

Kieran Fitzpatrick

To:

Seanad Reform Working Group  
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Dear Sir/Madam,

I wish to make the following points for consideration.

One of the main purposes of having a second chamber, is to oversee legislation, and to ensure a more robust separation of powers within government.

The Seanad's normal role is to check that legislation serves the public and is compliant with the constitution. However, sometimes legislation fails to be snagged up, as having unconstitutional aspects. My observation, is that legislation sometimes confers delegated powers, to authorities, usually government ministers, to pass statutory instruments, where the power vested sometimes exceeds the "principles and policy" test as outlined in a number of constitutional cases, by the Supreme Court, or alternatively allows the imposition of taxes potentially in contravention of Articles 21/22 of the constitution (relating to Money Bills).

A further problem arises, whereby, a delegated authority sometimes exceeds the power that is vested in it, to script statutory instruments, even where power has been appropriately assigned to the authority. Currently, there is no vetting system for such delegated legislation.

### **Review of Delegated Legislation by Seanad:**

My suggestion, is that all statutory instruments, should be submitted to the Seanad for review (whether this be before or after being signed into law; this issue would need to be given further consideration, and different policy might apply in different circumstances), for a period of one month, during which period, the Seanad can review such legislation to insure its constitutional compliance. A mechanism should be considered, whereby if the Seanad determines that a statutory instrument is unconstitutional *per se*, or alternatively the Seanad concludes that a delegated authority has exceeded the "principles and policy" test in the drafting of the Statutory Instruments, then some further scrutiny is required. For example, concerns could be expressed in writing to the authority, asking for re-consideration of the disputed legislation, or alternatively, a requirement could be created, by law, whereby, the Seanad could refer such legislation for approval to the Dail, accompanied by a report of its concerns.

In other words, the Seanad should be given a veto on secondary legislation, which can only be overturned by the Dail. Allowing S.I.s to be passed without either Seanad or Dail oversight can facilitate a bypass of such legislation in regard to its compliance with the Constitution.

## **EU Directives (Scrutiny of the Transposition of):**

Another concern I have, is that Directives are sometimes transposed into Irish legislation, in a manner that is not compliant with the Directives, as passed by the European Union.

A number of problems arise in this area:

I have observed, on a number of occasions that Directives have been transposed into Irish Law via a Statutory Instrument, usually by a government minister, whereby the S.I. is significantly altered compared to the original Directive.

The case of *Meagher v Minister for Agriculture and Food* [1994] 1 IR 329 established broad permission for EU Directives to be transposed into Irish Law, via Statutory Instruments. However, I submit, that this permission (and as detailed in the EC 1972 Act), and the boundaries of same, is sometimes breached: Sometimes, directives are significantly altered, by the creation of exceptions, or the alteration of the scope of the directive, or via the addition of new terms in its Irish transposition.

I submit, that where these type of changes are made to the transposition of Directives, that the process of transposition is no longer the "rubber stamping" process that I understand was envisioned in the *Meagher* decision. Significant alteration of directives, when being transposed into Irish Law, can equate to the exercise of "principles and policy" by a government minister in a fashion that violates Article 15.2.2 of the constitution. Currently, there is no system for snagging such actions. The Seanad could and **should** play such a role.

Lastly, as I understand it, there appears to be one lacuna in the constitution in regard to the passage of legislation. Where legislation is passed by the Oireachtas, the Taoiseach is required to send the Bill to the President for signature. However, there is no clear requirement to notify the public, or the Seanad, that this **event** has occurred.

## **Pleadings to President:**

This is important. The President usually has between 5 and 7 days to sign a Bill into law. Members of the Seanad (as well as the public), should be informed, via a Seanad website, for example, that a Bill has been delivered to the President, so that members of the Seanad, if they so choose, are in a position to bring particular issues to the attention of the President and request the President to scrutinise any particular Bill, in relation to its constitutionality, notwithstanding that the President does this routinely anyway.

In fact, consideration should be given to the creation of a process of "special pleading", whereby say, 20 members of the Seanad could request the president to give extra close scrutiny to a particular piece of legislation, which may be of concern to such a group of senators, and whereby this pleading is published on the Seanad's website.

I hope the Working Group can take these suggestions for reform into consideration of reform legislation for the Seanad.

Yours sincerely,  
Kieran Fitzpatrick