



Dáil Éireann

An Coiste um Chuntais Phoiblí

**An tríú tuarascáil eatramhach ar chomhlachtaí poiblí
d'fháil seirbhísí dlí.**

Eanáir 2011

Dáil Éireann

Committee of Public Accounts

**Third interim report on the procurement of legal services
by public bodies.**

January 2011

Table of Contents

	Pg
Chairman’s Preface	5
Executive Summary	7
Chapter 1	Introduction and Proceedings before the Committee
1.1	Introduction 9
1.2	Accountability issues 9
1.3	Proceedings before the Committee 10
1.4	Structure of the Report 10
Chapter 2	Tribunals of Inquiry
2.1	Introduction 13
2.2	Procurement of barristers and solicitors 14
2.3	Legal costs 15
2.4	Third-party legal costs 17
2.5	Procedural shortcomings 19
2.6	Conclusion 19
Chapter 3	How to make future Tribunals of Inquiry more cost effective
3.1	Law Reform Commission 2005 Report 21
3.2	Tribunals of Inquiry Bill 2005 22
3.3	C&AG’s Special Report 67: Laffoy/Ryan Commission of Inquiry into Child Abuse 23
3.4	Findings of the C&AG’s Special Report No. 63: Tribunals of Inquiry 23
3.5	Conclusion 25
Chapter 4	The provision of legal services to the State
4.1	Introduction 27
4.2	Appointment of legal advisors by the State and the legal costs incurred 27
4.3	The State’s role in the preservation of a high legal fees culture 28
4.4	Legal costs to the State 28
4.5	Procurement and competitive tendering for legal services by State and public bodies 31
4.6	Background law and guidelines on the procurement of legal services by State and public bodies 32
4.7	The role of the Department of Finance and Accounting Officers 33
4.8	Conclusion 33
Chapter 5	Competitiveness in the legal professions
5.1	Introduction 35
5.2	Regulation of the legal professions 35
5.3	Restrictive practices preventing transparency and competition 36
5.4	The report of the Legal Costs Working Group 2005 37
5.5	The taxation of costs system 37
5.6	IMF/EU Memorandum of Understanding 38
5.7	Conclusion 38
Chapter 6	Findings and Recommendations 39
Appendix 1	Cost of the Tribunals of Inquiry 41
Appendix 2	Terms of Reference of the Public Accounts Committee 53
Appendix 3	Membership of the Public Accounts Committee 55
Appendix 4	Correspondence from Ms. Susan Gilvarry, Solicitor to the Tribunal of Inquiry into Certain Planning Matters and Payments 56



Chairman's Preface

I welcome the publication of the Committee's report on the Procurement of Legal Services by Public bodies. Issues relating to the level of fees, the extent of the usage by public bodies of legal services and the way in which services must be procured have been raised on a number of occasions before this Committee.

The key issue raised in this Report is the need to get value for money in procuring legal services. The problem identified by the Committee is that there is no benchmark with which to measure how value can be obtained from the market place. Evidence presented to the Committee suggests that legal costs in Ireland are high and there are also comments to the fact that the State itself is a primary driver of our high levels of legal fees.

This Report makes a number of recommendations that will drive the value for money agenda in the area of legal fees and it will also add to the calls for more transparency in the way in which legal services are procured.

I would like to express my appreciation to the Members of the Committee and to the Committee secretariat for the work they have put in to producing this Report, which was approved at our meeting today.

Bernard Allen TD
Chairman

27th January 2011

Executive Summary

Public bodies procure huge amounts of legal services every year. The exact size of the market taken up by public bodies is not known, with suggestions that it can be as high as €500 million per annum. What is known is the amount spent by the central bodies such as the Director of Public Prosecutions (DPP) and the Chief State Solicitors Office (CSSO), the fees paid out by the various Tribunals, the expenditure by bodies such as the Central Bank and National Asset Management Agency (NAMA) and the legal fees associated with the bank stabilisation process.

This Report examines the way in which the legal system works and arises primarily from the Value for Money audit undertaken by the Comptroller and Auditor General on Tribunals of Inquiry (Special Report 63). The Committee reviewed the working of the three Tribunals covered in Special Report 63 and was concerned at the level of legal fees charged and the way in which legal services were procured. This Report acknowledges the valuable work undertaken by Tribunals and makes recommendations which will facilitate greater efficiency in future Tribunals. In that regard, the Report notes that while recourse to Tribunal-type inquiries has lessened as the State uses commissions, nevertheless the ability to be able to establish a Tribunal is an important part of the investigative powers of the Oireachtas and it is therefore desirable that legislation underpinning the work of Tribunals is revised to take account of lessons learnt from the State's experience to date.

Arising from the examination of the three Tribunals covered in Special Report 63, the Report also examines the wider issue of procurement of legal services by State bodies in Chapters four and five. The payments made, for instance, by NAMA and arising from the bank stabilisation, while at the upper end of the spectrum of payments, do serve to highlight the need to have a greater perspective on value for money in respect of this expenditure. As with the issues that arose in the Tribunals, the ability to get value for money is restricted by the practices of the legal profession and in that regard the non implementation of key elements of the Competition Authority Report on competition for legal services is an ongoing concern. The Report notes that there has been a move to have legal work subject to competitive tendering and is recommending that this becomes the norm for all public bodies.

Chapter One

Introduction and Proceedings before the Committee

1.1 Introduction

Public bodies are the largest procurers of legal services in the State with an estimated spend of anything up to €500 million. In that regard, and while the amount spent on legal fees by central agencies such as the Director of Public Prosecutions and the Chief State Solicitors Office is published, it is difficult to put an accurate figure on the spend. The Committee is aware of significant expenditure by Tribunals, NAMA, the HSE, the State Claims Agency and, while these bodies would be at the higher end of the spectrum of bodies procuring legal services, the figures when taken with the level of court action involving State bodies, such as local authorities, give an indication of the extent to which public bodies incur legal costs.

What is of concern to the Committee is that the majority of this procurement does not involve competitive tendering. In addition, the Committee heard evidence to suggest that the cost of legal services in Ireland is amongst the highest in the developed world and it has been suggested that the State itself is one of the primary drivers of high legal costs.

This Report arises from a number of hearings on both the cost of Tribunals and on other legal costs that have been incurred by State bodies and examines how the State can get better value for money when it comes to legal services. In addition to the Accounting Officers who have responsibility for the highest legal budgets, the Committee also heard evidence from the Law Reform Commission and from the Competition Authority, both of whom have addressed issues relating to Tribunals and the cost of legal services. The Committee is aware also that restructuring the legal professions and the market for legal services in Ireland is the central plank of the competitiveness reforms required to be undertaken by the State as a condition of the IMF/EU Memorandum of Understanding.

1.2 Accountability Issues

The accountability issues that arise in respect of the procurement of legal services by public bodies are as follows:

- Legal fees arising from the work of Tribunals
- The need to make Tribunals more cost effective
- The extent to which public bodies procure legal services without any competitive tendering
- The extent to which ongoing and invidious restrictive practices amongst solicitors and barristers respectively prevent a competitive market for legal services.

1.3 Proceedings before the Committee

The Comptroller and Auditor General in Special Report No. 63 on Tribunals of Inquiry examined the timescale, cost and efficiency of the Mahon, Morris and Moriarty Tribunals. Arising from issues of very high legal costs and extended durations of the Tribunals covered in the Special Report, the Accounting Officers for the Department of the Environment, Heritage and Local Government, the Department of Justice, Equality and Law Reform and the Department of an Taoiseach attended as witnesses at the Committee meeting of 2 July 2009 to deal with these issues.

The Committee in its examination of the Votes for the Office of the Attorney General, the Office of the Chief State Solicitor and the Director of Public Prosecutions raised questions about the issue of legal costs and the appointment of legal advisors by the State, as the State is the largest purchaser of legal services in the country, and also returned to the issue of the cost of Tribunals at the end of the examination. Officials from the Department of Finance also attended. The Committee also heard evidence from the Law Reform Commission and the Competition Authority on the high legal costs of the Tribunals and restrictive practices generally within the legal professions that lead to the high legal costs.

On 19 November 2009, the Committee examined the Chapter of the Comptroller and Auditor General's Special Report No. 67 which focused on the timeframe and the legal costs of the Commission to Inquire into Child Abuse and heard from the Accounting Officer for the Department of Education.

The matter of legal costs to the State also arose in examinations of the Comptroller and Auditor General's Special Report No. 76 on the National Asset Management Agency and in the Comptroller and Auditor General's Annual Report 2007 examining the National Treasury Management Agency and the State Claims Agency.

1.4 Structure of the Report

Chapter Two examines the Comptroller and Auditor General's Special Report into the Tribunals of Inquiry and in particular how barristers and solicitors were selected, the high legal costs to the State and third-party costs.

Chapter Three examines how future inquiries into matters of public concern can be made more cost-effective by looking at the report of the Law Reform Commission, the Tribunals of Inquiry Bill and lessons learned from the Commission of Inquiry into Child Abuse report.

Chapter Four examines the high costs of legal services to the State and measures that can be taken to significantly improve value for money in the procurement of legal services.

Chapter Five examines restrictive practices which are preventing, restricting and/or distorting a competitive market for legal services in Ireland to the detriment of the State and Irish consumers generally.

Finally, in Chapter Six, the findings and recommendations of the Committee are set down.

Chapter Two Tribunals of Inquiry

2.1 Introduction

The Comptroller and Auditor General in a Special Report on the Mahon, Moriarty and Morris Tribunals of Inquiry reported that the State faces a considerable challenge to achieve predictability and financial control in the case of Tribunals of inquiry which operate under the authority of the legislature without compromising their independent investigations or the constitutional rights of witnesses.

The report found that the ultimate cost of the three Tribunals examined remains inherently difficult to estimate. However, it stated that assuming the Tribunals concluded on the dates predicted at the time of the report, the following costs will arise:

- administration costs will amount to between €50 million and €52 million
- Tribunal legal teams will cost between €84 million and €87 million
- litigation will cost approximately €4 million
- State respondent costs will cost approximately €19 million
- other State costs, including judges' salaries and expenses, will cost approximately €22 million
- third-party costs could range from €57 million to €82 million, based on the pattern of awards observed in the Morris and Mahon Tribunals to date.

Overall, the report stated that the likely cost to the State of the three Tribunals based on the pattern of costs experienced to date is estimated to be in the range of €36 million to €66 million.

