in Chapter 2.

104. Joint Committee on the Constitution, Fourth Report - Review of the Electoral System for the Election of Members to Dáil Eireann (July, 2010) at pp. 150 – 151.

105. Joint Committee on the Constitution, Third Report - Results of Survey of Members of Both Houses of the Oireachtas (Feb, 2010).



**Initiatives Which Impact Upon the Level of Scrutiny****INTRODUCTION**

Various initiatives which have been introduced in recent years have, in many respects, improved the policy development and legislative processes and therefore merit some closer examination.

**LIBRARY & RESEARCH SERVICE**

The importance to any legislature of a professional and full-service research service is now widely recognized. For example, Robinson<sup>1</sup> is of the view that “[g]ood research and information can improve the effectiveness of the legislature along several dimensions.”<sup>2</sup> He cites a number of areas in which the research service can add to the work of the Houses. The availability of reliable facts and analysis can, he states, contribute to both a better understanding of the problems and more realistic and effective legislative solutions to those problems. He also makes the point that the availability of research can help improve the prospects of political agreement by narrowing the range of debate. The availability of a research service, he asserts, enables all members to avail of the best available thinking on an issue. Despite this, Robinson acknowledges that “the Executive will always have the upper hand on resources and information.”<sup>3</sup>

The Oireachtas Library was established in 1924 and its role in providing research services was significantly enhanced in 2005<sup>4</sup> when it was formally conferred with responsibility for providing research services to all members of the Houses.<sup>5</sup> The expansion of the Library and Research Service, and in particular the enhancement of its research capabilities followed on from an exercise which benchmarked the level of support services provided

to parliamentarians in Ireland against the services provided to parliamentarians in other jurisdictions. The ensuing Report found that “[t]he library and research facilities in the Office of the Houses of the Oireachtas are inadequate by international standards and will require enhancement ...”<sup>6</sup>

This led to a recommendation that the level of research staff be increased significantly<sup>7</sup> and that “[t]he research area should be organised according to specialisms”.<sup>8</sup> A team of approximately 20 researchers, structured as three subject-based research teams<sup>9</sup> in the Library and Research Service now provide services principally to the 226 parliamentarians in the Houses, their political staff of approximately 300 and also the 400 or so civil servants who work in the Houses. The research service endeavors to provide information which is both accurate and impartial. As stated by the Head of Library and Research Service, “[i]t is essential that all Library and Research Service staff demonstrate integrity, impartiality and accuracy in presenting information.”<sup>10</sup>

The Service provides on-demand research services to members of the Houses, the fruits of which are analytical research papers on the topics in question. As part of what it terms its Legislative Analysis Service, the Library and Research Service also provides a range of planned outputs such as Debate Packs<sup>11</sup> and Bills Digests<sup>12</sup> in respect of each piece of legislation, which are specifically aimed at providing useful information to members in advance of the Second Stage debate on that legislation.

The absence of any advance planning of the parliamentary schedule in Ireland coupled with the commencement of debates on legislation at very little advance notice often means that there is little time between the publication of a Bill and its debating at Second Stage. This of course

1. Robinson, “Knowledge and Power: The Essential Connection Between Research and the Work of Legislature” research paper published by the European Centre for Parliamentary Research and Documentation (EPCRD).

2. *ibid.*, at p.9.

3. *ibid.*, at p.22.

4. However, the Library had been providing more limited research services since 1976.

5. Pursuant to Standing Order 102 of Dáil Standing Orders, the Library and Research Service is subject to the direction of the Joint Houses Services Committee. Also, the Rules governing the Library and Research Service form part of the Standing Orders of the Dáil.

6. Houses of the Oireachtas, Staffing and Grading – International Benchmarking Review (2002) at para. 1.2.

7. From 11 staff members to 33.

8. Houses of the Oireachtas, Staffing and Grading – International Benchmarking Review (2002) at para. 4.10.

9. The focus of the three research teams is as follows: 1. Law; 2. economics and environmental science; and, 3. social science, politics and parliamentary affairs.

10. Dennison, “The Oireachtas Library & Research Service” 18(2) *An Leabharlann* (Oct 2009) 10 at p.16. The importance of balanced and objective research has also been emphasised by Robinson - Robinson, “Knowledge and Power: The Essential Connection Between Research and the Work of Legislature” research paper published by the European Centre for Parliamentary Research and Documentation (EPCRD).

11. Debate Packs are professionally presented information packs of carefully selected and edited secondary sources on the Bill in question.

12. Each Bill Digest is an analysis of the principal themes which are addressed in the Bill in question.

means that there may be very little time available for the Library and Research Service to prepare a Debate Pack or Bills Digest.

As a result of the development of the Library and Research Service, it is said that “Irish parliamentarians now have access to a similar range of information and research services as their colleagues in benchmark parliaments.”<sup>13</sup> As demonstrated in Chapter 4, it appears that the research services are widely valued by members.

## REGULATORY IMPACT ASSESSMENT<sup>14</sup>

Regulatory impact assessment (RIA) is a means of evaluating a policy which is intended to become part of law. It can involve not just an analysis of the financial cost, but can also involve a more wide analysis – such as the effect that the proposed new law will have on sectors of society. RIA was first introduced in Ireland 2004 when it was deployed on a pilot basis and was subsequently fully rolled-out in 2005. The original intention was that, where it has been conducted, an RIA report would be made available with each Bill, in the same way as an Explanatory Memorandum is made available.<sup>15</sup>

The roll-out of RIA in Ireland has its origins in an OECD Report from 2001<sup>16</sup> in which the OECD advocated that Ireland take a number of steps, including the development of a process of RIA, so as to enable it to produce high quality legislation. By way of a follow up to the OECD Report, the government’s consultation document entitled *Towards Better Regulation*<sup>17</sup>, addressed the possible requirements of a system of RIA.<sup>18</sup> This consultation paper was followed up by a White Paper, entitled *Regulating Better*<sup>19</sup>. It confirmed that Ireland would introduce a system of regulatory impact assessment, initially on a pilot basis.<sup>20</sup>

The publication of a Report on the Introduction of Regulatory Impact Analysis in 2005 marked the completion of the pilot phase in RIA, and the development of a model of RIA for use across the civil service. The Report proposed that a two-phase approach to RIA be

adopted. The first phase, known as a screening RIA, would be applied in all cases where RIA is required. The second phase, or full RIA, would be more in-depth and would only be utilised in relation to more significant proposals.

In July 2008, the Taoiseach published a Review of the Operation of Regulatory Impact Analysis which examined the conduct of RIAs since their roll-out. The report highlighted the public perception that RIAs were not being carried out, or if they were, they were not being published. This is borne out in the revelation that in the period being examined by the Report<sup>21</sup>, only one RIA had been published.

A set of Revised RIA Guidelines replaced the original Guidelines dating from 2005, and implemented a number of recommendations which arose from the 2008 review of RIA. Significantly, the Revised Guidelines removed the distinction between a screening RIA and a full RIA.

As it forces policy makers to consider alternative options, including non-legislative options, an effective RIA system has the potential to reduce the volume of legislation which might otherwise be enacted, and where legislation is deemed necessary, the associated RIA report can be of considerable assistance to members in scrutinising the associated legislation. A comprehensive RIA will explain the legal and policy context in which the initiative is being introduced. It will also provide details on the consultations which have been engaged in, and should also provide some insights into the anticipated costs which will result from the measure. This type of information should be of real value to members in discharging their duties as legislators and should ultimately enhance the scrutiny of legislation.

## PARLIAMENTARY ASSISTANTS

Since 2004, members of the Dáil have been entitled to appoint a parliamentary assistant<sup>22</sup>. According to one interviewee:

13. Dennison, “The Oireachtas Library & Research Service” 18(2) *An Leabharlann* (Oct 2009) 10 at p.18.

14. Also known as regulatory impact analysis. RIA was also the subject of more brief discussion in Chapter 4.

15. “A completed RIA, where carried out, should also be published alongside the Bill to ensure openness and transparency in the legislative process.” - Department of the Taoiseach, *Regulating Better* (January 2004) at p.29. See [HYPERLINK “http://www.betterregulation.ie/”www.betterregulation.ie](http://www.betterregulation.ie/)

16. *Regulatory Reform in Ireland* (Paris, 2001).

17. February, 2002. See [www.betterregulation.ie](http://www.betterregulation.ie)

18. It identified four common characteristics of an RIA system: (i) An attempt to quantify the likely impacts or outcomes arising from regulatory proposals; (ii) A built-in consultation requirement whereby

affected parties and wider society can offer views before regulations are enacted; (iii) A report on the alternatives which were considered before deciding on regulation as the means to achieve the goals in question; and, (iv) A report on how the regulation will be enforced and what problems may be anticipated with achieving compliance.

19. *Regulating Better: A Government White Paper* (Dublin, 2004).

20. Early in 2005, a report entitled *Report on the Introduction of Regulatory Impact Analysis* resulting from the pilot project was published by the Taoiseach.

21. Period between June 2005 and February 2008.

22. See Statutory Instrument No 888 of 2004. TDs who become Ministers receive additional administrative support which is specifically for assisting them in dealing with constituency matters.

*“The original intention was that the work of parliamentary assistants would be reasonably high level and it was envisaged that their work would involve researching legislation, speech writing etc, generally assisting members in discharging their parliamentary roles.”<sup>23</sup>*

It seems that the type of work carried out by parliamentary assistants varies and is dependent upon the approach which each Member takes to the management of his or her workload. For example, in some instances, parliamentary assistants principally carry out research and draft speeches in preparation for the Member’s participation in a debate on legislation. In other instances, parliamentary assistants are principally involved in assisting the member with constituency-related work and provide general assistance in the running of the Member’s office. One interviewee suggested that “[t] here is anecdotal evidence that many of the parliamentary assistants are in fact performing constituency-related work.”<sup>24</sup>

It is very difficult to assess the extent to which the availability of parliamentary assistants has enhanced the depth and quality of parliamentary scrutiny being conducted, but undoubtedly, the availability of parliamentary assistants has lightened to some degree the burden borne by members of the Houses and should have enabled members to dedicate more time to their priority areas.

## PRE-LEGISLATIVE SCRUTINY

### What Constitutes Pre-Legislative Scrutiny?

In the context of this work, the term pre-legislative scrutiny refers to interaction which takes place prior to the initiation of a Bill, between, on the one hand, the Minister or his civil servants and, on the other hand, key stakeholders and members of the public, the focus of which is the content of a proposed Bill.<sup>25</sup> The role of Joint Committees of the Houses in holding hearings into legislation which has been initiated or is about to be taken at Committee Stage, is not, for the purposes of this monograph to be regarded as constituting pre-legislative scrutiny.

## Benefits of Pre-Legislative Scrutiny

The publication of a Bill in draft form affords an opportunity for any obvious gaps, weaknesses or unintended consequences in the legislation to be addressed at an early stage. A thorough debate on the Bill prior to its formal initiation should lead to less time being consumed by the Bill’s passage through both Houses as the key principles of the Bill will have already been explored and teased out. It should also serve to reduce the level of opposition to the Bill, and in instances where the opposition is uncompromising, it serves as an indication of the issues which are likely to be contentious during the Bill’s journey through the Houses.<sup>26</sup>

The greatest scope for those outside the formal policy-making process to have some real input into the shaping of legislation is at stages of the Bill’s development prior to its initiation in the Houses. Therefore, subjecting a draft Bill to a process of pre-legislative scrutiny allows the policy to be developed by a wider body of people rather than being confined to a very tight team comprised of two or three Departmental officials along with one legislative drafter. Pre-legislative scrutiny allows the policy underpinning the Bill to be refined more thoroughly and over a longer period of time.

A further distinct advantage of pre-legislative scrutiny is that legislation which has undergone that process in a meaningful way is probably less likely to require amendment in the short to medium term. Also, opening up the consultation process to experts in the area with which the Bill is concerned allows for the Bill to benefit from the wisdom of key experts at no financial cost. It is also arguable that by providing a direct line of communication to the relevant officials or members of the Houses, there is much less of a need for the engagement of lobbyists by organisations seeking to influence the shape of the legislation at a later stage during the legislative process. In this respect the channels which are opened by pre-legislative scrutiny make the policy development process much more open to members of the public.

Perhaps most importantly, exposing a Bill to a process of pre-legislative scrutiny should serve to ensure that upon its initiation in the Houses, the Bill enjoys an enhanced degree of support and upon its enactment, perhaps a wider degree of legitimacy amongst members of the public. The latter point was recognised in the government’s White Paper on regulation:

23. Interview 1, 12 October 2010.

24. *ibid.*,

25. In other words the Heads of a Bill or the General Scheme of a Bill.

26. The development of a Bill prior to its initiation in the Houses has been addressed in Chapter 4.

*“Active participation by stakeholders/citizens in the design and implementation of regulations is an effective way, not only of promoting openness and transparency in policy making, but also of ensuring greater understanding of, and compliance with, the regulation.”<sup>27</sup>*

However, in order to ensure that the process of pre-legislative scrutiny is of value, it is essential that Ministers and their officials are open to taking on board observations and proposals which emerge from the process. The process should encourage and facilitate real and meaningful contributions from all sides of the Houses as well as wider society which ultimately must be reflected in the terms of the legislation upon its publication.

### **Commitment to Consultation**

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In its White Paper on regulation, the government pledged to “consult more widely before regulating” and indicated that “[c]onsultation processes will be improved and made more consistent across government Departments and Offices”.<sup>28</sup> In order to facilitate such consultations, the White Paper encouraged (but critically, did not require) government Departments to:

*“... consider publishing the draft heads of Bills where feasible and appropriate. This would enhance openness and transparency in the drafting process and allow for consultation on the measures proposed in the Bill.”<sup>29</sup>*

Published in July 2005, set of *Guidelines*<sup>30</sup> on how such consultation processes should be managed seemed to demonstrate some degree of commitment towards the objective of consulting more systematically. The Guidelines are designed to guide public servants through the various steps involved in embarking on a consultation process, as well as providing advice on how to manage the process and assess the results.

### **Future for Pre-Legislative Scrutiny**

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There seems to be a general recognition that Bills which are published in draft form and which undergo a process of consultation emerge from that process as an improved piece of legislation. Despite this, and despite the pledges

made in the government’s White Paper, instances in which the publication of the Heads of Bills occurs remain rare. Examples of the Heads of Bills published since the publication of the White Paper include: Companies Consolidation Bill; Intoxicating Liquor Codification Bill; Broadcasting Bill; Criminal Justice (Psycho Active Substances) Bill, and more recently, the Judicial Council Bill.

One interviewee felt that there was a role for pre-legislative scrutiny in the law-making process:

*“There is scope for pre-legislative scrutiny to be carried out on a more systematic basis, but it really comes down to a question of time. The feasibility of pre-legislative scrutiny would of course be enhanced if the parliamentary schedule were to be planned in advance, as it would be then possible to plan ahead and build in an opportunity for pre-legislative scrutiny.”<sup>31</sup>*

Labour Party whip, Deputy Emmet Stagg also sees value in opening a Bill up to consultation whilst the Bill is in draft form and believes that “[t]here should be a requirement that the Heads of Bills should be presented to committees and that they would then have an opportunity to contribute to the content of those Bills.”<sup>32</sup>

The Assistant Clerk of the Dáil highlighted the importance of striking the right balance between ensuring that the legislation fulfils its policy objectives whilst also taking on-board some of the views of interested parties. He is of the view that if consultation is to have “real meaning ... there must be scope for those consulted to have some impact on the shape of the legislation. This raises the prospect of legislation reflecting a populist view rather than addressing an identified policy need in an objective way.”<sup>33</sup>

### **eConsultation**

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The Broadcasting Bill 2007 was subjected to a very extensive and innovative round of pre-legislative scrutiny which was termed eConsultation. This initiative was piloted in 2006 in relation to the Broadcasting Bill 2007 which was subsequently enacted in 2009. The Bill was published in draft form and the purpose of the initiative was to utilise to the fullest extent possible electronic forms of communication for the purpose of engaging with the greatest number of interested parties possible.

The eConsultation process was led by the

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27. Department of the Taoiseach, *Regulating Better* (January 2004) at p.18. See [www.betterregulation.ie](http://www.betterregulation.ie)

28. *ibid.*, at p.10.

29. *ibid.*, at pp. 28 – 29.

30. Department of the Taoiseach, *Reaching Out: Guidelines on Consultation*

for Public Sector Bodies (July 2005).

31. Interview 1, 12 October 2010.

32. Interview with author, 20 October 2010.

33. Interview with author, 12 October 2010.

Joint Committee on Communications, Marine and Natural Resources and was facilitated by the establishment of a dedicated website<sup>34</sup> through which members of the public were invited to send their views and submissions on the heads of the Broadcasting Bill. The eConsultation website received approximately 422 observations from 60 groups/individuals. In addition, 13 groups/individuals made 52 non web-based observations. The total level of participation amounted to 474 observations made by 73 groups/individuals.

The consultation process was divided up into three stages. Stage I was concerned with the invitation and receipt of submissions. Stage II consisted of the Joint Committee exploring, through oral hearings, some of the submissions that it had received. Stage III enabled members of the public to post their comments on aspects of the proposed Bill on the website. The conclusion of the consultation process was marked by the publication of a Report of the Joint Committee in April 2007<sup>35</sup> which sought to reflect the terms of the submissions which were made to it during the consultation process.

During the Bill's passage through the Houses, members made very little reference to the eConsultation process or the benefits which may have flowed from it. Former Minister Eamon Ryan, the sponsoring Minister made some reference to the process:

*"When I was in opposition, I was a member of the Joint Committee that was responsible for the eConsultation initiative, which involved a review of the legislation in this area. I believe the committee's work constituted an important formative step."*<sup>36</sup>

The view of one interviewee in relation to the process was that it "wasn't as successful as it could or should have been. The volume of responses received was far less than would have been expected and this is because it needed to be marketed better."<sup>37</sup> Former Government Chief Whip, Tom Kitt favours a greater use of eConsultation:

*"I would very much like to see more e-Consultation take place and I think it could be particularly valuable if used in relation to legislation which younger people could take an interest in."*<sup>38</sup>

A report which evaluated the eConsultation initiative was published in 2007.<sup>39</sup> The report recommends that eConsultation should be deployed again, but in view of the demands of the initiative, it recommended that a dedicated staff or unit would be required. The report also recommended that "[f]or greater effectiveness, and greater participation, future e-Consultations should be started at an earlier stage in the policy-making process."<sup>40</sup>

## POST-LEGISLATIVE SCRUTINY

Post-legislative scrutiny involves the conduct of a review of a piece of in-force legislation. The primary purpose of post-legislative scrutiny is to ascertain: whether the legislation in question has achieved the original policy objectives; whether the legislation ought to continue in force in its current form; whether the legislation requires amendment in some way; or whether in fact the legislation ought to be repealed or revoked in its entirety.<sup>41</sup>

Post-legislative scrutiny is an extremely rare feature in Ireland. On occasion, a piece of legislation may provide for its continuance to be affirmed by the Houses<sup>42</sup> or may require its operation to be reviewed after a period of time.<sup>43</sup> The process of statute law revision could be said to be akin to a process of post-legislative scrutiny, however in that process the level of analysis is very much one-dimensional. Of course some pieces of existing legislation will invariably be subjected to some level of Departmental review in circumstances where amendments to those pieces of legislation are being considered. However, there is no systematic process in place for conducting a review of the existing body of legislation.<sup>44</sup>

34. [www.econsultation.ie](http://www.econsultation.ie)

35. Joint Committee on Communications, Marine and Natural Resources, Tenth Report - Considerations, Recommendations and Conclusions on the Joint Committee's Consultation on the Draft General Scheme of the Broadcasting Bill (April 2007).

36. 662 Dáil Debates Col. 579 (2 October 2008).

37. Interview 1, 12 October 2010.

38. Interview with author, 4 November 2010.

39. E-Consultation Research Group, Evaluation of the Houses of the Oireachtas Pilot e-Consultation for the Proposed Broadcasting Bill (May 2007).

40. *ibid.*, at p.75.

41. The UK Law Commission proposed that the following types of questions ought to be posed as part of a process of post-legislative scrutiny: Have the policy objectives been achieved? Has the legislation had unintended economic or other consequences? Has it been over-cumbersome? Do any steps need to be taken to improve its effectiveness or operation? Have things changed so that it is no longer

needed? See Law Commission, Post-Legislative Scrutiny (Law Com 302) (2006) at p.27.

42. For example, section 18 of the Offences against the State (Amendment) Act 1998.

43. An example of a detailed provision requiring an annual review of a piece of legislation may be found in section 7 of the Financial Emergency Measures in the Public Interest (No 2) Act 2009. A further example of a piece of legislation which provides for a review of its operation to be carried out is section 5 of the European Union (Scrutiny) Act 2002.

44. The statute law revision project which had, until relatively recently, been running in the Office of the Attorney General involved a degree of post-legislative scrutiny but it was not a system of post-legislative scrutiny in the traditional sense. This involved a one-dimensional assessment focusing on whether the continuance of that legislation is required. It did not involve an assessment of the terms of that legislation or an assessment of policies upon which that legislation was based.



Having sought to examine the issue of post-legislative scrutiny<sup>45</sup> on a comparative basis, the UK Law Commission was unable to identify formal review systems in any of the countries which they considered, but they were able to identify countries which had some good practices in place.<sup>46</sup> Therefore, it would seem that devising an effective and efficient process for conducting post-legislative scrutiny would be somewhat challenging.

