

Submission to the Working Group on Seanad Reform

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Introduction

This submission is intended to address – albeit only briefly - the topic of Seanad reform.

I note that the Working Group will be taking into account the eleven official reports on the Seanad which have been produced since 1937. I would encourage this, because the neglect of such reports should not be allowed to distract from the reality that many valuable ideas were contained in such earlier reviews. Furthermore, at least one such report – the 2004 Report On Seanad Reform by the Sub-Committee on Seanad Reform of the Seanad Éireann Committee on Procedure and Privileges - itself involved an extensive process of public consultation. In the Working Group is likely to find that a great deal of work in generating valuable and worthwhile ideas has in fact already been done.

I further note that the Working Group's terms of reference stipulates that all changes must be within the existing constitutional framework. This requirement is entirely understandable given the need for the process of Seanad reform not to be excessively drawn out. It might nonetheless be useful for the Group to outline in an annex or postscript to its conclusions possible ideas for reform which might possibly involve constitutional amendments. This could be done in order to provide a basis for later reform processes not so constrained in the conclusions they are allowed to reach. Nonetheless, in order to comply with the stipulation, this particular submission confines itself to changes within the existing constitutional framework.

Potential Role for the Seanad in European Affairs

My main submission relates to the field of European affairs. The work done by the Oireachtas in this field has of course been valuable. Yet is open to considerable improvement. It is possible to envisage a strong role for the Seanad in providing such improvement. In previous writings by me both for the Oireachtas and for the Institute of International and European Affairs, I have suggested that the Oireachtas would benefit from considering how to introduce systems with the following European-related objectives. I would invited the Working Group to consider both these objectives and more especially whether and how the Seanad might contribute to their attainment. The objectives are as follows:

- 1. influencing policy-making in the period before draft legislation is formally adopted at European Union level;*
- 2. dealing with the position once draft legislation is formally proposed at European Union level;*
- 3. overseeing the adoption of measures in Ireland in order to implement European Union directives and regulations;*
- 4. dealing with European Union initiatives which do not involve the adoption of legislation at all;*
- 5. making the Oireachtas an effective forum for a wider and deeper debate by the public on European issues.*

My more specific reflections in relation to these issues would be as follows.

1. A System for Influencing Policy-Making in the Period before Draft Legislation is Formally Adopted at European Union Level

If a national parliament which wishes to influence policy-making at European level it is necessary to intervene as early as possible. Intervening by the time draft legislation is proposed is too late a point to engage in fundamental elements of the policy-making debate, because the parameters of the debate will, to a large extent, already have been established by the time legislation is drafted.

If the Oireachtas wants to exert influence regularly and systematically at European level, therefore, it must set up a system whereby it intervenes in debates of its choosing conducted prior to the drafting of legislation at European level, preferably according to a pre-determined set of priorities. At Union level, a system has already been set up to ensure that contributions of this nature from national parliaments are given a receptive hearing. This is the system of 'political dialogue' between the European Commission and national parliaments – which was introduced as long ago as 2006, becoming known as the Barroso Initiative. It is to be noted that under Protocol No. 1 adopted at Lisbon, the Commission is required to send its consultation papers and its new proposals to national parliaments in order to enable them to provide an input thereon.

2. A System Dealing with the Position Once Draft Legislation is Formally Proposed at European Union Level

Apart from a pre-legislative system, the Oireachtas also needs a system dealing with the position once draft legislation is formally proposed at European Union level.

This has two main aspects: (i) securing accountability in relation to what government ministers agree to in Council, and (ii) the operation of the subsidiarity control mechanism.

(i) Securing Accountability in Relation to What Government Ministers Agree to in Council

Securing accountability in relation to what Government ministers agree to in Council is, and will remain, the main democratic function of national parliaments in relation to European Union affairs.

An enhanced role has been provided for sectoral committees in the lifetime of the present Oireachtas in the carrying out of this task. Senators have had and should continue to have a valuable

role in the operation of such committees. Such a role can only be one half of the story, however. Experience indicates that parliaments which provide for decentralisation in the form of a strong role for sectoral committees must balance that role with a continued central role in some shape or form for their European affairs committees. I would invite the Committee to consider whether an enhanced role for the Seanad in this regard might be one means of providing the necessary continued central role.

(ii) the Subsidiarity Control Mechanism

The second aspect of an Oireachtas system dealing with draft legislation after it is formally proposed at European Union level involves the parliamentary operation of the subsidiarity control mechanism.

The introduction of the subsidiarity control mechanism is a significant step. This is because it enables national parliaments, for the first time, to be direct *interlocutors* with the Commission during the process of legislation – and should facilitate discussions of legislation in national parliaments which seem highly likely to range well beyond the confines of subsidiarity to other issues raised by legislation.

The subsidiarity control mechanism may lead to greater involvement of national parliaments in European matters. The Seanad could play a valuable role in coordinating what have been to date relatively sporadic deployments of the principle by the Oireachtas by various committees.

3. A System for Overseeing the Adoption of Measures in Ireland in Order to Implement European Union Directives and Regulations

A third essential element needed in any system aimed at providing oversight in relation to European matters relates to the development of democratic control over the use of secondary legislation – as opposed to acts of the legislature – in order to implement directives and regulations adopted at European Union level.

