



The Law Reform Commission
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLI

CONSULTATION PAPER
ON
PUBLIC INQUIRIES
INCLUDING TRIBUNALS OF INQUIRY

(LRC CP 22 - 2003)

IRELAND

The Law Reform Commission

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THE LAW REFORM COMMISSION

Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act 1975*.

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in December 2000. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the Act.

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INTRODUCTION

1. Public inquiries is a peculiarly sprawling field, different from the compact areas in which the Commission feels that it can usually make its most useful contribution. There are several unrelated legislative codes, which provide the legal framework for different public inquiries. The subject-matter of inquiries, too, ranges very widely (as is illustrated in Appendix A) and the factual and political subject-matter make for unexpected kaleidoscopes with conventional legal rules. Furthermore so far as the legal system is concerned, public inquiries are very much a ‘sport’, using the word in its less common sense of an abnormal or striking variation from the parent stock. Because courts deal in legal rights, they require strict rules of procedure. Does it follow that, because inquiries investigate facts, they require no rules of procedure? The answer, which the Irish courts have given to this question, as this Paper shows, is that they require a modified but still fairly stringent form of procedure. Arguably indeed the following observation has not been taken sufficiently to heart: “[a] tribunal is not a court of law – either civil or criminal. It is a body – unusual in our legal system – an inquisitorial tribunal. It has not an adversary format.”¹ And the result of this oversight is that a very extravagant measure of constitutional justice has been granted, sometimes in circumstances where it was not legally or constitutionally required; a theme on which we elaborate at paragraphs 7.17-7.61. It bears saying, too, that this amplitude of constitutional justice may have been granted by virtue of the fact that inquiries have sometimes been forced to go beyond what we consider should be their primary task of discovering what happened and why, and into the role of assigning blame, which may be best left to a criminal trial: see further paragraph 1.12.

2. In any case, it is uncontroversial that starting out, as lawyers naturally do, from the concepts with which they are familiar in the form of court procedures, the appropriate modifications for inquiries have taken a while to evolve. But, by now a good deal of discussion has been given to the topic and it seemed to the Commission right and timely to tackle the subject and, indeed, this had been suggested by a number of people. The present Attorney General (though before he attained his present eminence) has remarked: “[w]ith the explosion in the number of tribunals of inquiry it is timely to review where we are heading as a society and the ramifications of this legal phenomenon, in terms of the constitutional rights of the citizen.”² There are also a number of concrete developments, among them the

¹ *Boyhan v Beef Tribunal* [1993] 1 IR 210, 222 *per* Denham J.

² Brady “Tribunals and Politics: A Fundamental Review” *Contemporary Issues in Irish Law & Politics* No 3, 156.

legislation for ‘committees of investigation’, which the Minister for Justice, Equality and Law Reform is expected to publish in the next few weeks: see further paragraph 10.03.

3. Since there was no way in which to divide the subject into handy segments, the only course seemed to be to publish one of the Commission’s longest papers, which still has no claims to be comprehensive. The last point ought to be stressed. We have been able to deal with only some of the codes of legislation, dwelling largely on the ‘Rolls-Royce’ among public inquiries, namely, the tribunal of inquiry.

4. Broadly speaking, there are three main sections to the Paper. After the general introductory Chapter 1, in the first section, Chapters 2-6 deals with the Company Inspectors, the Commission to Inquire into Child Abuse, Parliamentary Inquiries, and Tribunals of Inquiry (which is a sufficiently voluminous subject, to take up both Chapters 5 and 6). The point is that an inquiry may be required to investigate any number of diverse subject-areas, in very varied circumstances. This first section sets out four of the many legislative frameworks, which are available to policy-makers so that they may select whichever is appropriate for the particular investigation. Horses for courses. In addition in the context of law reform, these legislative frameworks provide models and experience from which anyone attempting to make recommendations for improvement will have to draw lessons. We have not, however, attempted to cover all of the several specialised statutory codes, for instance, we have scarcely touched upon the codes for railways,³ sea⁴ or air⁵ accidents, (which, in any case have been recently up-dated). There seems little point in our proposing specific amendments to each of these, since this can best be done by the specialists in the area, perhaps after they have considered the general observations and recommendations advanced in this Paper.

5. In the second section, in Chapters 7 – 9, dealing with Constitutional Justice, Publicity and Privacy; and the Information Gathering Stage, we consider the issues thematically, presenting a bird’s eye view of many of the major problems. Although we draw on material from the different types of public inquiry, and refer to relevant comparative law, much of the situations and cases analysed in the thematic chapters come from tribunals of inquiry. This is understandable given that so much legislative, judicial, political, media and public attention has been concentrated on tribunals. Yet it remains the case that many of the same issues

³ *Regulation of Railways Act 1871*. See also the *Railway Safety Bill 2001* which provides for a new regulatory framework for railway safety, including the establishment of an independent Railway Safety Commission with wide-ranging powers of inspection, investigation, and enforcement. The Bill also provides for the establishment of a Railway Safety Advisory Council to consider issues relevant to railway safety and to make recommendations, as appropriate to the Commission or to the Minister.

⁴ *Merchant Shipping (Investigation of Marine Casualties) Act 2000*, which established an independent Marine Casualty Investigation Board.

⁵ *Air Navigation (Notification and Investigation of Accidents and Incidents) Regulations 1997*, which established an independent Air Accident Investigation Unit.

which have arisen in connection with tribunal of inquiries might occur in the future, in the context of other public inquiries, depending on the circumstances. Chapter 10 – Alternatives to Public Inquiries – may be regarded as a form of conclusion to all the preceding chapters. It collects up the lessons from those chapters in order to address the basic question: consonant with fair procedures, to what extent is it possible, by altering the features of public inquiries, to reduce the entitlement to constitutional justice which creates much of the attendant expense and delay? The remaining substantive chapters deal with discrete subjects: Chapter 11 (Downstream proceedings which deals with the implications of a public inquiry for later criminal or civil proceedings); and Chapter 12 (Costs). Then, as usual comes a Summary of Recommendations and Conclusions, to which is appended a suggested re-draft of the *Tribunals of Inquiry (Evidence) Acts 1921-2002*. This collects together the changes we propose, some of them substantive and some of them merely consolidatory of what are at present six separate and inconvenient-to-use statutes.⁶ Many of these amendments could, with adjustment, be used for the parent legislation of other inquiries. Indeed, some of them are in fact inspired by the example of other inquiry laws.

Recommendations

6. While we include a complete summary of conclusions and recommendations in Chapter 13, given the diversity of the character and scale of the recommendations, it may be useful to give an impression here of their flavour:

- Proposals relating to the initial establishment, including selection of an appropriate form of inquiry, composition of the inquiry, and drafting terms of reference.
- As mentioned, a number of the proposals for substantive legal changes are discussed throughout the paper and then collected together as amendments to the *Tribunals of Inquiry (Evidence) Acts 1921-2002*.
- General principles as to the ways in which the chairpersons of inquiries might exercise their discretion in the procedural field, mainly in respect of constitutional justice.
- Suggestions as to ways in which costs might be reduced.

7. The Commission invariably publishes in two stages: first, the Consultation Paper and then the Report. The Paper is intended to form the basis for discussion and accordingly the recommendations, conclusions and suggestions contained herein are provisional. The Commission will make its final

⁶ *Tribunals of Inquiry (Evidence) Act 1921* (“The 1921 Act”); *Tribunals of Inquiry (Evidence) (Amendment) Act 1979* (“The 1979 Act”); *Tribunals of Inquiry (Evidence) (Amendment) Act 1997* (“The 1997 Act”); *Tribunals of Inquiry (Evidence) (Amendment) Act 1998* (“The 1998 Act”); *Tribunals of Inquiry (Evidence) (Amendment) (No. 2) Act 1998* (“The 1998 (No 2) Act”); *Tribunals of Inquiry (Evidence) (Amendment) Act 2002* (“The 2002 Act”)

recommendations on this topic following further consideration of the issues and consultation, including a colloquium attended we hope by a number of interested and expert people (details of the venue and date of which will be announced later). Submissions on the provisional recommendations included in this Consultation Paper are also welcome. Secondly, the Report also gives us an opportunity which is especially welcome with the present subject not only for further thoughts on areas covered in the Paper, but also to treat topics, not yet covered. In order that the Commission's final Report may be made available as soon as possible, those who wish to make their submissions are requested to do so in writing to the Commission by **1 July 2003**.

CHAPTER 1 PUBLIC INQUIRIES IN GENERAL

Part I Introduction

1.01 A good book of historical and legal interest remains to be written about public inquiries, in the widest sense. Given the potentially unlimited width of the subject, it would no doubt start with the Lord interrogating Adam: “Who told you that you were naked? Have you been eating of the tree I forbade you to eat?”¹ Later highlights would include: the Domesday Book (William the Conqueror’s land-survey of eleventh-century England); impeachment before the (British) House of Lords;² certain of the stages in the Dreyfus Affair;³ the Warren Commission (1963-65) investigating the murder of President Kennedy; the South African Truth and Reconciliation Commission, and the inquiry set up by the Football Association of Ireland⁴ to inquire into the preparations for the Irish team’s participation in the

¹ Genesis 3:11.

² Macaulay’s account of the trial is among the glories of English literature: see (ed. Trevor-Roper) *Macaulay’s Essays* (Collins, The Fontana Library) 400-511. Impeachment, as it existed up to the late eighteenth century (and still formally exists) consists of a trial, before the House of Lords with its lay members, not merely the judges as the deciding tribunal, and representatives of the House of Commons as the prosecution. Inevitably, the offence - “high crimes misdemeanours” - would be strongly political in character. The best known, though relatively late, example of this is the impeachment of Warren Hastings in 1787 for impropriety and corruption in the performance of his role as Governor-General of (British) India. Inevitably, the subject-matter of the trial was so far-reaching as to amount to an enquiry into his period in office to see how he had exercised his rule over 350 million people.

Notice the following account from a historian, of a commission which was not set up: “In Ireland, de Valera repeatedly called for a ‘Historical Commission of Inquiry’ into the Treaty and Civil War periods. When he became head of the government in the 1930s, he proposed to W T Cosgrave that the latter should nominate three members of such a commission, ‘say a judge, or constitutional lawyer, a Professor or recognised student of history...and some other third person qualified to examine documents and to weigh historical evidence’. De Valera promised to nominate three persons ‘of the same character’ and if these six could not agree on an impartial chairman, de Valera was prepared ‘to invite the Bishops to nominate one of their body’ to chair the proceedings. He himself was prepared ‘to give evidence before this Commission, and Mr Cosgrave and Miss MacSwiney may both be my accusers, if they choose’. Bowman *Eamon de Valera: Seven Lives in O’Carroll and Murphy, De Valera and his Times* (Cork University Press 1986) at 183.

³ Below fn 13.

World Cup finals in June 2002; and ‘the independent audit’ set up by the Catholic Church in Ireland to investigate its handling of allegations of child sex abuse.⁵

1.02 This is not such a general work. Rather, this Paper has a particular focus. Since most of an inquiry’s deliberations will usually be held in public, and since the final report should be authoritative and will often be damaging to someone’s reputation, an inquiry is naturally required to follow a high standard of procedural fairness. This is true of most jurisdictions. In Ireland, because of the need to comply with the stringent procedural principles which have been derived from the Constitution and explained by the judiciary, this standard is particularly high. *The main focus of this Paper is the operation of public inquiries in the light of the principles of procedural fairness.*

1.03 The object of a public inquiry is simply to ascertain authoritatively the facts in relation to some particular matter of legitimate public interest, which has been identified by its terms of reference. In the light of those factors, it may also make a recommendation as to how the accident, mischief or evil under investigation may be rendered less likely to occur in the future. It should be emphasised that such an inquiry is usually set up when something major has gone wrong; often because someone has done wrong, acted unlawfully or failed to act. It would, of course, be possible to employ a public inquiry for a wider category of case, as is clear from the six principal inquiry functions identified by a Canadian author:

“(a) they enable the government to secure information as a basis for developing or implementing policy; (b) they serve to educate the public or legislative branch; (c) they provide a means to sample public opinion; (d) they can be used to investigate the judicial or administrative (police, civil service, Crown corporation) branches; (e) they permit the public voicing of grievances; (f) they enable final action to be postponed.”⁶

1.04 This wider conception of an inquiry has been utilised rather rarely in Ireland: examples include, the Working Group on a Courts Commission⁷ which dealt with a range of issues, including the design of the new Courts Service during the period 1996-98; or the Working Group on the Jurisdiction of the Courts, set up to inquire into the distribution of court business. However, in this Paper, the focus

⁴ This report which was compiled by Genesis, a British firm of strategic management consultants, was not published in full: see *Irish Times* 13 November 2002 (the estimated cost of the Report was €30,000).

⁵ This ‘Independent Audit’ was chaired by retired District Court judge, Ms Gillian Hussey. (See *Irish Times*, 27 June and 3 September 2002). However the audit was disbanded in light of the Minister for Justice’s stated intention to introduce legislation for a new procedure which would, *inter alia*, enable a detailed and focused investigation into how the church authorities dealt with allegations of child sexual abuse by clergy and religious: see paragraph 1.24.

⁶ Macdonald “The Commission of Inquiry in the Perspective of Administrative Law” (1980) *Alberta L Rev* 366, 372.

⁷ See for example the Sixth Report (Pn 6533 1998).

is on the type of inquiry in which there is public disquiet because something has gone wrong: this is the situation in which public inquiries have mainly been used in Ireland.

1.05 Such inquiries have become common features of the constitutional landscape, especially in the past decade. They have shone a strong light into covert areas of government, business or society, and have incidentally been a central feature of Irish public life. Calls for inquiries have become very common.⁸ It would almost be possible to write a history of the dark side of modern Ireland by reference to public inquiries. An incomplete list of Irish public inquiries is included in Appendix A.

1.06 An elementary point, but one well worth emphasising, is that inquiries do not settle legal rights. They are simply intended to make an authoritative finding of the facts in regard to a matter of high public interest, for example, as to the causes of accidents, natural disasters or the performance of a public authority or big business.⁹ They usually set out what has occurred and make recommendations.

1.07 The fact that inquiries *do not settle legal rights* is the most important of the distinctions between an inquiry and a number of other bodies, with which they might be confused by virtue mainly of their somewhat similar *modus operandi* and strict procedure. Thus, they are not ‘administering justice’¹⁰ (in the language of the Constitution) and, hence, are distinct from courts. Again an inquiry is not even a tribunal,¹¹ using that confusing term in the sense of a body which settles legal rights usually in narrow specialised areas. This point is relevant in connection with the *Ansbacher (Cayman)* case, in which it was held that “a tribunal, such as that in question, although endowed with powers under the 1921 Act, is not a ‘court or tribunal’ for the purposes of s.1(a) of the [Cayman Islands] Evidence (Proceedings in Other Jurisdictions) Act 1975”.¹² Therefore in order to fall within section 1(a) of

⁸ For example *Irish Times* 16 November 2002 – “The advocacy group Patient Focus wants the Minister for Health to establish a judicial inquiry into the numbers of Caesarean hysterectomies carried out at [Drogheda] hospital over a 20-year period from the late 1970s. This followed on from a legal action for the unnecessary removal of a womb and at a time when an inquiry by the Medical Council’s Fitness to Practice committee was sitting.”

⁹ Hogan and Morgan *Administrative Law in Ireland* (3rd ed. Sweet & Maxwell 1998) at 294-6.

¹⁰ See Part VI below.

¹¹ One link between an inquiry and a tribunal is that it has often happened that, following on from a public inquiry, a compensation tribunal has been set up to compensate the victims of the episode or conduct which was under investigation at the inquiry. Examples include: the Stardust Compensation Tribunal (PI 7831 1985); the Hepatitis Compensation Tribunal (Scheme laid before each House on 15 December 1995); The Residential Institutions Redress Board (established under the *Residential Institutions Redress Act 2002*); see further Hogan and Morgan *op cit* fn 9 at chapter 6.6.

¹² The *McCracken Tribunal’s* petition to the Grand Court of the Cayman Islands, to make an order permitting the Ansbacher Bank to produce certain bank records was refused on 30 June 1997, by Mr Justice Patterson. See *Report of the Tribunal of Inquiry (Dunnes Payments) 1997* (Pn 3695 1997) at 13 and Collins “Foreign Evidence and Domestic Tribunals: The Paper

that Act a body would presumably need to be a tribunal which adjudicates on legal rights.

Part II Alternatives to Public Inquiries

1.08 In sketching the field, one should note that there are several bodies whose primary function is not to act as a public inquiry, but which may, on occasion, incidentally fulfil that role. Most obviously, a court case may also be the means by which information of great public interest is authoritatively established. A conventional civil action,¹³ for example a medical negligence action, may have the effect of publicly bringing home responsibility for a death or serious injury, as may a coroner's inquest into a death. A criminal prosecution might seem an even more likely candidate. For instance, it is worth noting that, in France, the use of contaminated blood in blood transfusions, which caused hundreds of deaths, led to the prosecution and conviction of some of the responsible officials.

1.09 Briefly, in June 1991, the French government commissioned the general inspector of social affairs, Michel Lucas, to investigate the allegation made in an article written by Dr Anne-Marie Casteret,¹⁴ that the *Centre national de transfusion sanguine* had sold a large number of factor concentrates which were known to be contaminated with HIV. The *Lucas Report*¹⁵ was submitted to the Government in September 1991 and the following month charges were brought against four officials, three of whom were subsequently convicted.¹⁶ The trial of these four officials was not the end of "*L'affaire du sang contaminé*".¹⁷ During the trial it was

Chase in the Sand"; Papers from the Bar Council conference "*Inquiries; the Rights of Individuals, Privacy and Confidentiality*" Dublin 17 July 1999.

¹³ *The Dreyfus Affair*, which divided French political society in the late-nineteenth and early twentieth century, is an example from the field of libel. The writer, Emile Zola, considered that the French-Jewish army officer, Captain Dreyfus, had been unjustly accused of treason and sent to Devil's Island. The only way which Zola could find to have the facts established and exposed to public view was to attack those responsible in a celebrated article headed "*J'accuse...*". This provoked a libel action against himself, which he then went on to win, on a plea of justification. See Cobban *A History of Modern France* Volume 3 (Penguin 1965) at 48-57.

¹⁴ Physician and journalist who published a series of articles in the magazine *L'Événement du Jeudi*. See also Casteret *L'affaire du sang* (Paris 1992).

¹⁵ *Blood Transfusion and AIDS in 1985: The Chronology and Events of AIDS and Haemophiliacs*; cited in the *Krever Report*, below fn 17.

¹⁶ Dr Michel Garreta, Director General of the Centre (4 years imprisonment); Dr Jean-Pierre Allain, Director of Research at the Centre (4 years imprisonment, with 2 years suspended); and Professor Jacques Roux, the Director General of Health (3 years suspended sentence on appeal). Dr Robert Netter, the Director of the *Laboratoire National de la Santé*, was acquitted because of the efforts he had made to alert his superiors.

¹⁷ For a summary of the French blood system at the time see Mr Justice Horace Krever *The Commission of Inquiry on the Blood System in Canada* (1997) Volume 3, Chapter 29.

suggested that HIV testing may have been unnecessarily delayed because of an interest in ensuring that the French test was given preference in the French market over a rival test manufactured by a foreign company. To make ministers legally accountable the National Assembly amended the Constitution in July 1993 not only to permit charges against current and former ministers but also to create a court expressly for that purpose, called the *Cour de justice de la République*. Charges were then laid against three ministers, including the former Prime Minister, Laurent Fabius,¹⁸ for conspiracy to poison by delaying approval of the testing process. However, on 9 March 1999, only the former Health Minister, Edmond Hervé, was found guilty of manslaughter and negligence in two cases. The court decided not to impose any punishment, saying he had endured almost 15 years of public criticism.¹⁹ The Commission is not suggesting that there should have been prosecutions on foot of the numerous infections and deaths in Ireland caused by contaminated blood.²⁰ The Department of Health and Children has expressed the view that the circumstances were different and did not justify prosecution. Indeed Judge Alison Lindsay, in her report, recommended that it was not appropriate to send the report to the Director of Public Prosecutions.²¹

1.10 By now there are a number of institutions – most of them ‘standing’ rather than *ad hoc* in character – whose purpose is to investigate what happened and publicise the results, often in particular areas. Whilst such institutions are usually not characterised as inquiries, this in effect is what they are. The longest-established example of this type is the Comptroller and Auditor-General,²² (though his investigation into the non-payment of DIRT was, in fact, grounded on specific legislation, as we shall see in paragraphs 4.13-4.21). The Ombudsman²³ is another possible resource. So, in a different field, is the Director of Consumer Affairs. Recently, too, the *Freedom of Information Act 1997* has been enacted (with the Ombudsman as Information Commissioner under it) as a means by which information held by public bodies may have to be disclosed (though not necessarily

¹⁸ Also Edmond Hervé, the former Health Minister and Georgina Dufoix, the former Minister for Social Affairs.

¹⁹ RTE news 9 March 1999 see www.rte.ie for details.

²⁰ More than 260 haemophiliacs were infected over a 20 year period and almost 80 have died: see “Opinion, The Lindsay Tribunal” (2002) *Bar Review* 354.

²¹ *Report of the Tribunal of Inquiry into the Infection with HIV and Hepatitis C of Persons with Haemophilia and Related Matters* (Pn 12074 2002) Part VI Recommendation paragraph 8.

²² *The Times* 26 July 2001 refers to the discovery, in Britain, that the government’s policy of cutting hospital waiting-lists has had the effect of encouraging doctors to undertake simpler and less important operations in order to achieve their targets. The essential point here is that this fact was discovered and authoritatively published in a report from the National Audit Office.

²³ “In 1972 the Vehicle and General case, involving the supervision of an insurance company by Ministers and civil servants, was investigated by a 1921 Act Tribunal, [HC 133 February 1972] whereas the Barlow Clowes case in 1992 was left to the Parliamentary Commissioner for Administration to inquire into”: Blom-Cooper “Public Inquiries” (1993) CLP 204, 208.

published to anyone other than the applicant). There are several other champions of the public interest, whose tasks include discovering and publicising information about matters of public concern, including the Equality Authority, the Human Rights Commission, and the National Safety Council.

1.11 Another way in which the public may obtain information are those statutory decisions carrying legal consequences and taken (usually by a Minister) in respect of which it is required that there should first be an inquiry.²⁴

1.12 The Commission ought to make the comment that while a criminal trial (or some other adjudicative proceedings) may in a subsidiary role play the part of an inquiry, the reverse may not work. In other words, if a criminal prosecution is not practicable, it is unlikely that the same objective can be achieved under the guise of an inquiry, by ‘naming and shaming’ the culprit. To attempt this would be to try to fit a square peg into a round hole. At a very broad level it may be said that the fear that such a process is occurring, whether designedly or not, even in a minority of cases, may underlie the intense application by the courts of the rules of constitutional justice to inquiries. The Commission would counsel against such substitution and urge that where criminality is suspected, a greater attempt should be made to bring criminal proceedings rather than hoping that the same objective can be achieved under the guise of an inquiry.

1.13 We wish to refer to the suggestion²⁵ that there should be established a standing inspectorate. While the Commission can see the attractiveness of such an institution, we are not convinced that this is the best way to proceed. The *ad hoc* arrangements currently made in relation to inquiries promote a variety of approaches, according to what is needed for fact-finding. Moreover, the fact that tribunals are of limited duration allows them to retain the services of some of the best and brightest of the Bar. It seems unlikely that such individuals would be prepared to take up salaried positions within a permanent inspectorate. Although we have had a spate of inquiries in recent years, there is no particular reason to believe that this trend will continue. This might mean that, over an extended period, any permanent inspectorate would be redundant part of the time. Last but not least we already have a number of what may be regarded as, amongst other things, a form of inspectorate: see paragraph 1.10. This allows the person who is to preside over the inquiry to have a role in the selection of the inquiry team. Accordingly, the Commission believes that it is better to continue with the practice of having inquiries conducted by teams assembled on a case-by-case basis.

²⁴ A local inquiry may be held in respect of the removal of members of a Health Board for failure to perform their duties (*Health Act 1970*, section 12 (1)(a)); the performance by harbour authority of its “powers, duties and functions”, and other related matters (*Harbours Act 1946*, section 164); the performance of the functions of a local authority (*Local Government Act 2001*, Part 20); the performance of the functions of a planning authority. (*Planning and Development Act 2000*, section 255)

²⁵ Brady “Reform of the Law of Tribunals” at 3: Paper delivered at the Bar Council Seminar *Inquiries: the Rights of Individuals, Privacy and Confidentiality*, held in Dublin on 17 July 1999.

1.14 At the same time the *ad hoc* quality of inquiries may, however, carry a disadvantage. They do not have any institutional continuity or memory. They do not have a well established footing in the government bureaucracy. As a result the inquiry will often be established by the Department of State into whose own past conduct the inquiry is investigating. While this will not create any problems in the majority of cases, there may well be cases where this will give rise to criticism, in that the body being investigated is responsible for establishing and servicing its inquisitor. The Commission suggests that an information and liaison office should be set up in the Department of the Taoiseach or the Attorney General's Office. Such an office would collate and manage a database of records and information in respect of precedents and guidance on matters concerning the establishment of an inquiry, including framing the terms of reference, financing, obtaining appropriate premises, and staffing requirements depending on the type of inquiry. A fund of records, experience and expertise.

1.15 The Commission has not reached any firm conclusion on this question and would be especially grateful to receive informed views on this, in order to formulate a proposal at the Report stage.

Part III Legislation

1.16 Since inquiries do not settle legal rights, do they need to be established under any law? One answer is that, as a matter of law, they do not have to be, and are not always, established by law: in principle, anyone, for instance a graduate student, may do research on a subject of public interest and publish the results. Yet, despite the lack of legal means of support if the inquirer were an independent official personage, the proceedings could be styled a public inquiry. An example is the *Report of the Chief Justice into the circumstances leading to the early release from prison of Philip Sheedy*.²⁶ (This was an episode which led to the resignation of two judges and a registrar).²⁷ The Chief Justice was anxious to stress, in relation to that task, that he was not exercising a statutory jurisdiction, as he had no powers of compulsion and was not in a position to test (by cross-examination, for example) the accuracy of the information given to him. He relied on the co-operation of the persons being interviewed. Likewise, Lord Denning's *Inquiry into the Profumo Affair* (see paragraph 5.06) and the *Scott Inquiry into the sale of arms to the Iraqi Government* were each without statutory means of support. Sir Richard Scott VC has remarked, extra-judicially:

“In England, the Tribunals of Inquiry (Evidence) 1921 Act is hardly ever used because it is thoroughly inconvenient to use it. Most inquiries, (certainly my own) are simply set up by *ad hoc* decision made by a Government. If there is something to be inquired into, they decide

²⁶ Dated 14 April 1999.

²⁷ See further O'Dowd “The Sheedy Affair” (2000) *Contemporary Issues in Irish Law & Politics* No 3, 103.

there should be an inquiry, they identify some figure to conduct the inquiry, they provide the figure with the funds necessary, and they say off you go and you decide your own procedure as you go along. The two desiderata of efficiency of the inquiry and fairness to those involved are the two critical elements in deciding on procedure.”²⁸

1.17 But equally it should be noted that most of the witnesses before the *Scott Inquiry* were politicians or officials, whom it might be hoped could be relied on to co-operate with it, apart from any legal imperative. Broadly speaking, a similar point could be made about the *Hamilton Inquiry into the Sheedy affair*, namely that the witnesses were all judges or court staff and accordingly their participation could be expected.

1.18 However, circumstances differ, and it is often necessary or convenient that inquiries should have some or all of the following legal powers to facilitate their work, for example, subpoena powers,²⁹ immunity from defamation, or the power to award costs.³⁰ Interference with their functioning (for instance, leaking information) may be made a crime. In addition, given the significance of fair procedures, the legislation may also set out specific procedural rules, rather than leaving this to the discretion of the inquiry itself.

1.19 The most formal and high-powered public inquiries are those constituted under the *Tribunals of Inquiry (Evidence) Acts 1921-2002*, described in Chapters 5 and 6. However, an inquiry may be set up under a number of other statutes. There is, for instance, a range of specialised legislation regulating accidents involving railways, shipping³¹ or aeroplanes (mentioned in the introduction to this Paper), also public local inquiries. In addition, the *Companies Act 1990*, section 14(1) empowers the Minister for Enterprise, Trade and Employment³² to appoint an inspector to investigate a company for the purpose of determining the identity of “the true persons” who are financially interested in it, or

²⁸ “Investigating Government: the Role of the Media and Publicity”, at 4; Papers from the Bar Council conference, *Inquiries; the Rights of Individuals, Privacy and Confidentiality* Dublin, 17 July 1999.

²⁹ Shakespeare put the point succinctly: “Glendower: I can call spirits from the vasty deep. Hotspur: Why, so can I, or so can any man: But will they come when you do call for them?” (Henry IV, Part I, Act III, Sc.i).

³⁰ See generally Chapter 6.

³¹ *Report into Disaster at Whiddy Island, Bantry, Co. Cork* (Prl. 8911) Chapter 1.1.1 observes that as well as the inquiry under the 1921 legislation, which is the subject-matter of the Report on 9 January 1979, the Minister for Tourism and Transport appointed a surveyor in his Department to carry out an inquiry into the casualties (50 people lost their lives in the disastrous fire and explosion), under section 465 of the *Merchant Shipping Act 1894*; and the Minister for Labour appointed an Inspector under the *Factories Act 1955* to begin an inquiry into the disaster.

³² Now vested in the Director of Corporate Enforcement, see Chapter 2.

who are able to shape its policy. Sometimes, an episode (for example, involving a possible conflict of interest), which engages the wider public interest, will also happen to come within the scope of this provision. Investigations of this type occurred in the case of Greencore and Bord Telecom.³³

Part IV Other Reviews in this Field

1.20 It is hard to know how to fit public inquiries into the categories of the conventional legal system. On the one hand, they are not courts, exercising the judicial function. On the other hand, they sit in public, and the person under investigation must be allowed strict procedural rights. Most significant of all, an inquiry's objective is to discover the truth whereas the law student early learns that this is not the purpose of a trial. Because of the unusual, amphibious character of an inquiry, lawyers have taken a while to balance up the various policies which are relevant, and to decide how they should be implemented. In addition, as explained at paragraph 1.32 there has been substantial political, media and public disquiet over the cost of some inquiries under the tribunals of inquiry legislation, especially the *Beef Tribunal*.

1.21 This thinking has proceeded at three levels. First, there have been a number of general surveys. Relatively early, the Dáil Public Accounts Committee ("PAC"), on 3 February 1994 requested the Comptroller and Auditor General ("CAG") "to report on comparative costs of public inquiries in the USA and the UK, with particular reference to the *Scott Inquiry*."³⁴ The CAG reported, and the Report and the PAC's response to it are published together. Five years earlier, at the request of the *First Report of the Parliamentary Inquiry into DIRT*, 15 December 1999,³⁵ comparative studies were undertaken by both the Attorney General's Office³⁶ and the Department of Finance.³⁷ In addition, when these reports had been made to the sub-committee, the then Attorney General, Michael McDowell SC, made an opening statement to the sub-committee on DIRT, and then answered its questions on 28 November 2000. Thereafter the sub-committee published its own views in *Inquiry into DIRT - Final Report, Chapter 5 "Parliamentary Inquiries"*.³⁸ In addition, on 12 July 1999, the Bar Council held a

³³ See Chapter 2.

³⁴ *Comparative Study into Tribunals of Inquiry and Parliamentary Inquiries (including Costs Comparison Report): Examination of the Report of the Comptroller and Auditor General of Investigation into the Administration of Deposit Interest Retention Tax and Related Matters during 1 January 1986 to 1 December 1998* Volume 2 Part 2 (Pn 7963 2001).

³⁵ *Ibid* chapter 16 "Future Parliamentary Inquiries".

³⁶ *Ibid* "Legal and Constitutional Issues (28 November 2000).

³⁷ *Ibid* "Cost Comparisons" (27 November 2000).

³⁸ There have also been a number of articles in legal journals which include, Murphy "Inquiries and Tribunals After Abbeylara" (2002) *Bar Review* 355; Brady "Tribunals and Politics and Politics: A Fundamental Review" (2000) *Contemporary Issues in Irish Law & Politics* 156;

Conference on “*Inquiries: the rights of individuals, publicity and confidentiality*”. Many of the contributors concentrated on particular aspects of inquiries.

1.22 At a second level, because of the widely differing situations which may arise, it will often happen, in a particular case that a ‘one-size-fits-all’ solution will not avail. Consequently, it is necessary, before settling the powers and shape of the inquiry, both to undertake some preliminary investigation and to assess, in the light of this, which is the most appropriate of the existing types of inquiry, or whether a new model should be designed. A most striking example is the amount of original and constructive thought which went into the devising by Laffoy J of the structure and processes of the *Commission to Inquire into Child Abuse*,³⁹ as is described in Chapter 3 and referred to elsewhere in this Paper.

1.23 The terms of reference of the *Moriarty Tribunal*⁴⁰ make explicit reference to the findings of the *McCracken Tribunal*⁴¹ and direct the inquiry to pursue matters that were outside the ambit of the earlier investigation. *McCracken* prepared the ground for *Moriarty* and provided the basis for the terms of reference for the second tribunal.⁴² Similarly, the *Finlay Tribunal*⁴³ into the circumstances

Quirke “Tribunals and the Parameters of the Judicial Function” (2000) *Bar Review* 328; O’hOisin “Tribunals of Inquiry: Clash of Adversarial and Inquisitorial Cultures” (1999) *Bar Review* 10; McGrath “Review of the Moriarty Tribunal and the Flood Tribunal to Date” (1999) *Bar Review* 230; Gallagher “Tribunals and the Erosion of the Right to Privacy” (1999) *Bar Review* 406; Brady “Inquiries: The Rights of Individuals, Privacy and Confidentiality, Reform of the Law of Tribunals” *Bar Review* 443; Moorhead “Inquiries: The Rights of Individuals, Privacy and Confidentiality, Representing the Public Interest” (1999) *Bar Review* 445; Rabbitte “A Tribunal Of Inquiry or an Investigation by Dail Committee” (1998) *Bar Review* 114; Brady “Reflections on Tribunals of Inquiry” (1997) *Bar Review* 121.

³⁹ An example of this can be seen by comparing the terms of reference for the non-statutory Commission to Inquire into Child Abuse with those effectively contained in the 2000 Act, which placed the Commission on a statutory basis shows that, in the former, it was unclear whether the scope of the inquiry should extend to children abused in the family. However, the latter makes it clear that the scope is confined to abuse in institutions.

⁴⁰ 480 *Dáil Debates Col 672* (10 September 1997), 152 *Seanad Debates Col. 74* (18 September 1997); also available at <http://www.moriarty-tribunal.ie/terms.html>.

⁴¹ *Report of the Tribunal of Inquiry (Dunnes Payments)* (Pn 4199 1997).

⁴² Indeed, the *McCracken Tribunal* was itself established on foot of reports of His Hon. Judge Gerard Buchanan, prepared at the instance of the Dáil Committee on Procedure and Privileges, submitted on 3 February and 6 March 1997. Judge Buchanan examined and reported on a report prepared by Price Waterhouse, which revealed payments made by a member of the Dunne family from accounts containing money which belonged to one or more entities in the Dunnes Stores Group. In its report the *McCracken Tribunal* observes that: “[i]t should be noted that Judge Buchanan was simply reporting on the Price Waterhouse findings, he was not conducting an inquiry, and although he obtained assistance in his examination of the Price Waterhouse report, he had no power to subpoena witnesses or hold hearings.” *Report of the Tribunal of Inquiry (Dunnes Payments)* (Pn 4199 1997) at 8.

It might have seemed natural that the *McCracken Tribunal’s* terms of reference might have been widened to allow it to investigate this new subject-area. However, McCracken J declined to allow his terms of reference to be expanded (on the grounds that to do so would be unfair to those who had acted or not acted on the basis of the existing terms of reference).

surrounding the contamination of blood and blood products was the precursor of the *Lindsay Tribunal*.⁴⁴ Another example is that the inquiry of the *Dáil Public Accounts Committee into the DIRT affair*⁴⁵ was preceded by a report by the Comptroller and Auditor General.⁴⁶

1.24 Even more recently, the preliminaries to the establishment of the tribunal of inquiry into Garda Misconduct in Donegal (chaired by the former President of the High Court, Mr Justice Morris) are of interest. First, an internal Garda inquiry reported in 2000 to the Garda Commissioner. This report was not published. Next, this report was criticised by two deputies and a further inquiry into their allegations was held. Then an independent review of all the relevant papers and the progress of the investigations into the allegations of unethical and criminal behaviour by Gardaí was conducted by Shane Murphy SC for the Minister for Justice.⁴⁷ In Mr Murphy's opinion a tribunal of inquiry was the only comprehensive method of inquiry to resolve these issues of fundamental public importance.⁴⁸ This led to the establishment of the *Morris Tribunal*, in late 2002. To facilitate the work of the *Morris Tribunal* and any downstream criminal proceedings, the *Tribunals of Inquiry (Evidence) (Amendment) Act 2002*, was enacted. Again, in March 2002, George Birmingham SC, was asked to conduct a preliminary investigation into the handling of clerical sexual abuse allegations in the Diocese of Ferns, with a view to advising as to what was the most appropriate type of inquiry to be used to deal with the issues. He submitted his report to the Minister for Health, Micháel Martin, on 2 August 2002. Subsequently, on 22 October 2002, the Government announced its intention to establish a non-statutory inquiry into the clerical sex abuse in the diocese, under the chairmanship of Mr Justice Francis Murphy. Finally, it should be noted here that recently the Irish Catholic Church's Independent Commission on Child Sex Abuse, chaired by Judge Gillian Hussey, has been disbanded. The Commission had been set up in June 2002 to establish the truth about the extent of child sexual abuse within the Catholic Church in Ireland, and the response of church authorities to complaints of such abuse. However, in view of the impending proposals from the Department of Justice⁴⁹ concerning a new procedure for

⁴³ *Report of the Tribunal of Inquiry into the Blood Transfusion Service Board* (Pn 3695 1997).

⁴⁴ *Report of the Tribunal of Inquiry into the Infection with HIV and Hepatitis C of Persons with Haemophilia and Related Matters* (Pn 12074 2002).

⁴⁵ See <http://www.gov.ie/committees-01/c-publicaccounts/sub-cttee/default.htm>.

⁴⁶ *Report of Investigation into the Administration of Deposit Interest Retention Tax and Related Matters during the period 1 January 1986 to 1 December 1999* (July 1999).

⁴⁷ See *Irish Times* 14 November 2002 at 6.

⁴⁸ Terms of the Oireachtas resolution establishing the *Morris Tribunal*, passed on 28 March 2002 - *Tribunals of Inquiry (Evidence) Act 1921 (Establishment of Tribunal) Instrument 2002*, S.I. No. 175 of 2002.

⁴⁹ On the Minister for Justice's proposals see *Irish Times* 28 November 2002 and 4 December 2002.

inquiries and a proposed State inquiry into clerical child sex abuse, Judge Hussey advised the Church that the *Hussey Commission's* work would not make sense as originally envisaged.⁵⁰

1.25 The third source of considered suggestions about the format of inquiries is informal. Many inquiries are presently sitting, and others have recently completed their work. Those involved in tribunals have had to do a good deal of thinking in this fairly novel area, and this Paper has been enriched by the opportunity to speak to some of them. In the thoughtful world of those lawyers who staff or appear before tribunals, there has been much discussion of the possible improvements which could be made to the present regime as well as the various pitfalls which must be avoided. The Commission is grateful to have been allowed the privilege of tapping into these deliberations and reflections.

1.26 These three sources add up to an unusually high level of recent thought on the subject by many of the ablest lawyers in the jurisdiction (both from the Bar and the official side). This concentration attests to the novelty, difficulty and importance of the subject-matter. It also means that much of what the Commission is recommending in this Paper is a codification of recent good practice, which has been “road-tested” and worked out in the hard school of experience.

Part V The Advantages and Disadvantages of an Inquiry

1.27 This is not an academic work and furthermore, there is little controversy in principle regarding either the advantages or the disadvantages of a public inquiry. Accordingly, while the Commission thinks it right to make explicit the basic assumptions of this Paper by outlining our understanding of the pros and cons, this can be done briefly.

1.28 Public inquiries carry the following significant and straightforward advantages:

- When there is loss of life, abuse by those in high office or widespread waste of public resources, it is only natural that the public should wish to be informed in detail as to: what happened, why it happened, who was responsible and how such an episode or practice can be prevented from recurring. Indeed, the notion that the public should be authoritatively informed is merely one facet of an ancient idea which is presently articulated as ‘openness, accountability and transparency’.⁵¹
- While there are exceptions, in the case of (say) accidents through natural causes, more usually public inquiries will involve misconduct or incompetence,

⁵⁰ See *Irish Times* 21 December 2002.

⁵¹ This is the oft repeated formulation though no one has explained what transparency adds to openness.

and this will often be compounded by being covered over by some element of secrecy, even deception. It is a further question (taken up at paragraphs 8.01-8.09) whether in order for full atonement to be made, they must not only know the conclusions as to what happened, but also see the chain of events being unearthed in public, in order to know that they are getting the full story.

- This is especially important where State organs or processes are involved, as they usually are, in one way or another. For even where the principal culprit is a private person, an organisation or big business, there will often have been a failure of the regulatory organs of State. Among the most significant elements of civilised existence is the citizenry's confidence that government is honest and competent: without this, the bonds of civilisation are that much weaker.

1.29 As against this, there are a number of disadvantages:

- The legal and other financial costs of an inquiry represent a huge imposition on the public purse. This will be the subject of Chapter 12.
- Plainly, to have one's behaviour the subject-matter of a tribunal of inquiry, with its strong powers of subpoena and production of documents, with the public's view of one's private affairs and information magnified by a hundred media outlets, possibly over a period of several months or years, is a signal infringement of a citizen's privacy, akin to being picked up and shaken by a giant.
- The reputation⁵² of the persons whose conduct is principally (or even peripherally) under investigation is likely to be affected to some degree.⁵³ In some cases, this person may well be the author of, or a contributory to, that misfortune. However, it could happen that a persons' reputation is damaged, even though the conclusion in the report at the end of the day is that they had done nothing wrong. Mud will be thrown and inevitably some may stick. The damage done might well be greater than that caused by allegations aired at a court hearing since the media coverage, over several months and years, is much more intense than in any but the most high-profile court case. Frequently, too, the delay between an allegation being made at a tribunal hearing and any final exoneration in the report is much longer.

⁵² Cf Othello (III) (iii) line 155: "Who steals my purse steals trash...but he that filches from me my good name/Robs me of that which not enriches him/And makes me poor indeed."

⁵³ The steel construction business of Joseph Murphy Structural Engineers was abandoned due to the length of time spent at the *Flood Tribunal*. "Joseph Murphy Structural Engineers has ceased operations in its main area of business because of the 'considerable trading difficulties' arising from its involvement at the *Flood Tribunal*." See *Irish Times* of 15 August 2001, at 16, on damage done to JMSE and Bovale. But, as against this, see *Second Interim Report of the Tribunal of Inquiry into Certain Planning Matters and Payments ('Flood')* (2002) chapter 12, and its criticisms of JMSE. (However it should be remembered that this was only an interim report and that the Inquiry continues).

- Court proceedings, criminal or civil, may arise out of some of the same ground traversed and covered by an inquiry. Another consequence of the publicity that is inherent in many inquiries is that it may or may be suggested to prejudice any downstream proceedings. This issue, too, is the subject of Chapter 11.
- In the crossfire of allegations ricocheting around a tribunal, an allegation may be made and widely reported against some person who is not or is only marginally within its terms of reference, and who is therefore probably not represented. Thus, a reputation may be damaged, perhaps because the tribunal is taken by surprise, or because the person is dead, not represented, not well informed, or not otherwise in a position to refute errors or falsehoods. It also heightens the risk of damage to reputations in that:

“The ultimate report may be ineffective in dislodging people’s recollection of the allegations particularly where the ultimate vindication of the good name is only part of the detail in a lengthy report. Such detail may never be given the publicity which the original allegations were given.”⁵⁴

As against this it must be emphasised that the tribunals have been very alert to this kind of danger and, for instance, Frank Dunlop, who was a significant witness before the *Flood Tribunal* was instructed to write down certain parts of his evidence so that reputations would not be unfairly besmirched in the media. Generally speaking, there seems not to have been very many innocent bystanders whose reputations have been hurt. Nor do we consider that this is a coincidence: an inquiry is staffed by expert lawyers, part of whose role is to prevent collateral damage. One way in which this is done is by the sifting carried out during the confidential, information-gathering part of the proceedings: see Chapter 9. A point often not considered is that the establishment of an inquiry, in a State in which there are already several standing bodies to seek out information (four of them noted at paragraph 1.10) may have the effect of incrementally undermining public confidence in these bodies and even perhaps, in the general fabric of the State. In a somewhat similar way, a surfeit of public inquiries may also tend to devalue the currency of inquiries. The point is well made that “[a] tribunal of inquiry should be an investigation of last resort. It is one to which recourse should only be had when the other agencies of investigation – that are typical of a modern parliamentary democracy – have failed to work”.⁵⁵

1.30 Speaking in the abstract, the only conclusion which can safely be drawn from this summary of pros and cons is that public inquiries should only be established in the most serious cases, and only then if the circumstances of the particular subject-matter are such that the advantages outweigh the disadvantages;

⁵⁴ Gallagher “Tribunals and the erosion of the right to privacy” at 14, paper delivered at the Bar Council conference on *Inquiries; the Rights of Individuals, Privacy and Confidentiality* Dublin 17 July 1999.

⁵⁵ Brady “Tribunals and Politics: A Fundamental Review” (2000) *Contemporary Issues in Irish Law & Politics* 156, 163.

bearing in mind, too, any possible alternative ways (see Chapter 10) in which the public's legitimate interests, in an open and mature democracy, can be safeguarded. Sometimes, the swift reaction which follows almost automatically from some public shock may not fully assess the disadvantages.

1.31 Speaking from a historical perspective, it is perhaps worth noting that the public and political mood-swing for or against inquiries, especially tribunals of inquiry, has been quite substantial. The base line perhaps was the popular indignation at the huge cost of the *Beef Tribunal* and the widespread feeling that no tangible advantages had emerged from this elaborate exercise. The natural consequence was reluctance on the part of politicians to set up any more 'formal inquiries' of this sort. Yet circumstances continued to arise which seemed to cry out for some form of independent investigation. Three of the best known of these were the 'non-statutory' *Hepatitis C Tribunal*; the *Dáil Committee of Inquiry into the fall of the Fiánna Fáil-Labour Government* and the *Dunnes Stores Inquiries*, the first carried out by an Expert Group, the second by the *sub-committee of the Select Committee on Legislation and Security* and the third by a retired Circuit Court judge.⁵⁶ However the first and third, at any rate, were superseded by the *Finlay* and *McCracken* tribunals of inquiry. This paved the way for further tribunals of inquiry. However, by late 2002 public concern at the cost was again in the ascendancy. Part of the responses to this was the promise of new legislation to set up private committees of investigation, to which we return in Chapter 10.

Part VI Non-applicability of Article 34.1 of the Constitution

1.32 Some of the criticisms made of public inquiries may be crystallised in the statement that an inquiry has the potential to do immense damage to an individual's reputation. One form in which this criticism has been made is to argue that an inquiry constitutes "an administration of justice". If this were so, then Article 34.1 of the Constitution would require that it should be heard by a court of law. Presumably the underlying policy justification for this view is that it would ensure that fair procedures are followed, and minimise any unjustified damage to reputation. However, the argument that a public inquiry is administering justice has been authoritatively rejected by the Supreme Court. According to McCarthy J in *Goodman International v Hamilton*: "the critical factor [in the definition of the administration of justice] is trial and adjudication, not inquiry."⁵⁷ In Ireland, this view represents a judicial consensus, which has been confirmed by the Supreme Court in *Haughey v Moriarty*.⁵⁸

⁵⁶ Hogan & Morgan above fn 9, Appendix to chapter 6.

⁵⁷ [1992] 2 IR 542, 607.

⁵⁸ [1999] 3 IR 1, 20-22 and 38-40. See, to the same effect, *Murphy v Flood* [1999] 3 IR 97, 103. For further information on the characteristics of the administration of justice see Morgan *The Separation of Powers in the Irish Constitution* (Sweet & Maxwell 1996).

1.33 However, this line of thought has been doubted in a much-quoted Australian case. This is the judgment of Murphy J in *State of Victoria v Australian Building Construction Employees' and Builders Labourers' Federation*,⁵⁹ though it should be noted that Murphy J was dissenting. The majority of the Australian High Court upheld the validity of an inquiry into an alleged bribery scandal, but Murphy J held that a Royal Commissioner, inquiring into various activities concerning a trade union, violated section 71 of the *Commonwealth Act 1900* which is the equivalent of Article 34.1:

“The authority given to the Commissioner to exercise such an important ingredient of judicial power as finding a person guilty of ordinary crimes, is in itself an undermining of the separation of powers. It is a fine point to answer that the finding is not binding and does not of itself make the person liable to punitive consequences. It is by fine points such as this that human freedom is whittled away. Many in governments throughout the world would be satisfied if they could establish commissions with prestigious names and the trappings of courts, *staffed by persons selected by themselves* but having no independence (in particular not having the security of tenure deemed necessary to preserve the independence of judges), assisted by *government-selected counsel* who largely control the evidence presented by compulsory process, overriding *the traditional protections of the accused and witnesses*, and authorised to investigate persons selected by the government and to find them guilty of criminal offences. The trial and finding of guilt of political opponents and dissenters in such a way is a valuable instrument in the hands of governments who have little regard for human rights. Experience in many countries shows that persons may be effectively destroyed by this process. The fact that punishment by fine or imprisonment does not automatically follow may be of no importance; indeed, a government can demonstrate its magnanimity by not proceeding to prosecute in the ordinary way.”⁶⁰

1.34 One should probably take the burden of this passage to be that, even apart from the formalistic concept of the “administration of justice”, damage to reputation may be so harmful⁶¹ that the individual whose reputation is at risk must be well protected. But surely, even understood in this broader sense, the picture painted in the passage is, in Ireland at any rate, the reverse of the truth. Consider the specific points made in the passage, and italicised in the quotation above. In the first place, inquiries are not staffed by persons “having no independence”. In the case of tribunals of inquiry, the chairperson is by convention usually a judge or former judge (see paragraphs 5.10-5.24); in the case of other public inquiries, the chairperson may be a judge but is more usually a successful professional person

⁵⁹ (1981-2) 152 CLR 25.

⁶⁰ *Ibid* at 110-111. (Emphasis added).

⁶¹ *Minister for Finance v Goodman (No 2)* High Court 8 October 1999.

(usually a lawyer or accountant) appointed *ad hoc*, whose independence is accepted by all sides.⁶² Secondly, more important than the “government-selected counsel” is the fact that the person whose reputation is in question is represented by independent and high-powered legal teams, often (depending on the inquiry) paid for by the State. Thirdly, “the traditional protections of the accused and witnesses,” (to quote the words italicised above), at a criminal trial do have their equivalent at a public inquiry in the amplitude of constitutional justice allowed to persons whose reputation is in question. In addition, public inquiries are subject to control by the courts by way of judicial review. In short, the dry remark with which this passage was dismissed by Hederman J in *Goodman International* - “this passage identifies a danger that such powers might be abused. If this were to happen, the courts would restrain it”⁶³ - appears well-merited.

⁶² For example Shane Murphy and George Birmingham, above at paragraph 1.24.

⁶³ *Haughey v Moriarty* [1999] 3 IR 1, 40.

CHAPTER 2 COMPANY INSPECTORS

Part I Introduction¹

2.01 The form of investigation described in this chapter is established by Part II of the *Companies Act 1990*,² which provides for the appointment of inspectors to investigate the affairs of a company, in particular situations. Broadly speaking, these are:

(a) On the application of the members of a company, the company itself or its creditors, the High Court has an unfettered discretion to appoint one or more competent inspectors to investigate the affairs of the company;³

(b) The Director of Corporate Enforcement may also petition the Court for the appointment of an Inspector (who may be an officer of the Directorate). But here, the Court's discretion is limited to circumstances suggesting fraud or the withholding of information from members of the company;⁴

(c) Without recourse to the courts, the Director of Corporate Enforcement may appoint an Inspector to investigate a company for the purpose of determining the true ownership of that company. Again, this discretion cannot be exercised unless there are circumstances suggesting that it is necessary for the effective administration of company law; or

¹ See generally: Keane *Company Law* (3rd ed. Butterworths 2000) chapter 35; Courtney *The Law of Private Companies* (Butterworths 1994) chapter 20; McGrath "Investigations under the Companies Act 1990" (1993) 11 ILT 264.

² As amended by the *Company Law Enforcement Act 2001* ("CLEA").

³ *Companies Act 1990*, section 7.

⁴ *Companies Act 1990*, section 8, as amended by section 21 CLEA. Courtney *The Law of Private Companies* (Butterworths 1994) states that "[p]resumably the court would wish to be satisfied that there was at least *prima facie* evidence of some irregularity in relation to the companies' affairs": paragraph 20.007.

for the effective discharge of ministerial functions; or on public interest grounds.⁵

2.02 The notion of appointing inspectors to scrutinise the affairs of a company is one of “venerable origin”⁶ and can be traced to section 56 of the English *Companies Act 1862*. While this facility, in one form or another, has been available to successive Ministers since the foundation of the State, prior to the 1990 Act it was little used.⁷ Writing extra-judicially, Keane CJ speculates about possible reasons for this disuse:

“In many cases those who wished to see the company’s affairs investigated were frustrated creditors and they might have preferred to petition for the winding up of the company. But another factor was undoubtedly the reluctance of successive Ministers to make use of their powers. There were also serious limitations on the circumstances in which the Minister could order an investigation.”⁸

2.03 Since 1990, the position has been radically different. The company inspector has been catapulted to the forefront of Irish political life and has been the inquiry of choice in respect of several high profile scandals.⁹ During the period 1991-2001 authorised officers or inspectors were appointed to twenty companies.¹⁰ To a large extent, this is attributable to the “sweeping changes”¹¹ introduced by the *Companies Act 1990*. The principal change is that the power to order an investigation was vested in the High Court, whereas previously it had been vested in the Minister. In tandem with this principal change, many of the limitations on the circumstances in which an investigation could be ordered were removed. The

⁵ Section 14 *Companies Act 1990*, amended by section 26 CLEA. Notice too that the Director may require information directly from companies without the need to launch a formal investigation and without appointing an inspector. This power cannot be exercised unless there are circumstances suggesting that it is necessary for the effective administration of company law; or for the effective discharge of Ministerial functions; or on public interest grounds: section 15 and section 16, as amended by section 27 CLEA. Nothing further will be said about this option.

⁶ *Chestvale Properties Ltd v Glackin* [1993] 3 IR 35, per Murphy J at 41.

⁷ McCormack notes that the equivalent investigatory procedures laid down in the *Companies Act 1963*, were employed on only five occasions between 1963 and 1990. See: McCormack, *The New Companies Legislation* (Round Hall Press 1991) 37.

⁸ Keane *Company Law* (3rd ed. Butterworths 2000) paragraph 35.02.

⁹ See *Irish Times* “Inspectors staffed and equipped to get answers” 4 February 2000; “Inspectors appointed to look behind cobwebs” 3 April 1998.

¹⁰ See Department of Enterprise, Trade and Employment *Companies Report 2001* (Pn 11966, 2002), Appendix 13, which lists investigations from 1991 to the end of 2001.

¹¹ *Op cit* fn 8, at paragraph 35.02.

Minister, when explaining¹² the new provisions postulated that the path of future investigations would run more smoothly if the inspector was under the watchful eye of the court. The thinking was that any procedural or legal difficulties could be more speedily and conclusively settled there.¹³

2.04 To date, the most celebrated investigations by company inspectors have been those involving: the privatisation of the Irish Sugar Company, (*the Greencore Affair*); or the fact that Telecom Éireann had paid £9.4 million (€11.94 million) for premises (formerly owned by Johnson, Mooney and O'Brien), which had changed hands only two years earlier for £4 million (€5.08 million) (*the Telecom Affair*). One context in which this type of investigation has proved particularly useful has been in the aftermath of tribunals of inquiry. In practice, where a matter is touched upon, but is not fully explored by a tribunal report, an Inspector may subsequently be appointed to concentrate on this particular issue. For example, following the *McCracken Tribunal*, company inspectors were appointed to investigate Celtic Helicopters, Ansbacher Accounts, and Garuda Limited, all of which were mentioned in the tribunal's report but did not fall four-square within its terms of reference.¹⁴

2.05 The fall-out of a formal investigation under the *Companies Act 1990*, is potentially quite serious for the company involved, as well as the individuals behind the corporate veil. In general, it is true that the Inspector's report merely contains findings of fact, but as Keane states:

“It is thus, in essence, a fact finding exercise which does not of itself affect the legal rights and obligations of any individual concerned, although the publication of the report – and even the fact of the investigation having been ordered – may affect their reputations.”¹⁵

2.06 Moreover, there is a further feature of this type of inquiry which warrants mention. Section 12(1) of the 1990 Act provides that the Court may make *any order it deems fit* in relation to matters arising out of the report, including an order of its own motion for the winding up of the company. This is obviously a severe penalty for the company in question. There is a savor to the effect that the court is not in a position to impose penalties on an individual without affording him the protection of a criminal trial. It is nonetheless clear that individuals, as the directing mind of the company, inevitably suffer if the company is wound up. These individuals will have no redress in the form of a defamation action in respect of the

¹² 116 *Seanad Debates* Col 304 (20 May 1987) and 127 *Seanad Debates* Col 215 (13 December 1990).

¹³ The power to appoint inspectors to investigate companies was seldom invoked whilst it was vested in the Minister and those investigations that were ordered became “bogged down in a legal and constitutional quagmire”: See McCormack (1990) ICLSA 1990/33 – 02.

¹⁴ *Op cit* fn 8 at paragraph 35.05.

¹⁵ *Op cit* fn 8 at paragraph 35.14.

contents of the Report, since the publication is privileged. Section 23(3) of the 1990 Act states that “publication, in pursuance of any provision in this Part, of any report, information, book or document shall be privileged.”

2.07 It is fair to say that this form of inquiry is well regarded by many commentators as being less expensive, speedier and more discreet than tribunals of inquiry. For these reasons, it is worth examining this method of investigation with a view to its possible application in a non-company context.

2.08 The workings of Part II of the *Companies Act 1990*¹⁶ are examined below under the following headings:

- The Privilege against Self-Incrimination
- Constitutional Justice
- Foreign Authorities on Procedure
- Publicity

Part II The Privilege Against Self-Incrimination

2.09 This topic falls to be considered fully in relation to downstream proceedings in Chapter 11 of this Paper so will only be dealt with briefly here.

2.10 As a general proposition, a tension exists between effective investigatory procedures and the privilege against self-incrimination. A clear example of this tension is to be found in the *Companies Act 1990*. On the one hand, a witness is placed under a statutory obligation to co-operate and disclose as much relevant information as possible. On the other hand, any such evidence may subsequently be used against him.

2.11 Section 10(1) contains the mandatory co-operation provision, as follows:

“It shall be the duty of all officers and agents of the company and of all officers and agents of any other body corporate whose affairs are investigated by virtue of s. 9 to produce to the inspectors all books and documents of or relating to the company, or, as the case may be, the other body corporate which are in their custody or power, to attend before the inspectors when required so to do and otherwise to *give to the inspectors all assistance* in connection with the investigation which they are reasonably able to give ...” (Emphasis added).

¹⁶ As amended by Part 3 of the *Company Law Enforcement Act 2001*.

2.12 As regards later use of information gained through such assistance, section 18, contains the following provision:

“(1) An answer given by a person to a question put to him in exercise of powers conferred by-

(a) section 10;

(b) section 10 as applied by sections 14 and 17; or

(c) rules made in respect of the winding up of companies whether by the court or voluntarily under section 68 of the Courts of Justice Act 1936, as extended by section 312 of the Principal Act;

may be used in evidence against him, and a statement required by section 224 of the Principal Act may be used in evidence against any individual making or concurring in making it.” (Emphasis added)

The combined impact of these sections clearly places witnesses testifying before company inspectors in an invidious position, and threatens their privilege against self-incrimination.

2.13 In essence in *National Irish Bank Ltd (No. 1)*,¹⁷ (“NIB”) the High and Supreme Court applied general constitutional principles to remedy what was, in our view, a significant omission by the legislature. In brief the case concerned allegations of improper charging of interest and fees to the accounts of customers. Two joint inspectors were appointed by the High Court, on an application by the Minister.¹⁸ The employees of NIB claimed to be entitled to the full panoply of procedural safeguards, among them the right to refuse to answer questions and to provide documents which may tend to incriminate them. The inspectors applied to the High Court for direction on the issue of self incrimination.¹⁹ Shanley J, in determining whether the ‘right of silence’ could be abridged, applied a proportionality test, *ie* whether the restriction placed on the right by statute was any greater than was necessary to enable the State to fulfil its obligation under the Constitution. It was held that the procedures proposed to be adopted by the inspectors accorded with the requirements of constitutional justice, and that the abrogation was no more than was necessary. Therefore, the employees were not entitled to refuse to answer questions put by the inspectors, nor to refuse to provide the documents required. The Supreme Court, whilst upholding the decision of Shanley J, stated that what was objectionable was compelling a person to confess

¹⁷ [1999] 3 IR 145 (HC); [1999] 3 IR 169 (SC).

¹⁸ *Companies Act 1990*, section 8.

¹⁹ The inspectors also sought direction on the question of availability of fair procedures at the preliminary stages of their investigation. The response of the High Court to this question is discussed above at paragraph 2.23, below.

and then convicting that person on the basis of his compelled confession. The crucial point in the court's reasoning was its view that any confession of an official of the company under investigation obtained by the inspectors, would not in general be inadmissible at a subsequent criminal trial unless the trial judge was satisfied that the confession was voluntary. In substance, therefore, the Supreme Court read into the legislation a rule which would render an involuntary confession inadmissible in subsequent criminal proceedings and is somewhat analogous to the rule - a direct use immunity – which has been applied to almost all other inquiries, by the constituent legislation: see Chapters 4 and 11. However, the drawback was that a person providing self-incriminating or potentially self-incriminating information would only know whether this material will be used against him after the event, in other words, when the trial judge in subsequent criminal proceedings rules on admissibility.

2.14 One should note here that at the time of enactment of the 1990 Act such immunity was felt by the legislature to be inappropriate. During the Dáil Committee stage of the Bill, which became the 1990 Act, an amendment was tabled which would not have withdrawn the privilege against self-incrimination, but would have rendered evidence given before the inspector as inadmissible in subsequent civil or criminal proceedings.²⁰ The proposed amendment was essentially a direct use immunity, along the lines of those contained in the legislation referred to above. The Minister opposed the proposed amendment, arguing that:

“I would not see any point in effectively forcing a person to answer a question and then ruling out the admissibility of his answer in any subsequent proceedings. That would amount to saying to a person: “If you come clean and make a full confession we will forget about any consequences and absolve you fully from any sins you may have committed”. I do not think that is what we should be able to do here. It has to be remembered that the prime purpose of an investigation is to establish the facts in a particular case of concern as a part of an overall system of regulatory control under company law. If the facts lead to a conclusion that some aspect of the law ought to be changed, then so be it but if, on the other hand, the facts established suggest that criminal proceedings ought to be brought against a person I do not think we should rule them out. That, in effect, is what ... [the] amendments would do.”²¹

2.15 The *National Irish Bank* decision is sensitive to the practical difficulties implicit in applying the privilege against self-incrimination in a public inquiry system, which will be examined in more detail in Chapter 11. However, in striking a balance between the exigencies of the inquiry system and the rights of individual

²⁰ 385 *Dáil Debates* Col. 1510 - 1515. For a discussion of this exchange see McCormack (1990) ICLSA 90/33-37. The author observes that “[t]he mover of the amendment, of course, somewhat ironically, became Minister of Industry and Commerce before the Act finally reached the statute book.”

²¹ 385 *Dáil Debates* Col 1515.

witnesses, it is submitted that the Supreme Court has leaned too far in favour of the needs of the former at the expense of the rights of the individual. It would now appear that legislation containing no immunity or protection whatsoever for witnesses who are compelled to incriminate themselves is constitutionally sound (or rather may be interpreted to be sound).

2.16 It should be noted here that following the enactment of the *Company Law Enforcement Act 2001* section 18 (the original version of which is in paragraph 2.12, above) was amended, as follows:

“(1) An answer given by an individual to a question put to him in exercise of powers conferred by-

(a) section 10;

(b) section 10 as applied by sections 14 and 17; or

(c) rules made in respect of the winding up of companies whether by the court or voluntarily under section 68 of the Courts of Justice Act 1936, as extended by section 312 of the Principal Act;

may be used in evidence against him in any proceedings whatsoever (save proceedings for an offence (other than perjury in respect of such an answer)), and;

(2) A statement required by section 224 of the Principal Act *may*, in any proceedings whatsoever (save proceedings for an offence (other than perjury in respect of any matter contained in the statement)), *be used in evidence against any individual making or concurring in making it.*” (Emphasis added)

Here one ought to focus on the phrase “any proceedings whatsoever (save for an offence...)”. If one reads this several times, it becomes clear, although not especially clear, that the power to use answers given in evidence against the individual giving them will not extend to use in criminal proceedings against the individual (*ie* “proceedings for an offence”), that is except for a perjury prosecution, which results from such answers.²² In short, perjury apart, there is a privilege in respect of criminal proceedings.

(a) Comment

2.17 *The Commission is of the opinion that the provision of a direct use immunity achieves a satisfactory balance between the competing interests of witnesses and the inquiry. Whilst it is true that the judiciary, through the application of the Constitution, have to a certain extent repaired the original*

²² For an explanation of the effect of the amendment see the Select Committee on Enterprise and Small Business 21 March 2001.

omission and the subsequent amendment of section 18 of the 1990 Act has sought to effect this by way of legislation; the Commission is of the view that section 18 ought to be amended further by the reframing of the direct use immunity, along the same lines as that contained in the 1921-2002 legislation, simply in the interests of clarity.

(b) Civil Proceedings

2.18 Section 22 of the 1990 Act provides that the inspector's report is to be admissible in any civil proceedings as evidence:

(1) of the facts set out therein without further proof unless the contrary is shown; and

(2) of the opinion of the inspector in relation to any matter contained in the report.

This provision was considered in *Countyglen Limited v Carway*.²³ The plaintiff company had instigated civil proceedings against the Carway family, Anglo Irish Bank and a firm of solicitors. The admissibility of an inspector's report by Frank Clarke SC into the affairs of the plaintiff was at issue. The plaintiff company contended that it was entitled to adduce the report in evidence, and that its production shifted the evidential burden of proof to the defendants to disprove the facts contained therein. The defendants resisted this interpretation of section 22, arguing that the report should only be relevant at interlocutory hearings, or alternatively that it should be evidence of "primary facts," but not of inferences, opinions or narrative evidence. Matters were complicated further by the fact that an appendix to the report had been omitted from publication, but had been furnished to the Court and the plaintiff Company. The defendants sought discovery of the appendix, or alternatively contended that facts contained therein should not be admitted as *prima facie* evidence.

2.19 Laffoy J stated the plaintiff's interpretation of section 22 was "the most obvious interpretation of the intention of the legislature."²⁴ Also, "report" meant the entire report and hence, the appendix was admissible even though the defendants were denied discovery of it. She stated, "it may be that in the instant actions the embargo on the disclosure of appendix 23 will give rise to difficulties. However these difficulties will have to be addressed as they arise."²⁵ Finally, the word "facts" was narrowly construed, and limited to "primary or basic facts and not secondary or inferred facts."

²³ 20 February 1996 High Court (Laffoy J).

²⁴ *Ibid* at 13.

²⁵ *Ibid* at 17.

2.20 The Australian High Court, in *Testro Bros Property Ltd v Tait*,²⁶ considered and upheld the validity of an identical legislative provision. The appellants argued that their rights could be prejudicially affected by the admissibility of the report as *prima facie* evidence of the facts contained therein, and hence they were entitled to a wide range of procedural safeguards. To side-step this line of interpretation, the High Court majority artificially interpreted the legislation as referring to the facts upon which the inspector's view was based, rather than "stand alone" facts. The Court stated: "we are of the opinion that the report of an inspector has no evidentiary value at all except where the fact of his opinion is a relevant issue in any particular proceedings."²⁷ Thus, in Australia, despite the plain words of the legislation, the scope of the provision has been construed restrictively and Laffoy J's interpretation in *Countyglen* expressly rejected.

2.21 It should be noted that the Supreme Court's surgery in the *Re National Irish Bank* case was confined to admissibility in respect of criminal proceedings and therefore does not impact on section 22. The Commission is of the view that the current use of an inspector's report in subsequent civil proceedings, as interpreted by Laffoy J, above, is an interesting feature. The issue of whether an equivalent to section 22 should be utilised in respect of an inquiry's report is considered later at paragraph 11.14.

Part III Constitutional Justice

2.22 In relation to company inspectors, the courts have been slow to emphasise the rules of natural and constitutional justice in order to avoid putting "those who hold inquiries into legal straitjackets."²⁸ Certainly, during the preliminary information-gathering stages of an inquiry, the view has been taken that the discretion of the inspector ought not to be fettered by imposing the full armoury of procedural safeguards.²⁹ Thus, in *Chestvale Properties v Glackin*,³⁰ the applicants based their argument on the first limb ('no bias') of constitutional justice,

²⁶ (1963) 109 CLR 353.

²⁷ *Ibid* at paragraph 9.

²⁸ *Maxwell v Department of Trade and Industry* [1974] 2 All ER 122, 131-2 *per* Lawton LJ.

²⁹ Keane states that the inspector is under no obligation to hold an oral hearing. If one is held, there is no obligation to conduct it in public, unless the inspector considers it desirable. "That, however would seem to be the limit of the obligation placed on the inspectors, unless they decide to hold an oral hearing. In that event, all the precautions to which the 'accused' is entitled under *In re Haughey* become applicable. He or they are not only entitled to be heard in their own defence under the *audi alteram partem* rule; they are also entitled to: (1) an opportunity to cross-examine witnesses; (2) an adjournment to enable them to prepare their case; (3) legal representation when the seriousness of the matter in issue or the consequences for the person concerned seem to warrant it." *Above* fn 8, at paragraph 35.18.

³⁰ [1993] 3 IR 35.

and argued that the inspector was disqualified on the basis that he could not be, or would not be seen to be, impartial in that the appointed inspector was a partner in a firm of solicitors which had acted professionally for both a partner of *D* (who was the beneficial owner of the shares in the applicant company) and also for certain companies in which *D* had an interest – although not for the applicant company itself.³¹ However, Murphy J distinguished the position of the applicants from the predicament faced by Pádraic Haughey in *In re Haughey*.³² The present investigation had reached “only a very preliminary and exploratory stage,” and the inspector did not yet “find it necessary to make a choice as between conflicting claims.” For the time being, the inspector was exercising an inquisitorial role only, and was not obliged to adhere to the requirements of constitutional justice. Murphy J outlined the “evolving aspect of an inspector’s statutory duties,” and predicted that the inspector might, at some stage, have to engage in a task which involved him in a quasi-judicial function. In this latter capacity, the inspector would be bound by the rules of fair procedures, but not before. Essentially, the applicant’s claim was “premature”³³ and therefore was refused.

2.23 This approach was recently affirmed in *Re National Irish Bank*.³⁴ The joint inspectors in that case proposed to adopt a two-stage system of work. Initially, they would engage in an information-gathering exercise. The second stage would commence once it became clear that adverse conclusions might be reached in relation to certain individuals. At this point, the individuals at risk would be entitled to attend, hear the evidence against them, cross-examine the witnesses and give evidence themselves. Employees of NIB asserted that the first stage of the proposed procedure, during which procedural protections would not be afforded, was inconsistent with the requirements of constitutional justice. It was submitted that the affidavit grounding the application to appoint the inspectors was full of accusations of criminal behaviour, and that the employees now stood “in the public domain accused of criminality and [were] therefore in no different a position to the position of Pádraic Haughey himself when he stood before the Public Accounts Committee of Dáil Éireann accused of criminal conduct.”³⁵ Shanley J in the High Court stated:

“I am satisfied that there is no entitlement to invoke the panoply of rights identified by the Supreme Court at the information gathering stage of the inspectors’ work. The procedures identified by the inspectors following the outcome of the first stage accord in my view with the requirements of fairness and justice, and guarantee, where appropriate, the exercise of the rights identified in the *Haughey* case. I

³¹ See further Hogan and Morgan *Administrative Law in Ireland* (3rd ed. Sweet & Maxwell 1998) at 528-529.

³² [1971] IR 217.

³³ *Op cit* fn 30 at 51.

³⁴ [1999] 1 ILRM 321.

³⁵ *Ibid* at 342.

therefore determine that the procedures outlined by the inspectors ... are consistent with the requirements of natural and constitutional justice.”³⁶

In a subsequent appeal to the Supreme Court, this aspect of the decision was not challenged by the appellants.³⁷

2.24 In *Dunnes Stores v Maloney*,³⁸ too, in a slightly different context, the High Court adopted a non-interventionist approach. In that case, the applicants were given just three days to disclose documentation relating to a ten-year period. They challenged the inspector’s demand on the grounds that it was excessive and unreasonable. It was further argued that the applicants ought to have been given advance notice of the demand and an opportunity to make prior representations. To support this contention, the applicants relied on the Supreme Court decision of *Haughey v Moriarty*.³⁹ In that case, a series of wide-ranging orders for discovery had been quashed on the basis that:

“Fair procedures require that before making such orders, particularly orders of the type made in this case, the person or persons likely to be affected thereby should be given advance notice by the tribunal of its intention to make such order, and should be afforded the opportunity, prior to the making of such order, of making representations with regard thereto.”⁴⁰

2.25 Laffoy J stated that *Haughey* could be distinguished from the instant case. In *Haughey*, the impugned orders were served on financial institutions, not on the persons directly affected by the tribunal’s investigation, namely the Haughey family. By contrast, the orders in *Dunnes Stores* were served on and affected *Dunnes Stores* alone. No third party was affected, and the applicants were free to raise objections to the orders once they were made.

2.26 So far, the case law has laid down only two fairly narrow exceptions to the general disinclination of the courts to require procedural fairness. First, it appears that it is incumbent on the Minister to give reasons for the appointment of an inspector. In *Dunnes Stores* Laffoy J stated:

“In my view, in adopting the stance which has been adopted, the minister has, in effect, rendered her decision unreviewable ... [The applicants] are entitled to have the decision reviewed ... and, in my

³⁶ [1999] 1 ILRM 321, 343

³⁷ The issue on appeal was the privilege against self-incrimination, discussed further in Chapter 11.

³⁸ [1999] 1 ILRM 119

³⁹ [1999] 3 IR 1.

⁴⁰ *Ibid per* Hamilton CJ at 173.

view, they are utterly stymied in the exercise of that right by reason of the refusal to give reasons for the decision ... this is a case in which procedural fairness requires that the minister give reasons for her decision.”⁴¹

2.27 The second very particular instance of court intervention is to be found in *Desmond v Glackin (No 2)*,⁴² which concerned a constitutional challenge to section 10 (5) of the 1990 Act. The subsection provided for the inspector to certify a witness's refusal to co-operate to the High Court, upon which that witness could be punished “in like manner as if he had been guilty of contempt of court.” The High Court,⁴³ and on appeal the Supreme Court, held the contempt provisions to be unconstitutional, having regard to the provisions of Article 38 of the Constitution. Essentially, this decision was a straightforward application of the principles laid down in *In re Haughey*.⁴⁴ The most noteworthy aspect of the matter is that the legislature should have chosen to include section 10 (5) in the 1990 Act in the first place. The equivalent 1963 provision was replaced by the *Companies (Amendment) Act 1982*, section 7, “because of concern that the provisions of the Principal Act were repugnant to the Constitution, having regard to the decision of the Supreme Court in *In re Haughey*.”⁴⁵ In 1990, McCormack wrote, “the legislative wheel has come full circle with again the absence of any right to jury trial.”⁴⁶ Keane notes that the “reversion to the dubious procedure in the Principal Act was described as ‘surprising’.”⁴⁷

2.28 Since 1990, it is no longer mandatory, but merely permissive to send a copy of the report to the company's registered office.⁴⁸ It seems strange that the company at the heart of the inspector's report can be prevented from having access to its contents. This is particularly so if one considers the grave consequences which can flow from the inspector's report. McCormack states: “a point of natural/constitutional justice arises. In view of the serious consequences, specified in section 12 that can result from an inspector's report, it would appear that the company should be sent a copy of the report whenever there is a possibility of

⁴¹ *Op cit* fn 38 at 138.

⁴² [1993] 3 IR 67.

⁴³ *Per* O'Hanlon J.

⁴⁴ [1971] IR 217. See Chapter 7 Parts II and III.

⁴⁵ Keane *Company Law* (3rd ed. Butterworths 2000) at paragraph 35.35.

⁴⁶ (1990) ICLSA 90/33-21.

⁴⁷ *Op cit* fn 45 at paragraph 35.35.

⁴⁸ Section 11(3) “... the court *may, if it thinks fit* – (a) forward a copy of any report made by the inspectors to the company's registered office ...” (Emphasis added).

winding up proceedings being brought on foot of the report.”⁴⁹ Following informal consultation with the Office of the Director of Corporate Enforcement it appears that both, natural and legal persons who may potentially be adversely affected by an inspectors report will normally be sent a copy, even, it seems, where there is a departure from the recent practice of general publication, discussed at paragraphs 2.37 - 2.48.

Part IV Foreign Authorities on Procedure

(a) England

2.29 An even lower standard of natural justice has been set by the English courts. For example, the inspector is under no obligation to allow the cross-examination of witnesses, or to recall witnesses to rebut allegations, or to submit tentative conclusions to the accused.⁵⁰ De Smith, Woolf and Jowell explain that:

“The weight of judicial authority on investigations of this kind conducted under the *Companies Act* has laid a heavy emphasis on their non-judicial character, the importance of an expeditious conclusion and the difficulty of the investigative task.”⁵¹

2.30 The leading English case is *Re Pergamon Press Ltd*⁵² in which the directors of the company (among them the late Robert Maxwell) were apprehensive that the inspector’s interim reports, if critical of their conduct, might be used in evidence against them in concurrent US civil litigation. For this reason, they sought undertakings from the inspector that certain procedural standards would be met and, in particular, that they would be fully informed of all allegations against them. The inspector agreed to outline the allegations in general terms, but refused the more elaborate procedures demanded by the directors. Not satisfied, the directors refused to co-operate with the investigation. The Court of Appeal held that their refusal was unjustified. Lord Denning MR began by listing the potentially far-reaching effects of an investigation under the *Companies Act 1948*, stating:

“They have to make a report which may have wide repercussions. They may if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn

⁴⁹ (1990) ICLSA 1990/33 – 23. See, to like effect, *Fayed v UK* 18 EHRR 393, at 408. Below at paragraph 2.33.

⁵⁰ *Re Grosvenor & West end Railway Terminus Hotel Co* (1897) 76 LT 337; *Hearts of Oak Assurance Company v Attorney General* [1932] AC 392; *O’ Connor v Waldron* [1935] AC 76; *St John v Fraser* [1935] SCR 441.

⁵¹ De Smith, Woolf and Jowell *Judicial Review of Administrative Action* (5th ed. Sweet & Maxwell 1995) at paragraph 10 – 028.

⁵² [1970] 3 All ER 535.

others; they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about the winding up of the company.”⁵³

Notwithstanding these serious consequences, the standard of procedural fairness required was set quite low, namely:

“The inspectors can obtain information in any way which they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said about him. They need not quote chapter and verse. An outline of the charges will usually suffice.”⁵⁴

2.31 This limited standard of fairness was further pared down in *Maxwell v Department of Trade and Industry*,⁵⁵ which concerned an investigation into a cluster of companies owned by the late Robert Maxwell. The plaintiff claimed that the Department of Trade and Industry (“DTI”) company inspectors had acted in breach of the rules of natural justice in that, having formulated their tentative criticisms of him, they had failed to give him an opportunity of answering about a quarter of those criticisms before publishing their report. In dismissing Mr Maxwell’s appeal, the Court of Appeal was enormously sympathetic to the difficult task faced by inspectors. Lord Denning MR stated:

“His task is burdensome and thankless enough as it is. It would be intolerable if he were liable to be pilloried afterwards for doing it. No one of standing would ever be found to undertake it. The public interest demands that so long as he acts honestly and does what is fair to the best of his ability, his report is not to be impugned in the courts of law.”⁵⁶

2.32 The severity of the English cases is open to criticism. The willingness of the courts to acknowledge the drastic effects of a company investigation is at odds with their reluctance to afford adequate protection to the “targets” of such an investigation.⁵⁷ In the realm of company inspectors, there is an unacceptable disparity between the impact of the investigations and the standards to be applied during the investigations. De Smith, Woolf and Jowell comment:

“The balance is still a fine one, inasmuch as the investigation...and report expose persons to a legal hazard as well as potentially damaging

⁵³ *Op cit* fn 52 at 539.

⁵⁴ *Ibid* at 539.

⁵⁵ [1974] 2 All ER 122.

⁵⁶ *Ibid* at 129.

⁵⁷ See *Re Pergamon Press* [1970] 3 All ER 535 *per* Lord Denning MR at 539.

publicity. It has accordingly been held that the rudiments of natural justice or fairness must be observed, in so far as the inspector must, before publishing a report containing serious criticisms and allegations against a person, put to that person the substance of them and given him the opportunity of rebutting them. However, it has been held that the inspector is not required to allow the cross-examination of witnesses, nor is he required to recall the person to rebut allegations subsequently made by other witnesses, nor submit his tentative conclusions to the ‘accused’ before sending his report to the Minister.”⁵⁸

Put simply, “the position of the person under investigation is unenviable.”⁵⁹

(b) European Court of Human Rights

2.33 The application of constitutional justice in the context of the investigation of companies has also been considered by the European Court of Human Rights (“ECtHR”). *Fayed v United Kingdom*⁶⁰ arose out of an investigation into House of Fraser Holdings PLC (“HOFH”), a company owned by Mohammed Al Fayed and his brothers. HOFH had acquired House of Fraser PLC, following an intense public campaign by the applicants to promote their family background, wealth, business interests and resources. A competitor, Lonrho PLC, asserted that the brothers had lied about their money and themselves. Eventually, two inspectors were appointed to assess, amongst other things, whether the Fayed brothers had misled the authorities and the public. All proceedings were conducted in private and there was no cross-examination. The inspectors agreed to notify the applicants of their provisional conclusions and these conclusions were largely unfavourable to the applicants. Before the ECtHR, the applicants grounded their arguments on Article 6(1) of the Convention,⁶¹ (the equivalent of Article 34.1 of the Irish Constitution, by which: “justice must be administered...in a court...”). They submitted that Article 6(1) was violated in that the report had undermined their civil rights to honour and reputation without allowing them effective access to the courts. The Court refused to extend the scope of Article 6(1) to company inspectors because their investigations were not directly determinative of any right or

⁵⁸ Above fn 51, at 10 – 028.

⁵⁹ Wade and Forsythe *Administrative Law* (6th ed. Oxford University Press) at 977.

⁶⁰ 18 EHRR 393.

⁶¹ Article 6(1) of the ECHR states: “(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

obligation.⁶² Also, to do so “would in practice unduly hamper the effective regulation in the public interest of complex financial and commercial activities.”⁶³

2.34 On a different point, the ECtHR emphasised that it was unwilling to give inspectors a licence to ignore basic minimum standards of fairness, stating that; “[t]he Inspectors are bound by the rules of natural justice; they have a duty to act fairly and to give anyone whom they propose to criticise in their report a fair opportunity to answer what is alleged against them.”⁶⁴ However, on the other hand, the Court held, consistently with English authorities in this regard, that proceedings before the inspectors are administrative, not judicial, and accordingly they are the masters of their own procedures; “[e]xcept for the duty to act fairly, Inspectors are not subject to any set rules or procedure and are free to act at their own discretion. There is no right for a person who is at risk of being criticised by Inspectors to cross-examine witnesses ...”⁶⁵

(c) Australia

2.35 In *Testro Bros Property Ltd v Tait*,⁶⁶ the applicant company sought the full range of procedural rights, including liberty to cross-examine witnesses, liberty to re-examine Testro’s own witnesses, notice of all allegations critical of the company or of its administration, and a full opportunity to meet those allegations. A majority of the High Court dismissed Testro’s appeal on two grounds. Firstly, the relevant legislation placed no obligation on the inspector to conduct his investigations by a process analogous to the judicial process. Secondly, the report could not, of its own force, prejudicially affect the rights of the company. In dissenting judgments, Kitto, and Menzies JJ took a different view of the impact of the inspector’s report, noting in particular the fact that it was admissible in subsequent criminal proceedings as proof of its contents (unlike the situation in Ireland). Menzies J stated: “Once legal consequences have been attached to a report it can no longer be said, as Chitty LJ accurately said in *Re Grosvenor & West end Railway Terminus Hotel Co. Ltd* that: ‘the beginning and the end of the duty of an inspector is to examine and report’.”⁶⁷

⁶² The Court stated, “the result of the proceedings in question must be directly decisive for such a right or obligation, mere tenuous connections or remote consequences not being sufficient to bring Article 6(1) into play.”

⁶³ *Op cit* fn 60 at 428. The ECtHR went on to state, at paragraph 62, that in its view “... investigative proceedings of the kind in issue in the present case fall outside the ambit and intendment of Article 6(1).”

⁶⁴ *Ibid* at 408.

⁶⁵ *Ibid* at 409.

⁶⁶ (1963) 109 CLR 353, also see Nash (1964) 38 ALJ 111.

⁶⁷ (1897) 76 LT 337, 339.

(d) Comment

2.36 The accord among the Irish and the three foreign jurisdictions examined is striking: in each of the foreign jurisdictions, there have been a number of cases in which claims grounded on various aspects of constitutional/natural justice have failed and only a very few in which such arguments have succeeded. This is a feature to which the Commission will return in Chapter 9 and Chapter 11.

Part V Publicity

2.37 The potential for these reports to harm the reputations of companies and the individuals behind the corporate veil is lessened by three important factors. These are: private proceedings, limited circulation of the report, and omission of parts of the report from publication.

(a) Private Proceedings

2.38 Since the legislation is silent on the point, it seems likely that company inspectors are perfectly entitled to conduct public sessions or not, as they see fit. However, as a matter of practice rather than law, company inspectors generally carry out their work behind closed doors. It may reasonably be assumed that this is attributable to the fact that should inspections be held in public then more formal procedural and constitutional safeguards would come into play.⁶⁸ Therefore, carrying out inspections in private is less time consuming, less formal and puts emphasis on practical efficacy.

2.39 Yet, interpreting identical statutory provisions, the English courts have arrived at quite a different position. As far back as 1932, in *Hearts of Oak Assurance Company Limited v Attorney General*,⁶⁹ the House of Lords held, by a four-to-one majority that an inspector appointed for the purpose of examining and reporting on the affairs of an industrial insurance company was not entitled to conduct the inspection in public. Lord Macmillan stressed the benefits of private proceedings in the following terms:

“On the one hand it is important to secure that the efficiency of the procedure for the purpose in view is not impaired. On the other hand it is not less important to ensure that fair treatment is accorded to all concerned. I am satisfied that both these ends can best be attained by the holding of such inspections in private. I can well imagine that irreparable harm might unjustly be done to the reputation of a company

⁶⁸ As alluded to by Keane CJ, above fn 29.

⁶⁹ [1932] AC 392.

and much anxiety unnecessarily occasioned to its policy-holders by giving publicity to such preliminary investigations.”⁷⁰

2.40 In response, two comments can be made here. First, there may be circumstances in which the inspector might be facilitated in discharging his duty if he had the option of holding a public hearing. Indeed, the Attorney General, in *Hearts of Oak* stated that: “publicity might have the advantage of bringing forward witnesses who could give useful evidence.”⁷¹ Alternatively, the threat of a public hearing might help to jog the memory of an uncooperative witness. There seems to be no advantage in limiting the inspectors’ discretion to hold public sessions, however rare these may be in practice. Secondly, a literal interpretation of the relevant legislation would suggest the opposite view to that taken in *Hearts of Oak*. As stated by Viscount Dunedin, in a partially dissenting judgment: “the statute does not say whether it is to be in public or in private, and therefore I cannot see how a court of law can have power to say that it must be in private simply because it thinks that conditions of expediency all point that way.”⁷²

2.41 Notwithstanding these complaints, the ruling was affirmed by Sir Richard Scott V-C (as he was then), in *In re an Inquiry into Mirror Group Newspapers plc*.⁷³ The case arose out of reports that Robert Maxwell had been using the Mirror Group pension fund as security against very substantial personal loans. In the course of subsequent investigation, the inspectors insisted that all witnesses give undertakings in respect of confidentiality. Mr Maxwell’s son refused. The inspectors relied on *Hearts of Oak* to support the proposition that company investigations are essentially private proceedings and ought to be confidential. Sir Richard Scott V-C thought that this was to read too much into the scope of the earlier decision. The Vice Chancellor re-affirmed that *Hearts of Oak* required mandatory private investigations, but stated that the case was not an authority for the proposition that witnesses must agree to a confidentiality agreement: “[T]he case does not impose, indeed the declaration expressly refrained from imposing, any other limitation on the way in which inspectors, sitting in private, conduct their investigation.”⁷⁴

2.42 *It seems, in any case, that there is no Irish authority to depart from what a straightforward reading of the legislation would seem to indicate and what Irish*

⁷⁰ *Op cit* fn 69 at 403. See also Lord Thankerton at 397: “If examination were to be held in public, it might well be that unfavourable opinions as to the financial position of the society or company might be prematurely and wrongly formed in the minds of the public or the policyholders either through reports in the press or as the results of attendance at the examination of some of the person examined on oath.”

⁷¹ *Ibid* at 403.

⁷² *Ibid* at 405.

⁷³ [1999] 3 WLR 583.

⁷⁴ *Ibid* at 597.

practice seems to have assumed: namely that it is open to an Inspector to sit in private or public, as he or she thinks fit; and the Commission does not find the English authority, to the contrary, convincing. On the plane of policy, too, this seems to the Commission, to be appropriate: the arguments in favour of publicity adduced largely in the context of tribunals of inquiry at paragraphs 8.01-8.09, will, depending on the circumstances usually not be as strong in the more specialised world of company investigation and where they are, then the Inspector has a discretion to sit in public. Accordingly, the Commission would recommend no change in the statutory position (silence) on this point.

(b) Limited circulation of Inspector's Report

2.43 Another source of comfort for the 'target' of an inspector's report is that the report might not be published and disseminated amongst members of the public. Where there is no publication, or even limited circulation, the potential harm to one's goodwill and reputation is reduced, though not eliminated.

2.44 Section 11(3)⁷⁵ of the 1990 Act states that:

“...the court may, *if it thinks fit* -

(a) forward a copy of any report made by the inspectors to the company's registered office,

(b) furnish a copy on request and payment of the prescribed fee to-

- (i) any member of the company or other body corporate which is the subject of the report;
- (ii) any person whose conduct is referred to in the report;
- (iii) the auditors of that company or body corporate;
- (iv) the applicants for the investigation;
- (v) any other interested person (including an employee) whose financial interests appear to the court to be affected by the matters dealt with in the report whether as a creditor of the company or body corporate or otherwise;
- (vi) the Central Bank, in any case in which the report of the inspectors relates, wholly or partly, to the affairs of the holder of a licence under section 9 of the Central Bank Act, 1971;

⁷⁵

Extended by section 24 of the CLEA 2001.

(ba) furnish a copy to –

- (i) an appropriate authority in relation to any of the matters referred to in section 21(1)(a) to (fb);
- (ii) a competent authority as defined in section 21(3)(a) to (i);

and

(c) *cause any such report to be printed and published.*” (Emphasis added)

2.45 The *Companies Act 1963* conferred a similar discretion, the only differences being that the range of persons to whom the report could be furnished was slightly narrower and the discretion was vested in the Minister rather than the courts. Despite the discretion to disseminate, just one report was printed and published between 1963 and 1990.⁷⁶ In 1990, McCormack wrote: “one can only speculate whether this [the 1990 Act] will make any difference to the practice of non-publication of inspector’s reports followed since the publication of an *Enquiry into Irish Estates Limited*, on 23 October 1963.”⁷⁷

2.46 Realistically, it is probably too soon to state conclusively that the courts are more willing than successive Ministers to publish these reports. However, initial indications are that the general practice is that Reports will be published and made available to members of the public. For example, in the 1990s, the Inspectors’ Reports on *Bula Holdings*,⁷⁸ *Telecom Éireann*⁷⁹ and *Chestvale Properties*⁸⁰ were all widely disseminated. The High Court adopted a similar strategy in relation to *Ansbacher Cayman Ltd*,⁸¹ but we must wait and see whether the forthcoming Reports concerning *National Irish Bank* and *National Irish Bank Financial Services Company Limited* will also be published.

