

The Interview with Judge Bryan McMahon, Chairman of the Referendum Commission, RTÉ radio programme Morning Ireland on 20th Oct. 2011

PRESENTER: In one of two referendums being held today week we are being asked to add into the Constitution giving powers of inquiry to Oireachtas Committees. At present their powers are not defined in the Constitution. If we vote yes they will be described in 3 new clauses which Brian Jennings is going to read for us now.

The proposed new wording will be added into Article 15.10 starting with subsection 2

2. *Each House shall have the power to conduct an inquiry, or an inquiry with the other House, in a manner provided for by law, into any matter stated by the House or Houses concerned to be of general public importance.*
3. *In the course of any such inquiry the conduct of any person (whether or not a member of either House) may be investigated and the House or Houses concerned may make findings in respect of the conduct of that person concerning the matter to which the inquiry relates.*
4. *It shall be for the House or Houses concerned to determine, with due regard to the principles of fair procedures, the appropriate balance between the rights of persons and the public interest for the purposes of ensuring an effective inquiry into any matter to which subsection 2 applies.*

INTERVIEWER: Thank you Brian. I put a range of questions about the details and the potential affects of the amendment to the Chairman of the Referendum Commission, former High court Judge Dr. Bryan McMahon. The first question was submitted by Morning Ireland listener David Robert about the results of supreme court judgment in the Abbeylara case which stopped a committee inquiry into the shooting of a man in Co. Longford. If such an event were to occur again, David asks, what difference would the amendment make and he also asked for an explanation in simple terms of what an Oireachtas Committee would be able to do?

Judge McMahon: Well the first point to note in the proposed amendment is that it gives a power to the House or Houses of the Oireachtas to conduct an inquiry into any matter stated by the House or Houses to be of general public importance. Now that's new. Abbeylara said initially that there was no inherent power in the Oireachtas and Houses of the Oireachtas to have an inquiry of this nature.

Interviewer: That's what the courts found.

Judge McMahon: That's what the courts found. So this is an attempt to establish in the Constitution that the House now have rights to conduct an inquiry into any matters of public interest.

Interviewer: So if an Oireachtas committee wanted to inquire into an issue, a very very serious issue involving the death of a citizen, it would, if we vote yes, be able to do so in a way it wasn't able in the case of Abbeylara.

Judge McMahon: But the second point of importance is contained in the second paragraph they can also, in holding such an inquiry, inquire into the conduct of any person and make findings in respect of that conduct - so they can hold an inquiry now and they can also make inquiry into the conduct of persons and also make findings which might be adverse to that persons reputation.

Interviewer: Other than what you have just said would inquiries, if we vote yes to this amendment, be more powerful than the tribunals of inquiries that we have seen in recent years?

Judge McMahon: There are many other tribunals out there and the powers which these tribunals have are set out in their own legislation so it is difficult for me to answer that in a comparative way, because we don't know yet what powers of inquiry the Houses are going to have because all we have is a bill which purports to set out what the Government say they will do if these proposals are passed..... the powers of such inquiries will be what the Government say they are.

Interviewer: and that's in draft legislation to be passed when and if we vote yes?

Judge McMahon: Yes. The amendment says that the inquiry shall be allowed and it shall be in a manner provided for by law, but the law is not defined as yet and if, say, you vote yes to this it is up to the government then to introduce the appropriate law to give effect to this referendum.

Interviewer: There is a draft Bill published. Could that draft Bill be changed and if it were changed, would it affect whether this amendment stands or not?

Judge McMahon: There is a draft bill published but that is not any business of the Commission-our job is to explain the amendment to the Constitution and there is no obligation on the Government to follow through with the draft as drafted and in fact you could have a situation where the government might change its mind on certain things in that draft bill going through the Oireachtas they may introduce amendments and indeed you could in an extreme situation, you could consider that if a government fell before the law was..(passed) you could have a new government with a new bill.

Interviewer: Will these inquiries apply to officials, politicians , public servants or do these inquiries apply to everyone?

Judge McMahon: The inquiry can apply to anyone. It says that in the course of such inquiry the conduct of any person may be investigated so it is not confined to public servants it's not confined to any particular group of people. Any person can be investigated in these committees.

Interviewer: Let's turn to the issue of who will make the final decision about the application of peoples' rights particularly if they feel they have been infringed, the Courts or the Oireachtas? Now the Constitutional expert Gerry Whyte wrote in the Examiner on Tuesday that clause 3 of this amendment if passed, would significantly restrict the ability of the courts to protect the rights of any person being investigated by an Oireachtas committee. Would you agree with that view?

