
REPORT
ON
PUBLIC INQUIRIES
INCLUDING TRIBUNALS OF INQUIRY

(LRC 73-2005)

IRELAND

The Law Reform Commission

35-39 Shelbourne Road, Ballsbridge, Dublin 4

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First Published

The Law Reform Commission 2005
May 2005

ISSN 1393 – 3132

An Taoiseach Bertie Ahern TD
Department of the Taoiseach
Government Buildings
Upper Merrion Street
Dublin 2

24 May 2005

Report on Public Inquiries Including Tribunals of Inquiry

Dear Taoiseach,

I enclose a copy of the Commission's **Report on Public Inquiries Including Tribunals of Inquiry (LRC 73-2005)** which will be published in the near future. .

Yours sincerely,

Catherine McGuinness
President

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 1975 Act.

To date, the Commission has published seventy one Reports containing proposals for reform of the law; eleven Working Papers; thirty seven Consultation Papers; a number of specialised Papers for limited circulation; An Examination of the Law of Bail; and twenty five Annual Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained in the Appendix B to this Report.

Membership

The Law Reform Commission consists of a President, one full-time Commissioner and three part-time Commissioners. The Commissioners at present are:

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ACKNOWLEDGEMENTS

The Commission would like to thank the following for their assistance in the preparation of this Report.

The Hon Mr Justice Robert Barr
The Hon Mr Justice Declan Budd
Mr David Clarke, Solicitor
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Full responsibility for this publication, however, lies with the Commission.

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INTRODUCTION

1. This Report, which follows a Consultation Paper published in 2003,¹ has been prepared under the Commission's Second Programme of Law Reform.²

2. The Report examines the law relating to public inquiries including tribunals of inquiry and make recommendations for reform where appropriate.

3. In the Consultation Paper, the Commission examined the law relating to public inquiries in some depth. While it focused on the tribunal of inquiry, it also examined other comparable models, such as Oireachtas committees and the Commission to Inquire into Child Abuse. The Consultation Paper discussed a number of issues that affect each of these, including how they are established, terms of reference, procedural fairness, publicity, costs and the impact of reports of public inquiries on court proceedings, civil and criminal. The Consultation Paper also recommended the enactment of legislation providing for a private low-key inquiry which would focus on the wrong or malfunction in the system rather than on individual wrongdoers and which would operate as a preliminary to, or in many cases an alternative to, a full scale tribunal of inquiry. The essential elements of this recommendation were implemented in the form of the commissions of investigation model of public inquiry introduced into Irish law by the *Commissions of Investigation Act 2004*.

4. This Report focuses primarily on tribunals of inquiry, and to a limited extent on commissions of investigation. This is because the

¹ The Law Reform Commission *Consultation Paper on Public Inquiries Including Tribunals of Inquiry* (LRC CP 22 – 2003) (which is referred to in this Report as “the Consultation Paper.”)

² *Second programme for examination of certain branches of the law with a view to their reform 2000-2007* (PN 9459) (December 2000), heading 8 of which concerns tribunals of inquiry.

Commissions of Investigation Act 2004 now provides a framework within which low-key preliminary investigations can take place, allowing the Commission to concentrate in this Report on the extent to which the law relating to tribunals of inquiry may be reformed.

5. Chapter 1 describes the main focus of the Report. It explains why the Report concentrates primarily on investigative public inquiries, in particular tribunals of inquiry and commissions of investigation. It explains why the Report does not examine Oireachtas inquiries or the Commission to Inquire into Child Abuse. It also examines the *Commissions of Investigation Act 2004*. It is clear that the 2004 Act provides a framework for investigations which may act as alternatives to or, where it proves necessary to investigate a matter further, precursors to, tribunals of inquiry. The Commission makes some limited recommendations for reform of the 2004 Act.

6. The remainder of the Report makes recommendations for the reform of the tribunals of inquiry legislation which is currently contained in 7 Acts beginning with the *Tribunals of Inquiry (Evidence) Act 1921* and ending most recently with the *Tribunals of Inquiry (Evidence) (Amendment) Act 2004*. In doing so, the Commission is conscious of the enormous public benefit which has resulted from the various tribunals of inquiry which have been established in recent years. These have had the effect of transforming our understanding of events in public life which occurred in the past, and without such inquiries these difficult areas may never have come to public attention. The Commission's recommendations for reform are not intended in any way to detract from the value of such tribunals. Rather, they are intended to ensure that tribunals continue to be available as a means of investigating urgent matters of public importance, while at the same time attempting to ensure that they are focused and provide adequate procedural protections without incurring excessive public costs.

7. Chapter 2 deals with the establishment of tribunals of inquiry and examines their inquisitorial nature, the power to establish tribunals, the question of whether there should be a standing inspectorate or a central inquiries office and the independence of tribunals.

8. Chapter 3 deals with the important issue of the drafting of terms of reference and makes recommendations as to how they might be made as precise as possible.

9. In Chapter 4, the Commission examines the membership of tribunals, including their appointment, qualifications and removal as well as the issue of reserve members and experts to assist a tribunal.

10. Chapter 5 deals with procedures and constitutional justice. It considers the application of the principles of fair procedures and constitutional justice to tribunals of inquiry. These include the right to copies of evidence taken, the right to cross-examination by a lawyer, the right to give rebutting evidence, and the right to address the tribunal through a lawyer. It also considers such matters as the information gathering stage, publicity, and broadcasting.

11. Chapter 6 provides a general overview of the powers possessed by tribunals of inquiry and makes recommendations for reform.

12. Chapter 7 deals with the issue of costs. It recommends that the sponsoring Department, following consultation with the Department of Finance, should set a broad budget figure at the outset of the tribunal. In addition, it recommends that the chairperson of an inquiry should have regard to the need to avoid any unnecessary cost in making any decision as to the planning, procedure or conduct of an inquiry. As regards legal and other professional representation, the Commission stresses the need to give considerable thought to what level of representation it engages for particular tasks and that flexible arrangements should be put in place in relation to the engagement and remuneration of lawyers and other personnel involved in tribunals.

13. Chapter 8 deals with judicial review and applications to the High Court. Chapter 9 deals with the issues of suspension, dissolution and termination of a tribunal of inquiry. Chapter 10 deals with the drafting and publication of interim and final tribunal reports and the effect of tribunal reports on criminal and civil court proceedings.

14. The Commission has appended a Draft bill incorporating its proposals for legislative reform. For convenience, the Commission has prepared a consolidated *Tribunals of Inquiry Bill* which

incorporates these proposals into a single text with a view to replacing the existing *Tribunals of Inquiry (Evidence) Acts 1921-2004*.

CHAPTER 1 PUBLIC INQUIRIES

A Introduction

1.01 In this Chapter, the Commission examines the role and functions of public inquiries, in particular investigatory inquiries. The Commission discusses why this Report concentrates primarily on investigative public inquiries, in particular tribunals of inquiry and commissions of investigation. The Commission also makes some limited recommendations for reform of the *Commissions of Investigation Act 2004*.

B Public Inquiries

1.02 The term “public inquiry” has a very broad meaning, which encompasses a variety of fact-finding procedures ranging from the most formal types of investigatory inquiry, namely, tribunals of inquiry, to everyday policy inquiries such as those carried out by the Commission on State Pensions.

C Investigatory Inquiries

1.03 This Report is concerned with investigatory inquiries. Investigatory inquiries may be defined as inquiries whose function is to ascertain authoritatively facts and, where appropriate, to make recommendations to prevent recurrence.

1.04 Irish law makes provision for a number of different types of investigatory inquiry. These range from special inquiries established to investigate a particular event or series of events, such as tribunals of inquiry, to other inquiries such as planning inquiries. This Report will confine itself primarily to an examination of the tribunal of inquiry and, to a limited extent, the recently established commission of investigation. By contrast, in the Consultation Paper, the Commission considered a number of other types of investigatory

inquiry, namely inspectors under the Companies Acts,¹ the Commission to Inquire into Child Abuse,² and Oireachtas inquiries.³ The Commission decided to narrow its focus for a number of reasons.

(1) Company Inspectors

1.05 In relation to inspectors appointed under the Companies Acts, the Commission concluded that these should be considered alongside other specific inquiries such as those under the Transport Acts, and not in the context of inquiries established to inquire into definite matters of public concern. The Commission considered that these inquiry methods should continue to be regulated by their specific legislative frameworks.⁴

(2) Commission to Inquire into Child Abuse

1.06 In relation to the Commission to Inquire into Child Abuse, the Commission concluded that a reconsideration of the Commission to Inquire into Child Abuse is not now necessary, partly because the Commission did not make any recommendations in respect of the Commission to Inquire into Child Abuse in the Consultation Paper, and partly because a widespread review process has been undertaken, and amending legislation is currently under consideration by the Oireachtas.⁵ In such circumstances, the Commission considers it inappropriate to deal with this form of investigatory model.

¹ See the Consultation Paper, Chapter 2.

² See the Consultation Paper, Chapter 3.

³ See the Consultation Paper, Chapter 4.

⁴ The Commission notes that, by contrast, the UK *Inquiries Act 2005*, which replaces the *Tribunals of Inquiry (Evidence) Act 1921* in the United Kingdom, incorporates many of these sector-specific inquiries under a single legislative framework.

⁵ See *Commission to Inquire into Child Abuse (Amendment) Bill 2005*. The background to the Bill may be gleaned from a perusal of the following documents: Attorney General, *Report to the Government on the Review of the Laffoy Commission* (Made pursuant to Government Decision S180/20/10/0270B of 3 December 2002); Sean Ryan SC, *Review of the Commission to Inquire into Child Abuse* (2004); Investigation Committee, *A Position Paper on Identifying Institutions and Persons under the Commission to Inquire into Child Abuse Act 2000* (2004); and *Decision of the Investigation Committee in Relation to the Position Paper* (2004).

(3) Oireachtas Inquiries

1.07 In relation to Oireachtas inquiries, the Commission has decided not to revisit this topic because, as was pointed out in the Consultation Paper, the decision of the Supreme Court in *Maguire v Ardagh*⁶ prevents Oireachtas inquiries from embarking on adjudicatory inquiries into the conduct of non-office holders, such as the conduct of individual Gardaí in relation to the death of Mr John Carthy in Abbeylara,⁷ and would probably require a constitutional amendment to do so.⁸ The Commission does not generally make recommendations which require constitutional amendment as the Oireachtas Committee on the Constitution more appropriately deals with these.

1.08 The Commission wishes to stress however that while the decision of the Supreme Court in *Maguire v Ardagh*⁹ prohibits the Oireachtas from carrying out an Abbeylara type inquiry where an adjudication of some type might be made on individuals, it does not prevent the Oireachtas from carrying out inquiries into policy matters or the activities of the holders of public office.¹⁰ The decision of the Supreme Court is confined to deciding that the Oireachtas is prohibited from conducting the types of inquiry which the *Tribunals of Inquiry (Evidence) Act 1921* was, in many respects, enacted to replace.¹¹

1.09 The remainder of this Report will thus focus on tribunals of inquiry and to a limited extent, commissions of investigation.

D Commissions of Investigation

1.10 Before proceeding to examine the law relating to tribunals of inquiry the Commission will consider to a limited extent

⁶ [2002] 1 IR 385.

⁷ A tribunal of inquiry was subsequently established to inquire into the events, the Barr Tribunal.

⁸ See the Consultation Paper at paragraphs 4.22- 4.54.

⁹ [2002] 1 IR 385.

¹⁰ See the Consultation Paper at paragraphs 4.30-4.45.

¹¹ See paragraphs 2.06ff.

commissions of investigation. This is because the *Commissions of Investigation Act 2004* provides a framework for investigations which may act as alternatives to or, where it proves necessary to investigate a matter further, precursors to, tribunals of inquiry.

1.11 Disenchantment with the cost and length of tribunals of inquiry led to calls for the introduction of a less expensive and speedier method of investigating matters of urgent public concern. Various possibilities were canvassed including the use of Oireachtas inquiries, leading ultimately to the enactment of the *Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997*. However, the decision of the Supreme Court in *Maguire v Ardagh*¹² means, in effect that Oireachtas Committees are precluded from making adjudications that affect an individual's rights, including the right to good name and reputation. In response to this a number of further options were canvassed, including a Parliamentary Inspector or the provision of a low key, preliminary inquiry.¹³ Ultimately, the *Commissions of Investigation Act 2004* was enacted. The Commission considers that the 2004 Act provides a useful legislative framework, in particular because it deals with issues such as establishment, terms of reference and costs which the *Tribunals of Inquiry (Evidence) Acts 1921 to 2004* do not cover.

1.12 The *Commissions of Investigation Act 2004* provides for the establishment of commissions of investigation to investigate any matters of "significant public concern." These are intended to be alternatives to or, where it proves necessary to investigate a matter further precursors, to tribunals of inquiry.¹⁴

1.13 The first commission of investigation was established in April 2005 to look into the Garda investigation into the Dublin and Monaghan bombings of 1974, which resulted in the death of 33 people. The commission of investigation was established in response to the recommendations of the Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights in 2004. That report

¹² [2002] 1 IR 385. See paragraph 1.07 above and the detailed discussion in the Consultation Paper, paragraphs 4.22-4.54.

¹³ The Commission recommended a low-key form of inquiry at paragraph 10.16 of the Consultation Paper.

¹⁴ Section 3(1) of the *Commissions of Investigation Act 2004*.

followed the Committee's consideration of the report on the bombings by the Independent Commission of Inquiry conducted by Mr Justice Henry Barron, a retired Supreme Court judge. The Government appointed Mr Patrick MacEntee SC as sole member of the commission of investigation. The Government requested that the commission report within 6 months of its establishment.¹⁵

1.14 The *Commissions of Investigation Act 2004* contains a number of significant provisions on which the Commission comments, particularly by way of comparison and contrast with the *Tribunals of Inquiry (Evidence) Acts 1921 to 2004*.

(1) Establishment

1.15 A commission of investigation may be established by the Government, based on a proposal by a Minister, with the approval of the Minister for Finance, to investigate any matter considered by the Government to be of "significant public concern."¹⁶ This can be contrasted with the phrase "definite matter of urgent public importance" in the *Tribunals of Inquiry (Evidence) Act 1921*. The order establishing a commission of investigation must set out the matter that is to be investigated and the Minister responsible for overseeing the administrative matters relating to the establishment of the commission, for receiving its reports and performing any other functions accorded to the specified Minister by the *Commissions of Investigation Act 2004*.¹⁷ The Houses of the Oireachtas must consent to the establishment of a commission of investigation. A draft of the proposed order and a statement of the reasons for establishing the commission of investigation must be laid before both Houses and a resolution approving the draft must be passed by each House.¹⁸

¹⁵ See the *Commission of Investigation (Dublin and Monaghan Bombings) Order 2005* (SI No 222 of 2005) and available at www.taoiseach.gov.ie/index.asp?locID=docID=1954

¹⁶ Section 3(1) of the *Commissions of Investigation Act 2004*.

¹⁷ Section 3(3) of the *Commissions of Investigation Act 2004*.

¹⁸ Section 3(2) of the *Commissions of Investigation Act 2004*.

(2) Terms of Reference

1.16 The order establishing the commission may authorise the specified Minister to set the commission's terms of reference.¹⁹ In the absence of such an authorisation, the terms of reference may be set by the Government.²⁰ The 2004 Act clearly envisages that the body setting the terms of reference, be it the Government or the specified Minister, will engage in a process of consultation with interested parties insofar as it accords the body setting the terms of reference the power to do so.²¹

1.17 The 2004 Act envisages that the terms of reference will be stated as precisely as possible.²² The terms of reference must set out as clearly and as accurately as possible, the events, activities, circumstances, systems, practices or procedures to be investigated, together with the relevant dates, locations and individuals involved.²³ This may be contrasted with the *Tribunals of Inquiry (Evidence) Act 1921*, which does not deal with this issue. In addition, the Minister responsible for the operation of the commission must ensure that as soon as possible after the terms of reference are set, an accompanying statement is prepared containing an estimate of the costs of the commission and the length of time it will take. This must be published, as soon as possible after the terms of reference are set, in *Iris Oifigiúil* and such other publications as the Minister considers appropriate.²⁴

(3) Procedures and Private Nature

1.18 The 2004 Act gives the commission the power to conduct its investigation in any manner it considers appropriate, subject to the Act and the commission's rules and procedures.

1.19 The commission is under a statutory duty to seek, and to facilitate, the voluntary cooperation of persons whose evidence is

¹⁹ Section 4(1) of the *Commissions of Investigation Act 2004*.

²⁰ Section 4(2) of the *Commissions of Investigation Act 2004*.

²¹ Section 4(3) of the *Commissions of Investigation Act 2004*.

²² Section 5(1) of the *Commissions of Investigation Act 2004*.

²³ Section 5(1) of the *Commissions of Investigation Act 2004*.

²⁴ Section 5(2)(b) of the *Commissions of Investigation Act 2004*.

required by the commission. In addition, the commission is under a duty to conduct its proceedings in private unless:

- (a) the witness requires that his or her evidence be given in public and the commission consents to that request; or
- (b) the commission is satisfied that it is desirable in the interests of both the investigation and fair procedures to hear all or part of the evidence in public.

1.20 This may be contrasted with the 1921 Act, which provides that tribunals sit in public unless compelling reasons exist for sitting in private.

1.21 The 2004 Act also clearly sets out the rights of interested parties at private sessions. Section 11(2) of the 2004 Act states:

“Where the evidence of a witness is heard in private—

- (a) the commission may give directions as to the persons who may be present while the evidence is heard,
- (b) legal representatives of persons other than the witness may be present only if the commission—
 - 1. is satisfied that their presence would be in keeping with the purposes of the investigation and would be in the interests of fair procedures, and
 - 2. directs that they be allowed to be present,
- (c) the witness may be cross examined by or on behalf of any person only if the commission so directs, and
- (d) any member of the commission or a person who has been appointed under section 8 and is authorised by the commission to do so may, orally or by written interrogatories, examine the witness on his or her evidence.”

1.22 Section 14 of the 2004 Act deals with the form and manner in which evidence may be given. It provides that a commission may receive evidence given orally before the commission, by affidavit, or as otherwise directed by the commission or allowed by its rules and procedures. This may include by means of a live video link, a video recording, a sound recording or any other mode of transmission.

Section 15 confers on commissions the power to establish their own rules and procedures in relation to evidence and submissions received.

1.23 In addition, the commission is entitled to compel witnesses to give evidence whether under oath or by means of interrogatories. The 2004 Act also introduces “a notice to admit” procedure similar to that in Order 32 of the *Rules of the Superior Courts 1986*. The commission is entitled to direct in writing any person to provide the commission with a list, verified by affidavit, disclosing all documents in the person’s possession or power relating to the matter under investigation, and to provide the commission with those documents, except those for which privilege is claimed. A failure to comply with this process may result in an application to the High Court to compel compliance, or the imposition of an order against the individual for the costs incurred by all other parties arising from the delay.

(4) Costs

1.24 Section 23 of the 2004 Act provides that the specified Minister must prepare guidelines for the payment of legal costs before commissions of investigation. Such general guidelines must be prepared in consultation with the commission and require the consent of the Minister for Finance.

1.25 The 2004 Act states that legal costs will be regarded as being incurred where the good name, conduct or other personal or property rights of a witness is called into question by evidence received by the commission.

1.26 Section 23 of the 2004 Act also provides that the guidelines may restrict the types of legal services or fees for which payment may be made and otherwise limit the extent to which costs may be paid. The commission is obliged to furnish a copy of these guidelines to a witness before evidence is given.

1.27 The Commission has come to the conclusion that this restriction on costs in section 23(3) of the 2004 Act is in conflict with the decision in *Re Commission to Inquire into Child Abuse*.²⁵ In this case, the applicant, the Commission to Inquire into Child Abuse, sought to limit the right to legal representation before its investigation

²⁵ [2002] 3 IR 459.

committee to one solicitor and one counsel. The applicant took the view that such a course of action was necessitated by section 4 of the *Commission to Inquire into Child Abuse Act 2000*, which requires the Commission to provide an atmosphere which is as sympathetic and as understanding as possible to persons who allege that they were abused. The High Court in finding that the applicant had no jurisdiction to make the direction held that the right to legal representation before a tribunal was a constitutional one thus following the decision of the Supreme Court in *In Re Haughey*.²⁶ Therefore:

“justice requires ... that parties be free prudently and reasonably to decide on and be permitted to have present parties, at all relevant times, the solicitors and counsel of their choice in whatever number was required to prosecute or defend claims before the applicant to best effect.”²⁷

1.28 Applying this reasoning to section 23 of the 2004 Act the Commission has concluded that a restriction in any general guidelines on costs as to the types of legal services or fees for which payment may be made and a limitation on the extent to which costs may be recoverable could, in effect, amount to a restriction of an individual’s discretion to have present at all relevant times the legal representation of their choice. The Commission accordingly recommends that section 23(3) of the 2004 Act be repealed.

1.29 *The Commission recommends that section 23(3) of the Commissions of Investigation Act 2004, which restricts the types of legal services or fees for which payments may be made, be repealed.*

(5) Connection with Tribunals of Inquiry

1.30 The 2004 Act also envisages that in certain circumstances it may be deemed appropriate to establish a tribunal of inquiry to inquire into a matter which was within the commission of investigation’s terms of reference. In such circumstances, the specified Minister or the commission, if it has not been dissolved, shall make available to the tribunal all the commission’s evidence and

²⁶ [1971] IR 217. See paragraph 5.14 below.

²⁷ [2002] 3 IR 459, 478-479.

documents.²⁸ This has the potential to result in a significant saving in time and cost in those situations where it is deemed necessary to establish a tribunal of inquiry because of the preparatory work carried out by the commission of investigation. This also indicates that a commission of investigation can be seen as a low key precursor to a tribunal of inquiry an approach which is consistent with the views expressed by the Commission in the Consultation Paper.²⁹

1.31 This also provides a useful link to the remainder of this Report, which focuses exclusively on the law of tribunals of inquiry. Where relevant, the Commission makes references throughout the Report to the 2004 Act, both for comparison and contrast with comparable issues that arise in the context of tribunals of inquiry.

²⁸ Section 45 of the *Commissions of Investigation Act 2004*.

²⁹ See the Consultation Paper at paragraph 10.16.

CHAPTER 2 NATURE OF AND ESTABLISHMENT OF TRIBUNALS OF INQUIRY

A Introduction

2.01 In this chapter, the Commission examines the law and practice relating to the establishment of tribunals of inquiry and makes recommendations for reform. The Commission also considers the suggestion that a Standing Inspectorate or a Central Inquiries Office should be established. The Commission also considers whether tribunals should be conferred with separate personality and the related issue of recognising their independence.

B Tribunals of Inquiry

(1) Introduction

2.02 Tribunals of Inquiry have been a regular feature of Irish life since the foundation of the State. They have been established to inquire into such matters as:

- Policy issues;
- Accidents or major disasters;
- Allegations of corruption;
- Deaths of individuals, where the State is involved.

2.03 It is important to state at the outset that tribunals of inquiry are not courts. As the Supreme Court authoritatively held in *Goodman International v Hamilton*,¹ they are not involved in the administration of justice and they have no power to determine civil or criminal liability. The Supreme Court also held that tribunals should not, however, be inhibited from making recommendations or findings merely because of a potential impact on civil or criminal proceedings.

¹ [1992] 2 IR 542. See the Consultation Paper at paragraph 1.06.

2.04 Most tribunals established in the State have been conferred with the powers contained in the *Tribunals of Inquiry (Evidence) Act 1921*.² This Act has been amended on 6 occasions since 1921, so that tribunals of inquiry are now governed by 7 pieces of legislation, which may be collectively cited as the *Tribunals of Inquiry (Evidence) Acts 1921 to 2004*.³ The *Commissions of Investigation Act 2004* is also relevant as it introduces a form of inquiry, the commission of investigation, which is expressed as an alternative to, or a precursor to, a tribunal of inquiry.⁴

2.05 The *Tribunals of Inquiry (Evidence) Act 1921* provides that tribunals of inquiry may be established to inquire into “definite matters of urgent public importance.”⁵ It is therefore open to the Government to establish a tribunal of inquiry into any such matter, which may now be contrasted with the text in the *Commissions of Investigation Act 2004*, namely a matter of “significant public concern.”⁶ The principal function of a tribunal of inquiry is to ascertain authoritatively the facts in relation to some matter of legitimate public interest which has been identified by its terms of reference and, where appropriate, to make recommendations as to how the future occurrence of the matter may be rendered less likely.

(2) History

2.06 The Tribunal of Inquiry owes its immediate origin to the *Tribunals of Inquiry (Evidence) Act 1921* but its history may be traced back to the Committee of Inquiry established by the House of

² In the Consultation Paper, the Commission examined the history of the *Tribunals of Inquiry (Evidence) Act 1921* and its operation in Ireland since the establishment of the State. See the Consultation Paper, at Chapter 5 and see Appendix A of the Consultation Paper for a list of all the tribunals of inquiry established since the foundation of the State.

³ These are the *Tribunals of Inquiry (Evidence) Act 1921*, *Tribunals of Inquiry (Evidence) (Amendment) Act 1979*, *Tribunals of Inquiry (Evidence) (Amendment) Act 1997*, *Tribunals of Inquiry (Evidence) (Amendment) Act 1998*, *Tribunals of Inquiry (Evidence) (Amendment) (No 2) Act 1998*, *Tribunals of Inquiry (Evidence) (Amendment) Act 2002* and *Tribunals of Inquiry (Evidence) (Amendment) Act 2004*.

⁴ See paragraphs 1.10 *ff*, above.

⁵ Section 1(1) of the *Tribunals of Inquiry (Evidence) Act 1921*.

⁶ See paragraphs 1.15 *ff*, above.

Commons in 1667, following the fall of Sir Edward Hyde, Earl of Clarendon, to inquire into the manner in which Charles II and his Ministers had spent taxes voted to them by Parliament. Parliamentary Committees were utilised as the primary method of investigating matters of urgent public concern until 1921.⁷

2.07 In 1921 a Member of Parliament, Captain Loseby, made certain allegations against the Minister for Munitions, relating to the disposal of Ministry stocks and, as the accusations were pressed, it was decided that they warranted investigation. The ordinary procedure would have been for the House of Commons to establish a Committee of Inquiry such as had been used from 1667 onwards. However, since such Committees had no powers to examine witnesses on oath, and since this power had been sought by some of the members pushing for an inquiry into the munitions affair, the Government proposed a new procedure, which was enacted as the *Tribunals of Inquiry (Evidence) Act 1921*.⁸

(a) *Irish Tribunals of Inquiry*

2.08 In the early years of the State the tribunals of inquiry mechanism was utilised in a number of different circumstances. They were established to inquire into policy issues such as retail prices, the ports and harbours of the State, the marketing of butter, pig production, the grading of fruit and vegetables, the law and practice relating to town tenants, the state of public transport, the supply and distribution of milk in the Dublin Area and cross channel ferry rates. In the Commission's view, such policy inquiries are more appropriately a matter for other modes of inquiry, whether Oireachtas inquiries or other non-statutory commissions.⁹

2.09 Similarly, the tribunal of inquiry process was used to inquire into such quasi-criminal matters as the circumstances surrounding the death of Timothy Coughlan and the death of Mr Liam

⁷ See the Consultation Paper at paragraphs 5.01-5.05.

⁸ See the Consultation Paper, at paragraphs 5.01-5.09. See generally Keeton, *Trial by Tribunal: A Study of the Development and Functioning of the Tribunal of Inquiry* (Museum Press 1960), Public Administration Select Committee of the House of Commons, *Government by Inquiry* (HC 2005) at 10-11.

⁹ See paragraph 1.08, above.

O'Mahony in Garda custody. The process was also used in the aftermath of what might be termed disasters, such as the Pearse Street Fire and the St Joseph's Orphanage Fire. It was also used for the purpose for which the legislation was initially passed, namely to inquire into allegations of political corruption, such as the inquiry into the sale of shares in the Great Southern Railway Company, the inquiry into allegations made against a Parliamentary Secretary, and the inquiry into allegations surrounding the sale of Locke's Distillery. A further corruption inquiry was instituted in 1975 when a tribunal of inquiry was established to inquire into allegations concerning the Minister for Local Government.

2.10 In recent years, tribunals have been established to inquire into the Whiddy Island Disaster, the Stardust fire, the Kerry Babies Scandal, the beef processing industry, the blood transfusion board, political corruption, planning matters, Garda conduct, and collusion with the IRA.

(3) *Inquisitorial Nature of Tribunals of Inquiry*

2.11 It should be noted that tribunals of inquiry are inquisitorial in nature. As Denham J put it in *Boyhan v Beef Tribunal* “[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.”¹⁰ The importance of this distinction, between the inquisitorial and the adversarial, is the key to a proper understanding of the operation of tribunals of inquiry.

2.12 In inquisitorial systems the decision maker initiates the investigation, summons the witnesses and examines them in what is essentially an inquiry by the court. By contrast in adversarial systems the responsibility for collecting and presenting evidence lies generally with the party who seeks to introduce that evidence, and the decision maker stands aloof and adjudicates having heard both side.

2.13 The Irish legal system generally favours the adversarial system and has developed long-standing and effective safeguards to protect the individuals who participate in that process. However, the existence of inquisitorial tribunals of inquiry is a recognition that there are certain circumstances in which an adversarial model is not

¹⁰ [1993] 1 IR 210, 222 *per* Denham J.

appropriate. The Commission agrees with the Royal Commission on Tribunals of Inquiry (the Salmon Commission) where it stated:

“it is essential on the very rare occasions when crises of public confidence occur, the evil, if it exists, shall be exposed so that it may be rooted out: or if does not exist, the public shall be satisfied that in reality there is no substance in the prevalent rumours and suspicions by which they have been disturbed. We are satisfied that this would be difficult if not impossible without public investigation by an inquisitorial tribunal.”¹¹

2.14 The Commission considers that the inquisitorial nature of tribunals of inquiry should be in the minds of all of those involved in tribunals of inquiry, and that procedures developed and applicable in the adversarial process should only be extended to tribunals of inquiry when absolutely necessary. For this reason, the Commission recommends that the tribunals of inquiry legislation be amended to state explicitly that they are inquisitorial in nature.

2.15 The Commission also recommends that it would be beneficial if the legislation was amended to make explicit the views expressed by the Supreme Court in *Goodman International v Hamilton*,¹² that a tribunal of inquiry has no power to determine, or rule on, any persons civil or criminal liability, but that this should not inhibit a tribunal in making findings or recommendations.

2.16 *The Commission recommends that the tribunals of inquiry legislation be amended to provide that:*

- *Tribunals of Inquiry are inquisitorial in nature.*
- *Tribunals of Inquiry have no power to determine or to rule on, any person’s civil or criminal liability.*
- *A Tribunal of Inquiry is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes.*

¹¹ *Royal Commission on Tribunals of Inquiry* (Cmnd 3132 1966) at 16.

¹² [1992] 2 IR 542, see paragraph 2.03.

(4) Purposes and Functions of Tribunals of Inquiry

2.17 Tribunals of inquiry have six primary purposes or functions. These are:

- To establish what happened, especially in circumstances where the facts are disputed, or the course and causation of events is not clear;
- To learn from what happened, and so helping to prevent their recurrence by synthesising or distilling lessons, which can be used to change practice. This includes identifying shortcomings in law or regulations;
- To provide catharsis or therapeutic exposure, providing an opportunity for reconciliation and resolution, by bringing protagonists face to face with each other's perspectives and problems;
- To provide reassurance, by rebuilding public confidence after a major failure
- To establish accountability, blame, and retribution —holding people and organisations to account, and sometimes indirectly contributing to assigning blame and to mechanisms for retribution;
- For political considerations —serving a wider political agenda for government either in demonstrating that “something is being done” or in providing leverage for change.¹³

2.18 Tribunals of inquiry may be divided into three categories, general inquiries, specific inquiries and mixed inquiries. General inquiries concentrate on the wrong or malfunction in the system rather than on the individual wrong doer. Specific inquiries investigate allegations of wrongdoing levelled against particular individuals or organisations in relation to matters of public importance. Mixed inquiries concentrate on the wrong or malfunction in the system and as part of this identify individuals who contributed to such wrongdoing.

¹³ See the Consultation Paper at paragraph 1.03 and House of Commons Public Administration Select Committee, *Government by Inquiry* (HC 2005) at 9, 10.

2.19 Because tribunals are established to inquire into what the 1921 Act refers to as matters of urgent public importance there may in many cases be a strong desire on the part of both those establishing public inquiries and the public for inquiries to establish liability and to punish individuals. This desire is particularly strong where the matter under investigation is a high profile or controversial occurrence. While this desire is understandable, it is not a legitimate function of public inquiries, which should not be used as surrogates for the criminal or civil justice processes. Tribunals are designed to investigate facts and make recommendations to prevent re-occurrence, not to establish liability or punish people.

2.20 In the Consultation Paper, the Commission considered in detail the advantages and disadvantages of establishing tribunals of inquiry, and concluded that they should only be established in the most serious cases where no other alternative means of protecting the public interest is available.¹⁴ The Commission sees no reason to depart from that view and would add that the enactment of the *Commissions of Investigation Act 2004* provides a further alternative method of investigation.¹⁵

2.21 *The Commission recommends that as tribunals of inquiry are designed to investigate facts and make recommendations to prevent re-occurrence, rather than to establish liability or punish people, those charged with the power to establish such inquiries should give careful consideration to the public interest in the matter under examination before deciding to establish an inquiry.*

C Should there be an Express Power to Establish Tribunals of Inquiry

2.22 The *Tribunals of Inquiry (Evidence) Act 1921*, as amended, does not deal with the establishment of tribunals of inquiry.¹⁶ It is concerned only with the powers which may be conferred on tribunals of inquiry established pursuant to a resolution of both Houses of the

¹⁴ See the Consultation Paper, at paragraphs 1.27 – 1.31.

¹⁵ See paragraph 1.15 *ff.* above.

¹⁶ *Goodman International v Hamilton* [1992] 2 IR 542, 544; *Haughey v Moriarty* [1999] 3 IR 1, 30.

Oireachtas.¹⁷ Thus the power to establish tribunals of inquiry lies elsewhere and it has been authoritatively decided that the Executive has an inherent power to establish tribunals of inquiry.¹⁸

2.23 Against this background, the Commission will consider, first, whether the power to establish tribunals of inquiry should be statutory in nature and, secondly, whether this power should be conferred on the Government or the Oireachtas.

2.24 The present position is that tribunals of inquiry are usually established by a combination of both the Government and the Oireachtas. The Government establishes a tribunal of inquiry to inquire into a definite matter of urgent public concern and if the 1921 Act is to apply there must be a resolution of both Houses of the Oireachtas to that effect.

(1) Consultation Paper

2.25 In the Consultation Paper, the Commission recommended that any redraft of the tribunals of inquiry legislation should confer an express power to establish tribunals of inquiry on the Oireachtas or a Minister.¹⁹

(2) Discussion

(a) *The Origins of the Tribunals of Inquiry (Evidence) Act 1921*

2.26 In considering this question it is useful to look at the origins of the *Tribunals of Inquiry (Evidence) Act 1921* and the stress placed on the importance of Oireachtas involvement in their establishment.

2.27 When the 1921 Act was first introduced, clause 1 read as follows:

“1(1) Where, in pursuance of a Resolution passed by, or an undertaking given by a Minister of the Crown to, either House of Parliament, a tribunal (other than a Committee of either House, is established for inquiring into...”

¹⁷ See the Consultation Paper at paragraph 6.03.

¹⁸ See *Goodman International v Hamilton* [1992] 2 IR 542, 554; *Haughey v Moriarty* [1999] 3 IR 1, 30.

¹⁹ See the Consultation Paper at paragraph 6.05.

This envisaged a tribunal being established in one of two ways, the first pursuant to a resolution of either House of Parliament, and the second subject to an undertaking given by a Minister to either House of Parliament that he would establish a tribunal.

2.28 During the legislative debates on the 1921 Act, concern was expressed concerning the second method of establishing a tribunal of inquiry. It was argued that this would in practice render Parliament's role in the establishment of inquiries meaningless. It was argued that the powers of tribunals of inquiry were such that the Government should not be able to establish them of its own accord, and that the consent of Parliament should be obtained prior to their establishment. This argument was accepted and the second method of establishing a tribunal was omitted from the Bill.

2.29 A related point concerning parliamentary scrutiny was also made. It was argued first, that because of the extensive powers of tribunals of inquiry, and secondly, that because the 1921 Act was establishing a mechanism which would remove the need for separate legislation for each inquiry, it was appropriate that the consent of both Houses of Parliament should be necessary for the establishment of a tribunal of inquiry. This amendment was accepted and section 1 of the 1921 Act in its current form became law.²⁰

(b) *The Commissions of Investigation Act 2004*

2.30 It is useful to contrast the absence of any reference to the power to establish a tribunal with the explicit references in the more recent *Commissions of Investigations Act 2004*. A commission of investigation may be established by the Government, based on a proposal by a Minister, with the approval of the Minister for Finance, to investigate any matter considered by the Government to be of "significant public concern."²¹ The order establishing a commission of investigation must set out the matter that is to be investigated and nominate the Minister responsible for overseeing the administrative matters relating to the establishment of the commission, for receiving its reports and performing any other functions accorded to the Minister by the 2004 Act.²² The Houses of the Oireachtas must

²⁰ House of Lords, 22 March 1921, c. 758.

