While the idea of a two-thirds majority may seem a significant bulwark for judicial independence, it should be remembered that at the last election a government was formed on the basis of a substantially higher level of party support in the Dáil. Therefore, as things stand, and as things may well continue to be in the future, the government of the day may command sufficient support in Dáil Éireann to remove a member of the judiciary from office without any further check or balance or separate consideration of the matter by any outside party.

A further feature of the proposed abolition of Seanad Éireann in relation to judicial impeachment is that the alteration of the threshold from a majority resolution to a two-thirds resolution may well give rise to a situation in future in which a member of the judiciary has been found by, say, 60% of the Dáil's membership to have engaged in stated misbehaviour of a very serious kind but to remain in office with the stigma of having been found unfit for office by a significant majority of those elected to the only chamber in our parliament.

It is very doubtful that the interests of the administration of justice or of the judiciary collectively speaking or of the people under the Constitution would be served by such a state of affairs.

In the case of the presidency, the people select the President; in the case of judges, they are not selected by the people and are supposed to be entirely politically impartial. It is very difficult to see how it could be correct or acceptable that a judge could remain in office in circumstances where 60% of the legislature had voted against his or her continuing tenure of office on the grounds of stated misbehaviour.

This proposal to change the mode of impeachment for members of the judiciary raises very serious questions about its suitability and practicality and efficacy.

In our view, this change has within it the seeds of a very serious constitutional crisis and has not received adequate public consideration or debate in the course of the last number of months.

The same considerations apply in part to the position of the Dáil's constitution of financial watchdog, the Comptroller and Auditor General.

Part

The European Union Dimension

The abolition of Seanad Éireann, in our view, raises very, very serious questions over the suitability and capacity of a single chamber parliament, consisting of Dáil Éireann, to discharge its responsibilities and functions on behalf of the Irish people in relation to the European Union and, consequent upon the changes made by the Lisbon Treaty, on the legislative processes of the European Union itself. The interaction of European Union law with the Irish Constitution and its legislature has been the subject of much comment and study in recent years.

In November 2008, a joint committee of both Houses of the Oireachtas identified major weaknesses in the then role of the Oireachtas in EU affairs including:

- The lack of influence of the Oireachtas in the EU decision-making process;
- A lack of Oireachtas oversight of the procedures giving effect to EU law in Ireland (i.e. transposition); and
- The organisation of how EU business is handled by the Oireachtas.

Following on the passing of the Lisbon referendum, the Oireachtas has, under the Constitution, even more important functions in respect of the relationship between the Irish State and the European Union and in relation to the participation by the Oireachtas and the Irish State in the formulation of EU legislation as provided for under that Treaty.

On the 7th of July 2010, a further all-party review of the role of the Oireachtas in European affairs was published.

Its report, prepared by a subcommittee chaired by the then opposition TD, Lucinda Creighton, made challenging and far-reaching proposals for the future interaction of the Oireachtas with the European Union.

We note that one of its proposals was that *"the Seanad play an important role in the area of monitoring the transposition of EU directives"*.

The report also recommended that in future sectoral committees would be obliged to report to the Seanad periodically in respect of its EU related work.

As the report acknowledges, with the entry into force of the Lisbon Treaty, the European Union has formally recognised that national parliaments had a key role to play in the European Union. Article 12 of the Treaty on the European Union states that *"national parliaments contribute actively to the good functioning of the Union"*. On this basis, the treaties contain a series of obligations and rights for national parliaments aimed at enhancing their role in the political process of the EU. These roles include, for example:

- The receipt of information from EU institutions, including all non-legislative and legislative documents;
- The evaluation of policies conducted in the area of freedom, security and justice, including the monitoring of Europol and Eurojustice;
- Participation in conventions dealing with Treaty changes;
- Objecting to legislation not complying with the principle of subsidiarity, through the *"yellow card"* and *"orange card"* procedures or by bringing an action before the Court of Justice;
- Veto over Treaty changes in the simplified revision procedure (the general passerelle clause);
- Veto over measures of judicial cooperation in civil law matters, in particular family law.

