

Submission by the Royal Irish Academy to the working group on Seanad Reform

Key points

- There is scope to devise alternative mechanisms for the election of the 43 senators within the vocational panel system. Change could be effected via the nomination system, the electoral system or both.
- Mechanisms can be devised to use the taoiseach's nominees to achieve Seanad representation for specific groups (e.g. Northern Ireland communities, emigrants, minority groups).
- Reform of Seanad procedures should be considered as part of a wider programme of Oireachtas reform.
- Senators could be given a greater role in contributing to the work of the Oireachtas by establishing a special Seanad committee on EU affairs to scrutinise EU activity.

1. Introduction

The Royal Irish Academy, Ireland's national academy for the sciences, humanities and social sciences, welcomes the setting up of the Working Group on Seanad Reform and its focus on reform of the Seanad electoral system and procedures within the limits of the Constitution.

This submission supplements some of the points articulated in the Academy response to the Seanad Electoral (University Members) (Amendment) Bill 2014, and draws on the Academy seminar in February 2014 on *Models of Bicameralism*.¹

2. Context

The content of this submission reflects two underlying realities. The first is the framework imposed by the Constitution, with its relatively detailed prescriptions regarding the membership and powers of the Seanad. The second is the comparative experience of bicameralism, which has left a legacy of international norms and expectations regarding the composition and functions of second chambers of parliament.

We proceed by considering four aspects of the composition and procedures of the Seanad. In each case, we outline the more obvious options that appear to be available, subject to the constitutional constraints (in Ireland) and the conventional norms (in other countries) referred to above. These are:

- The election of the 43 'panel' members;
- The selection of the 'taoiseach's eleven';
- The management of the business of the Seanad;
- The contribution of senators to the work of the Oireachtas.

¹ The Royal Irish Academy expresses its thanks to the following Members of the Royal Irish Academy: Professor John Coakley, Professor David Farrell and Professor Imelda Maher, for their significant contribution in the preparation of this submission. The assistance of Dr Eoin Carolan is also acknowledged. The views expressed in this submission are not necessarily shared by each individual Member of the Academy. The full text of the Academy's recent submission to the consultation on the Seanad Electoral (University Members) (Amendment) Bill 2014, is attached as Appendix I of this document.

We pay particular attention to the first of these points, since it is the one which has attracted most widespread criticism, and is also the one with the greatest potential for reform. Our thinking in this submission is also informed by recent proposals by individuals and groups (including members of the Seanad itself), as well as the formal recommendations of certain committees, which reported earlier to the Oireachtas. We consciously leave aside consideration of amending the election of the six university members to the Seanad, since this is the subject of a separate discussion.²

3. The panel members

Article 18.4 of the Constitution provides that the 43 panel members ‘shall be elected from panels of candidates constituted as hereinafter provided’, and Article 18.5 provides that any election shall be ‘on the system of proportional representation by means of the single transferable vote, and by secret postal ballot’. The article goes on in Section 7 to specify the nature of the panels:

- 1° Before each general election of the members of Seanad Éireann to be elected from panels of candidates, five panels of candidates shall be formed in the manner provided by law containing respectively the names of persons having knowledge and practical experience of the following interests and services, namely:–
 - i National Language and Culture, Literature, Art, Education and such professional interests as may be defined by law for the purpose of this panel;
 - ii Agriculture and allied interests, and Fisheries;
 - iii Labour, whether organised or unorganised;
 - iv Industry and Commerce, including banking, finance, accountancy, engineering and architecture;
 - v Public Administration and social services, including voluntary social activities.
- 2° Not more than eleven and, subject to the provisions of Article 19 hereof, not less than five members of Seanad Éireann shall be elected from any one panel.