²¹ Section 3(1) of the *Commissions of Investigation Act 2004*.

²² Section 3(3) of the *Commissions of Investigation Act 2004*.

consent to the establishment of a commission of investigation. A draft of the proposed order and a statement of the reasons for establishing the commission of investigation must be laid before both Houses and a resolution approving the draft must be passed by each House.²³

(c) *United Kingdom*

2.31 In the United Kingdom, the *Tribunals of Inquiry (Evidence) Act 1921* has recently been replaced by the *Inquiries Act 2005*. The UK *Inquiries Act 2005* provides a comprehensive statutory framework for inquiries set up by Ministers to look into matters of public concern. It gives effect to proposals contained in a Departmental of Constitutional Affairs Consultation Paper “Effective Inquiries,” and takes into account the House of Commons Public Administration Select Committee (PASC) “Government by Inquiry” investigation.²⁴

(d) *Canada*

2.32 In Canada, provision is made for public inquiries at both federal and provincial level. Federal inquiries are governed by the *Inquiries Act 1985*. Section 2 states that the establishment of inquiries is a matter purely for the Executive. Similarly, the various statutes governing provincial inquiries provide that the setting up of inquiries is a matter for the Executive.²⁵

²³ Section 3(2). See the *Commission of Investigation (Dublin and Monaghan Bombings) Order 2005* (SI No 222 of 2005).

²⁴ The Law Reform Commission participated in the consultation process which gave rise to the *Inquiries Act 2005*. In 2004, the Commission met with representatives of the Department of Constitutional Affairs to discuss its Consultation Paper, *Public Inquiries Including Tribunals of Inquiry* (CP 22-2003). In addition, the Commission made a written submission to the House of Commons Public Administration Select Committee, a copy of which may be found in *Government by Inquiry: Written Evidence* (HMSO 2004). This participation does not in any way indicate that the Commission expresses a general view on the *Inquiries Act 2005*.

²⁵ See section 2 of the *Public Inquiries Act*, RSA 2000 (Alberta), section 1 of the *Inquiry Act*, RSBS 1996 (British Columbia), section 1 of *An Act Respecting Public Inquiry Commissions*, RSQ 1981 (Quebec), section 2 of the *Public Inquiries Act*, RSS 1978 (Saskatchewan), section 2 of the *Public Inquiries Act*, RSO 1990 (Ontario), section 2 of the *Public Inquiries Act*, RSNS 1989 (Nova Scotia), section 2 of the *Inquiries Act*, RSNB 1973 (New Brunswick), section 1 of the *Public Inquiries Act*, PSPEI 1988

(e) *New Zealand*

2.33 In New Zealand, the law relating to public inquiries is contained in the *Commissions of Inquiry Act 1908*. Section 2 states that the establishment of inquiries is a matter purely for the Executive.

(f) *Australia*

2.34 In Australia, provision is made for public inquiries at both federal and state level. Federal Inquiries are governed by the *Royal Commissions Act 1902*. Section 1(a) of the Act bestows an express power to establish Royal Commissions on the Governor General. It makes no mention of the need for Parliamentary approval of this action.

2.35 State inquiries are governed by state legislation. In the Australian Capital Territory,²⁶ New South Wales,²⁷ Queensland²⁸ and Tasmania,²⁹ the legislation governing public inquiries provides that the establishment of inquiries is a matter purely for the Executive. In the Northern Territory, the *Inquiries Act 1985* provides two methods for establishing inquiries. The first is by order of the Executive,³⁰ and the second is pursuant to a resolution of the Legislative Assembly.³¹

(3) Recommendation

2.36 In light of the fact that tribunals of inquiry are established to inquire into definite matters of urgent public concern, the Commission considers that the Oireachtas should have a role in the

(Prince Edward Island), section 2(1) of the *Public Inquiries Act*, RSNL 1990 (Newfoundland & Labrador), section 2 of the *Public Inquiries Act*, RSY 2002 (the Yukon Territory), section 2 of the *Public Inquiries Act*, RSNWT 1988 (the North Western Territory and Nunavut (Nunavut was established in 1999. Prior to that it formed part of the North Western Territory)).

²⁶ Section 5 of the *Inquiries Act 1991*.

²⁷ Section 4 of the *Special Commissions of Inquiry Act 1983*.

²⁸ Section 4 of the *Commissions of Inquiry 1950*.

²⁹ Section 4 of the *Commissions of Inquiry Act 1995*.

³⁰ Section 4 of the *Inquiries Act 1985*.

³¹ Section 4A of the *Inquiries Act 1985*.

establishment process. The Commission has concluded that it would be appropriate that the legislation on tribunals of inquiry expressly provide that the Government has the power to establish tribunals of inquiry a point which has been definitively decided in the courts.³² The Commission also recommends that this power should only be exercised on foot of a resolution passed by both Houses of the Oireachtas, as is the case under the recently enacted *Commissions of Investigation Act 2004*.

2.37 *The Commission recommends that the tribunals of inquiry legislation be amended to confer the power to establish tribunals of inquiry on the Executive, and that this power should only be exercised on foot of a resolution of both Houses of the Oireachtas.*

D Permanent Standing Inspectorate and Central Inquiries Office

2.38 Given the large number of commissions and tribunals of inquiry currently in existence, and the length of time that they have been in operation, it is not surprising that a number of suggestions have been made as to how the manner in which they operate might be improved. It has been suggested that a Permanent Standing Inspectorate be created which would, in future, carry out the functions now being carried out by the various commissions and tribunals of inquiry. It has also been suggested that a Central Inquiries Office be created which would provide support and guidance to those charged with establishing and administering commissions and tribunals of inquiry. Since these two suggestions may be said to be variations on the same theme, namely, the creation of a permanent body that would be involved directly or indirectly in the investigation of matters of public concern, they will be considered together.

(1) Permanent Standing Inspectorate

2.39 In the Consultation Paper, the Commission considered the suggestion that a permanent standing inspectorate be established which would be charged with investigating the matters which are

³² See the Consultation Paper at paragraph 6.03, referring to *Goodman International v Hamilton* [1992] 2 IR 542 and *Haughey v Moriarty* [1999] 3 IR 1.

currently investigated by commissions and tribunals of inquiry but recommended that such an inspectorate should not be established.³³

(a) Advantages

2.40 On a general level, the establishment of a standing inspectorate may be said to be more advantageous than the current tribunals in a number of respects. In relation to staff, it might be expected that since a standing inspectorate would be composed of a staff of full time investigators, their remuneration would be determined at a salaried rather than a daily rate. This would result in significant economies of scale in relation to start up costs and administration. A related point is that a standing inspectorate would also bring the knowledge and experience gained by its past investigations to future investigations. Secondly, a permanent standing inspectorate would provide a valuable mechanism for investigating matters of urgent public concern as a preliminary to, or a low key alternative to, the establishment of a full scale tribunal or commission of inquiry.

(b) Disadvantages

2.41 However, a number of arguments may be made against the establishment of a permanent standing inspectorate. First, it could be argued that there is no need to establish such a permanent inspectorate. After all, public inquiries are usually set up to inquire into matters of urgent current public concern. Although a number of public inquiries may be in existence at present, there is no guarantee that there will be a need for similar bodies in the future on an ongoing basis. Accordingly, it may be pointless to institutionalise bodies which by their very nature are creatures of their time.

2.42 Secondly, it could be argued that public inquiries by their nature are ad hoc bodies set up to investigate urgent matters of public concern and to inquire into a wide variety of allegations, and their structure and personnel should reflect this.

2.43 Thirdly, it could be argued that a standing inspectorate might not have access to personnel of the same experience and quality that an ad hoc temporary inquiry would have access to.

³³ See the Consultation Paper at paragraph 1.13.

2.44 Fourthly, while it may be argued that public inquiries do not possess an institutional memory, this can be remedied by, for example, the establishment of a central inquiries office. Finally, it could be argued that the enactment of the *Commissions of Investigation Act 2004* removes the need to establish a permanent inspectorate in that it provides the framework for the establishment of private low key inquiries which are fast and flexible.³⁴

(c) *Recommendation*

2.45 Having weighed up the advantages and disadvantages of a standing inspectorate, the Commission sees no reason to depart from the conclusion it reached in the Consultation Paper and does not recommend the establishment of a permanent standing inspectorate.

2.46 *The Commission does not recommend the establishment of a permanent standing inspectorate for public inquiries.*

(2) ***Central Inquiries Office***

2.47 In the Consultation Paper, the Commission considered, and recommended, the establishment of a central inquiries office, which would be charged with collecting and managing a database of records and information in respect of public inquiries.³⁵ This would provide those charged with establishing and running public inquiries easy access to precedents and guidance on a wide variety of matters pertinent to their inquiry, including legislation, procedural issues, the drafting of terms of reference and administrative matters.

2.48 The establishment of a central inquiries office has much to commend it. As noted, one of the disadvantages of the ad hoc nature of inquiries is that they do not have an institutional memory. As a result those charged with responsibility for the establishment, management and operation of inquiries are forced to “re-invent the wheel” every time a different inquiry is set up. Although the Commission accepts that every inquiry will be different, it considers that there will also be a large degree of common issues, such as the location of suitable offices and staff. The advantage of a central

³⁴ The enactment of the *Commissions of Investigation Act 2004* is in line with the Commission’s recommendations in the Consultation Paper at paragraph 10.16.

³⁵ See the Consultation Paper at paragraph 1.14.

inquiries office is that it provides a one-stop shop for those seeking information on inquiries, thus making the task of those charged with responsibility for the establishment, management and operation of inquiries more efficient and less time consuming.

2.49 It could be argued that a designated inquiries office is not necessary as the provision of administrative and procedural guidance could be provided by the sponsoring department but the Commission has concluded that this is unlikely to occur in a structured manner.

2.50 The Commission has accordingly concluded that the views expressed in the Consultation Paper remain sound and the Commission recommends that a central inquiries office should be established to collect and manage a database of records and information in respect of public inquiries.

2.51 *The Commission recommends the establishment of a central inquiries office which would be charged with collecting and managing a database of records and information for tribunals of inquiry and public inquiries generally.*

2.52 The Commission has already outlined the functions which it proposes that the Central Inquiries Office perform, namely to collect and manage a database of records and information in respect of public inquiries. In this respect, the Commission considers that it would be especially important that the Office prepare a booklet, which would set out in a clear and easy to read format a series of guidelines for those charged with establishing public inquiries, those running them and those staffing them.³⁶

2.53 *The Commission recommends that the proposed Central Inquiries Office prepare a booklet, which would set out in a clear and easy to read format a series of guidelines for those charged with establishing public inquiries, those running them and those staffing them.*

³⁶ The Commission notes the publication in New Zealand of such a guide book in *Setting Up and Running Commissions of Inquiry: Guidelines for Officials, Commissioners and Commission Staff* (Department of Internal Affairs 2001) available at www.dia.gov.nz. The Commission also notes the manner in which the *Comparative Study into Parliamentary Inquiries and Tribunals of Inquiry* (Pn 9796) was utilised by the DIRT Inquiry. See also the recommendation at paragraph 5.11 below concerning procedures.

2.54 The Commission now turns to discuss a number of matters concerning the administrative framework of the proposed central inquiries office, in particular whether the office should be independent, where the office should be located and who should staff it.

2.55 It could be argued that as the central inquiries office is concerned with providing information and guidance to public inquiries it should enjoy the same measure of independence that public inquiries enjoy. However, as against this it could be argued that as the office is primarily concerned with administrative matters there is no need to place it on an independent footing. After all it is the inquiry itself, not the central inquiries office, that will make the final decision on matters such as procedures.

2.56 It should be noted that the work it is envisaged the Central Inquiry Office will carry out will not require a large staff. Its primary function is to ensure that a database be maintained of relevant information and that position papers and guides be prepared on the basis of this information.

2.57 An important issue is the appropriate location for the office. A number of options arise: the Office of the Attorney General, the Department of the Taoiseach, the Department of Justice, Equality and Law Reform and the Department of Finance. The Commission does not intend to express a concluded view on this matter.

2.58 Locating the office within the Office of the Attorney General has much to commend it. The main advantages would be that it is an office accustomed to researching, collecting and maintaining legal records and advices. A related point is that it also contains a pool of highly skilled lawyers who could bring their experience to bear on public inquiries. In addition, as the Office is accustomed to acting independently of the executive in the performance of the Attorney General's role as guardian of the public interest, locating the Central Inquiries Office here would deflect any criticism of partiality.

2.59 Locating the proposed unit within the Department of Justice, Equality and Law Reform would also bring many of the advantages outlined in respect of the Office of the Attorney General, namely an office skilled in dealing with complex legal and

administrative issues possessing an experienced pool of in house lawyers.

2.60 Locating the unit within the Department of Finance also has its advantages. The Department of Finance is after all the department of State responsible in most cases for planning and funding public inquiries. Accordingly, in light of the practical experience it has gained in this regard it would make sense to locate a unit that is responsible for providing practical advice and guidance to public inquiries in this department.

2.61 Similarly, locating the proposed office within the Department of An Taoiseach is not without its advantages. First, the Department of An Taoiseach has overall responsibility for the Office of Attorney General. As such it has a good liaison with officials in that office and this contact would be useful for a central inquiries office located in that Department in locating and collecting information. In addition, through necessity it has good links with the Department of Finance, contacts which it would be able to bring to bear if it was charged with the operation of the Central Inquiries Office. Thirdly, the Department of An Taoiseach has considerable experience in managing a variety of different bodies in that it is charged under section 1 of the *Ministers and Secretaries Act 1924* with responsibility for the administrative control of and responsibility for such public services and the business, powers, duties and functions not vested in other Departments of State.

2.62 *The Commission recommends that careful consideration should be given to the location of the Central Inquiries Office having regard to the points raised.*

E Separate Legal Personality

2.63 In the Consultation Paper the Commission provisionally recommended conferring separate legal personality on tribunals of inquiry.³⁷ The Commission considered that if tribunals had separate legal personality it would simplify their relationships with their staff as well as providing continuity to the tribunal.³⁸

³⁷ See the Consultation Paper at paragraph 6.137.

³⁸ See the Consultation Paper at paragraph 6.135.

2.64 The need for such a provision is illustrated by background to the *Tribunals of Inquiry (Evidence) (Amendment) Act 2004*. This was enacted because of concern that arose following the resignation in June 2003 of Flood J as Chairperson and as a member of the Tribunal to Inquire into certain Planning Matters. That issue related to the determination of applications by parties for costs arising out of the findings of the Tribunal in relation to certain modules contained in the Second Interim Report of the Tribunal published in September 2002. The modules were dealt with at a time when Flood J was the sole member of the Tribunal and the Second Interim Report was accordingly prepared by him. The 2004 Act provides that the person who is the sole member of a tribunal or is the chairperson may make an order in relation to any costs that were incurred before his or her appointment and that have not already been determined. In exercising this power, the sole member or chairperson shall have regard to any report of the tribunal relating to its proceedings in the period before his or her appointment.

2.65 The Commission sees no reason to depart from its original conclusion and recommends that any amending legislation should bestow legal personality on tribunals of inquiry.

2.66 *The Commission recommends that provision should be made to allow a tribunal to be conferred with separate 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.

F Independence

2.67 The tribunal of inquiry legislation does not deal with the independence of the tribunals. The independence of tribunals to date has depended on the integrity and character of those asked to undertake them. It should be noted that appointing members of the judiciary as members of tribunals does not confer the judiciary's constitutionally guaranteed independence on the tribunals. Judicial independence only applies in the "exercise of their judicial functions"

and so this independence does not apply in the discharge of extra judicial functions such as being members of tribunals of inquiry.³⁹

2.68 The Commission notes that both the *Commission to Inquire into Child Abuse Act 2000* and the *Commissions of Investigation Act 2004* provide expressly for the independence of those investigative bodies.⁴⁰

2.69 The Commission accordingly recommends that the independence of tribunals of inquiry should be placed on a statutory footing because of the role of tribunals of inquiry in investigating matters of public concern.

2.70 *The Commission recommends that the tribunals of inquiry legislation be amended to provide expressly for the independence of tribunals of inquiry and their members.*

³⁹ Article 35.2 of the Constitution of 1937.

⁴⁰ Section 9 of the *Commissions of Investigation Act 2004* and section 3(3) of the *Commission to Inquire into Child Abuse Act 2000*.

CHAPTER 3 TERMS OF REFERENCE

A Introduction

3.01 This Chapter discusses the terms of reference of tribunals of inquiry and makes proposals for reform in relation to their drafting and amendment.

3.02 Tribunals of inquiry are established to investigate particular sets of circumstances. As such the information contained within the terms of reference will vary from inquiry to inquiry. The drafting of the terms of reference is a crucial factor in determining an inquiry's ambit, length, complexity, cost and ultimately success. For these reasons the drafting of the terms of reference is one of the most important stages of the inquiry process and one in which considerable care should be exercised by those drafting them.

B Drafting Terms of Reference

(1) *Tribunals of Inquiry (Evidence) Act 1921*

3.03 The *Tribunals of Inquiry (Evidence) Act 1921* does not deal with the drafting of terms of reference, but leaves that to the Government and the Oireachtas. Section 1(1) of the 1921 Act provides:

“Where it has been resolved (whether before or after the passing of this Act) 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 concern...”

3.04 In describing the subject matter of the inquiry as being a “definite matter described in the resolution as of urgent public importance,” section 1(1) of the 1921 Act provides some guidance for those charged with drafting the terms of reference of inquiries. The

Oxford English Dictionary defines the word “definite” as an adjective meaning “clearly stated or decided; not vague or doubtful.”

3.05 It can be argued therefore that the 1921 Act envisages that the terms of reference of an inquiry to which it applies should be as clearly stated and precise as possible.

(2) *Recent Practice Regarding the Drafting of Terms of Reference*

3.06 In its *Comparative Study into Parliamentary Inquiries and Tribunals of Inquiry*, the Office of the Attorney General considered recent practice in the manner in which the terms of reference of inquiries are drafted.¹

3.07 It identified nine distinct stages in the drafting process.

- (i) A draft is prepared by the sponsoring department;
- (ii) The draft is examined by the Office of the Attorney General;
- (iii) Further consideration is given to the draft by the sponsoring department and Office of the Attorney General;
- (iv) The draft is then considered by the Chief Whips;
- (v) In certain cases, there may be consultation with certain interest groups;
- (vi) Further consideration is given to the draft by the sponsoring Department and the Office of the Attorney General gives legal clearance;
- (vii) The Government makes its decision on the terms of reference;
- (viii) The Draft is put to both Houses of the Oireachtas where it may be subject to amendment;

¹ *Comparative Study into Parliamentary Inquiries and Tribunals of Inquiry* (Pn 9796).

- (ix) Resolutions passed containing the terms of reference by both Houses of the Oireachtas.”²

3.08 The Office of the Attorney General concluded that in its experience the terms of reference become wider at each stage of that process, with the result that the subject matter of the inquiry may not be a definite matter.³

3.09 This would appear to be at variance with section 1(1) of the 1921 Act, which arguably envisages that terms of reference should be clearly stated in order to be “definite.” However, in *Haughey v Moriarty*⁴ the Supreme Court, when faced with the argument that the terms of reference of the Moriarty Inquiry were too vague, concluded that they were not and added the caveat that even if they were too vague, the Tribunal itself would clarify matters when it gave its interpretation.

(3) Consultation Paper Recommendation

3.10 In the Consultation Paper the Commission stressed the need for precision in the drafting of the terms of reference. It proposed the introduction of a two-stage approach to the drafting of terms of reference. At the first stage, the decision to establish an inquiry would be taken, broad terms of reference would be fixed, and the matter would then be handed over to those charged with running the inquiry. These persons would then examine the terms of reference, conduct something akin to a feasibility study and then submit its comments and recommendations relating to the draft terms of reference together with any suggestions or amendments. The Oireachtas and Government would then consider those proposals and incorporate them if they so wished into the final terms of reference.⁵

² *Comparative Study into Parliamentary Inquiries and Tribunals of Inquiry* (Pn 9796) at 26. See the Consultation Paper at paragraph 5.51.

³ *Ibid* at 29.

⁴ [1999] 3 IR 1.

⁵ See the Consultation Paper at paragraph 5.57.

(4) Discussion

(a) Commissions of Investigation Act 2004

3.11 The Commission notes that the *Commissions of Investigation Act 2004* appears to adopt a similar approach to this issue.

3.12 The 2004 Act envisages a two-stage approach to the drafting of terms of reference. The order establishing the commission of investigation will designate a Specified Minister to set the terms of reference.⁶ In the absence of such a designation the Government will set the terms of reference.⁷ The specified Minister, or the Government, may then consult with “any persons” prior to the setting of the terms of reference.⁸

3.13 The 2004 Act imposes an obligation on those drafting the terms of reference to be as precise as possible.⁹ The terms of reference must set out as clearly and as accurately as possible the events, activities, circumstances, systems, practices or procedures to be investigated, together with the relevant dates, locations and individuals involved.¹⁰ In addition, the Minister responsible for the operation of the commission must ensure that as soon as possible after the terms of reference are set an accompanying statement is prepared containing an estimate of the costs of the commission and the length of time it will take. This must be published as soon as possible after the terms of reference are set in *Iris Oifigiúil* and such other publications as the Minister considers appropriate.¹¹

(b) United Kingdom

3.14 Section 5 of the UK *Inquiries Act 2005* requires the Minister to specify the terms of reference for inquiries established under the Act. The Minister must consult with the chairperson when either setting up the inquiry or changing the terms of reference. The

⁶ Section 4(1) of the *Commissions of Investigation Act 2004*.

⁷ Section 4(2) of the *Commissions of Investigation Act 2004*

⁸ Section 4(3) of the *Commissions of Investigation Act 2004*.

⁹ Section 5(1) of the *Inquiries Act 2005*.

¹⁰ Section 5(1) of the *Inquiries Act 2005*.

¹¹ Section 5(2)(b) of the *Inquiries Act 2005*.

2005 Act does not require the Minister to consult with any other individuals or organisations, but they can be consulted if the Minister considers it appropriate in the particular circumstances.¹² The terms of reference must specify the matters to which the inquiry relates, any particular matters as to which the inquiry panel is to determine the facts, whether the inquiry is to make recommendations, or any other matters which the Minister may specify.

(c) *New Zealand*

3.15 In New Zealand, the Department of Internal Affairs also stressed the need for precision in drafting the terms of reference for commissions of inquiry.¹³ It took the view that the importance of the terms of reference cannot be overstated. It noted that if there is any confusion over their meaning then an inquiry could deliver up findings that do not answer the original problem. In addition, it noted that if the terms are too narrow then an inquiry might not be able to address all matters relevant to the issue. If the terms were too wide, the inquiry could take a very long time and come up with a large number of findings that the Government would be unable to implement.

3.16 It stated that:

“Ideally, Terms of Reference should:

- Address the fundamental issues causing the wider anxiety;
- Address the concerns of all parties likely to have an interest in the inquiry;
- Allow scope for the inquiry to inquire into whatever areas it sees fit in order to get a complete picture of the facts;
- Avoid directing the inquiry to investigate issues of criminal conduct;

¹² Section 5(4) of the *Inquiries Act 2005*.

¹³ Department of Internal Affairs *Setting up and Running Commissions of Inquiry* (2001).

- Be consistent within themselves and with the instructions contained in the rest of the Warrant (especially the provisions regarding secrecy and powers);
- Be consistent with natural justice;
- Not contain any implied conclusions;
- Be precise, clear and unambiguous in their meaning.”¹⁴

(5) Recommendation

3.17 The Commission agrees with the widely expressed view that the drafting of the terms of reference is one of the most important stages of the inquiry process. As such, the Commission considers that they should be set out as precisely as possible. The Commission does not consider it is either acceptable or desirable to draft vague and uncertain terms of reference in the hope or expectation that the particular tribunal of inquiry involved will interpret them.

3.18 The Commission therefore recommends that terms of reference should set out the events, activities or procedures to be inquired into as clearly and as accurately as possible, using as a model section 5(1) of the *Commissions of Investigation Act 2004*. This would include a consideration of whether the inquiry should be exhaustive or whether as will usually be the case. A significant number of representative cases or instances of malfunction, maladministration and alike should be examined.

3.19 *The Commission recommends that the tribunals of inquiry legislation be amended to impose a requirement that terms of reference should set out the events, activities, circumstances, systems, practices or procedures to be inquired into as clearly and as accurately as possible.*

3.20 As to the stages of drafting, the Commission considers that a two-stage approach would be appropriate. After a resolution is passed establishing a tribunal, the precise terms of reference should be drafted by the person or persons appointed as members of the

¹⁴ Department of Internal Affairs *Setting up and Running Commissions of Inquiry* (2001) at 28.

tribunal of inquiry, in consultation with the sponsoring Minister and such other persons or bodies as the tribunal considers appropriate. At the second stage, the draft terms of reference should be submitted to the Oireachtas for approval. In addition, a memorandum setting out the length of time the proposed inquiry will take and, subject to the Commission's recommendation at paragraph 7.36 below, the anticipated cost of the inquiry should accompany the terms of reference.

3.21 *The Commission recommends that a two-stage approach should be taken to the drafting of the terms of reference. After a resolution is made establishing a tribunal, the precise terms of reference should be drafted by the person or persons appointed as members of the tribunal of inquiry, in consultation with the sponsoring Minister and such other persons or bodies as the tribunal considers appropriate. At the second stage, the draft terms of reference should be submitted to the Oireachtas for approval. In addition, the terms of reference should be accompanied by a memorandum setting out the length of time the proposed inquiry will take and subject to the Commission's recommendation at paragraph 7.36 the anticipated cost of the inquiry.*

C Amending Terms of Reference

(1) *Tribunals of Inquiry (Evidence) Act 1921, as amended*

3.22 The procedure for amending the terms of reference of a tribunal of inquiry is governed by Section 1A of the 1921 Act, as amended.¹⁵

3.23 Section 1A provides that:

“(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 –

(a) The tribunal has consented to the proposed amendment, following consultation between the

¹⁵ As inserted by section 1(1) of the *Tribunals of Inquiry (Evidence) (Amendment) Act 1998*.

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.”

3.24 In the Consultation Paper, the Commission noted that section 1A of the 1921 Act was inserted to allow a variation in the terms of reference of the Planning Tribunal, and that its effect is that variations may only occur with the agreement of the tribunal, the Oireachtas and the relevant Minister.¹⁶

(2) Consultation Paper Recommendation

3.25 In the Consultation Paper, the Commission proposed that section 1A should be amended in two respects. First, it recommended that Section 1A(2) should be amended by substituting the phrase “who is unduly affected by the proceedings of the tribunal” for the phrase “any person who has cooperated with or provided information to the tribunal.” This change was recommended because the Commission felt that section 1A is too restrictive in its ambit.¹⁷ The second change recommended was to impose an obligation on the tribunal to consider whether it requires an amendment within four weeks of its establishment.¹⁸

(3) Discussion

(a) Commissions of Investigation Act 2004

3.26 The 2004 Act allows the terms of reference to be amended at any time prior to the submission of the commission’s final report. This ensures that a commission can evolve as its investigation does. However, the consent of a commission must be obtained where the

¹⁶ See the Consultation Paper at paragraph 5.62.

¹⁷ See the Consultation Paper at paragraph 5.61

¹⁸ See the Consultation Paper at paragraph 5.66

proposed amendments clarify, limit or extend the scope of its investigation.¹⁹ A commission is expressly prohibited from consenting to a request for an amendment of its terms of reference where it considers that the proposed amendment would prejudice the legal rights of any person who has cooperated with or provided information to, a commission.²⁰

3.27 Where the terms of reference are amended, the specified Minister must ensure that the statement accompanying the terms of reference is revised where the previous estimate of costs and duration are no longer appropriate. The accompanying statement must also be revised where the terms of reference are not amended but the commission forms the view that the time frame ought to be revised.²¹ Furthermore, in both situations, the specified Minister must cause the revised accompanying statement to be published in *Iris Oifigiúil* and such other publications, as he or she considers appropriate.²²

(b) *United Kingdom*

3.28 Section 5(3) of the UK *Inquiries Act 2005* gives the Minister the power to amend an inquiry's terms of reference. However, section 5(4) provides that before so doing he or she must consult the chairperson. In addition, section 6(4) imposes a requirement on the Minister to make a statement to Parliament setting out the amended terms of reference.

(c) *Canada*

3.29 In Canada, neither the Federal nor the Provincial legislation governing public inquiries provides for the amendment of an inquiry's terms of reference. However, section 3(3) of the *Uniform Public Inquiries Act*, published by the Uniform Law Conference as a model for the harmonisation of provincial legislation, provides that: "Where it is in the public interest, the Lieutenant-General in Council may by order revise the terms of reference for the inquiry and revise the dates set for the termination of the inquiry and delivery of the commission's report."

¹⁹ Section 6(1) of the *Commissions of Investigation Act 2004*.

²⁰ Section 6(2) of the *Commissions of Investigation Act 2004*.

²¹ Section 6(6) of the *Commissions of Investigation Act 2004*.

²² Section 6(7) of the *Commissions of Investigation Act 2004*.

(d) *Australia*

3.30 In the New South Wales, section 6 of the Special Commissions Act 1983 provides that the Governor may revoke, alter or vary any letters patent or commission made or issued under this Act from time to time as occasion requires.

(4) *Recommendation*

3.31 *In light of the Commission's recommendation that the tribunal itself should draft its precise terms of reference, the provisional recommendation it expressed in the Consultation Paper that the tribunal should be placed under a positive obligation to consider whether to request an amendment within 4 weeks of establish is no longer necessary.*

3.32 *The Commission recommends that the following procedure, based on those in the Commissions of Investigation Act 2004, should be adopted in respect of the amending of the terms of reference of an inquiry:*

- *The Sponsoring Minister and the Tribunal should be given the power to request an amendment of the terms of reference. Where the person seeking the amendment is the Sponsoring Minister, the consent of the tribunal should in general be sought. The requirement of generality is to prevent the discretion of the Oireachtas appearing to be subject to a decision of a tribunal obtained where the proposed amendments clarify, limit or extend the scope of its inquiry.*
- *The tribunal should be expressly prohibited from either seeking or consenting to a request for an amendment where it takes the view that the proposed amendment would prejudice the legal rights of any person who is adversely affected by the proceedings of the tribunal.*
- *The Oireachtas must consent to the amendment by means of a Resolution of both Houses.*
- *Where the terms of reference are amended the Sponsoring Minister must ensure that the statement accompanying the terms of reference is revised where the previous estimate of costs and duration is no longer appropriate. In addition, the Sponsoring Minister must cause the revised accompanying*

statement to be published in Iris Oifigiúil and such other publication, as he or she considers appropriate.

CHAPTER 4 MEMBERSHIP

A Introduction

4.01 This chapter discusses the appointment of persons to tribunals of inquiry, either as sole members, chairpersons, ordinary members, assessors or experts, and makes relevant proposals for reform.

B Membership

4.02 The Commission begins by considering who should be responsible for the appointment of the members of tribunals of inquiry, and secondly what qualifications should be required for appointment and thirdly whether there should be a statutory requirement of independence.

(1) *Responsibility for Appointment*

4.03 The *Tribunals of Inquiry (Evidence) (Amendment) Act 1979* deals with the membership of the tribunals of inquiry. Section 2(1) provides that a tribunal may consist of more than one person sitting with or without assessors.¹ Section 2(3), as inserted by the *Tribunals of Inquiry (Evidence)(Amendment) Act 2002*, provides that additional members may be appointed during the course of the tribunal.²

4.04 However, the legislation does not specify who is responsible for the appointment of members to a tribunal of inquiry. The present position is that the Government appoints the members of tribunals of inquiry.

¹ This was inserted in the context of the *Tribunal of Inquiry into the disaster at Whiddy Island Bantry Co Cork on 8th January 1979*. See the Consultation Paper at paragraph 5.46.

² As inserted by section 4 the *Tribunals of Inquiry (Evidence) (Amendment) Act 2002*. This was inserted in the context of the Planning Tribunal. See the Consultation Paper at paragraph 5.29.

(a) *Commissions of Investigation Act 2004*

4.05 The *Commissions of Investigation Act 2004* provides that the members of inquiries established under that Act are to be appointed by the specified Minister or by the Government, where there is no specified Minister.³

(b) *United Kingdom*

4.06 Section 4 of the UK *Inquiries Act 2005* provides as follows:

“(1) Each member of an inquiry panel is to be appointed by the Minister by an instrument in writing.

(2) The instrument appointing the chairman must state that the inquiry is to be held under this Act.

(3) Before appointing a member of an inquiry panel (otherwise than as chairman) the Minister must consult the person he has appointed or proposes to appoint, as chairman.”

(c) *Canada*

4.07 In Canada, the Executive makes appointments to both Federal and Provincial Inquiries.⁴

(d) *New Zealand*

4.08 In New Zealand, the Executive makes appointments to inquiries. The selection of Commissioners is the prerogative of Ministers, who take advice from relevant government departments

³ Section 7(2) of the *Commissions of Investigation Act 2004*.

⁴ See the *Public Inquiries Act*, RSA 2000 (Alberta), the *Inquiry Act*, RSBS 1996 (British Columbia), *An Act Respecting Public Inquiry Commissions*, RSQ 1981 (Quebec), the *Public Inquiries Act*, RSS 1978 (Saskatchewan), the *Public Inquiries Act*, RSO 1990 (Ontario), the *Public Inquiries Act*, RSNS 1989 (Nova Scotia), the *Inquiries Act*, RSNB 1973 (New Brunswick), the *Public Inquiries Act*, PSPEI 1988 (Prince Edward Island), the *Public Inquiries Act*, RSNL 1990 (Newfoundland & Labrador), the *Public Inquiries Act*, RSY 2002 (the Yukon Territory), the *Public Inquiries Act*, RSNWT 1988 (the North Western Territory and Nunavut (Nunavut was established in 1999. Prior to that it formed part of the North Western Territory)).

and the Solicitor-General, especially in regard to the need for a judge as Chair.⁵

(e) *Australia*

4.09 In Australia, the Executive makes appointments to both Federal and State inquiries.⁶

(f) *Recommendation*

4.10 Three options present themselves concerning the responsibility for the appointment of members of a tribunal of inquiry. The first is that they continue to be appointed by the Government. The second is that they should be appointed by, or their appointment should be subject to the approval, of the Oireachtas. The third is that they should be appointed by an independent body akin to the Top Level Appointments Commission, or the Judicial Appointments Commission.

4.11 The Commission considers that given the fact that tribunals may be established to inquire into a wide variety of circumstances, the Government is best placed to consider the suitability or otherwise of potential appointees.

4.12 The Commission considers that it would be inappropriate for the Oireachtas to debate or adjudicate on the suitability or otherwise of potential appointees particularly where those individuals are members of the judiciary.

4.13 The Commission also considers that a mechanism whereby the appointment would be made by an independent commission would be inappropriate for a number of reasons. First, because tribunals are established on an ad hoc and infrequent basis, it would be wasteful of resources to create a body specifically to consider candidates or appointment. Second, if such a commission were created, or the responsibility given to another body, such as the Top Level Appointments Commission, applicants would have to apply to that body to be members of the panel, and that might be inappropriate

⁵ See the *Commissions of Inquiry Act 1908*.

⁶ See generally the *Royal Commissions Act 1902*, the *Inquiries Act 1991* (ACT), the *Inquiries Act 1985* (NT), the *Commissions of Inquiry Act 1950* (Tas), the *Special Commissions of Inquiry Act 1983* (NSW).

particularly where the potential appointees are members of the Judiciary.

4.14 In addition, the Commission is particularly conscious that tribunals of inquiry are established to inquire into definite matters of urgent public importance. The requirement of urgency would militate against a lengthy appointment or approval process. This is reinforced by the fact that the Tribunal would, under the Commission's recommendations, be responsible for the drafting of the terms of reference, which must be approved by both Houses of the Oireachtas before the inquiry may commence its inquiry.

4.15 *The Commission recommends that the tribunals of inquiry legislation be amended to confer an express power to appoint members of the tribunal on the Government.*

(2) *Qualifications for Appointment*

4.16 The Commission will now consider the qualifications for appointment to the inquiry panel, in particular the question of whether the appointees should be members of the judiciary.

(a) *The Tribunals of Inquiry (Evidence) Acts 1921 to 2004*

4.17 The present position is that the *Tribunals of Inquiry (Evidence) Acts 1921 to 2004* do not lay down any guidelines as to what the qualifications for appointment should be. Accordingly, the decision as to qualifications is taken by the body responsible for appointing the members, namely the Government.