The Assistant Clerk of the Dáil, Dick Caffrey has alluded to quite a different role for post-legislative scrutiny such that it would, in effect, replace the current legislative process:

*“One could take an extreme view and suggest that because of the government’s control over the legislative process, it would be better to allow government to enact the legislation it wished and the efforts of the Houses should be addressed to subjecting it to post legislative scrutiny to establish whether it had the desired effects and what further amendments might be necessary.”<sup>47</sup>*

Whilst accepting that this is unlikely to occur, Mr Caffrey goes on to state that “it is certainly the case that the Houses should devote more time to considering whether the laws it passes are effective. The review would also be a way of scrutinising statutory instruments made under the legislation.”<sup>48</sup>

### **Benefits of Post-Legislative Scrutiny**

The UK Law Commission<sup>49</sup> expressed the view that “[b]etter pre-legislative scrutiny would decrease the need for post-legislative scrutiny.” However, the need for a process of post-legislative scrutiny is not necessarily symptomatic of inadequate scrutiny by the Houses or inadequate pre-legislative scrutiny. The political and social environment is in a state of flux and it is this process of change which can, over a period of time, cause laws to become inadequate, ineffective or to be of unintended effect.

In launching the government’s White Paper on regulation<sup>50</sup>, the former Taoiseach Brian Cowen characterised the drive towards better regulation in the following terms:

*“[W]e must systematically examine what is already in place to see if it is still relevant and still achieving the objective that gave rise to it. This greater care and management of the regulatory framework is the core commitment we are making in this White Paper.”*

To demonstrate the usefulness of putting place a process of post legislative scrutiny, the consequences which flowed from the Mr. C case<sup>51</sup> relating to the constitutionality of the Criminal Law (Amendment) Act 1935 could, in all likelihood, have been avoided if a system of post-legislative scrutiny had been in place. A process of post-legislative scrutiny could serve to ensure that the necessity for the continuance of older legislation is kept under review. Such a process also has a role to play in respect of recently enacted legislation; a process of post-legislative scrutiny would provide an opportunity for teething problems with newer legislation to be discussed and it would provide an opportunity for any unforeseen effects of legislation to be aired and addressed. At present, where newly introduced legislation is causing difficulties, those affected or concerned by it can only raise the issue directly with their local TD or with the Minister and his or her officials.

### **SUNSETTING OF LEGISLATION**

A sunset provision is a provision in legislation which directs that a piece of legislation or certain aspects of it will cease to have effect after a stated period. The onset of that deadline then triggers or forces the conduct of a review of that piece of legislation, akin to the kind of review which is performed in the context of post-legislative scrutiny. The government’s White Paper on legislation<sup>52</sup>, described sunseting as follows, “sunseting is when, at the time a regulation is made, a specific date is set on which that regulation will expire unless it is re-made. This ensures that a regulation is formally reviewed at an agreed date in the future, to establish whether or not it is still valid, or if it could be improved, reduced or even revoked.”

When legislation is enacted or made, it is invariably introduced for an indefinite period – notionally a piece of legislation will endure forever. The need for sunseting presents an opportunity to conduct a review, or a series of

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45. The UK Law Commission has looked closely at the whole issue of post-legislative scrutiny and in particular, it sought to identify a mechanism which would facilitate the conduct of a process of post-legislative scrutiny on a systematic basis - Law Commission, Post-Legislative Scrutiny (Law Com 302) (2006).

46. Article 170 of the Swiss Federal Constitution requires that “The Federal Parliament shall ensure that the efficacy of measures taken by the Confederation is evaluated.” This provision results in the evaluation of several legislative measures annually.

47. Interview with author, 12 October 2010.

48. *ibid.*,

49. Law Commission, Post-Legislative Scrutiny (Law Com 302) (2006) at p.13.

50. Department of the Taoiseach, Regulating Better – A Government White Paper Setting Out Six Principles of Better Regulation (2004).

51. Supreme Court, May 2006.

52. Regulating Better (Dublin, 2004) at p. 5.

periodic reviews of the content and necessity of that legislation, with a view to its ultimate repeal or revocation.

Section 18 of the Offences against the State (Amendment) Act 1998 is a rare legislative creature in the sense that it contains a complex sunset provision which meant that some sections of the Act would cease to be in operation on a fixed date unless they were continued in force by the passing of a resolution in the Dáil and the Seanad. In the interim, several such resolutions have been tabled and passed and are usually accompanied by a debate.

The sunseting of legislation is good legislative practice. At the very least, it forces the Minister and his or her officials to assess a particular piece of legislation after a period of operation, to report on its use, and justify its continuance so that it can be subjected to further scrutiny by the Houses.

### BROADCASTING OF PARLIAMENTARY PROCEEDINGS

Fixed television cameras were installed in the Dáil, the Seanad and Committee rooms in 1990 and this paved the way for the broadcast of proceedings on the internet and occasionally on television<sup>53</sup>. Currently, on Wednesday mornings, Leaders Questions are broadcast live on RTE television. This development has also facilitated clips from proceedings being shown on the news. In addition, important extracts from the days proceedings are compiled and broadcast in a nightly television programme. Proceedings of the Houses are also broadcast live on the internet.

The broadcasting of parliamentary proceedings has significantly increased the public's understanding and appreciation of the work of the Houses. Where members of the public have a greater exposure to the work being carried out by the Houses, it seems reasonable to suggest that they may be inclined to become more engaged with matters being debated in the Houses, including legislative business.

### ENGAGEMENT OF THE PUBLIC

Various initiatives in other countries which have been directed at engaging the wider public in the law and policy development processes have had some degree of success. For example, in the

UK in 2003, the Criminal Justice (Justifiable Conduct) Bill was initiated on foot of the votes of BBC radio listeners.<sup>54</sup> In 2007, the New Zealand Police launched an initiative which allowed members of the public to contribute to the shaping of the proposed new Policing Act by means of a wiki website. This allowed the public to directly edit an on-line version of a proposed new Policing Act. These initiatives suggest that there are various ways in which members of the public might become more involved with the wider parliamentary process.

In Ireland, the main political parties have advocated various initiatives which are aimed at encouraging a greater degree of public engagement with the parliamentary process. For example, in 2000 Fianna Fáil proposed a mechanism which would allow for a debate to be initiated in the Houses on foot of a demand made by 10,000 citizens by way of a citizens petition.<sup>55</sup> In 2006 a Labour Party Senator, Joanna Tuffy proposed the establishment of a petitions committee which would enable "individuals, community groups and organisations to petition the Seanad and make a request to the Seanad to take a view or initiate or amend legislation in relation to matters of public interest or concern."<sup>56</sup> During the course of the subsequent debate on the motion, Senator Tuffy pointed out that other parliaments such as the German Bundestag, the Scottish Parliament and the European Parliament all have a petitions committee. She set out her views on how the committee might work:

*"In that type of right to petition, members of the public would have an instigating role. They could come up with ideas for legislation and make requests. Individuals or groups could identify a gap in a particular law and seek appropriate change. They could also call for a debate on a particular issue. Under this process members of the public could have a major influence on legislation and on their legislators."<sup>57</sup>*

Senator (now Deputy) Tuffy noted that in Scotland, individuals, community groups and organisations can make requests or petitions to the Scottish Parliament on matters of public concern or to propose or request a change to existing legislation. In the instance of Scotland, this can and has led to changes in the law. Senator Tuffy felt that the establishment of such a committee would lead to greater engagement of the public with the world of politics:

53. The broadcasting of proceedings is provided for in Standing Order 112 of the Dáil and Standing Order 97 of the Seanad.

54. At the end of 2003, the BBC Today programme asked listeners to suggest a law that they would like to see put onto the statute books. There were 10,000 nominations and five were shortlisted. There were 26,000 votes, and listeners chose the proposal that homeowners should be able to use any means to defend their home from intruders.

See Bennion, "Home Defence: The Tony Martin Bill – I" 168 JP 348, 8 May 2004, & Part II - 168 JP 374. See also [www.francisbennion.com](http://www.francisbennion.com)

55. See further A Dáil for the New Millennium (2000).

56. 184(3) Seanad Debates Col. 223.

57. 184(17) Seanad Debates Col. 1481.

*“There is a great need to re-engage the public. If an issue, local, national or international, agitates people or is not, in their opinion, being addressed with the priority it deserves, they need to be persuaded there is a process through which ... they can put it right.”<sup>58</sup>*

particularly true in relation to the process of pre-legislative scrutiny.

The question of the acceptance of petitions in the Seanad was previously debated in that House in 1925. Provision has been made for the Seanad’s receipt of petitions from members of the public in relation to its “legislative powers or an issue of public policy”.

## IMPACT OF INITIATIVES

As alluded to at the outset, the initiatives just discussed have, to varying degrees, impacted upon the legislative process and in-turn the ability of members to scrutinise legislation.

It seems clear that the development of the research function of the Oireachtas Library has served to ensure that members of the Houses are better informed of the purpose of a Bill and understand more fully the proposals contained therein.

Whilst the primary purpose of regulatory impact assessment reports are to inform the policy development process, those reports can also prove to be of some assistance to members of the Houses who seek to anticipate and debate the likely impact of the proposed legislation. Such information serves to ensure that members of the Houses are better equipped to scrutinise legislation. There are of course issues regarding the availability of RIA reports and in circumstances where those reports are not published or available, the value which they might otherwise add to the task of legislative scrutiny is lost.

Initiatives such as post-legislative scrutiny and sunseting have the potential to enhance the scrutiny of pre-existing legislation in that they give rise to a process of analysis which adds to legislators understanding of the effect of that legislation. Such information can be of considerable value when legislators are faced with a Bill which proposes to amend or expand upon that pre-existing legislation or indeed related legislation.

Whilst parliamentary reforms have been slow, various reforms which have been introduced on a piecemeal basis have served to assist members in the task of scrutinising legislation. In their own way, these initiatives are helping to change the way in which the Houses conduct their business. Some initiatives which could enhance the process of scrutiny are greatly under-utilised, this is

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58. *ibid.*, at Col. 1486.

59. Standing Orders 91 to 94 of the Seanad.a

**Scrutiny of EU Legislation****INTRODUCTION<sup>1</sup>**

Ireland's accession to the EEC in 1973 marked a truly important milestone in several respects, but particularly in terms of the State's parliamentary system. More and more of the legislation which is added to the Irish Statute Book on an annual basis derives from the EU institutions. This is particularly true in relation to secondary legislation, a significant proportion of which has been created by Ministers in transposing EU Directives. The increasing role of the EU in serving as the source of a growing amount of Irish legislation was acknowledged by Denham J in *Maguire v Ardagh*<sup>2</sup>:

*"In 1937, the Oireachtas had the sole and exclusive power of making laws for the State. No other legislative authority had powers to make laws for the State: Article 15.2 of the Constitution of Ireland, 1937. However, that is no longer the situation. The decision that Ireland join the European Union has had a profound effect, not least on the legislature. Many laws for Ireland today come from the European Union through Regulations and Directives."*

In that context, any examination of the role of the Houses in the scrutiny of legislation, must therefore reflect the significance of the body of EU derived legislation which becomes law in Ireland each year. What follows then is an outline of the various legislative and committee-based initiatives which were designed to enhance the ability of the Houses to scrutinise EU measures whether prior to or following their finalisation by the EU institutions.

**TYPES OF EU LEGISLATION**

The two principal forms of EU legislation<sup>3</sup> are Regulations and Directives<sup>4</sup>. Regulations are directly and immediately applicable in each

Member State and do not require, and are not dependent upon any domestic, implementing measure. In contrast, Directives are not binding in their effect until they are implemented through a domestic measure in each Member State. In Ireland, Directives are usually transposed through the passing of an Act or the making of a statutory instrument. Each year, the institutions of the EU make a large number of Regulations and Directives<sup>5</sup>. In Ireland on an annual basis, the transposition of Directives gives rise to the enactment of anywhere from five to ten Acts and the making of approximately 150 statutory instruments<sup>6</sup>.

**EUROPEAN COMMUNITIES ACTS AND SCRUTINY**

As a result of Ireland's membership of the EU, a number of foundation Acts have been put in place to facilitate the fulfillment of obligations which arise, particularly with regard to the transposition of legislation emanating from the EU institutions. The legislature has also acted to ensure that procedures are in place so that EU legislation receives some degree of monitoring and scrutiny by the Houses.

**European Communities Act 1972**

Under the EU Treaties, Member States enjoy discretion as to how they give effect to obligations which arise from their membership. Through the enactment of the European Communities Act 1972 the legislature determined that many of its obligations would be discharged through the use of statutory instruments. In order to fulfill obligations which arise from Ireland's membership of the EU, section 3 of the European Communities Act 1972<sup>7</sup> Act allows for the making of regulations

1. This Chapter does not purport to advance a comprehensive or wide-ranging analysis of Ireland's membership of the EU. Instead the purpose of this Chapter is to outline the developments which have taken place in Ireland with a view to facilitating a greater degree of scrutiny of EU measures. The whole question of Ireland's relationship with the European Union, and the evolving role which the Oireachtas will have in that relationship, is being examined in great detail by Dr Gavin Barrett, holder of the Parliamentary Fellowship 2010 – 2011, in his monograph entitled "The Evolving Role of the Oireachtas in European Affairs."

2. [2002] 1 IR 701.

3. In different contexts, the term EU legislation can mean a number of different things. For example, the term can be used to refer to any of the following categories of legislation: draft legislative proposals which are being developed by the EU institutions; legislative instruments which

have been made by the EU institutions – principally Regulations and Directives; and (iii) Statutory instruments and Acts which transpose or implement a legislative measure which originates in the EU institutions.

4. Other types of measures emanating from the EU include Decisions which are of a more limited effect, and also Recommendations and Opinions, which have no binding effect.

5. In 2009, 1291 Regulations and 164 Directives. In 2008, 1342 Regulations and 126 Directives. And, in 2007, 1561 Regulations and 76 Directives.

6. Approximately 121 in 2009, 136 in 2008 and 174 in 2007.

7. Section 3(1) reads as follows: A Minister of State may make regulations for enabling s.2 of this Act to have full effect.

which are capable of amending primary legislation<sup>8</sup> and in that regard is perhaps the most clear-cut exception to the rule that amendments made to primary legislation by way of secondary legislation are impermissible. From the point of view of scrutiny, this Act was significant in that it expressly facilitated the implementation of EU derived policies by a means which is devoid of scrutiny. It was this consideration which led the then Taoiseach Jack Lynch, when introducing the Bill, to comment that the powers conferred on Ministers to make regulations “are admittedly considerable.”<sup>9</sup>

To serve as a counter-measure to this wide-ranging power, section 4 of the 1972 Act provided that regulations made under the Act shall cease to have statutory effect unless they are confirmed by Act of the Oireachtas passed within six months after they are made. One such Act was enacted – the European Communities (Confirmation of Regulations) Act 1973. It listed 22 Regulations which were made under the 1972 Act as states that they “are hereby confirmed”. However, section 4 of the 1972 Act was amended in 1973<sup>10</sup> and the requirement for a confirmatory Act no longer exists. As an alternative means of ensuring some degree of scrutiny, section 5 of the 1972 Act required the Government to report twice yearly to each House of the Oireachtas on developments in the European Communities, however this obligation to report was diluted somewhat in 2003.<sup>11</sup> A further effect of the 1973 Act is that statutory instruments which are made under the 1972 Act are automatically of “statutory effect”.

As the obligations which arise by virtue of the State’s membership of the European Union become more onerous, regulations under section 3 are becoming increasingly frequent. By providing for the transposition of EU derived obligations by means of secondary legislation, the 1972 Act has in many respects enabled the Houses of the Oireachtas to abrogate its responsibility for scrutinising domestic legislation which derives from EU measures. Were it not for section 3, a

great deal more primary legislation would have to be brought before the Houses and scrutinised. This development is of real consequence and concern, particularly in view of the fact that there is effectively no parliamentary scrutiny of secondary legislation.<sup>12</sup>

### **European Union (Scrutiny) Act 2002**

From the point of view of the scrutiny of EU legislation, the European Union (Scrutiny) Act 2002 marked an improvement upon the arrangements which were previously in place.<sup>13</sup>

The Act led to the establishment of the Joint Committee on European Scrutiny as a successor to the sub-committee which previously had responsibility for this role. Section 2(1)<sup>14</sup> of the 2002 Act requires Government Ministers to lay before the Houses a copy of each legislative proposal or other measure which is proposed by the European Commission. At that time, Ministers are also required to lay an explanatory statement relating to the proposed measure. An explanatory statement is required to summarise the aim of the proposal, highlight any implications for the State, indicate the anticipated negotiation period, and also indicates the expected implementation date. The Act also requires the Minister to have regard to recommendations made to him or her by either House or by a committee in relation to the proposed measure.<sup>15</sup> The 2002 Act was groundbreaking in the sense that for the first time it sought to give members of the Houses a role in seeking to examine and ultimately influence the shape of EU measures prior to their finalisation.

### **European Communities Act 2007**

The European Communities Act 2007 effected a number of significant amendments to the European Communities Act 1972.<sup>16</sup> Section 2 of

8. Section 3 of the European Communities Act 1972 has been deemed constitutional by the Supreme Court in *Meagher v Minister for Agriculture*, where the applicant sought to challenge the validity of two statutory instruments made by the Minister pursuant to s.3(2) of the European Communities Act 1972.

9. 263 Dáil Debates Col. 95 (25 October 1972).

10. European Communities (Amendment) Act 1973, section 1.

11. European Union (Scrutiny) Act 2002 s.4 substitutes s.5 of the 1972 Act so that it now provides: “In each year, beginning with the year 2003, the Government shall make a report to each House of the Oireachtas on developments in the European Communities and the European Union.”

12. The scrutiny of secondary legislation is considered in Chapter 8.

13. This Act began its life as a Private Members’ Bill which was introduced by the Labour Party and was accepted by the Government.

14. S.2(1) As soon as practicable after a proposed measure is presented by the Commission of the European Communities or initiated by a Member

State, as the case may be, the Minister shall cause a copy of the text concerned to be laid before each House of the Oireachtas together with a statement of the Minister outlining the content, purpose and likely implications for Ireland of the proposed measure and including such other information as he or she considers appropriate.

15. S.2.(2) The Minister shall have regard to any recommendations made to him or her from time to time by either or both Houses of the Oireachtas or by a committee of either or both such Houses in relation to a proposed measure.

16. The principal purpose of the Act was to address the issues which arose following two Supreme Court decisions in *Browne v AG* [2003] 3 IR 305 and *Kennedy v AG* [2005] 2 ILRM 401. For an in-depth analysis of the impact of these decisions, see: Fahey, “*Browne v Attorney General and Kennedy v Attorney General: The Current State of the Ultra Vires Doctrine and the Necessitated Clause*” 2005 23 *ILT* 258.

the 2007 Act enables a Minister who is making regulations under the 1972 Act to create indictable offences where in the opinion of the Minister, such an offence is necessary to give effect to the treaties or an instrument of the European institutions. The Act also introduced a requirement to the effect that that statutory instruments which are made under section 3(3) of the 1972 Act must be laid before the Houses of the Oireachtas.

### ROLE OF COMMITTEES IN SCRUTINISING EU LEGISLATION

The principal means by which the Houses of the Oireachtas exercise some degree of oversight over legislation emanating from the EU institutions is through various parliamentary committees which have been established for that purpose. The principal committees which provide this oversight today are the Joint Committee on European Affairs and the Subcommittee on European Scrutiny.

However, these particular committees are relatively recent innovations, and it is the case that since Ireland's accession to the EEC, a number of different Committees had been established as a means of monitoring and scrutinising legislation being devised by the European institutions.

### Joint Committee on the Secondary Legislation of the European Communities

The Joint Committee on the Secondary Legislation of the European Communities held its first meeting in 1973<sup>17</sup> and Deputy Charles Haughey was elected as its first Chair. During its existence the Committee appears to have given a healthy degree of consideration to legislative matters arising from the State's membership of the EEC.<sup>18</sup>

### Joint Committee on European Affairs

This Committee was established in 1993 and it was in effect a successor to the previous Joint Committee on the Secondary Legislation of the EC. Since 2002, the Committee has met on an almost weekly basis. At its meetings it considers a wide range of matters pertaining to European affairs.

### Joint Committee on European Scrutiny

Established in October 2007, the Committee has a membership of 11 members of the Dáil and 4 members of the Seanad.<sup>19</sup> The European Union (Scrutiny) Act 2002 requires that the following measures be subjected to scrutiny by the Joint Committee on European Scrutiny:

- (i) Regulations and Directives which are to be adopted under the EU Treaties;
- (ii) Joint Actions;
- (iii) Common Positions; and
- (iv) other measures requiring the approval of the Houses.

As a result of the ratification of the Lisbon Treaty, the Joint Committee on European Scrutiny now has responsibility for ensuring that the principle of subsidiarity<sup>20</sup> is respected by the institutions of the EU.

The Orders of Reference<sup>21</sup> of the Joint Committee indicate that its primary function is to scrutinise proposals for legislation which are being developed by the EU institutions and to report on those matters to the Houses of the Oireachtas. Legislative proposals which are regarded as not requiring any further scrutiny are simply noted by the Joint Committee. Having considered a legislative proposal which it regards as being of sufficient importance, the Joint Committee may:

- (i) conduct further scrutiny itself and prepare a report;

**Table: Scrutiny Conducted by Joint Committee on European Scrutiny**

<b>No. of Documents Considered</b>	883
<b>No. of Legislative Proposals</b>	746
<b>No. Referred to Sectoral Committee for Further Scrutiny</b>	5
<b>No. Referred to Sectoral Committee for Observations</b>	35
<b>No. Subjected to Further Scrutiny by the Joint Committee</b>	23
<b>No. of Reports Adopted by the Joint Committee</b>	21

17. See debates of Joint Committee on the Secondary Legislation of the European Communities (3 August 1973).

18. For example, at a meeting in 1977, having considered the terms of European Communities (Fresh Poultry Meat) Regulations 1976 (SI No. 317 of 1976) the Joint Committee proposed to annul the statutory instrument.

19. Irish MEPs are entitled to attend and participate in the meetings of the

Joint Committee, but they are not entitled to vote at the meetings.

20. This principle refers to the requirement that the institutions of the EU only act within the competences conferred upon them by the Member States.