There is already a system in place, under the European Communities Act 1972 (as amended by the European Communities Act 2007), which purports to establish democratic control over ministerial implementation of European Union law via statutory instruments. However, the system is, and always has been, dysfunctional. No real oversight is exercised by the Oireachtas in relation to secondary legislation. Part of the problem here is that members of the Oireachtas are not made aware of statutory instruments implementing European obligations until *after* they have been adopted. Even then, there is little likelihood that members will actually find out about any given instrument's existence within the 21 days after its being 'laid before the House'¹ (during which period it is technically possible to annul it by a resolution of either House) Further, no special

¹ Details of this obscure procedure are provided in Appendix V of the Cabinet Handbook, as well as in the Standing Orders of Dáil Éireann and Seanad Éireann. Some details are also provided online on the Oireachtas website at:
[http://www.oireachtas.ie/ViewDoc.asp?fn=%2Fdocuments%2Flibrary%2FDocuments_Laid%2Fdocument1.htm#Question 2](http://www.oireachtas.ie/ViewDoc.asp?fn=%2Fdocuments%2Flibrary%2FDocuments_Laid%2Fdocument1.htm#Question%202)

parliamentary time is allocated by Irish Governments for the purpose of debating the annulment of such statutory instruments.

The end result has been the ongoing, decades-long, large-scale use of statutory instruments by Irish ministers in order to implement all kinds of rules, with virtually no Oireachtas control. These statutory instruments have been used even in those cases where an Act of the Oireachtas would have been a more appropriate implementation method, and even where the drafting of the legislation has been flawed or otherwise inappropriate.

It is perfectly clear that not all such statutory instruments can or should be debated. It is equally clear that some of them should be, and that this could be done once an appropriate filtration system is provided. The Seanad could play a key role in this regard: it could be the forum for such debates. Indeed it was recalled to carry out just such a role just before the Seanad election in August 2013 when a directive on organ donation was debated.

4. A System to Deal with European Union Initiatives Which do not Involve the Adoption of Legislation at All

There is also a need to review the operation of European Union-level activities in fields which do not normally or invariably give rise to legislative measures.

Such fields include (i) *the European Union's foreign affairs and security policy*, an area where the possibility of legislation does not legally exist; and (ii) *the operation of the open method of co-ordination* – a process of intergovernmental peer review which is being deployed to an increasing extent at European Union level ; and (iii) *the process of social dialogue between the social partners* at European Union level in general or sectoral negotiations, which may sometimes give rise to legislation - but it does not have to.

One possible approach in relation to the open method of co-ordination might be for hearings of participating Irish officials and Commission officials to be held and for an annual report to be written on the operation of the open method of co-ordination. As regards the social dialogue process, inviting the social partners at both Irish and European level to discuss recent developments– either annually or at six-month intervals – might also be a useful idea, since these, rather than member state representatives, are the main players in this process. Common foreign and security policy matters are another area in which an approach to overview diverging from the normal approach is clearly required.

5. A System for Making the Oireachtas an Effective Forum for a Wider and Deeper Debate by the Public on European Issues

The facilitation of a wider and deeper debate by the public on European issues was regarded as the terrain of the National Forum on Europe until its closure by the Government after just under eight years of existence, in April, 2009. in the lead-in period to the second referendum on the Treaty of Lisbon. The letter from then Taoiseach Brian Cowan to Senator Maurice Hayes, the chairperson of the Forum, announcing that body's closure, referred to "the Oireachtas' capacity for constructive debate about Europe, including hearing from a wide range of voices, from across civil society" and

promised consultation “in relation to how we can optimise the Oireachtas’ role”. Arguably that role is not yet adequately being fulfilled and I would invited this Committee to consider how it might be and more specifically how the Seanad might play a role in that regard.

Composition of the Seanad

One further – and more general - matter I would invite the Working Group to consider is the issue of the how the Seanad can be composed in the future as well. This is an issue which merits careful reflection given the need for the Government of the day to be able to command a majority in the Seanad, and for the directly elected Dáil to have legislative supremacy as between the two Houses. In my view, the need for direct parliamentary democratic legitimacy is an imperative which is sufficiently met without the Upper House also being directly elected by the entire electorate. Yet the existing method of nomination, followed by the election of the bulk of Seanad members by an electorate constituted by elected members of local authorities has not worked satisfactorily, tending merely to serve the interests of political parties rather than the wider general good and in reality depriving the Seanad of the vocational representativity which it was originally intended to have. An altered selection process for Seanad candidates seems desirable. Perhaps the nomination of candidates who are (i) vocationally representative or expert in a particular field of knowledge by relevant bodies , who would nonetheless (along the lines of members of the House of Lords in the neighbouring jurisdiction) be expected in practice to accept the party whip of a political party and who would be subject to a vote of approval by the Dáil might suffice to achieve this aim. It is clear that determining a new nomination and election system is not without its challenges, but I would suggest it is key to the role of this Working Group. The setting up of a new system in this regard is something which can be done without revisiting the Constitutional rules regarding the Seanad.