The report provided these estimates with one major caveat. The major area of uncertainty pertains to third-party costs. In the case of those costs, there is a risk that, due to greatly underestimated timescales, their ultimate cost could rise due to future settlements and large costs awards by the Taxing Master. If the ratio of third-party costs to direct costs experienced in the Beef Processing Tribunal was taken as a guide, the ultimate cost could increase by a further €68 million.

The Committee recognises that the Tribunals have shown unsavoury areas of Irish life which is valuable and about which the public is entitled to know. It is important also to declare that significant monies have been recouped by the Revenue Commissioners in recent years through special investigations which arose because of discoveries made through various Tribunals. There has been a return to the State in this regard.

2.2 Procurement of barristers and solicitors

Senior and junior counsel

The Committee learned that the basis on which counsel were selected to represent the various Tribunals was determined by the sole member of the Tribunal alone, in consultation with the Attorney General. No procurement procedures were followed in the selection process. The doctrine was that the Oireachtas was entrusting the sole member with the responsibility and he was to pick the best and most suitable legal personnel available for the tasks at hand.

The Committee heard that the selection and retention of counsel in these instances, as in other cases where barristers' services are retained by or on behalf of the State, was not approached through the normal procurement process. Provision is being made to remedy this procurement practice lacuna in the Tribunals of Inquiry Bill currently before the Houses of the Oireachtas. The Bill would create the scope for future competitive tendering processes, which would be desirable when one sees the duration of Tribunals. As things stand now, the sole member of the Tribunal has responsibility for the identification, selection and retention of counsel with the appropriate expertise and availability, as in all other engagements of counsel for the State at present. The relevant Departments paying for the selected barristers' services were not party to the selection process for any counsel engaged by Tribunals to date. Rather, the Accounting Officers from the relevant Departments advised that the customs and practices of the two legal professions in Ireland were followed and that there was no tendering process engaged in by any of the Tribunals. They explained that the normal way of doing things in Ireland is one where a solicitor, acting as the client's agent, would not be going to tender for counsels' services.

Absence of competitive tendering increased the cost to the public

The key concern of the Committee is that the services of counsel, many of whom have earned millions from their work with the Tribunals, were not procured by way of a competitive process. The services of counsel could have been obtained at lower rates if a competitive tender process had been undertaken.

Staffing levels

The Committee noted that there are major differences in the staffing and cost structures of the different Tribunals and that the individual staffing levels were recommended by the sole member of the Tribunal alone in each case. According to figures in the Special Report, the Mahon Tribunal has a staff of 50, of whom 21 are legal staff, the Morris Tribunal has a staff of 22, of whom five are legal staff and the Moriarty Tribunal has a staff of 14, of whom seven are legal staff.

Solicitors

The Committee believes that better use could be made of solicitors working in the Office of the Chief State Solicitor's Office, but the Chief State Solicitor advised the Committee that he would be anxious to avoid providing solicitors to act for Tribunals for fear of a perception of a conflict of interest, even though it is something he does not believe has arisen in the past. Given the level of cost, the Committee is of the view that CSSO solicitors should be seconded to Tribunals to cover that element of the legal work of Tribunals.

2.3 Legal costs

Setting the Tribunals' legal fees

The setting of an initial brief fee of €31,743 and €20,951 for senior and junior counsel respectively and the *per diem* rate of €1,714 for senior counsel and €1,143 for junior counsel was primarily dealt with by the Department of Finance and the Office of the Attorney General, but paid for by the relevant Departments administering the Tribunals.

Reviewing the per diem rate in 2002

In 2002 the *per diem* rate for senior counsel went up from €1,714 to €2,250 when the counsel engaged by the Tribunals in each case sought a review of the rate. The review was a function of specific proposals and representations made by the individual barristers concerned and, separately, a review conducted by the Department of Finance and the Office of the Attorney General about appropriate rates at that time. A legal cost accountant was consulted on what would be a reasonable rate at the time.

The Committee was advised that the continuity of the legal teams' service to the Tribunals was in question at that time and that it was a matter of real concern to the Tribunals in a number of respects that their capacity to retain their preferred counsel might be severely compromised. The Tribunals' counsel had submitted certain material in support of the case for an increase, including an assessment from independent consultants about what might be reasonable. The over-riding policy concern was to secure the continuity of the Tribunals, which were dealing with significant and sensitive issues.

The Committee has a difficulty in accepting the way this was handled given the likelihood of a continuous stream of income for the barristers concerned and the fact that many had already earned sums running to millions arising from their work with the Tribunals at that time.

Paying the Tribunals' legal fees

The Committee noted that, based on the figures in the Comptroller and Auditor General's report, the cost for the 21 legal staff in the Mahon Tribunal is estimated at €48 million, which is an average of €2 million per staff member. The Morris Tribunal had a legal team consisting of five members. The estimated costs for it are €10 million, which, again, is an

average of €2 million per staff member. The Moriarty Tribunal had a legal team of seven and estimated legal fees of €8 million, which gives an average payment of €4 million.

In the context of the level of fees, the Committee learned that the largest brief fee for a senior counsel engaged by the DPP's office would be for a murder case, which is €8,600. That covers all the preparatory work and the first day of appearance in court in what can be complex and voluminous cases and a subsequent per diem rate of €1,800. These figures stand in stark contrast to the Tribunal brief fees of €30,000 and a *per diem* rate of €2,250 for matters that in some Tribunals have lasted for over 12 years.

Attendance records

The Committee referred to three senior counsel at the Moriarty Tribunal being paid €2,500 a day for an extraordinary 304 days in 2008. The Moriarty Tribunal sat in public session for an average of 20 days in each of the past three years. The report advised that there were no specific attendance records for the legal teams maintained at the Morris and Mahon Tribunals. The Moriarty Tribunal records attendance of Tribunal legal team members but does not take account of arrival and departure times.

Extra payments made to Moriarty Tribunal Lawyers

The Committee was exercised to learn that at the Moriarty Tribunal, an extra €1 million has been paid to counsel because of an error in the Department of the Taoiseach, where counsel have been paid a *per diem* rate of €2,500 instead of €2,250 and where the matter was allowed continue without rectification.

The Committee was informed that after lengthy negotiations, a rate of €2,500 per day was agreed with Moriarty senior counsel and notified to them by letter in June 2002. A few weeks later, in view of the setting of the fee of €2,250 per day for senior counsel at other Tribunals, it was realised that the Moriarty rate had been agreed at a higher figure arising from a misunderstanding between the Department and those setting the fees. The Moriarty fee was reviewed again. It was considered that in view of the particular circumstances of that Tribunal, the higher fee was appropriate and, following advice from the Attorney General this rate was sanctioned by the Department of Finance on a personal basis. Tribunal senior counsel were informed by letter in August 2002 that the notification of the higher rate was an error but that, as an exceptional measure, it had been sanctioned to stand on a strictly personal basis.

The Committee was informed that the Department of Finance saw no basis for paying the higher fee of €2,500 per day and having regard to this, is of the view that steps should have been taken to apply the lower fee. The Department of the Taoiseach should have acted with more vigour in refusing the higher rate of payment.

Institutional memory

The Committee also heard from the Chairperson of the Competition Authority who dismissed the institutional memory argument advanced by Tribunal chairmen to justify paying higher rates to retain the services of specific barristers, advising that from his experience he would have every confidence in highly trained legal professionals being able to pick up the thread of something that somebody else did very quickly. Sometimes for good reason, counsel hired may find later that they might have a conflict of interest and another barrister has to come in straight away and pick up the threads. That is what barristers are trained for and experienced in.

The Committee noted that the Mahon Tribunal was established in 1997 and its chairman, Mr Justice Flood, retired but that the Tribunal did not collapse as a result. Also many of the senior counsel working for the Tribunals have come and gone for their own reasons, yet the Tribunals have carried on. Mr. Charleton, SC, became a High Court judge and was replaced. The Morris Tribunal did not collapse when Mr. Charleton left. The Secretary General of the Department of Justice and Law Reform also informed the Committee that some counsel already engaged by the Tribunals at a lower grade were promoted to take over the work of more senior departing counsel. This ensured a continuity of experience and knowledge which was important to them. The Committee finds it difficult to understand therefore why a stronger line was not taken in 2002 in opposing increases in fees for Tribunal lawyers.

2.4 Third-party legal costs

The Comptroller and Auditor General's report estimates that the total cost to the State across the three Tribunals examined is likely to amount to between €336 million and €366 million. The latest position on the costs of the three Tribunals is outlined in correspondence to the Committee which is contained in Appendix 1 of this Report. The assessment made by the Comptroller remains valid, albeit the figures are from 2008 and two of the Tribunals have continued in existence for longer than what was predicted in 2008. The true cost of the three Tribunals will not be known until third party costs have been decided in the case of Mahon and Moriarty Tribunals. The Committee notes that the Special Report provides a caveat in respect of estimating third-party legal costs.

It seems to the Committee that third-party costs are a big black hole and nobody can know what the final liability to the State will be. It was noted that it could be some years before the final costs are determined and known. It is an unknown liability and it seems to the Committee to be an extraordinary way of conducting business. The Department of Finance advised the Committee that no monies can be set aside to cover these unknown third-party costs as the liabilities have not matured.

Leverage for co-operation

The Committee heard that there are parameters within which third-party costs can be denied, and costs incurred by the Tribunals can be sought from the individuals concerned in certain circumstances. It is a matter for the Tribunals, exercising their judgment based on their assessment of the behaviour of the individuals concerned. In each instance, the truthfulness and co-operation of a witness is a weapon in the hands of a Tribunal and is the pivotal point, which gives massive leverage to it in exacting people's co-operation. It is a fact that already the bills of people who failed to co-operate or were dilatory in their co-operation have not been met or have been met to a much reduced degree.

When the Committee heard evidence from the Secretary General of the Department of the Environment, Heritage and Local Government, it was informed that there was an outstanding legal challenge against a decision of the Flood/Mahon Planning Tribunal to refuse two directors of engineering firm JSME Ltd their legal costs arising from their involvement with the Tribunal. The Committee heard that the outcome of the appeal then before the Supreme Court could have implications in terms of the right of a Tribunal on the award or refusal of third-party costs, and ultimately have major implications for the total quantity of costs to be faced by the State and the taxpayer. The Supreme Court subsequent to the hearing before the Committee ruled that the Tribunal had no power to make findings of obstruction and hindrance, which is a criminal offence, and that the Tribunal did not have the power to make an order in relation to costs in the context and terms in which it did.

