ADDRESS
BY
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TO

MEETING OF FORMER MEMBERS OF THE OIREACHTAS

DAIL CHAMBER LEINSTER HOUSE

2.00 P.M. 25TH JANUARY 2013

"OPEN THE SEANAD – DON'T CLOSE IT!"

In his address, Michael McDowell argues that abolishing, rather than reforming, the Seanad:

- Would wreck the Constitution (requiring 75 separate amendments and deletion of entire articles)

- Would reduce the quality of Irish democracy and the effectiveness of the Oireachtas

- Would sweep away hugely important safeguards in terms of E.U. and Irish matters

- Would not save money as claimed.

There is a general perception that our parliamentary institutions are not working. I agree.

But I think the problem lies in this Chamber – not so much in the Seanad Chamber.

There is an appetite for reform of our democracy. But because there is an appetite for reform does not mean that any reform will do.

In particular, there is a danger that those who now hold democratically elected office will respond to a perceived mood of public anger against the political system in its entirety by engaging in high profile, short-term populism rather than acting as statesmen confronting a crisis.

I share the opinion that the Oireachtas badly needs radical reform. It seems to me that in many respects it operates on a *"tick over"* basis in which it does the minimum required to be publicly perceived as discharging its functions rather than functioning as a healthy, effective democratic parliamentary institution.

I have to say, based on many years experience both of opposition and of government, that there are many fundamental problems in the way in which the Oireachtas discharges its constitutional functions.

However, I also have to say that most of the problems, if not all, flow from the way in which our political class in the Dail has used and abused the institutional framework for parliament provided under the Constitution rather than from any inherent problem in the Constitution itself.

I WAS WRONG ABOUT THE SEANAD

In the late 1980s I was asked to be one of a small group of people who would draft legislation to abolish Seanad Éireann and make the Irish State a unicameral parliamentary democracy.

When I got down to this task it became clear to me that the amendments to the Constitution required to dispense with Seanad Éireann would be very far reaching indeed.

I have appended to this paper a schedule of the paragraphs, sections and articles of Bunreacht na hÉireann which would require textual amendment and it would appear 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.

Faced with this challenge, the small group of which I was a member concluded that it would be simpler, given the extent of the amendments involved, to draft an entirely new constitutional document.

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. Hence my reference to the *"convalescent home"* and *"crèche"*.

Because of this strongly stated attitude in relation to Seanad Éireann, I declined on a couple of occasions to be considered for nomination to it. While I do not now regret declining such proposals, I no longer believe that it would be wise or beneficial to amend our Constitution to dispense with Seanad Éireann.

It was not until I became a Minister managing a huge volume of major law reform and other day to day legislative business that I really began to doubt the correctness and wisdom of abolishing Seanad Éireann and bringing about a unicameral parliament for Ireland.

ABOLISHING THE SEANAD WOULD MUTILATE THE CONSTITUTION

If you look at the 75 separate amendments that would be required to abolish the Seanad, it becomes clear that entire articles would be deleted.

Separate checks and balances would have to be re-written including impeachment processes for the President and Judges. The membership of the Council of State and the Presidential Commission would have to be reformed.

Abolition, by itself, will leave our Constitution a mutilated wreck. And it will leave Irish democracy in a weakened, wounded state.

THE CASE FOR A TWO CHAMBER PARLIAMENT

Under our system, the Government is responsible to Dáil Éireann (Article 28.4.1). This accountability to one chamber of the Oireachtas alone was also reflected in the Constitution of the Free State (Article 51).

It follows logically that in our scheme of things the Government is **not** responsible to Seanad Éireann. Nor does it depend on the support of a majority in the Seanad to remain in office. This distinction is very important.

Seanad Éireann¸ like its Free State predecessor, has no function in selecting a Taoiseach, approving a Government, maintaining confidence in the Government, or forcing the resignation of a Taoiseach (under Article 28.10).

Dáil Éireann is stated by the Constitution to be *"a House of Representatives"* (Article 15.1.2) *"who represent constituencies determined by law"*(Article 16.2).