⁷⁶ *An Enquiry into Irish Estates Limited* (Stationery Office 23 October 1963).

⁷⁷ (1990) ICLSA 1990/33 – 23.

⁷⁸ *Report on certain shareholdings in Bula Resources (Holdings) PLC* Dublin Stationery Office (No 1/247 1998).

⁷⁹ See Department of Enterprise, Trade and Employment *Companies Report 2001* (Pn 11966 2002) Appendix 13 which lists investigations from 1991 to the end of 2001.

⁸⁰ *Chestvale Properties Limited and Hoddle Investments Limited: Investigation under Section 14 (1) Companies Act 1990 Final Report by John A. Glackin (Solicitor)* Dublin Stationery Office (No 1/212/A 1993).

⁸¹ *High Court Inspectors Inquiry into the Affairs of Ansbacher (Cayman) Limited* (“The Ansbacher Report”) 6 July 2002.

England

2.47 The position in England is more settled. In practice, reports are published, subject to one broad exception. According to the Investigation Handbook,⁸² if criminal prosecutions are pending, or if the investigation has prompted police inquiries, the Department will defer publication until all proceedings are completed or dropped. This practice was considered by the House of Lords in *Lonrho plc v Secretary of State for Trade and Industry*.⁸³ The case concerned the decision of the Secretary of State to defer publication of an inspector's report pending completion of a separate investigation by the Serious Fraud Office. Indeed, the oral evidence of DTI witnesses was that the policy of the Department had always been to defer publication until any prosecution was completed. It was held that the Secretary of State had properly exercised his discretion on the ground that early publication might be prejudicial to the Serious Fraud Office's investigation and to any subsequent trial.

(c) Omission of Parts of the Report

2.48 Section 11(4) of the 1990 Act provides that “[w]here the court ... thinks proper it may direct that a particular part of a report made by virtue of this section be omitted from a copy forwarded or furnished under subsection (3) (a) or (b), or from the report as printed and published under subsection (3) (c).”⁸⁴ There seems to be no reason to prevent this omission from being temporary, for instance, pending the completion of a criminal trial or investigation. In relation to the *Ansbacher Report*, prior to publication Finnegan P ruled against arguments made by lawyers representing a large number of identified and unidentified people who wished to have changes made to the report or who did not wish to have their identities known.⁸⁵

⁸² *Department of Trade and Industry Investigation handbook: inspections and departmental enquiries under the Companies Act 1985 (as amended by the Companies Act 1989), the Financial Services Act 1986, the Insolvency Act 1986 and the Insurance Companies Act 1982.* (London HMSO 1990).

⁸³ [1989] 1 WLR 525.

⁸⁴ Keane predicted in 2000 that “[t]his will enable the Court to publish the report without needlessly damaging the financial or other interests of a company or individual”: Keane *Company Law* (3rd ed. Butterworths 2000) at paragraph 35.40. However, following informal consultation with the Office of the Director of Corporate Enforcement, it seems that, to date, this facility has been little used.

⁸⁵ See RTE news 24 June 2002: www.rte.ie/news/2002/0624/ansbacher.html. It should be noted that prior to this decision two individuals named in the Report made an application to the Court (through their solicitors) to have their names omitted from publication. However, the case ultimately failed as McCracken J in *In re Ansbacher (Cayman) Ltd* [2002] 2 ILRM 491 held that the desire for confidentiality in proceedings could not be considered a ‘special and limited case prescribed by law’ under Article 34.1 of the Constitution and accordingly the court could not hear the application *in camera*. Yet to hear the application in public would have had the effect of destroying the very purpose of the application (*ie* to ensure that the applicants were not identified).

Comment

2.49 What of general interest emerges from this Chapter? The main point is the way in which the legislation leaves it to the discretion of the Inspector whether to hold the inspection in public or in private. It also confers discretion on the court as to whether to publish in full or to omit parts of the report. Inspections have in the main been conducted in private, where the trade-off (if trade-off it be) is that the right of the person whose conduct is under investigation to constitutional justice is reduced. The significance of this is that it is one more piece of evidence supporting the broad theme, which is taken up in Chapter 9, on information gathering that much can be done by way of collecting information or proposed evidence, without attracting a stringent right of constitutional justice. The companies inspector constitutes one model as to how this may be done.

CHAPTER 3 COMMISSION TO INQUIRE INTO CHILD ABUSE

Part I Introduction

3.01 It should be noted at the outset that this Chapter is not intended to be a handbook to the workings of the Commission to Inquire into Child Abuse (“*Laffoy Commission*”). Our objective here is to provide an overview of this particular model of inquiry and highlight some of its features that may have an application in other contexts. Three further caveats should be identified: first, the Attorney-General is presently conducting a review of the *Laffoy Commission*’s mandate and is expected to report shortly after this Paper has been published and: secondly, in November 2002 the procedures before the Investigation Committee of the *Laffoy Commission* underwent something of an overhaul, with the Rules of Procedure being augmented by the new Framework of Procedures (see paragraph 3.11-3.15),¹ the practical result of which has not at the time of writing been fully realised.² Finally, the *Laffoy Commission* has not yet reached Phase 2 (the public phase) and is not expected to do so (subject to the review of its mandate) until 2004.

3.02 In succeeding Parts of this chapter, we survey: inquiry officers (Part II), deciding officers (Part III), the legal representative of the survivor’s interest (Part IV), procedures adopted at Phase 1 and (envisaged at) Phase 2 hearings of the Investigation Committee (Part V) and the appointment of experts (Part VI). A further aspect that is also instructive is the way in which the *Laffoy Commission* (in consultation with its sponsoring Department and no doubt the Department of Finance) has unsuccessfully attempted to minimise its costs. However, discussion of this is deferred until paragraphs 12.47-12.62.

(a) Background

3.03 The establishment of the *Laffoy Commission* is one aspect of the societal catharsis that has been underway since revelations of the shocking abuse perpetrated upon vulnerable children began to surface. The broadcasting of the

¹ Commission to Inquire into Child Abuse Investigation Committee – Framework of Procedures (8 November 2002) available at <http://www.childabusecommission.ie>.

² Although additional resources have been granted - see Framework of Procedures Availability of Resources 20 December 2002 also available at <http://www.childabusecommission.ie>.

RTÉ documentary series, *States of Fear*, brought the issue of child abuse to the forefront of public consciousness and demanded a political response.

3.04 On 11 May 1999, the Taoiseach announced a package of measures to address the issue, including:

“...an apology on behalf of the State to victims of child abuse; the setting up of a commission to inquire into childhood abuse; expansion nationwide of the counselling services available to assist victims of child abuse; the preparation of a White paper on the mandatory reporting of child abuse; immediate amendment of the limitation laws as they relate to civil actions based on childhood sexual abuse; referral of the question of limitation in other forms of childhood abuse to the Law Reform Commission and priority advancement of legislation to include a register of sex offenders.”³

3.05 The first item in this package, the *Laffoy Commission*, was initially established on a non-statutory footing. This non-statutory Commission was charged by the Government with considering the broad terms of reference assigned to it, in order to determine whether these needed to be refined, and with making recommendations as to the powers and protections it would need to do its work effectively.⁴ The non-statutory Commission reported in September 1999, and the Government accepted its recommendations almost without reservation. The *Laffoy Commission* was put on a statutory footing following the enactment on 26 April 2000 of the *Commission to Inquire into Child Abuse Act 2000* (“the 2000 Act”). This Act has been slightly amended.⁵ The idea of holding a preliminary inquiry in order to make the task of a substantive inquiry easier is not new and other instances have been noted at paragraph 1.24.

3.06 The purposes of the *Laffoy Commission* are:

- (a) “to provide, for persons who have suffered abuse in childhood in institutions... an opportunity to recount the abuse, and make submissions, to a Committee,
- (b) through a Committee—

³ 505 *Dáil Debates* Col 1021 (27 May 1999).

⁴ 516 *Dáil Debates* Col 292 (8 March 2000).

⁵ The 2000 Act has now been amended slightly by the *Residential Institutions Redress Act 2002*, section 32. The Commission has also been given the additional functions under the *Commission to Inquire Into Child Abuse Act 2000 (Additional Functions) Order 2001 (S.I. No. 280 of 2001)* to inquire into - (a) the 3 vaccine trials referred to in the Report of the Chief Medical Officer entitled *Report on Three Clinical Trials Involving Babies and Children in Institutional Settings 1960/1961, 1970 and 1973*, and (b) any other vaccine trial found by the Commission to have taken place in an institution between 1940 and 1987 based on an allegation by a person who was a child in that institution that he or she was the subject of such a vaccine trial.

- (i) to inquire into the abuse of children in institutions...
 - (ii) where it is satisfied that such abuse has occurred, to determine the causes, nature, circumstances and extent of such abuse, and
 - (iii) without prejudice to the generality of any the foregoing, to determine the extent to which—
 - (I) the institutions themselves in which such abuse occurred,
 - (II) the systems of management, administration, operation, supervision, inspection and regulation of such institutions, and
 - (III) the manner in which those functions were performed by the persons or bodies in whom they were vested,
 contributed to the occurrence or incidence of such abuse,
- and
- (c) to prepare and publish reports...”.⁶

Thus the *Laffoy Commission* has at least three objectives. The first is to provide a forum in which persons who may have suffered childhood abuse can tell their stories.⁷ According to the Minister for Education and Science, Dr Michael Woods, TD, who sponsored the bill, “[t]his telling and listening function, which can be called the therapeutic function of the commission or the healing forum, is the function to which everything else should be subordinate.”⁸ Secondly, the *Laffoy Commission* has an investigative function, in that it is required by way of a committee to inquire into the abuse of children in institutions and to make various findings in relation to such abuse, which will include naming the perpetrators and the institutions in which abuse took place.⁹ Thirdly, in publishing its reports,¹⁰ the *Laffoy Commission* will also make recommendations for alleviating or otherwise addressing the effects of abuse on those who suffered it, and for the prevention

⁶ *Commission to Inquire into Child Abuse Act 2000* (“the 2000 Act”) section 4(1).

⁷ This is acknowledged in the 2000 Act section 4(6), where the *Laffoy Commission* is enjoined to “bear in mind the need of persons who have suffered abuse in their childhood to recount to others such abuse... and the potential beneficial effect on them of so doing...”.

⁸ 516 *Dáil Debates* Col. 293.

⁹ Section 5(3) 2000 Act.

¹⁰ The reports of the *Laffoy Commission* are published directly to the public: 2000 Act, sections 5(5)(a) and (7). See in this regard the *Laffoy Commission*’s website: <http://www.childabusecommission.ie/Infoleaflet.htm>.

(where possible) and the reduction of the incidence of abuse of children in institutions, and for the protection of children from abuse.¹¹

3.07 To meet the particular circumstances, an unusual structure has been adopted. Two committees are established, each composed of different members of the *Laffoy Commission*¹² and responsible to it.

(b) The Confidential Committee

3.08 The first committee, the Confidential Committee,¹³ has an “overwhelmingly therapeutic” purpose.¹⁴ It hears from victims of childhood abuse in a sympathetic and informal atmosphere and makes general findings for publication in a report to the *Laffoy Commission*.¹⁵ It has no investigative role and is simply a forum in which a person who claims to have suffered abuse can recount his or her tale. No findings are made against the alleged perpetrator of the abuse, nor are they informed that allegations against him or her have been made. The Confidential Committee is prohibited from identifying or publishing information that could lead to the identification of: (a) persons alleged to have committed abuse; (b) institutions in which abuse is alleged to have taken place; or (c) the person alleging abuse.¹⁶ Not surprisingly the hearings of the Confidential Committee are conducted in private.¹⁷

3.09 These restrictions are necessary to ensure that hearings of the Confidential Committee can proceed with the appropriate level of informality. It is understood that these hearings are very informal indeed. The *Laffoy Commission* has taken the view that the presence of a legal representative is unnecessary, although the witness may be accompanied by a companion if the latter gives an undertaking of confidentiality.¹⁸ Restricting disclosure of allegations of abuse to the members of the Confidential Committee means that the injury to the personal rights of those against whom allegations may be made (such as the right to good name) is minimal. This low level of interference with personal rights means that a constitutional challenge would be unlikely to succeed. In any case a constitutional challenge is unlikely because, first, a person would not ordinarily know that an

¹¹ 2000 Act section 5(2).

¹² A person may not be a member of both committees: 2000 Act section 10(6).

¹³ *Ibid* section 10(1).

¹⁴ 516 *Dáil Debates* Col 293.

¹⁵ 2000 Act sections 4(6) and 15(1).

¹⁶ *Ibid* section 16(2).

¹⁷ *Ibid* section 11(2).

¹⁸ See the *Laffoy Commission*'s web site: <http://www.childabusecommission.ie/Infoleaflet.htm>.

allegation against him had been made, and secondly, the mere fact of bringing proceedings would be likely to expose a person to just the sort of publicity the 2000 Act seeks to avoid.

(c) The Investigation Committee

3.10 The second committee is known as the Investigation Committee.¹⁹ Its remit is more far-reaching than that of the Confidential Committee. While it too has a therapeutic function in providing a forum in which the victims of abuse may tell their stories, it goes further in that it is required to inquire into the abuse with a view to producing a report that will enable the *Laffoy Commission* to achieve the second purpose explained at paragraph 3.06, above; namely to make findings and name perpetrators.²⁰ For this reason, its procedural rules and practices are much more stringent and of much more interest in the context of this Paper. They occupy the lion's share of this Chapter, in Part V.

(d) Procedural Rules of the Two Committees

3.11 The 2000 Act provides very little guidance as to the procedures to be employed by the Committees. Under section 11(4), the *Laffoy Commission* is empowered to regulate the procedure and business of a Committee, but in doing so it must have regard to the obligation imposed by section 4(6) to endeavour to ensure that meetings of both Committees, at which evidence is being given, are conducted:

“(a) so as to afford to persons who have suffered abuse in institutions... an opportunity to recount in full the abuse suffered by them in an atmosphere that is as sympathetic to, and as understanding of, them as is compatible with the rights of others and the requirements of justice, and

(b) as informally as possible in the circumstances.”²¹

3.12 The procedures that the *Laffoy Commission* has adopted, whilst tailored to meet the specific circumstances of its tasks, are instructive and innovative. As has already been mentioned, the procedures of the Confidential Committee are extremely informal. Bearing in mind that the primary purpose of that Committee is therapeutic, it does not really constitute an inquiry at all; any evidence given before it is entirely uncontroverted and untested and hence it would be inappropriate for the Committee to make findings of fact adverse to the interests of individuals or others on the basis of such evidence.

3.13 In respect of the Investigation Committee, the procedural rules have been adopted which, given its complicated structure, were necessary in order to give

¹⁹ 2000 Act section 10(1).

²⁰ *Ibid* section 12.

²¹ *Ibid* section 4(6).

effect to the objectives expressed in section 4(6), as detailed at paragraph 3.06.²² The Investigation Committee's work was originally divided into two parts: the first dealing with hearings in relation to evidence of allegations of abuse (Phase 1), and the second with public hearings in relation to institutions at which abuse has been established (Phase 2). Following the recent overhaul of the procedures for Phase 1 of the Investigation Committee, the hearing of allegations of abuse are now specific to the institutions implicated rather than the complaints or complainants themselves. In other words, all allegation of abuse in respect of an individual institution are heard on a modularised basis. Phase 2 is unaffected by the Framework of Procedures, but is the stage at which the *Laffoy Commission* will seek to fulfil its third purpose, as explained at paragraph 3.06; namely, to make recommendations.

3.14 In relation to the procedure to be adopted, the non-statutory Commission's report to Government indicated that:

“[E]ven where findings in individual cases are not being made, individuals to whom responsibility is likely to be ascribed must be afforded constitutional rights that include, as a minimum, being furnished with a statement of every allegation, being allowed to cross-examine the person making the allegation, give rebuttal evidence and make submissions in their own defence [*sic*].”²³

3.15 The rules of procedure that were subsequently adopted by the *Laffoy Commission* display sensitivity to the rights of persons against whom adverse findings might be made by the Investigation Committee. A major theme in the rules is the importance that no-one should be taken by surprise at an oral hearing. In this regard, the use of inquiry officers is an important mechanism.

Part II Inquiry Officers

3.16 Section 23 of the 2000 Act gives the *Laffoy Commission* the power to authorise members of its staff to act as inquiry officers. In its opening statement of 29 June 2000, it was implied that inquiry officers would be recruited from the Civil Service, although not from any department that has or has had responsibility for children's institutions.²⁴ However, this proposal provoked a great deal of opposition, and in July 2000 practising barristers were retained to perform the functions of inquiry officers.²⁵ It seems rather surprising that the *Laffoy*

²² It should be noted that by virtue of section 7 (4) of the 2000 Act, the *Laffoy Commission* has been conferred with a wide discretion in regulating its procedures: “Subject to the provisions of this Act, the Commission shall regulate, by standing orders or otherwise, the procedure and business of the Commission”.

²³ 516 *Dáil Debates* Col 301 (8 March 2000) (Mr Richard Bruton TD (FG)).

²⁴ Statement delivered at first public sitting of the *Commission to Inquire into Child Abuse* at 4.

²⁵ *Interim Report* (May 2001) at 17 – available on the *Laffoy Commission's* website.

Commission chose barristers to perform this function, as there appears to be no reason why other members of the legal profession, such as solicitors or even a team of paralegals could just as effectively fulfil this role. Indeed, the role of an inquiry officer is more akin to that of a solicitor in preparing a case before briefing a barrister to present that case in court.

3.17 In any case, the 2000 Act allows an inquiry officer, whenever requested by the Investigation Committee,²⁶ to conduct a preliminary inquiry into an allegation of abuse.²⁷ It appears from the *Interim Report* of May 2001 and the rules of procedure of the Investigation Committee²⁸ that an inquiry officer will be assigned to every allegation of abuse that the Investigation Committee is asked to investigate. Despite the Investigation Committee procedures having undergone somewhat of an overhaul, as noted at paragraph 3.01, above, an inquiry officer's role does not appear to have been substantially affected. However, it is likely that inquiry officers will be assigned to conduct preliminary investigations in respect of complaints made against a particular institution or institutions, rather than assigned to random complaints.

3.18 The job of an inquiry officer begins by obtaining a statement from a complainant, which may either be already prepared in writing (if the complainant is represented), or obtained in the course of an interview with the inquiry officer.²⁹ If the complainant wishes to have witnesses called in support of the allegation, the identity of the witness should be included in the statement provided to the inquiry officer as well as the substance of the evidence to be given by that witness.³⁰ The statement may also include details of any direction that the complainant wishes the chairperson of the Investigation Committee to make in the exercise of her powers under section 14 of the Act to compel the attendance of witnesses and the production and discovery of documents.³¹ The rules of procedure require the inquiry officer, so far as it is possible to do so against documents in the possession of public bodies in the State to which the Investigation Committee has access,³² to verify that the complainant was in the institution in which the abuse was alleged to have occurred at the relevant time and any other relevant facts capable of

²⁶ It should be noted that inquiry officers have no role in connection with the Confidential Committee.

²⁷ 2000 Act section 23 (2).

²⁸ Rules of Procedure of the Investigation Committee, Part 2, paragraph 2.

²⁹ *Ibid* 2000 Act section 23 (2).

³⁰ Rules of Procedure of the Investigation Committee, Part 2, paragraph 2 (a).

³¹ *Ibid*.

³² "The Commission, through its historical researcher, has access to all documentation in relation to industrial and reformatory schools held in the Special Education Branch of the Department of Education and Science in Athlone." Statement delivered at first public sitting of the Commission to Inquire into Child Abuse, at 22.

verification.³³ (Presumably this preliminary cross-referencing with documentation, such as school records, is to ensure that fraudulent complaints are kept to a minimum.)

3.19 Once this is done, the inquiry officer must then furnish the respondents³⁴ with copies of the complainant's statement and any relevant documents and request each respondent to provide a statement of the evidence he or she proposes to give to the Investigation Committee. Again, this statement may be prepared in advance by the person or taken in the course of an interview with the inquiry officer³⁵ and the respondent should name any witnesses who should be called and provide a statement of the substance of the evidence to be given by those witnesses.³⁶

3.20 The inquiry officer may request the production of any document in the possession or control of a person that he or she considers relevant to the inquiry.³⁷ The rules of procedure also state that the chairperson of the Investigation Committee will give such directions as she considers appropriate in the exercise of her powers under section 14³⁸ to compel the production of documents and the attendance of witnesses to give evidence before the Committee.³⁹ This means that where a person is behaving in an obstructive manner the Committee can take steps to obtain the evidence it needs to proceed to a full hearing.

3.21 A person may decline to answer any question asked at an interview with an inquiry officer and may terminate it at any time.⁴⁰ Presumably this provision takes account of the fact that it may be very difficult for a person who has suffered abuse to speak about it and it seems that the most likely reason that such a person would refuse to co-operate or terminate an interview would be because the

³³ Rules of Procedure of the Investigation Committee, Part 2, paragraph 2 (b).

³⁴ “‘Respondent’ means a person against whom a Complainant makes an allegation of abuse and any other person or body, whether concerned with the management or regulation of an institution, whom the Complainant implicates in the alleged abuse and any other person or body against whom an adverse finding might be made arising out of such allegation”: Rules of Procedure of the Investigation Committee, Preamble, paragraph 1 (d).

³⁵ 2000 Act section 23(2).

³⁶ Rules of Procedure of the Investigation Committee, Part 2, paragraph 2 (d).

³⁷ 2000 Act section 23(5). On its face, this is not limited to the complainants and respondents, but, surprisingly, the explicit power to refuse a request to produce a document is, in that it is granted (by section 23(7)) only to “a person being interviewed pursuant to [the procedures just described]”. However, given that the power is only to make a request, nothing really turns on this.

³⁸ On which, *cf* the *Comptroller and Auditor General and Committees of the Houses of the Oireachtas (Special Provisions) Act 1998*, section 3.

³⁹ Rules of Procedure of the Investigation Committee, Part 2, paragraph 2 (g).

⁴⁰ 2000 Act section 23(7).

memories dredged up became too painful. Moreover, if the complainant is not in a position to provide a full statement, it seems unlikely that the Investigation Committee would elect to proceed with the investigation.⁴¹ On the other hand, a respondent might be much less enthusiastic about co-operating. For this reason, the rules of procedure provide that if a respondent fails to comply with an inquiry officer's request to produce a narrative statement within the time stipulated, that fact is noted in the report that is forwarded to the Investigation Committee.⁴² The significance of this is that the entitlement of the respondent at the hearing to address questions to the complainant or witnesses for the complainant or for that matter call witnesses in rebuttal is dependent on the provision of a written statement setting out the basis on which the evidence is contested, and is subject to such other terms (as to adjournment or otherwise) that the Investigation Committee considers appropriate in the interests of justice.⁴³ This hard line is interesting. Restricting the respondent's participation according to their or its corresponding co-operation or lack thereof is thought-provoking. One may question whether such an approach could have an application in other contexts, for instance where an interested party declines to co-operate with a tribunal of inquiry or its investigator.

3.22 Once their inquiry is concluded, the inquiry officer must prepare for the Investigation Committee a written report summarising the complainant's and the respondent's statements and identifying the areas of factual dispute. The report is accompanied by (a) the statement of the complainant and of each respondent, (b) any relevant documents submitted by the complainant and each respondent, (c) the verification data mentioned above at paragraph 3.18, and (d) any other relevant documentation. According to the Framework of Procedures, it appears that inquiry officers will now have a role in collating the evidence and information gathered into 'books of documents' for circulation to the parties involved in the hearings for use at the hearings, see paragraphs 3.37-3.38 below. It is notable that the Act explicitly states that "the report shall not contain any determinations or findings".⁴⁴

3.23 Since inquiry officers are prohibited from making any findings on the basis of their inquiries, it seems that their function is primarily preparatory. This is not to undervalue the peculiar skills and sensitivity that will be required when questioning people who may have been subjected to or have perpetrated abuse., but

⁴¹ The chairperson of the Commission, Ms Justice Laffoy, has publicly stated that: "[i]f a person chooses to stop testifying, the person against whom it was thought he would testify is no longer at risk." See transcript of the Second Public Sitting of the Commission to Inquire into Child Abuse, 20 July 2001 (<http://www.childabusecommission.ie/downloads.htm>), at 50.

⁴² Rules of Procedure of the Investigation Committee, Part 2, paragraph 2 (f).

⁴³ *Ibid* Part 2, paragraphs 3 (a) and (c). Indeed, the Framework of Procedures stipulates that "there is no basis in fairness for seeking the postponement of compliance with [requests for a statement] pending the finalisation of the [Framework]". It goes on to remind respondents that if they wish to proffer a witness for consideration by the Investigation Committee then a statement must be submitted containing the substance of the evidence to be given: Framework of Procedures, Part D Pre-Hearing Procedures, at 7-8.

⁴⁴ *Commission to Inquire into Child Abuse Act 2000* section 23 (3).

the inquiry officer's main job is to get the file in order for delivery to the Investigation Committee. There is no indication in the Act (or the Framework) that the inquiry officers are to act as any sort of filter. They have no discretion to refuse to send forward allegations they consider to be manifestly unfounded, or in respect of which they have been unable to obtain any statements because of a decision to terminate an interview. Any such arrangement would be inconsistent, not only with the prohibition against the drawing of conclusions on the part of the inquiry officers, but also with the significant therapeutic function of the Investigation Committee. The result, therefore, is that the Investigation Committee seems to be under an obligation to consider every complaint that is made to it. However, one may speculate that if, for example, the verification documentation, referred to at paragraph 3.18, above, did not confirm that the complainant went to the institution in question and there were no witness or others sources to verify this, then it is likely that such a complainant's case would be short lived.

3.24 An interesting question is whether inquiry officers ought to be given a role that makes greater use of their critical faculties. They might be given the power to present their conclusions to the inquiry proper, or even to conduct their own mini-inquiries in which they attempt to resolve conflicts of fact, with the power to compel attendance and the production of documents. However, the further one goes down this road, the more the inquiry officer is becoming the inquiry itself, with the result that the inquiry is going on much as it might otherwise do, only at a further remove from the body charged with its conduct. If we assume that inquiry officers are not likely to be in a position to arrange for the cross-examination by an accused person or institution of the accuser, it is unfair to ask for factual conflicts to be resolved. Moreover, the usefulness of simply putting the file in order should not be underestimated. If this is done assiduously, it might greatly ease the task of the Investigation Committee in making findings and also assists in allowing respondents to prepare their case properly. However, we would add one caveat: if a person acted in an obstructive manner, the inquiry officer might be permitted to note this fact in a report to the *Laffoy Commission*, which the latter could take into account in exercising its discretion to grant or withhold costs under section 20A(3) of the 2000 Act.⁴⁵

3.25 It is understood that the legal teams of certain tribunals of inquiry sometimes carry out functions not dissimilar to those of the inquiry officer under the 2000 Act, in that they conduct informal meetings with individuals whose evidence may be of relevance to the tribunal in order to ascertain whether it is worthwhile to call such individuals before a public hearing. Even prior to the *Tribunals of Inquiry (Evidence) (Amendment) Act 2002*, the Supreme Court has upheld the practice of holding these preliminary meetings, but ruled that the legal team must be joined at them by a member of the tribunal, because the tribunal's lawyers themselves have no independent investigative function.⁴⁶ However,

⁴⁵ As inserted by section 32 of the *Residential Institutions Redress Act 2002*.

⁴⁶ Cases that have considered this issue include: *Haughey v Moriarty* [1999] 3 IR 1, 74; *Redmond v Flood* [1999] 3 IR 79, 95; *Flood v Lawlor* Supreme Court 24 November 2000.

following the enactment of the 2002 Act, statutory blessing has been given to this practice and it would appear that investigators are intended to fulfil this type of function: see paragraphs 9.28-9.53.

3.26 *The Commission is of the view that the way in which inquiry officers carry out their functions is a useful precedent in deciding the scope of an investigator's role within the context of a tribunal of inquiry, or, for that matter, within the context of other inquiries, and will return to consider this further in Chapter 9.*

Part III Deciding Officers

3.27 Section 32 of the *Residential Institutions Redress Act 2002* inserted section 23A into the 2000 Act. It provides for the appointment of 'deciding officers' to assist the Investigation Committee in carrying out its functions.⁴⁷ Deciding officers are to have expertise in law, medicine, psychiatry, psychology, or social work, and may be appointed subject to such conditions as the Minister for Education and Science and the Minister for Finance may determine.⁴⁸ The purpose of appointing deciding officers is to assist and fill the gap in expertise when the Investigation Committee divides under section 11(6) of the 2000 Act, in order to deal with modularisation more efficaciously. In other words, where the chairperson of a division of an Investigation Committee is a psychologist, he or she is likely to be assisted by a deciding officer who is a lawyer. Similarly, Ms Justice Laffoy, whilst sitting as chair of a division, is likely to be assisted by a deciding officer or officers⁴⁹ with expertise in medicine, psychiatry, psychology or social work. Furthermore, deciding officers are deemed to exercise the functions of a member of a division of the Investigation Committee.⁵⁰

3.28 What is interesting for present purposes is not only that Committees may divide – no doubt to hear the vast number of complaints made to date – but that help can be enlisted to ensure that such a division is suitably qualified to hear the complaint. This feature is peculiar to the *Laffoy Commission* and shows how it had to adapt in a way not envisaged when its original statute was passed. The Commission does not immediately envisage application of this feature in other contexts (although there may be circumstances that call for this power), but deciding officers are mentioned here as a testament to the innovation of the *Laffoy Commission*.

⁴⁷ 2000 Act Section 23A(1).

⁴⁸ *Ibid* subsections (2) and (3) respectively.

⁴⁹ Under section 23A(4), the chairperson may include such numbers of deciding officers as is appropriate.

⁵⁰ Subsection (5).

Part IV The Legal Representative of the Survivors' Interest

3.29 Before turning to examine the procedures before the Investigation Committee, the issue of the legal representation of “survivors” (*ie* victims) of child abuse should be addressed. In the rules of procedure, the concept of “the survivors’ interest” is introduced and is defined, rather confusingly, as “the interest of survivors of abuse in an institution in which it has been established that abuse has occurred, including complainants”.⁵¹ Underlying this infelicitously-drafted provision is the notion that the survivors of abuse in an institution will consist of some people who have complained at Phase 1 and some who have not. The rules of procedure refer to “the legal representative of the survivors’ interest” as having a role in the public hearings, although this role is not clearly defined. One may assume that it is to advance the survivors’ interest, as defined, although what this rather generalised interest will amount to in individual cases is difficult to predict, and whether all survivors will share the same interests is also questionable.

3.30 In her letter of 14 June 2000 to the Department of Education and Science, Ms Justice Laffoy stated:

“It is felt that the requirements of the survivors would be best met if all survivors were represented before the Commission by one legal team... At the... hearings of their allegations, A, B and C would be represented by one of the barristers on the team. In the second phase, A, B and C and all the other survivors would be represented by the team.

The advantages of this approach from the survivors’ perspective are manifold. It is to be expected that a team which habitually represents survivors before the Investigation Committee will build up more expertise in relation to the issues which concern survivors than a legal representative who appears before the Investigation Committee only once or only occasionally. Each individual survivor who is represented by a member of the team at the first phase will have the knowledge and the expertise of the entire team working for him. More importantly, the team which represents the survivors’ interests at the second phase will, through its individual members, have been involved in every hearing at the first phase. I believe that the co-ordinated and coherent approach which the team, with its background knowledge of the facts and the issues, could bring to the second phase would be of more benefit to the survivors and, indeed, to the Investigation Committee than three separate legal representations [*ie* for A, B and C] none of which, because the first phase hearings were held in private, would know the whole picture. Indeed given the requirements of section 11(3) (a) and 13(2) (c) of the Act, it could be argued that it would go against the scheme of the Act to hold the second phase in public if every survivor coming before the Investigation Committee was allowed separate legal representation at the second phase.

⁵¹ Preamble, paragraph 1(e).

From the perspective of the Investigation Committee, allowing fragmented representation of persons who were in institution X at the relevant time... would be wholly unwieldy and inefficient and, in my view, would not promote the interests of the survivors. The interests of both the Investigation Committee and the survivors would be best served by a legal team which has a comprehensive and thorough knowledge of and insight into the overall work of the Investigation Committee.”⁵²

Ms Justice Laffoy also goes on to make the point that a legal team which had represented every complainant before the Investigation Committee would be a valuable resource in relation to the making of submissions on the subject of dealing with and alleviating the continuing effects of abuse. The suggestion was that complainants be represented by a member of the panel of barristers (chosen by an independent person such as the chairman of the Bar Council or the President of the Law Society) who are appointed to represent the survivors’ interests as a whole. Hence, the vast number of individual complainants would not be represented by their own lawyer, but a lawyer representing a number of complainants. The advantage is self-evident. Not only would the lawyers be experienced in handling this type of case, but the submissions from a lawyer representing a group are particularly forceful.

3.31 The presence of the legal representative of the survivors’ interest is certainly intended to protect the identity of complainants, who take no part in the public hearings, as to do so would jeopardise the anonymity drawn about them by the private phases. Similarly, although all managers and regulators may inspect the transcript of the (Phase 1) hearings on the basis of which the Investigation Committee concluded that abuse took place at the institution, the name of the complainants and details that would identify them are redacted.⁵³

3.32 However, the suggestion concerning legal representation of the survivors’ interest has not found favour with the complainants and their legal representatives. The *Laffoy Commission*, therefore, decided to permit each person before the Investigation Committee legal representation by “a solicitor and one counsel of his or her choice at the first phase hearings”.⁵⁴ (But see paragraph 5.82, below, as to the efforts to limit the number of lawyers at the Investigation Committee hearings). Interestingly, the *Laffoy Commission* also has the power to

⁵² See Statement delivered at first public sitting of the Commission to Inquire into Child Abuse Appendix F.

⁵³ Rules of Procedure of the Investigation Committee Part 1 paragraph 7 and Part 2 paragraph 1.

⁵⁴ See transcript of the Second Public Sitting of the Commission to Inquire into Child Abuse, 20 July 2001 (available at <http://www.childabusecommission.ie/downloads.htm>) at 4. The *Residential Institutions Redress Act 2002*, section 32, amended the 2000 Act to provide for this by the insertion of new section 20A, which confers the power on the Investigation Committee to allow a person appearing before it (whether complainant or respondent) to be represented.

pay, withhold, or order the costs of such representation: a subject to which we shall return at paragraph 12.06.

3.33 In relation to Phase 2 of the Investigation Committee although it was recognised that every person or body materially affected by an issue raised will be entitled to legal representation, the detail of such representation has not yet been determined, so the position is unclear.⁵⁵ It may well be that the concept of a legal team representing the survivors' interests will feature at this second phase. *Leaving aside the reservation expressed at paragraph 3.29, the Commission is of the view that having one legal team to represent the interests of a number of parties who have similar or the same interests is a notion that should be considered for use in other inquiries. This is an issue that will be discussed further at paragraph 7.37 on legal representation and costs.*

Part V Investigation Committee Procedure

(a) Rules and Framework of Procedures

3.34 The *Laffoy Commission* has drawn up Rules of Procedure in relation to the Investigation Committee. These rules were initially published as an appendix to the statement delivered by Ms Justice Laffoy at the first public sitting, but have been subject to modification since then in the light of submissions made by interested persons. The latest modification is the Investigation Committee Framework of Procedures, dated 8 November 2002,⁵⁶ in relation to Phase 1 hearings, which was produced following a review of procedures in light of the experience to date of hearing allegations of abuse. However, the Framework of Procedures states that the existing rules continue to apply in so far as they are consistent with the Framework. Presumably, where the Framework is silent on a matter the rules will apply in the normal way. (Again we can only speculate as the Framework, at the time of writing, had not yet been finalised).

3.35 Use of the word "rules" is, however, apt to mislead, as the *Laffoy Commission* clearly envisages the rules being more in the nature of guidelines. The rules themselves state:

"Notwithstanding anything contained in this Appendix, the Investigation Committee shall be at liberty to adopt such procedures as it considers appropriate in relation to the conduct of its inquiry or any part of it and, subject to giving reasonable notice to any person or body thereby affected, may depart from the procedure outlined in this Appendix."⁵⁷

⁵⁵ *Ibid* at 4.

⁵⁶ See <http://www.childabusecommission.ie> for details.

⁵⁷ Rules of Procedure of the Investigation Committee, Preamble, paragraph 7.

Moreover, the recent Framework of Procedures states that it is necessary for both the Framework and the rules to be flexible and accordingly the *Laffoy Commission* has reserved the right to adopt alternative procedure where appropriate (subject to reasonable notice to any person or body affected).⁵⁸ With the caveat that the Committee might decide to depart from this framework, it is envisaged that the Investigation Committee will conduct its work in two phases, as highlighted at paragraph 3.13; namely, in Phase 1 to deal with complaints against institutions and in Phase 2 to conduct full public hearings with a view to drawing upon the evidence heard to make recommendation to alleviating or otherwise addressing the effects of abuse.

(b) Phase 1 Hearings

3.36 Originally in Phase 1 the Committee investigated individual complaints of abuse. That is to say, it held hearings at which the complainant made the allegation of abuse, which was answered by the person said to have committed the abuse, and any other person or body against whom an adverse finding might be made, such as the institution where the alleged abuse took place (collectively referred to as ‘the respondents’). These hearings were held in private.⁵⁹ However, subject to the finalisation of the Framework of Procedures, it is now envisaged that the business of the Committee will be reorganised on a modular basis in relation to institutions under investigation. In other words, there will be one inquiry unit or module in respect of each institution and what happened in that institution. However, a module may be sub-divided if appropriate, for example by reference to the period of responsibility of a particular manager of an industrial school. The result may be that an individual complainant will be involved in more than one module. In order to conduct its business more efficaciously, the Investigation Committee will operate in four divisions and separate modules will be assigned to each division.⁶⁰ (Hence the need to amend the 2000 Act to provide for Deciding Officers, referred to at paragraphs 3.27 - 3.28).

3.37 The format is that at least six weeks before the date set for the evidential hearings (*ie* where the substantive complaints are heard), both the complainant and each respondent will be served with Books of Documents (A, B, C, and D) for use at the hearings, containing the report of the inquiry officer and the accompanying documents.⁶¹ At least three weeks in advance, a preliminary hearing will be held in

⁵⁸ Framework of Procedures at 5.

⁵⁹ 2000 Act section 11(3)(a) provides that “a meeting of the Investigation Committee, or a part of such a meeting, at which evidence in relation to particular instances of alleged abuse of children is being given shall be held otherwise than in public.” However, section 11(3)(b) goes on to provide that “[o]ther meetings of the Investigation Committee or other parts of such meetings may, if the Committee considers it appropriate, having had regard to the desirability of holding such meetings in public, be held otherwise than in public”. In other words, whenever possible, there is a bias in favour of public hearings.

⁶⁰ Framework of Procedures, at 8.

⁶¹ Rules of Procedure of the Investigation Committee, Part 2, paragraph 2 (h) and Framework of Procedures, at 11-13.

order to resolve any procedural or legal issue which has arisen, such as admissibility of evidence.

3.38 The procedures at the evidential hearings are stated to be at the absolute discretion of the Investigation Committee, but the rules and more recently the Framework of Procedure give an outline of what will be the normal format.⁶² It is envisaged that hearings will now consist of three stages which reflect the format previewed in the Books of Documents A, B, and C.⁶³ The first stage is the opening component, which consists of setting the scene for the module, and it is envisaged that all or part of this stage may take place in public.

3.39 The second stage relates to the hearing of each complainant's allegations of abuse and the response thereto. This will be held privately in respect of particular complainants and the respondents against whom the allegation are made. In other words, the identity of individual complainants is shared with the Committee and the respondents only. It appears the original procedural rules still apply. Thus, first the direct evidence of the complainant will be heard. Either the statement provided will be deemed to be read into the record and the complainant may elaborate on it, or oral evidence of the substance of the statement may be given. The members of the Committee may then question the complainant, after which cross-examination⁶⁴ by each respondent, or legal representative of such respondent, will take place.⁶⁵ As is mentioned above, the right to cross-examine is dependent on the respondent in question having provided a written statement to the Committee. Once cross-examination has concluded, the complainant's legal representative may ask questions of the complainant, by way of re-examination.⁶⁶ Secondly, the evidence of each of the respondents is taken. The statement (if provided) is deemed to be read into the record. Questions from the Committee follow, then cross-examination by the complainant or complainant's legal representative, with re-examination by the respondent's own legal representative. The rules provide that if a respondent has not complied with the request of an inquiry officer to furnish a statement, he or she may still be allowed to give evidence, but on such terms (as to adjournment or otherwise) as the Committee

⁶² Rules Part 2, paragraph 3 and Framework at 15.

⁶³ It should be noted that Book D contains documents that are required to be disclosed to the parties, but are in respect of matters not intended to be adduced as evidence.

⁶⁴ In fact, the rules of procedure do not use the word "cross-examine". Rather, they state that each respondent or its legal representative "may address questions to the complainant". According to the chairperson of the Commission, this non-use of the word "cross-examine" is deliberate, but it seems that nothing much turns on it. See transcript of the Second Public Sitting of the Commission to Inquire into Child Abuse at 65.

⁶⁵ Although attention should be drawn to the typical practice of institutional respondents as well as individuals being represented by one legal team, perhaps comprising of two counsel and one or two solicitors. This was highlighted in the judgment of Kelly J in *Commission to Inquire into Child Abuse v Notice Party A and others* 9 October 2002 at 27.

⁶⁶ Rules of Procedure of the Investigation Committee, Part 2, paragraph 3(a).

considers necessary to allow any person affected by the evidence to address it adequately.⁶⁷ Thirdly, the evidence of the complainant's witnesses is taken in the same way as that of the complainant, and fourthly, that of each respondent's witnesses is taken in the same way as that of a respondent.⁶⁸ This process, one may deduce, is then repeated in respect of each complainants' allegation against the respondent in question. The original rules state that the fifth element is the exercise of the Investigation Committee's (sole) discretion to call evidence itself.⁶⁹ However, in light of the new Framework, this fifth element may now be more appropriate to Book C and the third stage, below. The final element outlined in the original rules is that, at the conclusion of evidence submissions may be made by or on behalf of the complainant and each respondent.⁷⁰ This is probably still allowed, although the Framework omits mention of this element.⁷¹

3.40 The third, or general, stage of Phase 1 is where all other evidence relevant to the module will be adduced and it is envisaged that all or part of this stage may be heard in public. One may surmise that the evidence adduced here will be that which was gathered through the discovery process and as a result of the advertisements (other than the evidence of complainants), such as from people like social workers or doctors, who had dealings with the institution at the time.⁷²

3.41 It is envisaged that evidence in relation to context, referred to below at paragraph 3.55, will be heard at either the first or third stage, and that issues in relation to the type of evidence of context to be heard will be dealt with at the preliminary (procedural) hearing.⁷³

3.42 At any stage in the proceedings, the Committee is entitled to "seek the assistance of or require submissions from counsel to the Investigation Committee".⁷⁴ Counsel are not explicitly mentioned in the Act of 2000, but it appears that they have been appointed under the aegis of section 24, considered below at paragraph 3.55, which confers the power to appoint experts.⁷⁵

⁶⁷ *Op cit* fn 66 Part 2, paragraph 3 (b).

⁶⁸ *Ibid* Part 2, paragraphs 3(c) and (d).

⁶⁹ *Ibid* Part 2, paragraph 3 (e).

⁷⁰ *Ibid* Part 2, paragraph 4.

⁷¹ Framework of Procedures at 16.

⁷² Framework of Procedures, Part D4, at 10.

⁷³ *Ibid* Part G, at 17-21.

⁷⁴ *Op cit* fn 66 Part 2, paragraph 6.

⁷⁵ See the *Laffoy Commission's Interim Report* (May 2001) at 19.

3.43 It is a significant point that the second stage of Phase 1 is held in private. This guarantees the privacy of both the complainants and the respondents, and it ensures that the latter's good name will not be tarnished unless the Committee finds the allegations to be substantiated.⁷⁶ The standard of proof will be on the balance of probabilities, as confirmed in public statements.⁷⁷

3.44 In relation to anonymity, the Framework requires that, so far as it is necessary, those persons who were the subject of child abuse shall be identified using pseudonyms at the public hearings and that identity and personal information will be redacted or pseudonyms used in document (including transcripts) which are circulated. With regard to the first and third stage of Phase 1, the Framework states:

“In determining whether and to what extent, the first and third stages will be heard in public, the division of the Committee to which the module is assigned will have regard to the extent to which the identification in public of a respondent at a stage prior to the making of a determination or a finding in relation to the allegations against that respondent is fair.”⁷⁸

(c) Phase 2 Hearings

3.45 As already noted, Phase 2 of the Investigation Committee has not yet been reached and it is uncertain what form this phase will finally take. Accordingly, only the original procedure that was envisaged can be articulated here. It is envisaged at present that the hearings at Phase 2 will be public and the main aim of these hearings will be to put the *Laffoy Commission* in the best possible position so as to fulfil, its third main purpose (see paragraph 3.06), namely, make recommendations for alleviating or otherwise addressing the effects of abuse on those who suffered it, and for the prevention (where possible) and the reduction of the incidence of abuse of children in institutions, and for the protection of children from abuse.

3.46 The Investigation Committee will proceed to Phase 2 only if it is satisfied that abuse has indeed taken place. A finding that abuse has taken place is

⁷⁶ In this regard, there is no indication of the standard of proof required, save that the Committee must be satisfied that abuse of children occurred in a particular institution before it may make findings to that effect and identify [the institution concerned] and the persons responsible: 2000 Act section 13(2)(a). However, the institution concerned is in brackets here, because, following the modularisation of the *Laffoy Commission*, this will be known already.

⁷⁷ See statement delivered at first public sitting of the Commission to Inquire into Child Abuse, at 8 and transcript of the Second Public Sitting of the Commission to Inquire into Child Abuse, above fn 41, at 41-42. It is notable that the *Laffoy Commission* rejected a submission made on behalf of the Christian Brothers Congregation that a more exacting standard, referred to as the “higher civil standard”, should be used.

⁷⁸ *Op cit* fn 72, Part F.

final and is not open to challenge in Phase 2.⁷⁹ According to the *Laffoy Commission* Phase 2 will itself have two components:

“One will involve investigating, in relation to each institution (or group of institutions under the same or connected ownership or management) the context in which the abuse occurred and why it occurred and the attribution of responsibility for it, whether institutional or regulatory. This investigation will be conducted through public hearings. Each public hearing will involve discrete issues in relation to an institution (or group of institutions). In the other component, the Investigation Committee will look at the broader picture – the legislative framework and the social and historical context in which the abuse existed and will conduct such comparative analyses as it considers appropriate. It is envisaged that this component may be partly conducted through research projects.”⁸⁰

3.47 In short: the Investigation Committee is in a position to determine whether abuse has taken place at a particular institution, and, if so, at whose hands. Although the Committee will not be entitled to report on individual cases, it will be able to identify abusers and the institutions at which abuse took place, and these findings may make their way into the report.⁸¹ That report, as already noted, is published directly to the public. It is clear, therefore, that the personal rights of those against whom allegations are made in the context of an Investigation Committee hearing are much more strongly affected than before the Confidential Committee: see paragraph 3.09.

3.48 The substance and relationship between Phases 1 and 2 were explained at paragraph 3.13. Put briefly, if satisfied that abuse of children occurred in the institution under investigation, the Investigation Committee is entitled to proceed to public hearings in relation to that institution.⁸² There is another component to Phase 2 of the Investigation Committee’s work. In this second component, the Committee “will look at the broader picture – the legislative framework and the historical and social context in which the abuse existed – and will conduct comparative analyses as it considers appropriate”.⁸³ It is also envisaged that this component may be partly conducted through research projects.⁸⁴ *This is an interesting strategy for*

⁷⁹ Statement delivered at first public sitting of the Commission to Inquire into Child Abuse, 29 June 2000 (available at <http://www.childabusecommission.ie/downloads.htm>) at 16.

⁸⁰ *Ibid*, at 16-17.

⁸¹ 2000 Act section 13(2).

⁸² Rules of Procedure of the Investigation Committee, Part 2, paragraph 1.

⁸³ Although to a certain extent this will already have been done in the Phase 1, as noted above at paragraph 3.41.

⁸⁴ Statement delivered at first public sitting of the Commission to Inquire into Child Abuse, at 17.

*fulfilling its third purpose (looking to the future and making recommendations), and is a strategy that could be adopted in other contexts where an inquiry has been asked to make recommendations to alleviate or reduce the likelihood of the particular mischief from occurring in the future.*⁸⁵

3.49 Under the main part of Phase 2, the *Laffoy Commission* sends, to those concerned with the management and regulation of the institution in question at the relevant time, a copy of its findings based on the hearings just described, seeking a statement setting out if, and to what extent, the person acknowledges or denies contributing to the occurrence of the abuse found by the Investigation Committee to have occurred in the institution.⁸⁶ As in Phase 1 the statement should also name witnesses the person wishes to be called, provide a précis of the evidence they will give, ask for any necessary directions under section 14 to be made, and be accompanied by copies of supporting documentation on which it is intended to rely.

3.50 The rules of procedure provide that all statements and supporting documentation furnished by each manager should be given to each regulator, and *vice versa*, and that copies of all documentation should be sent to the legal representative of the survivors' interest (should this be the case; see Part IV).⁸⁷ That legal representative is obliged to furnish to the Committee a statement containing the names of witnesses he wishes to call with the substance of the evidence to be given by each, and requests for directions to be made pursuant to section 14 of the 2000 Act.⁸⁸ Any outstanding documentation must then be circulated among the interested parties in advance of the hearing.⁸⁹

3.51 The hearing itself, which is to be publicly advertised, is to be held to deal with the matters mentioned in section 12(1)(c) and (d) of the 2000 Act, which are the same as those mentioned above, at paragraph 3.06, under headings (b)(ii) and (b)(iii). Essentially, the hearing's purpose is to ask how and why abuse was

⁸⁵ We do not wish to in any way pre-empt the *Barr Tribunal*, which has not yet started hearing evidence even on the substantive module of what happened at Abbeylara, but it would seem to us advisable that its later module(s) (eg in relation to gun laws) may be more appropriately dealt with by way of research projects or public seminars. A comparative example of a public inquiry conducting seminars as a basis for collecting evidence in order to make recommendation is provided by the *Victoria Climbié Inquiry*, which recently reported; that inquiry first invited written submissions from the public at large (over 200 were received and 77 were accepted as evidence and published on the inquiry's website). Next, five seminars were conducted in public covering certain aspects of working with children. A wide range of interested people were invited to participate, including those from the police, social services, health services, academics and lawyers. *The Victoria Climbié Inquiry: A Report of an Inquiry by Lord Laming* (Cm 5730 January 2003) at paragraphs 2.54 – 2.60.

⁸⁶ Rules of Procedure of the Investigation Committee, Part 2, paragraph 2.

⁸⁷ *Ibid* Part 2, paragraph 4.

⁸⁸ *Ibid* Part 2, paragraph 5.

⁸⁹ *Ibid*, Part 2, paragraph 7.

permitted to occur at the institution in question, and to determine who (if anyone) was responsible for allowing it to continue.

3.52 The procedure at the hearing is quite different from that in the Phase 1 hearings. The most significant change is that the hearing is “run” by counsel for the Investigation Committee. He or she makes an opening statement, calls all witnesses, may re-examine them after they have been cross-examined by or on behalf of each manager, regulator and the legal representative of the survivors’ interest (should this be the case, above), and make the final submissions to the Committee.⁹⁰ In other words, he or she enjoys the first and last word.

3.53 The rules of procedure provide for cross-examination of witnesses by all interested parties and for the making of submissions to the Committee, which are each aspects of the rule that both sides must be heard.⁹¹ Certainly, the managers and regulators stand more or less in the shoes of the accused person. It is therefore unsurprising that counsel to the Investigation Committee take a back seat in the Phase 1 hearings into allegations of abuse, addressing the Committee only when requested to do so. By contrast, however, they effectively run the Phase 2 hearings. Perhaps this is justified on the grounds that, at this stage, the proceedings do not resemble a normal *lis inter partes* so much as they do at the Phase 1 hearings, where there is a complainant and a respondent.⁹² Since the anonymity of complainants is guaranteed, it is impossible to ask complainants, at public hearings, to go on and make the case against the management and regulators of the institution where they suffered abuse. And in any event, even if a complainant were willing to forego the shield of anonymity, this might not be the best way to go about things.

3.54 At Phase 2, the complaint of abuse has already been substantiated, and all that remains is for the Committee to decide how and why that abuse was allowed to happen and look towards making recommendations. This is not to say that the Committee does not have the power to make findings adverse to the interests of individuals and other persons: it does. The Committee may decide that “the manner in which ... functions were performed by the persons or bodies, in whom they were vested, contributed to the occurrence or incidence of... abuse”.⁹³ By any reckoning, such a decision has the potential to harm the reputation. But the proceedings still differ from those at Phase 1. Whether and, if so, how the systems of management and regulation failed a victim of abuse is not something of which that victim could ordinarily be expected to have first-hand knowledge.

⁹⁰ Rules of Procedure of the Investigation Committee, Part 2, paragraph 9.

⁹¹ *Ibid*, Part 2, paragraph 9.

⁹² Counsel for the Investigation Committee is therefore analogous to counsel to the inquiry under the *Tribunals of Inquiry (Evidence) Acts 1912-2002*.

⁹³ 2000 Act section 12 (d) (iii).

Part VI Appointment of Experts

3.55 Section 24 of the 2000 Act allows for the appointment of advisers having expertise in an area or areas in which the *Laffoy Commission* or a Committee considers that it requires advice, guidance or assistance, as follows:

“(1) If the Commission considers that it, or a Committee, in the performance of its functions requires the advice, guidance or assistance of experts in respect of any matter, it may, upon such terms and conditions as it may determine, appoint such and so many advisers having expertise in relation to that matter as it may determine to provide it or the Committee, as the case may be, with such advice, guidance or assistance.

(2) The Commission may, for the purpose of the performance of its functions, conduct, or commission the conduct of, research.”⁹⁴

3.56 The terms of reference provided by the Government to the non-statutory Commission made reference to the appointment of “specialist advisors to supply information or elucidate areas of complexity, to conduct investigations, hold hearings, both private and public”, and also allowed the *Laffoy Commission* “to conduct or commission research for the purposes [of] carrying out these Terms of Reference”.⁹⁵ It is understood that an expert in the field of social history has been appointed in order to help it to place the events the subject of its work (many of which happened 30, 40 or even 50 years ago) in their social context, for example the attitude of Irish society at the time of the events under examination was more tolerant of violence towards children. Since the Committees are not courts of law and are not bound by the rules of evidence, not every matter requires proof.⁹⁶ It therefore makes good sense to obtain expert assistance on matters such as this, which are not likely to be particularly contentious.

⁹⁴ Cf *Comptroller and Auditor General and Committees of the Houses of the Oireachtas (Special Provisions) Act 1998*, section 15.

⁹⁵ See Commission to Inquire into Child Abuse *Report on Terms of Reference* (14 October 1999) paragraph 1.1.

⁹⁶ Notwithstanding this, the *Laffoy Commission* has stated publicly that the Investigation Committee will make findings based only on evidence that would be admissible in a court: Statement delivered at first public sitting of the Commission to Inquire into Child Abuse, at 8.

Comment

3.57 There are a number of lessons of general interest that can be learnt from the innovative way in which the *Laffoy Commission* has sought to conduct its proceedings, some of which we have mentioned in outline, above, and others will be considered in the context of later Chapters.

CHAPTER 4 PARLIAMENTARY INQUIRIES

4.01 Before going any further we ought to note that it cannot be said that parliamentary inquiries offer an inexpensive route to formality free inquiries. Indeed the seminal case on constitutional justice before inquiries, arguably the patriarch of Irish administrative law, *In re Haughey*¹ which commands several pages of our attention, at paragraph 7.14-7.30, was a case brought against the Dáil Public Accounts Committee. And while the CAG-PAC inquiry into DIRT was certainly a success, its success flowed not from the fact that it was parliamentary but from certain other aspects, which have certainly much to teach us (Part II). Most recently the *Abbeylara* case² (Part III) confirmed that Leinster House was not a constitutional justice-free zone (though this was not its main message).

4.02 In the present context, only a brief sketch of the position of the Oireachtas and its committees in the general constitutional scheme is necessary. The Oireachtas is the legislative organ.³ In addition, the Dáil is the organ to which the Government is responsible, and which has the power to remove and even to replace the Government.⁴ It is because of this second aspect that we enjoy what is called responsible government. One should also note that this is the constitutional position: in the political field, it is reversed in respect of both the legislative and the responsibility function, by the fact that, in normal times, the Government controls both Dáil and Seanad, by way of its control of the majority party in each House.⁵ As a result of this political reality, the objective of the Oireachtas may be captured in the notion of the 'Grand Inquest of the Nation'.⁶ What this means is that the legislature does not take decisions; yet it investigates, appraises, publicises and even dramatises the Government's decisions, and highlights the alternatives. Whichever view one takes of the functions of the Oireachtas, an elementary point remains true:

¹ [1971] IR 217.

² *Maguire & Others v Ardagh & Others* Divisional High Court judgment (Morris P, Carroll and Kelly JJ) 23 November 2001; Supreme Court judgment 11 April 2002.

³ Article 15.2.1°.

⁴ Article 28.4 and 10.

⁵ See generally Morgan *Constitutional Law of Ireland* (2nd ed. Sweet & Maxwell 1990) chapters 5 and 7.

⁶ A traditional phrase, which is not mentioned in the Constitution.

relevant and comprehensive information is essential to its performance, whether in the field of law-making or controlling the Government. There are numerous channels by which the Houses of the Oireachtas secure this information. Among these are, statements by Ministers, debates on legislation, adjournment debates, (in the case of the Dáil, not the Seanad) Questions to Ministers,⁷ Committees to hear the third stage of Bills, or to keep under surveillance a broad area, often covering the field of a Department of State, such as Foreign Affairs. In the present chapter, we are concerned with one specific way in which information may be obtained, namely the *ad hoc* investigatory committee which inquires into a discrete subject.

Part I Inquiry by Oireachtas Committees⁸

(a) From the PAC Inquiry into Northern Ireland Relief to the 1997 Act

4.03 It is most useful, given the continuous line of evolution from that inquiry, to take the baseline for the development of Oireachtas inquiries as being the 1970 (Dáil) Public Accounts Committee investigation into the fate of the grant-in-aid for Northern Ireland. These monies had been voted for Red Cross relief; but, it was suspected, had found their way into the hands of the resurgent IRA. To sustain the PAC's inquiry, the *Committee on Public Accounts of Dáil Éireann (Privilege and Procedure) Act 1970* was enacted. Despite this legislation, the Committee's questioning of Mr Pádraic Haughey ran into difficulties. These ended up in a court challenge, *In Re Haughey*,⁹ whose two aspects – the first dealing with Mr Haughey's procedural rights and the other with whether the Committee could punish him for refusal to answer its questions – are each of sufficient general interest to be considered elsewhere in this Paper.¹⁰ This case effectively brought an end to the Committee's inquiry. The fact that the quest for a comprehensive statute, providing for parliamentary inquiries, took the next quarter of a century, (involving various abortive attempts,) attests to its legal, constitutional and political difficulties. Eventually, the *Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997* ("*Committees of the Houses...Act 1997*") dragged its weary way to the statute book.

⁷ It is true that there is no effectual sanction if a Minister fails to give what, even on the surface, appears to be an adequate answer. Nevertheless, the fact remains that, for whatever reasons of political or personal loss of face, Ministers usually attempt to give a plausible answer, provided that the right question is asked. And it is notorious that Hamilton CJ remarked, as follows, at the *Beef Tribunal*: "I think that if the questions that were asked in the Dáil were answered in the way they are answered here, there would be no necessity for this inquiry and an awful lot of money and time would have been saved" O' Toole *Meanwhile back at the Ranch* (Vintage 1995) at chapter 18 'Democracy', 241.

⁸ This material draws on the annotations to the 1997 (Siobhán Gallagher) and 1998 (Leonard Lavelle) Acts, in the *Irish Current Law Statutes Annotated*.

⁹ [1971] IR 217.

¹⁰ On these points see paragraphs 7.14-7.16 and 6.19-6.25 respectively.

4.04 Between the inquiry into Northern Ireland relief and the 1997 Act, there was only one Oireachtas inquiry, namely that into the fall of the 1992-94 Fianna Fáil-Labour Coalition Government. The Dáil ordered the Select Committee on Legislation and Security to investigate the events leading up to the fall of this government. However, within a day of commencing its inquiry, the Committee's efforts had to be suspended because of the refusal of an important witness to appear before it, in the absence of appropriate privileges and immunities. At that time insufficient progress had been made on the general legislation to provide the machinery to meet this objection. Accordingly another piece of *ad hoc* legislation, in the form of the *Select Committee on Legislation and Security of Dáil Éireann (Privilege and Immunity) Act 1994*, was enacted.¹¹

(b) *Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997*

4.05 This chapter is not a general essay on Oireachtas inquiries. Accordingly, this is not an analysis of general constitutional aspects such as, parliamentary privileges, the limited exclusion of certain constitutional personages (Attorney General and the Director of Public Prosecutions and their staff), or Government or Government committee confidentiality.¹² (In line with the rather elegant style of drafting which was then the convention, there is no mention of this sort of exemption in the 1921 Act, though it is likely that they could be invoked, where appropriate.)¹³ Our focus here is on the points of interest which parliamentary inquiries share with other inquiries – subpoena, privilege, constitutional justice – since the subject of this Paper is the general problems of inquiries. In the context of this study, the following features are of interest.

4.06 A general issue, to which we shall return at paragraphs 5.72-5.86, is the question of how disputes arising out of the inquiry's operation are resolved ultimately by the courts. Reflecting the special constitutional status of the Oireachtas, the 1997 Act is especially rich in variations in this area. Leaving aside

¹¹ For further discussion on this legislation, see Gallagher, "Select Committee on Legislation and Security of Dáil Éireann (Privilege and Immunity) Act 1994" [1994] ICLSA, at 32-01.

¹² See *Attorney General v Hamilton (No 1)* [1993] 2 IR 250 (the collective cabinet confidentiality case). The Constitution was amended effectively to reverse the result of the case, by the insertion of (new) Article 28.4.3°, which reads: "The confidentiality of discussions at meetings of the Government shall be respected in all circumstances save only where the High Court determines that disclosure should be made in respect of a particular matter – (i) in the interests of the administration of justice by a Court, or (ii) by virtue of an overriding public interest, pursuant to an application in that behalf by a tribunal appointed by the Government or a Minister of the Government on the authority of the Houses of the Oireachtas to inquire into a matter stated by them to be of public importance."

¹³ Cf equivalent in 1921 legislation [Section 1(3) "A witness before any such tribunal shall be entitled to the same immunities and privileges as if he were a witness before the High Court or the Court of Session". Also Section 1(4) (which was inserted by section 2 of the 1997 Act) "A person who produces or sends a document to any such tribunal pursuant to an order of that tribunal shall be entitled to the same immunities and privileges as if he or she were a witness before the High Court"] thought documents were not included.

conventional judicial review, no fewer than three methods are used. In the first place, special machinery is created for determining whether, by virtue of these High Court “privileges or immunities”, a person may disobey a direction in a particular case: section 6(2)(a) states that: “the committee shall apply to the High Court in a summary manner for the determination of the question whether the person [*sc.* the witness] is entitled to [the privilege].”¹⁴

4.07 Next, section 4(1) states that: “a committee may not direct a person to give evidence...that is not relevant to the proceedings of the committee.” Now such a rule undoubtedly exists in relation to a tribunal of inquiry, though only by necessary implication. However, its enforcement would, in the final analysis, be by way of judicial review. The 1997 Act modifies this route, presumably out of (limited) deference to the right of each of the Houses of the Oireachtas to regulate their own procedure. Instead, the question of relevance is to be determined by the Ceann Comhairle, in the case of a direction given by a Dáil committee; or by the Cathaoirleach of the Seanad, in the case of a direction given by a Seanad committee; or by both such chairpersons, in the case of a direction given by a Joint Oireachtas Committee. If the evidence is found to be irrelevant, the direction must be withdrawn. Alternatively, if it is relevant, then the witness must either comply or, within the specified 21 days, appeal this determination to the High Court.

4.08 There is a substantive rule that evidence should not be given where it relates to state security, international relations or law enforcement.¹⁵ Section 7 provides that the way in which any dispute as regards a claim in this area, is to be settled, is by a determination by the Secretary to the Government. However, presumably out of deference to Article 34.3.1° of the Constitution by which ultimately the High Court must always have jurisdiction to settle any question of “fact or law...”¹⁶ it is not provided that the Secretary’s declaration is to be “final”. Instead, the reluctant witness is allowed at least 30 days to comply with the request, thus allowing time to seek judicial review.

4.09 The 1997 Act is unusual in that section 10(1) spells out the rights embraced by the *audi alteram partem* (‘hear the other side’) precept of constitutional justice. More interestingly, subsection (2) states the situations in which these rights are attracted. They are said to spring up:

“...for the purpose of -

(i) correcting any mistake of fact or misstatement relating to or affecting the person made in the proceedings,

¹⁴ In connection with section 6, see also section 8.

¹⁵ Sections 5(1)(d) and (e).

¹⁶ See *Tormey v Attorney General* [1985] IR 28 where the court held that the jurisdiction of the High Court cannot be excluded.

(ii) defending the person in relation to any allegation or charge, or defamatory or untrue statement, made in the proceedings, or

(iii) protecting and vindicating the personal and other rights of the person.”

Subsection (3) muddies the water slightly by qualifying the right to constitutional justice bestowed by subsection (1). It states that: “[a] committee shall comply with a request under ... *subsection (1)*...if it considers that, in the interests of justice, it is necessary or expedient to do so for any of the purposes specified in that subsection”.

4.10 Section 11(1), gives a witness who gives oral and/or documentary evidence to a Committee “the same privileges and immunities as if the person were a witness before the High Court” - in other words, it embraces, for instance, the privilege against self-incrimination or the privilege of a legal adviser. However, the existence of these privileges and immunities depends on whether the person is giving evidence “pursuant to a directive”. In other words, there is no protection for those who voluntarily give evidence. Also, section 11(2) says that if the witness “is directed to cease giving such evidence”, the witness is entitled to only “qualified privilege” against defamation, in respect of evidence given after such a direction. Despite Opposition pressure (on the basis that committee chairpersons do not have legal training), the Minister refused to withdraw this limitation, which was designed to deal with witnesses who might seek to abuse privilege in order to settle a score. Evidence given to committees is rendered non-admissible in later criminal proceedings. But this immunity does not apply where a person voluntarily sends information to a committee.¹⁷

4.11 By section 15, a witness who is a civil servant or member of the Gardai or the Defence Forces is barred from commenting “on the merits of any policy of the Government”. This was said to be necessary in order to protect “the traditional neutrality of those in the public service in providing objective advice to Ministers”.¹⁸ Nothing is said in the Act as to how any dispute as to (say) the interpretation of ‘policy’ in any particular case would be settled. Accordingly, any such dispute would presumably be resolved by conventional judicial review.

4.12 Section 13(3) states simply: “[p]roceedings of a committee may be heard otherwise than in public.” Thus, the matter of sitting in private is left to the committee and there is no other form of words, as there is in the 1921 Act,¹⁹ to restrict its discretion. Section 13 allows the sub-committee established to oversee

¹⁷ Section 12.

¹⁸ 151 *Dail Debates Col 396* (29 April 1997).

¹⁹ See Chapter 8.

the exercise of the powers of the Committee of Procedure and Privileges²⁰ to make rules and issue guidance as to conduct and “in so far as is reasonably practical, conduct its proceedings and perform its functions in accordance with any rules and guidelines laid down in subsection (1)”. Such rules had been made for the Abbeylara Committee, and breach of them was one of the bases on which the Committee’s inquiry was terminated by the High Court.²¹

Part II Comptroller and Auditor General and Public Accounts Committee Inquiry into DIRT: A Case Study

4.13 A lot of government comes down in the end to money, either the levying of taxation or the expenditure of public funds. Indeed, the establishment and rapid development of the Dáil’s precursor in Britain – the House of Commons – goes back to the King’s need, in the thirteenth century to tax the merchant classes and, in quick response, the House of Commons’ desire to control the Royal expenditure. In modern times, the final stage in the cycle of the Dáil’s control over taxation and public expenditure is the audit of public expenditure by the Public Accounts Committee (“PAC”), assisted by the Comptroller and Auditor General (“CAG”). We are concerned here with an exceptional instance of the work of the CAG and the PAC, namely an investigation into the evasion of Deposit Interest Retention Tax (“DIRT”), which falls within the broad category of ‘public inquiries’. Not only was the inquiry’s subject-matter significant, but this was, by common consent, regarded as a successful inquiry, it is worth discussing in detail, as a case study, and then, by way of conclusion, drawing out certain general themes of significance to this Paper.

(a) CAG Inquiry

4.14 Before the *Committees of the Houses...Act 1997* could be used for its first inquiry, it had to be amended by the *Comptroller and Auditor General and Committees of the Houses of the Oireachtas (Special Provisions) Act 1998* (hereafter, ‘the 1998 Act’). The significance of this is that it illustrates one of the major themes of this Paper: that specific legislation (and hard thought preceding it) is often necessary for a particular inquiry, simply because the subject-matter is so variable. The occasion for the first inquiry under the 1997 Act was that, in 1998, there were reports in the print media concerning the use, by the financial institutions, of bogus non-resident accounts, in order to evade the payment of DIRT. The PAC requested the chairman of the Revenue Commissioners to attend a PAC meeting on 13 October 1998. The chairman stated first that the Revenue Commissioners were unaware of the alleged scale of bogus non-resident accounts until the media disclosures in early 1998, and secondly, that the Commissioners had done no deal with AIB in respect of unpaid DIRT. Eventually the PAC passed a resolution, recommending that the CAG should investigate the operation of DIRT

²⁰ Or, where one is dealing with a Joint Oireachtas Committee, a sub-committee of the CPPs of each House.

²¹ See Part III.

by the Revenue Commissioners and the financial institutions, during 1986-98. In addition, the Oireachtas enacted the *ad hoc* 1998 Act. This gave the CAG for the purpose of this particular investigation special power to compel people to give evidence under oath and to obtain discovery of documents.

4.15 The CAG investigation was carried out under a significant time constraint in that the PAC sub-committee hearings were slated to be held in September-October 1999. This was at a time when the Dáil itself was not sitting, and all the other committees had been stood down, to allow deputies and staff to work on a special sub-committee of the PAC to focus on the CAG's report. The net result was that the PAC had to complete its investigations, within the period January to July 1999.

4.16 The initial step taken by the CAG was to request each of the financial institutions which, it was thought, were involved in the non-payment of DIRT, to furnish, on an informal basis, information under an identical set of headings. A written summary of this information was then sent back to each institution for confirmation. At the same time, discussions were held with, and files obtained from the Central Bank, the Department of Finance and the Revenue Commissioners. Once this preliminary information had been obtained, the investigation proceeded in three complementary directions. First, the financial institutions were directed to make discovery on oath of relevant documents, for example: the minutes of the Board; its sub-committees or audit committee; reports to senior management, including internal audit reports; and correspondence with external auditors. Secondly, section 2(1)(c) of the 1998 Act gave the CAG power to appoint an auditor to go into the financial institutions and examine the accounts and documents of private individuals, in order to establish the extent to which DIRT had been paid. A significant constitutional point here is that it was thought necessary that the power to examine individual accounts should be vested in an independent auditor,²² rather than in the CAG directly. The reason for this was that Article 33.1 of the Constitution specifies the CAG's role as being "...to audit all accounts of monies administered by or under the authority of the Oireachtas."²³

4.17 The third tool of investigation was that, during 26 April to 21 June 1999, the CAG himself held 59 hearings, taking evidence on oath from 76 witnesses, mainly chief executives, or internal auditors of the financial institutions under investigation. The evidence was taken in private in the presence of a stenographer and the transcripts were made available to each witness. While some of the witnesses brought their in-house lawyers, all the examination was done by the CAG. The lack of opportunity, for persons or financial institutions, whose conduct was in question in the investigation, to cross-examine other witnesses was justified²⁴ on the basis that the CAG was engaged in gathering relevant information

²² Albeit one who was subject to control by the CAG.

²³ Vol 498 *Dáil Debates* col 864 (15 December 1998).

²⁴ Correctly, we believe; though the matter was not tested before a court.

rather than ‘taking evidence’: on which distinction see further Chapter 9. Further consequences which followed from the fact that the CAG was only gathering information were that there was no need to give a ‘*Haughey v Moriarty*-style’ exegesis on the scope of his investigation to interested parties; and, secondly, that the atmosphere was more conducive to co-operation by the witnesses.²⁵

4.18 One limitation which followed from the fact that the CAG was ‘gathering information’ was that, where there were contradictory views on the facts, the CAG’s report summarises the arguments on each side, but without drawing any conclusions²⁶ leaving this to the PAC itself.²⁷ Thus, for instance, the CAG’s report reaches no conclusion as to whether there was a ‘deal’ or not between the Revenue Commissioners and AIB, regarding unpaid DIRT. Another consequence of the same practice concerns the inclusion in the CAG’s report of the first draft of a long-form report (“LFR”) produced for ACC Bank as part of the process by which the Bank would be privatised. The LFR naturally includes a description of key business risks, among them a potential liability to DIRT of the order of €21 (IR£17) million. Later drafts of the LFR made fundamental alterations. Because of this ACC claimed that it was unfair of the CAG to include the first draft. Nevertheless, the first draft was published, but the report also includes an affidavit from the ACC’s solicitor which indicated why the ACC considered the inclusion of the first draft to be unfair.²⁸ In order to remain within the field of information-gathering and not stray across the border into the terrain of evidence-taking, the CAG considered it necessary to include this affidavit.

4.19 Admittedly, the inquiry was at an advantage compared to many other inquiries in that most of the information it sought was on some kind of permanent record and, secondly, the institutions whose conduct was under investigation appear to have taken the view that they were culpable and that it was in their interest to co-operate. Complementing this was the fact that the CAG’s normal focus, which was also followed on this occasion, is not to try to allocate blame to a particular individual, but to try to establish whether institutional machinery has failed to work satisfactorily. In the present instance, section 2(6) of the 1998 Act forbade the identification of account-holders. Moreover, the report often omits names which would identify other individuals.²⁹

²⁵ Although it should also be said that most of the financial institutions decided for ‘commercial reasons’ to give the necessary information.

²⁶ What in civil law is called *procedure contradictoire*.

²⁷ *Report of the sub-committee of the Select Committee on Legislation and Security* (Pn. 1478 1995) 957, 960.

²⁸ Report, at 233-34; Appendix G 21.1.

²⁹ See Report, at 4.

(b) PAC Hearings

4.20 Once the CAG's Report had been published, the baton passed, in the usual way, to the Public Accounts Committee of the Dáil, which set up a sub-committee to hold oral hearings, at 26 sessions between 31 August and 12 October, 1999.³⁰ The sub-committee consisted of six³¹ members, evenly balanced as between the Government and the Opposition: three Fiánna Fáil; two Fine Gael (including the chairperson), and one Labour.

4.21 As a preliminary, the sub-committee secured the documents which had been before the PAC. First, as regards the financial institutions' own documents in respect of which discovery had been made to the CAG, permission was given for these to be transferred to the PAC. Secondly, as to the information as regards customer accounts though only in the aggregate which had been collected by the independent auditor, described in paragraph 4.16: section 2(3), the relevant section, allowed the CAG to transfer this to the PAC. In addition to the same witnesses who had already appeared before the PAC, the sub-committee called the external auditors of the financial institutions involved, and also the Ministers for Finance, for the periods during which DIRT had not been collected. Significantly, all the questioning emanated from the Deputies on the sub-committee. The only situation in which the institutions whose conduct was under investigation exercised their right to cross-examine was where counsel for the AIB cross-examined the Revenue Commissioners as to whether a deal had been struck between the Bank and the Revenue Commissioners as regards the payment of DIRT counsel for the Revenue Commissioners cross-examined the AIB witnesses on the same issue. In addition, all the questioning of the Ministers for Finance, as regards the alleged deal, was done by the sub-committee's legal team, rather than the deputies, lest it be thought that the deputies were unduly lenient on the politicians.

Part III Abbeylara

4.22 Apart from the special case of the non-payment of DIRT, two other attempts³² have been made to use the *Committees of the Houses.....Act 1997*. We now turn to these attempts: one is the Mini-CTC Signalling Inquiry, which is considered briefly at paragraph 4.41. The other, and the one to which we must devote significant space, is the Joint Committee on Justice, Equality, Defence and Womens' Rights Sub-Committee on the Abbeylara Incident ("*Abbeylara Inquiry*").

³⁰ *Parliamentary Inquiry into DIRT, First Report* (Pn 7963 1999).

³¹ There are twelve members of the PAC itself. By design, the membership of the sub-committee omitted a member with connections with the financial world, who might have been perceived as having an interest.

³² Notice also that the Post Mortem (organ retention by hospitals) Inquiry was originally intended to proceed in two stages: first, an extra statutory private inquiry, chaired by Anne Dunne SC, which will lay its results before the Oireachtas Committee on Health, thereby attracting absolute privilege against defamation action. See *Irish Times*, April 5 2000 and October 4 2002.

4.23 In April 2000, an incident occurred at Abbeylara, County Longford which led to a man being shot dead by the Garda. A Chief Superintendent was appointed by the Garda Commissioner to investigate the circumstances surrounding the death. After he had submitted his report, the Commissioner in turn reported to the Minister for Justice, Equality and Law Reform. In order to attract parliamentary privilege against legal action, the Report was then published as an appendix to a formal report by the Oireachtas Joint Committee on Justice, Equality, Defence and Womens' Rights. In view of criticism of 'the politicians', it bears emphasis that it was the public reaction to this Report which made the Committee feel obliged to establish, in March 2001, a sub-committee under the 1997 Act, to investigate the incident further.

4.24 In a case popularly known as *Abbeylara*,³³ the Gardaí, whose conduct was under investigation, successfully sought judicial review to prevent the inquiry from going ahead. Essentially, they took four points:

(i) Given the terms of the 1997 Act, the procedure followed by the Sub-Committee was flawed in a number of respects;³⁴

(ii) The sub-committee had failed to observe the second rule of constitutional justice (*audi alteram partem*);³⁵

³³ *Maguire & Others v Ardagh & Others* Divisional High Court judgment (Morris P, Carroll and Kelly JJ) 23 November 2001; Supreme Court judgment 11 April 2002.

³⁴ This refers to a group of points which was more significant in the High Court than in the Supreme Court, and is not covered further in the text. The first of these is that section 3 of the 1997 Act specifies that a sub-committee of this type must have the consent of a 'compellability' sub-committee appointed jointly by the Committees on Procedure and Privilege of each House before it can lawfully issue a direction of the type contemplated in section 3 *eg* a direction to answer questions. Because of three defects in the process followed by both the Investigatory and the Compellability sub-committees, the High Court found that when directions were issued to the applicants to appear before the Investigatory sub-committee there was no valid consent in existence. Secondly, the Joint Oireachtas Committee had set up the sub-committee according to the appropriate resolution, "to consider the report...and to consider submissions received and to report back to the Joint Committee." The High Court ruled that "to transform a requirement that [the sub-committee] consider and report upon a report into an investigation that it inquire into the underlying events which gave rise to the report was to go too far". The final defect of this type was that when the application was made to the Compellability Committee, the documents misrepresented to it that certain powers had been given which had not in fact been given until the following day.

³⁵ First, while it had been accepted by the sub-committee that the applicants were entitled to *Re Haughey* rights as regards cross-examination, the applicants were told that they would be allowed to cross-examine any particular witness only after all of the witnesses had been subjected to questioning by all the members of the sub-committee. A second defect was that it was left to the sub-committee to stipulate that "any witness would be entitled to be told of any persons who might be permitted to cross-examine them and be heard as to why such person ought not to be so permitted" (at 32 of the High Court judgment); and also that any cross-examination would be subject to leave of the sub-committee. In sum, the High Court remarked: "All of this suggests that there was a clear attempt to rewrite the rules guaranteed under *Re Haughey* and to do so in a manner which substantially diluted and negated them. Even if this had been done by a tribunal of inquiry presided over by a Judge (which *per* Murphy J in *Lawlor v Flood* and Finlay CJ in *Goodman v Hamilton* was regarded as a

(iii) The sub-committee had no legal authority to mount such an investigation;

(iv) The sub-committee had failed to follow the first rule of constitutional justice (the ‘no bias’ rule).

Items (i) and (ii) are matters which could, in future inquiries, be put right by proper observance of procedural requirements. Thus (iii) and (iv) are more significant questions, which rightly, we believe, received the lion’s share of attention in the courts, especially the Supreme Court. From the perspective of any future reforms, they are of the greater significance and, accordingly, we concentrate upon them in the following account.

4.25 In the Supreme Court, the case was decided in favour of the applicant by a five-to-two majority, upholding a unanimous Divisional Court. Because the decision appears unlikely to be reversed in the foreseeable future, in trying to discern the future course of the law, we concentrate on the majority judgments in the Supreme Court. There was a good level of consensus among the majority judges. In the first place, there were two linked³⁶ aspects of the inquiry which the majority judges regarded as unlawful. The first is that the Committee’s conclusions would be “adjudicatory”.³⁷ The second, which will be covered at paragraphs 4.30-4.33, is that the targets of the investigation by politicians were not Ministers or holders of any other constitutional office, but were ordinary citizens albeit public servants.

(a) ‘Adjudicatory’ – Findings of Facts

4.26 The notion of the ‘adjudicatory’ conclusion was a novel legal concept which was used in the applicant’s argument and in the majority judgments. It appeared to mean that the Committee was empowered to reach a finding which, while not an administration of justice, still made an impact on an individual’s right to his good name. It should be emphasised that the argument was not that there was an “administration of justice”, (Article 34.1) by a body which was not a court of law. Given the absence of this argument, then might it not have been thought that there was nothing untoward? Hardiman J responded to this line of thought by

substantial guarantee that fair procedures would be followed) it would not survive criticism. Here with no Judge and no such guarantee and in reliance upon what appears to be Parliamentary procedure there was an attempt to substantially rewrite and recast the entitlements of persons appearing before the sub-committee.”

³⁶ The question did not have to be addressed as to whether either of these features would have been fatal on its own, or whether the flaw was that the two occurred together. But it seems from phrases like “to adjudicate...on the culpability of citizens in their conduct...” (Murray J at 10 of the Supreme Court decision, quoted more fully at paragraphs 4.30 and 4.34) that it was the fact that there was an adjudication against private citizens which was the factor - in other words, *the coincidence of the two elements was necessary for invalidity*.

³⁷ *Per* Murray J at 4 and 17 (SC). See too *per* Hardiman J at 7-11 (SC).

emphasising the use of the phrase “findings of fact or conclusion”³⁸ in both the formal rules and guidelines adopted by the sub-Committees on Compatibility of the Dáil and Seanad Committees on Procedure and Privileges, and in the Committee of Inquiry’s own terms of reference. Hardiman J stated:

“When it is recalled that the hypothetical finding of fact in this case might involve a finding as serious as “unlawful killing”, made by a parliamentary sub-Committee acting under the authority of both Houses, I believe that it is quite fanciful to consider that a reasonable man or woman in the street would not regard a report so phrased as a solemn finding of demonstrated wrongdoing.”³⁹

4.27 But the question then persists: if there is no ‘administration of justice’, why should the issue not be vested in an Oireachtas Committee in the same way as other public inquiries which are required by their terms of reference to reach a conclusion as to whether the course of conduct which they are set to investigate amounts to a crime? Are all such inquiries in danger of being struck down?⁴⁰ This question was not expressly addressed by the entire *Abbeylara* majority (since it was not directly in point; although it is naturally central to the present Paper). However, Hardiman J responds to this argument as follows: “[i]t was not argued by the applicants in the present case that the proposed activities of the Committee would be an administration of justice. The quite different point is made that the proposed activities of the Committee are simply without legal authority”.⁴¹ This supports the view that what distinguishes an Oireachtas Committee from another type of inquiry in the present context, might lie in the question of authority (see Part IV).

4.28 There is another point which will be especially important, when we come to consider drafting. This is an issue as to whether the area, which the judgment held to be excluded from the remit of an Oireachtas Committee, included

³⁸ Above fn 33 at 6-8 (Geoghegan J concurring); see, to like effect, Murray J at 5-6.

³⁹ *Ibid* at 8. Notice, too, Hardiman J (at 26). “It is worth recalling here the investigation into the fall of the Fianna Fáil-Labour Coalition in late 1994, carried out under the *Select Committee on Legislation and Security Dáil Éireann (Privilege and Immunity) Act 1994*. The Schedule to the Act states: “[f]or the particular purpose of hearing statements and the answering of members questions...upon circumstances surrounding [five particular events in November, 1994, which led to the fall of the Government then in power]”. See also Casey *The Irish Law Officers* (Sweet & Maxwell 1996) chapter 7. The Select Committee made no findings of fact at all but simply transmitted the transcript of its proceedings to Dáil Éireann. But the examination of the various matters set out in the Schedule to the Act, and the hearing of the witnesses in connection with this examination was thought to be a useful exercise notwithstanding that the Committee, from its inception, intended to find no facts and to express no opinions”.

⁴⁰ To take an example, an inquiry set up under the *Companies Act, 1990* was required under its terms of reference “to identify laws which may have been broken by Ansbacher, its agents here and third parties”. (*Irish Times* 11 June 2002) This plainly meant identifying customers of the bank’s operations here as having possibly committed particular offences.

⁴¹ Above fn 33, at 10.

the taking of a definite view on the facts of a controversial issue, as a basis for policy-making. For this is something which the Oireachtas (or indeed many other public or private persons) often needs to do. To put this another way: where does the boundary run between an inquiry into policy, as distinct from an inquiry into culpability? The judges were obviously aware that their judgment would give rise to this question, and appeared to signal that the sort of traditional parliamentary inquiry would not be affected by the judgment. McGuinness J remarked apparently approvingly:

“[There have been] the Joint Oireachtas Committee on Marriage Breakdown 1987, the Sub-committee on Health and Smoking and the All-Party Oireachtas Committee on the Constitution. These Committees have relied on voluntary submissions and willing witnesses but there is in fact no reason why such enquiries should not use the powers of the 1997 Compellability Act to obtain necessary evidence and information”.⁴²

4.29 Moreover, significantly, other members of the majority went further, and accepted that a thorough investigation of this type might – incidentally - have gone into questions of individual culpability. Geoghegan J remarked: “[a]n Oireachtas committee... may necessarily have to probe into management structures and there may consequentially be read into the report implied criticism of persons in existing management roles”.⁴³

(b) Holding ‘Non-Office-Holders’ Responsible

4.30 The second and inter-related aspect of the inquiry which concerned the majority judges was that the inquiry amounted to the assertion of a power to hold ordinary individuals responsible. The majority addressed and rejected the argument that the inquiry could be regarded as authorised by Article 28.4.2° of the Constitution, by which the Government is responsible to the Dáil.⁴⁴ Hardiman J

⁴² Above fn 33, at 6. See also Murray J at 17 (SC). Giving evidence to the PAC, the then Attorney General, Michael McDowell SC remarked that Deputies: “are elected by reference to their policy position on matters likely to come before them - or if they aren’t, they ought to be...[They are] entitled to bring their prejudices with them into a committee-room and still to function as members of a parliamentary committee of inquiry.” And, in response to the last part of that view, the Attorney remarked: “I think there are some issues such as, for instance, health insurance and the various policy options there - it might well be necessary in those circumstances to oblige people to come and testify before a Committee of the Houses of the Oireachtas even if all the Members of the House had different competing policy positions as to what the outcome should be.” (Transcripts 28 November 2000, at 9, *Inquiry into DIRT – Final Report* (PAC), Chapter 5, “Parliamentary Inquiries”).

⁴³ *Ibid* at 10.

⁴⁴ There is a point here about the entity to which the responsibility is owed. This arises from the fact that Article 28.4 refers only to the Dáil, and not both Houses. It is only Geoghegan J who deals with this point, remarking briefly: “Dáil Éireann has been given some non-legislative functions by the Constitution, but Seanad Éireann almost none. Insofar as there is a joint committee of both Houses, the purposes must be common to both” (*Ibid* at 8).

referred disapprovingly to: “a new form of direct personal accountability to politicians of ordinary citizens or at least such of them as are public servants”.⁴⁵ He also noted that a member of the Gardaí is not “directly and individually, responsible to the Oireachtas at common law or by statute”.⁴⁶ It seems, thus, that for Hardiman J, only the activities of Ministers (or possibly other members of the Oireachtas) could be made the subject of direct scrutiny. This proposition was directed at the particular situation before the Court. However, Murray J took a more expansive view of the permitted scope of an Oireachtas Committee:

“I did not see any reason why the Oireachtas cannot conduct inquiries of the nature which they have, for practical purposes, traditionally done including inquiries into matters concerning the competency and efficiency in departmental or public administration as well as such matters as those concerning the proper or effective implementation of policy, and to make findings accordingly. Also if a particular office-holder, such as the chief executive of a semi-state body, is by virtue of his appointment, whether by statute or contract, answerable to the Houses of the Oireachtas different considerations arise and I do not consider that the order proposed to be made by this Court affects such a situation.”⁴⁷

4.31 The difference in the formulations of Hardiman J and Murray J makes it difficult to determine how far this second limitation goes. However, on a general level, it may be possible to say that the majority did not exclude the possibility of an Oireachtas inquiry into the conduct of Ministers (who are made responsible by the Constitution) or other entities which are made responsible by statute, contract or otherwise. Secondly, it may be permissible, in appraising the performance of Ministers or other principals, to bring in their staff who are operating under their direction. In summary, what was banned by the majority in the *Abbeylara* case lies in the *Abbeylara* committee’s direct focus on the conduct of the staff.

4.32 One ought to add that, far from being novel, the two related restrictions, considered under headings (i) and (ii) are in fact traditional and appear to have operated satisfactorily, both in principle and in practice. It is commonplace that public servants are not named in parliamentary or other official reports. For instance, following a long-established convention that civil servants should not be named, the Report of the Select Committee on Legislation and Security which reported on the fall of the Fianna Fáil-Labour Coalition was enlivened by references to Civil Servants A, B and C. This flows from the individual ministerial

⁴⁵ *Ibid* at 29 -30.

⁴⁶ Above fn 33 at Hardiman J at 29-30. Apart from the Oireachtas, we see an example of this self-denying ordinance in the practice of the Ombudsman, who scrutinises whether the outcome involves ‘maladministration’ without allocating blame or identifying public servants.

⁴⁷ *Ibid* at 17.

responsibility which still⁴⁸ remains one of the leading principles shaping Government accountability.

4.33 It is useful, at this point, to draw a contrast with one of the unsuccessful submissions made in *Haughey v Moriarty*.⁴⁹ This was the argument that, since the tribunal of inquiry was set up following Oireachtas resolutions, consequently the scope of its field of investigation must be in aid of the legislative process (eg to reform the political system as to the making of payments to politicians or political parties) and could not, as the actual terms of reference did, focus on the private finances of Mr Haughey and Mr Lowry, albeit that these were or had been public figures. This argument which failed in *Moriarty* had a significant aspect in common with the argument which succeeded in *Abbeylara*. In each case, there was an equal want of explicit authorisation to hold an inquiry, in the governing legislation. Why then the difference in the outcome of the two cases? The only possible answer is that the forum in *Abbeylara* was an Oireachtas Sub-Committee; whereas, in *Moriarty*, it was a tribunal of inquiry chaired by a judge. Put shortly, the conclusion which seems to emerge from this contrast is that, irrespective of the legislation, the Supreme Court would be very reluctant to rule that an investigation of the type upheld in *Moriarty* was valid, if it were vested in an Oireachtas committee. If, irrespective of the legislation, a court would be likely to rule that an investigation of this type was invalid, this would mean that vesting an investigation of this type in an Oireachtas committee would be unconstitutional. This is a point to which we shall return to in Part V.

Part IV Authority to Hold Inquiry

4.34 There was a great deal of discussion as to where the Oireachtas might find its authority to hold an inquiry of this type. This took the form of reference to: history, foreign legislatures; and even to tribunals of inquiry. Each line of argument led, according to a majority, to a negative conclusion. But the logically antecedent question was whether the Oireachtas needs to be able to point to any specific power to collect facts. Surely a private individual would not need such authority, but could do so as an aspect of his personality? Is the Oireachtas different? Murray J addressed this point in the following passage:

“The capacity of such Committee to conduct an inquiry does not have to be received from any express or inherent power conferred by the Constitution. It is simply something which they are not prohibited from doing... . The fact that the Houses of the Oireachtas may conduct or initiate inquiries to obtain information or ascertain facts does not derive from an inherent power *peculiar* to its role and function as a

⁴⁸ Despite its dilution by the *Public Service Management Act 1999* and the fact that civil servants may be called to give evidence under the *Committees of the House... Act 1997*.