The Committee is concerned that the JSME decision may have a significant effect on decisions to award or refuse third-party costs, and ultimately increase dramatically the total quantity of third-party costs payable by the State arising from the Tribunals.

Office of the Taxing Master

The Comptroller and Auditor General's report sets out the views of the Legal Costs Working Group established by the Minister for Justice in 2005. This group recommended the establishment of a new legal costs assessment office to replace the Office of the Taxing Master. In the view of the group, the taxation process lacks any transparency.

The recommendation to replace the Office of the Taxing Master was made in 2005. Subsequent to this, an implementation group was established on how to implement the recommendations of the Working Group. In view of the fundamental criticisms of the current arrangements applying to the Office of the Taxing Master made by both the working group and the implementation group, the Committee believes that this office should be replaced by a legal costs assessment office, which the Committee presumes would be more transparent, rather than have the remaining outstanding costs of the Tribunals dealt with by the current Taxing Master. The Committee is of the view that it would be preferable, from a

transparency viewpoint, if the level of third-party costs, which will have to be decided in respect of both the Mahon and Moriarty Tribunals, were dealt with by the legal costs assessment office proposed by the two legal costs groups.

Up-front costs arrangements

The Comptroller and Auditor General's report notes that a number of other countries he examined did not have a system which dealt with Tribunal costs retrospectively. Rather, they were dealt with on an up-front basis in advance, and if legal representation was granted to parties appearing before the Tribunal in question, the fees that would be payable to the parties' lawyers were dealt with at that stage. There also seems to be some inconsistencies in the granting of legal representation and the awarding of costs at different Tribunals. In some cases, the prior granting of legal representation did not confer an automatic entitlement to fees for the representation, and may have been refused on the basis of non-cooperation. In other cases, legal representation may have been refused by the Tribunal, but legal costs incurred in their dealings with the Tribunal were awarded by the Tribunal. Different judges at different Tribunals took different approaches to the awarding of costs with or without grants of representation.

2.5 Procedural shortcomings

The Committee noted procedural shortcomings in the operations of the Tribunals.

The Committee heard that despite the amendment of the Tribunals legislation in 2004, at the request of the Mahon Tribunal for the appointment of additional members, by reference to the scale and complexity of the matters remaining to be investigated, which would allow Tribunal members to sit in parallel and hear evidence on more than one module at a time, that Tribunal subsequently informed the Comptroller and Auditor General that the activation of that provision did not in fact ever become feasible due to the interlinked nature of its modules of inquiry.

The Committee is not satisfied that after the Oireachtas making legal provision for a new procedure, to discover that the Tribunal in question then decided that it was not practicable to use it and yet because the two extra judges have now been involved in hearing around 60,000 pages of evidence, the view of the Department is that the three-member operation is necessary to bring the huge volume of work to completion in terms of producing a final report. The Committee is of the view that the two extra judges retained by the Tribunal should have been released when the proposal to have parallel sittings did not proceed.

2.6 Conclusion

The legal costs associated with Tribunals that will ultimately have to be paid from public funds are huge. While there is uncertainty about third-party costs that will arise, there are agreements in place in relation to fees for counsel working for the Tribunals given the number of counsel who have earned substantial fee incomes running into the millions of euro. On the third-party costs issue, the Committee recommends that all future adjudications be undertaken in a transparent manner and therefore recommends that a legal costs assessment office be established. On the issue of fees for Tribunal lawyers, the Committee is of the view that a competitive tendering process would have procured these services at lower cost, and that the decision to increase the fees in 2002 should have been resisted by the State.

Chapter 3 How to make future Tribunals of Inquiry more cost effective

3.1 Law Reform Commission 2005 Report

Appendix L of Special Report 63 sets out the key recommendations of the report of the Law Reform Commission in the area of cost containment, which includes consideration of alternatives, such as the commission of investigation route; more precise terms of reference; a central source of guidance on Tribunal administration and procedure; and the establishment of up-front budgets. The Commission also suggested a range of measures to control the extent to which third-party legal representation would be funded from the public purse.

The Committee heard from the President of the Law Reform Commission that following on from its 2005 Report on Public Inquiries Including Tribunals of Inquiry, many of its 58 recommendations for reform of the law on Tribunals of Inquiry have been included in the Tribunals of Inquiry Bill 2005.

Many of the recommendations in the 2005 report aimed at promoting the efficiency of the Tribunal of Inquiry process by focusing on the following two elements: early project management of the process, including the drafting of terms of reference, which would contribute to overall efficiency; and management of financial costs at an early stage and flexible arrangements on personnel selection and fee arrangements.

As regards the financial cost of Tribunals, the Commission recommended that the relevant Department with responsibility for a particular Tribunal, following consultation with the Department of Finance, would set a broad budget figure at the outset of the Tribunal. The Commission recommended that flexible arrangements be put in place for the engagement and remuneration of solicitors and barristers and other personnel involved in Tribunals. This could include a combination of a set fee structure, a competitive tendering procedure or the existing procedure whereby a Tribunal engages a lawyer at an agreed level of remuneration.

One of the main recommendations in the Commission's report was that a central inquiries office should be put in place to gather together know-how, implement procedures that members of Tribunals would follow and implement administrative structures. For the taxpayer, this would facilitate much more project planning, competition, cost efficiency and so on and the whole question of fees could be dealt with there. That could dictate how people would be engaged, whether on a salary basis or by a competitive tendering process or on a module basis. The question of efficiency arises in terms of the modules and how one engages people for specific pieces of work. That is key. The Commission advised that a permanent office would not be appropriate but that there should be a core element of institutional knowledge available to ensure that before a full public Tribunal of Inquiry is set up, there is an examination of the other options first and the procedures decided on, depending on what route is taken.

3.2 Tribunals of Inquiry Bill 2005

There are recommendations and suggestions in the Comptroller and Auditor General's report relating to the manner in which Tribunals should be established and how they should operate. These recommendations are, for the most part, being provided for in the Tribunals of Inquiry Bill 2005. This Bill comprehensively reforms the legislation relating to the investigation of matters of urgent public importance and draws extensively from the Law Reform Commission's 2005 report. It is worth noting that on this issue, the Law Reform Commission, the Department of Justice and Law Reform and the Comptroller and Auditor General effectively came to the same conclusions.

The Committee notes that the Bill calls for the terms of reference of a Tribunal to be tightly drawn and that new lines of inquiry should be limited. The Bill clarifies the process for setting and amending terms of reference of a Tribunal and provides that a Tribunal shall not inquire into a relevant matter unless it is satisfied that the likely cost and duration of that inquiry is justified by the importance of the facts to be established.

The Bill provides for competitive tendering for the selection of legal, administrative and support staff, including solicitors and counsel, and provides for regulations governing the maximum amounts payable to barristers and solicitors in private practice.

The Bill provides detailed arrangements for dealing with costs. Co-operation with the Tribunal remains the key determinant for an award of costs to third parties and a Tribunal may also award costs against a person to the benefit of the Exchequer in the circumstances where a person knowingly or recklessly provides false or misleading information, as had been suggested by the Comptroller and Auditor General.

The Bill provides that soon after it is established, a Tribunal will be required to produce a statement of estimated costs, including anticipated third-party costs, and an estimate of the duration of the Tribunal, both of which must be laid before the Houses of the Oireachtas.

The Bill clarifies the situation with regard to the granting of legal representation before a Tribunal. A relevant person must apply for representation and the Tribunal will only grant the application where the person's legal or constitutional rights are likely to be significantly affected by the proceedings. In addition, the Tribunal will state its opinion as to the number of representatives that may be retained by a person.

The Committee welcomes the proposals contained in the Bill which should give more control to the State and the taxpayer over the costs of future Tribunals.

3.3 Comptroller and Auditor General's Special Report 67: Laffoy/Ryan Commission of Inquiry into Child Abuse

The Secretary General of the Department of Education and Science, in evidence to the Committee, outlined how the estimated timescale for the Commission of Inquiry into Child Abuse was to be two years and an early estimated cost was approximately €2 million to €2.5 million. It is now clear that it is likely to last in excess of ten years and cost approximately €130 million. The Committee heard that one reason for the delay was the number of judicial review challenges. The Committee feels this situation may mirror some of what has happened with other Tribunals, where it was envisaged that the process would be far shorter and less costly than it turned out to be.

The Committee heard that the initial rates set for counsel, at the time the Commission was established, were about 10% higher than those for senior and junior counsel in the other Tribunals then ongoing. The rates were agreed at the time on the basis that there had been inflation in legal fees since the other Tribunals had been established and their legal fees agreed. A case was made through Ms Justice Laffoy to the Department that the appropriate rate was 10% higher because of the level of legal fees being charged by barristers and solicitors in private practice at the time. The rates then fell behind and were due to be reviewed after two years. They were not reviewed and, therefore, fell behind. As a result, they were lower than for the other Tribunals for a period and were brought into line with the rates for the other ongoing Tribunals at a later stage.

The Committee heard that general lessons can be learned from the operation of this inquiry and they are being reflected in the proposed new legislation discussed above. In terms of application, there was no requirement in the legislation at the time that people would apply in advance for grants of legal representation. The way in which the Commission operated — it was clear from Judge Laffoy's scheme of operation — was that people would be allowed one barrister and one solicitor unless they applied in advance for alternative arrangements. The Commission's third-party costs are now being negotiated on the basis of one barrister and one solicitor for each of the parties deemed to be entitled to them.

The Secretary General of the Department of Education and Science advised that were the Department ever to be involved in the establishment of such a commission again, the issue of the awarding of costs must be determined at the outset and put in place before such a commission be allowed to commence.

3.4 Findings of Special Report No. 63: Tribunals of Inquiry

The Special Report makes a range of suggestions for the more efficient conduct of Tribunals. Apart from having more focused terms of reference, there may be merit in limiting new lines of enquiry to instances where the Tribunal has reported it is satisfied that the cost and duration of those additional enquiries are likely to be justified by their relevance to the Tribunal's terms of reference of the matters to be investigated. This together with the provision of periodic interim reports by each Tribunal on its general progress would allow the

Oireachtas to review the cost-justification of new lines of enquiry and the progress being achieved on the Tribunal's core mandate.