21. Available at: HYPERLINK "<http://www.oireachtas.ie/>"www.oireachtas.ie

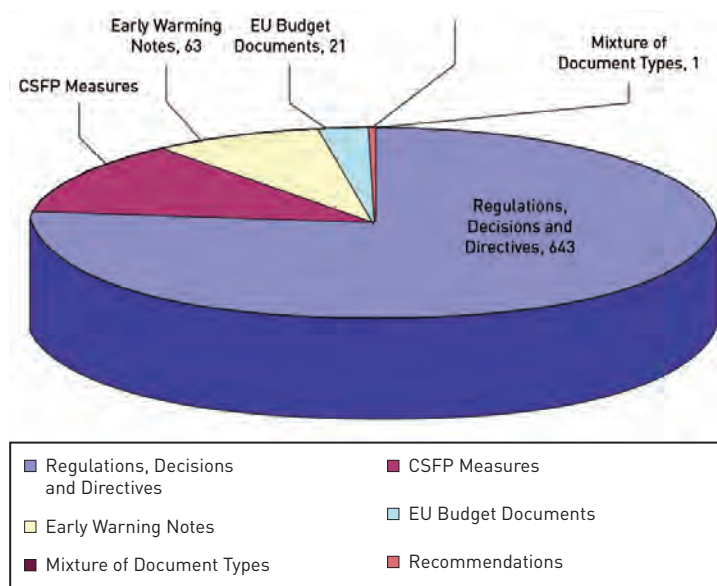
- (ii) refer the proposal to another Committee of the Houses for observations or further scrutiny,<sup>22</sup> or
- (iii) refer the proposal directly to the Houses.

Where the Joint Committee determines that further scrutiny is required and it decides to conduct that further scrutiny itself, it may request further information from the relevant government Department and it may decide to hold public hearings for the purpose of allowing stakeholders, experts or the wider public to express their views. Arising from this, the Committee would then go on to produce its report in which it makes recommendations to the relevant government Minister with a view to influencing the stance which the State adopts in relation to the measure. Significantly, pursuant to section 2(2) of the 2002 Act, where the Houses of the Oireachtas or a Committee make a recommendation to a Minister in relation to the scrutiny of EU legislation, Ministers are obliged to take any such recommendation into account when devising their stance in relation to the proposal.

In practice, the Joint Committee subjects every legislative proposal emerging from the EU to some degree of scrutiny. In a sense it serves as a filtering mechanism – sorting out the relevant measures from the less important ones. According to its Annual Report<sup>23</sup>, the Joint Committee met 27 times over a 14 month period. During that time, it considered 833 documents, 746 of which were legislative proposals. Of the 833 documents considered by the Joint Committee, as detailed in the Table below, a surprising 77% of the proposals considered by the Joint Committee were identified as not warranting any further scrutiny. A mere 8% (63) of the documents were deemed to be of such significance that they warranted further scrutiny.

As is demonstrated by its *Sixth Annual Report*<sup>25</sup>, the Joint Committee clearly has a very demanding workload. In the 14 month period examined by its Annual Report, the number of documents considered at each meeting of the Joint Committee seem to have ranged from a high of 166 proposals to 4 or even zero proposals. According to the Joint Committee's 2010 *Work Programme*<sup>26</sup>, the Committee can expect to consider in the region of 600 legislative proposals per year.

Table: Breakdown of Proposals/documents received by category<sup>24</sup>



Former Taoiseach Bertie Ahern saw the establishment of this Committee as being a truly significant development in the context of the scrutiny of legislation:

*“I would say that the development of the Committee led by Gay Mitchell which was dedicated to the scrutiny of EU measures has been the most significant development in relation to the scrutiny of legislation. It was significant because at that time most or all EU legislation was not receiving any degree of scrutiny in the Houses. That approach has been developed to a point now where EU legislation is being examined on an almost weekly basis. The level of scrutiny which EU legislation receives is now far better than it has been in the past.”<sup>27</sup>*

In an exchange in the Dáil with the then Taoiseach Brian Cowen, one member asserted that proposals were being drawn to the attention of the Joint Committee at a late stage in the policy development process, such that scrutiny by the Joint Committee “becomes a waste of time”<sup>28</sup>.

22. Other Committees of the House are notified of the measures considered by the Joint Committee on European Scrutiny and it is open to any of those Committees to subject an EU proposal to further scrutiny should they so wish. Pursuant to Standing Order 83(4) of the Dáil, the Dáil may confer upon a Select Committee, the power to consider proposals for EU legislation and report upon those proposals to the Dáil.  
 23. Joint Committee on European Scrutiny, Sixth Annual Report on the Operation of the European Union (Scrutiny) Act 2002 (2009).  
 24. This Table appears in the Joint Committee on European Scrutiny's

Sixth Annual Report on the Operation of the European Scrutiny (Act) 2002 (2 October 2009).  
 25. Joint Committee on European Scrutiny, Sixth Annual Report on the Operation of the European Union (Scrutiny) Act 2002 (2009) at pp. 15-16.  
 26. Available at [www.oireachtas.ie](http://www.oireachtas.ie)  
 27. Interview with author, 13 October 2010.  
 28. 673 Dáil Debates (3 February 2009).

## EFFECTIVENESS OF THE SCRUTINY OF LEGISLATION

As outlined in this Chapter, ever since Ireland's accession to the EEC, successive governments have put in place various initiatives aimed at ensuring that legislation emanating from the EU receives some degree of monitoring or scrutiny by the Houses. Some of these initiatives have been effective to at least some degree, others less so.

Even before Ireland's accession in 1973 to the EEC, the Government of the day was acutely aware of the difficulties which would be faced in seeking to scrutinise such a large and growing body of legislation. When speaking during the Second Stage debate on the European Communities Bill 1972, the then Taoiseach Jack Lynch recognised the difficulties which would be faced:

*"...even in Member States which have such arrangements, we understand that considerable difficulties have arisen for the parliamentary committees in dealing with the large mass of Community documentation and in distinguishing the more important policy documents from the essentially technical proposals."*<sup>29</sup>

Former Taoiseach, Bertie Ahern acknowledged the challenge which the scrutiny of EU legislation presents:

*"The scrutiny of EU legislation presents real difficulties particularly because of the diverse nature of the areas which it covers and also because of the sheer volume involved. It's hard to keep on top of it and there's a danger that there's not enough scrutiny. Another concern is the fact that the number of officials in Government Departments who look at EU legislation is very small."*<sup>30</sup>

There appears to be some level of agreement amongst the opposition parties that the current level of scrutiny of EU legislation is inadequate. For example, Fine Gael whip (And current Government Chief Whip), Deputy Paul Kehoe is of the view that "the scrutiny of EU legislation is not adequate, there is only one Committee charged with examining what is a large volume of proposals, and that in itself is a failing."<sup>31</sup> Similarly, Labour Party whip, Deputy Emmet

Stagg is of the view "that the degree of scrutiny of EU legislation is totally inadequate".<sup>32</sup>

If anything, the challenge posed by the need to scrutinise EU legislation has grown exponentially since 1972 as the breadth of matters now regulated by the EU has expanded. The importance of scrutinising proposals for legislation before they become cast in stone presents a further challenge. There would appear to be a clear need for the Houses to step up their efforts in scrutinising EU legislation.<sup>33</sup>

Since the introduction of the Barroso Initiative in 2006, the European Commission has been circulating legislative proposals and discussion documents to national parliaments of member states. National parliaments now have the opportunity to play a meaningful role in the development of policy and legislative proposals at EU level. The ratification of the Lisbon Treaty means that the task of scrutinising EU legislation is of even greater importance than was previously the case, particularly as there is now a real opportunity for Member States to have some degree of influence over the final shape of legislative proposals prior to their finalisation. In the context of those developments, the view of the former Tánaiste and Minister for Justice, Michael McDowell is that "...the Irish Parliament has lamentably failed to engage with the European legislative process".<sup>34</sup> He adds that:

*"As presently organised, the Oireachtas is nowhere near being in a position to fulfil the enhanced role envisaged for it under the Lisbon Treaty, let alone to discharge the functions which it has abysmally failed to discharge in respect of our membership of the European Union up to this point. The whole process of transposition of EU law into Irish law is one which the Oireachtas has, largely speaking, totally abdicated its functions."*<sup>35</sup>

The question as to what steps should be taken so as to ensure that measures emanating from the EU receive greater scrutiny (i) at proposal stage and (ii) following transposition is one which political parties and indeed various parliamentary committees, have grappled with for quite some time.

A number of reports have advocated that the Seanad be conferred with a greater role for the Seanad in scrutinising EU legislation.<sup>36</sup> In its

29. 263 Dáil Debates Col. 100 (25 October 1972) as also quoted by O'Halloran, *The Dáil in the Twenty-First Century* (Dublin, 2010) at p.180.

30. Interview with author, 13 October 2010.

31. Interview with author, 27 October 2010.

32. Interview with author, 20 October 2010.

33. Despite this, one interviewee has suggested that major reforms in this area are not necessary: "We have in place a process for scrutinising EU legislation which is the envy of a number of EU Member States ...

The process itself is bullet-proof." Interview 1, 12 October 2010.

34. McDowell, "That the Oireachtas is in Dire Need of Reform" a paper delivered at the Liber Society Debate, Dublin 29 June 2010 at p.12.

35. *ibid.*,

36. In this context, Fine Gael whip, Deputy Paul Kehoe has stated: "If the Government were serious about preserving and reforming the Seanad they could have given the Seanad a meaningful role in scrutinising EU legislation." – Interview with author, 27 October 2010.



*Second Progress Report*<sup>37</sup> in 1997 which focused on the Seanad, the All-Party Oireachtas Committee on the Constitution made a recommendation to the effect that the Seanad should be conferred with responsibility for monitoring and scrutinising EU legislation and that it would produce reports on the impact of EU legislation and highlight trends. A similar, more general recommendation was contained in a subsequent *Progress Report*<sup>38</sup> in 2002 and the proposal was advocated yet again in 2004.<sup>39</sup> However, these recommendations were never implemented.

Perhaps the most far-reaching and significant recommendations in relation to the scrutiny of legislation have been advanced in a report prepared by both the Joint Committee on European Affairs and the Joint Committee on European Scrutiny.<sup>40</sup> The Committees identified a number of factors which they viewed as playing an important role in enhancing the national parliament's role in scrutinising EU affairs.<sup>41</sup> These included the need for national parliaments to prioritise EU documents and proposals which are of domestic importance or strategic significance. To this end, the report suggests that the Joint Committee on European Scrutiny should categorise legislative proposals as being either (i) of limited significance or (ii) of greatest significance. The report also highlighted the need for the Houses to engage with the EU legislative process at the earliest possible opportunity when the potential for influence is greatest.

But from the perspective of scrutiny, the Committee's most far-reaching proposal is that a scrutiny reserve mechanism be introduced, which in practice would mean that a Minister could not commit to supporting an EU proposal for legislation until the Houses of the Oireachtas had completed their scrutiny process.<sup>42</sup> As part of this proposal, it is envisaged that a Minister could override the reserve in exceptional circumstances.<sup>43</sup> The Committee also proposed that in the Houses, the Joint Committee on European Affairs and the Joint Committee on European Scrutiny should be amalgamated to form a single standing committee dealing with the scrutiny of EU proposals as well as more general European affairs.<sup>44</sup>

## FUTURE FOR SCRUTINY OF EU LEGISLATION

That we should have effective and efficient procedures in place for the scrutiny of EU legislation is important for two reasons - firstly so as to ensure that members of the Houses have advance knowledge of the proposals which are being devised by the EU institutions and secondly, because that legislation will become effective in the State or will require implementation. As a direct result of the Lisbon Treaty, the scrutiny of such legislative proposals is now all the more important as the Houses are presented with an opportunity to potentially influence the shape of that legislation before it is cast in stone.

Scrutinising EU legislation is important, but has not always been regarded as such. The processes which are now in place to facilitate the scrutiny of legislative proposals emerging from the EU institutions marks a great improvement on the dearth of scrutiny of years gone by. According to the Sub-Committee on Seanad Reform<sup>45</sup> the new systems which were put in place under the 2002 Act function well and it concluded that "there is now a satisfactory level of parliamentary scrutiny of EU measures."<sup>46</sup>

However, despite the best efforts of the members involved in the Joint Committee on European Scrutiny, the sheer volume of legislative proposals emanating from the EU means that the current measures which are in place to facilitate the scrutiny of EU legislation are unable to provide the systematic and detailed scrutiny of proposals for legislation which is so badly needed.

37. All Party Oireachtas Committee on the Constitution, *Second Progress Report – Seanad Éireann* (1997).

38. All Party Oireachtas Committee on the Constitution, *Seventh Progress Report – Parliament* (2002).

39. In its 2004 Report, the Sub-Committee on Seanad Reform advocated the conferral upon the Seanad of special responsibility in the area of European affairs, including the scrutiny of legislative proposals which are being presented to the European Council as well as responsibility for reviewing draft EU legislation which is regarded as being of major national importance - Seanad Sub-Committee on Seanad Reform, *Report on Seanad Reform* (May 2004) at p.56.

40. *Review of the Role of the Oireachtas in European Affairs* (July, 2010).

41. *ibid.*, at p.4.

42. *ibid.*, at p.15.

43. Former Government Chief Whip, Deputy Tom Kitt's experience of Council of Ministers' meetings in Brussels was that he "would often find that before attending the meeting my colleagues around the table had appeared before their own parliamentary committees so as to discuss the stance which he or she would adopt at the Council meeting." – Interview with author, 4 November 2010.

44. *ibid.*, at p.16.

45. Seanad Sub-Committee on Seanad Reform, *Report on Seanad Reform* (May 2004).

46. *ibid.*, at p. 56.

## Scrutiny of Secondary Legislation

### INTRODUCTION

Secondary legislation is playing an increasingly important role in the governance of society particularly as it often serves as the vehicle of choice by which EU legislation is transposed. The growth in secondary legislation is also attributable to the growing complexity of society coupled with the pressures on parliamentary time. These factors have conspired to ensure that secondary legislation plays an even greater role in supplementing primary legislation.

Articulating law in the form of a statutory instrument also spares the relevant Minister the time and commitment which would otherwise be required if the same provisions were to be set out in a Bill which would then have to be steered through the legislative process in the Houses. What makes secondary legislation especially attractive for a member of government is that it can be brought into force by the stroke of a Ministerial pen.

### VOLUME OF SECONDARY LEGISLATION

Approximately 28,767<sup>1</sup> pieces of secondary legislation have been made since the foundation of the State and this body of law is currently growing at the rate of approximately 600 each year.

As the table illustrates, in the past decade, there has been a sizeable increase in the number of statutory instruments, peaking in 2005

**Table: Statutory Instruments Made**

Year	Volume of Secondary Legislation
2009	590
2008	608
2007	872
2006	708
2005	923
2004	915
2003	740
2002	647
2001	658
2000	495
1990	347
1980	414
1937	362
1923	84

and tapering off in recent years to a reduced level. This reduction may be due to in part to the economic downturn as well as a move by government away from the previous position whereby legislation was seen as being the sole or most appropriate response to issues which arose.

### SECONDARY LEGISLATION AND THE CONSTITUTIONAL FRAMEWORK

#### Article 15.2.1 of the Constitution

The primacy of the Oireachtas as the sole law-making body for the State which is emphasised in Article 15.2.1 of the Constitution is, as acknowledged by Fennelly J in *Kennedy v Law Society of Ireland*<sup>2</sup>, not without qualification:

*“The Oireachtas may, by law, while respecting the constitutional limits, delegate power to be exercised for stated purposes.”*

If an unduly restrictive interpretation were to be applied to Article 15.2.1, it might lead to a stance which would dictate that every piece of law which is to govern the country would have to be passed by the Dáil and Seanad and be promulgated by the President. This would mean that the Houses would be burdened with the task of reviewing or scrutinising the 600 or so statutory instruments which are normally made each year by Ministers. However, with no small degree of pragmatism, the courts have recognised that not all types of law must adhere to the terms of Article 15.2.1. In *Laurentiu v Minister for Justice*<sup>3</sup>, Barrington J expressly recognised the need for the legislature to delegate responsibility for secondary legislation:

*“One of the tasks of legislation is to strike a balance between the rights of individual citizens and the exigencies of the common good ... [T]he facts of modern society are often so complex that the legislature cannot always give a definitive answer to all problems in its legislation. In such a situation the legislature may have to leave complex problems to be worked out on a case by case basis by the executive. But even in such a situation the legislature should not abdicate its position by simply handing over an absolute discretion to the executive. It should set out standards or guidelines to control the executive discretion and should leave to the executive only a*

1. From 1922 to 1947, approximately 5,007 statutory rules and orders have been made; and from 1948 to 2009, 23,760 statutory instruments have been made.

2. [2002] 2 IR 458.

3. [1999] 4 IR 26.

*residual discretion to deal with matters which the legislature cannot foresee.”<sup>4</sup>*

Similar comments were expressed by the Court in *Maher v Minister for Agriculture*<sup>5</sup>, where Fennelly J stated:

*“The necessary regulation of many branches of social and economic activity involves the framing of rules at a level of detail that would inappropriately burden the capacity of the legislature. The evaluation of complex technical problems is better left to the implementing rules. They are not, in their nature, such as to involve the concerns and take up the time of the legislature. Furthermore, there is frequently a need for a measure of flexibility and capacity for rapid adjustment to meet changing circumstances.”*

However, the increasing reliance upon statutory instruments and the scope of areas which they address can give rise to the suggestion that primary legislation is becoming more skeletal, with the real details being contained in a series of statutory instruments which are made after the enactment of the Act. This practice, combined with the fact that the Houses have no meaningful role as regards reviewing or scrutinising secondary legislation, has led some members of the Houses to argue that the widespread use of secondary legislation has, in effect, circumvented the legislative process.

In addition, an over-reliance on statutory instruments has given rise to some instances where the courts have found that certain statutory instruments constituted an unauthorised delegation of legislative power or were beyond the scope of the parent Act.

## **Secondary Legislation & Principles and Policies**

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The scope of secondary legislation is bound by the principles and policies of its parent Act and any attempt to exceed these limits is likely to fall foul of the courts. This ground rule can be attributed to the decision of the Supreme Court in *Cityview Press Ltd v An Chomhairle Oiliúna*.<sup>6</sup> The Court’s decision in this case was also significant because of its role in safeguarding

the role of the legislature.<sup>7</sup> In this regard, former Taoiseach Bertie Ahern is welcoming of the effect of the principles and policies test:

*“The position regarding the scrutiny of statutory instruments has improved mainly because the courts have become more strict regarding the content and scope of statutory instruments.”<sup>8</sup>*

The effect of the decision in *Cityview* is that primary legislation must encompass more matters of detail, and in particular, the legislature has to take great care to adequately articulate the principles and policies of the legislation, especially in circumstances where the making of secondary legislation is envisaged. In this way, the decision in *Cityview* has safeguarded the primacy of the Oireachtas as being the sole legislature.

## **ROLE OF COMMITTEES IN SCRUTINISING STATUTORY INSTRUMENTS**

### **Seanad Select Committee on Statutory Instruments**

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The Seanad Select Committee on Statutory Instruments was first established in 1948 and its remit involved examining pieces of secondary legislation with a view to determining whether the special attention of the Seanad Éireann should be drawn to it on certain grounds.<sup>9</sup> In discharging its role, the Committee frequently questioned Ministers (through correspondence) on the effect of specific provisions of statutory instruments which they had made or proposed to make. Prior to its demise in 1981, the Select Committee produced many reports which served to highlight to the Houses, the impact of certain statutory instruments.

### **Joint Committees on Secondary Legislation of the European Communities**

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The Joint Committee on Secondary Legislation was first established in 1973. The first Committee, which sat from 1973 until 1977, was

4. *ibid.*, at 70.

5. [2001] 2 IR 139.

6. [1980] IR 382.

7. There are a number of other court decisions which address the principles and policies tests. It is beyond the scope of this monograph to explore those cases in any detail. For further reading on this issue, see Hogan & Whyte, *Kelly - The Irish Constitution* (4th ed., Dublin, 2003) and Hunt, *The Irish Statute Book: A Guide to Irish Legislation* (Dublin, 2007).

8. Interview with author, 13 October 2010.

9. The ground applicable in 1948 were: (i) that it imposes a charge on

the public revenues; (ii) that it is made in pursuance of any enactment containing specific provisions excluding it from challenge in the courts either at all times or after the expiration of a specified period; (iii) that it appears to make some unusual or unexpected use of the powers conferred by the Statute under which it was made; (iv) that it purports to have retrospective effect where the parent Statute confers no express authority so to provide; (v) that there appears to have been unjustifiable delay either in the laying of it before Seanad Éireann or in its publication; (vi) that for any special reason its form or purport calls for elucidation. See 48 Seanad Debates Col. 410 (4 July 1948).

confined to examining proposed directives. In 1977 the Committee requested the Oireachtas to give it more powers to enable it to act in a more fruitful way.

In subsequent years, the role of the Committee was expanded so that it could examine programmes and guidelines prepared by the EEC as a basis for possible legislative action. The Committee also examined drafts of regulations, directives, decisions, recommendations and opinions of the Council of Ministers proposed by the Commission, as well as regulations made under the European Communities Act 1972. In 1993 this Committee became the Oireachtas Joint Committee on European Affairs.

### **Joint Committee on Legislation**

A Joint Committee on Legislation was established in July 1983<sup>10</sup> with a membership of 18 TDs and 7 Senators. Its purpose was to invite submissions from interested persons on Bills or other proposals for legislation referred to it by either House.

A Motion on delegated legislation tabled by former Minister John Bruton in the Dáil<sup>11</sup> and former Senator James Dooge<sup>12</sup> in the Seanad called upon the Joint Committee on Legislation or one of its sub-committees to “review the exercise of existing statutory powers of delegated legislation ... and that the Joint Committee report on whether, in order to maintain appropriate balance between the legislative supremacy of the Oireachtas and the needs of efficient Government, any special safeguards are desirable in regard to the future exercise of those powers and the delegation of such powers in future legislation.”