⁴⁹ [1999] 3 IR 1. On this point, see Blom-Cooper “The Role and Functions of Tribunals of Inquiry – an Irish Perspective” [1999] PL 175.

representative democratic parliament. But once an inquiry is conducted within the law and the Constitution it seems to me it is axiomatic that the National Parliament, *like many other even private bodies, may conduct an inquiry for their own purposes*. It is not restricted from doing so.

When the Oireachtas exercises its authority in a manner which may affect the rights of others, it acts with the aura and authority of a constitutional organ of State. *To adjudicate, in the sense that the term is used here, on the culpability of citizens in their conduct cannot in my view be equated with the everyday search for knowledge of facts or expert opinions*. That is a governmental power which it seems to me can only be exercised by virtue of power conferred by the Constitution. Accordingly, different considerations must arise when the Houses of the Oireachtas assert a constitutional power to embark upon an adjudicative process...⁵⁰ (Emphasis added).

4.35 What appears to emerge from this passage is that, where an Oireachtas committee is confined to fact-finding, there is no need for it to be justified by any specific authority (whether express or inherent). By contrast, (as indicated in the words italicised), where the power is ‘adjudicatory’ it is necessary for there to be some specific authority. This distinction is important when it comes to considering the majority's treatment of the *Committees of the House of the Oireachtas Act 1997*. Drawing on this same distinction, Geoghegan J stated:

“It is not in dispute that it [*sc.* the 1997 Act] is a procedural Act only and it does not confer any powers of inquiry on either House of the Oireachtas. Whilst effectively that Act may be used for some forms of legitimate inquiry, it cannot be availed of as a basis of proof of the existence of the inherent power contended for in this case.”⁵¹

4.36 This view seems to have very much coloured the majority’s interpretation of the 1997 Act. For it might have been thought that the strong powers of compellability of witnesses bestowed by this Act imply the power to inquire; just so that there is some purpose for which the specific powers of compellability may be used. One might invoke here an analogy with a tribunal of inquiry. For in *Goodman International v Hamilton*⁵² it was held by the High Court,

⁵⁰ Above fn 33 at 10. See, to like effect, Murray J at 8. Also, to broadly similar effect: McGuinness J at 9-11, citing, with approval, *PAC Inquiry into DIRT: Comparative Study of Tribunals of Inquiry and Parliamentary Inquiries* and the Attorney General’s Opening Statement to the PAC of November 28 2000. McGuinness J concludes this part of her judgment, at 11: “...both the present remit of the Abbeylara Inquiry and the course of action taken by it go well beyond *any constitutionally-related and proportionate inherent power of a committee of both Houses of the Oireachtas*.” (Emphasis added).

⁵¹ Above fn 33, at 8.

⁵² [1992] 2 IR 542, 554, approved by the Supreme Court in *Haughey v Moriarty* [1999] 31 IR 1, 32-33. For more detail, see paragraph 6.03.

(in a passage which the Supreme Court approved) that the *Tribunals of Inquiry (Evidence) Acts 1921* do not endow the Oireachtas with competence to establish a tribunal, but merely assume that they already have this power. Surely one could at least say that likewise the *Committees of the Houses of the Oireachtas... Act* assumes that the Oireachtas has competence to set up an inquiry, by way of sub-committee? However, this was not so, according to the majority.

4.37 What emerges from the contrast drawn in the previous two paragraphs is that the courts would be very loath to interpret any statute as giving, to an Oireachtas Committee, authority to hold an *Abbeylara*-type inquiry. Admittedly, the wording in the 1997 Act is not the most explicit or clearest: but then, neither is the wording of the *Tribunal of Inquiry (Evidence) Acts*. It seems quite likely, therefore, that no legislation could give authority of this width to an Oireachtas Committee. In short, a constitutional amendment would be required. To this issue we return in paragraph 4.47.

(a) No Bias

4.38 The rule against bias (*nemo iudex in causa sua*) is one of the two major principles of constitutional justice. While most of the members of the Supreme Court in the *Abbeylara* case did not decide the case on the basis of this principle, and so did not need to go into this aspect fully, it was accepted - even by the two minority judges - that this rule would apply to an Oireachtas inquiry. One point of uncertainty in this area concerned a refinement on the broad 'no bias' principle, namely 'structural bias'. This expression refers to the notion that, even irrespective of the circumstances of a particular case, a particular body might, of its nature, be inherently biased. Thus, here, the applicants submitted that the inquiry was invalidated by:

“the underlying fact that as public representatives they each have an ever-present interest, from one perspective or another, in the political issues of the day including the ever-present one of the standing or otherwise of the Government in office and its Ministers”.⁵³

Most of the judges either rejected this argument, or declined to rule upon it. However, Geoghegan J did remark:

“It would only be in rare circumstances that a body composed in that way would be perceived by reasonable members of the public as capable of independent arbitration”.⁵⁴

4.39 However, even assuming that structural bias does not apply, that still leaves the less extreme form of the rule, namely 'objective bias'. And, as to this, Denham J stated:

⁵³ Above fn 33, at 10 *per* Murray J, although he was stating the argument only to reject it.

⁵⁴ *Ibid* at 11. See, to like effect, Hardiman J at 29.

“A committee member in such an inquiry as is in issue may not sit if in all the circumstances a reasonable person would have a reasonable apprehension of bias, and apprehension that the committee member might not bring an impartial and unprejudiced mind to the hearing. This would refer to considerations relating to matters prior to the establishment of the committee and during the hearings of the committee. Thus, indications of a view being held by a committee member whilst the hearing is proceeding would be contrary to the concept of fairness”.⁵⁵

4.40 In the same vein, McGuinness J stated:

“If they are to carry out such a proper inquiry, the members of such an inquiry committee would have to accept a self-denying ordinance which would, for example, prevent them from carrying out any media appearances or interviews dealing with the subject-matter of the inquiry both before and during its currency”.⁵⁶

It is clear from this, at the very least, that if an Oireachtas inquiry were to satisfy this rule, its members would have to be at pains to behave in a way which is very different from the norm; a norm which is, moreover, often expected or demanded of Oireachtas members by the media and public. It bears stating, too, that probably an infringement by even one member of a twelve or fifteen member committee would be regarded as tainting the entire inquiry with bias.

(b) Permissible Oireachtas Inquiries: the Mini – CTC Signalling Inquiry

4.41 Here, we might make explicit a crucial point which was left hanging yet was implicit (see paragraph 4.27) in the majority judgments. It is that while the Oireachtas may lack the capacity to carry out an inquiry with the deleterious characteristics (identified at paragraphs 4.30) of the Abbeylara inquiry; it probably does have the capacity to carry out other inquiries. This means that inquiries such as: the Dail Inquiry into the fall of the Fiánna Fáil – Labour Government,⁵⁷ the PAC-CAG DIRT inquiry and the CIE Signalling costs over-run Inquiry would almost certainly be held to be within the capacity of the Oireachtas.

4.42 At this point, we shall elaborate on the CIE Signalling over-run inquiry. This inquiry was conducted by the Joint Committee on Public Enterprise and Transport Sub-Committee on the Mini – CTC Signalling Project. This was a sworn inquiry using the powers conferred by the *Committees of the Houses*

⁵⁵ Above fn 33 at 9.

⁵⁶ *Ibid* at 10. In the context of bias, see, too Attorney General’s remarks to DIRT Inquiry on 20 November 2000, quoted by Hardiman J at 28.

⁵⁷ Above fn 39.

(*Compellability, Privileges and Immunities of Witnesses*) Act 1997 and the *Comptroller and Auditor General and Committees of the Houses of the Oireachtas (Special Provisions) Act 1998*. The Sub-Committee's terms of reference required that:

“The circumstances surrounding the entering into and the performance of the Iarnród Éireann mini-CTC and Knockcroghery signalling projects and the Esat/CIE cabling and telecommunications and related matters be inquired into and reported on...”⁵⁸

4.43 On 18 July 2001 the Sub-Committee held its preliminary hearing at which the chairman made a detailed statement outlining the membership of the Sub-Committee, the purpose and framework of the inquiry. The Sub-Committee commenced the evidence gathering phase of the inquiry in public on 10 September 2001. However on 27 November 2001 in the closing stages of the Sub-Committee, in response to the decision of the High Court in the *Abbeylara* case concluded that it must adjourn *sine die* as the procedures of the Sub-Committee closely followed those adopted by the *Abbeylara* Sub-Committee. At this point, the Sub-Committee had reached the closing stages of the evidence-gathering phase of its work and was on the point of preparing its Report, including findings and recommendations as appropriate.

4.44 As things happened, the true position as to the validity of mini-CTC inquiry was obscured by two coincidental factors. First, the family of the late Mr McDonald, the former group chief executive of CIE, had earlier brought unsuccessful legal proceedings against the Sub-Committee,⁵⁹ which yielded an interim injunction to stay the proceedings. By the time the injunction had been lifted, the *Abbeylara* proceedings were under way.⁶⁰ If the inquiry had recommenced at this stage, no doubt an attempt would have made to stop it, especially if the action had been taken, after the High Court judgment in *Abbeylara*, which is less nuanced than the Supreme Court judgments, and offered less ground for the sort of distinction drawn in paragraph 4.27. By the time the dust had settled after the Supreme Court judgment in *Abbeylara*, (April 2002) and the fairly restricted ambit of the ruling had been appreciated, the Oireachtas was entering the

⁵⁸ Joint Committee on Public Enterprise and Transport sub-committee on the Mini-CTC Signalling Project *Interim Report* (Pn 11426 2002) at 61.

⁵⁹ The grounds on which the applicant sought judicial review were as follows: (a) By failing to provide legal representation to the widow of Mr McDonnell the sub-committee had prevented her from exercising her constitutional right to protect the good name and reputation of her late husband; (b) the applicant's constitutional right to cross examine witnesses whose evidence might impinge on the good name and reputation of her late husband was seriously abridged by the procedures adopted by the sub-committee; (c) the members of the sub-committee were guilty of bias; (d) the sub-committee had failed to furnish the applicant with all the documentation relevant to the interest she was seeking to protect; (e) the sub-committee had refused to allow the applicant's legal representatives to make an opening statement to the committee without first submitting it in advance of the hearing to the committee.

⁶⁰ *McDonnell v Brady & Others* High Court 3 October 2001, Supreme Court 31 October 2001.

final straight before the General Election (17 May 2002). As a result of these two factors, the Committee's swansong took the form of an impassioned 'Interim Report'⁶¹ which merely lamented that it had been prevented from completing its report.

4.45 It might have been thought possible to reconvene the inquiry, in the post-election Houses, to complete the report. The major difficulties lay in the fact that it was assumed the inquiry would have to retain the same membership throughout. This was not possible because a number of the Committee's members were not members of the new Houses. And, secondly, because the balance of political parties in the Houses was affected by the respective elections, there would have been a political requirement that the balance in the Committee be altered to reflect this.

Part V Recommendations

4.46 Two questions naturally arise from the *Abbeylara* case, for consideration before we deal with any possible recommendation.

(a) Would Amending Legislation be Unconstitutional?

4.47 The question of whether it is appropriate for the Oireachtas to set up an inquiry of the type which bit the dust in the *Abbeylara* case is a matter of high policy. As such, it is naturally a matter to be determined by the House of the Oireachtas themselves. But it may be useful if the Commission makes a comment, however tentatively, on the purely legal aspects of the issue. In the first place, (since there is no virtue in advising a law change which would be likely to turn out to be unconstitutional) we need to take a view on the preliminary legal question of whether it would be unconstitutional for legislation to be enacted which would bestow on the Oireachtas a power to set up an *Abbeylara*-type inquiry. In respect of this question, we can start by summarising the relevant features of our account of the majority judgments by characterising an *Abbeylara*-type inquiry as one in which there is (i) an 'adjudicatory' finding upon the conduct of (ii) a person who was not a Minister or holder of other constitutional office (or a member of the Oireachtas).

4.48 Understandably, none of the judges wished to express a view on this controversial question of constitutionality, which in any case was not an issue before the Court. Geoghegan J said of this question:

“This is irrelevant now. If such law were enacted it would attract the presumption of constitutionality. It might well be for instance that there would be considerable opposition to such a Bill if introduced or more to the point that even if it was thought to be perfectly constitutional, it might be perceived in practice to be very difficult to operate in any

⁶¹ Joint Committee on Public Enterprise and Transport sub-committee on the Mini-CTC Signalling Project, *Interim Report* (4 April 2002)

controversial circumstances such as the *Abbeylara* incident because of the problems of bias....

[A]lthough in theory.... the Oireachtas could legislate to give itself the powers which it now claims to be inherent, the exercise of those powers might prove legally difficult because... all the normal rules of natural and constitutional justice involving fair procedures and absence of bias whether subjective or objective would apply...⁶²

4.49 In considering the question of unconstitutionality, at least two lines of argument seem to point in the same direction. The first is the question of bias: while it was not necessary in the *Abbeylara* case, for the majority to rely on the ‘no bias’ rule of constitutional justice, the view of Geoghegan J, just quoted, is clear. Equally, the silence of most of the majority on this point was plainly pregnant with forebodings, which might well be articulated in an appropriate case. Violation of the principle that an adjudicator should be free of prejudice or bias could well attract the taint of unconstitutionality, either on a free-standing basis or especially when associated with the violation of a citizen’s good name (see Article 40.3.2° of the Constitution).

4.50 Secondly, take some of the points of distinction which have been drawn earlier in this account. First, we noted in the comparison between *Abbeylara* and *Moriarty* at paragraph 4.33, that, in each there was an investigation into the possibly criminal conduct of a private citizen, and in each the investigation was based on similarly lapidary legislation. Yet in *Abbeylara*, the inquiry was condemned, and in *Moriarty* this aspect of the inquiry was upheld. It is reasonable to conclude that in part the difference in outcome lay in the fact that the *Abbeylara* investigation was being carried out by a committee of the Oireachtas, and thus that any legislation involving the Oireachtas would be likely to be held unconstitutional. The same lesson could be deduced from the contrast between *Abbeylara* and *Goodman*, drawn at paragraph 4.36. In *Goodman* too, there was an inquiry into misconduct allegedly committed by a ‘private individual’ (in the sense in which that phrase was understood in *Abbeylara*). Yet in *Goodman*, the inquiry was upheld. The message from Hardiman J’s judgment, too, suggests that there is something inherent in the nature of the Oireachtas having a possibly structural bias (see paragraph 4.38) which would render an investigation of the character stigmatised in *Abbeylara* because it is likely to involve an invalid ‘adjudication’ on that constitutionally-protected value, the citizen’s good name, irrespective of the legislation which authorised it.

4.51 *In summary, it seems that the character of the Oireachtas cannot be altered by a re-drafting of the 1997 Act, however clear. Based on the decision of the Supreme Court in the Abbeylara case, there seems quite a danger that any such re-drafting would be unconstitutional. Therefore, it seems to the Commission that it would be unwise to recommend legislation which would purport to authorise the Oireachtas to constitute a committee which is to carry out an Abbeylara-type*

⁶² Above fn 33 at 22. See also Hardiman J at 30.

inquiry, unless of course such legislation is to take the form of a constitutional amendment. On this last possibility – a constitutional amendment – it is not for us to comment.

(b) Is New Legislation Necessary for Non-Abbeylara Type Inquiries?

4.52 The other question which must be addressed is what area of investigation remains open to an Oireachtas committee? In this respect the Supreme Court seemed to go out of its way to make it clear that, under the existing law, a great deal of terrain is left, within which an Oireachtas committee may legally and constitutionally operate.⁶³ That leaves open the issue of whether authority to undertake an investigation into what one may call the ‘non-Abbeylara’ area already exists, under the present legislation - the *Committees of the Houses of the Oireachtas Act 1997* - or whether further legislation is required. On this question, it is, we believe, impossible to be absolutely certain. However, there are quite a few suggestive remarks. For instance, Geoghegan J remarked, in the passage quoted at paragraph 4.35, “[the 1997] Act may be used for some forms of legitimate inquiry.” Again, Murray J stated in the passage quoted at paragraph 4.34, “the National Parliament, like many other even private bodies, may conduct an inquiry for their own purposes.”⁶⁴

4.53 This reasoning is naturally somewhat tentative: for it attempts to infer what the Court would have said, if the facts before it been different. However, *Abbeylara* was a major constitutional case in which the Supreme Court was concerned to set out a dividing line, and it would be unrealistic to dismiss its views on the matter as being merely *obiter*. Thus there seems to be no need for an amendment to be made to the 1997 Act in order to put it beyond doubt that the Oireachtas can endow its committees with the authority to investigate in appropriate areas. Moreover defining the areas would, of course, pose a substantial drafting difficulty.

⁶³ As is noted by Murphy “Inquiries and Tribunals After Abbeylara” (2000) *Bar Review* 355, 358: “Although it was not an issue in the case it is clear from all seven judgments that the Houses have an inherent power to inquire into matters of public importance that fall within the remit of a parliamentary body”.

⁶⁴ Similarly, one might ask: if it is acceptable for a tribunal of inquiry to hold inquiries which make no specific grant of power to do so, why should there be any difficulty in the Oireachtas doing so? A partial response is to the effect that *Abbeylara* rules that there is a difficulty in the case of an Oireachtas inquiry with the characteristics identified at paragraph 4.25. (This is made clear in the *Goodman* contrast at paragraph 4.36). But the crucial point is that the Supreme Court in *Abbeylara* was at pains to indicate that what was excluded were only Oireachtas inquiries with the two characteristics identified earlier in this Part.

4.54 *It seems clear enough (from the points made in paragraphs 4.52- 4.53) that either the existing 1997 Act or some inherent power, akin to that which applies to ordinary persons, already authorises the Oireachtas to hold inquiries, apart from those which are of the type excluded in Abbeylara. On balance, the Commission considers that an amendment to the 1997 Act of this type is not necessary or expedient.*

Part I History

5.01 The discipline imposed by the Irish Constitution, which is such a significant part of the landscape against which our inquiries operate, had no equivalent in Britain.¹ Accordingly, we must be wary in this Paper about using British parallels. However, we should briefly mention the origins of the 1921 Act because of its continuing significance here, and also the place of the Royal Commission chaired by Salmon LJ,² which reviewed the operation of the 1921 legislation. The *Salmon Commission* remarks:

“From the middle of the 17th century until 1921, the usual method of investigating events giving rise to public disquiet about the alleged misconduct of ministers or other public servants was by a Select Parliamentary Committee or Commission of Inquiry.”³

5.02 According to Professor Keeton, investigation by way of Committee of Inquiry originated in 1667 when a Committee of Inquiry was appointed to investigate how the King and his Ministers had spent taxes voted by Parliament.⁴ However, the first Committee of Inquiry appointed to investigate allegations of misconduct on the part of public officials was appointed in 1678 to inquire into miscarriages in the Navy.⁵ This was a blatantly partisan affair designed to reduce

¹ At any rate, not until the recent incorporation of the European Convention of Human Rights into domestic law in Britain by the *Human Rights Act 1998*.

² *Report of the Royal Commission on Tribunals of Inquiry, 1966* (Cmnd 3121 London) (“*The Salmon Commission*”). See also supplementary report dealing separately with the question of contempt of the tribunal, by press comment (Cmnd 4078 1969).

³ *Ibid* at paragraph 6.

⁴ Keeton *Trial by Tribunal: A Study of the Development and Functioning of the Tribunal of Inquiry* (London 1960) at 22.

⁵ Other examples of early committees of inquire include: *Committee of Inquiry into the Mismanagement of Irish Affairs, 1689*; *Committee of Inquiry into allegations of widespread corruption, 1695*; *Committee of Inquiry into the signing of the Treaty of Utrecht, 1715*; *Committee of Inquiry into the Collapse of the South Sea Company, 1720*; *Committee of Inquiry into the Conduct of Sir Robert Walpole as Prime Minister, 1742*.

the influence of James, Duke of York, the former Lord High Admiral and to destroy the career of supporter and Secretary Samuel Pepys. Thus, as Professor Keeton notes:

“The Committee of Inquiry, therefore, appears in its first use as a tribunal of investigation after the Restoration as a party instrument making no claim to impartiality. This defect remained a feature of it throughout its history.”⁶

5.03 The development of the modern party system and with it strict party political discipline in the 1870s, naturally had an impact on the already suspect impartiality of Select Committees, particularly when issues with a political flavour were under investigation. As a result, there had been “since the mid-Nineteenth Century...a drift towards independent commissions, sometimes consisting wholly of judges, sometimes a judge and two members of Parliament, one from each side and sometimes of a single judge”.⁷ The shortcomings of the Select Parliamentary Committee were inadvertently recognised by 1888, when serious allegations were made against the leader of the Irish Parliamentary Party, Charles Stewart Parnell. Parnell requested the establishment of a Parliamentary Select Committee. Instead, the Government⁸ established a statutory committee of inquiry: the matter was referred for investigation to a Special Commission set up *ad hoc* by the *Special Commission Act 1888*.⁹ In retrospect the motivation of the Government was suspect but the outcome was very different from what either side had envisaged, namely the vindication of Parnell and the suicide of Richard Pigott. While interesting from a historical perspective, what is important from our point of view is that “this tribunal

⁶ *Op cit* fn 4 at 23. An insight into the partiality of the Committee may be gleaned from the fact that the chairman of the Committee, William Harbord, hoped to succeed Pepys in the office of Secretary. Not surprisingly the Committee concluded that Pepys was guilty of wasting public funds. However the Attorney General refused to prosecute Pepys as the evidence was insufficient to support a criminal trial. Pepys eventually proved his innocence by exposing the true character of those who had sworn evidence against him.

⁷ *Per* Hardiman J in *Abbeylara*, Supreme Court, 11 April 2002, at 13 summarising Keeton *Trial by Tribunal: A Study of the Development and Functioning of the Tribunal of Inquiry*, chapters II and III.

⁸ “Motivated not so much by a desire for justice as by the desire for a technique that would put the whole nationalist movement on trial and, it was hoped, damage it beyond recovery while justifying the Coercion Bill”, *Parliamentary Inquiry into DIRT: final report: examination of the report of the Comptroller and Auditor General of investigation into the administration of deposit interest retention tax and related matters during 1 January 1986 to 1 December 1998* Dublin Stationery Office (No D/R/01/01 2001) at 98.

⁹ The commission lasted from 17 September 1888 to 22 November 1889. It sat in the Royal Courts of Justice and the tribunal comprised three commissioners, the Rt. Hon. Sir James Hannen, Mr. Justice Day and Mr. Justice AL Smith. The commissioners were granted special powers and also had “all such powers, rights and privileges as are vested in Her Majesty's High Court of Justice, or in any judge thereof, on the occasion of any action ...” The commission reported in 1889, vindicating Parnell and showing the ‘Pigott letters’ to be fake.

had been set a vast and unenviable task which they had discharged conscientiously and with conspicuous ability”.¹⁰

5.04 Next, early in the twentieth century there occurred what became known as the Marconi Scandal. In 1912 the Postmaster General in a Liberal Government accepted a tender by the (British) Marconi Company for the construction of a chain of state-owned wireless telegraph stations throughout the British Empire. There followed widespread rumours that the Government had corruptly favoured the Marconi Company because certain prominent members of the Government, who had purchased shares in the (US) Marconi Company, had intended to profit by the transaction. The majority report by the Liberal members of the Select Committee appointed to investigate these rumours exonerated the members of the Government concerned, whereas a minority report by the Conservative members of the Committee found that these members of the Government had been guilty of gross impropriety. When the reports came to be debated in the House of Commons, the House divided on strictly party lines, and exonerated the Ministers from all blame.¹¹ This is the only British twentieth century instance of a matter of this kind being investigated by a Select Committee of Inquiry of Parliament.

5.05 Although the 1921 Act was enacted at Westminster, its pedigree is, to some degree, Irish. For in 1921, when grave allegations of war-time profiteering were made against officials in the Ministry of Munitions, the unpleasant flavour left behind by the Marconi Committee of Inquiry, as well as the favourable impression created by the Parnell Commission were recalled. Consequently, it was felt that new machinery based on the Parnell Commission should be created.¹² The widely-differing nature of the circumstances in which the statute would be invoked in the future could not all be foreseen and, as a matter of necessity, the passage of the Bill through Parliament was somewhat hurried. Indeed Professor Keeton stated that “the entire procedure embodied in the Act has something of an improvised air.”¹³ As a result, there are certain omissions and shortcomings in the 1921 Act, some of which are dealt with at various parts of this Paper. To the inquiry which it established, the Act gave the ponderous title ‘tribunal of inquiry’. But it is worth noting that the term tribunal is often used in a different sense in the context of administrative tribunals.¹⁴

¹⁰ Above fn 4, at 103.

¹¹ The findings were the subject of a cartoon in *Punch*: the drawing showed Lloyd George and Rufus Isaacs leaving the Committee-room, with the chairman saying: “you leave the Inquiry, boys, without a stain on your character, apart from the whitewash!”

¹² *Salmon Commission* above fn 2 at paragraph 13; quoted in *Lawlor v Flood* [1999] 3 IR 1, 121 per Hamilton CJ.

¹³ Keeton *Trial by Tribunal: A Study of the Development and Functioning of the Tribunal of Inquiry* (London 1960) at 9

¹⁴ Generally speaking, a tribunal is: “a body, independent of the Government or any other entity but at the same time, not a court which takes decisions affecting legal rights, according to some fairly precise (and usually legal) guidelines and by following a regular and fairly formal

5.06 The only major review of the 1921 Act is contained in the *Salmon Commission* Report.¹⁵ The train of events leading to the Report commenced with the Profumo Affair which arose when the British Secretary of State for War shared a mistress, Christine Keeler, with the Russian Military Attaché, giving rise to both salacious rumours and legitimate worries for the security implications of the liaison. To investigate the Profumo Affair, the Government chose not to set up a tribunal, under the 1921 Act. Instead, as Salmon LJ remarked:

“[T]hey appointed Lord Denning, the Master of the Rolls, to hold this inquiry. This task he performed with conspicuous success, despite the difficulties inherent in the procedure which he followed. The inquiry was conducted behind closed doors. None of the witnesses heard any of the evidence given against him by others or had any opportunity of testing such evidence. The transcript of the evidence was never published. Lord Denning had, in effect, to act as detective, solicitor, counsel and judge. In spite of the many serious defects in this procedure, Lord Denning’s Report was generally accepted by the public. But this was only because of Lord Denning’s rare qualities and high reputation. Even so, the public acceptance of the Report may be regarded as a brilliant exception to what would normally occur when an inquiry is carried out under such conditions.”¹⁶

5.07 It was the kind of concerns alluded to in this rather notable and possibly disingenuous paragraph which led to the establishment of the *Salmon Commission*. Because of the different courses taken by constitutional development here and in Britain, not all of the recommendations of this excellent and concise report are of interest here, those which are relevant will be mentioned at appropriate points in this Paper. For the moment, we need note only that, after due deliberation:

“In 1973 the government published its comments on the various recommendations [of the Salmon Report], accepting the greater part of them but rejecting the committee’s proposals for amendment of the 1921 Act in the matter of contempt. It said that legislation would be brought forward to make other amendments which would be necessary.”¹⁷

procedure” Hogan and Morgan *Administrative Law in Ireland* (3rd ed. Sweet & Maxwell 1998) at 256-257. Examples include: the Appeal Commissioners of Income Tax; An Bórd Pleanála; An Bórd Úchtála; Rent Tribunal. See, respectively: *Taxes Consolidation Act 1997*, section 850 and Part 40; *Planning and Development Act 2000*; *Adoption Act 1952*, section 13; *Housing Private Dwellings (Amendment) Act 1983*.

¹⁵ Above fn 2.

¹⁶ Above fn 2 at paragraph 21.

¹⁷ Wade and Forsyth *Administrative Law* (7th ed. Oxford University Press 1994) at 1009.

5.08 But matters rested so, and to this day, the 1921 Act remains unamended in the land of its birth. Possibly this has something to do with the view expressed in the bleak remark of the former Prime Minister Sir Edward Heath, “[t]he plain fact is that we have never succeeded in finding the perfect form of inquiry”.¹⁸ In setting up the *Salmon Commission*, the Prime Minister, Harold Wilson said: “I do not think that we have yet found the right answer” and he hoped that the *Salmon Commission* would devise satisfactory alternatives so that recourse to tribunals may be a rare as possible.¹⁹ In fact during the 1921-97 period, 21 British inquiries were set up under the Act.²⁰

5.09 In Part II of this Chapter we ask whether or not the chairperson, as has been the convention in this country, should always be a judge. Part III - Part IV deal with the issues of single or multi-member tribunals, in conjunction with the related issue of assessors. Part V makes a proposal to provide for a dialogue between the tribunal and the political organs in drafting its terms of reference. Part VI deals with interpreting the terms of reference. Part VII considers the various methods by which the legal challenge of inquiry decisions can be either obviated or expedited. Finally, Part VIII considers a proposal to provide for the termination of a tribunal which is plainly outlived its purpose and usefulness.

Part II Should the Chairperson Always be a Judge?

5.10 Attention ought to be drawn to a simple point of the most fundamental importance: it is a crucial condition of the success of an inquiry that the chairperson – and, scarcely less important, the staff of a tribunal - should be persons of high calibre. For various reasons to do with the open texture of a tribunal of inquiry, this quality of personnel is even more important in regard to an inquiry than in respect of a court, which has a substantive law to administer. We highlight this point simply in order to state the full picture. It is not, however, something which can be much affected by any law or change of law, being mainly an issue about which great care should be taken by those who bear the responsibility of selecting the chairperson. As well as ensuring that the staff of a tribunal are competent and reliable, it is essential that an appropriate and properly equipped set of rooms are made available.

¹⁸ House of Commons debate on the appointment of the Falkland Islands Review. HC Deb. Vol 27 c 494 (July 8 1982).

¹⁹ HC Deb Vol 716 c 1843 (July 22 1965).

²⁰ Winetrobe “Analysis: Inquiries after Scott: the return of the tribunal of inquiry” [1997] *PL* 18, 19. Examples include: *Report of the Tribunal to inquire into Allegations reflecting on the Official Conduct of Ministers of the Crown and other Public Servants* (Cmd 7616 1949); *Report of the Tribunal appointed to inquire into the allegation of Assault on John Waters* (Cmd 718 1959); *Inquiry into Disorders in Northern Ireland* (‘Bloody Sunday’) (Cmd 566 NI April 1972); *Report of the Fay Committee of Inquiry on the Crown Agents on 1 December 1977* (Cmd 49); *The Public Inquiry into the Shootings at Dunblane Primary School on 13 March 1996* (Cm 3386); *The Tribunal of Inquiry into Child Abuse in North Wales* (‘Lost in Care’) (30 September 1999).

5.11 We turn now to consider the qualifications of the chairperson. The Salmon Commission, writing in 1966, observed that: “[t]he 1921 Act lays down no requirements as to the composition of the tribunal. Since 1948, however, it has been the practice for tribunals to consist of members of the judiciary and eminent leading counsel.”²¹ In this country it has been the invariable practice that a judge, or former judge, has chaired all inquiries under the 1921 legislation, though this is certainly not true of other inquiries.²²

5.12 Two questions arise: must the chairperson be a lawyer and, if so, must he or she also be a judge? As to the former question, first of all one should eliminate any suggestion that the chairperson has to be a lawyer on the assumption that this could be necessary in order to possess the very particular skill of cross-examination: for the fact of the matter is that chairpersons do not, and indeed as a matter of constitutional justice (paragraphs 7.05-7.08) generally must not cross-examine; they have a tribunal legal team to do this for them. The next relevant point is that in other types of inquiry the chairperson (or whatever the title) is often not a lawyer. For instance, company inspectors are often accountants; accident investigators (under the various transport statutes: on which see Introduction, paragraph 4) are usually technical experts; also neither the Comptroller and Auditor General nor most of the members of the Public Accounts Committee, which investigated the non-payment of DIRT were lawyers. In all these cases, cross-examination was carried out by the lay investigator.²³

5.13 It is, however, inappropriate to compare tribunals of inquiry with other public inquiries, for at least three reasons. In the first place, the subject matter before a tribunal of inquiry is generally much more voluminous and diverse. Secondly, the tribunal is more likely to sit in public. Finally, the parties affected will almost invariably be represented by the ablest counsel in the jurisdiction. The net result of all this is that, while in principle constitutional justice applies in some form to all public inquiries, it is much more common for a tribunal chairman to be called on to give sophisticated procedural rulings. In *Haughey v Moriarty*²⁴ the Supreme Court, in rejecting an argument that the terms of reference of the *Moriarty Tribunal* were excessively vague, held that the tribunal was obliged to give its own interpretation of them, and that this would clarify the issues. Having regard to the latitude shown by the courts to decisions of tribunals in a variety of areas, as noted at paragraphs 8.19-8.25, it may reasonably be supposed that this interpretation could

²¹ Above fn 2, at paragraph 72.

²² Take for example, Company Inspectors on which see Chapter 2. Again the *Report of the Investigation into the Accident on the C.I.E. Railway at Buttevant, Co. Cork on the 1st August 1980* (Pri 9698 April 1981) indicates that the investigation was chaired by an “inspector under the *Regulation of Railways Act 1871*”, J. V. Feehan. According to the Report, Vincent Feehan, the Railways Inspector, was “assisted” by Declan Budd BL. Interestingly, Mr Budd signed the Report, along with Mr. Feehan.

²³ However, it should be noted that the Public Accounts Committee retained counsel to cross-examine on its behalf on the trickier aspects of the inquiry.

²⁴ [1999] 3 IR 1. See Part VI, below.

have significant legal consequences, in terms of opening up or closing down various avenues of inquiry. Often the work of the tribunal will be so important that some party will think it worthwhile to test the correctness of a ruling by way of judicial review. It seems clear not least from the outcome of such cases that the High Court extends wide latitude to such rulings just because they are usually in substance, though not in form, the ruling of a High Court judge. It would not suffice, we believe, if there were a lay-chairperson (albeit experienced in the field of government and business), advised by a team of expert lawyers. Thus the legal confines on the work of an inquiry are such that it is preferable that the chairperson should be an experienced lawyer.

5.14 *In summary the Commission takes the view that, with the plethora of legal issues which can arise before a tribunal and where the good name and reputation of persons may be at stake, it is usually prudent to appoint a judge or other eminent lawyer as chairperson of the inquiry.*

5.15 If a lawyer, must he or she be a judge? One argument against a judge, rather than another lawyer, being a chairperson of an inquiry which has been raised is that such an extra-curial activity may be damaging to the position of the judge, or of the judiciary generally.²⁵ This argument focuses on the danger that the judges may be regarded as less independent or impartial by virtue of the involvement in such policy-laden work of even one of their number. Consider Lord Devlin's dry remark: "[t]he reputation for independence and integrity [of the judges] is a national asset of such richness that one government after another tries to plunder it".²⁶ The point being made in this remark is that the non-participation of the judiciary in public life outside the court is at the root of the institution's reputation for fairness and impartiality. This reputation can be relied upon to gain widespread acceptance of the report of a tribunal, particularly into a politically charged subject; but, on the downside, this participation runs the risk of debasing the reputation which justified the appointment in the first place.

5.16 On the other hand, it is almost certainly not unconstitutional for a judge to chair a tribunal²⁷ although such an argument was made successfully in the

²⁵ See; Quirke "Tribunals and the Parameters of the Judicial Function" [2000] *Bar Review* 328; Hillyard "The Use of Judges to Chair Social Inquiries" (1971) 6 *Irish Jurist* 93.

²⁶ Devlin *The Judge* (Oxford University Press 1979) at 56.

²⁷ *Op cit* fn 24 at 15 *per* Geoghegan J: "On the question of appointing a judge as sole member of the tribunal, I cannot see that this in any way involves an infringement of the constitutional separation of powers. The tribunal is not in any sense a court and there is nothing in the 1921 Act which prevents a person other than a judge or indeed a person other than a lawyer from being sole member or chairman of a tribunal. It may well be a matter of legitimate public debate as to the extent to which it is appropriate that judges should be chairmen of boards, commissions, tribunals, etc, but that debate would merely arise out of a legitimate concern as to a potential conflict of interest in the future. It could not be suggested that there is anything illegal or unconstitutional about judges being appointed to any of these positions provided of course that they do not receive any remuneration. Traditionally, it has been thought that a judge because of his professional training and independence is ideally suited to these positions and particularly of course if the body has to find facts. But in *Moriarty J.* becoming sole member of this tribunal there is in no sense an invasion by the courts into the realm of

Australian case of *Attorney General for Australia v R, ex parte Boilermakers' Society of Australia*,²⁸ where it was held by the Privy Council that an arbitral function in the field of industrial relations (a non-judicial function) could not be conferred on a court, on the basis that powers wholly alien to the judicial cannot be vested in a court, lest they undermine the integrity of the judicial branch. (The difference between an arbitral commission and a tribunal of inquiry is not important in the present context.)²⁹

5.17 A second, straightforward disadvantage of the appointment of a serving judge is that it reduces the number of judges available for the important work of sitting on the High (or some other) Court. For instance, as of February 2003, there were two High Court (Ms Justice Mary Laffoy, Mr Justice Michael Moriarty) and three Circuit Court judges (Judge Mary Faherty, Judge Alan Mahon, Judge Gerald Keys) sitting on tribunals. In addition a number of retired judges (Mr Justice Francis Murphy, Mr Justice Frederick Morris and Mr Justice Feargus Flood) have been appointed, as chair of tribunals.³⁰

5.18 As against this, we think it is beyond argument that the public does have confidence in the judiciary's integrity and competence. Much of the reason for holding a tribunal of inquiry in the first place is to ensure that the public may be reassured that serious ills, affecting some vital public or commercial function, have been thoroughly and impartially investigated. The basic question is whether the public is more likely to have this confidence if the tribunal is chaired by a member of that much-respected group, known as judges, rather than another lawyer. Within

the legislature or executive. I cannot see, therefore, that the argument put forward is sustainable.”

But as against this see the decision of Keane J in *Neilan v DPP* [1990] 2 IR 267, 278: “The view that it is competent for the Oireachtas to confer powers of a nonjudicial nature on the courts established under the Constitution derives support from observations of Kenny J. (sitting as a judge of first instance) in *Deaton v Attorney General* [1963] IR 170 and *McDonald v Bord na gCon (No 2)* [1965] IR 217. I do not think, however, that this can be regarded as settled law, having regard to the decision of the High Court in Australia in *Attorney General of the Commonwealth of Australia v Reginam and the Boilermakers' Society of Australia* [1957] AC 288, which was upheld on appeal by the Privy Council. But, as Kenny J points out, a wide variety of powers which might, on one view, be regarded as executive are at present vested in the judiciary, such as the wardship jurisdiction of the High Court and the various jurisdictions vested in the High Court under the Companies Act 1963 to 1986. The topic is, accordingly, one of no little difficulty and has not been the subject of any argument in the present case. I have, however, found it possible to arrive at my decision on the present application irrespective of what the law may be on this particular matter and, accordingly, say no more about it.”

²⁸ [1957] AC 288.

²⁹ *Ibid* at 312-313. However, it is probable that the *Boilermakers* case no longer represents Australian law: *R. v Joske, ex parte A B C E B L F* (1974) 130 CLR 87, 90. See also Sawyer “The Separation of Powers in Australian Federalism” (1961) 35 ALJ 177; Morgan *The Separation of Powers in the Irish Constitution* (Sweet & Maxwell 1997) 215-219.

³⁰ See Appendix A.

the profession the other lawyer may be infinitely respected; he or she may indeed be on the verge of becoming a judge or may not wish to be a judge. But, in the eyes of the public, that person would usually not have the same cachet as the member, or former member, of the judiciary.

5.19 There is another point. An inquiry can often be a very political instrument. Immense, if unseen, pressure³¹ may rest upon it to get results of one sort or another, and quickly. In resisting such pressure, where necessary, the status of the judge is a useful bulwark. In addition, the chairperson is in a very influential position and, consequently, he must be a person who is accustomed to reaching decisions, confidently but also cautiously, and in a demonstrably reasoned and measured way. Judges have experience in reaching such decisions, and are also used to distilling complex and conflicting facts into the coherent form of a judgment or report.

5.20 We note the way in which the principle as to the chairperson's qualifications is formulated by the *Salmon Commission*: as quoted in paragraph 5.11, tribunals and members should be "members of the judiciary or eminent senior counsel". Certainly, here one can think of particular senior counsel or solicitors who would enjoy a sufficient reputation with the lay-public to discharge such a role. But in the nature of things, this would be fairly rare.

5.21 *The Commission's conclusion, therefore, is that subject to these exceptional cases and the point made in paragraph 5.12, it will usually be best for the chairperson to be a (serving or retired) judge.*

5.22 The next issue is the status of the rule; at present, the requirement that a judge be the chairperson is a strong convention only, not a matter of law.³² The advantage of this being a convention is that it may be honoured in the spirit, though not necessarily in the letter. An example of this is the appointment of a retired judge. Such a person would of course have all the wisdom and authority of the sitting judge, and we do not consider that his or her retired status is likely to diminish the esteem in which he or she is held by the public at large. The chairmanship of the inquiry into the Blood Transfusion Services Board³³ by former Chief Justice Thomas Finlay, was a notable success. While the chairperson is often a High Court judge, on occasion, judges of the Circuit Court and of the District Court have presided over inquiries. An example of this is the recent tribunal of

³¹ A striking example of what may happen was the well orchestrated media campaign in Britain against Sir Richard Scott V-C on the eve of the publication of his report, in February 1996. The campaign, expertly conducted by British Government "spin doctors", was designed to discredit the report, which showed the then Conservative administration in a poor light. See also "Opinion – Lindsay Tribunal" (2002) *Bar Review* 354.

³² Cf *Report of the Tribunal of Inquiry into the "Kerry Babies Case"* (Pl.3514 1985) at 143, remarking that a tribunal may be presided over by the Commissioner of the Garda Síochána or by a senior civil servant. On conventions, see Morgan *Constitutional Law of Ireland* (Round Hall Sweet & Maxwell 1990) at 13-14.

³³ *Report of the Tribunal of Inquiry into the Blood Transfusion Service Board* (Pn 3695 1997).

inquiry into the HIV and Hepatitis C of persons with haemophilia and related matters, which was chaired by Judge Alison Lindsay of the Circuit Court.

5.23 The disadvantage of a convention is that, as it is not legally-binding, it can be broken without legal consequences, though there may be political consequences; its significant advantage is its flexibility: “the letter killeth while the spirit giveth life”.³⁴ For instance, there seems to be no difficulty in appointing retired judges. Perhaps consideration might also be given, where appropriate, to the appointment of foreign judges.³⁵ Successive Irish governments have not shown any inclination to flout the spirit of the convention. Accordingly, we believe that the advantages of flexibility in retaining the rule in the form of a convention, rather than a law, outweigh any possible disadvantages.

5.24 *The Commission therefore recommends that there is no need for legislation requiring the chairperson to be a judge, but that the convention that the chairperson should usually be a (serving or retired) judge ought to continue to be respected.*

Part III Tribunals Comprising More Than One Member

5.25 Circumstances may arise in which it is deemed appropriate to appoint a tribunal consisting of more than one member. This is of course a different situation from a tribunal sitting with assessors (paragraph 5.44-5.50); since that term suggests that the appointee (usually an individual with expertise outside the law) is not a member of the inquiry with a vote. An example of a multi-member tribunal is the inquiry under the chairmanship of Lord Saville of Newdigate into the events of Bloody Sunday, which (as recounted in paragraph 5.30 below) comprises three members, all of whom are judges or former judges. We may surmise that the political sensitivity of this inquiry – particularly in the wake of the much criticised *Widgery Inquiry*, the findings of which failed to gain widespread acceptance in the nationalist community – was such that it would not have been acceptable to have it carried out by a single judge from one of the United Kingdom jurisdictions. The power to constitute such a tribunal is akin to the power to convene a Divisional Court. It is a useful, although *ad hoc* response to a situation which is perceived, for some particular reason, to require even more weight than normal. In the case of a multi-member tribunal, one or more of the members, other than the chairperson may, for particular reasons be a non-judge, a point to which we shall return in paragraph 5.49.

5.26 It is clear that the 1921 Act (implicitly at least) recognised the possibility of there being multi-member tribunals, by referring in section 1(1) to “a summons signed by *one or more of the members of the tribunal*”. Such tribunals

³⁴ II Corinthians chapter 3, verse 5.

³⁵ The *Bloody Sunday Inquiry* is made up of one senior English judge and two other judges from countries of the Commonwealth. See paragraph 5.30.

are quite common even in the United Kingdom, where the 1921 legislation has not been amended.³⁶ In Ireland, moreover, such tribunals have been expressly authorised, by amendment.³⁷

5.27 *The Commission does not recommend any change in the law. Against the rare occasion when it will be considered necessary, a tribunal should be capable of being set up with as many members, from as many different fields, as are considered appropriate to the matters under investigation.*

Additional and Reserve Members

5.28 Another issue which arises is the appointment, after its commencement, of new members to tribunals of inquiry, whether in addition to existing members or as replacements.³⁸ The *Tribunals of Inquiry (Evidence) (Amendment) Act 2002* addressed this issue. Section 4 of the Act allows “one or more persons may be appointed to be a member or members of a tribunal at any time after the tribunal is appointed...”. Such an appointee may come in from ‘outside’ as it were. Alternatively, there are some advantages in the appointee having been a reserve member, a position which is created by section 5 of the 2002 Act which provides:

“(1) One or more persons may be appointed to be a reserve member or members of a tribunal...

(2) A reserve member of a tribunal may—

(a) sit with the member or members of the tribunal during its proceedings and consider any oral evidence given, and examine any documents or things that are produced or sent in evidence, to the tribunal, and

(b) be present at the deliberations of the tribunal,

but may not otherwise participate in those proceedings or deliberations and may not seek to influence the tribunal in its decisions or determinations.

(3) If a member of a tribunal is for any reason unable to continue to act as such member, whether temporarily or for the remainder of the

³⁶ Aside from the *Bloody Sunday Inquiry*; other examples include, *The Tribunal of Inquiry into Child Abuse in North Wales (“Lost in Care”)* (30 September 1999), made up of Sir Ronald Waterhouse (chairman), Margaret Clough, and Morris le Fleming.

³⁷ 1979 Act, section 2(1).

³⁸ A variation of this is the ability of the *Laffoy Commission* to appoint ‘deciding officers’ to a division of the Investigation Committee in order to assist the chair of that division and fill the gap in expertise. Once appointed a deciding officers is deemed to exercise the functions of a member of that division; see paragraphs 3.27-3.28.

tribunal's inquiry, a reserve member of the tribunal may be appointed to be a member of it.

(4) An appointment under subsection (3) shall be deemed, other than for the purposes of subsection (5), to be operative from the date on which the person concerned was appointed to be a reserve member of the tribunal concerned or such later date as may be specified in the amendment under subsection (6) of the instrument by which the tribunal concerned was appointed giving effect to the appointment.

(5) An appointment under subsection (3) shall not affect decisions, determinations or inquiries made or other actions taken by the tribunal concerned before such appointment.”

5.29 These provisions may be said to constitute a direct response of the Government to a request made by Flood J, the chairman of the *Tribunal of Inquiry into Certain Planning Matters and Payments*. On 13 June 2001 the chairman wrote to the Ceann Comhairle seeking the appointment of two further judges to the tribunal to assist him with his enormous workload.³⁹ He also sought the appointment of a further person to sit with the tribunal to hear evidence “with a view to that person being available to replace any member of the tribunal who, for any reason, is unable to continue to act as a member of the tribunal”, *ie* a reserve member.

5.30 It may be that Mr. Justice Flood was influenced by the contemporaneous *Bloody Sunday Inquiry*. As already touched upon, above at paragraph 5.25, that inquiry was constituted with three members, the others being Mr William Hoyt and Sir Edward Somers. Sir Edward resigned in late July 2000 and was replaced in early September by Mr John Toohey. In November the same year, a reserve member, Mr William Esson, was appointed, although he too was forced to resign, on account of ill-health, in August 2001. Mr Esson has not been replaced. Interestingly, this was all carried out under the original unamended 1921 Act.

5.31 Section 4 of the 2002 Act adds certain subsections to section 2 of the 1979 Act, which itself made express provision for multiple member tribunals.⁴⁰ Section 4 is directed primarily at allowing the appointment of further members to a tribunal *after* it has been established, and lays down the mechanics for this to take place.⁴¹ Essentially, a new member is appointed by way of amendment of the terms of reference of the tribunal, pursuant to section 1A of the 1921 Act.⁴² It also

³⁹ See report in *Irish Times* 14 June 2001. Both sections 4 and 5 apply to tribunals appointed before, as well as after, the coming into force of the 2002 Act: section 10(2).

⁴⁰ Below at paragraphs 5.44-5.49.

⁴¹ 1979 Act, section 2(3) and (6) as inserted by 2002 Act, section 4.

⁴² Inserted by the 1998 Act (No 2), section 1.

provides that a decision to be taken by a multiple member tribunal is to be taken by the majority, with the chairman enjoying a casting vote in the case of an equal division.⁴³ There is provision made for the inability of the chairperson to continue in that role;⁴⁴ for a member who is temporarily incapacitated being deemed, for the duration of that incapacity, not to be a member;⁴⁵ and for the tribunal continuing to act, notwithstanding a vacancy in its membership.

5.32 There is a difficulty here which, the Commission believes is not adequately addressed in the existing legislation. One of the reasons for conducting oral hearings is to allow the tribunal members to observe the demeanour and manner of witnesses, in order to allow greater scrutiny of their truthfulness. Clearly a member who misses these opportunities is not in as good a position as one who has been present. Certainly in a judicial forum there would be grave, and probably insurmountable difficulties, with a judge entering upon the hearing of a case which was already part heard by another judge. However, it has repeatedly been held that tribunals of inquiry are not in quite the same position as courts of law, and so it may be possible for substitution of members' *en courant*. Nevertheless the elementary principle of constitutional justice means that in general 'he who decides must hear'. This precept has usually been met tribunals by dividing its subject matter into 'modules or phases' and only allowing an incoming member to make factual decisions as to the module which he or she has heard. And there appears to be no operational difficulty with this.

5.33 However the present legislation's attempt to meet this sort of difficulty leaves a certain amount to be desired. The closest it comes to dealing with the difficulty is section 4(7) which reads as follows:

"An appointment under subsection (3), or a designation under subsection (5), of this section shall not affect decisions, determinations or inquiries made or other actions taken by the tribunal concerned before such appointment or designation."

5.34 The curious fact is that subsection (7) only catches the case of a person who is appointed before the actual "decisions, determinations or inquiries or other actions taken ... before such appointment ...". Problems may arise where a new member is appointed after some or all of the evidence is heard but nevertheless participates in the "decisions", which are made after his appointment (leaving aside the question of whether "decisions" is an accurate description of what a tribunal does). This difficulty is no small matter, since the most elementary understanding of constitutional justice is that the adjudicator must have heard the evidence on the basis of which he reaches his conclusion. As a result it is submitted that it is better

⁴³ 1979 Act, section 2(4) as inserted by the 2002 Act.

⁴⁴ *Ibid* section 2(5).

⁴⁵ *Ibid* section 2(8).

if the matter was settled expressly in the governing legislation. One way in which this might be done is suggested by section 4(9), which reads as follows:

“A tribunal may act or continue to act notwithstanding one or more vacancies among its members if it is satisfied that the legal rights of any person affected by the proceedings of the tribunal would not be thereby unduly prejudiced.”

5.35 At present this provision is directed to the situation in which a vacancy appears rather than the present situation where a new member is added to the tribunal. However, it is the situation outlined above which would be more likely to cause prejudice and the Commission is of the view that it can and should be catered for by a form of words modelled on subsection (9).

5.36 The key words in section 4(9) are that “the legal rights of any person affected by the proceedings of the tribunal would not be thereby unduly prejudiced”. It must be said that the phrase “the legal rights” is infelicitous. The reinforcing of the noun “right” with the adjective “legal” suggest a precise and well-established concept rather than a constitutional interest, like ‘good name’. Yet as explained at paragraphs 1.07 and 1.32-1.34 it is of the essence of an inquiry that it ascertains facts and does not affect rights. The formulation might be more accurately worded: “subject to the tribunal being satisfied that any person affected by the proceedings of the tribunal would not be unduly prejudiced thereby”.

5.37 Accordingly, the Commission proposes that section 4(7) should be amended as follows:

“(7) An appointment under subsection (3), or a designation under subsection (5), of this section:

(a) shall not affect decisions, determinations or inquiries made or other actions taken by the tribunal concerned before such appointment or designation, and

(b) shall not be made unless the tribunal is satisfied that no person affected by the proceedings of the tribunal would be unduly prejudiced thereby.”

5.38 Of course the difficulty under consideration would be largely dissolved if the new member was already a ‘reserve’ member of the tribunal who under the definition given in section 5(2), quoted in the following paragraph, will have been sitting with the tribunal and following all the evidence. It is hard to see, therefore, how, in such a situation, any question of prejudice could arise.

5.39 Section 5 provides for the appointment of reserve members, who may be appointed either by the instrument appointing the tribunal itself, or subsequently, by means of amendment of that instrument. According to the explanatory memorandum accompanying the Bill (which became the 2002 Act): “[t]he principle on which this provision is based is that the reserve member, though not a member of

the tribunal, will be fully *au fait* with its work and will be in a position to replace a full member if that becomes necessary.” According to section 5(2) a reserve member may:

“(a) sit with the member or members of the tribunal during its proceedings and consider any oral evidence given, and examine any documents or things that are produced or sent in evidence, to the tribunal, and

(b) be present at the deliberations of the tribunal,

but may not otherwise participate in those proceedings or deliberations and may not seek to influence the tribunal in its decisions or determinations”.

5.40 This description looks similar to the role of the reserve judge at the *Bloody Sunday Inquiry*, as expressed by a press notice released by that inquiry. It said of Mr Justice William Esson that:

“[H]e will sit in the hearing chamber and observe all proceedings; he will review all written evidence; he will not contribute to tribunal decisions or seek to influence those decisions in any way; [and] he will attend tribunal discussions as an observer only.”⁴⁶

5.41 Where a full member of the tribunal is unable to continue, it is provided that a reserve member may be appointed to the tribunal proper,⁴⁷ and such an appointment is deemed to be operative from the date of appointment as a reserve member (or a later date if specified).⁴⁸ Any such appointment to the full tribunal is without prejudice to its earlier decisions.⁴⁹ A recent example of this is the appointment of Judge Keys as a reserve member of the *Flood Tribunal*; he will become a full member if any full member is unable to act because of sickness or for other reasons.

5.42 The Commission’s view on these developments is that, having regard to the great length of many modern tribunals, there is good sense in providing for a safety net in the event that, due to death, illness or other unforeseen circumstance, a member is unable to continue.

⁴⁶ Press Notice “Reserve Member Appointed to Bloody Sunday Inquiry Tribunal” 10 November 2000 (see www.bloody-sunday-inquiry.org.uk).

⁴⁷ 2002 Act, section 5(3).

⁴⁸ *Ibid* section 5(4).

⁴⁹ *Ibid* section 5(5).

5.43 The experience of the *Bloody Sunday Inquiry* might seem to give pause for thought. Here is a tribunal established under the same basic legislation, which experiences no difficulty in: (a) appointing multiple members at the outset; (b) replacing one of those members with a new member; and (c) appointing a reserve member. If this was possible under the 1921 Act, are the provisions of the 2002 Act necessary? On balance, it seems that the amendments, outlined at paragraphs 5.35-5.37 do little, if any, harm and for the sake of clarity and certainty they have much to commend them.

Part IV Assessors

5.44 Although the Commission accepts that the chairperson of a tribunal should usually be a judge, it is easy to perceive situations in which the involvement of a person with expertise in the tribunal's subject matter could be useful. This is an age of early retirement and longevity and recently-retired, if not practising, surgeons, head-teachers, master mariners, builders and professionals of all kinds will be readily available to assist tribunals, should they be called upon to do so. The question is whether such an expert ought to be cast as a "member of the tribunal" or as an assessor. (The *Laffoy Commission* includes what is in essence a third way of achieving the same objective, namely the appointment of expert advisers to the Commission: see paragraphs 3.55-3.56.)

5.45 The *Tribunals of Inquiry Act 1921* did not provide for tribunals of inquiry to sit with assessors. This was expressly authorised by an amendment, in section 2 of the 1979 Act, which provides:

"(1) A tribunal may ...sit with or without an assessor or assessors appointed by the instrument appointing the tribunal or any instrument supplemental thereto.

(2) An assessor appointed under this section shall not be a member of the tribunal in relation to which he is so appointed."

5.46 In relation to assessors, subsection (2) makes it clear that such persons are not members of the tribunal.⁵⁰ Section 2 was designed to facilitate, and was used for the first time by the *Whiddy Inquiry*: four assessors were appointed to assist Costello J in his capacity as sole member of the tribunal: a scientific consultant, a master mariner, a chief engineer and a naval architect.⁵¹ For the *Stardust Inquiry*,

⁵⁰ The *Salmon Commission*, in its short chapter on the Composition of the tribunal, makes no reference to assessors. The Commission may, however, have assumed that their availability was implicit under the 1921 Act..

⁵¹ *Report of the Tribunal of Inquiry: Disaster at Whiddy Island, Bantry, Co. Cork* (Pr1 8911), at paragraph 1.4.1. The tribunal of Inquiry into Child Abuse in North Wales (above fn 36) also had one assessor to advise in respect of police matters, namely Sir Ronald Hadfield QPM, DI. It is also worth mentioning that the *Stephen Lawrence Inquiry*, although established under section 49 of the *Police Act 1996*, was made up of Sir William MacPherson of Cluny (chairman) and three 'advisors': Mr Tom Cook; the Rt Revd Dr John Sentamu Bishop of

three assessors were appointed: a professor of fire safety engineering, Denmark's Chief Inspector of Fire Services, and the Head of the Construction Division of An Foras Forbartha.⁵²

5.47 The role of an assessor is not defined in the 1979 Act (or anywhere else), and we consider that it is reasonable that this should be left to be determined, in the actual circumstances of a tribunal, by the tribunal itself, though with the ultimate possibility of judicial review if there is a dispute.

5.48 The significance of the 1979 amendment arises from the general principle⁵³ that, if a function is vested in a person, then it must be exercised by that person, and without influence from other quarters, save in so far as the contrary is provided by statute. The precedents, mentioned at paragraph 5.46, suggest that an assessor will generally be a person with a special expertise, who is presumably appointed in order to give advice and assistance to the tribunal, which is comprised of a layman from the perspective of the technical matters involved. It can thus be assumed that the assessor influences the chairperson. Strictly speaking, on a very literal construction, there might have been a violation of the general principle mentioned earlier, unless the existence of an assessor had been expressly provided for in the legislation.

5.49 The question is whether such experts ought to be appointed as assessors, rather than as members of the tribunal proper. The situations in which assessors have so far been appointed suggest that it will often be necessary to obtain assistance in relation to a variety of different fields. The virtue of having the chairperson-judge as the sole decision-maker is that he or she is likely to be accustomed to weighing and considering the advice of several experts (usually in the form of expert evidence), whereas the lay-experts themselves may not be so at ease in fields other than their own. From time to time, however, it may be thought appropriate to allow experts to play a fuller role in the decision-making process, and where this is so then it would seem to be preferable to appoint them as members of the tribunal.⁵⁴ This might be the case where the subject-matter of the tribunal is very specialised, relating to one narrow field of interest. However, as with so much in this area it is difficult to be prescriptive. The resolution of whether an expert should be a tribunal-member or simply an assessor is a practical decision to be taken in the light of the particular circumstances. The law allows either option and careful consideration should be given to this aspect as a preliminary to the setting up of a tribunal.

Stepney; and Dr Richard Stone. All four signed the letter dated 15 February 1999 to the Home Secretary accompanying the report, which stated that the conclusion contained therein were "our unanimous views".

⁵² *Report of the Tribunal of Inquiry on the Fire at the Stardust, Artane, Dublin on the 14th February 1981* (Pl 853 June 1982) at xii.

⁵³ On which see Hogan and Morgan *Administrative Law in Ireland* (3rd ed. Sweet & Maxwell 1998) chapters 9, 12 and 14.

⁵⁴ *Comparative Study into Parliamentary Inquiries and Tribunals of Inquiry* (Pn 9796) at 29.

5.50 *The Commission recommends no substantive change to the 1921-2002 legislation since it already allows for the appointment of assessors and multi-member tribunals. In relation to assessors, the Commission recommends that a similar provision to that contained in section 2(2) of the 1979 Act ought to be included in other statutes providing for public inquiries, where this has not already been done.*

Part V Dialogue Between the Inquiry and the Political Organs to Adjust the Terms of Reference

5.51 The Attorney General's Office 'Comparative Study' gives the following helpful account of the preliminary legal work involved in establishing a tribunal of inquiry:⁵⁵

"The procedure adopted by which terms of reference are formulated in this jurisdiction in at least the last five tribunals is generally as follows:

- (i) Initial draft or heads of draft of terms of reference prepared by the sponsoring Government Department. The sponsoring Department is generally the Government Department of the Minister who will be executing the instrument pursuant to Section 1(1) of the 1921 Act establishing the Tribunal;
- (ii) Examination of the proposed terms of reference or heads of terms of reference by the Office of the Attorney General;
- (iii) Further consideration by the sponsoring Department and Office of the Attorney General;
- (iv) Consideration of the terms of reference by the Chief Whips;
- (v) In certain cases, consultation about the terms of reference with certain interest groups (*eg* as in the *Hepatitis C Tribunal*);
- (vi) Further consideration by the sponsoring Department and legal clearance by the Office of the Attorney General;
- (vii) Government decision on the terms of reference;

⁵⁵

Op cit fn 54, at 26. The *Salmon Commission* commented at paragraph 78: "The Act lays down, rightly in our view, that what is to be inquired into shall be a 'definite matter'. Accordingly no tribunal should be set up to investigate a nebulous mass of vague and unspecified rumours. The reference should confine the inquiry to the investigation of the definite matter which is causing a crisis of public confidence. On the other hand it is essential that tribunals should not be fettered by terms of reference which are too narrowly drawn".

- (viii) Resolutions containing terms of reference put to both Houses of the Oireachtas where they may be subject to amendment;
- (ix) Passing of the resolutions containing the terms of reference by both Houses of the Oireachtas.”

5.52 The Comparative Study goes on to make the following comment:

“The experience has been that there is a tendency for the terms of reference to become wider as each step is taken. This may militate against the subject-matter of the terms of reference being a “definite matter”. However, given the judgment of the Supreme Court in the case of *Redmond v Flood* [[1999] 3 IR 79 at 89-94: see paragraph 5.71] in relation to paragraph A5 of the terms of reference of the *Flood Tribunal*, it is recognised that terms of reference cannot be too narrowly drawn.”⁵⁶

5.53 Plainly, the drafting of the terms of reference is a matter of great importance. A question which is relevant here is suggested by the CAG’s achievements in the DIRT investigation, considered at paragraphs 4.13-4.21. This general approach is naturally inspired by the profession of auditor or accountant, from which he and most of his senior staff come. Standard practice in those professions is to explore a representative sample of the facts and figures in the field being surveyed, which sample is, in his educated opinion, sufficient to indicate whether the system or institution under investigation is performing satisfactorily; or, if not, in what ways it is falling down. His concern is to learn what lessons may be important in order to prevent the evil from recurring in the future. By contrast, the chairperson of an inquiry and his senior staff are overwhelmingly lawyers, usually trial lawyers, and their approach, too, has also naturally been formed by this professional background. As a result, their instinct is to explore the territory under investigation exhaustively. This, of course, may not be the result in all cases, but our feeling is that this is the assumption from which they start. This approach carries advantages and disadvantages. Which of these weighs most heavily depends on what one takes to be the objective of a public inquiry. For example, is it, as far as possible, to get to the bottom of all episodes about which there is public disquiet, which fall within the terms of reference, and, where possible, to point the finger of blame? Or is it to find out whether the malfunction or misconduct alleged existed in a significant number of episodes, with a view to making improvements to prevent a recurrence? The short answer is that it will depend on the circumstances. We have just mentioned a situation – the DIRT inquiry – in which the representative sample option was selected, rightly, we believe. By contrast, in the (British) *Shipman Inquiry*, into deaths perpetrated by a medical practitioner, (this was seen and we think, correctly in the circumstances) the exhaustive option was selected. The following explanation was given:

⁵⁶ *Op cit* fn 54.

“Having considered the matter carefully and discussed it with the legal team, I decided on the latter course. My reasons for doing so were these:

There were hundreds of people who were in a state of uncertainty and distress, not knowing whether their relatives had died a natural death or been killed by Shipman; there was a strong feeling that it was only by knowing the truth that they would be able to begin to come to terms with their shock and grief.

Whilst it was anticipated that some of the deaths would be the subject of coroner’s inquests in the future, not all those deaths had been fully investigated by the police, and, if the inquiry did not undertake further investigations, the evidence, relating to those deaths would remain incomplete. Also, it was unlikely that inquests would be held into all the deaths which the inquiry would investigate.

It seemed to me essential that, before I went on to consider whether, and, if so, in what respects, there had been failures in systems or on the part of individuals or statutory or other bodies, which had allowed Shipman to commit murder unchecked, I had to be able to form an accurate and authoritative view as to the number of people he had killed and the period over which – and the circumstances in which – the killings were perpetrated. Only by making decisions about Shipman’s responsibility for individual deaths would I be able to form such a view.”⁵⁷

5.54 Later, however the first report goes on to describe its *modus operandi* and to indicate not all of the deaths were the subject of oral testimony.

“It would clearly have been impracticable for me to hear oral evidence relating to every one of the 494 cases in respect of which I have had to make a decision as to Shipman’s guilt. It was, therefore, decided that I should hear oral evidence in a representative sample of cases, where it seemed that the evidence required clarification or where there was some other particular feature (for example, a link with another death) which made an oral hearing desirable....In each case where there was no oral hearing of the evidence, Counsel to the inquiry prepared a detailed summary of the evidence relating to the death, together with submissions as to the appropriate finding. The case summary and submissions were put into the public domain by placing them on the inquiry website. Where the evidence was heard orally, brief written submissions as to the appropriate finding were prepared by Counsel to the inquiry and made public in the same way. In most cases where family members of the deceased were legally represented, written

⁵⁷ Dame Janet Smith DBE *The Shipman Inquiry; First Report. Volume One: Death Disguised* (2002) at paragraph 2.7.

submissions on the evidence were also made by their Counsel. In considering the evidence in each case, I took careful account of the submissions made by Counsel, but the final decision was, of course, mine alone.”⁵⁸

Thus here, the *Shipman Inquiry* took into account the conflicting *desiderata* and sought to balance them, in a sensible way.

5.55 The Commission cannot offer definite answers to the question posed above - exhaustive or representative - since the answer will vary, depending on the circumstances of the particular inquiry. However, we think that this is a significant question, and at the very least, policy-makers in this area - that is, the Houses of the Oireachtas, the responsible Minister, and the chairperson of a tribunal of inquiry - ought to keep it well in mind. It should be remembered that an inquiry does not, in most cases, result in the punishment of anyone or the compensation of anyone else. Its purpose is to see whether the system has broken down, if so, why, and how to repair it. Where this assumption is correct, as it usually will be,⁵⁹ the conclusion would be that it is appropriate for the inquiry to probe a sufficient number of typical instances of the flaw or misconduct.

5.56 *The Commission recommends, therefore, that (unless this is impossible to determine in advance) the terms of reference of an inquiry should make it clear whether the inquiry should be exhaustive or whether, as will usually be the case, a sufficient number of representative cases or instances of malfunction, maladministration and alike should be examined.*

Two Stage Process

5.57 The substantial practical difficulties attending the initial stage of an inquiry should not be overlooked. Typically, inquiries are set up in a blaze of genuine public anger and media frenzy, with an uncertain reaction from politicians who are operating often in an unprecedented situation, apprehensive of the long-term repercussions and unsure how long the public’s mood will last.⁶⁰ They may be hampered by differences within the (usually coalition) government, coupled often with a desire to put forward a proposal which is supported by the opposition. (The practice has developed in respect of the 1990s generation of tribunals that there should be agreement between the government and opposition parties as to the setting up of a tribunal of inquiry, so that there can be confidence that a tribunal is not being used for party political ends.) This is an especially difficult atmosphere in

⁵⁸ *Op cit* fn 57 at paragraphs 3.37 and 3.49

⁵⁹ Though it may not be, for instance, in an accident case.

⁶⁰ The decision to set up the *Laffoy Commission* was among a package of urgent measures designed to address the issue of child sex abuse announced by the Government on the very evening of the broadcasting of the last of three television programmes in which the tragic story of child abuse was laid before the Irish public: see paragraphs 3.03-3.07.

which to resolve difficult technical, legal issues, balancing up the need for a thorough investigation with fairness to the individuals who may be affected.

5.58 Against this background (and bearing in mind, too, the requirement, explained at paragraphs 5.68 below, that the tribunal itself must explain its terms of reference), it seems that there is a lot to be gained and little to be lost, from a two-stage approach. The Commission's proposal which is detailed at paragraph 5.66 is that at the first stage, the decision to set up an inquiry in principle is taken and the broad terms of reference are fixed, by the political organs. This will substantially allay public disquiet. At the second stage, during the next few weeks, the tribunal of inquiry should have time for deliberation and contemplation, in order to fine-tune the terms of reference and also the forms and powers by which it should operate.

5.59 The tribunal is, in substance, the expert who will have to actually carry out the job on the ground, over many painstaking months or years, and it is likely that the tribunal especially may be able to anticipate difficulties and suggest a more suitable alternative method.⁶¹ Often, the changes which a tribunal would recommend would be designed to meet drafting difficulties. This type of difficulty is well illustrated in *Haughey v Moriarty*.⁶² Here, there was discussion regarding the drafting infelicities in the terms of reference of the *Moriarty Tribunal*, by which the phrases "public office" and "ministerial office" were used in different paragraphs. This gives rise to various uncertainties, for instance, whether time as a deputy, but not as a minister, was included.

5.60 There is nothing very radical in this proposal. Indeed, a form of it already exists. Originally, under the (unamended) 1921 Act, the only bodies formally involved in the establishment of a tribunal were the responsible Minister and the two Houses of the Oireachtas. Then, the 1921 Act was amended by Section 1(1) of the *Tribunals of Inquiry (Evidence) (Amendments) (No 2) Act 1998*, which inserted the following as section 1A of the 1921 Act:

"(1) An instrument to which this section applies (whether made before or after the passing of the 1998 Act) shall be amended, pursuant to a Resolution of both Houses of the Oireachtas, by a Minister of the Government where –

⁶¹ For the situation in which (because of the then state of the legislation) this could not happen, see *Beef Tribunal Report* (Pn 1007 1994) paragraph. 5. Its terms of references included: "allegations regarding illegal activities...in connection with the beef processing industry made or referred to (a) in Dáil Éireann, and (b) on a television programme transmitted by ITV on May 13, 1991". The Report complains bitterly: "[t]his consideration of the official Dáil Reports for the said purpose was made unnecessarily difficult for the tribunal because of the failure to indicate the dates upon which the allegations...were made...or in any way to particularise the said allegations."

⁶² [1999] 3 IR 1, 77-78.

- (a) the tribunal has consented to the proposed amendment, following consultation between the tribunal and the Attorney General on behalf of the Minister, or
- (b) the tribunal has requested the amendment.

(2) Without prejudice to the generality of subsection (1), the tribunal shall not consent to or request an amendment to an instrument to which this section applies where it is satisfied that such amendment would prejudice the legal rights of any person who has co-operated with or provided information to the tribunal under its terms of reference.

(3) Where an instrument to which this section applies is so amended this Act shall apply.

(4) This section applies, in the case of a tribunal to which this Act is applied under section 1 of this Act, to the instrument by which the tribunal is appointed.”⁶³

5.61 As a preliminary, we should note that subsection (2) of this provision is too restrictive, by virtue of the words ... “who has cooperated with or provided information to the tribunal ...” What if some person is prejudiced who has not been asked or, perhaps more likely, has defied the tribunal? We take the policy view that even in these circumstances persons should not be prejudiced. It is recommended, therefore, that the phrase “who has cooperated with or provided information to the tribunal under its terms of reference” should be substituted by the wider phrase “affected by the proceedings of the tribunal”. However, in the opposite direction the Commission believes that any prejudice should be more than merely negligible and in line with section 4(7) of the 2002 Act (see paragraph 5.37, above) the word “unduly” should be inserted before prejudice: this is what is done in our draft Bill at Appendix C.

5.62 The immediate cause of this change was the need to vary the terms of the *Flood Tribunal*.⁶⁴ The effect of this change is that the instrument setting up a tribunal may be varied only with the agreement of both the tribunal and the political organs: the Oireachtas and Minister, and on the other hand, the tribunal, each has a veto on an amendment by the other. Section 1(2) is designed to prevent the power

⁶³ This version replaced an earlier Section 1A (inserted by the 1997 Act, section 2), which did not include subsection (2) in the present provision.

⁶⁴ During the course of its investigations, evidence came to the attention of the *Flood Tribunal* concerning matters which fell (or might have fallen) outside its terms of reference. The tribunal requested the Government to delete the date “20th June 1985” from its terms of reference (Paragraph A(5)). However, on the advice of the Attorney General it was concluded that once the tribunal had been set up the terms of reference could not be amended. Accordingly, amending legislation was introduced to facilitate the request and the tribunals terms of reference were amended in July 1998. See further McGrath “Review of Moriarty and Flood Tribunals, to date” (1999) *Bar Review* 230.

contained in section 1(1) from being used where to do so “would prejudice the legal rights of any person.”⁶⁵ The Commission agrees that this proviso is plainly necessary.

5.63 The Commission’s proposal would go beyond the existing law by imposing an obligation, in every case, for a tribunal of inquiry, to consider positively whether it ought to request an amendment.⁶⁶ This would ease the path of any tribunal which wished to make such a proposal, by virtue of the fact that the tribunal is positively enjoined to consider whether it should request such an amendment. The Commission proposes that the tribunal should be required to attend to this positive duty during the first four weeks of its establishment. In a sense, even this is substantially part of the existing regime. For example, the terms of the resolution establishing the *Finlay Tribunal* required the tribunal to report on an interim basis to the responsible Minister, not later than the 20th day of any oral hearings, on a number of matters⁶⁷ including:

“...(d) any other matter that the tribunal considers should be drawn to the attention of the Houses of Oireachtas at the time of the report (including any matters relating to its terms of reference)”.⁶⁸ (Emphasis added)

5.64 The Commission also wishes to emphasise that, because of the way the proposed provision is drafted (in particular, the phrase “without prejudice to the generality of subsection (1)(b); see next paragraph) - as a graft onto the existing

⁶⁵ Such a situation would have existed if the *McCracken Tribunal’s* terms of reference had been widened to include Mr Haughey. Legally, this could probably have been accomplished using Section 1 of the 1921 Act, under which a tribunal is initially established (since the *Interpretation Act 1937*, section 15(1) allows the power conferred by an Act to “be exercised from time to time as occasion requires”). However, the change was opposed by McCracken J and, out of deference to his views, was not effected. Instead, a separate tribunal, the *Moriarty Tribunal* was set up to inquire into the affairs of Messrs Haughey and Lowry.

⁶⁶ Another device, which might be thought to achieve more or less the same objective, is to be found in section 4(4) of the *Commission to Inquire into Child Abuse Act 2000*. This allows for an additional function to be bestowed upon the *Laffoy Commission* by Government order, such as *Commission to Inquire Into Child Abuse Act 2000 (Additional Functions) Order, 2001* (SI No 280 of 2001) authorising the investigation of vaccine trials in institutions (though it may be that this was included in the general clause anyway). However, the important point is that this power does not impose any duty on the tribunal of inquiry to scrutinise its terms of reference. Another somewhat similar option would be to include a ‘catch-all’ in the original terms of reference. Thus, for example, in the terms of reference of the *Flood Tribunal* there is a provision, A5, which is a catch-all for wrongdoing uncovered in the course of the investigation, but not otherwise within the terms of reference. However, there are various disadvantages to such a clause. It could protract the proceedings of an inquiry to an unlimited degree. It also violates the precept that the terms of reference should be definite so that it is known what area the inquiry is to cover and tries to define the scope and limits of an inquiry.

⁶⁷ *Finlay Tribunal* Report above fn 33, at Appendix B.

⁶⁸ The terms of the resolutions establishing the following generation of inquiries have also contained such a requirement: see further below paragraph 5.88 and fn 92.

subsection - the tribunal would retain its present power to return to propose an amendment at any time (subject to the existing subsection 1A(2)). The change the Commission would propose is that during the four-week period the tribunal is positively obliged to think about seeking an amendment and that this obligation would be a permanent feature of the legislation, instead of being left to be included with the terms of reference for each tribunal. The Commission is of the view that its importance warrants this additional step. Our proposal is that this duty should be discharged in private so that the tribunal is not subject to pressure from any quarter.⁶⁹

5.65 One other issue which the Commission did consider is whether the amendments emanating from the tribunal ought to be confined to the technical rather than the policy category. On balance, we consider that a tribunal will, where appropriate, observe this distinction itself, and trying to find a form of words to articulate it would lead to complication and restriction.

5.66 *The amendment which we propose would be to add on at the end of the present subsection 1(A)(1), the following form of words: "...[p]rovided that without prejudice to the generality of subsection (1)(b), the tribunal shall consider, otherwise than in public, within four weeks of commencing its work, whether to exercise its power to make a request under subsection (1)(b)".*

Part VI Interpreting the Terms of Reference

5.67 Persons whose conduct is under examination will sometimes make a fundamental attack on the terms of reference of a tribunal. A number of grounds have been alleged. For instance, it has been claimed that particular terms of reference involve an attack on privacy, a point considered at paragraphs 8.26-8.30. In *Haughey v Moriarty*,⁷⁰ a number of complaints were also made regarding the subject-matter of the inquiry. It was said that the inquiry was: "not in aid of the legislative process"; and not a matter of "urgent public importance". In addition, it

⁶⁹ One suggestion to which this proposal might be thought to give rise is that the tribunal of inquiry ought, at the stage at which it is deliberating whether to propose amendments, to be under an obligation to observe the *audi alteram partem* rule: in other words, that the inquiry would have to notify persons likely to be affected (in the sense discussed at paragraphs 7.14-7.16 that it had specified terms of reference and, if this were the case, that it had amendments in mind. It would then be open to the persons affected to make submissions as to either the original terms of reference and/or the tribunal's own amendments. The tribunal, the argument might run, would then be bound to consider these submissions before deciding what, if any, proposals itself to make to the Minister. However, we consider that a suggestion along these lines would involve imposing constitutional justice in a context in which it is not required. Here, what is involved is a basic policy decision (which was, until 1998, exclusively the preserve of the Houses and the Minister). Extending this to allow the involvement of the tribunal does not alter the essentially policy-laden character of this decision. Constitutional justice, accordingly, is not required, in the same way that it is not required for legislation (see eg on making a maximum prices statutory instrument *Cassidy v Minister for Industry and Commerce* [1978] IR 297).

⁷⁰ [1999] 3 IR 1.

was submitted that a tribunal of inquiry should only be used as a last resort, and instead there should have been a select committee. Each of these arguments was rejected fairly briefly.⁷¹ The contention that the terms of reference were “vague” also failed,⁷² on the grounds that, even if they were vague, the tribunal itself would clarify matters when it gave its interpretation (on which see the following paragraph).

5.68 However, on one point of this type, the applicant succeeded. One of his complaints arose from the fact that, at one stage, the tribunal’s chairperson had declined to give to the applicants his interpretation of the terms of reference. Hamilton CJ, citing the *Salmon Commission Report*⁷³ as authority, stated:

“The tribunal should take an early opportunity of explaining in public its interpretation of its terms of reference and the extent to which the inquiry is likely to be pursued. As the inquiry proceeds, it may be necessary for the tribunal to explain any further interpretation it may have placed on the terms of reference in the light of the facts that have emerged.”⁷⁴

5.69 The High Court (Geoghegan J) had responded to this complaint⁷⁵ by itself interpreting the terms of reference. The Supreme Court, however, reversed Geoghegan J’s approach, remarking that “[i]t is not the function of the High Court or this Court to interpret the terms of reference of the tribunal at this stage. The

⁷¹ [1999] 3 IR 1, 54-57. Hamilton CJ rejected these arguments on the basis that it was for the Oireachtas to determine whether a matter was one of ‘urgent public concern’ and that this decision was unreviewable by the Courts. Similarly, the argument that the tribunal was ‘not in aid of the legislative process’ was rejected on the basis that its function was to determine facts and was therefore in aid of the legislative process. Also the argument that the Oireachtas should have exhausted other modes of inquiry before having recourse to tribunals of inquiry was rejected as an attempt to fetter the Oireachtas’s discretion in such matters.

⁷² *Ibid* at 56.

⁷³ Above fn 2, at paragraph 79.

⁷⁴ [1999] 3 IR 1, 56. At the *Flood Tribunal*, too, it had caused disquiet that there had been no opening statement. The reason seems to have been that it was not known whether Mr Gogarty would live to give his evidence, and consequently his evidence could not be foreshadowed in an opening statement.

⁷⁵ *Ibid* at 17-20. Here, there is no need to go far into the substantive question of how far the points on the terms of reference were uncertain. Briefly, to give the flavour, one can note that the terms of reference referred to “any substantial payments made... to [the first plaintiff]... during any period when he held public office”. One of the issues was whether “public office” was confined to ministerial office or whether it included being a deputy and/or leader of the opposition. Again, another segment of the terms of reference referred to “the source of any money held in the Ansbacher for the benefit [of the first plaintiff]...or in any other bank accounts...to be for the benefit of [the first plaintiff] or in the name of a connected person within the meaning of the *Ethics in Public Office Act 1995*”. Here, the question was whether a reference to a bank account meant any and every bank account during a lifetime, or was it confined to bank accounts which were currently held: see [1999] 3 IR 1, 18-20.

interpretation of the terms of reference is, at this stage, entirely a matter for the tribunal itself.”⁷⁶

5.70 It is legitimate to infer from the term “opportunity” used in the quotation, above, that the tribunal must do this only when it is opportune, that is when the tribunal is in a position to do so. This is a view based on practicality, which is probably beyond dispute. At this point, one ought to refer to the “information-gathering stage”. As we explain in Chapter 9, in many cases the tribunal will embark on its work with a clean slate so far as concerns any reliable information about the area into which it is inquiring. Its first task, which may take many months, must be to collect such information. It is only after this has been done that it is in any better position than anyone else to comprehend and interpret its terms of reference. Until such time, any interpretation is simply a matter of reading and understanding the words used. Accordingly, while there is an obligation on the tribunal to explain (in open session), its understanding of its terms of reference, it may not be practicable to do this until a substantial amount of information-gathering has been done. It is suggested that the obligation would not arise until that point.

5.71 The remaining question is whether, once a tribunal’s interpretation has been given, a court would be prepared to review it. In principle, there appears no reason why not. In *Redmond v Flood*,⁷⁷ the applicant sought *inter alia* an order that the *Flood Tribunal’s* interpretation of paragraph A5 of its terms of reference had been incorrect. Hamilton CJ did entertain the possibility that the tribunal’s interpretation may have been incorrect but he concluded that given that the words of the paragraph were clear and unambiguous: “...it is hard to see what alternative interpretation can be placed on [them]. The words of that paragraph are clear and admit only of the interpretation placed thereon by the tribunal.”⁷⁸ In practice, as has been noted at paragraph 5.13, in other areas courts have allowed a lot of latitude to tribunal decisions.

Part VII The Impact of the Courts

5.72 Undoubtedly, it may be in the interests of some parties (or other persons) to delay or thwart the smooth running of a public inquiry, or to create a cloud of doubt as to its legitimacy. One way in which to achieve these objectives is to drag the public inquiry before the courts, by way of judicial review. However, there are signs, of a fairly strong line of judicial impatience with such attempts.⁷⁹

⁷⁶ [1999] 3 IR 1, 56.

⁷⁷ [1999] 3 IR 79.

⁷⁸ *Ibid* at 91. Notice that, arising out of the *Lindsay Tribunal*, judicial review proceedings were nearly taken as to whether its terms of reference were sufficiently extensive to include an investigation of US pharmaceutical companies.

⁷⁹ See paragraphs 8.19-8.25.

But even if victory is rare, delay and public doubt or confusion are valuable consolation prizes. On this point, it seems clear that the appropriate policy to follow is that, since inquiries are of national importance (and, if they are not, then they should not be held), and since they are chaired by judges, then the scope for intervention by the courts should be reduced as far as possible consistent with respect for the constitutional right to judicial review. At the outset, it should be emphasised that the Commission rejects the counter-argument that establishing a fast track system for tribunals of inquiry would reduce the speed of the fast track to that on the main road: for there will never be sufficient traffic on this particular fast track to have such an effect. We will now proceed to consider three possible methods of fast tracking judicial review proceedings in the context of tribunals of inquiry.

(a) Reducing Time Limits for Judicial Review

5.73 As regards confining the judicial review of an inquiry, the first point which should be made is that the imposition of specific time limits for the institution of proceedings for judicial review is nothing new: it already exists in relation to a number of statutory schemes, most notably planning and immigration.⁸⁰ Section 50(4)(a) of the *Planning and Development Act 2000* and section 5(2)(a) of the *Illegal Immigrants (Trafficking) Bill 2000* provide for the imposition of a time-limit of eight weeks and fourteen days, respectively, on the institution of judicial review proceedings. It should be emphasised that these time-limits are not cast in stone; the High Court has a discretion to extend these periods where it considers that there is “a good and sufficient reason” (a formula used in section 50(4)(a) (iii) of the *Planning and Development Act 2000* and section 5(2)(a) of the *Illegal Immigrants (Trafficking) Act 2000* for doing so.

5.74 The Irish courts have considered the constitutionality of these statutory time-limits on a number of occasions. In *Brady v Donegal County Council*,⁸¹ Costello J, as he then was, outlined the rationale for the imposition of statutory time-limits as follows:

“The public interest in (a) the establishment at an early date of certainty in the development decisions of planning authorities and (b) the avoidance of unnecessary costs and wasteful appeals procedures is obviously a very real one and could well justify the imposition of stringent time limits for the institution of court proceedings.”⁸²

⁸⁰ See generally, Law Reform Commission *Consultation Paper on Judicial Review Procedure* (CP 20-2003) chapter 2.

⁸¹ [1989] ILRM 282.

⁸² *Ibid* at 289. The particular time-limits in question were those imposed by section 82(3)(a) of the *Local Government (Planning and Development) Act 1963*.

5.75 More recently, in *In re Article 26 and sections 5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999*⁸³ the Supreme Court considered the constitutionality of the imposition of a 14-day time limit on the institution of judicial review proceedings, in relation to immigration matters. The Supreme Court, *per* Keane CJ, held that the imposition of the 14 day time limit was not unconstitutional. He was of the view that it served a legitimate public policy objective, in that it was designed to bring about, at an early stage, legal certainty as regards administrative decisions. In addition, Keane CJ felt that the discretion afforded to extend the time period where there was, in the opinion of the High Court, a good and sufficient reason for doing so, meant that the 14-day time limit could not operate as an unreasonable and unjustifiable restriction on the plaintiff's constitutional rights.

5.76 *The Commission is of the view that, as interested parties are likely to be represented before the inquiry, they are likely to be aware of decisions which affect them as soon as they are made, and, therefore, they are likely to know, at a very early stage, whether or not they want to challenge these decisions. The Commission therefore recommends that a statutory time limit of 28 days should be placed on the institution of judicial review proceedings in the context of public inquiries. In case of any possible constitutional infirmity to this, the Commission recommends that the High Court should be afforded discretion to extend this time period where it considers that there is a "good and sufficient reason for doing so".*

(b) Right of Tribunal of Inquiry to Apply to the High Court

5.77 A different device with an essentially similar objective would be to allow the inquiry itself to make an application to the High Court for directions in relation to the performance of any of its functions: a type of 'case stated' procedure. The Commission is of the view that such a 'case stated' type procedure could be a useful tool in ensuring the secure operation of tribunals of inquiry, by enabling an inquiry to seek confirmation from the High Court as to the legality of its decisions. One example of how the power would be used would be if a dispute arose over a tribunal's interpretation of its own terms of reference. At present, if one of the interested parties expresses dissatisfaction with the decision but fails to initiate judicial review proceedings in respect of that decision, the tribunal, being unable to initiate judicial review proceedings itself is forced to proceed at risk that its proceedings could later be halted. An example of the difficulties that can arise from such a decision may be seen in the aftermath of the decision of the Supreme Court in *Haughey v Moriarty*.⁸⁴ In this case the Supreme Court quashed a number of orders for discovery made by the *Moriarty Tribunal* against various members of the Haughey Family. As McGrath,⁸⁵ notes, this decision had serious ramifications for the work of the tribunal, as it meant that the documentation obtained under the

⁸³ [2000] 2 IR 360.

⁸⁴ [1999] 3 IR 1

⁸⁵ McGrath "Review of the Moriarty and Flood Tribunals, to Date" (1999) *Bar Review* 230

orders could not be used. As a result, the tribunal had to proceed as if it had never seen the documents, and had to discontinue any lines of investigation which were based upon the documents until the documents were obtained in a constitutional manner. We suggest that had the tribunal been able to refer the matter to the High Court once the controversy over the legality of the orders had arisen, a lot of time and expense could have been saved.

5.78 A close example of this ‘case stated’ procedure may be found in section 25(1) of the *Commission to Inquire into Child Abuse Act 2000*, already in the law, which provides:

“The Commission may, whenever it considers it appropriate to do so, apply in a summary manner to the High Court sitting otherwise than in public for direction in relation to the performance of any the functions of the Commission or a Committee or for its approval of an act or omission proposed to be done or made by the Commission or a Committee for the purposes of such performance.”

This power is also somewhat akin to that of an Inspector appointed under the *Companies Act 1990*⁸⁶ or a liquidator⁸⁷ to apply to the High Court in order to seek judicial approval for actions done or not done in discharging the functions of those offices.

5.79 One feature of the provision from the 2000 Act, just quoted, is that the matter be dealt with by the High Court “sitting otherwise than in public”. This stems from the nature of the *Laffoy Commission’s* subject matter, and the fact that much of the Commission’s own proceedings must be heard in private. Indeed in the case of *Commission to Inquire into Child Abuse Act 2000 v Notice Party A and others*,⁸⁸ outlined at paragraph 5.82, the fact that High Court proceedings under section 25 were held *in camera* was of particular advantage given the subject matter of the inquiry. While in a more general context, we can conceive of situations in which an *in camera* hearing might be appropriate (for example, if it concerned a question such as the admissibility of evidence), we can also conceive of situations in which the ordinary rule that justice should be administered in public (Article 34.1) should apply. The Commission considers that in the context of a public inquiry it could be an anomaly to have the procedural hearings held in public; but the High Court applications held *in camera*. Accordingly in the Commission’s recommendation detailed at paragraph 5.83 the court has been afforded a wide discretion to hear the application in public or private.

5.80 In relation to procedure, all that is stated in the 2000 Act (beyond the fact that the application is “summary”) is that the Superior Court Rules Committee

⁸⁶ Section 7(4) of the *Companies Act 1990*.

⁸⁷ Section 280 of the *Companies Act 1963*.

⁸⁸ High Court (Kelly J) 9 October 2002.

is permitted, with the concurrence of the Minister for Justice, Equality and Law Reform, to make rules to facilitate the obligation imposed on the High Court to expedite the hearing of such applications.⁸⁹ The legislation is silent as to the question of who is to be represented before the High Court. However, if the decision of the court could operate to the prejudice of an individual who is appearing before the Investigation Committee by clothing an action of the Committee with judicial authority, it is plainly a matter of constitutional justice that such a person should be entitled to make submissions to the Court before any such decision is made. Finally, there is no mention of any appeal. However, since nothing to the contrary is stated, an appeal to the Supreme Court would in effect be read in, by virtue of Article 34.4 of the Constitution.

5.81 What powers may the High Court exercise on a section 25 type application? The provision states that, on an application by the *Laffoy Commission*, the High Court may:

- (a) “give such directions as it considers appropriate (including a direction that the Commission or a Committee should make a report and, if that Court considers it appropriate, an interim report, to it at or before such times as it may specify in relation to the matter the subject of the application or any related matter),
- (b) make any order that it considers appropriate, [or]
- (c) refuse to approve of an act or omission [proposed to be done or made for the purpose of the performance of the functions of the Commission or either Committee]”.

5.82 To date, only one application has been made to the High Court for directions in relation to the performance of the *Laffoy Commission* or its committees’ but this serves as a useful illustration of the way in which the provision might be used. In *Commission to Inquire into Child Abuse Act 2000 v Notice Party A and others*,⁹⁰ the court’s approval was sought in respect of the determination that all parties entitled to appear before the Investigation Committee at the evidential stage should have their legal representation physically in attendance limited to one solicitor and *one* counsel each. Not surprisingly this proved to be a very controversial ruling among those appearing before the *Laffoy Commission*. Ultimately, Kelly J took the view that the *Laffoy Commission* either: (1) did not have jurisdiction to limit the number of solicitors and counsel who are in attendance at evidential hearings; or (2) if there was such jurisdiction, it was not exercised in a manner that was compatible with the rights of others and the requirements of justice.⁹¹ Although the High Court held that the *Laffoy Commission* was unable for

⁸⁹ Section 25(5).