(b) *Practice to Date*

4.18 As the Consultation Paper pointed out it has generally been the practice (particularly in recent years) that judges are appointed to chair, or be sole members of, tribunals of inquiry. This has not however been an invariable practice, particularly in relation to those tribunals which dealt with policy areas. Nonetheless, in recent years a convention has applied that judges (whether sitting or retired) are appointed to chair or be the panel members of, a tribunal of inquiry.

(c) *Consultation Paper Recommendation*

4.19 The Commission in the Consultation Paper recommended that, in light of the plethora of legal issues which can arise before a tribunal of inquiry, it would be prudent to appoint a judge or other

eminent lawyer as chairperson.⁷ The Commission stated that on the rare occasions where it is considered necessary to appoint a multi member inquiry, the panel should be composed of as many members, from as many backgrounds, as is considered appropriate having regard to the subject matter of the inquiry.⁸

(d) *Discussion*

(I) *Commissions of Investigation Act 2004*

4.20 The *Commissions of Investigation Act 2004* requires that appointees should be persons who, having regard to the subject matter of the investigation, have the appropriate experience, qualifications, training or expertise.⁹

(II) *United Kingdom*

4.21 Section 8 of the UK *Inquiries Act 2005* provides that in appointing a member of the inquiry panel, the Minister must have regard (a) to the need to ensure that the inquiry panel has the necessary expertise to undertake the inquiry; and (b) in the case of an inquiry panel consisting of a chairman and one or more other members, to the need for balance in the composition of the panel.

4.22 Section 9 of the UK 2005 Act provides that the Minister may not appoint a person if that person has (a) a direct interest in the matter under investigation, or (b) a close association with an interested party unless the Minister takes the view that this association would be unlikely to influence the proposed appointee's decisions.¹⁰

⁷ See the Consultation Paper at paragraph 5.15.

⁸ See the Consultation Paper at paragraph 5.27.

⁹ Section 7(4) of the *Commissions of Investigation Act 2004*.

¹⁰ Section 9(2) of the *Inquiries Act 2005* provides that a proposed appointee must inform the Minister if he has a direct interest in the matter under investigation or a close relationship with an interested party. Section 9(3) provides a member of the panel must inform the Minister if he acquires an interest or an association with an interested party during the course of the inquiry. Section 9(4) of the *Inquiries Act 2005* provides that a member of the inquiry panel must not, during the course of the inquiry, undertake any activity that could reasonably be regarded as affecting his suitability to serve as such.

4.23 Section 10 deals with the appointment of members of the judiciary to the inquiry panel. It provides that if the Minister proposes to appoint a judge, he or she must first consult with the senior judge of the court of which the proposed appointee is a member.

(III) *Canada*

4.24 Neither Federal nor Provincial inquiries legislation lays down any criteria for the appointment of members to public inquiries. It is therefore open to those appointing commissioners to appoint either judges or laypersons. Section 56 of the *Judges Act 1985* deals with the appointment of judges to commissions of inquiry. It provides that a judge may not serve on a Commission of Inquiry unless the matter is authorised by the Governor-in-Council, or the Lieutenant General.

4.25 The Canadian Judicial Council issued a position paper regarding the appointment of Federally Appointed Judges to commissions of inquiry which stated that:

- “A request to appoint a judge should first be addressed to the senior judge of the court to which the appointee belongs;
- This request should be accompanied by a statement setting out the proposed terms of reference for the inquiry and an indication as to the time limit, if any, to be imposed on the work of the commission.
- The senior judge and the potential appointee should consider whether:
 - The absence of the judge for these purposes would significantly impair the work of the court;
 - The acceptance of the appointment to the commission of inquiry could impair the future work of the judge as a member of the court. In this respect they may consider:
 - Does the subject-matter of the inquiry either essentially require advice on public policy or involve issues of an essentially partisan nature?

- Does it essentially involve an investigation into the conduct of agencies of the appointing government?
- Is the inquiry essentially an investigation of whether particular individuals have committed a crime or a civil wrong?
- Who is to select commission counsel and staff?
- Is the proposed judge through particular knowledge or experience specially required for this inquiry? Or would a retired judge or a supernumerary judge be as suitable?
- If the inquiry requires a legally trained commissioner, should the court feel obliged to provide a judge or could a senior lawyer perform this function equally well?

If the senior judge and the potential appointee take the view that the appointment would impair the future work of the judge, then the appointment should be declined.”¹¹

(IV) *New Zealand*

4.26 The *Commissions of Inquiry Act 1908* does not lay down any guidelines as to what qualifications are necessary for appointment to an inquiry established under the Act. However, historically, commissions of inquiry have been chaired by members of the judiciary.¹²

4.27 The Council of Chief Justices of Australia and New Zealand recently considered the appointment of members of the judiciary.¹³ They were concerned that the policy of appointing members of the judiciary to public inquiries might compromise the independence and

¹¹ Canadian Judicial Council *Position of the Canadian Judicial Council on the Appointment of Federally-Appointed Judges to Commissions of Inquiry* (1998) available at <http://www.cjc-ccm.gc.ca/article.asp?id=2371>.

¹² Department of Internal Affairs *Setting Up and Running Commissions of Inquiry* (DIA 2001) at 36.

¹³ *Statement on the Appointment of Judges to Other Offices by the Executive* (1998).

integrity of the judiciary. Accordingly, they recommended that before a judge is appointed to a public inquiry, the Executive must consult with the head of the Court of which he is a member.

4.28 In its Guidelines on Commissions of Inquiry, the Department of Internal Affairs state that appointing Commissioners of the right calibre is vital to the success of an inquiry. It stated that where legal issues are likely to be involved, members of the judiciary should be appointed. However, it also recognised the value of appointing laypeople where the circumstances of the inquiry required it.¹⁴

(e) *Recommendation*

4.29 Having surveyed the practice relating to the appointment of members to tribunals of inquiry in Ireland and a number of common law jurisdictions, the Commission turns to consider the appropriate manner in which this would be dealt with in reformed tribunals of inquiry legislation.

4.30 In relation to the question of whether the chairperson should be a lawyer, it could be argued that this is not required as the type of person appointed to an inquiry should depend on the nature of the inquiry. The Commission is aware that there are many types of public inquiry in existence which are not chaired by or composed of lawyers. When legal advice is required by such inquiries, it is sought and having received the advice the inquiry proceeds.¹⁵

4.31 However, it could be argued that tribunals of inquiry are a very different type of investigation from these two types of inquiry. First, the subject matter of tribunals of inquiry is generally more voluminous and diverse than other types of public inquiry. Secondly, a tribunal is likely to sit in public so the chairperson should be someone with experience in public hearings. Thirdly, the risk of injury to reputation inherent in many tribunals of inquiry means that parties appearing before them will often be entitled to a number of constitutional rights. Fourthly, the chairperson will often be required

¹⁴ Department of Internal Affairs, *Setting Up and Running Commissions of Inquiry* (DIA 2001) at 36.

¹⁵ However, there is no guarantee that the inquiry will always act on its legal advice. See *Maguire v Ardagh* [2002] 1 IR 385.

to give rulings, for example to interpret the inquiry's terms of reference, a decision that may have significant legal consequences. Sixthly, the *Tribunals of Inquiry (Evidence) Acts 1921 to 2004* invest inquiries pursuant to that legislation with many of the powers, privileges and immunities of the High Court. Accordingly, it would seem logical that the chairperson, who is ultimately responsible for the exercise of these powers, privileges and immunities, should be someone familiar with the operation of the legal system.

4.32 Having decided that the chairperson or sole member of a tribunal of inquiry should in the majority of cases be a lawyer the question arises whether that lawyer need be a judge. In other words, would a senior counsel, solicitor or legal academic fulfil this role just as well.

4.33 The arguments in favour of appointing members of the judiciary may be summarised as follows.¹⁶ First, members of the judiciary enjoy a reputation for independence and integrity and this is a vital quality for those charged with investigating what may be politically sensitive issues. Secondly, the judiciary has a great deal of experience in analysing evidence, determining facts and reaching conclusions, prerequisite abilities for anyone chairing a tribunal of inquiry. Thirdly, the judiciary has experience in providing a detailed account of the reasoning behind their decisions, a quality which may prove of assistance to the courts if those decisions are the subject of judicial review proceedings. Fourthly, since the *Tribunals of Inquiry (Evidence) Acts 1921-2004* invest tribunals of inquiry with many of the powers, privileges and immunities of the courts, it makes sense to appoint a member of the judiciary.¹⁷

¹⁶ See the Consultation Paper at paragraph 5.10-5.24.

¹⁷ In his evidence to the House of Commons Public Administration Select Committee, Lord Hutton, stated, "a judge is very well versed in some aspects of running an inquiry, which flows from his experience in conducting cases in court." This, he continued, was because "they are used to hearing witnesses, they are used to assessing evidence, they are used to defining issues, ...[and considering] whether a question is fair, whether it is relevant." Second, judges have been appointed because they are independent and impartial. (House of Commons Public Administration Select Committee, Government by Inquiry (HC 2005) at 19, 20.) In his evidence to the Committee, Professor Jowell described this as "symbolic reassurance."

4.34 As against this, a number of arguments may be made against appointing judges, serving or retired, to chair inquiries. First, appointing serving judges to chair such inquiries reduces the number of judges available to do judicial work. Secondly, although it is accepted that the appointment of judges as chairpersons of inquiries is not unconstitutional, it could be argued that while it is within the letter of the law it is outside the spirit of the law, insofar as judges appointed under the constitution should fulfil the tasks required of them under the Constitution, namely to administer justice. Thirdly, it could be argued that by appointing judges to chair inquiries, the Government runs the risk of tarnishing their reputations for integrity and independence, often one of the reasons they were appointed in the first place.¹⁸ Fourthly, it could be argued that appointing judges, serving or retired, to chair inquisitorial inquiries is inappropriate because their background is adversarial as opposed to inquisitorial. Fifthly, it could be argued that the appointment of judges as chairpersons makes it more difficult for the public to distinguish between the inquisitorial inquiry process and the adversarial judicial process. Sixthly, it could be argued that appointing a serving judge as chairperson of an inquiry is unfair on the individual concerned insofar as if the final report is heavily criticised, the judge by virtue of his or her position will not be able to defend himself or herself in the media.

4.35 While there are strong arguments on both sides of this issue, the Commission has ultimately concluded that the Chairperson or Sole Member of a tribunal of inquiry should in most cases be a member of the judiciary. The following reasons lie behind this conclusion.

¹⁸ In his evidence to the House of Commons Public Administration Select Committee, Mr Justice Beatson, stated that if an inquiry was “highly political, then it ... would be undesirable [to appoint a judge] because it would expose the judge to having to adjudicate on issues, which would not be appropriate for a judge to adjudicate on.” Lord Morris of Aberavon made a similar point, albeit in more colourful language, “when a judge enters the marketplace of public affairs outside his court and throws coconuts, he is likely to have coconuts thrown back at him...If one values the standing of the judiciary [...] the less they are used the better it will be.” (House of Commons Public Administration Select Committee, Government by Inquiry (HC 2005) at 23.)

4.36 The Commission considers that the argument that appointing judges to tribunals reduces the numbers available to carry out normal judicial duties is one which can be remedied. Three solutions are available, first, that only retired judges be appointed, secondly that a provision similar to section 14 of the *Law Reform Commission Act 1975* (which allows for the appointment of an extra High Court or Supreme Court Judge when a member of those courts is appointed to the Commission) be inserted into the tribunals of inquiry legislation or thirdly, that a provision be inserted requiring the consent of the President of the court of which the proposed appointee is a member. In relation to the argument that appointing serving judges to tribunals is outside the spirit of the Constitution in that they were appointed to administer justice not to chair inquiries, the Commission takes the view that judges are appointed to bring the same judicial qualities to bear in their involvement with tribunals as they do in the course of their judicial duties. Similarly, the Commission considers that any perception that the independence of the judiciary could be tarnished through their involvement with tribunals can be catered for through the requirement for consent from the senior judge of the court of the proposed appointee.

4.37 The fourth and fifth arguments against the appointment of judges to tribunals, namely that it makes it more difficult for the public to distinguish between the inquisitorial nature of the tribunal and the adversarial nature of the courts, is perhaps the most telling. However, the Commission considers that it is an argument which could be levelled at any inquiry presided over by a lawyer. The Commission has concluded that this can be mitigated by clear explanations and directions on behalf of the chairperson of the inquiry. In relation to the sixth point, the fact that judges through their involvement with tribunals may be criticised in the media, a criticism that because of their position they are unable to answer back, the Commission agrees that this can give rise to problems but in an ever increasing age of media comment this is not confined to comment on the work of tribunals of inquiry alone.

4.38 In addition, this recommendation should be read in conjunction with the Commission's recommendations that tribunals of inquiry only be set up after careful consideration.

4.39 The Commission recommends that where the inquiry is likely to involve legal issues, the Chairperson should be a member of the judiciary. However, the Commission does not recommend that this should be expressed in legislation as there may be circumstances in which, having regard to the subject matter of the inquiry, it is more appropriate that the chairperson be someone with expertise in the area under investigation. The Commission therefore concludes that the Government should be free to appoint laypersons as ordinary members of the tribunal.

4.40 Where the Government is contemplating appointing a member of the judiciary to an inquiry, the Commission recommends that the legislation should be amended to require consultation with, and the agreement of, the President of the court of which the proposed appointee is a member. The Commission also recommends that there should be a statutory requirement of independence and impartiality for members of the tribunal who are not members of the judiciary.

4.41 *The Commission recommends that where the inquiry is likely to involve legal issues, the Chairperson of an Inquiry Panel should be a member of the judiciary. However, the Commission does not recommend that this should be expressed in legislation as there may be circumstances in which, having regard to the subject matter of the inquiry, it is more appropriate that the chairperson be someone with expertise in the area under investigation. The Commission therefore concludes that the Government should be free to appoint laypersons as ordinary members of the tribunal.*

4.42 *Where the Government is contemplating appointing a member of the judiciary to an inquiry, the Commission recommends that the tribunals of inquiry legislation should be amended to require consultation with, and the agreement of, the President of the court of which the proposed appointee is a member.*

(3) Termination of Appointment

4.43 The Commission now turns to consider the circumstances in which the appointment of a member of an inquiry panel may be terminated. This should be distinguished from the issue, discussed later, of when a tribunal of inquiry may be terminated.

(a) *Tribunals of Inquiry (Evidence) Acts 1921 to 2004*

4.44 The *Tribunals of Inquiry (Evidence) Acts 1921 to 2004* do not lay down any guidelines as to the circumstances, other than inability to act, in which the appointment of a person to a tribunal of inquiry may be terminated.¹⁹ To the Commission's knowledge this has not been an issue with which members of tribunals of inquiry have been faced in the past.

(b) *Commissions of Investigation Act 2004*

4.45 The *Commissions of Investigation Act 2004* does not lay down any guidelines as to the circumstances in which the appointment of a person to a commission of investigation may be terminated.

(c) *United Kingdom*

4.46 Section 12(3) of the *Inquiries Act 2005* provides that the Minister may at any time by notice terminate the appointment of a member of an inquiry panel

“(a) on the ground that, by reason of physical or mental illness or for any other reason, the member is unable to carry out the duties of a member of the inquiry panel;

(b) on the ground that the member has failed to comply with any duty imposed on him by this Act;

(c) on the ground that the member has

(i) a direct interest in the matters to which the inquiry relates, or

(ii) a close association with an interested party, and in the Minister's opinion the member's interest or association is likely to influence his decisions as a member of the inquiry panel.”

The Minister must, before exercising the power to dismiss, inform the member of the proposed decision and the reasons for it, and allow the member an opportunity to refute the case against him or her.

¹⁹ Inability to act is dealt with in section 4(5) of the *Tribunals of Inquiry (Evidence) (Amendment) Act 2002*.

(d) *Canada*

4.47 The *Canadian Federal Inquiries Act 1985* does not deal with the circumstances in which the appointment of a member of an inquiry panel may be terminated. Provincial Inquiries Legislation also does not deal with this issue. However, the *Uniform Public Inquiries Act 2002*, prepared by the Uniform Law Conference provides the Lieutenant Governor in Council with an express power to terminate the appointment of a member of a commission of inquiry.²⁰

(e) *New Zealand*

4.48 The New Zealand *Commissions of Inquiry Act 1908* does not deal expressly with the question of when an inquiry member can be dismissed. However, the Guidelines prepared by the Department of Internal Affairs indicate that the circumstances in which an appointment may be terminated will be set out in the letter of appointment.²¹

(f) *Australia*

4.49 The Federal *Royal Commissions Act 1902* does not deal expressly with the termination of the appointment of a member of a Royal Commission.

4.50 In the Australian Capital Territory, section 11 of the *Inquiries Act 1991*, gives the Government the power to terminate the appointment of a member for misbehaviour or physical or mental incapacity. In New South Wales, section 6 of the *Special Commissions Act 1983* gives the Executive the Power to terminate the appointment of a commissioner. The inquiries legislation of the other States does not provide an express power to terminate the appointment of a member of the inquiry panel.

(g) *Recommendation*

4.51 The Commission recommends that the tribunals of inquiry legislation should be amended to confer a power on the Government to terminate the appointment of a member of a tribunal of inquiry

²⁰ Section 22 of the *Uniform Public Inquiries Act 2002*.

²¹ Department of Internal Affairs, *Setting Up and Running Commissions of Inquiry* (DIA 2001) at 39.

where by reason of physical or mental illness or for any other reason, the member is unable to carry out the duties of a member of the inquiry. Tribunal members should have regard to the general principles of efficiency and cost effectiveness in conducting an inquiry and any gross failure to comply with such duties may be a matter to be considered when calling for the termination of appointment. Furthermore the Commission is of the opinion that the Government should have the power to terminate an appointment where the member has done anything which would render him or her unsuitable for inclusion on a tribunal of inquiry.

4.52 *The Commission recommends that the tribunals of inquiry legislation should be amended to deal expressly with the circumstances in which a member of an inquiry may be dismissed, namely on the grounds of misbehaviour or inability to perform the functions of the office.*

(4) *Effect of the Appointment of a New Tribunal Member*

(a) Tribunals of Inquiry (Evidence) Acts 1921-2004

4.53 Section 4(7) of the *Tribunals of Inquiry (Evidence) (Amendment) Act 2002* deals in limited form, with the issue of the effect of the appointment of a new member of a tribunal after its establishment. Section 4(7) of the 2002 Act provides that:

“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.”

(b) Consultation Paper Recommendation

4.54 In the Consultation Paper, the Commission recommended that this provision be amended to insert the additional provision that “an appointment shall not be made unless the tribunal is satisfied that no person affected by the proceedings of the tribunal would be unduly prejudiced thereby.”²² The Commission sees no reason to depart from this additional protection.

²² See the Consultation Paper at paragraph 5.37.

(c) *Recommendation*

4.55 *The Commission recommends that where a new member of a tribunal is appointed, the tribunals of inquiry legislation should be amended to provide “that this is not to occur unless the tribunal is satisfied that no person affected by the proceedings of the tribunal would be unduly prejudiced thereby.”*

C Reserve Members

(I) Appointment

(a) *Tribunals of Inquiry (Evidence) Acts 1921 to 2004*

4.56 Section 2(5) of the *Tribunals of Inquiry (Evidence) (Amendment) Act 2002* provides for the appointment of reserve members to a tribunal of inquiry.

4.57 Reserve members sit with the member or members of the tribunal during its proceedings and consider any oral evidence given, examine any documents or other items that are produced or sent in evidence to the tribunal, and are present at all the deliberations of the tribunal. However, reserve members are not entitled to participate in either the proceedings of the tribunal or its deliberations. In addition, reserve members are not entitled to influence the tribunal in its decisions or determinations.

4.58 The principle on which this provision is based is that the reserve member, though not a member of the tribunal, will be fully familiar with its work and will be in a position to replace a full member if that becomes necessary.

(b) *Consultation Paper Recommendation*

4.59 In the Consultation Paper, the Commission stated that the introduction of the concept of a reserve member was a useful one bearing in mind the length of some modern inquiries.²³

(c) *Recommendation*

4.60 The Commission sees no reason to depart from the view that the reserve member procedure is a useful one. It caters for the rare situations in which it is necessary to appoint a new member to an

²³ See the Consultation Paper at paragraph 5.42.

inquiry panel but where the appointment of a new individual would unduly prejudice the legal rights of an individual appearing before the inquiry.

4.61 *The Commission recommends that the tribunals of inquiry legislation should retain the provision for the appointment of reserve members and that the law relating to the appointment, qualifications, removal, and effect of a removal of a reserve member should be the same as that for members.*

D Experts

(1) Experts

4.62 The Commission now turns to the situation that arises where a tribunal of inquiry may find it necessary to retain the services of experts to conduct research on topics relating to the subject matters of the investigation.

4.63 The Commission notes that section 24(1) of the *Commission to Inquire into Child Abuse Act 2000* provides that if the Commission considers that it, or a Committee, requires the advice, guidance or assistance of experts in respect of any matter, it may appoint such and so many advisers having expertise in relation to that matter as it may determine to provide it or the Committee of the Commission, as the case may be, with such advice, guidance or assistance. Similarly, section 8 of the *Commissions of Investigation Act 2004* provides that the chairperson of a commission or, if the commission consists of only one member, the sole member may, with the approval of the specified Minister given with the consent of the Minister for Finance and the need to avoid unnecessary cost appoint persons with relevant qualifications and experience (including barristers and solicitors) to advise or assist the commission in relation to any matter within its terms of reference.

4.64 *The Commission recommends that the tribunals of inquiry legislation be amended to confer a power on a tribunal of inquiry to appoint experts to carry out research pertinent to the matter under investigation, subject to the approval of the sponsoring Minister and the Minister for Finance and the need to avoid unnecessary cost.*

(2) Assessors

(a) Tribunals of Inquiry (Evidence) Acts 1921 to 2004

4.65 The *Tribunals of Inquiry (Evidence) Act 1921* did not provide for the appointment of assessors. It was first expressly included in section 2 of the *Tribunals of Inquiry (Evidence) (Amendment) Act 1979*.

4.66 Assessors are not members of the tribunal. Although the term is not defined in the 1979 Act, assessors are experts appointed to assist the inquiry with its task. Assessors were appointed to assist the Chairpersons of the Whiddy Tribunal (1979)²⁴ and the Stardust Tribunal (1981).²⁵

4.67 It should be noted that it is open to the sponsoring Minister to appoint persons with expertise as members of the inquiry as well as assessors.

(b) Consultation Paper Recommendation

4.68 In the Consultation Paper, the Commission considered that the ability to appoint assessors is useful, particularly where the inquiry panel does not include any individual with expertise in the matter under investigation.²⁶

(c) Discussion

(I) United Kingdom

4.69 Section 11 of the UK *Inquiries Act 2005* provides for the appointment of assessors. Assessors do not have any of the inquiry panel's powers and are not responsible for the inquiry report or the findings. An assessor may be appointed for the duration of the inquiry or for a defined part of the inquiry.

²⁴ See the *Report on the disaster at Whiddy Island Bantry Co Cork on 8th January 1979* (Government Publications 1980).

²⁵ See the *Report of the Tribunal of Inquiry on the Fire at the Stardust, Artane, Dublin on the 14th February, 1981* (Government Publications 1982).

²⁶ See the Consultation Paper at paragraph 5.50

(d) Recommendation

4.70 The Commission sees no reason to depart from the approach in the Consultation Paper that the ability to appoint assessors is useful, particularly where the tribunal does not consist of any individual with expertise in the matter under investigation. The Commission does wish to stress however that an assessor may be appointed for the duration of the inquiry or for a defined part of the inquiry.

4.71 *The Commission recommends that the power to appoint experts include the power to appoint assessors where appropriate.*

CHAPTER 5 PROCEDURES AND CONSTITUTIONAL JUSTICE

A Introduction

5.01 This chapter deals with the question of what procedures a tribunal of inquiry may adopt. This includes discussion of the four procedural rights arising from the decision of the Supreme Court in *In re Haughey*.¹ The Commission also discusses other procedural issues, such as the preliminary information gathering stage, the publicity of tribunal hearings and the question of broadcasting.

5.02 In *Haughey v Moriarty*,² the Supreme Court stated that generally there are five stages in the tribunal of inquiry process:

1. A preliminary investigation of the evidence available;
2. The determination by the tribunal of what it considers to be evidence relevant to the subject matter of the inquiry;
3. The service of such evidence on the persons likely to be affected thereby;
4. The public hearing of the evidence of witnesses, together with cross-examination by the persons likely to be affected by the evidence;
5. The preparation of the Report setting out the findings of the tribunal and any recommendations based on those facts.³

5.03 It should be noted from the outset that tribunals of inquiry have a wide discretion in the area of procedures which will be influenced by factors such as the nature of the inquiry, speed, efficiency and cost, subject to the requirements of fair procedures and

¹ [1971] IR 217.

² [1999] 3 IR 1.

³ [1999] 3 IR 1, 74

constitutional justice. The issue of fair procedures and constitutional justice were discussed in detail in the Consultation Paper,⁴ but in view of its central importance, it is necessary to return to this area in some detail, taking into consideration relevant decisions of the courts since the publication of the Consultation Paper.

B Tribunals of Inquiry May Control their Own Procedures

5.04 The *Tribunals of Inquiry (Evidence) Acts 1921 to 2004* do not specify what procedures should be adopted by tribunals of inquiry, other than that the public should not be excluded from any of their proceedings, unless it is, in the public interest, expedient to do so by reason of the subject matter of the inquiry or the nature of the evidence to be given.⁵

5.05 The courts have repeatedly held that tribunals of inquiry are masters of their own procedure, and that as such, they have a wide discretion as to what procedures they may adopt, subject to the requirements of constitutional justice.

5.06 In *Flood v Lawlor*,⁶ the Supreme Court described this discretion as follows:

“It is not necessary to stress, because it has been repeatedly said in this court, that 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

⁴ See the Consultation Paper, Chapters 7-9.

⁵ Section 2 of the *Tribunals of Inquiry (Evidence) Act 1921*.

⁶ Supreme Court 24 November 2000. See also *O’Callaghan v Mahon* Supreme Court 9 March 2005; *Desmond v Moriarty* [2004] 1 IR 334; *Finnegan v Flood* [2002] 3 IR 47; *Bailey v Flood* Supreme Court 14 April 2000.

important qualification, the principle remains as I have indicated.”⁷

5.07 The fact that tribunals of inquiry are masters of their own procedure may be traced to the inquisitorial nature of the inquiry and the need for flexibility in dealing with the particular matter under investigation. The Commission considers that in light of this those charged with chairing inquiries and those who assist them should ensure that in formulating procedures, the inquisitorial nature of the process rather than those of the adversarial process are paramount.⁸

C Code of Procedures

5.08 A related point is whether a tribunal’s wide discretion as to procedure should be reduced to a single code of rules for tribunals of inquiry comparable to the rules of courts.⁹

5.09 Arguably, a single code of rules on evidence and procedure would act as a guide for those charged with running tribunals of inquiry in the conduct of their inquiries, and introduce an air or predictability which would militate in favour of fair procedures.¹⁰ However, in the Consultation Paper the Commission rejected this suggestion. It noted that as tribunals of inquiry vary in subject matter, with no two inquiries being exactly alike, their procedures should likewise be flexible. Accordingly, it did not recommend that a formal code of procedures should be established.¹¹

5.10 The Commission remains of this view, subject to one proviso. It considers that the Central Inquiries Office¹² should draw up a handbook for those charged with chairing tribunals of inquiry setting out briefly the law relating to tribunals of inquiry, a summary of the law relating to constitutional justice and its implications for

⁷ *Flood v Lawlor* Supreme Court 24 November 2000, at 6.

⁸ See paragraphs 2.11 - 2.16, above.

⁹ See the Consultation Paper at paragraph 7.63.

¹⁰ Brady, “Tribunals and Politics: A Fundamental Review” *Contemporary Issues in Irish Law and Politics* No 3 at 165.

¹¹ See the Consultation Paper at paragraph 7.64.

¹² See paragraph 2.47 *ff*, above.

tribunals of inquiry, and procedures which have been adopted by previous inquiries both in Ireland and abroad. The Commission considers that this would be a useful tool to assist chairpersons of tribunals of inquiry to formulate procedures for their own inquiries. It would prevent them “having to reinvent the wheel” by enabling them to build on good practice.

5.11 *The Commission does not recommend that a formal code of procedure be established for tribunals of inquiry. It recommends that the proposed Central Inquiries Office should draw up a handbook setting out briefly the law relating to tribunals of inquiry, a summary of the law relating to constitutional justice and its implications for tribunals of inquiry, and the procedures which have been adopted by previous inquiries both in Ireland and abroad.*

D Constitutional Justice

5.12 The Commission now turns to the critically important issue of the application of the principles of constitutional justice to tribunals of inquiry.

5.13 The starting point for any discussion of the application of the principles of constitutional justice to tribunals of inquiry is the decision of the Supreme Court in *In re Haughey*.¹³

(1) *In re Haughey*

5.14 This case arose out of the investigation by the Committee of Public Accounts into the expenditure of a certain grant-in-aid for Northern Ireland relief. Section 4(3) of the *Committee of Public Accounts of Dáil Éireann (Privilege and Procedure) Act 1970* provided that, if any person being a witness before the Committee should refuse to answer any question to which the Committee might legally require an answer, the Committee might “certify the offence of that person under the hand of the chairman of the committee to the High Court” and that the High Court might “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.”

¹³ [1971] IR 217. See the Consultation Paper at paragraph 7.14.

5.15 The Committee received hearsay evidence, containing serious accusations against Mr Padraic Haughey. Mr Haughey appeared before the Committee as a witness. Having unsuccessfully sought leave to cross-examine witnesses appearing before the Committee and to have counsel appear on his behalf, Mr Haughey read a statement in which he refused to answer any questions of the Committee. The Committee then certified to the High Court that “an offence under the [1970] Act has been committed by the said Mr Haughey” by reason of his refusal to answer questions. The High Court convicted Mr Haughey and he was sentenced to six months imprisonment.

5.16 On appeal, the Supreme Court considered whether there had been a breach of fair procedures in not allowing Mr Haughey leave to cross-examine witnesses appearing before the Committee and to have counsel appear on his behalf. In this context, the Supreme Court stressed that the role of Mr Haughey before the Committee was not that of a witness but was that of a party accused of serious offences, whose conduct had become the subject matter of the Committees inquiry.

5.17 The Court held that in those circumstances, Mr Haughey should have been afforded a reasonable means of defending himself. The Supreme Court stated that the minimum protection which the State should afford such an individual was as follows:

“(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.”¹⁴

The Supreme Court concluded that as Mr Haughey had been deprived of his right to cross-examine, by counsel, his accusers and to address, by counsel, the Committee in his defence, he had not received a reasonable means of defending himself and accordingly his personal rights as guaranteed by Article 40.3 of the Constitution had been infringed.

¹⁴ [1971] IR 217, 263-264.

(2) *The Need for A Tailored Approach to the In re Haughey Principles*

5.18 In recent years, the Supreme Court has stressed that tribunals of inquiry should take a tailored approach to the issue of constitutional justice. In *Lawlor v Flood*,¹⁵ Murphy J, speaking in the context of the right to cross-examine, stressed that the constitutional rights flowing from *In re Haughey* are “not a ritual or a formula requiring a slavish adherence.”¹⁶ Rather he suggested that the constitutional rights entitlement of a particular individual will vary according to the position in which he is placed, a position that he acknowledged might well evolve during the course of proceedings.

5.19 Similarly, in *O’Callaghan v Mahon*,¹⁷ Geoghegan J stated that:

“Given the clear public interest from time to time in having matters investigated by a 1921 Act tribunal, it may well be that the requirements of the constitutional obligation to vindicate as far as possible the good name of the citizen are in that context somewhat less stringent than in other circumstances. For that reason, I would prefer not to express any view on whether all the rules relating to evidence and cross-examination etc. fashioned by the courts or derived from the Common Law Procedure Acts are necessarily and in all circumstances equally applicable to a 1921 Act tribunal.”¹⁸

(3) *The In re Haughey Principles Apply Only to Persons Whose Rights are Risk*

5.20 As has been noted, the Supreme Court in *In re Haughey* stressed that the role of Mr Haughey before the Committee was not that of a witness but was that of a party accused of serious offences, whose conduct had become the subject matter of the Committee's inquiry.

¹⁵ [1999] 3 IR 107.

¹⁶ *Ibid* at 143.

¹⁷ Supreme Court 9 March 2005.

¹⁸ *Ibid* at 3.

5.21 This approach has been echoed in a number of other decisions.

5.22 Notably, in *Boyhan v Beef Tribunal*,¹⁹ the plaintiffs were members of the United Farmers Association (UFA). The Tribunal granted them limited representation, namely, the right to be present when their witnesses gave evidence and to have the right to examine their witnesses and to participate in the tribunal at that time. The plaintiffs sought an injunction requiring the tribunal to grant them full representation at the proceedings of the tribunal when it was dealing with matters which the plaintiffs deposed were particularly relevant to them (“relevant allegations”) or, in the alternative, full representation at the proceedings of the tribunal where there was any purported refutation by or on behalf of any other parties of the evidence given by the plaintiffs' witnesses. They also sought an injunction directing the tribunal to furnish books of documents in relation to the “relevant allegations” or, in the alternative, such portions of the books of documents, which comprised evidence tending to support or refute the evidence to be given by the plaintiffs' witnesses at the tribunal. The plaintiffs alleged that they represented the public interest and the interest of farmers.

5.23 The High Court refused the application. Applying, the principles in *In re Haughey*, Denham J commented:

“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 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 at (a) and (d) by O Dálaigh CJ [in *In re Haughey*]. Its position, as

¹⁹ [1993] 1 IR 210. This account is based on the analysis in the Consultation Paper at paragraphs 7.20-7.22, which the Commission considers is worth reiterating in this report.

a witness, is fully protected by the limited legal representation awarded by the Tribunal.”²⁰

5.24 Thus, Denham J rejected 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 would itself entitle the person to full legal representation.

5.25 In summary, persons asked to appear before a tribunal of inquiry are entitled to the rights listed in *In re Haughey* where the allegations against that person are such that the person is not in the position of a mere witness but in that of a person accused of serious offences, whose conduct is the subject matter of the inquiry and that person can point to a substantive or external right, such as their good name and reputation, which is under threat and requires protection in the form of procedural rights before the inquiry. As Ó’Dálaigh CJ stated:

“In proceedings before any tribunal where a party to the proceedings is on risk of having his good name, or his person or property, or any of his personal rights jeopardised, the proceedings may be correctly classed as proceedings which may affect his rights, and in compliance with the Constitution, the State, either by its enactments or through the Courts, must outlaw any procedures which will restrict or prevent the party concerned from vindicating these rights.”²¹

5.26 However, the Commission recognises that procedural rights are sometimes extended to individuals even if they are not entitled to them as of constitutional right. This issue is discussed more fully in the context of the right to representation, but the Commission accepts that tribunals extend procedural rights for a variety of reasons, including situations when the issue of whether they are strictly entitled to them is unclear. The Commission considers that in such situations, in deciding whether to extend procedural rights to

²⁰ [1993] 1 IR 210, 222.

²¹ [1971] IR 217, 264.

individuals not strictly entitled to them, a tribunal should bear in mind the inquisitorial nature of its investigation.

5.27 *The Commission notes that the principles of constitutional justice listed by the Supreme Court in In re Haughey [1971] IR 217, namely, the right to copies of evidence taken, the right to cross-examination by a lawyer, the right to give rebutting evidence, and the right to address a tribunal through a lawyer, do not apply to all parties before a tribunal. They apply only to a person in the equivalent position of a person charged with a serious offence, whose conduct is the subject matter of the inquiry and who can point to a right, such as their good name and reputation, which is under threat.*

(4) Specific Rights

(a) Right to Legal Representation

5.28 Section 2(b) of the *Tribunals of Inquiry (Evidence) Act 1921* (“the 1921 Act”) gives tribunals of inquiry established pursuant to the Act a discretion to grant legal representation to persons appearing before them and appearing to them to be interested, by counsel or solicitor or otherwise, or to refuse to allow such representation.

5.29 The Commission has already noted that the Supreme Court decision in *In re Haughey* provides that a person will only be entitled to legal representation before an inquiry, as of constitutional right, where the allegations are such that the person is not in the position of a mere witness but rather of a person whose conduct is the subject matter of the inquiry and that person can point to a substantive or external right which is under threat and requires protection in the form of procedural rights before the inquiry. In addition, constitutional justice would not require the granting of representation to individuals appearing before the information gathering stage where it is held in private.

5.30 However, in certain circumstances it may be deemed appropriate to grant legal representation to persons who do not fall into this category, and section 2(b) of the *Tribunals of Inquiry (Evidence) Act 1921* caters for such situations. For example, where the tribunal is investigating matters which have left victims or survivors in their wake and where these are identifiable persons, those individuals will be accorded legal representation. Examples of such inquiries include the *Whiddy Inquiry*; the *Stardust Inquiry*; the *Finlay*

and *Lindsay Tribunals* dealing with infected blood products; the *Morris Tribunal* into Garda misconduct; and the *Barr Tribunal* into the shooting of John Carthy.