### **STATUTORY INSTRUMENTS AND THE ABSENCE OF SCRUTINY**

Aside from concerns which arise from the current approach whereby statutory instruments receive virtually no parliamentary scrutiny, there are three areas in particular where the absence of any systematic scrutiny of secondary legislation gives rise to special concern. They are, first, statutory instruments designed to transpose EU law which are made pursuant to section 3 of the European Communities Act 1972 and which can amend primary legislation; secondly, the growing body of statutory instruments which are said to be of “statutory effect”; and, thirdly,

statutory instruments which are made pursuant to what have become known as Henry VIII provisions in primary legislation, which purport to permit the making of secondary legislation to amend primary legislation.

### **Secondary Legislation & the Transposition of EU Law**

Article 29.4.10 of the Constitution provides that “[n]o provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities ...”. This provision places all domestic legislation which can be said to be “necessitated” by our membership of the EU, in the very special position of not having to be compatible with the terms of the Constitution. However, as Fennelly J alluded to in *Maher v Minister for Agriculture*<sup>13</sup>, not all pieces of legislation which seek to transpose EU law can be said to be “necessitated” within the meaning of Article 29.4.10:

*“It need not follow that in every case an exercise of a power delegated by Community law which is valid in the sense of being within the principles and policies laid down by the latter will survive scrutiny vis-a-vis other articles of the Constitution.”*

Primary legislation which can be said to be “necessitated” in this context is subject to scrutiny by the Houses in the same way as any other Bill which is put before the Houses. However, as regards secondary legislation, the situation is somewhat different as the bulk of secondary legislation made in any given year receives virtually no scrutiny.

### **Statutory Instruments Having “Statutory Effect”**

Consistent with Article 15.2.1 of the Constitution<sup>14</sup> and the case-law which has developed around it, legislation has traditionally been categorised as either being primary legislation (Acts) or secondary legislation (statutory instruments).

Coinciding with our accession to the EEC, there has been a tendency towards the creation of what can be described as a form of hybrid of legislation which seems to tread dangerously on the line which separates primary legislation

10. Pursuant to the Order of Dáil Éireann of 6 July 1983 and the Order of Seanad Éireann of 7 July 1983.

11. 351 Dáil Debates Col.601 (7 June 1984).

12. 104 Seanad Debates Col. 612 (28 June 1984).

13 [2001] 2 IR 139.

14. Article 15.2.1 of the Constitution provides “The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas; no other legislative authority has power to make laws for the State.”

from secondary legislation. The principal basis for statutory instruments of this nature is section 4(1)(a) of the European Communities Act 1972.<sup>15</sup> Section 4(1)(a) (as amended) provides that “[r]egulations under this Act shall have statutory effect”.

A similar approach, albeit with far more restrictive application, is contained in section 2 of the Immigration Act 1999 which provides that “Every order made before the passing of this Act under section 5 of the Act of 1935 ... shall have statutory effect as if it were an Act of the Oireachtas.” Similar provisions are also contained in section 6 of the Diplomatic Relations and Immunities (Amendment) Act 2006 and section 3 of the Stamp Duties Consolidation Act 1999.<sup>16</sup> Perhaps of most significance is the fact that this approach was utilised in section 5(1) of the European Communities Act 2007 so that an unknown and unidentified body of statutory instruments would have “statutory effect”.

By conferring “statutory effect” on statutory instruments in this way, the House are effectively abdicating their role in scrutinising a body of legislation which is asserted as having the same status as an Act of the Oireachtas which has been scrutinised by them.

### **Statutory Instruments and Henry VIII Provisions**

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It is well established that an Act cannot be amended by a statutory instrument (save as envisaged by section 3 of the European Communities Act 1972). Despite this, the legislature sometimes purports to authorise the making of secondary legislation to amend an Act, and on occasion, Ministers proceed to make such regulations. Such a provision is known as a Henry VIII provision.<sup>17</sup> It is so named because in the 16th Century, that Monarch had, through the Statute of Proclamations, claimed for himself the power to legislate unilaterally by proclamation.

An early example of a Henry VIII provision is to be found in section 99(2A) of the Companies Act 1963 (as inserted by Companies Act 1990

s.122).<sup>18</sup> It empowers the Minister for Enterprise, Trade and Employment to make regulations to amend section 99(2) of the 1963 Act in a substantive way.

Provisions of this nature give rise to two particular concerns. First, a provision in an Act which purports to confer the power to make regulations which can amend primary legislation is, having regard to Article 15.2.1, of doubtful constitutionality. Secondly, a Henry VIII provision in an Act can give rise to an action of unconstitutionality if regulations purporting to amend primary legislation are made on foot of it.

### **Safeguards for Secondary Legislation**

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On occasion, primary legislation, particularly where a Henry VIII provision is involved, will require that any such statutory instruments be laid before the Houses.<sup>19</sup> The laying of documents before the Houses can serve a number of different functions, principally to draw the making of the instrument to the attention of members of the Houses and in theory affords them an opportunity to table a motion to annul the instrument. The requirement to lay may be prescribed for a number of reasons, including:

- (i) to allow the passing of a certain number of days, within which the instrument may be annulled;
- (ii) to allow the passing of a certain number of days, within which the instrument may be annulled, before the statutory instrument can be of full effect; or
- (iii) to afford the Houses an opportunity to pass a positive resolution affirming the content of the instrument.

The laying of documents before the Dáil is governed by an Act<sup>20</sup> and also Standing Orders.<sup>21</sup> The laying of a document before the Dáil is effected by the delivery of a copy of the document to the Clerk of the Dáil. Once a document has been laid, its laying is noted in the Order Paper of each House, and it is then

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15. As amended by s.1 of the European Communities (Amendment) Act 1973.

16. This approach was again adopted in the Health (Miscellaneous Provisions) Act 2007, section 5(1) of which provides that: “every order under section 3 of the Act of 1961 made before the passing of this Act shall have statutory effect as if it were an act of the Oireachtas.” This approach has also been replicated in the Local Government Services (Corporate Bodies) (Confirmation of Orders) Act 2008.

17. A Henry VIII provision is a provision contained in primary legislation which either expressly or implicitly authorises the making of secondary legislation which amends primary legislation. See generally, *The Use of “Henry VIII Clauses” in Queensland Legislation* (January, 1997).

18. Section 99(2A) reads “The Minister may by regulations amend subsection (2) so as to add any description of charge to, or remove any description of charge from, the charges requiring registration under this section”.

19. The practice of laying instruments before parliament grew from the practice in the UK in the 1830s, so as to draw parliament’s attention to its content.

20. Houses of the Oireachtas (Laying of documents) Act 1966.

21. Standing Order 171 of the Dáil. Similar provision is made in respect of documents laid before the Seanad – see Standing Order 152 of the Seanad.

regarded as being a public document.

The key question in the case of secondary legislation which amends an Act, is whether this “safeguard” procedure is sufficient to prevent any possibility of it amounting to the exercise of an unconstitutional delegation of legislative power?<sup>22</sup> It would seem that the imposition of a laying requirement has been of some comfort to the courts when they have considered such matters. For example, in *Cityview Press v An Comhairle Oiliúna*<sup>23</sup>, the Supreme Court seemed to place some value in the power of annulment resting with the Houses:

*“Sometimes, as in this instance, the legislature, conscious of the danger of giving too much power in the regulation or order making process, provides that any regulation or order which is made should be subject to annulment by either House of Parliament. This retains a measure of control, if not in Parliament as such, at least in the two Houses. Therefore, it is a safeguard. Nevertheless, the ultimate responsibility rests with the courts to ensure that constitutional safeguards remain, and that the exclusive authority of the National Parliament in the field of law making is not eroded by a delegation of power which is neither contemplated nor permitted by the Constitution.”*<sup>24</sup>

However, in a more recent decision, *Laurentiu v Minister for Justice*,<sup>25</sup> Keane J was less sure about the value of the power of annulment in this context:

*“It is quite usual to find that the exercise of the rule making power is subject to annulment by either House and I do not underestimate the value of such a provision. However, even in the hands of a vigilant deputy or senator, it is something of a blunt instrument, since it necessarily involves the annulment of the entire instrument, although parts only of it may be regarded as objectionable. In any event, I do not think that it could be seriously suggested that a provision of this nature was sufficient, of itself, to save an enactment which was otherwise clearly in breach of Article 15.2.”*<sup>26</sup>

However, the power of annulment may come to be regarded as being a blunt instrument for reasons relating to its very effectiveness rather than for those reasons alluded to by Keane J. In this regard, a question which must arise is

whether the possibility of annulment exists as an actual or theoretical safeguard.

Labour Party whip, Deputy Emmet Stagg sees no value in the requirement that statutory instruments be laid before the Houses:

*“As a device to facilitate scrutiny, the laying a statutory instrument before the Houses, is virtually worthless because any attempt to challenge a statutory instrument which has been laid can only be done during private members’ time.”*<sup>27</sup>

In addition, some insight into the value of the power of annulment can be gleaned by examining the extent to which such pieces of secondary legislation are subject to scrutiny upon their making and also the number of instances in which the power of annulment has been invoked with success.

Of the 590 statutory instruments made in 2009, a statutory requirement to lay the instrument before the Houses would have applied to in the region of 120 instruments. There is no evidence to suggest that those instruments which are laid receive any greater degree of consideration by members of the Houses as compared with those instruments which are not laid. Despite a laying requirement being imposed in respect of perhaps several thousand statutory instruments, to date, it would appear that no statutory instrument which has been laid before the Houses has ever been annulled.<sup>28</sup>

In accord with Article 15.1.2 of the Constitution<sup>29</sup>, the Oireachtas is a tri-partite body comprised of the Dáil, Seanad and the President. The legislative process which a Bill goes through involves all three elements of the Oireachtas. In contrast, a statutory instrument which amends an Act and which is subject to a laying requirement, does not feature any involvement of the President. The fact that each House passes an order approving a draft regulation cannot be equated with the legislative process which a Bill goes through.<sup>30</sup> So on any interpretation, it would seem that secondary legislation which is laid before the Houses or which is approved by the Houses does not - and more importantly, nor can it be deemed to - fully satisfy the requirements of the legislative process envisaged in the Constitution.

Therefore, a question which must then arise

22. The value and effectiveness of such safeguards has been considered more fully in Hunt, *The Irish Statute Book: A Guide to Irish Legislation* (Dublin, 2007) Chapter 10.

23. [1980] IR 381.

24. *ibid* at 398.

25. [1999] 4 IR 26.

26. *Ibid* at 93.

27. Interview with author, 20 October 2010.

28. Though not constituting a statutory instrument, a motion was tabled

in the Dáil to annul the Statute CV of University College, Galway, which had been laid before Dáil Éireann on 26th January 1976 and the motion was passed. See 288 Dáil Debates Col. 1180 (3 March 1976).

29. The Oireachtas shall consist of the President and two Houses, viz.: a House of Representatives to be called Dáil Éireann and a Senate to be called Seanad Éireann.

30. See, Hogan & Whyte, *Kelly The Irish Constitution* (4th ed., Dublin, 2003) at para. 4.2.08.

is whether it is wise that the very Houses which authorise the making of a body of voluminous and often far-reaching secondary legislation, have no role, or certainly no meaningful role, in scrutinising or even monitoring the making of that legislation.

## INCREASING THE PARLIAMENTARY SCRUTINY OF LEGISLATION

### Parliamentary Scrutiny of Secondary Legislation

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There are several features which distinguish an Act from a statutory instrument. For example the scope of an Act must principally be within the confines of the Constitution, whereas in addition to fulfilling that requirement, the scope of a statutory instrument must be within the confines of its parent Act. A further differentiating feature is the unilateral way in which a statutory instrument is brought into being. The fact that a statutory instrument can be brought into force by a Minister acting alone, means that there is no opportunity for debate and invariably there is no advance warning of the making of a statutory instrument.

Statutory instruments are effectively made in silence. There are no parliamentarians present to keep a watchful eye on the Minister's pen. From a government perspective, statutory instruments can be an attractive means of legislating as it enables matters which are likely to be controversial or troublesome if debated on the floor of the Houses, to be committed to legislation without being questioned or challenged.

Invariably, the making of a statutory instrument is not preceded by a consultation process and the conduct of regulatory impact analysis in relation to statutory instruments is extremely rare. Consequently, the maker of a statutory instrument is therefore unlikely to have a real sense of the impact which the statutory instrument is likely to have on those who will be affected by it. This is in stark contrast with an Act which only becomes law when the related Bill has been debated and endorsed by a majority of members of the legislature. In some instances a draft version of the Bill will have been made available to the public and a process of regulatory impact analysis may have been conducted. This means that before a Bill becomes law, the public will have some sense of its content as well as its imminence.

The content of a statutory instruments is rarely, if ever, the subject of debate in the Houses and as already stated, on no occasion has a statutory instrument ever been annulled by the Houses. This is despite the existence of a requirement that some statutory instruments be laid before the Houses. Consequently there is virtually no parliamentary oversight in respect of this significant body of legislation. This has been a cause of concern to the Law Reform Commission which has stated:

*“The point can certainly be made that the absence of public discussion and review of statutory instruments militates in favour of poor or obscure drafting. It is a matter of concern that there has been no effective process of review of delegated legislation since the demise, in 1981, of the Seanad Select Committee on Statutory Instruments.”*<sup>31</sup>

The All-Party Oireachtas Committee on the Constitution, also expressed concern about the lack of any scrutiny mechanism:

*“The committee views with concern, however, the lack of any real facility to scrutinise statutory instruments, similar to the former Seanad Select Committee on Statutory Instruments.”*<sup>32</sup>

There appears to be agreement amongst Fine Gael and the Labour Party to the effect that the scrutiny of secondary legislation is seriously deficient, with former Fine Gael whip (now Government Chief Whip), Deputy Paul Kehoe stating:

*“The scrutiny of statutory instruments is totally inadequate, even in respect of those statutory instruments which are laid before the Houses, I don't believe that members even read which instruments have been laid.”*<sup>33</sup>

Labour Party whip, Deputy Emmet Stagg is adamant that the scrutiny of EU legislation is not what it ought to be:

*“The scrutiny of statutory instruments simply does not take place at all and this suits the Government. Officials in the Departments are particularly fond of skeletal legislation because it allows them to set out the detail of the legislation in statutory instruments which will not be examined by the Houses. From the point of view of scrutiny, this is one area which badly requires attention.”*<sup>34</sup>

But Ireland is by no means unique in not having put in place a process for the scrutiny of

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31. Law Reform Commission, Report on Statutory Drafting and Interpretation: Plain Language and the Law (LRC 61-2000) at p.2.

32. All Party Oireachtas Committee on the Constitution, Seventh Progress Report – Parliament (March 2002) at p.61.

33. Interview with author, 27 October 2010.

34. *ibid.*,

secondary legislation. With reference to what he saw as the inadequacy of the arrangements in place for the scrutiny of secondary legislation in Australia, one commentator<sup>35</sup> expressed concern about the failure to put in place a mechanism to scrutinise secondary legislation in some way:

*“The absence of formal machinery for consultation before making means that, if the Parliament is really going to exercise an oversight role in relation to the use by the executive of delegated power to make legislation, it needs to take steps to apprise itself of that legislation and have means available to those affected to raise their concerns.”*

He concludes by urging parliamentarians to take a more active role as regards secondary legislation on the basis that “[w]ithout some greater interest being taken in the substantive content of the ever increasing body of this form of legislation, the parliamentarians of today must be taken to have ceded a significant part of their legislative role to the executive.”

as part of this new role, it could be tasked with preparing reports on statutory instruments which could then be considered by the Dáil. Some years later, the Committee proposed that “Seanad Éireann should put in place an effective review system for statutory instruments.”<sup>37</sup>

## **A Way Forward**

The failure to put in place any arrangements for the scrutiny of the large volume of statutory instruments which are made each year represents a gap in the Houses’ role in scrutinising legislation.

In theory, it would be possible to provide for some level of parliamentary scrutiny of statutory instruments by requiring that every statutory instrument must be laid before the Houses. However, the value of laying is clearly questionable and is unlikely likely to enhance the level of scrutiny of those instruments in any real sense. An alternative approach could be the introduction of a requirement to the effect that no statutory instrument can take effect until thirty days have elapsed following its making. This should provide an opportunity for those likely to be affected by the statutory instruments to raise, with the Minister or State agency responsible, any constitutionally-rooted objections that they may have before the instrument comes into force.

The Seanad has been mentioned on a number of occasions, by others, as being a suitable venue where statutory instruments could be subject to some degree of scrutiny. In considering the roles which a reformed and enhanced Seanad might play, the All-Party Oireachtas Committee on the Constitution<sup>36</sup> was of the view that the Seanad could play an important role in monitoring the making of statutory instruments and that

36. All Party Oireachtas Committee on the Constitution, Second Progress Report – Seanad Éireann (1997).

37. All Party Oireachtas Committee on the Constitution, Seventh Progress Report – Parliament (March 2002) at p.61.





## Scrutiny in Practice

### INTRODUCTION

The preceding chapters have sought to examine the various factors which, to a greater or lesser extent, have a bearing on members' ability to scrutinise legislation. The purpose of this Chapter is to look closely at how, in practice, the legislature discharges its role in scrutinising legislation. Norton was of the view that "the fundamental task of legislatures is the making of laws"<sup>1</sup>, so how then does the Irish legislature fare in terms making laws?

By examining the parliamentary debates in relation to a small sample of Bills, this Chapter seeks to answer a number of questions, such as: How much legislation is enacted or made on an annual basis? How much time is spent scrutinising legislation as compared with other forms of parliamentary business? How long does it typically take a piece of legislation to make its way through the Houses? Who really are the participants in the task of legislative scrutiny? And, to what extent are legislative amendments which are tabled by the opposition accepted by the Government.

Whilst the data presented in this Chapter does not seek to be infallible, the data provides an evidence-based indication of the actual parliamentary practice in the areas examined.

### SITTING-DAYS

In accordance with Standing Orders, the Dáil and Seanad sit on Tuesday afternoons, Wednesdays, and Thursdays.<sup>2</sup> The Table below indicates the number of sitting days over the past 10 years and also at ten yearly intervals back to 1970.

The Table reveals that the number of sitting days has remained relatively steady, with an average of 92 sitting days over the past five years. Remembering that there are approximately 240 work days per year, the number of sitting days is relatively low and perhaps suggests members of the Houses are spending a very significant portion of their time in their constituencies. Yet when benchmarked against certain other countries, the combined sittings of both Houses places Ireland in third highest place, behind the

Table: Statutory Instruments Made

Year	Number of Sitting Days
2009	101
2008	96
2007*	76
2006	96
2005	92
2004	102
2003	97
2002*	67
2001	94
2000	90
1990	93
1980	85
1970	89

\* Denotes a general election year.

UK and Canada which are in first and second place<sup>3</sup>.

### USE OF PARLIAMENTARY TIME

Former Taoiseach, Bertie Ahern is critical of the way in which the Dáil conducts its business:

*"In my view the Dáil is not efficient, take a Wednesday in the Dáil for example, when you allow time for questions, the order of business and private members' time, you will find that there is very very little time left to deal with legislation which has been scheduled for that day. The work of the Dáil could be organised and carried out in a better and more efficient way."*<sup>4</sup>

A survey conducted by the Oireachtas Joint Committee on the Constitution found that TDs spend approximately 38% of their time in dealing with parliamentary based matters<sup>5</sup>. Delving into how that time breaks down reveals that: 23% is spent researching legislation or proposed amendments to legislation; 26% is spent participating in parliamentary committees; 22% is spent participating in Dáil debates; 13% is spent tabling parliamentary

1. Norton, Legislatures (Oxford, 1990) at p.5.

2. Pursuant to Standing Order 21 of Dáil, the normal sitting hours of the Dáil are as follows: Tuesday 2.30pm – 8.30pm; Wednesday 10.30am – 8.30pm; and, Thursday 10.30am – 4.45pm. In respect of the Seanad, see Standing Order 22 of the Seanad.

3. The Oireachtas performs well when benchmarked against other national parliaments in terms of total sitting days and sitting hours, recording

third place with a total of 201 sitting days and second place with a total of 1,593 sitting hours for both Houses. The UK recorded the highest total of 273 sitting days and 1,961 hours per year for both Houses. See Houses of the Oireachtas Commission, Annual Report 2009 p.28.

4. Interview with author, 13 October 2010.

Table 2: Use of Parliamentary Time

*Sample day in Year	Duration of Sitting Day	Requests for Adjournment/ Order of Business/ Statements/ Resolutions/ Adjournment Debates/Private Members Time	Oral Questions	Scrutiny of Legislation	Number of Votes Held	% age of debating time spent on scrutiny of legislation
2009	12hr	3hr 9min	1hr 24min	5hr 2min	5	42%
2008	6hr 50 min	1hr 38min	1hr 12min	3hr 47min	4	55%
2007	9hr 40min	8hr 47min	1hr 18min	0	0	0%
2006	9hr 25min	8hr 6min	1hr 37min	0	0	0%
2005	6hr 50min	3hr 53min	1hr 28min	1hr 56min	0	25%
2000	6hr 55min	5hrs 39min	1hr 53min	0	0	0%
1990	8hr 15min	1hr 30min	1hr 41min	4hr 20min	0	52%
1980	6hr 30min	3hr 19min	1hr 22min	1hr 2min	0	16%
1970	7hr	4hr 26min	1hr 12min	0	0	0%
1960	11hr 30min	1hr 16min	1hr 29min	7hr 31min	3	65%

\* Sample day is first Thursday in December in respect of the relevant year<sup>7</sup>. Column II includes time consumed by votes, adjournments and the calling of quorums. Speaking time has been calculated on the basis of 140 words per-minute.

questions on legislative issues; and 13% is spent participating in parliamentary party meetings.<sup>6</sup>

The Table above seeks to identify the portion of Dáil time spent in dealing with various types of business, in particular the scrutiny of legislation, calculated by reference to sample days.

Caution is required when interpreting this particular Table for a variety of reasons, including the fact that in the early decades covered in the Table, the Committee Stage debates on legislation would have taken place in the Dáil chamber whereas in more recent times, Committee Stage takes place in committee rooms and that latter time is not captured by this Table.