⁹⁰ High Court (Kelly J) 9 October 2002.

⁹¹ *Ibid* at 26 Kelly J stated: “The interests of justice and a patently fair hearing to both complainant and respondent is the essence of the work of the [*Laffoy Commission*]. There can

the reasons outlined above to make the challenged order, the ability of the *Laffoy Commission* to utilise the section 25 ‘case stated’ procedure meant that the legality or otherwise of the order was determined quickly. This contrasts sharply with the uncertainty, delay and expense which would have arisen had the *Laffoy Commission* been forced to wait for an interested party to take judicial review in respect of its decision.

5.83 *In light of the above, the Commission recommends that the case stated procedure contained in section 25 of the Commission to Inquire into Child Abuse Act 2000 be inserted into the Tribunals of Inquiry Acts 1921-2002. The only change that the Commission would recommend in respect of section 25 is that the court should be afforded discretion to hear the application in public, rather than in private, as is currently the case. The new section would provide as follows:*

(1) The tribunal may, whenever it considers appropriate to do so, apply in a summary manner to the High Court for directions in relation to the performance of any of the functions of the tribunal for its approval of an act or omission proposed to be done or made by the tribunal for the purposes of such performance.

(2) On an application to the High Court for the purposes of subsection (1), that Court may—

(a) give such directions as it considers appropriate (including a direction that the tribunal should make a report and, if that Court considers it appropriate, an interim report, to it at or before such times as it may specify in relation to the matter the subject of the application or any related matter),

(b) make any order that it considers appropriate,

(c) refuse to approve of an act or omission referred to in subsection (1).

(3) The tribunal shall comply with a direction or order of the High Court under this section and shall not do any such act as aforesaid or make any such omission as aforesaid if the High Court has refused to approve of it.

(4) The High Court shall give such priority as it reasonably can, having regard to all the circumstances, to the disposal of proceedings in that Court under this Act.

(5) The Superior Court Rules Committee may, with the concurrence of the Minister for Justice, Equality and Law Reform, make rules to facilitate the giving of effect to subsection (4).

be no question of sacrificing the requirements of a patently fair hearing in favour of sympathy for a complainant or for the creation of an atmosphere.”

(c) Expedition

5.84 The two proposals made so far deal with getting the proceedings into the High Court. But the remaining part of the picture is to have the case brought on for hearing. Section 25(4) of the Act of 2000 imposes an obligation on the High Court to deal with the application as swiftly as possible having regard to the circumstances of the case. It provides that:

“The High Court shall give such priority as it reasonably can, having regard to all the circumstances, to the disposal of proceedings in that Court under this Act.”

5.85 It is true that even without such a provision, the High Court would, follow its usual practice accord priority to such cases.

5.86 *However despite this, the Commission is of the view that it is best to state the provision expressly. Accordingly, the Commission recommends that a similar provision should be inserted into the Tribunals of Inquiry Acts 1921-2002. This provision would replicate section 25(4).*

Part VIII Termination of the Tribunal

5.87 If there is one fact which is beyond dispute about tribunals of inquiry, it is that they may take a long time, almost invariably a good deal longer than is anticipated when they are being set up. There is no cause to be censorious about this phenomenon: it is inevitable, given that the inquiry is investigating the unknown. Nevertheless, this fact should be taken into account when devising good law for this area.

5.88 One relatively moderate solution that has been adopted to meet this difficulty is to include in the resolution constituting the tribunal and laying down in its terms of reference a clause whose purpose is to concentrate the mind of the tribunal on the need to complete its task as expeditiously as possible. The method adopted is to require the tribunal to report on an interim basis by a specified time, outlining any progress made, and the likely duration of the entire tribunal proceedings. The earliest example of such a clause was in the terms of reference of the *Finlay Tribunal* in 1996, the first to be set up after the wave of popular indignation at the huge cost, engendered by the *Beef Tribunal*, had abated somewhat. By now, the form of words has settled down into a conventional pattern, though the time allowed may vary depending on the particular tribunal. We may quote the *Morris Tribunal* as a recent example:

“(I) the tribunal shall report to the Minister for Justice, Equality and Law Reform on an interim basis not later than four months from the date of establishment of the tribunal and also as soon as may be after the tenth day of any oral hearings of the tribunal on the following matters:

- (a) the number of parties then represented before the tribunal,

- (b) the progress which will then have been made in the hearings and work of the tribunal,
- (c) the likely duration (so far as that may then be capable of being estimated) of the proceedings of the tribunal,
- (d) any other matters that the tribunal considers should be drawn to the attention of the Houses of the Oireachtas at the time of the report (including any matters relating to its terms of reference)".⁹²

5.89 In practice, there is no sanction to enforce a commitment given in the interim report. Probably, judicial review would not be available, and the only sanction would be "public opinion". Yet surely reliance on this would be improper, if it amounts to an attempt to "overawe" the inquiry? In the previous paragraph, we summarised precautionary measures, taken in advance of a tribunal's commencement. But, to go a step further, what if, after a tribunal has been sitting for some time, it became clear that like the Rump Parliament, it has "sat too long for any good [it had] been doing".⁹³ A definite form of control has been suggested to meet this difficulty, as follows:

"The legislature should assume to itself a power to direct that a tribunal cease its inquiry. This is a power that should be exercised only where the legislature considers that it is in the public interest to do so. This could arise, by way of illustration, because the cost involved in the investigation would be disproportionate to the benefit to be extracted by society in continuing to exercise control over the extent of investigation being carried out by the tribunal ... In order to control the ambit of inquisitorial powers of tribunal, the legislature must assume the overriding right of intervention. It is no longer adequate to leave issues of the proper limits of the territory of tribunals of inquiry to the niceties of the law and the uncertainties of our constitutional jurisprudence."⁹⁴

5.90 Before considering this proposal, the Commission would like to suggest varying it in one minor respect: tribunals of inquiry are set up both by resolutions of the Dáil and Seanad and by order of the appropriate minister. For this reason and also because of the significant position of the government, being in some form,

⁹² *Tribunals of Inquiry (Evidence) Act 1921 (Establishment of Tribunal) Instrument 2002 SI No. 175 of 2002. See also Finlay Tribunal Report at Appendix B ("...not later than the 20th day of any oral hearings..."); McCracken Tribunal Report at First Schedule ("...not later than the tenth day of any oral hearing..."), and Lindsay Tribunal Report at Appendix 1 ("...not later than four months from the date of establishment of the Tribunal and also as soon as reasonably may be after the tenth day of any oral hearings..."). On the *Finlay Tribunal*, see also 474 Dáil Debates Cols 122 ff (29 January 1997); Vol 476, cols 1449 ff (25 March 1997).*

⁹³ The quotation concludes: "... Depart, I say, and let us have done with you. In the name of God, go": Cromwell, Addressing the Rump Parliament, 20 April 1653.

⁹⁴ Brady "Tribunals and Politics: A Fundamental Review" *Contemporary Issues in Irish Law & Politics* No 3 156, 165.

often the subject matter of the tribunal's investigation, the Commission assumes that any power to direct a tribunal to cease operations should be vested in the Houses and in the Minister acting together. Another caveat is that the power suggested ought to be taken as only to be used in extreme circumstances.

5.91 Read in that light it seems to the Commission that the proposal contained in the quotation has a number of merits. In the first place, the Houses of the Oireachtas are the assemblies of the nation, formally responsible for ranking the various claims on public expenditure and it is appropriate that they should have the power not only to set up a tribunal but also, in extreme cases, to terminate it. Secondly, such a decision should naturally be taken openly so that the legislature would have to take responsibility for its action. Finally, it might be objected that such a power would be open to abuse, most obviously if a member of the Government party were under investigation. Our response to this objection is that the public obloquy engendered by such an action would make such a possibility most unlikely. Besides, if a government were motivated by such a consideration, it would be unlikely to have set up the tribunal in the first place. However, bearing this slight possibility in mind and also the more general need to ensure that such a power were only used where a tribunal was plainly straggling and unlikely to bear fruit, we recommend that the legislation implementing this proposal would require 'stated reasons' to be given, where a tribunal is to be terminated.

5.92 *The Commission recommends that the 1921-2002 Acts be amended to allow for the termination of a tribunal. We suggest the following form of words: "Where at any time it has been resolved, for stated reasons, by each Houses of the Oireachtas that it is necessary to terminate the work of the tribunal, the relevant Minister or the Government may by order dissolve the tribunal".*

CHAPTER 6 POWERS OF THE TRIBUNAL

Part I General Considerations

(a) Introduction

6.01 The issue of the powers conferred upon tribunals of inquiry is an important one, for several reasons. First, there is a public interest, stemming from the general principle of a society founded on the Rule of Law, in the powers of such an important instrument of state policy being clearly delimited and defined. Secondly, tribunals have the potential to impinge quite seriously on the rights of the individual, and those who are at the sharp end of their inquiries have a legitimate interest in knowing just how far those inquiries may go, and in what manner they ought to be conducted. Thirdly, and this is a point that is easily overlooked, those who are appointed to conduct tribunals must find that onerous task easier if the powers to be wielded by them are clearly set out and understood. Litigation arising out of recent tribunals suggests that there may be some areas of uncertainty in this regard, although there is certainly nothing in the relatively few cases on the issue to suggest that this uncertainty is endemic.

6.02 The chief source of powers for a tribunal of inquiry is the *Tribunals of Inquiry (Evidence) Act 1921*, and its amending legislation. The title of the 1921 Act suggests its rather limited ambition, which is primarily to lay down the means by which a tribunal may take evidence. The Act is by no means a comprehensive statement of the powers that have, as a matter of historical fact, been exercised by tribunals both in this jurisdiction and in the United Kingdom. For example, the power (which has never been doubted) of a tribunal to retain counsel to assist it in the conduct of its inquiries is nowhere stated in legislation.¹ It seems to be considered that this is an inherent power enjoyed by a tribunal by virtue of its very existence, which need not be expressed in positive law: see further paragraphs 6.128-6.137.

¹ It is submitted that this is a classic example of a non-intrusive power: see further below, paragraphs 6.128 to 6.129. In *Lawlor v Flood* [1999] 3 IR 107, 133 Hamilton CJ said: "No doubt it was envisaged that the tribunal, for the purpose of carrying out the inquiry mandated by the resolutions of both houses of parliament, could retain persons to act on its behalf, both in the gathering of evidence and its adduction before the tribunal or to carry out the administrative requirements of the tribunal."

6.03 Notably, these Acts of 1921 to 2002 do not actually provide for the establishment of a tribunal of inquiry. What section 1(1) of the 1921 Act states is that:

“[w]here it has been resolved... by both Houses of Parliament that it is expedient that a tribunal be established for inquiring into a definite matter described in the Resolution as of urgent public importance, and in pursuance of the Resolution *a tribunal is appointed for the purpose either by His Majesty or a Secretary of State*,² the instrument by which the tribunal is appointed or any instrument supplemental thereto may provide that this Act shall apply”.³ (Emphasis added).

Where the Act applies the tribunal may exercise the powers it confers. In a modern Irish context, section 1(1) has been interpreted by the Supreme Court to mean that the powers conferred by the Act may be exercised by a tribunal appointed by the Government, or by any Government minister (including the Taoiseach), pursuant to resolutions of both Houses of the Oireachtas.⁴ The provision therefore envisages the Houses of the Oireachtas calling on the executive branch to establish a tribunal, but goes no further than to assume the competence of the executive in this regard; it is not the source of the executive power to appoint a tribunal. In *Goodman International v Hamilton*, Costello J, in a passage subsequently approved by the Supreme Court, stated:

“*The Government or any Minister can inquire into matters of public interest as part of the exercise of its executive powers, but if this is done without reference to parliament then the inquiry will not have statutory powers which are to be found in the Tribunals of Inquiry (Evidence) Act 1921, and the Tribunals of Inquiry (Evidence) (Amendment) Act 1979.*”⁵

² In *Haughey v Moriarty* [1999] 3 IR 1, Hamilton CJ (delivering the judgment of the Supreme Court) stated (at 46 - 47): “At the time of the enactment of the 1921 Act, accordingly, a tribunal could be vested with the powers under the 1921 Act only where it was appointed by the Crown acting on the advice of the Government or a Secretary of State, which latter expression, under section 12 (3) of the *Interpretation Act, 1889* meant, unless a contrary intention appeared, one of the ‘Principal Secretaries of State’. However, it is submitted that a more natural reading of Section 1 of the 1921 Act suggests that a tribunal could be appointed *either* by the Crown on the advice of the Government, *or* by one of the principal secretaries of state.”

³ Emphasis added.

⁴ *Ibid* at 46-49. Consideration of this issue was necessitated by an argument made by the applicants in the case that the Taoiseach was not competent to appoint a tribunal of inquiry to which the Act could apply. This argument was based on the proposition that the Prime Minister was not included in the expression “Secretary of State”. However, it was rejected by the Supreme Court, primarily on the basis that the Taoiseach occupies a quite different position in the Irish constitutional structure from that occupied by the Prime Minister in the British equivalent.

⁵ [1992] 2 IR 542, 554; approved by the Supreme Court in *Haughey v Moriarty* [1999] 3 IR 1, 32-33.

6.04 The extent to which a tribunal enjoys powers deriving from its status as a creature of the executive is, however, unclear, and in this chapter the focus is directed more to the powers bestowed by statute. The reason for this is straightforward: it is beyond our remit to recommend (and possibly beyond the power of the Oireachtas to implement) changes to the inherent powers of the Executive. Furthermore, since any inherent powers of a tribunal are of their nature somewhat murky, this alone provides a good justification for attempting to spell out at least the more significant powers in legislation, and if this entails a measure of duplication, that does not seem to be a very great evil.

6.05 *The Commission therefore recommends that any re-draft of the tribunals of inquiry legislation bestows express power on the Oireachtas or Minister, as the case may be, to establish an inquiry.*

(b) Powers Categorised

6.06 As a framework for analysis we propose to deal with the subject-matter of this Chapter under three broad headings in the next three Parts. First, in Part II we address the enforcement mechanisms available to a tribunal of inquiry in order to ensure that its orders are obeyed. Secondly, in Part III we deal with what may be termed the “substantive powers” of a tribunal of inquiry. These powers are relevant to various aspects of an inquiry’s task in respect of which it can make orders, for instance the summoning of witnesses. Thirdly, in Part IV we examine the less drastic powers, which we describe as “non-intrusive powers”. Although these powers are just as substantive as those under the second heading, such as the power to publish a report, they differ from those powers because they do not entail the tribunal ordering any person to do anything (possibly against their will). On account of this distinguishing factor, we believe that certain different considerations may be appropriate, meriting the separate treatment of the second and third categories.

Part II Enforcement Mechanisms

6.07 It is obvious that inquiries will not always receive the full co-operation of those who appear before them. The sense of civic duty is not always enough to guarantee that the proceedings of an inquiry will not be obstructed or interfered with, and that the orders of the inquiry will be obeyed. On the contrary, since the report of an inquiry which imputes serious wrongdoing may have extremely grave consequences for those implicated, an incentive for obstruction clearly exists. The sensible step is therefore to set up a framework within which the inquiry can operate which provides for even weightier disincentives. The Acts of 1921 to 2002 have attempted to achieve this by creating two alternative and overlapping mechanisms, whereby obstruction and disobedience can be dealt with.

- (i) Under section 1(2) of the 1921 Act (as amended), such behaviour constitutes an offence, punishable by imprisonment and or fine: see paragraphs 6.18 to 6.31.

- (ii) Where one of its orders has not been complied with, section 4 of the 1997 Act allows a tribunal to apply to the High Court for a supportive order and for ancillary relief: see paragraphs 6.39 to 6.47.

6.08 The advantages and disadvantages of each mechanism will be considered presently, but before doing so it is necessary to say a few words about the jurisdiction known as “contempt of court” upon which each is, to a greater or lesser extent, dependent. In doing so, we draw heavily on significant earlier Commission publications, in particular the *Consultation Paper* and *Report on Contempt of Court*, which included substantial chapters dealing with contempt in the context of tribunals of inquiry.⁶

(a) Contempt of Court

6.09 The jurisdiction of the courts to punish for contempt is one of the oldest in the common law, having been described by one judge writing in 1765 as standing upon “immemorial usage”.⁷ It is a jurisdiction which lies behind almost everything that the courts do in the performance of their functions. As the late Professor Kelly used to observe, no matter how humble or innocuous the procedure is, it is connected by a number of steps (however long) to the prospect of a man or woman rattling the keys of a prison.⁸

6.10 In broad terms, the Irish courts have respected a division between two categories of contempt: civil and criminal. Stated very briefly, civil contempt generally comprises non-compliance with an order of a court, such as continuing to trespass on lands, in the face of an injunction restraining such acts. The contempt is usually brought to the attention of that court by the party who is prejudiced by the non-compliance,⁹ in the example given, the person entitled to possession of the land. It has sometimes been said that attachment for civil contempt is, effectively, a means of execution open to a successful litigant, where other approaches have failed.¹⁰ The purpose of imprisonment in civil contempt cases is said to be coercive, rather than punitive, in that the court is not so much expressing its displeasure at the non-compliance with its order, as giving the contemnor a stern incentive to reconsider his recalcitrance. Once the party in question repents of his

⁶ Law Reform Commission *Consultation Paper on Contempt of Court* (July 1991); *Report on Contempt of Court* (LRC 47-1994); see generally Eady and Smith, *Arlidge, Eady & Smith on Contempt* (2nd ed Sweet & Maxwell 1999).

⁷ *Almon's case, Wilmot's Notes* (1765) 243, 97 ER 94, 99 per Wilmot J

⁸ O'Donnell “Some Reflections on the Law of Contempt” (2002) 2 *Judicial Studies Institute Journal* 88 at 115.

⁹ *Cf Flood v Lawlor* High Court (Smyth J) 15 January 2001, at 7: “...the Court itself has a very substantial interest in seeing that its Orders are upheld”.

¹⁰ *In re Earle* [1938] IR 485, 501 per Fitzgibbon J.

ways and agrees to comply with the order, he thereby ‘purges’ his contempt and is said to be entitled to be released from prison *ex debito justitiae*, or as a matter of course. (For this reason a fine is not usually considered an appropriate sanction for civil contempt.) The religious overtones of the language employed are not wholly inappropriate, since the doctrine of civil contempt grew out of the practice of the Court of Chancery, an institution that had ecclesiastical roots and was often referred to as a “court of conscience”.

6.11 Criminal contempt, on the other hand, comprises distinct categories of behaviour: (i) contempt in the face of the court (or *in facie curiae*), which comprises disruptive behaviour in or in the precincts of the court; (ii) scandalising the court, that is the holding of courts or judges up to public ridicule or obloquy in a manner calculated to interfere with the administration of justice; and (iii) other interference with the administration of justice, such as an accused person attempting to intimidate or suborn a juror, a newspaper printing a report of a trial in breach of the *in camera* rule, or a story which prejudices the right of an accused person to a fair trial. This last category is sometimes referred to as a breach of the *sub judice* rule.¹¹

6.12 The purpose of criminal contempt remains something of a live issue, but it seems fair to say that the dominant purposes are related to upholding respect for the courts and the administration of justice generally, rather than simply ensuring compliance with particular orders. (Of course, a distinction along these lines is difficult to maintain rigidly, since the flouting of court orders might be considered one way in which the administration of justice could be undermined.) The other notable feature of criminal contempt is that sanctions imposed by the courts are generally characterised as punitive, rather than coercive, which has the consequence that there is no equivalent process to purging one’s contempt: only a determinate sentence can be imposed, and once imposed the contemnor cannot shorten it by thinking better of his actions. To put it another way, as with a normal criminal trial, upon handing down sentence the judge becomes *functus officio*.

6.13 In procedural terms, the courts have long exercised a summary jurisdiction in respect of criminal contempt.¹² In *State (Director of Public Prosecutions) v Walsh*¹³ O’Higgins CJ said: “[p]rior to the foundation of the Irish Free State, the Courts in Ireland exercised a summary jurisdiction in respect of all forms of criminal contempt.” The court has an inherent power to commence proceedings itself in respect of a criminal contempt of court. This will be the

¹¹ See for example *S (PS) v Independent Newspapers (Ireland) Ltd* High Court 22 May 1995 (Budd J): followed by Laffoy J in *MP v AP* [1996] 1 IR 144.

¹² *Arlidge, Eady & Smith, op cit* fn 6, paragraphs 2-4, advise caution in the use of the term “summary”, since in some instances it may be many months before an alleged contempt of court is dealt with. In relation to such contempts (primarily those in respect of which the Attorney-General elects to take proceedings), the procedure is summary but only in the sense that the matter is tried by a judge alone.

¹³ [1981] IR 412, 422.

normal course where the contempt is committed *in facie curiae*.¹⁴ In relation to other contempts, committed outside the immediate purview of the court, the position is more complicated. There seems to be a tradition in the Irish courts of the parties to litigation commencing criminal contempt proceedings.¹⁵ However, the English courts have expressed doubt as to whether it is appropriate for such proceedings to be commenced by any person other than one of the law officers of the State.¹⁶

6.14 The Irish courts have, historically, tended to insist upon a fairly strict division between civil and criminal contempt,¹⁷ for reasons which are not directly relevant to the issues under consideration, but as shall be shown, this orthodoxy has been challenged by developments in relation to tribunals of inquiry.

6.15 Orders in respect of contempt tend to have a deterrent effect in relation to possible future contempts.¹⁸ To this extent, the jurisdiction is universally forward-looking. However, leaving aside this general observation, it may fairly be said that the hallmark of criminal contempt is that it looks backward, imposing punishment in respect of an act done, whereas civil contempt looks mainly to the future, imprisoning a person only as a means to the end of coercing him to obey the court's order.

¹⁴ See *eg Keegan v de Burca* [1973] IR 223 where, although contempt proceedings were commenced by the beneficiaries of an injunction, the actual contempt at issue was one acted upon by the court of its own motion, namely a failure to answer a question posed by a judge.

¹⁵ For example, in *In re Kennedy and McCann* [1976] IR 382, where an article was published making comments critical of certain *in camera* proceedings, one of the parties to the proceedings sought and was granted liberty to bring a motion to attach for contempt the writer of the article and the editor of the newspaper in which it appeared.

¹⁶ *Re Lonhro* [1990] 2 AC 154.

¹⁷ See *eg State (Commins) v McRann* [1977] IR 78 at 87 where Finlay P summed up the position as follows: "The major distinction ... between criminal and civil contempt of court seems to be that the wrong of criminal contempt of court is the complement of the right of the court to protect its own dignity, independence and processes and that, accordingly, in such cases, where a court imposes sentences of imprisonment its intention is primarily punitive. Furthermore, in such cases of criminal contempt the court moves of its own volition, or may do so at any time. In civil contempt, on the other hand, a court only moves at the instance of the party whose rights are being infringed and who has, in the first instance, obtained from the court the order which he seeks to have enforced. It is clear that in such cases the purpose of imprisonment is primarily coercive; for that reason it must of necessity be in the form of an indefinite imprisonment which may be terminated either when the court, upon application by the person imprisoned, is satisfied that he is prepared to abide by its order and that the coercion has been effective or when the party seeking to enforce the order shall for any reason waive his rights and agree, or consent, to the release of the imprisoned party."

¹⁸ In this connection, see the comments of O'Higgins CJ in *State (DPP) v Walsh* [1981] IR 412, 428 (speaking in the context of criminal contempt): "The primary purpose of such action is not to punish those whose criminal conduct has endangered the administration of justice. It is to discourage and to prevent the repetition or continuance of conduct which, if it became habitual, would be destructive of all justice."

6.16 It should be said, however, that the division between civil and criminal contempt can produce some odd results, when viewed from a utilitarian perspective. Take the case of a person who, in the course of a hearing before a court refuses to answer a question. This is analysed as contempt in the face of the court, of the criminal species and therefore punishable only by a determinate sentence. Yet in most instances what the court really wants is to have the question answered. Coercion rather than punishment would seem to be appropriate, but it is not (traditionally at least) available. Similarly, if a person disobeys an order not to destroy a document, there is little that can be done by way of coercion since the document cannot be recreated, but some form of punitive sanction might seem merited.

6.17 With this brief synopsis of the law relating to contempt in mind, it is now appropriate to consider the enforcement mechanisms that apply in the context of tribunals of inquiry. Our treatment observes the distinction, drawn in paragraph 6.07 between section 1(2) of the 1921 Act under which obstruction and disobedience constitutes an offence, punishable by imprisonment and or a fine; and section 4 of the 1997 Act which allows a tribunal, where one of its orders has not been complied with, to apply to the High Court for a supportive order and ancillary relief.

(b) Section 1(2) of the 1921 Act

6.18 Section 1(2) of the 1921 Act, as originally enacted, armed tribunals of inquiry with fairly wide powers to deal with those who obstructed them in any way, coming close to conferring (albeit that it probably did not quite reach) a power to convict of an offence. That provision stated:

“(2) If any person—

- (a) on being duly summoned as a witness before a tribunal makes default in attending; or
- (b) being in attendance as a witness refuses to take an oath legally required by the tribunal to be taken, or to produce any document...or to answer any question...; or
- (c) does any other thing which would, if the tribunal had been a court of law having power to commit for contempt, have been contempt of that court;

the chairman of the tribunal *may certify the offence* of that person under his hand to the High Court... and the court may thereupon inquire into *the alleged offence* and after hearing any witnesses who may be produced against or on behalf of *the person charged with the offence*, and after hearing *any statement that may be offered in defence*, punish

or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the court.”¹⁹

6.19 A similar provision fell to be considered by the Supreme Court in *In re Haughey*.²⁰ The facts were that Mr Pádraic Haughey refused to answer certain questions put to him by the Committee of Public Accounts in the course of an investigation it was conducting. Under section 4(3) of the *Committee of Public Accounts of Dáil Éireann (Privilege and Procedure) Act 1970* where any person refused to answer any question to which the committee could legally require an answer, then:

“the committee may certify the offence of that person under the hand of the chairman of the committee to the High Court and the High Court may, after such inquiry as it thinks proper to make, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the High Court.”

6.20 A divisional High Court sentenced Mr Haughey to six months’ imprisonment, from which decision he appealed to the Supreme Court, contending *inter alia* that section 4(3) was invalid having regard to the provisions of the Constitution. In the course of argument, three possible constructions of this provision were suggested, and were summarised by Ó Dálaigh CJ (who delivered the judgment of the Court in relation to the constitutional challenge) as follows:

“(i) that the subsection purports to authorise the Committee to try and convict, and thereupon to send the offender forward to the High Court for punishment;

(ii) in the alternative, that the subsection merely authorises the Committee to complain to the High Court and, thereupon, it is for that court to try summarily and, if it should convict, to punish the offender;

(iii) in the further alternative, that the subsection - as in (ii) - merely authorises the Committee to complain to the High Court and, thereupon, that it is for the court either summarily, or upon indictment (*ie* by jury), to try and, if it should convict, to punish the offender.”²¹

6.21 Ó Dálaigh CJ noted the differences between the formula of words used in section 4(3) and that utilised by the 1921 Act. He attached significance to the fact that in the 1921 Act there was reference made to “*the alleged offence*”, “*the person charged with the offence*” and “*any statement that may be offered in defence*”, all of which indicated that the High Court was entitled to exercise an

¹⁹ Emphasis added.

²⁰ [1971] IR 217.

²¹ [1971] IR 217, 248.

independent judgment as to whether or not an offence had indeed been committed. By contrast, the Act of 1970 contained no such concessions. These considerations suggested that, on a straightforward interpretation of the subsection, (i) was the correct construction, as contended for by Mr Haughey. This would have been manifestly unconstitutional, because it would represent a usurpation of what was an exclusively judicial function: the administration of justice by trying and convicting an individual of an offence. However, the court declined, having regard to the presumption of constitutionality,²² to interpret section 4(3) in this way.

6.22 It was the second interpretation²³ which commended itself to the Supreme Court. Mr Haughey's argument on this point was that, because the potential penalty which may be imposed in respect of a contempt of court is unlimited, the subsection created a non-minor offence, which could not therefore be tried summarily. In response to this, the Attorney General submitted, relying on two earlier decisions,²⁴ that summary trial was constitutionally permissible because the case was one of contempt of court, in respect of which such trials had been upheld. Ó Dálaigh CJ rejected this submission, in the following terms:

“It is enough for this Court now to say that these two cases cannot assist the Attorney General's submission. The High Court in the present case was not dealing with a charge of contempt of court. The impugned subsection does not purport to make the offence here in question ‘contempt of court’; it does no more than direct that the offence, which is an ordinary criminal offence, shall be punished in like manner as if the offender had been guilty of contempt of court, that is to say, it defines the punishment for the offence by reference to the punishment for contempt of court. Moreover, it would not be competent for the Oireachtas to declare contempt of a committee of the Oireachtas to be contempt of the High Court. This is an equation that could not be made under the tripartite separation of the powers of government. The reasoning in *O'Kelly's Case* and in *Connolly's Case* does not support the Attorney General's submission but, on the contrary, is inimical to it. The exception which the High Court (under Article 72 of the Constitution of the Irish Free State) in *O'Kelly's Case* and (under Article 38 of the Constitution of Ireland) in *Connolly's Case* engrafted on the injunction for trial by jury²⁵ is based on the inherent jurisdiction

²² As explained by Walsh J in *East Donegal Co-Operative Livestock Marts v Attorney General* [1970] IR 317. “An Act of the Oireachtas, or any provision thereof, will not be declared to be invalid where it is possible to construe it in accordance with the Constitution; and it is not only a question of comparing a constitutional construction to one which would be unconstitutional where both may appear to be open, but it also means that an interpretation favouring the validity of an Act should be given in cases of doubt.”

²³ For the third interpretation, see fn 28, below.

²⁴ *Attorney General v O'Kelly* [1928] IR 308 and *Attorney General v Connolly* [1947] IR 213.

²⁵ Although *cf State (Director of Public Prosecutions) v Walsh* [1981] IR 412, 439-440 *per* Henchy J. Henchy J (who delivered the majority judgment) expressed the opinion, *obiter*, that jury trial would be appropriate in cases of criminal contempt where there were factual

of the High Court to ensure the administration of justice without obstruction. That is to say, the exception finds its source and justification in...Article 34. Neither *O'Kelly's Case* nor *Connolly's Case* makes any exception in respect of the trial of ordinary criminal offences which are not minor offences.”²⁶

6.23 Thus with the Attorney General’s defensive argument grounded on contempt of court rejected, Mr Haughey’s submission prevailed. Ó Dálaigh CJ went on to hold that the High Court could not legally hold a summary trial in respect of a criminal offence, as it was not a court of summary jurisdiction within the meaning of Article 38.2 of the Constitution. Hence a criminal trial in the High Court could not be held otherwise than with a jury. The court further held that the terms of section 4 of the Act of 1970 could not be stretched, even having regard to the presumption of constitutionality, to allow of an interpretation whereby the “inquiry” in the High Court could be conducted with a jury.²⁷

6.24 The decision in *In re Haughey* almost certainly prompted the amendment to section 1(2) of the 1921 Act, brought about by the 1979 Act. Presumably amendment was not considered urgent until it became apparent that a tribunal would have to be set up to investigate a disastrous explosion and fire at Whiddy Island, County Cork. Having regard to the broad manner in which the Supreme Court’s reasons were stated, and notwithstanding that section 1(2) of the 1921 Act was compared favourably with section 4(3) of the Act of 1970, this was a necessary step. Section 1(2) was clearly affected by the same infirmity: that of permitting the summary trial of a non-minor offence. Section 3 of the 1979 Act replaced it with the following provision.

“(2) If a person—

matters in dispute. However, the particular form of jury trial envisaged by the learned judge was most unusual, being one in which the judge retains a much larger degree of control than would otherwise be normal. There does not seem to have been any case in which Henchy J’s *dictum* was applied. In *De Rossa v Independent Newspapers Ltd* High Court (Kinlen J) 3 April 1998, the court rejected the assertion made by the alleged contemnor that all factual matters were in dispute and stated that the issue was one “primarily of law” and therefore fit for trial by a judge alone.

²⁶ [1971] IR 217, 253.

²⁷ Ó Dálaigh stated at 254-255: “The statute in this case created an offence which was not prohibited by the common law. It indicated a particular manner of proceeding against the alleged offender by express reference to contempt of court in terms which clearly indicated a summary manner of disposal of the trial and of the offender... If, however, the subsection were to be construed as contended for by the Attorney General [*ie* (iii) in the passage quoted in paragraph 6.20], in the opinion of the Court the subsection would not thereby shed its constitutional infirmity. The subsection, in the supposed meaning, would then authorise trial either summarily or on indictment. But for the subsection to authorise summary trial (*ie* a mode of trial suitable for a minor offence) and upon conviction to authorise punishment by a penalty only appropriate to a non-minor offence would offend grossly against the substance of the guarantee contained in Article 38.” (Article 38 deals with the trial of offences in due course of law).

- (a) on being duly summoned as a witness before a tribunal, without just cause or excuse disobeys the summons, or
- (b) being in attendance as a witness refuses to take an oath or to make an affirmation when legally required by the tribunal to do so, or to produce any documents (which word shall be construed in this subsection and in subsection (1) of this section as including things) in his power or control legally required by the tribunal to be produced by him, or to answer any question to which the tribunal may legally require an answer, or
- (c) wilfully gives evidence to a tribunal which is material to the inquiry to which the tribunal relates and which he knows to be false or does not believe to be true, or
- (d) by act or omission, obstructs or hinders the tribunal in the performance of its functions, or
- (e) fails, neglects or refuses to comply with the provisions of an order made by the tribunal, or
- (f) does or omits to do any other thing and if such doing or omission would, if the tribunal had been the High Court, have been contempt of that Court,

the person shall be guilty of an offence.”

6.25 The new provision accords quite closely with section 82(7)(b)(iv) of the *Local Government (Planning and Development) Act 1963*, which was described by Ó Dálaigh CJ in *In re Haughey* as a “wholly unobjectionable formula”.²⁸ The tribunal is given no power to “certify” an offence, and for a conviction to be obtained the constituent elements of the offence must be proved, to the criminal standard, in the normal way. It is a significant practical point that, under subsection (2A), newly introduced by the 1979 Act, provision is made whereby the offence may be tried either on indictment or summarily (by the District Court), provided that: (i) the District Judge is of opinion that the facts proved or alleged against the defendant constitute a minor offence fit to be tried summarily, (ii) the Director of Public Prosecutions consents, and (iii) the defendant (on being informed by the judge of his right to be tried by a jury) does not object to being tried summarily. It is therefore clear that the accused person may insist on trial by jury. However, this issue is addressed more fully in Chapter 11, at paragraph 11.42 - 11.43, where we

²⁸ *Ibid* at 250. Section 82(7)(b)(iv) provides that: “every person to whom a notice has been given who refuses or wilfully neglects to attend in accordance with the notice or who wilfully alters, suppresses, conceals or destroys any document to which the notice relates or who, having so attended, refuses to give evidence or refuses or wilfully fails to produce any document to which the notice relates shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding twenty pounds.”

recommend a fundamental change on this point under the tribunals of inquiry legislation.

(1) Particular Amendments of Section 1(2) of the 1921 Act (as amended)

6.26 The Commission will consider here whether *any* changes are necessary to the offences created by the present version of section 1(2) quoted at paragraph 6.24. In the first place, we have nothing to say about paragraphs (a)-(c), except that they seem to be necessary and appropriately drafted.

6.27 In its *Report on Contempt of Court*,²⁹ the Commission recommended the repeal of section 1(2)(d) and its replacement with a new provision, making it an offence to disrupt a tribunal in the course of its proceedings. The Commission was of the view that section 1(2)(d) was too broad in its ambit, was an unwarranted interference with freedom of expression on matters of serious public concern and rendered criminal conduct which should be permitted. The Commission also recommended that there should be created a number of specific offences dealing with interference (otherwise than by way of publication) with the administration of a tribunal.³⁰ Although the present Commission agrees that the performance of any of these acts should undoubtedly be punishable by criminal sanction, we are not so confident that the appropriate way in which to accomplish this is to attempt to identify each and every one of the various ways in which the work of the tribunal may be culpably be interfered with.³¹

6.28 Moreover, the current Commission is of the opinion that it would be appropriate to afford some measure of protection to tribunals of inquiry in relation to matters published concerning them, and that this can be best accomplished by means of a provision such as section 1(2)(d). The primary argument against criminalising “scandalous” publications and other breaches of the *sub judice* rule is from freedom of expression. However, in the marketplace of ideas, the judge’s ability to answer criticism is non-existent, being hide-bound by centuries of judicial convention. That, the Commission is quite satisfied, is just as it should be. In these circumstances, it is appropriate that the capacity of others to criticise the judge should be somewhat limited, and it seems to us that a prohibition on scandalising accomplishes this. Having regard to the wording of section 1(2)(d), it is clear that

²⁹ (LRC 47-1994) paragraph 9.6.

³⁰ These were: “1. improperly influencing or attempting to influence a tribunal in the determination of any issue which it may have to decide; 2. bribing or attempting to bribe a person who is or may be a witness in proceedings before a tribunal; 3. intimidating or attempting to intimidate such a witness with respect to such evidence; 4. taking or attempting to take reprisals against a witness who has given evidence in such proceedings; 5. similar offences in respect of chairpersons and other persons involved in the work of a tribunal” at paragraph 9.14.

³¹ To illustrate this point, the draft quoted in the previous footnote, does not cover situations where persons attempt to use influence over a possible witness (other than by bribery or intimidation), such as friendship, for example, in order to alter the evidence which that person may give to a tribunal.

the criticism would need to be extremely vitriolic and damaging for the offence to be committed, since only conduct which actually obstructs or hinders the tribunal in the performance of its functions qualifies. But that said, the Commission is of the view that the case for intervention to prevent such conduct (whether by publication or otherwise) is just as strong as in relation to the courts: after all, tribunals of inquiry may have to offend powerful interest groups; money talks and when it is hurt, it has powerful lungs, not least through the media. The fact that the Commission previously recommended the creation of the specific offences is implicit recognition of a similar view.

6.29 A further point of difference concerns the fact that the earlier Commission was influenced by the view that if sections 1(2) (d) and (e) were to be retained they should be amended so as to include an express *mens rea* requirement (*ie* intentionally or recklessly...). But the current Commission takes a different view on the issue of *mens rea*. Our view is that the mental element is implicit in the provisions and there is no necessity to state it expressly in the provisions.

6.30 *The current Commission is not of the view that the sweeping nature of section 1(2)(d) to catch acts of publication is problematic. Rather, we see it as a definite advantage, and, since the same provision would clearly encompass the specific offences recommended by the Commission in its Report on Contempt of Court, the Commission thinks that the best course of action would be to retain section 1(2)(d).*

6.31 Also in its *Report on Contempt of Court*³² the Commission recommended the repeal of section 1(2) (e) partly because they felt the *mens rea* requirement was not sufficiently clear. However in light of the current Commission's view of the *mens rea* requirement, which has been discussed at paragraph 6.29, there is no good reason why the failure or refusal to obey a lawful order of a tribunal of inquiry should not constitute an offence.

6.32 *Accordingly, the Commission recommends that section 1(2)(e) of the 1921 Act should be retained.*

6.33 Further, in its *Report on Contempt of Court*³³ the Commission recommended that it should be an offence to disrupt a tribunal in the course of its proceedings. However, in view of our comments in relation to the retention of sections 1(2)(d) and (e), above, the Commission is now of the view that the creation of such an offence is superfluous

6.34 The decision in *In re Haughey* indicates clearly that in the context of obstruction of an inquiry it is not possible to invoke the summary procedure used by the High Court in the exercise of its contempt jurisdiction. According to Ó Dálaigh CJ, the only reason this procedure is appropriate, even in relation to

³² (LRC 47-1994) at paragraphs 9.6 – 9.7.

³³ *Ibid* at paragraph 9.5.

contempt, is to allow the High Court to ensure the administration of justice without obstruction. The same considerations do not apply to a tribunal of inquiry which, although it is charged with an important task, has been held not to be involved in the administration of justice.³⁴

6.35 However, a further question seems to arise. If a tribunal of inquiry does not administer justice it must be open to question whether it is appropriate to define an offence committed in relation to a tribunal by analogy with contempt of court. It has been frequently stated that the gist of a criminal contempt is its tendency to damage the administration of justice. As an English judge has commented: “The sole purpose of proceedings for contempt is to give our courts the power effectively to protect the rights of the public by ensuring that the administration of justice shall not be obstructed or prevented.”³⁵ The offence under paragraph (f) of section 1(2) can be committed by act or omission which would, if the tribunal were the High Court, constitute contempt of court. The issue has already been considered by the Commission, in its study of the law relating to contempt of court.³⁶

6.36 In answering these arguments, it might be said that although a tribunal of inquiry does serve a different function from that entrusted to the courts, its function is nevertheless of considerable importance, and it is right that tribunals in general should be respected and that citizens should co-operate with them.

³⁴ *Goodman International v Hamilton* [1992] 2 IR 542.

³⁵ *Morris v The Crown Office* [1970] 2 QB 114 per Salmon LJ.

³⁶ *Consultation Paper on Contempt of Court* (July 1991) 422-433. Commenting on section 1(2)(f) and recommending the abolition of this offence, the Paper states: “Such a provision has the benefit, if not the virtue, of covering the widest range of conduct without having to make any attempt to define its actual content. It seems to us, however, to have fundamental weaknesses. The first is that it is quite *unjust* that such conduct should be penalised as contempt by virtue of the fact that, if the tribunal had been the High Court, it *would have been* contempt of court. The truth of the matter is that tribunals frequently serve functions which are in a number of respects somewhat different from those served by the High Court. What possible basis can there be in justice for criminalising conduct the characterisation of which as contempt, when occurring in respect of the High Court, is defensible only, or primarily, in the light of protecting the Courts’ underlying functions? The assumption that there is a close or automatic similarity of functions, which could justify the exportation of contempt provisions, unthinkingly, to the different environment of tribunal proceedings seems to us mistaken. Now it is of course true that tribunal proceedings bear some close parallels with judicial proceedings, in the gathering of evidence and the maintenance of order but it is equally true that in the many important respects which we have already identified, the two proceedings serve quite different goals. The generic criminalisation of conduct in relation to tribunals by reference to contempt of the High Court must surely be unconstitutional in view of the arbitrary imposition of criminal responsibility which it necessarily involves. In order to preserve its constitutional validity a court might seek to read into it an implied qualification that conduct should be criminal only to the extent that the tribunal shares with the High Court common goals as to the administration of justice. Apart from the fact that we doubt whether such an identity of goals can always be discerned, we consider that such an implied qualification would not save the constitutional validity since the offence would still seem to be too uncertain to pass muster.” This recommendation was confirmed in the *Report on Contempt of Court* (LRC 47-1994) paragraphs 9.2-9.3.

6.37 However, the original view of the Commission seems to us to remain sound: the uncertainty that surrounds the law of contempt, even in its home territory of the administration of justice, is such that it seems to us to be inappropriate to attempt to transpose it to other areas of the law. The case law, and in particular the large number of successful appeals, suggests that contempt is not like the proverbial elephant; one does not always know it when one sees it. The contempt jurisdiction is the result of public policy, rather than the application of pre-announced legal principles and as one judge has shrewdly pointed out, “public policy is generally the result of strong feelings, commonly held, rather than of cold argument”.³⁷ Defining criminal conduct by reference to “strong feelings” which are peculiar to the context in which they are felt seems to us to be an excessively uncertain way in which to develop the law. We therefore see no reason to depart from the Commission’s earlier recommendation.

6.38 Accordingly, the Commission recommends the repeal of section 1(2)(f) of the 1921 Act (as amended).

(c) **Section 4 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1997**³⁸

6.39 At paragraph 6.07, we noted that there are two alternative mechanisms by which disobedience may be dealt with. The first which we have just reviewed is to the enforcement mechanism contained within section 1(2) of the 1921 Act. The other to which we now turn is section 4 of the 1997 Act. This gives the tribunal the power to apply to the High Court, to back up one of its own orders with an order of the court. Section 4 provides as follows:

“Where a person fails or refuses to comply with or disobeys an order of a tribunal, the High Court may, on application to it in a summary manner in that behalf by the tribunal, order the person to comply with the order and make such other order as it considers necessary and just to enable the order to have full effect.”

6.40 The primary order which the section envisages the court making is one simply directing the person who has not complied with the tribunal’s order to do so. Provision is also made for ancillary orders, but only to the extent necessary to enable this primary order to have effect. At the second stage of the Bill’s passage through the Dáil, the sponsoring Minister, Mr O’Donoghue stated:

“Section 4 is intended to strengthen the position of tribunals of inquiry so as to ensure that its [*sic*] orders can be enforced... The provisions in the Constitution in relation to trial of offences are such that a tribunal cannot have the same powers as the High Court has to commit a person

³⁷ *Attorney-General v Times Newspapers Ltd* [1974] AC 273, 300 *per* Lord Reid; quoted with approval by Denham J in *Kelly v O’Neill* [2000] 1 IR 354, 364.

³⁸ See also 2002 Act, section 6(6), which is in very similar terms.

for failure to obey orders. However, in framing section 4 of the Bill I have taken into account section 3 of the *Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997*, which provides that where a person disobeys a direction of a committee the committee may seek an order of the High Court to have the direction complied with. section 4 of the Bill is similar to the provisions in the 1997 Act and is intended to provide an effective method of enforcement of a tribunal's orders."³⁹

6.41 This provision has been described by the Supreme Court as one of a number of measures taken by the Oireachtas "to strengthen the powers available to... tribunals to ensure that the evidence which they require to bring their investigations to a comprehensive and speedy conclusion, whether it takes the form of oral testimony or documentary evidence, is made available to them as expeditiously as is practicable".⁴⁰ This purpose is achieved by a process of legal alchemy, whereby section 4 allows an order made by a tribunal of inquiry to be transformed into an order of the High Court, with all that that entails, including the possibility of attachment and committal for contempt. In effect, the tribunal's order becomes subsumed into the order of the court and, where that order is breached, the summary contempt jurisdiction is available to coerce the recalcitrant.⁴¹

6.42 The perceived need for section 4 can perhaps be illustrated by reference to comments made by two Supreme Court judges, one in his capacity as chairman of a tribunal of inquiry, and the other in her judicial role. In his capacity as chairman of the "Kerry Babies Tribunal", Lynch J addressed himself to a situation in which protests had taken place outside the premises in which the tribunal was sitting. He said:

"[A]s a Judge of the High Court I have extremely wide powers to preserve the integrity of any proceedings over which I am presiding and I not only intend, but it is my duty, to exercise those powers where

³⁹ 484 *Dáil Debates* Cols 863-864 (10 December 1997). Section 6(6) of the *Tribunals of Inquiry (Evidence) (Amendment) Act, 2002* is quite similar to section 4 of the 1997 Act. Section 6(6) provides: "Where a person mentioned in subsection (4) fails or refuses to comply with a requirement made to the person by an investigator under that subsection, the Court may, on application to it in a summary manner in that behalf made by the investigator with the consent of the tribunal concerned, order the person to comply with the requirement and make such other (if any) order as it considers necessary and just to enable the requirement to have full effect."

⁴⁰ *Flood v Lawlor* Supreme Court 12 December 2001, 57 *per* Keane CJ.

⁴¹ That this is the way in which the provision is understood is clear from *Lawlor v Flood* [1999] 3 IR 107; *Lawlor v Flood* High Court 2 July 1999; *Murphy v Flood* High Court 1 July 1999; *Haughey v Moriarty* Supreme Court 28 July 1998.

necessary, to ensure that this tribunal will proceed in an orderly, free and open manner.”⁴²

6.43 And a little later:

“As I have said, apart altogether from the offences created by section 3 of the 1979 Act which would be matters for the Director of Public Prosecutions to bring before the Courts, I have the powers of a High Court Judge to commit to prison any person who threatens the integrity of this tribunal... [I]f any person shall breach any of these prohibitions they shall be committed to prison by me.”⁴³

6.44 In the more reflective surroundings of the Supreme Court and with the benefit of over 15 years experience of tribunals, Denham J has made comments quite at odds with these statements. In *Lawlor v Flood*, the learned judge said:

“The powers of a tribunal are those conferred by legislation. The fact that the respondent is a judge of the High Court is not relevant to the determination of his jurisdiction as sole member of the tribunal of inquiry.”⁴⁴

6.45 With respect to the views of Lynch J, which it should be said were delivered in a tense and highly-charged atmosphere, Denham J is surely correct. A High Court judge sitting in this capacity has powers to commit an individual to prison. This, however, does not apply when a High Court judge is acting as chairman of a tribunal of inquiry.⁴⁵ Section 4 of the 1997 Act is an attempt to remedy what was clearly perceived as a deficiency in this regard, by allowing a tribunal to tap into the contempt powers of the High Court.

6.46 Next, let us comment on the technique employed in section 4, and how it has been operated. Read literally, it might have been thought that a tribunal, drawing on its power to “make such orders as it considers necessary...” and, to do so, exercising “all such powers, rights and privileges as are vested in the High Court...” would itself make the necessary order. Then, if the person to whom the order is addressed fails to obey, it would be for the High Court straightaway to consider whether the order had been broken and, if so, to enforce it, including the possibility of attachment. Almost certainly, such an arrangement would be constitutional on the basis that, in making such an order, the tribunal would not be

⁴² *Report of the Tribunal of Inquiry into “The Kerry Babies Case”* (Prl 3514 October 1985) at 143.

⁴³ *Op cit* fn 42 at 145.

⁴⁴ [1999] 3 IR 107, 135.

⁴⁵ In this respect it may be that the fact that tribunals have, in Ireland, been traditionally chaired only by judges tends to lead to some confusion.

administering justice.⁴⁶ Rather, the administration of justice does not occur until the stage at which the question of whether there has been a breach of the order is adjudicated upon, and this is always left to the High Court.

6.47 Nevertheless, the Commission can see that there are policy reasons why it might be thought a good thing for the High Court also to be involved at the initial, but important stage of making the order. This is what is now provided for by section 4 of the 1997 Act. This provision presupposes the existence of a tribunal order (whether under section 1(1) of the 1921 Act, or section 4 of the 1979 Act), and then, itself, goes on to state that if the tribunal order is flouted, the High Court may make its own order, which will necessarily usually be at least similar to the tribunal order.

(d) Case Study: The *Flood v Lawlor* Saga

6.48 At the time of writing, section 4 has been extensively (although, as we shall see, not quite comprehensively) tested. Its operation in practice can be illustrated by reference to the saga involving Mr Liam Lawlor TD and the *Flood Tribunal*, which, despite its prominence in the news media has not, we believe, been thoroughly analysed anywhere else. Due to the number of occasions upon which the matter has been before the High and Supreme Courts, this episode gives some insight into the courts' approach to the provision. The decisions also shed light on the manner in which the courts will approach their own contempt jurisdiction, when it is invoked in support of the work of tribunals of inquiry.

6.49 The story dates back to the spring of 1999. In April of that year, the *Flood Tribunal* made certain orders against Mr Lawlor, one of which required him to make discovery of certain documents. Mr Lawlor applied by way of judicial review to have these orders quashed and, on the 2 July 1999, was successful at first instance in respect of several orders, but not the one directing him to make discovery.⁴⁷ That determination was not appealed to the Supreme Court.⁴⁸ The decision of the Supreme Court in relation to the other orders (those quashed by the High Court) was delivered on the 8 October 1999, and upheld the decision of the High Court.⁴⁹

6.50 Meanwhile, on the 7 October 1999, the tribunal received a "statement" of discovery from Mr Lawlor.⁵⁰ It appears that the tribunal was not satisfied with this, as the statement received did not constitute an affidavit of discovery in the

⁴⁶ See paragraph 6.71 where the reasons for this are discussed.

⁴⁷ *Lawlor v Flood* High Court (Kearns J) 2 July 1999.

⁴⁸ [1999] 3 IR 107.

⁴⁹ *Lawlor v Flood* [1999] 3 IR 107

⁵⁰ This "statement" was not on oath; it seems that the order of the High Court of the 2 July 1999 was not explicit in this regard: see *Flood v Lawlor* High Court (Smyth J) 15 January 2001, 3.

conventional form.⁵¹ In May 2000, the tribunal wrote to Mr Lawlor, informing him of its view and requesting him to provide further information. The letter indicated that, if Mr Lawlor declined to do so, the tribunal would consider making certain specified orders against him, including an order for discovery. Having received a negative response from Mr Lawlor, the tribunal on the 8 June 2000 made an order for discovery of (a) documents relating to any financial institution; (b) documents relating to companies in which Mr Lawlor held an interest; and (c) documents relating to the tax amnesty. Fourteen days was given for compliance with the order. In the absence of a response, the tribunal, in late July 2000, invited Mr Lawlor to challenge the validity of the order of the 8 June, if he disputed it, but no such challenge was instituted.⁵²

6.51 At around the same date, orders were also made requiring Mr Lawlor to attend before the tribunal in due course and (i) to bring and hand over the documents and records the subject of the Order for discovery mentioned in the previous paragraph, and (ii) to give evidence in relation to the documents and records the subject of the order for discovery. The tribunal took the view that Mr Lawlor had failed to comply with these orders, and on the 21 September 2000 issued two summonses under section 1(1) of the 1921 Act directing Mr Lawlor to attend before the tribunal and to comply with the two orders just mentioned. Mr Lawlor did not appear, and the correspondence between him and the tribunal was read into the public record.

6.52 Next, the tribunal instituted proceedings under section 4 by way of special summons⁵³ seeking several orders. The first was “an order compelling [Mr Lawlor] to comply with the order of the [tribunal] made on the 8 June 2000”. The tribunal also sought a new date by which discovery was to be made, and orders in substantially the same terms as the summonses of 21 September 2000. The matter came on for hearing before Smyth J, who on 24 October 2000 upheld the validity of the discovery order and ordered Mr Lawlor to comply with it, setting different deadlines in respect of various categories of documents.⁵⁴ He expressly stipulated that discovery should be made in the manner required under the Rules of the Superior Courts. He also upheld the summonses and made orders in support of them.

⁵¹ As prescribed under the *Rules of the Superior Courts 1986* (SI No. 15 of 1986), Appendix C, Form No 10.

⁵² If the tribunal had possessed the legal capacity to do so, it might, at this point, have used the power to make a case stated to the High Court. For a discussion of such a procedure in the context of the Commission to Inquire into Child Abuse and the applicability of this procedure to other inquiries see paragraphs 5.72-5.86.

⁵³ This can be deduced from the record number of the relevant proceedings and seems to be in line with Order 3 rule 21 of the *Rules of the Superior Courts*, which provides that the special summons procedure may be used in the case of “[a]ny other proceeding which is required or authorised by statute to be brought in a summary manner and for which no other procedure is prescribed by these Rules”.

⁵⁴ High Court (Smyth J) 24 October 2000.

6.53 No appeal was taken against so much of the High Court decision as required Mr Lawlor to make discovery of the documents and to attend before the tribunal and to hand over those in his power or possession. However, an appeal was taken against the decision ordering him to attend before the tribunal in public session and to give evidence in relation to the documents. Exactly a month after the decision of the High Court was delivered; the Supreme Court dismissed this appeal.⁵⁵

6.54 On the 6 November 2000, Mr Lawlor swore an affidavit of discovery. Due to dissatisfaction expressed by the tribunal, a supplementary affidavit was sworn on the 11 December 2000. Following this, Mr Lawlor was questioned before the tribunal for three days in mid-December. The chairman seems to have become increasingly exasperated with Mr Lawlor's evasions and, at the conclusion of his evidence; the tribunal brought a motion for attachment and committal before the High Court, in respect of alleged contempt of the orders of the High and Supreme Courts.

6.55 The contempt motion came on for hearing before Smyth J once more. This judgment was given on the 15 January 2001. Following a detailed review of the transcripts of the proceedings before the tribunal at which Mr Lawlor was questioned. The court found as a fact that there had been "very substantial non-compliance with the orders" and that "the word vast might be a more correct description of the amount of documentation still to be discovered."⁵⁶

6.56 Having held, on the application of the "beyond any reasonable doubt" test, that Mr Lawlor was in deliberate and serious contempt of the court orders to discover and to produce documents, and to answer questions upon those documents, Smyth J went on to consider the application of the principles of civil contempt to the case. He said that there were two objectives in contempt proceedings: "1. To mark the court's disapproval of the disobedience of its order(s)" and "2. To secure compliance with that order (or those orders) in future."⁵⁷ To mark its disapproval, he stated, the court was entitled to impose a fine or a prison sentence. He indicated that: "In contempt of court cases suspension is possible in a much wider range of circumstances than in criminal cases. It is often but not always the first way of attempting to secure compliance with the court's order." Smyth J went on to impose a prison sentence of three months, suspending all but the first seven days so as to allow Mr Lawlor to comply with the orders of the court. It may be observed, in passing at this stage since the point will be returned to at paragraph 6.66, that Smyth J's conception of the operation of the court's civil contempt jurisdiction was novel but practical. However, no appeal was taken from his judgment.

⁵⁵ Supreme Court 24 November 2000. This judgment is considered in more detail at paragraphs 6.58-6.64

⁵⁶ *Flood v Lawlor* High Court (Smyth J) 15 January 2001, at 39.

⁵⁷ *Ibid* at 43.

6.57 Following his week in prison, Mr Lawlor delivered affidavits and documents to the tribunal on a number of occasions from January to March 2001. However, the tribunal was not satisfied with the discovery as made, in particular because it seems that the affidavits were not in the format prescribed under the Rules of the Superior Courts, a format which requires the deponent not only to identify all documents in his power or possession, but also those which were in his power or possession but no longer are, and to the best of his ability to explain what became of those documents.⁵⁸ The matter was re-entered before the court and on the 31 July 2001 Smyth J found that there had been a serious failure to comply with the High Court order of the 15 January.⁵⁹ He committed Mr Lawlor to prison for a further seven days of the three month sentence and fined him IR£5,000 (€6,349). He also ordered that Mr Lawlor should make further and better discovery, in the form prescribed under the Rules, in accordance with the orders already made against him. Mr Lawlor appealed against this decision and was granted a stay of Smyth J's order pending the determination of the appeal by the Supreme Court.⁶⁰ That determination was forthcoming on 12 December 2001, when the appeal was dismissed.⁶¹

(1) *Flood v Lawlor Judgments in the Supreme Court*

6.58 Keane CJ delivered the main judgment,⁶² and he addressed the submission made on behalf of Mr Lawlor that, as the case was one of civil contempt,⁶³ the appropriate penalty was imprisonment, only until such time as the contemnor should purge his contempt. Hence, it was argued, the imposition of a fine and a definite sentence was unlawful. The Chief Justice quoted from the decision of Ó Dalaigh CJ in *Keegan v de Burca*,⁶⁴ where it was stated:

“Criminal contempt consists of behaviour calculated to prejudice the due course of justice, such as contempt *in facie curiae*, words written or spoken or acts calculated to prejudice the due course of justice or disobedience to a writ of *habeas corpus* by the person to whom it is directed – to give but some examples of this class of contempt. Civil

⁵⁸ Rules of the Superior Courts 1986 Appendix C Form No 10.

⁵⁹ *Flood v Lawlor* High Court (Smyth J) 31 July 2001. Interestingly, Smyth J did not think it necessary to identify each and every instance of non-compliance with the orders; he confined himself to indicating “by illustration or example some aspects in which this deficiency appeared”.

⁶⁰ *Flood v Lawlor* Supreme Court 3 August 2001.

⁶¹ *Flood v Lawlor* Supreme Court 12 December 2001.

⁶² Fennelly J delivered a short concurring judgment.

⁶³ For the significance of this category, see paragraph 6.09-6.17.

⁶⁴ [1973] IR 223, 227.

contempt usually arises where there is a disobedience to an order of the court by a party to the proceedings and in which the court has generally no interest to interfere unless moved by the party for whose benefit the order was made. Criminal contempt is a common-law misdemeanour and, as such, is punishable by both imprisonment and fine at discretion, that is to say, without statutory limit, its object is punitive: see the judgment of this Court in *In re Haughey*.⁶⁵ Civil contempt, on the other hand, is not punitive in its object but coercive in its purpose of compelling the party committed to comply with the order of the court, and the period of committal would be until such time as the order is complied with or until it is waived by the party for whose benefit the order was made. In the case of civil contempt only the court can order release but the period of committal cannot be commuted or remitted as a sentence for a term definite in a criminal matter can be commuted or remitted pursuant to Article 13.6 of the Constitution.”

6.59 This represented the view of the majority in *Keegan*. Keane CJ then quoted from the dissenting judgment of McLoughlin J in the same case, as follows:

“...in a case such as this the purpose of the sentence is not *primarily* punitive but coercive and more strictly in the interests of justice and the effect of the administration of justice. By this means the wrong can best be remedied and the plaintiff’s right of action duly litigated.”⁶⁶

6.60 Keane CJ went on to comment on these passages. It is worth quoting his judgment at some length on this point. He said:

“In that case, the essential issue for determination was as to whether a refusal to answer a question during the course of civil proceedings constituted contempt in the face of the court which was criminal contempt and accordingly punishable only by a determinate sentence. The majority of the court were of the view that it was a criminal contempt and hence punishable by a determinate sentence only. McLoughlin J was of the view that, since the primary object of the imposition of the sentence in that case was to ensure that the question was answered, it was appropriate to deal with it by means of an indeterminate sentence until the contemnor had purged her contempt.

Accordingly, while the decision suggests that there may be some room for a difference of view as to whether a sentence imposed in respect of civil contempt is *exclusively* – as distinct from *primarily* – coercive in its nature in civil proceedings generally, I am satisfied that where, as here, the proceedings are inquisitorial in their nature and the legislature has expressly empowered the High Court to secure compliance with the

⁶⁵ [1971] IR 217.

⁶⁶ [1973] IR 223, 236 Keane CJ’s emphasis.

orders of the tribunal, it cannot be said that a sentence imposed in respect of a contumelious disregard of the orders of the tribunal and the High Court is coercive only in its nature. The machinery available for dealing with contempt of this nature exists not simply to advance the private, although legitimate, interests of a litigant: it is here to advance the public interest in the proper and expeditious investigation of the matters within the remit of the tribunal and so as to ensure that, not merely the appellant in this case, but all persons who are required by law to give evidence, whether by way of oral testimony or in documentary form, to the tribunal comply with their obligations fully without qualification.

I am also satisfied that a court has jurisdiction to suspend, in whole or in part, a sentence of imprisonment imposed in respect of civil contempt and thereafter, in the event of a further contempt, may at its discretion require the party in default to serve some or all of the balance of the sentence.”

6.61 Having accepted that contempt had been demonstrated, Keane CJ concluded by stating that, as the trial judge had made no error of principle, and had not imposed a sentence that was disproportionate or excessive, he would not interfere with the order of the High Court.

6.62 In terms of the pre-existing common law, this reasoning might appear rather creative. Insofar as it deals with the issue of civil contempt, which the contempt in *Flood v Lawlor* undoubtedly was, *Keegan v de Burca* stands only for the proposition that imprisonment on foot of such contempt is coercive in its purpose and merits an indeterminate sentence. McLoughlin J, in the passage quoted, had nothing whatsoever to say about civil contempt, confining his remarks to the criminal variety. (Earlier in his judgment he had stated that “[c]ontempts have been classified as criminal contempts and civil contempts, but there does not seem to be any clear dividing line.”)⁶⁷

6.63 The learned Chief Justice attached significance to the fact that “the proceedings are inquisitorial”, and it can with considerable force be argued that both the statutory invocation of contempt of court in section 4 intended to circumvent the decision in *In re Haughey* and the involvement of the tribunal justifies some remodelling of common law contempt of court. The Chief Justice seems to be of the view that the legitimate public interest in the progress of the tribunal’s investigations takes the case out of the ordinary run of those in which a court order is disobeyed. And even apart from the involvement of a tribunal of inquiry, there are good arguments in favour of the proposition that sentencing in

⁶⁷ [1973] IR 223, 235.

respect of civil contempt should be capable of having a punitive as well as a coercive component.⁶⁸

6.64 In any case, the law in the light of the Supreme Court's decision seems to be that contempt proceedings brought on foot of a section 4 order constitute a special case, in which punitive sanctions are available in respect of civil contempt. It is an open question as to whether the converse (*ie* that coercive sanctions are available in respect of a criminal contempt) is also true. The better view (having regard to the present state of the law in which the civil/criminal dichotomy remains) would appear to be that it is not. First, while there is a direct parallel between the breach of an order made under section 4 and the breach of the order of the tribunal (on which the court's order is predicated), there is no similar parallel between acts which would constitute criminal contempt of court, and similar acts directed against the tribunal. To take an example, if a person "scandalises" a tribunal by the publication of venomous criticism, there is no provision whereby that can be brought to the attention of the court in the same way as a failure to obey an order of the tribunal. Secondly, an act constituting criminal contempt of the court would almost certainly be less directly related to the underlying orders (of the tribunal) at issue.

6.65 What lessons can be learned from the Lawlor saga? First, although it was played out over almost three years, from the making of the first discovery order to the final determination by the Supreme Court, it does seem that the courts responded with alacrity on each occasion when the matter was brought before them. For instance, Mr Lawlor's non-attendance before the tribunal, which actually sparked the section 4 application, was on the 10 October 2000; two weeks later judgment had been delivered. Similarly, in respect of the first contempt application was made to the court shortly before Christmas (during the vacation), and judgment was handed down on the 15 January 2001. Most of the delays seem to have stemmed from the tribunal's dealings with Mr Lawlor, whether due to his tardiness in actually furnishing the affidavits he was ordered to provide or through internal delays in the tribunal, possibly caused by the necessity of examining the voluminous documentation provided. Insofar as section 4 was intended to provide a responsive mechanism, whereby matters could be dealt with quickly, it seems to have succeeded quite well. The alternative of prosecution for the offence of failure to comply with an order of the tribunal would almost certainly have been more cumbersome, and the whole procedure would have had to be repeated upon Mr Lawlor's failure to comply with his discovery obligations after his first spell in prison.

6.66 Secondly, there is considerable merit from a practical point of view in having available a mechanism which can mix coercion with punishment, as the circumstances of the case demand. The Supreme Court has decided that, at least insofar as it relates to the proceedings of a tribunal of inquiry, the contempt of court

⁶⁸ See Law Reform Commission *Consultation Paper on Contempt of Court* (July 1991) 176-177. See also O'Donnell, "Some Reflections on the Law of Contempt" (2002) 2 *Judicial Studies Institute Journal* 88.

jurisdiction is even more flexible than when protecting the administration of justice alone. Although Mr Lawlor's contempt was clearly of the civil variety, the decision to impose a determinate fine and sentence was upheld, which as we have seen⁶⁹ represents a modification of the common law position in respect of contempt of court. Suspension of part of the sentence seems to correspond to the coercive element which is usually central in cases of civil contempt. The ability to mix the punitive and coercive elements allows the court to achieve, in any given case, the correct balance to achieve its objective, whether that be to compel a person to produce documents, or to express the court's displeasure at the wilful breach of its (and by extension the tribunal's) order.

6.67 One particularly interesting feature of the section 4 jurisdiction is the standard of appraisal exercised by the court in relation to the orders which the tribunal is seeking to enforce. In his judgment on the tribunal's initial application, Smyth J made several comments which seem to indicate that he approached the case on the same basis as if it were an application for judicial review. That is to say, in relation to the validity of the tribunal's own orders, upon which the application depended, he allowed a significant measure of latitude to the tribunal. He went no further than to review the making of the orders and did not consider whether he, had he been in the position of the tribunal, would have made the same orders. For instance, in relation to relevance of the documents in respect of which discovery had been ordered, he stated: "I hold that relevance in the instant case is a matter for decision by the tribunal."⁷⁰ Later in his judgment, he held that the tribunal had jurisdiction to make the discovery order and that it was an order within the tribunal's discretion.⁷¹ In relation to the summonses, he commented:

"...I am satisfied that by reason of the responses of Mr Lawlor, the tribunal was perfectly within its rights to issue the summonses to produce documents and records requested related to the Discovery Order.

The summons to give evidence concerning the documents and records related to the Discovery order at a sitting in public is an Order made within jurisdiction and was not an unreasonable Order for the sole member to have made in all the circumstances disclosed to the Court."⁷²

6.68 On appeal to the Supreme Court, similar remarks were made. In the course of his judgment, Keane CJ observed that the courts were obliged to "afford a

⁶⁹ See paragraph 6.56.

⁷⁰ *Flood v Lawlor* High Court (Smyth J) 24 October 2000, at 10.

⁷¹ *Op cit* fn 70, at 13.

⁷² *Ibid* at 26.

significant measure of discretion to the tribunal as to the way in which it conducts these proceedings”.⁷³

6.69 It may be that this approach is warranted by the statement in section 4 that the application to the High Court is to be made in a “summary” manner. On one interpretation, this suggests that the court should not embark upon a full and detailed consideration as to whether or not the order ought to have been made; if the order would pass muster on an application for judicial review, the court ought to make a supportive order under section 4. This is a most convenient arrangement: to require the court to exercise a full judgment of this nature it might well be necessary to appraise it of an enormous amount of information which has been gathered, or taken in evidence, by the tribunal. It can readily be envisaged that this could be a lengthy, difficult and expensive process. It would entail a re-hearing of arguments made to the tribunal before the court, with the significant difference that the court which, as a matter of law (and possibly as a matter of fact), knows nothing of the inquiry, must be given enough information to allow it to exercise an informed judgment. The potential for disputes, in relation to presenting the court with a “potted history” of the relevant tribunal proceedings up to the making of the order, would be very great.

6.70 However, it must be observed that the consequences of the court upholding an order on an application for judicial review are significantly different from those attendant upon the making of an order under section 4. In judicial review proceedings a finding in favour of the tribunal would simply mean that the order remains in being. The position is the same as if the proceedings had never been brought. By contrast, where an order is made under section 4 the order of the tribunal becomes, in all but name, an order of the High Court, with the full panoply of High Court powers becoming available to enforce it. Yet the order is made by the court without full consideration having been given as to whether or not it was warranted; all that the court itself has decided is that the order is legal. On this analysis, the court’s discretion is significantly fettered. Despite this, the Commission does not think, however, that it can be argued that this arrangement involves the exercise of the judicial function by a body which is not a court, something which would violate Article 34.1, by which justice must be exercised only by a court. The central reason for the view that there is no administration of justice here is that the High Court is, at this stage, merely setting a standard. Significantly, the making of such an order is not one of the five classic characteristics of the judicial function.⁷⁴ In the present context, the exercise of the judicial function commences only when, assuming that the order is disobeyed, the contemnor is brought before the High Court, to answer for his alleged contempt.

6.71 An analogy can be drawn with section 160 of the *Planning and Development Act 2000*,⁷⁵ pursuant to which the High Court (or the Circuit Court)

⁷³ *Flood v Laylor* Supreme Court 24 November 2000, 6.

⁷⁴ The generally accepted formulation of which is quoted at paragraph 12.32.

⁷⁵ The successor of the *Local Government (Planning and Development) Act 1976*, section 27.

may make an order in injunctive terms directing a person who has *inter alia* breached a term of a planning permission fixed by a non-judicial body (*ie* a planning authority or An Bord Pleanála) to remedy such breach. Commenting on the predecessor of this provision, Gannon J has stated:

“In relation to the development and use of land within the scope of the Planning Acts when permission has been granted, with or without conditions, obligations are created which are enforceable under statutory procedures which might be found deficient for want of expedition in some circumstances. In such circumstances there would be little risk of injustice in invoking the authority of the court by a summary procedure to enforce performance or to restrain abuse of the obligations imposed.”⁷⁶

6.72 In other words, the court is prepared to accept the standards laid down by the non-judicial body unless it is plainly unlawful, and of course the consequences of disobeying an order under section 160 are similar to those of disobeying an order made under section 4 of the 1997 Act. Just as with section 4, one body effectively sets the standard, and the court confirms it (as it were), and then decides whether or not that standard has been breached.

6.73 *Having regard to the foregoing, the Commission takes the view that section 4 of the 1997 Act is constitutional. And since its utility is difficult to gainsay, we would not recommend that any substantive change be made in relation to section 4 of the 1997 Act. We shall however suggest (at paragraph 6.103) a largely presentational change.*

6.74 It seems much more convenient if, instead of having three intimately-related provisions spread out over three statutes (section 1(1) of the 1921 Act; section 4 of the 1979 Act and section 4 of the 1997 Act), they were located next to each other. The function of section 4 of the 1997 Act in relation to the other two is clear: it authorises the High Court to make the necessary order if a tribunal's order, the making of which is authorised by the other two provisions, has been flouted. On this analysis, section 4 of the 1997 Act should come last. At paragraph 6.103 we shall look further at the question of how to consolidate section 1(1) of the 1921 Act; section 4 of the 1979 Act and section 4 of the 1997 Act.

Part III Substantive Powers

6.75 For all that, circumstances will vary widely from inquiry to inquiry, the task of any individual tribunal can actually be described fairly simply: find the facts,

⁷⁶ *Dublin County Council v Kirby* [1985] ILRM. 325 at 329. Relief under section 27 was also available in circumstances where no planning permission had been granted, and Gannon J indicated that different considerations would apply. However, the better parallel with the present situation is that in which the planning authority has made a decision, rather than that in which it has not.

report and make such recommendations as are necessary. These functions dictate what powers an inquiry must have, and here the Commission will consider how well existing legislation fulfils the requirements, and the ways in which it might be improved.

6.76 However, before dealing with the specific powers conferred on tribunals, it is appropriate to deal with one issue of more general application: how such powers ought to be articulated, in particular, ought there to be a ‘catch-all’ provision enabling a tribunal to make all such orders, being orders that could be made by the High Court. Although it would be useful to set out individually each and every power that might be exercised by a body such as a tribunal of inquiry, it is suggested that if this were all that were done, there would be a danger of neglecting to provide for a simple yet important power. Thus we would retain a ‘catch-all’ provision. It must be emphasised that such a provision operates merely as a ‘fail safe mechanism’, within the wider framework of detailed substantive powers, which recognises the reality that a draftsman may omit inadvertently a useful power.

(a) Definition of Powers, Rights and Privileges

6.77 The two main provisions in existing law conferring powers on tribunals of inquiry are section 1(1) of the 1921 Act and section 4 of the 1979 Act. The first provides that, in respect of certain defined categories relating to the taking of evidence and so on, “the tribunal shall have all such powers, rights, and privileges as are vested in the High Court... or a judge of... such court, on the occasion of an action”. The wording of section 4 is very similar, although not identical. It states that: “A tribunal may make such orders as it considers necessary for the performance of its functions and it shall have, in relation to their making, all such powers, rights and privileges as are vested in the High Court or a judge of that Court in respect of the making of orders”. There is a curious dichotomy here between the power to make “orders” and, on the other hand, “powers, rights and privileges” to which we return at paragraph 6.89. For the present, let us focus on the second part of section 4 of the 1997 Act and section 1(1) of the 1921 Act. The gist of both provisions is that, in those areas where it is given competence, a tribunal enjoys all the “powers, rights and privileges” of a High Court judge.

6.78 Why should the powers of a tribunal be defined by reference to the High Court? The more persuasive answer is that the reference was intended to imbue a tribunal with something akin to the High Court’s contempt jurisdiction, and in that way to ensure that a power which might be useful is not omitted. One particular example of this is that the invocation of High Court powers, rights and privileges carries with it not only the power to make the primary order (eg the order to attend before the tribunal to be examined), but also the host of ancillary and supportive powers enjoyed by the High Court in relation to its own orders: the High Court not only has the power to make an order: it can take steps to see that this order is, in fact, obeyed. Furthermore, in the conduct of its own hearings, the court has wide-ranging powers under the criminal contempt jurisdiction to ensure that it is neither obstructed nor otherwise interfered with. When section 1(1) of the 1921 Act is read in conjunction with subsection (2) of the same section, this view is

strengthened. As has already been observed, subsection (2) allowed a tribunal, where a person committed an act which would, if the tribunal were a court, have been contempt of court, to certify the offence to the High Court, which could administer punishment in like manner as if the offender were in contempt of court. That provision was repealed following the decision of the Supreme Court in *In re Haughey*, but section 1(1) remains unamended, and section 4 of the 1979 Act has followed its lead.

6.79 Three types of point arise in relation to this. First, although the amendment of section 1(2) does appear to have been necessitated by *In re Haughey*, the change has actually highlighted a difficulty with subsection (1) and section 4 of the 1979 Act. When the old section 1(2) was part of the law, it stated that the way in which a “contempt of tribunal” was dealt with was by way of certificate to the High Court. Only that court had the power to administer punishment but since the repeal of section 1(2) by the 1979 Act, there is no longer any obvious restriction on the phrase (in section 1(1)) “all powers, rights and privileges” of the High Court. On a literal interpretation, this suggests that a tribunal is conferred with full contempt powers, which would include the power to commit an individual to prison. This is not what is intended, and, having regard to the decision in *In re Haughey*, this would be manifestly unconstitutional.

6.80 The 1921 Act is not an Act of the Oireachtas, and as such does not benefit from the presumption of constitutionality. Such an Act is carried over into the laws of the State only to the extent it is compatible with the Constitution. It is therefore somewhat unclear whether the canons of construction laid down in *McDonald v Bórd na gCon*⁷⁷ and *East Donegal Co-Operative Marts v Attorney General*⁷⁸ are applicable to section 1(1); they are certainly applicable to section 4 of the 1979 Act.⁷⁹ It may be that both provisions can be interpreted so as to be subject to an implied saver: “provided that the tribunal does not enjoy any power to attach or commit or otherwise to impose punishment for contempt”. Even if this were not the case, however, it seems to us that if the same provision were to be re-enacted in a new Act and this proviso were included, this would overcome the difficulty (and this view is implemented in the form of words suggested at paragraph 6.109)

6.81 Secondly, while, as mentioned in paragraph 6.78, the powers of a tribunal are defined by reference to the High Court, it must be borne in mind that a tribunal of inquiry is an entity radically different from the High Court. According to Denham J, it is a body unusual in our legal system: an inquisitorial tribunal.⁸⁰ The most salient difference for present purposes is that a court’s judgment is based on evidence almost always brought before it by parties who are adversaries. The

⁷⁷ [1965] IR 217.

⁷⁸ [1970] IR 317.

⁷⁹ *Hardy v Ireland* [1994] 2 IR 550.

⁸⁰ *Boyhan v Beef Tribunal* [1993] 1 IR 210, 222.

tribunal is an active participant in the calling of witnesses and the adducing of evidence, in circumstances where there are no parties and hence no true adversarial process, and exercises its own judgment on that same evidence: we return to this point in paragraph 6.87.

6.82 On the other hand, other recent legislation concerning inquiries conducted by the Comptroller and Auditor General,⁸¹ the Oireachtas Committees⁸² or the *Commission to Inquire into Child Abuse Act*⁸³ has eschewed any such reference, preferring to state the powers specifically.

6.83 In the end, it seems to the Commission that there are two alternative ways of articulating the powers of inquiry. The first is to continue to define the powers by reference to those of the High Court, but subject to an explicit proviso to the effect that the tribunal enjoys no power to attach, commit or otherwise punish for contempt of court. The alternative is to do away altogether with the reference to the High Court.

6.84 The determinative consideration in relation to which method is preferable seems to us to be this. Up to now the express powers appear generally to have been working satisfactorily, bucking the modern trend towards legislative verbosity.⁸⁴ The courts have not been unduly troubled by the mismatch between court and tribunal in relation to the functions which they perform⁸⁵ (and it must be recognised that there are as many similarities as there are differences) and seem simply to have interpolated the words “*mutatis mutandis*” into the relevant provisions.

6.85 For instance, the reference to the privileges of the High Court is extremely useful shorthand for protecting the tribunal from defamation proceedings in relation to its utterances. Although the position of counsel to the tribunal has no direct equivalent in court cases, the Commission is confident that, should the question arise, the courts would take the view that such individuals are entitled to the same privileges and immunities as counsel for a party appearing before the High Court. The courts, and the tribunals themselves, have become familiar with the operation of the current legislation, and a body of judicial decisions has been built

⁸¹ *Comptroller and Auditor General and Committees of the Houses of the Oireachtas (Special Provisions) Act 1997*.

⁸² *Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1998*.

⁸³ This Act is considered in more detail in Chapter 3.

⁸⁴ See eg *Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997*; *Comptroller and Auditor General and Committees of the Houses of the Oireachtas (Special Provisions) Act 1998*; *Commission to Inquire into Child Abuse Act 2000*.

⁸⁵ See paragraph 6.81.

up to act as an aid to interpretation. The Commission is aware of only three occasions on which the courts have struck down an attempt by a tribunal to exercise its powers,⁸⁶ and in none of these cases was the difference noted here at issue. Furthermore, as we shall see, a reference to the High Court in relation to a catch-all provision can actually operate to *restrict* its ambit.

6.86 Finally, we should briefly mention one possible, related objection to the form of words used in the Acts of 1921 and 1979. Section 1(1) vests the tribunal with the “powers, rights, and privileges... vested in the High Court... or a judge of... such court, on the occasion of an action”, whereas section 4 refers to the “powers, rights and privileges as are vested in the High Court or a judge of that Court in respect of the making of orders”. However, the powers, rights and privileges of a judge of the High Court in respect of the making of orders would seem to encompass and go beyond the powers, rights and privileges vested in such a judge on the occasion of an action. For example, the High Court has a wardship jurisdiction in the exercise of which it can make orders that would not be possible in the context of a *lis inter partes*. On this interpretation the wording in section 4 is broader. In the one decision of the Supreme Court in which the two provisions fell to be considered and compared, this distinction was not mentioned. Hamilton CJ stated in respect of section 4 that it “cannot be interpreted as giving to a tribunal powers in excess of those vested in the High Court *in the course of an action*”.⁸⁷

6.87 In any event, the fact is that tribunals and courts have radically different purposes has already been noted. It is questionable whether the powers available to a court “on the occasion of an action” would extend so far as to allow a tribunal to make the orders it must make in the context of an inquisitorial inquiry. For example, a court does not decide what witnesses to call, so can the High Court’s power to enforce the attendance of witnesses on the occasion of an action, which is exercised on the application of a party to the proceedings, permit a tribunal to call a witness of its own motion? It seems to us that any difficulty (which is in all likelihood illusory) can be overcome by removing the references to “on the occasion of an action” and inserting “in respect of the making of orders”.

6.88 *Accordingly, the Commission recommends that “the powers, rights and privileges” of tribunals of inquiry continue to be defined by reference to the powers of the High Court, but with no reference to “the course of an action”.*

(b) Capacity to Make Orders

6.89 As indicated at paragraph 6.77, the existing law draws a distinction between the “powers, rights and privileges” of a tribunal, which may be regarded as its subsidiary accoutrements and on the other hand, its capacity to make orders, to

⁸⁶ *Irish Times v Flood* High Court (Morris P) 28 September 1999 see paragraph 8.31-8.41 *Lawlor v Flood* High Court (Kearns J) 2 July 1999 see paragraph 6.48-6.57; [1999] 3 IR 107; and *Haughey v Moriarty* [1999] 3 IR 1 see paragraph 6.124

⁸⁷ *Ibid* at 132 (emphasis added).

which we now turn.⁸⁸ Earlier, we noted that by section 4 of the 1997 Act, the High Court may enforce the order of a tribunal. Here we are concerned with a tribunal's capacity to make the initial order. There are two sources of this capacity. The first is in section 1(1) of the 1921 Act (quoted at paragraph 6.03) which implies the existence of this power in the field of three specific areas of which the most important are enforcing the attendance of witnesses and the production of documents. Secondly, there is a catch-all contained in the words italicised in the quotation below of section 4 of the 1979 Act, a free-standing section not expressly connected with section 1(1) of the 1921 Act, although, as we shall see, a nexus of sorts has been established by judicial decision. It provides:

*“A tribunal may make such orders as it considers necessary for the purposes of its functions, and it shall have, in relation to their making, all such powers, rights and privileges as are vested in the High Court or a judge of that Court in respect of the making of orders.”*⁸⁹ (Emphasis added).

6.90 On its face, section 4 seems to extend the powers of a tribunal beyond those granted by section 1(1) of the 1921 Act. Once again, there is the reference to the High Court, but on this occasion the powers granted are not limited by reference to particular categories. Rather, they are at large and limited, in breadth at least, only by the requirement that the powers should be necessary to enable the tribunal to perform its functions.

6.91 Whether it was intended that section 4 would extend the powers of compulsion of tribunals is unclear, and there is not much guidance in the legislative history. At the relevant Bill's second reading, the sponsoring Minister merely stated that the section was intended to remove any doubt as to whether a tribunal was entitled to make orders corresponding to those which the High Court or a judge of the High Court could make.⁹⁰ At the committee stage, the Minister acknowledged that the powers conferred by section 4 would be circumscribed by the functions of tribunals, which he described as “to inquire into definite matters and to find facts”.⁹¹

6.92 This review of section 4 raises two immediate concerns. First, there is the question of what should be the appropriate body to determine whether a power is necessary for the purposes of a particular tribunal's functions. The wording of the provisions, at the moment, suggests that this question might fall to be determined by the tribunal itself. The second question is this: what is the

⁸⁸ Paragraphs 6.06 and 6.39.

⁸⁹ See paragraphs 6.77-6.88 for an analysis of section 4 of the 1979 Act and section 1(1) of the 1921 Act.

⁹⁰ 311 *Dáil Debates* Col 430 (6 February 1979).

⁹¹ 311 *Dáil Debates* Cols 544-545 (7 February 1979).

relationship as between the two main clauses of the section, the boundary between the two being marked by the word “and”? In other words, does the reference to “all such powers, rights and privileges as are vested in the High Court or a judge of that Court in respect of the making of orders” qualify the grant of powers to the tribunal? If so, then section 4 powers are doubly restricted, first by reference to the functions of the tribunal, and secondly by the overriding constraint that the tribunal is not granted any power that could not be exercised by the High Court or a judge thereof. These issues fell to be resolved in *Lawlor v Flood*.⁹²

6.93 The applicant, Mr Liam Lawlor TD, sought judicial review of three orders made by the respondent tribunal. One required him to make discovery of certain documents said to be relevant to the inquiry. The attack on this order was based on a straightforward argument to the effect that the discovery sought was too wide: it did not seek to challenge the entitlement of the tribunal to make a discovery order. This particular order was upheld by the High Court and no appeal was taken from this decision. Of more importance for present purposes are the second and third orders. The second sought to compel the applicant to attend an interview with tribunal counsel and to answer their questions, in the absence of the tribunal’s sole member. Thirdly, the applicant was ordered to provide to the tribunal a sworn affidavit containing details of all companies with which he had been associated as director or shareholder, or in which he had a beneficial interest, over a specified period of time. The case was heard in the High Court by Kearns J, who delivered a lengthy and impressive judgment, the conclusions of which were in large measure upheld by the Supreme Court.⁹³

6.94 On behalf of the tribunal, it had been submitted that section 4 should be construed disjunctively. In other words, the first part of the section, which permits a tribunal to make “such orders as it considers necessary for the purposes of its functions”, should be read more or less independently of, and so not qualified by, the remainder. Specifically, the contention was that “any power conferred by the second part of the section does not relate to the scope or effect of any Order to be made by a tribunal, but relates merely to the mechanics and incidental features of the execution of an Order”.⁹⁴ It was further submitted that the appropriate body to determine whether a power was “necessary for the purposes of its functions” was the tribunal itself, and that the Court could not substitute its own view for that of the sole member, but rather could exercise only a review-type jurisdiction over the tribunal’s decision on the point. In the Supreme Court, Hamilton CJ said that if the tribunal’s submissions were correct, then:

⁹² High Court (Kearns J) 2 July 1999; [1999] 3 IR 107.

⁹³ Although it should be noted that Murphy J took the opportunity, *obiter*, to voice serious misgivings about some of the passages in the judgment of the learned High Court Judge. At 139 he stated: “Nevertheless I believe that it is desirable that I should record my doubts as to the correctness of the conclusions of the learned trial judge on the application of the principles of natural and constitutional justice to the conduct of the business of the tribunal.” See further paragraph 7.26-7.27.

⁹⁴ High Court (Kearns J) 2 July 1999, at 36.

“[T]he effect of the section is to give to [the sole member of the tribunal] wide and sweeping powers fettered only by the restriction that they are considered *by him* to be necessary for the purpose of his functions, and to give him powers which are not vested in the High Court or any judge thereof”.⁹⁵ (Emphasis added)

6.95 Frankly, there was much to be said for the tribunal’s arguments, given the statutory language, which allows a tribunal to make such orders “as *it* considers necessary for the purposes of its functions”,⁹⁶ and which is less than clear on the relationship of the two clauses of section 4 to one another. However, both submissions were rejected.

6.96 There were lengthy and sophisticated judgments at both High Court and Supreme Court level. Those of Hamilton CJ (Barrington and Keane JJ concurring) and Kearns J are most extensive in relation to the issues under consideration. Both judges agreed that section 4 should properly be interpreted in the light of the powers granted by section 1(1), and to this extent established a connection between the two provisions. As Kearns J said: “[s]uch a limited repertoire of powers forms the backdrop against which the 1979 Act must be considered.”⁹⁷ This is an important point. It illustrates that, in relation to the substantive powers at least; the courts will be slow to allow a tribunal to fall back on a catch-all provision in order to supplement its arsenal.

6.97 According to the Chief Justice, the matter came down to this: if the tribunal’s arguments were correct, the consequence for section 1(1) would be either (a) that a tribunal would be limited to the powers vested in the High Court in relation to the matters in section 1(1)(a)-(c), but not other matters; or (b) that the restriction in section 1(1) was impliedly removed (in that section 4 simply superseded it). Hamilton CJ stated:

“If the legislature had intended to so fundamentally alter the nature of the powers given to the tribunal it would, or should, have so stated in clear and unambiguous terms.”⁹⁸

6.98 It was held that section 4 had to be read as a whole, and in conjunction with section 1(1), so that the powers given to the tribunal could not exceed “those vested in the High Court in the course of an action”.⁹⁹ This is an important aspect

⁹⁵ [1999] 3 IR 107, 131.

⁹⁶ Cf the language of the *Commission to Inquire into Child Abuse Act 2000*, section 4(3), which provides that “The Commission shall have all such powers as *are* necessary or expedient for the performance of its functions” (emphasis added).

⁹⁷ High Court (Kearns J) 2 July 1999, at 52.

⁹⁸ [1999] 3 IR 107, 132.

⁹⁹ *Ibid.*

of the decision, to which we return below. The separate assenting judgment of Denham J is very clear on this point. She did not think that there was any ambiguity attaching to the section under consideration, and stated in very forthright terms her preferred interpretation (which was in line with that of the majority). She said:

“The words of the statute are clear and unambiguous. Thus, the ordinary sense of the words should be applied. The words state clearly that the tribunal would have powers, rights and privileges of a High Court Judge in respect of the making of orders it considers necessary for the purposes of its functions. *The tribunal is not given powers in excess of a High Court Judge.* The powers given to a tribunal are those ‘vested in the High Court or a judge of that Court’.”¹⁰⁰ (Emphasis added)

6.99 The Commission thinks that, from a policy perspective, it is correct that a person should be required to provide a sworn affidavit to a tribunal relating to issues other than discovery of documents. In relation to whether or not it is appropriate for a person to be required to answer questions posed by a person other than the tribunal itself, we deal with this issue at length elsewhere.¹⁰¹ The point which is highlighted by the foregoing passage is simply that, when used in a catch-all, a reference to the powers, rights and privileges of the High Court or a judge thereof can act as a *restraint* on the powers conferred by the provision.

6.100 There is an interesting contrast in approaches to be found in the *Commission to Inquire into Child Abuse Act 2000*.¹⁰² Under section 14(1) and (5) of the Act the Investigation Committee is conferred with certain specific powers (*ie* the power to compel the attendance of witnesses in order to give evidence; the power to issue a commission; and certain powers in relation to the production and discovery of documents) supplemented by a more general power to “give any other directions for the purpose of the proceedings concerned that appear to the Committee to be reasonable and just”. It is unclear what are the outer parameters of this last power, but it should be noted that all the powers conferred by section 14(1) and (5) are defined by reference to High Court powers. However, there is another ‘catch-all’ type provision - section 4(3) states that:

“The Commission shall have all such powers as are necessary or expedient for the performance of its functions.”

6.101 This is redolent of section 4 of the 1979 Act, yet, significantly, it does not contain the limitation that the powers are to be no greater than those of the High Court. On the other hand, it is phrased so as not to admit of the subjective

¹⁰⁰ [1999] 3 IR 107, 136.

¹⁰¹ Paragraph 6.92-6.98.

¹⁰² On which see Chapter 3.

interpretation contended for by the tribunal in *Lawlor v Flood*,¹⁰³ to the effect that it was the tribunal (or here the Commission) itself which is entitled to determine a power was or expedient. The only reasonable construction of section 4(3) is that the test is objective; in other words, it is for the courts to decide in any individual case what is necessary or expedient. But, having regard to the decision in *Lawlor v Flood*, nothing much turns on this point.