It was in this context that the report suggested that the Seanad should be reformed so as to ensure that either among its elected vocational panels or among the Taoiseach's nominees, adequate provision should be made *"to appoint individuals with a background in EU affairs"*.

We are in agreement with the all party committee that because of the multi-seat PR constituency basis of Dáil Éireann and the pressures and priorities imposed by that system on sitting TDs, Seanad Éireann must be given a specialist role in relation to EU affairs and that it is the ideal vehicle for providing specialist skills in the Oireachtas for persons *"with a background in EU affairs"*.

We note that this all party committee's report has largely been ignored since it was tabled.

However, it is our view that the report makes an unanswerable case for a hugely increased EU dimension to the Oireachtas and for the use of the Seanad as a specialist chamber in delivering on Ireland's obligations and responsibilities in relation to the EU legislative process and the post Lisbon function of national parliaments.

In our view, abolition of the Seanad and reliance on Dáil Éireann alone is radically incompatible with the realisation of a major transformation of the Oireachtas's engagement with the European Union and its legislative processes.

The constitutional significance of Seanad Éireann in relation to EU matters under Article 29 of the Constitution

We are deeply concerned that the provision in Article 29 of the Constitution have received little or no consideration in the course of the debate on the abolition of the Seanad over the last several months.

Article 29, which deals with international relations including the European Union, provides at Article 29.4.6 that *"no provision in this constitution invalidates laws enacted, acts done or measures adopted by the State"* which are either *"necessitated by the obligations of membership of the European Union"*.

In addition to that, however, Article 29.4.7 and Article 29.4.8 now authorise the Irish State, without any further reference to the people by referendum, to do any or all of the following:

- To engage in *"enhanced cooperation measures"* under Article 20 of the Treaty on European Union
- To participate in international security and police action on foot of the Schengen Acquit as provided for in Protocol 19 of the Treaty on the Function of the European Union
- To opt in or to opt out of the *"area of freedom, security and justice"* as provided for in Protocol 21 of that Treaty
- To surrender our veto in areas requiring unanimity under the EU Treaties under Article 47.8 of the Treaty on European Union
- To submit Ireland QNV in respect of EU laws now requiring unanimity and to surrender our right of opt outs in respect of cross-border measures in relation to criminal law and procedure under Article 82 of the Treaty on European Union.

All of the foregoing powers, which would obviate the reference of the steps of European integration to the people for their decision by way of referendum are made subject to the constitutional double lock that they must be supported by separate resolutions passed by Dáil Éireann and Seanad Éireann.

The express exclusion of a right of referendum in respect of such measures was justified at the time of the Lisbon Treaty by the compensating guarantee that each House of the Oireachtas would have to separately agree to such measures before they could take effect and before they could indirectly trench upon the sovereignty of the Irish people to decide by referendum on the pace and nature of integration measures in the EU.

It is not necessary to consider the huge scope of potential measures under which *"enhanced cooperation"* or abrogation of our right of veto under the unanimity rule or exercise of opt ins or opt outs in respect of criminal and civil law could have very serious implications for what are now regarded as constitutional guarantees which cannot be changed except by the expressed will of the people through referendum.

The loss of our tax veto by the decision of a single House of the Oireachtas or the introduction of a European public prosecutor to prosecute people for crimes in Ireland under procedures laid down by the European Union itself are but two examples of potential measures which could come into effect under Article 29 as it now exists.

In our view, the public has largely been kept in the dark over recent months about the effect of the abolition amendment on Article 29 of the Constitution.

The *"double lock"* is to be taken away and to be replaced by a *"single lock"* in a chamber which is subject to strict discipline by party whips.

The consolation that was given to the Irish people in relation to concerns about the possible constitutional and sovereignty effects of the provisions of the EU Treaties relating to the surrender of our veto in areas of unanimity such as taxation was that it would require separate votes by both Houses of the Oireachtas.