Dáil Éireann therefore differs from Seanad Éireann in that it is a constitutional organ based on constituency representation which is uniquely given the function of selecting a Taoiseach and Government, of holding the Government accountable, of approving and controlling the State's finances (including the nomination of the Comptroller and Auditor General), of approving international agreements and treaties and of terminating the existence of the Government by withdrawing its support from the Taoiseach, thereby obliging the Taoiseach to resign (Article 28.10).

In addition, Dáil Éireann is given the exclusive right to legislate in respect of Money Bills and the exclusive right to commence the legislative process to amend the Constitution.

Seanad Éireann, on the other hand, is not a geographically representative chamber, has little or no function in relation to Money Bills (save making recommendations), and has a subordinate, but important, legislative role.

Seanad Éireann has, in effect, three months (90 days) to consider, amend, pass or reject any Bill passed by Dáil Éireann after which Dáil Éireann can deem the Bill to be passed by both Houses. In certain circumstances, the three month period can be shortened if the President concurs (but any such legislation automatically expires in 90 days unless both Houses agree to the contrary).

THE DÁIL A HIGHLY ADVERSARIAL CHAMBER

Precisely because the very existence of the Government depends upon the continuing support of a day-to-day majority of TDs, and because the duty and responsibility to Dáil Éireann (especially at the hands of the opposition) the general dynamic of Dáil Éireann is a lot more adversarial and polarised than the prevailing ambience of the Seanad.

It was my experience as Attorney General and as Minister for Justice, Equality and Law Reform that the Seanad considered legislation in a much more reflective, bipartisan spirit or perhaps more correctly, a non-partisan spirit. This meant that the proponents of legislation could explain in a measured way the provisions of their Bills and would hear

back from all quarters of the Seanad measured reasonable and objective commentary thereon.

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. The guillotine was rarely used to close debate because filibustering and cynical time-wasting was unknown and because the House valued its own time.

I found that in the Seanad the members who were interested in a Bill and who had improvements to suggest generally acted reasonably and allocated the debating time sensibly and generally did not attempt to *"talk out"* Bills or drag out debates for ulterior political reasons. I also found that the practice of initiating major reforming legislation in the Seanad and then bringing it to the Dáil frequently 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.

It is my view that a bicameral system is far better suited to the emergence of a more reasoned and reasonable approach to the legislation process than would be achieved in a unicameral system.

THE SEANAD AS A CHECK AND BALANCE

Apart entirely from the legislative process itself, we ought not to lose sight of the constitutional system of safeguards, checks and balances which, although rarely invoked, create a systemic safeguard against the abuse of crude power by a temporary majority in the Dáil – especially a huge governing majority such as we have today.

Seanad Éireann has the following important constitutional functions in terms of safeguards, checks and balances:

- The President may only be impeached by a process involving the separate independent decisions of the two Houses of the Oireachtas.

- Judges, who are independent under the Constitution, may only be removed by a process involving independent and separate decisions of the two Houses of the Oireachtas.

- Likewise, the independence of the Comptroller and Auditor General is emphasised by the fact that he cannot be removed from office except for stated misbehaviour or incapacity and then only upon separate resolutions independently considered by *both* Houses, even though he is appointed by and accountable only to Dáil Éireann.

- Of huge importance, constitutionally, is the role of the Seanad, as one House of the Oireachtas, under the provisions of Article 29 of the Constitution, as recently amended. The Seanad must give *"prior approval"* to EU proposals for enhanced cooperation, the Shengen Acquis, and the *"opt outs"* of Ireland in respect of EU measures on freedom, security and justice, including the ending of those opt outs.

- Likewise, the Government's capacity under EU treaties to agree to abandon the requirement for unanimity on certain EU matters and abandon our veto permanently in cases such as corporation tax and to submit Ireland to QMV in respect of other matters which could fundamentally over-ride other constitutional provisions by the EU passarelle procedure, cannot happen without the separate prior approval of Seanad Éireann.

- These are vitally important safeguards checks on the power of a Government with a large majority in the tightly-whipped Dail Eireann.