6.102 The result is that section 4(3) of the 2000 Act is subject to only one limitation: a functional one. If a power is necessary *or expedient* having regard to the functions of the Commission, then the Commission has that power. On the other hand, in relation to tribunals of inquiry, as matters stand, a second question must be asked, after it is established that a power is necessary or expedient for the purposes of the tribunal: the question is could the High Court exercise a similar power? It was this limitation which prevented the *Flood Tribunal* from being able to order Mr Liam Lawlor to provide it with a sworn affidavit containing details of all the companies with which he was associated.

6.103 The policy question, therefore, which must be answered, is whether the power given to a public inquiry should be similar to that found in the 2000 Act, or that of the 1979 Act, as interpreted in *Lawlor*. This question would need to be considered in respect of each particular inquiry; though, in most cases, the outcome would probably be the same. For brevity, we direct our comments here to the tribunals of inquiry legislation. We start from the basis that, whereas inquiries are similar to court, they are not identical in that they are primarily inquisitorial and investigatory. Certain powers may be necessary which are not needed by courts. For example in *Lawlor* the tribunal sought *inter alia* an order compelling Mr Lawlor to provide the tribunal with documents relating to companies with which Mr Lawlor had an interest.¹⁰⁴ These powers might be especially necessary, bearing in mind the considerations indicated in the Information Gathering Chapter.¹⁰⁵ Accordingly, we would omit the reference to the High Court.

6.104 In order to control the widening of powers which such a view implies, we should, however, fix a limit: it should be made clear that a power would only be made available where it was both necessary and reasonable, the test in each case being objective. In short, the Commission is opting for the policy it believes was intended by the legislature to underlie the 2000 Act (and, it may also be the 1979 Act); though not the policy discerned by the Supreme Court in *Lawlor*, in respect of the 1997 Act.

6.105 *Accordingly, the Commission recommends that a catch-all provision be retained, in substantially the same terms as section 4 of the 1979 Act, but subject to some minor modifications. We tentatively recommend the following wording:*

¹⁰³ [1999] 3 IR 107.

¹⁰⁴ See paragraph 6.50.

¹⁰⁵ Chapter 9.

“A tribunal may make such orders as are reasonable and necessary for the purposes of its functions.”

6.106 The relationship between section 4 and section 1(1) of the 1921 Act also requires clarification. Section 1(1) provides that in respect of certain defined categories relating to the taking of evidence:

“... the tribunal shall have all such powers, rights, and privileges as are vested in the High Court ... on the occasion of an action in respect of the following matters:

(a) The enforcing the attendance of witnesses and examining them on oath, affirmation, or otherwise;

(b) The compelling the production of documents;

(c) Subject to the rules of court, the issuing a commission or request to examine witnesses abroad;

and a summons signed by one or more of the members of the tribunal may be substituted for and shall be equivalent to any formal process capable of being issued in any action for enforcing the attendance of witnesses and compelling the production of documents.”

The question is how should the specific powers (“to enforce the attendance of witnesses...”) which are, implicitly given here be linked with the wider express power, bestowed by section 4 of the 1979 Act?

6.107 *Accordingly, the Commission recommends that the two provisions be combined. The new section 1(1) would be divided into three subsections; the first would bestow express power to establish a tribunal as recommended in paragraph 6.05. This would be followed by the part of section 4 of the 1979 Act, as amended, and then the more specific powers presently in section 1(1) of the 1921 Act would follow, though prefaced by the words “without prejudice to the generality of the foregoing.” The result would be along the following lines:*

“Section 1

(1)(a) Where it has been resolved by both Houses of the Oireachtas that it is expedient that a tribunal be established for inquiring into a definite matter described in the resolution as of urgent public importance, in pursuance of this resolution a tribunal may be appointed for the purpose either by the Government or a Minister and the instrument supplemental thereto may provide that this Act shall apply.

(b) A tribunal may make such orders as are reasonable and necessary for the purposes of its functions. Without prejudice to the generality of the foregoing, it may make orders:

- (i) *enforcing the attendance of witnesses and examining them on oath, affirmation, or otherwise;*
- (ii) *compelling the production of documents;*
- (iii) *(subject to the rules of court) issuing a commission or request to examine witnesses abroad;*

and a summons signed by one or more of the members of the tribunal may be substituted for and shall be equivalent to any formal process capable of being issued in any action for enforcing the attendance of witnesses and compelling the production of documents.”

6.108 A further range of questions arise in relation to the phrase “all such powers, rights and privileges as are vested in the High Court...”. The Commission has already suggested at paragraph 6.80 that there should be added to this phrase the qualifier: “provided that the tribunal does not enjoy any power to attach or commit or otherwise to impose punishment for contempt.” In addition, the Commission would omit the limiting words “...on the occasion of an action...” presently to be found in section 1(1) of the 1921 Act (see paragraph 6.87). The remaining question is how the phrase “all such powers, rights and privileges...” is connected with the substantive powers. At the moment, the connecting phrase “...in respect of the following matters...” is used in section 1(1) (a). And, in section 4, the phrase used is “in respect of the making of orders”. Yet, it seems to the Commission that this connection is an undesirable and unnecessary limitation. To take an example, a tribunal might need a privilege against, say, defamation in respect of some feature of its work other than the making of an order - for instance, the publishing of its report or a conversation among its staff. It seems to the Commission, therefore, that the “powers, rights and privileges” ought to be available to the tribunal on a wider basis than simply if an order is being issued, and we would end the link between powers, rights and privileges and an order. Instead, we should simply state that the tribunal’s “powers, rights and privileges” are to be invoked, simply, “in the exercise of [the tribunal’s] functions”.¹⁰⁶

6.109 *Accordingly the Commission proposes the insertion of the following provision (located next to but separate from the provision dealing with powers as suggested in paragraph 6.106):*

“In the exercise of its functions, a tribunal shall have all such powers, rights and privileges as are vested in the High Court or a judge of that court provided that the tribunal does not enjoy any power to attach or commit or otherwise to impose punishment for contempt.”

¹⁰⁶

Cf Mr Gerard Collins, Minister for Justice speaking during the committee stage of the 1979 Bill stated that: “Section 4 of the Bill will [mean that] a tribunal will be able to make such orders as it considers necessary for the purpose of its functions”: 311 *Dáil Debates* Col. 430 (6 February 1979)

(c) Specific Powers

6.110 According to Hamilton CJ “[t]he principal powers of the tribunal are to enforce the attendance of witnesses; to provide for their examination before the tribunal and to compel the production of documents”.¹⁰⁷ The tribunals’ legislation also provides for the taking of evidence abroad.¹⁰⁸ It has also been suggested that “a member of a tribunal should be invested with the power to compel the mass media to print corrections”.¹⁰⁹ However, the Commission prefers not to consider suggestions of this type in the present paper simply for the reason that it seems to us that they are better considered as part of a general review of the law of defamation.

6.111 The powers required by a tribunal of inquiry may be summarised as follows:

- (i) the power to compel persons to furnish information; (provided for section 6(4) of the 2002 Act)
- (ii) the power of the tribunal to delegate functions in relation to the gathering of information; (provided for in section 6(1) of the 2002 Act)
- (iii) the power to order discovery of documents and to enforce the production of documents; (provided for in section 1(1)(b) of the 1921 Act)
- (iv) the power to enforce the attendance of witnesses; (provided for in section 1(1)(a) of the 1921 Act)
- (v) the power to provide for the examination of witnesses on oath, affirmation or otherwise; (provided for in section 1(1)(a) of the 1921 Act)
- (vi) the power to issue a commission for the purposes of taking evidence abroad; (provided for in section 1(1)(c) of the 1921 Act)

¹⁰⁷ [1999] 3 IR 107, 132.

¹⁰⁸ 1921 Act, section 1(1)(c).

¹⁰⁹ Brady “Tribunals and Politics: A Fundamental Review” (2000) 3 *Contemporary Issues in Irish Law and Politics* 156, at 165. The entire proposal reads as follows: “In the process of reconciling constitutional rights and obligations, some further reforms commend themselves. The member of the tribunal should be vested with the power to compel the mass media to print corrections. This would be directed at correcting facts erroneously recorded in the media as evidence given before or available to a tribunal. In addition there should be amendments to the Defamation Act, 1961 so as to provide that the publication of a correction – pursuant to an order of a member of a tribunal – shall be admissible in evidence by way of mitigation of damages in any defamation action. Furthermore, section 8 of the Defamation Act, 1961 should be amended so as to provide that the High Court shall not give permission for a criminal prosecution against a journalist where the underlying fact has been the subject matter of correction subject to an order of the tribunal.”

- (vii) the power to hold sittings otherwise than in public where the occasion demands; (provided for in section 2(a) of the 1921 Act)
- (viii) the power to retain counsel and other staff; (not expressly provided for)
- (ix) the power to produce and publish a report; (not expressly provided for)
- (x) privilege against self-incrimination;
- (xi) privilege for the tribunal and its staff in their utterances and in any report; and (not expressly provided for: but it may be inferred from section 1(1) of the 1921 Act and section 4 of the 1979 Act)
- (xii) the ability to apply to the High Court for directions in relation to the performance by the tribunal of its functions (not provided for).

6.112 The first two powers, ((i) and (ii)), which are related to the information-gathering stage of the tribunal's inquiry, are dealt with in the chapter devoted to that subject.¹¹⁰ The next four powers, ((iii)-(vi)), as well as (x) on privilege, are well-understood and operating satisfactorily, and we do not see any reason to review them generally. However, privilege in the context of information gathering is examined at paragraph 9.45 - 9.49. As to item (vii), the power to hold private sittings, this is considered in Chapter 8, dealing with publicity and privacy issues. The powers identified at (viii)-(ix) which we characterise as non-intrusive powers, are addressed in Part IV of this chapter. Power (x), the privilege against self-incrimination, will be covered at paragraphs 11.03-11.06. Power (xii) has already been covered at paragraphs 5.72-5.86. That leaves only discovery and privileges and immunities to be covered here.

(d) Privileges

6.113 Section 1(3) of the 1921 Act confers, on a person required to provide an investigator with information, documents or a statement, the immunities enjoyed by a High Court witness. These include immunity from defamation proceedings arising out of statements made by a witness, at a tribunal.

6.114 As the legislation now stands, the immunities and privileges under discussion seem to apply to those who are required to furnish material to an investigator,¹¹¹ or who provide information pursuant to an order of the tribunal.¹¹² During parliamentary debates concerning the 1997 Act, which inserted the provision extending immunity to persons producing or sending documents to a tribunal "pursuant to an order of that tribunal", opposition spokesmen proposed an

¹¹⁰ See Chapter 9.

¹¹¹ 2002 Act, section 6(7).

¹¹² 1921 Act, section 1(3) and (4) (as amended by the 1997 Act, section 2).

amendment that would have altered the wording to “pursuant to an order *or request* of that tribunal”.¹¹³ The amendment was rejected by the Government spokesman on the basis that “[a]ll directions by a tribunal to persons to furnish documents are sent on foot of an order of the tribunal” and consequently, “the inclusion of the words ‘or request’ are not necessary”.¹¹⁴ Clearly a distinction can be drawn between an order made by such a body in the exercise of its statutory powers and a mere request. However, it is unnecessary to dwell on this issue because the Commission is of the opinion that both the immunity, privileges and non-admissibility¹¹⁵ rules should be extended yet further to cover those who spontaneously (that is to say, without prompting by order or request) send information, statements or documents to a tribunal.

6.115 The reasons for extending immunity to those who of their own volition provide information to a tribunal are straightforward. The Commission wishes to encourage people to co-operate with inquiries and, since the inquiry may not realise that a person has useful information to give, the Commission does not want a person with such information to be dissuaded from coming forward because of the possibility of exposure to civil or criminal penalties. It may be that this adds little to immunity on foot of orders of the tribunal, because a person who thought that he had information to give could inform the tribunal of this and, in effect, request it to make an order to supply it. However, the Commission considers that it would be simpler, and would do no harm, simply to extend the immunity to those who volunteer information. Of course, there is the risk that persons might make malicious and unfounded allegations against others, which may or may not be within the terms of reference. However, the information would be received in private by the tribunal which, in line with our proposed information-gathering procedure, may decide simply to discard it, and accordingly the risk of unjustified damage to reputations is very small.

6.116 An objection might be made that to extend the rule in respect of immunity in this way would be likely to worsen the practical difficulties of carrying out a criminal prosecution, down-stream. In our view the answer is that in most instances any material received by a tribunal without prompting will be at the information-gathering stage, and therefore received privately. It will fall to the tribunal to decide whether the material should be aired in public, and it is publicity that is the essence of the practical difficulty. The position, therefore, should be no worse than it already is.

6.117 There is one qualification to be noted. The Commission takes the view that if the tribunal, or an investigator, directs a person giving a statement before it to cease giving evidence, the immunity should not extend to anything said after that direction is given. There is no good reason why any such statements should be

¹¹³ 484 *Dáil Debates* 873 (10 December 1997).

¹¹⁴ 484 *Dáil Debates* 873 (10 December 1997).

¹¹⁵ As regards non-admissibility see Chapter 11.

clothed with immunity, and this limitation is in line with that contained in recent legislation.¹¹⁶ We recommend an appropriate form of words at paragraph 6.120, below.

Privileges and Immunities, by Analogy with High Court Witnesses

6.118 As the legislation currently stands, the immunities and privileges granted to qualifying persons are those enjoyed by witnesses before the High Court. The Commission must decide whether such “legislation by reference” is a practice that suffices in the present context; or whether it would be preferable to spell out precisely the nature of the privileges and immunities available to those who provide material to tribunals of inquiry or to investigators. In favour of the latter course of action, while the parallel drawn between a witness before a tribunal and a witness before the High Court is clear, it is less easy to support the parallel where the tribunal is receiving documents or, particularly, unsworn information. Yet, before the High Court a person who is, was or may become a witness enjoys no immunity in respect of what he or she says otherwise than under oath.

6.119 The great advantage of invoking High Court privileges and immunities is that one thereby taps into centuries of learning and judicial precedent. A provision that attempts to set out, one by one, the privileges and immunities enjoyed by a person in relation to a tribunal of inquiry would always be likely to sin by omission. Moreover, the extent to which the privileges and immunities would themselves have to be described is a difficult issue; most of them arose in the context of litigation and, on the basis of the argument advanced in the preceding paragraph, ought therefore to be reformulated to take account of their new inquisitorial situation. And, as regards the difficulty noted in the previous paragraph, the Commission inclines to the view that the courts should be trusted to interpret the High Court privileges and immunities *mutatis mutandis* when they arise in relation to tribunals of inquiry. Accordingly, no major change is recommended.

6.120 *Taking into account the issues canvassed above, the Commission proposes legislation along the following lines, to replace section 1(3) and (4) of the 1921 Act and section 6(7) of the 2002 Act:*

(1) A person who provides information, evidence, documents or other material to a tribunal, whether pursuant to an order or request of the tribunal or otherwise, is entitled to the same immunities and privileges in respect of such information, evidence, documents or other material as a witness before the High Court.

¹¹⁶ *Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997*, section 11(2): “If a person who is giving evidence to a committee in relation to a particular matter is directed to cease giving such evidence, the person shall be entitled only to qualified privilege in relation to defamation in respect of any such evidence as aforesaid given after the giving of the direction unless and until the committee withdraws the direction.”

(2) *If a person who is providing information, evidence, documents or other material to a tribunal or to an investigator, as the case may be, in relation to a particular matter is directed to cease giving such information, evidence, documents or other material, then subsection (1) shall not apply in respect of anything said or given by that person after the giving of the direction unless and until the tribunal withdraws the direction.*¹¹⁷

(3) *For the purposes of subsections (1) and (2) ‘information, evidence, document or other material’ includes data, all forms of writing and other text, images (including maps and cartographic material), sound, codes, computer programmes, software, databases and speech.*

(e) Discovery

6.121 The current provision relating to discovery of documents is section 1(1) (b) of the 1921 Act, which confers upon a tribunal the powers, rights and privileges of the High Court in respect of the production of documents. It is notable that the provision does not explicitly state that a tribunal may require a person to provide it with an affidavit of discovery; rather this must be inferred from the reference to the powers of the High Court. The Commission thinks that this is quite legitimate, as discovery is a necessary step in the process by which litigants can identify which documents they in fact require the other side to produce. In any event the jurisdiction of tribunals in this regard does not seem to have been questioned,¹¹⁸ and where occasion demanded, the courts had little difficulty in accepting that failure by a person to comply with a tribunal’s discovery order (in the face of an order to do so by the High Court) merited committal to prison.¹¹⁹

6.122 An interesting question is whether a tribunal is bound by the relevant rules of court in relation to discovery. Order 31 rule 12 of the Rules of the Superior Courts, 1986¹²⁰ (as recently amended) lays down a number of requirements that must be observed if discovery is to be ordered in the course of civil litigation. For

¹¹⁷ The wording of this proposed subsection closely follows that of the *Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997*, section 11(2) (*op cit* fn 116). One difference is that section 11(2) allowed for qualified privilege even after the giving of a direction to cease, whereas the proposed wording does not. However, the words granting qualified privilege were inserted only because of concerns relating to the lack of legal expertise of the chairpersons of Oireachtas committees (see 477 *Dáil Debates* Cols.1305-1306 (15 April 1997)). Since the Commission has recommended that the chairperson of a tribunal should always be a senior judge, such concerns are inapplicable.

¹¹⁸ In *Lawlor v Flood* High Court (Kearns J) 2 July 1999; [1999] 3 IR 107 (SC) the challenge to the discovery order was that its terms were too wide, not that the tribunal lacked the jurisdiction to make it.

¹¹⁹ See above, paragraphs 6.48-6.64

¹²⁰ As amended by *Rules of the Superior Courts (No. 2) (Discovery) 1999* (SI Number 233 of 1999).

example, a party seeking discovery is obliged first to seek voluntary discovery by letter, to divide the documents sought into discrete categories and to provide reasons why each category is included in the request. It is submitted that the better view is that a tribunal is not so bound. Section 1(1)(b), which grants powers in relation to the production of documents, may be contrasted with paragraph (c) of the same subsection. This paragraph, which is concerned with the issuing of a commission or request to examine witnesses abroad is expressly “subject to the rules of court”, a qualification which is absent from paragraph (b). The maxim *expressio unius est exclusio alterius* would appear to apply, so that paragraph (b) should not be read as being subject to a requirement to comply with the rules of court.

6.123 Interestingly, the *Commission to Inquire into Child Abuse Act 2000* goes so far as to provide that “the rules of court relating to the discovery of documents in proceedings in the High Court shall apply in relation to the discovery of documents pursuant to this paragraph with any necessary modifications”.¹²¹ It must be remembered, that the Investigation Committee does play a role not dissimilar to that of a court, in that it adjudicates upon disputes as between specific parties.¹²² A tribunal’s position is rather different in that it does not adjudicate upon disputes between the parties.

6.124 Yet, at a wider level, the voluntary discovery process is governed by the requirements of constitutional justice, as is demonstrated by *Haughey v Moriarty*.¹²³ In that case, the *Moriarty Tribunal* had made orders for discovery and production of documents against various financial institutions in relation to the plaintiffs, who were the former Taoiseach, Mr CJ Haughey, his wife, daughter and sisters. Mr Haughey’s financial affairs were at the centre of the tribunal’s terms of reference, and as “connected persons” the other plaintiffs also fell within the remit of the investigation. The plaintiffs successfully challenged the orders. Hamilton CJ (speaking for the Supreme Court) said:

“Fair procedures require that before making such orders, particularly orders of the nature of the orders made in this case, the person or persons likely to be affected thereby should be given notice by the tribunal of its intention to make such order, and should have been afforded the opportunity prior to the making of such order, of making representations with regard thereto. Such representations could conceivably involve the submission to the tribunal that the said orders were not necessary for the purpose of the functions of the tribunal, that they were too wide and extensive having regard to the terms of reference of the tribunal and any other relevant matters.”¹²⁴

¹²¹ *Commission to Inquire into Child Abuse Act 2000*, section 14(1) (d).

¹²² See further paragraph 6.100.

¹²³ [1999] 3 IR 1.

¹²⁴ [1999] 3 IR 1, 75-76.

6.125 It is understood that the current practice of the tribunals now sitting is to write to a person from whom discovery is sought, seeking voluntary discovery, and in the same letter to state that should discovery not be forthcoming, notice is given that the tribunal is considering making an order for discovery, in respect of which submissions are invited.¹²⁵ This seems appropriate, in that the request component of the voluntary discovery process can be identified with giving notice of the intention to make an order for discovery. Of course, to characterise it as a mere request from the tribunal does seem to be a little disingenuous in that the body which will eventually adjudicate upon whether or not that request is justifiable is the tribunal itself. Assuming that the tribunal acts *bona fide*, it is clear that it already subscribes to this view. That said, there is no good reason for not giving a person from whom discovery is sought the opportunity to provide it voluntarily.

6.126 It appears that, when giving notice to a person from whom discovery is sought, modern tribunals do specify the categories of documents required, and may also provide reasons in respect of each category. In the general run of cases, this seems to be appropriate because making discovery can be an extremely expensive and time consuming undertaking; in *Flood v Lawlor*,¹²⁶ it was remarked upon by Keane CJ that, prior to the re-entry of the contempt proceedings, Mr Lawlor had furnished the *Flood Tribunal* with 157 folders of documents, and had written to 272 individuals, firms and companies; yet, he had still not fully complied with his discovery obligations. No person should be asked to discover documents to a tribunal of inquiry unless there are good reasons for requiring this. Furthermore, the giving of reasons in respect of categories of documents would facilitate the individual to whom the request is directed in ascertaining what documents are required and also in the making of submissions and, if it should prove necessary, in taking judicial review proceedings. However, the Commission does not go so far as to suggest that compliance with these requirements should in all cases be mandatory. It is not difficult to conceive of a situation in which a tribunal, starting with a blank sheet of paper as it were, is not in a position to identify the categories of documents to which it requires access in other than very broad terms. To insist on narrowly-drawn categories supported by cogent reasons in every case has the potential, the Commission thinks, to frustrate inquiries in getting their investigations off the ground. Therefore, the Commission does not suggest the codification of the rules, which (in response to the needs of constitutional justice) have grown up in this area.

6.127 *Accordingly, the Commission applauds the practice of modern tribunals of inquiry of generally requesting discovery of documents by reference to categories, and of giving reasons in respect of each. However we do not recommend codification of rules in relation to the powers conferred on tribunals in connection with the discovery and production of documents.*

¹²⁵ See eg *Flood v Lawlor* High Court (Smyth J) 24 October 1999, at 8.

¹²⁶ Supreme Court 12 December 2001, at 9.

Part IV Non-Intrusive Powers

6.128 Tribunals routinely perform various different actions for which there is no express support in statute. For example, it is nowhere provided by legislation that a tribunal enjoys the power to publish a report, yet that is one of the central objectives of any tribunal. Similarly, one looks in vain for a provision granting to a tribunal the power to instruct and retain counsel. In this connection, Hamilton CJ has commented:

“No doubt it was envisaged that the tribunal, for the purpose of carrying out the inquiry mandated by the resolutions of both houses of parliament, could retain persons to act on its behalf, both in the gathering of evidence and its adduction before the tribunal or to carry out the administrative requirements of the tribunal.”¹²⁷

6.129 On a superficial level, this appears to sit ill with the general tenor of the rest of the Chief Justice’s judgment, which is to confine tribunals to those powers affirmatively granted to them by law. However, the comments must be understood in their context, which is that of a non-intrusive power. It has already been observed that the Rule of Law pulls much less strongly in favour of the individual expression of such powers than when applied to the substantive powers, and to the enforcement mechanisms.

6.130 Each of the powers just mentioned, to instruct counsel or employ other staff and to write and publish a report, scarcely deserve to be characterised as powers at all. They are actions which can be engaged in by any legal person. It seems that the courts will adopt a reasonable approach to the situation, and recognise that tribunals must possess certain basic powers as an adjunct to their function. In this connection, Hamilton CJ’s comment supports this viewpoint.

6.131 As has been remarked elsewhere, flexibility is essential in the case of inquiries because of the unexpected directions in which their subject-matter may lead them. One further instance of this is that an inquiry should have the capacity to publish an interim report. In deciding whether to do this and, if so, how to divide up its subject-matter, a tribunal will, of course, not be acting blindly or in a vacuum, because it will at least have evaluated the information gathered during preliminary private hearings.¹²⁸

6.132 There are various situations in which an interim report may be desirable or essential. First, generally, it keeps the public in touch with the deliberations and conclusions of the tribunal better than a long period of silence ended by a single large explosion. Most important of all, perhaps, where unjustifiable allegations have been made in public and widely reported against a person, it is well for any conclusion vindicating or partly vindicating that person’s reputation to be published

¹²⁷ *Lawlor v Flood* [1999] 3 IR 107, 133.

¹²⁸ Referred to in Chapter 9.

as soon as possible. On the other hand, because of the especially-delicate subject-matter, section 5 of the *Commission to Inquire into Child Abuse Act 2000* takes more than a page to deal with the report of the *Laffoy Commission*, and sections 13 and 16 deals with various subsidiary reports. The Commission is of the view that there is usually no need to go to such lengths to delineate the process.

6.133 The possession of such non-intrusive powers by tribunals of inquiries can be justified in a number of ways. First, such powers may simply be incidental to the establishment of a tribunal in the first place. If such a body is not to be entirely paralysed it must enjoy basic incidental powers to allow it to carry out the multiplicity of actions that are taken for granted by almost all institutions. Secondly, powers of this nature could be said to arise out of the catch-all provision in section 4 of the 1979 Act.¹²⁹ This provision confers on a tribunal those powers which are necessary for the performance of its functions, and which could be exercised by the High Court or a judge thereof. Thirdly, the powers could arise out of the existence of legal personality.

6.134 However, it is tolerably clear that a tribunal of inquiry is not a legal person. There is implicit recognition of this in the fact that, when a tribunal is involved in litigation, it is the chairperson of the tribunal who is named as the party.¹³⁰ This position can be contrasted with that which obtains in connection with the Commission to Inquire into Child Abuse. Under section 3(2) of the Act establishing that body:

“The Commission shall be a body corporate with perpetual succession and it shall have power to sue and may be sued in its corporate name.”

6.135 To place tribunals of inquiry on a similar footing might well copper-fasten their ability to carry out certain basic functions as well as providing continuity to the tribunal. For example, as a body corporate there would be nothing to prevent a tribunal from publishing a report, despite the absence of an explicit power in that regard.¹³¹ Similarly, if tribunals were legal persons this might simplify their relationships with the counsel they retain and the administrative and other staff who assist them. While no complaint has yet been made in respect of the activities of tribunals in employing staff and retaining counsel, it is uncertain on what basis this is done.

6.136 The fact that no complaint has yet been made is perhaps attributable to fact that powers of this nature are generally non-intrusive and non-contentious.

¹²⁹ See above, paragraph 6.89.

¹³⁰ Although *cf Boyhan v Beef Tribunal* [1993] 1 IR 210. This case seems to be unique, and one can deduce that the tribunal may have been named as a party in error.

¹³¹ The necessity for further statutory support would relate only to attaching privilege to the contents of that report. As far as we are aware, it has never seriously been contended that the reports of tribunals do not enjoy privilege.

However, it seems to us that there is little to be said against the idea of conferring legal personality upon tribunals.

6.137 *The Commission recommends that provision should be made to allow a tribunal to be conferred with legal personality. Such a provision (based on the model provided by the Commission to Inquire into Child Abuse Act 2000) might read as follows:*

- (1) *An instrument to which this Act applies may provide that the tribunal shall be a body corporate with perpetual succession and the power to sue and be sued in its corporate name.*
- (2) *When the relevant minister or the Government (as the case may be) is satisfied that the tribunal has completed the performance of its functions, or that it is otherwise expedient to do so, such Minister or the Government may by order dissolve the tribunal and may include in the order such incidental, ancillary or consequential provisions as are considered necessary or expedient.*
- (3) *When an order under subsection (2) is proposed to be made, a draft of the order shall be laid before each House of the Oireachtas, and the order shall not be made until a resolution approving of the draft has been passed by each such House.*

CHAPTER 7 CONSTITUTIONAL JUSTICE

Introduction

7.01 The two great principles of natural justice are that each sides should be heard (*audi alteram partem*) and that no-one should be a judge in his own cause (*nemo iudex in causa sua*). In an Irish context natural justice has been slightly reconceptualised as “constitutional justice” (the vagueness of this term is appropriate). This occurred in a judgment of Walsh J, in which he stated: “[i]n the context of the Constitution, natural justice might be more appropriately termed constitutional justice and must be understood to import more than the two well-established principles that no man shall be a judge in his own cause, and *audi alteram partem*.”¹³² A general observation which is relevant, however, is that the establishment of a constitutional pedestal for the two principles reflects the importance assigned to them in Ireland, much more than for instance in Britain and, in respect of the second rule probably in any other jurisdiction in the world.¹³³ Constitutional justice is, in legal terms, the central feature of public inquiries and we consider its implications at various points in this Paper.

7.02 The case has been made that the granting of legal representation undermines an inquiry’s fundamental duty to establish the truth of a matter: “[the implantation of adversarial procedures] has turned many an inquiry from its central thrust”.¹³⁴ Nevertheless a consistent line of high authority shows that it is long past the stage at which anyone could reasonably dispute that constitutional justice applies to the proceedings of inquiries. In many cases this is treated as axiomatic,

¹³² *McDonald v Bord na gCon* [1965] IR 217, 242. Or as it was more recently put by McCarthy J in the context of a case relating to tribunals of inquiry: “[t]he precepts of natural justice... have, themselves, been subsumed by the constitutional right to fair procedures”: *Goodman International v Hamilton* [1992] ILRM 145 (HC) 162 (SC), 185. Constitutional justice is said to be one of the unenumerated rights in Article 40.3.1: *In Re Haughey* [1971] IR 267.

¹³³ See Hogan and Morgan *Administrative Law in Ireland* (3rd ed. Sweet & Maxwell 1998), Chapters 10 and 11. *Cp* Blom-Cooper “The role and functions of Tribunals of Inquiry – an Irish perspective” [1999] PL 175, 177: stated that Irish decisions on inquiries are “overladen with considerations of constitutional rights... The absence in the Supreme Court’s judgment [in *Haughey v Moriarty* [1999] 3 IR 1] of any reference to Scott, if only by way of comparison between the statutory and extra-statutory mode of public inquiry, must be a deliberate omission. It indicates a clear preference for the Salmon/Howe approach to problems of legal representation and procedural safeguards for individuals who may be criticised in the final reports of public inquiries.”

¹³⁴ Blom-Cooper “Public Inquiries” (1993) CLP 204, 215.

but there are also explicit statements such as: “[t]he court is entitled to assume that a tribunal of inquiry will conduct its inquiry, *as it is obliged to do*, in accordance with the principles of constitutional justice and in particular with regard to fair procedures.”¹³⁵

7.03 Because inquiries do not determine rights, it is not possible for a person whose conduct is under investigation to point to the direct consequences for him of a decision of the inquiry in order to attain procedural protection. However, although inquiries do not determine rights, they certainly have the potential to *affect* rights. In most instances the right affected by the proceedings and report of an inquiry is the right to good name or to reputation,¹³⁶ which is protected by Article 40.3.2° of the Constitution. Examples are legion. The right to privacy or confidentiality may also be affected, as may other rights.¹³⁷ In the context of an inquiry procedural fairness is the main¹³⁸ means by which these rights receive protection.

Part I The Principle that ‘No One Should be a Judge in his Own Cause’

7.04 It seems that in the context of a tribunal of inquiry, there are three features which might be thought possibly to attract this principle: (a) descent into the “forensic arena”; (b) decisions made in the course of proceedings; and (c) the rule against personal interest. Only in relation to the third element do we consider that the principle applies to its normal extent.

(a) Descent into the Forensic Arena

7.05 The most subversive attack on inquiries that could be grounded on the no-bias principle would be to claim that it is wrong for the inquiry to ask questions of those whose conduct is under investigation. The gist of this attack would be that by doing so the inquiry takes on the appearance of an advocate, losing the impartiality so prized by the common law.

¹³⁵ *Haughey v Moriarty* [1999] 3 IR 1, 41 *per* Hamilton CJ delivering the judgment of the Supreme Court (emphasis added). *Cf. Goodman International v Hamilton (No 1)* [1992] 2 IR 542, 587 *per* Finlay CJ.

¹³⁶ Tribunals of inquiry frequently inquire into matters that have the potential to harm reputations: see *e.g. Report of the tribunal appointed by the Taoiseach on the 7th day of November, 1947 (Locke’s Distillery)*, (December 1947) paragraph 42; *Report of the Tribunal of Inquiry into the Beef Processing Industry* (1994 Pn 1007) at 18ff.; *Report of the Tribunal of Inquiry into the Blood Transfusion Services Board* (1997 Pn 3695) at 147; *Report of the Tribunal of Inquiry (Dunnes Payments)* (1997 Pn 4199) at 69 and 73.

¹³⁷ See for example the case of *R v Saville, ex parte A* [1999] 4 All ER 860 (right to life, indirectly); see paragraph 7.65 below.

¹³⁸ *Haughey v Moriarty* [1999] 3 IR 1, 59.

7.06 Judicial antipathy to decision-makers and those associated with them taking the role of counsel is illustrated by the decision in *Kiely v Minister for Social Welfare (No 2)*.¹³⁹ A medical assessor had sat with a social welfare appeals officer who was hearing the applicant's claim, and the assessor had asked questions of a medical nature of the applicant's expert medical witness. Henchy J said:

"It ill becomes an assessor who is an affiliate of the quasi-judicial officer, to descend into the forensic arena... [T]he taint of partiality will necessarily follow if [the appeals officer or assessor] intervenes to such an extent as to appear to be presenting or conducting the case against the claimant."¹⁴⁰

7.07 However, as against this, it must be remembered, in the first place, that the rules of natural justice are rooted in the adversarial format of litigation. In Ireland the traditional role of the judge, in court proceedings, is that of keeping order between the parties and ensuring that neither gets an unfair advantage over the other, but otherwise generally remaining aloof, rather akin to a tennis umpire. The judge can adopt this reserved position because the conduct of the hearing is, in large measure, in the hands of the parties. However, the same is not true of an inquiry. Some inquiries may of course resolve themselves into disputes between parties, who take opposing positions on a particular issue, but many more will deal with a multitude of issues and the faces appearing before the inquiry will change as it moves from one topic to the next. In such circumstances only the inquiry itself is in a position to direct matters. This means that, to a greater or lesser extent, the inquiry is obliged to enter the forensic arena. Since no party can necessarily be relied upon to elucidate matters to their fullest extent, the inquiry itself, or someone acting on behalf of it, must to ask questions, though doing so may give the impression of hostility or partiality, an impression generated by even gentle cross-examination. Confirming this realistic line of thought, in *Boyhan v Beef Tribunal*¹⁴¹ Denham J stated: "[a] tribunal is not a court of law – either civil or criminal. It is a body – unusual in our legal system – an inquisitorial tribunal. It has not an adversary format."¹⁴² This is the obvious distinguishing factor.

7.08 Secondly, the courts have always recognised that the no-bias principle will yield in cases of necessity.¹⁴³ If there is no one but the inquiry qualified to

¹³⁹ [1977] IR 267.

¹⁴⁰ *Op cit* fn 139 at 283.

¹⁴¹ [1993] 1 IR 210.

¹⁴² *Ibid* at 222.

¹⁴³ Hence the decision in *O'Neill v Beaumont Hospital* [1990] ILRM 419. See also *O'Byrne v Minister for Finance* [1959] IR 1, in which the High Court and the Supreme Court considered the constitutionality of legislation rendering judges liable to income tax; *Flynn v Allen* High Court (Lynch J) 2 May 1988 in which the Court heard an action against the King's Inns, an institution of which all judges of the superior courts are benchers. See also *O'Neill v Irish Hereford Breed Society Ltd* [1992] 1 IR 431; *McMenamin v Ireland* [1996] 3 IR 100; *Attorney General (Humphreys) v Governors of Erasmus Smith's Schools* [1910] 1 IR 325. In

direct the proceedings and to ask the questions, then the principle may be subject to an exception.¹⁴⁴ In this regard it should be noted that the courts have on several occasions remarked upon the importance of work being conducted by tribunals of inquiry. Under the 1921-2002 Acts the “very reason for the establishment of such a tribunal is that urgent matters causing grave public disquiet need to be investigated in order either to root out the wrongdoing or to expose the concerns as misplaced.”¹⁴⁵ And the courts are unlikely (save in exceptional circumstances¹⁴⁶) to look behind a decision of the Houses of the Oireachtas, expressed as a resolution of each, that a particular matter is of urgent public concern, particularly since such resolutions are entitled to the presumption of constitutionality.¹⁴⁷ Thirdly, and most important, in many instances inquiries take the precaution of distancing themselves as far as possible from the forensic arena by retaining counsel, who actually conducts the examination and cross-examination of witnesses.¹⁴⁸ It is their duty:

“[T]o enable the tribunal to undertake investigations, to have investigations carried out on its behalf, to obtain statements from witnesses, to arrange the attendance of witnesses in due order, to prepare and serve Books of Documents and statements of witnesses on all ‘interested parties’, to present the evidence and examine the witness”.¹⁴⁹

the present context, see too the passage from *Murphy v Flood* [1999] 3 IR 97, 105 quoted at paragraph 7.09.

¹⁴⁴ Though, at the same time, the doctrine of necessity “is not a dominant doctrine” and “could never defeat a real fear and a real reasonable fear [sic] of bias or injustice” (*O’Neill v Beaumont Hospital* [1990] ILRM 419, 440 per Finlay CJ).

¹⁴⁵ *Bailey v Flood* High Court (Morris P) 6 March 2000, at 33.

¹⁴⁶ *Norris v Attorney General* [1984] IR 36, 98 per McCarthy J, approved in *Haughey v Moriarty* [1999] 3 IR 1, 52.

¹⁴⁷ *Goodman International v Hamilton* [1992] 2 IR 542, approved in *Haughey v Moriarty* [1999] 3 IR 1, 55.

¹⁴⁸ The *Report of the Tribunal of Inquiry into the Disaster at Whiddy Island, Bantry, Co. Cork* (Prl 8911) refers, at paragraph 1.6.1, to the relatively new development of counsel for the tribunal: “[t]he procedure adopted in relation to oral testimony was as follows. All witnesses were called by the tribunal’s counsel and first examined by him...” On the role of counsel to the inquiry at the *Scott Inquiry* the Rt Hon the Lord Howe of Aberavon CH QC stated: “Sir Richard Scott’s readiness to engage himself at the inquisitorial heart of matters was compounded by the role assigned to counsel to the inquiry. Far from the carefully distanced neutrality that normally separates the two, Presley Baxendale QC and the judge sat alongside each other, like partners in a double-barrelled inquisition” [1996] PL 445, 457.

¹⁴⁹ *Report of the Tribunal of Inquiry into the Disaster at Whiddy Island, Bantry, Co. Cork* (Prl. 8911) at 3. Hogan and Morgan, above fn 133 at 298 state: “[w]hy is the function no longer performed, as it was traditionally, by the Attorney-General? The answer given in the *Whiddy Island Report*, at 6-7, (the first Tribunal of Inquiry not to use the Attorney-General) is: ‘The Attorney-General suggested that this practice should not be adhered to and that, instead, he would assign solicitor and counsel to the tribunal ... A tribunal ... is not a court of law hearing evidence adduced by opposing parties, its function is to conduct an inquiry. In the

(b) Decisions Made in the Course of Proceedings

7.09 An inquiry is likely at various stages of its existence to be required to rule on matters which arise before it. Where the ruling might have the consequence of either expediting or hindering the inquiry's work, it might be thought that this would expose the inquiry to the charge of becoming a judge in its own cause. However, this argument was rejected in *Murphy v Flood*.¹⁵⁰ The applicant was the Chief Bureau Officer of the Criminal Assets Bureau. Following the making of an order by the *Flood Tribunal* against George Redmond for discovery and production of certain documents in his possession, Mr Redmond was arrested by Bureau officers and the documents in question were seized. The tribunal requested the applicant to furnish it with copies of the documents but the request was refused and on being summoned before the tribunal the applicant claimed privilege in respect of them. Despite objection by the applicant, the tribunal ruled on the question of privilege and rejected the claim, whereupon the applicant sought judicial review of the decision. In response to the applicant's argument that, in ruling on the issue of privilege, the tribunal, was acting as judge in its own cause the Supreme Court stated:

“...it is hardly appropriate to describe the respondent as being in a ‘dispute’ with the applicant. He has exercised the powers vested in him by the Oireachtas for the purpose of the inquiry... and the applicant has sought to resist the exercise of the powers on the ground of privilege. The decision as to whether such a claim is well founded is not in any sense the resolution of a ‘dispute’ between the tribunal and any other party and the same could be said of the many other rulings which a tribunal of this nature may be required to make...”

The object of the maxim is to ensure that in judicial and quasi-judicial proceedings, decisions are not made by persons who could be perceived as having an interest in the decision... In that sense, *the respondent has no interest whatever in the decision*. The fact that the nature of a ruling made by him on a matter in dispute during the course of the proceedings of the tribunal may facilitate the inquiry which he is conducting does not render the making of the decision subject to the application of the maxim: if it did, every such ruling made during the course of such an inquiry could be challenged by a person claiming to be aggrieved by it in judicial review proceedings in the High Court and the operations of

present instance, it would have been very difficult for it adequately to carry out its statutory functions if it had not been able to consider, with its own solicitor and counsel, what evidence should be obtained, and direct what steps should be obtained, and direct what steps should be taken in search of the cause of the disaster. A further reason for adopting this procedure arose from the fact that the role of the public authorities could come under scrutiny of the tribunal and it was obviously not desirable that the Attorney-General – who would represent the government departments involved and the Garda authorities – should at the same time be responsible for the presentation of evidence to the tribunal.”

¹⁵⁰

[1999] 3 IR 97.

such tribunals, established to deal with matters of importance to the public on an urgent basis, would be rendered even more lengthy, cumbersome and expensive than they sometimes necessarily are. That cannot have been the intention of the legislature.”¹⁵¹

7.10 It was fundamental to Hamilton CJ’s reasoning, that “the respondent has no interest whatever in the decision”. This opinion is not beyond criticism. To respond to the final sentence of the quotation the no bias principle is grounded not in “the intention of the legislative”; but in the Constitution. In addition, the principle directed not only against partiality in decision making, but also against the *appearance* of partiality, although Finlay CJ was undoubtedly legally correct in taking the view that the tribunal had no interest in the determination of a question of privilege, one can question whether this is the only consideration to be taken into account for if the claim of privilege had been upheld the inquiry would have been frustrated. Given the adverse public reaction to the report of the *Beef Tribunal* and the attitude of the media during the sittings of the *Flood* and *Moriarty Tribunals*, it is probably fair to say that there is a certain amount of pressure on the tribunals to be perceived as getting to the bottom of things as quickly as possible. In these circumstances a tribunal may indeed have its own ‘interest’ in ensuring that its inquiry is not held up.

7.11 These considerations notwithstanding, the Commission respectfully suggests that the decision of the Supreme Court in *Murphy v Flood* was right. It is entirely consistent with the ability of tribunals of inquiry to direct their own inquiries. If it were otherwise, then no decision to pursue one line of inquiry in preference to another would be immune from challenge, since in each case an applicant whose rights might be affected by the decision could claim that the tribunal had been a judge in its own cause. It is also notable that many higher courts manage or direct the proceedings before them in a manner not unlike that of an inquiry, directing counsel to particular areas of difficulty and restricting argument in relation to others. To our knowledge, it has never been contended that this undermines the impartiality of the senior judiciary.¹⁵²

7.12 In sum, the Commission believes that, by deciding on matters of procedure and matters relating to the conduct of its inquiry, an inquiry does not infringe the no-bias principle.

(c) The Rule Against Personal Interest

7.13 Where the members of an inquiry panel have a pecuniary or other personal interest in the proceedings before the inquiry, first principles suggest that the *nemo iudex* principle applies with full force. This may be subject to

¹⁵¹ [1999] 3 IR 97, 105 *per* Hamilton CJ (emphasis added). *Cf* Hogan and Morgan *Administrative Law in Ireland* (3rd ed. Sweet & Maxwell 1998) at 518.

¹⁵² *Cf* (English) *Civil Procedure Rules*, (January 1999) Rule 1.4 and Part 3, which promote a much more active role in proceedings for trial judges.

qualification in relation to a private information-gathering exercise¹⁵³ but no decision maker can be permitted to participate in any stage more advanced than this, if he or she really has such an interest.¹⁵⁴ Although an inquiry does not determine rights and obligations, it is not difficult to envisage circumstances in which its proceedings and report could have an effect that might expose the members to the charge of partiality. In this field therefore, the test should be no different from that applicable in relation to allegations of bias against judges.

Part II The Principle that Each Side Must be Heard (*audi alteram partem*)

7.14 The classic statement of the rights derived from this principle is to be found in the judgment of Ó Dálaigh CJ in *In re Haughey*.¹⁵⁵ The case concerned an investigation by the Dáil Committee of Public Accounts into the expenditure of a certain grant-in-aid for Northern Ireland relief. In the course of this investigation Chief Superintendent Fleming of the Gardaí gave evidence, the gist of which was that Mr Pádraic Haughey was deeply involved in assisting the Irish Republican Army with the importation of illegal arms and had paid public funds intended for the Red Cross over to that organisation. Clearly, these were extremely serious allegations. The Chief Superintendent told the Committee that his information was from confidential sources, whose identities he was not prepared to reveal. On being summoned to appear before the Committee, Mr Haughey, on the basis of legal advice, declined to answer any questions put to him. This resulted in the chairman of the committee exercising his power of certifying to the High Court that Mr Haughey was guilty of an offence, as an aspect of the case which is dealt with elsewhere.¹⁵⁶ Here we are concerned with another argument made on behalf of Mr Haughey, namely the contention that his rights under Article 40.31 of the Constitution had been disregarded in the proceedings before the committee. In a seminal passage, Ó Dálaigh CJ accepted counsel's submission that:

“...in all the circumstances, the minimum protection which the State should afford his client was (a) that he should be furnished with a copy of the evidence which reflected on his good name; (b) that he should be allowed to cross-examine, by counsel, his accuser or accusers; (c) that he should be allowed to give rebutting evidence; and (d) that he should be permitted to address, again by counsel, the Committee in his own defence.”¹⁵⁷

¹⁵³ On which, see Chapter 9.

¹⁵⁴ See *Chestvale Properties Ltd v Glackin* [1993] 3 IR 35, 48 and 51. See paragraph 2.22.

¹⁵⁵ [1971] IR 217.

¹⁵⁶ See paragraphs 6.19-6.23.

¹⁵⁷ *Op cit* fn 155 at 263. Cf the statement of Schroeder JA in *In re Ontario Crime Commission* (1962) 34 DLR (2d) 451, 475: “In the present inquiry, allegations of a very grave character have been made against the applicants, imputing to them the commission of very serious crimes. It is true that they are not being tried by the Commissioner, but their alleged

7.15 These protections, which, it should be noted, implicitly include the right to legal representation, are classically the protections necessary to allow a person to make his case as best he may.

7.16 The central question in any particular case ought to be what procedural rights are necessary to afford protection to the substantive right threatened by the inquiry, having due regard to the public interest in the inquiry carrying out its work as thoroughly and expeditiously as possible. In general, the Commission takes the view that this will require an inquiry to adopt a flexible approach to its procedures, according more or fewer constitutional justice rights to different persons as their circumstances dictate. Moreover, we believe that where the inquiry is engaged in a private, information-gathering procedure, constitutional protection exists only in an attenuated form. The issue is dealt with in detail in Chapters 9 and 10. We turn now to consider certain of the individual aspects, comprised in the ‘each side must be heard’ limb of constitutional justice

Part III Right to Representation: Haughey Casts Too Long a Shadow

(a) General

7.17 *In re Haughey* has cast a longer shadow than its *ratio* warrants. Certain tribunals of inquiry, most notably the *Beef Tribunal*, seem to have applied a rather relaxed standard as a prerequisite for the application of the *In re Haughey* rights. In that tribunal’s report it is stated that “[e]very witness who was likely to be affected by the findings of the tribunal was entitled to be legally represented before the tribunal”.¹⁵⁸ So permissive was the interpretation of this standard that, for example, representation was granted to a dozen or so public representatives, simply on the basis that they had made certain allegations,¹⁵⁹ which were being inquired into by the tribunal.¹⁶⁰ More recently, Deputy Howlin and Senator O’ Higgins have been

misconduct has come under the full glare of publicity, and it is only fair and just that they should be afforded an opportunity to call evidence, to elicit facts by examination and cross-examination of witnesses and thus be enabled to place before the commission of inquiry a complete picture rather than incur the risk of its obtaining only a partial or distorted one. This is a right to which they are, in my view, fairly and reasonably entitled and it should not be denied them. Moreover it is no less important in the public interest that the whole truth rather than half-truths or partial truths should be revealed to the Commissioner.”

¹⁵⁸ *Report of the Tribunal of Inquiry into the Beef Processing Industry* (1994, Pn. 1007) at 9. In *Haughey v Moriarty* [1999] 3 IR 1, 74, when describing the stages in the life of a tribunal of inquiry, the Supreme Court (Hamilton CJ) appeared to proceed on the assumption that such rights would apply when a person is “likely to be affected” by evidence given to the tribunal. This, it is respectfully submitted, is vague and seems to be an extremely low threshold. (Notice that these proceedings are entirely separate from *In re Pdraig Haughey* and Haughey referred to there is Mr Pdraig Haughey’s brother (Mr Charles Haughey) who also happens to be a former Taoiseach (or Prime Minister).

¹⁵⁹ They were memorably condemned by Mr Goodman as “alligators”.

¹⁶⁰ *Op cit* fn 158, these persons were Messrs Dick Spring TD (see paragraph 23), Barry Desmond MEP, Pat Rabbitte TD, Tomás MacGiolla, Eamon Gilmore TD, Sean Barrett TD, John Bruton

granted representation, as ‘allegers’, before the *Morris Tribunal*. It is suggested that these individuals were persons in a position analogous to that of one who was merely a witness and not a party, before a court. No allegations had been made against them personally or professionally, and the only risk they ran was that their own allegations might not have been substantiated, with the attendant damage to their credibility. The question, which arose in the *Beef Tribunal* and was answered in the affirmative, is whether the accusers should be allowed to be legally represented before the inquiry.

7.18 In substantiating this line of comment, the following authorities should be mentioned. First the Public Accounts Committee stated that:

“Generally it is the practice in modern tribunals that the tribunal must be persuaded that the party applying has a *manifest interest* in the inquiry either as a party or as someone who will be at hazard or prejudicially affected by the evidence or by any finding or comment of the report of the inquiry.”¹⁶¹

7.19 Secondly in *In re Haughey* itself Ó Dálaigh CJ was at pains to distinguish the position of Mr Haughey from that of “a mere witness”, which it is submitted can only suggest that he did not perceive that a person in such a position was entitled to the protections sought in that case. In a later case, Costello J, having recited the allegations against Mr Haughey, found it significant that the inquiry was “engaged in ascertaining the truth of serious allegations of criminal misconduct”.¹⁶² For Murphy J in a more recent case, Mr Haughey was a “potential accused” and the inquiry had taken “on the aspect of the criminal prosecution”.¹⁶³ To put this in the terms adopted in paragraph 7.03 above, Mr Haughey’s important right to reputation was grievously jeopardised by the proceedings of the inquiry, the inquiry is

TD, Senator Tom Raftery, Paul Connaughton TD, Michael Noonan TD, Joe McCartin MEP, Desmond O’Malley TD (paragraph 37): Appendix 3. Note that they can be divided into four groups, along party political lines, and that solicitors and counsel were shared between members of each group. Cf also the *Report of the Locke’s Distillery Tribunal* (above fn 136) at paragraph 4. Representation before that tribunal was granted to Oliver Flanagan TD, whose only involvement in the matters under investigation was that he had made allegations against several individuals (all of whom were exonerated by the tribunal). Mr Flanagan was not thought to be a credible witness by the tribunal, which stated of his allegations that they were “without foundation and wholly untrue in fact” (paragraph 52), “wholly untrue...entirely without foundation and... made with a degree of recklessness amounting to complete irresponsibility” (paragraph 54), and made “recklessly and without any foundation in fact” (paragraph 55). None of Mr Flanagan’s allegations was upheld. Cf also the granting of full representation by the *Finlay Tribunal* to the family of the late Brigid McCole, and to Positive Action Ltd, both of which had raised questions relevant to the tribunal’s work, but against neither of which allegations had been made: *Report of the Tribunal of Inquiry into the Blood Transfusion Services Board* (above fn 136) at 7.

¹⁶¹ Dáil Committee of Public Accounts sub-committee on Certain Revenue Matters, *Comparative Study of Tribunals of Inquiry and Parliamentary Inquiries* at 28.

¹⁶² *Goodman International v Hamilton* (No 1) [1992] 2 IR 542, 549.

¹⁶³ *Lawlor v Flood* [1999] 3 IR 107, 141.

therefore required to accord him procedural protection sufficient to allow him to vindicate that substantive right. Since the situation was so very serious, it is hardly surprising that the Supreme Court accepted the submission that he was entitled to what has subsequently¹⁶⁴ been dubbed “panoply”¹⁶⁵ of rights. In the circumstances, this was a just and proportionate response, but the *ratio* of the case goes no further. It does not itself require that the same rights should be extended to persons in a less serious position than that of a “potential accused”.

7.20 It is striking that when the question of representation has explicitly come up for decision before the courts, a more stringent test than that followed at the *Beef Tribunal* and plainly in line with *In re Haughey* itself, has been adopted. In *Boyhan v Beef Tribunal*¹⁶⁶ the United Farmers’ Association (UFA), was dissatisfied with the representation that was granted on a limited basis¹⁶⁷ by the *Beef Tribunal*. Accordingly, it sought a mandatory injunction requiring the tribunal to grant it full representation in respect of the matters it regarded as particularly relevant to it, or in the alternative, full representation where there was any purported refutation by or on behalf of any other party of evidence given by UFA witnesses. The UFA also sought to compel the production to it of books and documents in relation to the matters said by it to be relevant, or those materials which tended to support or refute the evidence to be given by UFA witnesses at the tribunal.

7.21 Denham J (then a judge of the High Court) noted that there were no allegations against the UFA. It was, she said, in the position of a willing witness who had approached the tribunal and sought to give evidence. The UFA’s interest in the tribunal was limited to this situation. She said:

“On the facts herein it is clear that the UFA is not an accused. Its conduct is not being investigated by the tribunal. There are no allegations against the UFA or its members. It is a witness which has proffered itself. As such, while its constitutional rights must at all times be protected it does not appear that its *rights – to good name, for example – are in jeopardy* in any way at all. The position of the UFA at

¹⁶⁴ See *Lawlor v Flood* High Court (Kearns J) 2 July 1999; [1999] 3 IR 107, 141 and 144 *per* Murphy J; *In re National Irish Bank Ltd* [1999] 3 IR 145, 168 *per* Shanley J; *Kennedy (t/a Giles J Kennedy & Co) v Law Society of Ireland* High Court (Kearns J) 5 October 1999.

¹⁶⁵ “Panoply” is defined by the *Shorter Oxford English Dictionary* (3rd ed. 1975) as “a complete suit of armour, the ‘whole armour’ of a soldier of ancient or medieval times”. The term has a distinguished literary pedigree: see *eg* Sir Walter Scott, *The Lay of the Last Minstrel*; a poem (London: Longman, Hurst, Rees & Orme; Edinburgh: James Ballantyne, 1805) “...that chapel proud, / Where Roslin’s chiefs uncoffin’d lie, / Each Baron, for a sable shroud, / Sheath’d in his iron panoply” (from Canto VI, known as *Rosabelle*).

¹⁶⁶ [1993] 1 IR 210.

¹⁶⁷ *Ibid* at 213 and 217. The UFA was permitted to be legally represented when ‘their’ witnesses (of course, as noted at paragraph 7.43, below, all witnesses are the inquiry’s witness) gave evidence. Therefore if those witnesses were cross-examined as to credibility, or their veracity or their good name is called into question, counsel would be present to protect their interest at that time.

this time in relation to the tribunal is *analogous to a witness in a trial* and as such it is not entitled to the protection as set out [in *In re Haughey*] by Ó Dálaigh CJ. Its position, as a witness, is fully protected by the limited legal representation awarded by the tribunal.”¹⁶⁸

7.22 Denham J was implicitly rejecting the contention that refutation by one witness of evidence given by a second witness means that the reputation of the second witness is sufficiently affected to warrant representation for the second witness at times other than when giving evidence. She also explicitly rejected the argument that an effect on a person’s financial interests by virtue of events the subject matter of a tribunal (for example the effect on the UFA’s membership of the management of Goodman International’s meat factories) would itself bring such a person within the meaning of “interested” persons.¹⁶⁹ In summary, *Boyhan* stands for the proposition that *In re Haughey* rights do not apply to a person in the position of a mere witness before a tribunal of inquiry.

7.23 The only other court case of which we are aware, in which the right to representation before a tribunal of inquiry has been considered, is *K Security Ltd & William Kavanagh v Ireland and the Attorney General*.¹⁷⁰ This case concerned representation before the tribunal set up in December 1969 to investigate and report on specific matters which pertained to a *Seven Days* feature broadcast on RTE on 11 November 1969, which related to unlicensed money-lenders and their activities. Gannon J said, in a passage endorsed by Denham J in the *Boyhan* case:

“[T]he tribunal had [neither] function nor authority to deal with the plaintiff or his activities in any way other than in his capacity as a witness before them. In my opinion neither the good name, reputation, business connection or property rights nor any other personal rights of the plaintiff were ever interfered with or exposed to unjust attack or injustice of any kind in the proceedings before the tribunal nor did they require vindication or defence during the course of the proceedings of the [i]nquiry.”¹⁷¹

¹⁶⁸ *Op cit* fn 166 at 219 (Emphasis added). It is right to note that Denham J observed the position of the association might change, although what measures ought then to be taken were not a matter for the court. However, on this see paragraph 7.30, below.

¹⁶⁹ Denham J endorsed the following passage from the *Whiddy Report*, which appears in the context of a ruling on the entitlement to representation of the owners and underwriters of a cargo of oil being carried on the ill-fated vessel. It was stated that the tribunal “took the view that, whilst the economic and financial interests of these applicants might have been affected by the disaster, this fact alone did not give them a right to be legally represented before the tribunal – clearly no reflection on the conduct of any of these applicants could arise in the course of the evidence or in the tribunal’s findings. They were not, in the tribunal’s view, ‘interested’ persons within the meaning of the section.” (Appendix 4, paragraph 3).

¹⁷⁰ High Court (Gannon J) 15 July 1977.

¹⁷¹ *Ibid*, at 13.

7.24 It is clear that, like Denham J, Gannon J rejected the contention that being a witness before a tribunal placed a person in a position where his right to good name was jeopardised.

7.25 Another judgment in which the issue under discussion was plainly seen and a narrow view taken of the constitutional justice rights to be afforded by a tribunal of inquiry is that of Murphy J in *Lawlor v Flood*.¹⁷² Although not directly concerned with representation, it contains strong statements of principle. It should also be noted that in the situation before the court, Mr Lawlor was not in the position of a ‘mere allegor’: rather his behaviour was squarely under investigation to see whether it amounted to misconduct. Accordingly Murphy J’s comment goes even further than is necessary to support the contention under consideration here – that ‘mere allegors’ are not generally entitled to be represented.

7.26 At issue in the case was the extent of the powers of a tribunal of inquiry to make orders, as conferred by section 4 of the 1979 Act.¹⁷³ Murphy J, however, went on to raise questions regarding the application of *In re Haughey* rights in the context of a tribunal. He was responding to an argument which the trial judge had put forward as a subsidiary reason for deciding the case in favour of the applicant. Kearns J, at first instance, had stated, in a passage that was also clearly *obiter dictum*:

“Again, if I am in error in so holding, I would hold in favour of [counsel for the applicant’s] submission on fair procedures in relation to the point in time where the applicant’s *Re Haughey* rights accrue, namely, in this situation, where the applicant is obliged to commit himself in an affidavit as to facts. An affidavit sworn by a person in the applicant’s position requires him to commit himself in a form and manner which clearly will form part of the evidence before the tribunal and may consist of material either to build a case against him or on which he may be later cross-examined. It is not therefore confined in its intended user or effect to the preliminary stage of the investigation but has a very real capacity to be a document of major significance at public hearings or perhaps in some other forum to the detriment of the applicant.

Without knowing the full detail of the case made against him, the applicant is in effect, being ordered to make a case against himself either by virtue of the matters which he deposes in the affidavit or by his omissions. He could be seriously disadvantaged at the public hearing had he sworn an affidavit at an earlier stage which was significantly deficient in any respect for reasons of which he might not have known at the time of making the affidavit.

¹⁷² [1999] 3 IR 107, 138 *ff*.

¹⁷³ See paragraph 6.89.

It seems to me that in this situation, the supposed demarcation line between the preliminary investigation work and full public hearings is transgressed. Accordingly, before the applicant is required to swear such an affidavit, he must be afforded his *Re Haughey* rights. As the respondent has made it quite clear that such rights will not be afforded at this juncture. I would feel obliged to quash the order made on this alternative ground also.”¹⁷⁴

7.27 Murphy J, while recognising that his own opinions were also *obiter*, took serious issue with these comments, as follows:

“Clearly an inquiry may, as it did in *In re Haughey*, evolve into a charge by the investigative body against what should be a witness. On the other hand, it is to my mind, inconceivable that witnesses who are called before a tribunal to give such evidence as is available to them in relation to the subject matter of the tribunal should be treated as defendants in civil or criminal proceedings or afforded the rights which would be available to such parties. An inquiry as such does not constitute legal proceedings (whether civil or criminal) against any person: less still does it constitute a multiplicity of legal proceedings against each and every of the witnesses subpoenaed to appear before it. If such were the case it would be impossible to conduct any inquiry...

It must be remembered that the report of the tribunal whilst it may be critical and highly critical of the conduct of a person or persons who give evidence before it is not determinative of their rights. The report is not even a stage in a process by which such rights are determined. The conclusions of the tribunal will not be evidence either conclusive or *prima facie* of the facts found by the tribunal.

This is not to suggest for one moment that a party to adversarial proceedings has extensive natural and constitutional rights and that a witness before a tribunal has none. It is merely to recognise that the need for rights in determinative proceedings differs from those which have no such consequence and that some of the rights long associated with adversarial proceedings do not translate into those of an inquisitorial nature. What I venture to suggest is that it may be necessary to examine afresh the manner in which the constitutional rights of a witness required to attend such a public inquiry must be protected. In that regard it must be recalled that natural rights are the procedures for the protection of the constitutional rights of citizens and the attainment of justice. They are not a ritual or formula requiring a slavish adherence.”¹⁷⁵

¹⁷⁴ As quoted in the judgment of Murphy J *op cit* fn 172, at 138-139.

¹⁷⁵ *Op cit* fn 172 at 142.

7.28 In the first paragraph of this quotation, Murphy J seems to endorse the difference highlighted, above at paragraphs 7.17-7.18, between a person against whom serious allegations of misconduct are made and “witnesses who are called before a tribunal”. This latter term is taken as including a person whose reputation is at risk only in the sense that the inquiry to which he is giving evidence might not believe him or might take the view that he has lied. The former is entitled to “the panoply of rights”, the latter is not. Of course the situation may change during the course of an inquiry and therefore the Commission recommends that an inquiry remain open to applications for the grant of representation in respect of later parts or phases. The Commission would like to endorse the approach recently adopted by the *Barr Tribunal* in this respect:

“When the tribunal refuses an application for representation that does not preclude the applicant from applying again at a later date if there are changed circumstances which justify a further application. In that event a statement should be furnished to the tribunal’s solicitor specifying the grounds for the renewed application.”¹⁷⁶

7.29 In summary, it seems to us that the law, as mandated by the Constitution, is in all probability that one should be able to point to a substantive or external right which is under threat and requires protection in the form of procedural rights before the inquiry. As a matter of policy this seems to be a fair test. To go beyond it and to include – as was done at the *Beef Tribunal* – those who have made allegations – seems to go unnecessarily far. After all, the courts are full of witnesses who, as of yet, are not parties to a case. Is it to be said that some of these witnesses called by one side – (presumably depending on how significant is their evidence) are to be allowed separate representation simply because the side other side may win and, in that case, they may suffer some slight blow to their credibility? This proposition is too fantastic to warrant further discussion. Yet it seems to be implicit in the view that those who made allegations against Mr Goodman at the *Beef Tribunal* should be allowed their own representation.

7.30 *The Commission’s view therefore, is that (subject to the overriding obligation to proceed under the Constitution, as determined by the courts) representation should be granted only to a person who has some right external to the proceedings of the tribunal, which maybe prejudicially affected by the evidence it hears or the finding it reaches. The fact that the person has made allegations, however serious, to or before the tribunal will not generally suffice.*

(b) Full and Limited Representation

7.31 At the *Beef Tribunal* only three parties were granted full representation, meaning the right to be represented by and to have counsel present during all sittings of the inquiry. These three were: (1) the Attorney General and all State authorities; (2) Goodman International and its subsidiary companies; and (3) Mr Laurence Goodman. No criticism can be made of this decision. These three were

¹⁷⁶ See the *Barr Tribunal* website at: <http://www.barrtribunal.ie/PreOpenStatement.html>.

involved in all aspects of the inquiry and serious allegations had been made against the Goodman Group and Mr Goodman, which allegations were, to a large extent, the basis of the inquiry itself. All other persons who were granted representation before the tribunal were allowed what is termed “limited representation”,¹⁷⁷ which is to say they enjoyed rights of representation only in respect of those subject areas that “affected” them. The ‘affected’ test has just been discussed (at paragraph 7.18) and it is worth pointing out that the availability of full or limited representation is entirely consistent with our view that the requirements of fairness demand that constitutional protection be afforded only where the person can show a risk of injury to some external or substantive right. For in a wide-ranging inquiry, which is obliged to deal with a variety of issues, it would be wholly disproportionate and unnecessary to grant full representation to persons whose substantive rights are implicated in respect of only one or a few of these issues. Furthermore, with the increasing tendency amongst inquiries to modularise or divide into phases their task, it will become easier for representation to be granted which is limited to one or two phases or modules of an inquiry.

7.32 *The Commission therefore endorses the practice of granting limited representation (in both senses: see paragraph 7.31, above).*

(c) Inquiries in which there are ‘Identifiable Victims’

7.33 The preceding discussion has concerned mainly the extent to which the right to reputation must be threatened by the proceedings of an inquiry before it is proper to allow a person to be represented before the inquiry. Here the position of those who claim representation is very different. The situation is that the inquiry has been constituted to investigate an affair in which there is an identifiable group of victims and these victims claim representation briefly. Examples of such inquiries include the *Whiddy inquiry*, the *Stardust inquiry*, the *Finlay* and *Lindsay Tribunals* dealing with infected blood products, the *Laffoy Commission* into child abuse, the *Morris Tribunal* into Gardaí misconduct, and the *Barr Tribunal* into the shooting of John Carthy. In these inquiries the victims are unlikely to have their reputations subjected to criticism; rather the case for their being represented is (as strong or as weak as) the fact that they have been so strongly and uniquely affected by the alleged or suspected misconduct, maladministration, or otherwise. Yet it is a significant point that any questions their legal representatives would have asked could be satisfactorily dealt with by counsel for the inquiry. However, it seems that for reasons of sympathy or sentiment, and no doubt in deference to the strong views of public opinion, representation has been granted in the inquiries just mentioned. One further reason is that more often than not such inquiries are so dependent on

¹⁷⁷ Limited representation may most straightforwardly refer to, first, a person’s right to be represented at some parts (what have been more recently termed phases or modules) of an inquiry, secondly, however, it may mean that the representation is of a less intense kind. Earlier we have noted that constitutional justice consists of different elements. Where a person only has certain of these rights that person may have limited representation, for example the status of the UFA before the *Beef Tribunal* were “legally represented when their witnesses are in court [*sic*]” but not have the right to demand that other evidence be called or to cross-examine other witnesses. Above fn 166, at 217.

the co-operation of the victims, survivors, and families that the grant of representation may have to be given in return for co-operation.

7.34 *Our comments in this respect are: where an identifiable group can point to specific factors which demonstrate that its members have been affected more seriously than the general public, it may seem appropriate that that group should be represented before an inquiry. However, this is not required from a legal or constitutional viewpoint, under the test (however stretched) discussed in paragraph 7.18. Rather, if representation is to be granted on the basis of public sentiment or sympathy, this is very subjective and a matter of policy and it is certainly not a legal requirement. Accordingly it should be decided carefully in the circumstances of each case and our only recommendation is that it should not be done automatically but only after due consideration of all the issues.*

(d) The Statutory Power to Authorise Representation

7.35 The present law is that under section 2(b) of the 1921 Act an inquiry has the “power to authorise the representation before them of any person appearing to them to be interested to be by counsel or solicitor or otherwise, or to refuse to allow such representation.” As drafted (although in a very different legal era from the present), the power to authorise representation is wide and permissive and is, in view of the discussion above, not constitutionally required. Accordingly, in order to add force to the suggested good practice articulated in this Part the Commission recommends that a more exacting yardstick than ‘appearing to them to be interested’ be applied to this power.

7.36 *Accordingly, the Commission recommends that section 2(b) be re-drafted, as follows:*

“(b) A tribunal shall have the power to grant representation, by counsel, solicitor, or otherwise;

(c) Save in exceptional circumstances, a tribunal shall only exercise such power where a person’s legal or constitutional rights are significantly affected by its proceedings or any part of its proceedings; and

(d) The tribunal shall have the power to refuse to grant such representation.”

(e) Legal Representation and Costs

7.37 Although to a certain extent tied in with the subject of granting representation, the issue of pooling legal representation is a practice that has, until recently,¹⁷⁸ been thought to have a dramatic effect on costs. Such pooling can be

¹⁷⁸ Although at an early stage in relation to taxation of costs, it is worth noting that although the Irish Haemophilia Society and the individual victims (approximately 200) at the *Lindsay Tribunal* were represented by a single ‘team’ the bill (to be paid by the State) which has been

divided into two categories: first the use of lead teams to represent the interests of the identifiable group of victims and; second lead teams to represent other interested parties who have a similar (if not the same) ‘interests’ before the inquiry. By way of example in this jurisdiction, in the *BTSB Inquiry* former Chief Justice Finlay utilised the ‘Positive Action’ lawyers as the ‘lead team’ for most of the victims and limited representation was granted for other persons who were outside this category of victims.¹⁷⁹ The *Laffoy Commission* too recently expressed the view that the interests of all ‘survivors’ of abuse might best be served by a single legal team.¹⁸⁰ However, this suggestion did not find favour with the complainants and their lawyers and so the decision was taken to grant complainants legal representation before the first phase of the Investigation Committee by a solicitor and one counsel of their choice.¹⁸¹ We await a decision on the second (public) phase, where one would envisage that the logic behind this suggestion carries more force: see further paragraphs 3.29 - 3.33.

7.38 As regards the suggestion that other interested parties before an inquiry (such as potential ‘wrong-doers’) should in some way pool their representation into a ‘lead team’, this involves separate issues from that of ‘victims’. In practice it will often be that such parties have diverse, if not conflicting, interests and therefore require (and insist on) separate legal representation. Further, whereas in the case of ‘victims’ it has always been a uniquely political judgement, out of sympathy, courtesy, or otherwise, to permit them to be represented before the inquiry (it is often the case, especially where some arm of the State is the ‘wrongdoer’ that there is a political imperative to allow almost unlimited representation), alleged malefactors, however, are different: as has been highlighted at paragraph 7.18, the constitutional rights of such parties may be intimately involved. This is not to suggest that it is never possible for there to be a pooling of representation of non-victim interested parties. Indeed to a certain extent it has occurred in the *Laffoy Commission* as highlighted in the judgment of Kelly J (see paragraph 5.82) in the first ‘case stated’ application under section 25 of the 2000 Act.¹⁸² The institutions before the *Laffoy Commission* tend to engage a team to represent both themselves as well as their employees, past and present. More recently, all 36 members of An Garda Síochána before the *Barr Tribunal* are represented by a single legal team.

submitted by the legal costs accountant in respect of this work is reported to be the largest single bill to come before a High Court Taxing Master: *Irish Times* 4 February 2003.

¹⁷⁹ *Report of the Tribunal of Inquiry into the Blood Transfusion Service Board* (Pn 3695 1997) at Appendix A.

¹⁸⁰ *Statement Delivered at First Public Sitting of Commission to Inquire into Child Abuse held on 29 June 2000*, at 27-29. See also the Commission’s letter of 14 June 2000 to the Department of Education and Science set out in Appendix F.

¹⁸¹ *Statement Delivered at Second Public Sitting of Commission to Inquire into Child Abuse held on 20 July 2000*, at 4. But see paragraph 5.82 on the attempted limitation to “a solicitor and one counsel”.

¹⁸² High Court (Kelly J) 9 October 2002.

7.39 *The Commission believes that this is a step in the right direction and suggests that it is preferable that as much as possible an inquiry should grant interested parties pooled representation.*

7.40 A more forceful line would be that if parties before an inquiry have largely the same interests, then they should only be either granted representation or at any rate, have their costs paid by the State, if all are represented by a single legal team, as opposed to a number of legal teams representing a each individual party; especially where the costs are likely to be defrayed out of the public purse. Then if parties do not consent and insist on separate representation, then this should be a factor to be taken into account when determining the level of costs payable by the State. Of course it will often be the case that the extent of State liability (*ie* the default position in the absence of a costs order against a party, see Chapter 12 generally) to pay the costs of interested parties representation will not be known until after the inquiry has concluded. However, it is usually better that the inquiry and/or the sponsoring departments (from whose budget the costs will ultimately be defrayed) from the outset manage and regulate what may turn out to be a considerable liability in costs.

7.41 *While a good deal of what has been suggested in the preceding paragraphs depends naturally on the circumstances of a particular inquiry, as well as its subject matter, generally groups of alleged malefactors and victims alike should pool their representation whenever appropriate. In determining whether this is appropriate and deciding on the grant of representation, factors such as common interest and costs, should be considered by the inquiry.*

Part IV Remaining Issues of Constitutional Justice

7.42 In this part, we are dealing with areas in which there is very little case-law and, accordingly the views put forward here are advanced very tentatively. In general our recommendations are directed at those chairing inquiries with the particular purpose of encouraging more active management of proceedings; a practice that is well developed in the courts.

7.43 It has been well observed in Britain that all witnesses before an inquiry are the inquiry's witnesses.¹⁸³ It decides (within parameters delimited by constitutional justice) who to call and there is, in general, no obligation on it to call anyone in particular. The corollary of this is, of course, that in the normal course of events no one has a right to insist that he or anyone else be called. However, in Ireland, all this is subject to the Constitution and, in particular, the seminal passage from *Re Haughey*,¹⁸⁴ quoted at paragraph 7.14, above. Usually all four rights

¹⁸³ *Report of the Royal Commission on Tribunals of Inquiry* chaired by Lord Justice Salmon (Cmnd 3121 1966) at paragraph 30.

¹⁸⁴ Above fn 155 at 263. *Cf* the statement of Schroeder JA in *In re Ontario Crime Commission* (1962) 34 DLR (2d) 451, 475: "In the present inquiry, allegations of a very grave character have been made against the applicants, imputing to them the commission of very serious crimes. It is true that they are not being tried by the Commissioner, but their alleged

elucidated by Ó Dálaigh CJ apply together and indeed to apply wherever the right to representation, discussed in Part III, exists. However, the inquiry itself is the master of its own procedures and in consequence has the discretion to determine the minutiae of such minimum protection that must be afforded to a person appearing before it (subject, of course, to the overriding jurisdiction of the courts). Therefore, particular circumstances may dictate that one or more of these rights do not apply (or may only do so in a diluted form). (We note, parenthetically, that the same undemanding test that was applied by the *Beef Tribunal* to the issue of representation was again applied in relation to the right to address the tribunal.)¹⁸⁵

(a) Allegations and Potential Criticism

7.44 The most minimal of the rights identified in *In re Haughey* is the right to advance notice of allegations. In *Lawlor v Flood* Murphy J made the following comment which is full of good sense:

“Clearly witnesses must know the subject matter of the inquiry and be advised as to the procedure to be adopted by it. In the interest of the tribunal as well as that of the witness, notice should be given to the witness of the area in respect of which it is intended to examine him.”¹⁸⁶

7.45 Currently, the practice of inquiries has been to serve copies of all proposed evidence on those parties who have been granted full representation and to serve those parts of the proposed evidence on relevant parties with limited representation, as well as on other persons likely to be affected by such evidence (*eg* witnesses). This will usually be sufficient to notify persons against whom allegations have been made of the substance of the proposed evidence in support of such allegations (for the purposes of affording the first protection articulated by Ó Dálaigh CJ).

7.46 Another possible extension to this aspect of procedural fairness, which has been used in British inquiries, is the provision of “notices of potential criticism”. By way of example the *Victoria Climbié Inquiry*,¹⁸⁷ which recently

misconduct has come under the full glare of publicity, and it is only fair and just that they should be afforded an opportunity to call evidence, to elicit facts by examination and cross-examination of witnesses and thus be enabled to place before the commission of inquiry a complete picture rather than incur the risk of its obtaining only a partial or distorted one. This is a right to which they are, in my view, fairly and reasonably entitled and it should not be denied them. Moreover it is no less important in the public interest that the whole truth rather than half-truths or partial truths should be revealed to the Commissioner.”

¹⁸⁵ *Report of the Tribunal of Inquiry into the Beef Processing Industry* (Pn 1007 1994) at 9, paragraph 35.

¹⁸⁶ Above fn 172 at 143. See to like effect the second ‘cardinal principle’ articulated in the *Salmon Commission Report*, at paragraph 32 (hence the phrase ‘Smoked Salmon’ referring to the letters was coined).

¹⁸⁷ Although it should be noted that this particular inquiry, whilst conducted as a public inquiry, was not established under the 1921 Act (unamended in Britain), but was appointed by the

reported, sent notices of potential criticism to individuals and public bodies where it appeared (from the preliminary information gathered) that they may be criticised for their conduct in relation to matters covered by that inquiry's terms of reference. Accordingly, each witness was given the opportunity to address those points of potential criticism during the course of their evidence. Lord Laming,¹⁸⁸ the chairman, in his report stated:

"I made it clear at the preliminary meeting [of the inquiry] that some individuals and organisations could be criticised in this Report, and that out of fairness I would adopt a procedure that allowed those concerned to address any criticism. ... I proposed taking an extra step to ensure proceedings were conducted fairly.

I made it clear that I would make no finding significantly adverse to an individual or organisation without ensuring that they first had a proper opportunity to answer the criticism. Wherever it was possible to do so, the witness would be informed by the inquiry team of the nature of the potential criticism before they were called to give evidence. Where that was not possible, either because of the time at which grounds for the potential criticism emerged or otherwise, arrangements would be made either for the witness to respond in writing, or for the witness to be recalled so that they could answer the criticism. At the preliminary meeting, I made it clear that I would particularly welcome representations on those procedures. I received no suggestions indicating a need to amend the proposed arrangements and so they were put into practice during the course of the inquiry."¹⁸⁹

7.47 Even the rather austere measure of natural justice meted out by the *Scott Inquiry*¹⁹⁰ allowed for notice of the areas in which the inquiry intended to examine a witness. If it were intended to spring serious allegations of misconduct on a witness it would in all likelihood be contrary to constitutional justice. There is another point too: witnesses will be more likely to be able to assist the inquiry if they have some indication of the issues in which it is interested.

7.48 The Commission's view is that (possibly nowadays more frequently, by virtue of the information gathering stage) it may at an early stage become apparent to an inquiry that certain individuals or organisations may potentially be criticised

Secretary of State for Health and the Home Secretary under section 81 of the *Children Act 1989*, section 84 of the *National Health Service Act 1977*, and section 49 of the *Police Act 1996*.

¹⁸⁸ Who interestingly is not a judge or even a lawyer, but rather a Peer and former Chief Inspector of the Social Services Inspectorate.

¹⁸⁹ *The Victoria Climbié Inquiry: A Report of an Inquiry by Lord Laming* (Cm 5730 January 2003) at paragraphs 2.51 – 2.53.

¹⁹⁰ Scott "Procedures at Inquiries – The Duty to be Fair" (1995) 111 LQR 596.

in its report(s). Of course the practice that was adopted in Lord Laming's inquiry would not necessarily be suitable for all inquiries: but, it seems to us, where appropriate an inquiry should endeavour either to issue notices of potential criticism so as to enable a person called to give evidence to address potential criticism directly or, as Lord Laming, allow the witness to respond in writing or to be recalled so that they could properly address potential criticism as it arises. This, we feel, would not only be fair, but also it may help focus the hearings themselves on those issues that are most in dispute and help reduce the length of the evidence taking sessions of the inquiry (with the consequence of saving costs).

7.49 *The Commission recommends that in appropriate cases, witnesses may either be issued with notices of potential criticism; or be re-called (or provide a written statement) in order to address potential criticism that has come to light since they gave evidence.*

(b) Examination and Cross-examination

7.50 Normally, before a tribunal of inquiry, there is a practice of examination¹⁹¹ being first carried out by counsel for the inquiry. Next, interested parties are given the opportunity to cross-examine, followed by the witness's own lawyer (if the witness is permitted to be represented) re-examining. Counsel to the inquiry will then re-examine the witness. Occasionally, the chair may wish to ask questions of a particular witness.

7.51 The proposed evidence of witnesses (where written statements are provided to the inquiry) is in practice circulated to interested parties and those likely to be affected by such proposed evidence, as highlighted at paragraph 7.45, above. What transpires at the hearings is that a witness will be called and taken through their statement. The tendency has been to go through every aspect of a witness's evidence, often with the previous written statement (of which all interested parties have a copy) in front of them. This includes not only the controversial aspects but also the non-controversial. Of course it may well be difficult to distinguish between the two and therefore appropriate in some cases for all a witness's evidence to be led. But there will equally be aspects of a witness's evidence that can easily be identified as uncontroversial, in which case that aspect will need to be adduced, but there will be no necessity to subject that part to the same amount of scrutiny as for the disputed evidence. Another point is where a witness has evidence relevant to an inquiry's terms of reference, but it is not in dispute between either the parties or for that matter the inquiry. Accordingly, there is no reason to call the witness and lead their evidence at all. This would be to squander an inquiry's time and can easily be avoided. We feel that better use should be made of the statements of proposed evidence submitted to the inquiry.

¹⁹¹ 'Examination' is used here because of the role of counsel to the inquiry is to both present the evidence to the inquiry and to test such evidence. Accordingly, such questioning is not strictly examination-in-chief or cross-examination, but an amalgamation of the two.

7.52 Although it is no doubt cross-examination of witnesses that takes up the majority of the time at an inquiry's hearings, we consider that the option of having a witness's statement 'read in' is a useful one: firstly, as part of their evidence,¹⁹² where they may supplement it and be cross-examined on it and secondly, for those witnesses who need not be called, as their evidence in its entirety.¹⁹³ As regards the former, the statement may by agreement between the witness and the inquiry be deemed to be read into the record or to put it another way, may be adopted as part of a witness's evidence.¹⁹⁴ Consequently, there may be no need to 'lead' all the evidence at the eventual hearing and this will enable the inquiry to concentrate on the issues that are in contention. (Of course this may not be suitable across the board, as we envisage that in some cases it would be appropriate to hear all the evidence in full.) As regards the latter, all that need be done is for counsel to the inquiry to draw to the attention of the chairperson the witness statement of Mr or Mrs X, contained in witness statement bundle Y/03 for example, and request that it be read into the record. The inquiry is then able to consider this relevant material as evidence without the need to literally read it out.¹⁹⁵

7.53 Of course the immediate concern is that the public are excluded from hearing evidence relevant to a 'public' inquiry and therefore a decision to 'read in' a witness's statement may on the face of it appear to conflict with the obligation imposed on an inquiry by section 2(a) of the 1921 Act (considered in detail in the following chapter). The practice of the *Shipman Inquiry* (established under the 1921 Act, as unamended) is a useful example of how that inquiry has catered for the obligation imposed by section 2(a), which provides that in most circumstances the public must be present at any of the proceedings. What takes place at the evidence taking sessions of that inquiry, and indeed others,¹⁹⁶ is that a witness may adopt his or her statement provided to the inquiry as part of their evidence (in-chief). Once such a witness begins giving evidence then copies of their statement are distributed to the public who attend and are also scanned and uploaded onto the inquiry's

¹⁹² Clearly, as in civil proceedings a witness may supplement his or her evidence to take into account developments since the statement was made.

¹⁹³ This is nothing new, as far back as the *Whiddy Inquiry* a similar procedure was adopted: see the Report above fn 148 at paragraph 1.6.1, which states that "... in most cases the written statement or report was accepted by the tribunal as part of the witness's testimony; it was, however, in most cases supplemented by oral evidence."

¹⁹⁴ Examples of this practice within this jurisdiction include: *Laffoy Commission*, paragraph 3.39 and; *Barr Tribunal*, which has recently published a memorandum of procedures – "4.5 A witness will be given the opportunity of adopting his or her statement, if any, as part of his/her evidence subject to any modification or clarification which he or she may wish to make"; www.barrtribunal.ie.

¹⁹⁵ We will return to the practice of the current generation of inquiries in the following chapter, however, it should be mentioned here that days are spent in which the registrar will literally read out the statement of a witness in order for it to form part of the record of the inquiry: paragraphs 8.31-8.44.

¹⁹⁶ Such as the *Victoria Climbié Inquiry* above fn 189, at chapter 2.

website¹⁹⁷ by the following day. In the UK inquiries have not encountered any difficulty in operating such a practice in order to run the public sessions more effectively, and there has been no legal challenge to this practice on the basis that it does not comply with the obligation imposed by section 2(a). However, although we feel that providing copies of the witness statements to those members of the public who attend the hearings of an inquiry would satisfy section 2(a), we prefer to put matters beyond doubt and recommend at paragraphs 8.31-8.44 a re-draft of the section. The draft treats witnesses in two separate categories: first, where the witness statement is not in dispute; secondly, where it is in dispute. As regards the latter, in all probability the witness will be called to give oral evidence and so can be cross-examined *in addition* to the statement being read in as part only of that witness's evidence.

7.54 As regards cross-examination, the second protection illuminated by Ó Dálaigh CJ, hostility towards extending the right stems from the tendency it has to prolong proceedings.¹⁹⁸ The question is whether it is necessary for the protection of a substantive right that a person should be entitled to cross-examine a witness. Where allegations are made against the person and they are not merely trivial, it is likely that, given the high value that our system of justice places on cross-examination as an instrument for determining truth, cross-examination by the person traduced, will be permitted. However, one should note that one view is that sufficient protection will be afforded by the fact that the party making the potentially harmful allegations will be cross-examined by counsel for the inquiry. The inquiry has no interest in reaching false conclusions in relation to factual conflicts, and ought to take steps to resolve such conflicts by testing the relevant evidence. In other words, the inquiry will arrange for its own counsel to play devil's advocate when contested evidence is being given. Indeed, in relation to the entitlement to cross-examine or have cross-examined a witness critical of an interested party, Murphy J, in *Lawlor v Flood* stated (although clearly *obiter dictum*), as follows:

“To impose such a requirement would involve the assumption that cross-examination is the only means or the only appropriate means of eliciting the truth. Such an assumption would place an excessive value on the adversarial system and implicitly reject alternative systems which find favour in other jurisdictions and appear to achieve an equally high standard of truth and justice. The examination and cross-examination of witnesses by the tribunal or its counsel might meet the requirements of natural justice having regard to functions which such a body performs.”¹⁹⁹

¹⁹⁷ The Internet is a tool which has been increasingly used to disseminate not only on administrative matters but also the transcripts of the inquiry hearings themselves. We approve of this practice in the context of a ‘public’ inquiry.

¹⁹⁸ It came in for particular criticism from Murphy J in *Lawlor v Flood* [1999] 3 IR 107, 143-144.

¹⁹⁹ [1999] 3 IR 107, 143.

7.55 This observation implies a caution against any easy assumption that cross-examination by counsel for an inquiry is a poor safeguard; such cross-examination can be expected to be as vigorous as is consistent with a desire to discover the truth, and that ought to be quite vigorous enough. Murphy J went on to suggest that the extent to which cross-examination should be confined was a matter for the inquiry.²⁰⁰ The Commission agrees with this sentiment. Further, in certain cases but by no means in all an interested party may and should be permitted to cross-examine a witness who gives evidence critical of such a party.²⁰¹ In our view the demands of constitutional justice and the proper and efficient conduct of the inquiry can be adequately balanced by the chair, whom we recommend at paragraph 5.21 should usually be a judge. The approach that has recently been adopted by the *Barr Tribunal* in this regard represents a useful precedent, as follows:

“The operation of the tribunal is inquisitorial in nature rather than adversarial. Accordingly, all evidence will be led by counsel for the tribunal. Interested parties or their legal representatives may at the discretion of the tribunal question witnesses who give evidence. Where a party wishes to have a witness called on his/her behalf, a statement of proposed evidence and a written submission explaining the perceived relevance of the witness shall be furnished to the tribunal’s solicitor. Where possible this should be done in good time before commencement of the relevant module hearing. If it appears to the tribunal that the proposed evidence is or may be relevant, arrangements will be made for the witness to be examined by counsel for the tribunal at a public hearing which the tribunal deems to be appropriate. Other parties may question the witness if the tribunal is satisfied that they have a legitimate interest in doing so. The party who proposes the witness may also question him/her immediately after examination in chief or when all interested parties have questioned the witness. Counsel for the tribunal will have the right to re-examine the witness.”²⁰²

7.56 *Accordingly, we recommend that an inquiry ought to be flexible and discriminating in how it applies the rules of constitutional justice, particularly the facility to cross-examine witnesses.*

7.57 It is a notable feature of certain of the present generation of inquiries that counsel representing interested parties occasionally decline to exercise the right to cross-examine witnesses, even though the evidence given may be adverse to their clients. There are at least two possible reasons for this. The first is that counsel for

²⁰⁰ [1999] 3 IR 107, 143.

²⁰¹ That is so long as the evidence critical of the party is relevant to the inquiry’s task. After all there is no reason to allow the inquiry to become a forum in which individuals thrash out disputes unrelated to matters on which the inquiry must decide. It is, however, envisaged that this will be a rare occurrence as the irrelevant should be excluded at the information gathering stage.

²⁰² See the *Barr Tribunal* website <http://www.barrtribunal.ie/PreOpenStatement.html>.

the inquiry, who goes first, has asked all the questions that need to be asked. The second reason is related to the fact that before an inquiry can rely on evidence, it must be satisfied that it is reliable, even if it is not directly contradicted. Some canny barristers have recognised that a vigorous but unsuccessful attack on a witness's credibility is likely to do more harm than good to a client's interests.

7.58 Finally, it is well worth bearing in mind the truism that cross-examination will only be an issue where there is a difference in two or more accounts of the facts. Where there is no dispute there is no requirement for cross-examination. The inquiry should do its utmost to keep the need for cross-examination to a minimum by, for example, informing persons, whom it is thought might wish to contest a view of the facts, that there is strong documentary information or evidence tending to support it. The swiftness with which the Dáil Committee on Public Accounts was able to conclude its inquiry into the DIRT affair was due in no small measure to the existence of a report by the Comptroller and Auditor General in which many of the background facts were established. Clearing the ground in this way reduces the necessity for cross-examination, a point adverted to by Sir Richard Scott in relation to his inquiry into the Arms to Iraq affair:

“The need for facilities for cross-examination of witness by or on behalf of other witnesses was always likely in my inquiry, whatever might be the case in other Inquiries, to be limited. The reason for this was the absence of much scope for significant dispute of primary fact. This feature of the evidence was attributable to the Whitehall habit of making a written record of the issues to be decided, of the arguments and recommendations on those issues, of the decisions reached and the action taken to implement the decisions. These habits have resulted in a comprehensive volume of documentary records from which the course of events can be traced.”²⁰³

7.59 Clearly, if a broad measure of agreement as to the primary facts can be secured at an early stage, then the inquiry is able to progress to the real areas of contention more quickly. It is in these areas of conflict that the value of cross-examination is greatest. The importance of the information gathering stage of an inquiry can not therefore be underestimated.