5.31 It should be noted that the position in respect of these individuals is quite different to the position of those against whom allegations are made, or whose reputations are at stake. The victims or survivors are unlikely to have their reputations subjected to criticism; rather the case for their being represented is that they have been so strongly and uniquely affected by the alleged or suspected misconduct, maladministration, or otherwise. It may be argued that any questions their legal representatives would have asked could be satisfactorily dealt with by counsel for the inquiry.²² Nonetheless representation has been granted to such persons in the inquiries just mentioned. A clear practical reason for so doing is that such inquiries are dependent on the co-operation of the victims, survivors, and the grant of representation may assist in this process.

5.32 In considering whether to exercise its discretion under section 2(b) of the 1921 Act, the Commission notes that a tribunal should take into account a number of factors. The first is the requirement of constitutional justice. It should be remembered that in cases where constitutional justice does not apply the persons who appear to give evidence to the tribunal are witnesses, not parties. The second is whether, bearing in mind the inquisitorial nature of the tribunal, the granting of representation would assist the tribunal.

5.33 In considering this factor it is notable that section 2(b) of the 1921 Act confers a power to refuse as well as grant representation to interested parties. Thirdly, the tribunal may take into account whether the interests sought to be protected by the granting of representation could adequately be protected by the tribunal itself and its legal team. It should be remembered that the role of counsel for the inquiry should not be confused with that of a party in adversarial proceedings. The position of counsel for the inquiry arose because it would have been very difficult for the members of tribunals to carry out their functions if they had to act as investigators, inquisitors, and adjudicators. As a result, tribunals appointed counsel to assist them in deciding what evidence should be obtained, and direct what steps

²² See paragraph 5.37 below.

should be taken in the search for the causes of the matter under investigation.²³

5.34 If a tribunal decides to exercise its discretion to grant representation it should also be borne in mind that there are a number of options available. The first is that it may grant individual representation, the second is that the tribunal may grant pooled representation, and the third is that it may grant a mixture of pooled and individual representation.

5.35 Pooled representation, by which a group of people may be represented by a single legal team, has much to commend it particularly where the parties before an inquiry have largely the same interests. For example, in the Barr Tribunal all 36 members of An Garda Síochána who have an interest in the tribunal were represented by a single legal team. However, in many cases witnesses will have diverse, if not conflicting, interests and therefore one single legal team may not be appropriate. In such situations a tribunal may see fit to grant a number of different groups separate pooled legal representation and/ or individual representation. A variation on this would be the appointment of counsel by the tribunal who would sit in on the hearings and act as “guardian of the witnesses interests” in much the same way that counsel for the Attorney General exercise a watching brief in cases involving the Constitution. The Commission considers that such an approach has much to commend it.

5.36 The Commission does not propose to recommend that the legislation be amended to curtail the discretion of tribunal in respect of the grant of legal representation, but instead proposes to summarise the factors which should be taken into account in this context.

5.37 *The Commission recommends that before exercising their discretion to grant representation, tribunals of inquiry should consider:*

- *Whether constitutional justice requires the granting of representation;*
- *Whether the granting of such representation would assist the tribunal;*

²³ See the *Report on the disaster at Whiddy Island Bantry Co Cork on 8th January 1979* (Government Publications 1980) at paragraph 1.7.1.

- *Whether counsel for the inquiry could discharge the functions sought to be achieved by granting witnesses representation;*
- *Whether pooled representation would be appropriate;*
- *Whether individual representation would be appropriate;*
- *Whether a mixture of pooled representation and individual representation would be appropriate;*
- *Whether the tribunal should appoint counsel to act as guardian of the witnesses interests.*

(b) *Full or Limited Representation*

5.38 The Commission now turns to discuss to what extent a grant of legal representation involves full or limited representation.

5.39 In some inquiries the granting of legal representation will require that the person be represented at all stages of the inquiry. This may be described as full representation. In other inquiries, this will require that the person be represented only at certain stages of the inquiry, where their rights are at risk. Applying this test in a wide-ranging inquiry, which is obliged to deal with a variety of issues, it would, the Commission considers, be unnecessary to grant full representation to persons whose substantive rights are implicated in respect of only one or a few of these issues under investigation. Indeed, with the increasing tendency amongst inquiries to modularise or divide their task into phases, it will become easier for representation to be granted which is limited to one or two phases or modules of an inquiry. In this context, the Commission endorses the approach to limited representation expressed by Denham J in *Boyhan v Beef Tribunal*.²⁴

5.40 *The Commission recommends that, in respect of the two types of individual legal representation, limited representation and full representation, the entitlement to either will depend on the extent to which an individual's rights are at risk. If they are at risk during the whole inquiry, the Commission recommends that full representation should be granted whereas if they are at risk only at certain stages of the inquiry, limited representation only should be granted.*

²⁴ [1993] IR 210, 219. See paragraph 5.22 above.

(5) *The Four In Re Haughey Rights Considered*

5.41 In its Consultation Paper, the Commission noted that the general tendency has been to confer all four rights elucidated by Ó Dálaigh CJ in *In re Haughey* on individuals or bodies who are granted representation. The Commission considered that a more tailored approach should be taken to this issue. It noted that as tribunals of inquiry have the power to determine the minutiae of the procedural protection that must be afforded to a person appearing before it, they should have regard to the particular circumstances of each case in determining whether one or all of these rights should apply. With this in mind, it is proposed to examine each of the four *In re Haughey* rights in turn.

(I) *Allegations and Potential Criticism*

5.42 The right to advance notice of allegations and criticisms levelled against an individual or body may be said to be one of the most basic rights identified in *In re Haughey*. In the Consultation Paper, the Commission noted the practice in the United Kingdom to issue witnesses with “notices of potential criticism” setting out the allegations and criticisms made against them.²⁵

5.43 The Commission notes that “notices of potential criticism” were also used by the English Hutton Inquiry. The Hutton Inquiry was established following the apparent suicide of Dr David Kelly, a Ministry of Defence civil servant and advisor, who had become embroiled in a row over BBC reports on the war with Iraq.²⁶ The Inquiry, chaired by Lord Hutton, was not an inquiry invested with the powers in the 1921 Act.

5.44 Lord Hutton conducted the Inquiry in two stages. The first stage was the information gathering stage. This was devoted to obtaining an account of the events which took place from those who took part in them. At the conclusion of this stage, Lord Hutton retired to consider the evidence given. He then notified by private letter the relevant persons of possible criticisms which he considered might be

²⁵ These are also known as “Salmon Letters.” See the Consultation Paper at paragraph 7.46.

²⁶ See generally, the Hutton Inquiry’s website <http://www.the-hutton-inquiry.org.uk/index.htm>.

made against them. He asked those persons whether they accepted or rejected these criticisms.

5.45 During the second stage, the persons against whom the criticisms were made were given the opportunity, if they so wished, to give further oral evidence, and to make oral and written submissions. In addition, other parties who did not give evidence in stage one, but who were identified in stage one as persons possessing relevant information, were asked to give evidence. Furthermore, counsel for the represented parties were given the opportunity to cross-examine witnesses for other parties. This was designed to elicit evidence which might enable those parties to answer criticisms made of them, or to suggest further criticisms for other witnesses. At the conclusion of the second stage, Lord Hutton retired to prepare his report.

5.46 Although the Hutton Inquiry was not a tribunal of inquiry conferred with the powers in the 1921 Act the Commission considers that its approach to the issue of fair procedures, in particular its use of a two stage approach, whereby witnesses are initially examined by counsel for the inquiry and then where relevant issued with notices of potential criticism and accorded representation, the right to cross examine and so forth, reflects longstanding practice in relation to tribunals under the 1921 Act and should be followed in appropriate cases.

5.47 *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.*

(II) *Examination and Cross-examination*

5.48 Ordinarily, the procedure before tribunals of inquiry is that a witness is examined by counsel for the tribunal, then cross examined by interested parties, then examined by his or her own lawyer, if the witness is represented, followed by a re-examination by counsel for the tribunal. Usually, the Chairperson or members of the tribunal will ask questions throughout this process.

5.49 In relation to the right to cross-examine witnesses, the Commission noted in the Consultation Paper that this should not be

taken to be an automatic right.²⁷ Implicit in the inquisitorial nature of tribunals is a recognition that the examination and cross-examination of every witness by every represented party, in addition to counsel for the tribunal, is not appropriate. In some cases, examination of witnesses by counsel for the inquiry may be sufficient.

5.50 The Commission sees no reason to depart from this view. Nonetheless, the Commission acknowledges that the right to cross-examine in appropriate situations is particularly important where a person's rights are at issue, whether the person is in the position of a potential accused or their good name or reputation is at issue. As Hardiman J stated in *Maguire v Ardagh*:²⁸

“Cross-examination adds considerably to the length of time which proceedings will take. But it is an essential, constitutionally guaranteed, right which has been the means of the vindication of innocent people... It must be firmly understood that, when a body decides to deal with matters as serious as those in question here, it cannot (apart from anything else) deny to persons whose reputations and livelihoods are thus brought into issue, the full power to cross-examine fully, as a matter of right and without unreasonable hindrances. This, of course, is not to deny to any tribunal the right to control prolixity or incompetence if that is manifested.”²⁹

5.51 On this basis, the Commission recommends that tribunals must ensure that appropriate cross-examination is provided for where the rights of an individual, including good name and reputation, are at issue. The Commission also recommends that this should not in any way restrict the right of a tribunal to control prolixity or cross-examination by successive counsel.

5.52 *The Commission recommends that tribunals must ensure that appropriate cross-examination is provided for where the rights of an individual, including good name and reputation, are at issue. The Commission also recommends that this should not in any way restrict*

²⁷ See the Consultation Paper at paragraph 7.54.

²⁸ [2002] 1 IR 385.

²⁹ [2002] 1 IR 385, 707.

the right of a tribunal to control prolixity or cross-examination by successive counsel.

5.53 In the Consultation Paper, the Commission recommended that uncontested evidence should be simply “read into” the record where all the interested parties consent, with a written account of the evidence being, where appropriate, posted on a tribunal’s website or circulated to parties present at the hearing.³⁰ This it was felt would satisfy the requirement imposed on tribunals of inquiry by section 2(a) of the 1921 Act to conduct proceedings in public. The Commission sees no reason to depart from its earlier view. However, the Commission wishes to stress that the decision to read in evidence should not be taken lightly, it should be noted that even where the evidence is uncontested and all the interested parties consent to it being read in, there may be merit to having the particular witness give his or her evidence in their own words, rather than reading in an affidavit or document drafted with the aid of a solicitor or some other person.

5.54 *The Commission recommends that where appropriate uncontested evidence should be simply “read into” the record.*

(III) The Right to Call Evidence in Rebuttal

5.55 The right to call evidence in rebuttal is the third protection referred to in *In re Haughey*. This does not create a difficulty in relation to written evidence of rebuttal as all witnesses before a tribunal of inquiry are the inquiry’s witnesses, and it is not possible for an individual to call witnesses to give evidence on his or her behalf.³¹ Provided an inquiry calls all the witnesses who may give evidence to rebut allegations made against an interested party, there is no danger of an inquiry infringing a person’s constitutional protection. In this respect, it should be noted that there is nothing to prevent an interested party from suggesting to the inquiry whom should be called and what information they may have. Accordingly, the Commission recommends that parties be encouraged to inform the inquiry of the existence of useful potential witnesses.

³⁰ See the Consultation Paper at paragraph 7.52.

³¹ See the Consultation Paper at paragraph 7.60.

5.56 *The Commission recommends in the context of the right to call evidence in rebuttal, that parties be encouraged to inform the inquiry of the existence of useful potential witnesses.*

(IV) *Submissions*

5.57 The fourth protection referred to in *In re Haughey* is the right to address the inquiry. This right is similar to the right to examine and cross-examine witnesses and the same considerations apply. As a result, a tribunal should adopt a tailored approach, which would enable it to administer an inquiry as efficaciously as possible and yet still furnish the appropriate constitutional protection. This could involve, for example placing indicative time limits on submissions. Support for this conclusion may be drawn from the judgment of Geoghegan J in *O’Callaghan v Mahon* where he stated:

“A tribunal is also perfectly entitled ... to try as far as possible to discipline counsel and the witnesses so that the evidence at any given time is confined to the evidence relevant to that module.”³²

5.58 *The Commission recommends that tribunals of inquiry adopt a tailored approach to the right to make submissions to the inquiry which could include placing indicative time limits on submissions while ensuring that the full constitutional protection of fair procedures is furnished.*

E Other Procedural Issues, including Publicity and Broadcasting

(I) *Preliminary Investigations*

(a) *Purposes and Functions*

5.59 Section 2(a) of the *Tribunals of Inquiry (Evidence) Act 1921* lays down a basic rule in favour of the proceedings of a tribunal being heard in public. It provides:

“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

³² Supreme Court 9 March 2005, at 4-5.

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...”

5.60 However, many tribunals of inquiry conduct preliminary investigations in private before proceeding to the public stage of their proceedings. Such preliminary investigations depend on the cooperation of the individuals asked to participate in the process, as tribunals of inquiry have no powers of compulsion at the information gathering stage.³³

5.61 The information gathering stage was recognised by the Supreme Court in *Haughey v Moriarty*.³⁴ In *O’Callaghan v Mahon*³⁵ the Supreme Court considered the information gathering stage. Hardiman J accepted that tribunals had the authority to engage in a preliminary investigation to identify issues meriting further investigation at public hearings. However, he stated that it did not have express authority to embark on an information gathering stage in private, in which statements would be obtained by voluntary cooperation, irrelevant material excluded and voluntary cooperation of potential witnesses obtained. However, Hardiman J considered that the absence of such an express power would not of itself render such a process unlawful as the Courts have repeatedly held that tribunals are masters of their own procedures.

5.62 In *O’Brien v Moriarty*,³⁶ the Supreme Court outlined the rationale of the information gathering stage as follows:

³³ Per *O’Brien v Moriarty* Supreme Court 12 May 2005, at 14.

³⁴ [1999] 3 IR 1, 74.

³⁵ Supreme Court 9 March 2005.

³⁶ Supreme Court 12 May 2005. See also *Redmond v Flood* [1999] 3 IR 79, 94 where Hamilton CJ stated:

“An inquiry under the Tribunals of Inquiry (Evidence) Act, 1921, is a public inquiry. The Court in the passage quoted [from *Haughey v Moriarty* [1999] 3 IR 1, 74] 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

“Tribunals of inquiry, however, necessarily have to conduct much of their initial investigations in private. This is both for practical reasons and to protect the interests and confidentiality of persons assisting the Tribunal in its work. Furthermore, it enables the Tribunal to decide that a particular matter does not warrant a public hearing.”³⁷

5.63 The Commission accepts that it will not be necessary for all inquiries to utilise a preliminary investigation process. Nevertheless, it recommends that where appropriate tribunals of inquiry should utilise an information gathering process and that the tribunals of inquiry legislation should be amended to make express provision for this.

5.64 *The Commission recommends that the tribunals of inquiry legislation should be amended to make express provision for a preliminary investigation stage.*

(b) *Impact of Constitutional Justice*

5.65 Having set out the functions of the information gathering stage the Commission now turns to consider the extent to which the procedural requirements indicated in *In re Haughey* apply to the private information gathering stage.

5.66 In order to understand the application of the principles of constitutional justice to the information gathering process, it is important to set out the difference between “information” and “evidence.”³⁸ The Commission defines evidence as material from which the inquiry is entitled to draw conclusions of fact and to make recommendations. Information, on the other hand, may be defined as material obtained in private on the basis of which the inquiry may make immediate decisions as to relevance and how it intends to

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 Tribunal is not obliged to hold a private inquiry before proceeding with its public inquiry.”

³⁷ Judgment of Fennelly J, at 14.

³⁸ See the Consultation Paper at paragraphs 9.03-9.14.

organise the inquiry. Information is intended to provide focus to the investigation.

5.67 In the Consultation Paper, the Commission envisaged that material gathered in the information gathering stage would only become evidence in two exceptional circumstances, first where statements obtained in the information gathering stage are read into the record, and second, where the information gathered at the preliminary stage differs from the evidence given at the public hearings. In such circumstances, the Commission considered that the information should be admitted to the extent that it affects the credibility of the witness.

5.68 The Commission considers that in light of the private nature of the information gathering stage and its purpose the rules of constitutional justice would not apply.

(c) Written Protocol

5.69 The use of private meetings as part of the information-gathering phase is a matter, which has been drawn to the Commission's attention on a number of occasions during the consultation period. By private meetings the Commission means preliminary meetings in which potential witnesses and those with relevant information are usually invited to meet with counsel for the tribunal in order to discuss confidentially the matters under investigation. The Commission has been informed that the Chairperson rarely attends such meetings. Such meetings, which are mostly recorded, tend to be followed by formal requests for information.

5.70 The Commission is aware that the experience of some participants in these meetings has been mixed. Some view these meetings as a positive development, a sort of informal discussion, which breeds trust. Others have been critical of the way in which supposedly confidential information obtained at such meetings has been used in later hearings.

5.71 The Commission is conscious of the need for private meetings in order to allow counsel for tribunals to filter information, but considers that in light of the mixed experience of some participants, such meetings ought to be governed by a written protocol. Such a protocol would set out the rights and duties of those

participating in such meetings and inform those present of the manner in which such information can be used. The Commission also recommends that the Chairperson of the inquiry exercise a greater degree of oversight over the manner in which such meetings are being conducted. The Commission recommends that where individuals are accompanied by lawyers at these private meetings their costs should be recoverable as expenses.

5.72 The Commission recommends that private preparatory meetings be governed by a written protocol. Such a protocol would set out the rights and duties of those participating in such meetings and inform those present of the manner in which such information can be used. The Commission also recommends that the chairperson of an inquiry should exercise a greater degree of oversight over the manner in which such meetings are being conducted.

(d) Investigators

5.73 Section 6 of the *Tribunals of Inquiry (Evidence) (Amendment) Act 2002* “the 2002 Act” provides tribunals of inquiry with the power to appoint investigators to carry out “preliminary investigations” in relation to any matter material to the terms of reference of the inquiry.

5.74 Section 6(4) confers a number of powers on investigators. These include the power to require a person to:

- “Give to him or her such information in the possession, power or control of the person as he or she may reasonably request,
- 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
- 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.”

It is important to note that there is no requirement on a person appearing before an investigator pursuant to section 6(4) to provide a sworn statement to the investigator. Section 6(7) provides that a person appearing before an investigator is entitled to the same

privileges and immunities as witnesses appearing before the High Court.

5.75 Section 6(5) of the 2002 Act provides that an investigator may examine a person mentioned in relation to any information, documents or things mentioned and may reduce the answers of the person to writing and require the person to sign the document containing them. Section 6(6) provides that where a person fails or refuses to comply with a requirement made by an investigator under section 6(4), 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 order as it considers necessary and just to enable the requirement to have full effect.

5.76 Section 7 makes it an offence to obstruct or hinder an investigator in the course of his or her work.

5.77 The 2002 Act is silent on the role, if any, of the investigators in sifting the material collected by them. Section 6(8) clearly suggests that the material is to be disclosed to the tribunal. In the Consultation Paper the Commission considered that given the inquisitorial nature of tribunals of inquiry it is a matter for the inquiry, and not the investigators, to decide on the relevance or otherwise of material collected by investigators during the preliminary investigative stage.

5.78 In the Consultation Paper the Commission recommended no change to the provisions dealing with preliminary investigations and the Commission sees no reason to depart from this view.

5.79 *The Commission recommends that the provision of section 6 of the Tribunals of Inquiry (Evidence)(Amendment) Act 2002, which deal with the appointment of investigators to carry out preliminary examinations, should be retained in the tribunals of inquiry legislation.*

(2) Publicity

(a) Introduction

5.80 The Commission now turns to examine the extent to which tribunals of inquiry should conduct their business in public.

5.81 In considering this question, the Commission is conscious that section 2(a) of the 1921 Act currently contains a presumption of conducting hearings in public by providing that such tribunals are under an obligation not to refuse to allow the public to be present at the hearings of the inquiry unless it is in the public interest not to do so. Other inquiries, on the other hand, whether they are set up by an organ of state or a private individual or body, are under no such obligation. Indeed, in contrast, section 11 of the *Commissions of Investigation Act 2004* provides that a commission of investigation which are under a duty to conduct its proceedings in private unless (1) the witness requires that his or her evidence be given in public and the commission consents to that request; or (2) the commission is satisfied that it is desirable in the interests of both the investigation and fair procedures to hear all or part of the evidence in public.

(b) *Constitutional Requirements*

5.82 As the Commission has noted, a tribunal of inquiry is not a court. Therefore, the duty imposed on the courts by Article 34.1 of the Constitution, that justice shall be administered in public, has no application to tribunals of inquiry.

(c) *Tribunals of Inquiry (Evidence) Act 1921*

5.83 Section 2(a) of the 1921 Act states 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 it is in the public interest expedient to do so 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.”

Thus, the inquiry is placed under a positive obligation to admit the public to be present at the “proceedings of the inquiry” unless it is justified in excluding them under one of the three headings contained in the section.

5.84 The Supreme Court explained the meaning of the phrase “proceedings of the tribunal” in *Haughey v Moriarty*.³⁹ Having identified the five stages of a tribunal of inquiry, namely the

³⁹ [1999] 3 IR 1.

preliminary investigation, the determination of the relevant evidence, the service of such evidence on the relevant parties, the public hearing and the preparation of the final report, the Court concluded that section 2(a) applied only to the fourth stage, the public hearing of evidence and cross-examination.⁴⁰

(d) Policy Underpinning the Legislation

5.85 The policy underpinning section 2(a) is that in order for the public to have confidence in an inquiry set up to inquire into matters of definite public concern, it is necessary for the hearings of the inquiry to be conducted in public. This view has been endorsed by the Irish courts on a number of occasions, which are discussed comprehensively in the Consultation Paper.⁴¹

(e) Consultation Paper Recommendation

5.86 The Commission in the Consultation Paper agreed with the view that in order for public inquiries to maintain public confidence, they should be conducted, where possible, in public. The Commission in the Consultation Paper therefore recommended that the pro-publicity policy inherent in section 2(a) of the 1921 Act should be retained.

(f) Advantages and Disadvantages of Public Hearings

5.87 The main advantages of conducting an inquiry in public are as follows. First, it ensures public confidence in the inquiry and its conclusions. This is particularly important where there is a crisis of public confidence in the persons or matters under investigation. Secondly, conducting an inquiry in public enables the public to reach its own judgement on the matters under investigation. Thirdly, witnesses may be less inclined to mislead the inquiry or fail to cooperate with the inquiry if the hearings are conducted in public.

5.88 However, conducting an inquiry in public is not without its disadvantages. First, it could be argued that such inquiries tarnish the reputations and characters of individuals by airing what might eventually prove to be baseless accusations in public. According such

⁴⁰ [1999] 3 IR 1, 74-75. See paragraph 5.02 above and the Consultation Paper at paragraph 8.13.

⁴¹ See paragraphs 8.01- 8.09 of the Consultation Paper.

individuals the full protection of constitutional justice and eventual vindication will provide scant protection from taunts of “no smoke without fire.” However, as the Supreme Court held in *Redmond v Flood*,⁴² where the Oireachtas has deemed it necessary to establish a tribunal, “the exigencies of the common good may outweigh the constitutional right to privacy.”⁴³ The Court concluded that 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.”⁴⁴ Secondly, it could be argued that certain key witnesses might be reluctant to testify before a public hearing. However, this is a problem which could easily be solved by giving the inquiry compellability powers. Having considered these arguments, the Commission has concluded that the view it took in the Consultation Paper is correct and that the general approach in section 2(a) of the 1921 Act should be retained, subject to a clarification that this does not apply to the information gathering stage, as held by the Supreme Court in *Haughey v Moriarty*.⁴⁵

(g) Recommendation

5.89 *The Commission recommends that the proceedings of tribunals of inquiry should in general be conducted in public, in accordance with the approach currently contained in the tribunals of inquiry legislation, but that this should be clarified in line with the view taken by the Supreme Court that this does not apply to any information gathering stage.*

(3) Broadcasting

5.90 The Commission now turns to consider whether the media ought to be permitted to broadcast the public proceedings of a tribunal of inquiry. While section 2(a) of the 1921 Act deals with the public’s right to be physically present at the tribunal hearings, it does not deal directly with the issue of broadcasting.

⁴² [1999] 3 IR 79.

⁴³ [1999] 3 IR 79, 88.

⁴⁴ [1999] 3 IR 79, 88

⁴⁵ [1999] 3 IR 1.

5.91 In its *Report on Contempt of Court*,⁴⁶ the Commission outlined in detail the advantages and disadvantages of broadcasting, albeit as it applied to courts, and concluded that “an advisory committee be established to review the arrangements for, and the provisions relating to, the recording and broadcasting of court proceedings by the media.”⁴⁷ The Commission recommended that the advisory committee should also consider the desirability of permitting the broadcasting of the proceedings of tribunals of inquiry.⁴⁸

(a) *The Present Law*

5.92 As was noted in the Consultation Paper, subject to the Constitution and other appropriate laws, the inquiry has an inherent right to govern its own procedures, including presumably the power to allow the public hearings of the inquiry to be broadcast.⁴⁹

5.93 It is perhaps arguable that section 2(a) of the 1921 Act in fact covers broadcasting. Thus, it is possible that the term “public or any portion of the public” in section 2(a) includes the audiovisual media as well as the print media. It is therefore at least arguable that section 2(a) places the obligation on the inquiry to justify its refusal to admit the audiovisual media together with their equipment under the three headings in section 2(a).⁵⁰

(b) *Consultation Paper Recommendation*

5.94 Having concluded in the Consultation Paper that section 2(a) of the 1921 Act did not, however, extend to broadcasting, the Commission recommended that section 2(a) should be amended to include a provision expressly allowing the filming, recording or broadcasting of the proceedings of the tribunal, the details of which would be subject to a protocol. In determining whether to allow the filming, recording or broadcasting of proceedings, the tribunal would

⁴⁶ (LRC 47-1994).

⁴⁷ (LRC 47-1994) at paragraph 4.49.

⁴⁸ *Ibid.* For a general overview, see McGonagle *Media Law* (2nd ed Thomson Round Hall 2003) paragraph 7.1.4.

⁴⁹ See the Consultation Paper at paragraph 8.47.

⁵⁰ Namely, that it is in the public interest expedient to do so for reasons connected with the subject matter of the inquiry, the nature of the evidence to be given or where there is a risk of prejudice to criminal proceedings.

have regard to the public interest, the conduct of the proceedings, the interests of the participants, the risk of prejudice to criminal proceedings and any other relevant considerations.

(c) *Impact of the ECHR*

5.95 The Irish courts have yet to consider the effect of the European Convention of Human Rights (ECHR) on the interpretation of section 2(a) of the 1921 Act. Since the enactment of the *European Convention on Human Rights Act 2003*, Irish courts must, in interpreting, and applying any statutory provision or rule of law, insofar as it is possible, do so in a manner compatible with the State's obligations under the ECHR.

5.96 Article 10(1) of the ECHR provides that the right to freedom of expression includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. Article 10(2) provides that any restrictions on this right may only be those that are, "necessary in a democratic society."

5.97 It could be argued that in recognising the right "to receive and impart information" Article 10(1) creates a right to broadcast the proceedings of an inquiry, a right that can only be restricted in accordance with Article 10(2). Although the Irish courts have yet to rule on the effect, if any, that Article 10 has on the interpretation of section 2(a), the matter has been considered on a number of occasions in the United Kingdom, albeit by the chairpersons of inquiries.

5.98 Dame Janet Smith, chairperson of the independent public inquiry into issues arising from the case of the serial killer Harold Shipman, considered the question of whether a failure to allow a television company leave to broadcast the evidence of witnesses in a court or before a public inquiry constituted a breach of Article 10. She concluded that it did not. She said that Article 10 does not guarantee the right to receive information, which is in the possession or control of one who does not wish to impart it. As a result, she stated that insofar as an inquiry is in control of certain information, it is for those who wish to broadcast such information to request permission to receive it, rather than to assert a right to receive it. However, this decision was not the subject of judicial review, so the courts did not get an opportunity to express their opinion on it. It is worth noting that a similar approach was taken by Lord Hutton

when he delivered his decision on a similar application during the Hutton Inquiry, though this was not an inquiry under the 1921 Act.⁵¹

(d) Discussion

5.99 The arguments for and against broadcasting were discussed in detail in the Consultation Paper,⁵² and the Commission can deal with this issue concisely here.

(I) Arguments For

5.100 The main argument in favour of allowing the proceedings of inquiries to be broadcast is an extension of the policy underlining section 2(a) of the 1921 Act, namely that it is only when the public can see what is being done that they will have confidence that everything possible has been done in order to arrive at the truth. Broadcasting ensures that the maximum number of people, not just the limited number who manage to obtain seating in the hearing room, can observe the proceedings of the tribunal. In this sense, broadcasting is simply an extension of the current process whereby print journalists report on the day-to-day proceedings of the tribunal.

(II) Arguments Against

5.101 The main argument advanced by opponents of broadcasting is the effect that broadcasting would have on witnesses. It is argued that the possibility of being broadcast on national television might deter some witnesses from coming forward or cooperating with the inquiry. Secondly, that the broadcasting of proceedings will place great strain on witnesses, particularly where the inquiry relates to matters of great public interest. Thirdly that witnesses might be more circumspect in their comments if the proceedings are broadcast.

5.102 Aside from the potential effect on witnesses, it is also argued that to allow the broadcasting of proceedings could have an adverse impact on proceedings, in particular that by only reporting sensational or newsworthy parts of the evidence it could give a distorted impression of the proceedings.

⁵¹ *Ruling on applications to broadcast the inquiry* (5th August 2003.) <http://www.the-hutton-inquiry.org.uk/content/rulings/ruling01.htm>.

⁵² See the Consultation Paper at paragraphs 8.45-8.60.

(e) *Recommendation*

5.103 The Commission accepts that there are strong arguments on either side of this debate, and that it would not serve the public interest to state definitively that the media be allowed to broadcast all tribunals proceedings or, alternatively, that they should be prohibited in all cases. Instead the Commission recommends that this should be a matter for the exercise of discretion by the relevant tribunal chairperson, or sole member, taking into account the criteria referred to by Dame Janet Smith during the Shipman Inquiry. The Commission accordingly recommends that the tribunals of inquiry legislation be amended to allow such broadcasting, as the tribunal considers appropriate, having regard to a number of criteria.

5.104 The Commission therefore recommends that the tribunals of inquiry legislation be amended to allow a discretion to permit broadcasting of its proceedings on the basis that in deciding whether to allow filming, recording, or broadcasting of the proceedings of the tribunal, 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.

5.105 *The Commission recommends that the tribunals of inquiry legislation be amended to allow a discretion to permit such broadcasting of its proceedings as the tribunal considers appropriate on the basis that in deciding whether to allow filming, recording, or broadcasting of the proceedings of the tribunal, the tribunal shall have regard to the following considerations:*

- *the interests of the general public, particularly the right to have the best available information on matters of urgent public importance;*

- *the proper conduct and functioning of the tribunal proceedings;*
- *the legitimate interests of the participants;*
- *the risk of prejudice to criminal proceedings;*
- *any other relevant considerations.*

(4) Evidence taken on Commission

5.106 The Consultation Paper contained a detailed examination of the law relating to evidence taken on commission abroad pursuant to section 1(c) of the *Tribunals of Inquiry (Evidence) Act 1921*.⁵³ Evidence is taken on commission where the chairperson of the inquiry appoints a commissioner to go outside of the jurisdiction to take statements from witnesses. Such statements do not become evidence until they are formally read into the record at a public sitting of the tribunal.

5.107 The Commission recommended two changes to the law in this respect. The first related to the requirement that the evidence be taken abroad. The Commission considered that this requirement was unduly restrictive and hampered inquiries seeking to appoint commissions to take evidence from persons who are unwell within the State, otherwise than in public session.

5.108 The second change recommended related to the manner in which such evidence is read into the record. The Commission considered that the current practice whereby evidence taken on commission must be physically read into the record was unduly cumbersome and a waste of time and resources. The Commission recommended that a much better approach would be to provide that the obligation concerning hearings in public would be satisfied by the circulation to the public present at the proceedings of the tribunal of a copy, in writing, of the statement that is being adduced as evidence where the evidence was taken on commission.

5.109 In addition, the Commission recommended that this procedure be utilised in two other situations, first, where a witness is giving oral evidence and the written statement forms only part of the evidence and secondly, where the written statement of a witness is not

⁵³ See the Consultation Paper at paragraph 8.37-8.44.

in dispute and the tribunal does not propose to call the witness to give oral evidence. The Commission sees no reason to depart from its recommendations in this respect.

5.110 *The Commission recommends that the tribunals of inquiry legislation be amended to allow evidence to be taken on commission within the jurisdiction as well as abroad. In addition, the Commission recommends that the obligation to conduct hearings in public would be satisfied 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 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.”*

CHAPTER 6 POWERS

A Introduction

6.01 In this chapter, the Commission discusses the powers of tribunals of inquiry. This is an important issue for a number of reasons. First, those charged with the establishment, management and operation of tribunals of inquiry should know the precise nature and limit of the powers possessed by them. Second, given the potential of tribunals of inquiry to impact on the constitutional rights of those who appear before them, those individuals have a legitimate interest in knowing the extent of the powers possessed by tribunals of inquiry.

6.02 The powers of tribunals of inquiry derive from the *Tribunals of Inquiry (Evidence) Acts 1921 to 2004*, and the inherent power of a tribunal of inquiry to govern its proceedings, subject to the constitutional rights of those who appear before them.¹ The powers of tribunals of inquiry may be divided into two categories, substantive powers, and enforcement powers. The first category includes all those powers, rights and privileges that tribunals of inquiry may exercise to go about their task, for example, the power to summon witnesses. The second category includes those powers that tribunals may use to enforce those decisions.

B Substantive Powers

(1) *The Present Law*

6.03 The main provisions conferring powers on tribunals of inquiry are section 1(1) of the *Tribunals of Inquiry (Evidence) Act 1921*, section 4 of the *Tribunals of Inquiry (Evidence) (Amendment) Act 1979*, and section 6 of the *Tribunals of Inquiry (Evidence) (Amendment) Act 2002*.

¹ See Chapter 5.

(a) *Specific Powers*

6.04 Section 1(1) of the *Tribunals of Inquiry (Evidence) Act 1921* provides that a tribunal shall have all the “powers, rights and privileges as are vested in the High Court ... or a judge of ... such court, on the occasion of an action” in respect of:

- Enforcing the attendance of witnesses;
- Examining them on oath, affirmation or otherwise;
- Compelling the production of documents;
- Issuing a commission or request to examine witnesses abroad.

(b) *General Powers*

6.05 Section 4 of the *Tribunals of Inquiry (Evidence) (Amendment) Act 1979* provides that 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.” This may be described as a catch-all provision, which confers on tribunals a power to make such orders, as it considers necessary.

(c) *Scope of Powers*

6.06 It is arguable that section 4 of the 1979 Act is much broader in scope than section 1(1) of the 1921 Act. Section 1(1) limits the powers, rights and privileges of a tribunal in respect of the defined categories relating to the taking of evidence to those of the High Court on the “occasion of an action.” Section 4 of the 1979 Act, in contrast, contains no such limitation. It vests tribunals of inquiry with all the powers of the High Court or judges of that Court “in respect of the making of orders.”

6.07 The Supreme Court in *Lawlor v Flood*² considered these two provisions. In this case the sole member of the Planning Tribunal made three orders directing the applicant to attend for questioning before counsel for the Tribunal and to make discovery and produce all documents relating to accounts for or on behalf of the applicant between the years 1987 and 1994 and, in particular, records of any

² [1999] 3 IR 107.

payment received by him in respect of planning matters. They also directed the applicant to furnish an affidavit stating the names and giving details of any company of which the applicant was a shareholder, director or in which he had a beneficial interest between 1987 and 1994.

6.08 The applicant argued that the respondent had no power to order him to attend for examination or to furnish such an affidavit in the manner and terms requested because the respondent was purporting to exercise a jurisdiction greater than that vested in the High Court. The respondent argued that section 4 of the 1979 Act empowered him to make whatever orders were necessary for the purposes of the functions of the Tribunal and that he was not limited to the powers of the High Court in this regard. In support of this submission he argued that section 4 which provides that 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” should be construed disjunctively. Accordingly, it was argued that the tribunal had the power to make whatever orders it considered necessary and that the reference to the High Court in the second part of the section related merely to the enforcement of the order made under the first part of the section.