THE IMPORTANCE OF THE SEANAD'S ROLE

These latter provisions are of fundamental importance to our constitutional system of safeguards, checks and balances. Seanad Éireann is given a veto over the majority wishes of Dáil Éireann in respect of impeaching the President, removing judges, and taking part in EU decisions which could have dramatic and far reaching effects on Irish sovereignty and on the application of the other provisions of the Constitution by virtue of our membership of the European Union.

Bluntly put, if Seanad Éireann were abolished, there would be very little standing in the way of a transient majority in Dáil Éireann acting in a manner which had very far reaching effects on the nature and quality of Irish democracy.

ARTICLE 27

Even in the legislative area, the existence of Seanad Éireann provides a useful check and balance to the abuse of power by a majority in Dáil Éireann.

The capacity of a majority in Dáil Éireann to override Seanad Éireann in respect of ordinary legislation is itself subject to a further constitutional safeguard in that the President, under Article 27, can, if requested by a majority of the members of Seanad

Éireann and one-third of the members of Dáil Éireann by joint petition, decline to sign and promulgate as a law any Bill which has been the subject of overriding provisions of Article 23 *"on the ground that the Bill contains a proposal of such national importance that the will of the people thereon ought to be ascertained."*

In such cases, the President may independently and (but having consulted with the Council of State) determine that any such Bill shall not be signed into law unless the people approve it in the manner provided under Article 47 of the Constitution or unless the people have an opportunity, at a General Election in the interim to elect a new Dáil in general assembly which resolves to re-approve the measure.

DO WE WANT TO SWEEP THESE SAFEGUARDS AWAY?

Sweeping away these protections, safeguards and checks and balances which are of potentially enormous significance in our constitutional order, affecting as they do the Presidency, the independence of the judiciary, the superiority and sovereignty of our Constitution in the context of EU law, and protection of the people from ordinary legislation which might have far reaching effects and on which they ought to be consulted either by referendum or general election, is a very major step and one on which we should all reflect very carefully indeed.

Do we really want to sweep all that away, and to hand to a majority in Dáil Éireann, unfettered and uncontrollable, such far reaching discretions?

Especially in view of the consensus (which I believe would exist among experienced observers) that Seanad Éireann even with its very defective electoral system as it now is, improves rather than disimproves the quality of our legislative process, should we not now ask whether proposals for its abolition have been genuinely thought through or whether they are populist and somewhat mindless, empty-headed political gestures which would achieve very little by way of change.

THE DANGERS OF ABOLITION

As I understand it, the Taoiseach spoke eloquently at the Magill Summer School in the Summer of 2009 for enhancing the role of the Seanad and reforming it as an institution, especially in the context of its potential role as a chamber to examine EU legislation.

Totally without explanation, a few weeks later, without any prior consultation or debate of a public kind or even of a private kind within his party, he articulated, on behalf of his party a policy of abolishing the Seanad. Although this u-turn did cause muted internal dissent within his party, his party appeared to unite behind him without any real consideration of the matter rather than face the alternative, which was public embarrassment and political damage. There is a lesson here.

I mention this, not in a spirit of political point scoring but to underline the danger of giving to any majority, of *whatever* political hue in Dáil Éireann, the right to make far reaching constitutional decisions of importance based on inadequate reasoning or justification.

I ask you to consider whether, if a u-turn of that kind was possible without consideration, it is wise to accord to any future, tightly-whipped majority in Dáil Éireann the capacity to make hugely important decisions at will, without any system of safeguards, checks or balances which I have mentioned earlier, fraught as they are with the gravest of implications for our constitutional order, our civil liberties, our sovereignty and our independence.

It may be that some of you would agree that having any written Constitution at all would be of limited value if we set about the wholesale elimination of important political and constitutional safeguards for our democracy in such a cavalier fashion.

I pose to you these questions:

> *"Are you happy that these things should happen in the manner suggested and for the reasons suggested? Are you happy that the abolition of Seanad Éireann is proposed in the long term interests of the health of Irish democracy? Or is it proposed as a short term expedient pursuit of political popularity?"*

THE EU FUNCTIONS OF THE OIREACHTAS

The response of our Parliament to our membership of the EU has been close to pathetic.