(c) The Right to Call Evidence in Rebuttal

7.60 A word on Ó Dálaigh CJ's third protection (in the celebrated passage quoted at paragraph 7.14) is warranted here: namely, that a person manifestly affected by the inquiry should be allowed to give rebutting evidence. Clearly, if a

²⁰³ Above fn 190 at 609. By contrast the Rt. Hon. the Lord Howe of Aberavon CH QC who was one of the witnesses, stated that “quite apart from justice to the many other individuals concerned, would not the purpose of the [i]nquiry itself be helped by enabling advocates to be heard on some of the other issues? Even on questions of fact, it would be surprising if any judge sitting alone, could have total confidence in his own unaided ability to avoid significant error in analysing the mountain of evidence that has now piled up”: *The Times* 1 January 1994.

person has been granted representation then their evidence is almost certainly relevant to the inquiry's terms of reference and will be called to give evidence, in which case they will have an opportunity to rebut allegations or criticism. What they cannot do is actually call a witness to provide evidence on their behalf, such as in a civil trial where litigants call witnesses to support their claim. As noted at paragraph 7.43, above, all witnesses before an inquiry are the inquiry's witnesses. Therefore, subject to constitutional justice, it is for the inquiry to determine who should be called to give evidence. However, there is nothing to prevent an interested party from suggesting to the inquiry whom should be called and what information they may have. So long as it is relevant to the inquiry's terms of reference then there is no reason why such a witness would not be called. Again the recently expressed memorandum of procedures of the *Barr Tribunal* puts the position accurately:

“The tribunal shall decide which witnesses shall be called to give oral evidence to the tribunal. Persons are encouraged to suggest to the tribunal witnesses who they feel would be in a position to give relevant evidence. In deciding which witnesses shall be called the tribunal will consider all such suggestions.”²⁰⁴

7.61 So long as an inquiry calls all the witnesses who may give evidence that rebut allegations made against an interested party, which fall within its Terms of Reference, then there is no danger of an inquiry infringing a person's constitutional protection.

(d) Submissions

7.62 In relation to the right to address the inquiry (the fourth protection) the same considerations and recommendations which have been articulated in respect of cross-examination also apply: an inquiry should be flexible and discriminating in permitting persons to make opening and closing speeches, subject to one further proposition. Namely, that the Commission is of the view that in order to administer an inquiry as efficaciously as possible and yet still furnish the appropriate constitutional protection a chairperson should seek to time-limit submissions (just as a judge hearing a case in court manages proceedings) and permit counsel to supplement them with written submissions. Again the same considerations apply to such supplemental written submissions as for statements adopted as evidence, explained at paragraph 7.52, above.

(e) Rules of Procedure

7.63 A very obvious issue, which may be considered as appropriately here as anywhere, is whether there should be some code of rules for inquiries – the equivalent of rules of court. A code of procedures for the operation of tribunals has been called for in recent times, as a means of reducing the scope for legal challenge

²⁰⁴ See the *Barr Tribunal* website <http://www.barrtribunal.ie/MemoOfProcedures.html>

and the ensuing delay.²⁰⁵ The advantage of such rules would be that they give predictability and militate in favour of fair procedures. However, it seems to us that one of the conclusions which emerges throughout this paper, especially the present chapter and Chapter 5, is that the well-known and sophisticated rules of constitutional justice, which inquiry chairpersons are experienced in operating (presuming that the chair is a judge or other lawyer; otherwise the lay chairperson would draw heavily on the advice of counsel to the inquiry) would be sufficient. Moreover, a feature of inquiries, which distinguishes them from courts, is the wide range of sometimes unexpected material which comes before them. Against this background, a detailed code of inflexible rules could unreasonably thwart an inquiry and would not always serve the meritorious party. On balance, therefore, the Commission concludes that, rules of procedure should not be recommended. This is in line with the conclusion reached by the Comparative Study:

“The issue arises as to whether there should be statutory rules which lay down procedures to be adhered to by tribunals. The disadvantage of such rules would be that they would necessarily be detailed and rigid, and therefore may be an aid to anyone who wished to retard a tribunal by alleging a technical breach. This point is well made in Chapter V of the Salmon Report. It does not recommend such statutory rules of procedure.”²⁰⁶

7.64 *The Commission accordingly does not recommend that formal codes of procedure be established for inquiries.*

(f) Other Constitutional Rights

7.65 Inquiries should be prepared to grant procedural rights on a flexible basis in order to provide sufficient protection for external or substantive rights. The case of *R v Saville, ex parte A*,²⁰⁷ represents a good example of the flexibility that is required to respond to a particular threat. The *Bloody Sunday Inquiry*, under the chairmanship of Lord Saville of Newdigate, had ruled that certain soldiers involved in the military operations on Bloody Sunday would have to give evidence under their real names. The Court of Appeal noted that this indirectly threatened the right to life of the soldiers (who might have become targets for paramilitary attack) and that the potential injury to that right was very grave, amounting to total abnegation. Having regard to this danger, procedural fairness required that the inquiry, while taking the evidence of the soldiers, preserve their anonymity. What this case illustrates is that an inquiry must be prepared to move beyond the rights traditionally associated with natural justice if the occasion demands. It is likely that these situations will be rare, and in many cases, will be dealt with by the inquiry

²⁰⁵ Brady “Tribunals and Politics: A Fundamental Review” *Contemporary Issues in Irish Law and Politics* No 3, 165.

²⁰⁶ *Comparative Study into Parliamentary Inquiries and Tribunals of Inquiry* (Pn 9796) at 28-29.

²⁰⁷ [1999] 4 All ER 860.

simply deciding to go into private session, as should be permissible under section 2(a) of the 1921 Act (though see paragraph 8.35). If this is not enough or is inappropriate to protect the substantive right jeopardised by the inquiry's proceedings, the inquiry must be flexible in seeking a solution, which protects the external rights, such as the right to life.

Comment

7.66 In this Chapter it is the size and shape of the constitutional rights of persons before an inquiry – rights which are ultimately grounded in the Constitution - which have been under discussion. Accordingly, it is inappropriate to recommend any legislation in this area. Instead, we have made suggestions which have been aimed at the inquiry itself and may be of use to an inquiry chairperson in deciding the level of constitutional protection which is appropriate in the particular circumstances of the person whose conduct is being investigated by the inquiry.

CHAPTER 8 PUBLICITY AND PRIVACY

Part I Policy Arguments Concerning Public Airing

8.01 The simple policy question is this: does the public have the right only to read the final report of an inquiry or also to follow the developments as it hears evidence. The Commission should emphasise that this is a policy and not a constitutional question. There is nothing about inquiries in the Constitution. In particular, there is no equivalent of Article 34.1 of the Constitution by which: "...save in such special and limited cases as may be prescribed by law, justice shall be administered in public."¹

8.02 To go back to the main question: ought the inquiry's evidence-taking be heard in public? Such judicial comment as there has been is in the affirmative. Lynch J, chairman of the "*Kerry Babies*" Tribunal, remarked: "How can an inquiry sitting in public, dispel public disquiet if crucial evidence is taken in private?"² Similarly, approving the pro-publicity policy of the 1921 Act, Keane CJ made the following statement in a judgment given on behalf of the Supreme Court in *Flood v Lawlor*:³

"It is quite clearly envisaged from [Section 2], and this court has emphasised this aspect of it in a number of its recent decisions on the matter, that in general the proceedings of the tribunal are to be heard in

¹ The policy underlying Article 34.1 was explained as follows by Walsh J in *In re R Ltd* [1989] IR 126: "... the administration of justice in public does require that the doors of the courts must be open so that the members of the general public may come and see for themselves that justice is done. It is in no way necessary that the members of the public to whom the courts are open should themselves have any particular interest in the cases or that they should have business in the courts. Justice is administered in public on behalf of all of the inhabitants of the State." In other words, the objective is not essentially for the public to know the content of what is going on in the court, but rather for them to be reassured that the important function of administration of justice is being carried on freely, impartially and according to law. The policy considerations regarding publicity in the cases of a court and of an inquiry are thus rather different. See also *Sutter v Switzerland* [1984] 6 EHRR 272.

² (1985 PI 3514) at 142.

³ Supreme Court 24 November 2000. See, to like effect, *Redmond v Flood* [1999] 3 IR 79, 88: "It is of the essence of such inquiries that they be held in public for the purpose of allaying the public disquiet that led to their appointment."

public. This is of paramount importance because the tribunal is established by a resolution of both Houses of the Oireachtas in order that matters of definite public concern should be investigated by an independent tribunal as a matter of urgency. As has been frequently pointed out, one of the objects and indeed probably the main object of an inquiry, is to seek to allay public concern arising from matters comprised in the terms of reference of the tribunal and affecting in general, although not exclusively, the conduct of public life at various levels and the conduct of public administration at various levels. That object of course will be defeated if the inquiry as a general rule is to be conducted in private rather than in public.”⁴

8.03 Reflecting on the reason why his own inquiry (which involved duplicity by government ministers or officials) sat largely in public, Sir Richard Scott offered the following nuanced view:

“If the inquiry is an investigative or inquisitorial inquiry into affairs of government, into what had been done by ministers, civil servants or by others at the direction of ministers or civil servants. I think that the public is entitled to have that inquiry done to the greatest extent possible, consistently with expense and expedition in public. It is a side of the coin of executive accountability. The first rule is that the procedures of the inquiry must be fair, the second is that the accountability of government and members of government is a public accountability, but the third is that, subject to those two rules, individuals are entitled to have their private affairs kept private.”⁵

8.04 Speaking later and not in the particular context of his inquiry,⁶ Lord Scott of Foscote (as he is now) stated that there are essentially two reasons to convene an inquiry; first, in order to find out things that are not known; and secondly, to allay public disquiet about a matter of public concern, that is often voiced in the media. Sometimes the two are joined together, but if the only reason for setting up an inquiry is to find out something that is not known then there is no reason to hold a full-blown public inquiry. However, if the imperative is for reasons of public disquiet then there must be a public inquiry.

8.05 As a matter of law, there is a recent British authority on the issue of publicity verses privacy in the context of inquiries namely of *R (Wagstaff and others) v Secretary of State for Health and another*.⁷ In this case, the High Court

⁴ *Op cit* fn 3 at 4.

⁵ “Investigating Government: the role of the Media and Publicity”, at 7. This was a paper given at the *Bar Council Conference on Inquiries: The Rights of Individuals, Publicity, and Confidentiality* 17 July 1999. See also *Report of Royal Commission on Tribunals of Inquiry* (Cmnd 3121 HMSO 1966) (“Salmon Report”) at paragraph 115.

⁶ On the BBC Radio 4 programme *Broadcasting House* 17 November 2002.

⁷ [2001] 1 WLR 292.

considered whether the decision of the Secretary of State for Health to hold in private the inquiry⁸ into the conduct of Harold Shipman (a GP jailed for murder, and suspected of murdering several other patients, apart from those for whose deaths he was responsible) was lawful, notwithstanding the views of both the relatives and the media that it should be held in public. Kennedy LJ, sitting as a High Court judge, handing down the judgment of the court highlighted some of the material considerations which might be regarded as arguing in favour of opening up the inquiry in that case:

“(1) The fact that when a major disaster occurs, involving the loss of many lives, it has often been considered appropriate to hold a full public inquiry... (2) There are positive known advantages to be gained from taking evidence in public, namely: (a) witnesses are less likely to exaggerate or attempt to pass on responsibility; (b) information becomes available as a result of others reading or hearing what witnesses have said; (c) there is a perception of open dealing which helps to restore confidence; (d) there is no significant risk of leaks leading to distorted reporting (3) The particular circumstances of this case militated in favour of opening up the inquiry because: (a) ...it was clear that was what the families wanted, and that the Secretary of State had been mistaken to think otherwise... (d) there was no obvious body of opinion in favour of evidence being received behind closed doors; (e) given an inquisitorial procedure and firm chairmanship, there was no reason why the inquiry should take longer if evidence were taken in public, nor was there any tangible reason to conclude that any significant evidence would be lost; (4) Where, as here, an inquiry purports to be a public inquiry, as opposed to an internal domestic inquiry, there is now in law what really amounts to a presumption that it will proceed in public unless there are persuasive reasons for taking some other course...(5) If the inquiry has been conducted in public, then the report which it produces and the recommendations which it makes will command greater public confidence. Since all members of the community, especially the elderly and vulnerable, have been accustomed to place great trust in their GPs, such restoration of confidence is a matter of high public importance.”⁹

8.06 Having regard to these five material considerations and following an examination of the Secretary of State's reasons for the decision, the High Court quashed the decision on the basis that it was “irrational”. One might have expected that a Secretary of State's decision as to whether to hold an inquiry in public or private would fall within an area of political policy discretion, which would only be reviewed in extreme circumstances (at any rate, in the absence of any underlying

⁸ Established under the *National Health Service Act 1977* section 2 which confers wide powers upon the Secretary of State for Health, for the purposes of discharging his duty to promote a comprehensive health services, as imposed by section 1.

⁹ *Op cit* fn 7 *per* Kennedy LJ, at 319-320.

promise or practice to the contrary).¹⁰ It is questionable whether the Irish courts in judicial review proceedings would reach the same conclusion because of their traditional reluctance to interfere with the decision to hold, or the design of, an inquiry.¹¹ Since the circumstances of the *Wagstaff* case are very particular, all that can be said here is that it demonstrates that, in circumstances which give rise to such a level of public concern, condemnation and outcry, the rationality of a decision to hold an inquiry otherwise than in public may be open to challenge.

8.07 In Chapter 1, the Commission examined the arguments for and against an inquiry taking evidence mainly in public. Some of the same considerations apply here too, and we can, therefore, summarise the pros and cons as to whether an inquiry should sit in public, very briefly:

- Whether public concern can be allayed only by way of an inquiry going on in public is a quintessentially political judgment. A public inquiry has the advantage that members of the public are allowed to form their own judgement, rather than simply having the report served up to them at the end as a *fait accompli*. To some degree this is an ideal position, because it presupposes that a member of the public has devoted sufficient attention to be able to form an *informed* judgement. However, there is, at the least, a legitimate¹² public interest in following the evidence as it unfolds.
- A more prolonged and intense experience of a public hearing may be necessary because this gives longer for the evidence to sink into the public consciousness. There are two aspects to this: first, the public has longer to absorb the information. Secondly, (assuming that this is a legitimate purpose) the ‘name and shame’ aspect of the publicity, as a sanction against those shown to be ‘guilty’ of misconduct, is more prolonged.
- As against this, it is hard on an ‘innocent’ person if privacy is violated or damaged rumours are publicly ventilated (though this is reduced if an ‘information-gathering’ phase eliminates information before it is given in public). As regards damage to reputation, it is true that there may be vindication when the report is published. However such vindication, months or years later, may well not undo the damage. But on the other hand in some

¹⁰ The Court specifically rejected the applicants’ contention that the Secretary of State’s decision that the inquiry be held in private contravened their legitimate expectation that it would be held in public: *per Kennedy LJ* above fn 7 at 313-314.

¹¹ *Eg Haughey v Moriarty* [1999] 3 IR 1, 55-56.

¹² And, sometimes, other sorts of interest. See “*Kerry Babies*” *Tribunal Report* (Pl 3514) at 7: “The Gardai had more evidence about a highly unlikely sea-journey by a dead baby in a plastic bag from the Dingle Peninsula across Dingle Bay and around Doulus Head to the White Strand in a period of approximately thirty-six hours against a stiff breeze.”

circumstances it may be better for those under investigation to have rumours out in the open so that they can be publicly squashed.¹³

- Witnesses giving evidence in public (or knowing that they will soon have to do so) might be made more circumspect by virtue of the fact that, if the witness goes too far, the media reports of his allegations increase the risk of attracting contradictory evidence from people who are goaded into going to the tribunal to correct him. But, as against this, it is entirely possible that a different kind of witness will, from time to time arise, with persons who have axes to grind, and who will view the fact that hearings are conducted in public with relish rather than trepidation. All in all, it is hard to deny the occasional truth of the old adage, ‘mud sticks’.

8.08 The legislation establishing tribunals of inquiry (considered in Part II) contains a strong policy in favour of public hearing. Since this is such well-established and well-known legislation, we have not sought to fundamentally alter this and have, in paragraph 8.44, below, added to it an interpretation clause which we believe is both necessary and in keeping with the pro-publicity imperative of the legislation. We do, however, emphasise that decision-makers should bear this feature of the 1921 Act well in mind, when deciding which category of inquiry is most appropriate to their objectives. For there are many circumstances in which this feature will not be appropriate, and there are several legislative frameworks which provide for evidence to be taken mainly in private or allow a discretion to the inquiry examples include: companies (Chapter 2); child abuse (Chapter 3); and the non-statutory inquiry into organ retention by hospitals, chaired by Anne Dunne SC.¹⁴ The *Laffoy Commission* is another example of an inquiry in which, because of the subject-matter, some private hearings were inevitable, and appear not to have undermined the esteem in which the inquiry is held by the public.

8.09 These factors can vary so much that, the 1921 legislation apart, it seems to the Commission best that, in drafting legislation, care should be taken as to whether to emphasise a pro-publicity or a pro-privacy approach; or whether, as we consider will often be best, *the legislation should allow a good deal of flexibility as regards whether an inquiry operates largely in public or largely in private and as to the point at which it moves from private to public session*. Consideration should also be given as whether any such flexibility should be exercised either in the inquiry’s terms of reference or left to be settled by the inquiry as it goes along.

¹³ See *Barry v Medical Council* [1998] 3 IR 368, 392: “The present case is unusual in that the applicant, the practitioner against whom the complaints have been made, has demanded that the proceedings be held in public. He has done this, he says, because the case has received so much damaging advance publicity that his reputation as a doctor has been ruined and he would therefore welcome the opportunity to vindicate his character in public.”

¹⁴ *Irish Times*, 5 April 2000.

Part II Publicity-Privacy in Practice

The Constitution

8.10 Article 40.3.1° of the Constitution provides that: “The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.” It is now well established that, among these ‘unenumerated personal rights’, which are “fundamental to the personal standing of the individual in question in the context of the social order envisaged by the Constitution”¹⁵ is the right to privacy. It is true, of course, that privacy is a concept with many ramifications; but there is no need to go into this, since we are concerned with the most basic and indisputable aspect, namely an individual’s right not to be subjected to intrusive publicity into his person and affairs. In addition, among the personal rights explicitly protected by Article 40.3.2° is a citizen’s right to his or her ‘good name’. But, equally indisputably, the individual’s constitutional rights may be qualified by (what is often called) the requirements of the ‘common good’.

8.11 These propositions were authoritatively stated in the context of tribunals of inquiry by the Supreme Court (*per* Hamilton CJ) in *Redmond v Flood*:

“There is no doubt but that an inquiry by the tribunal into the allegations made by Mr Gogarty allied with the exceptional inquisitorial powers conferred upon such tribunal under the 1921 Act, as amended, necessarily exposes the applicant and other citizens to the risk of having aspects of their private lives uncovered which would otherwise remain private and to the risk of having baseless allegations made against them. This may cause distress and injury to their reputations, and may interfere with the applicant’s constitutional right to privacy.

The right to privacy is, however, not an absolute right. The exigencies of the common good may outweigh the constitutional right to privacy. The exigencies of the common good require that matters considered by both Houses of the Oireachtas to be of urgent public importance be inquired into, particularly when such inquiries are necessary to preserve the purity and integrity of public life without which a successful democracy is impossible.”¹⁶

Accordingly, the courts have reached the unexceptionable conclusion that a public inquiry is not, in principle, unconstitutional.

8.12 We turn now to the more difficult issue of how an inquiry is operated in practice. It cannot be emphasised too strongly that, on the issue of privacy in relation to tribunals of inquiry, two laws are relevant, and between them there is a tension. The first is Article 40.3.1° of the Constitution (including the right to

¹⁵ *McGee v Attorney General* [1974] IR 284, 325.

¹⁶ [1999] 3 IR 79, 87-88. See, to similar effect, *Haughey v Moriarty* [1999] 3 IR 1, 57-59.

privacy, already alluded to in paragraph 8.10), and the other is section 2 of the 1921 Act, which provides:

“[A] tribunal shall not refuse to allow the public or any portion of the public to be present at any of the proceedings of the tribunal unless in the opinion of the tribunal it is in the public interest expedient so to do for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given *and, in particular, where there is a risk of prejudice to criminal proceedings.*”¹⁷

8.13 In *Haughey v Moriarty*,¹⁸ the tribunal had been holding a preliminary stage in private. It suited the plaintiffs, at this point, not to base their submissions on the constitutional right to privacy, but rather on the requirement in the 1921 Act that the tribunal ought to conduct its hearing in public. Attacking the validity of holding the preliminary stage in private, the plaintiffs founded themselves upon section 2 of the 1921 Act. It had been submitted, on behalf of the plaintiffs, that “proceedings”, in section 2, relate to all activities of the tribunal, including the preliminary investigation of the matters relating to the terms of reference. In response, Hamilton CJ, for the court, commenced by categorising “the proceedings” as follows:

“A Tribunal of Inquiry of this nature involves the following five stages:

- (1) a preliminary investigation of the evidence available;
- (2) the determination by the tribunal of what it considers to be evidence relevant to the matters into which it is obliged to inquire;
- (3) the service of such evidence on persons likely to be affected thereby;
- (4) the public hearing of witnesses in regard to such evidence, and the cross-examination of such witnesses by or on behalf of persons affected thereby;
- (5) the preparation of a report and the making of recommendations based on the facts established at such public hearing.

It cannot be suggested or submitted that the public...are entitled to be present at this later stage. Neither can it be submitted that the public...are entitled to be present at the preliminary investigation of the evidence for the purposes of ascertaining whether it is relevant or not.

¹⁷ The italicised part of this section was inserted by section 2 of the 2002 Act: see further paragraphs 11.45-11.56.

¹⁸ [1999] 3 IR 1.

If these inquiries in this investigation were to be held in public it would be in breach of fair procedures because many of the matters investigated may prove to have no substance and the investigation thereof in public would unjustifiably encroach on the constitutional rights of the person or persons affected thereby.

The Court is satisfied that such was not the intention of the legislature and that the “proceedings of the tribunal” referred to in the said Section relate merely to the proceedings of the tribunal where evidence is given on oath, the witnesses giving such evidence being subject to cross-examination and the other matters at the public hearing.

The Court is satisfied that the tribunal was entitled to conduct this preliminary investigation in private for the purpose of ascertaining what evidence was relevant and to enable the tribunal in due course to serve copies of such evidence on the plaintiffs which it is obliged to do in order to enable them to exercise their constitutional right to be present at the hearing of the tribunal where such witnesses will give evidence on oath and be liable to cross-examination.”¹⁹ (Emphasis added).

8.14 A significant feature of this reasoning is that the applicant’s case was based on a straightforward interpretation of the 1921 Act, whereas the court’s response was founded at least in part upon an application of the Constitution (“if these inquiries were to be held in public, it would be in breach of fair procedures...”). It is also notable that, so far as can be seen from the law report, the applicant appears not to have made the counter-argument that he could waive his constitutional right to fair procedure, including his right to privacy and have the preliminary inquiries heard in public in line with Section 2. The court’s radical re-interpretation of section 2 of the 1921 Act has been criticised. McGrath argues that:

“[T]he Court goes too far in ruling out the possibility of public attendance at sittings held during the preliminary investigation which involves the making of discovery and other orders. As noted, section 2(a) stipulates that the public must be admitted to “any of the proceedings of the tribunal”. There is no doubt that in the curial context, the hearing and disposition of a motion for discovery or any other preliminary matter would be regarded as a proceeding. Therefore, it is arguable that pursuant to section 2(a) the public has a *prima facie* right to be present at such proceedings. While it would be open to a tribunal to exercise its discretion to exclude the public for the specified reasons, and it might very often decide to do so, it would, at a minimum, have to direct its mind to the question”.²⁰

¹⁹ [1999] 3 IR 1, 74-75.

²⁰ McGrath “Review of the Moriarty Tribunal and Flood Tribunal to date” (1999) 4 (5) *Bar Review* 230.

8.15 One response to this is that analogies with the courts are not apt as the court is holding an adversarial process, in which each side is responsible for preparing its own case separately from the court process in a civil case. For instance, in a criminal trial, which is perhaps the closest analogy, the investigation and prosecution is a matter for the Gardaí and the prosecuting authority respectively. By contrast, in an inquiry, with its inquisitorial process, there is not this manifest distinction dependent on separate agencies responsible for separate functions of information gathering and hearing evidence. Accordingly, Hamilton CJ's classification seems to be convincing, and seems to chime well with the understanding of people to whom we have spoken who service or appear before inquiries.

8.16 Moreover, if we were to recommend a change to the law to address the criticism made we should have to go through the various stages – those identified by Hamilton CJ but also others, for instance, applications for representation and hearings to determine whether privilege can be claimed – and classify each expressly as either open to the public or not. Given that the present law appears to be satisfactory in this respect, and, in particular, the notion of private preliminary information-gathering has been accepted, we do not think there is any need to make any change to section 2 in this respect.

8.17 The long passage from *Haughey v Moriarty* quoted at paragraph 8.13 cuts straight to the heart of the 'privacy v publicity' issue, and it was inevitable that it would soon be tested from the opposite point of view, that is, by a plaintiff who sought privacy. This occurred in *Redmond v Flood*, in which the plaintiff argued, seemingly basing himself on the Constitution that if the allegations made by Mr Gogarty were arrived at in public, his reputation would suffer a stain from which later cross-examination, or even vindication in the tribunal's final report, would not cleanse it. Thus, in the circumstances, there was a right to a hearing in private. This substantive argument seems to have been augmented by a complementary procedural submission, founded on the *audi alteram partem* limb of constitutional justice, to the effect that:

“The tribunal, while conducting its preliminary investigations in private was obliged to follow fair procedures and should therefore have given the applicant an opportunity to be heard in relation to the sufficiency of the evidence against him before deciding to proceed to a public inquiry.”²¹

8.18 In any case, without noting that there was a distinction between the two arguments, each of them was rejected by Hamilton CJ,²² giving judgment for the Supreme Court. He commenced by acknowledging that an inquiry by the tribunal into the allegations made by the witness G, in his affidavit, allied with the tribunal's exceptional inquisitorial powers, necessarily exposed the applicant to the risk of

²¹ [1999] 3 IR 94, 88.

²² [1999] 3 IR 79, 94.

having aspects of his private life uncovered which would otherwise remain private and to the risk of having baseless allegations made against him. It was natural for the applicant to buttress his case with the passage from the court's judgment in *Haughey* which is quoted in paragraph 8.13. This meant, so counsel for the applicant submitted, that the applicant had a constitutional right not only to see the evidence proposed to be produced against him, but also to have, in effect, a private hearing on the matter before a public hearing was commenced. Addressing this argument, Hamilton CJ quoted the passage from his judgment in *Haughey* quoted above, and then responded as follows:

“An inquiry under the Tribunals of Inquiry (Evidence) Act 1921, is a public inquiry. The Court in the passage quoted accepted that it was proper for a tribunal to hold preliminary investigations in private. This would enable the tribunal, inter alia, to check on the substance of the allegations and in this way would protect the citizens against having groundless allegations made against them in public. But the Court was not suggesting that the tribunal should proceed to a public inquiry only if there was a prima facie case or a strong case against a particular citizen. It was suggesting that the allegation should be substantial in the sense that it warranted a public inquiry. The allegations made against the applicant in this case could be false. At this stage we simply do not know. But they are grounded on a sworn affidavit. In these circumstances it appears to this Court that the tribunal was entitled to decide that they were of sufficient substance to warrant investigation at a public inquiry. Indeed it would have been surprising if the tribunal had decided otherwise.”²³

8.19 The substance of Hamilton CJ's reasoning has been italicised. It suggests that a great deal of latitude is allowed to a tribunal in deciding when it should move to the public inquiry phase of its investigation.

8.20 In *Lawlor v Flood*,²⁴ the Supreme Court copper-fastened its decision in *Redmond*. Counsel for Mr Lawlor had submitted, presumably (like Mr Redmond in the previous case) basing himself on the Constitution, that: “in fairness both to the defendant and to other persons who might be affected by anything he has to say in relation to the matter”,²⁵ the tribunal ought to take evidence from the defendant in private, not in public. In response, Keane CJ first emphasised (in a passage quoted at paragraph 8.01) that the policy of the 1921 legislation is that the proceedings of the inquiry should be conducted in public. He continued by stating that, at the same time:

²³ [1999] 3 IR 79, at 95.

²⁴ Supreme Court 24 November 2000.

²⁵ *Ibid* at 2-3.

“It is of course the case that ...the tribunal...will of necessity hear some matters in private while it assembles evidence and considers whether evidence should be further inquired into, and whether it is in any way relevant to its terms of reference or simply does not arise in relation to its terms of reference and therefore need not be inquired into any further. That is a necessary inquiry process which all tribunals of this nature have to undertake to a greater or less extent and that aspect of their inquiry, of course, is conducted in private and for obvious reasons because it might lead to utterly unsubstantiated or irrelevant allegations being given widespread currency which would obviously not be in the public interest or required in any way.”²⁶

8.21 It bears noting that there was no authority, in the wording of the 1921 Act, for this “necessary inquiry process...” to protect persons whose conduct is under investigation though this has been substantially remedied by the 2002 Act: see paragraphs 9.28-9.53. It must be the case that this protection is being read in, as a matter of honouring as far as possible the constitutional right to privacy of the person under investigation. (Here we should refer back to the analysis of *Haughey* at paragraphs 8.13-8.17). This necessary inquiry process has certainly been observed in the practice of recent tribunals, and is the subject of Chapter 9.

8.22 But the critical point here and in many other cases is the decision as to the point at which a tribunal shifts from private to public proceedings. The crucial ruling on this is that of Keane CJ in *Lawlor v Flood*:

“...the courts in interpreting the relevant legislation, must afford a significant measure of discretion to the tribunal as to the way in which it conducts these proceedings. It must, of course, observe the constitutional rights of all persons who appear before it or upon whom the decisions of the tribunal or the manner in which they conduct their business may impinge, but making every allowance for that important qualification, the principle remains as I have indicated. The tribunals must be afforded a significant measure of discretion...because if that principle is not borne in mind then the very important objectives which the establishment of the tribunal of this nature was intended to achieve can only be frustrated.”²⁷

8.23 The learned Judge goes on to quote the following passage from Denham J’s judgment of the Supreme Court, in *Bailey v Flood*²⁸:

“The novel feature of the present case was the argument that the evidence of the Applicants should be heard by the tribunal in private in

²⁶ Supreme Court 24 November 2000, at 4-5.

²⁷ *Ibid* at 6.

²⁸ Supreme Court 14 April 2000.

the first instance and if it was then established or emerged that the evidence so given was relevant or material the hearing could be repeated in public. Assuming, without deciding, that such a procedure was permissible a decision as to whether that course should be adopted was one which fell to be made by the tribunal itself. That decision must conform to the standard of reasonableness laid down by the court in *The State (Keegan) v Stardust Victims Compensation Tribunal*²⁹ and *O'Keefe v An Bórd Pleanála*³⁰.³¹

8.24 Here, we have three recent Supreme Court authorities – *Redmond, Lawlor* and *Bailey* – giving a unanimous view. Their ruling is that, as regards the exercise of its discretion on this point, a tribunal of inquiry, in the same way as administrative bodies (and one might note that the point may be regarded as even stronger in that few administrative bodies are chaired by superior court judges) is to be allowed a significant measure of tolerance, in fact up to the point at which its “decision...is irrational or flies in the face of common sense”.³² There is an implicit rejection here of any contention that, because the right to privacy is established on the authority of the Constitution, it follows that there must be an especially stringent review (or in US jargon, ‘hard look’), where there is any disturbance of it.

8.25 The net result seems to be that, on the two major constitutional points (constitutional justice and privacy), which often arise together, a wide measure of discretion is allowed to a tribunal. This result may be drawn from either of two independent, though usually complementary, bases:

- (i) the test is so designed that the scales are set fairly substantially in favour of the public interest in investigation (as opposed to the individual under investigation);
- (ii) before the test is applied, a wide margin of discretion is allowed to a tribunal of inquiry, not least because the chairperson is normally a judge.

Either way, the practical result is likely³³ to be the same.

²⁹ [1986] IR 642.

³⁰ [1993] IR 39. There is also a reference to the similar approach taken in England in the case of *R v Lord Saville* [1999] 4 All ER 860. (Court of Appeal).

³¹ *Op cit* fn 28 at 6-7.

³² *Lawlor v Flood* Supreme Court 24 November 2000, at 7.

³³ The exception would be a case in which the tribunal had decided against an investigation in order to protect an individual's privacy, and some third party took judicial review proceedings. Only in such a case would it matter if rationale (i) or (ii) were being followed.

Part III Right to Confidentiality

8.26 Here, we ought to mark a distinction between:

- (a) the right to ‘privacy’ meaning not having untested allegations, which may lower one’s reputation in the eyes of members of the public, bruited forth from a body with an aura of authority. These are allegations that may be from malicious people, to which convincing rebuttals may eventually be given.
- (b) ‘confidentiality’ in the sense of a tribunal not exercising its powers to cause the person under investigation to disclose material –for example, in *Haughey v Moriarty*, banking records – which, in a civilised polity, one is entitled to keep private, as part of one’s personal, autonomous space.³⁴

8.27 The two are conceptually distinct. For instance, the issue of confidentiality could arise in relation to some person (as, in the instant case, the sister of the person under investigation by the inquiry) whose conduct is not under any suspicion or investigation by the inquiry. We have already considered some recent cases on privacy and the limitation on it. Here, we turn to confidentiality. This issue, too, arose in *Haughey v Moriarty*.³⁵ During its inquiries, the tribunal had made orders of discovery and production against various financial institutions, requiring the production of the banking records not only of the first plaintiff, Mr Charles Haughey, but also his wife, daughter and sisters. Responding to the argument that the Haugheys’ right to confidentiality was violated, Hamilton CJ stated: “[f]or the purposes of this case and not so holding, the court is prepared to accept that the constitutional right to privacy extends to the privacy and confidentiality of a person’s banking transactions.”³⁶ The court thus seems³⁷ to have ruled, if cautiously, that the plaintiff’s banking records fell within the protection of the right to privacy.

8.28 A point of distinction to notice here is that between the substantive right to confidentiality, and, on the other hand, the procedural point that fair procedure must be followed before this right may be affected. In *Haughey*, the applicant made submissions on each of these points, grounded on the basic contention which was

³⁴ However, this terminology is not always followed: for example in *Haughey* at 58, we find Hamilton CJ referring to banking records, and stating: “... the constitutional right to privacy extends to the privacy and confidentiality of a person’s banking records”.

³⁵ [1999] 3 IR 1.

³⁶ *Ibid* at 58.

³⁷ The words italicised have been criticised by McGrath “Review of the Moriarty Tribunal and Flood Tribunal to date” (1999) 4 (5) *Bar Review* 230. It is unclear to what extent a court may prevent a later court from relying upon what is, on any objective view, an essential part of the first court’s reasoning and, hence, a part of its *ratio*.

accepted in the passage quoted in the previous paragraph. On the substantive point, it was submitted that the orders of discovery infringed the substantive constitutional right to confidentiality in respect of banking transactions. While accepting that there was such a substantive right, the court went on briefly to dismiss this argument in the case: “[the court]...repeats the statement already made by the court that: ‘[t]he encroachment on such rights is justified in this particular case by the exigencies of the common good.’”³⁸

8.29 However, on the procedural point, the plaintiff succeeded.³⁹ Hamilton CJ stated:

“While the tribunal is entitled to conduct the preliminary stage of its investigations in private, and to make such orders as it considers necessary for the purposes of its functions, that does not mean that in the making of such orders, it was not obliged to follow fair procedures...

Fair procedures require that before making such orders, particularly orders of the nature of the orders made in this case, the person or persons likely to be affected thereby should be given notice by the tribunal of its intention to make such order, of making representations with regard thereto. Such representations could conceivably involve the submission to the tribunal that the said orders were not necessary for the purpose of the functions of the tribunal, that they were too wide and extensive having regard to the terms of reference of the tribunal and any other relevant matters.

Such a procedure was not adopted in this case...such failure was not remedied by the insertion in such orders of the provision that the person to whom the order was directed or any person affected thereby had the right to apply to the tribunal to vary or discharge that order.

This is particularly so having regard to the circumstances of this case, the nature of the orders made and the time scale within which compliance therewith was ordered.

There may be exceptional circumstances, such as a legitimate fear of destruction of documents if prior notice was given, where the requirements of fair procedures in this regard may be dispensed with. No such circumstances exist in this case”.⁴⁰

³⁸ [1999] 3 IR 1, 75.

³⁹ *Ibid* at 77. Though, in line with the normal situation where procedure is concerned, the court indicated that this did “not preclude the sole member of the tribunal from making similar orders in the future”.

⁴⁰ *Op cit* fn 38, at 75-76.

8.30 This is a fairly straightforward application of the *audi alteram partem* limb of constitutional justice. In fact, the *Moriarty Tribunal* subsequently followed the rule correctly and made a similar order to the one which had been struck down in this case.⁴¹

Part IV Re-draft of the Publicity Provision in the 1921 Act

8.31 As regards the particular case of the 1921-2002 legislation, the present wording of section 2 reflecting a pro-publicity standpoint, states that the tribunal must not refuse to allow the public to be present at any of its proceedings unless “in the opinion of the tribunal it is in the public interest expedient so to do for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given”. This exception has been interpreted quite restrictively so that, for example, in *Irish Times v Flood*,⁴² the High Court held that the *Flood Tribunal*, when it went to Guernsey, was not entitled, on grounds relating to the health of a prospective witness, to prevent the press from attending.

8.32 *Irish Times v Flood* is an interesting case in this area, principally for two reasons: first, because of the decision of Morris P in relation to the status of what is harvested in consequence of examination on commission and, second, the arrangements that both the *Flood Tribunal* and the *Moriarty Tribunal* have felt compelled to make, in order to adduce such material at the inquiry proper, as a result of the judgment.

8.33 The case arose following an order of 24 September 1999, by which Flood J purported to appoint himself a Commissioner under section 1(1)(c) of the 1921 Act,⁴³ in order to examine Joseph Murphy senior in Guernsey, who was in ill-health. Flood J confined to a limited category those persons entitled to be present. The effect was that the public (including various media organisations) were not permitted to attend. The order was challenged on the basis that the *Flood Tribunal* was unable to exclude the public under section 2(a) because of the well-being of a witness. The *Flood Tribunal's* response to this challenge was, unsurprisingly, that the general public are not and have never been entitled to be present at an examination on commission. For clarity, it is best to take what followed in two stages.

⁴¹ See www.moriarty-tribunal.ie

⁴² *Irish Times Ltd v Flood* High Court (Morris P.) 28 September 1999.

⁴³ Section 1(1) (c) of the 1921 Act states that “the tribunal shall have all such powers, rights and privileges as are vested in the High Court ... on the occasion of an action in respect of ... subject to the rules of court, the issuing of a commission or request to examine witnesses *abroad*”. (Emphasis added). We shall address the word “abroad” at paragraph 8.41, below.

(a) Was the Evidence Taken ‘on Commission’?

8.34 Morris P examined the ruling of Flood J, which referred to the order and procedures to be adopted in Guernsey. Flood J had described the proceedings in Guernsey as “a public sitting of the tribunal”, having said this, Flood J then proceeded to apply the test set out in section 2(a) to exclude the public in light of the medical evidence, as follows:

“Having regard to the overriding public interest and having the evidence taken and recorded I am of [the] opinion in the light of the medical evidence that it is in the public interest expedient to exclude the public on the occasion for reasons connected with the subject matter of the [I]nquiry and the nature of the evidence to be given”.⁴⁴

8.35 Morris P stated that: “[i]n my view it is clear from these extracts from the Judgment of the sole member that he regards the procedures in Guernsey as far more than the mere taking of evidence on commission.” Having established this, it then fell to Morris P to determine whether Flood J had the power to exclude the public because of the welfare of a witness. As regards this element of the judgment he states, as follows:

“In my view, with great respect to the sole member, there is nothing in the medical evidence to which he refers which bears on ‘the subject matter of the [I]nquiry’. Section 2 is designed, in my view, to permit the public to be excluded from a proceeding of the tribunal where the subject matter of the inquiry is such that the public interest requires that they be excluded. One might imagine circumstances in which the security of the State was the subject matter of the inquiry and the nature of the evidence being given would require that such a step be taken.”⁴⁵

8.36 Morris P’s adherence to the wording of section 2 in this respect exemplifies the pro-publicity accentuation of the 1921 Act, highlighted in this chapter. However, it does not take away from the fact that section 1(1) (c) of the 1921 Act empowers a tribunal to “issue...a commission or request to examine witnesses abroad”. The essential point of Morris P’s judgment is that the sole member did not exercise this power correctly and, consequently, Morris P characterised the examination of Mr Murphy Senior not as “examination on commission”, but as the normal “proceedings of the tribunal” and, as such, subject to the usual publicity requirement of section 2(a). *Our conclusion, therefore, from this episode is that the law, in particular the drafting of section 2(a), is not in need of changing – to allow for the “taking of evidence”, if the witness is unwell or abroad – though care must be taken to follow it scrupulously.*

⁴⁴ *Op cit* fn 42 quoting from the ruling of Flood J on 24 September 1999, at 14.

⁴⁵ *Ibid.*

(b) The Status of ‘Evidence’ Taken on Commission

8.37 In relation to the status of the material elicited on commission, Morris P was clear:

“The function of receiving or rejecting the evidence is vested not in the Commissioner but in the Court or tribunal. The statement of evidence harvested by the Commissioner remains in escrow until it is submitted to and considered and either rejected or received by the Court or the tribunal. When it is *received as evidence* by the Court then and only then *does it become evidence...*”⁴⁶ (Emphasis added)

8.38 Morris P accepted that the public were not entitled to be present at the commission stage but were (subject to section 2(a)) entitled to be present at the latter stage, when the evidence (we prefer proposed evidence) taken on Commission was adduced at the inquiry. In the event, the following day after the High Court ruling, Flood J appointed himself (this time satisfactorily) as a Commissioner under section 1(1)(c) of the 1921 Act in order to examine Joseph Murphy senior in private. However, – and this is the important point – the statement of the evidence that was ‘harvested’ by him, as a Commissioner remained ‘in escrow’ until it could be submitted to the inquiry upon its return to Dublin.

8.39 A similar procedure was followed in respect of Charles Haughey’s evidence before the *Moriarty Tribunal*. On 7 December 2000 Moriarty J resolved that it be ‘taken on commission’ by virtue of the powers conferred by section 1(1) (c) of the 1921 Act and a daily transcript was made. It is notable that Mr Justice Moriarty was at pains to highlight the status of this ‘evidence’, in light of *Irish Times v Flood*, as follows:

“[The examination] would be no more than gathering evidence for the purpose of tendering it to the tribunal for its consideration. The transcript would not be made available to the public unless and until I had determined that the statement of evidence so harvested should be *adduced in evidence at the tribunal’s public sittings.*”⁴⁷ (Emphasis added)

8.40 The ability of an inquiry to appoint a Commissioner to examine a potentially important witness who is in ill-health is an invaluable tool. Of course one can readily envisage situations in which unscrupulous individuals who are called to give evidence may wish to appear otherwise than in public and therefore seek to advance ill-health as a reason. This danger is clear, but in our view an inquiry (especially one chaired by a judge) can be trusted to test the veracity of the

⁴⁶ *Op cit* fn 42.

⁴⁷ 7 December 2000: see – <http://www.moriarty-tribunal.ie/07122000.html>.

medical reasons advanced.⁴⁸ Indeed, the practice has been to call the doctor who provided the certificate to give evidence as to the medical condition of the witness and if this is not sufficient then an independent medical opinion may be sought.⁴⁹

8.41 *However, there is one curious point about the drafting in relation to section 1(1)(c) of the 1921 Act, quoted above: The word “abroad” unnecessarily narrows the ability of an inquiry to “examine on commission” and it would appear not to extend to examining on commission an ill or elderly witness within the jurisdiction, in a hospital or a more suitable place than the normal tribunal forum. Accordingly, the Commission recommends that the word abroad be omitted from section 1(1)(c) of the 1921 Act.*

(c) The Procedure Adopted to Adduce ‘Evidence’ Taken on Commission

8.42 In order for the statement of ‘evidence’ – we prefer proposed evidence or information (see further Chapter 9) – to form part of the evidence before the inquiry proper, both the *Flood* and *Moriarty Tribunals* have been forced to adopt a somewhat cumbersome procedure. (This is not criticism of those tribunals of inquiry, as they are no doubt wary of radically departing from established practice, for fear of judicial review.) Both tribunals of inquiry have felt obliged to have such a statement literally read, by the registrar, into the record. Strikingly, the statement of Joseph Murphy senior was read into the record over four days in order for it to be adduced at the inquiry proper. The same procedure has been adopted at the *Moriarty Tribunal*.

8.43 The heart of this problem lies in an inquiry’s perceived inability to use the proposed evidence that has been taken on commission more effectively: incidentally the same constraints apply in relation to the adoption of a statement of proposed evidence provided by both a witness who is to be called and cross-examined as well as a witness who has relevant evidence that is not in dispute: considered at paragraphs 7.50-7.53. The *Flood Tribunal* has spent a number of its sitting days reading into the record uncontested evidence – for example on days 141, 142 and 143 the uncontested evidence of Sinead Collins and Liam Murphy was read out. We are of the view that there should be some measure of flexibility that can be afforded to an inquiry in adducing such evidence without detracting from the pro-publicity policy of section 2(a). Bearing in mind the pro-publicity policy of the 1921-2002 legislation and the slight danger that the inquiry could go too far behind closed doors, we propose only that instead of being read out, the proposed evidence should be circulated to everyone at the tribunal. The other restriction is that even this could only be done in narrowly defined situations, as follows:

⁴⁸ The *Flood Tribunal* whilst in Guernsey called Dr Joseph Curran to give evidence of his medical view as to whether or not it was safe for Mr Murphy Senior to give evidence in public: 28 September 1999 (Day 89).

⁴⁹ The *Moriarty Tribunal* sought and obtained the independent medical advice of two eminent London medical practitioners, which was to the effect that Mr Charles Haughey was fit to give evidence before the inquiry: see – <http://www.moriarty-tribunal.ie/07122000.html>.

8.44 Accordingly the Commission recommends that section 2 be amended to include, as follows:

“(x) The obligation imposed on the tribunal by subsection (a) shall be fulfilled by the circulation to the public present at the proceedings of a copy, in writing, of the statement that is being adduced as evidence, where:

(i) a witness is called to give oral evidence and the written statement forms part only of his or her evidence; or

(ii) the written statement of a witness is not in dispute between those persons who have been authorised by the tribunal to be represented, under subsection (b), at the part of the proceedings at which it is being adduced and the tribunal does not propose to call the witness to give oral evidence; or

(iii) a Commissioner, appointed by the tribunal under section 1(1) (c) of this Act, has examined a witness on commission and obtained a written statement of such examination.”

Part V Broadcasting

8.45 Where the proceedings of an inquiry are held in public, the question arises as to whether they should be permitted to be broadcast on television or radio. At this point we ought to make two preliminary points; firstly, it by no means follows that, even when allowed the opportunity, a broadcaster would always want to broadcast a particular tribunal. Divergent factors all have to be weighed up, among them: costs, viewing figures⁵⁰ and, on the positive side of the equation - in the case of RTÉ - its public service broadcasting mission. All that one can say with certainty is that some broadcasters would want to cover some inquiries some of the time and it is plainly not possible for any law to impose any kind of obligation on them. Secondly, we ought to emphasise that we are of course, not dealing with the question of whether court proceedings ought to be open to being broadcast. Such a major question plainly involves different issues from the present one. Experience in the US has demonstrated that, if not properly controlled, broadcasting can turn a criminal trial into a media circus.⁵¹ In most other countries in the democratic world there is a perception that, even if filming is properly controlled by way of a written protocol or otherwise, the fairness of a criminal trial is put at risk by broadcasting. However, public inquiries are essentially different from trials in that they are not

⁵⁰ The Dáil PAC hearings (between 31 August – 12 October, 1999) had an average ‘session audience’ (*ie watching* entire session) of 4,000, with highest figure of 12,000; in contrast, average session reach (‘reach’ refers to the number watching at least one minute of a session) of 71,000 and a maximum session reach of 149,000 (Figures are from TG4 Audience Research Department).

⁵¹ Take for example some of the difficulties perceived to have arisen in the OJ Simpson trial (*California v Orenthal James Simpson* 4 October 1995) and the trial of Louise Woodward (*Massachusetts v Louise Woodward* 6 October 1997).

concerned with determining criminal liability or civil rights or obligations. They are usually concerned with discovering facts; making recommendations for change; and allaying public concern.⁵²

8.46 The present law in relation to broadcasting public inquiries is less than clear, a fact that is hardly surprising considering that, to take one example, the 1921 Act was drafted at a time when sound broadcasting was very much in its infancy and television had not even been invented. But even in the digital age, perhaps surprisingly the issue of broadcasting public inquiries has not yet emerged as a red-hot issue and it has not yet spawned litigation. It is known that McCracken J preferred not to allow the *Dunnes Payments Inquiry* to be broadcast. Also that in late 1998 the *Flood Tribunal* did not accede to RTE's request for permission to film its proceedings. These decisions have not been judicially reviewed, so as a matter of existing Irish law this is really an open point.

8.47 Subject to the Constitution⁵³ and any other applicable laws, the chairperson of an inquiry has an inherent right to govern their own proceedings. One may argue that this necessarily embraces the discretion to grant or refuse permission to film and broadcast the hearings, just as there is the discretion to set the times of the hearings and to direct in what part of the room the public may sit. It is true that in the case of an inquiry set up under the 1921-2002 Acts, section 2(a) requires that:

“A tribunal shall not refuse to allow the public or any portion of the public to be present at any of the proceedings of the tribunal unless in the opinion of the tribunal it is in the public interest expedient so to do for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given *and, in particular, where there is a risk of prejudice to criminal proceedings.*”⁵⁴

No doubt the authors of section 2 had in mind allowing ordinary members of the public, and presumably journalists, to be present at the hearings, but it would stretch this section to breaking point to interpret “the public or any portion of the public” to include mass media organisations armed with lights and cameras.⁵⁵

8.48 Indeed, this was the interpretation recently given to the original version of section 2(a), albeit in another jurisdiction, by Dame Janet Smith, as she then

⁵² See Part I and Chapter 1 generally.

⁵³ Proceedings of an inquiry must be conducted in accordance with the principles of constitutional justice and in particular have regard to fair procedures, as discussed in Chapter 7.

⁵⁴ The italicised part of this section was inserted by section 2 of the 2002 Act: see further 11.45-11.56.

⁵⁵ Note that at paragraph 8.44 the Commission has recommended a reformulation of section 2(a) of the 1921 Act.

was,⁵⁶ the chair of the *Shipman Inquiry*,⁵⁷ when considering whether to permit media organisations to broadcast that inquiry. It fell to Dame Smith to consider an application to broadcast proceedings on two separate occasions, of which only the second was partially successful.⁵⁸ Permission was granted to record and broadcast stages 2, 3, and 4 of Phase 2 of the inquiry, namely those parts focused on good practice, the future and proposals for change. Thus, permission was not granted to record and broadcast Phase 1, which involved considering how many patients Shipman killed and the means employed and the period over which the killings took place, or Stage 1 of Phase 2, which covered the police investigations.⁵⁹ Moreover, permission was given very much as a ‘pilot experience’ and in accordance with a strict protocol.⁶⁰ What is interesting for the purposes of this paper is not only the content of the protocol, drafted with a view to combating the perceived dangers of broadcasting, but also the approach taken by Dame Smith in partially allowing the application. In reaching her decision she adopted a different approach to the test that she would have had to apply if she were deciding whether to exclude the public or a portion of it from the hearings. Furthermore, her decision was not grounded in free expression arguments; in fact she specifically rejected the submissions of the applicants that Article 10(1) of the European Convention on Human Rights (“ECHR”)⁶¹ created a presumptive right for any person to film the proceedings, which may only be restricted in accordance with Article 10(2):

“In my opinion, subject to restrictions which may be imposed if they satisfy Article 10(2), Article 10(1) guarantees freedom to disseminate information which is already in the possession or control of or accessible to the person or body whose rights are under consideration ... However, in my view, Article 10(1) does not bear upon the right to access information that another holds but has not made accessible and does not wish to impart.”⁶²

⁵⁶ “Such an appointment [to the Court of Appeal] during an inquiry is rare and is a rare stamp of approval from the senior judiciary.” *Times* 22 November 2002.

⁵⁷ The Independent Public Inquiry into the issue arising from the case of Harold Shipman, who was convicted at Preston Crown Court on 31 January 2000 of the murder of 15 of his patients while he was a General Practitioner at Market Street, Hyde, near Manchester, and of one count of forging a will. He was sentenced to life imprisonment.

⁵⁸ Applications made on 10 May 2001 on behalf of the BBC, ITN, and Dennis Woolf Productions were refused on 11 June 2001 see www.the-shipman-inquiry.org.uk/rulings.asp.

⁵⁹ See www.the-shipman-inquiry.org.uk/listofissues.asp.

⁶⁰ See Appendix B: Published in April 2002 and subsequently amended on the 20th September 2002 - see www.the-shipmaninquiry.org.uk/rulings.asp.

⁶¹ The *Human Rights Act 1998* imposes an interpretative obligation on a Court or tribunal to read and give effect to legislation in a way which is compatible with the Convention rights (section 3); and when determining a question which has arisen in connection with a Convention right a Court or tribunal must take into account ECHR jurisprudence (section 2).

⁶² See www.the-shipman-inquiry.org.uk/rulings.asp CNN Ruling at paragraph 45.

8.49 In exercising her discretion to permit the proceedings to be broadcast and deciding what restrictions to impose on the use of cameras, she had regard to both the proper conduct of the inquiry and the legitimate interests and expectations of the witnesses. As regard witnesses she stated, as follows:

“Until now, it has been the expectation of any citizen who has to give evidence in a court of law that they will do so in public but not on television. I do not think it has been the general expectation that more will be required of one called to give evidence at a public inquiry. If and when Parliament decides, as it could, that the hearings of a public inquiry will normally be televised, (subject to ... discretionary limitation ...for good reason) then the expectation of witnesses will be that they will have to submit to being filmed. But we are not in that situation now.”⁶³

In line with this assumption, the permission given by Dame Smith to broadcast the proceedings extended, in the main, only to those parts of the inquiry concerned with looking at the role played by the various statutory agencies, systems of accountability, and monitoring of practice. Accordingly, the witnesses to be filmed were professionally qualified persons, public servants or other persons who were professionally involved.⁶⁴

8.50 Of course the experience of broadcasting public inquiries in other jurisdictions is not conclusive as to the advisability of broadcasting of inquiries in this jurisdiction, because so much depends on the prevailing social and political environment, as well as the subject-matter of an individual inquiry and the nature and sensitivity of the evidence involved. But nevertheless one must question whether in the modern era a television journalist, with his camera, is now a member of the public just as a newspaper journalist is, with his pen and notebook; and whether the public, journalists and broadcasters alike should be allowed access to the inquiry proceedings and denied only when, in the opinion of the chairperson, it is appropriate.

8.51 We turn now away from this fairly uncertain law, to consider what, if any, new law should be recommended. Given what has been said already as regards an inquiry sitting in public,⁶⁵ it seems some of the same arguments in favour of a public hearing also militate in favour of broadcasting: without it, the public’s right to see and hear the proceedings is confined to that small minority who are able to

⁶³ *Op cit* at paragraph 84.

⁶⁴ We are informed that the *Shipman Inquiry* have sought feedback from witnesses, and their representatives, regarding broadcasting and, thus far, there has been no negative feedback to give the Inquiry cause for concern about the impact of broadcasting on witnesses to the Inquiry or on the efficient and effective management of the Inquiry. Dame Janet of course retains the right to forbid broadcasting should a submission be made by a witness’s legal representative.

⁶⁵ See Part I, above.

get themselves to Dublin Castle or wherever the tribunal is physically sitting. In effect, the great majority of the public are excluded, and it may even be that those who do come are, to a considerable extent, people with a personal interest in the proceedings rather than the broader public who need to be informed. Of course, the print media at present do a reasonably good job of describing what they perceive to be the highlights of the inquiry proceedings. But how much of these are selected for publication and how they are portrayed naturally depends on such adventitious factors as: whether the proceedings are sufficiently arresting and straightforward to appeal to an audience which can only be given a truncated account; what competing news there is; and even the editorial policy of the commercial group which owns the newspaper. Similarly, those sections of the public who have an Internet connection may access a particular inquiry's web-site and read the *minutiae* of evidence contained in the transcripts, which are increasingly made available in this way.⁶⁶

8.52 However, even with print media reports of proceedings and the opportunity to have sight of the evidence on-line, what one cannot do is see and hear the witnesses giving evidence. This is what makes that witness's account meaningful; the tone of voice, hesitations, emphasis, and body language of a particular witness are all important parts of fully understanding and appreciating the evidence. Allowing the hearings to be broadcast would be infinitely more interesting and arresting than any second-hand account. Moreover, there is the distinct possibility that many people especially people who have had less formal education get more of their general knowledge of public affairs, such as the administration public services and use of public funds, from the electronic than the print media.⁶⁷

8.53 In Britain there have been a number of examples when the broadcasting of inquiry proceedings has been in issue. Professor John Uff QC, the chairman of the *Inquiry into the Southall Rail Crash*, allowed broadcasting subject to a protocol. He reported that broadcasting did not have an adverse impact on the inquiry.⁶⁸ Lord Cullen, chairman of the *Ladbroke Grove Rail Inquiry*, agreed to allow recording of the opening and closing statements by counsel to the inquiry and parties. Similarly, Lord Laming, chairman of the *Victoria Climbié Inquiry*, permitted the opening statements and closing submissions to be broadcast.⁶⁹ Elsewhere, the *Antiguan*

⁶⁶ For example, transcripts of the hearings of the *Flood Tribunal* are available online at www.flood-tribunal.ie. Although the other various inquiries operate websites the material that is posted varies: see the *Moriarty Tribunal* (www.moriarty-tribunal.ie), the *Laffoy Commission* (www.childabusecommission.ie); the *Morris Tribunal* (www.morristribunal.ie); and more recently the *Barr Tribunal* (www.barrtribunal.ie).

⁶⁷ According to a BBC study cited in the *Report of a working party of the Public Affairs Committee of the General Council of the Bar of England and Wales on Televising the Courts* (1989) 70% of adults in the UK learn most of what they know about current events from the television.

⁶⁸ *The report of the Southall Rail Accident Inquiry*, chaired by Professor John Uff, published on 24 February 2000.

⁶⁹ See further www.victoria-climbie-inquiry.org.uk

Royal Commission on the smuggling of arms to the Colombian drug cartels, chaired by Sir Louis Blom-Cooper QC in 1990, was open to radio and television. His report concluded, as follows:

“My fears of physical obstruction were entirely misplaced; one single television camera behind Counsel, trained for the most part on the witness soon went entirely unnoticed. No lights or other studio impedimenta were required. It was observed that some Counsel, who at first disdained microphones, very quickly and effortlessly learned to use them. The witnesses were in no way flustered or deterred, or for the most part even conscious of the recording. I am confident that they remained blissfully unaware that their evidence was going to be relayed to the populace. If they were aware, they raised no objection and showed no sign of disquiet, let alone dissent. Several senior counsel indicated to me that they felt an extremely beneficial discipline to ask relevant and comprehensible questions, and not to waste time. I felt, myself, the sense of Jeremy Bentham’s argument in favour of open justice, namely, that ‘it keeps the judge while trying, under trial’. That the Commission proceeded as effectively and efficiently as it did, is, in my view, due in some measure to the fact that we could all be heard and seen... each evening on radio and television. The benefits of electronic media coverage, in terms of public understanding, were incalculable. It meant that citizens could receive accurate information about the testimony. Although, I accept that electronic media coverage of criminal trials requires a very careful and gradual introduction, I hope that it will come to be considered routine for public inquiries.”⁷⁰

8.54 Arguments in favour of broadcasting the proceedings of a public inquiry can be succinctly listed, as follows:

- As a matter of principle, the proceedings of a public inquiry should be made readily accessible to the public and thus bring colour and immediacy;
- There is indisputable public interest in receiving the best possible information about an inquiry, its processes and evidence, which would be facilitated by allowing broadcasting;
- Broadcasting would facilitate openness, fairness, and transparency, by enabling the media to fulfil a ‘public watch-dog’ function over proceedings more effectively.

8.55 Against the broadcasting of inquiry proceedings is the significant argument that a witness might be affected, in one of several ways: by being more frightened, or less frank, or might tend to show off or over dramatise his or her account. These are no doubt factors at the forefront of any chairperson's mind when

⁷⁰ Blom-Cooper *Guns for Antigua* (Duckworth 1990) at 46, cited in Robertson & Nicol *Media Law* (3rd ed. Penguin) at 381-382.

considering whether to allow proceedings to be broadcast; particularly so at the very start of a tribunal into sensitive and difficult matters. Of course under the 1921 Act the inquiry chairperson has the powers of a High Court judge to order a witness to testify,⁷¹ but to do so would severely hinder the smooth operation of the inquiry. It is self-evident that the process of investigation and presentation of the evidence would be virtually impossible without the co-operation of witnesses and it would surely be an unfortunate situation if a witness who was perfectly willing to attend a public inquiry to give evidence subsequently refused when the proceedings were allowed to be televised. One can see the force of this argument in relation to particularly vulnerable witnesses, but politicians and those who work in the public service can reasonably be expected to stand up and be counted.

8.56 The example of the *Shipman Inquiry*, recounted at paragraphs 8.48-8.49, where only parts of the proceedings were allowed to be broadcast, shows that there will often be parts where it is appropriate and parts where it is not, which is natural to be so. However, this merely sets a premium on the use of discrimination.

8.57 Moreover, time spent on rulings and even worse judicial review would add to the problems of inquiry proceedings, which are already complicated and protracted; viewed in this way broadcasting would be clearly undesirable. Interconnected with this is the argument that broadcasting may be an unnecessary distraction for those involved in the inquiry proceedings, as is the fear that lawyers may abuse the opportunity to make applications, examine and cross-examine in front of a wider audience. However, the countervailing argument is that the presence of cameras helps to uphold the code of conduct, since there can be little argument about it if it is on video: the footage can be looked at and scrutinised time and again should a complaint be made to the Bar Council or the Law Society.

8.58 Arguments opposed to broadcasting include:

- Potential witnesses might be deterred from volunteering information by the prospect of their evidence being broadcast, for fear of that evidence being distorted, for example;
- Some witnesses might ‘play up’ to the cameras and take advantage of the opportunity to address a wider audience;
- Other witnesses might be inhibited from speaking out frankly and may be more defensive than they otherwise would be;
- Reports of ‘newsworthy’ or ‘sensational’ parts of the evidence that are unrepresentative of the whole of the evidence on a particular topic may only be used.

8.59 The arguments for and against televising inquiry proceedings are, in our view, fairly well balanced. However the Commission is persuaded by the view that

⁷¹ Section 1(1)(a) of the 1921 Act.

in practice, disadvantages can be countered by a rigorously drafted protocol (as appended to this chapter) coupled with an appropriately drafted statutory test which provides guidance to an inquiry chairperson in deciding whether to allow proceedings to be broadcast. The Commission is unable to think of any situations in which inquiry proceedings would be broadcast yet sit in private. On the other hand, it would, we think, be quite common for an inquiry to sit in public while, for whatever factors of concerns for witnesses or the wider public, it was not appropriate to be broadcast. Sitting in public and allowing broadcasting are distinct questions, indeed in the analogous scenario of court proceedings the Supreme Court ruling in *Irish Times & Ors v Judge Anthony Murphy*⁷² did not involve the proposition that public hearing extended to media broadcasting, although it has been suggested that it could.⁷³

8.60 *Accordingly, the Commission proposes which may for convenience be in the context of the 1921-2002 legislation, be expressed and located as follows. The Commission recommends a new subsection to Section 2 which is to be distinct from sub-(a), along the following lines:*

(x) In deciding whether to allow filming, recording, or broadcasting of the proceedings of the tribunal (subject to an appropriate written protocol) the tribunal shall have regard to the following considerations:

- (i) the interests of the general public, particularly the right to have the best available information on matters of urgent public importance;*
- (ii) the proper conduct and functioning of the tribunal proceedings;*
- (iii) the legitimate interests of the participants;*
- (iv) the risk of prejudice to criminal proceedings;*
- (v) any other relevant considerations.*

⁷² [1998] 1 IR 359.

⁷³ Wood "Recent judgment could lead to TV cameras in the court rooms" (1998) 92 (4) LSG 7. But also see Lambert "*In camera*: the case against courtroom TV" (1998) 92 (5) LSG 6.

CHAPTER 9 THE INFORMATION GATHERING STAGE

9.01 Section 6 of the *Tribunals of Inquiry (Evidence) (Amendment) Act 2002* represents a radical departure for tribunals legislation. For the first time, it provides express statutory authority for carrying out a preliminary investigation. While the idea of an information gathering-stage is not new, it has developed rather recently and in a fairly *ad hoc* way, with little discussion. The Commission considers therefore that it is worth scrutinising, in Part I, the assumptions on which it is based in order to see if they are well founded. Against the background of this longer than usual introduction, we go on to appraise some concrete models in Part II, namely company inspectors then, modern tribunals and other inquiries, which, as we shall see, have in practice tended to conduct such investigations; however, these inquiries have been without specific statutory support and consequently have been constrained in relation to the identity of the persons who might carry out the task, and the powers which they could exercise in doing so. One other model has already in its own context, namely the ‘inquiry officers’ of the *Laffoy Commission*: paragraphs 3.16-3.26. Finally, in Part III, we address the terms of the 2002 Act directly.

9.02 Preliminary work of some kind will often be necessary to allow meaningful lines of inquiry to be identified, and to prevent the public sittings, at which evidence is taken, from becoming side-tracked or bogged down in irrelevant detail. This is particularly so in relation to inquiries in which there is no identifiable group of victims pushing the process forward and providing information. Proceeding in this manner can be to the benefit of both the inquiry and those against whom allegations may be made. It allows the inquiry to identify areas of factual controversy, to discard allegations for which there is no basis before they acquire unwarranted publicity, and to communicate with persons whose conduct is under investigation, with a particularity that would not otherwise be possible. This should ease the task of persons wishing to answer allegations made against them, as their own inquiries into their affairs and documents can be reasonably focused. By contrast, if a glut of unsubstantiated and wide-ranging allegations is made against a person, then there is much more difficulty in orchestrating a defence. The Commission refers to preliminary work of this kind as “information-gathering”.

Part I The Distinction Between Information and Evidence

9.03 At this point the, we must make explicit our understanding of two central terms. *Evidence* is defined as material on the basis of which the inquiry is entitled to draw conclusions of fact and to make recommendations. In other words,

it can make its way into the eventual report. In most inquiries this will be given on oath or affirmation, usually but not necessarily in public, and will be tested in some manner (see paragraph 9.25 below) unless entirely non-contentious. *Information* we define as material on the basis of which the inquiry may make immediate decisions only as to relevance and how it intends to organise the inquiry (with two exceptions, considered below, paragraph 9.06). This rather formal distinction is imposed for a particular reason.

9.04 The point of distinguishing between the two types of material is related to the requirements of constitutional justice. Essentially, the Commission believes that if the distinction is observed by an inquiry, and provided it follows certain other guidelines, (among them those relating to privacy, covered in the following paragraph) it should be able to collect large quantities of information (not evidence) with minimal constitutional justice implications. It seems to the Commission that, to a great extent, it is the obligation upon inquiries to respect various rights derived from the principle that both sides must be heard that slows the progress of such inquiries at their public sittings, and adds greatly to the expense of the undertaking. Of course, as these rights are of constitutional significance the Commission cannot recommend that they be altered by legislation; nor would the Commission wish to do so. However, the Commission does believe that there are legitimate methods for reducing their impact on the work of an inquiry. The essential distinction between information-taking and evidence gathering, which has just been set out, appears to be observed in section 6(3) and (4) of the 2002 Act, which refers to “a preliminary investigation” (also to a certain extent this distinction is observed in the *Laffoy Commission*, where its inquiry officers conduct inquiries in order to collate a book of documents for circulation to those involved in the hearings: see paragraphs 3.22 and 3.37-3.38).

9.05 Information will almost always, we anticipate, be received in private, because if it were to be taken in public many of the constitutional justice safeguards would apply, and in such circumstances it would be better for the inquiry to receive the material as evidence, since it would then have the option of relying on it in its report. The safeguards would apply because the right to reputation of various persons could be affected by public disclosure. Let us assume that at a public information-gathering hearing A makes certain serious allegations of wrongdoing against B. Although the inquiry might take the view that these allegations are completely irrelevant to its terms of reference, because of the potential for damage to B’s reputation it is suggested that the inquiry would not be able to resist an application by B to exercise a right of reply. Only if A’s allegations were received in private could the inquiry justify leaving the issue aside without hearing from B.

9.06 However, the Commission takes the view that in two exceptional situations, material from the information-gathering stage might be employed at the evidence taking stages. The first situation (although strictly speaking there are three situations) is where the inquiry may have written statements “read in” or adduced under the amendments we have proposed to section 2: see paragraphs 8.31-8.44.

9.07 The second situation is where a person has given a statement to the inquiry during the information-gathering stage and then gives evidence which is

substantially different from that in the statement; there may well be sound reasons for allowing the person to be cross-examined on the basis of his earlier statement.¹

9.08 It might be objected that cross-examining a witness on the basis of information provided by him at the preliminary stage runs the risk of trespassing on the private nature of that stage, thereby undermining the rationale for not providing the protections normally associated with constitutional justice. In answering this objection, the Commission considers that there is a difference between using a statement taken in the information-gathering stage as evidence of the truth of its contents and using it as a prior inconsistent statement on the basis of which the credibility of a witness may be attacked.² The statement is not being admitted in order to prove anything, other than that the witness has previously told a different story, and that his credibility is therefore suspect. The only risk to the witness's reputation is that he may be shown to be untrustworthy.³

9.09 On a slightly different note, it might seem, however, on a very stringent view that information-gathering might entail a different type of danger, namely that the inquiry might form a provisional view on the basis of the information gathered. However the Commission believes that it would be farfetched to read this as if it undermines the inquiry in any way, provided that its members keep an open mind. By way of analogy, it is surely the rare appellate judge who does not, having read the papers in the case and the judgment of the trial judge form a provisional view on the matter. All that is required is that he or she keeps a genuinely open mind, remaining susceptible to persuasion by counsel that the provisional view is mistaken. In this respect the appointment of a judge⁴ to chair an inquiry is a valuable protection, because such individuals are accustomed to the mental discipline required in order to put inadmissible evidence out of their minds should it inadvertently be given.

9.10 So the main reason for holding a preliminary investigation can be summed up in one word: focus. At the information-gathering phase, the inquiry would be expected to filter a very large volume of material. This filtering process has two aspects. First, the inquiry may decide to discard much of the information it obtains as irrelevant, and this material goes no further. Other information may tend to disclose facts and controversy that the inquiry considers to be germane to its

¹ *Report of the Royal Commission on Tribunals of Inquiry ("The Salmon Commission")* seems to have assumed that a preliminary statement could form the basis for cross-examination: 1966 (Cmnd 3121) (London) at paragraph 57.

² But *cf* *Lawlor v Flood* High Court (Kearns J) 2 July 1999, quoted by Murphy J [1999] 3 IR 107, 138-139.

³ If the earlier statement contained allegations of misconduct against another person, which had not already come out in the public hearings, it seems that in these circumstances the inquiry would be obliged to give the person affected sufficient opportunity to vindicate his good name. Constitutional justice rights would apply at this point, but of course they would have applied anyway if the witness had given evidence in line with his previous statement.

⁴ See also the discussion at paragraphs 5.10-5.24.

investigations. There may not necessarily be allegations against persons – although frequently there will – but there may be a body of circumstantial information which suggests that a person has been involved in misconduct covered by the terms of reference. There may also be information tending to exonerate individuals against whom misconduct is alleged. All are *prima facie* relevant. However, and this is the second aspect of the filter, if the inquiry takes the view that potentially damaging allegations are not sufficiently substantiated to warrant ventilation at a public hearing, it may decide not to proceed any further with them. Ultimately, it is a decision for the inquiry whether it prefers to proceed quickly to public sittings on an issue, or instead prefers to wait to test the allegation somewhat before possibly affording the opportunity for injury to reputation caused by groundless accusations. The courts are unlikely to review this decision. As Hamilton CJ said in *Redmond v Flood*:

“The Court in [*Haughey v Moriarty*]... accepted that it was proper for a tribunal to hold preliminary investigations in private. This would enable the tribunal, *inter alia*, to check on the substance of the allegations and in this way would protect citizens against having groundless allegations made against them in public. But the Court was not suggesting that the tribunal should proceed to a public inquiry only if there was a *prima facie* case or a strong case against a particular citizen. ...”⁵

9.11 The Commission is conscious of the fact that the *Salmon Commission* decided in its 1966 Report not to recommend that a tribunal should hold a preliminary investigation in private.⁶ The suggestion made to that Commission was that at the preliminary investigation “evidence should be called and submissions made to enable the tribunal to decide whether or not there was a *prima facie* case to support any allegation against any of the persons concerned”. And the perceived advantage of this course was, essentially, protection of individuals from having possibly groundless allegations made against them in public. The *Salmon Commission* rejected the suggestion for several reasons. First, it stated that hearing evidence in private, where there are widespread rumours and allegations, is not the best way in which to protect the reputations of the innocent. Should the tribunal decide not to proceed with an issue, there is a real risk of the perception of a cover-up. Being able to destroy unfounded allegations in public may be valuable to the victim of the allegations. Secondly, if the tribunal decides that it must proceed with a public hearing; after holding a private investigation, this might, in the public consciousness, reflect rather badly on the person concerned. Thirdly, there is “something unreal about evidence being taken in private and then being re-hashed before the same tribunal in public”.⁷ Fourthly, the witness who performed badly when examined in private may have the opportunity to do much better, being forewarned, in public. But as against this, the Law Reform Commission takes the

⁵ *Redmond v Flood* [1999] 3 IR 79, 95. The full quotation is at paragraph 8.18.

⁶ Above fn 1, at chapter IX.

⁷ *Ibid* at paragraph 82.

view that, as a matter of fair procedures (see paragraph 7.49), witnesses should not be ambushed. And finally, there is the argument that conducting such an inquiry would necessarily entail considerable delay in the preparation of the report. For these reasons, the *Salmon Commission* preferred to recommend that the preliminary stages should concentrate on the documentary evidence. It stated:

“It seems to us that if more time is given to collating the material evidence before the public hearing begins, the tribunal should have an ample opportunity of defining the allegations, pinpointing the relevant matters to be investigated, and discarding any prejudicial testimony that is clearly immaterial. This will also make it possible for the tribunal to comply with our recommendations for making known to witnesses the allegations and rumours they have to meet and the substance of the evidence on which they are based. If a witness after he has been supplied with this material wishes to make a submission to the tribunal in private, either personally or through solicitor or counsel, he should be allowed to do so. It is thus, rather than by a two tier investigation with a preliminary hearing of evidence in private, that we think the interests of witnesses can be best protected.”⁸

9.12 But put like this, there is not very much between the course advocated by the *Salmon Commission* and that which is recommended here. Certainly, the Commission would also reject the suggestion in the terms in which it was put to the *Salmon Commission*. It is of the essence of our recommendations that the information-gathering stage should not be concerned with evidence. This is the point of the distinction that has been drawn between information and evidence. Although it is not entirely clear that this is so, it seems that the preliminary investigation rejected by the *Salmon Commission* would in terms of procedure be very close to the public hearings, with the calling of witnesses, their examination and cross-examination, and the making of submissions. Our conception of the information-gathering stage is quite alien to this. Like the *Salmon Commission*, we see the preliminary stage as being primarily concerned with documentary information, whether written statements or other documents. There would however be some interviews, the point of the interview being simply to obtain a statement outlining the facts that the person concerned could be expected to give, as evidence, if called as a witness. Most significant of all is that references to statements made to the Treasury Solicitor are scattered through the report⁹ and it seems that the *Salmon Commission* envisaged some sort of preliminary scrutiny of information being conducted by the inquiry prior to embarking on public hearings, mainly for the purpose of “discarding irrelevant evidence”.¹⁰ (See further paragraph 9.30).

⁸ Above fn 1 at paragraph 83.

⁹ For example above fn 1 at paragraphs 50 and 53.

¹⁰ Above fn 1 at paragraph 52

9.13 In summary, the Commission conceives of the information gathering stage of an inquiry as having the following characteristics: (1) The information received may not (unless wholly uncontested) form the basis of a decision or recommendation of the inquiry, other than a decision as to relevance and how the inquiry will proceed; and (2) the information must be gathered in private. If these restrictions are observed, the Commission believes that the courts are justified in holding that in respect of information gathering; no constitutional justice (*ie* procedural) rights accrue to any individuals.

9.14 The Commission appreciates that there is nothing revolutionary in proposing an information-gathering phase. Broadly speaking such a procedure is well established in relation to inspections carried out under the Companies Acts, in which context it has been accorded judicial endorsement. In respect of tribunals of inquiry, the provisions of the 2002 Act, as has already been remarked upon, provide for the carrying out of a preliminary investigation, but even prior to this the practice had developed and was substantially relied upon by several modern tribunals. We now turn to these topics.

Part II Company Inspections and Pre-2002 Act Tribunals of Inquiry

(a) Company Inspections

9.15 The company law inspector cases are discussed in their own context and in greater detail in Chapter 2, but it is relevant to mention two here. In *Chestvale Properties v Glackin*¹¹ Murphy J refused to accede to the submission that the normal rules of constitutional justice applied to the conduct of an investigation by a company inspector. This was because his inquiry had reached “only a very preliminary and exploratory stage” and it was not yet necessary for the inspector “to make a choice as between conflicting claims”.¹² There was nothing to indicate that he would ever have to make such a choice and Murphy J declined the invitation to take pre-emptive action: the rules of constitutional justice did not apply because what was at stake (in our terminology) was merely information-gathering, not evidence taking.

9.16 The more recent decision in *In re National Irish Bank Ltd (No 1)*¹³ confirms this approach. Shanley J held that in a two-stage inquiry being conducted by a company inspector, the inspector was not obliged to afford the full panoply of *In re Haughey*, rights at the preliminary information-gathering stage. He stated:

“The rights identified by the Supreme Court in *In re Haughey* were rights which the court believed should be afforded to a person who had

¹¹ [1993] 3 IR 35.

¹² *Ibid* at 51.

¹³ [1999] 3 IR 145.

been accused of conduct reflecting on his character and good name and where the accusations were made upon the hearsay evidence of a witness before the Public Accounts Committee of Dáil Éireann. While it is undoubtedly the case that allegations of the commission of criminal offences have been made in the media against National Irish Bank Limited and its officers, the case differs from *In re Haughey* where the accusations were made by evidence under oath from one Superintendent Fleming before the Public Accounts Committee. It was that evidence that the Supreme Court held Mr Haughey was entitled to have tested; *in the present case, there is no evidence; there is documentation in the hands of inspectors but that documentation has not become and is not 'evidence' in the sense understood by the Supreme Court in In re Haughey.* Accordingly, the inspectors cannot be compelled at this point in time to produce any documents to the representative respondent and, he in turn, is not entitled to any documents or to the facility of cross-examining any person at this initial stage in the process.”¹⁴ (Emphasis added).

9.17 The focus on the word “evidence” is obvious. Shanley J was concerned to emphasise that the information gathered in the early stages of the inquiry is not evidence: there will be a lot of chaff with the wheat and the inspectors are expected to sift through the information to decide what will be discarded and what is of sufficient relevance to merit being taken as evidence.

(b) Tribunals of Inquiry

9.18 In the case of the *Blood Transfusion Services Board Inquiry*, chaired by former Chief Justice Finlay, it is stated in the report:

“The legal team representing the tribunal studied the entire of the documentation available to it together with statements of evidence supplied to it by the various witnesses and as a result prepared prior to the 2nd December 1996 *when the taking of evidence commenced*, a document in the form of a “Statement of Facts” concerning the matters arising under [the] Terms of Reference... which was served on the other parties concerned seeking their agreement or dispute with the facts as itemised.”¹⁵

9.19 Notwithstanding the reference to “statements of evidence”, the italicised words demonstrate that the tribunal did not consider that it had taken any evidence,

¹⁴ [1999] 3 IR 145, 168.

¹⁵ *Report of the Tribunal of Inquiry into the Blood Transfusion Services Board* (1997 Pn 3695) at 8 (emphasis added). Cf. *Goodman International v Hamilton (No. 1)* [1992] 2 IR 542, 565-566 where Costello J stated that the practice of the Beef Tribunal “has been and will be to endeavour to obtain statements in advance of the calling of a witness and to forward them to the parties concerned”; *Report of the Tribunal of Inquiry into the Beef Processing Industry* (1994 Pn 1007) at 5 paragraph 13.

properly so called, until after 2 December 1996. Thus, in the terminology used above, what went on prior to that date seems to have been an information gathering exercise.

9.20 The *Moriarty* and *Flood Tribunals* have not yet finally reported, but it is known that, they have adopted procedures involving substantial private information gathering. It is understood that the *Moriarty Tribunal* have conducted private interviews in order to gather information off the record. This is, of course, consistent with the distinction which we have highlighted in Part I. Such interviews have tended to be informal, although lawyers have been present. In the *Moriarty Tribunal* the practice has been for the solicitor to the inquiry to prepare a statement based on the information given at interview and to send it to the interviewee to review and, if necessary, correct. If the interviewee is called to give evidence at the later public stage, then the information will have to be heard afresh. The practice of the *Flood Tribunal* has been to have a stenographer present at the interview, but a note of the interview is not circulated unless the person is being called upon to give evidence. In his *Second Interim Report*, Flood J stated:

“Where the tribunal was satisfied, following a preliminary examination of the matter, that there appeared to be no evidence of wrong-doing, and that the matter did not warrant further investigation at that time, the tribunal so informed the complainant. The tribunal reserved the right to re-open the matter should further information become available. Thirty-two of these fifty-nine complaints were so decided by the tribunal. Apart from the foregoing, and arising from the balance of these complaints to the tribunal, there are twenty-seven of these matters currently the subject matter of private inquiry by the tribunal so as to determine whether there is sufficient evidence to warrant proceeding to a full public inquiry in relation to such matters or any of them.”¹⁶

9.21 Such sessions (as distinct from the rare formal private evidence taking sessions) in our view, comply with the terms of section 2(a) of the 1921 Act, as they do not fall within the proceedings of the tribunal at which the public can not be excluded: they are preliminary and embryonic.

9.22 An early judicial endorsement of the information/evidence distinction may be observed in the leading case of *In re Haughey*. McLoughlin J, delivering a concurring judgment in the Supreme Court, commented on the allegations made against Mr Haughey by Chief Superintendent Fleming as follows.

“It is clear that this ‘evidence’ was not first-hand evidence but hearsay, or even hearsay upon hearsay, or as the witness said as to part of it ‘speculation or rumour’. In my opinion the Committee was entitled to receive information in this way, *not by way of proof, but as a line of inquiry to be investigated, although I think it should have been obtained*

¹⁶ *The Second Interim Report of the Tribunal of Inquiry into Certain Planning Matters and Payments* (September 2002) chapter 19, paragraph 19-16.

*in private or by way of preliminary statement and not at a public sitting...*¹⁷

9.23 More recently, there is an interesting passage in *Flood v Lawlor*.¹⁸ In that case the defendant was actually seeking to overturn a decision of the *Flood Tribunal* which was to bypass a preliminary investigation stage, in relation to documents and evidence, he had been ordered to give to the tribunal. Keane CJ said:

“It is of course the case that the tribunal, in setting about the task which it has been entrusted with by the Oireachtas, *will of necessity hear some matters in private while it assembles evidence and considers whether evidence should be further inquired into, and whether it is in any way relevant to its terms of reference or simply does not arise in relation to its terms of reference and therefore need not be inquired into any further*. That is a necessary inquiry process which all tribunals of this nature have to undertake to a greater or less extent and that aspect of their inquiry, of course, is conducted in private and for obvious reasons because it might lead to utterly unsubstantiated or irrelevant allegations being given widespread currency which would obviously not be in the public interest or required in any way. The tribunal will, however, at some stage come to a decision that the evidence of particular persons is required to be given in public at a public sitting of the tribunal and that was the stage that matters reached in this case.”¹⁹

9.24 In the context of the analysis advanced here, it is unfortunate that this passage uses the term “evidence” rather than “information”. However, it seems plain from the words italicised that Keane CJ had in mind the preliminary, private investigation sessions, which the Commission has described as information gathering.

9.25 Broadly similar comments may be made on a passage from the judgment of the Supreme Court in *Haughey v Moriarty*. The court summarised the stages in the procedure of a tribunal of inquiry, as follows:

¹⁷ [1971] IR 217, 267-268 (emphasis added). Note that in *Goodman International v Hamilton (No 1)* [1992] 2 IR 542, 605 McCarthy J (with whose judgment Finlay CJ, O’Flaherty and Egan JJ agreed) said that he did not wholly adopt the observations of McLoughlin J in relation to the sitting of an inquiry in private or in public. But the Commission believes that McCarthy J’s comments probably do not undermine McLoughlin J’s views in relation to the distinction to be drawn between evidence received by way of proof and information to be received as a line of inquiry, but rather were directed towards McLoughlin J’s view that the inquiry was not at liberty to take the evidence in public. Information can be taken in public; it is simply that when this is done, certain aspects of constitutional justice then reassert themselves.

¹⁸ 24 November 2000 Supreme Court.

¹⁹ *Op cit* fn 18 at 4 – 5.

- “1. a preliminary investigation of the *evidence* available;
2. the determination by the tribunal of what it considers to be *evidence* relevant to the matters into which it is obliged to inquire;
3. the service of such *evidence* on persons likely to be affected thereby;
4. the public hearing of witnesses in regard to such evidence, and the cross-examination of such witnesses by or on behalf of persons affected thereby;
5. the preparation of a report and the making of recommendations based on the facts established at such public hearing.”²⁰

9.26 It seems that the word “evidence” was not used in a particularly technical sense in this passage. This is unsurprising, since it formed part of a judgment in which the different issue of the entitlement of persons to be present at proceedings of a tribunal was being considered. There is no indication that the Supreme Court intended to reject any distinction between “information” and “evidence”. The Commission suggests that in the first three stages “information” could be substituted for “evidence” without doing any violence to the passage. It is perhaps notable, with reference to stage 2, that in proceedings before a court, the primary criterion governing the admissibility of evidence is relevance. Information on the basis of which the court is not entitled to reach a decision is frequently referred to as “inadmissible evidence”. An inquiry is not bound by the strict rules of evidence, so such terminology is inappropriate, but the distinction between mere information and evidence captures the flavour of the difference between inadmissible and admissible evidence.²¹

9.27 This distinction, on which we rely, seems also to have been accepted in Canada, where the position is well summarised by the following passage from a decision of the Supreme Court, which contains principles of general application:

“Courts must, in the exercise of this discretion, remain alert to the danger of unduly burdening and complicating the law enforcement investigative process. Where that process is in embryonic form engaged in the gathering of the raw material for further consideration, the inclination of the courts is away from intervention. Where, on the other hand, the investigation is conducted by a body seized of powers to determine, in a final sense or in the sense that detrimental impact may

²⁰ [1999] 3 IR 1, 74 (emphasis added).

²¹ This comparison must be treated with caution, however, because information includes both inadmissible (irrelevant) and admissible (relevant) material. So while in court proceedings inadmissible and admissible evidence are sets between which there is no overlap, in inquiry proceedings, evidence is a subset of information.

be suffered by the individual, the courts are more inclined to intervene.”²²

Part III 2002 Act Provisions Regarding Preliminary Investigations

9.28 At this juncture it is appropriate to outline the provisions of the *Tribunals of Inquiry (Evidence) (Amendment) Act 2002* relating to preliminary investigations. It is proposed then to consider these provisions by reference the desiderata for an information-gathering stage, as outlined in Part I, above.

9.29 Section 6 of the 2002 Act allows for the appointment of “investigators”. The rationale for such an appointment is explained by subsection (3), which provides:

“Whenever an investigator is so requested by the tribunal by which he or she was appointed, he or she shall, for the purpose of assisting it in the performance of its functions and subject to its direction and control, carry out a preliminary investigation of any matter material to the inquiry to which the tribunal relates.”

9.30 Two comments may be made in respect of this provision. First, the legislation does not define what a “preliminary investigation” entails. The Commission takes the view that this term should be interpreted in a manner consistent with the information-gathering process as explained in Part I, above, of this chapter. Secondly, the preliminary investigation is expressed to relate to “any matter material to the inquiry”. This particular formula of words has the potential to cause difficulties, in that it seems to suggest that the matters investigated must be “material”, or to put it another way, “relevant” to the inquiry. However, we have already expressed the view that one of the central features of the information-gathering stage is that it may well be concerned with information which is not relevant, for the purpose of excluding it from the public hearings.²³ This part of the provision should not, therefore, be strictly construed, but should admit of the possibility of irrelevant issues being investigated, since their irrelevance will not always be obvious on the face of things.

9.31 An investigator is invested with a number of powers which, hitherto, could be exercised only by the tribunal itself. Section 6(4) provides:

“An investigator may, for the purposes of a preliminary investigation under subsection (3), require a person to—

²² *Irvine v Canada (Restrictive Trade Practices Commission)* [1987] 1 SCR 181, 235.

²³ In this connection, the comments of the sponsoring minister at the relevant Bill’s second stage are interesting. He stated: “It will frequently be the case that the preliminary investigation discloses material that is of no further interest to the tribunal, perhaps because it falls outside its terms of reference.” 551 *Dail Debates Col 9* (22 March 2002).

- (a) give to him or her such information in the possession, power or control of the person as he or she may reasonably request,
- (b) send to him or her any documents or things in the possession, power or control of the person that he or she may reasonably request, or
- (c) attend before him or her and answer such questions as he or she may reasonably put to the person and produce any documents or things in the possession, power or control of the person that he or she may reasonably request,

and the person shall comply with the requirement.”

9.32 Subsection (5) goes on to provide that “An investigator may examine a person mentioned in subsection (4) in relation to any information, documents or things mentioned in that subsection and may reduce the answers of the person to writing and require the person to sign the document containing them”.

9.33 At the Bill’s second stage, the sponsoring minister stated that the impetus for these provisions lay in the decision in *Lawlor v Flood*.²⁴ In that case an attempt by the *Flood Tribunal* to compel the applicant to attend before counsel to the tribunal and to answer their questions, in the absence of the chairman himself, was struck down. Interestingly, in relation to the information/evidence distinction, the minister also made the following comment:

“The most notable characteristic of the powers being given to investigators is that they parallel the powers of the tribunal itself, except that they will be used at the preliminary investigation stage. Accordingly, I do not propose that the investigators should examine persons on oath – that is for the tribunal itself if it decides that the answers given by a person to the investigator merit the calling of that person to give evidence at a public hearing of the tribunal.”²⁵ (Emphasis added).

9.34 Under section 6(6), an investigator is permitted (with the consent of the tribunal) to apply to the High Court for an order compelling a person to comply with a requirement imposed by him. This enforcement mechanism is considered in detail at paragraph 6.40, above, and 9.50, below.

9.35 It is also notable that a person mentioned in subsection (4) is entitled, by virtue of subsection (7), to “the same immunities and privileges as if he or she were a witness before the [High] Court”. Finally, under subsection (8):

²⁴ High Court (Kearns J) 2 July 1999; [1999] 3 IR 107 (SC).

²⁵ 551 *Dail Debates* Col 9 (22 March 2002).

“An investigator shall not, without the consent of the tribunal by which he or she was appointed, disclose other than to that tribunal any information, documents or things obtained by him or her in the performance of his or her functions under this section.”

9.36 We turn now to focus on a number of key aspects of the investigator.

(a) The Role of the Investigator

9.37 It is unclear from the legislation what precisely an investigator is to do with the information he or she gathers in the course of a preliminary investigation. While subsection (8) clearly suggests that the material may be disclosed to the tribunal, there is no indication as to whether or not the investigator is entitled or expected to exercise some sort of evaluation function. In other words, should the investigator simply forward the statements, documents and other material gathered to the tribunal for consideration, or should a report be prepared in which the material might be summarised, and its relevance or other value estimated? More radically, should the investigator be in a position to make decisions as to relevance which could bind the tribunal? This might entail the investigator deciding that certain elements of the information gathered do not merit being forwarded to the tribunal for consideration.

9.38 In this connection, the practice of the Commission to Inquire into Child Abuse is relevant.²⁶ For the *Laffoy Commission* benefits from the services of inquiry officers who are analogous to investigators. These officers conduct preliminary work in connection with complaints of abuse made to the Investigation Committee of the *Laffoy Commission*. The inquiry officers take statements from interested parties and prepare a file, highlighting the areas of factual controversy, for the committee. It seems plain that these statements do not constitute evidence, because they must be (or by agreement between the parties be deemed to be) read into the record at a hearing of the Committee. In relation to the issue presently under consideration, it is notable that the inquiry officers are not entitled to draw any conclusions from the material they accumulate; they simply put it in order, prepare a report that accurately gives a synopsis of it and furnish the file to the Committee, in which the decision making powers are vested.

9.39 It seems to us that the radical suggestion that investigators should be permitted to decide what information is relevant to the tribunal and what is not must be rejected. The best argument in favour of such a suggestion would be that by ensuring that the tribunal does not itself see irrelevant and possibly damaging material, the impartiality of the fact-finding body is assured. Our adversarial system accustoms us to certain institutional arrangements, one of which is that the body that adjudicates does not investigate. However, the Commission has recommended elsewhere that tribunals of inquiry should usually be chaired by a retired or serving judge.²⁷ It is our view that this requirement goes a long way to

²⁶ See generally paragraphs 3.16-3.26.