Beyond specifying that between five and 11 senators be elected from one or another of five ‘vocationally’ defined panels, the Constitution is silent as to how the panels should be formed, and as to who comprise the electorate, allowing legislators freedom to determine these. Article 19 provides an apparent alternative route to inclusion in one or other of these panels by allowing provision to be made by law for ‘the direct election by any functional or vocational group or association or council of so many members of Seanad Éireann as may be fixed by such law’. (It is worth noting that Article 15.3 further reinforces the Constitution’s emphasis on the vocational principle by permitting the establishment or recognition of ‘functional or vocational councils representing branches of the social and economic life of the people’, whose functions and relationship to the Oireachtas and government would also be defined by law, a provision that would allow the introduction of an additional consultative collective body).

² Three important government reports have recommended an overhaul of the composition of the Seanad, but each of these would require a constitutional amendment: the All-Party Oireachtas Committee on the Constitution, in its second progress report (1997); the reconstituted All-Party Oireachtas Committee on the Constitution, in its seventh progress report (2002); and the Sub-Committee on Seanad Reform of the Seanad’s own Committee on Procedure and Privileges (2004). Other reform proposals were put forward by such bodies as the Department of the Environment (1996, in respect of emigrant representation through the taoiseach’s nominees) and by senators themselves.

The vocational principle is an extremely unusual one internationally. Most second chambers are predominantly or entirely elected, either directly by the general electorate or indirectly by such bodies as local councillors, to represent territorial regions. Almost all of the remaining second chambers are predominantly nominated by the head of state, typically on the advice of the prime minister.

Outside Ireland, only two contemporary second chambers in sovereign states come close to the principle of vocational representation.³ The 40-member National Council of Slovenia consists of 18 representatives of functional groups (social, economic, trade and professional interests), together with 22 representatives of local interests, though its powers are so limited that even designating it as a second chamber is problematic. The 270-member House of Councillors in Morocco, mainly indirectly elected on a regional basis, includes 108 members (40%) elected by representatives of professional chambers in the areas of agriculture, commerce, industry and services, the craft industry, marine fisheries and trade unions.

The other examples are historical. The notion of corporate or vocational representation found expression in certain Catholic societies in the interwar period, as in Portugal (the Corporative Chamber, 1933–74), Austria (the Economic and Cultural Councils, 1934–38) and Italy (the Chamber of Fasci and Corporations, 1939–43). During the closing years of authoritarian government in Estonia (1938–40), a National Council constituted mainly on vocational lines functioned as a second chamber. Until 1999, one German *Land*, Bavaria, had a bicameral system with a senate selected on vocational lines.

It has been recognised from an early stage that the image of the Seanad as a vocational second chamber is entirely illusory: the ‘panel’ members identify strongly with particular political parties, not with, say, Agriculture or Public Administration. This party political outcome, more pronounced even than in the case of the Dáil, may be traced directly to the method of candidate selection and, in particular, to the electoral mechanism. Since the first Seanad election in 1938, there has been a dual route to candidacy: nominations may be made either by registered ‘nominating bodies’ affiliated to the five panels, or by members of the Oireachtas (prior to 1947, the second route was confined to Dáil deputies). But the Seanad electorate is overwhelmingly party political: it consists of about 1,000 electors, dominated by county and city councillors (before 1947 this component was smaller, since each council was represented by only seven councillors).

The current position could be changed, within the terms of the Constitution, by adjusting either the nomination system, the electoral system, or both. The nomination system could be adjusted by strengthening or weakening the ‘vocational’ component at the expense of the political component, along a sliding scale ranging from positions where Seanad candidates may be nominated only by nominating bodies, or, at the opposite pole, only by members of the Oireachtas. The election system could be similarly adjusted, resulting in a sliding scale ranging from positions where the electorate comprises only representatives of nominating bodies to one where it comprises, as at present, only elected representatives at local and national level.

³ For more detail, see John Coakley, ‘The Seanad: reform or redundancy?’, in *Reforming political institutions: Ireland in comparative perspective*, pp. 90–136 (Dublin: Institute of Public Administration, 2013); John Coakley, ‘The strange revival of bicameralism’, *Journal of Legislative Studies*, vol. 20, no. 4, pp. 542–572.