As a Minister, almost alone, I regularly convened a joint committee of both Houses to brief and inform them about every forthcoming Council meeting at which I, on behalf of the Irish people, would participate in the area of justice and home affairs so that the sovereignty of the Irish Parliament would be respected in the context of the EU legislative process and so that there would be openness and transparency in relation to the policy decisions that I, as Minister and member of the Council was adopting and pursuing at EU level.

I am not sure whether that procedure endures to this day but I am certain that it was potentially a very important part of enhancing the role of our Parliament. For all the media interest in it, we might as well have stayed at home.

I also had the unique (I think) experience of appearing before a House of Lords committee in London as a member of the Irish Government to give evidence to that committee in respect of Ireland's position on the Charter of Fundamental Rights and Freedoms and the EU Constitutional Treaty process. I accepted the invitation to go there although I was conscious that the Irish Parliament, because of the complete inadequacy of its approach to EU affairs, had not and probably would not establish an equivalent parliamentary process of inquiry into a major constitutional step which all of the Member States of the European Union were then contemplating.

I witnessed and participated in proper parliamentary scrutiny of EU matters – but, alas, not in the parliament to which I had been elected.

In general terms, the Irish Parliament has lamentably failed and is failing to engage with the European legislative process and with the State's participation in the European Union at Council level in any meaningful way.

I believe that Enda Kenny was *"spot-on"* when he suggested, before his u-turn, at the Magill Summer School that Seanad Éireann could play a very valuable part in enhancing the parliamentary response of the Irish State to our opportunities and obligations in the EU process.

One of the rarely discussed aspects of the Lisbon Treaty is the enhanced function envisaged by Member States' parliaments in EU legislation. It doesn't happen here.

As presently organised, the Oireachtas is nowhere near being in a position to fulfil the 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 all of its functions.

When you hear people clamouring for the abolition of Seanad Éireann, ask yourself whether the *"pared down"* single chamber institution proposed could, given its other obligations of governmental accountability, domestic legislation and the like, ever even make a start in addressing the issues which I have just mentioned.

I don't see TDs prioritising these matters over the more urgent pressures of re-election. Do you?

ENRICHING OUR DEMOCRACY

Apart entirely from constitutional considerations and legislative matters, the Seanad offers us the means to enrich the quality of representative democratic politics in a number of ways.

For instance, the Seanad is a means whereby persons other than TDs can be brought into government as ministers. Do we want to end that? Have we arrived at the view that election on the basis of multi-seat PR constituencies is the only way to become a member of or to participate in the executive of the Irish State?

Do we now regret that persons such as WB Yeats, Mary Robinson, David Norris, TK Whitaker, Gordon Wilson, Seamus Mallon, having been given a voice at the heart of the institutions of Irish democracy?

Was it is wrong that WB Yeats could speak out in this building for the civil liberties of the Protestant people of the Irish Free State in his famous speech in which, referring to that minority, he stated: "we are no petty people".

Was it wrong that Mary Robinson, who could not get elected to the Dáil, could use her membership of the Senate to articulate the liberal and progressive point of view in relation to issues such as contraception, illegitimacy, and the status of women in Irish society?

Was it wrong that David Norris could become a member of a Parliament to eloquently advocate justice and fairness for gay people in Ireland?

Was it wrong that having served this country loyally for many years and having promoted the prosperity of Ireland and reconciliation with the people and institutions of Northern Ireland, TK Whitaker should have been afforded a voice in the Senate to lend his experience and judgement to the deliberations of this Parliament?

Was it wrong that Gordon Wilson and Seamus Mallon should have been given the opportunity to speak on behalf of fellow Irish people of both communities in Northern Ireland?

And if it is right and fitting that these notable members of the Seanad should have had the opportunity to participate in the Oireachtas, is it right that we should now slam the door firmly in the face of such participation in our democratic discourse in the future?

Our Constitution permits the Seanad to be a forum of distinguished and valuable contributors to our Democratic process. Only the present crippling system of election imposed on the Seanad by the all-controlling, dysfunctional Dáil holds it back from achieving its true potential.