Whilst scrutinising legislation is one of the most important types of parliamentary business, the Table above demonstrates that in respect of the sample dates, the amount of time spent scrutinising legislation varies immensely from a high of 65% on a sample day in 1960 to no time whatsoever on a number of the sample days. This variation is reflective of the fact that on any given day Dáil time can be taken up with matters such as a full day debate on the Estimates<sup>8</sup> or statements in relation to matters of significant public importance. Interestingly, the Table indicates that over the time period examined, 25.5% of Dáil time was spent on the scrutiny of legislation<sup>9</sup>.

## LEGISLATIVE OUTPUT

One way to examine the efficiency of the Houses as a legislature may be to look simply at output – the number of pieces of legislation which is passed by them. Whilst recognising that the Houses are not a factory and that legislative output is worth noting, Table 3 illustrates the number of Acts passed by the Houses in the period 2000 – 2009 as well as the number of Statutory Instruments made during that time.

The Table indicates that the number of Acts enacted over the last ten years has remained relatively steady with the average number of Acts enacted annually over the period standing at 42. Whilst the number of Acts enacted has not risen significantly, the length and complexity of Acts has and consequently more parliamentary time is required for the purpose of conducting an adequate level of scrutiny.

The number of statutory instruments made in the period examined rose quite steadily to a peak in 2004 and 2005 before falling back considerably in 2009. Over the period, the average number of statutory instruments made stands at 718. The volume of statutory instruments made is notable for the fact that effectively none of them are the subject of any form of meaningful parliamentary scrutiny.

5. Joint Committee on the Constitution, Third Report - Results of Survey of Members of Both Houses of the Oireachtas (Feb, 2010) at p.23.

6. *ibid.*, at p.37.

7. 2009 – 3rd; 2008 – 4th; 2007 – 6th; 2006 – 7th; 2005 – 1st; 2000 – 7th; 1990 – 6th; 1980 – 4th; 1970 – 3rd; and, 1970 – 15th (second Thurs).

8. As occurred on the sample day in 2007.

9. A survey of the work of the British Houses of Parliament indicated that in the lower house, only 29% of parliamentary time was spent scrutinising legislation: Borthwick, "The Floor of the House" in Ryle & Edwards, *The Commons Under Scrutiny* (London, 1988) as cited in Humphreys, "Legislative Obstruction: How to Do It" 39(1) (1991) *Administration* 55.

**Table 3: Number of Acts and Number of Statutory Instruments 2009 – 2000**

Year	Number of Acts	Number of Statutory Instruments
2009	47	590
2008	25	607
2007*	42	872
2006	42	712
2005	34	926
2004	45	924
2003	47	741
2002*	34	654
2001	57	658
2000	43	495
1990	38	347
1980	44	414
1970	26	315

\* Denotes a general election year.

## LIFECYCLE OF A BILL

The Stages of the legislative process as set down in the Standing Orders of the Houses lend procedural expression as to how the Houses must set about discharging their role as the sole and exclusive legislature in the State. The various stages of the legislative process are therefore of real significance in relation to the scrutiny of legislation. As discussed in earlier chapters, the absence of the advance planning of the parliamentary agenda means that a Bill can often spend quite a long time in its journey towards enactment, gaining and losing priority

as it makes its way through the Houses.

The purpose of the Table below is to look more closely at the length of time it takes for a Bill to journey from its initiation through to its passing. The sample used for the purposes of this Table is each Bill which led to Act number 10 in each year from 2001 to 2010.

## Scheduling of Legislation

Perhaps what this Table demonstrates most starkly is the impact which the current approach to the scheduling of legislation has on the lifecycle of a Bill. Some Bills are clearly seen to progress with speed from stage<sup>10</sup> to stage whilst others meander through the Houses in a series of stops and starts with several months between each stage<sup>11</sup>. Also noteworthy is the fact that of the ten Bills examined, only three were initiated in the Seanad.

## Comparison of Houses

In every instance examined in this Table, the duration of the legislative process in the Seanad was very significantly shorter than that in the Dáil<sup>12</sup>, save for one instance in which the time spent in each House was one day<sup>13</sup>. In many instances Committee and Report Stage in the Seanad were taken together on the same day. Whilst one explanation for this practice might be that the reputedly more calm and focused atmosphere of the Seanad is more conducive

**Table 4: Timeframe for Passage of Bills Through the Houses (2001 – 2010)**

*Sample Act (Act No10 2001 - 2010)	Number of Sections Upon Initiation	Initiation Date & House	FIRST HOUSE Second Stage	Committee Stage	Report Stage	SECOND HOUSE Second Stage & House	Committee Stage	Report Stage	Returned to the First House	Number of Days in Dáil	Number of Days in Seanad	Initiation to Passing – Approximate Duration
Inland Fisheries Act 2010	80	16/11/2009 (D)	1/12/09 2/2/10	24/2/10	11/3/10	20/4/10 (S)	28/4/10	29/4/10	20/5/10	101 days	30 days	186 days
Social Welfare and Pensions Act 2009	23	15/4/09 (D)	22/4/09 23/4/09	28/4/09	28/4/09	29/4/09 (S)	29/4/09	29/4/09	N/A	7 days	1 day	15 days
Prison Development (Confirmation of Resolutions) Act 2008	2	17/6/08 (D)	24/6/08	24/6/08	24/6/08	26/6/08 (S)	26/6/08	26/6/08	N/A	1 day	1 day	10 days
Prisons Act 2007	42	10/11/06 (S)	22/11/06 23/11/06	28/11/06	5/12/06	1/2/07 14/2/07 (D)	27/2/07 28/2/07	7/3/07 8/3/07	20/3/07	48 days	14 days	131 days
Diplomatic Relations and Immunities (Amendment) Act 2006	7	29/9/05 (D)	29/9/05	6/12/05	15/2/06	22/3/06 (S)	6/4/06	6/4/06	N/A	140 days	16 days	281 days
Safety, Health and Welfare at Work Act 2005	89	21/6/04 (D)	14/10/04	21/11/04 24/11/04	23/2/05 26/04/05 4/5/05	11/5/05 (S)	17/5/05	31/5/05	15/6/05	171 days	36 days	359 days
Aer Lingus Act 2004	13	15/9/03 (D)	9/10/03 2/12/03 12/12/03 16/12/03	14/1/04	18/2/04	3/3/04 (S)	25/3/04	31/3/04	N/A	119 days	29 days	196 days
National Tourism Development Authority Act 2003	42	21/11/02 (S)	27/11/02	3/12/02	5/12/02 12/12/02	12/2/03 (D) 13/2/03	20/2/03	2/4/03	3/4/03	50 days	8 days	134 days
Gas (Interim) (Regulation) Act 2002	19	11/7/01 (S)	3/10/01	10/10/01	10/10/01	30/1/02 (D) 31/1/02 21/2/02	13/3/02	21/3/02	27/3/02	56 days	8 days	260 days
Housing (Gaeltacht) (Amendment) Act 2001	14	20/10/00 (D)	30/11/00 21/1/01	20/3/01	27/3/01	5/4/01 (S)	12/4/01	12/4/01	N/A	87 days	8 days	144 days

10. For example, the Social Welfare and Pensions Act 2009 which was passed by both Houses within 15 days; the Prison Development (Confirmation of Resolutions) Act 2008 was passed within 10 days.

11. For example, the Diplomatic Relations and Immunities (Amendment) Act 2006.

12. For example, the Inland Fisheries Act 2010 took approximately 4 months in its journey through the Dáil, whereas its journey through the Seanad was completed in 9 days.

13. For example: the Social Welfare and Pensions Act 2009.

to focused and more efficient debate, another possible interpretation is that once a Bill has passed all stages in the Dáil, pressure is perhaps mounted so as to ensure that its passage through the Seanad is swift.

The same pattern does not appear to be replicated in relation to Bills which are initiated in the Seanad, as (save for one instance) such Bills seem to enjoy an unpressured passage through the Seanad, with Stages being taken on different days, followed by a leisurely passage through the Dáil. Perhaps this suggests that the Seanad is likely to be afforded more time to consider Bills which are initiated in that House.

### Number of Sections and Duration of the Process

Of the Bills examined in Table 4, the average duration of the legislative process was 171 days. No Bill spent greater than one year on its journey through the Houses – the Safety, Health and Welfare at Work Act 2005 coming closest at 359 days.

One conclusion which may be drawn from Table 4 is that there seems to be little or no relationship between the length of a Bill (ie. the number of sections) and the period of time which it takes for it to pass all stages of the legislative process. The second shortest Bill – comprising 7 sections – took 277 days to pass, which is a significantly greater period of time than was required for many other longer Bills.

### Time Spent at Each Stage

A further consideration which emerges from Table 4 is the degree of consideration which is given to certain stages of some Bills. For example, of the ten Bills examined, five of them spent more than one day at Second Stage in the initiating House. A small number of Bills spent multiple days at certain stages, such as the Safety, Health and Welfare at Work Act 2005 which spent three days at Report Stage in the Dáil; the Aer Lingus Act 2004 which spent four days at Second Stage in the Dáil; and the Gas (Interim) (Regulation) Act 2002 which spent three days at Second Stage in the Dáil. The fact that the debate at one stage has taken a number of days can be indicative of a number of different factors, including a high level of interest amongst members to contribute to the debate on that legislation; a willingness of the Government to have the legislation extensively debated and scrutinised; the non-urgency of the Bill; and somewhat more cynically, it can perhaps indicate that the opposition are seeking to obstruct the Bill's passage by prolonging the debate.

### Intervals Between Stages

What can prove problematic for legislators is the occasional practice of moving a Bill at Second Stage very soon after its initiation. Whilst this did not occur in relation to any of the Bills in the Table examined above, this practice prevents members of the Houses from having sufficient time to consider the legislation, develop a position in relation to it and devise amendments. The taking of Committee and

**Table 5: Timeframe for Passage Through the Houses (Acts 1 to 5 of 2010)**

Taking the first five Bills which were passed in 2010, as with the previous Table, this Table looks at the length of time which it took for the relevant Bills to journey from their initiation through to their passing. The sample used for the purposes of this Table is each Bill which led to Act number 1 to 5 in 2010.

Act No 1 – 5 of 2010	Number of Sections Upon Initiation	Initiation Date & House	FIRST HOUSE Second Stage	Committee Stage	Report Stage	SECOND HOUSE Second Stage & House	Committee Stage	Report Stage	Returned to the First House	Number of Days in Dáil	Number of Days in Seanad	Initiation to Passing – Approximate Duration
Finance Act 2010 [No 5/2010]	155	4/2/10 (D)	9/2/10 10/2/10	23/2/10 24/2/10 25/2/10	9/3/10 10/3/10	24/3/10 (S)	25/3/10	25/3/10	30/3/10	30	7	56 days
Petroleum (Exploration & Extraction) Safety Act 2010 [No 4/2010]	4	18/1/10 (S)	28/1/10	4/2/10	16/2/10	23/2/10 (D)	10/3/10	24/3/10	30/3/10	36	20	72 days
George Mitchell Scholarship Fund (Amendment) Act 2010 [No 3/2010]	6	26/1/10 (D)	18/2/10	18/2/10	23/2/10 (S)	23/2/10	23/2/10	23/2/10	24/3/10	1	1	58 days
Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 [No 2/2010]	20	6/7/09 (D)	8/10/09	11/11/09	8/12/09 17/12/09	20/1/10 (S)	27/1/10	27/1/10	3/3/10	71	8	237 days
Arbitration Act 2010 [No 1/2010]	36	6/6/08 (D)	19/11/08 20/11/08	23/4/09	3/2/10	11/2/10 (S)	24/2/10	24/2/10	N/A	454	14	623 days

Report Stage together on the same day<sup>14</sup>, or separately on consecutive days<sup>15</sup> leaves virtually no time for issues raised at Committee Stage to be given serious consideration in advance of Report Stage.

The curtailment of the legislative process in this way can lead to cynicism amongst observers. It also fuels the contention made by some to the effect that the Dáil and Seanad are powerless in the legislative process and that they are there to merely “rubber-stamp” legislation which has been pre-determined by the government.

This Table examines the parliamentary life-cycle of the first five Acts enacted in 2010 with a view to facilitating a comparison between the practice of the preceding decade, as highlighted by the sample Acts examined in Table 4.

### **Scheduling of Legislation**

There is some evidence of Bills rolling from one stage to the next in a way which leaves an appropriate interval between stages<sup>16</sup>. This suggests that in respect of Bills which do not go into abeyance between Stages, it is possible for such Bills to be afforded a respectable degree of time for scrutiny, with adequate intervals between stages, and yet still secure enactment within a relatively short period of perhaps 50 to 70 days.

Table 5 also serves as a reminder of the fact that the advance scheduling of legislation is not practised, as two of the five Bills took a considerable length of time to be enacted - the longest being the Arbitration Act which took 623 days.

### **Comparison of the Houses**

Again (as with Table 4) there is evidence in Table 5 to suggest that legislation is pushed through the Seanad at a faster rate than that encountered in the Dáil. Of the four Bills initiated in the Dáil, every one of them experienced a curtailed legislative process in the Seanad.<sup>17</sup> Whilst this seems to mark the escalation of a trend which is evident in Table 4, perhaps what is most concerning is that a curtailed Seanad legislative

process was imposed in respect of two Bills which had languished for long periods in the Dáil. The Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 spent approximately six months in the Dáil and was pushed through the Seanad in seven days, whilst the Arbitration Act 2010 spent approximately 22 months in the Dáil before being passed by the Seanad in approximately 14 days. The length of time which each of these Bills spent in the Dáil clearly indicates that urgency was not the motivating factor behind the rushed legislative process in the Seanad.

Again the most startling trend which emerged from Table 4, is prominent in Table 5 – the fact that legislation undergoes a very significantly shorter legislative process in the Seanad, as compared with that of the Dáil.

### **Number of Sections and Duration of the Process**

As with the Acts examined in the previous Table, in Table 5 there seems to be no correlation between the length of a Bill and the period of time required for enactment. For example, a 155 section Bill took 56 days, whilst a 4 section Bill took 72 days. Of the sample Acts, the average duration of the legislative process from initiation to passing was 209 days.

### **Time Spent at Each Stage**

Only one Bill spent multiple days at one or more stages. The overall pattern which emerges is that each Bill tends to spend just one day at each stage of the legislative process. This trend is largely consistent with that which emerges from Table 4.

### **Intervals Between Stages**

The handling of the Finance Bill is of particular interest because of the importance of its subject-

14. For example, the Committee and Report Stages of the Social Welfare and Pensions Act 2009 were taken on the same day in the Dáil and all stages of the Bill were taken together in one day in the Seanad (the day after the Bill was passed by the Dáil). All Stages of the Prison Development (Confirmation of Resolutions) Act 2008 were taken in one day in the Dáil and one further day in the Seanad. All stages of the Diplomatic Relations and Immunities (Amendment) Act 2006 were taken in one day in the Seanad. Committee and Report Stage of the Gas (Interim) (Regulation) Act 2002 in the Seanad were taken together on the same day. Committee and Report Stage of the Housing (Gaeltacht) (Amendment) Act 2001 were taken together on the same day in the Seanad.

15. For example, Committee and Report Stages of the Inland Fisheries

Act 2010 taken on consecutive days in Seanad.

16. For example, Finance Act 2010 and Petroleum (Exploration & Extraction) Safety Act 2010.

17. In respect of the Finance Act 2010, Committee and Report Stage were taken together in the Seanad; in respect of the George Mitchell Scholarship Fund (Amendment) Act 2010, Second, Committee and Report Stages were taken in one day in the Seanad; in respect of the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010, Committee and Report Stages were taken together in the Seanad; and in respect of the Arbitration Act 2010, Committee and Report Stages were taken together in the Seanad.

matter and the breadth of its impact and, the fact that it runs to 155 sections also adds to its significance. There were only four clear days between the initiation of the Finance Bill and the opening of the Second Stage debate. The Finance Bill spent approximately 34 days in the Dáil and yet spent only 7 in the Seanad. In the Seanad, Second Stage and the remaining Stages of the Finance Bill were taken on consecutive days and both Committee Stage and Report Stage Stages were taken together in one day.<sup>18</sup>

All Stages of the George Mitchell Scholarship Fund (Amendment) Act 2010 were taken in the Dáil on one day and in one subsequent day in the Seanad. In respect of the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 and also the Arbitration Act 2010, both had Committee and Report Stages taken together in one day the Seanad.

## PARTICIPANTS IN LEGISLATIVE SCRUTINY

A question which arises is whether the task of scrutinising legislation is one which is shared amongst members on all sides of the House or whether it is a task which rests much more easily on the shoulders of those on the opposition benches. One way of assessing this is to look more closely at the various contributors at Second Stage in each House and secondly to look at the extent to which amendments are tabled at Committee and Report Stages.

## Attendance of the Sponsoring Minister

The sample of Bills examined in Table 6 shed some light on the level of participation by government Ministers in the legislative process. In respect of the Communications Regulation Bill and the Criminal Justice Bill, the sponsoring Minister attended five out of six stages across both Houses. In respect of the Petroleum Bill, the sponsoring Minister attended all stages in the Seanad and attended no stages in the Dáil. In respect of the Arbitration Bill, the sponsoring Minister steered the Bill through all stages in the Dáil and the Bill was then steered through the Seanad by a Minister of State. Only in one instance – the George Mitchell Scholarship Fund (Amendment) Bill – did the sponsoring Minister attend no stage of the Bill's journey through the Houses.

The data above would seem to dispel the perception that Ministers are reluctant to attend the Seanad. The Table seems to suggest that a sponsoring Minister was more likely to be unable to attend a stage in the Dáil rather than in the Seanad. In fact, the sponsoring Minister attended every Seanad Stage of three Bills, whereas in respect of the Dáil, the sponsoring Minister attended every stage of two Bills.

## Participation of Government Backbenchers

The data in Table 6 suggests that government backbenchers are most likely to participate in the Second Stage debate in the Seanad. Of the five Bills examined, in four out of five instances,

Table 6: Participation in the Legislative Process

Sample Act (Act No 1 – 4 & 6 of 2010)	Second Stage Contributors (D)		Committee Stage Contributors (D)		Report Stage Contributors (D)		Second Stage Contributors (S)		Committee Stage Contributors (S)		Report Stage Contributors (S)	
Arbitration Bill	Minister for Justice	1 FG 1 Lab* 1 SF*	Minister for Justice	1 FG 1 Lab*	Minister for Justice	1 FG 1 Lab*	Minister of State 2 FF 1 Gn	1 FG 1 Lab*	Minister of State 1 FF	1 FG 1 Lab*	-	-
Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Bill	Minister of State 1 FF	2 FG* 1 Lab*	Minister for Communications	2 FG* 1 Lab*	Minister for Communications	1 FG* 1 Lab* 1 FG# 1 Lab#	Minister for Communications 2 FF 1 Gn	1 FG 2 Ind	Minister for Communications 1 FF	1 FG* 1 Lab*	Minister for Communications 1 FF	1 FG* 1 Lab*
George Mitchell Scholarship Fund (Amendment) Bill	Minister of State	6 FG* 1 Lab* 1 SF*	Minister of State	1 FG* 1 Lab*	-	-	Minister of State 3 FG* 1 Lab 2 Ind	1 FG*	Minister of State	1 FG*	-	-
Petroleum (Exploration and Extraction) Safety Bill (initiated in the Seanad)	Minister of State 3 FF	1 FG* 1 Lab* 1 SF*	Minister of State 2 FF	1 FG* 1 Lab*	Minister of State	1 FG* 1 Lab*	Minister for Communications 1 FF	2 FG 1 SF 3 Ind	Minister for Communications 1 FF	1 FG* 1 Lab*	Minister for Communications 1 FF	1 FG 1 Lab* 3 Ind
Criminal Justice (Money Laundering and Terrorist Financing) Act	Minister for Justice	3 FG* 2 Lab	Minister for Justice 3 FF	1 FG* 1 Lab	Minister for Justice	2 FG 1 Lab	Minister for Justice and also Minister of State 3 FF* 1 Gn	2 FG* 1 Lab* 1 Ind	Minister for Justice 1 FF*	1 FG* 1 Lab*	Minister for Justice 1 FF	1 FG* 1 Lab*

Note: **FF**: denotes Fianna Fáil; **FG**: denotes Fine Gael; Lab denotes Labour Party; **Gn**: denotes Green Party; **SF** denotes Sinn Féin; **Ind**: denotes Independent.

\*: Denotes participation of party spokesperson on current issue. #: Denotes participation upon the resumption of the debate on a different day

18. Finance Act 2010.

Government backbenchers participated in the Second Stage debate in the Seanad and this level of participation falls to two out of five instances in respect of the Dáil. In relation to subsequent stages, government backbenchers seem more likely to participate during all stages in the Seanad, whereas in the Dáil, government backbencher participation at Committee and Report Stages seems surprisingly low.

### **Participation of the Opposition**

Each of the main opposition parties were represented at every stage of each Bill across both Houses. Looking at all stages in both Houses, the opposition had an average of 3.1 contributors at each stage. Members of the opposition appear to participate in greater numbers in the Second Stage debate in each House, appearing to yield to the relevant party spokesperson at Committee and Report Stage debates in each House.

### **Role of Independent Members**

Independent members of the Houses were far more likely to contribute in the Seanad contributing at Second Stage in the Seanad on four out of five occasions. In contrast, in respect of the sample Bills examined, no independent member of the Dáil contributed at any stage in that House.

## **TABLING AND ACCEPTANCE OF AMENDMENTS**

The tabling of amendments is an important part of the process of legislative scrutiny as it affords members an opportunity to put forward specific proposals which are aimed at improving the legislation. The trends which emerge in this respect are examined in Table 7 (see next page).

### **Critical Analysis of Legislation**

A number of observations may be made on the basis of the small sample of legislation examined in the Table 7.

The process from which proposed amendments are devised is one which has the detailed scrutiny of legislation at its heart. It may or may not be reasonable to suggest that those who have analysed a Bill for the purposes of ascertaining if the Bill requires improvement or amendment in some way, have engaged in the most meaningful way in the scrutiny of

legislation. A question which must then arise is whether those who have not analysed the Bill in this way, with a view to devising possible amendments are in some way abdicating their responsibilities as members of the legislature.