Combining these two sliding scales gives us a near-infinite number of possible ways of selecting the 43 'panel' senators, even without going outside the 'box' defined by the existing set of nominating bodies and the existing Seanad electorate (to which we adhere here to facilitate our examples). What this might mean in practice may be illustrated by just a few of the possible combinations of positions on the two scales.

1. A vocational body: only nominating bodies may nominate candidates for the five panels; the electorate comprises representatives of the existing nominating bodies (this would probably require an agency similar to the Dáil constituency commission to determine how nominating body status would be awarded, and how the electorate would be distributed among them; this function could be incorporated into the remit of the proposed Electoral Commission).
2. A political body: only members of the Oireachtas may nominate candidates for the five panels; the electorate comprises, as at present, county and city councillors, TDs and senators.
3. A hybrid body: a mixture of the two principles, with a quota of senators (which could extend across panels) to be elected in accordance with model 1 (no political involvement) and another quota in accordance with model 2 (purely political involvement).⁴
4. A vocational body with political controls: only nominating bodies may nominate candidates for the five panels; the electorate comprises, as at present, county and city councillors, TDs and senators.
5. A political body with vocational controls: only members of the Oireachtas may nominate candidates for the five panels; the electorate comprises representatives of the existing nominating bodies.

There are very many variants of this schema, such as the present system (which combines hybrid nomination with political election).

Of the stark approaches we have outlined, the first appears closest to the original vision of the Constitution. Implementing it would, however, pose considerable challenges. The right to be included in the register of nominating bodies would be much more strongly contested than at present, since it would also bring with it the right to vote. Bodies might be expected to engage in tactical reorganisation (such as division into separate entities) and political parties would almost certainly become involved in seeking to determine the outcome (indeed, instead of depoliticising the Seanad panel seats, this might have the effect of politicising the nominating bodies). The electorate would need to be determined precisely (for example, such bodies as the Royal Irish Academy might have a single vote, the right of voting might be extended to its council, or all Academy Members might be entitled to vote).

⁴ A proposal similar to this hybrid body was made by the Seanad Electoral Law Commission, 1959.

The second approach, it could be argued, is a more honest version of the present system. It would properly undermine the illusion that nominating bodies act as a useful filter on appropriate candidates for the relevant panels, leaving the process as a purely political one and removing the ineffective fig leaf of endorsement by a nominating body.

Moving away from the familiar panel electorate as it currently exists in an effort to be more inclusive gives rise to major practical difficulties. The constitutional insistence on postal voting makes extending the right to vote to a wide electorate particularly challenging. If this electorate were to coincide with the Dáil electorate, this would also set up an undesirable tension between the two chambers, since many senators would be able to claim the same democratic legitimacy as Dáil deputies.

4. The taoiseach's nominees

The Constitution is relatively unspecific on the criteria for the taoiseach's nominees; the only requirements are that they be Irish citizens aged at least 21 and that they give their prior consent (Articles 16.1, 18.2, 3). The very simplicity of the provision for nomination by the taoiseach reduces the capacity for innovation without constitutional change.

In fact, the principle of appointment of any senators by the prime minister is unique to Ireland; elsewhere, it is the head of state who makes the formal appointments, though often on the advice of other office holders, such as the prime minister or the leader of the opposition.

Since there is a tradition of using the taoiseach's nominees not just to secure a government majority in the second chamber and to allocate parliamentary positions to coalition allies, but also to represent particular sectors (such as Irish language interests and the Anglo-Irish community in the past, and Northern Ireland more recently), there might be a case for making these arrangements more formal. While any attempt to do so by legislation would risk falling foul of the Constitution if it were to place any limits on the taoiseach's discretion, it would be worth exploring the possibility of achieving Seanad representation for specific interests, such as the Northern Ireland communities, emigrants or minority groups, by this means. A cross-party compact would be an alternative way of arriving at a systematic formula that would have the same effect; but it would be relatively easy for any taoiseach to abrogate this compact should political interests so dictate. Consideration could also be given to the introduction of some kind of 'vetting' process for nominated senators, analogous to the procedures followed in judicial appointments; this could also form part of the remit of the proposed electoral commission.