What then is the excuse for destroying such a forum when we have every opportunity to reform it and to be proud of it?

Moreover, without any constitutional reform, it is entirely permissible by ordinary legislation to provide in the Seanad for participation in our affairs by citizens in Northern Ireland, by members of our Diaspora, elected on the basis of gender balance, and thereby bring new voices and new points of view and new opportunities for minorities to be heard in our Parliament

REFORMING – NOT ABOLISHING – THE SEANAD

I would like to state my views on the reason why Seanad Éireann needs to be retained, and can easily be radically reformed.

I have come to the conclusion that there is every sound reason why we should have and retain a second chamber in our Parliament.

To those who say that it is up to now little more than a rubber stamp for the Dáil majority, I say that that is not necessarily so.

The 60 members of Seanad Éireann, of whom 11 are nominated by the Taoiseach, six by the electors of certain third level institutions, and the remaining 43 elected by a ridiculous electoral system consciously chosen by Dáil Eireann to neuter the Seanad, (creating an electorate consisting of outgoing senators, incoming Dáil deputies and members of County Councils), could, without any constitutional change, now be given real political status and independence simply by providing in an Act for a system of election of its members in a manner radically different from that which applies today but entirely consistent with and, arguably, much more consonant with the spirit of the Constitution.

There is simply no reason why 31 years since the Constitution was amended to a widen university franchise, and 21 years after the establishment of the University of Limerick and Dublin City University and decades after the establishment of other third level institutions in the country, Dail Eireann has made no legislative effort to give effect to the Seventh Amendment to the Constitution.

As Kelly's Irish Constitution comments at paragraph 4.4.03:

> *"At present the only senate seats whose political complexion is unpredictable are the six university seats; and even here party politics has played a role. Of the remaining 54 seats, 43 are filled by an electorate consisting of about 900 persons, of whom the overwhelming majority are expressly representative of the large political party: namely all the members of the newly elected Dáil, plus all the outgoing senators, plus all members of county councils or county borough councils (Seanad Electoral (Panel Members) Act 1947, section 44). The pattern of political party strength among the 43 panel members thus will tend to reflect*

roughly the pattern seen in the last local election, which will generally speaking not differ from the pattern seen in the recent Dáil election. But even if, as often happens, the current government does not control a majority of the 43 panel members, nor of the six university members, any government deficit is capable of being made up by way of the 11 members whom it lies with the incoming Taoiseach to nominate. Accordingly, a government reverse in the Seanad is exceedingly rare."

Without any constitutional amendment, elected members of Seanad Éireann, who must be elected *"on the system of proportional representation by means of a single transferable vote, and by secret ballot"*, should, I think, be chosen by electorates consisting of broad sections of the population choosing from panels of really worthy candidates formed in a manner which would guarantee independence from the party political process.

Under Article 18.7 of the Constitution, the electoral system for Seanad Éireann is one in which our parliament is virtually at large as to how the broad vocational categories envisaged in that article should be elected in Seanad Éireann.

THE COST ARGUMENT IS BOGUS

It is being dishonestly claimed that abolishing the Seanad would save €150 million over the life of one Dail. That claim is mendacious rubbish.

The Clerk of the Dail, Kieran Coughlan, the accounting officer to the Oireachtas, has publicly testified to the contrary - that the gross annual saving from abolition on the vote for the Oireachtas would be less than €10 million. The net saving would be very much less.

If you take into account that at least 30% of that goes back to the Exchequer in taxes, levies and VAT, the real annual cost of the Seanad to the taxpayer is probably between €6 million and €7 million.

Compare that figure with the annual payroll bill for the 37 Special Ministerial Advisors which under the present Government is **€3.4 mi**llion (**or an average of €91,000 per advisor**).

Compares it with an annual **€28 million** in pay and allowances for county and city councillors.

Compares it with an additional **€250 million** each year on the public payroll bill solely arising out of the payments of increments.

It is less than **1%** of the annual budget of Dublin City Council.

But if you still take the view is that the Seanad costs too much, then why not simply cut back the amount we pay Senators?