There are also indications to suggest that amendments are not tabled for the purpose of obstruction or delay or for the sake of tabling them. For example, in relation to the Arbitration Bill, at all stages in both Houses, Fine Gael decided against proposing any amendments and similarly, at all stages in the Seanad the Labour Party decided against proposing any amendments.

Whilst it is not appropriate for this work to assess the merits of the policy objectives behind each opposition amendment, what emerges from an examination of amendments tabled by the opposition is the quality of drafting. It is clear that a considerable degree of thought is invested in capturing the opposition's intent in language which is compatible with the legislation. It is this fact which ensures that the amendments which have been tabled by the opposition are, from a language and style perspective, fit for acceptance, should the Minister choose to so do.

### **Tabling of Amendments by Government Backbenchers**

As regards the participation of members at Committee and Report Stage, Table 7 reveals that of the Bills examined, government backbenchers did not table any amendments. This is reflective of the long-standing tradition in that regard. However, in spite of that, government backbenchers do, on occasion, participate in the debate on amendments which have been tabled by a Minister or a member of the opposition.

### **Volume of Opposition Amendments Tabled**

One trend which is notable is that there appears to be a significant decline in the number of amendments which are tabled by each party as the legislative process progresses, a decline which is particularly evident at the final stage in the second House.

The decline in the number of amendments tabled from stage to stage may be attributable to a number of factors which relate to the previous stage, including: the Minister's agreement to accept an amendment; the Minister's outright rejection of the policy objectives behind an amendment; or, the Minister's undertaking to consider again the point being made by the



**Table 7: Tabling and acceptance of Amendments**

		Dáil Committee Stage - Amendments Accepted (A) Or Undertaking to Consider Further (CF)	Dáil Report Stage - Amendments Tabled & comparison with Previous Stage	Dáil Report Stage - Amendments Accepted (A) Or Undertaking to Consider Further (CF)	Seanad Committee Stage - Amendments Tabled	Seanad Committee Stage - Amendments Tabled Seanad Committee Stage - Amendments Accepted (A) Or Undertaking to Consider Further (CF)	Seanad Report Stage - Amendments Tabled & comparison with Previous Stage	Seanad Report Stage - Amendments Accepted (A) Or Undertaking to Consider Further (CF)
Arbitration Act 2010 (1 of 2010)	0 FG 9 Lab	- 1 A, 4 CF	0 FG 4 (1 new, 3 S/I) Lab	- -	0 FG 0 Lab	- -	0 FG 0 Lab	- -
Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (2 of 2010)	6 FG 11 Lab	4 CF -	7 FG (1 new, 6 S/I) 14 (3 new, 11 S/I) Lab	- -	3 FG 12 Lab	- -	0 FG 2 (2 S/I) Lab	- -
George Mitchell Scholarship Fund (Amendment) Act 2010 (3 of 2010)#	0 FG 3 Lab	- 1 CF	N/A N/A	- -	0 FG 0 Lab	- -	N/A N/A	N/A N/A
Petroleum (Exploration and Extraction) Safety Act 2010 (4 of 2010)*	9 FG 1 Lab	1 A, 1 CF -	6 (6 S/I) FG 1 (1 S/I) Lab	- -	2 FG 10 Lab	- 1 A	1 (1 new) FG 5 (3 new, 2 S/I) Lab	- 2 A
Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (6 of 2010)	23 FG 8 Lab	- -	0 FG 7 (2 new, 5 S/I) Lab	- -	0 FG 7 Lab	- 1 CF	0 FG 8 (2 new, 6 S/I) Lab	- -
<b>TOTAL</b>	70 Tabled	2 A 10 CF	39 Tabled	0 A 0 CF	34	1 A 1 CF	16 Tabled	2 A 0 CF

Note: **A**: denotes amendment accepted; **C/F**: denotes an undertaking from the Minister to consider the matter further; **S/I**: denotes similar or identical to amendments tabled at Committee Stage in the same House; **\***: denotes a Bill which was initiated in the Seanad; **#**: denotes a Bill whose Committee and Report Stages were taken together in each House.

member of the opposition.

Of the five Bills examined in Table 7, four were initiated in the Dáil. At Committee Stage in the Dáil, 70 amendments were tabled and this fell to 39 at Report Stage. When the Bills moved to the Seanad, the number of amendments tabled declined further to 34 at Committee Stage, finally falling to 16 at Report Stage in the Seanad.

### Distinction Between Stages

Significantly, Table 7 seems to demonstrate quite clearly that the opposition parties do not treat each stage in each House as being just a re-run of the previous stage. One interpretation of the data above is that after Committee Stage, the parties or their spokespersons consider the discussions which were generated by the tabling of their amendments before deciding what amendments should be submitted for Report Stage. There are also indications that similar considerations are taken into account when a piece of legislation moves from one House to the other. Contrary to the common perception, the amendments proposed in the initial House

are not simply re-tabled en-masse in the second House.

### Acceptance of Opposition Amendments

One way of judging the effectiveness and worth of each stage of the legislative process is to look at the number of amendments which have been made to the Bill during that stage. However, the apparent non-acceptance of amendments in any House should not be taken to suggest that the tabling of amendments served no purpose because there will be instances where the Minister agrees to give further consideration to an opposition amendment which in turn prompts the Minister to bring forward his or her own version of the opposition amendment. As stated by Renton,<sup>19</sup> “it is the tendency of Ministers to purchase progress in Committee by giving undertakings to consider at Report.” Therefore, often the opposition’s objective is to extract an undertaking from the Minister to go away and re-consider the matter prior to Report Stage.<sup>20</sup> This practice indicates that members of the opposition do have some impact on the shape of legislation even in circumstances where

19. H.C. 538 of 1970-1971.

20. As stated by Griffith, “Much of the skill of debate in committee is directed to forcing the Minister to promise to reconsider. Incidentally,

this contributes in part to keeping the tone of committee debate relatively quiet.” - Griffith, Parliamentary Scrutiny of Government Bills (London, 1974) at p.121.

their amendments may be rejected outright.

Furthermore, to simply judge the worth and effectiveness of the legislative process purely from the point of view of the number of opposition amendments accepted would be to dismiss the importance of Second Stage which provides a meaningful opportunity to the sponsoring Minister to justify the Bill and explain its terms, while also affording members of the opposition an opportunity to question the Minister's rationale, identify gaps and make reference to areas warranting amendment.

Whilst Ministers do accept opposition amendments on some occasions, it remains a relatively rare occurrence.<sup>21</sup> However, where an amendment is viewed by the Minister as improving the Bill, the Minister may on some rare occasions, accept the opposition amendment in the form which it has been tabled.

Table 7 reveals the extent to which amendments tabled by the opposition are accepted outright or cause the Minister to undertake to consider the matter further in advance of the next stage. In relation to the five sample Bills examined, 70 amendments were tabled at Committee Stage in the Dáil, only two of which were accepted and an undertaking to give further consideration was given in respect of 10 of the amendments. Then at Report Stage in the Dáil, all 39 of the opposition's amendments were rejected. Of the 34 amendments tabled at Committee Stage in the Seanad, one was accepted and an undertaking to give further consideration was given in respect of one of the amendments. Finally, at Report Stage in the Seanad, of the 16 amendments tabled, two were accepted.

This data seems to suggest that the opposition's best prospect of having amendments accepted is at Committee Stage in each House. In overall terms, the data points to an extremely low rate of acceptance of amendments tabled by members of the opposition, which despite the small size of the sample used, seems to fairly reflect a much wider trend.

One high profile example which demonstrates the impact which the scrutiny of legislation by members of the Houses can have is former Senator Shane Ross' success in highlighting of a loophole in the government's plans to ban the publication of opinion poll results close to polling day.<sup>22</sup> Senator Ross highlighted the issue

by tabling an amendment which subsequently led to the government's decision to withdraw the proposed ban.<sup>23</sup>

A further example relates to the introduction of competitive tendering for the engagement of lawyers involved in Commissions of Investigation. The concept was first proposed by Deputy Jim O'Keeffe at Committee Stage of the Commission of Investigation Bill 2003<sup>24</sup> and was accepted in principle by the then Minister for Justice, Michael McDowell, who brought forward his own amendment to the same effect at Report Stage in the Dáil.<sup>25</sup> Another example of the value of scrutiny by members of the opposition is illustrated by the acceptance of a Labour Party amendment to the Sea Fisheries and Maritime Jurisdiction Act 2006 which resulted in the addition of the concept of "contiguous zone" to our maritime jurisdiction laws.

21. There are also some rare instances where an opposition-tabled amendment has been made to a Bill against the wishes of Minister. For example in the Seanad, an opposition amendment was made to the Charities Bill 2007 against the wishes of the sponsoring Minister which was subsequently reversed by the Minister at the next Stage.

22. The proposed ban was to form part of the Electoral (Amendment) Bill 2000.

23. See 167 Seanad Debates Cols. 1432 – 1458 (11 July 2001). See also "Government Drops Proposal to Ban Opinion Polls", Irish Times 12 July 2001. See also, "Poll Ban Move Turns Out to Be Another Fine Mess", Irish Times 12 July 2001.

24. Select Committee on Justice, Equality, Defence and Women's Rights (26 May 2004), Amendment No.38.

25. 588 Dáil Debates (29 June 2004) Col. 378, Amendment No.15.



**Concluding Remarks****INTRODUCTION**

The focus of this monograph has been to examine all of the various factors which help or hinder members of the Dáil and Seanad in their task of scrutinising legislation. As shown in the preceding chapters, there are several factors which can influence the degree to which legislation is scrutinised.

The role of the Houses in the scrutiny of legislation is founded in Article 15.2.1 of the Constitution, which is given expression in the Standing Orders of each House through what is termed the legislative process. From a scrutiny perspective, each stage of the legislative process is of significance in that it presents a potential opportunity for scrutiny. However, whether the potential for scrutiny transcends into actual scrutiny on the part of the Houses is a matter which requires consideration.

Whilst the Houses are the principal actors concerned with the scrutiny of legislation, it is also important to bear in mind that the scrutiny of legislation also occurs in places other than the Houses and at points both before legislation ever reaches the Houses, as well as after it leaves the Houses.

**INFLUENTIAL FACTORS**

Three principal factors stand out from all others in terms of their influence over the extent to which legislative scrutiny which is feasible. They are firstly, how people are elected to the Houses; secondly, how business is conducted in the Houses, and thirdly, the public's view of legislative scrutiny. The combined effect of these three factors, to a large extent, determine members' enthusiasm for, and effectiveness in, scrutinising legislation.

**Impact of the Electoral System on the Scrutiny of Legislation**

Much consideration has been given to the question as to whether changing the electoral system would lessen the burden of constituency work which TDs currently endure. As explored in Chapter 2, the Constitution Review Group

gave serious consideration to the merits of retaining or changing the current electoral system. It seemed to recognise the fact that changing the electoral system is not necessarily to going to deliver real change in the conduct of parliamentary affairs, including the scrutiny of legislation:

*"... while changing the electoral system may seem on the face of things to be an attractive cure for some malaise in the political system, such change may well not have the predicted effect. The ingenuity of political parties and the subtlety of voters allow systems to be worked in unforeseen ways."*<sup>1</sup>

The Review Group went on to refer to examples of other countries in which electoral reform failed to deliver the expected or desired changes. The All-Party Oireachtas Committee on the Constitution was equally skeptical of the perceived benefits of changing the electoral system and this led it to recommend against any change to the current system.<sup>2</sup> The matter was most recently considered by the Joint Committee on the Constitution which in its 2010 Report<sup>3</sup> concluded that there was not a compelling case for recommending a complete replacement of the PR-STV electoral system.<sup>4</sup>

It seems that the most favoured alternative to our current electoral system would be a system which has a significant list-system element within it. If elements of a list system were to be introduced into our electoral system, this would undoubtedly enable parties to introduce specialists in certain areas which could have a positive and worthwhile impact on the process of scrutinising legislation.<sup>5</sup>

It is clear that the current PR-STV electoral system with multi-seat constituencies encourages constituency service. However, even looking at other jurisdictions which have a different electoral system, constituency service appears to also be an important and significant feature.

Whilst electoral reform does have its advocates, there does not seem to be a groundswell of public opinion demanding change. In the absence of compelling evidence that electoral reform would lead to a significant improvement in the ability of individual members, and the Houses collectively, to

1. Report of the Constitution Review Group (1996) p.50.

2. All Party Oireachtas Committee on the Constitution, Seventh Progress Report – Parliament (Mar 2002) at p.29.

3. Joint Committee on the Constitution, Fourth Report - Review of the Electoral System for the Election of Members to Dáil Eireann (Jul,

2010).

4. *ibid* ., at p.160.

5. In other words, specialists in a particular field who would otherwise be uninterested in electoral politics because of the demands of constituency work and the demands of electioneering.

dedicate a greater amount of time to their parliamentary duties, and in particular, to the scrutiny of legislation, change for the sake of change seems hard to justify.

### **Dynamic of Parliament**

The second aspect of the political system which has a significant influence on legislative scrutiny is the dynamic of parliament. It is clear that in the years since the foundation of the State, our parliamentary system has been fine-tuned to its current condition whereby we have a strong government and a weak parliament. This has meant that the content of legislation is almost exclusively determined by the government majority which dominates both Houses.

As highlighted in earlier chapters, the government retains control over the agenda of the Houses and also the Committees. It may then be said that where government has the power to control what may be discussed, it also has the power to control what issues will be decided upon. This degree of government control clearly has an impact upon the level of scrutiny to which legislation is subject particularly as the government's priority will invariably be to have a Bill passed by both Houses with as few opposition amendments as possible having been made to it.

In order to facilitate an enhanced degree of scrutiny of legislation by members on all sides of the Houses, including government backbenchers, perhaps the dynamic of parliament requires recalibration so that it moves away from its current way of conducting business where the winner takes all, to the exclusion of all others. Whilst it is recognised that the government must govern, the task of scrutinising legislation would benefit from a move away from the current combative and at times contentious way of debating legislation towards the adoption of a more collaborative and inclusive approach to the shaping of legislation.<sup>6</sup>

### **A Disengaged Public**

The public tend to evidence little concern for the activities of parliament and this apathy, save for some clear exceptions<sup>7</sup>, deepens when it comes to the legislative process and the parliamentary scrutiny of legislation.<sup>8</sup>

One of the reasons why the electorate may care little about proposed legislation is that they have the comfort of knowing that the fundamental rights which they enjoy are safeguarded by the Constitution and the European Convention of Human Rights and they can therefore assume that legislation which is passing through the Houses will not encroach upon those rights.<sup>9</sup> However, the reality is that the Houses' legislative output can and often does affect the rights of ordinary people.<sup>10</sup>

But the other reasons for what seems to be a lack of care on the part of the electorate may perhaps be due to inertia combined with their belief that they can have no degree of influence over the terms of the proposed legislation. Whilst this may be untrue in many instances, it is nonetheless a perception which appears to prevail. Therefore, it would seem that if the public are to become re-engaged with the legislative process, they need to feel that issues which are addressed in legislation are 1. of real importance; 2. could or will have some direct impact upon them; and 3. that they can have a role in shaping those proposed laws.

Restoring public interest and engagement in the wider parliamentary process, and in particular in the scrutiny of legislation, is a necessary ingredient in ensuring that the task of scrutiny is itself enhanced. The approaches taken in other jurisdictions where public engagement plays a meaningful role are also worth considering. For example, Switzerland's approach of encouraging greater public engagement where proposed legislation on issues of national importance is to put those matters to the people by way of a referendum.<sup>11</sup> The use of referenda also have a role to play in Austria where a demand by 100,000 citizens

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6. As stated by one interviewee, "If a more inclusive approach were taken to the legislative process, where there was real scope for the opposition to have some influence over the final shape of the legislation, then both sides would work together and debates would then be more constructive." And also: "If there was more consultation and collaboration with the opposition, the business of the Houses, including the scrutiny of legislation could become so much more efficient." – Interview 2, 12 October 2010.

7. A recent example being the National Assets Management Agency Act 2009. It is arguable that the people's concern in relation to that Bill was more about the principle behind the legislation rather than the detail of the legislation itself.

8. Joint Committee on the Constitution, Third Report - Results of Survey of Members of Both Houses of the Oireachtas (Feb, 2010) suggests that the number of instances in which members of the public raise issues

with regard to legislation which is before the Houses is surprisingly small.

9. The level of the public's interest in legislation is also addressed in Hunt, *The Irish Statute Book: A Guide to Irish* 10. The more serious instances where the rights of persons are encroached upon are evidenced in successful court challenges which have been mounted to legislation – both primary and secondary.

11. In Lane and Ersson's view, the use of referenda opens up "the possibility of considerable citizen influence on the actions of political parties, if practices as in Switzerland." In their view, the use of referenda in Switzerland serve as "a brake" upon the power of national government but also serve "as a tool for minorities to assert their interests" since the rate of participation tends to be low. See Lane & Ersson, *Politics and Society in Western Europe* (London, 1999) at p.199.

will give rise to a referendum in relation to proposed legislation.<sup>12</sup> It may be that there are elements of these approaches which could be utilised in Ireland in order to encourage greater involvement by the public in the task of making and scrutinising proposed laws.

### COMPONENTS OF EFFECTIVE LEGISLATIVE SCRUTINY

The question as to whether the degree of scrutiny of legislation conducted by the Houses is adequate is one which generated different responses from those interviewed for the purpose of this monograph. Former Government Chief Whip, John Curran was of the view that the scrutiny of legislation in the Houses is adequate:

*“In my view the level of scrutiny which takes place in the Houses certainly is adequate. For example, I steered the Charities Bill through the Houses and I can say that that Bill received very detailed and thorough scrutiny.”*<sup>13</sup>

In contrast, former Government Chief Whip, Tom Kitt is of the view that the level of legislative scrutiny conducted by the Houses is “probably not as effective as it could be, especially when you look at what is being done in other parliaments”. He added that in his view, “scrutiny really takes place at Committee Stage.”<sup>14</sup> Regarding the dominance of the Executive and the impact which this has on the degree of scrutiny, former Deputy Kitt had this to say:

*“In the main, I think that the Executive does get its way and the effect of this is that the role of the Houses has been reduced to that of a rubber-stamp for the decisions and policies of the Executive, but I can think of several examples where Government plans were revised so as to take account of ideas advanced in the Houses by the opposition.”*<sup>15</sup>

Former Taoiseach, Deputy Bertie Ahern rejects the suggestion that the Houses serve as a “rubber-stamp” for proposals which have been decided upon by the Executive:

*“The Government certainly doesn’t regard the Houses as a rubber stamp. The fact that you hold a majority in the Houses is not something which is on your mind when you are making policy decisions or drawing up legislation which needs to be endorsed by the Houses.”*<sup>16</sup>

In order to be in a position to objectively assess whether the role of the Houses in the scrutiny of legislation is adequate or otherwise, it is necessary to look back at the various components of the legislative process (examined in the earlier chapters) and the role which the Houses play in relation to each.

In its broadest sense, legislative scrutiny is not something which only takes place during Committee Stage and Report Stage. In order to be in a position to adequately scrutinise legislation, members of the Houses must have an opportunity:

- (i) to influence the Bill prior to its initiation;
- (ii) to prepare for the Bill in advance of its tabling;
- (iii) to understand the Bill once initiated;
- (iv) to look behind the Bill;
- (v) to consult with those with an interest in the Bill;

and

- (vi) to influence the shape of the Bill during the legislative process.

This series of considerations are now assessed in the context of the current parliamentary and legislative processes.

#### **(i) Opportunity to Influence Prior to Introduction of the Bill**

*Do members have an opportunity to potentially influence the shape of the legislation prior to its initiation in the Houses?*

As discussed in Chapter 6, pre-legislative scrutiny which takes place prior to the publication of a Bill remains more the exception than the rule. Equally sparse is the level of consultation which takes place after a Bill has been published. When utilised, both initiatives encourage members of the Houses, experts and the wider public to engage with the task of refining the legislation at an early stage. Such input can only enhance the legislative product which emerges.

It seems widely accepted that legislation which has been parsed and considered by persons with differing perspectives will make for better legislation. The task of consultation can often reveal gaps or flaws in the legislation which can be remedied at an early stage. Also, it seems reasonable to suggest that consultation smoothes the ensuing legislative process in that members of the Houses will already have had an

12. In Italy, a demand by 500,000 people can force a referendum on a legislative proposal. The referendum facility is also part of the Danish and also Swedish political systems.

13. Interview with author, 17 November 2010.

14. Interview with author, 4 November 2010.

15. *ibid.*,

16. Interview with author, 13 October 2010.

opportunity to air their concerns. Yet, too often this valuable input is seen at coming at too high a price to Ministers and their officials – that price being speed. Consequently, the opportunities for members to influence a Bill prior to its introduction in the Houses remain extremely rare.

### **(ii) Opportunity to Prepare for the Bill Prior to its Tabling**

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*Do members have advance knowledge of when legislation is likely to be debated in the Houses, such that they can arrange their own work schedule in advance?*

Some might argue that the stop-start nature of the legislative process, combined with the absence of any advance planning of the parliamentary agenda and the scheduling of Bills, together make for an inefficient legislature. Under the current arrangements, members can receive as little as 4 to 7 days notice of when a Bill will be taken at a particular stage of the legislative process.

More precise, advance indications as to when legislation is likely to be initiated and tabled at Second and subsequent stages as well as closer adherence to the Government's legislation programme, could mean that members on all sides of the House are better equipped to anticipate the upcoming legislation and this could enable them to make advance preparations for their contribution to a particular debate.

*Do members have the opportunity to set-aside other competing demands so as to be able to dedicate a sufficient amount of time to the task of scrutinising legislation?*

It is clear from the results of the survey conducted by the Joint Committee on the Constitution<sup>17</sup>, that members of the Dáil see their role, first and foremost as being there to serve the needs of their constituents and intervene on their behalf in their dealings with agencies of the State. And so it follows that it is the electorate's expectation that the local TD is there to serve those needs.