5. Managing the business of the Seanad

The business of the Seanad is covered by Article 15:

- 9.1° Each House of the Oireachtas shall elect from its members its own Chairman and Deputy Chairman, and shall prescribe their powers and duties.

- 10° 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.

While these clauses might suggest a high degree of latitude on the part of the Seanad in how it organises its business, the reality is of course very different. In practice, the business of the Seanad is tightly controlled by party managers, and especially by those of the government party. The same situation applies in the Dáil.

Given ongoing debates over Oireachtas reform, and in the light of the Convention on the Constitution's Seventh Report (on Dáil reform),⁵ it would seem appropriate to consider possible reforms to how the Seanad manages its business. It should be noted, of course, that such reforms might be equally applicable to both Houses of the Oireachtas, and part of the agenda for Oireachtas reform in general.

The Convention made a number of proposals for Dáil reform that would not require constitutional amendment and that might merit consideration for the Seanad also, the most pertinent of which include the following:

- Election of the Chairman of the House by secret ballot;
- Proportionate allocation of committee chairs, and secret ballot for their election;
- Central role for members of the House in setting the agenda to ensure adequate time for debate in a forum chaired by the Chairman;
- Additional technical and professional resources for committees;
- More 'free' votes in the House and in the committees;
- Family friendly hours.

The intention behind these changes is to address the issue of governmental accountability by the parliament, bringing the Oireachtas more in line with other parliaments in Europe.

6. Senators and the work of the Oireachtas

Senators provide a vital service to the work of Oireachtas committees. Given its small size as a parliament, and one that after the next election will be smaller, senators are important in ensuring that the committees are adequately populated. In addition to servicing the joint committees, the Senate also has its own dedicated committees on: Members' Interests; Procedures and Privileges; Selection; and Public Consultation.

One area that might warrant consideration for reform would be to give the Seanad a more prominent role in scrutinising EU activity. Currently, this is managed in the Oireachtas in two respects: by the work of the Joint Committee on European Union Affairs and by means of sectoral scrutiny in the relevant policy committees.

⁵The Convention on the Constitution's Seventh Report on Dáil reform is available at: <https://www.constitution.ie/AttachmentDownload.ashx?mid=bd05f391-a9b8-e311-a7ce-005056a32ee4> (accessed 30 January 2015).

Under the Lisbon Treaty it was envisaged that national parliaments would provide more proactive scrutiny of EU legislation and activities. It is not entirely clear whether the Oireachtas has adapted its procedures to reflect this; the work of the current Joint Committee appears to remain more reactive than proactive. There could be scope, therefore, to emulate good practice in the British House of Lords by establishing a special committee on EU affairs in the Seanad, providing sufficient resources and time in the Seanad schedule.

7. Conclusion

We may summarise the principal conclusions of this document by identifying areas where, even without constitutional amendment, extensive change is possible, areas where change will be challenging, and areas where change might be contemplated as part of a wider programme of parliamentary reform:

- The Constitution offers an extended description of the division of 43 senators across five panels, but is substantially silent on the mechanisms for bringing this about; there is therefore great scope for devising an alternative to the present system.
- The Constitution offers a brief but clear description of the taoiseach's right to nominate 11 senators; this may leave open the possibility of further specification by legislation, of further elaboration by (potentially volatile) cross-party compacts, or of vetting by an independent body.
- The Constitution leaves a great deal of space for reform of parliamentary practices, either by legislation or through standing orders; this could have the consequence of greatly enhancing the effectiveness of the Seanad.
- The Constitution does not prevent additional valuable functions being given to the Seanad, for example in the area of EU affairs.

In brief, we believe that the working group has considerable discretion in respect of the range of reforms it may recommend as regards the election of the 43 'panel' senators and that there is a strong case for overhauling the panel election system; that mechanisms for securing representation of particular groups through the taoiseach's nominees might be explored; that reform of Seanad procedures should be carried out as part of a wider programme of Oireachtas reform; and that additional functions might be given to the Seanad.

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