Most members of a reformed Seanad, if they represented different interests in Irish society, would be honoured by the fact of their election, and few would want to be full time politicians or to be remunerated as if they were.

The *"cost"* argument for abolishing the Seanad is, I think, an entirely dishonest, bogus argument given that we could easily cut the cost without abolition.

CONCLUSION

Last year, TK Whitaker and some others made a public appeal to reform the Seanad rather than abolish it.

He said:

"As former members of Seanad Eireann, we would like to express our shared view that rather than amend the constitution to abolish the Seanad, it would be better to reform the Seanad's electoral law to empower citizens to become more directly involved, to continue and strengthen the presence in the Irish parliamentary process of voices and viewpoints that might not be heard if future parliamentarians were only to be elected to a single chamber solely on the basis of geographical multiseat Dail constituencies."

I leave it to you to judge whether these were words spoken in the interests of a discredited political elite, as we are asked to believe, or whether they were words spoken from wisdom, experience patriotism and an a profound passion for the future of our State by someone whose judgment we ignore at our peril.

ENDS

Schedule

Articles, sections and paragraphs of Bunreacht na hÉireann which require amendment or deletion if Seanad Éireann were to be abolished:

1. Article 12.4.2
2. Article 12.6.1
3. Article 12.6.2
4. Article 12.6.8
5. Article 12.10.1
6. Article 12.10.2
7. Article 12.10.3
8. Article 12.10.4
9. Article 12.10.7
10. Article 13.2.3
11. Article 13.3.1
12. Article 13.7.1
13. Article 13.8.1
14. Article 13.8.2
15. Article 14.2.1
16. Article 14.2.4
17. Article 15.1.2
18. Article 15.1.3
19. Article 15.8.1.
20. Article 15.8.2

21. Article 15.9.1
22. Article 15.9.2
23. Article 15.10
24. Article 15.11.1
25. Article 15.11.3
26. Article 15.12
27. Article 15.13
28. Article 15.14
29. Article 15.15.
30. Article 18 (in its entirety)
31. Article 19 (in its entirety)
32. Article 20.1
33. Article 20.2.1
34. Article 20.2.2
35. Article 20.3
36. Article 21.1.1
37. Article 21.1.2
38. Article 21.2.1
39. Article 21.2.2
40. Article 22.3
41. Article 22.3.4
42. Article 22.3.5
43. Article 22.3.6

44. Article 23.1.1

45. Article 23.1.2

46. Article 23.2.1

47. Article 23.2.2

48. Article 24.1

49. Article 24.2

50. Article 24.3

51. Article 25.1

52. Article 25.2.2

53. Article 25.3

54. Article 25.4.3

55. Article 26 (introductory paragraph)

56. Article 27 (introductory paragraph)

57. Article 27.1

58. Article 27.2

59. Article 27.3.

60. Article 27.4

61. Article 27.5.

62. Article 27.6

63. Article 28.3

64. Article 28.7

65. Article 28.8

66. Article 29

67. Article 31.2

68. Article 33.3

69. Article 33.5.1

70. Article 33.5.2

71. Article 35.3

72. Article 35.4.1

73. Article 35.4.2

74. Article 46.2

75. Article 47

10 Check list Questions on Abolition of the Seanad

Would abolishing the Seanad improve the quality of scrutiny of Irish legislation?

YES **NO**

Should we scrap checks and balances on the power of a Dail majority?

YES **NO**

Should we scrap the Seanad's role in safeguarding decisions on changes to our voting rights in the EU?

YES **NO**

Should a simple Dail majority suffice to remove the President or a Judge?

YES **NO**

Could we have a better system of electing the Seanad?

YES **NO**

Would abolishing the Seanad save €150 million over the life of a Dail?

YES **NO**

Would a single chamber Dail give more scrutiny to legislation?

YES **NO**

Should we scrap the idea of non TD ministers completely?

YES **NO**

Would independent and minority voices and interests be heard in a single Dail chamber in the way they have been in the Seanad?

YES **NO**

Will a single chamber Dail be better able to carry out its EU parliamentary role than a two chamber house?

YES **NO**