Judge McMahon: Well that has been the view of the Commission. We have expressed it in our literature and in our website that the paragraph 3 which specifically provides that it's for the house or houses concerned to determine, with due regard to fair procedures, the appropriate balance between the rights of the individual, who might be before such an inquiry, on the one hand, and the purpose of trying to ensure an effective inquiry on the other hand. That balance is now to be struck by the Houses themselves, and provided they have due regard to fair procedures the courts in that situation would have very great difficulty in second guessing the balance which the houses have struck in any individual case. Now, I should say that these inquiries can vary from very simple inquiries into, for instance, why a railway bridge collapsed to an inquiry where one considers whether a person who was

unlawfully shot In the case of the bridge collapsing, the inquiry might be just to find out what happened and it might be a scientific examination where they find that the wrong cement was used or a weakened girder was used and that caused it.. But if they go the next step and they say well who was at fault for that then you get into a different stage of the inquiry. So in the latter case where you are talking about faulty persons, people might find that their fair procedures need to be guarded better. But in the earlier inquiry where there is just a factual determining what happened on this night in this case, it might be just a scientific discussion and there would be no need to have lawyers at your side or cross examination rights or anything like that so it will vary on the inquiry in question.

Interviewer: But what about the other basic rights that will still be in our Constitution if we vote yes- the rights to natural justice, the rights to our good name the right to privacy and so on. Wouldn't it always be open to a court to entertain a reasonable submission by someone who felt my rights, under one or other of these headings, obviously your right to a good name, were not properly applied or defended by this committee and therefore what they are proposing to do or their findings that they propose to issue are wrong and should be stopped?

Judge McMahon: Well that might be a fair statement BEFORE this amendment was passed where the courts, as in the Abbeylara case itself, when they saw a guard or a group of Gardai were being investigated and inquiring and were going to be suggestions that they were discharging weapons improperly, or whatever word one wants to use, in that situation the Gardai were able to go to the courts and get the courts to look to see what fair procedures were going to be applied. BUT NOW you have to read all of these rights subject to this amendment and whatever your rights or reputation, good reputation or your good name , this new amendment when your good name is challenged within an inquiry established by the Houses of the Oireachtas, it may be less protected because of this amendment. That of course is justified in the amendment, according to those who are supporting it, by the public interest to get an effective inquiry.

Interviewer: The issue of legal representation. Would a person, if we vote yes, called before an Oireachtas inquiry be entitled to legal representation if they felt they needed it?

Judge McMahon: The question of legal representation or any of the other fair procedure rights are now transferred to the House to determine the balance between the rights of the individual and the rights of the effective inquiry and that's a matter initially for the house to determine and it would be difficult, as I say in those circumstances if they decided that in this case, you are not entitled to legal representation, for the courts to intervene and override that, provided everything else was in order.

Interviewer: If a person got a copy of a draft report from a committee and felt it was unfair and felt it was about to form an unjustified conclusion in relation to what they had done would they have a decent chance of being able to go to Court, and if they could establish that what happened was unfair, be able to prevent the publication of the findings?

Judge McMahon: Well again, I think that the draft legislation does make provision for draft report and the objection by the person who is named therein to do something about it, but then I can't say because the amendment to the Constitution does not make any provision for that so it will be dependent on the legislation that is introduced whether you have a right in that situation or not.

Interviewer: Would the legal, situation of witnesses giving evidence before Oireachtas committees be the same in relation to appearances in court in the event of any prosecution?

Judge McMahon: I think the short answer is yes and since time is limited here I'll leave it at that. By and large the decision to prosecute will be a DPP decision afterwards in the criminal court which is an independent process.

Interviewer: Nothing that you say before an Oireachtas committee can be used in court?

Judge McMahon: Well not as evidence, not directly as evidence.

Interviewer: Would a Parliamentary committee with powers to refer issues to investigation to a totally impartial group - wouldn't that be a better solution?

Judge McMahon: Well the Commission's role is not whether or not there are better solutions out there or not, there may be, but we're here to determine and explain the proposal that is put to the people and whether there are better or worse alternatives out there is not for the Commission to comment on.

Interviewer: Now these questions may not be for you to answer but let me just raise them with you. If we vote yes would you be compelled if required to give evidence to an Oireachtas inquiry would an Oireachtas inquiry investigator have the power to search your house?

Judge Mc Mahon: Well This will all depend on the legislation that is to be brought in and as I say the amendment suggest that these inquiries will be conducted in a manner provided for by law and we await the law. We have a draft Bill but the law will determine what procedures are to be followed in these situations and what rights are to be determined in that type of situation.