If the constitutional amendment to abolish the Seanad is passed, this could have very significant long-term constitutional effects on the Irish State and on popular sovereignty of the Irish people within the European Union.

Unlike the German Constitution which provides that the Federal Republic can participate in the European Union to the extent permitted by that Constitution and no further, the Irish Constitution is open-ended as regards the capacity of the Irish State through the European Union to agree to the introduction of measures which have the effect of varying or overriding the Constitution and which are binding on the Irish courts by reason of the terms of Article 29 itself.

We regard the presence of a double lock, particularly a double lock involving a Seanad in which the elected members have greater freedom of thought and action because they are popularly elected (as permitted under our Constitution) as a very important *"check and balance"* on the power of the Government and one which should not be lightly taken away.

In particular, bearing in mind the degree of executive control over Dáil Éireann, we regard it as very questionable indeed as to whether a single chamber Oireachtas would act as an effective check and balance on a decision by the Irish government to make substantial inroads on popular sovereignty and on the supremacy of the Irish Constitution by taking steps such as abandoning our right to unanimity in hugely important areas from the perspective of Ireland, such as taxation policy or the criminal justice process.

Part

Article 27

Article 27 of the Constitution accords to the President the right, having consulted the Council of State, to refer any Bill which, in his or her opinion, contains a proposal *"of such national importance that the will of the people thereon ought to be ascertained"* to a referendum of the people.

The preconditions for such a presidential reference of a Bill to the people are that a majority of senators and at least one-third of all Dáil deputies must petition the President requesting him or her to exercise the power.

Where the President is of such opinion, the Bill must be put to the people by way of referendum within 18 months of the President's decision or else there must be a General Election after which the Bill is confirmed by the newly elected Dáil.

While this power has never had to be used, it is an important check and balance in respect of a government which is proposing to use its Dáil majority in a manner which would be clearly at variance with the will of the people.

While the courts are given jurisdiction to strike down a Bill that is unconstitutional, the Article 27 procedure was designed to prevent a majority in the Dáil from abusing its strength to railroad

legislation into law in circumstances where it is likely that the people would be vehemently opposed to it.

The proposed amendment of abolish the Seanad would have the effect of sweeping away this function of the elected President of the Irish people and would have the effect, in our view, of permitting a temporary majority in the Dáil to enact laws which were, though compatible with the Constitution, were repugnant to the will of the people of Ireland.

While Article 27 has not yet been invoked by any Irish President (largely due to the vice like grip kept on the composition of the Seanad by the current method of election imposed on it by the Dáil) it would, in our opinion, be a retrograde step to amend our Constitution so as to prevent any Bill being made subject to the process of referendum.

Indeed, in this context, we note that the present Constitutional Convention (whose terms of reference were designed to prevent it from considering the question of abolishing the Seanad) came to the conclusion that there should be provision in our Constitution for consideration of legislation by the people through the referendum process.

We are at a loss, therefore, to see why this additional check and balance on the absolute power of a Dáil majority to legislate in any way it likes should be swept away, given that the Government has promised to give careful consideration to the proposal of the Constitutional Convention to give the people a direct say in legislation in certain limited circumstances.

Part

Non TD Ministers

The Constitution provides at Article 28.7.2 for the inclusion in the Government of persons who are not members of Dáil Éireann, i.e. not TDs, but who have been elected (or maybe appointed by the Taoiseach) to be senators.

The proposed amendment to abolish the Seanad would sweep away the right of a Taoiseach to include in his or her cabinet non-TD expert ministers as provided for by Article 28.

It is our opinion that the freedom given by Article 28 to a Taoiseach to include non-TD ministers in the cabinet is an important constitutional provision which permits Ireland, like nearly every other EU member state, to have ministers who are not a member of the lower house.

We believe that the capacity of a Taoiseach to appoint a non-TD minister permits the inclusion in an Irish cabinet of persons with special talents or skills (such as Senator James Doogue who was appointed as Minister for Foreign Affairs by Garret Fitzgerald) and that there is no case made out for altering the Constitution to prevent this from happening in the future. Again, in this context, we note that ministers who are not elected representatives, while almost the norm in many European countries, have been recommended by the most recent reports of the Constitutional Convention.

