

GUIDELINES FOR WITNESSES OR OTHER PERSONS AGAINST WHOM ALLEGATIONS ARE MADE

Introduction

- The Committees on Procedure and Privileges of Dáil Éireann and Seanad Éireann hereby make guidelines under s.19(2)(b) to set out the any distinctions which may be drawn between procedures applicable to witnesses and other persons against whom allegations are made.
- In essence, these Guidelines outline in summary form the provisions of the *Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013* (“the Inquiries Act”) relevant to where a person’s¹ good name is, or may be, impugned. This includes the rules on a finding of “relevant misbehaviour” under the Act. All witnesses should have reference to the *Guidelines for persons giving evidence or documents to the Committee of Inquiry*.
- Please note that these Guidelines are for reference purposes only. This document should not be used as a substitute for legal advice. These Guidelines are not intended to have binding legal effect.

What type of Inquiry is this?

1. The Inquiries Act has set out in legislation a number of Part 2 Inquiries which may be carried out by the Oireachtas.² Each type of inquiry is regulated by the Inquiries Act, and the Act provides detail on the scope of each inquiry. Any inquiry should make its Terms of Reference publicly available, so that it is clear what section of the Inquiries Act the inquiry is being conducted under. The Terms of Reference of the inquiry should also include important details about the content and scope of the inquiry.

Can a person’s good name be impugned by the Committee?

2. It will be evident from the type of inquiry being conducted and the section of the Act it is being conducted under whether it is permissible to make findings of fact which impugn a person’s good name.³ For example, a section 7 Inquiry can only make such a finding if it is uncontradicted by anyone giving evidence in the Inquiry or, so far as the Committee is aware, in certain other proceedings.⁴ Subject to meeting certain criteria in the Act, all Part 2 Inquiries may make a finding of “relevant misbehaviour” against a witness.⁵

Can a person’s good name be impugned by witnesses?

3. During an Inquiry circumstances can arise from which it will be apparent that a person’s good name might be impugned by the evidence that a witness is proposing to give. This may or may not be permitted by the Committee depending on the Terms of Reference of the Committee and, in particular, whether the Committee is

¹A person here refers to both witnesses and non-witnesses

² A Part 2 Inquiry is defined in the Inquiries Act as follows: ““Part 2 inquiry” means a *section 7* inquiry, *section 8* inquiry, *section 9* inquiry, *section 10* inquiry, *section 11* inquiry or *section 16* inquiry conducted or to be conducted by a committee”

³ See s.17 of the Act.

⁴ See s.7(2)

⁵ See s.17(4)

empowered to make findings against that person. Further details on how such impugment will be treated are set out below.

What is “relevant misbehaviour”?⁶

4. A Committee can make a finding of fact of “relevant misbehaviour” by a witness if the witness has failed to co-operate with the Inquiry by:
 - a. failing to attend the Inquiry as a witness when required under this Act to do so by the Committee,
 - b. attending the Inquiry as a witness but refusing to answer a question (not being a question that the witness is entitled by law to refuse to answer) put to him or her by the Committee,
 - c. failing to give to the Inquiry a document within his or her possession or control (not being a document that the person is entitled by law to withhold from the Inquiry) when required under the Inquiries Act to do so by the Committee,
 - d. giving evidence or a document to the Inquiry that is false or misleading in a material particular,
 - e. destroying, or attempting to destroy, evidence,
 - f. influencing, or attempting to influence, witnesses,
 - g. interfering with, or attempting to interfere with, witnesses, or
 - h. otherwise obstructing or interfering with the Inquiry in an unlawful manner.

What are the consequences of a finding of “relevant misbehaviour”?

5. If a finding of “relevant misbehaviour” has been made against a witness, they may be subject to an award of legal costs⁷ or Inquiry expenses⁸ being made against them. For further information on this witnesses may have reference to the Guidelines on Legal Costs and/or the Guidelines on Expenses as appropriate. Certain behaviour which may constitute “relevant misbehaviour” may also amount to a criminal offence under the Act.⁹

What is the standard of proof for a Committee in making a finding of fact which impugns a person’s good name?¹⁰

6. The standard of proof is that applicable to civil proceedings, namely the balance of probabilities.

How will a person know if their good name is being impugned within the meaning of the Act?

7. In some instances it may be clear, for example if a witness’s conduct is the main focus of the Inquiry. If a person is unsure, they may, at any time, apply to the

⁶ See s.2(1) where relevant misbehaviour is defined as follows: ““relevant misbehaviour”, in relation to the Committee conducting a *Part 2* inquiry, means a finding of fact by the Committee which falls within any of *paragraphs (a) to (h)* of *section 14*.”. See also s.14

⁷ See s.48(1)(d) and s.48 generally

⁸ See s.55(1)(d) and s.55 generally

⁹ See s.30 and s.32.