The Report recognised that, due to their investigatory nature, the costs of Tribunals are difficult to estimate. Nonetheless, good financial management demands that mechanisms be established to make Tribunal costs more predictable and transparent. One possible approach would be to require the production of a formal public statement of estimated costs, timescale and milestones, at all key stages, beginning with the Tribunal's establishment. This statement could be subsequently updated to take account of significant developments or proposed new lines of enquiry.

Much of the support work at Tribunals is done using barristers in private practice. There appears to be scope to achieve significant economies by:

- using less expensive paralegal or professional staff for research and investigation work
- moving away from the 'exclusive attention' basis of hiring barristers in private practice and engaging individual barristers for discrete modules only
- employing barristers instead of retaining them
- implementing a scheme of pre-determined fee rates for future Tribunals which takes account of the certainty of Tribunal work for barristers and solicitors in private practice on their own accounts in determining those rates.

Third-party costs represent the major portion of the cost of Tribunals. These costs are awarded and their amount determined in retrospect. While the process in other countries varies, application for legal fees to be met from the public purse is required prior to participation in the public inquiry process in Australia, Canada and the UK. It would be worth exploring the feasibility of providing for the up-front grant of legal representation and determining its extent based on an application that gives reasons why a person considers he or she should be represented, and why they require the services of more than one legal representative.

There is also a need to clarify the circumstances in which a Tribunal may award costs by establishing criteria to guide Tribunal chairs.

In circumstances where a person increased the duration of hearings by knowingly or recklessly providing false or misleading information or otherwise failing to provide appropriate cooperation, the existing statutory provision allowing costs to be awarded against that party for the benefit of the Exchequer, would also reduce the cost of Tribunals to the State and the taxpayer.

3.5 Conclusion

The Committee finds that Tribunals are not cost effective as presently structured: it notes that other forms of inquiry such as commissions are now used by the State and these appear to work better and are less expensive. That said it is important that the State retains the capacity to establish a Tribunal and to that end the proposals for reform which commenced with the report of the Law Reform Commission and which are currently contained in the Tribunal of Inquiry Bill, 2005 should be brought into force.

Chapter 4 The provision of legal services to the State

4.1 Introduction

The State is the largest purchaser of legal services in the country and responsibility falls on Accounting Officers and heads of public bodies for ensuring value for money in this area. The Committee has a duty to follow up on this issue so as to provide assurance to the taxpayer, based on audit findings in respect of legal costs. The Committee recognises that legal services provide part of the fundamental infrastructure of the economy and are very important to competitiveness in the economy. Ireland has improved its competitiveness performance across a number of sectors in recent years but it still remains an expensive location for legal services.

As outlined in the introduction to this Report, the level of expenditure by the State on legal services has not been calculated: it runs into the hundreds of millions. The Committee has in recent times heard evidence which shows that there has been some slow gradual movement towards public bodies tendering for solicitors' legal services (the HSE and NAMA for example), however it remains the position that there are still a large number of public bodies and local authorities that have never gone to tender for solicitors' legal services. More importantly, and in line with custom and practice of the legal professions, there are no instances where the legal services provided by barristers have ever been procured by any public body by way of advertised open competitive tendering. It appears that many contracts for legal services are allocated on the basis of administrative convenience where the incumbent provider of such services is familiar with the needs of the public body and there is a reluctance to open up such contracts to the market. This is a system that will have to change.

4.2 Appointment of legal advisors by the State and the legal costs incurred

In the course of the Committee's work, it increasingly encountered more and more situations where questions about the subject of legal services arose, mostly concerning the procurement of legal advisors and the resultant costs to the taxpayer. This chapter examines some of these instances:

Bank stabilisation

The recently-published Comptroller and Auditor General's Special Report No. 76 revealed that €1.61m of taxpayers' money was spent on legal consultancy fees in respect of the various measures taken to stabilise the banking sector.

National Asset Management Agency

NAMA is incurring high legal costs, given the nature of its work especially in carrying out due diligence on loans transferring to it from the covered financial institutions. In the first three tranches of loans it took over, the costs of due diligence on the legal side was €5.4 million. However, the legal adjustments it made as a consequence of the defects that came to light in those loans amounted to €259 million. The Committee recognises the value of such diligence, however it is uneasy about the amounts of money being spent and the small number of firms from its panel of legal service providers being instructed.

The Committee is aware that there is provision in the NAMA legislation to allocate €2.5bn towards professional fees, of which a significant amount will be for legal fees. The Committee has a concern that taxpayers should not end up paying for a repeat of the high and uncontrollable legal costs incurred at the Tribunals of Inquiry. The Committee is anxious that competitive procurement systems for solicitors' and barristers' services are put in place, that own and third-party costs are negotiated in advance and that those relevant recommendations from the Comptroller and Auditor General's Special Report No. 63 into the Tribunals of Inquiry are seriously considered where appropriate.

Tribunals of Inquiry

Chapter two of this Report has highlighted the estimated costs of the three Tribunals that were the subject matter of C&AG Report No 63. The extended duration of these Tribunals has led to increased costs although even at this stage their ultimate cost to the taxpayer remains inherently difficult to estimate. However, assuming the Tribunals conclude on the dates currently predicted and based on the pattern of costs experienced by them to date, the likely cost to the State of those three Tribunals is estimated to be in the region of €336 million to €366 million. A major area of uncertainty pertains to third-party costs. There is a risk that, due to extended timescales, the ultimate bill to the State could rise very significantly.

The Committee welcomes the Government decision which has seen daily rates reduced by successive cuts of 8% applied in recent years to all professional service fees. With the exception of the three Tribunals reported on, in 2006, the daily rates for senior counsel were reduced to €1,004.

State Claims Agency

The State Claims Agency advised that its legal fees, plaintiff fees and the fees of the agency were €8 million in 2007. Since its establishment in 2001, the agency has recovered €6.6 million on legal costs. While the Agency assured the Committee that it endeavours to recover costs wherever it can, the Committee understands that the amount actually recovered is small relative to activity in recent years.

Asylum Legal Aid

The Committee heard that approximately €8 million per year is spent by the Department of Justice and Law Reform directly funding the legal supports for asylum seekers through the Refugee Legal Service, which is an arm of the Legal Aid Board, and that fewer than 2% of applications succeed. While the Committee recognises the rights of all to legal representation, it has concerns that a number of frivolous proceedings may be leading to the generation of yet more legal fees. This is an issue that the Committee will examine in more detail in the future.

Criminal Legal Aid Scheme

The Committee is aware that in 2010, €4.2 million was paid to barristers and solicitors through the Criminal Legal Aid Scheme. This payment represents a 5.7% decrease on the 2009 figure of €7.5million.

4.3 The State's role in the preservation of a high legal fees culture

While it has been mentioned to the Committee on many occasions that the State generally pays less than the market rate for the legal services it purchases, the Committee has a great difficulty in understanding how one can determine what the market rate for legal services is. The essential problem lies in the fact that the market rate cannot be deemed the benchmark given that it is determined outside of any form of competition. The Committee notes that there are guideline fees, however these are based on what is charged generally and when an international comparison is made, these are high. The Committee accepts that in terms of market rates, the State can and does pay somewhat below the standard rate. It would be very worrying to the Committee if the State was paying market rates for legal services considering the quantity of legal services it purchases. It is a natural business expectation that private purchasers of legal services will pay a little more than the State will pay for legal services as their purchases are nowhere near as voluminous, as frequent or as informed.

In addition, the guarantee of payment from the State in the current economic market is invaluable. Members of the legal professions, no matter how big or small, are currently experiencing the same invoice collection difficulties faced by many other businesses.

The Chairperson of the Competition Authority advised the Committee that in his view the reason legal fees in Ireland, generally speaking, are so high relative to other countries is because the legal professions can charge what they think the market can bear. His reasoning is that there are too many protections and shelters which protect individual professionals from the vagaries of a competitive market. An example given to the Committee was that if one has a dispute with one's solicitor and one wants to get another solicitor, the first solicitor can hold on to one's file until he or she gets paid what he or she thinks the client can bear. There is no other profession where that is the case. The Committee is of the view that the State is not doing all it can to address the issues of high legal fees and until the State implements reform

within the legal professions, it perhaps inadvertently is facilitating a continuation of existing practices which maintains a culture of very high legal fees.

4.4 Legal costs to the State

The net overall cost of the three main offices that provide legal services to or on behalf of the State, the Chief State Solicitor's Office, the Office of the Attorney General and the Office of the Director of Public Prosecutions, in 2008 was €103 million, of which €31.5 million was legal fees paid to barristers in private practice.

Counsel fees

The CSSO advised that the practice would be not to agree a fee for their legal services with counsel in advance. Given the nature of the work allocated to counsel by the CSSO, the fee submitted is examined in the context of the quantum and complexity of the work and also the performance of the counsel involved. The CSSO does not operate a scale of fees as it is thought that to do so may be anti-competitive. The Committee has serious reservations about how the State can get value for money if legal fees are not agreed in advance.

The CSSO advised the Committee that there are significant controls in place to manage expenditure and legal fees paid to counsel. Guidelines agreed with the Department of Finance governing payments of counsels' fees, which have been in place since 2002, are applied. The CSSO advised that counsels' fees are assessed by looking at volume and complexity, magnitude of the issues, time required to do the work, urgency and importance of the case, and the seniority, standing and special expertise of particular counsel engaged to provide legal services. It also looks at the potential exposure to the State, to consequential legislative change or financial implications and at legal fees paid in comparable cases. The performance of counsel is taken into account in the payment of legal fees.

Recommendations are made to accept or negotiate counsels' fees, having regard to the guidelines in force from the Department of Finance since 2002. Although market forces influence the ultimate level of counsels' fees it is stated that the Attorney General's office and the Office of the Chief State Solicitor pay counsels' legal fees at significantly less than the perceived market rate for such legal services. In any event, where a fee exceeds €9,525, sanction of the Department of Finance is required.

The CSSO believes the rates for legal fees it pays counsel are significantly lower than the rates operating in the market. It was stated that in a comparison of fees paid to State counsel against legal fees fixed by the Taxing Master, the evidence supports the view that State rates are preferential.