6.09 The Supreme Court rejected this contention. It held that section 4 of the 1979 Act had to be read as a whole, and in conjunction with section 1(1) of the 1921 Act. Accordingly, under section 4 of the 1979 Act a tribunal of inquiry may make such orders as it considers appropriate for the purposes of its functions and in the making of such orders it has the powers, rights and privileges of the High Court in the course of an action. This involves a tribunal of inquiry asking itself two questions before making an order, (1) is the order necessary for the purposes of its functions, and (2) could the High Court exercise a similar power on the occasion of an action.

(2) Consultation Paper

6.10 The Commission in the Consultation Paper recommended the amalgamation of section 1(1) of the 1921 Act and section 4 of the

1979 Act into one section, so that the powers of a tribunal of inquiry could be set out in clearly.³

(a) *General Powers*

6.11 The Commission in the Consultation Paper considered that although there was considerable merit in being able to set out individually each and every power of a tribunal of inquiry, such an approach would inevitably fail to identify all of the powers which might be needed by tribunals of inquiry. Accordingly, it recommended the retention of a general catch all provision, which would entitle a tribunal of inquiry to make such orders, as it considers necessary for the purposes of its functions.⁴

6.12 The Consultation Paper then proceeded to consider what form this general powers provision should take. It noted that section 4 of the 1979 Act, as interpreted by the Supreme Court in *Lawlor v Flood*,⁵ limited the general powers of tribunals of inquiry to those possessed by the High Court on the occasion of an action.⁶

6.13 However, in the Consultation Paper the Commission considered that it was not appropriate to limit the powers, rights and privileges of tribunals of inquiry to those possessed by the High Court as there may well be occasions when a tribunal of inquiry will need powers not possessed by the High Court in order to complete its task. In support of this view, the Commission pointed out the differences between inquisitorial systems such as tribunals of inquiry and adversarial systems such as courts of law.⁷

6.14 The Consultation Paper then considered the approach of the Commission to Inquire into Child Abuse to this question. It noted that the general powers provision in the *Commission to Inquire into Child Abuse Act 2000* does not limit the powers of the Commission to Inquire into Child Abuse to the powers of the High Court. Section 4(3) of the 2000 Act states that “[t]he Commission shall have all such

³ See the Consultation Paper at paragraph 6.107.

⁴ See the Consultation Paper at paragraph 6.105.

⁵ [1999] 3 IR 101, at 132.

⁶ See the Consultation Paper at paragraph 6.86.

⁷ See the Consultation Paper at paragraph 6.87.

powers as are necessary or expedient for the performance of its functions.” The test is a functional one which is subject to general constitutional principles. If the Commission to Inquire into Child Abuse considers that the proposed power is necessary or expedient having regard to its functions then the Commission has that power.

6.15 In the Consultation Paper, the Commission favoured the approach adopted by the Commission to Inquire into Child Abuse. It recommended that any amendment of the tribunals of inquiry legislation should include a similar provision, subject to one change. It recommended the insertion of a reasonableness provision, to the effect that a tribunal of inquiry may make such orders as are reasonable and necessary for the purposes of its functions.⁸

(b) Specific Powers

6.16 In the Consultation Paper, the Commission did not recommend any substantive changes to the specific powers relating to the taking of evidence listed in section 1(1) of the 1921 Act. However, it did make a number of recommendations to the way that these powers should be framed in any amendment of the tribunals of inquiry legislation.⁹

6.17 First, the Commission recommended that although the powers, rights and privileges of tribunals of inquiry in relation to the taking of evidence should continue to be those of the High Court, they should not continue to be fixed to those possessed by the High Court on the occasion of an action.¹⁰ The Consultation Paper highlighted a number of potential problems which could arise if the powers, rights and privileges of inquiries continued to be limited in this way. It noted that tribunals of inquiry, as inquisitorial vehicles, choose what witnesses appear before them. This is not the case in proceedings before the High Court where the witnesses are those of the parties. The Consultation Paper posed the question of whether the limitation in section 1(1) of the 1921 Act on the power to call witnesses to that of the High Court upon the occasion of an action, permits a tribunal of inquiry to call its own witnesses. The Commission in the

⁸ See the Consultation Paper at paragraph 6.105.

⁹ See the Consultation Paper at paragraph 6.107.

¹⁰ See the Consultation Paper at paragraph 6.108.

Consultation Paper recommended removing this potential difficulty by removing the limitation “on the occasion of an action” and replacing it with “in respect of the making of orders.”¹¹

6.18 Second, in the Consultation Paper, the Commission accepted that, while it is likely that section 1(d) and section 4 are subject to the implied saver “that the tribunal does not enjoy any power to attach for contempt,” it recommended the insertion of the phrase “provided that the tribunal does not enjoy any power to attach for contempt” into any amended tribunals of inquiry legislation to give legislative effect to the ruling in *In re Haughey*.¹²

(3) Discussion

(a) Commissions of Investigation

6.19 Section 15 of the *Commissions of Investigation Act 2004* provides commissions of inquiry with a general power, subject to the rules of constitutional justice, to establish rules and procedures for (a) the receiving of evidence, and (b) the receiving of submissions.

6.20 Section 16 of the 2004 Act deals with a number of specific powers relating to the taking of evidence. These include the power to:

- direct in writing any person to attend, to give evidence, and to produce any documents in that person’s possession or power which are specified in the direction;¹³
- direct a witness to answer any questions it believes to be relevant to the matter under investigation;¹⁴
- examine or cross-examine a witness on oath or affirmation or by use of statutory declaration or written interrogatories, to the extent the commission considers proper in order to elicit information relevant to the matters under investigation;¹⁵

¹¹ See the Consultation Paper at paragraph 6.88.

¹² [1971] IR 217. See the Consultation Paper at paragraph 6.107.

¹³ Section 16(1)(a), (e) and (g) of the *Commissions of Investigation Act 2004*.

¹⁴ Section 16(1)(b) of the *Commissions of Investigation Act 2004*.

¹⁵ Section 16(1)(c) and (d) of the *Commissions of Investigation Act 2004*.

- direct in writing any person to provide a list of all the documents in that persons possession or power relating to the matter under investigation, and to specify which of these documents the person objects to disclosing, and the reasons why;¹⁶
- direct a person who has provided information to experts or advisors appointed by the commission to swear a statement confirming, if such is the case, that the information was given voluntary and that it is to the best of that person’s knowledge true and accurate.¹⁷

6.21 In addition, section 16(1)(i) of the 2004 Act gives a commission of inquiry a general power to give any other directions that appear to it to be reasonable.

(b) *United Kingdom*

6.22 Section 19 of the UK *Inquiries Act 2005* deals with a number of specific powers relating to the taking of evidence and provides that the Chairperson of an inquiry may by notice direct a person:

- to attend at a time and place stated in the notice to give evidence; or
- to provide evidence in the form of a written statement; or
- to produce any documents or things in that person’s control, or possession relating to the matter under investigation.¹⁸

The direction may be varied or revoked if the person to whom it is addressed satisfies the inquiry that he or she is unable or cannot reasonably be expected to comply with the direction.¹⁹ The direction must explain the possible consequences of not complying with the notice, and outline the process by which a person may make a claim that he or she is unable, or cannot reasonably be expected, to comply with the direction.²⁰

¹⁶ Section 16(1)(f) of the *Commissions of Investigation Act 2004*.

¹⁷ Section 16(1)(h) of the *Commissions of Investigation Act 2004*.

¹⁸ Section 19(1), and (2) of the *Inquiries Act 2005*.

¹⁹ Section 19(4) of the *Inquiries Act 2005*.

²⁰ Section 19(3) of the *Inquiries Act 2005*

6.23 The Explanatory Notes that accompanied the Inquiries Bill 2004, which became the 2005 Act, stated that it was envisaged that most requests for information from an inquiry would not be made under section 19. It anticipated that an inquiry would usually ask for information informally first, and it noted that experience from past British Inquiries has shown that the vast majority of informal requests will be complied with.²¹

6.24 The Explanatory Notes envisaged three main scenarios in which powers of compulsion would be likely to be used:

- 1) a person is unwilling to comply with an informal request for information;
- 2) a person is willing to comply with an informal request, but is worried about the possible consequences of disclosure (for example, if disclosure were to break confidentiality agreements) and therefore asks the chairman to issue a formal notice; or
- 3) a person is unable to provide the information without a formal notice because there is a statutory bar on disclosure.²²

(4) Recommendation

6.25 The Commission considers that as tribunals of inquiry will often have varied subject matter and procedures, any attempt to delimit or quantify the whole range of powers needed by them would be bound to omit some power of relevance. Accordingly, the Commission takes the view that the tribunals of inquiry legislation should be amended to confer a general power on tribunals of inquiry to make such orders as they consider necessary and reasonable for the purposes of their functions. As tribunals of inquiry differ largely from courts, the Commission considers that the capacity of a tribunal of inquiry to make orders of a general nature should not be limited to those which the High Court can make on the occasion of an action.

6.26 The Commission recommends that the specific powers of a tribunal of inquiry in relation to the taking of evidence should be retained but for the reasons given in the Consultation Paper and

²¹ UK Inquiries Bill: Explanatory Notes at 12.

²² UK Inquiries Bill: Explanatory Notes at 13.

outlined above, they should not be limited by reference to the powers of the High Court.

6.27 *The Commission recommends that the tribunals of inquiry legislation should be amended to contain the following provision concerning the powers of tribunals.*

A tribunal of inquiry may make such orders as are necessary and reasonable 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 examination of them on oath, affirmation or otherwise;*
- b) Compelling the production of documents or things;*
- c) Issuing a commission or request to examine witnesses.*

C Enforcement Powers

(1) The Present Law

6.28 The main provisions relating to the enforcement of tribunal orders are section 1(2) of the *Tribunals of Inquiry (Evidence) Act 1921* and section 4 of the *Tribunals of Inquiry (Evidence)(Amendment) Act 1997*.

6.29 The main difference between the two provisions is that whereas section 1(2) of the 1921 Act criminalises those who attempt to obstruct the proceedings of tribunals of inquiry, section 4 of the 1997 Act is aimed at shoring up the ability of tribunals of inquiry to proceed with their investigation by providing a mechanism whereby the orders of a tribunal may be enforced by orders of the High Court.

(a) Offences

6.30 Section 1(2) of the 1921 Act arms tribunals of inquiry with a broad array of powers to deal with those who decide to obstruct them. It provides that:

“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 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.”

(b) Enforcement

6.31 Section 4 of the 1997 Act gives the tribunal the power to apply to the High Court for an order enforcing an order of the tribunal which has not been complied with. It provides:

“Where a person fails or refuses to comply with 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 order as it considers necessary and just to enable the order to have full effect”

It should be noted that a failure to comply with an order made pursuant to section 4 of the 1997 Act is not an offence but rather contempt of court.

6.32 An example of how section 4 operates in practice is provided by the case *Flood v Lawlor*.²³ In this case, the plaintiff, who was the sole member of a tribunal of inquiry, ordered that the defendant make discovery of certain categories of documentation. Following the making of that order, the plaintiff sought, and the High Court granted, an order compelling the defendant to comply with the order and an order compelling him to attend before the plaintiff to give evidence. The defendant failed to comply with the order for discovery and refused to answer relevant questions put to him at public hearing of the tribunal.

6.33 The plaintiff brought a motion for the attachment and committal of the defendant for contempt of court. The High Court sentenced the defendant to three months imprisonment with the first seven days to be actually served, with the balance of the sentence to be suspended to enable the defendant to comply with the order of discovery and swear a full and proper affidavit of discovery. Thereafter, the defendant made discovery in respect of a considerable volume of documentation. However, the plaintiff was not satisfied with the discovery made and the matter was re-entered for hearing before the High Court. The High Court found that there had been non-compliance by the defendant of a serious nature and ordered, *inter alia*, that the defendant should serve a further seven days of the sentence, pay a fine of IR£5,000 and make further and better discovery on oath in the form prescribed by the *Rules of the Superior Courts 1986*.²⁴

6.34 The defendant appealed to the Supreme Court. It was argued that as the contempt complained of was civil contempt, the appropriate penalty was imprisonment, but only until such time as the contempt was purged. This argument was based on the premise that civil contempt is coercive in nature rather than punitive. However, the Supreme Court dismissed the appeal. It held that contempt proceedings brought by a tribunal of inquiry for non-compliance of an order of the High Court granted pursuant to section 4 constituted a

²³ [2002] 3 IR 67.

²⁴ SI No 15 of 1986 (as amended).

special category in which punitive sanctions are available in respect of civil contempt.²⁵

(2) Consultation Paper

(a) Section 1(2) of the 1921 Act

6.35 In the Consultation Paper, the Commission considered that paragraphs (a) to (c) of section 1(2) of the 1921 Act were useful and necessary provisions and should be retained.²⁶ It then proceeded to examine paragraphs (d) and (e).

6.36 Paragraph (d) provides that where a person “by act or omission, obstructs or hinders the tribunal in the performance of its functions” that person shall be guilty of an offence. The Commission noted that in its *Report on Contempt of Court*,²⁷ the Commission took the view that paragraph (d) was too broad in ambit and that it was furthermore an unwarranted interference with the freedom of expression on matters of public concern. Accordingly, in the *Report on Contempt*²⁸ the Commission recommended the deletion of paragraph (d) and its replacement with a number of specific offences of disrupting a tribunal of inquiry (by means other than by publication.)²⁹ The Commission also recommended that, if the decision were taken to retain the paragraph, then a *mens rea* requirement requiring intention or recklessness should be added to it.³⁰

6.37 The Commission in the *Consultation Paper on Public Inquiries Including Tribunals of Inquiry* did not agree with this recommendation. It was considered that any attempt to set out an exhaustive list of the ways in which the work of a tribunal of inquiry could be culpably interfered with was bound to fail.³¹ Furthermore, it was considered that it was necessary to provide some measure of

²⁵ [2002] 3 IR 67 at 80.

²⁶ See the Consultation Paper at paragraph 6.26.

²⁷ (LRC 47-1994).

²⁸ (LRC 47-1994).

²⁹ (LRC 47-1994) at paragraph 9.6-9.7.

³⁰ *Ibid.*

³¹ See the Consultation Paper at paragraph 6.27.

protection to tribunals of inquiry in respect of matters written concerning them.³² The Commission recommended that there was a very real need for such a provision, as tribunals of inquiry will often be investigating powerful interest groups with a vested interest in obstructing and hindering its work. In relation to the requirement of *mens rea*, the Commission considered that there was no need to provide for this expressly, as the *mens rea* is implicit in the offences. Accordingly, the retention of paragraph (d) in its existing form was recommended.³³

6.38 Paragraph (e) provides that if a person “fails, neglects or refuses to comply with the provisions of an order made by the tribunal” that person shall be guilty of an offence. In the *Consultation Paper on Contempt of Court*, the Commission noted that as with paragraph (d) paragraph (e) was too wide in nature and should be deleted and replaced with a number of specific offences of obstructing a tribunal of inquiry.³⁴ The *Report on Contempt of Court* recommended that, if the decision were taken to retain the paragraph, then a *mens rea* requirement requiring intention or recklessness should be added to it.³⁵

6.39 However, in the *Consultation Paper on Public Inquiries Including Tribunals of Inquiry*, the Commission rejected the replacement of paragraph (e) with a series of general provisions with an exhaustive list of offences for the same reasons that it rejected the replacement of paragraph (d). The Commission considered that there was no good reason why the failure or refusal to obey a lawful order of a tribunal of inquiry should not constitute an offence. In relation to the requirement of *mens rea*, the Consultation Paper considered that there was no need to provide for this expressly, as the *mens rea* was implicit in the offences. Accordingly, the Commission recommended the retention of paragraph (e) in its existing form.³⁶

³² See the Consultation Paper at paragraph 6.28.

³³ See the Consultation Paper at paragraph 6.30.

³⁴ (LRC CP July 1991) at recommendation 66.

³⁵ (LRC 47 1994) at paragraph 9.6-9.7

³⁶ See the Consultation Paper at paragraph 6.32.

6.40 Paragraph (f) provides a person shall be guilty of an offence if that person does or omits to do any thing, which would have been contempt of court if the tribunal of inquiry had been the High Court. The Consultation Paper noted that the *Report on Contempt of Court* had favoured the repeal of paragraph (f) on the ground that it was inappropriate that the law of contempt of court should be transplanted into the tribunals of inquiry legislation bearing in mind the fact that tribunals of inquiry are not courts and that they embody too different systems, namely the inquisitorial and the adversarial.³⁷ The Commission concurred in this view. In addition, an overview of the law of contempt was conducted and the Commission concluded that an additional reason for not applying the law of contempt to tribunals was its uncertainty, even in its application to in the context of the administration of justice.³⁸

(3) Discussion

(a) Commissions of Investigation

(1) Offences

6.41 The *Commissions of Investigation Act 2004* provides that it is an offence for a person:

- to disclose or publish any evidence given, or the contents of any document produced, in private save in very limited circumstances,³⁹
- to fail to attend before a commission of investigation on being summoned, in order to give evidence and to produce documents.⁴⁰ It also provides that such behaviour may be punished as contempt. However, it states that an individual

³⁷ See the *Report on Contempt of Court* (LRC 47-1994) at paragraphs 9.2-9.3.

³⁸ See the Consultation Paper at paragraph 6.37.

³⁹ Section 11(3) of the 2004 Act. These are (a) where disclosure was directed by the court, (b) where disclosure is necessary for the purposes of section 12, (c) to the extent necessary for fair procedures, and (d) to a tribunal of inquiry, where a tribunal of inquiry is established, to inquire into the same matter.

⁴⁰ Section 16(8) of the *Commissions of Investigation Act 2004*.

may not be prosecuted and found in contempt for the same offence;⁴¹

- to make a statement, while giving evidence, which the person knows to be false or does not believe to be true;⁴²
- to obstruct an authorised person appointed by the commission;⁴³
- to destroy any document, or information in any form, relating to the matter or, matters under investigation; and⁴⁴
- to disclose a draft or a portion of the draft report of a commission of investigation.⁴⁵

(II) *Enforcement*

6.42 The *Commissions of Investigation Act 2004* provides a mechanism for the enforcement of orders of commissions established under that Act in three circumstances, first, in relation to orders in respect of witnesses and documents, second, in respect of orders relating to costs, and third, in relation, to determinations of privilege. This section will consider the first and the third category.

6.43 Section 16(6) of the 2004 Act deals with the powers of commissions of investigation in respect of witnesses and documents. It provides that where a person does not comply with a direction given by a commission pursuant to section 16, the High Court may, on application to it by the commission, order the person to comply with the direction and make any other order the High Court considers necessary and just to enable the direction to have full effect. Section 16(7) provides that if a person fails to comply with the order of the High Court, the matter may be dealt with as if it were contempt of the High Court.

6.44 Section 17 of the 2004 Act deals with privilege. It provides that where a person claims privilege in relation to any matter the

⁴¹ Section 16(9) of the *Commissions of Investigation Act 2004*.

⁴² Section 18 of the *Commissions of Investigation Act 2004*.

⁴³ Section 30 of the *Commissions of Investigation Act 2004*.

⁴⁴ Section 31(2) of the *Commissions of Investigation Act 2004*.

⁴⁵ Section 37(2) of the *Commissions of Investigation Act 2004*.

commission may determine whether the person is so entitled, and where a commission determines that the person is not so entitled the person must disclose the information, including any relevant documents. Section 17(7) provides that if the person does not disclose the information the commission may apply to the High Court for an order directing the person to comply with the request and the High Court may make or refuse to make the order.

(b) *United Kingdom*

6.45 In the UK law relating to public inquiries is contained in the UK *Inquiries Act 2005*.

(I) *Offences*

6.46 Section 35 of the 2005 Act provides that a person shall be guilty of an offence if that person:

- fails to comply with an order made by the inquiry in relation to the taking of evidence;⁴⁶
- does anything that is intended to have the effect of distorting, altering or otherwise preventing any evidence, document or thing from being given, produced or provided to the inquiry;⁴⁷
- intentionally suppresses, conceals, alters or destroys any document which that person knows or believes to be a relevant document.⁴⁸

(II) *Enforcement*

6.47 Section 36 of the UK 2005 Act provides that where a person fails to comply with, or acts in breach of, a notice under section 17 (a notice restricting public access to the proceedings of the inquiry) or section 19 (an order relating to the taking of evidence), the Chairperson of the Inquiry, or after the end of the inquiry, the Minister, may certify the matter to the High Court (England and Wales) or the Court of Session (Scotland).⁴⁹ Having heard representations on the matter the Court may then make an order

⁴⁶ Section 35(1) of the *Inquiries Act 2005*.

⁴⁷ Section 35(2) of the *Inquiries Act 2005*.

⁴⁸ Section 35(3) of the *Inquiries Act 2005*.

⁴⁹ Section 36(1) of the *Inquiries Act 2005*.

imbuing the original order with the force it would have had if it had been an order of that court.⁵⁰

(4) Recommendation

(a) Offences of Obstructing or Hindering

6.48 The Commission considers that attempts to obstruct or hinder a tribunal in the course of its work should constitute a criminal offence. However, the Commission is not in favour of the establishment of an offence of contempt of a tribunal and therefore the retention of section 1(2)(a)-(e) of the 1921 Act is recommended.

6.49 *The Commission recommends that the tribunals of inquiry legislation should continue to contain provisions equivalent to section 1(2)(a)-(e) of the 1921 Act which deal with attempts to obstruct or hinder a tribunal.*

(b) Should there be an Offence of Disclosing or Publishing Confidential Material?

6.50 The Commission now turns to consider whether any further offences should be added to this list of offences. During the Consultation process it was pointed out that many tribunals of inquiry have problems with the leaking of confidential information to the media. Furthermore, despite repeated attempts by the tribunals and the Gardaí to establish the sources of these leaks this has not been possible due to a refusal on the part of the journalists concerned to disclose their sources. This refusal is of course based on the long established view of journalists expressed in the code of conduct of the National Union of Journalists (NUJ) that sources which themselves forward information on a confidential basis should have that confidentiality respected, a view which has some support in the decision of the European Court of Human Rights in *Goodwin v United Kingdom*⁵¹ which held that in certain cases the right to freedom of expression in Article 10 of the European Convention on Human Rights protected the confidentiality of sources.⁵²

⁵⁰ Section 36(2) of the *Inquiries Act 2005*.

⁵¹ (1996) 22 EHRR 123.

⁵² For an overview of the issue of the journalists claim to confidentiality, see McGonagle, *Media Law* (2nd ed Thompson Round Hall 2003), at 189-193.

6.51 Against this background it was suggested that it should be an offence to disclose or communicate or publish any Tribunal document or the contents of any such document, or other Tribunal information to any third person or party, except to the extent authorised in writing by the Tribunal.

6.52 The Commission agrees that the unauthorised disclosure of confidential information emanating from tribunals of inquiry is a very serious problem. A tribunal of inquiry could of course individualise documents so that if published the tribunal can clearly identify the source of the information. This would be of limited value in situations where journalists paraphrase the information in question.

6.53 Two issues must be considered in this respect, first, the question of how the unauthorised disclosure of information is currently dealt with, and secondly the proposal for the creation of a new criminal offence of disclosing, communicating or publishing confidential information emanating from the tribunal.

6.54 Section 1(2) of the *Tribunals of Inquiry (Evidence) Act 1921* confers on tribunals of inquiry wide powers to deal with those who obstruct them. Of particular relevance in section 1(2)(d), which provides:

“If a person...

d. by act or omission, obstructs or hinders the tribunal in the performance of its functions,
the person shall be guilty of an offence”

6.55 In *Kiberd v Hamilton*⁵³ the Court considered the applicability of section 1(2)(d) to the publication of confidential material emanating from a tribunal of inquiry. The respondent in this case was the chairman and sole member of a tribunal of inquiry into the beef processing industry. The first applicant was the editor of the Sunday Business Post and the second applicant was the author of two articles, which contained confidential information that had emanated from the tribunal. The respondent indicated that it was considering whether there had been a breach of section 1(2)(d) and (f) of the 1921 Act and made an order, pursuant to section 4 of the *Tribunals of Inquiry (Evidence) (Amendment) Act 1979* directing the applicants to

⁵³ [1992] 2 IR 257.

appear before it in order to ascertain the source of the material. The applicants disputed the jurisdiction of the tribunal to make such an order but the Supreme Court held that it had. The decision in *Kiberd* indicates that the publication of confidential information emanating from the tribunal may in certain circumstances constitute an obstruction or hindrance of the tribunal in its work.

6.56 In addition, it remains open to a tribunal of inquiry to make an order that confidential information emanating from the tribunal should not be communicated, disclosed or published. Any breach of such an order would be an offence under section 1(2)(e) of the 1921 Act which provides that it is an offence where a person “fails neglects or refuses to comply with the provisions of an order made by the Tribunal.”

6.57 In this context it remains to consider what a proposed new offence of disclosure of confidential information would add. It might be argued that such an offence is an attempt to remedy a perceived deficiency in section 1(2)(d) of the 1921 Act, namely that it does not expressly deal with the publication of confidential information emanating from the tribunal in all circumstances. But in light of *Kiberd v Hamilton*,⁵⁴ section 1(2)(d) already appears to cover acts of publication where these amount to a hindrance or obstruction of the tribunal. Therefore any proposed offence would appear to lower the threshold so that it would no longer be necessary to show that the publication causes an obstruction or hindrance and the mere fact of publication would be sufficient.

6.58 The Commission wishes to point out one possible outcome of the phrase “third person or party” in any proposed offence concerning the disclosure of confidential information. It is possible that this would make it an offence for the persons involved to communicate certain issues to their employers. For example, if a particular employee was involved in a tribunal of inquiry and the employer wished to investigate the matter either for internal purposes or in order to formulate its own evidence to the tribunal, the particular employee would be able to refuse to co-operate on the grounds that to do so would be an offence. For this reason and that the existing offence of obstruction or hindrance appears to cover this area, the

⁵⁴ [1982] 2 IR 257.

Commission does not recommend that there should be a specific offence of publishing or disclosing confidential material.

6.59 *The Commission does not recommend that there should be a specific offence of publishing or disclosing confidential material as it considers that the tribunals of inquiry legislation in dealing with obstruction or hindrance already caters for such offences.*

(c) *Enforcement*

6.60 The Commission recommends that the existing power of a tribunal of inquiry to apply to the High Court for an order enforcing an order of the tribunal is a useful and a necessary one and should be retained in any amendment of the tribunals of inquiry legislation.

6.61 *The Commission recommends that the tribunals of inquiry legislation should retain the power of a tribunal of inquiry to apply to the High Court for an order enforcing an order of the tribunal.*

D Privileges

(1) The Present Law

6.62 The present position under section 1(3) of the 1921 Act is that persons who give evidence before tribunals of inquiry, or who are required to give evidence, enjoy the privileges and immunities of High Court witnesses.

(2) The Consultation Paper

6.63 In the Consultation Paper, the Commission recommended extending the privileges and immunities of those who give evidence to tribunals of inquiry to those who provide information, evidence, documents or other material to a tribunal, whether pursuant to an order or request of the tribunal or otherwise.⁵⁵ However, the Commission stressed that these privileges and immunities would not extend to persons providing information, evidence or documents after they have been directed to cease doing so.⁵⁶ The Commission advocated this course because it wished to encourage people to co-

⁵⁵ See the Consultation Paper at paragraph 6.120.

⁵⁶ See the Consultation Paper at paragraph 6.120.

operate with the inquiry, and not to be dissuaded from coming forward for fear of civil or criminal prosecution.

(3) Recommendation

6.64 The Commission sees no reason to depart from this view in general terms, but subject to one proviso. In line with the recommendation concerning the privilege against self-incrimination⁵⁷ the Commission has concluded that this immunity should only apply in cases where the information, documents or material provided is used as “evidence.”

6.65 *The Commission recommends that the tribunals of inquiry legislation should continue to define the privileges and immunities of witnesses by reference to the privileges and immunities of witness in High Court proceedings.*

⁵⁷ See paragraph 10.38 above.

CHAPTER 7 COSTS

A Introduction

7.01 In Chapter 12 of the Consultation Paper the Commission tackled the difficult issue of the spiralling costs of tribunals of inquiry. The Commission examined in detail the question of who may be ordered to pay costs and then went on to make a number of recommendations aimed at minimising the costs of tribunals. It is important to remember that the question of awarding costs is a matter for the discretion of the chairperson of the relevant tribunal and much will depend on the particular circumstances of each tribunal.

7.02 Since the publication of the Consultation Paper, the latest estimate puts the ongoing costs associated with the various recent tribunals at €200 million.¹ It is perhaps unfortunate that the bulk of public and media attention has focused on the costs of the tribunals. In the midst of this focus it is important not to lose sight of the purpose behind tribunals and to acknowledge what they have actually achieved. The objective of a tribunal is to ascertain, in accordance with its terms of reference, the facts in relation to some matter of public importance and to make recommendations aimed at ensuring that the matter under investigation is less likely to occur again in the future.

7.03 By virtue of the fact that much of a tribunal's work is carried out in public there are many positive by-products of its work which are difficult to measure. For example, the costs of tribunals must be weighed against the process of assuaging public disquiet and concerns in relation to the particular matter under investigation. Another by-product which is often difficult to measure is the extent to which such inquiries act as a deterrent to future negative activities. The benefit of putting things right may be real but are very intangible. One clearly positive outcome to some of the recent tribunals is the

¹ See *The Irish Times* 19 May 2005.

extent to which the facts highlighted during the various inquiries have assisted the Revenue Commissioners in its investigation of serious and systematic tax evasion. To date approximately €50 million has been collected on behalf of the Exchequer as a result of Revenue investigations of matters which could be said to have arisen directly or indirectly from issues highlighted at the tribunals. To a certain extent this extra revenue can be said to off-set part of the costs associated with the tribunals.

7.04 The high cost of public enquiries has also been experienced in other jurisdictions. In England it has been mooted that the recent UK *Inquiries Act 2005* was introduced partly as a result of the vast cost and length of the Saville inquiry.² The Regulatory Impact Assessment issued with the Bill indicated concerns about the costs of inquiries.³ It noted that:

“Inquiries are funded by the taxpayer, through the sponsoring Government Department, and can result in substantial costs to others involved, within both the public and private sector. The costs of inquiries should be proportionate to the problems that are being addressed.”

7.05 The total costs of any tribunal will depend on a number of factors such as:

- the legislative provisions governing the costs of tribunals;
- the exercise of the chairperson’s discretion and the role of the tribunal in relation to the awarding of costs;
- the tribunal’s terms of reference;
- the complexity and duration of the inquiry;
- the extent of the legal representation allowed to parties appearing before the tribunal;

² This inquiry into the events surrounding “Bloody Sunday” concluded its hearings in November 2004 having sat for approximately seven years. The inquiry heard evidence from 921 witnesses and considered a further 1,555 written statements. The cost was estimated at €155 million.

³ *Inquiries Bill Regulatory Impact Assessment* Department for Constitutional Affairs (2005), available at www.dca.gov.uk/risk/ibria.pdf.

- legal costs and the basis used for calculating lawyers' fees;
- general costs.⁴

B Legislative Provisions

(1) Jurisdiction to award costs

7.06 The jurisdiction of a tribunal in relation to costs was originally dealt with by section 6(1) of the *Tribunals of Inquiry (Evidence) (Amendment) Act 1979* ("the 1979 Act"). This section has since been amended by the *Tribunals of Inquiry (Evidence) (Amendment) Act 1997* and the *Tribunals of Inquiry (Evidence) (Amendment) Act 2004*. Section 6(1) of the 1979 Act (as amended) 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 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 taxed as aforesaid, shall be paid to the Minister for Finance by any other person named in the order.

⁴ Such as the remuneration of the chairperson(s), secretarial staffing costs, IT support, accommodation costs and the costs of producing the report.

(1A) The person who for the time being is the sole member of a tribunal or is the chairperson of a tribunal consisting of more than one member:-

(a) may make an order under subsection (1) in relation to any costs referred to in that subsection that were incurred before his or her appointment as sole member or chairperson and that have not already been determined in accordance with that subsection, and

(b) shall, for that purpose, have regard to any report of the tribunal relating to its proceedings in the period before his or her appointment.

(1B) Paragraph (b) of subsection (1A) shall not be taken to limit the matters to which regard is to be had under subsection (1).’’

Subsections (1A) and (1B) were inserted by the 2004 Act to deal with an issue of concern which arose following the resignation in June 2003 of Mr Justice Flood as chairperson and as a member of the *Tribunal to Inquire into certain Planning Matters and Payments*. Subsection (1A) provides that the person who is the sole member of a tribunal or is the chairperson may make an order in relation to any costs that were incurred before his or her appointment and that have not already been determined. In exercising this power, the sole member or chairperson shall have regard to any report of the tribunal relating to its proceedings in the period before his or her appointment.

7.07 The jurisdiction to award costs is therefore discretionary in nature. A tribunal may award costs in full or in part or refuse costs to parties appearing before it. It also has power to order a party to pay all or part of the costs of the tribunal or of any other party. The Consultation Paper contained a detailed discussion of who may be ordered to pay the costs of a tribunal. Having reviewed the relevant case law and legislative provisions the Commission concluded that the present legislative policy and the judicial discretion regarding the award of costs should be retained.⁵

7.08 In the Consultation Paper, the Commission did however recommend that section 6(1) be re-drafted in order to avoid any

⁵ See the Consultation Paper at paragraph 12.44.

possible misinterpretation of its terms.⁶ The Commission’s concern centred around the danger that the section might be interpreted as meaning that the only basis upon which a non-State party may be required even to pay its own costs would be if the party had obstructed the tribunal in its inquiry. It was considered that section 6 (as amended) enabled the tribunal when exercising its discretion in relation to costs to have regard to its findings on the substantive issues.⁷

7.09 The Commission was also of the view that the phrase ‘equitable to do so’ probably implicitly includes consideration of the means of a party. The Commission considered that it was only fair indeed and realistic that, among the factors to be taken into account in awarding costs, the means of a party should be stated explicitly.⁸

7.10 The Commission’s view was that, the fact that the tribunal is required by section 6(1) 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” in section 6(1) 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, a 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, mention of the “terms of reference” points the tribunal in the direction of its findings on the substantive issue being a relevant factor to be taken into account in deciding on costs.

7.11 Since the publication of the Consultation Paper, the question of costs and the interpretation of section 6 of the 1979 Act (as

⁶ See the Consultation Paper at paragraphs 12.45 and 12.46.

⁷ *Ibid* at 12.25.

⁸ *Ibid* at 12.46.

amended) has been the subject of consideration both by the courts and the chairpersons of the tribunals.

(2) *McBrearty v Morris*

7.12 In *McBrearty v Morris*⁹ the applicant had been granted the right to be legally represented before the tribunal but argued that he was unable to fund legal representation in the absence of being provided with the means to do so. In other words, the right to be legally represented was of no benefit where he could not afford to fund that representation in advance of the hearings. The tribunal pointed out that it was not entitled to grant legal aid under the civil or criminal legal aid scheme or to make a recommendation under the Attorney General's non-statutory Scheme¹⁰. The tribunal argued that it had no power to adjudicate on the issue of costs, or direct the payment of costs, of any person appearing before the tribunal, prior to reaching any findings on the matters being investigated.

7.13 Peart J held that the applicant's rights to fair procedures under Article 40.3 of the Constitution could not be regarded as including the right to have his legal representation funded or provided for in advance of the tribunal reaching its findings. He was satisfied that the tribunal had no power under section 6 of the 1979 Act to make provision for, or at least guarantee in advance, the costs of the applicant's legal representation. In reaching his decision Peart J stated that:

“The legislature has revisited the question of costs of those appearing at tribunals and has decided how the matter is to be dealt with. It has decided to strike a balance between the right of some parties to whom representation has been granted to have their costs paid for, and the public's right to be protected from a situation where all witnesses who have been granted representation at the tribunal would have their costs discharged from public funds, regardless of whether they had co-operated or not, or given false or misleading information. In so deciding, due regard is had to the right of

⁹ High Court (Peart J) 13 May 2003.

¹⁰ On the Attorney General's scheme see Collins & O'Reilly *Civil Proceedings and the State in Ireland* (2nd ed Round Hall, 2004) at paragraphs 3.37-3.41.

persons to have their costs paid, provided that they have co-operated.”

7.14 This decision (which is currently under appeal to the Supreme Court) affirmed that the intention of section 6 of the 1979 Act that there is not to create a legal entitlement to costs. The question of costs is entirely a discretionary matter for each tribunal.¹¹

(3) Mahon Tribunal

7.15 On 30 June 2004, Judge Mahon gave his ruling in relation to the principles to be applied in respect of certain applications for costs arising in relation to the Planning Tribunal.¹² A number of parties submitted that in the exercise of his discretion under section 6 of the 1979 Act, the chairman of the tribunal could not or should not have regard to the findings on the substantive or primary issues reported upon. Judge Mahon, having considered the interpretation suggested by the Law Reform Commission in the Consultation Paper, agreed that the word “findings” in section 6 meant the findings on the substantive issue of corruption. In so holding he emphasised that a finding of corruption did not of itself mean that he must in the exercise of his discretion refuse the costs of a person who was found to have been corrupt. Judge Mahon subsequently made rulings in relation to specific costs applications by certain parties.¹³

(4) Morris Tribunal

7.16 In his ruling on applications for costs concerning a module of the tribunal of inquiry into certain Gardai in Donegal,¹⁴ Morris J considered the meaning of section 6 (as amended) and in particular the words

¹¹ The decision did not need to address the matters of interpretation of section 6 of the 1979 Act, as amended, as discussed in paragraphs 7.08 and 7.09 above.