We cannot see any good reason why the constitutional amendment to abolish the Seanad was crafted in such a way as to exclude such persons from becoming members of Government; it would have been relatively easy to craft the constitutional amendment to abolish the Seanad in a manner which allowed for the appointment of non-TD ministers but no such option was apparently even considered by the Government in framing its proposals.

We regard this as a retrograde and unjustified aspect of the abolition amendment.

Part

Lastly, we wish to consider the interaction of the creation of a one chamber parliament in Ireland with the predominant political culture of Irish party politics.

From the legal and constitutional point of view, we regard it as essential that any proposal to abolish the Seanad should fully take into account that Ireland, almost uniquely in Europe, has a system of party discipline which gives the executive, which is nominally there during the pleasure of Dáil Éireann, almost complete effective control over that chamber.

In our view, it should not be forgotten that all of the major political parties in Ireland rigidly impose a regime on candidates and elected public representatives which goes far beyond the disciplinary and cohesion measures adopted by most European parliamentary democracies.

Every candidate for a major party in an Irish election is required to sign a party pledge which, *inter alia*, obliges that person if elected to obey collective decisions of the party in respect of the discharge of his or her duties and voting patterns following election.

In practice, this means that future members of Dáil Éireann will be required to sign a party pledge solemnly undertaking to abide by majority decisions taken by their parliamentary party in relation to

the manner in which they function within parliament and to accept the party rules which provide that should they *"break ranks"* in any respect in respect of the manner in which they cast their votes as members of Dáil Éireann, they will automatically forfeit their membership of their parliamentary party.

Although there have been a handful of occasions on which the Government has permitted a derogation from this discipline in the form of a *"free vote"* on the part of its supporters, the reality is that a TD who is elected for a political party faces immediate expulsion from his or her party, political isolation, and an immediate and credible threat of non-reselection by the leadership (as opposed to his or her own constituency supporters) for re-election to the Dáil.

Furthermore, the *"speaking rights"* of such TDs stand to be forfeited because of the extraordinary degree of control exercised by party whips over the number and identity of speakers in Dáil proceedings. An individual TD has virtually no right to contribute to a Dáil debate where the party whips are not supportive of such an intervention.

It is in this context that provisions in other EU member states' constitutions to the effect that parliamentarians have an overriding duty to vote in accordance with their conscience becomes significant. The Irish Constitution has no such provision and there is no constitutional support for an individual member of Dáil Éireann in their right to be heard in debate or to take an individual stance based on conscience in any issue.

In those circumstances, the *"bloc"* nature of Irish parliamentary politics will be magnified hugely by the abolition of Seanad Éireann which has traditionally included independent voices over whom the Government of the day has had little or no power or influence.

It is our considered belief that the abolition of Seanad Éireann, as opposed to its reform, would tend to the exclusion from Irish parliamentary life of important voices which are unlikely to be heard in Dáil Éireann due to the system of election to Dáil Éireann, the pressures of constituency politics to seek re-election, the dominance of the party structure there, the all-embracing power of the party whip and the unique and massive dominance of the Irish parliament by the executive which it elects.

We believe that there is no reason at all to hope that the abolition of Seanad Éireann will improve the legislative performance of the Oireachtas, the care and attention that is required to revision and scrutiny of legislation during the legislative process, the system of checks and balances currently provided by the Constitution in respect of executive power and the legislative capacity of an absolute majority in the Dáil and the discharge of Ireland's parliamentary functions in relation to EU matters both at home and at EU level.

Having formed these views, we feel it is incumbent upon us to draw them to the attention of the wider public.

While expressing no views in this report on the validity of claims in respect of the cost of the Seanad or the desirability of there being *"fewer politicians"*, we nonetheless feel obliged to put on the record our shared opinion that the legal and constitutional consequences of abolition seem, when taken together, to greatly outweigh the arguments, such as they are, that have been made in support of that proposal.