The Committee welcomed the recent putting in place of a high level professional fees group within the CSSO with the purpose of ensuring that legal fees paid to private practitioners are fair, consistent across the office, in keeping with guidelines and Government policy, effect

savings and that they represent good value for money. The Committee heard that, following these enhanced controls, the office achieved an overall reduction of 14.7% in the outturn for payment of counsel's fees when comparing 2009 with 2008. While this reduction relates to actual payments made, and is to be welcomed, the reduction may have to be qualified if the actual quantum of work supplied by counsel had also fallen.

Selection of counsel to act for the State

The DPP advised that its system of employing counsel is on the basis of panels for different areas of law and different geographical areas. In overall terms it uses the services of about 170 counsel, both senior and junior.

The CSSO also uses panels which are prepared by the Attorney General and are updated twice a year. The selection of a particular counsel to undertake a task is at the discretion of the Attorney General, based on his knowledge of the competence of the particular counsel, the nature of the work involved and the availability of counsel. The State is keen to get the best people. The quality of service is important and it is also necessary to have due regard to the specialised expertise.

The Attorney General invites applications from all barristers. There is no procurement procedure, in the sense of tendering, competitive or otherwise. Selection of counsel for each case and the number of counsel engaged is left to the discretion of the Attorney General.

8% reductions

Government implemented a policy of applying an 8% reduction in professional fees in 2009 and again in 2010. The successive cuts of 8% applied to counsel fees. The Committee heard that the 8% reductions do not apply to third-party costs in matters where the State pays the costs, as these are determined by market rates.

4.5 Procurement and competitive tendering for legal services by State and public bodies

The Committee noted the final recommendation in the Competition Authority's 2006 report on the two legal professions that the State should examine the possibility of introducing competitive tendering for the provision of legal services to the State as a consumer or procurer of legal services. The intention was to ensure the State could get value for money or better value for money for the legal services it purchased in appropriate circumstances.

Competitive tendering and contracting out has been widely adopted internationally as a tool to improve budget performance and lower costs. It is widely and successfully used in government and industry for the procurement of a wide range of products and services. In the area of legal services specifically, competitive tendering may be an appropriate tool for

obtaining value for money where a Department, local authority or other public body requires ongoing legal services. Clearly, competitive tendering would involve solicitors and barristers competing to be the chosen provider of defined legal services for a specific period. With a tender process, interested persons make a proposal and one is selected based on quality, price and value for money. Naturally, the design of the request for tenders is important in securing quality services at the right price in the long term. If some of these principles of competitive tendering had been applied at the initial stages of appointing legal counsel for the Tribunals, the bill being faced by taxpayers for services rendered might have been considerably lower.

The Committee is aware that many public bodies and local authorities successfully run competitions for solicitors' and barristers' legal services in England and Wales without difficulty, and has been advised that there is no reason why this cannot be replicated in Ireland.

4.6 Background law and guidelines on the procurement of legal services by State and public bodies

All other professional services purchased by the State are procured in accordance with 2004/18/EC (the "Public Sector Directive"), except legal services, as it uniquely categorised as an Annex IIB service and thus not subject to the full scope of the Directive. The costs of other professional services to the State in recent years have reduced significantly as the obligations under the Directive provide that all Departments and agencies procure these professional services by way of competitive tendering. In comparison, there have been only marginal declines in the costs of legal services in recent years, despite deteriorating economic circumstances across the wider economy. Some contracting authorities have run competitive tendering processes for solicitors' legal services in order to ensure that public money is spent in an economic, efficient, transparent and effective way with a view to achieving value for money for the contracting authority.

The Committee believes that all legal services to be provided to the State by solicitors and barristers in private practice must be procured in accordance with the National Public Procurement Policy Unit (NPPPU) Public Procurement Guidelines – Competitive Process 2004 for competitive tendering and conducted in accordance with prescribed procedures which observe fundamental EC Treaty principles of non-discrimination, transparency, proportionality, mutual recognition and equal treatment. The guidelines provide that all procurements over €5,000 must be conducted by way of receipt of competitive fee quotes.

The Department of Finance has advised the Committee that value for money needs to be at the heart of every procurement by the State. The Committee feels that the State is not getting value for money in respect of its procurement of legal services. The Committee believes that the listing of legal services in Annex IIB is not a sufficient or justifiable reason to excuse Government Departments and public bodies from tendering for solicitors' and barristers' legal services. The Committee heard that the listing of legal services in Annex IIB in the EU directive is not preventing other member states of the European Union from going to tender

for all legal services and achieving significantly better value for money from legal service providers.

4.7 The role of the Department of Finance and Accounting Officers

The Committee has taken issue on many occasions with the role of the Department of Finance in the procurement area and is of the view that the Department needs to be more proactive in procurement.

All Departments are allowed spend public money under the delegated sanction of the Department of Finance. The Committee is of the view that in allocating voted monies to Departments and Offices, the Department of Finance should give an annual sanction which sets out the conditions under which the monies are allocated to the Department and which should state that, in the case of funds available to procure legal services, the sanction will be withdrawn if the Department of Finance becomes of the view that the public body has not taken sufficient steps to undertake procurement in a manner that ensures compliance, or if it is apparent that Departments/Offices are not availing of centrally-placed contracts and framework agreements, or if it becomes aware of a significant loss to the State arising from the procurement practices of that public body. The Committee is of the view that in placing such conditions on its sanction to spend funds, the Department of Finance will have a stronger oversight of the public procurement practices engaged in by Departments/Offices in the procurement of legal services.

The NPPPU in the Department of Finance, and the National Procurement Service in the Office of Public Works under the aegis of the Department of Finance, promote and support public procurement policies and act as centres of excellence providing advice on implementing procurement policy in line with best practice and Government initiatives. The Committee believes that these two dedicated procurement services must urgently provide support and guidelines to Government Departments/Agencies to address and resolve the inconsistent and non-compliant procurement practices for legal services that have come to the Committee's attention.

Equally, Accounting Officers need to have systems in place to ensure that procurement guidelines are implemented fully and that procurement is a priority within the organisation, not least because of the risks that are inherent in procurement if things go wrong. The Committee would expect a greater degree of effort to be made by Accounting Officers to ensure that value for money is achieved in the procurement of legal services. Finally, the whole financial accounts and the way that procurement transactions are both accounted for and certified needs to be more transparent.

4.8 Conclusion

The provision of legal services to public bodies forms a significant part of the market. The key players for the State, including the CSSO and the DPP, have highlighted the controls they have in place to control legal costs. The Committee accepts that these bodies pay less than the market rate, however it is of the view, based on evidence from the Competition Authority and elsewhere, that the market rate may be artificially high and that it cannot be used as a benchmark as it has not been determined by a competitive process. This needs to happen and Chapter five examines what has been proposed in this area and how the system works elsewhere.

Chapter 5 Competitiveness in the legal professions

5.1 Introduction

In its Report, the Competition Authority outlined a set of competition issues that it identified in respect of the two legal professions and made 29 recommendations for reform, a number of which relate to legal fees. These include in particular the need to remedy the limited information on fees and costs on the part of persons purchasing legal services made available by individual solicitors and barristers and by their representative bodies; the fact that the State, as the largest purchaser of legal services, is well-placed to influence the move towards competitive tendering; and the need to ensure that the taxation-of-costs process does not support anti-competitive restrictive practices.

The Committee heard that the Competition Authority's statutory function is to advocate for more competition in the economy. It has the power to investigate complaints and use its powers of enforcement if complaints are substantiated and are an offence under the Competition Act. However, it prefers to rely on the power of persuasion and the power of the argument, which it says pays dividends with many Departments adopting its recommendations and legislatively providing for them.

Disappointingly, the Committee heard that of the 15 recommendations in its report which were addressed to the Department of Justice and Law Reform in 2006, only one recommendation so far has been implemented. The Committee informed the Department of Justice and Law Reform that it would draw its own conclusions from the inadequate response by the Department to the Competition Authority's findings and recommendations.

5.2 Regulation of the legal professions

The Committee heard that in terms of the regime of restrictions and law over which the State presides, the self-regulation of the legal profession is a significant problem. One only needs to look at almost every other profession in this country and the split between the regulatory and representative bodies is clear. The Medical Council and the Irish Medical Organisation were mentioned to the Committee by way of an example of a separate regulatory and representative body in another profession. Furthermore, the Committee heard that the Bar Council of Ireland has no statutory basis and is best described as an association of undertakings under the Competition Act. The legal profession is one of the last professions in Ireland, and in fact may be the last, that is holding out for a self-regulatory system.

A comparison was made with England and Wales, with whom Ireland shared a common legal system and structure until quite recently, where the same self-regulatory systems existed but the British Government has since changed that and the splitting of regulatory and representative roles has taken place. There is now an independent regulatory oversight body for barristers and solicitors in England and Wales. It is being done in Britain and is being done or has been done a long time ago in every other profession in Ireland.

The Committee, while welcoming the proposed establishment of a Legal Services Ombudsman, notes its limited functions and is of the view that it goes nowhere near the fundamental sort of reform of the legal professions and the legal services market that is necessary. Effectively, it will add a further small piece to the disciplinary processes of the Law Society and the Bar Council but the Ombudsman will not have any redress powers to resolve consumers' complaints and will send legitimate complaints back to the Law Society or Bar Council for further investigation by the self-regulated body.

5.3 Restrictive practices preventing transparency and competition

From evidence heard during its lifetime, the Committee has concluded that legal practitioners seem to be regarded as comprising of a very privileged group. It seems to the members of the Committee that the normal rules of accountability do not apply to the legal profession. From the exorbitant figures charged and paid to members of the legal professions by the State Claims Agency, HSE, local authorities and public bodies, at the Tribunals and Commissions of Inquiry, during the bank stabilisation process and the provisions being made in NAMA for legal costs, it seems the legal profession is treated very much with a kid-glove approach on the part of the State. With all the restrictions it identified in its report, the Chairperson of the Competition Authority informed the members that one could drill down through them and see that they will inevitably lead to higher costs for the person paying the piper. The range of studies it has done of various professions and sectors, informs us that there are too many legislative and regulatory shelters under which people, professionals and businesses of all kinds can take refuge. When those are stripped away, costs, fees and prices start to fall.

The Committee was advised that within the Office of the Attorney General, there is a convention and the scales it has on litigation do not necessarily operate on the practice of paying junior counsel two thirds of the fees of senior counsel. It looks at the work performed by the junior counsel but acknowledges that as a rule of thumb the two thirds rule is adhered to by the Bar.