¹² Tribunal of Inquiry into certain planning matters and payments.

¹³ See www.flood-tribunal.ie – Decisions and Rulings.

¹⁴ Ruling of Mr Justice Morris on application for costs concerning term of reference (e) the explosive module. Tribunal of Inquiry into complaints concerning some gardai in the Donegal division. Available at www.morristribunal.ie.

“...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)”.

Morris J ultimately did not find it necessary to reach a decision on the correct interpretation of the words “findings of the tribunal” in section 6 (as amended). He proceeded on the basis that a substantive finding of wrongdoing on the part of a person would not necessarily deprive that person of the opportunity to have costs awarded in their favour. He considered whether each applicant had cooperated fully with the tribunal by furnishing it with documents, by furnishing it with all the information in their knowledge or procurement, by telling the whole truth to the tribunal investigators and by telling the whole truth in the witness box. Where an applicant had done so, they were deemed to have cooperated with the tribunal. In such circumstances, Morris J was prepared to grant them their costs irrespective of the finding that may have been made as a result of their cooperation and truthful testimony.

(5) *The Consultation Paper*

7.17 It seems clear, particularly from the submissions made to the *Mahon Tribunal* discussed above, that the phrase “findings of the tribunal” in section 6(1) as currently drafted may be misinterpreted. The Commission therefore endorses its recommendation in the Consultation Paper that the section should be redrafted.¹⁵

7.18 For the purposes of clarification therefore the Commission recommends that the first part of section 6(1) of the 1979 Act be redrafted as follows:

“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;

¹⁵ See the Consultation Paper at paragraph 12.46.

- (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 considered that the later part of section 6(1) of the 1979 Act – from the words “there are sufficient reasons rendering it equitable to do so”...to the end – required no change.

7.19 *The Commission recommends that the first part of section 6(1) of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979 which deals with the awarding of costs, be redrafted as follows:*

“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...”

C Role of the Tribunal in relation to Costs

(1) United Kingdom

7.20 The UK *Inquiries Act 2005* (“the UK 2005 Act”) contains a number of provisions designed to reduce the potential for excessive cost and delay. The pre-legislative Regulatory Impact Assessment¹⁶ suggested that the scale of costs of certain inquiries was one of the spurs to the UK 2005 Act. It noted that with no statutory or other cap on expenditure, “inquiries have to rely on the ability of the chairman and the co-operation of parties, rather than the legislation under which they have been established to ensure an effective result”.

¹⁶ Department for Constitutional Affairs *Final Regulatory Impact Assessment: Inquiries Bill* November 2004 at www.dca.gov.uk.

7.21 Section 17(3) of the UK 2005 Act which deals with evidence and procedure provides that:

“In making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others).”

7.22 The Explanatory Notes to the Inquiries Bill indicated that:

“The purpose of subsection (3) is to ensure that the need to control cost is a valid consideration for the chairman when conducting and planning proceedings. The cost of inquiries will vary according to the complexity of the matters being investigated. The Minister is required, by clause 36(3), to meet expenses reasonably incurred in holding the inquiry. Each decision to admit evidence, to hold oral hearings, or to allow legal representation adds to the cost of the inquiry. The requirement in subsection (3) will strengthen the chairman's ability to defend decisions in which the need to limit costly elements of an inquiry was a factor.”¹⁷

7.23 The Draft Rules of Procedure which were published by the Department of Constitutional Affairs indicate that Rules could, for example

- Enable the inquiry to set limits in advance for the number of hours work per week or month that will be paid for out inquiry funds and set time limits for different types of work;
- Enable the inquiry to set procedures for submitting bills, both timescales and forms to be used;
- Require rates for particular types of work to be agreed in advance before representation is authorised;
- Require interested parties who are to be publicly funded to produce estimates of the work involved;

¹⁷ Explanatory Notes to the Inquiries Bill, HL Bill 7-EN at paragraph 28.

- Set out the basis on which costs will be assessed and the circumstances for the inquiry to take into consideration when making assessments.

These proposed rules form a good basis for controlling the costs associated with a tribunal.

(2) Recommendation

7.24 The Commission considers that the chairperson of a tribunal has an important role to play in monitoring and controlling the costs of a tribunal. As noted in Chapter 5 tribunals of inquiry have a wide discretion in the area of procedures.¹⁸ The Commission therefore recommends that in the exercise of their discretion chairpersons of tribunals should be expressly required by any amended tribunals legislation to have regard to the issue of costs.

7.25 *The Commission recommends that the chairperson of an inquiry should be required by amended tribunals legislation to have regard to the need to avoid any unnecessary costs in making any decision as to the planning, procedure or conduct of an inquiry.*

D Minimising Costs

(1) Complexity and Duration

7.26 The duration and therefore the costs of any tribunal will be driven to a large extent by the complexity of the matters to be investigated and the tribunal's terms of reference. If the terms of reference are set too broadly this may result in unnecessary cost and delay. In this regard the recommendations made in Chapter 3 in relation to terms of reference may assist in this respect.¹⁹

7.27 Factors such as the number of witnesses called to participate, the amount of evidence admitted and the legal representation granted all have the potential to escalate the length and potential costs of a tribunal. In this regard the recommendations

¹⁸ See paragraphs 5.04 - 5.07 above.

¹⁹ See paragraphs 3.19 and 3.21 above.

made in Chapter 5 in relation to the information gathering phase²⁰ and the grant of legal representation²¹ should lead to a significant reduction in costs.

(2) Timetables/Deadlines

7.28 The question arises as to whether provisional timetables/ deadlines should be set for completion of the tribunal's work (once the chairman has had an opportunity to assess the task ahead) subject to the time being extended for appropriate reasons.

7.29 In *Government by Inquiry*,²² the House of Commons Public Administration Select Committee (PASC) acknowledged that setting arbitrary deadlines might be counterproductive in a process which is intended to establish the facts, provide public reassurance and in many cases have a healing and cathartic effect. Nonetheless the PASC felt that this was not incompatible with announcing a timescale which would be non-binding and open to being revisited in light of developments.

7.30 In the *Government Response to the PASC Report*²³ the view was taken that to set an estimated completion time at the outset could place unnecessary pressures and expectations on the inquiry, before the chairman has had the opportunity to assess the scale of the task involved. The most serious consequence of such pressure would be if a deadline caused an inquiry to curtail some its investigations or to act too hastily in assessing evidence. It was felt that public confidence in the inquiry could be undermined if the chairman had to continually return to the Minister seeking an extension, giving the impression of an inquiry proceeding slowly even though the inquiry quite legitimately required further time to fulfil the terms of reference.

7.31 The Commission is similarly of the view that setting arbitrary deadlines at the outset of the proceedings is not appropriate but that good practice would dictate that tribunals should set their own provisional timetables for different modules.

²⁰ See paragraphs 5.59 – 5.64 above.

²¹ See paragraphs 5.28 – 5.40 above.

²² House of Commons HC 51-1 2005.

²³ Cm 6481.

(3) Timetabling and Sequencing

7.32 Where the subject matter under inquiry is complex, another way of controlling costs is by making appropriate arrangements regarding the division of its subject matter into modules and by arranging the sequence in which topics are taken. The Commission notes that existing tribunals have adopted this method of operation. Efforts should be made to ensure that legal representatives and other experts should attend at the tribunal only when necessary. To this end it is advisable that a note of those in attendance should be taken together with the subject matter covered on that date and the times of sitting of the tribunal.

7.33 *The Commission recommends that sensible arrangements regarding the division of subject-matter and the sequence in which topics are taken should be followed so as to minimise wasted time and control costs.*

(4) Budget Figures

7.34 Another consideration is whether a broad budget figure should be announced at the start of a tribunal and that any increases would need to be explained at the end of the inquiry when final costs are published.

7.35 The Commission can see the benefits of requiring estimated budget figures to be considered at the outset of a tribunal. Such an exercise would focus attention on the costs of the tribunal and the need to ensure efficiency at all times. The budgeted figures could be revised, for example, following any changes to the tribunal's terms of reference. The Commission acknowledges that the publication of estimates at the outset may detract from the work to be carried by the tribunal. The Commission therefore considers that such estimates should be used for internal control purposes and does not see any need for such figures to be made public at the outset of a tribunal.

7.36 *The Commission recommends that the sponsoring Department, following consultation with the Department of Finance, should set a broad budget figure at the outset of the tribunal. Such estimates should be used for internal control purposes and need not be made public at the outset of a tribunal.*

(5) Level of legal expertise required by the tribunal

7.37 In the Consultation Paper the Commission highlighted the importance of matching skills to the work to be performed.²⁴ There are many tasks, particularly at the information gathering and concluding stages, which may be carried out by paralegal teams or administrative staff engaged on a short to medium term contract or on secondment from a Government Department. Multidisciplinary teams comprising administrative, information technology, financial, accounting, research and legal expertise could match core skills to the work involved thereby creating a more efficient and less costly process. Lawyers should only be used if their particular skills and expertise are required to deal with particular issues.

7.38 Currently tribunal legal teams are employed on a full time basis and this often dictates the level of remuneration sought. This means that lawyers have to vacate their existing practice if they are engaged by a tribunal. On completion of the inquiry, there is no guarantee that lawyers, for example, will regain their practice at the level previously enjoyed. Some element of flexibility, for example, using different counsel for different “issues” or “modules” would mean that involvement in a tribunal would not necessarily be detrimental to a lawyer’s practice.

7.39 *The Commission emphasises that the inquiry itself should give considerable thought to what level of representation it engages for particular tasks. The Commission considers 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 or paralegals or other multidisciplinary teams retained to do it.*

E Level of legal representation allowed to parties appearing before the tribunal

7.40 The level of legal representation allowed to parties appearing before the tribunal will have a direct effect on the total costs of the tribunal. It should be noted that the grant of representation in itself even without an award of costs in respect of that representation has the effect of adding to the overall costs of the

²⁴ See the Consultation Paper at paragraph 12.49.

tribunal. The grant of representation introduces an adversarial element to the inquiry process which tends to lengthen the process considerably. In this regard the recommendations made in Chapter 5 including the possibility of pooled representation should be borne in mind which should impact positively on the overall reduction of costs.

F Basis for calculating lawyers fees

(1) Legal Costs – Current Position

7.41 The legal costs associated with a tribunal comprise:

- (1) The costs of the tribunal's own legal team; and
- (2) The legal costs payable in respect of parties represented before the tribunal (if the tribunal directs the State to pay all or part of the costs of any such party).

7.42 In relation to category (1) the State exercises control over the costs in that rates of fees can be agreed in advance with the tribunal's team. The costs arising in relation to category (2) are outside the control of the State because currently it is a matter for a solicitor advising a client appearing at a tribunal to determine what level of legal representation is required and to agree the level of fees.

7.43 If a tribunal makes an order for costs in favour of a third party then the State endeavours to agree the level of costs to be paid. In default of agreement the matter is referred to the Taxing Master of the High Court to measure and assess the reasonableness of the level of costs charged. This in turn may give rise to further litigation and consequent legal costs.²⁵ It appears that the greater proportion of

²⁵ The Beef Tribunal has given rise to much litigation in relation to the taxation of costs – see *Goodman v Minister for Finance* [1999] 3 IR 356; *Goodman v Minister for Finance (No. 1)* [1999] 3 IR 321; *Goodman v Minister for Finance (No. 2)* [1999] 3 IR 333; *Spring and Desmond v Minister for Finance* High Court (Smyth J) 29 May 2000; *Minister for Finance v Taxing Master Flynn Costs of Tomás MacGiolla and Patrick Rabbitte* High Court (Herbert J) 31 July 2003.

legal costs paid by the State relate to the costs of third party representation rather than the tribunal's own legal teams.²⁶

7.44 In the Consultation Paper the Commission drew attention to the basis on which the fees of lawyers appearing before tribunals are calculated.²⁷ Given that legal fees constitute the largest portion of the costs of tribunals it is clear that this is an important issue. The Commission suggested 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. It was noted that such a formula should take into account the fact that a barrister who has been employed full-time by a tribunal for some time cannot immediately resume private practice at the same level because the solicitors who had briefed the barrister will have become accustomed to briefing other barristers. It was also suggested that a 'scheme' setting fixed costs for specific aspects of work might be appropriate in some instances rather than having a pay structure on the basis of the status of the person involved (although the status of the person doing the work will have some impact on the overall cost).

(2) *Proposed new structure for payment of legal fees*

7.45 On 19 July 2004, the Minister for Finance announced a new structure for the payment of legal fees at tribunals and other forms of inquiry.²⁸ The features of the new structure for payment of legal fees to legal personnel hired by tribunals, the State or third parties at tribunals or other forms of inquiry are as follows:

- with effect from 1 September 2004, in the case of tribunals of inquiry or other forms of inquiry established from that date, the costs of all legal representation at the tribunal/inquiry are to be remunerated by reference to a set fee;
- in the case of existing tribunals of inquiry or other forms of inquiries, from a date to be determined by the Government,

²⁶ For example, it is understood that approximately 70% of the cost of the Beef Tribunal and 80% of the cost of the McCracken Tribunal were attributable to third-party legal fees.

²⁷ See the Consultation Paper at paragraph 12.52.

²⁸ See Department of Finance press release 19 July 2004 at www.finance.gov.ie.

following communication between the Attorney General and the Chairpersons of the existing tribunals, the cost of all legal representation will be remunerated by reference to a set fee for the remainder of the tribunal or other inquiry;

- the set fee is to be based on the current annual salary of a High Court Judge (plus 20% in respect of pension contribution) for a Senior Counsel, with existing relativities for other legal staff retained and paid by reference to this basis;
- the remuneration package proposed with effect from 1 January 2005 is as follows:
 - Senior Counsel €221,708 p.a. or €1,008 per day
 - Junior Counsel €147,806 p.a. or €672 per day (2/3 of Senior Counsel rate)
 - Research Counsel €55,427 or €252 per day (1/4 of Senior Counsel rate)
 - Solicitor €176,000 p.a. or €800 per daily appearance or €100 per hour for work undertaken other than appearing at the tribunal;
- a fee based on the above for preparatory work will be paid to counsel and solicitors subject to a time ceiling to be set on a tribunal-by-tribunal basis;
- other legal personnel will be paid at rates to be determined by reference to the new rates;
- the daily rates indicated above will be paid where legal personnel work less than the full calendar year;
- no brief fee will be paid in respect of legal representation at a new or existing tribunal from 1 September 2004.

7.46 On 5 September 2004, the Government announced the agreed dates on which the new schedule of fees would be applied to existing tribunals and inquiries as follows:

- The *Clarke Inquiry* into events at Lourdes Hospital, Drogheda (31 March 2005)
- The *Moriarty Tribunal*, investigating payments to Mr. Haughey and Mr Lowry (11 January 2006), and

- The *Morris Tribunal* investigating activities by Gardai in Donegal (30 September 2006).
- The *Planning Tribunal* (31 March 2007).²⁹

7.47 It appears that the proposed new structure as outlined above envisages a set fee which is payable by reference to the status of the person involved rather than related to the work to be done. While the Commission does not wish to comment on the proposed fee structure it notes that lawyers like any other professional persons have many overheads such as office running costs, professional indemnity insurance, staff costs and technical support services. Any prolonged absence from a lawyer's private practice must also be taken into consideration. The level of commitment to the tribunal dictates to a large extent the level of fees charged. The salary of a High Court judge represents only one element of the cost to the State of employing a High Court judge. Other costs such as accommodation, travel costs, administrative services, ushers and pension must also be considered. The Commission does note that the proposed figures contain an uplift from the basic salary to take account of pension contributions.

7.48 From the point of view of the State, the measures proposed clearly aim to reduce the overall legal costs of new tribunals and inquiries and reduce the costs of existing tribunals and inquiries with effect from the date of implementation of the new rates. In relation to third party costs, the State would be assured in advance that fees would be capped at an appropriate level. If parties wish to engage legal representation at a higher cost then they will have to bear any additional costs over and above the set scale.

7.49 It would seem however that a set fee structure does not represent a realistic assessment of the actual cost of doing the work or a value for money assessment. In relation to the tribunal's own legal team the capping of fees may mean that a tribunal will not be in a position to engage lawyers of its own choice. The difficulty with having a set fee structure is that it does not take account of varying levels of experience or expertise. A tribunal may find that more experienced lawyers will not be prepared to abandon (albeit temporarily) lucrative private practices to engage in tribunal work.

²⁹ See Government press release 5 September 2004 at www.taoiseach.gov.ie.

As a result the tribunal may not be in a position to obtain the services of lawyers with the necessary levels of experience and skill required. In fact it seems that one of the main reasons for the staggered introduction of the scale of fees to existing tribunals was the fear of extensive disruption of the tribunals and inquiries by reason of changes in legal representation involved.

7.50 A more appropriate option for engaging legal personnel would be to use some form of competitive tendering process. Tendering processes are used frequently to ensure value for money and there is no reason why the engagement of personnel to serve on tribunals should be treated differently. A tender process would open up competition and would ensure that the tribunal could engage suitable personnel at competitive prices. Indeed, this mode of tendering was included in section 8(2) of the *Commissions of Investigation Act 2004*.

(2) Criminal Legal Aid

7.51 While perhaps not directly comparable with the payment of legal fees in relation to tribunals, it is useful to look at the criminal legal aid arrangements which is another situation where the State funds legal representation of third parties. Under the current Criminal Legal Aid Scheme, solicitors are paid on a fixed scale of fees in respect of cases heard in the District Court. The fees paid to counsel and solicitors in respect of their services in the higher Courts are related to the fees payable to prosecution counsel as determined by the Director of Public Prosecutions.

7.52 The Criminal Legal Aid Review Committee in its *Final Report*³⁰ examined the merits of contracting for the provision of criminal representation in court. The Committee defined contracting as a system whereby the purchaser of the legal aid service enters into contracts with firms or individual lawyers for the provision of an agreed amount of work at a fixed price, the work and price both usually being agreed on the basis of an accepted tender. The Committee assessed the merits of introducing a system similar to that which exists in the United States and found that:

³⁰ Criminal Legal Aid Review Committee - Final Report, February 2002 available at www.justice.ie.

“...while it may be possible to operate contract systems which provide an acceptable level of service, we have found no evidence to indicate that this can be achieved at a lesser cost than that which prevailed for assigned counsel and/or public defender systems. The evidence for the US indicates that cost savings are achieved in certain situations where competitive bidding operates but this has a direct adverse effect on the quality of representation provided. We consider, therefore, that the US experience in providing criminal legal aid services by way of contract does not make a sound case for the implementation of such a system in Ireland.”

7.53 The Committee also examined the programme of reforms taking place in England and Wales where the authorities had decided that, in future, most publicly-funded criminal defence services will be provided by lawyers in private practice, under contracts which would be designed to include quality standards. The Committee noted, however, that the ‘contract’ system being implemented in England and Wales differed substantially from contract systems in operation in the US. The key difference is that the contracts are not based on competitive bidding. Solicitors who wish to provide criminal legal aid services will effectively enter into agreements with the newly established Criminal Defence Service to provide legal services on the basis of a prescribed fee structure and subject to a quality assurance assessment being carried out on their work.

7.54 The Committee ultimately did not recommend the implementation of contracting, be it the United States model or the England/Wales model, for providing criminal legal aid in Ireland.

7.55 Contracting promotes value for money through encouraging efficiency. Another benefit of a fixed price contract system is the ability to more accurately control and contain costs. Contracting allows the contractor to take account of the past performance and reputation of the service provider and to match the service provider’s qualities to the work required.

7.56 The greatest risk is a potential reduction in the quality of the service. Some fixed price contract systems operate on a competitive, low-bid basis where little regard is given to the qualifications of the

lawyers bidding or to the quality of service provided. Cost savings may be achieved at the direct expense of quality.

7.57 The Commission considers that there are many benefits to be gained by introducing a tendering process for the engagement of lawyers to provide legal services to tribunals on the lines of section 8(2) of the *Commissions of Investigation Act 2004*. The awarding of any contract would take account of the complexity of the issue involved, the timeframe involved, the experience and skill and the time and labour required.

(3) Recommendation

7.58 The Commission considers that in contracting legal services the principal objective should be to ensure value for money. It considers that it is not advisable to introduce one standard fee system to cater for all eventualities. Where the services of a lawyer are required on a long term basis a set fee structure may be the most appropriate method of remuneration. In other instances a tender process resulting in a fixed price contract may be a more appropriate system. There may also be situations where, as at present, a tribunal wishes to engage a particular lawyer because that lawyer holds some specific experience and expertise in a particular area of law. This process should also be allowed to continue.

7.59 *The Commission considers that flexible arrangements should be put in place in relation to the engagement and remuneration of lawyers and other personnel involved in tribunals which may involve a fee structure and a tendering process where either of them are appropriate. The Commission also considers that the existing procedure whereby the tribunal can engage a particular lawyer at an agreed level of remuneration should be retained.*

CHAPTER 8 JUDICIAL REVIEW AND APPLICATIONS TO THE HIGH COURT

A Introduction

8.01 In this chapter the Commission examines aspects of judicial review and the process by which tribunals may apply to the High Court for directions in respect of certain decisions they make.

B Judicial Review Proceedings

8.02 This part will consider two possible methods of ‘fast tracking’ judicial review proceedings. These are, first, reducing the time limits for the institution of judicial review proceedings, second, giving the tribunal the right to apply to the High Court for directions in relation to the performance of any of its functions.

(1) Reducing the Time Limits for Judicial Review

8.03 In the Consultation Paper the Commission recommended the imposition of a time limit of 28 days on the institution of judicial review proceedings in the context of tribunal proceedings, subject to the caveat that this period may be extended by the court where there exists good and sufficient reason for doing so.¹ The Consultation Paper examined the operation of similar time limits in respect of planning and immigration law and the case law surrounding them.² Time limits have the advantage of ensuring certainty and avoiding unnecessary costs and wasteful appeal procedures. In addition, according the courts a discretion to extend the time-period where it considers it just and equitable to do so ensures that the time limits do not act as an unreasonable and unjustifiable restriction on a plaintiff’s constitutional rights.

¹ See the Consultation Paper at paragraph 5.76.

² See the Consultation Paper at paragraph 5.73-5.75.

(2) Discussion

8.04 After the publication of the Consultation Paper, the Commission published a *Report on Judicial Review Procedure*.³ In that report, the Commission recommended that a time limit of 28 days from the date on which the grounds for the application first arose for the institution of judicial review proceeding would be appropriate in respect of specialist judicial review schemes. It was recommended that this be subject to a judicial discretion to extend this time-period where the High Court considers there to be “good and sufficient reason for doing so”.⁴ The Commission sees no reason to depart from that general approach in the context of tribunals of inquiry and accordingly recommends that a 28-day time limit from the date on which the grounds for the application first arose should be introduced, subject to a discretion to extend this time-period where the High Court considers that there is a “good and sufficient reason for doing so”.

(3) Recommendation

8.05 *The Commission recommends that a statutory time limit of 28 days from the date on which the grounds for the application first arose should be placed on the institution of judicial review proceedings in the context of public inquiries, subject to a judicial discretion to extend this time-period where the High Court considers that there is a “good and sufficient reason for doing so”.*

C Application of Tribunal of Inquiry to the High Court

(1) Application to the High Court

8.06 In the Consultation Paper the Commission recommended that a tribunal of inquiry should be allowed to make an application to the High Court for directions in relation to the performance of any of its functions.⁵ The High Court would then have a discretion as to whether to hear the application in public or private depending on the subject matter of the hearing. The Consultation Paper noted with

³ (LRC 71-2004).

⁴ (LRC 71-2004) at paragraph 6.08.

⁵ See the Consultation Paper at paragraph 5.83.

approval the operation of such a procedure in section 25(1) of the *Commission to Inquire into Child Abuse Act 2000*.⁶

8.07 Such a provision has the advantage of enabling a tribunal to seek confirmation from the High Court as to the legality of its decisions. At present, if an interested party expresses dissatisfaction as to the legality of, for example, the terms of reference, but fails to initiate judicial review proceedings, the tribunal (being unable to initiate judicial review proceedings itself) must proceed subject to the risk that its proceedings could later be halted. By giving a tribunal the power to refer such a matter to the High Court, much time and expense might be saved. In addition, such a power would accord with the inquisitorial nature of the tribunal. Being a body appointed to look into certain matters it is logical that it should be given standing to test the legality of its own powers where those are in doubt. Furthermore, a tribunal avoids delays by having a contentious matter ruled on by the High Court and there is thus less uncertainty and delay caused to the tribunal's hearings and process.

8.08 The Commission therefore sees no reason to depart from the view expressed in the Consultation Paper and recommends that the tribunals of inquiry legislation be amended to allow a tribunal apply to the High Court for directions, in a manner comparable to that contained in the *Commission to Inquire into Child Abuse Act 2000*.

8.09 *The Commission recommends that the tribunals of inquiry legislation be amended to allow a tribunal apply to the High Court for directions, in a manner comparable to that contained in the Commission to Inquire into Child Abuse Act 2000.*

⁶ Section 25(1) of the *Commission to Inquire into Child Abuse Act 2000* provides that:

“The Commission may, whenever it considers appropriate to do so, apply in a summary manner to the High Court sitting otherwise than in public for directions in relation to the performance of any of 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.”

See Consultation Paper at paragraphs 5.79-5.83 for a discussion of how section 25(1) has operated in practice.

(2) Expedition

8.10 In the Consultation Paper the Commission recommended that a provision be inserted into the tribunals of inquiry legislation similar to that currently contained in section 25(4) of the *Commission to Inquire into Child Abuse Act 2000*, to place an obligation on the High Court to deal with proceedings concerning tribunals of inquiry as expeditiously as possible. The Commission is conscious of the fact that such cases are currently heard as expeditiously as possible but considers that this good practice should be elevated to statutory requirement.

8.11 Accordingly, the Commission recommends that the tribunals of inquiry legislation be amended to include a provision placing an obligation on the High Court to deal with proceedings concerning tribunals of inquiry as expeditiously as possible. Such a provision would enable tribunals of inquiry to proceed as expeditiously as possible.

8.12 *The Commission recommends that the tribunals of inquiry legislation be amended to include a provision placing an obligation on the High Court to deal with proceedings concerning tribunals of inquiry as expeditiously as possible. Such a provision would enable tribunals of inquiry to proceed as expeditiously as possible.*

CHAPTER 9 **SUSPENSION, DISSOLUTION OR TERMINATION OF A TRIBUNAL OF INQUIRY**

A Introduction

9.01 In this chapter the Commission considers the circumstances in which a tribunal may be suspended, dissolved or terminated and makes proposals for reform in that respect.

B Suspension

9.02 There may be circumstances where it is necessary to suspend the work of a tribunal of inquiry. For example, it might be deemed necessary to do so pending the outcome of criminal proceedings thus ensuring that the work of the tribunal would not have the effect of prejudicing downstream criminal proceedings. However, the *Tribunals of Inquiry (Evidence) Acts 1921 to 2004* do not provide for the suspension of the work of a tribunal of inquiry.

9.03 The courts already have the power to suspend the work of a tribunal of inquiry by injunction. An example of this is provided by *O'Brien v Moriarty*.¹ In this case, the applicant sought to judicially review the decision of the tribunal to inquire into certain matters, and an injunction restraining the tribunal from proceeding to hear those matters pending the determination of the judicial review proceedings. The Supreme Court in granting leave to apply for judicial review also granted the injunction on the basis that:

“the balance of convenience more strongly favours the grant of an injunction in a situation where the grounds upon which leave to apply for judicial review is granted would, if

¹ Supreme Court 12 May 2005.

successful, mean that there would be no public hearing at all on the matter in issue.’²

9.04 The Commission is of the view that the tribunals of inquiry legislation should contain a power to suspend the work of tribunals of inquiry in exceptional circumstances in order to facilitate and not prejudice criminal prosecutions. The Commission recommends that this power should only be exercisable on foot of a resolution of both Houses of the Oireachtas such resolution being sponsored by the Minister responsible for the operation of the tribunal.

9.05 *The Commission recommends that the tribunals of inquiry legislation should be amended to confer a power on the Houses of the Oireachtas, to suspend by resolution the work of a tribunal in exceptional circumstances, such resolution being sponsored by the Minister responsible for the operation of the inquiry.*

C Dissolution

9.06 A tribunal of inquiry will generally come to an end when the chairperson has submitted its report to the Minister and has done any further work necessary to wind up the inquiry, such as the assessment of costs. However, the *Tribunals of Inquiry (Evidence) Acts 1921 to 2004* do not expressly provide for this. The Commission notes that the UK *Inquiries Act 2005* provides expressly for the dissolution of an inquiry on the date, after the delivery of the report of the inquiry, on which the chairperson notifies the relevant Minister that the inquiry has fulfilled its terms of reference. The Commission considers that this clarifies in an important respect the issue of finality of tribunals and recommends that a similar provision be introduced in this jurisdiction.

9.07 *The Commission is of the view that the tribunals of inquiry legislation should be amended to deal expressly with the circumstances in which a tribunal of inquiry stands dissolved on fulfilling its terms of reference.*

² Supreme Court 12 May 2005 at 23, 24 per Fennelly J.

D Termination

9.08 The Commission now turns to consider whether an express power to terminate a tribunal of inquiry should be conferred.³ It may become necessary to terminate a tribunal for a variety of reasons, for example, it might not be fulfilling its terms of reference, it may be costing too much for the good it is doing, or it may become evident at an early stage what the ‘wrong’ was and what should be done to ensure that it does not happen again.

9.09 The *Tribunals of Inquiry (Evidence) Acts 1921 to 2004* do not provide any mechanism by which the work of a tribunal of inquiry may be terminated.

(1) The Consultation Paper

9.10 In the Consultation Paper the Commission recommended that a power of termination should be conferred. It recommended the following provision be inserted into the tribunals of inquiry legislation:

“Where at any time it has been resolved, for stated reasons, by both 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.”⁴

(2) Discussion

(a) Commissions of Investigation

9.11 The *Commissions of Investigation Act 2004* does not lay down a mechanism by which a commission established pursuant to that Act may be terminated other than where it has presented its report, or a decision has been taken to establish a tribunal of inquiry.⁵

(b) United Kingdom

9.12 Section 14(1) of the UK *Inquiries Act 2005* sets out the methods by which an inquiry may come to an end. In most cases an inquiry will end when the chairman has submitted a report to the

³ See Consultation Paper at paragraphs 5.87-5.92.

⁴ See Consultation Paper at paragraph 5.92.

⁵ Section 43.

Minister and has done any further work necessary to wind up the inquiry, such as costs assessment. However, there might be situations before the submission of the report in which it is no longer necessary or possible for the inquiry to continue. The Explanatory Notes to the Bill give a number of examples of this:

“New evidence may emerge that obviates the need to hold an inquiry or demonstrates that the inquiry has the wrong focus, for example, if it emerged during an inquiry that the event being investigated was an act of sabotage rather than failings of a particular system. In such cases, the Minister is able to bring the inquiry to a close. If there is still a need for investigation, the Minister might choose to start a new inquiry, with different terms of reference and possibly a change in panel membership.”⁶

(3) Recommendation

9.13 Conferring the power to terminate a tribunal of inquiry on the Oireachtas has a number of advantages. First, the Oireachtas has the power to establish a tribunal of inquiry. It would follow, therefore, that it should be given the power to terminate a tribunal that it has created. In addition, the requirement of a resolution being passed by the Oireachtas to authorise the termination of a tribunal reduces the risk of abuse by an Executive which, for reasons of expediency, might wish to terminate a politically embarrassing investigation.

9.14 However, as against this, it could be argued that as the Oireachtas is dominated by the Government parties the ability of the Oireachtas to act as a check on the Government is rendered ineffective. Indeed, this risk of political interference might be regarded as the strongest argument against granting the Oireachtas such a power. It could be argued that if a Government were motivated by such considerations in relation to a tribunal it would not have set up the tribunal in the first place. Nevertheless, the Commission is conscious that it is important that reasons be given before a tribunal can be wound up.

⁶ Explanatory Notes to the Inquiries Bill 2005 at clause 22.

9.15 The Commission considers that, aside from the furore likely to be aroused from the public and the media in the event an attempt is made to terminate a tribunal for political reasons, the safeguard proposed, namely, the requirement of a joint resolution of both Houses of the Oireachtas terminating the tribunal for stated reasons, would ensure public confidence in the system.

9.16 *The Commission recommends that the following provision be inserted into the tribunals of inquiry legislation “Where at any time it has been resolved, for stated reasons, by both Houses of the Oireachtas that it is necessary to terminate the work of a tribunal, the relevant Minister or the Government may by order dissolve the tribunal.”*

CHAPTER 10 REPORTS AND DOWNSTREAM PROCEEDINGS

A Reports

10.01 In this chapter, the Commission considers the law relating to the reports, both interim and final, of tribunals of inquiry.

(1) *Present Law*

10.02 The tribunal of inquiry legislation does not confer an express power on tribunals to publish interim or final reports despite the fact that the publication of a report is one of the central objectives of any tribunal. As the Commission pointed out in the Consultation Paper, tribunals regularly perform different actions for which there is no express statutory provision.¹ The power to publish interim and final reports is one of these non-statutory actions which are necessary for the performance of a tribunals functions.

10.03 However the *Tribunals of Inquiry (Evidence) (Amendment) Act 2002* deals with the procedure to be followed by the Sponsoring Minister if on receipt of an interim or final report he or she takes the view that publication of the report in full or in part might prejudice criminal proceedings. Section 3(1) of the 2002 Act provides that in such circumstances the Minister should apply to the court for directions concerning publication. The Attorney General, the Director of Public Prosecutions and the person affected must be notified of the application and given an opportunity to make submissions.² Having heard submissions the court may direct that the report or a specified portion of it may not be published for a specified period or until the court directs. The application can be heard in public or private at the discretion of the Court.³

¹ See the Consultation Paper at paragraph 6.128.

² Section 3(2) of the *Tribunals of Inquiry (Evidence)(Amendment) Act 2002*.

³ Section 3(3) of the *Tribunals of Inquiry (Evidence)(Amendment) Act 2002*.

(2) Commissions of Investigation

10.04 In contrast to the tribunals of inquiry legislation, the *Commissions of Investigation Act 2004* deals expressly with the preparation, content, and publication of interim and final reports.

10.05 On the conclusion of its investigation, a commission must prepare a final written report, based on the evidence received by it setting out the facts it established.⁴ If a commission considers that the facts relating to a particular issue have not been established, the commission must identify the issue and may indicate its opinion as to the quality and weight of any evidence relating to the issue.⁵ The use of the word “may” envisages that a commission may, in the exercise of its discretion, decline to give its opinion as to the quality and weight which should be accorded to the evidence. A commission must endeavour to submit its report to the specified minister within the period set out at the commencement of the inquiry.⁶

10.06 A commission is also given a discretion to exclude from the report any information which identifies, or is likely to identify any person in the following situations.⁷ First, if in its opinion, the context in which the person was identified has not been clearly established.⁸ Secondly, where disclosure of the information might prejudice criminal proceedings.⁹ Thirdly, where disclosure would not be in the interests of the investigation or any subsequent inquiry.¹⁰ Fourthly, where it would not be in the person’s interests to have their identity made public and the omission of the information would not be contrary to the interests of the investigation or any subsequent inquiry.¹¹

⁴ Section 32(1) of the *Commissions of Investigation Act 2004*.

⁵ Section 32(2) of the *Commissions of Investigation Act 2004*.

⁶ Section 32(4) of the *Commissions of Investigation Act 2004*.

⁷ Section 32(3) of the *Commissions of Investigation Act 2004*.

⁸ Section 32(3)(a) of the *Commissions of Investigation Act 2004*.

⁹ Section 32(3)(b) of the *Commissions of Investigation Act 2004*.

¹⁰ Section 32(3)(c) of the *Commissions of Investigation Act 2004*.

¹¹ Section 32(3)(d) of the *Commissions of Investigation Act 2004*.

10.07 In addition, the specified Minister may at any time request a commission to furnish him or her with draft reports concerning the progress of the investigation or any aspect of the investigation.¹²

10.08 Commissions must send a copy of the draft interim or final report, or a portion thereof, to any person who is identified or identifiable in it prior to submitting it to the specified minister.¹³ The draft report must be accompanied by a notice setting out the periods for making submissions or applying to the court for an order amending the draft report.¹⁴

10.09 If a person believes that a commission has not observed fair procedures, they may (a) make a written submission setting out the reasons why the draft should be amended, or (b) apply to the court to amend the document.¹⁵

10.10 In response to a written request to amend the document, a commission may amend the report, apply to the court for directions or send the report unamended.¹⁶ If the latter approach is adopted, it is unclear whether the person who made the submission has the right to apply to the court for a direction, or in fact will have the time to apply for a direction, in respect of the draft report before it is sent off. The Commission considers that there should be a right of appeal to the court.