²⁷ See paragraphs 5.10-5.24.

addressing the argument based on the possibility of prejudicial information coming out at the preliminary sessions. No other category of individuals is so well qualified to ignore such information if it is irrelevant, and the Commission considers that the chairperson is in any event the best person to make that decision as to relevance.

9.40 This last comment touches on a fundamental issue; namely, whether the preliminary inquiry ought to be vested in a body separate from the tribunal. However the Commission takes the view that if a tribunal of inquiry is appointed to inquire, it should be allowed to do so. The Commission considers that the obligation to inquire connotes the tribunal adopting a “hands-on”, rather than “hands-off” approach to the subject-matter under investigation.²⁸ One of the reasons for appointing a former or serving judge to chair an inquiry is the expectation that he or she will bring experience and wisdom to the investigative process. This presumed advantage would be lost or at least eroded, if the tribunal were to abdicate its preliminary investigative role entirely in favour of another body. Even at the information-gathering stage, there will be important decisions to be made as to relevance, which may affect the course of the inquiry, and the Commission believes that in principle these are better taken by the tribunal, in consultation with its legal team, than by another body that is not obliged to report to the public, and is in any event unlikely to command the same respect as the tribunal itself. However, the Commission envisages no objection to an investigator preparing a report for the tribunal, which might include recommendations as to how the tribunal could proceed with its inquiries, provided that these were not binding on the tribunal.

(b) Sworn Statements Made to Investigators

9.41 It is notable that section 6(4) and (5) of the 2002 Act do not seem to envisage a person appearing before an investigator being required to provide a sworn statement. Presumably there is nothing to prevent a person, who wishes to do so, from furnishing a statement in such a format (for example by way of affidavit) but it cannot be demanded.

9.42 It has been noted, at paragraph 9.03, that information cannot be the basis of any findings of fact by an inquiry. In these circumstances there does not appear to be much point in insisting that such statements should be sworn. Moreover, to do so might raise difficulties. In *Lawlor v Flood*²⁹ Kearns J stated, *obiter*:

“...I would hold in favour of counsel for the applicant’s submission on fair procedures in relation to the point in time where the applicant’s *Re Haughey* rights accrue, namely, in this situation, where the applicant is obliged to commit himself in an affidavit as to facts. An affidavit sworn by a person in the applicant’s position requires him to commit himself in a form and manner which clearly will form part of the evidence before

²⁸ To an extent the legislation reflects this by permitting the investigators to operate only subject to the tribunal’s direction and control.

²⁹ High Court (Kearns J) 2 July 1999.

the tribunal and may consist of material either to build a case against him or on which he may be later cross-examined. It is not therefore confined in its intended user or effect to the preliminary stage of the investigation but has a very real capacity to be a document of major significance at public hearings or perhaps in some other forum to the detriment of the applicant.

Without knowing the full detail of the case made against him, the applicant is in effect, being ordered to make a case against himself either by virtue of the matters which he deposes in the affidavit or by his omissions. He could be seriously disadvantaged at the public hearing had he sworn an affidavit at an earlier stage which was significantly deficient in any respect for reasons of which he might not have known at the time of making the affidavit.

It seems to me that in this situation, the supposed demarcation line between the preliminary investigation work and full public hearings is transgressed. Accordingly, before the applicant is required to swear such an affidavit, he must be afforded his *Re Haughey* rights.”³⁰

9.43 Although this passage was the subject of criticism by Murphy J on appeal, and although the Commission takes issue with the view that such an affidavit “clearly will form part of the evidence before the tribunal and may consist of material... to build a case against him”, since there seems to us to be little to be gained from requiring the information to be given on oath or affirmation, it is as well to obviate any risk that such a power might require the constitutional justice rights to be granted at the preliminary stage.

9.44 *Accordingly, the Commission does not recommend any change to the current position that (given the general low-key character of the information gathering stage) sworn statements cannot be required. However, the Commission does support the policy of conferring compellability powers upon investigators, outlined at paragraph 9.31 and 9.52.*

(c) Privilege and Immunity

9.45 For the information-gathering stage to be as efficient and as useful as it can be, people should be encouraged to supply (or at least not be discouraged from supplying) information to the tribunal. This observation suggests the extension of the immunities and privileges granted to witnesses (*ie* those who give “evidence”) to those who supply the tribunal with information (*ie* potential witnesses).

9.46 The reason for the extension of immunities to witnesses is not difficult to identify. As the *Salmon Commission* stated in its report, “persons may be chary of coming forward for fear of exposing themselves to the risk of prosecution or an

³⁰ High Court (Kearns J) 2 July 1999, at 91-92.

action in the civil courts”.³¹ The immunities are thought to be “of considerable assistance in obtaining relevant evidence”.³² It is interesting that the *Salmon Commission* took the view that “the witness’s immunity should be extended so that neither his evidence before the tribunal, nor his statement to the *Treasury Solicitor*, nor any documents he is required to produce to the tribunal, shall be used against him in any subsequent civil or criminal proceedings...”.³³ The Commission endorses the view that statements provided to an inquiry during its early information-gathering phase should be protected in the same way as evidence given at the public hearings, and therefore is broadly supportive of the policy decision made in section 6(7) of the 2002 Act, whereby a person mentioned in subsection (4) is entitled to “the same immunities and privileges as if he or she were a witness before the [High] Court”. However certain points of detail call for consideration.

9.47 In interpreting this provision, it must be borne in mind that there is a distinction to be drawn between an immunity rule on the one hand, and a non-admissibility rule on the other. An immunity is designed to protect a person against subsequent criminal or civil proceedings arising out of what is said or published at an inquiry, whereas a rule of non-admissibility applies in respect of material that might, without the rule, constitute evidence in a court of law. To be immune from, say, prosecution under the *Official Secrets Act 1964* means that within the parameters of that immunity a witness (or other individual belonging to a protected class) can say whatever he pleases without any possibility of being prosecuted under the *Official Secrets Act 1964*. Non-admissibility is quite different. It simply means that evidence one gives to a tribunal is not admissible in subsequent criminal proceedings; but this of course does not mean that one is immune from such proceedings.³⁴ Evidence may come from other sources. Thus the witness might still be prosecuted for an offence under the *Official Secrets Act 1964* for some related episode (not the statement before the tribunal, as already explained); proven by evidence other than the testimony given before the tribunal.

9.48 There is a very good reason for having separate immunity and non-admissibility rules. If the mere act of confessing one’s crimes to a tribunal were sufficient to render one immune from prosecution in respect of those crimes, then there would be a grave risk that the tribunal might degenerate into a sort of information laundry. By this we mean that individuals would have an incentive to reveal all their sins, however irrelevant to the inquiry, and from the point of view of

³¹ Above fn 1, at 26 paragraph 63.

³² *Ibid* at paragraph 63.

³³ *Ibid* (emphasis added). References to statements made to the Treasury Solicitor are scattered through the report (eg paragraphs 50 and 53) and it seems that the *Salmon Commission* envisaged some sort of preliminary scrutiny of information being conducted by the inquiry prior to embarking on public hearings, mainly for the purpose of “discarding irrelevant evidence” (paragraph 52). (See further paragraph 9.30, above). The Treasury Solicitor has no direct parallel in Ireland, but the closest analogy is with the solicitor appointed to assist a tribunal of inquiry, generally referred to as the solicitor to the tribunal.

³⁴ But see paragraph 9.48, below.

the criminal law at any rate, the slate would be wiped clean. However, there are practical problems with bringing such a down-stream prosecution, and these are dealt with in Chapter 11.

9.49 Both the question of immunity, privilege and non-admissibility in respect of the information gathering stage (section 6(7) and section 8³⁵ of the 2002 Act, respectively) are analogous to the provisions in respect of a witness before the inquiry itself and are discussed thoroughly at paragraphs 6.113-6.120 (immunities and privilege) and paragraphs 11.31-11.32 (non-admissibility). At the moment, because of the history of the legislation the sections are to be found in different Acts. Elsewhere we recommend consolidation. When this is done (and we suggest drafts at 6.120 and 11.32) the provision regarding witnesses or persons giving information should be treated in succeeding provisions. As regards the fairly minimal substantive changes, recommended in Chapter 6 and Chapter 11, since we are taking the policy position that people giving information should be treated the same as witnesses, these changes should also be extended to persons giving information.

(d) Powers of Compulsion

9.50 Under section 6 of the 2002 Act, an investigator is entitled to compel a person to provide assistance, by way of furnishing information, documents or things, and by answering questions. The first reason for equipping the inquiry with the power to compel a person to provide it with a statement is that the inquiry is able to ascertain what evidence could be expected from that person, should the inquiry decide to call him or her as a witness. In this way, the risk that a person might, for the first time, make a series of groundless or irrelevant allegations in public, with the attendant damage to reputation for the persons affected, is reduced.

9.51 Secondly, and perhaps more importantly, having such a power in the background is likely to persuade certain people, who might otherwise attempt to obstruct the tribunal, to co-operate at a much earlier stage. A request for information that is backed up by the possibility of an enforceable demand is much more likely to excite a positive response than the request alone. Of course, it may be that certain recalcitrant individuals will prove uncooperative, even when compelled to appear before an investigator. Where a tribunal encounters such a person, it will have a choice of referring the matter to the DPP or proceeding to the public stages.

9.52 *Accordingly, the Commission is in favour of the legislation, insofar as it grants powers of compulsion to investigators, and would not wish to recommend any change from this position.*

³⁵ Section 8 of the 2002 Act states that: "A statement or admission made by a person before an investigator shall not be admissible as evidence against the person in any criminal proceedings".

Comment

9.53 *In summary, it seems to the Commission that in operating the provisions under the 2002 Act, tribunals of inquiry should respect the distinction between information and evidence. Express provision for a preliminary investigation stage is welcome. Of course, it is right and proper that there should be no obligation to avail of the facility provided by the 2002 Act, since it is merely is a tool to be used where the chairperson thinks it appropriate. Investigators have rightly been given the power to compel persons to provide them with information, documents and answers to their questions. However, the Commission believes that although in almost all inquiries it will be extremely useful, the appointment of investigators should not detract from the tribunal's responsibility to determine for itself the manner in which its own inquiry will proceed, by making decisions concerning relevance and lines of inquiry to be pursued.*

CHAPTER 10 ALTERNATIVES TO PUBLIC INQUIRIES

10.01 This chapter may be regarded as a sort of conclusion. It is true that there are two substantive chapters to come but these are on discrete topics (Downstream Proceedings and Costs). This chapter is a conclusion in that it attempts to knit together the lessons from a number of the previous chapters. It attempts to navigate away from the dangerous shoals marked out in the chapters on Constitutional Justice and Publicity and Privacy. On the positive side, it builds on the diverse useful experience gained from the three types of inquiry described in chapters 2-4 (Company Inspectors, Commission to inquire into Child Abuse and Parliamentary Inquiries) and the investigations outlined in the previous chapter: the Information Gathering Stage. When several well-respected and distinct channels of thought reach a confluence, it is well to take notice of this consensus.¹

Part I Forthcoming Legislation

10.02 Building, it seems likely, on the sort of analysis advanced in Part II, new legislation is expected to be published very soon. Two separate, new models of inquiry are anticipated. Since we know little about these proposed Bills, we cannot discuss them. For the sake of completeness, we simply summarise what little information is already in the public domain.

(a) Minister for Justice's Proposals for a 'Committees of Investigation'

10.03 It seems that these proposals involve investigation under the supervision of a small committee of inquiry of (probably three or so) persons with expertise in the field under investigation. The investigation will be in private, but the Committee will, however, have compulsory powers. In this respect, the Committee would go beyond the kind of non-statutory, exploratory investigation which was held, for instance, by Shane Murphy SC or George Birmingham SC, as a prelude to the *Morris Tribunal*, or the *Ferns Inquiry*, respectively: see paragraph 1.24, above.

10.04 But the more significant difference is that it would be intended that, unlike the two examples just cited, in most cases, the Committee's investigation would lead to a reasonably complete result, so that there would be no need for further proceedings. For the central feature of the new proposal is that it would

¹ Brady "Tribunal and Politics: A Fundamental Review" *Contemporary Issues in Irish Law & Politics* No 3, 156, 162-163 also makes this point strongly.

draw on a number of features designed to secure the co-operation of key witnesses without extensive legal representation. There are two points here. The first is promoting co-operation: certain aspects of the inquiry, outlined below at paragraph 10.07, will reduce the disadvantages to a witness of co-operating with this type of inquiry. The chances of co-operation would also be increased by the fact that the inquiry would have statutory powers (to summon witnesses, to exact answers) as well as the fact that in the background would be the threat of a tribunal of inquiry, or something similar, if the private inquiry did not produce results: the carrot and the stick is often an effective combination. The second point is that the witnesses, it is reasonably anticipated, would be likely to co-operate without extensive legal representation. This is likely to occur because the aspects of the inquiry, outlined below at paragraph 10.07, will also have the effect of minimising a witness' entitlement to constitutional justice.

(b) The Parliamentary Inspector

10.05 The CAG-PAC inquiry into DIRT (see paragraphs 4.13-4.21) investigation was widely regarded as a success, and we understand that a certain amount of official thinking² has gone into trying to replicate it in the form of a parliamentary inspector and that (as of February 2003) the publication of legislation was anticipated. However, given the overlap between the parliamentary inspector and the committee of inquiry, and the fact that legislation for the committee is at a very advanced stage, it is possible that the parliamentary inspector will not be established. In any case, it is worth mentioning briefly, if only to show the range of thinking going into this area. Since the parliamentary inspector would investigate matters in private, would not finally determine any facts, and, finally, would be a non-political figure, there would probably be no argument for any right to representation before him or her. It seems likely that the parliamentary inspector would draw up a complete report which would be laid before the House of the Oireachtas. In other words, he would not be directing it to an Oireachtas Committee for further discussion, along the lines of the CAG/PAC partnership.

Part II Recommendation

10.06 There are, by now, enough models for public inquiries in existence. The Commission sees no need to add a further model (though we should be open to argument to the contrary, at the consultation stage). Rather, the Commission focuses generally on certain aspects of the problem, in order to discern the sort of qualities which a new model should have. As will be seen, our conclusion broadly supports the design which is anticipated from the Minister for Justice.

10.07 Put simply, the central problem addressed in this Paper is how best, subject to observing fair procedures, to minimise the need for constitutional justice.

² The Parliamentary Inspector was promised by the Government Chief Whip (Mr S. Brennan) at PAC hearings on 30 November 2000, and the Final Report of the DIRT inquiry refers to a Parliamentary Inspector, at 2.

The best way of doing this is to ensure that the inquiry has one or more of the following characteristics:

- (i) It would be held in private (though the report emanating from the inquiry may be published). The obvious advantage of this is that accusations against a person, made by possibly prejudiced witnesses and often amplified by the mass media, are not bruited forth to the world immediately. At most, if the inquiry finds the accusations to be substantiated, a version of them will appear in the final report, together with the inquiry's measured judgment. (There is a less obvious point: the privacy and low-key ambience of a private inquiry is more likely to encourage co-operation. The psychological environment within which those involved in inquiries operate is, we have been told by participants, a significant factor);
- (ii) Where appropriate, the inquiry report would emphasise the flaw or malfunctioning of the institution, big business or profession involved, rather than the sins of an individual wrong-doer. There is an analogy here with the way in which the Ombudsman goes about his work, avoiding the identification of the particular public servant who was responsible for maladministration.³ In assessing this point, we would refer to the point emphasised in paragraphs 7.19 and 7.30 that a right to constitutional justice depends on the party being in the position of 'an accused';
- (iii) As well as the conclusions, where a point is disputed, the report would include comments on, or even disagreement with those conclusions by any person whose good name or conduct they call into question. Thus, each side of the argument is recorded.

10.08 A central point here, however, is that, depending on the particular circumstances of the inquiry, any of these limitations may, for policy reasons, be regarded as undesirable. This is a consideration which will have to be born in mind by the decision-makers who are designing the inquiry. We allude to it as we review briefly each of these features.

10.09 As regards (i) – evidence taken in private – there will be many cases in which the legitimate public interest will be satisfied by a thorough investigation by a respected individual, who publishes a full report, without the entire evidence-taking process having to go on in public. Even where this is not completely correct, the Commission feels, as a generalisation, that the balance between private information-gathering and public evidence-taking should be a little further towards the former than has been the case in some recent tribunals of inquiry.

³ Hogan and Morgan *Administrative Law in Ireland* (3rd ed. Sweet & Maxwell) at 380.

10.10 As to (ii) – not singling out individuals, there have been a number of inquiries – for instance, the CAG inquiry into DIRT, in which this restriction has been acceptable. Many examples of this come from the field of transport accident investigation, which, probably because of its success, has attracted little attention. One of the few (even unsuccessful) judicial reviews in this area is *Stokes v Minister for Public Enterprise*.⁴ Here, under the procedure established by the regulation quoted at paragraph 10.13, below, a draft report into an aeronautical accident had been furnished to the applicant (who was the widow of a pilot involved in an accident). The applicant contended that, as a matter of constitutional justice, she had a right to see all records pertaining to the investigation. This contention was rejected by the High Court, on the basis that:

“...the object sought to be achieved by this report is the improvement of air safety and the prevention of future accidents and incidents. Not merely do the Regulations require that the investigation and the report which derives from it is not concerned with apportioning blame or liability but the draft report does not in fact attempt to do so.”⁵

10.11 Here, then, is precise authority for the proposition that, where there is no individual blame, the rules of constitution justice are not attracted, a view which is also advanced in a more general form at paragraphs 10.15-10.16, below.

10.12 However, on the other hand, it must also be recalled that, in certain circumstances, the policy view may be taken that it is necessary that any responsibility for what has gone wrong is, should be brought home to a specific individual (and it bears noting that the reaction to certain tribunals of inquiry, like the *Beef Tribunal*, or the *Lindsay Tribunal* included complaints from some quarters that this had not been done). One way of dealing with this sort of case is to hold a preliminary inquiry in which there is no individual condemnation, but with the possibility that it will be done at the final stage of the inquiry.

10.13 Next, take (iii) – the recording of the comments and even protests of a person whose conduct is under investigation. This is probably the least likely of the three to be objectionable on policy grounds. Equally, however, it may only go some way to make up for the absence of what one could call full constitutional rights. This feature was used, for instance, in the CAG report into DIRT (see paragraphs 4.13-4.21). Again, the Air Navigation Regulations,⁶ Regulation 18 offers a comprehensive formulation:

“(1) No report...may be made to the Minister or made public until the investigator-in-charge has –

⁴ High Court (Kelly J) July 3 2000.

⁵ *Op cit* fn 4 at 12.

⁶ *Air Navigation (Notification and Investigation of Accidents and Incidents) Regulations SI No 205 of 1997* (Pn 3956).

(a) where it appears to him or her practical to do so, served a notice...on any party involved in the occurrence and on any other person, including the Minister, who is, in the inspector's opinion, likely to be adversely reflected on by the report or, where such person is deceased, on the person who appears to the investigator-in-charge to best represent the interests of the deceased

(b) considered any comments which may be made to him or her...

(c) by notice in writing, informed the person or party who made the comments of the result of the inspector's consideration of the comments, and such information may include a copy of the report...

... (4) The investigator-in-charge may, after considering any comments referred to in paragraph (1) (b), amend the report, or may append such comments to the report.”

10.14 Finally, we ought to advert to another device with a similar objective, namely to minimise the need for constitutional justice. This consists of the inquiry simply collecting and recording the competing versions of the facts, but coming to no judgment between them. It has been used on at least one occasion, namely the Dáil inquiry into the fall of the Fianna Fáil/Labour Government of 1994 (see paragraph 4.03-4.04).⁷ While this may have some value in clarifying issues, in most circumstances it would be regarded as not going far enough to satisfy a genuine need for a public inquiry.

Comment

10.15 Enough has been said to show that there are both substantial advantages and disadvantage in the traditional public inquiry. Given discrimination in its operation, a model with the characteristics (i)-(iii) just outlined would often allow sufficient flexibility for the advantages to be captured, while avoiding the disadvantages. It would not be suitable in every circumstance. But, in view of the variety of circumstances which public inquiries may have to deal with, among them the possibility of downstream criminal proceedings, there are many situations in which it would be useful.

10.16 *Accordingly, the Commission recommends that legislation be enacted providing for a private, low-key inquiry which focuses on the wrong or malfunction in the system and not the wrong-doer. The Commission would expect that such an inquiry will not attract the rules of constitutional justice.*

⁷ See Hogan and Moran above fn 3, at 307-09.

CHAPTER 11 DOWNSTREAM PROCEEDINGS

Introduction

11.01 In this chapter we address certain difficulties which may arise where there are subsequent legal proceedings flowing from the same subject matter as the inquiry. We write ‘subsequent legal proceedings’, but far and away the most likely possibility would be that, after an inquiry in which a person’s conduct had been investigated, that person would be tried for a crime arising from the same conduct.¹ Other possibilities could be conjectured, for instance; civil litigation,² disciplinary sanctions,³ or other administrative proceedings, including action to recover taxes taken by the Revenue Commissioners.⁴ But, for brevity’s sake here, we assume, unless the contrary is indicated, that the subsequent proceedings take the form of a criminal trial, in which issues arise in the most acute form. Broadly speaking, two types of difficulty may arise out of the fact that a trial concerns the same subject-matter as an earlier inquiry:

¹ Such as in “*L’affaire du sang contaminé*” in France, as mentioned at paragraph 1.09, above. Also see the prosecution of George Redmond arising from the evidence heard by the *Flood Tribunal*, see details at fn 60 below.

² See *Stokes v Minister for Public Enterprise, the Chief Inspector of Air Accidents and Frank Russell* High Court (Kelly J) 3 July 2000, in which the applicant sought disclosure of all records, notes and memoranda concerning an air accident investigation (including ‘black box’ recordings) in order to “comprehensively comment on the draft report” of the investigation, which implicated the pilot (the applicant’s deceased husband).

³ A recent example from the work of the *Victoria Climbié Inquiry* in Britain can be referred to here: many of those called to give evidence and eventually named in the Report (Cm 5730) were subject to disciplinary sanctions, such as suspension, redundancy or dismissal. See *The Times* 29 January 2003, 4.

⁴ The revelation of the ‘Ansbacher deposits’ by the *McCracken Tribunal*, resulted in the appointment of a company inspector to investigate the affairs of Ansbacher (Cayman) Ltd, which reported in July 2002. Following on from these inquiries (as well as DIRT), at the end of 2001, the Revenue Commissioners were investigating “191 Ansbacher type-cases and other cases involving offshore funds and deposits” and had collected € 15.77 million, by way of settlement: see Revenue Commissioners Annual Report 2001, at 27. Moreover, in the Preface to the *Second Interim Report of the Flood Tribunal*, Flood J states: “In response to my request for information, the Revenue Commissioners and the Criminal Assets Bureau have informed me that, to date, in excess of €34,500,000 has been paid to these bodies in connection with inquiries into Revenue compliance issues arising directly or indirectly from this tribunal.”

- (a) information obtained at the inquiry might be used at the trial, such a use being regarded, for reasons given at paragraph 11.03, as a violation of the accused's rights (Part I - Part IV);
- (b) the bad publicity generated by the public inquiry may render the trial either unfair to the accused, or only fair if precautionary measures are taken (Part V - Part VII).

11.02 In respect of each of these issues, as we shall see, the question arises as to whether the law should address the protection at the stage of the inquiry or at the later downstream proceedings.

Part I The Privilege Against Self-incrimination⁵

11.03 The major precaution available at the inquiry stage to protect the person under investigation from later proceedings is the privilege against self-incrimination or the synonymous expression the 'right to silence'. In a most sophisticated analysis Lord Mustill stated that the privilege or right to silence does not denote any single right, but rather it refers to a disparate group of immunities; such as "a general immunity, possessed by all persons and bodies from being compelled on pain of punishment to answer questions, the answers to which may later be used to incriminate them."⁶ In *Saunders v UK*,⁷ Walsh J traced the origins of the common

⁵ Expressed in the maxim *nemo tenetur se ipsum accusare*. See generally, Keane *The Modern Law of Evidence* (4th ed. Butterworths 1996) 510 *et seq*; *Cross and Tapper on Evidence*, (9th ed. Butterworths 1999) 422 *et seq*. The subject is also touched upon in the specific context of company inspectors, at paragraphs 2.09-2.21.

⁶ *R v Director of the Serious Fraud Office, ex parte Smith* (1993) AC 1, 3. Lord Mustill states at 30-31: "the right of silence.' This expression arouses strong but unfocused feelings. In truth it does not denote any single right, but rather refers to a disparate group of immunities, which differ in nature, origin, incidence and importance, and also as to the extent to which they have already been encroached upon by statute. Amongst these may be identified: (1) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies. (2) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them. (3) A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind. (4) A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock. (5) A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority. (6) A specific immunity (at least in certain circumstances, which it is unnecessary to explore), possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial. Each of these immunities is of great importance, but the fact that they are all important and that they are all concerned with the protection of citizens against the abuse of powers by those investigating crimes makes it easy to assume that they are all different ways of expressing the same principle, whereas in fact they are not."

⁷ [1996] 23 EHRR 313.

law privilege: “[t]he seeds of the privilege were planted in the thirteenth century in English common law when the English ecclesiastical courts began to administer what was called the ‘oath *ex officio*’ to suspected heretics.”⁸ This practice entailed questioning a suspect who had sworn to tell the truth. Later, the oath *ex officio* was employed by the Court of Star Chamber in rooting out opposition to the King. As a reaction to the excessive zeal of that court, the principle emerged that a man had a privilege to refuse to testify against himself. According to Walsh J, “the principle was that ‘a man could not be made the deluded instrument of his own conviction’.”⁹ The rationale is that:

“The essential and inherent cruelty of compelling a man to expose his own guilt is obvious to everyone, and needs no illustration. It is plain to every person who gives the subject a moment’s thought. A sense of personal degradation in being compelled to incriminate one’s self must create a feeling of abhorrence in the community at its attempted enforcement.”¹⁰

11.04 In addition, the privilege is reflective of the traditional distribution of the burden of proof in a criminal trial, namely that it is incumbent on the prosecution to establish guilt beyond a reasonable doubt. In other words, the privilege absolves the accused from having to face the “cruel trilemma of self-accusation, perjury or contempt.”¹¹ Lord Mustill remarked more tersely that the right is a “reflection of the common view that one person should so far as possible be entitled to tell another person to mind his own business.”¹²

11.05 But the great question in what way should effect be given to this privilege? Three forms are possible. In descending order of stringency, the possibilities are:

- (a) to prohibit at the inquiry stage any question which might lead to a self-incriminatory answer;¹³
- (b) to provide that any evidence given at the inquiry (‘derivative or fruits evidence’) cannot be repeated before the court;

⁸ *Op cit* fn 7 344.

⁹ *Ibid* at 345.

¹⁰ *Brown v Walker* 161 US 591, 637 (1896) *per* Justice Field.

¹¹ *Murphy et al. v Waterfront Commission of New York Harbour* 378 US 52 (1964), 55

¹² *Op cit* fn 6 at 31.

¹³ This is what has been adopted in the USA. Hence the expression to plead the fifth, as noted below at paragraph 11.28.

- (c) to preclude any statement given at an inquiry from being admissible in later proceedings.

11.06 The Commission turns in the next Part to survey the way in which this privilege has been expressed in legislation. Then by way of appraisal, both the constitutional standard and the requirements of good policy are considered, in Part III and Part IV respectively.

Part II Legislative Provisions Dealing with the Relationship between the Privilege and Public Inquiries

11.07 In Ireland, as elsewhere:

“... legislatures have sought a legislative solution to the tension between the privilege against self-incrimination and the interests of the State in investigative procedures of various kinds. This has been achieved by compelling examinees to answer questions even though the answers thereto might tend to incriminate them and, at the same time, protecting the interests of those examinees by granting them either an indemnity against prosecution or conferring some form of use immunity in respect of the compelled testimony.”¹⁴

11.08 For example, the *Tribunals of Inquiry (Evidence) (Amendment) Act 1979*, section 5 provides as follows:

“A statement or admission made by a person before a tribunal or when being examined in pursuance of a commission or request issued under subsection (1) of section 1 of the Principal Act shall not be admissible as evidence against that person in any criminal proceedings [other than an offence under the Act itself.]”¹⁵

11.09 This type of exclusion clause is known as ‘direct use immunity’. On the one hand, it abrogates the privilege against self-incrimination at the inquiry, but on the other, it renders inadmissible in subsequent proceedings direct evidence given by an examinee. There is a trade-off whereby the privilege is abridged, but replaced with a prohibition on the use of such evidence. At the committee stage of the Bill which became the 1979 Act, the sponsoring minister made it clear that the purpose of section 5 was to ensure that “a witness before a tribunal cannot lawfully withhold evidence” from it by relying on the privilege against self-incrimination. The minister explained that the immunities and privileges granted by section 1(3) to the

¹⁴ *Ferriera v Levin* 6 December 1995, Constitutional Court of South Africa, *per* Ackermann J, at 32.

¹⁵ In relation to statements and admissions before investigators a similar admissibility rule is provided by section 8 of the 2002 Act, which states that: “[a] statement or admission made by a person before an investigator shall not be admissible as evidence against the person in any criminal proceedings.”

witness before the tribunal¹⁶ were qualified by section 5. The intention being to make it clear that any privilege, which a High Court witness would enjoy not to answer a question if the response might be incriminating, is abrogated.¹⁷

11.10 The protection afforded to witnesses by a direct use immunity is quite limited. It does not prevent the use of the examinee's testimony as a 'lead' to search out other evidence to be used against the examinee in a subsequent criminal trial. In other words it does not rule out the admissibility of derivative or 'fruits' evidence, which the prosecution might not have found were it not for the initial compelled testimony; see paragraph 11.05(a).

11.11 Further, the particular immunity conferred by the 1979 Act is confined to statements or admissions, and appears not to extend to documentary evidence. This is a potentially broad omission, particularly in the investigation of corporate crimes, where documentary evidence is of particular importance. Especially since a very similar direct use immunity is conferred on a witness giving evidence before Joint Committees of the Oireachtas,¹⁸ and the Comptroller and Auditor General.¹⁹ The significant distinction is that these immunities do extend to documentary evidence. Accordingly, the Commission recommends that in order to avoid any doubt electronic documentation should be included; an appropriate form of words is recommended at paragraph 11.32, below.

(a) Civil Proceedings

11.12 The immunity conferred by the 1979 Act relates to criminal proceedings only and is silent on the admissibility of incriminatory evidence in subsequent civil proceedings. This is in contrast to the position in respect of a company inspectors' report, where such evidence is admissible in civil proceedings, as *prima facie* proof of the facts set out therein and of the opinion of the inspector (see paragraph 2.18-2.21) by virtue of section 22 *Companies Act 1990*. An inquiry report is clearly a public document once it has been published and it would appear that the admissibility of such report, in the absence of an explicit statutory provision, is governed by common law, as follows:

“Because of the variety in the classes of documents to which this exception [to the hearsay rule] applies, the conditions of admissibility vary somewhat but as a general rule, it would seem as if a public

¹⁶ Section 5 provides that section 1(3) of the 1921 Act (which refers to a “witness”) is to be construed in the light of section 5 itself. No mention is made of section 1(4), but of course this was first inserted in 1997, long after the enactment of section 5.

¹⁷ 311 *Dáil Debates* (7 February 1979).

¹⁸ *Committees of the Houses of the Oireachtas (Competence, Privileges and Immunities of Witnesses) Act 1997*, section 12.

¹⁹ *Comptroller and Auditor General and Committees of the Houses of the Oireachtas (Special Provisions) Act 1998*, section 5.

document is only admissible if (i) it concerns a public matter; (ii) it was made by a public officer acting under a duty to inquire and records the results of such inquiry; and (iii) it was intended to be retained for public reference or inspection.”²⁰

11.13 Clearly an inquiry concerns a public matter, as it is specifically set up to inquire into a matter of urgent public importance and the final report is published and is available for purchase from the stationery office and held at main libraries for public reference or inspection. As regards the second proviso it is axiomatic from the resolution of the Oireachtas that a duty to inquire and record results is imposed on those charged with carrying out the inquiry (who are for these purposes public officers).

11.14 *It would seem, therefore, that even at common law, the final report of an inquiry is admissible in subsequent civil proceedings as an exception to the hearsay rule. However, it seems well to put the matter beyond doubt by a statutory provision. The other question is what weight should be attached to such a document. The Commission can see no reason why the report of an inquiry (which will be as thorough and exacting as a company inspection, and to which arguably a more stringent requirement of constitutional justice is attached) should not be given the same weight as a company inspector’s report. Accordingly the Commission recommends that an equivalent provision to that of section 22 of the Companies Act 1990 be inserted into the 1921 to 2002 legislation.*

Part III The Constitution

(a) A Common Law Privilege or a Constitutional Right?

11.15 The scope for limiting the privilege against self-incrimination depends largely on whether it is classed as a mere common law privilege or a mandatory constitutional right. If, as appears to be the case, the latter interpretation is correct, in order to pass constitutional muster, any abrogation of the privilege must satisfy the test of proportionality.

11.16 Matters were clarified in *Re National Irish Bank*,²¹ the facts and decision of which have been touched upon elsewhere: paragraph 2.13. What is important to note here is that both the High Court and the Supreme Court decisively elevated the privilege against self-incrimination to the constitutional plane. Shanley J, in the High Court, held that the privilege was inexorably bound up with the constitutional rights to silence and privacy, and approved the statement of Costello J in *Heaney v Ireland*,²² to the effect that the right to silence “can properly be referred

²⁰ Delany and McGrath *Civil Procedure in the Superior Courts* (Sweet & Maxwell 2001) at 498 paragraph 19.019.

²¹ [1999] 3 IR 145.

²² [1994] 3 IR 593, 603-4.

to as an immunity or privilege against self-incrimination.” In the Supreme Court, the privilege against self-incrimination was seen as part of a bundle of rights, including the right to free expression, silence and trial in due course of law. Reliance was again placed on the *Heaney* case, this time by Barrington J (giving judgment for the Court) to the effect that: “the right to freedom of expression necessarily implies the right to remain silent However, it is clear that the right to freedom of expression is not absolute. It is expressly stated in the Constitution to be subject to public order and morality. The same must be true of its correlative right - the right to silence.”²³

11.17 Similarly, in Canada,²⁴ the United States,²⁵ New Zealand,²⁶ and South Africa,²⁷ but not Australia,²⁸ the privilege has been given constitutional protection, either expressly or as an unenumerated right.

(b) At What Stage does the Constitutional Privilege Operate: at the Inquiry or only Downstream?

11.18 The crucial question concerns the stage at which the privilege comes into play. Does the privilege entitle such a witness to withhold self-incriminating evidence at the inquiry stage itself? Alternatively, does the privilege merely require incriminating evidence, involuntarily given,²⁹ to be excluded in subsequent proceedings? In terms of the typology set out at paragraph 11.05, the question is whether to prohibit at the inquiry stage any question which might lead to a self-incriminatory answer or to preclude as inadmissible in subsequent proceedings such statements made at the inquiry stage.

²³ [1999] 3 IR 145, 179.

²⁴ *Thomson Newspapers Ltd et al v Director of Investigation and Research et al* [1990] 67 DLR (4th) 161.

²⁵ The Fifth Amendment to the United States Constitution states that: “[No person] ...shall be compelled in any criminal case to be witness against himself, nor be deprived of life liberty or property, without due course of law.”

²⁶ *New Zealand Bill of Rights Act 1990*, Article 14(3) (g).

²⁷ *Ferriera v Levin* 6 December 1995, Constitutional Court of South Africa.

²⁸ *Sorby and Another v Commonwealth of Australia and Others* [1983] 57 AJLR 248. Gibbs CJ stated unequivocally, 255 A-C: “The privilege against self-incrimination is not protected by the Constitution, and like other rights and privileges of equal importance it may be taken away by legislative action. Counsel for the plaintiffs sought to find some constitutional protection for the privilege in Chapter III of the Constitution ... With all respect, I agree with the view that the privilege against self-incrimination is not a necessary part of a trial by jury.” (See also *Pyne Board Pty Ltd v Trade Practices Commission* [1983] 57 AJLR 236, handed down on the same day as the *Sorby* judgment).

²⁹ In the present case the want of voluntariness stems from the fact that it is a criminal offence if a witness before an inquiry refuses to answer.

11.19 Those who support the former interpretation, argue that, “the right against incrimination is a right recognised under the Constitution in extra-curial proceedings including proceedings at an [i]nquiry...”³⁰ The argument is that the constitutional basis for the right means that it cannot be confined to the judicial sphere, but must also be available in inquisitorial proceedings.³¹ The case in favour of a robust privilege against self-incrimination was forcefully put by Wilson J, (be it noted, dissenting), in the Canadian Supreme Court, where he stated:

“There is however, in my view, a vast difference between a general regulatory scheme (such as the rules of the road for motorists) designed to give some order to human behaviour and a state-imposed compulsion on an individual to appear at proceedings against his will and testify on pain of punishment if he refuses. The difference is even greater, in my view, where the compelled testimony given by the individual may be used to build a case against him in what is, in effect, a subsequent criminal prosecution. It is my opinion that this compulsion linked as it is to the criminal process, touches upon the physical integrity of the individual as well as that individual’s reasonable expectation of privacy. The fact that the section 17 procedure is ‘investigatory’ as opposed to ‘prosecutorial’ seems to me to be irrelevant when a criminal prosecution is a potential consequence of the section 17 [i]nquiry.”³²

11.20 Although solely concerned with the use made of relevant statements at a subsequent criminal trial, the decision of the European Court of Human Rights (“ECtHR”) in the case of *Saunders v United Kingdom*³³ is worthy of note. Mr Saunders was the former director and chief executive of Guinness plc during the company’s aggressive takeover bid for Distillers Company plc. Following the successful takeover, two inspectors were appointed pursuant to section 432 of the English *Companies Act 1985*. The Department of Trade and Industry (“DTI”) inspectors interviewed Mr Saunders on nine occasions in 1987, and passed transcripts of these interviews onto the Crown Prosecution Service. In 1989, Mr Saunders was charged with eight counts of false accounting, two counts of theft and several counts of conspiracy. During his trial, the transcripts of the DTI interviews

³⁰ *Ferriera v Levin*, 6 December 1995, Constitutional Court of South Africa, at 7.

³¹ The Law Reform Commission of Canada states: “These privileges must be available, for they are based on considerations of public policy which extend beyond judicial proceedings. If state secrets, the marital relationship, trade secrets and so on constitute valid reasons for refusing to give testimony in court, this is equally true of investigatory commissions,” Law Reform Commission of Canada *Advisory and Investigatory Commissions* Report Number 13, at 46.

³² *Thomson Newspapers Ltd. et al v Director of Investigation and Research et al.* [1990] 67 DLR (4th) 161, 186 h.

³³ (1997) 23 EHRR 313.

formed a significant part of the prosecution case.³⁴ He was convicted on twelve counts. Before the ECtHR, Mr Saunders argued that his right to a fair trial, guaranteed by Article 6(1) of the Convention, had been violated, *inter alia*, on the basis that: “implicit in the right to a fair trial ... was the right of an individual not to be compelled to contribute incriminating evidence to be used in a prosecution against him.”³⁵ Addressing the equivalent English provision,³⁶ the ECtHR found that the applicant had been denied a fair trial because of the use, at his subsequent criminal trial, of statements obtained from him by the DTI Inspectors, in exercise of their statutory powers of compulsion. The ECtHR stated as follows: “[t]he public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during trial proceedings.”³⁷

11.21 On the issue in question here (at what stage the privilege operates) the ECtHR made a brief, ambiguous reference to the role of the privilege at the inquiry stage, reiterating the principle alluded to in *Fayed v UK*,³⁸ namely that: “a requirement that such a preparatory investigation should be subject to the guarantees of a judicial procedure as set forth in Article 6(1) would in practice unduly hamper the effective regulation in the public interest of complex commercial and financial activities.”³⁹ It is unclear whether this reference was intended to exclude the applicability of the privilege from extra-curial investigative proceedings, since the *Fayed* case concerned the availability of fair procedures during company investigations and not self-incrimination, *per se*. But following on from the passage quoted in the *Saunders* judgment the *Fayed* Court stated: “[i]n the court’s view, investigative proceedings of the kind in issue in the present case [i.e. company inspections] fall outside the ambit and intendment of Article 6(1)”.⁴⁰ This would seem to represent the ECtHR position, but the Commission can only speculate here that the brief reference in *Saunders* may not have been intended to rule out the availability of the privilege to witnesses before public inquiries.⁴¹

³⁴ (1997) 23 EHRR 313, 334, paragraph 60: “Three days were spent reading extracts from his interviews with the Inspectors to the jury before Mr Saunders decided that he ought to give evidence to explain and expand upon this material.”

³⁵ *Ibid* at 334, paragraph 60.

³⁶ *Companies Act 1985*, section 434(5).

³⁷ (1997) 23 EHRR 313, 340, at paragraph 74.

³⁸ (1994) 18 EHRR 393.

³⁹ *Ibid* at 337.

⁴⁰ *Ibid* at paragraph 62.

⁴¹ It should also be noted here that, although concurring with the judgment of the court, both Judge De Meyer and Judge Walsh, in their Opinions expressed reservations concerning this aspect of the court’s judgment. *Per* Walsh J, at 344: “The right to the protection against self-incrimination is not simply a right to refuse to testify in a court but must also apply to bodies endowed with inquisitorial powers; and the right to refuse to answer questions which may open an incriminating line of inquiry.”

11.22 In *Re National Irish Bank* (“NIB”),⁴² mentioned at paragraph 11.16, above, although constitutional status was bestowed upon the privilege, the Supreme Court took a restrictive view of the role of the privilege in investigative proceedings. The court applied the test of proportionality in assessing the legality of the abrogation of the privilege in the case: “... whether the restriction which the impugned sections place on the right to silence is any greater than necessary to enable the State to fulfil its constitutional obligations”.⁴³ Upholding the decision of Shanley J at first instance, Barrington J stated that the provisions of the *Companies Act 1990* were “clear and they pass the proportionality test. Accordingly it appears to me that interviewees are not entitled to refuse to answer questions properly posed to them by the inspectors.”⁴⁴ A striking point here is that this case centred on section 18 of the *Companies Act 1990*,⁴⁵ which provided that there was no immunity, yet the proportionality test was satisfied because the incriminating testimony would *probably* be excluded in a subsequent criminal trial, on the basis that it was not voluntary. It seems that this residual discretion of the courts to exclude involuntary evidence was sufficient to satisfy the proportionality test. The absence of any immunity or protection in the Act itself was not problematic. The Supreme Court focussed on the potential violence that might be done to the privilege at a subsequent criminal trial (*ie* the latter interpretation elucidated at paragraph 11.18). The notion that the privilege might have a role to play during the inquiry, irrespective of subsequent prosecutions, was not really entertained. Once it could be shown that the Act “does not authorise the admission of forced or involuntary confessions against an accused person in a criminal trial,”⁴⁶ the legislation was constitutionally sound. The issue of the admissibility of fruits evidence, as explained at paragraph 11.10,⁴⁷ was briefly considered by Barrington J who concluded that “[i]n the final analysis ... it will be for the trial judge to decide whether, in all the circumstances of the case, it would be just or fair to admit any particular piece of evidence, including any evidence obtained as a result or in consequence of the compelled confession.”⁴⁸

⁴² [1999] 3 IR 145.

⁴³ *Ibid* at 165 *per* Shanley J in the High Court.

⁴⁴ *Ibid* at 180.

⁴⁵ See paragraph 2.12.

⁴⁶ *Op cit* fn 42, at 188.

⁴⁷ In this regard see also the discussion concerning section 3 of the 2002 Act, below at paragraph 11.28.

⁴⁸ *Op cit* fn 42, at 188.

Part IV Appraisal

11.23 There are a number of arguments in favour of what may be regarded as the legislative *status quo*, as explained at paragraphs 11.07-11.11. In the first place it is only at the actual stage of any downstream proceedings that it can be known if there are downstream proceedings and hence it can be assessed whether there would be any self-incrimination. The reality indeed is that, in Ireland there have been few downstream proceedings against anyone.

11.24 The likelihood is that at most public inquiries a number of witnesses could point to some threat of criminal proceedings, no matter how theoretical or fanciful that threat might be. The danger is that, by allowing witnesses to refuse to testify on the basis of the privilege against self-incrimination, the effective functioning of public inquiries might be crippled.

11.25 Broadly speaking the same option that has been taken in Ireland (as well as, it would seem, in ECtHR jurisprudence) of focussing on the effect in downstream proceedings appears to have been adopted in many foreign jurisdictions. The Canadian Law Reform Commission stated:

“[O]nce it has been accepted that commissions to investigate are desirable in certain circumstances, it is irrational to introduce protection for witnesses that will in many instances prevent meaningful investigation. An inquiry barred from examining wrongdoing that may lead to criminal prosecutions would have very little room for manoeuvre.”⁴⁹

11.26 The practice of including a direct use immunity in public inquiries legislation received the following high praise from Wilson J in the Canadian Supreme Court:

“The effect of section 5 was to abolish the common law rule of allowing a witness to refuse to answer a question on the ground that it would tend to incriminate him and replace it with the rule that the witness must answer the question but the answer could not be used in evidence against him in a subsequent criminal case. This legislation reflects the state’s interest in having all available information before the tribunal so that a proper determination in that case can be made.”⁵⁰

11.27 Similarly, in the Constitutional Court of South Africa case of *Ferriera v Levin*,⁵¹ Ackermann J observed that a fair balance has been:

⁴⁹ Law Reform Commission of Canada *Commissions of Inquiry: A New Act* Working Paper 17, at 36.

⁵⁰ *Thomson Newspapers Ltd. et al v Director of Investigation and Research et al.* [1990] 67 DLR (4th) 161, 200 a – c.

⁵¹ 6 December 1995, Constitutional Court of South Africa.

“[A]chieved by compelling examinees to answer questions even though the answers thereto might tend to incriminate them and, at the same time, protecting the interests of those examinees by granting them either an indemnity against prosecution or conferring some form of use immunity in respect of the compelled testimony. What is important to note is that the privilege has not, in most cases, simply been abolished without providing some form of protection to the examinee.”⁵²

11.28 As against this the US courts have required that both a direct and a derivative use immunity be applicable (as explained at paragraph 11.10) in order for the Fifth Amendment right to be lawfully abridged. This is probably because of the express wording of the Fifth Amendment,⁵³ thus even derivative (*fruits*) evidence must be excluded to save a statute. This form of immunity provides a very wide safeguard, barring the use of compelled testimony, even as an ‘investigatory lead’. In essence, the immunity is commensurate with the privilege it replaces.⁵⁴

11.29 In support of the US approach, it is a matter of common sense that it must be easier to investigate the commission of an act when the ultimate answers of whom and why are already known. To take a homely analogy, most school students have at one stage or another checked the answer at the back of the maths book, and found that they could negotiate their way from problem to solution more easily than beforehand. The investigations of an inquiry, conducted with the assistance of powers to compel testimony and the production of documents, may well uncover a wealth of evidence in relation to the commission of offences. However, there is no prohibition on the Gardaí using the tribunal’s findings as the basis for independent investigations.

11.30 The effect of the 1921-2002 legislation, although not as stringent as the US approach, is by no means minimal as it does not allow self-incriminatory evidence, such as a confession, to be directly admissible in subsequent criminal proceedings. Our only comment on this line of argument is that it all comes down to how heavy a value one wishes to set on the privilege against self-incrimination. The nature of and importance attached to the privilege, and consequently the extent to which it may be encroached by statute, is ultimately representative of a delicate balance between protecting individual rights and the desire to successfully prosecute offences which are likely to depend upon evidence obtained under compulsion powers. In the Commission’s view, the inclusion of a direct-use immunity has the effect of preventing powers of compulsion in pre-trial investigations or at an inquiry from destroying the very essence of the privilege against self-incrimination.

⁵² *Ferriera v Levin* 6 December 1995, Constitutional Court of South Africa, *per* Ackermann J, 32.

⁵³ “No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...”.

⁵⁴ *Kastigar v United States* 406 US 441 (1972).

11.31 Yet, on the other hand, the Commission supports the legislative policy, which has been fairly steadily followed in Irish legislation, of including a direct-use immunity and recommends that it be continued. However, we would wish to add one proviso so as to bring the non-admissibility rule in line with our recommendations concerning the privileges and immunities that are enjoyed by those providing information to investigators and witnesses before the inquiry, detailed at paragraph 6.117. This is that section 5 of the 1979 Act and section 8 of the 2002 Act should not apply once the investigator or inquiry has instructed an individual to cease providing information, evidence, documents or other material.

11.32 *The Commission therefore recommends that section 5 of the 1979 Act and section 8 of the 2002 should be replaced, as follows:*

(1) Information, evidence, documents or other material provided by a person to or before a tribunal (or an investigator, as the case may be) whether pursuant to an order or request or otherwise shall not be admissible as evidence against that person in any criminal proceedings (other than proceedings in relation to an offence under section [x] and perjury in respect of such information, evidence, documentation or other material);

(2) Subsection (1) shall not apply in respect of anything provided by a person after the tribunal (or investigator, as the case may be) has directed that the person cease providing such information, evidence, documents or other material, unless and until the direction is withdrawn;

(3) For the purposes of subsections (1) and (2) ‘information, evidence, document or other material’ includes data, all forms of writing and other text, images (including maps and cartographic material), sound, codes, computer programmes, software, databases and speech.

Part V Bad Publicity

11.33 The other way (as highlighted from the outset at paragraph 11.01(a)) in which a public inquiry might impact on downstream proceedings is that it engenders so much publicity as to render any later criminal trial unfair. It has sometimes been said that if criminal behaviour is suspected, then criminal charges should be laid. If there is insufficient evidence for this, then it is unfair to expose a person, who must be presumed innocent until he has been proved guilty, to the twenty-first century equivalent not of his day in court, but his day in the stocks.⁵⁵ A related theme is that being put through the rigours of a public inquiry may be

⁵⁵ Cp Blom-Cooper “Public Inquiries” (1993) CLP 204, 220: “Removal of the ultimate threat of a criminal trial, where every forensic sinew is strained to safeguard the individual in jeopardy of his liberty or even his reputation, would be the price for insisting on the primacy of the inquisitorial role of the public inquiry.”

punishment enough, without prosecution and conviction.⁵⁶ These contentions raise very difficult questions of policy and political judgment, which admittedly become a little easier when seen in the light of the subject-matter of a particular inquiry and the other circumstances surrounding it. For there is another way of looking at the situation, namely that there is, in respect of certain matters, a public right to know, which is increasingly acknowledged in other contexts, for instance, under the *Freedom of Information Act 1997*. Coupled with this, it may be repulsive that a person - possibly a person who occupies a leading position in politics or business - should go without criminal prosecution, but instead be chastised by (a possibly inconclusive) tribunal investigation and finding. Here, too, the Commission expresses no view; but simply notes that this is a factor which must be taken into account when deciding whether to set up an inquiry in the first place. In this Part, the legal constraints which affect the issue are considered.

11.34 Recent inquiries have been charged with the task of investigating a broad range of serious allegations against both named and unknown individuals. In many instances, the nature of these allegations connotes criminal conduct.⁵⁷ Satisfying the twin demands of carrying out a public inquiry in order to 'clear the air' in a public fashion, and of holding the guilty to account, presents a dilemma, because it is the publicity generated by a tribunal which jeopardises criminal prosecutions brought on foot of what it discovers. The *Salmon Commission* Report went so far as to say:

“In any event, it has long been recognised that from a practical point of view it would be almost impossible to prosecute a witness in respect of anything which emerged against him in the course of a hearing before a tribunal of inquiry.”⁵⁸

11.35 In Ireland, too, curiously few prosecutions have posed the dilemma under discussion. In one, the obvious way out of the dilemma – to allow the prosecution to go first – was taken. It was apprehended during the course of the *Cherryville Rail Inquiry*⁵⁹ that criminal charges were to be brought against an individual whose conduct fell within the remit of the inquiry (a driver of one of the trains involved in the accident). Accordingly, the inquiry was adjourned generally until those criminal proceedings were fully disposed of (in the event, from late

⁵⁶ The *Cour de justice de la République* in “*L'affaire du sang contaminé*” in France took a similar view, albeit in relation to sentencing following conviction, that Edmond Hervé, the former Health Minister, should receive no punishment. The Court said that he had endured almost 15 years of public criticism: see paragraph 1.09.

⁵⁷ See for example *Goodman International v Hamilton* [1992] 2 IR 542, where it was argued (unsuccessfully) that, insofar as the *Beef Tribunal* was investigating allegations of criminality, it was engaged in the unlawful administration of justice.

⁵⁸ *Report of the Royal Commission on Tribunals of Inquiry 1966* (Cmnd 3121 London) at paragraph 64.

⁵⁹ *Report of the Investigation into the Railway Accident near Cherryville Junction, County Kildare, on the 21st August 1983* (December 1984 Prl 2904) at paragraph 2.

September 1983 until June 1984). Ultimately, the driver was acquitted of manslaughter, but the inquiry went on to make certain adverse findings against him.⁶⁰

11.36 Another type of case is exemplified by the prosecution brought against Charles J Haughey, who was charged with obstruction of the *McCracken Tribunal*. (On one view, the obstruction case is not strictly a downstream prosecution; but it is worth considering here because the publicity aspects are likely to be similar). The prosecution was to be tried in the Circuit Court before His Hon Judge Haugh. The judge refused an application made on behalf of Mr Haughey to defer the case until after the *Moriarty Tribunal* had reported, but of his own motion produced a questionnaire for potential jurors, in an attempt to determine whether or not they were capable of trying Mr Haughey fairly. The Director of Public Prosecutions was steadfastly opposed to this course of action and, on an application for judicial review, succeeded in having the decision to distribute the questionnaire quashed.⁶¹ The matter was remitted to the learned judge, who then acceded to an application made by the defendant for a postponement of the trial until such time as the unfairness created by substantial pre-trial publicity had abated.⁶² This decision was upheld upon an application for judicial review.⁶³ What the case demonstrates is that, even where the charge is simply obstruction of the tribunal, rather than a criminal charge arising out of the matters under investigation by the tribunal, there may be serious difficulties in assembling twelve individuals who can bring an unbiased judgement to bear. Of course, the fact that the defendant was such a high-profile individual exacerbated the problems, but the mere involvement of a tribunal of inquiry can elevate the hitherto unknown to the status of household name.

⁶⁰ Another case which arose out of matters investigated by a tribunal of inquiry concerned George Redmond, a former Dublin Assistant City and Assistant County Manager, who was charged with certain revenue offences, specifically failure to make proper income tax returns. The background was that the *Flood Tribunal* had heard evidence which suggested that Mr Redmond might have been accepting payments from improper sources. However, the prosecution is of little assistance from an analytic point of view because Mr Redmond pleaded guilty. Ultimately, a fine of IR£7,500 (€9,523) was imposed in respect of all charges. The Director of Public Prosecutions appealed to the Court of Criminal Appeal (Mr Redmond had, on the Director's insistence, been sent forward to the Circuit Criminal Court for sentencing) on the grounds that this sentence was unduly lenient. The Court of Criminal Appeal dismissed the appeal, stating that it would not take into account "the notoriety and speculation arising from the circumstances of the Defendant's arrest": *Director of Public Prosecutions v Redmond* Court of Criminal Appeal, 21 December 2000.

⁶¹ *Director of Public Prosecutions v Haugh* [2000] 1 IR 184.

⁶² Part of the background is that the Tánaiste, Ms Mary Harney TD, made certain unguarded remarks concerning Mr. Haughey in the course of a radio interview: see *Irish Times* 22 June 2000 "100 articles read to court in Haughey case".

⁶³ *Director of Public Prosecutions v Haugh (No 2)* [2001] 1 IR 162.

Part VI Fair Trial in the Context of an Earlier Public Inquiry under General Law

11.37 The Commission consider here the general law and then in the next Part the modifications to it by the tribunals of inquiry legislation. Ultimately, the decision whether or not a fair trial is possible, in the light of adverse publicity, will be made by the trial judge, and the courts will intervene (whether through the trial judge himself or the High Court on an application for prohibition) to prevent an (unfair) trial from going ahead. However, having regard to the circumstances recounted in the following paragraphs, in which the courts have been prepared to allow trials to proceed, it seems that, in order to obtain another result, the facts would need to be fairly strong.

11.38 While it did not involve a public inquiry, the following passage from the judgment of Finlay CJ in *D v Director of Public Prosecutions*⁶⁴ is representative of the general law on prejudice by publicity:

“The fundamental nature of the constitutional right involved [the right to a fair trial] and the incapacity of the court further to intervene to defend it leads, in my view, to the conclusion that the standard of proof which the court should require from the applicant ... is that he should be required to establish that there was a real or serious risk of that occurring.”⁶⁵

11.39 This test was applied in the case⁶⁶ of the man convicted of kidnapping and assaulting the girl at the centre of *Attorney General v X*.⁶⁷ In view of the enormous level of publicity which surrounded that case, the accused contended that no jury could be assembled capable of trying him fairly. An order of prohibition was, however, refused both by the High Court and the Supreme Court. It was held that a trial would only be prevented if any unfairness which might arise could not be counteracted by appropriate rulings and directions on the part of the trial judge. The fact that the *X Case* was so well known actually seemed to tell against the accused's application, in that it meant that the judge could deal with the publicity surrounding it in a very specific manner. Properly instructed jurors, it was considered, would be able to try the issues impartially.

11.40 In the particular context of tribunals of inquiry, a similar point was raised in *Goodman International v Hamilton*, where Finlay CJ referred to:

⁶⁴ [1994] 2 IR 465.

⁶⁵ *Ibid* at 467. Finlay CJ dissented from the majority decision (to permit the trial to go ahead) on the application of this test to the facts of the case at bar. However, there was unanimity among the members of the Supreme Court that this was the correct test.

⁶⁶ *Z v Director of Public Prosecutions* [1994] 2 IR 476. Note also that his appeal against conviction was recently refused: *Irish Times* 7 February 2003.

⁶⁷ [1992] 1 IR 1.

“... [T]he submission ... that ... the publicity attendant on the proceedings of the tribunal could make the applicants incapable of having a fair trial by jury on a criminal charge ... and that therefore they would be deprived of the possibility of obtaining an acquittal ... which would clear their good name. I am satisfied that this submission does not invalidate the resolutions of the two Houses of the Oireachtas nor the proceedings of the tribunal being carried out in pursuance of those resolutions. *If a person charged with a criminal offence can for any reason establish that due to pre-trial publicity a fair trial is impossible, the courts have jurisdiction to prevent an injustice occurring.*”⁶⁸ (Emphasis added).

11.41 The reasoning contained in the passage does not seem to quite meet the argument in counsel’s admirably subtle submission, which assumed that a trial would be in the interests of a person implicated before the tribunal, and that its impossibility was what was unfair. Nevertheless, the message which emerges clearly is that the Constitution does not require evidence to be excluded from a tribunal on the basis that it may be used at a later trial. The reason is that, if it should be held by the trial judge that fairness to the accused cannot be achieved due to adverse publicity, the trial will not be allowed to go ahead. It seems that this reasoning has been accepted in that, as far as the Commission is aware, no similar line of argument focussing on the time of the inquiry has been relied upon in any of the subsequent cases.

11.42 A potential solution to the problem of media publicity thwarting the effective enforcement mechanism for ensuring compliance with inquiry directions (as highlighted at paragraph 11.36) would be to re-categorise an offence under the 1921-2002 legislation as a ‘hybrid offence’.⁶⁹ In other words, the offence may be triable either summarily or on indictment at the discretion of the Director of Public Prosecutions only. The provision would then need to specify either a lesser or greater maximum punishment, depending on where the offence is being tried. The crucial difference from that of a traditional ‘either-way’ offence is that the accused cannot insist on being tried on indictment (*ie* before a jury where the risk of prejudice through pre-trial publicity is more pronounced). Where an offence is tried summarily, however, there is a trade-off between the level of potential sanction, on the one hand, and maintaining the teeth behind the inquiry’s compellability powers, on the other. Where an offence is tried summarily it will be before a District Court judge who will be experienced in putting aside pre-trial publicity as irrelevant: thus, the argument that pre-trial publicity will prejudice a subsequent trial is reduced.⁷⁰

⁶⁸ [1992] 2 IR 542, 591.

⁶⁹ See Law Reform Commission *Consultation Paper on Penalties for Minor Offences* (LRC 18-2002) at paragraphs 1.14 – 1.16.

⁷⁰ This is not the only potential solution to the dilemma caused by pre-trial publicity. It has been suggested elsewhere that another solution to the quandary under consideration here might be that in certain circumstances where there is excessive, prejudicial pre-trial publicity, the trial might be transferred to the Special Criminal Court, on the basis that “the ordinary Courts are... inadequate to secure the effective administration of justice and the preservation

11.43 *The Commission recommends that the offences before a tribunal of inquiry be re-drafted so as to create 'hybrid offences', as explained above.*

11.44 It should also be borne in mind that the publication by a newspaper or other organ of the media of prejudicial material in relation to a trial which is actually ongoing, could constitute a contempt of court, as a breach of the *sub judice* rule.⁷¹

Part VII Fair Trial under the 1921 to 2002 Acts

11.45 We turn now to consider the way in which the *Tribunals of Inquiry (Evidence) Acts 1921-2002* address the question of adverse publicity and its effect on downstream criminal prosecutions. As originally enacted, the 1921 Act made no express reference to such prosecutions, but did contain the following provision, section 2(a):

“A tribunal to which this Act is so applied as aforesaid — (a) shall not refuse to allow the public or any portion of the public to be present at any of the proceedings of the tribunal unless in the opinion of the tribunal it is in the public interest expedient so to do for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given.”

11.46 It is self-evident, and has been accorded judicial recognition,⁷² that there is a public interest in the prosecution of offences. It follows that section 2(a) is open to an interpretation, whereby a tribunal would be entitled to hold certain of its proceedings in private if it were of the opinion that to do so would be expedient due to the possibility that the evidence being taken would interfere with a criminal prosecution. In any case, this interpretation has been copper-fastened by the 2002 Act, which amends section 2(a) by the addition of the following words at the end of that provision: “and, in particular, where there is a risk of prejudice to criminal proceedings”. Under section 2(a), it is up to the tribunal itself to decide whether the public interest warrants excluding the public from a session. However, the explicit legislative endorsement of averting prejudice to criminal prosecutions suggests that, where there is a risk of such prejudice, the hearing ought to take place in private.

of public peace and order in relation to the trial of such person on such charge”: *Offences Against the State Act 1939*, section 48. See O’Donnell “The Jury on Trial: Reflections on DPP v Haugh” *Bar Review* July 2000, 470.

⁷¹ See, generally, Law Reform Commission, *Report on Contempt of Court* (1994), at chapter 6. However, the Commission prefers not to consider the suggestion that a member of an inquiry should be vested with the power to compel a newspaper or other organ of the media to publish a retraction, as it would be better considered as part of a general review of the law of defamation.

⁷² In *D v Director of Public Prosecutions* [1994] 2 IR 465, 474 Denham J referred to “the community’s right to have alleged crimes prosecuted” (approved by the Supreme Court: *Z v Director of Public Prosecutions* [1994] 2 IR 476, 507).

11.47 There may be some practical difficulties with the operation of the new legislation. In the first place, some tribunals may make findings that have implications for criminal prosecutions, only as an unlikely by-product of their primary objective. Examples include the inquiries into the disasters at Whiddy Island and the Stardust night-club. Those tribunals were established first and foremost to find out what happened, and to make recommendations to ensure that there was no repetition. On the other hand, there are tribunals where the manifest purpose is to decide, in effect, whether crimes have been committed. The *Flood* and *Moriarty Tribunals* are examples of this species of inquiry, (especially the latter, since it is limited in its terms of reference to investigating the affairs of two named individuals). Whereas it is easy to envisage evidence that might be adduced before a Whiddy-type tribunal that would have no possible prejudicial effect on any prosecution, practically all the evidence adduced before a Moriarty-type tribunal is potentially prejudicial. How section 2 of the Act is to be interpreted therefore poses a major problem for a tribunal of the latter kind. Either almost all the evidence is to be taken in private, reflecting the importance attached to eventually securing convictions, or the public theme of the tribunal's work is to be stressed, with the accompanying risks already identified. The practical point should also be stressed that in order for an inquiry to be run effectively decisions as to what evidence should be heard in public and what in private need to be taken in advance of the particular hearing (preferably, from an organisational perspective, as early as possible). Although there is nothing to stop the inquiry from withdrawing to hear parts of the evidence in private, should the need arise.

11.48 A further range of difficulties arises where the subject-matter under investigation will be "mixed" in the sense that only a part of it would be at all likely to be relevant to downstream criminal proceedings. This part would have to be heard in private, whereas the remainder would not. The difficulty lies in attempting to segregate this material so that all the evidence which might be relevant to the trial can be heard in private. Take the case of an investigation into sexual abuse. Criminal proceedings might be anticipated in the case of certain of the victims, but not others, possibly because the victims are dead, or otherwise incapable of giving evidence. But of course a particular perpetrator or institution may well be common to victims of both categories. If all steps are to be taken to safeguard the possibility of criminal charges being successfully prosecuted, it might well be necessary to hear in private some or all the evidence that touches on an implicated institution. In summary, all that can be said at the moment, by way of comment, is that this new dimension naturally places a heavy premium on the work of gathering information, an aspect of tribunal procedure which was discussed in Chapter 9.

11.49 The 2002 Act safeguards the possibility of prosecution by preventing prejudicial material from escaping into the public domain in two ways: first, as just noted, by means of restraint on the part of the tribunal in relation to the evidence it accepts in public; and, secondly, by allowing for an application to be made to the High Court for directions regarding the publication of a report which might contain such material. This second stratagem is novel, and is contained in section 3 of the Act, which states:

“(1) If, on receipt by the person to whom a tribunal is required...to report of an interim or the final report of the tribunal, that person considers that the publication of the report might prejudice any criminal proceedings, that person may apply to the Court for directions regarding the publication of the report.”

11.50 Having heard the application, *in camera* if the Court considers it appropriate, the Court has the power, if “it considers that the publication of the report concerned might prejudice any criminal proceedings” to direct that either the report in its entirety, or a specified part of the report, be not published (a) for a specified period, or (b) until the Court otherwise directs.⁷³

11.51 In general, a tribunal is required by its terms of reference to report to the minister responsible for establishing it in the first place or to the Clerk of the Dáil. It follows that, under this provision, it will usually fall to a minister to decide whether publication of the report might prejudice any criminal proceedings. The scope of this section is itself open to interpretation. While it certainly encompasses proceedings which are actually in being, it is not absolutely clear that it extends to potential proceedings, *ie* prosecutions which may be taken at some point in the future. The explanatory memorandum suggests that it is intended to protect only criminal proceedings already in being, but there is no similar limitation in the Act itself.⁷⁴ Section 3 refers to *any* and not *any pending* criminal proceedings. This seems rather precious: it would probably be to read too much into this wording to restrict the ambit of subsection (1) to extant proceedings, since to restrict the natural width of the phrase “*any* criminal proceedings” would also be to exclude the most likely category of cases (future cases) from its scope.⁷⁵

11.52 Subsection (2) provides:

“Before the Court determines an application under subsection (1), it shall direct that notice of it be given to—

(a) the Attorney General,

(b) the Director of Public Prosecutions, and

(c) a person who is a defendant in criminal proceedings relating to an act or omission that—

⁷³ 2002 Act, section 3(3).

⁷⁴ The Explanatory Memorandum states that: “Section 3 deals with the situation which would arise if a tribunal reports at a time when criminal proceedings in respect of a matter mentioned in the report are pending.”

⁷⁵ This conclusion is supported by the fact that an amendment, tabled by Deputy Brendan Howlin, which would have changed the term “criminal proceedings” to “existing criminal proceedings” was rejected.

- (i) is described or mentioned in the report concerned, or
- (ii) is related to any matter into which the tribunal concerned inquired and which is so described or mentioned,

and the Court may receive submissions, and evidence tendered, by or on behalf of any such person.”

11.53 Bearing in mind that the initial decision whether or not to make an application to the High Court will generally be that of the minister responsible for establishing the tribunal. It seems to us that if the minister takes the view that the damage to the public interest caused by non-publication is likely to be more than offset by prejudice to criminal prosecutions, then this is a factor which is likely to weigh reasonably heavily with the High Court.

11.54 The gist of the provisions in the 1921 to 2002 Acts, which seek to ensure that criminal prosecutions are not aborted as a result of tribunal publicity, is to prevent prejudicial material from escaping into the public domain. Pre-2002, it was effectively the case that, when a tribunal was established, this was because a policy choice had been made to investigate publicly, and thus to forego the traditional, routes leading to prosecution and to run the (likely) risk that those implicated by the evidence before (or findings of), the tribunal would escape without trial. In short, the choice was made that the public interest in favour of dispelling the general disquiet was stronger than that in seeing the guilty convicted.⁷⁶ In contrast, the new measures seek to remove or reduce the danger that the proceedings of the tribunal will constitute a bar to downstream criminal trials. But the price of the new legislation is that the publicity given to the tribunal proceedings is reduced. In short, the scales can be tipped one way or the other: in favour of openness in tribunal hearings or in favour of subsequent prosecutions. What the new legislation attempts is a re-calibration of the scales in favour of the latter objective.

11.55 It is too early to gauge whether or not the provisions introduced by the 2002 Act will be successful. They reflect a growing uneasiness, dating back to the *Beef Tribunal*, with a situation in which millions of Euros are spent conducting an investigation which seeks to uncover what may amount to criminal conduct, while, at the same time, those perceived to have broken the law are not brought to book in the traditional manner. The 2002 Act seeks to ‘square the circle’, and, at this stage, since it has been untested, the most that can be done is to wait and see how well it manages its appointed task.

11.56 *Accordingly, the Commission does not recommend any amendment to either section 2 or 3 of the 2002 Act in this respect*

⁷⁶ The position that was exemplified by Salmon LJ in the passage quoted at paragraph 11.34, above.

CHAPTER 12 COSTS

Introduction

12.01 The fact that the legal and other professional fees for the *Beef Tribunal* (1991-94) totalled IR£18.5 million (€23 million) naturally affected the attitude of people, politicians and the media towards tribunals of inquiry; indeed sadly, for some, this was the main feature of the inquiry. Likewise, the cost of the current generation of inquiries has been a subject of a great deal of recent concern,¹ a matter that is hardly surprising considering that the *Moriarty* and *Flood Tribunal* costs so far are estimated to be almost €11 and €22.7 million, respectively and as of late 2002 the cost of the *Lindsay Tribunal* was €12.4 million.² When one takes into account that current practice seems to be that the state pays all parties' costs, the total burden to the taxpayer (depending on the number of parties) could be three or four times these figures.

12.02 By contrast, the *Scott Inquiry* which sat for a comparable period to the *Beef Tribunal* (1992-96) cost STG£3 million. But this inquiry employed only one senior counsel and three legal civil servants. Furthermore, the vast bulk of the evidence before the inquiry was written evidence sent to the inquiry. However, other British inquiries have been more expensive,³ most notably the *Bloody Sunday*

¹ The Minister for Finance is reported to be clamping down on the exorbitant costs of tribunals and inquiries – particularly in the health sector – see *Irish Examiner* 10 December 2002.

² Examples of the estimated costs so far of various tribunals and inquiries include: *Laffoy Commission* - €5.46 million; *Dunne Inquiry* - €5.3 million; *Morris Tribunal* - €999,045; *Barr Tribunal* - €225,000; *Murphy Tribunal* - €423,861 (including the cost of the preliminary investigations conducted by George Birmingham SC) – See *Irish Times* 23 November 2002 and for figures for other tribunals see *Cost Comparison Report of the Department of Finance of 27 November 2000*, Tables 1 and 2.

³ The *BSE Inquiry*, announced on 22 December 1997, set up on 12 January 1998 and reported in October 2000, ran into STG£27 million; *The Stephen Lawrence Inquiry*, announced on 31 July 1997, conducted the first preliminary hearing on 8 October 1997 and reported in February 1999, ran into STG£4 million; *The Bristol Royal Infirmary Inquiry*, announced on 19 June 1998, held its first preliminary hearing on 27 October 1998 and reported in July 2001, ran into STG£14 million.

Inquiry, which is still sitting, has an estimated eventual cost of STG£155 million, making it the most expensive inquiry ever.⁴

12.03 This expenditure is obviously a disadvantage. Self-evidently, public money spent on an often long inquiry cannot be spent on public services, such as hip-operations or be put towards tax reductions. Furthermore, a great deal of the public and media attention devoted to inquiries has focused on the payments made to well-paid professionals. This tends to distract attention from other aspects of the inquiries and puts pressure on the inquiries to ‘produce results’, something which does not always yield desirable consequences. In contrast with the financial costs which are fairly certain, the ‘product’ of an inquiry will often be elusive and indirect and, naturally, impossible to predict in advance.⁵ The kind of concrete gains which flowed from the Public Accounts Committee sub-committee (“PAC”) into the non-payment of DIRT are unusual. More usual would be some (reasonably presumed) improvement in, say, the observance of some regulation in the public health or planning field. This gain would be difficult to establish conclusively or to trace back to an inquiry. At a basic level, one might ask: how much is a functioning constitutional polity worth? Many people might reply “a good deal”. But how can we know how much of this desirable state of affairs flows from an inquiry?

12.04 The first question to ask here is: as a matter of law, who is responsible for paying the legal and other costs of representation before a tribunal? As a starting point it would seem to be axiomatic that, where there is no statutory authority authorising an inquiry to order one person to pay another’s legal (or other) costs, then it may not do so and the costs must lie where they have fallen. This proposition may be illustrated by *Condon v CIÉ*,⁶ a case which, however, carried a sting in the tail. In *Condon*, Barrington J ruled that a statutory inquiry constituted under section 7 of the *Railway Regulation Act 1871* did not have the power to award costs. However, the plaintiff was an employee of CIÉ and he claimed that he

⁴ “£155 Million Inquiry” *The Times* 20 November 2002. See also the Inquiry’s web-site: <http://www.bloody-sunday-inquiry.org.uk/index2.asp?p=1>. As of 31 May 2002, Northern Ireland Office funding of the Inquiry totalled £60.28 million. An estimated £15 million of net additional costs arises from the transfer of the hearings to London.

⁵ The following is an extract from the *Cost Comparison Report* (Department of Finance 27 November 2000) at 4: “Each Inquiry is unique in its subject-matter, in its complexity and in its findings, so that it is difficult to make meaningful comparisons of outcomes. Table 2 attached gives brief comments on the main outcomes of completed Inquiries. There are important tangible outcomes from some Inquiries, notably the very substantial recovery of revenue from financial institutions following the DIRT Inquiry; the extensive upgrading of the blood products system following the *Finlay Tribunal*, with a consequent major gain in health and safety; and the reorganisation of the Department of Agriculture following the *Beef Tribunal*. There are also important, less tangible outcomes. These include the exposure of shortfalls in frameworks of accountability, the highlighting of management deficiencies, as well as significant advances in transparency and openness which should contribute to development of a culture of good governance.”

⁶ High Court (Barrington J) 22 November 1984. For the background to this case, see *Report of the Investigation into the Accident on the CIÉ Railway at Buttevant, Co. Cork on August 1, 1980* (1981 Pr 9698).

had been “singled out” as the person principally responsible for a serious train crash at Buttevant Station, Co. Cork, in 1980. Since his good name and his livelihood were at stake, the plaintiff engaged a solicitor and instructed counsel to represent him at the inquiry. It was argued that if the inquiry had no jurisdiction to award him costs, a constitutional duty was imposed on the State by the terms of Article 40.3 to defray the cost of such representation. Barrington J rejected this argument, saying that while the guarantee of fair procedures contained in Article 40.3 required that the plaintiff be allowed to defend himself, “it was quite another thing to say that the State must pay the costs of his defence.” In so holding, Barrington J followed the earlier decision of *K. Security Ltd. v Ireland*⁷ in which Gannon J held that the State was not under any constitutional duty to discharge the costs of the plaintiff company which had been legally represented at a tribunal of inquiry.⁸ However, as CIÉ had been negligent and responsible for the accident, in *Condon*, Barrington J found: (1) that it was almost unthinkable that the Minister for Transport would not establish a statutory inquiry into the disaster; and (2) that the plaintiff, as a person immediately involved in the events leading up to the disaster, would naturally seek to be legally represented before the inquiry. The judge concluded that as the plaintiff “was placed in the position of needing such representation as a consequence of the negligence of CIÉ,” this was a reasonably foreseeable consequence of such negligence, and so he was entitled to recover the reasonable costs of being legally represented. Two conclusions emerge from this case: first, in general, the State is not responsible for costs. Secondly, in the instant case, CIÉ had to pay Mr Condon’s costs, only on the basis that it had been negligent and responsible for the accident.

Legislative Rights to ‘Expenses’ or Costs

12.05 Certain other statutes constituting public inquiries do provide for costs or ‘expenses’. For example, costs may be awarded against a local authority or other body in the case of inquiries held at the instance of the Minister for the Environment under the provisions of section 214 of the *Local Government Act 2001*.⁹ Two of the more recent statutes dealing with the issue of payment of costs (or, as it is often put, “expenses”) in ways which are wisely tailored to the circumstances of the particular inquiry are the *Commission to Inquire into Child Abuse Act 2000* (“2000 Act”) and the *Comptroller and Auditor General and Committees of the Houses of the Oireachtas (Special Provisions) Act 1998*.

⁷ High Court (Gannon J) 15 July 1977.

⁸ This was before the enactment of the *Tribunal of Inquiry (Evidence) Amendment) Act 1979*, section 6 of which makes provision for the payment of the parties’ costs by the State or other party appearing before the tribunal.

⁹ The Minister may certify that the local authority or other body should make a contribution towards the costs and expenses reasonably incurred by any person (other than the local authority or other body) in relation to the inquiry. For the precursor, see *Local Government Act 1941*, section 83(2). A further example is the *Public Health (Ireland) Act 1878*, section 210.

12.06 As regards the 2000 Act, section 20 of this Act¹⁰ provides for payment by the *Laffoy Commission* of miscellaneous costs and expenses reasonably incurred by those called to attend the committees, such as travel costs. Section 20 also permits the Minister for Finance, in consultation with the *Laffoy Commission*, to draft and make use of a ‘scheme’¹¹ governing such payments, presumably with a view to regulating costs. Section 20A of the 2000 Act, which was inserted by the *Residential Institutions Redress Act 2002*, section 32, on the other hand specifically provides for legal representation and costs thereof before the Investigation Committee:

“(1) The Investigation Committee may allow a person appearing before it to be legally represented by counsel or solicitor or otherwise. (2) Subject to subsection (3), the Commission may pay such reasonable costs arising out of the representation referred to in subsection (1) to the person so represented as are agreed between the Commission and that person or, in default of agreement, such costs as may be taxed by a Taxing Master of the High Court. ...”

12.07 Under section 20A(3) of the 2000 Act (to anticipate the issue raised in the context of tribunals of inquiry, in paragraphs 12.10-12.26, below) the chairperson of the Investigation Committee has the discretion to refuse to allow costs and to order payment of others costs, including the Committee itself. But in exercising this discretion the chairperson is expressly confined to considering matters related to behaviour before the Committee *only* and not conduct in the field under investigation. The provision allows for the refusal of costs only “where the chairperson is of the opinion that a person has failed to co-operate with or provide assistance, or has knowingly given false or misleading information, to the Investigation Committee and there are sufficient reasons rendering it equitable to do so...”¹²

12.08 As regards the *Comptroller and Auditor General and Committees of the Houses of the Oireachtas (Special Provisions) Act 1998*, this statute was enacted to facilitate an investigation into the banks’ and other financial institutions’ failure to ensure the payment of DIRT. Plainly, these were institutions and personages with very different levels of means, compared to the persons affected by the child abuse legislation. The relevant provision here, section 18, provides that, whilst the expenses of the CAG’s investigation would initially be paid by the State, the Minister for Finance could then apply to the High Court for an order requiring a financial institution to pay some or all of the expenses. Section 18 states: “... the High Court may direct on application [by] the Minister that a financial institution ... shall be liable, to such an extent as that Court may direct, to pay to the Minister

¹⁰ As amended by the *Residential Institutions Redress Act 2002* section 32.

¹¹ It should be noted here that the original section 20 embraced both miscellaneous expenses and legal costs, which were to be paid under a ‘scheme’, to which we shall return at paragraph 12.53.

¹² Section 20A(3).

such amount not exceeding [the expenses of the CAG and an auditor appointed] as it may determine.”¹³

12.09 It is clear (again to anticipate the issue raised in paragraphs 12.10-12.26, below) that the Committee’s recommendation may be based on what the evidence tells about the financial institution’s conduct in the field under investigation, and not confined to whether the financial institution misbehaved before the CAG.

Part I *Tribunals of Inquiry (Evidence) Act 1921*

12.10 Nothing was said about costs in the 1921 Act. This omission was first addressed by the *Tribunals of Inquiry (Evidence) (Amendment) Act 1979*, section 6(1) of which provided:

“Where a tribunal, ... is of the opinion that, *having regard to the findings of the tribunal* and all other relevant matters, there are sufficient reasons rendering it equitable to do so, the tribunal... may by order direct that the whole or part of the costs of any person appearing before the tribunal by counsel or solicitor, as taxed by a Taxing Master of the High Court, shall be paid to the person by any other person named in the order.” (Emphasis added).

12.11 The first tribunal to interpret this provision was the *Whiddy Inquiry*¹⁴ which was set up to investigate a fire in an oil tanker and storage depot, which claimed the lives of 50 people as well as causing major damage to property. In this inquiry, applications for an award of costs (whether against the Minister for Finance or the oil companies) were made by seven persons or bodies, who had been represented. Yet, at the end of the day, costs order was granted only in the case of one (private) party, on the express basis that they were not in a financial position to discharge their own costs.¹⁵

12.12 In approaching the question of costs, the chairman of the *Whiddy Inquiry*, Costello J (as he then was), dealt with the question of whether a person found responsible should pay the State’s costs:

“...there can be no hard and fast rules as to how a tribunal’s discretion to award costs should be exercised. Each tribunal will, no doubt, bear in mind the particular circumstances into which it is inquiring, and a

¹³ See to somewhat similar effect the *Committees of the Houses ... Act 1997* section 3(2).

¹⁴ *Report of Tribunal of Inquiry Disaster at Whiddy Island Bantry Co Cork* (Prl 8911, 1980).

¹⁵ *Ibid* at 348, as follows: “The tribunal is satisfied (a) that it was proper that Mr. and Mrs. Brennan should have been represented by counsel ... before the tribunal and (b) that they are not in a financial position to discharge the costs which they have incurred. In the circumstances of this Inquiry the tribunal is satisfied that these are sufficient reasons rendering it equitable that their costs be paid by the Minister for Finance.”

situation can be envisaged in which a tribunal might consider it proper to require that a wrongdoer should pay the State's costs of the inquiry. For example, a tribunal inquiring into an allegation made against a public official or Department of Government might consider it proper to direct that a person who made a reckless and malicious allegation should pay the State's costs. No doubt a tribunal inquiring into a disaster such as happened at Whiddy had jurisdiction to require *the party or parties responsible for it* to pay the State's costs but, before doing so, it must be satisfied that there are sufficient reasons which render it equitable that the party or parties in default should be penalised in this way. In exercising its discretion it should bear in mind that a tribunal established under the 1921 Act is established because the two Houses of the Oireachtas consider that its establishment *is in the public interest*; that is it is not a court of law in which, generally speaking, the costs follow a determination of fault; that it is established to ascertain facts (and make recommendations arising from its findings) which, as a matter of urgent public importance, the two Houses of the Oireachtas consider should be publicly ascertained. In carrying out the wishes of the two Houses, the Departments of State concerned and the Attorney General will certainly incur expenses (including legal expenses), but it does not follow that if the tribunal is able to ascertain *who was responsible* for the disaster it would be equitable that that person should pay those expenses. They are incurred for a public purpose and, generally speaking, it would appear that they should properly be paid out of public funds."¹⁶ (Emphasis added).

12.13 This passage was addressing and rejecting the contention that a guilty party should be required to pay the State's costs.

12.14 However, Costello J also rejected emphatically what is in a sense the reverse contention, namely "that *prima facie* the costs of all public inquiries should be borne by the State",¹⁷ the view which appears to have more or less been adopted in the *Beef Tribunal* (see paragraphs 12.18 - 12.22).

¹⁶ *Op cit* fn 14 at 345-346.

¹⁷ *Ibid* at 346 He stated: "...the tribunal cannot agree with this sweeping proposition and regards it as being founded on a misconception of the nature of tribunals established under the 1921 Act, [which] are essentially carrying out investigatory functions and need not require that any person be represented by a solicitor and counsel. It certainly does not follow that when persons incur legal expenses in defence of their own interests, *prima facie* those expenses should be paid out of public funds. Total has not shown any reasons why, in the present instance, it would be equitable that expenses, which obviously they can themselves discharge, should be paid out of public funds. Total also submitted that if the tribunal came to the conclusion that there had been an attempt to frustrate the proper work of the tribunal by the deliberate fabrication or suppression of evidence by Gulf, it might be more appropriate that an award of costs be made against Gulf rather than against the Minister for Finance. For reasons already given, the tribunal does not consider that *prima facie* Total are entitled to have their costs recouped from any source."

12.15 Later, and most significantly, Costello J dealt with a specific application by Gulf Oil to have its costs paid out of public funds, on the basis that it had not obstructed or prolonged the inquiry by way of over-lengthy cross-examination of witnesses or by withholding any relevant information. Responding to this argument, Costello J stated:

“if a counsel engaged in lengthy cross-examination or if a person withheld relevant information, such conduct might, in certain circumstances, justify an award of costs against the party concerned; but the fact that a party’s counsel did not abuse his privileges or that a party did not act wrongfully is not in itself a reason which would justify an order under the section.”¹⁸

12.16 Broadly speaking, a very similar attitude to that of Costello J was adopted by Keane J (as he then was) when chairing the *Tribunal of Inquiry on the Fire at the Stardust, Artane, Dublin*¹⁹ where many of the principles enunciated by Costello J were quoted and “respectfully adopted”. Claims that the legal costs of Dublin Corporation should be paid by the State were rejected. Secondly, in advance of the tribunal, the Government had announced that legal representation should be available, at State expense, to all of the next-of-kin or injured who wished to avail of it, something which the tribunal naturally accepted. In view of this, the tribunal declined to order that the State should pay for separate representation of the next-of-kin who did not wish to avail of the representation being afforded by the Government.²⁰ This is a most significant ruling, in the light of what has happened in the *Laffot Commission* (see paragraphs 3.29-3.33).

12.17 The *Whiddy Inquiry* and the *Beef Tribunal* have a good deal in common – in that each involved an investigation into the conduct of big business, whose conduct was found to be far from blameless. Despite this in the *Report of the Beef Tribunal*, there was no reference to the *Whiddy Inquiry*, which it might be thought would have been a valuable precedent.

12.18 One of the major aspects of the *Beef Tribunal* was the huge legal costs which the State was directed to pay: orders were made directing the Minister for Finance to pay the legal and other costs of (with one small exception) all the parties represented at the tribunal. Two statements of principle were offered to justify this result. First:

“The tribunal has in the course of its introductory chapter to this Report referred to a statement of Lord Justice Salmon made in the course of the Report of the Royal Commission on Tribunals of Inquiry (1966) that a person who is involved in an inquiry should normally have his legal

¹⁸ Above fn 14 at 347.

¹⁹ *Report of the Tribunal of Inquiry on the Fire at the Stardust Artane Dublin* (PI 853, 1982).

²⁰ *Op cit* fn 19 chapter 10 paragraph 16.

expenses met out of public funds and the statement of the late Mr Justice McCarthy, concurred with by the Chief Justice, in the case of *Goodman International and Laurence Goodman -v- The Tribunal* that ‘ordinarily, any party permitted to be represented at the inquiry should have their costs paid out of public funds’.

The tribunal is satisfied that in the exercise of its discretion to award the whole or part of the costs of any party appearing before the tribunal, it cannot have regard to any of its findings on the matters being inquired into by it but is only entitled to consider ‘*conduct of or on behalf of that party at, during or in connection with the inquiry*’ that unless such conduct so warrants, a party, permitted to be represented at the inquiry should have their costs paid out of public funds”.²¹ (Emphasis added).

12.19 The italicised quotation within the extract above is not attributed. However, the passage is from McCarthy J’s judgment in *Goodman International v Hamilton (No 1)*.²² The full passage reads:

“...[S]ection 6: the liability to pay costs cannot depend upon the findings of the tribunal as to the subject-matter of the inquiry. *When the inquiry is in respect of a single disaster*, then, ordinarily, any party permitted to be represented at the inquiry should have their costs paid out of public funds. The whole or part of those costs may be disallowed by the tribunal because of the conduct of or on behalf of that party at, during or in connection with the inquiry. The expression “*the findings of the tribunal*” should be read as the findings as to the conduct of the parties at the tribunal. *In all other cases* the allowance of costs at public expense *lies within the discretion of the tribunal*, or where appropriate, its chairman.”²³ (Emphasis added)

12.20 It may be observed that, in any case, this passage is very much *obiter dictum* and, by way of scene-setting. The point is not dealt with at all in the other judgments in *Goodman*. Likewise, there is no attempt to square it with the wording of section 6, (which is not quoted), regarding “*the findings of the tribunal*”. Most significant of all, the *Beef Tribunal* took no notice of the words “[w]hen the inquiry is in respect of a single disaster”. While it is unclear where McCarthy J derived support for this qualification, there would seem to be some justification in treating a person or business responsible for a single disaster in an otherwise blameless record differently from a person or business which had been involved in numerous forms of misconduct. But the strange thing is that the *Goodman case* (unlike *Whiddy* or *Stardust*) was not ‘a single disaster’ episode. In any case, in the *Beef Tribunal*

²¹ *Report of the Tribunal of Inquiry into the Beef Processing Industry* (Pn 1007) Chapter 26 at 719. One should note that this extract from *Hamilton* was the basis of the *Beef Tribunal’s* sole refusal to order the costs of a person (Mr P Smith) represented: see 719-720.

²² [1992] 2 IR 542, 605.

²³ *Op cit* fn 21 at 10.

report, Hamilton P entirely ignored it. Finally, the last sentence of the passage quoted seems that where a party has not misconducted himself before the tribunal, it is still a matter for the tribunal's discretion whether to award costs.

12.21 The second statement of principle made by the *Beef Tribunal* reads as follows:

“Having regard to the nature, extent and length of the inquiry it would be inequitable to require that persons, necessarily appearing at or before the tribunal should be required to pay their own costs of such appearances and as the Houses of the Oireachtas had considered it expedient to establish the tribunal, the tribunal considers it equitable that the Minister for Finance should pay, out of monies provided by the Oireachtas the costs of the persons named in Appendix 3 ...”²⁴

12.22 The notion which emerges from this passage is that, since it was the Houses of the Oireachtas which willed the end, the State should be responsible for paying the bill for the means. In fact, the antithesis (as it were to this thesis) might be to say that, if a party is shown to have been responsible for the event which caused the setting up of the inquiry, then it might well be said that he ought to be responsible for the costs of each of the other parties to the inquiry. In fact, in the *Whiddy Inquiry* the synthesis reached, in regard to the same argument was that the party found guilty of misconduct should pay its own costs, but not those of the State: for “[the Attorney General’s expenses] are incurred for a public purpose and generally speaking, it would appear that they should properly be paid out of public funds.”²⁵

12.23 But the most significant point of all is that the words of the 1979 Act, italicised at paragraph 12.10 and 12.20, were ignored. There is no constitutional, or other, reason to overlook these plain words.

Part II *Tribunals of Inquiry (Evidence) (Amendment) Act 1997*

12.24 This Act substituted a modified subsection (1) in section 6 of the 1979 Act, so that the provision now reads as follows:

“(1) Where a tribunal or, if the tribunal consists of more than one member, the chairperson of the tribunal, is of opinion that, having regard to the findings of the tribunal and all other relevant matters (*including the terms of the resolution passed by each House of the Oireachtas relating to the establishment of the tribunal or failing to co-operate with or provide assistance to, or knowingly giving false or*

²⁴ *Op cit* fn 21 at 720.