On the fees for litigation, the Office of the Attorney General does not accept that the guideline scales it operates are extraordinarily high despite a member of this Committee mentioning that former Supreme Court Judge, Mr. Justice Barrington had recently commented that the State was the key driver in setting exorbitant legal fees because of its failure to address the issue.

The Office of the Attorney General and the Chief State Solicitor's Office argue that they get a substantial discount from private sector rates. They point out that State fees for litigation are not extraordinarily high and following the CSSO's analysis the offices believe they are getting considerable value for money compared to the private sector.

Other recommendations by the Competition Authority to address changing restrictive practices which prevent transparency and competition include allowing consumers and

businesses to have direct access to barristers for legal advice; ending restrictions on entry into the legal professions; ending restrictions on competition between practising lawyers; barristers to be allowed form modern business structures such as partnerships; the common law right of solicitors to hold on to a client's file, thus preventing a client from switching to another solicitor, being removed; and legal fees, in practice as well as in theory, being awarded on the basis of work done, and not by reference to the size of the award received by the client or other irrelevant considerations.

5.4 The report of the Legal Costs Working Group 2005

One of the recommendations in the report of the Legal Costs Working Group, which was established by the Minister for Justice, was that provision should be made for up-to-date information and data to be made available to the public on the outcome of assessments and appeals under a new Legal Costs Assessment Office, to replace the Taxing Master's Office. As it stands, the taxation process lacks any transparency. The report stated that the absence of a public record of taxation decisions or any register of taxation outcomes recording key factors in the outcome, has created a significant information deficit which severely limits public awareness and awareness within the legal professions, of the likely levels at which bills of cost in different categories of proceedings or stages within proceedings, may be allowed or not.

5.5 The taxation of costs system

The Committee understands that some work has commenced in drafting a Legal Costs Bill, reflecting the analysis of the report of the Legal Costs Working Group and the subsequent Legal Costs Implementation Advisory Group. The Committee understands that one of the concerns of the Department relates to the reluctance to establish another State body. Notwithstanding this issue, the Committee is of the view that the substantive recommendations of the groups regarding the assessment of legal costs are still valid. The aim of a Legal Costs Bill would be to make changes that would lead to greater efficiency and transparency and greater competition and predictability of legal costs and discourage the incurring of unnecessary costs and recourse to wasteful and restrictive practices in the conduct of litigation.

There would be an examination of the current structure of the Office of the Taxing Master with a view to introducing a more modern legal costs regulatory structure in the Courts Service in which people would be specially recruited for that task and where the principles underpinning the assessment would be set out more fully in statutory form. In the spirit of the reports, costs would be assessed primarily by reference to work appropriately done where the level of recoverable costs should not be proportionate to the value of the claim or award and should not be the main determinant for the amount of costs recoverable.

If the Oireachtas saw its way to making legislation in this regard, such a modern costs assessment process would have regard to all relevant circumstances, including complexity, skill, specialised knowledge and value of the claim or counterclaim.

5.6 IMF/EU Memorandum of Understanding

The IMF/EU Memorandum of Understanding requires as a pre-condition on further loan drawdowns that the Government implement the recommendations of the Legal Costs Working Group and outstanding Competition Authority recommendations by the end of Quarter 3, 2011. The Committee very much regrets that it has taken an external agency like the IMF to insist that these recommendations are in fact implemented.

5.7 Conclusion

The Committee notes the restrictive practices that are keeping legal fees artificially high. As public bodies are the largest procurer of legal services, it believes the State should bring in reforms that will eliminate restrictive practices and bring in more competition in this market. The Competition Authority has provided a blueprint which will facilitate change and it is the Committee's view that this should now be implemented.

Chapter 6 Findings and Recommendations

Findings

1. As of mid 2009, the likely cost of the Mahon, Moriarty and Morris Tribunals of Inquiry is between €336 – 366 million, with serious caveats and contingencies that third-party costs could increase the final sum.
2. Five Senior Counsel working for either the Moriarty or Mahon the three Tribunals had earned in excess of €5 million on legal fees (see Appendix 1).
3. The Chief State Solicitor's Office, the Director of Public Prosecutions and the Office of the Attorney General pay over €30 million each year in counsel fees.
4. Barristers have not asked to competitively tender on price to provide their legal services to State bodies.
5. Legal services are listed as an Annex IIB category in the EU Public Procurement Directive, and thus the full scope of the Directive does not apply. Many State and public bodies are relying on this provision to excuse themselves completely from running competitive tender processes when they procure expensive legal services. Annex IIB does not prevent contracting authorities from procuring legal services by competitive tender.
6. The Department of Finance procurement guidelines clearly provide that all services with a value over €5,000 must be procured competitively by getting at least three written fee quotes in advance.
7. The State is the largest procurer of legal services in Ireland.
8. Reform of the legal sector has been under consideration since 2006 when work commenced in the Department of Justice and Law Reform on proposals for a legal costs bill.
9. The Competition Authority Report which reviewed legal services was published in 2006 and the implementation of the key recommendations in that report has not happened.

Recommendations

1. Competitive tendering should be made mandatory for the procurement of solicitors' and barristers' services by the State, so that a greater number of legal service providers have the opportunity to compete for work. This will lead to better service and better value for money for all State and public bodies.
2. The Department of Finance should issue a Circular to all Departments and Accounting Officers requiring that all State and public bodies comply with its guidelines when procuring legal services from private practitioners.
3. The taxation of costs system should be overhauled or replaced so that legal professionals and consumers of legal services have available to them clear guidance on current market rates for such services.
4. All State and public bodies must ensure that own and third-party costs for all legal proceedings relating to future Tribunals and Commissions are decided in advance either by negotiation or through using court rules for the exchange of detailed fee estimates.
5. The legislation underpinning Tribunals needs to be reformed along the lines proposed in the Tribunal of Inquiry Bill, 2005.
6. Restrictive customs and practices in the two legal professions which lead to higher legal fees should be challenged and removed and should not be tolerated any longer by the State.
7. The accounts of all State and public bodies should provide the total amount spent on legal services.
8. Accounting Officers should ensure, unless there are valid reasons to the contrary which should be clearly recorded in writing at the time for audit purposes, that value for money is paramount in the procurement of legal services.

Appendix 1 – Cost of the Tribunals of Enquiry



OIFIG AN ARD-RÚNAÍ, AN ROINN DLÍ AGUS CIRT, COMHIONANNAS AGUS ATHCHÓIRITHE DLÍ
OFFICE OF THE SECRETARY GENERAL, DEPARTMENT OF JUSTICE, EQUALITY AND LAW REFORM

Mr. Ted McEnery
Clerk to the Committee
Committee of Public Accounts
Leinster House
Dublin 2

3.3



20/01/11

Re: Costs of Tribunals of Inquiry

Dear Mr. McEnery,

I refer to your recent letter of 14 January requesting information in respect of the Morris Tribunal.

The requested information is detailed in the information note enclosed.

Yours sincerely,

Seán Aylward
Secretary General

21 January, 2011

**Information requested by the Committee of Public Accounts
in respect of the Morris Tribunal**

1. The overall cost of the Tribunal until end of December 2010

The overall cost of the Morris Tribunal from its establishment in April 2002 until the end of December 2010 is €57.89m.

2. The projected final costs of the Tribunal having regard to Figure 2.2 of the Special Report

(Figure 2.2 was the Projected final costs excluding Third Party Costs)

Category of Cost	Low	High	As at end 2010
Administration	16.16	16.81	17.32
Legal Team Fees	10.18	10.60	9.57
Litigation Costs	0.38	0.38	0.40
State Respondent Costs	11.93	11.93	11.93
Other State Costs	5.55	5.55	5.55
Total	44.20	45.27	44.77

This Department still expects the final cost of the Morris Tribunal to be in the order of the €70m figure mentioned by the Secretary General during his appearance before the Committee in July 2009.

We estimate that the total cost to date of €57.8m and expected future third party costs of approximately €12.5m to €15m (see para 4 below) could put the final figure at approximately €72m.

The Special Report of the Comptroller and Auditor General puts the final figure at approximately €80m but this figure includes costs arising to other Departments arising from the Tribunal.

3. The amount paid to each member of the Tribunal Legal Team

The final figures for the amounts paid to each member of the Tribunal's legal team are as follows:

Mr Peter Charleton SC	€2.2m
Mr Paul McDermott SC	€3.2m

Mr Anthony Barr SC	€2.6m
Ms Kathleen Leader BL (Part-time Researcher and later a member of Legal Team)	€0.7m
Mr Shane Dwyer BL (Legal Researcher)	€0.7m

4. A note on the position of third party legal costs

The total amount paid to the end of 2010 in respect of third party legal costs at the Morris Tribunal is €30.03m. This figure includes an amount of €9.3m in respect of the legal teams for the Garda Commissioner and the Department. The remaining figure of almost €21m relates to third party witnesses appearing before the Tribunal.

In all there were a total of 154 applications for costs made to the Tribunal.

The Tribunal granted 115 Orders for full costs; 17 Orders for partial costs, ranging from 10% to 80%, and refused 22 applications in their entirety.

A total of 59 bills of cost have been received to date. 50 have been negotiated and/or taxed by the Taxing Master and paid at a total of approximately €21m. A further 9 Bills of Cost, claiming a total of €11.2m, are on hands at present. These are being examined at present and it is expected that they will be substantially reduced during the negotiation/taxation process. Average savings of between 35 and 50 percent have been achieved on the bills of costs paid to date.

Bills of Cost in respect of 59 Orders have yet to be received. However, because Judge Morris issued "joint orders" in a number of modules it is expected that 39 of these could be encompassed within 2 bills. In all, this Department expects to receive about 22 further bills. It is a matter for the parties themselves to prepare the bills of cost and it is unclear when they might be received.

In total, therefore, it is estimated that 31 bills have to be finalised. The average cost to date is €0.4m, giving an estimated total of €12.5m outstanding. Allowing for some deviation from the earlier pattern it is estimated that this figure could be as high as €15m, giving rise to the previously mentioned possible overall estimated cost for the Morris Tribunal of up to €72m.

3.7



January 2011.

Mr. Ted McEnery,
Clerk to the Committee,
Committee of Public Accounts,
Houses of the Oireachtas,
Kildare Street,
Dublin 2.