10.11 If a person applies to the court for a direction, the court may direct the commission to submit the draft report to the Minister unamended, invite the aggrieved party to make submissions, or direct the commission to submit the draft report to the Minister amended.¹⁷

¹² Section 33 of the *Commissions of Investigation Act 2004*.

¹³ Section 34(1). Section 34(3) provides that “A person will be regarded as being identifiable if the report contains information which could reasonably be expected to lead to the person’s identification.” Section 37 imposes a duty of confidentiality on those to whom the draft report is sent.

¹⁴ Section 34(2) of the *Commissions of Investigation Act 2004*.

¹⁵ Section 35(1) of the *Commissions of Investigation Act 2004*.

¹⁶ Section 35(2) of the *Commissions of Investigation Act 2004*.

¹⁷ Section 35(3) of the *Commissions of Investigation Act 2004*.

10.12 An application to amend a draft report may be made where the information contained is (a) commercially sensitive and (b) disclosure is not necessary for the purposes of the investigation.¹⁸ A commission may accede to this request where it is satisfied that the application is made out.¹⁹

10.13 On receipt of a commission's final or interim report, the specified Minister can do one of two things, publish it or, where they believe that the report, or a specified part of it, might prejudice criminal proceedings, apply to the court for directions concerning publication. The Attorney General, the Director of Public Prosecutions and the person affected must be notified of the application and given an opportunity to make submissions. Having heard submissions the court may direct that the report or a specified portion of it may not be published for a specified period or until the court directs.²⁰

(3) Recommendation

10.14 The Commission considers that the procedure to be followed concerning the publication of interim and final reports should be dealt with expressly in the tribunals of inquiry legislation.

10.15 The Commission favours the approach adopted in sections 32 to 38 of the *Commissions of Investigation Act 2004* and recommends that it should be the basis for the amendment of the tribunals of inquiry legislation in this respect.

10.16 *The Commission recommends that the procedure to be followed concerning the publication of interim and final reports should be dealt with expressly in the tribunals of inquiry legislation. The Commission favours the approach adopted in sections 32 to 38 of the Commissions of Investigation Act 2004 and recommends that it should be the basis for the amendment of the tribunals of inquiry legislation in this respect.*

¹⁸ Section 36(1) of the *Commissions of Investigation Act 2004*.

¹⁹ Section 36(2) of the *Commissions of Investigation Act 2004*.

²⁰ Section 38(3) of the *Commissions of Investigation Act 2004*.

B Downstream Proceedings

10.17 In this Part, the Commission discusses the problems posed by public inquiries to downstream proceedings, that is, proceedings subsequent to, and concerning the same material as, a public inquiry. The Commission is conscious that downstream proceedings may take many forms including criminal proceedings, civil litigation, disciplinary hearings, or other administrative proceedings. This part is confined to a discussion of the effect of public inquiries on subsequent criminal proceedings and the evidential status of a report in subsequent civil proceedings.

10.18 A public inquiry may have a significant impact on downstream criminal proceedings in two ways. First, if evidence tendered before a public inquiry is used in subsequent criminal proceedings, this may constitute a breach of the accused's constitutional right to the privilege against self-incrimination, and secondly, the adverse publicity generated by a public inquiry may be so unfair as to render a fair trial impossible.

10.19 In light of the very significant impact that a tribunal of inquiry may have on downstream proceedings the Commission wishes to reiterate that careful consideration should be given to the establishment of inquiries. The Commission considers that such inquiries should not be used as a substitute for, or as a preliminary to, criminal proceedings.

(1) *The Privilege Against Self-Incrimination*

(a) *The Current Law*

10.20 The privilege against self-incrimination, exempts persons from having to answer questions, or produce documents, that have the effect of exposing those individuals to a criminal charge, penalty or forfeiture.²¹

²¹ The classic formulation of this rule was given by Goddard LJ in *Blunt v Park Lane Hotel Ltd* [1942] 2 KB 253. At 257 he stated: "no-one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the deponent to any criminal charge, penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for." For a more detailed description of the privilege see Hogan & Whyte *JM Kelly: The Irish Constitution* (4th ed Lexis Nexis Butterworths 2003) at paragraphs 6.5.94 – 6.5.117, Forde *Constitutional*

10.21 The privilege against self-incrimination has been recognised for centuries at common law as a privilege having its origins in the constitutional struggles, which resulted in the abolition of the Courts of Star Chamber and High Commission in the second half of the 17th century.²²

10.22 The privilege against self-incrimination is also a right guaranteed protection under the European Convention on Human Rights (ECHR). Article 6(1) of the ECHR guarantees the right of an accused person to a fair trial. This right has been interpreted by the European Court of Human Rights (ECtHR) as including the privilege against self-incrimination.

10.23 In *Saunders v United Kingdom*²³ the ECtHR held that the admission of evidence obtained pursuant to a statutory demand by a company inspector in a subsequent criminal trial constituted a breach of the privilege against self-incrimination, a privilege which was part of the right to a fair trial guaranteed by Article 6(1).²⁴ This is particularly relevant in light of the enactment of the *European Convention on Human Rights Act 2003*, section 2 of which provides that in interpreting, and applying any statutory provision or rule of law, a court shall, insofar as it is possible, do so in a manner compatible with the State's obligations under the Convention.

10.24 In addition to its status as a common law privilege and a right guaranteed under Article 6(1) of the ECHR, the privilege against self-incrimination is also a right guaranteed by the Constitution.

Law (2nd ed, First Law 2004) at 456-462, Healy *Irish Laws of Evidence* (Thomson Round Hall 2004) at paragraphs 13.80 – 13.109).

²² For a more detailed discussion of the common law origins of the privilege see Wigmore "The History of the Privilege Against Self Incrimination" (1902) 15 *Harvard Law Review* 610, McNair "The Early Development of the Privilege Against Self-Incrimination" (1990) OJLS 66, Langbein "The Historical Origins of the Privilege Against Self Incrimination at Common Law" (1994) 92 *Michigan Law Review* 1047.

²³ (1996) 23 EHRR 313.

²⁴ For a more detailed examination of this case see the Consultation Paper at paragraphs 11.20-11.21. See also Dillon-Malone "The Privilege against Self-Incrimination in Light of *Saunders v United Kingdom*" (1997) 3 *Bar Review* 132.

10.25 In *Re National Irish Bank Ltd*,²⁵ the Supreme Court confirmed the status of the privilege against self-incrimination as a constitutional right. In this case, inspectors were appointed by the High Court, to investigate allegations of improper charging of interest and fees by National Irish Bank. The investigation was governed by section 10 of the *Companies Act 1990*, which compels the officers and agents of a company under investigation to cooperate with the inspectors and to furnish them with such documents and information as they may require. The *Companies Act 1990* went on to provide that information obtained pursuant to section 10 could be used in evidence against the person giving the information.²⁶ The employees of the bank claimed that these provisions violated their right to refuse to answer questions or provide information, which would incriminate them.

10.26 The question faced by the courts in this regard was two-fold, first was the privilege against self incrimination a constitutional right, and secondly, in what circumstances would an interference with this right be tolerated. In response to the first question, both the High Court and the Supreme Court took the view that the privilege against self-incrimination was a correlative right to the constitutional guarantee of freedom of expression under Article 40.6.1° i and as such was a constitutional right. In answer to the second question, however, both courts held that the privilege was not an absolute right and could be abrogated, expressly or impliedly, by statute. The test to be applied in such situations was a proportionality test.

10.27 Applying these principles, the High Court held that the privilege against self-incrimination had been violated but that the violation was proportionate in the circumstances and accordingly, the employees of the bank were not entitled to refuse to answer questions, produce documentation or otherwise provide information. The Supreme Court upheld this decision but stated that what was objectionable under Article 38 of the Constitution was compelling a person to confess and then convicting that person based on his compelled confession. Accordingly, it stated that any confession obtained by the inspectors would not in general be admissible at a

²⁵ [1999] 3 IR 145.

²⁶ Section 18 of the *Companies Act 1990*. This provision has since been the amended by section 28 of the *Company Law Enforcement Act 2001*.

subsequent criminal trial of such an official unless the trial judge was satisfied that the confession was voluntary.

(2) *Applicability of the Current Law to Tribunals of Inquiry*

10.28 Having determined that the privilege against self-incrimination is a right guaranteed by the Constitution, the ECHR and the Common Law it is necessary to consider the extent to which that privilege applies to public inquiries. In considering this, regard must be had to the type of inquiry involved. This is important because the legislation establishing the inquiry may deal expressly with the privilege.

10.29 In respect of tribunals of inquiry, the privilege against self-incrimination is dealt with by section 5 of the *Tribunals of Inquiry (Evidence) (Amendment) Act 1979* which provides that a statement or admission, which is made to a tribunal shall not be admissible as evidence against the person who made the statement in any criminal proceedings.

10.30 This type of exclusion has been described as “direct use immunity” and must be distinguished from “derivative or fruits immunity.”²⁷ Under the direct immunity rule, only the evidence which was tendered to the tribunal is inadmissible in subsequent criminal proceedings. As a result, the authorities may use that evidence as a springboard to discover other types of evidence, which may prove the same matter, in a manner which may be admissible in subsequent criminal proceedings. Derivative immunity is broader in scope than direct immunity and renders inadmissible not only the evidence tendered to the tribunal but also all evidence that emanates or flows from the evidence tendered before the tribunal.

10.31 In addition, it is important to note that section 5 of the 1979 Act only applies to statements and admissions made by a person before a tribunal or a commission and so does not apply to documentary evidence. This is a significant restriction of the immunity in light of the large amount of documentation presented to modern tribunals and should be contrasted with the position pertaining to witnesses giving evidence before the Joint Committees

²⁷ See the Consultation Paper at paragraph 11.09ff.

of the Oireachtas²⁸ or the Comptroller and Auditor General.²⁹ Witnesses appearing before these bodies enjoy direct use immunity in respect of documents given to those bodies.

10.32 Furthermore, it is important to note that section 5 of the 1979 Act only applies to criminal proceedings. As a result, it does not preclude the use of statements or admissions made to a tribunal in civil proceedings.³⁰

(3) Consultation Paper Proposals

10.33 Having surveyed the law relating to the privilege against self-incrimination insofar as it applies to tribunals of inquiry in the Consultation Paper³¹, the Commission made a number of provisional recommendations.

10.34 The Commission considered that a delicate balance needs to be struck between the individual's right to the privilege against self-incrimination and the desire to prosecute offences which are likely to depend on the evidence obtained under compulsion powers. The Commission concluded that section 5 of the 1979 Act strikes the right balance between these two positions.³²

10.35 Accordingly, the Commission recommended that the use of direct use immunity in section 5 of the 1979 Act, be retained albeit in an expanded form. The Commission recommended that the various forms of documentary or electronic evidence should also be included within the ambit of section 5 to place witnesses before tribunals of inquiry in the same position as witnesses before the Joint Committees of the Oireachtas or the Comptroller and Auditor General.³³

²⁸ Section 12 of the *Committees of the Houses of the Oireachtas (Competence, Privileges and Immunities of Witnesses) Act 1997*.

²⁹ Section 5 of the *Comptroller and Auditor General and Committees of the Houses of the Oireachtas (Special Provisions) Act 1998*.

³⁰ See Law Reform Commission *Report on A Fiscal Prosecutor and a Revenue Court* (LRC 72-2004) at paragraphs 3.19 to 3.34 for a discussion of the privilege against self incrimination in the context of revenue law.

³¹ See the Consultation Paper at paragraphs 11.03-11.32.

³² See the Consultation Paper at paragraph 11.31.

³³ See the Consultation Paper at paragraph 11.32.

(4) Recommendation

10.36 The Commission considers that many tribunals of inquiry would be rendered unworkable if witnesses appearing before it were allowed to refuse to answer questions because their answers could be used against them in subsequent criminal proceedings. Accordingly, it is necessary to provide such witnesses with a measure of protection if the tribunal is given the power to compel answers to its questions. The Commission considers that the use of the direct use form of immunity provides an adequate protection of the individual's rights while at the same time not removing the ultimate threat of a criminal trial. However, the Commission has concluded that this immunity should only apply in cases where the information, documents or material provided is used as "evidence". The Commission also notes in this respect its recommendation already made concerning suspension of a tribunal pending a criminal trial.

10.37 Accordingly, the Commission recommends that the tribunals of inquiry legislation be amended to provide as follows:

- (i) Information, 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, which are used in evidence, 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);
- (ii) 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.

10.38 *The Commission recommends that that the tribunals of inquiry legislation be amended to provide as follows:*

- (i) Information, 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, which are used in evidence, shall not be admissible as evidence against that person in any criminal proceedings (other than*

proceedings in relation to an offence under section 35³⁴ and perjury in respect of such information, evidence, documentation or other material);

- (ii) *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.*

C Adverse Pre-Trial Publicity

10.39 A difficulty associated with downstream criminal proceedings is the risk that the pre-trial publicity caused by a tribunal of inquiry may be so adverse as to render it difficult for an accused to obtain a fair trial in accordance with Article 38.1 of the Constitution.

10.40 It should be noted that adverse publicity could affect two types of criminal proceedings, the first being prosecutions having the same subject matter of the inquiry, and the second being enforcement proceedings being brought against an individual by the inquiry.

(1) The Law Relating to Adverse Pre-Trial Publicity

10.41 The effect of adverse pre-trial publicity was considered by the Supreme Court in *D v Director of Public Prosecutions*.³⁵ In this case, the applicant twice stood trial on a charge of indecent assault. On both occasions, the jury had been discharged. Shortly after the discharge of the jury in the second case, the complainant gave a lengthy interview to a national Sunday newspaper. The article did not directly identify the applicant or the complainant, but included material which was both legally inadmissible and highly prejudicial to the applicant. The applicant sought an order prohibiting a retrial because the adverse publicity generated by the article rendered a fair trial impossible. The Supreme Court held that the test applicable was that the accused person must establish, on the balance of probabilities, that the adverse pre-trial publicity means that there is a real risk that he could not obtain a fair trial.

³⁴ This refers to an offence under the legislation when amended.

³⁵ [1994] 2 IR 465.

10.42 That this is a high threshold is illustrated by *Z v Director of Public Prosecutions*.³⁶ In this case, the applicant was charged with a number of offences against the girl at the centre of the X Case.³⁷ This case had been the subject of widespread media and public controversy and the applicant contended that this negative publicity rendered it possible on the balance of probabilities that he would not receive a fair trial. The Supreme Court agreed that the test was whether, on the balance of probabilities, the applicant would receive a fair trial. The Court held that a trial is unfair if any unfairness which might arise cannot be avoided by appropriate rulings and directions on the part of a trial judge. In applying this test, the Court rejected the applicant's claim because it held that the trial judge would be able to deal with the publicity surrounding it in a very specific manner by directing the jury that the controversy and publicity surrounding the case was completely irrelevant to the trial and must be totally excluded from their minds.

(2) Prosecutions Having the Same Subject Matter as the Inquiry

10.43 The test in relation to prosecutions having the same subject matter as a public inquiry is the same as for any other type of prosecution. It is a matter for the person seeking to prevent the prosecution from proceeding to prove on the balance of probabilities that the publicity is so adverse that the individual concerned would not receive a fair trial. This is a very high threshold and it should be noted that in recent years a number of prosecutions have been taken against individuals after the conclusion of the inquiry's investigations where the inquiry concluded that the individual concerned engaged in illegal or criminal conduct.³⁸

10.44 One mechanism of ensuring that criminal prosecutions are not prejudiced because of adverse publicity created by a public

³⁶ [1994] 2 ILRM 481. See also *The People (DPP) v Nevin* [2003] 3 IR 321 and Walsh, *Criminal Procedure* (Round Hall Press 2003).

³⁷ See *Attorney General v X* [1992] 1 IR 1.

³⁸ For example, Mr Ray Burke was jailed for tax offences arising out of the investigations of the Planning Tribunal: see *The Irish Times* 29 January 2005. Similarly, the trial of Mr George Redmond, former assistant Dublin city and county manager, for alleged corruption has been fixed for December 2005; see *The Irish Times* 19 April 2005.

inquiry is to postpone the inquiry until the prosecutions are concluded. This approach was adopted by the Railway Inquiry into the Cherryville Railway Accident where the inquiry was adjourned pending the conclusion of criminal proceedings.³⁹ Another approach discussed more comprehensively in Chapter 11⁴⁰ would be for the inquiry to refrain from identifying individuals in its report. In addition, a prosecution could be delayed until such point as the publicity had abated sufficiently to allow a fair trial to proceed. However, it should be noted that this approach might be of limited value given the high profile of the various tribunals of inquiry and the likelihood that people will remember the participants.

10.45 At paragraph 9.05, the Commission recommended that a tribunal of inquiry should be given the power to suspend its work until the prosecutions are concluded. This, in conjunction with the recommendation that tribunals should not be used as surrogates for the criminal system, should ensure that problems with adverse publicity should not arise. In any event, recent case law suggests that adverse publicity would only prevent a tribunal of inquiry from proceeding in very exceptional circumstances.

(3) Enforcement Proceedings

10.46 The applicability of the law relating to adverse publicity to enforcement proceedings was considered by the High Court in *Director of Public Prosecutions v Haughey (No 2)*.⁴¹ In this case, the applicant, Mr Charles Haughey was charged with obstructing the Moriarty Tribunal. Considerable publicity surrounded the case and the Circuit Court granted an order staying the prosecution until the adverse publicity had abated.

10.47 The difficulty in respect of adverse publicity and enforcement proceedings is that such proceedings are necessary if the tribunal is to operate effectively. In the Consultation Paper, the Commission suggested that one method of removing the problem of adverse publicity from enforcement proceedings would be to

³⁹ *Report of the Investigation into the Railway Accident near Cherryville Junction, County Kildare on the 21st August 1983* (December 1984 P11 2904) available at www.transport.ie/transport.railwaysafety/publishers.

⁴⁰ See the Consultation Paper at Paragraphs 11.45-11.56.

⁴¹ [2001] 1 IR 162.

reategorise such offences as hybrid offences triable either summarily or on indictment at the discretion of the Director of Public Prosecutions.⁴²

10.48 Having reconsidered the matter, the Commission has concluded that the question of whether an offence should be tried summarily or on indictment is a matter for the prosecuting authorities having regard to whether the offence is minor or non-minor. In *Melling v O Mathghamhna*,⁴³ the Supreme Court laid down four criteria that a court should consider in deciding whether an offence is minor or non-minor. These are the severity of the penalty, the moral quality of the act, the state of law at time of enactment of the Constitution and public opinion at time of enactment.⁴⁴

10.49 The Commission does not consider that the success or otherwise of a prosecution in one forum over another should be a matter which the prosecuting authority should take into account. In any event, the Commission has recommended that a tribunal of inquiry should be given the power to suspend its work until the prosecutions are concluded. This, in conjunction with the recommendation that tribunals should not be used as surrogates for the criminal justice system and that recent case law suggests that adverse publicity would only prevent a tribunal of inquiry from proceeding in very exceptional circumstances, should ensure that problems with adverse publicity should not arise.

10.50 *The Commission does not recommend any amendment to the tribunals of inquiry legislation concerning potential prejudice of subsequent criminal proceedings.*

D The Evidential Value of Inquiry Reports in Civil Proceedings

10.51 In the Consultation Paper, the Commission noted that at common law the report of an inquiry would be admissible in civil proceedings as an exception to the hearsay rule.⁴⁵ However, the

⁴² See the Consultation Paper at paragraph 11.43.

⁴³ [1962] 1 IR 1.

⁴⁴ [1962] 1 IR 1, 13.

⁴⁵ See the Consultation Paper at paragraphs 11.12-11.14.

question remained as to what weight should be afforded to such a report. It was noted that reports prepared by company inspectors are *prima facie* proof of the facts set out therein and the opinion of the inspector.⁴⁶ The Commission considered that the report of an inquiry should be afforded the same weight as that of a company inspector's report in civil proceedings, as the report of an inquiry will be as thorough and as exacting as the report of a company inspector.⁴⁷

10.52 The Commission sees no reason to depart from this recommendation. Therefore it recommends that reports prepared by tribunals of inquiry should be regarded as *prima facie* proof in civil proceedings of the facts set out therein and the opinion of the inquiry. It recommends that the following provision be inserted into the tribunal of inquiry legislation.

“A report of a tribunal of inquiry appointed under the provisions of this Act shall be admissible in any civil proceedings as evidence—

- i. of the facts set out therein without further proof unless the contrary is shown, and
- ii. of the opinion of the inspector in relation to any matter contained in the report.”

10.53 *The Commission recommends that reports prepared by tribunals of inquiry should be regarded as prima facie proof in civil proceedings of the facts set out therein and the opinion of the inquiry. It recommends that the following provision be inserted into the tribunal of inquiry legislation:*

“A report of a tribunal of inquiry appointed under the provisions of this Act shall be admissible in any civil proceedings as evidence—

- i. of the facts set out therein without further proof unless the contrary is shown, and*
- ii. of the opinion of the tribunal in relation to any matter contained in the report.”*

⁴⁶ Section 22 of the *Companies Act 1990*.

⁴⁷ See the Consultation Paper at paragraph 11.14.

CHAPTER 11 SUMMARY OF RECOMMENDATIONS

Chapter 1 Public Inquiries

11.01 The Commission recommends that section 23(3) of the *Commissions of Investigation Act 2004*, which restricts the types of legal services or fees for which payments may be made, be repealed. [Paragraph 1.29]

Chapter 2 Nature of and Establishment of Tribunals of Inquiry

11.02 The Commission recommends that the tribunals of inquiry legislation be amended to provide that:

- Tribunals of Inquiry are inquisitorial in nature.
- *Tribunals of Inquiry have no power to determine or to rule on, any person's civil or criminal liability.*
- A Tribunal of Inquiry is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes. [Paragraph 2.16]

11.03 The Commission recommends that as tribunals of inquiry are designed to investigate facts and make recommendations to prevent re-occurrence, rather than to establish liability or punish people, those charged with the power to establish such inquiries should give careful consideration to the public interest in the matter under examination before deciding to establish an inquiry. [Paragraph 2.21]

11.04 The Commission recommends that the tribunals of inquiry legislation be amended to confer the power to establish tribunals of inquiry on the Executive, and that this power should only be

exercised on foot of a resolution of both Houses of the Oireachtas. [Paragraph 2.37]

11.05 The Commission does not recommend the establishment of a permanent standing inspectorate for public inquiries. [Paragraph 2.46]

11.06 The Commission recommends the establishment of a central inquiries office which would be charged with collecting and managing a database of records and information for tribunals of inquiry and public inquiries generally. [Paragraph 2.51]

11.07 The Commission recommends that the proposed Central Inquiries Office prepare a booklet, which would set out in a clear and easy to read format a series of guidelines for those charged with establishing public inquiries, those running them and those staffing them. [Paragraph 2.53]

11.08 The Commission recommends that careful consideration should be given to the location of the Central Inquiries Office having regard to the points raised. [Paragraph 2.62]

11.09 The Commission recommends that provision should be made to allow a tribunal to be conferred with separate 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. [Paragraph 2.66]

11.10 The Commission recommends that the tribunals of inquiry legislation be amended to provide expressly for the independence of tribunals of inquiry and their members. [Paragraph 2.70]

Chapter 3 Terms of Reference

11.11 The Commission recommends that the tribunals of inquiry legislation be amended to impose a requirement that terms of reference should set out the events, activities, circumstances, systems, practices or procedures to be inquired into as clearly and as accurately as possible. [Paragraph 3.19]

11.12 The Commission recommends that a two-stage approach should be taken to the drafting of the terms of reference. After a resolution is made establishing a tribunal, the precise terms of reference should be drafted by the person or persons appointed as members of the tribunal of inquiry, in consultation with the sponsoring Minister and such other persons or bodies as the tribunal considers appropriate. At the second stage, the draft terms of reference should be submitted to the Oireachtas for approval. In addition, the terms of reference should be accompanied by a memorandum setting out the length of time the proposed inquiry will take and subject to the Commission's recommendation at paragraph 7.36 the anticipated cost of the inquiry. [Paragraph 3.21]

11.13 In light of the Commission's recommendation that the tribunal itself should draft its precise terms of reference, the provisional recommendation it expressed in the Consultation Paper that the tribunal should be placed under a positive obligation to consider whether to request an amendment within 4 weeks of establish is no longer necessary. [Paragraph 3.31]

11.14 The Commission recommends that the following procedure, based on those in the *Commissions of Investigation Act 2004*, should be adopted in respect of the amending of the terms of reference of an inquiry:

- The Sponsoring Minister and the Tribunal should be given the power to request an amendment of the terms of reference. Where the person seeking the amendment is the Sponsoring Minister, the consent of the tribunal should in general be sought. The requirement of generality is to prevent the discretion of the Oireachtas appearing to be subject to a decision of a tribunal obtained where the proposed amendments clarify, limit or extend the scope of its inquiry.
- The tribunal should be expressly prohibited from either seeking or consenting to a request for an amendment where it takes the view that the proposed amendment would prejudice the legal rights of any person who is adversely affected by the proceedings of the tribunal.
- The Oireachtas must consent to the amendment by means of a Resolution of both Houses.

- Where the terms of reference are amended the Sponsoring Minister must ensure that the statement accompanying the terms of reference is revised where the previous estimate of costs and duration is no longer appropriate. In addition, the Sponsoring Minister must cause the revised accompanying statement to be published in *Iris Oifigiúil* and such other publication, as he or she considers appropriate. [Paragraph 3.32]

Chapter 4 Membership

11.15 The Commission recommends that the tribunals of inquiry legislation be amended to confer an express power to appoint members of the tribunal on the Government. [Paragraph 4.15]

11.16 The Commission recommends that where the inquiry is likely to involve legal issues, the Chairperson of an Inquiry Panel should be a member of the judiciary. However, the Commission does not recommend that this should be expressed in legislation as there may be circumstances in which, having regard to the subject matter of the inquiry, it is more appropriate that the chairperson be someone with expertise in the area under investigation. The Commission therefore concludes that the Government should be free to appoint laypersons as ordinary members of the tribunal. [Paragraph 4.41]

11.17 Where the Government is contemplating appointing a member of the judiciary to an inquiry, the Commission recommends that the tribunals of inquiry legislation should be amended to require consultation with, and the agreement of, the President of the court of which the proposed appointee is a member. [Paragraph 4.42]

11.18 The Commission recommends that the tribunals of inquiry legislation should be amended to deal expressly with the circumstances in which a member of an inquiry may be dismissed, namely on the grounds of misbehaviour or inability to perform the functions of the office. [Paragraph 4.52]

11.19 The Commission recommends that where a new member of a tribunal is appointed, the tribunals of inquiry legislation should be amended to provide “that this is not to occur unless the tribunal is satisfied that no person affected by the proceedings of the tribunal would be unduly prejudiced thereby.” [Paragraph 4.55]

11.20 The Commission recommends that the tribunals of inquiry legislation should retain the provision for the appointment of reserve members and that the law relating to the appointment, qualifications, removal, and effect of a removal of a reserve member should be the same as that for members. [Paragraph 4.61]

11.21 The Commission recommends that the tribunals of inquiry legislation be amended to confer a power on a tribunal of inquiry to appoint experts to carry out research pertinent to the matter under investigation, subject to the approval of the sponsoring Minister and the Minister for Finance and the need to avoid unnecessary cost. [Paragraph 4.64]

11.22 The Commission recommends that the power to appoint experts include the power to appoint assessors where appropriate. [Paragraph 4.71]

Chapter 5 Procedures and Constitutional Justice

11.23 The Commission does not recommend that a formal code of procedure be established for tribunals of inquiry. It recommends that the proposed Central Inquiries Office should draw up a handbook setting out briefly the law relating to tribunals of inquiry, a summary of the law relating to constitutional justice and its implications for tribunals of inquiry, and the procedures which have been adopted by previous inquiries both in Ireland and abroad. [Paragraph 5.11]

11.24 The Commission notes that the principles of constitutional justice listed by the Supreme Court in *In re Haughey* [1971] IR 217, namely, the right to copies of evidence taken, the right to cross-examination by a lawyer, the right to give rebutting evidence, and the right to address a tribunal through a lawyer, do not apply to all parties before a tribunal. They apply only to a person in the equivalent position of a person charged with a serious offence, whose conduct is the subject matter of the inquiry and who can point to a right, such as their good name and reputation, which is under threat. [Paragraph 5.27]

11.25 The Commission recommends that before exercising their discretion to grant representation, tribunals of inquiry should consider:

- Whether constitutional justice requires the granting of representation;
- Whether the granting of such representation would assist the tribunal;
- Whether counsel for the inquiry could discharge the functions sought to be achieved by granting witnesses representation;
- Whether pooled representation would be appropriate;
- Whether individual representation would be appropriate;
- Whether a mixture of pooled representation and individual representation would be appropriate;
- Whether the tribunal should appoint counsel to act as guardian of the witnesses interests. [Paragraph 5.37]

11.26 The Commission recommends that, in respect of the two types of individual legal representation, limited representation and full representation, the entitlement to either will depend on the extent to which an individual's rights are at risk. If they are at risk during the whole inquiry, the Commission recommends that full representation should be granted whereas if they are at risk only at certain stages of the inquiry, limited representation only should be granted. [Paragraph 5.40]

11.27 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 5.47]

11.28 The Commission recommends that tribunals must ensure that appropriate cross-examination is provided for where the rights of an individual, including good name and reputation, are at issue. The Commission also recommends that this should not in any way restrict the right of a tribunal to control prolixity or cross-examination by successive counsel. [Paragraph 5.52]

11.29 The Commission recommends that where appropriate uncontested evidence should be simply "read into" the record. [Paragraph 5.54]

11.30 The Commission recommends in the context of the right to call evidence in rebuttal, that parties be encouraged to inform the inquiry of the existence of useful potential witnesses. [Paragraph 5.56]

11.31 The Commission recommends that tribunals of inquiry adopt a tailored approach to the right to make submissions to the inquiry which could include placing indicative time limits on submissions while ensuring that the full constitutional protection is furnished. [Paragraph 5.58]

11.32 The Commission recommends that the tribunals of inquiry legislation should be amended to make express provision for a preliminary investigation stage. [Paragraph 5.64]

11.33 The Commission recommends that private preparatory meetings be governed by a written protocol. Such a protocol would set out the rights and duties of those participating in such meetings and inform those present of the manner in which such information can be used. The Commission also recommends that the chairperson of an inquiry should exercise a greater degree of oversight over the manner in which such meetings are being conducted. [Paragraph 5.72]

11.34 The Commission recommends that the provision of section 6 of the *Tribunals of Inquiry (Evidence)(Amendment) Act 2002*, which deal with the appointment of investigators to carry out preliminary examinations, should be retained in the tribunals of inquiry legislation. [Paragraph 5.79]

11.35 The Commission recommends that the proceedings of tribunals of inquiry should in general be conducted in public, in accordance with the approach currently contained in the tribunals of inquiry legislation, but that this should be clarified in line with the view taken by the Supreme Court that this does not apply to any information gathering stage. [Paragraph 5.89]

11.36 The Commission recommends that the tribunals of inquiry legislation be amended to allow a discretion to permit such broadcasting of its proceedings as the tribunal considers appropriate on the basis that in deciding whether to allow filming, recording, or broadcasting of the proceedings of the tribunal, the tribunal shall have regard to the following considerations:

- the interests of the general public, particularly the right to have the best available information on matters of urgent public importance;
- the proper conduct and functioning of the tribunal proceedings;
- the legitimate interests of the participants;
- the risk of prejudice to criminal proceedings;
- any other relevant considerations.

[Paragraph 5.105]

11.37 The Commission recommends that the tribunals legislation be amended to allow evidence to be taken on commission within the jurisdiction as well as abroad. In addition, the Commission recommends that the obligation to conduct hearings in public would be satisfied 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 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. [Paragraph 5.110]

Chapter 6 Powers

11.38 The Commission recommends that the tribunals of inquiry legislation should be amended to contain the following provision concerning the powers of tribunals:

A tribunal of inquiry may make such orders as are necessary and reasonable 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 examination of them on oath, affirmation or otherwise;
- b) Compelling the production of documents or things;
- c) Issuing a commission or request to examine witnesses. [Paragraph 6.27]

11.39 The Commission recommends that the tribunals of inquiry legislation should continue to contain provisions equivalent to section 1(2)(a)-(e) of the *Tribunals of Inquiry (Evidence) Act 1921* which deal with attempts to obstruct or hinder a tribunal. [Paragraph 6.49]

11.40 The Commission does not recommend that there should be a specific offence of publishing or disclosing confidential material as it considers that the tribunals of inquiry legislation in dealing with obstruction or hindrance already caters for such offences. [Paragraph 6.59]

11.41 The Commission recommends that the tribunals of inquiry legislation should retain the power of a tribunal of inquiry to apply to the High Court for an order enforcing an order of the tribunal. [Paragraph 6.61]

11.42 The Commission recommends that the tribunals of inquiry legislation should continue to define the privileges and immunities of witnesses by reference to the privileges and immunities of witness in High Court proceedings. [Paragraph 6.65]

Chapter 7 Costs

11.43 The Commission recommends that the first part of section 6(1) of the *Tribunals of Inquiry (Evidence) (Amendment) Act 1979*, which deals with the awarding of costs, be redrafted as follows:

“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...” [Paragraph 7.19]

11.44 The Commission recommends that the chairperson of an inquiry should be required by amended tribunals legislation to have regard to the need to avoid any unnecessary costs in making any decision as to the planning, procedure or conduct of an inquiry. [Paragraph 7.25]

11.45 The Commission recommends that sensible arrangements regarding the division of subject-matter and the sequence in which topics are taken should be followed so as to minimise wasted time and control costs. [Paragraph 7.33]

11.46 The Commission recommends that the sponsoring Department, following consultation with the Department of Finance, should set a broad budget figure at the outset of the tribunal. Such estimates should be used for internal control purposes and need not be made public at the outset of a tribunal. [Paragraph 7.36]

11.47 The Commission emphasises that the inquiry itself should give considerable thought to what level of representation it engages for particular tasks. The Commission considers 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 or paralegals or other multidisciplinary teams retained to do it. [Paragraph 7.39]

11.48 The Commission considers that flexible arrangements should be put in place in relation to the engagement and remuneration of lawyers and other personnel involved in tribunals which may involve a fee structure and a tendering process where either of them are appropriate. The Commission also considers that the existing procedure whereby the tribunal can engage a particular lawyer at an agreed level of remuneration should be retained. [Paragraph 7.59]

Chapter 8 Judicial Review and Applications to the Court

11.49 The Commission recommends that a statutory time limit of 28 days from the date on which the grounds for the application first arose should be placed on the institution of judicial review proceedings in the context of public inquiries, subject to a judicial

discretion to extend this time-period where the High Court considers that there is a “good and sufficient reason for doing so”. [Paragraph 8.05]

11.50 The Commission recommends that the tribunals of inquiry legislation be amended to allow a tribunal apply to the High Court for directions, in a manner comparable to that contained in the *Commission to Inquire into Child Abuse Act 2000*. [Paragraph 8.09]

11.51 The Commission recommends that the tribunals of inquiry legislation be amended to include a provision placing an obligation on the High Court to deal with proceedings concerning tribunals of inquiry as expeditiously as possible. Such a provision would enable tribunals of inquiry to proceed as expeditiously as possible. [Paragraph 8.12]

Chapter 9 Suspension, Dissolution or Termination

11.52 The Commission recommends that the tribunals of inquiry legislation should be amended to confer a power on the Houses of the Oireachtas, to suspend by resolution the work of a tribunal in exceptional circumstances, such resolution being sponsored by the Minister responsible for the operation of the inquiry. [Paragraph 9.05]

11.53 The Commission is of the view that the tribunals of inquiry legislation should be amended to deal expressly with the circumstances in which a tribunal of inquiry stands dissolved on fulfilling its terms of reference. [Paragraph 9.07]

11.54 The Commission recommends that the following provision be inserted into the tribunals of inquiry legislation “Where at any time it has been resolved, for stated reasons, by both Houses of the Oireachtas that it is necessary to terminate the work of a tribunal, the relevant Minister or the Government may by order dissolve the tribunal.” [Paragraph 9.16]

Chapter 10 Reports and Downstream Proceedings

11.55 The Commission recommends that the procedure to be followed concerning the publication of interim and final reports should be dealt with expressly in the tribunals of inquiry legislation. The Commission favours the approach adopted in sections 32 to 38 of the *Commissions of Investigation Act 2004* and recommends that it

should be the basis for the amendment of the tribunals of inquiry legislation in this respect. [Paragraph 10.16]

11.56 The Commission recommends that that the tribunals of inquiry legislation be amended to provide as follows:

- (i) Information, 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, which are used in evidence, shall not be admissible as evidence against that person in any criminal proceedings (other than proceedings in relation to an offence under section 35 and perjury in respect of such information, evidence, documentation or other material)
- (ii) 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 10.38]

11.57 The Commission does not recommend any amendment to the tribunals of inquiry legislation concerning potential prejudice of subsequent criminal proceedings. [Paragraph 10.50]

11.58 The Commission recommends that reports prepared by tribunals of inquiry should be regarded as *prima facie* proof in civil proceedings of the facts set out therein and the opinion of the inquiry. It recommends that the following provision be inserted into the tribunal of inquiry legislation.