Whilst it has not been possible to pinpoint concrete evidence to this effect, it seems reasonable to conclude that the priority afforded to constituency work, and the amount of time which it consumes, has a real impact on the level of time available to members to dedicate to

the scrutiny of legislation. Ultimately, this must have a detrimental effect on the adequacy of legislative scrutiny.

### **(iii) Understanding of the Bill**

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*Are members afforded an opportunity to gain a deep understanding of the Bill as well as the reasoning behind its introduction?*

Understanding the Bill is a prerequisite to a member being in a position to scrutinise that Bill. Having an appreciation of the purpose and objectives of the legislation is therefore an important part of this. The purpose and objectives of a particular piece of legislation may not always be clear to members of the Houses from a reading of the legislation alone. Often then, a greater insight into the legislation must be gleaned from other sources.

It is important that members have an opportunity in advance of any formal stage of the legislative process, to gain a deeper understanding of the legislation, whether through the formal setting of pre-legislative scrutiny, through briefings from Departmental officials or through informal contact with those officials.

As already alluded to, in practice, the opportunities for members to engage in this way would seem to be extremely limited. The prevailing practice of only discovering the Minister's intent at Second Stage does not seem conducive to a satisfactory degree of scrutiny.

*Do members have access to the Explanatory Memorandum and RIA associated with the proposed legislation?*

Upon initiation, most Bills are accompanied by an Explanatory Memorandum which seeks to explain the purpose of the Bill and outlines the effect of its key sections. Occasionally, an Explanatory Memorandum can be unhelpful where it does not adequately explain the provisions of the Bill or where the text of the section of the Bill itself is merely repeated in the Explanatory Memorandum in place of a more clear, plain language explanation.

Unlike Explanatory Memoranda, there currently no requirement that a regulatory impact assessment (RIA) be conducted in relation to every Bill<sup>18</sup> and, as a consequence, many Bills which are initiated each year do not have the benefit of an associated regulatory

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17. Joint Committee on the Constitution, Third Report - Results of Survey of Members of Both Houses of the Oireachtas (Feb, 2010).

18. In July 2008, the Taoiseach published a Review of the Operation of Regulatory Impact Analysis which examined the implementation of

Government policy on the conduct of Regulatory Impact Assessments. It found that only half of all primary legislation enacted in 2007 was accompanied by a screening RIA.

impact assessment. Even where a RIA has been conducted in the course of preparing the Bill, the RIA is not published in conjunction with the Bill in the way that an Explanatory Memorandum is, and in some instances RIAs are not published in a timely way or even at all.<sup>19</sup> Consequently, this has caused members of the Houses and the wider public to experience some difficulty in locating a copy of an RIA.

A thorough RIA has the potential to serve as a valuable aid to a member of the Houses who seeks to scrutinise the related legislation. However, due to the low rate at which RIAs are conducted and subsequently published, the value which they could add to the task of scrutiny is not being fully realised.

#### **(iv) Opportunity to Look Behind the Legislation**

*Do members have access to the research papers and working papers which were relied upon by the Departmental officials who devised the legislation?*

Where legislation is based upon a report of the Law Reform Commission, a working group or committee of the Houses, the resultant reports will be readily accessible. However, where the legislation has been informed by the reports of experts which have been commissioned by the Minister or Departmental officials, such reports might not be made available. In addition, research papers, comparative analyses and other working documents which informed the legislation will not ordinarily be made available to members of the Houses who are tasked with scrutinising the legislation. This means that, in those circumstances, the depth of knowledge of the officials who devised the legislation will be superior to that of the elected members of the Houses who are charged with the task of scrutinising and enacting that legislation. Therefore, such an approach is not conducive to an adequate degree of legislative scrutiny.

*Are members afforded an opportunity to conduct or commission research, including comparative research on the subject-matter of the legislation in advance of the taking of a stage of the legislative process?*

It is important that there is an adequate interval between publication of the legislation and its taking at Second Stage. This will afford members an opportunity to commission or carry out their own research into the subject matter of the legislation, and perhaps also look

at the approaches taken in other jurisdictions. On occasion, a Bill might be published only a few days or indeed one day, before its taking at Second Stage. Such an approach denies members of the opportunity to research and truly scrutinise that Bill before making their contribution on the floor of the Houses.

#### **(v) Opportunity to Consult with Interested Parties**

*Do members have an opportunity to engage with experts, stakeholders and the wider public so as to seek their views on the legislation before the legislation is taken at Second Stage?*

Whilst individual members of the Houses can bring their own particular perspectives to a debate on legislation, consultation with experts, stakeholders and the wider public will provide members with a more broad sense of the impact which the legislation will have, as well as a sense of the possible alternative approaches which could be taken.

Such consultations should ideally take the shape of pre-legislative scrutiny before the Bill is initiated in either House. Where that does not occur, a process of consultation which takes place after the Bill's initiation is also valuable. However, in order to be of real benefit to those scrutinising legislation, members of the Houses including the sponsoring Minister, must be afforded a sufficient amount of time to consider the views expressed to them during the process before the Bill is taken at Committee Stage. Where such intervals are not built into the parliamentary schedule, the value which consultations could otherwise add to the task of scrutiny is diminished.

#### **(vi) Opportunity to Influence During the Legislative Process**

*During Second Stage, do members have an opportunity to articulate their views and highlight areas of concern in relation to the Bill and to debate those concerns with other members in the House?*

An important part of the process of scrutiny is the opportunity which it affords members to express their views on the legislation which is before them. In this regard, Second Stage provides members with an important opportunity to air their views on the Bill. However, the format of the debate which take

19. The Taoiseach's report entitled a Review of the Operation of Regulatory Impact Analysis highlighted the public perception that RIAs were not being carried out, or if they were, they were not being published. This

is borne out in the revelation that in the period June 2005 to June 2008, only one RIA had been published.



place at Second Stage is not conducive to a free-flowing and interactive debate. This occurs for two reasons, firstly, because members are not free to interject or spontaneously respond to the contribution of another member. This means that even the Minister is precluded from providing an immediate response to points made by members during the course of the debate. Secondly, the existence of precisely timed speaking slots, means that even those members who plan to participate in the debate will tend to remain absent from the chamber until moments before their contribution begins and will invariably leave shortly after they conclude their contribution.

As a result, it can be said that whilst Second Stage does afford all members an opportunity to express their views and air their concerns in relation to the legislation, the lack of any interaction between members participating in the debate means that, from a scrutiny perspective, Second Stage is not conducive to a great degree of scrutiny.

*Are members afforded an opportunity to devise and table amendments to address their concerns?*

At Committee Stage and Report Stage, members are provided with an opportunity to table amendments which are designed to address their concerns in relation to the Bill. Whilst some restrictions are imposed on the type of amendments which may be tabled, members have a relatively free rein in relation to the tabling of amendments.

However, one factor which can impact upon members ability to devise amendments is the time window between the conclusion of Second Stage and the commencement of Committee Stage, and also the interval between Committee Stage and Report Stage. Where the intervals are short, this may not allow members a sufficient amount of time to devise and draft amendments.

*During Committee Stage and also Report Stage, do members have an opportunity to debate their own amendments in a meaningful way with the sponsoring Minister?*

Where the duration of Committee Stage and Report Stage are not subject to a predetermined time limit, those stages normally only conclude once all of the amendments which have been tabled, have been discussed. Therefore in the normal course of events, members do have an opportunity to debate their own amendments in a meaningful way with the sponsoring Minister. In some instances, the grouping of amendments

can affect the extent to which a member's proposal is debated.

However, in circumstances where the parliamentary guillotine is used to bring an end to Committee Stage or Report Stage within a predetermined time period, the consequences often are that the remaining opposition amendments are not reached, are not debated and are therefore automatically deemed to have been rejected, whereas, amendments which have been tabled by the sponsoring Minister, but remain unreached, are deemed to have been accepted. This means that amendments of substance which have been tabled by the Minister are inserted without any degree of scrutiny, whilst amendments tabled by the opposition are rejected on a wholesale basis, without any regard to their merits. Curtailing the process of scrutiny in this way is undoubtedly detrimental to the very task of scrutiny as it effectively prevents a core feature of scrutiny from taking place.

As regards adequately debating amendments, a similar problem arises where stages are taken together. For example, where Committee and Report Stage are said to be taken together, in practice what this usually means is that Committee Stage is the only stage which is taken and therefore members have only one opportunity to discuss their amendments. From a scrutiny perspective, the practice of taking stages together shortens the legislative process in a way which deprives members of an opportunity to consider the legislation one further time. This is especially significant as it prevents members, including the sponsoring Minister, from considering points which are made at Committee Stage with a view to reconsidering the issues in advance of Report Stage.

*During Committee Stage and also Report Stage, do members have a reasonable prospect of having well drafted and well argued amendments accepted by the sponsoring Minister?*

Whilst the acceptance of amendments tabled by members of the opposition is not the sole indicator of the effectiveness of the process of scrutiny, it does provide a sense of the openness of the sponsoring Minister to the views of those outside his or her Department. Having an amendment accepted is perhaps one aspect of the scrutiny process where members can point to concrete evidence of the influence which they have had over the shape of the legislation.

However, as illustrated in Chapter 9, the instances in which Ministers are likely to accept amendments which have been tabled by the opposition are relatively rare. The danger

inherent in this reluctance to accept amendments is that members of the Houses can come to view Committee Stage and Report Stage as being stages where their proposals do not receive serious consideration and consequently might conclude that investing time and effort in devising and debating amendments is not worthwhile.

On occasion, in response to an amendment tabled by the opposition, a Minister might indicate his or her willingness to re-consider the matter raised, and undertakes to bring forward his or her own amendment at the next stage should he or she consider it warranted. As shown in Chapter 9, Ministers quite frequently give such undertakings and on occasion, a Ministerial amendment results from the proposal made by a member of the opposition.

*Are members sufficiently informed of the purpose of Ministerial amendments?*

Whilst members of the Houses will invariably have had the opportunity to peruse the Explanatory Memorandum which assists their understanding of the legislation, no such explanatory note is made available to them in respect of proposed Ministerial amendments. Whilst the text of Ministerial amendments are made available shortly before the commencement of Committee and Report Stages, most members will see Ministerial amendments for the first time when they sit down at Committee or Report Stage to actually consider those amendments. The real purpose of the amendments will only become apparent when the Minister moves the amendments and provides an explanation. This means that members have virtually no time to consider what their response to the amendments ought to be and such an approach does not foster a good degree of scrutiny in so far as Ministerial amendments are concerned.

*In casting their vote for or against the passing of a Bill at each Stage of the legislative process, and also when casting their vote on an amendment which is being pressed by a member of the opposition, are members on all sides of the House fully aware of the terms of the legislation or the purpose of the amendments in question?*

The vote which takes place at the end of each stage of the legislative process is a milestone in the parliamentary life of each Bill, it is a truly significant part of the legislative process as the vote will indicate whether each House endorses or rejects the Bill which is before them.

In view of their workload, it seems that it is not possible for every member of the Houses to

be fully aware of the purpose of every Bill which is being taken on a given week and therefore it seems highly likely that, save for the relevant party spokespersons, members are not making an informed decision when it comes to voting on the acceptance or rejection of a Bill or an amendment. This view is supported by former Fine Gael whip (now Government Chief Whip), Deputy Paul Kehoe:

*“Such is the extent of TD’s commitment to constituency matters that half wouldn’t know what is being discussed in the Dáil from week to week and many of them would not know the detail of an issue which they are being asked to vote in the Houses upon.”<sup>20</sup>*

This practice is a direct consequence of the strict whip system which operates in the Houses, whereby when the division bell rings and members enter the Houses to vote, they are instructed by the party whip or their colleagues as to how they must cast their vote on that particular division. Therefore as members have no discretion in how to cast their vote, they do not see it as being their business to fully understand the merits of what is being voted upon. In this respect the whip system denies members of their voice as individuals, and as elected representatives. In addition, this approach is clearly detrimental to the task of scrutinising legislation as it effectively encourages each member to abrogate his or her duties as a legislator in favour of the stance adopted by the party, as enforced by the party whip.

## INTEGRITY OF THE LEGISLATIVE PROCESS

As stated earlier, the root of the legislative process lies in Article 15.2.1 of the Constitution and its detail is prescribed by the Standing Orders of each House. The clear intent of Standing Orders is that each stage of the legislative process will be a separate stage which will allow the legislation to be scrutinised in its fullest sense.

As the parliamentary schedule is determined only on a week to week basis, members of the Houses currently have no way of knowing which piece of legislation will be debated in two or three weeks’ time. This means that they have no opportunity to make advance preparations for legislation which they will be scrutinising in the weeks ahead. The settling of an outline of the parliamentary schedule for one or several months in advance could redress this difficulty.

Whilst it is not a formal part of the legislative process, in the instances where it has been used, consultation on the content of proposed legislation has shown itself to be a worthwhile part of the task of devising legislation. Whilst consultation may add more time to the task of preparing legislation, because it facilitates collaboration at an early stage, it can assist in smoothing a Bill's passage through the Houses. It seems reasonable to conclude that, at present, consultation is not a valued part of the task of devising policy and drafting legislation.

Once legislation is initiated, it is important that members of the Houses are in a position to gain a really good understanding of the legislation. The principal source which enables members to understand the legislation is the Explanatory Memorandum accompanying the Bill, as well as the Debate Pack or Bills' Digest which is produced by the Oireachtas Library and Research Service. Regulatory Impact Assessments play a lesser role due to their lack of availability. The availability of these secondary sources of information is of importance as it should enable members to have a full understanding of the purpose of the legislation, so that all stages of the legislative process can be utilised for scrutiny rather than information gathering.

In terms of being equipped with the best available information relating to the legislation, it seems that the Minister and his or her officials are likely to be in a superior position to that of all other members of the Houses. Whilst the development of the Library and Research Service at the Houses has significantly enhanced the information available to members, it seems that a greater degree of sharing of information by the sponsoring Minister would enable members to assess and utilise the same information which was available to the Minister and his or her officials.

Once a Bill has been published, the effectiveness of the scrutiny which that Bill receives will, in most instances, be influenced by the amount of time which members have to analyse and research the legislation - the time interval between the initiation of the Bill and its taking at Second Stage, and the interval between each subsequent stage are therefore of significance.

Whilst in the normal course of events the stages of the legislative process do afford members on all sides the opportunity to express their views on the legislation which is before them, that freedom effectively disappears upon the calling of a division, because members are then subject to the direction of their party whip. In many respects the whip system discourages

or even prevents members from engaging in independent thinking and articulating personal perspectives where to do so goes against the party line. If members feel constrained in this way, it must follow that this impacts upon the degree to which legislation is scrutinised; this logic seems equally applicable to members on all sides of the Houses. Of course the alternative to political parties and the whip system is a parliament which is fragmented, with shifting loyalties and one with which the electorate has little affinity.

Members' opportunity to express their views on the legislation which is before them is also diminished in circumstances where the government of the day seek to rush a Bill in manner which results in the legislative process being curtailed – as generally happens when a Bill is said to be urgent, or as frequently happens, when a parliamentary session is coming to an end. This manifests itself in the taking of stages of the legislative process concurrently, or when stages are simply curtailed after a set period of time.

The rushing of Bills and the curtailing of debate undoubtedly has a real impact on the level of scrutiny to which a Bill can be subjected. One could argue that the prevailing rule ought to be that in the absence of some exceptional circumstances, a Bill should undergo a legislative process which is not curtailed in any way. Of course, it is important to also recognise that there are certain, exceptional circumstances in which the speedy enactment of a Bill is required.

## ABSENCE OF REFORMS

As discussed in Chapters 5 and 6, various initiatives to reform the approach to policy development outside the Houses, as well as changes to procedures in the Houses, have combined to bring about some improvements in the degree of scrutiny to which legislation is subjected. However, those reforms have been introduced on an incremental and piecemeal basis, whereas, what seems to be required is a series of radical parliamentary reforms aimed at significantly enhancing the ability of members to scrutinise legislation.

Former Taoiseach, Bertie Ahern attributes the lack of real reform to the absence of all-party agreement on the best way forward:

*“Major reforms such as the reduction in the number of TDs has not happened because to achieve it you need cross party consensus and that just is not forthcoming.”<sup>21</sup>*

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21. Interview with author, 13 October 2010. Similar views were expressed by former Government Chief Whip, John Curran: “Dáil and Seanad

reform has not happened because securing cross-party agreement did not prove possible.” – Interview with author, 17 November 2010.

Prior to leaving office, former Government Chief Whip, Tom Kitt had nursed a package of reforms to an advanced stage. As to the whereabouts of those proposed reforms, he states:

*“We had about 80 or 90% agreement on a package of reform proposals, and then we had a change of leader. Any reform proposals have to be agreed upon by the Taoiseach and it may be the case that the [current] Taoiseach and his Cabinet colleagues are not in agreement with the package of reforms which had been put forward by the whips.”*<sup>22</sup>

Labour Party whip, Deputy Emmet Stagg is clearly frustrated at the lack of Dáil reform:

*“One of the reasons why Dáil reform has not taken place is because the opposition’s interests in reform are counter to the Government’s interests.”*<sup>23</sup>

In acknowledging that Dáil reform has traditionally been introduced only in circumstances where there is all-party consensus, Deputy Stagg is of the view that “in many respects this desire on the part of Government for consensus serves a handy crutch for doing nothing in terms of reforms.” He went on to insist that “consensus is not an essential pre-requisite for Dáil reform” and he pledged that once in government, the Labour Party will introduce a series of reforms “with or without consensus”.<sup>24</sup>

Irrespective of where the blame lies, the pace of reforms to date has been a cause of great frustration to many, as put by one commentator:

*“Our politicians should stop talking about and do something about substantial and immediate Dáil reform ... Cabinet should take the lead on such initiatives and if it doesn’t [government] backbenchers ... should insist on change and/or opposition politicians should refuse to continue to participate in our current parliamentary charade by withdrawing from the chamber.”*<sup>25</sup>

According to a Report of the *All-Party Oireachtas Committee on the Constitution*<sup>26</sup>, if the Houses are to be in a position to discharge its functions, particularly in relation to the scrutiny of legislation:

*“[T]he structure and procedures of parliament must be such as to enable the scrutiny of proposed legislation to be informed and searching, and to encourage as appropriate the amendment of that legislation to reflect well-grounded concerns and views expressed within parliament.”*

Whilst government parties have been happy to exercise their dominance over the Houses in all other respects, it would seem that in relation to achieving reforms of the Houses themselves, successive governments insist that parliamentary reforms cannot take place without the imprimatur of the opposition parties. Whilst government and opposition parties have together discussed reform packages, it is clear that there has never been sufficient agreement to introduce a series of radical reforms.

## CLOSING THOUGHTS

This monograph has sought to shed some light on the way in which the Houses discharge one of their primary responsibilities – that of the sole law-making body in the State. The examination of the various aspects of the Houses and the factors which assist or impede them in conducting scrutiny has pointed towards areas where there is scope for comprehensive, game-changing reforms, and these are outlined in the Appendix.

As regards the scrutiny of legislation which emanates from the EU institutions, the degree of scrutiny is a mere shadow of what it ought to be, whilst the scrutiny of statutory instruments is non-existent.

When the process of the scrutiny of Bills is broken down into various components, it can be seen that in several areas, the current practice is not conducive to the optimum level of scrutiny. The opportunities to influence a Bill prior to its initiation are all too rare. The absence of advance scheduling of the business of the Houses mean that members have very little notice of the scheduling of a Bill and this really limits members’ ability to prepare for, research and understand the Bill in advance of its tabling in the Houses. In most instances, members are not afforded an opportunity to formally consult with those with an interest in the legislation through committee hearings. And when the

22. Interview with author, 4 November 2010.

23. Interview with author, 20 October 2010.

24. On the matter of consensus, Deputy Stagg had this to say: “It’s not so long ago that people were fighting each other on battlefields to select their rulers. The political forum is our replacement for war, the notion that we need the two sides to agree on everything is just ridiculous.” - Interview with author, 20 October 2010. On the question of consensus, former Government Chief Whip, John Curran stated: “It is true that with a Government majority we could push through reforms, but that could

bring with it unforeseen consequences because we have to remember that the opposition are members of the Houses too and for that reason any reform must attract broad support or else they are not feasible.” - Interview with author, 17 November 2010.

25. Whelan, “Our Electoral System and Political Culture Have to be Changed” paper delivered at MacGill Summer School (Jul 2010).

26. All Party Oireachtas Committee on the Constitution, Seventh Progress Report – Parliament (Mar 2002) at p.9.

Bill is debated on the floor of the Houses, the reality is that dynamic of parliament and the whip system means that even those members who are interested in scrutinising the legislation, have virtually no real influence over its ultimate shape.

These considerations unavoidably lead to a conclusion that, in the current circumstances, the way in which the Houses discharge their role in scrutinising legislation is inadequate. This view is based on the belief that legislation which is presented to the Houses has been shaped almost exclusively by the Minister and his or her officials and that any changes which are made to the Bill during the legislative process have been devised, almost exclusively, by the Minister and his or her officials. It is this consideration which suggests that it is in fact Ministers, civil servants, and others engaged on their behalf, who are the real “actors” when it comes to the scrutiny of legislation, rather than our parliamentarians. Whilst the stages of the legislative process and the exchanges between members which take place during those stages give the impression that scrutiny is taking place, the scrutiny is more illusory than real.

## **Rushing of Legislation**

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Before being permitted to undergo a curtailed legislative process, a Bill should first be certified as being urgent by the Attorney General in his or her capacity as guardian of the Constitution. Such a certificate would be pre-requisite to the application of the parliamentary guillotine to any debate on legislation.

Also, where the guillotine is to be applied, the decision as to how that limited period of time should be allocated to the different stages of the legislative process should be at the discretion of the opposition.