²⁵ Above fn 14 at 346. See also Hogan and Morgan *Administrative Law in Ireland* (3rd ed. Sweet & Maxwell) at 562.

misleading information to the tribunal), there are sufficient reasons rendering it equitable to do so, the tribunal, or the chairperson, as the case may be, may, *either of the tribunal's, or the chairperson's own motion, as the case may be, or on application by any person appearing before the tribunal*, order that the whole or *part* of the costs—

- (a) of any person appearing before the tribunal by counsel or solicitor, as taxed by a Taxing Master of the High Court, shall be paid to the person by any other person named in the order;
- (b) incurred by the tribunal, as named as aforesaid, shall be paid to the Minister for Finance by any other person named in the order.”
(Emphasis added)

12.25 The substantive changes introduced by the 1997 Act are italicised in the above text. There are three of them:

- (i) by virtue of sub-paragraph (b), the power to award costs is extended to cover costs incurred by the tribunal itself;²⁶
- (ii) partly to complement (i), the order may now be applied for either on the application of the tribunal (or its chairperson) or of a person appearing before it;
- (iii) the major change is directed at the main point under consideration here, namely whether in deciding whether to award costs, a tribunal may take into account its findings on the substantive issue or whether it is confined to the party's behaviour before the tribunal. The following points are relevant. First, the fact that the tribunal is enjoined to pay regard to the fact that a person has “fail[ed] to co-operate with ... or knowingly giv[en] false ... information to the tribunal” is now (in contrast to the original 1979 Act wording) stated explicitly. It is critical that there can, therefore, be no room for the suggestion that the phrase “the findings of the tribunal” should be taken to mean a finding as to whether a person has failed to co-operate with the tribunal. Instead, this key phrase must bear its natural meaning, that is, the findings of the tribunal as to the substantive issue. The second point tending in the same direction concerns the phrase “including the terms of the resolution ... relating to the establishment of the tribunal”. These words, too, make it clear that in awarding costs, the tribunal must take into account the facts found in relation to the subject-matter which it was mandated, by its terms of reference, to explore. In short,

²⁶ This gap in the existing law had become evident when the chairman of the *McCracken Tribunal* ruled, on 28 October 1997, that he had no power to order a person to pay the cost of the Tribunal's expenses. See *484 Dáil Debates* Cols 861-888 (10 December 1997).

mention of the “terms of reference” points the tribunal in the direction of its findings on the substantive issue, as a relevant factor to be taken into account in deciding on costs. This confirms the first point.

12.26 Nevertheless, it is just possible that the present drafting in relation to element (iii) could be misinterpreted. Accordingly, in Part IV, the Commission will suggest a re-draft.

Part III Policy and Constitutionality

12.27 Before considering drafting, however, we must examine some matters of principle, namely two arguments in the policy and constitutional field which might possibly be thought to be relevant to the question of costs. The first of these arguments - that justice must be administered in a court and that the award might, arguably, be regarded as an administration of justice is largely a constitutional argument. The second argument - that it is bad policy to put a party in a position where he has to expend a large sum of money on costs – may be regarded as both a constitutional and a policy issue.²⁷ These arguments have to be considered against the background of two distinct situations. The first of these is where a person who chooses to be represented at an inquiry is left to pay his own legal costs. The second is where some person may be ordered by the inquiry to pay another person’s costs or those of the tribunal itself.

(a) Article 34.1: ‘Administration of Justice’

12.28 It might be argued that an order to pay another person’s costs amounts to an “administration of justice”. Article 34.1 provides that an administration of justice must be vested in a court and not, for instance, in an inquiry (albeit one which is chaired by a judge, acting extra-judicially). In assessing this argument, two points are relevant. First, is the costs order, in fact, an administration of justice?²⁸ Secondly, even if so, could such an order not be brought within the scope of the exception to Article 34.1 contained in Article 37.1?

²⁷ Obviously, the Commission does not wish to make a recommendation which is either unconstitutional or bad policy. Consequently, the category into which the argument falls is not especially important.

²⁸ It is also worth mentioning that the qualification which may have been introduced into the law by Hamilton P at the *Beef Tribunal*, at paragraph 12.17, is not required or justified, by Article 34.1: for, if it were a violation of Article 34.1 for an order to pay another party’s cost on the basis of a finding of misconduct in the field under investigation, so it would equally be, if the basis were misbehaviour before the tribunal. For, in either situation, there would be just as strong (or weak) an argument that the tribunal was administering justice; indeed, *Re Haughey* would presumably be an even more direct precedent on characterisation as an ‘administration of justice’, where it was misbehaviour during the tribunal’s hearing which was in issue, rather than misconduct in the field under investigation.

12.29 The question of whether it was unconstitutional for an inquiry to order that the costs of the inquiry should be paid by some person, on the basis that the inquiry had found that he had committed acts of misconduct, fell to be considered only recently, albeit under a different statutory framework. In the Supreme Court case of *State (Plunkett) v Registrar of Friendly Societies*²⁹ it was decided authoritatively that a provision enabling such an order to be made was constitutional. Section 13 of the *Industrial and Provident Societies (Amendment) Act 1978*, allows, *inter alia*, the Registrar of Friendly Societies to appoint an inspector to report to him on the affairs of any society. The facts in the case were that the first applicant substantially owned a group of industrial and provident societies which engaged in the accepting of deposits from the public and the making of loans and property investments. An inspector was appointed by the Registrar to investigate the affairs of members of the group. The report of the inspector found, *inter alia*, that the first applicant had acted with culpable disregard of responsibilities owed to creditors and depositors, and that the second applicant was unjustly enriched at the expense of group creditors. Section 13(3) of the Act provides:

“All expenses of or incidental to an investigation under this section shall be defrayed out of the funds of the society, or by the members (or former members) or officers of the society, in such proportions as the Registrar shall direct.”

12.30 The Registrar later informed the applicants that it was his intention to consider making a direction under section 13(3) requiring them to pay all or a proportion of the expenses of the inspector.

12.31 The applicant’s argument, founded on Article 34.1, failed in the High Court on the basis that the Registrar was not administering justice or, even if he were, then his powers and functions were “limited powers” in the non-criminal field and, consequently, fell within the protection of Article 37.1, by which where the administration of justice involves a “limited function” and is not “criminal matter”, it need not be vested in a court.

12.32 The Supreme Court (Hamilton CJ, O’Flaherty, Barrington, Keane and Barron JJ) upheld the High Court on the first point and did not find it necessary to consider the second point. Giving judgment for the court, O’Flaherty J commenced by rehearsing the classic definition of an ‘administration of justice’ set out in the judgment of Kenny J in the High Court in *McDonald v Bórd na gCon*.³⁰ In a passage which was expressly accepted by the Supreme Court on appeal in *McDonald*, Kenny J identified the following as among the characteristic features of the administration of justice, *viz*:

²⁹ [1998] 4 IR 1. See also *State (Plunkett) v Registrar of Friendly Societies (No 2)* [1998] 4 IR 4.

³⁰ [1965] IR 217.

1. "...dispute or controversy as to the existence of legal rights or a violation of the law;
2. The determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;
3. The final determination (subject to appeal) of legal rights or liabilities or the infliction of a penalty;
4. The enforcement of those rights or liabilities or the imposition of a penalty by the Court or by the executive power of the State which is called in by the Court to enforce its judgment;
5. The making of an order by the Court which as a matter of history is an order characteristic of Courts in this country."³¹

12.33 Applying these tests in *Plunkett*, O'Flaherty J stated:

"It seems clear that for an activity to qualify as being an administration of justice, each of the five *McDonald* tests must be satisfied. The Court is of the opinion that none of the five tests have been satisfied in this case; certainly, as regards the first, there is no dispute or controversy as to the existence of legal rights or violation of the law. The Registrar has pointed to a possible dereliction of duties and responsibilities and has given the applicants an opportunity to respond. Further, and this encompasses the fourth test in *McDonald*, as pointed out by the learned High Court Judge, the decision of the Registrar - if he comes to reach a decision - does not amount to the imposition of a penalty or the final determination of legal rights and liabilities. That matter is reserved to the courts. The applicants have argued that the order is analogous to an order for costs made at the conclusion of legal proceedings. But this is not so. A court order for costs is self-executing. Any order of the Registrar is not."³²

³¹ [1965] IR 217, 231; approved by the Supreme Court at 244.

³² Above fn 29 at 5. O'Flaherty J also went on to make a distinct, supporting point, (at 6) namely: since the applicant in the case had benefited from legislation, it was only right that he should pay for the cost of protecting members of the public - in this case, depositors - who had suffered by virtue of the applicant's abuse of those privileges. This factor will not usually apply exactly to those whose conduct is being investigated under (say) the tribunals of Inquiry legislation in that, in *Plunkett*, the relevant legislation set up a licensing system, and the inquiry was constituted under the same legislation as an integral part of the licensing system. This is, of course, not so of the 1921-2002 Acts. However, on the broad policy level, it can be said that there is an analogy in that, in many cases, the persons whose conduct is under investigation under these Acts are persons who have been trusted with positions of significant political or commercial power in respect of the community, and if the tribunal does discover that there has been misconduct, this will often take the form of an abuse of trust.

12.34 One must question whether there were any special features of an inquiry, established under the 1978 Act, which would have the effect of narrowing its scope as a precedent so that it might not govern the present issue in relation to (some or all) inquiries. The first possibility is that what the legislation allowed was for a person in the position of the applicant to be ordered to pay the costs of the inquiry itself, and not the legal expenses of other persons. But this difference does not affect the impact of the award on the applicant or make the payment more or less of a ‘penalty’, to use the parlance of item two of the *McDonald* list of characteristics, quoted in paragraph 12.31 above.

12.35 The objection might be raised that the amount of costs in *Plunkett* may have been less than those which might be awarded after a lengthy tribunal of inquiry. But, it is suggested that this is not significant just because the Supreme Court’s decision was based on Article 34.1 and not Article 37.1, and it is Article 37.1 which would have required the amount to involve “limited function.”

12.36 Before concluding our discussion of *Plunkett*, it is worth noting (though it has nothing to do with Article 34.1) that the Registrar’s decision that the applicants should pay rested squarely on his finding that he had found that the applicant had committed significant acts of misconduct in his business. To compare the situation with the interpretation of the 1979 Act, reached at the *Beef Tribunal* (paragraph 12.17 above): the question of whether the plaintiff had misbehaved before the Registrar was not even mentioned.

(b) The State has set up an Inquiry; therefore the State Must Pay the Legal Costs?

12.37 There is a second argument against requiring the person under investigation to pay costs: it is mainly a policy argument, though it could possibly be grounded on the constitutional right to property. Firstly, as a constitutional matter in *K Security Ltd v Ireland*,³³ Gannon J held that the State was not under any constitutional duty to discharge the costs of the plaintiff company which had been legally represented at a tribunal of inquiry.³⁴ The policy argument is that, since the Oireachtas set up the tribunal of inquiry, and since (we assume) that it was foreseeable and reasonable that the person affected be represented, accordingly it is appropriate that the cost of his representation ought to be paid out of public funds. In short, the State has willed the end and, therefore, it must also will the means. This argument, in contrast to the first (Article 34.1) argument applies even to the payment of the party’s own costs, and would lead to the result that the State ought to pay these costs. (We come in paragraphs 12.42-12.43 to the issue of a party being ordered to pay the costs of another party or the inquiry itself.)

³³ High Court (Gannon J) 15 July 1977.

³⁴ This was before the enactment of the *Tribunal of Inquiry (Evidence) Amendment) Act 1979*, section 6 of which provided for the payment of costs.

12.38 But there are counter-arguments to this, which the Commission finds compelling. For the Oireachtas does not resolve to set up an inquiry in a fit of absent-mindedness or caprice. It does so because it considers that there is some serious misconduct for investigation and the correctness of this may be borne out by the very fact that the inquiry's finding is that he has committed such misconduct. In other words, one must look back to the misconduct, not the Oireachtas, as (discourse) the original cause of the tribunal. Some authority for this chain of reasoning may be found in *Condon v CIÉ*, outlined in paragraph 12.03. Here, the High Court, in ordering CIÉ to pay the costs of an employee who was represented at the inquiry, relied on the fact that, given that there was a serious accident, it was almost unthinkable that the Minister for Transport would not order an inquiry.

12.39 In considering whether there ought generally, as a matter of policy, be an obligation on the State to pay the legal costs of a party represented at a public inquiry or whether, such an obligation ought to be established, by legislation, it is relevant to consider comparable areas (some of them even more serious than an inquiry). By comparable areas, we mean those in which, first, the State intrudes on a person's life, liberty, reputation, financial well-being or other interest and, secondly, where it is appropriate for that person to be represented. In fact, the only situation in which such a contention has been generally accepted is the most parlous situation in which the State can place a person, namely a criminal prosecution and then only if the accused is of limited means. In *State (Healy) v O'Donoghue*,³⁵ despite the fact that his lack of means would have entitled him to legal aid under the statutory *Criminal Justice (Legal Aid) Act 1962*, owing to unusual circumstances, the applicant was left without legal representation. The offence was one of dishonesty, and he was convicted and sentenced to six months imprisonment. The reasoning of the Supreme Court was that the Constitution, Articles 38.1 and 40.3, implies that, in a criminal trial, impecunious persons must be provided with legal representation at public expense. Accordingly, the conviction was quashed. But this is as far as the proposition has been taken. Other analogies may be drawn. What if for instance a taxpayer appeals *unsuccessfully* to the income tax appeal commissioners? He has no right to have his legal costs paid by the State, despite the fact that presumably it could be argued (by analogy with the argument suggested in paragraph 12.37) that the State introduced income tax, and it was reasonable and foreseeable for him to appeal (to adopt the argument advanced in the context of inquiries).

12.40 More generally, it has been stated that apart from three exceptions - *Healy*, *Condon* (with its own particular circumstances) and certain statutory provisions: "... there is nothing in any of the case law to suggest that there is any general principle applicable to administrative cases on the basis of which legal costs may be claimed. And some of the authorities actually state that any general principle is confined to criminal cases."³⁶ Similarly, even in the case of people of limited means, another writer remarked:

³⁵ [1976] IR 325. See too *Kirwan v Minister for Justice* [1994] 1 ILRM 333 and *Corcoran v Minister for Social Welfare* [1991] 2 IR 175.

³⁶ Hogan and Morgan above fn 25 at 562.

“It is clear, therefore, that in general, the Irish courts are reluctant to develop a right to civil legal aid and in one sense, this is surprising given that the *Airey* case offers a promising line of argument for any judge interested in going down this road.”³⁷

12.41 For instance, it has not been suggested that there is a constitutional right to legal aid before an appeals officer of the Department of Social, Community and Family Affairs, despite the fact that one’s only means of support may be hanging in the balance.

12.42 In summary, in the absence of any such right in other, possibly even more deserving situations, why should a person whose conduct is under investigation by a public inquiry have a right to have the State pay his legal costs?

12.43 At this point, we ought to recall the two situations distinguished at paragraph 12.37. The first of these is where a person who chooses to be represented at an inquiry is left to pay his own legal costs. This is the situation, to which the proposition just advanced - that there is no constitutional or policy obligation on the State to pay the party’s own costs - is most relevant. However, the second situation, to which we now turn, is more extreme. It is where some person may be ordered by the inquiry to pay another party’s costs, or those of the tribunal itself. We consider, finally, in this Part, whether this possibility should be retained.

12.44 In the first place, although an order that one party should pay another’s costs has been a possibility since the 1979 Act and indeed was considered in the *Whiddy Inquiry*,³⁸ such an order has never yet been made. We think it realistic to assume that an order of this type would only be made in the most extreme circumstances - let us say an investigation into a Mafia-type organisation. In the context of court cases, judges have traditionally been trusted with an almost unlimited discretion in regard to costs and we believe that the chairman of a tribunal should be allowed such discretion here, against the rare occasion when it might be considered appropriate.³⁹ Accordingly, we see nothing wrong in retaining such discretion against the rare possibility that circumstances will arise in which it might appropriately be used. The conclusion to this Part is, therefore that we see no policy reason or constitutional danger which would militate against the conclusion that the present legislative policy be retained.

³⁷ Whyte, *Social Inclusion and the Legal System* (IPA; 2001) at 253. In the European Court of Human Rights case of *Airey v Ireland* (1979) 2 EHRR 305, it was held that the right of access to the courts, guaranteed by the European Convention, meant that, in certain circumstances, (for instance, where a marital separation order was necessary) the State would be obliged to provide a lawyer, in the case of an impoverished litigant. But, as indicated in the quotation, *Airey* has shown little capacity for growth.

³⁸ Above fn 14 at Chapter 24, 345-346.

³⁹ One should note, by analogy here that it has long been the law (though, for practical reasons, seldom invoked) that a convicted person may be ordered to pay the prosecution costs and the costs of the trial.

Part IV Re-draft of the Costs Provision

12.45 In Parts I-II, we argued that the provision dealing with costs - originally section 6 of the 1979 Act, now modified by the 1997 Act - seems to have been judicially re-interpreted in that a significant qualification has been interpolated, namely that the only basis on which a non-State party may be required even to pay their own costs is that they have obstructed the tribunal in its inquiry. In Part III, we considered whether what seemed to us to be the original intention of the existing statutory provision ought to be changed on either policy or constitutional grounds, and concluded that it need not. Accordingly, in this Part, we suggest how the existing statutory provision could be re-arranged to put it beyond danger of misinterpretation. The present law which is contained in the 1997 Act, which inserted a modified section 6(1) into the 1979 Act, reads as follows:

“(1) Where a tribunal ... is of opinion that, having regard to the findings of the tribunal and all other relevant matters (*including the terms of the resolution passed by each House of the Oireachtas relating to the establishment of the tribunal or failing to co-operate with or provide assistance to, or knowingly giving false or misleading information to the tribunal*), there are sufficient reasons rendering it equitable to do so, the tribunal ... may *either of the tribunal’s, or the chairperson’s own motion, as the case may be, or on application by any person appearing before the tribunal*, order that the whole or part of the costs : -

- (a) of any person appearing before the tribunal by counsel or solicitor, as taxed by a Taxing Master of the High Court, shall be paid to the person by any other person named in the order;
- (b) incurred by the tribunal, as named as aforesaid, shall be paid to the Minister for Finance by any other person named in the order.” (Emphasis added)

12.46 *The drafting of the 1997 version seems a little cumbersome and loose in that there are two elements to which the tribunal is to “hav[e] regard”, namely “the findings of the tribunal and all other relevant matters”. Then immediately afterwards comes the phrase “(including the terms of the resolution...relating to the establishment of the tribunal or failing to co-operate with ... or knowingly giving false ... information to the tribunal)”. It is not clear which one or other (or both) of the phrases within brackets is to connect up with which one or other or both of the elements immediately preceding the brackets. A form of words which avoided this possible uncertainty would be less open to misinterpretation. Clarification could be achieved by linking the phrase “findings of the tribunal” with “the terms of the resolution passed by each House” so to make it clear that the findings referred to are the findings as to the substantive issue before the tribunal. To achieve this, the first part of subsection (1) should, we recommend, be re-organised and re-drafted as indicated below. Secondly, ‘equitable to do so’ probably implicitly includes means. This is what was understood by Costello J in the Whiddy Report.⁴⁰*

⁴⁰

Above fn 14.

However, it seems only fair and, indeed realistic to the Commission that, among the factors to be taken into account in awarding costs, the means of a party should be stated explicitly. We propose the following draft:

“Where a tribunal...is of the opinion that having regard to:

- (i) the findings of the tribunal in relation to its subject-matter as indicated in the terms of the resolution passed by each House of the Oireachtas relating to the establishment of the tribunal;*
- (ii) and all other relevant matters (including failing to co-operate with or provide assistance to, or knowingly giving false or misleading information to the tribunal and the means of a party),*

there are sufficient reasons...”

The Commission considers that the later part - from the words “there are sufficient reasons rendering it equitable to do so”...to the end - requires no change from the present law, quoted in paragraph 12.45.

Part V Minimising Costs

12.47 So far in this chapter the focus has been on the question of who may be ordered to pay costs. In this Part, we consider the logically earlier question of ways of minimising costs consonant with the fundamental precept of ensuring that an inquiry is both thorough and fair. It is not appropriate to attempt to lay down rules about the way in which a chairperson ought, to exercise his/her discretion to award costs or to award them on a limited basis. Such a matter depends very much on the circumstances of each tribunal as perceived by the chairperson in the exercise of this discretion and is inappropriate for regulation by statute. Moreover, most of the proposals which are made in this Part are not directed at this stage; rather they are aimed at decisions taken at much earlier stages of the inquiry, which may have the affect of minimising the need for costs. Although it should be noted we do not envisage our suggestions having a considerable affect, because inquiries are inherently expensive. In this context the Commission considers it desirable to highlight instances of good practice which have been developed in certain tribunals, though not observed in others. A further proviso should be attached to what follows and it is this: most of what is advised here must be read and applied globally in conjunction with many of the other specific recommendations that have been made elsewhere in this Paper, particularly in Chapters 7 and 9.

12.48 First, and most basic, the Commission recommended in Chapter 9, the widening of the private information gathering phase of inquiries, in part as a way of reducing costs. Here it is only necessary to refer to good examples, such as the *Finlay Tribunal* on the Blood Transfusion Service Board and Hepatitis C. Given the complexity of its subject-matter and the large number of witnesses, the costs of the *Finlay Tribunal* could be regarded as relatively modest. From a cost viewpoint

as well as other grounds, there seems to be a very strong case for having, where appropriate, some form of preliminary investigation in the case of tribunals.

12.49 Secondly, the level of legal expertise which is appropriate should be taken into account. Varying very much with the circumstances, one or more of the following may be appropriate: paralegal, solicitor, junior counsel, senior counsel. In settling this question, the chairperson must be aware of the difficulty of the subject-matter: how much of it is routine and repetitious; whether it requires skilled cross-examination. The Commission does, however, agree for the reasons articulated in the *Comparative Study by the PAC sub-committee*,⁴¹ with the study's rejection of the remarkable suggestion that the State might be represented by "barristers, who are full time State employees paid on an annual salary". After all, cross-examination is a most particular skill which, to be exercised properly, requires recent, high-level extensive experience. On the other hand, there is a very great deal of preparatory work which does not call for the skill and experience of a senior barrister or junior barrister. Senior counsel should be used on a full time basis at the hearings, but only on a part time/*ad hoc* basis during the preliminary and final stages of an inquiry. This would have a substantial impact on the costs of an inquiry. So too would the use of paralegal teams and administrative staff (engaged on a short to medium term contractual basis or on secondment from a Government department), as opposed to barristers (who are being paid at a daily rate), to carry out preparatory and administrative tasks. The precise nature of these tasks will depend on the individual circumstances of the inquiry, but by way of example, may range from logging documents and collating bundles to drafting witness summaries and highlighting issues in dispute. Presently, it is understood that the level of work being carried out by individuals is not commensurate to their qualifications and skills. It should be emphasised that this is in no way a criticism of the quality of the work that has been and is being done, it is just that an inquiry should be more selective in what lawyers are being used to do.

12.50 In relation to the level of interested parties' representation, we should re-emphasise what was recommended in paragraphs 7.31-7.32: namely that the power to grant differing levels of representation before the inquiry and during the particular phases/modules should be exercised judiciously.

12.51 The third way of keeping down costs is by the tribunal making sensible arrangements regarding the division of its subject-matter and the sequence in which the topics are to be taken.⁴² One objective should be to ensure that lawyers or other

⁴¹ *Comparative Study into Parliamentary Inquiries and Tribunals of Inquiry* (Pn 9796) at 29: "Consideration may also be given as to whether or not the State can be represented by barristers who are full-time State employees and paid an annual salary. However, this would have the disadvantage that such full-time barristers/lawyers drawn from those currently in State employment would be barristers who have not practised advocacy before the courts for some time, and would be relatively unused to the work in such a forensic environment. It may be, therefore, that the representation and forensic expertise would not be of the same quality as other parties. Indeed, this may lead to a lengthening of the duration of the tribunal."

⁴² *Comparative Study into Parliamentary Inquiries and Tribunals of Inquiry* (Pn 9796) at 28 states: "... a more recent experience from the existing sitting tribunals is that the tribunal will

expensive experts do not have to *waste* time by being at the tribunal, when they are not required. Naturally, if appropriate arrangements are made and, yet, lawyers or other experts persist in attending when this is unnecessary, this factor should be taken into account in deciding how much of the costs should be paid by the State or some other party. A point to bear in mind here is that inquiries (even if one is only thinking about a phase of the inquiry) last a lot longer than even the longest civil litigation: years rather than weeks are the appropriate measure. This may mean that the proportion of the subject-matter which is merely routine is relatively high. Following informal consultation with those presently working on inquiries it would appear that a note is taken of those in attendance on a daily basis. While, just because someone is not in attendance it does not necessarily follow that they are carrying out work unconnected with the inquiry. Yet such a record of attendance, the subject-matter covered on that date and even whether the inquiry sat for a full day or half day is valuable. It will have a use in determining costs, if necessary, before the High Court Taxing Master.

12.52 Fourthly, mention should be made of the important issue of what is the basis on which the fees of lawyers before tribunals are calculated. It should be noted here that to a large extent the fees of the inquiry team and those of the interested parties in any inquiry are paid at similar rates. Much of what follows can be taken to apply to each of them with substantial modifications to reflect significant differences in their circumstances, for instance the fact that the inquiry team will be there all of the time, whereas interested parties will not be there during those parts of the inquiry that do not concern them. It is notable here that the increasing tendency on the part of tribunals to modularise proceedings will no doubt aid in this respect.

12.53 The most radical attempt in this field (already alluded to at paragraph 12.06) proposed to deal with the legal costs and expenses of persons before the Investigation Committee of the *Laffoy Commission*.⁴³ The proposed scheme sets out 'fixed fees' payable by the Commission for specific aspects of work, for example £100 (€127) for attending consultation, £105 (€133) counsel's fee for settling a statement, and £750/£1,000/£1,250 (€952/€1270/€1587) counsel's Brief

only grant limited representation. It grants representation in regard only to that portion of the tribunal's business in which the applicant has a manifest interest. This minimises legal costs, and ensures that parties' legal representatives do not attend all through the public sittings of the tribunal. [This is eminently reasonable and to be recommended.]"

For example, the *Report of the Tribunal of Inquiry (Dunnes Payments)* (Pn 4199 1997) Chapter 2, at 11, lists three persons - Attorney General, Mr Ben Dunne and Dunnes Holding Company - granted "full representation for the duration of the inquiry and 19 other persons, granted "limited representation, namely, representation when they or any witness called at their request was giving evidence together with a right to cross-examine any witness who made allegations against them ..." Furthermore, the *Report of the Tribunal of Inquiry into the Blood Transfusion Service Board* (Pn 3695 1997) lists six parties granted full representation; four associations or bodies granted limited representation; and four persons, *ie* "witnesses [who] were granted representation in connection with the giving of their testimony".

⁴³ Drafted by the Minister for Education and Science on 9 May 2001, pursuant to the original section 20 of the 2000 Act.

fee, according to the difficulty and complexity of the case. In short, one may describe this as a graduated fees system analogous to legal aid funding. However, in the event, 83% of complaints failed to meet the deadline imposed by the Investigation Committee for the submission of statements. The *Laffoy Commission* sought the view of those solicitors acting for the complainants in this respect and in its Second Interim Report stated as follows:

“[Solicitors acting on behalf of those complainants] ... stated that, because of the exclusion from the terms of the Redress Bill of substantial categories of childhood victim, and because of concerns relating to the mode of assessment of compensation provided for in the Bill, the point had not arrived whereby the solicitors could with confidence advise their clients in relation to the work of the Commission. Moreover, dissatisfaction was expressed with the existing scheme for payment of costs of legal representation. That scheme was described as ‘seriously flawed’.”⁴⁴

12.54 The *Laffoy Commission* was of the view that the scheme would be workable, but in view of the ‘impasse’ reflected by the complaints solicitors, the Minister for Education and Science agreed to the taxation of the costs of legal representation.⁴⁵

12.55 Although this scheme ultimately failed the Commission is of the view that further consultation with the legal profession may prove fruitful in developing a workable scheme for the payment of the legal costs of interested parties who have a limited role at the inquiry or for the payment of witnesses’ legal costs and expenses.

12.56 The normal way in which a barrister’s fee is calculated for a court case is by agreeing a relatively larger sum for preparing the case, the brief fee, plus a daily rate for the period for which the case lasts in court. The same formula has been employed, in agreeing fees for tribunals of inquiry, without reference to the fact that whereas a court case will last days or possibly weeks the tribunals will last for months or years. Thus, for instance, the fees for senior counsel for the *Morris Tribunal* have been fixed at €60,000 plus €2,250 *per diem*. Following an increase for inflation the daily rate for the tribunal’s senior counsel to the *Moriarty Tribunal* and the *Flood Tribunal* are now €2,500 and €2,250, respectively.⁴⁶ (The rates of payment are settled by agreement between the barristers concerned and the relevant Department, on the advice of the Attorney-General’s Office or Chief State Solicitor’s Office.) As a comparison, notice that the Queens Counsel at the *Scott Inquiry* was paid STG£800 per day, whether or not the inquiry was sitting. Senior

⁴⁴ Commission to Inquire into Child Abuse *Second Interim Report* November 2001, at 7.

⁴⁵ *Ibid* at 7-8.

⁴⁶ For details of junior counsel’s fees and other inquiries’ costs see *Irish Times* 23 November 2002.

counsel were paid at the (roughly contemporaneous) *Beef Tribunal* IRE£1,800 per sitting day and IRE£1,000 per non-sitting day.⁴⁷

12.57 A point that ought to be mentioned here is that these rates should be seen in light of the fact that the prolonged absence from private practice which participation in a tribunal entails will reduce a barrister's practice; solicitors simply get used to instructing other barristers. (However, there may be some limited relief from this.)⁴⁸ On the other hand, it may be that representing an interested party before a public inquiry or acting as counsel to the inquiry itself raises the profile of a barrister and in turn may impact positively on their practice. Having canvassed opinion at the Bar it would seem that in the case of a junior barrister this may be so, but in the case of a senior (of the type who currently appear before inquiries) they are already established so the argument lends little weight.

12.58 It is relevant to refer here to the basis upon which barristers generally fix their fees for court cases. These include the fact that, often, a barrister will take a case on the basis that the client ought to have "his day in court" despite the fact that he cannot afford to pay the regular fees. Thus, in such cases, counsel will not be paid if the client's case is unsuccessful. The net result is that counsel's income depends upon an aggregate of "sunny days" (when he is paid) and "rainy days" (when he is not). Against this background, tribunals of inquiry offer the climatologically impossible scenario of, often, three or four years of continuous sunny days.

12.59 The Comparative Study remarked that consideration should be given to the possibility of counsel being engaged on a contractual/salaried basis rather than on the usual *per diem* rate.⁴⁹ However, as to this it should be noted that paragraphs 2.4 and 11.1(b) of the Code of Conduct for the Bar of Ireland states that a barrister may not undertake work at a salary. Therefore any consideration of barrister's fees will need to take this into account. Perhaps consideration should be given to initiating negotiations with the Bar Council of Ireland with a view to inserting a similar exemption for inquiries, as there is for political appointments, teaching, and legal editing.⁵⁰ However, again having sought views on this issue it would appear

⁴⁷ *Cost Comparison Report of the Department of Finance* 27 November 2000.

⁴⁸ In February 2001 Ms Anne Dunne SC (chairperson of the inquiry into post mortem and retention of children's organs by hospitals: see Appendix A) was refused an increase in both her own fees and counsel's fees. She stated that the inquiry was more extensive, comprehensive, and complex than was originally envisaged and also that her brief fee and daily rate reflected those agreed with other tribunals some years ago. The terms of her and her legal team's appointment include operating on a full-time basis with flexibility. In her letter to the Department of Health (obtained by the *Irish Times* under the *Freedom of Information Act 1997*) she elaborated that "in order to allow us to maintain some connection with the Law Library and with our respective practices, it will be necessary for each of us from time to time to attend to legal work other than that of the inquiry". It was made clear that "there will be no charge made to the inquiry by counsel when they are engaged in other legal work" – *Irish Times* 4 December 2002.

⁴⁹ *Op cit* fn 41 at 29.

⁵⁰ Code of Conduct of the Bar of Ireland, paragraph 2.4 (a) – (c).

that inquiries would simply not be able to attract the calibre of barrister that they currently attract if a different method of remuneration were adopted. One should bear in mind, however, the overheads that a barrister must carry, such as office running costs and pension contributions. In order to pay counsel at a different rate one would have to factor in these overheads, which in the event would have little effect in reducing costs.

12.60 One slight evolution of the traditional method of remunerating counsel has been utilised in both the *Lindsay Tribunal* and the *Laffoy Commission*, namely a reduction in the daily rate the longer the tribunal runs (although as we have seen there may be an increase of rates because of inflation). In *Lindsay* both the tribunal's legal team and the State team were paid, as follows:

<u><i>Senior Counsel</i></u>			
	IRE£	€	% Reduction
<i>Brief fee</i>	25,000	31,743	
<i>First 30 days</i>	1,450	1,841	
<i>Next 20 days</i>	1,400	1,777	3.4%
<i>Thereafter</i>	1,350	1,714	Total = 6.9%
<i>(Non-sitting days</i>	1,350	1,714)	

<u><i>Junior Counsel</i></u>			
	IRE£	€	% Reduction
<i>Brief fee</i>	16,500	20,950	
<i>First 30 days</i>	950	1,206	
<i>Next 20 days</i>	925	1,174	2.6%
<i>Thereafter</i>	900	1,142	Total = 5.3%
<i>(Non-sitting days</i>	900	1,142)	

12.61 For *Laffoy* a similar approach has been adopted in this regard; the daily rate for both senior counsel and junior counsel are to decline after a specified

number of days.⁵¹ This method of calculating fees needs to take it into account not only that inquiries predominantly last longer than even the most complex court cases, but also that the intensity lessens the longer one is engaged in a specific role, particularly if there is an element of repetition. However, this approach has to be viewed in context. The total reduction for *Lindsay* was 6.9% or 5.3% (for senior and junior counsel, respectively) has to be set off against a possible increase in that rate to compensate for inflation. These reductions are very modest.

12.62 *Of the tentative suggestions towards minimising costs outlined in the preceding paragraphs, the Commission would like, firstly, to emphasise that the inquiry itself should give considerable thought to what level of representation it engages for particular tasks. The Commission is of the view that there is some scope for a closer match between the difficulty of the work and the ability and experience (and therefore cost) of the lawyer retained to do it. Secondly, we feel that sensible arrangements regarding the division of subject-matter and the sequence in which topics are taken, as they have been adopted in some recent tribunals, should be followed, so as to minimise wasted time. Thirdly, the Commission suggests that a means of calculating legal costs and expenses be devised, which is more appropriate to pay for guaranteed employment for several months or years. (Such a formula would naturally take it into account that a barrister who has been employed full-time by a tribunal for some time, cannot immediately resume private practice at the same level at which he or she left it, because the solicitors who send him or her work will have become accustomed to briefing other barristers). Fourthly, it is also suggested that a 'scheme' similar to that highlighted in paragraph 12.53, on a piecework basis, be put in place where it is appropriate. Finally, to summarise a recommendation outlined in paragraphs 7.37-7.41 we wish to also emphasise that where possible legal representation should be pooled.*

⁵¹

Above fn 46.

CHAPTER 13 SUMMARY OF RECOMMENDATIONS AND CONCLUSIONS

13.01 The provisional recommendations contained in this Paper may be summarised as follows:

Part I Chapter 2 – Company Inspectors

13.02 The Commission is of the opinion that the provision of a ‘direct use immunity’ achieves a satisfactory balance between the competing interests of witnesses and the inquiry. Whilst it is true that the judiciary, through the application of the Constitution, have to a certain extent repaired the original omission and the subsequent amendment of section 18 of the *Companies Act 1990* has sought to effect this by way of legislation; the Commission is of the view that section 18 ought to be amended further by the reframing of the direct use immunity, along the same lines as that contained in the 1921-2002 legislation, simply in the interests of clarity. [Paragraph 2.17]

13.03 In relation to whether to conduct a company inspection in private or public a straightforward reading of the legislation would seem to indicate and Irish practice seems to have assumed: that it is open to an Inspector to sit in private or public, as he or she thinks fit. This seems to the Commission, to be appropriate: the arguments in favour of publicity have been adduced largely in the context of tribunals of inquiry (paragraphs 8.01-8.09) and depending on the circumstances, will usually not be as strong in the more specialised world of company investigation; and where they are, then the Inspector has a discretion to sit in public. Accordingly, the Commission would recommend no change in the statutory position (silence) on this point. [Paragraph 2.42]

Part II Chapter 3 – Commission to Inquire into Child Abuse

13.04 The Commission is of the view that the way in which inquiry officers carry out their functions is a useful precedent in deciding the scope of an investigator’s role in the context of a tribunal of inquiry, or, for that matter, other inquiries. [Paragraph 3.26]

13.05 The way in which the *Laffoy Commission* proposes to conduct research projects in relation to the historical and social context of child abuse and the way in

which inquiries elsewhere have held seminars is an interesting strategy for looking to the future and making recommendations. The Commission recommends that such a strategy be adopted by future (and where appropriate existing) inquiries in order to work towards making recommendations to alleviate or reduce the likelihood of the particular mischief or malfunction from occurring in the future. [Paragraph 3.48].

Part III Chapter 4 – Parliamentary Inquiries

13.06 It seems that the character of the Oireachtas cannot be altered by a re-drafting of the 1997 Act, however clear. Accordingly, the decision of the Supreme Court in the *Abbeylara* case, indicates a danger that any such re-drafting would be unconstitutional. Therefore, it seems to the Commission that even if this is desirable it would be unwise to recommend legislation which would purport to authorise the Oireachtas to constitute a committee which is to carry out an *Abbeylara*-type inquiry (unless of course such legislation is to take the form of a constitutional amendment. On this last possibility – a constitutional amendment – it is not for the Commission to comment.) [Paragraph 4.51]

13.07 On the other hand, it seems clear enough (from the points made in paragraphs 4.52- 4.53) that either the existing 1997 Act or some inherent power, akin to that which applies to ordinary persons, already authorises the Oireachtas to hold a wide category of inquiries, apart from those which are of the type excluded in *Abbeylara*. On balance, the Commission considers that an amendment to the 1997 Act of this type is not necessary. [Paragraph 4.54]

Part IV Chapter 5 – Tribunals of Inquiry

13.08 The Commission takes the view that, with the plethora of legal issues which can arise before a tribunal and where the good name and reputation of persons may be at stake, it is usually prudent to appoint a judge or other eminent lawyer as chairperson of the inquiry. [Paragraph 5.14]

13.09 The Commission's conclusion, is that subject to exceptional cases and the point made in paragraph 5.12, it will usually be best for the chairperson to be a (serving or retired) judge. [Paragraph 5.21]

13.10 The Commission recommends that there is no need for legislation requiring the chairperson to be a judge, but that the convention that the chairperson should usually be a (serving or retired) judge ought to continue to be respected. [Paragraph 5.24]

13.11 The Commission does not recommend any change in the law in respect of multi-member tribunals. Against the rare occasion when it will be considered necessary, a tribunal should be capable of being set up with as many members, from as many different fields as are considered appropriate to the matters under investigation. [Paragraph 5.27]

13.12 The Commission proposes that section 4(7) of the 2002 Act should be amended as follows:

“(7) An appointment under subsection (3), or a designation under subsection (5), of this section:

(a) shall not affect decisions, determinations or inquiries made or other actions taken by the tribunal concerned before such appointment or designation, and

(b) shall not be made unless the tribunal is satisfied that no person affected by the proceedings of the tribunal would be unduly prejudiced thereby.” [Paragraph 5.37]

13.13 The Commission recommends no substantive change to the 1921-2002 legislation since it already allows for the appointment of assessors and multi-member tribunals. In relation to assessors, the Commission recommends that a similar provision to that contained in section 2(2) of the 1979 Act ought to be included in other statutes providing for public inquiries, where this has not already been done. [Paragraph 5.50]

13.14 The Commission recommends that (unless this is impossible to determine in advance) the terms of reference of an inquiry should make it clear whether the inquiry should be exhaustive or whether, as will usually be the case, a sufficient number of representative cases or instances of malfunction, maladministration or the like should be examined. [Paragraph 5.56]

13.15 The Commission believes that a tribunal might well have some useful contribution to make to the development of its terms of reference. Accordingly, the Commission propose the adding on at the end of the present subsection 1(A)(1) of the 1921 Act, the following form of words: “...provided that without prejudice to the generality of subsection (1)(b), the tribunal shall consider, otherwise than in public, within four weeks of commencing its work, whether to exercise its power to make a request under subsection (1)(b)”. [Paragraph 5.66]

13.16 The Commission is of the view that, in order to expedite the work of the tribunal, there should be a restricted time period during which its decisions are open to review. Since interested parties are likely to be represented before the inquiry, they are likely to be almost immediately aware of decisions which affect them and, therefore, know, at a very early stage, whether they want to challenge these decisions. The Commission therefore recommends that a statutory time-limit of 28 days should be placed on the institution of judicial review proceedings in the context of public inquiries. In case of any possible constitutional infirmity to this, the Commission recommends that the High Court should be afforded discretion to extend this time-period where it considers that there is a “good and sufficient reason for doing so”. [Paragraph 5.76]

13.17 The Commission recommends that in order to allow a tribunal itself to refer a controversial point to the courts the case stated procedure contained in

section 25 of the *Commission to Inquire into Child Abuse Act 2000* be inserted into the *Tribunals of Inquiry Acts 1921-2002*. The only change that the Commission would recommend in respect of section 25 is that the court should be afforded discretion to hear the application in public, rather than in private, as is currently the case. The new section would provide as follows:

(1) The tribunal may, whenever it considers appropriate to do so, apply in a summary manner to the High Court for directions in relation to the performance of any of the functions of the tribunal for its approval of an act or omission proposed to be done or made by the tribunal for the purposes of such performance.

(2) On an application to the High Court for the purposes of subsection (1), that Court may—

(a) give such directions as it considers appropriate (including a direction that the tribunal should make a report and, if that Court considers it appropriate, an interim report, to it at or before such times as it may specify in relation to the matter the subject of the application or any related matter),

(b) make any order that it considers appropriate,

(c) refuse to approve of an act or omission referred to in subsection (1).

(3) The tribunal shall comply with a direction or order of the High Court under this section and shall not do any such act as aforesaid or make any such omission as aforesaid if the High Court has refused to approve of it.

(4) The High Court shall give such priority as it reasonably can, having regard to all the circumstances, to the disposal of proceedings in that Court under this Act.

(5) The Superior Court Rules Committee may, with the concurrence of the Minister for Justice, Equality and Law Reform, make rules to facilitate the giving of effect to subsection (4). [Paragraph 5.83]

13.18 In relation to expedition of proceedings, the Commission is of the view that it is best to state the provision expressly. Accordingly, the Commission recommends that a similar provision should be inserted into the *Tribunals of Inquiry Acts 1921-2002*. This provision would replicate section 25(4). [Paragraph 5.86]

13.19 Against the possibility that a tribunal is struggling to fulfil its mandate after a time when circumstances are such that it is unlikely to do so, the Commission recommends that the 1921-2002 Acts be amended to allow for the termination of a tribunal. We suggest the following form of words: “Where at any time it has been resolved, for stated reasons, by each Houses of the Oireachtas that

it is necessary to terminate the work of the tribunal, the relevant Minister or the Government may by order dissolve the tribunal”. [Paragraph 5.92]

Part V Chapter 6 – Powers of the Tribunal

13.20 The Commission recommends that any re-draft of the tribunals of inquiry legislation bestows express power to establish a tribunal. [Paragraph 6.05]

13.21 The Commission is not of the view that the sweeping nature of section 1(2)(d) to catch acts of publication is problematic. Rather, the Commission see it as a definite advantage, and, since the same provision would clearly encompass the specific offences recommended by the Commission in its *Report on Contempt of Court*, the Commission thinks that the best course of action would be to retain section 1(2)(d). [Paragraph 6.30]

13.22 The Commission recommends that section 1(2)(e) of the 1921 Act should be retained. [Paragraph 6.32]

13.23 The Commission recommends the repeal of section 1(2)(f) of the 1921 Act (as amended). [Paragraph 6.38]

13.24 The Commission takes the view that section 4 of the 1997 Act is constitutional. And since its utility is difficult to gainsay, we would not recommend that any substantive change be made in relation to section 4 of the 1997 Act. We shall however, suggest (at paragraph 6.103) a largely presentational change. [Paragraph 6.73]

13.25 The Commission recommends that “the powers, rights and privileges” of tribunals of inquiry continue to be defined by reference to the powers of the High Court, but without the limitation inherent in the phrase (presently in section 1(1) of the 1921 Act) “on the occasion course of an action”. [Paragraph 6.88]

13.26 The Commission recommends that a catch-all provision be retained, in substantially the same terms as section 4 of the 1979 Act, but subject to some minor modifications. We tentatively recommend the following wording:

“A tribunal may make such orders as are reasonable and necessary for the purposes of its functions.” [Paragraph 6.105]

13.27 The Commission recommends that what is at present two provisions – section 1(1) of the 1921 Act and section 4 of the 1979 Act - be combined and presented in the form of three parts: the first would bestow express power to establish a tribunal as recommended in paragraph 6.05. This would be followed by section 4 of the 1979 Act, as amended, and then the more specific powers presently in section 1(1) of the 1921 Act would follow, though prefaced by the words “without prejudice to the generality of the foregoing.” The result would be along the following lines:

“(1)(a) Where it has been resolved by both Houses of the Oireachtas that it is expedient that a tribunal be established for inquiring into a definite matter described in the resolution as of urgent public importance, in pursuance of this resolution a tribunal may be appointed for the purpose either by the Government or a Minister and the instrument supplemental thereto may provide that this Act shall apply.

(b) A tribunal may make such orders as are reasonable and necessary for the purposes of its functions. Without prejudice to the generality of the foregoing, it may make orders:

- (i) enforcing the attendance of witnesses and examining them on oath, affirmation, or otherwise;
- (ii) compelling the production of documents;
- (iii) (subject to the rules of court) issuing a commission or request to examine witnesses abroad;

and a summons signed by one or more of the members of the tribunal may be substituted for and shall be equivalent to any formal process capable of being issued in any action for enforcing the attendance of witnesses and compelling the production of documents.” [Paragraph 6.107]

13.28 The Commission proposes the insertion of the following provision (located next to but separate from the provision dealing with powers as suggested in paragraph 6.106):

“In the exercise of its functions, a tribunal shall have all such powers, rights and privileges as are vested in the High Court or a judge of that court provided that the tribunal does not enjoy any power to attach or commit or otherwise to impose punishment for contempt.” [Paragraph 6.109]

13.29 The Commission proposes legislation along the following lines, to replace section 1(3) and (4) of the 1921 Act and section 6(7) of the 2002 Act, which deal with privileges and immunities:

(1) A person who provides information, evidence, documents or other material to a tribunal, whether pursuant to an order or request of the tribunal or otherwise, is entitled to the same immunities and privileges in respect of such information, evidence, documents or other material as a witness before the High Court.

(2) If a person who is providing information, evidence, documents or other material to a tribunal or to an investigator, as the case may be, in relation to a particular matter is directed to cease giving such information, evidence, documents or other material, then subsection (1)

shall not apply in respect of anything said or given by that person after the giving of the direction unless and until the tribunal withdraws the direction.

(3) For the purposes of subsections (1) and (2) “information, evidence, document or other material” includes data, all forms of writing and other text, images (including maps and cartographic material), sound, codes, computer programmes, software, databases and speech. [Paragraph 6.120]

13.30 The Commission applauds the practice of modern tribunals of inquiry of generally requesting discovery of documents by reference to categories, and of giving reasons in respect of each. However we do not recommend codification of rules in relation to the powers conferred on tribunals in connection with the discovery and production of documents. [Paragraph 6.127]

13.31 The Commission recommends that provision should be made to allow a tribunal to be conferred with legal personality. Such a provision (based on the model provided by the *Commission to Inquire into Child Abuse Act 2000*) might read as follows:

- (1) An instrument to which this Act applies may provide that the tribunal shall be a body corporate with perpetual succession and the power to sue and be sued in its corporate name.
- (2) When the relevant minister or the Government (as the case may be) is satisfied that the tribunal has completed the performance of its functions, or that it is otherwise expedient to do so, such Minister or the Government may by order dissolve the tribunal and may include in the order such incidental, ancillary or consequential provisions as are considered necessary or expedient.
- (3) When an order under subsection (2) is proposed to be made, a draft of the order shall be laid before each House of the Oireachtas, and the order shall not be made until a resolution approving of the draft has been passed by each such House. [Paragraph 6.137]

Part VI Chapter 7 – Constitutional Justice

13.32 The Commission’s view is that (subject to the overriding obligation to proceed under the Constitution, as determined by the courts) representation should be granted only to a person who has some right external to the proceedings of the tribunal, which maybe prejudicially affected by the evidence it hears or the finding it reaches. The fact that the person has made allegations, however serious to or before the tribunal will not generally suffice. [Paragraph 7.30]

13.33 The Commission endorse the practice of granting limited representation (in both senses: see paragraph 7.31). [Paragraph 7.32]

13.34 Where an identifiable group can point to specific factors which demonstrate that its members have been affected more seriously than the general public, it may seem appropriate that that group should be represented before an inquiry. However, this is not required from a legal or constitutional viewpoint, under the test (however stretched), discussed in paragraph 7.18. Rather, if representation is to be granted on the basis of public sentiment or sympathy, this is very subjective and a matter of policy and it is certainly not a legal requirement. Accordingly it should be decided carefully in the circumstances of each case and our only recommendation is that it should not be done automatically but only after due consideration of all the issues. [Paragraph 7.34]

13.35 The Commission recommends that section 2 (b) be re-drafted, as follows:

(b) A tribunal shall have the power to grant representation, by counsel, solicitor, or otherwise;

(c) Save in exceptional circumstances, a tribunal shall only exercise such power where a person's legal or constitutional rights are significantly affected by its proceedings or any part of its proceedings; and

(d) The tribunal shall have the power to refuse to grant such representation. [Paragraph 7.36]

13.36 Whenever appropriate, groups of alleged malefactors and victims alike should pool their representation. In determining whether this is appropriate and deciding on the grant of representation, factors such as common interest and costs, should be considered by the inquiry. [Paragraph 7.41]

13.37 The Commission recommends that in appropriate cases, witnesses may either be issued with notices of potential criticism; or be re-called (or provide a written statement) in order to address potential criticism that has come to light since they gave evidence. [Paragraph 7.49]

13.38 The Commission recommends that an inquiry ought to be flexible and discriminating in how it applies the rules of constitutional justice, particularly the facility to cross-examine witnesses. [Paragraph 7.56]

13.39 The Commission does not recommend that formal codes of procedure be established for inquiries. [Paragraph 7.64]

Part VII Chapter 8 – Publicity and Privacy

13.40 In drafting legislation, care should be taken as to whether to emphasise a pro-publicity or a pro-privacy approach; or whether, as we consider will often be best, the legislation should allow a good deal of flexibility as regards whether an inquiry operates largely in public or largely in private; and also as to the point at which it moves from private to public session. Consideration should also be given as whether any such flexibility should be exercised either in the inquiry's terms of reference or left to be settled by the inquiry as it goes along. [Paragraph 8.09].

13.41 In section 1(1) (c) of the 1921 Act, the word "abroad" unnecessarily narrows the ability of an inquiry to "examine on commission" and it would appear not to extend to examining on commission an ill or elderly witness within the jurisdiction, in a hospital or a more suitable place than the normal tribunal forum. Accordingly, the Commission recommends that the word abroad be omitted from section 1(1) (c) of the 1921. [Paragraph 8.41]

13.42 The Commission recommends that section 2 of the 1921 Act be amended to include, as follows:

"(x) The obligation imposed on the tribunal by subsection (a) shall be fulfilled by the circulation to the public present at the proceedings of a copy, in writing, of the statement that is being adduced as evidence, where:

(i) a witness is called to give oral evidence and the written statement forms only part of his or her evidence; or

(ii) the written statement of a witness is not in dispute between those persons who have been authorised by the tribunal to be represented, under subsection (b), at the part of the proceedings at which it is being adduced and the tribunal does not propose to call the witness to give oral evidence; or

(iii) a Commissioner, appointed by the tribunal under section 1(1) (c) of this Act, has examined a witness on Commission and obtained a written statement of such examination." [Paragraph 8.44]

13.43 In relation to the broadcasting of tribunal proceedings, the Commission proposes that some guidance be given to the chairperson of an inquiry. This may for convenience be in the context of the 1921-2002 legislation. The Commission recommends a new subsection to section 2:

(x) In deciding whether to allow filming, recording, or broadcasting of the proceedings of the tribunal (subject to an appropriate written protocol) the tribunal shall have regard to the following considerations:

- (i) the interests of the general public, particularly the right to have the best available information on matters of urgent public importance;
- (ii) the proper conduct and functioning of the tribunal proceedings;
- (iii) the legitimate interests of the participants;
- (iv) the risk of prejudice to criminal proceedings;
- (v) any other relevant considerations.” [Paragraph 8.60]

Part VIII Chapter 9 – The Information Gathering Stage

13.44 The Commission does not recommend any change to the current position that (given the general low-key character of the information gathering stage) sworn statements cannot be required at this stage. However, the Commission does support the policy of conferring compellability powers upon investigators, outlined at paragraph 9.31 and 9.52. [Paragraph 9.44]

13.45 The Commission is in favour of the legislation, insofar as it grants powers of compulsion to investigators, and would not wish to recommend any change from this position. [Paragraph 9.52]

13.46 It seems to the Commission that in operating the provisions under the 2002 Act, tribunals of inquiry should respect the distinction between information and evidence. Of course, it is right and proper that there should be no obligation to avail of the facility provided by the 2002 Act, since it is merely a tool to be used where the chairperson thinks it appropriate. Investigators have rightly been given the power to compel persons to provide them with information, documents and answers to their questions. However, the Commission believes that although in almost all inquiries it will be extremely useful, the appointment of investigators should not detract from the tribunal’s responsibility to determine, for itself the manner in which its own inquiry will proceed, by making decisions concerning relevance and lines of inquiry to be pursued. [Paragraph 9.53]

Part IX Chapter 10 – Alternatives to Public Inquiries

13.47 The Commission recommends that legislation be enacted providing for a private, low-key inquiry which focuses on the wrong or malfunction in the system and not the wrong-doer. The Commission would expect that such an inquiry will not attract the rules of constitutional justice. [Paragraph 10.16]

Part X Chapter 11 – Downstream Proceedings

13.48 At present, under common law, the report of an inquiry is admissible in subsequent civil proceedings as an exception to the hearsay rule. However, it seems well to put the matter beyond doubt by a statutory provision. The other question is what weight should be attached to such a document. The Commission can see no reason why the report of an inquiry (which will be as thorough and exacting as a company inspection, and to which arguably a more stringent requirement of constitutional justice is attached) should not be given the same weight as a company inspector's report. Accordingly the Commission recommends that an equivalent provision to that of section 22 of the *Companies Act 1990* be inserted into the 1921 to 2002 legislation. [Paragraph 11.14]

13.49 The Commission recommends that section 5 of the 1979 Act and section 8 of the 2002 should be replaced, as follows:

(1) Information, evidence, documents or other material provided by a person to or before a tribunal (or an investigator, as the case may be) whether pursuant to an order or request or otherwise shall not be admissible as evidence against that person in any criminal proceedings (other than proceedings in relation to an offence under section [x] and perjury in respect of such information, evidence, documentation or other material);

(2) Subsection (1) shall not apply in respect of anything provided by a person after the tribunal (or investigator, as the case may be) has directed that the person cease providing such information, evidence, documents or other material, unless and until the direction is withdrawn;

(3) For the purposes of subsections (1) and (2) “information, evidence, document or other material” includes data, all forms of writing and other text, images (including maps and cartographic material), sound, codes, computer programmes, software, databases and speech. [Paragraph 11.32]

13.50 The Commission recommends that the offences before a tribunal of inquiry be re-drafted so as to create ‘hybrid offences’, in order to minimise the danger that adverse publicity should prevent the trial from proceeding. [Paragraph 11.43]

13.51 The Commission does not recommend any amendment to either section 2 or 3 of the 2002 Act in this respect of prejudicial pre-trial publicity. [Paragraph 11.56]

Part XI Chapter 12 – Costs

13.52 The drafting of the 1997 version seems a little cumbersome and loose in that there are two elements to which the tribunal is to “hav[e] regard”, namely “the findings of the tribunal and all other relevant matters”. Then immediately afterwards comes the phrase “(including the terms of the resolution...relating to the establishment of the tribunal or failing to co-operate with ...or knowingly giving false...information to the tribunal)”. It is not clear which one or other (or both) of the phrases within brackets is to connect up with which one or other or both of the elements immediately preceding the brackets. A form of words which avoided this possible uncertainty would be less open to misinterpretation. Clarification could be achieved by linking the phrase “findings of the tribunal” with “the terms of the resolution passed by each House” so to make it clear that the findings referred to are the findings as to the substantive issue before the tribunal. To achieve this, the first part of subsection (1) should, we recommend, be re-organised and re-drafted as indicated below. Secondly, it seems only fair and, indeed realistic to the Commission that, among the factors to be taken into account in awarding costs, the means of a party should be stated explicitly. We propose the following draft:

“Where a tribunal...is of the opinion that having regard to:

- (i) the findings of the tribunal in relation to its subject-matter as indicated in the terms of the resolution passed by each House of the Oireachtas relating to the establishment of the tribunal;
- (ii) and all other relevant matters (including failing to co-operate with or provide assistance to, or knowingly giving false or misleading information to the tribunal and the means of a party),

there are sufficient reasons...”

The Commission considers that the later part - from the words “there are sufficient reasons rendering it equitable to do so”...to the end - requires no change from the present law, quoted in paragraph 12.45. [Paragraph 12.46]

13.53 Of the tentative suggestions towards minimising costs outlined in the preceding paragraphs, the Commission would like, firstly, to emphasise that the inquiry itself should give considerable thought to what level of representation it engages for particular tasks. The Commission is of the view that there is some scope for a closer match between the difficulty of the work and the ability and experience (and therefore cost) of the lawyer retained to do it. Secondly, we feel that sensible arrangements regarding the division of subject-matter and the sequence in which topics are taken, as they have been adopted in some recent tribunals, should be followed, so as to minimise wasted time. Thirdly, the Commission suggests that a means of calculating legal costs and expenses be devised, which is more appropriate to pay for guaranteed employment for several months or years. (Such a formula would naturally take it into account that a barrister who has been employed full-time by a tribunal, for some time, cannot immediately resume private

practice at the same level at which he or she left it, because the solicitors who send him or her work will have got used to briefing other barristers). Fourthly, it is also suggested that a 'scheme' for payment on a piece-work basis, similar to that highlighted in paragraph 12.53, be put in place where it is appropriate. Finally, to summarise a recommendation outlined in paragraphs 7.37-7.41, where possible legal representation should be pooled. [Paragraph 12.62]

APPENDIX A LIST OF INQUIRIES, INSPECTIONS AND INVESTIGATIONS

The following list of past and present inquiries is by no means complete. In the case of many of the inquiries, further details may be found in the more specialised chapters:

Non-statutory Inquiries:

- Report of the Expert Group on the Blood Transfusion Service Board, Chaired by Hederman O'Brien, (Pn 1538 1995) (the forerunner to the *Findlay* and *Lindsay Tribunals*, below);
- Report of the Inquiry into the conduct of a District Court Judge pursuant to the provisions of the Courts of Justice (District Court) Act 1946, (conducted by Mr Justice Francis Murphy, 2000) (an inquiry into allegations made by certain members of the gardaí that Judge Donal Ó Buachalla had acted improperly in his handling of the licensing of Jack White's Inn);
- Chief Justice's Report on the Role of the Judiciary (14 April 1999) published in the *Irish Times* April 17, 1999; The Report of the Department of Justice, Equality and Law Reform Arising from the Early Release from Prison of Philip Sheedy (19 April 1999) published in the *Irish Times* April 21, 1999; and see also O'Dowd "The Sheedy Affair" *Contemporary Issues in Irish Law & Politics* No 3 103;
- The Commission to Inquire into Child Abuse. This was established on an administrative basis in May 1999, chaired by Ms Justice Mary Laffoy (now on a statutory footing see Chapter 3);
- The Commission of Inquiry into the 1947 Dublin-Monaghan bombing. This was set up in January 2000. It is now under the chairmanship of Mr Justice Henry Barron. ("*Barron Inquiry*");
- Post Mortem Inquiry; chaired by Ms Anne Dunne S.C ("*Dunne Inquiry*") (Set up in April 2000) (The 'Progress Report to the Minister for Health and Children' was published by the Department of Health and Children in 2002.);
- Independent review conducted by Shane Murphy SC into allegations of unethical and criminal behaviour in the Donegal Division of the Garda Síochána (the forerunner to *Morris Tribunal*, below);
- Inquiry into the treatment of allegations of child sex abuse by clergy of the Ferns diocese, under the chairmanship of Mr Justice Francis Murphy ("*Murphy Inquiry*") (Set up in October 2002 following a preliminary investigation by and recommendation from George Birmingham SC).

Air, Sea, Railway Inquiries/Investigations:

- Report of the Investigation into the Accident on the CIE Railway at Buttrvant, Co. Cork on the 1st August 1980, by J V Feehan and Declan Budd (Prl 9698 April 1981);
- Accident to Reims Cessna F.182 Q in the Blackstairs Mountains, Co. Wexford on 7th September, 1983 (Department of Communications 1984);
- Report of the Investigation into the accident on the CIE railway near Cherryville Junction, Co. Kildare on 21st August, 1983, by J V Feehan and Declan Budd (Dublin Stationery Office No T28 1985).

Parliamentary Inquiries:

- The 1970 Public Accounts Committee Investigation into the fate of the grant-in-aid for Northern Ireland;
- Report of the Sub-Committee of the Select Committee on Legislation and Security (Pn 1478 1995) (The investigation into the fall of the 1992-94 Fianna Fail-Labour Coalition Government);
- Interim Report of the Sub-Committee on the Mini-CTC Signalling Project (Pn 11426 2002);
- First Report Parliamentary inquiry into D.I.R.T: first report: examination of the report of the Comptroller and Auditor General of investigation into the administration of deposit interest retention tax and related matters during 1 January 1986 to 1 December 1998. (Pn 7963 1999);
- Parliamentary inquiry into D.I.R.T: final report: examination of the report of the Comptroller and Auditor General of investigation into the administration of deposit interest retention tax and related matters during 1 January 1986 to 1 December 1998 (Dublin Stationery Office No D/R/01/01 2001);
- Report of the Joint Committee on Justice, Equality, Defence and Women's Rights on the work of the Sub-Committee on the Abbeylara Incident, Dublin: Stationery Office, 2002. ("*Abbeylara*").

Companies Act Inquiries

- Siuicre Eireann c.p.t., Sugar Distributors (Holdings) Limited, Gladebrook Company Limited, I.S.M. Investments Limited: investigation under section 14 of the Companies Act 1990: Report by Maurice Curran, Solicitor (Dublin Stationery Office No I/206 1991);
- Siuicre Eireann c.p.t., Sugar Distributors (Holdings) Limited, Gladebrook Company Limited, I.S.M. Investments Limited: investigation under section 8 of the Companies Act 1990: Report by Ciaran Foley SC (Dublin Stationery Office No I/206/D 1992);
- Chestvale Properties Limited and Hoddle Investments Limited: Investigation under Section 14 (1), Companies Act 1990 Final Report, by John A. Glackin (Solicitor) (Dublin Stationery Office No I/212/A 1993);
- Final report of the inspector into the affairs of County Glen plc pursuant to section 8 of the Companies Act 1990: Frank Clarke SC: (Dublin Stationery Office No I/217A 1994);

- Report of the Inspectors appointed to enquire into the affairs of Ansbacher (Cayman) Limited: published by Order of the Court made on 24 June 2002 (Dublin Stationery Office No I/275 2002);
- Report on certain shareholdings in Bula Resources (Holdings) PLC by Lyndon MacCann (Dublin Stationery Office No I/247 1998);
- An Enquiry into Irish Estates Limited, Stationary Office 23 October 1963;
- Report on certain shareholdings in Bula Resources (Holdings) PLC;
- High Court Inspectors Inquiry into the Affairs of Ansbacher (Cayman) Limited, ("The Ansbacher Report") published on 6 July 2002.

Tribunals of Inquiry

- Report of the Tribunal on Prices, 1927 (Chairman: Senator S. L Brown);
- Report of the Ports and Harbours Tribunal, 1930 (Chairman: H. B. O'Hanlon);
- Shooting of Timothy Coughlan at Woodpark Lodge, Dartry Road, on 28th January, 1928 : tribunal of inquiry appointed by the Minister for Justice pursuant to resolution of both Houses of the Oireachtas to inquire into the facts and circumstances : proceedings of the Tribunal and minutes of evidence;
- Report on the Proposal that Maize Meal and Maize Products for sale in Saorstát Éireann should contain a definite proportion of home grown grain ("Grain Inquiry Tribunal") (P No 539);
- Interim report of the tribunal to inquire into the marketing of butter, 1931
- Pig industries tribunal : Interim report, 1933;
- Report of the fruit and vegetables tribunal on the grading, packing, marking and marketing of fruit and vegetables, 1940;
- Reports of the Town Tenants (occupation tenancies) tribunal (Chairman: The Hon. Mr. Justice Black);
- Report of the Tribunal of Inquiry into the fire at Pearse Street, Dublin, 1937;
- Reports of the Tribunal of Inquiry on Public Transport, 1941;
- Report of the Tribunal of Inquiry into the Fire at St. Josephs Orphanage, Main Street, Cavan, 1943 (P 6144);
- Report of the Tribunal of Inquiry into dealings in Great Southern Railways stocks, 1940 (Chairman: A K Overend);
- Report of the tribunal appointed by the Taoiseach on the 7th day of June, 1946, pursuant to resolution passed on the 5th day of June, 1946, by Dáil Éireann and Seanad Éireann: (Monaghan Curing Company), 1946;
- Report of the Tribunal appointed by the Taoiseach on November 7 1947 (P No 8576) (sale of Locke's distillery);
- Report of the Tribunal of inquiry into cross-channel freight rates, 1959;
- Death of Liam O'Mahony: Report of the Tribunal appointed by the Minister (1968 Pr 9790);
- Inquiry into the programme on illegal money lending ("Seven Days") broadcast on television by Radio Telefís Éireann on 11th November 1969 (1970);
- Report of the Tribunal appointed by the Taoiseach on 4 July 1975 (PrI 4745) (allegations against Minister for Local Government);
- Report of the Tribunal of Inquiry: Disaster at Whiddy Island, Bantry, Co. Cork ("*Whiddy Inquiry*") (1980 Pl 8911);
- Report of the Tribunal of Inquiry; Fire at the Stardust, Artane, Dublin ("*Stardust Inquiry*") (Pl 853);

- Report of the Tribunal of Inquiry: The “Kerry Babies” case (1985 Pl 3514) (“*Kerry Babies Inquiry*”);
- Report of the Tribunal of Inquiry into the Beef Processing Industry 1994 (Prl. 1007) (allegations of favouritism and malpractice in the beef industry) (“*Beef Tribunal*”);
- Report of the Tribunal of Inquiry into the Blood Transfusion Service Board (Pn 3695) (“*Finlay Tribunal*”);
- Report of the Tribunal of Inquiry (Dunnes Payments) (“*McCracken Tribunal*”), set up on February 6, 1997, under the Chairmanship of Mr Justice Brian McCracken (Pn 4199);
- The Tribunal of Inquiry into Certain Payments to Politicians (“*Moriarty Tribunal*”), set up on September 18, 1997, under the Chairmanship of Mr Justice Michael Moriarty;
- The Tribunal of Inquiry into Certain Planning Matters and Payments (“*Flood Tribunal*”), set up on November 4, 1997, under the Chairmanship of Mr Justice Feergus M. Flood;
- Report of the Tribunal of Inquiry into the Infection with HIV and Hepatitis C of Persons with Haemophilia and Related Matters (2002 Pn 12074) (“*Lindsay Tribunal*”);
- Tribunal of Inquiry into certain Garda activities in Donegal, set up on March 28, 2002, under the chairmanship of Mr Justice Frederick Morris (established following the preliminary review by Shane Murphy SC, noted above) (“*Morris Tribunal*”);
- Tribunal of Inquiry into the Facts and Circumstances Surrounding the Fatal Shooting of John Carthy at Abbeylara, Co. Longford on 20 April, 2000, set up on April 18, 2002, under the chairmanship of Mr Justice Robert Barr (“*Barr Tribunal*”).

APPENDIX B THE SHIPMAN INQUIRY WRITTEN PROTOCOL

SECOND PROTOCOL GOVERNING THE RECORDING OR BROADCASTING OF THE SHIPMAN INQUIRY (20 September 2002)

Introduction

1. The Shipman Inquiry is an independent public inquiry established by the Government under the terms of the Tribunals of Inquiry (Evidence) Act 1921.
2. Permission to record and broadcast stages 2, 3 and 4 of Phase 2 of the Shipman Inquiry proceedings is granted on the terms set out in this protocol. The protocol relates to the recording or broadcasting of those parts of the Inquiry only. Live broadcasting will not be permitted. There will be a time delay of 60 minutes between recording and broadcast. Permission is given solely for the purpose of recording and broadcasting the proceedings on film and sound or by sound only. The Chairman may vary this protocol if the interests of the Inquiry so require.

Authority

3. The Chairman of the Inquiry is under no obligation to extend filming or recording facilities to broadcasters. However, recognising the public interest in the issues under investigation, it has been decided to allow the recording and broadcasting of those parts of the Inquiry proceedings specified in paragraph 2 above.
4. At all times the Chairman has the power to instruct that the evidence given by certain witnesses or during specific parts of the proceedings should not be recorded or broadcast. For the avoidance of doubt, this covers both sound and vision. The power will be exercised only if the Chairman considers that there is good reason for doing so. The Chairman's decision on this matter will be final.
5. If, at any point, the Chairman considers that broadcasting or recording is interfering with the proper conduct of the Inquiry then the Chairman may withdraw the permission to record and/or broadcast either temporarily or permanently.

Approval Criteria

6. Applicant companies must seek permission from the Chairman of the Inquiry to take part in this project. The Chairman's decision as to whether or not to grant such permission to any individual applicant company will be final. An applicant company is defined as any company seeking permission to record and/or broadcast the Inquiry proceedings.
7. Companies seeking permission must, as a minimum, meet the requirements of the 1990 and 1996 Broadcasting Acts and as appropriate, the codes of practice and guidance issued by The Broadcasting Standards Commission, The Independent

Television Commission and The Radio Authority. In cases of doubt, the Inquiry may seek advice from the relevant bodies or authorities.

Provision of Pictures and Sound

8. All arrangements for the recording of pictures and sound will be made by the applicant company at no cost to the Inquiry. In order to record the proceedings a switched feed from the Inquiry's sound and vision system will be supplied. This will be the only means by which a recording can be made. The applicant company will not be permitted to use their own cameras or lighting equipment. Any other additional equipment necessary to record or broadcast the proceedings will be provided by the applicant company and at no cost to the Inquiry. Only one feed per company will be provided.

9. The Inquiry accepts no responsibility for the overall quality of the feed and will not make any recompense should the feed be disrupted for technical or any other reasons. In the event of disruption, best endeavours will be made to resolve the problem as soon as practical, but the proceedings of the Inquiry will not be interrupted save as directed by the Chairman.

10. All equipment and cabling at Manchester Town Hall is left at the applicant company's own risk. The Inquiry accepts no responsibility for any damage, theft or loss that may occur.

Accommodation...

Facilities...

Coverage

17. Sound and images will be provided on a switched feed basis from the Inquiry's cameras whose operators will adopt the following rules:

- The general principle is that camera views and sound will only be of the individual speaking. These are likely to be confined to the Chairman of the Inquiry, Counsel to the Inquiry, legal representatives of other represented parties and the witness. The Chairman reserves the right to direct that camera views and sound include other speakers if appropriate.
- No camera views will be taken in such a way that allows Inquiry and/or other parties' documents to be read.
- If a witness becomes distressed then the camera will immediately switch to a general fixed wide-angle view of the chamber.
- When the hearing is not in session the image will be of a fixed wide-angle view of the chamber. No sound will be relayed.
- No filming will take place except during public hearings of the Inquiry.
- Camera views will not be taken of members of the public in the public gallery, nor should views of members of the public elsewhere within the hearing chamber be recorded or broadcast.
- In the event of a disturbance the cameras will not give prominence to that disturbance but will continue to concentrate, as appropriate, on the Chairman of the Inquiry, Counsel to the Inquiry, witness or the legal representative. If the disturbance persists then, depending on the circumstances, the camera will either switch to the fixed wide-angle view of the chamber or sound and vision will temporarily cease.

Broadcasting

18. While recognising the editorial independence of broadcasters the Inquiry expects that material will be used in such a way as to give a fair reflection of the nature of the proceedings and the issues under discussion.

19. The Chairman may instruct that certain parts of recorded material must not be recorded or broadcast. In such circumstances the relevant section of the recording must be physically erased and the action confirmed to the satisfaction of the Inquiry.

20. It is a condition of the entitlement to record or broadcast that none of the recorded material may be used in humorous, satirical or fictional drama programmes, for the purpose of advertising or with any sound other than that recorded at the time, except for simultaneous translation into a foreign language.

21. Signatories to the protocol may place sound and footage on a general news website for up to seven days after recording has taken place, but may not place it on any other website under their control; they must provide with any such material a clear statement that footage of The Shipman Inquiry may not be moved to any other website without the written permission of the Chairman.

22. Material proposed to be used subsequently in documentary format must be submitted to the Chairman who reserves the right to request any material be withdrawn. If the Shipman Inquiry is no longer in being then permission must be sought from the Department of Health who are the sponsoring Government Department for the Inquiry. Permission of the witnesses concerned must also be sought if footage is to be used in documentaries or programmes other than those about the progress of the Inquiry.

23. If requested by the Chairman, the applicant company must make available to the Inquiry, free of charge, a VHS video tape or sound recording tape copy of any material broadcast by that company which includes a recording of the Inquiry's proceedings.

Copyright

24. In accordance with the Copyright, Designs and Patents Act 1988, copyright of any recording of the Inquiry proceedings rests with The Crown.

Abuse

25. Failure to comply with any of the terms set out in this protocol may result in permission being removed for that company to record or broadcast proceedings and may have the same effect as being in contempt of court

APPENDIX C DRAFT LEGISLATION

Number __ of 2003

TRIBUNALS OF INQUIRY BILL, 2003

ARRANGEMENT OF SECTIONS

Section

1. Purpose.
2. Interpretation.
3. Establishment, powers and functions.
4. Enforcement.
5. Amendment.
6. Termination.
7. Public Proceedings.
8. Legal Representation.
9. Membership.
10. Reserve Members.
11. Investigators.
12. Offences before the tribunal.

13. Offences before Investigators.
14. Privileges and Immunities.
15. Non-admissibility in Criminal Proceedings.
16. Admissibility in Civil Proceedings.
17. Reports of Tribunals.
18. Legal Personality.
19. Directions of the High Court.
20. Judicial Review Time Limits.
21. Costs.
22. Repeals.
23. Short Title and Commencement.

ACTS REFERRED TO

Tribunals of Inquiry (Evidence) Act, 1921	1921, c. 7
Tribunals of Inquiry (Evidence) (Amendment) Act, 1979	1979, No. 3
Tribunals of Inquiry (Evidence) (Amendment) Act, 1997	1997, No. 42
Tribunals of Inquiry (Evidence) (Amendment) Act, 1998	1998, No. 11
Tribunals of Inquiry (Evidence) (Amendment) (No. 2) Act, 1998	1998, No. 18
Tribunals of Inquiry (Evidence) (Amendment) Act, 2002	2002, No. 7

BILL

entitled

AN ACT TO AMEND THE LAW RELATING TO TRIBUNALS OF INQUIRY, AND TO REPEAL THE TRIBUNALS OF INQUIRY (EVIDENCE) ACT, 1921, AND TO REPEAL THE TRIBUNALS OF INQUIRY (EVIDENCE) (AMENDMENT) ACT, 1979, AND TO REPEAL THE TRIBUNALS OF INQUIRY (EVIDENCE) (AMENDMENT) ACT, 1997, AND TO REPEAL THE TRIBUNALS OF INQUIRY (EVIDENCE) (AMENDMENT) ACT, 1998, AND TO REPEAL THE TRIBUNALS OF INQUIRY (EVIDENCE) (AMENDMENT) (NO. 2) ACT, 1998, AND TO REPEAL THE TRIBUNALS OF INQUIRY (EVIDENCE) (AMENDMENT) ACT, 2002.

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

Purposes

1.- The purposes of this Act are to –

...

Interpretation

2.- In this Act –

...

“information, evidence, document or other material” includes data, all forms of writing and other text, images (including maps and cartographic material), sound, codes, computer programmes, software, databases and speech.

...

Establishment,
powers and
functions

3.- (1) Where it has been resolved by both Houses of the Oireachtas that it is expedient that a tribunal be established for inquiring into a definite matter described in the Resolution as of urgent public importance, in pursuance of this resolution a tribunal may be appointed for the purpose either by the

Government or a Minister and the instrument supplemental thereto may provide that this Act shall apply.

(2) A tribunal may make such orders as are reasonable and necessary for the purposes of its functions. Without prejudice to the generality of the foregoing, it may make orders:

- (a) enforcing the attendance of witnesses and examining them on oath, affirmation, or otherwise;
- (b) compelling the production of documents;
- (c) (subject to the rules of court) issuing a commission or request to examine witnesses.

and a summons signed by one or more of the members of the tribunal may be substituted for and shall be equivalent to any formal process capable of being issued in any action for enforcing the attendance of witnesses and compelling the production of documents.

(3) In the exercise of its functions, a tribunal shall have all such powers, rights and privileges as are vested in the High Court or a judge of that court provided that the tribunal does not enjoy any power to attach or commit or otherwise to impose punishment for contempt.

Enforcement

4.- Where a person fails or refuses to comply with or disobeys an order of a tribunal, the High Court may, on application to it in a summary manner in that behalf by the tribunal, order the person to comply with the order and make such other orders as it considers necessary and just to enable the order to have full effect.

Amendment

5.- (1) Subject to *subsection (2)*, an instrument by which the tribunal is appointed shall be amended, pursuant to a Resolution of both Houses of the Oireachtas, by a Minister of the Government where -

(a) the tribunal has consented to the proposed amendment, following consultation between the tribunal and the Attorney General on behalf of the Minister, or

(b) the tribunal has requested the amendment

Provided that without prejudice to the generality of *subsection (1)(b)*, the tribunal shall consider, otherwise than in public, within four weeks of its establishment, whether to exercise its

power to make a request under *subsection (1)(b)*.

(2) The tribunal shall not consent to or request an amendment to an instrument to which this section applies where it is satisfied that such amendment would unduly prejudice the legal rights of any person affected by the proceedings of the tribunal.

(3) Where an instrument to which this section applies is so amended this Act shall apply.

(4) This section applies, in the case of a tribunal to which this Act is applied under *section 1* of this Act, to the instrument by which the tribunal is appointed.

Termination **6.-** Where at any time it has been resolved, for stated reasons, by each Houses of the Oireachtas that it is necessary to terminate the work of the tribunal, the relevant Minister or the Government may by order dissolve the tribunal.

Public Proceedings **7.- (1)** A tribunal shall not refuse to allow the public or any portion of the public to be present at any of the proceedings of the tribunal unless in the opinion of the tribunal it is in the public interest expedient so to do for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given and, in particular, where there is a risk of prejudice to criminal proceedings.

(2) The obligation imposed on the tribunal by *subsection (1)* shall be fulfilled by the circulation to the public present at the proceedings of a copy, in writing, of the statement that is being adduced as evidence, where:

(a) a witness is called to give oral evidence and the written statement forms only part of his or her evidence; or

(b) the written statement of a witness is not in dispute between those persons who have been authorised by the tribunal to be represented, under *section 8* of this Act, at the part of the proceedings at which it is being adduced and the tribunal does not propose to call the witness to give oral evidence; or

(c) a Commissioner, appointed by the tribunal under *section 1(1)(c)* of this Act, has examined a witness on commission and obtained a written statement of such examination.

(3) In deciding whether to allow filming, recording, or

broadcasting of the proceedings of the tribunal (subject to an appropriate written protocol), the tribunal shall have regard to the following considerations:

- (a) the interests of the general public, particularly the right to have the best available information on matters of urgent public importance;
- (b) the proper conduct and functioning of the tribunal proceedings;
- (c) the legitimate interests of the participants;
- (d) the risk of prejudice to criminal proceedings;
- (e) any other relevant considerations.

Legal
Representation

- 8.-** (1) A tribunal shall have the power to grant representation, by counsel, solicitor, or otherwise;
- (2) Save in exceptional circumstances, a tribunal shall only exercise such power where a person's legal or constitutional rights are significantly affected by its proceedings or any part of its proceedings; and
- (3) The tribunal shall have the power to refuse to grant such representation.

Membership

- 9.-** (1) A tribunal may consist of one or more than one person sitting with or without an assessor or assessors appointed by the instrument appointing the tribunal or any instrument supplemental thereto.
- (2) An assessor appointed under this section shall not be a member of the tribunal in relation to which he is so appointed.
- (3) One or more persons may be appointed to be a member or members of a tribunal at any time after the tribunal is appointed.
- (4) Subject to *section* 21 of this Act, a decision or determination of a tribunal consisting of more than one member may be that of a majority of its members and, in the case of an equal division among its members as to the decision or determination to be made, the decision or determination shall be that of the chairperson of the tribunal.
- (5) If the chairperson of a tribunal is for any reason unable to continue to act as such chairperson, another member of the tribunal may be designated as its chairperson, and the former

chairperson may continue to be a member of the tribunal.

(6) An appointment under *subsection* (3), or a designation under *subsection* (5), of this section shall be made by an amendment under *section* 5 of the instrument by which the tribunal concerned was appointed, and may be so made notwithstanding the fact that the tribunal concerned, while consenting to or requesting the making of the appointment or designation, does not consent to the appointment or designation of the particular person.

(7) An appointment under *subsection* (3), or a designation under *subsection* (5), of this section:

(a) shall not affect decisions, determinations or inquiries made or other actions taken by the tribunal concerned before such appointment or designation, and

(b) shall not be made unless the tribunal is satisfied that no person affected by the proceedings of the tribunal would be unduly prejudiced thereby

(8) A member of a tribunal who is unable to act as such member, whether temporarily or for the remainder of the tribunal's inquiry, shall be deemed for the duration of such inability not to be a member of the tribunal.

(9) A tribunal may act or continue to act notwithstanding one or more vacancies among its members if it is satisfied that the legal rights of any person affected by the proceedings of the tribunal would not be thereby unduly prejudiced.

Reserve Members

10.- (1) One or more persons may be appointed to be a reserve member or members of a tribunal by—

(a) the instrument by which the tribunal is appointed, or

(b) an instrument amending that instrument.

(2) A reserve member of a tribunal may—

(a) sit with the member or members of the tribunal during its proceedings and consider any oral evidence given, and examine any documents or things that are produced or sent in evidence, to the tribunal, and

(b) be present at the deliberations of the tribunal, but may not otherwise participate in those proceedings or deliberations and may not seek to influence the tribunal

in its decisions or determinations.

(3) If a member of a tribunal is for any reason unable to continue to act as such member, whether temporarily or for the remainder of the tribunal's inquiry, a reserve member of the tribunal may be appointed to be a member of it.

(4) An appointment under *subsection* (3) shall be deemed, other than for the purposes of *subsection* (5), to be operative from the date on which the person concerned was appointed to be a reserve member of the tribunal concerned or such later date as may be specified in the amendment under *subsection* (6) of the instrument by which the tribunal concerned was appointed giving effect to the appointment.

(5) An appointment under *subsection* (3) shall not affect decisions, determinations or inquiries made or other actions taken by the tribunal concerned before such appointment.

(6) An appointment under *subsection* (1)(b) or (3) shall be made by an amendment under *section* 5 of the instrument by which the tribunal concerned was appointed, and may be so made notwithstanding the fact that the tribunal concerned, while consenting to or requesting the making of the appointment, does not consent to the appointment of the particular person.

Investigators

11.- (1) A tribunal may, with the approval of—

(a) the Government, if it was appointed by the Government, or

(b) the Minister of the Government by whom it was appointed and the consent of the Minister for Finance,

appoint such and so many persons to be investigators to perform the functions conferred on investigators by this section.

(2) The appointment of an investigator shall be for such term and subject to such other terms and conditions (including terms and conditions relating to remuneration and allowances for expenses) as the tribunal concerned may, with the approval of—

(a) the Government, if it was appointed by the Government, or

(b) the Minister of the Government by whom it was appointed and the consent of the Minister for Finance,

determine.

(3) Whenever an investigator is so requested by the tribunal by which he or she was appointed, he or she shall, for the purpose of assisting it in the performance of its functions and subject to its direction and control, carry out a preliminary investigation of any matter material to the inquiry to which the tribunal relates.

(4) An investigator may, for the purposes of a preliminary investigation under *subsection (3)*, require a person to—

(a) give to him or her such information in the possession, power or control of the person as he or she may reasonably request,

(b) send to him or her any documents or things in the possession, power or control of the person that he or she may reasonably request, or

(c) attend before him or her and answer such questions as he or she may reasonably put to the person and produce any documents or things in the possession, power or control of the person that he or she may reasonably request, and the person shall comply with the requirement.

(5) An investigator may examine a person mentioned in *subsection (4)* in relation to any information, documents or things mentioned in that subsection and may reduce the answers of the person to writing and require the person to sign the document containing them.

(6) Where a person mentioned in *subsection (4)* fails or refuses to comply with a requirement made to the person by an investigator under that subsection, the Court may, on application to it in a summary manner in that behalf made by the investigator with the consent of the tribunal concerned, order the person to comply with the requirement and make such other (if any) order as it considers necessary and just to enable the requirement to have full effect.

(7) A person to whom a requirement under *subsection (4)* is made shall be entitled to the same immunities and privileges as if he or she were a witness before the Court.

(8) An investigator shall not, without the consent of the tribunal by which he or she was appointed, disclose other than to that tribunal any information, documents or things obtained by him or her in the performance of his or her functions under this section.

(9) An investigator shall be furnished with a warrant of appointment and when performing a function under this section shall, if so requested by a person affected, produce the warrant or a copy of it to the person.

Offences before the
Tribunal

12.- (1) If a person—

(a) on being duly summoned as a witness before a tribunal, without just cause or excuse disobeys the summons, or

(b) being in attendance as a witness refuses to take an oath or to make an affirmation when legally required by the tribunal to do so, or to produce any documents (which word shall be construed in this subsection and in *subsection* (1) of this section as including things) in his power or control legally required by the tribunal to be produced by him, or to answer any question to which the tribunal may legally require an answer, or

(c) wilfully gives evidence to a tribunal which is material to the inquiry to which the tribunal relates and which he knows to be false or does not believe to be true, or

(d) by act or omission, obstructs or hinders the tribunal in the performance of its functions, or

(e) fails, neglects or refuses to comply with the provisions of an order made by the tribunal, or

the person shall be guilty of an offence.

(2) a person guilty of an offence under this section shall be liable—

(a) on summary conviction, to a fine not exceeding €3,000 or, at the discretion of the court, to imprisonment for a term not exceeding 12 months or both, and

(b) on conviction on indictment, to a fine not exceeding €300,000 or, at the discretion of the court, to imprisonment for a term not exceeding 2 years or both.

(3) A prosecution for an offence under this section may be brought only by or with the consent of the Director of Public Prosecutions.

[(4) *Subsection (2)* shall apply in respect of offence committed after the passing of this Act irrespective of whether the tribunal concerned was appointed before or after such passing.]

Offences before
Investigators

13.- (1) A person who, without reasonable cause, by act or omission obstructs or hinders an investigator in the performance of his or her functions under *section 6*, or fails or refuses to comply with a requirement made to the person under *subsection (4)* of that section, shall be guilty of an offence.

(2) A prosecution for an offence under this section may be brought only by or with the consent of the Director of Public Prosecutions.

(3) A person guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding €3,000 or imprisonment for a term not exceeding 12 months or both.

Privileges and
Immunities

14.- (1) A person who provides information, evidence, documents or other material to a tribunal, whether pursuant to an order or request of the tribunal or otherwise, is entitled to the same immunities and privileges in respect of such information, evidence, documents or other material as a witness before the High Court.

(2) If a person who is providing information, evidence, documents or other material to a tribunal or to an investigator, as the case may be, in relation to a particular matter is directed to cease giving such information, evidence, documents or other material, then *subsection (1)* shall not apply in respect of anything given after the giving of the direction unless and until the tribunal withdraws the direction.

Non-admissibility
in Criminal
Proceedings

15.- (1) Information, evidence, documents or other material provided by a person to or before a tribunal (or an investigator, as the case may be) whether pursuant to an order or request or otherwise shall not be admissible as evidence against the person in any criminal proceedings (other than proceedings in relation to an offence under *sections 12* and *13* and perjury in respect of such information, evidence, documentation or other material)

(2) *Subsection (1)* shall not apply in respect of anything provided by a person after the tribunal (or investigator, as the case may be) has directed that the person cease providing such information, evidence, documents or other material, unless and until the direction is withdrawn.

Admissibility in
Civil Proceedings

16.- A Report of a tribunal appointed under the provisions of this Act shall be admissible in any civil proceedings as evidence—

(a) of the facts set out therein without further proof unless the contrary is shown, and

(b) of the opinion of the tribunal in relation to any matter contained in the report

Reports of
Tribunals

17.- (1) If, on receipt by the person to whom a tribunal is required, by the instrument by which it is appointed or any instrument amending it, to report of an interim or the final report of the tribunal, that person considers that the publication of the report might prejudice any criminal proceedings, that person may apply to the Court for directions regarding the publication of the report.

(2) Before the Court determines an application under *subsection* (1), it shall direct that notice of it be given to—

(a) the Attorney General,

(b) the Director of Public Prosecutions, and

(c) a person who is a defendant in criminal proceedings relating to an act or omission that—

(i) is described or mentioned in the report concerned, or

(ii) is related to any matter into which the tribunal concerned inquired and which is so described or mentioned,

and the Court may receive submissions, and evidence tendered, by or on behalf of any such person.

(3) On an application under *subsection* (1) the Court may, if it considers that the publication of the report concerned might prejudice any criminal proceedings, direct that the report or a specified part of it be not published—

(a) for a specified period, or

(b) until the Court otherwise directs.

(4) An application under *subsection* (1) may be heard otherwise than in public if the Court considers that it is appropriate to do so.

Legal Personality

18.- (1) An instrument to which this Act applies may provide

that the tribunal shall be a body corporate with perpetual succession and having the power to sue and may be sued in its corporate name.

(2) When the relevant minister or the Government (as the case may be) is satisfied that the tribunal has completed the performance of its functions, a resolution under section 6 has been passed, or that it is otherwise expedient to do so, such Minister or the Government may by order dissolve the tribunal and may include in the order such incidental, ancillary or consequential provisions as are considered necessary or expedient.

(3) When an order under *subsection (2)* is proposed to be made, a draft of the order shall be laid before each House of the Oireachtas, and the order shall not be made until a resolution approving of the draft has been passed by each such House.

Direction of the
High Court

19.- (1) The tribunal may, whenever it considers appropriate to do so, apply in a summary manner to the High Court for directions in relation to the performance of any of the functions of the tribunal for its approval of an act or omission proposed to be done or made by the tribunal for the purposes of such performance.

(2) On an application to the High Court for the purposes of subsection (1), that Court may—

(a) give such directions as it considers appropriate (including a direction that the tribunal should make a report and, if that Court considers it appropriate, an interim report, to it at or before such times as it may specify in relation to the matter the subject of the application or any related matter),

(b) make any order that it considers appropriate,

(c) refuse to approve of an act or omission referred to in subsection (1).

(3) The tribunal shall comply with a direction or order of the High Court under this section and shall not do any such act as aforesaid or make any such omission as aforesaid if the High Court has refused to approve of it.

(4) The High Court shall give such priority as it reasonably can, having regard to all the circumstances, to the disposal of proceedings in that Court under this Act.

Judicial Review
Time Limits

(5) The Superior Court Rules Committee may, with the concurrence of the Minister for Justice, Equality and Law Reform, make rules to facilitate the giving of effect to *subsection (4)*.

20.- (1) An application for leave to apply for judicial review in respect of any of the functions, decisions or Orders of a tribunal shall be made within the period of 28 days commencing on the date on which the person was notified of the decision, determination, recommendation, refusal or making of the Order concerned unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made.

(2) The High Court shall give such priority as it reasonably can, having regard to all the circumstances, to the disposal of proceedings in that Court under this section.

Costs

21.- Where a tribunal or, if the tribunal consists of more than one member, the chairperson of the tribunal, is of opinion that, having regard to-

(a) the findings of the tribunal in relation to its subject-matter as indicated in the terms of the resolution passed by each House of the Oireachtas relating to the establishment of the tribunal; and

(b) all other relevant matters (including failing to co-operate with or provide assistance to, or knowingly giving false or misleading information to the tribunal and the means of a party),

there are sufficient reasons rendering it equitable to do so, the tribunal, or the chairperson, as the case may be, may, either of the tribunal's, or the chairperson's own motion, as the case may be, or on application by any person appearing before the tribunal, order that the whole or part of the costs: -

(i) of any person appearing before the tribunal by counsel or solicitor, as taxed by a Taxing Master of the High Court, shall be paid to the person by any other person named in the order;

(ii) incurred by the tribunal, as named as aforesaid, shall be paid to the Minister for Finance by any other person named in the order."

Repeals

22.- ...

Short Title and
Commencement

23.- ...



The Law Reform Commission

AN COIMISIÚN UM ATHCHÓIRIÚ AN DLI

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