“A report of a tribunal of inquiry appointed under the provisions of this Act shall be admissible in any civil proceedings as evidence—

- i. of the facts set out therein without further proof unless the contrary is shown, and
- ii. of the opinion of the tribunal in relation to any matter contained in the report.” [Paragraph 10.53]

APPENDIX A DRAFT BILL

DRAFT TRIBUNALS OF INQUIRY BILL 2005

Explanatory Notes

The references below to sections given are to comparable, though not necessarily identical, provisions in the Tribunals of Inquiry (Evidence) Acts 1921 to 2004. References to paragraphs are to paragraphs in this Report.

DRAFT TRIBUNALS OF INQUIRY BILL 2005

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ACTS REFERRED TO

Commissions of Investigation Act 2004	2004, No. 23
Criminal Procedure Act 1967	1967, No. 12
Petty Sessions (Ireland) Act 1851	1851, c.93
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
Tribunals of Inquiry (Evidence) (Amendment) Act 2004	2004, No.13
Tribunals of Inquiry (Evidence) Acts 1921 to 2004	

DRAFT TRIBUNALS OF INQUIRY BILL 2005

BILL

entitled

AN ACT TO MAKE FURTHER PROVISION CONCERNING THE ESTABLISHMENT OF TRIBUNALS OF INQUIRY, INCLUDING THE POWERS OF SUCH TRIBUNALS, TO REPEAL THE TRIBUNALS OF INQUIRY (EVIDENCE) ACTS 1921 TO 2004, TO AMEND THE COMMISSIONS OF INVESTIGATION ACT 2004 AND TO PROVIDE FOR RELATED MATTERS

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

PART 1

PRELIMINARY MATTERS

Short title

1. – This Act may be cited as the Tribunals of Inquiry Act 2005.

Definitions.

2. – In this Act, unless the context otherwise requires –
“responsible Minister” means the Minister referred to in *section 3(3)(b)*;
“the Tribunals of Inquiry (Evidence) Acts 1921 to 2004” means the Tribunals of Inquiry (Evidence) Act 1921, the Tribunals of Inquiry (Evidence) (Amendment) Act 1979, the Tribunals of Inquiry (Evidence) (Amendment) Act 1997, the Tribunals of Inquiry (Evidence) (Amendment) Act 1998, the Tribunals of Inquiry (Evidence) (Amendment) (No.2) Act 1998, the Tribunals of Inquiry (Evidence) (Amendment) Act

2002 and the Tribunals of Inquiry (Evidence) (Amendment) Act 2004;

“tribunal” means a tribunal of inquiry established under this Act.

PART 2

ESTABLISHMENT, TERMS OF REFERENCE AND MEMBERSHIP

Establishment

3. – (1) The Government may, by order, establish a tribunal to—
- (a) inquire into any matter considered by the Government to be a definite matter of urgent public importance, and
 - (b) make any reports required under this Act in relation to its inquiry.
- (2) An order may be made under this section only if—
- (a) a draft of the proposed order and a statement of the reasons for establishing the tribunal have been laid before the Houses of the Oireachtas, and
 - (b) a resolution approving the draft has been passed by each House.
- (3) The order establishing a tribunal shall specify—
- (a) the definite matter considered by the Government of urgent public importance, and
 - (b) the Minister responsible for overseeing administrative matters relating to the conduct of the tribunal, for receiving its reports and for

performing any other functions given to him or her by this Act.

Explanatory Note

This section is a new section incorporating elements of section 1 of the Tribunals of Inquiry (Evidence) Act 1921. See paragraph 2.37.

Nature of tribunal and effect on civil or criminal liability

4. – (1) A tribunal is inquisitorial in nature.
- (2) A tribunal is not to rule on, and has no power to determine, any person’s civil or criminal liability.
- (3) A tribunal is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes.

Explanatory Note

This section is a new section. See paragraph 2.16

Legal personality

5. – A tribunal established shall be a body corporate with perpetual succession and power to sue and be sued in its corporate name.

Explanatory Note

This section is a new section. See paragraph 2.66.

Independence

6. – A tribunal shall be independent in the performance of its functions.

Explanatory Note

This section is a new section. See paragraph 2.70.

Terms of reference

7. – (1) The order establishing a tribunal shall authorise the tribunal to set the terms of reference of the tribunal.
- (2) Before setting terms of reference, the tribunal shall consult with the responsible Minister, and such other persons or organisations as the tribunal considers appropriate.
- (3) The terms of reference and the accompanying statement shall be laid before the Houses of the Oireachtas and be approved by a resolution of each House.

Explanatory Note

This section is a new section. See paragraph 3.21.

Content of terms of reference and accompanying statements

8. – (1) The terms of reference of a tribunal shall, as appropriate and to the extent possible, specify the events, activities, circumstances, systems, practices or procedures to be inquired into with a view to ensuring that the scope of the inquiry into any matter referred to the tribunal is described precisely.
- (2) The tribunal in consultation with the responsible Minister shall ensure that an accompanying statement is prepared containing—

- (a) a time frame for the submission of the final report of the tribunal to the responsible Minister; and
- (b) where it is considered appropriate, an estimate of the costs (including the legal costs) to be incurred by the tribunal in conducting its inquiry and preparing its reports.

Explanatory Note

This section is a new section. See paragraph 3.21 and 7.36.

Amendment of terms of reference

9. – (1) The terms of reference of a tribunal and accompanying statement may be amended at any time pursuant to a resolution of both Houses of the Oireachtas before the submission of the final report: —

- (a) following consultation between the tribunal and the Attorney General on behalf of the responsible Minister, or

- (b) where the tribunal has requested the amendment.

(2) A tribunal may not consent to or request an amendment of its terms of reference or accompanying statement if satisfied that the proposed amendment would prejudice the legal rights of any person who has co-operated with or provided information to the tribunal.

(3) The accompanying statement shall only be amended if, as a consequence of an amendment of those terms under this section, either or both of the following contents of the statement are no longer appropriate:

(a) the time frame for the submission of the final report of the tribunal to the responsible Minister; and

(b) the estimate of the costs (including the legal costs) to be incurred by the tribunal in conducting its inquiry and preparing its reports,

(4) Without prejudice to the preceding sub-sections, the tribunal in consultation with the responsible Minister may revise: —

(a) to the extent possible, the time frame for the submission of the final report of the tribunal with the objective of having the inquiry conducted and the report submitted as expeditiously as a proper consideration of the matter referred to the tribunal permits, or

(b) the estimate of the cost (including legal costs) to be incurred by the tribunal in conducting its inquiry and preparing its reports.

(5) The revised accompanying statement must be approved by a resolution of both Houses of the Oireachtas.

Explanatory Note

This section is based on section 2A of the Tribunals of Inquiry (Evidence) Act 1921 as inserted by the Tribunals of Inquiry (Evidence)(Amendment) Act 1998. See paragraph 3.32.

Members

10. – (1) A tribunal may consist of one or more than one member.

(2) Where a tribunal consists of one member, that person shall be known as the chairperson.

(3) The Government shall appoint each member of a

tribunal by instrument in writing.

(4) Appointments may be made to a tribunal at any time, including during the course of its inquiry.

(5) Before appointing a person to be a member of a tribunal, the Government shall be satisfied that, having regard to the subject matter of the inquiry, the person has the appropriate experience, qualifications, training or expertise.

(6) If the Government proposes to appoint as a member of a tribunal a serving member of the judiciary, the Government must consult with, and secure the approval of, the President of the Court of which the proposed person is a member.

(7) Where more than one member is appointed to a tribunal, the Government shall designate one of the members as the chairperson.

(8) If a tribunal consists of more than one member—

(a) a decision of a majority of its members on any matter is deemed to be the decision of the tribunal, and

(b) in the case of an equal division among the members as to a decision to be made, the decision of the chairperson on the matter is the decision of the tribunal.

(9) If the chairperson is for any reason unable to continue to act as chairperson, the Government may designate another member of the tribunal as chairperson.

(10) An appointment under *subsection (3)* or a designation under *subsection (7)* made during the course of an inquiry by a tribunal does not affect decisions made or actions taken by the tribunal before the appointment or designation.

(11) An appointment under *subsection (3)* or a designation under *subsection (7)* shall not be made unless the tribunal is satisfied that no person affected by the proceedings of the tribunal would be prejudiced thereby.

(12) A member of a tribunal who is unable to act as a member, whether temporarily or for the remainder of the inquiry, is while unable to act deemed not to be a member of the tribunal.

(13) A tribunal may act or continue to act despite one or more than one vacancy among its members if satisfied that the legal rights of any person affected by its inquiry would not be unduly prejudiced by doing so.

(14) The Government may at any time by notice terminate the appointment of a member of a tribunal—

(a) on the ground that, by reason of physical or mental illness or for any other reason, the member is unable or unfit to carry out the duties of a member of the tribunal.

(b) on the ground that the member has failed to comply with his or her duties as a member of the tribunal.

(15) Before exercising its powers to terminate the appointment of a member of a tribunal in relation to a member other than the chairperson, the Government must consult the chairperson.

(16) Before exercising its powers to terminate the appointment of a member of a tribunal in relation to any member of the tribunal, the Government must—

(a) inform the member of the proposed decision and of the reasons for it, and take into account any representations made by the member in response, and

(b) if the member so requests, consult the other members of the tribunal.

(17) An order may be made under this section only if—

(a) a draft of the proposed order terminating the appointment of the member and a statement of the reasons for have been laid before the Houses of the Oireachtas, and

(b) a resolution approving the draft has been passed by each House.

Explanatory Note

This section is based on section 2 of the Tribunals of Inquiry (Evidence)(Amendment) Act 1979. See paragraphs 4.15, 4.41, 4.42, 4.52, and 4.55.

Reserve members

11. – (1) The Government may appoint one or more persons to be a reserve member or members of a tribunal.

(2) Appointments may be made at any time, including during the course of an inquiry by a tribunal.

(3) Before appointing a person to be a reserve member, the Government shall be satisfied that, having regard to the subject matter of the tribunal, the person has the appropriate experience, qualifications, training or expertise.

(4) If the Government proposes to appoint as a reserve member a serving member of the judiciary, the Government must consult with, and secure the approval of, the President of the Court of which the proposed person is a member.

(5) An appointment under *subsection (2)* made during the course of an inquiry by a tribunal does not affect decisions made or actions taken by the tribunal before the appointment.

(6) A reserve member of a tribunal who is unable to act as a member, whether temporarily or for the remainder of the inquiry, is while unable to act deemed not to be a member of the tribunal.

(7) A tribunal may act or continue to act despite one or more than one vacancy among its reserve members if satisfied that the legal rights of any person affected by its inquiry would not be unduly prejudiced by doing so.

(8) The Government may at any time by notice terminate the appointment of a reserve member of a tribunal—

(a) on the ground that, by reason of physical or mental illness or for any other reason, the reserve member is unable or unfit to carry out the duties of a reserve member of the tribunal, or

(b) on the ground that the reserve member has failed to comply with his or her duties as a reserve member of the tribunal.

(9) Before exercising its powers to terminate the appointment of a reserve member, the Government shall consult the chairperson.

(10) Before exercising its powers to terminate the appointment of a reserve member of a tribunal, the Government shall—

(a) inform the reserve member of the proposed decision and of the reasons for it, and take into account any representations made by the reserve member in response, and

(b) if the member so requests, consult the other members of the tribunal.

(11) An order may be made under this section only if—

- (a) a draft of the proposed order terminating the appointment of the reserve member and a statement of the reasons for have been laid before the Houses of the Oireachtas, and
- (b) a resolution approving the draft has been passed by each House.

Explanatory Note

This section is based on section 5 of the Tribunals of Inquiry (Evidence)(Amendment) Act 2002. See paragraph 4.61.

Experts and research

12. – (1) If a tribunal considers that it 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.

(2) A tribunal may, for the purpose of the performance of its functions, conduct, or commission the conduct of, research.

Explanatory Note

This is a new section. See paragraph 4.64.

PART 3

PROCEDURES, POWERS AND OFFENCES

Procedures

13. –1 (1) A tribunal may, subject to this Act and the rules and procedures of the tribunal and the inquisitorial nature of a

tribunal, conduct its inquiry in the manner that it considers appropriate.

(2) A tribunal shall conduct its inquiry as expeditiously as a proper consideration of the matter referred to the tribunal permits.

(3) In making any decision as to the procedure or conduct of an inquiry, the tribunal must have regard to the need to avoid any unnecessary cost.

Explanatory Note

This is a new section. See paragraphs 2.16, 5.07 and 7.25.

Divisions

14. – (1) A tribunal consisting of more than one member may, whenever the chairperson so determines, act in divisions each of which consists of such members of the tribunal, whether one or more, as the chairperson may determine.

(2) The chairperson of a tribunal may, in relation to each division—

(a) designate one member of the division as its chairperson,

(b) determine those functions of the tribunal that are to be performed by the division,

(c) determine the matters in relation to which the division is to perform those functions, and

(d) require the division to prepare a report of its findings.

(3) A division of a tribunal shall provide any report prepared as required by *subsection (2)* to the chairperson of the tribunal,

and the report is considered for all purposes to have been made by the tribunal.

(4) A division of a tribunal and the chairperson of a division have, for the purposes of performing the functions of the division, all the powers and duties of the tribunal and chairperson of the tribunal respectively, including their powers and duties relating to costs.

(5) If the chairperson of a division of a tribunal is for any reason unable to continue to act as such, another member of the division may be designated under *subsection (2)(a)* as its chairperson, and the designation does not affect decisions, determinations or inquiries made or other actions taken before the designation.

Explanatory Note

This section is based on section 4B of the Tribunals of Inquiry (Evidence) Act 1921 as inserted by the Tribunals of Inquiry (Evidence)(Amendment) Act 2004.

Preliminary investigations

15. – A tribunal may conduct such private preliminary investigations as it considers appropriate.

Explanatory Note

This is a new section. See paragraph 5.64.

Investigators

16. – (1) A tribunal may, with the approval of the responsible Minister, and with 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 a tribunal may, with the approval of the responsible Minister, and with the consent of the Minister for Finance, determine.

(3) Whenever an investigator is so requested by a 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 High 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 High 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.

Explanatory Note

This section is based on section 6 of the Tribunals of Inquiry (Evidence)(Amendment) Act 2002. See paragraph 5.79.

Publicity

17. – (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 in subsection (1) shall not apply to any preliminary investigation stage conducted under *section 15*.

(3) The obligation imposed by *subsection (1)* shall be fulfilled by the circulation to the public present at the proceedings of a copy, in writing, of a 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 18*, 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) an investigator, appointed by the tribunal under *section 16(1)*, has examined a witness on tribunal and obtained a written statement of such examination.

(4) Subject to *subsection (1)*, a tribunal may, in its discretion, permit the filming, recording, or broadcasting of such of the proceedings of the tribunal (subject to an appropriate written protocol), as the tribunal considers appropriate, having 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.

Explanatory Note

This section is a new section incorporating elements of section 2(a) of the Tribunals of Inquiry (Evidence) Act 1921. See paragraphs 5.89 and 5.105.

Representation

18. – A tribunal shall have the power to authorise the representation before it of any person appearing to it to be interested to a relevant extent in any of the matters referred to in its terms of reference by counsel or solicitor or otherwise, or to refuse to allow such representation.

Explanatory Note

This section is based on section 2(b) of the Tribunals of Inquiry (Evidence) Act 1921. See paragraph 5.37.

Powers

19. – (1) A tribunal may make such orders as are reasonable and necessary for the purposes of its functions.
- (2) Without prejudice to *subsection (1)*, it may make orders: –
- (a) enforcing the attendance of witnesses and examining them on oath, affirmation, or otherwise;
 - (b) compelling the production of documents; and
 - (c) issuing a commission or request to examine witnesses

and a summons signed by 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) A tribunal may issue a commission or request to examine witnesses whether abroad or within the jurisdiction.

Explanatory Note

This section is based on section 1(1) of the Tribunals of Inquiry (Evidence) Act 1921 and section 4 of the Tribunals of Inquiry (Evidence)(Amendment) Act 1979. See paragraph 6.27.

Enforcement by the High Court

20. – 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.

Explanatory Note

This section is based on section 4 of the Tribunals of Inquiry (Evidence)(Amendment) Act 1997. See paragraph 6.61.

Privileges

21. – A person who gives evidence to a tribunal or who produces or sends documents to a tribunal as directed by the tribunal—

- (a) has the same immunities and privileges in respect of that evidence or those documents, and
- (b) is, in addition to the penalties provided by this Act, subject to the same liabilities,

as a witness in proceedings in the High Court.

Explanatory Note

This section is based on section 1(4) of the Tribunals of Inquiry (Evidence) Act 1921 as inserted by section 2 of the Tribunals of Inquiry (Evidence)(Amendment) Act 1997. See paragraph 6.65.

Judicial review

22. – (1) Without prejudice to any provision of the Constitution, a person shall not question in a court or otherwise a decision or determination of a tribunal otherwise than by way of an application to the High Court for judicial review under Order 84 of the *Rules of the Superior Courts 1986* (S.I. No. 15 of 1986) ('the Order').

(2) Subject to *subsection (3)*, an application to the High Court for leave to apply for judicial review under the Order in respect of such a decision or determination as aforesaid—

(a) shall be made not later than 28 days from the date of the decision or determination, and

(b) shall be made by motion on notice (grounded in the manner specified in the Order in respect of a motion *ex parte* applying for such leave) to the tribunal that made the decision or determination,

and such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision or determination is invalid or ought to be quashed.

(3) The High Court may extend the period specified in *subsection (2)* if it considers that there is good and sufficient reason for doing so.

(4) (a) The decision of the High Court on an application for leave to apply for judicial review, or on an application for judicial review, of such a decision or determination as aforesaid shall be final and no appeal shall lie from the decision to the

Supreme Court in either case except with the leave of the High Court, which leave shall be granted only where the Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court.

(b) *Paragraph (a)* shall not apply to a decision of the High Court in so far as it involves a question as to the validity of any law having regard to the provisions of the Constitution.

(5) References in this section to the Order shall be read as including references to the Order as amended or replaced (with or without modification) by rules of court.

Explanatory Note

This is a new section. See paragraphs 8.03.

Directions of the High Court

23. – (1) A tribunal may, whenever it considers it appropriate to do so, apply to the High Court for directions relating to the performance of the functions of the tribunal or 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 under *subsection (1)*, the High Court may give such directions and make such orders as it considers appropriate.

(3) The High Court may, on application, hear an application under *subsection (1)* otherwise than in public if satisfied that it is appropriate to do so because of—

(a) the subject matter in relation to which directions are sought,

(b) a risk of prejudice to criminal proceedings, or

(c) any other matter relating to the nature of the evidence to be given at the hearing of the application.

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

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

Explanatory Note

This section is based on section 4(B) of the Tribunals of Inquiry (Evidence)(Amendment) Act 1997 as inserted by section 3(1) of the Tribunals of Inquiry (Evidence)(Amendment) Act 2004. See paragraph 8.09.

Offences

24. – (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, including things in his or her power or control legally required by the tribunal to be produced by him or her, or to answer any question to which the tribunal may legally require an answer, or

- (c) willfully gives evidence to a tribunal which is material to the inquiry to which the tribunal relates and which he or she 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) without reasonable cause, by act or omission obstructs or hinders an investigator in the performance of his or her functions, or fails to comply with a requirement made by that person under section 16,

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 Judge of the District Court shall have jurisdiction to try summarily an offence under this section if—

- (a) the judge is of the opinion that the facts proved or alleged against a defendant charged with such an offence constitute a minor offence fit to be tried summarily,

(b) the Director of Public Prosecutions consents,
and

(c) the defendant (on being informed by the judge of his right to be tried by a jury) does not object to being tried summarily.

(4) Section 13 of the Criminal Procedure Act 1967 shall apply in relation to an offence under this section as if, in lieu of the penalties specified in *subsection (3)* of that section, there were specified therein the penalties provided for by *subsection 2(a)* of this section, and the reference in subsection 2(b) of that section to the penalties provided for in *subsection (3)* of that section shall be read accordingly.

(5) Where a body corporate commits an offence under this Act, each person who was an officer of the body corporate when the offence was committed is guilty of an offence against this section if it is proved that he or she—

(a) willingly participated in, connived at or consented to the commission of the offence by the body corporate, or

(b) knowing that the body corporate was committing or about to commit that offence, failed to take all reasonably practicable steps to prevent its commission.

(6) A person may be proceeded against for an offence under this section whether or not the body corporate has been proceeded against or been convicted of the offence committed by that body.

(7) A person guilty of an offence under this section is liable to a fine not exceeding the fine for which the body corporate is liable for the offence.

(8) In this section “officer”, in relation to a body corporate, means a director, manager, executive officer, secretary or

other person concerned in the management of the body corporate.

(9) A prosecution for an offence under this section may be brought only by or with the consent of the Director of Public Prosecutions.

(10) Notwithstanding section 10(4) of the Petty Sessions (Ireland) Act 1851 proceedings for an offence under this Act may be instituted at any time within 2 years after the date alleged to be the date on which the offence was committed.

Explanatory Note

This section is based on section 2A of the Tribunals of Inquiry (Evidence) Act 1921 as inserted by section 3 of the Tribunals of Inquiry (Evidence)(Amendment) Act 1979 and as amended by the Tribunals of Inquiry (Evidence)(Amendment) Act 2002. See paragraph 6.49.

Suspension

25. – (1) The tribunal, or the Government, may at any time, by notice to the tribunal where it is the Government, suspend an inquiry for such period as appears to be necessary to allow for—

(a) the completion of any other inquiry relating to any of the matters to which the inquiry relates, or

(b) the determination of any civil or criminal proceedings arising out of any of those matters.

(2) The power conferred by *subsection (1)* may be exercised whether or not the inquiry or proceedings have begun.

(3) An order may be made under this section only if—

(a) a draft of the proposed order and a statement of the reasons for suspending the tribunal have been laid before the Houses of the Oireachtas, and

- (b) a resolution approving the draft has been passed by each House of the Oireachtas.

Explanatory Note

This section is a new section. See paragraph 9.05.

Termination and dissolution

26. – A tribunal comes to an end—

- (a) on the date, after the delivery of the report of the inquiry, on which the tribunal notifies the responsible Minister that the inquiry has fulfilled its terms of reference, or
- (b) where at any time it has been resolved, for stated reasons, by both Houses of the Oireachtas that it is necessary to terminate the work of the tribunal, the responsible Minister or the Government by order dissolves the tribunal.

Explanatory Note

This section is a new section. See paragraph 9.16.

Non-admissibility in criminal proceedings of evidence given to tribunals

27. – (1) A statement or admission made by a person before a tribunal or when being examined in pursuance of a commission or request issued this Act, or when being examined by an investigator under this Act, shall not be admissible as evidence against that person in any criminal proceedings (other than proceedings in relation to an offence under *section 24*).

(2) Information, 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, which are

used in evidence, by the tribunal shall not be admissible as evidence against that person in any criminal proceedings (other than proceedings in relation to an offence under *section 24* and perjury in respect of such information, evidence, documentation or other material)

(3) For the purposes of *subsection (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 programs, software, databases and speech.

Explanatory Note

This section is a new section incorporating elements of Section 5 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979. See paragraph 10.38.

PART 4

REPORTS

Preparation of the report

28. – (1) On the conclusion of its inquiry, a tribunal shall prepare a written report, based on the evidence received by it, setting out the facts it established in relation to the matters referred to it for inquiry and such other matters, including recommendations, as it considers appropriate.

(2) If for any reason (including insufficient, conflicting or inconsistent evidence) a tribunal considers that the facts relating to a particular issue have not been established, the tribunal in its report—

(a) shall identify the issue, and

(b) may indicate its opinion as to the quality and weight of any evidence relating to the issue.

(3) A tribunal may omit from its report any information that identifies or that could reasonably be expected to lead to the identification of a person who gave evidence to the tribunal or any other person, if in its opinion—

- (a) the context in which the person was identified has not been clearly established,
- (b) disclosure of the information might prejudice any criminal proceedings that are pending or in progress,
- (c) disclosure of the information would not be in the interests of the inquiry, or
- (d) it would not be in the person's interests to have his or her identity made public and the omission of the information would not be contrary to the interests of the inquiry.

(4) The tribunal shall endeavour to submit the report to the responsible Minister within the time frame specified in *section 8* or *9*.

Explanatory Note

This section is a new section. See paragraph 10.16.

Interim reports

29. – (1) If requested by the responsible Minister, a tribunal shall make interim reports to him or her at the intervals stated in the request.

(2) The responsible Minister may request an interim report on the general progress of the inquiry of a tribunal or on a particular aspect of the inquiry.

(3) If a tribunal requests that the time frame for submitting its final report be revised under *section 9*, the tribunal shall

submit an interim report to the responsible Minister with the request.

Explanatory Note

This section is a new section. See paragraph 10.16.

Publication of the report

30. – (1) The responsible Minister—

- (a) shall cause the final report of a tribunal to be published as soon as possible after it is submitted to him or her, and
- (b) may, at his or her discretion and following consultation with the tribunal, cause an interim report to be published, unless publication would hinder or impair the inquiry.

(2) If the responsible Minister considers that the publication of the final report or an interim report of the tribunal might prejudice any criminal proceedings that are pending or in progress, he or she shall apply to the High Court for directions concerning the publication of the report.

(3) Before determining an application under *subsection (2)* in respect of a report of a tribunal, the High Court shall direct that notice be given to the following—

- (a) the Attorney General;
- (b) the Director of Public Prosecutions;
- (c) a person who is a defendant in criminal proceedings relating to an act or omission that is mentioned in the report or that is related to any matter investigated by the tribunal and mentioned in the report.

(4) On an application under *subsection (2)*, the High Court may—

(a) receive submissions, and evidence tendered, by or on behalf of any person mentioned in *subsection (3)*, and

(b) hear the application in private if the High Court considers it appropriate to do so.

(5) If, after hearing the application, the High Court considers that the publication of the report might prejudice any criminal proceedings, it may direct that the report or a specified part of it be not published—

(a) for a specified period, or

(b) until the High Court otherwise directs.

(6) An application under *subsection (1)* may be heard otherwise than in public if the Court considers that it is appropriate to do so.

Explanatory Note

This section is based on section 3 of the Tribunals of Inquiry (Evidence) Act 2002. See paragraph 10.16.

Admissibility of reports in civil proceedings

31. – A report 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.

Explanatory Note

This section is a new section. See paragraph 10.53.

PART 5

COSTS AND REPEALS

Costs

32. – (1) Where a 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,
- (b) 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 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.

(2) Where any costs referred to in *subsection (1)* have been incurred before the appointment of any member of a tribunal or, in the case of a tribunal consisting of one member the appointment of that one member, the tribunal—

- (a) may make an order under *subsection (1)* in relation to any costs referred to in that subsection that were incurred before such appointment and

that have not already been determined in accordance with that subsection, and

(b) shall, for that purpose, have regard to any report of the tribunal relating to its proceedings in the period before such appointment.

(3) Any sum payable by the Minister for Finance pursuant to an order under this section shall be paid out of moneys provided by the Oireachtas.

Explanatory Note

This section is based on section 6(1) of the Tribunals of Inquiry (Evidence) Acts 1979. See paragraph 7.19.

Expenses

33. – (1) If the Minister for Finance is the responsible Minister in relation to a tribunal, any expenses incurred by him or her in the administration of this Act shall be paid out of money provided by the Oireachtas.

(2) If any other Minister is the responsible Minister in relation to a tribunal, any expenses incurred by him or her in the administration of this Act shall, to such extent as may be sanctioned by the Minister for Finance, be paid out of money provided by the Oireachtas.

Amendment of Commissions of Investigation Act 2004

34. – The *Commissions of Investigation Act 2004* is amended as follows:

(a) in section 2, the definition of "tribunal" shall be replaced by the following: "'tribunal" means a tribunal of inquiry appointed under the *Tribunals of Inquiry Act 2005*.'

(b) by the deletion of section 23(3) and the renumbering of section 23(4) as section 23(3).

Explanatory Note

See paragraph 1.29.

Repeals and consequential provisions

35. – (1) The *Tribunals of Inquiry (Evidence) Acts 1921 to 2004* are repealed.

(2) Notwithstanding the repeal by this Act of the *Tribunals of Inquiry (Evidence) Acts 1921 to 2004*, where any tribunal of inquiry stands established under those Acts prior to the coming into force of this Act, the provisions of those Acts shall continue to apply to those tribunals as if those Acts had not been repealed.

APPENDIX B LIST OF LAW REFORM COMMISSION PUBLICATIONS

First Programme for Examination of Certain Branches of the Law with a View to their Reform (December 1976) (Prl 5984)	€0.13
Working Paper No 1-1977, The Law Relating to the Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises (June 1977)	€1.40
Working Paper No 2-1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects (November 1977)	€1.27
Working Paper No 3-1977, Civil Liability for Animals (November 1977)	€3.17
First (Annual) Report (1977) (Prl 6961)	€0.51
Working Paper No 4-1978, The Law Relating to Breach of Promise of Marriage (November 1978)	€1.27

Working Paper No 5-1978, The Law Relating to Criminal Conversation and the Enticement and Harboursing of a Spouse (December 1978)	€1.27
Working Paper No 6-1979, The Law Relating to Seduction and the Enticement and Harboursing of a Child (February 1979)	€1.90
Working Paper No 7-1979, The Law Relating to Loss of Consortium and Loss of Services of a Child (March 1979)	€1.27
Working Paper No 8-1979, Judicial Review of Administrative Action: the Problem of Remedies (December 1979)	€1.90
Second (Annual) Report (1978/79) (Prl 8855)	€0.95
Working Paper No 9-1980, The Rule Against Hearsay (April 1980)	€2.54
Third (Annual) Report (1980) (Prl 9733)	€0.95
First Report on Family Law – Criminal Conversation, Enticement and Harboursing of a Spouse or Child, Loss of Consortium, Personal Injury to a Child, Seduction of a Child, Matrimonial Property and Breach of Promise of Marriage (LRC 1-1981) (March 1981)	€2.54

Working Paper No 10-1981, Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (September 1981)	€2.22
Fourth (Annual) Report (1981) (PI 742)	€0.95
Report on Civil Liability for Animals (LRC 2-1982) (May 1982)	€1.27
Report on Defective Premises (LRC 3-1982) (May 1982)	€1.27
Report on Illegitimacy (LRC 4-1982) (September 1982)	€4.44
Fifth (Annual) Report (1982) (PI 1795)	€0.95
Report on the Age of Majority, the Age for Marriage and Some Connected Subjects (LRC 5-1983) (April 1983)	€1.90
Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters (LRC 6-1983) (November 1983)	€1.27
Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (LRC 7-1983) (December 1983)	€1.90
Report on Divorce a Mensa et Thoro and Related Matters (LRC 8-1983) (December 1983)	€3.81

Sixth (Annual) Report (1983) (PI 2622)	€1.27
Report on Nullity of Marriage (LRC 9-1984) (October 1984)	€4.44
Working Paper No 11-1984, Recognition of Foreign Divorces and Legal Separations (October 1984)	€2.54
Seventh (Annual) Report (1984) (PI 3313)	€1.27
Report on Recognition of Foreign Divorces and Legal Separations (LRC 10-1985) (April 1985)	€1.27
Report on Vagrancy and Related Offences (LRC 11-1985) (June 1985)	€3.81
Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters (LRC 12-1985) (June 1985)	€2.54
Report on Competence and Compellability of Spouses as Witnesses (LRC 13-1985) (July 1985)	€3.17
Report on Offences Under the Dublin Police Acts and Related Offences (LRC 14-1985) (July 1985)	€3.17
Report on Minors' Contracts (LRC 15-1985) (August 1985)	€4.44
Report on the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (LRC 16-1985) (August 1985)	€2.54

Report on the Liability in Tort of Minors and the Liability of Parents for Damage Caused by Minors (LRC 17-1985) (September 1985)	€3.81
Report on the Liability in Tort of Mentally Disabled Persons (LRC 18-1985) (September 1985)	€2.54
Report on Private International Law Aspects of Capacity to Marry and Choice of Law in Proceedings for Nullity of Marriage (LRC 19-1985) (October 1985)	€4.44
Report on Jurisdiction in Proceedings for Nullity of Marriage, Recognition of Foreign Nullity Decrees, and the Hague Convention on the Celebration and Recognition of the Validity of Marriages (LRC 20-1985) (October 1985)	€2.54
Eighth (Annual) Report (1985) (PI 4281)	€1.27
Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries (LRC 21-1987) (September 1987)	€5.71
Consultation Paper on Rape (December 1987)	€7.62
Report on the Service of Documents Abroad re Civil Proceedings -the Hague Convention (LRC 22-1987) (December 1987)	€2.54

Report on Receiving Stolen Property (LRC 23-1987) (December 1987)	€8.89
Ninth (Annual) Report (1986-1987) (PI 5625)	€1.90
Report on Rape and Allied Offences (LRC 24-1988) (May 1988)	€3.81
Report on the Rule Against Hearsay in Civil Cases (LRC 25-1988) (September 1988)	€3.81
Report on Malicious Damage (LRC 26-1988) (September 1988)	€5.08
Report on Debt Collection: (1) The Law Relating to Sheriffs (LRC 27- 1988) (October 1988)	€6.35
Tenth (Annual) Report (1988) (PI 6542)	€1.90
Report on Debt Collection: (2) Retention of Title (LRC 28-1988) (April 1989)	€5.08
Report on the Recognition of Foreign Adoption Decrees (LRC 29-1989) (June 1989)	€6.35
Report on Land Law and Conveyancing Law: (1) General Proposals (LRC 30-1989) (June 1989)	€6.35
Consultation Paper on Child Sexual Abuse (August 1989)	€12.70

Report on Land Law and Conveyancing Law: (2) Enduring Powers of Attorney (LRC 31-1989) (October 1989)	€5.08
Eleventh (Annual) Report (1989) (PI 7448)	€1.90
Report on Child Sexual Abuse (LRC 32-1990) (September 1990)	€8.89
Report on Sexual Offences against the Mentally Handicapped (LRC 33-1990) (September 1990)	€5.08
Report on Oaths and Affirmations (LRC 34-1990) (December 1990)	€6.35
Report on Confiscation of the Proceeds of Crime (LRC 35-1991) (January 1991)	€7.62
Consultation Paper on the Civil Law of Defamation (March 1991)	€25.39
Report on the Hague Convention on Succession to the Estates of Deceased Persons (LRC 36-1991) (May 1991)	€8.89
Twelfth (Annual) Report (1990) (PI 8292)	€1.90
Consultation Paper on Contempt of Court (July 1991)	€25.39
Consultation Paper on the Crime of Libel (August 1991)	€13.97
Report on the Indexation of Fines (LRC 37-1991) (October 1991)	€8.25

Report on the Civil Law of Defamation (LRC 38-1991) (December 1991)	€8.89
Report on Land Law and Conveyancing Law: (3) The Passing of Risk from Vendor to Purchaser (LRC 39-1991) (December 1991); (4) Service of Completion Notices (LRC 40-1991) (December 1991)	€7.62
Thirteenth (Annual) Report (1991) (PI 9214)	€2.54
Report on the Crime of Libel (LRC 41-1991) (December 1991)	€5.08
Report on United Nations (Vienna) Convention on Contracts for the International Sale of Goods 1980 (LRC 42-1992) (May 1992)	€10.16
Report on the Law Relating to Dishonesty (LRC 43-1992) (September 1992)	€25.39
Land Law and Conveyancing Law: (5) Further General Proposals (LRC 44-1992) (October 1992)	€7.62
Consultation Paper on Sentencing (March 1993)	€25.39
Consultation Paper on Occupiers' Liability (June 1993)	€12.70
Fourteenth (Annual) Report (1992) (PN 0051)	€2.54

Report on Non-Fatal Offences Against The Person (LRC 45-1994) (February 1994)	€25.39
Consultation Paper on Family Courts (March 1994)	€12.70
Report on Occupiers' Liability (LRC 46-1994) (April 1994)	€7.62
Report on Contempt of Court (LRC 47-1994) (September 1994)	€12.70
Fifteenth (Annual) Report (1993) (PN 1122)	€2.54
Report on the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (LRC 48-1995) (February 1995)	€12.70
Consultation Paper on Intoxication as a Defence to a Criminal Offence (February 1995)	€12.70
Report on Interests of Vendor and Purchaser in Land during the period between Contract and Completion (LRC 49-1995) (April 1995)	€10.16
An Examination of the Law of Bail (LRC 50-1995) (August 1995)	€12.70
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