Dear Mr. McEnery,

I refer to your letter of 14 January 2011 in relation to Costs of Tribunals of Inquiry and enclose the information requested in relation to the Mahon Tribunal.

Yours sincerely,

Geraldine Tallon,
Accounting Officer.

Note on the Planning (Mahon) Tribunal for the Public Accounts Committee

1. Overall cost of the Mahon Tribunal to end 2010

In 2010, the cost of the Tribunal was **€3.28m**, of which:

- the cost of the internal legal team amounted to **€1.58m**,
- administrative costs were **€1.38m**,
- court costs were **€0.05m**, and
- third-party costs were **€0.27m**.

The overall cost of the Tribunal met from the Department's Vote up to end 2010 was **€93.22m**. Including an estimate of **€12.38m** in relation to State costs (based on the figures given by the C&AG), the total cost of the Tribunal to end 2010 is of the order of **€105.60m**.

The main elements of the Department's expenditure on the Tribunal are –

- operational costs, including the fees of the Tribunal's internal legal team;
- court costs i.e. the costs of litigation in which the Tribunal has been engaged;
- third-party costs, i.e. costs incurred by persons in their dealings with the Tribunal.

The table below sets out the breakdown of costs to end 2010:

Tribunal Costs incurred by DEHLG							
	1. Administrative costs (incl. non legal staff)	2. Tribunal's internal legal team	3. Court costs (breakdown in 3.1 and 3.2)	3.1. Court costs - external counsel engaged by Tribunal	3.2. Court costs - other costs	4. Third party costs	Total
To end 2010	€28,312,592	€48,820,640	€6,051,993	€3,260,966	€2,791,026	€10,030,077	€93,215,302

2. The projected cost of the Tribunal

The Comptroller and Auditor General, in his Report of December 2008, indicated an estimated total cost of the Tribunal of between **€171m and €194m**, including third-party costs of between **€84m and €104m**. The C&AG did, however, note that third-party costs could be much higher if a final pattern resembling previous tribunals were to emerge.

In April 2010, the Supreme Court ruling in the JMSE Judicial Review litigation reversed the decision of the High Court that JMSE were not entitled to their costs on the basis of the Tribunal's finding that they had obstructed the work of the Tribunal. This judgment may have implications for other claims for third-party costs.

The current estimate of the Chairman of the Tribunal, taking account of the aforementioned decision, is that the total costs may be in the region of €247m. This would be based on an estimate of total third-party costs of something in the region of €147m: however, there is no way of knowing the amount that will be claimed and agreed in respect of third-party costs over the period 2003-2008, until such time as the specific claims are submitted, assessed and resolved. The first claims and payments for third-party costs arising in this period are likely to be made in the third quarter of this year.

3. Total amount paid to each member of the Tribunal Legal Team

Payments to Tribunal's Internal Legal Team 1997 – December 2010 inclusive	
Payee	Amount (€)
ADELE MURPHY	1,480,693.00
ANNETTE FOLEY	2,542,530.34
BARRY RYAN	4,148.23
CAROLINE WILLIAMS	193,152.34
CATHAL MURPHY	1,551,939.31
CORMAC MAC AMHLAIGH	50,234.87
DAMIEN KEANEY	77,860.37
DESMOND O'NEILL S.C.,	5,279,311.97
DONALL KING	1,207,291.23
EMMA DALTON	935,295.48
EUNICE O'RAW B.L.	4,200,165.50
FELIX McENROY S.C.	638,751.26
FERGAL TF DOYLE	1,493,045.08
GERALDINE STACK	746,151.60
HELEN M JOHNSON	410,916.00
HENRY R. MURPHY	2,338,959.38
IMELDA ANNE HIGGINS	925,657.91
JOHN GALLAGHER SC	3,218,709.36
JOHN PADRAIC DILLON	706,720.56
MAIRE A. HOWARD, SOLR.	1,163,391.32
MAIREAD COUGHLAN B.L.	2,110,041.31
MARCELLE GRIBBIN	785,072.50
MARY CAHILL,	39,174.88

MICHAEL RAMSEY	17,598.63
NICOLA LOWE B.L.	68,832.54
PADRAIG GLEESON	35,796.68
PATRICIA DILLON S.C.	5,591,889.06
PATRICK F. HANRATTY S.C.,	1,769,078.58
PATRICK GALLAGHER SC	214,296.63
PATRICK QUINN S.C.	4,975,377.17
PAUL GILICK	23,273.97
SARAH (O CONNELL) MAGUIRE	1,253,331.68
SUSAN GILVARRY	2,164,663.57
THOMAS HANNON	590,247.00
WILLIAM CORCORAN	12,675.17

4. Note on the position in relation to third-party costs

To date, the Chairman has only ruled on third-party costs applications relating to the period 1997-2002 (at the end of which period the Tribunal's Second and Third interim reports were completed). The Chairman proposes to rule on costs applications for the period 2003 - 2008 once the Tribunal's final report is written. There is a significant difficulty in assessing the scale and timing of potential costs arising from the award of third-party costs, based on the experiences in resolving third-party costs for the earlier period to 2002. More than 400 witnesses have appeared before the Tribunal since 2002 (compared to 75 third-party bills received for the period to end-2002), and it is reasonable to assume that it will take some years to receive, process and settle all third-party bills of costs, based on previous experiences.

It is also open to the Tribunal to allow the cost of compliance with discovery orders, either as stand-alone costs or as part of an overall third-party bill of costs. In its Fourth Interim Report (2004), the Tribunal indicated that it had made in excess of 9,000 discovery orders, but the Chairman has subsequently declined to update this figure, on the basis that it is not useful in estimating discovery costs, due to the disparities in the amounts involved. Accordingly, the Department has no means of estimating the overall cost of compliance with discovery orders, which are generally made in furtherance of the Tribunal's preliminary (and confidential) investigations, prior to public hearings.

It is likely that consideration of third-party costs incurred during the period 2002-2008 will begin within weeks of the completion and publication of the Final Report. Assuming that the report will be completed within the coming summer period (see 5 below), some third-party payments are likely to fall due to be paid in the latter half of this year, with the major cost cases probably falling due in the years from 2012.

5. The likely date on which the Tribunal will have completed its business

In March 2010, the Registrar to the Tribunal wrote to the Department, stating that the Chairman and Members considered that it was not appropriate to provide an estimate for completion of the final Report/Recommendations until such time as the outcome of the O'Callaghan Supreme Court Appeal was known.

In September 2010, the Registrar to the Tribunal reiterated the view that the Tribunal considers it appropriate that it awaits the outcome of the Supreme Court appeal before indicating a likely publication date. However, the Registrar stated that, in the event of the Supreme Court upholding the decision of the High Court, the Tribunal estimates that it could proceed to publication within a period of months.

In November 2010, the appeal made by Mr. O'Callaghan and others to the Supreme Court concluded in favour of the Tribunal. Accordingly, the Department wrote to the Tribunal in January 2011, requesting an estimated timeframe to complete drafting of the final Report/Recommendations and arrange for publication. The Tribunal has since responded indicating a likely completion timeframe for its Final Report (and accompanying recommendations) of within the coming summer period, with a view to publishing the report as soon thereafter as practicable.

6. Daily rate paid to Tribunal Counsel

Fees for professional services rendered up to 28 February 2010	Counsel	Brief Fee	Per Diem Rate
	Senior Counsel	€31,743.00	€2,070.00
	Junior Counsel	€20,951.00	€1,380.00

Fees for professional services rendered on or after 1 March 2010	Counsel	Brief Fee	Per Diem Rate
	Senior Counsel	€31,743.00	€1,760.00
	Junior Counsel	€20,951.00	€1,173.00

**Department of the Environment, Heritage and Local Government,
January 2011.**

25 January 2011

Mr Ted McEnery
Clerk to the Committee of Public Accounts
Leinster House
Dublin 2

Costs of Tribunals of Inquiry

Dear Mr McEnery

I refer to your letter of 14 January 2011 seeking updated figures on matters referred to in Special Report 63 of the Comptroller and Auditor General (C&AG): Tribunals of Inquiry.

The following is the position.

Overall cost to end 2010 of the Moriarty Tribunal

The cost of the Tribunal to this Department to end 2010 was €41,396,005 including VAT. Tribunal costs are of course also borne by other public bodies, as the C&AG's Report pointed out.

Projected cost of the Tribunal (having regard to Figure 2.2 of the C&AG Report)

It is not possible to estimate accurately the total cost of the Tribunal to this Department, because this depends on factors such as the timing of the completion of the Tribunal's work. The Department's expenditure on the Tribunal in 2010 was some €3.1m. It is hoped that the Tribunal's report will be published this year and that winding up, etc. of the Tribunal will be complete by end-year. Our Estimates provision for the Tribunal this year is €6.7m; any remaining funds from this provision would be available towards some element of third-party costs if any have been agreed and finalised for payment by then (see below). As mentioned above, the costs of the Tribunal of course include costs borne by other State bodies.

Total paid to each member of Tribunal Legal Team

Attached (Appendix 1) is a table which outlines the total amount (including VAT) paid to each member of the legal team to end 2010, including former members. The figures include those referred to in the Cost of Legal Challenges Section in Chapter 6 of the C&AG's Report.

Position on Third Party Costs

Likely date for completion of business

As mentioned in the C&AG's report, this Department has on many occasions, in particular in the context of the annual Estimates process, asked the Tribunal for an estimate of what third-party costs might be. In response, the Tribunal has indicated that any attempt to quantify these costs would lead to conclusions being drawn and suppositions being made which could infringe the rights of witnesses and impinge upon the independence of the Tribunal and its findings. This remains the Tribunal's position.

Following receipt of your letter of 14 January 2011, the Department contacted the Tribunal in relation to these matters. In reply, the Sole Member indicated that the Tribunal is at present urgently engaged in the process of concluding its work at the earliest feasible vantage point. That process, he says, is essentially twofold: firstly, finalising the Second (Final) Part of its Report in a manner according with fair procedures being afforded to affected persons, and secondly and thereafter, receiving and ruling upon such third-party costs applications as may be made.

In the latter regard, the Sole Member went on to say that it is envisaged that notification of a short period for the making of such applications will be conveyed, following which determination will be made and conveyed with the minimum delay possible. All that would then remain would be the essential housekeeping task of winding up the Tribunal, involving preservation of records, return of documents and the like.