## **Engagement with Members of the Public**

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One further stage should be added to the legislative process so that prior to its introduction in the Houses, a draft of each Bill would be subjected to scrutiny and discussion in the public domain prior to its initiation (ie. pre-legislative scrutiny). Unambiguous criteria could be devised so as to clearly identify Bills which ought not to be subjected to this process – such as short, technical Bills and legislation such as Appropriation Bills etc.

## **Eradicating the Constituency-Work Culture**

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The clientelist role of TDs appears to be fostered when councillors (whose focus is on local issues) are elected as TDs (whose focus ought to be on national issues). The introduction of a prohibition on current and former local authority members running for election to the Dáil is likely to ensure that from the outset, the focus of a TD is primarily on national issues (including legislative scrutiny), rather than just local issues.

## **Empowerment of Local Government**

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Further research is required in order to determine whether:

- shifting certain powers from central government to local government-level, and
- enhancing the accessibility of services delivered at central government level,
- would lead to reduced demands being made of TDs at constituency level, resulting in them having more time to commit to parliamentary duties, in particular, the scrutiny of legislation.

## **Seanad**

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It would appear that if the Seanad is to survive, it can only do so if it undergoes a process of radical reform encompassing a simplification of the electoral system, a broadening of its electorate and an overhaul of its remit.

The introduction of a prohibition on unsuccessful and aspiring Dáil candidates running for election to the Seanad would be likely to enhance the standing of the Seanad and its members.

If the Seanad is to be dissolved, the preservation of the integrity of the legislative process dictates that the Seanad must then be replaced by a new second House or by a legislative committee or other forum in which legislation can be reviewed for a second time prior to its passing.

## **Scrutiny of EU Legislation**

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Arrangements on a much grander scale are required in order to scrutinise EU legislation in a much more detailed and meaningful way. It may be that the Seanad is best placed to perform this task, or alternatively, what may be required is a series of parliamentary committees which have sufficient professional resources to cope with the volume of legislative proposals.

## **Scrutiny of Secondary Legislation**

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The current Joint Committees of the Houses whose remit is reflective of the scope of Government Departments is the obvious forum where secondary legislation could be subject to even a basic level of scrutiny.

## **Interactive Debates**

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The delivery of pre-prepared speeches from a script should be expressly prohibited in Standing Orders.

Standing Orders should also be amended to allow interjections during Second Stage as this is likely to facilitate a more free-flowing, participative debate, which might also encourage members to attend debates in greater numbers.

## **A More Collaborative Approach to Legislative Scrutiny**

One initiative which would lead to a more collaborative and inclusive approach to legislative scrutiny is if the opposition were to receive briefings from members of the Government and civil servants on a more frequent basis. It would also enhance the scrutiny process if Government backbenchers and the opposition were to receive the background material on Bills.

Consideration could also be given to putting in place an inter-institutional agreement between the Government, the Dáil and the Seanad which would set out how the Dáil and Seanad would respond if the government of the day were to loosen the whip system.

## **Outcome of the Legislative Process**

It would be helpful to people's understanding of the purpose and benefits of the legislative process if after the passing of each Bill, a short scrutiny report were prepared in which the headline details of the Bill's legislative process were set out, such as details of the amount of time which the Bill spent at each Stage in each House, the number of persons who contributed at Second Stage, the number of amendments tabled by the sponsoring Minister, Government backbenchers and members of the opposition; as well as an outline of the amendments made.

## **Scheduling of Legislation**

An outline of the parliamentary schedule for the coming months should be published at the beginning of each parliamentary session so that members of the Houses can see in advance which Bills will be published and debated in the weeks ahead.

## **Reviewing Existing Legislation**

The large body of Acts which are on the statute book should be subjected to a review (post-legislative scrutiny) so as to determine whether that legislation is still required or is in need of updating. The relevant government Department could be tasked with carrying out an initial review of a piece of legislation and its report could then be submitted to the relevant sectoral Joint Committee of the Houses who could then carry out a more in-depth assessment. The entire process could be coordinated by a legislation review committee.

A more studied assessment of the effectiveness of a piece of legislation might be facilitated if the objectives were clearly spelled out in the body of the legislation or in the explanatory memorandum. Openness about the time-frame within which those objectives are expected to be achieved would also facilitate post-legislative scrutiny.

## **Statutes In-Force Database**

The accessibility of legislation has been greatly enhanced in other jurisdictions through the development of a revised statutes database, which contains legislation in its in-force form, incorporating the effect of all amendments whilst also omitting spent Acts or repealed provisions. Such an approach would make all existing legislation far more accessible to members of the Houses who are faced with the task of scrutinising any proposed amendments to the existing law.

## Bibliography

### Texts

- Barnett, *Constitutional and Administrative Law* (4th ed., London, 2002)
- Bennion, *Statutory Interpretation* (5th ed., London, 2009)
- Bennion, *Bennion on Statute Law* (3rd ed., London, 1990)
- Blackburn et al., *Parliament: Functions, Practice & Procedures* (2nd ed., London, 2003)
- Bryce, *Modern Democracies* (London, 1921)
- Callanan & Keogan, *Local Government in Ireland Inside Out* (Dublin, 2003)
- Chubb, *Cabinet Government in Ireland* (Dublin, 1982)
- Chubb, *The Government and Politics of Ireland* (London, 1992)
- Coakley & Gallagher, *Politics in the Republic of Ireland* (5th ed., London, 2010)
- Crick, *The Reform of Parliament: An Interpretation of the British System of Government by an Advocate of Change* (London, 1965)
- Dooney & O'Toole, *Irish Government Today* (2nd ed., Dublin, 1998)
- Doring, *Parliaments and Majority Rule in Western Europe* (New York, 1995)
- Farrell, *De Valera's Constitution and Ours* (Dublin, 1998)
- Fitzgerald, *Reflections on the Irish State* (Dublin, 2003)
- Foot, *Parliament in Danger!* (London, 1959)
- Frank, *Lawmakers in a Changing World* (Tallahassee, 1966)
- Gallagher, *Constituency Service, the Role of the TD and the Electoral System* (2009) (Submission to Joint Oireachtas Committee)
- Gallagher & Mitchell, *The Politics of Electoral Systems* (Oxford, 2008)
- Gallagher, Laver & Marsh, *The Oireachtas Committee System* (Dublin, 1997)
- Griffith, *Parliamentary Scrutiny of Government Bills* (London, 1974)
- Dodd, *Statutory Interpretation in Ireland* (Dublin, 2008)
- Hogan & Gwynn-Morgan, *Administrative Law in Ireland* (3rd ed., Dublin, 1998)
- Hogan & Whyte, Kelly - *The Irish Constitution* (4th ed., Dublin, 2003)
- Hunt, *The Irish Statute Book: A Guide to Irish Legislation* (Dublin, 2007)
- Jennings, *Parliament* (New York, 1940)
- Keogh & McCarthy, *The Making of the Irish Constitution, 1937* (Cork, 2007)
- Kissane, *Explaining Irish Democracy* (Dublin, 2002)
- Kohn, *The Constitution of the Irish Free State* (London, 1932)
- Lane & Ersson, *Politics and Society in Western Europe* (London, 1999)
- Lees & Shaw, *Committees in Legislatures* (Oxford, 1979)
- Levy, *Strengthening Parliament's Powers of Scrutiny?* (London, 2009)
- Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-one Countries* (Yale, 1984)
- Longley & Davidson, *The New Role of Parliamentary Committees* (London, 1998)
- Loewenberg et al., *Legislatures – Comparative Perspectives* (Michigan, 2002)
- Lynch & Meenan, *Essays in Memory of Alexis Fitzgerald* (Dublin, 1997)
- Marsh, *Intra-party Conflict* (2009) (Submission to Joint Oireachtas Committee)
- May, *Parliamentary Practice* (18th ed., London, 1971)
- Mayhew, *Congress: The Electoral Connection* (New Haven, 1974)
- McCracken, *Representative Government in Ireland – A Study of Dáil Éireann 1919 – 49* (London, 1958)
- McGowan-Smith, *The Houses of the Oireachtas* (Dublin, 1973)
- MacCarthaigh, *Accountability in Irish Parliamentary Politics* (Dublin, 2005)
- MacCarthaigh, *Government in Modern Ireland* (Dublin, 2008)
- MacCarthaigh & Manning, *The Houses of the Oireachtas: Parliament in Ireland* (Dublin, 2010)



- Malone, *Oireachtas Procedure* (Dublin, 1947)
- Mitchell, *By Dáil Account: Auditing of Government, Past, Present and Future* (Dublin, 2010)
- Morgan, *The Separation of Powers in the Irish Constitution* (Dublin, 1997)
- Muller & Saalfeld, *Members of Parliament in Western Europe: Roles and Behaviour* (London, 1997)
- Norton, *Legislatures* (Oxford, 1990)
- Norton, *Parliaments and Governments in Western Europe* (London, 1998)
- Norton & Wood, *Back from Westminster: Constituency Service by British Members of Parliament* (1993, Kentucky)
- O'Halloran, *The Dáil in the 21st Century* (Cork, 2010)
- Oliver, *The Changing Constitution* (6th ed., Oxford, 2007)
- Olson, *Democratic Legislative Institutions* (New York, 1994)
- Ornstein, *The Role of the Legislature in Western Democracies* (Washington, 1981)
- O'Sullivan, *The Irish Free State and its Senate* (London, 1940)
- Patterson & Wahlke, *Comparative Legislative Behavior* (New York, 1972)
- Power, *Parliamentary Scrutiny of Draft Legislation 1997 – 1999* (London, 2000)
- Revenue Legislation Service, *Guide to the Legislative Process* (Dublin, 2007)
- Roche, *Local Government in Ireland* (Dublin, 1982)
- Rush & Ettinghausen, *Opening Up the Usual Channels* (London, 2002)
- Russell & Paun, *Managing Parliament Better? - A Business Committee for the House of Commons* (London, 2006)
- Ryle & Edwards, *The Commons Under Scrutiny* (London, 1988)
- Sidgwick, *The Elements of Politics* (London, 1891)
- Smyth, *The Theory and Practice of the Irish Senate* (Dublin, 1972)
- Taylor, *House of Commons at Work* (Baltimore, 1951)
- Tierney, *I Am My Rights* (Dublin, 2004)
- Tsebilis & Money, *Bicameralism* (Cambridge, 1997)
- Wheare, *Legislatures* (Oxford, 1963)
- Zander, *The Law Making Process* (6th ed., Cambridge, 2004)
- Carey, "Parliamentary Reform is Long Overdue" Paper delivered at MacGill Summer School (Jul 2010)
- Carey & Shugart, "Incentives to Cultivate a Personal Vote: A Rank Ordering of Electoral Formulas" 14(4) *Electoral Studies* 417
- Chubb, "Going About Persecuting Civil Servants: the Role of the Irish Parliamentary Representative" 11(3) *Irish Political Studies* 272
- Dennison, "The Oireachtas Library & Research Service" 18(2) *An Leabharlann* (Oct 2009) 10
- Diermeier & Myerson, "Bicameralism and its Consequences for the Internal Organisation of Legislatures" 89(5) *The American Economic Review* 1182
- Elgie, Stapleton & Quinn, "Testing the Decline of Parliament Thesis: The Parliamentary Activity of the Head of Government in Ireland, 1923-2002" 54(3) *Political Studies* 465
- Fahey, "Browne v Attorney General and Kennedy v Attorney General: The Current State of the Ultra Vires Doctrine and the Necessitated Clause" 23 (2005) *Irish Law Times* 258
- Farrell, "A Note on the Dáil Constitution, 1919" (1969) *Irish Jurist* 127
- Farrell, "The Drafting of the Irish Constitution" (1970) *Irish Jurist* 115
- Ferris, "The Increasing Importance of Regulatory Impact Analysis", *Public Affairs Ireland Journal*, Issue No. 49, July 2008

### Journal Articles

- Bennion, "Multilex and Monolex: Aspects of Law Quality" 17 *Com L* (August 2008) 76-81
- Bennion, "Should Non-Lawyers Have Power to Change the Law?" 19 *The Commonwealth Lawyer* (Dec 2010) 22-26
- Bromage, "Foreign Government and Politics: The vocational Senate in Ireland" 34(3) *The American Science Review* 519

- Heitshusen et. al., “Electoral Context and MP Constituency Focus in Australia, Canada, Ireland, NZ, and the UK” 49 *American Journal of Political Science* 32
  - Hogan, “The Implementation of European Union Law in Ireland: The Meagher Case and the Democratic Deficit” (1994) 2 *Irish Journal of European Law* 190
  - Hogan, “The Meagher Case and the Executive Implementation of European Directives in Ireland” (1995) 2 *Maastricht Journal of European and Comparative Law* 174
  - Humphreys, “Legislative Obstruction: How to Do It” 39(1) (1991) *Administration* 55
  - Hunt, “Plain Language in Legislative Drafting: An Achievable Objective or a Laudable Ideal?” 24(2) *Statute Law Review* 112
  - Katz & Sala, “Careerism, Committee Assignments, and the Electoral Connection” 90 *American Political Science Review* 21
  - Kelly, “Focus on Clients: A Reappraisal of the Effectiveness of TDs’ Interventions” 35(2) *Administration* 130
  - Keane, “Judges as Lawmakers: The Irish Experience” [4:2 2004] *Judicial Studies Institute Journal* 1
  - Lundberg, *An Alternative to STV? MMP and the Constituency Role of Representatives* (2009) (Submission to Joint Oireachtas Committee)
  - Lundberg, “Second-Class Representatives? Mixed-Member Proportional Representation in Britain” 59 *Parliamentary Affairs* 60
  - Martin, *Role Orientation, Electoral Institutions and the Internal Organisation of Legislatures* (Rennes, April 2008)
  - McDermott “The Separation of Powers and the Doctrine of Non-Justiciability” (2000) 35 *Ir Jur* 280
  - McDowell, “That the Oireachtas is in Dire Need of Reform” a paper delivered at the Liber Society Debate, Dublin 29 June 2010
  - Murphy, “Reform of Dáil Éireann: The Dynamics of Parliamentary Change” 59(3) *Parliamentary Affairs* (July 2006) 437
  - Norris, “The Puzzle of Constituency Service” 3(2) *Journal of Legislative Studies* 29
  - Oliver, “Constitutional Scrutiny of Executive Bills” 4 *Macquarie Law Journal* (2004) 33
  - O’Halloran, “Transformation in Contemporary Ireland’s Society, Economy & Polity” 53(1) *Administration* 54
  - O’Halpin, “Parliamentary Party Discipline and Tactics: The Fianna Fáil Archives, 1926 – 1932” *Irish Historical Studies* Vol XXX (120) 581
  - O’Halpin, “Oireachtas Committees: Experience and Prospects” 7(2) *Seirbhís Phoiblí* 3
  - O’Muineacháin, “After the Seanad” *Public Affairs Ireland Journal* 19
  - Pearce, *Rules, Regulations and Red Tape – Parliamentary Scrutiny of Delegated Legislation* Papers on Parliament - Canberra: Parliament House 42 (December 2004): 81-96
  - Robinson, “The Role of the Irish Parliament” 22(1) *Administration* 3
  - Robinson, “Knowledge and Power: The Essential Connection Between Research and the Work of Legislature” research paper published by the European Centre for Parliamentary Research and Documentation (EPCRD)
  - Teahon, “The Irish Political and Policy-Making System and the Current Programme of Change” 45(4) *Administration* 49
  - Ward, “Parliamentary Procedures and the Machinery of Government in Ireland” 4(2) *Irish University Review* 226
  - Whelan, “Our Electoral System and Political Culture Have to be Changed” paper delivered at MacGill Summer School (Jul 2010)
  - Wood & Young, “Comparing Constituency Activity by Junior Legislators in Great Britain and Ireland” 22(2) *Legislative Studies Quarterly* 217
  - Zimmerman, “An Oireachtas Innovation: Backbench Committees” 36(3) *Administration* 271
- Official Documents – Ireland (in chronological order)**
- Report of the Joint Committee on the Constitution of Seanad Éireann (1928)
  - Report of the Second House of Oireachtas Commission (1936)
  - Dáil Éireann, *Special Report of the Special Committee on the Seanad Electoral (Panel Members) Bill 1937* (1937)

- Report of the Commission on Vocational Organisation (1943)
- Report of the Joint Committee on Seanad Panel Elections (1947)
- Seanad Éireann, *Report of the Select Committee on the Seanad Éireann (Panel Members) Bill 1952* (1953)
- Report of the Seanad Electoral Law Commission (1959)
- Oireachtas Committee on the Constitution, *Report of the Committee on the Constitution* (1967)
- Informal Committee on Reform of Dáil Procedure, *Final Report* (1972)
- All Party Oireachtas Committee on the Constitution & Laver, *A New Electoral System for Ireland?* (1988)
- Constitution Review Group, *Report* (1996)
- Standing Sub-Committee on Dáil Reform, *First Report on Reform of Dáil Procedure* (1996)
- Standing Sub-Committee on Dáil Reform, *First Report on Establishment of Committees in the 28th Dáil* (1997)
- Standing Sub-Committee on Dáil Reform, *Consensus Positions on Areas for Reform of Dáil Procedure* (1997)
- All Party Oireachtas Committee on the Constitution, *Second Progress Report – Seanad Éireann* (1997)
- Public Accounts Committee, *Sub-Committee on Certain Revenue Matters: Parliamentary Inquiry Into DIRT* (1999)
- Law Reform Commission, *Report on Statutory Drafting and Interpretation: Plain Language and the Law* (LRC 61-2000)
- OECD, *Regulatory Reform in Ireland* (Paris, 2001)
- Public Accounts Committee, *Sub-Committee on Certain Revenue Matters: Parliamentary Inquiry into DIRT – Final Report* (2001)
- All Party Oireachtas Committee on the Constitution, *Seventh Progress Report – Parliament* (2002)
- Houses of the Oireachtas, *Staffing and Grading – International Benchmarking Review* (2002)
- Department of the Taoiseach, *Towards Better Regulation - Consultation Paper* (February 2002)
- Department of the Taoiseach, *Regulating Better – A Government White Paper Setting Out Six Principles of Better Regulation* (2004)
- Seanad Sub-Committee on Seanad Reform, *Report on Seanad Reform* (May 2004)
- Department of the Taoiseach, *Report on the Introduction of Regulatory Impact Analysis* (2005)
- Department of the Taoiseach, *Reaching Out: Guidelines on Consultation for Public Sector Bodies* (July, 2005)
- Houses of the Oireachtas, *Salient Rulings of the Chair* (3rd ed., 2006)
- Houses of the Oireachtas Commission, *Strategic Plan 2007 – 2009 – Excellence in Parliamentary Service* (Dec, 2006)
- Department of the Taoiseach, *Business Regulation Survey* (Mar 2007)
- Joint Committee on Communications, Marine and Natural Resources, *Tenth Report - Considerations, Recommendations and Conclusions on the Joint Committee's Consultation on the Draft General Scheme of the Broadcasting Bill* (April 2007)
- E-Consultation Research Group, *Evaluation of the Houses of the Oireachtas Pilot e-Consultation for the Proposed Broadcasting Bill* (May 2007)
- Standing Orders of the Dáil Relative to Public Business (2007)
- Standing Orders of the Seanad Relative to Public Business (2007)
- Joint Committee on European Scrutiny, *Special Report on the Enhanced Role for National Parliaments in the Lisbon Treaty* (May, 2008)
- Department of the Taoiseach, *Review of the Operation of Regulatory Impact Analysis* (July 2008)
- Office of the Attorney General, *Maintenance of the Electronic Irish Statute* (Feb, 2009)
- Department of the Taoiseach, *Revised RIA Guidelines* (June, 2009)
- Joint Committee on European Scrutiny, *Sixth Annual Report on the Operation of the European Union (Scrutiny) Act 2002* (2009)
- Joint Committee on the Constitution, *Third Report - Results of Survey of Members of Both Houses of the Oireachtas* (Feb, 2010)

- Joint Committee on the Constitutional Amendment on Children, *Proposal for a Constitutional Amendment to Strengthen Children's Rights - Final Report* (Feb, 2010)
- Joint Committee on the Constitution, *Fourth Report - Review of the Electoral System for the Election of Members to Dáil Eireann* (July, 2010)
- Joint Committee on European Affairs & Joint Committee on European Scrutiny, *Review of the Role of the Oireachtas in European Affairs* (July, 2010)
- Law Reform Commission, *Classified List of Legislation in Ireland* (LRC CP 62-2010)
- Law Reform Commission, *Legislation Directory* (LRC 102-2010)
- Hansard Society, *Law in the Making: Influence and Change in the Legislative Process* (London, 2008)
- House of Commons Library, *Pre-Legislative Scrutiny* (Nov 2007)
- House of Commons Reform Committee, *Rebuilding the House* (Nov 2009)
- House of Lords Committee on the Constitution, *Parliament and the Legislative Process (14th Report)* (London, 2004)
- House of Lords Committee on the Constitution, *Parliament and the Legislative Process: The Government's Response* (London, 2005)
- House of Lords, *9th Report – Criminal Evidence (Witness Anonymity) Bill* (HL 147)
- Law Commission, *Post-Legislative Scrutiny – A Consultation Paper* (No 178)
- Law Commission, *Post-Legislative Scrutiny (Law Com 302)* (2006)
- Select Committee on the Constitution, *Government Response to a Report on Pre-Legislative Scrutiny in the 2007-08 Session* (Oct 2009)

### Other Official Documents

#### EU

- European Commission, *Green Paper on a European Citizen's Initiative* (Brussels, 2009)

#### OECD

- OECD, *Regulatory Reform in Ireland* (Paris, 2001)
- OECD, *Better Regulation in Europe: Ireland* (Paris, 2010)

#### UK

- Hansard Society Commission on the Legislative Process, *Making the Law* (London, 1992)
- Hansard Society Commission on Parliamentary Scrutiny, *The Challenge for Parliament: Making Government Accountable* (London, 2001)
- Select Committee on the Constitution, *Parliament and the Legislative Process: The Government's Response – Report* (April 2005)
- Select Committee on the Constitution, *Fast-Track Legislation: Constitutional Implications and Safeguards* (Jul 2009)