¹⁰ See s.27 of the Act

Committee for a determination as to whether they are a person whose good name is or may be directly impugned by the Inquiry.¹¹

If a person's good name is, or is likely to be, directly impugned, what rights do they have?

8. It is important to remember that as with any witness, a person whose good name may be affected retains all of the normal rights accorded to witnesses appearing before Inquiries. Further details on those general rights are set out under the *Guidelines for persons giving evidence or documents to the Committee of Inquiry*. However, you may also be entitled to certain additional rights which are set out below. Further, if you are a person who is not appearing before the Inquiry (i.e. you are not a witness) then you may still have certain rights if your good name is or may be impugned.¹² These are also set out below.
9. If a person is one against whom the Committee is entitled to make a finding directly impugning his/her good name, and his/her good name is to be, or is likely to be directly impugned by a witness, they have certain additional rights to most persons.¹³ For completeness these are repeated here:
 - a. To be given advance notice in writing of the evidence proposed to be given against him or her in so far as such evidence is reasonably ascertainable,
 - b. To cross-examine the witness (or any other witness who is relevant to such impugnement) for the purpose of challenging the allegation, whether by his or her legal practitioner or otherwise,
 - c. To give evidence to the Inquiry to answer the allegation,
 - d. To call witnesses to answer the allegation,
 - e. To make a submission at the close of evidence, and
 - f. subject to s.24(2),¹⁴ request the Committee—
 - i. to direct specified persons to attend before the Inquiry to give evidence, and
 - ii. to procure, by direction, the giving of specified documents to the Inquiry.
10. In addition, persons against whom findings of fact are being made which directly impugn their good name are entitled to receive a copy of the draft Committee report.¹⁵ Where they form a belief that there are certain issues with the draft report¹⁶, the person may, within 14 days after they have been given the draft report (or longer if so specified by the Committee), give to the Committee a statement in writing setting out the reasons for that belief and requesting the Committee to review the draft report having regard to the statement. Having considered the statement, heard additional evidence (if it feels it appropriate to do so) and having

¹¹ See s.47(4) of the Act. See also s.25 which is of relevance to persons who are not witnesses, and deals with their right in certain circumstances to be furnished with the transcript of evidence.

¹² It may be the case that a "non-witness" might decide to, for example, give evidence to the Inquiry to answer an allegation made against them (per s.24(1)(c)) and by virtue of taking this step, become a witness.

¹³ See s.24.

¹⁴ Subsection (2) states: "The Committee may comply with a request under subsection (1)(f) made to it and shall do so if it considers that, having regard to the requirement to observe fair procedures, it is necessary or expedient to do so."

¹⁵ See s.35

¹⁶ See s.39(1) (a) to (e)

reviewed the draft report the Committee may amend or decline to amend the draft.¹⁷

11. A witness whose good name is or may be directly impugned may apply for their legal costs.¹⁸ Where the impugnement relates to a lawful finding of relevant misbehaviour by the Committee no award of costs will be made.¹⁹ For further detail on legal costs in general please have reference to the *Guidelines on Legal Costs*.

What extra duties are placed on a Committee making a finding of fact that impugns a person's good name?

12. Where a Committee is making any lawful finding of fact under the Act, it must give reasons in writing for the findings.²⁰
13. In addition, a Committee making a finding of relevant misbehaviour shall, in the finding of fact:
 - a. give particulars of the matter occasioning that finding of fact, and
 - b. give an assessment of the prejudice (if any) caused to the *Part 2* Inquiry by that matter.²¹

What if a person's good name is being impugned in contravention of the Act?²²

14. If the Chairman of the Committee holding a Part 2 Inquiry is of the opinion that a person's good name is being impugned in contravention of the Act, they shall:
 - a. direct the witness or Committee member, as the case may be—
 - i. to cease giving the evidence or making the utterance concerned, or
 - ii. to not give the evidence or make the utterance concerned, and
 - b. if *paragraph (a)(i)* applies, direct that the allegation constituting such impugnement shall not be published.
15. In a case where the Chairman issues a direction that an allegation which affects a person's good name should not be published, then any other person who refers to that allegation will not be protected by privilege against defamation in respect of those references.²³

¹⁷ See s.39(2)

¹⁸ See s. 47(1). Note that, as provided in s.47(2), in the absence of exceptional circumstances, an application for costs will only be decided after the finalisation of the final report or after the termination of the Inquiry.

¹⁹ See, *inter alia*, s.47(3) and s.48(1)(d). Further, no award of costs will be made where the circumstances referred to in s.48(4) apply.

²⁰ See s.27(b)

²¹ See s.17(4)

²² See s.23

²³ S.23(2)