The Sole Member has assured the Department that throughout all such remaining work, the Tribunal will be fully alert to the requirement to conserve further expenditure of public funds.

Daily rate paid to Senior and Junior Counsel in 2010

Attached (Appendix 2) is a table setting out details of the daily fee rates paid to the Tribunal's Senior and Junior Counsel in 2010. The rates were reduced from 1 February 2010, having previously been reduced from 1 March 2009.

Yours sincerely,

Dermot McCarthy
Secretary General

APPENDIX 1

Total amount (including VAT) paid to end-2010 by the Department to the members of the Tribunal Legal Team

Current Members of Team

Name	From	Amount paid up to end 2010, including VAT
Jerry Healy, SC	October 1997	€9,490,181
Jacqueline O'Brien, SC ⁽¹⁾	October 1997	€6,707,891
Maire Moriarty, JC ⁽²⁾	December 1997	€2,351,893
Stephen McCullough, JC	May 2002	€1,775,551
Patrick Dillon-Malone, JC ⁽³⁾	2001-2003 and from October 2010	€132,798
Stuart Brady, Solicitor	January 2005	€1,732,404
Darach McNamara, Research Assistant	September 2003	€753,775

Former Members

Name	Period	Amount paid, including VAT
John Coughlan, SC	October 1997 - April 2010	€9,285,628
Brian McGuckian, Research Assistant	1998 – 2002	€324,122

NOTES:

1. Ms O'Brien was a Junior Counsel when she was appointed to the Tribunal. Since 2002 she is paid at 80% of the rate payable to the Tribunal's Senior Counsel. The higher rate was sanctioned as it was considered that she would by then have been Senior Counsel but for the fact that she was working for the Tribunal. She was subsequently appointed Senior Counsel (October 2003) but continues to be remunerated at 80% of the Senior Counsel rate.

2. Ms Moriarty was a research assistant from 1997 until 2005 when she was appointed Junior Counsel.

3. Mr Dillon-Malone was a research assistant from 2001 to 2003. He was taken on as Junior Counsel on an ongoing basis in October 2010 to replace Mr John Coughlan SC, who has not been available to the Tribunal since April 2010. The Tribunal requested that a senior Junior Counsel be taken on to carry out Mr Coughlan's ongoing work and that in recognition of seniority a higher Junior Counsel rate be paid.

APPENDIX 2

Daily rate paid to Senior and Junior Counsel of the Tribunal in 2010

Level	Daily Rate – ex VAT 1 Jan – 31 Jan 2010	Daily Rate - ex VAT 1 February 2010 - date
Senior Counsel	€2,300	€1,955
Senior Counsel (80% rate) ⁽¹⁾	€1,840	€1,564
Junior Counsel	€1,012	€860.20
Junior Counsel ⁽²⁾	n/a	€1,050

NOTES:

1. Ms O'Brien was a Junior Counsel when she was appointed to the Tribunal. Since 2002 she is paid at 80% of the rate payable to the Tribunal's Senior Counsel. The higher rate was sanctioned as it was considered that she would by then have been Senior Counsel but for the fact that she was working for the Tribunal. She was subsequently appointed Senior Counsel (October 2003) but continues to be remunerated at 80% of the Senior Counsel rate.

2. Mr Dillon-Malone was as a research assistant from 2001 to 2003. He was taken on as Junior Counsel on an ongoing basis in October 2010 to replace Mr John Coughlan SC, who has not been available to the Tribunal since April 2010. The Tribunal requested that a senior Junior Counsel be taken on to carry out Mr Coughlan's ongoing work and that in recognition of seniority a higher Junior Counsel rate be paid.

Appendix 2

..

Orders of Reference of the Committee of Public Accounts

- (1) There shall stand established, following the reassembly of the Dáil subsequent to a General Election, a Standing Committee, to be known as the Committee of Public Accounts, to examine and report to the Dáil upon—
 - (a) the accounts showing the appropriation of the sums granted by the Dáil to meet the public expenditure and such other accounts as they see fit (not being accounts of persons included in the Second Schedule of the Comptroller and Auditor General (Amendment) Act, 1993) which are audited by the Comptroller and Auditor General and presented to the Dáil, together with any reports by the Comptroller and Auditor General thereon:

Provided that in relation to accounts other than Appropriation Accounts, only accounts for a financial year beginning not earlier than 1 January, 1994, shall be examined by the Committee;
 - (b) the Comptroller and Auditor General's reports on his or her examinations of economy, efficiency, effectiveness evaluation systems, procedures and practices; and
 - (c) other reports carried out by the Comptroller and Auditor General under the Act.
- (2) The Committee may suggest alterations and improvements in the form of the Estimates submitted to the Dáil.
- (3) The Committee may proceed with its examination of an account or a report of the Comptroller and Auditor General at any time after that account or report is presented to Dáil Éireann.
- (4) The Committee shall have the following powers:
 - (a) power to send for persons, papers and records as defined in Standing Order 85;
 - (b) power to take oral and written evidence as defined in Standing Order 83(1);
 - (c) power to appoint sub-Committees as defined in Standing Order 83(3);
 - (d) power to engage consultants as defined in Standing Order 83(8); and

- (e) power to travel as defined in Standing Order 83(9).
- (5) Every report which the Committee proposes to make shall, on adoption by the Committee, be laid before the Dáil forthwith whereupon the Committee shall be empowered to print and publish such report together with such related documents as it thinks fit.
- (6) The Committee shall present an annual progress report to Dáil Éireann on its activities and plans.
- (7) The Committee shall refrain from—
- (a) enquiring into in public session, or publishing, confidential information regarding the activities and plans of a Government Department or office, or of a body which is subject to audit, examination or inspection by the Comptroller and Auditor General, if so requested either by a member of the Government, or the body concerned; and
- (b) enquiring into the merits of a policy or policies of the Government or a member of the Government or the merits of the objectives of such policies.
- (8) The Committee may, without prejudice to the independence of the Comptroller and Auditor General in determining the work to be carried out by his or her Office or the manner in which it is carried out, in private communication, make such suggestions to the Comptroller and Auditor General regarding that work as it sees fit.
- (9) The Committee shall consist of twelve members, none of whom shall be a member of the Government or a Minister of State, and four of whom shall constitute a quorum. The Committee and any sub-Committee which it may appoint shall be constituted so as to be impartially representative of the Dáil.

Appendix 3

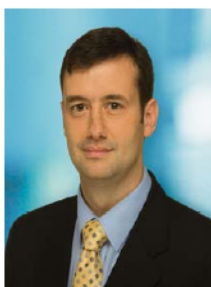
Membership of the Committee of Public Accounts



Allen, Bernard (FG)
(Chairman)



Collins, Niall (FF)



D'Arcy, Michael (FG)



Enright, Olwyn (FG)



Fleming, Seán (FF)



Kenneally, Brendan (FF)



McGrath, Michael (FF)



O'Brien, Darragh (FF)
(Vice-Chairman)



O'Keefe, Edward
(FF)



O'Keefe, Jim (FG)



Rabbitte, Pat (Lab)



Shortall, Róisín (Lab)

Appendix 4

Tribunal of Inquiry into Certain Planning Matters and Payments Binse Fiosrúcháin um Chúrsaí Pleanála agus Íocaíochtaí Áirithe

Appointed by instrument of The Minister for the Environment and Local Government dated the 4th day of November 1997 as amended by instruments dated the 15th day of July 1998, the 24th day of October 2002, the 7th day of July 2003 and the 3rd day of December 2004



Ceaptha de réir Ionstraim an Aire Comhshaoil agus Rialtais Áitiúil dar dáta an 4ú lá de Shamhain 1997 a leasaíodh de réir Ionstraimí dar dátaí an 15ú lá de Iúil 1998, an 24ú lá de Dheireadh Fómhair 2002, an 7ú lá de Iúil 2003 agus an 3ú lá de Mhí na Nollag 2004

His Honour Judge Alan P. Mahon S.C. (Chairperson)
Her Honour Judge Mary Faherty S.C.
His Honour Judge Gerald B. Keys

A Onóir an Breitheamh Alan P. Mahon S.C. (Cathaoirleach)
A hOnóir an Breitheamh Mary Faherty S.C.
A Onóir an Breitheamh Gerald B. Keys

2nd February, 2011

3.4

Our Ref: PTB/292

Mr Ted McEnery
The Clerk to the Committee
Public Accounts Committee
and
Mr. Bernard Allen, T.D.
Chairman, Leinster House
Kildare Street
Dublin 2



Re: The Third Interim Report on the Procurement of legal services by public bodies: January 2011

Dear Secretary

I have been directed by the Members of the Tribunal to write to the Committee of Public Accounts in relation to the content of the section of the Report entitled "Procedural Shortcomings" (Chapter 2: Tribunals of Inquiry: Page 19), and to point out that much of that content is erroneous.

The correct position is as follows:

1. The legislation providing for the Tribunal to have three Members (and one Reserve Member) was enacted in 2002, and not in 2004 as your Report states. The three current Members were duly appointed Judges and assigned to the Tribunal in 2002.
2. The 2002 legislation did not provide for the three Members to sit in more than one division. At the time of their appointment and in 2002, each of the three Members was advised by the (then) Attorney General that the Tribunal would continue to sit in one division. It was never intended at that time by the Oireachtas that the newly constituted Tribunal would sit, other than as one division.
3. In 2003, the current Chairman of the Tribunal, following his appointment as Chairman (on the retirement of Judge Flood), met with the then Attorney General (the late Mr. Rory Brady S.C.), and requested amendments be made to the Tribunal's Terms of Reference in order to

reduce its workload. The Chairman also requested that the Oireachtas consider the enactment of legislation to allow, when appropriate and practical, a Tribunal consisting of three Members, to sit in separate divisions.

4. The legislation which followed upon that contact between the Chairman and the then Attorney General was not enacted by the Oireachtas until late 2004. By that time, the Tribunal had embarked upon public hearings of a number of interlinked Modules. These public hearings continued until the end of 2008. It was not practical to continue with those public hearings from, say 2005, in three (or two) divisions. Also, and most importantly, the sub division of those Modules with different Members taking different Modules was not legally feasible and would have resulted in legal challenges.
5. The Report suggests that two of the three Judges should have been "released" when it was decided that parallel hearings would not proceed. However, this was not legislatively possible. The relevant legislation provides that the Tribunal consist of three Members (one of whom is Chairman). That number may reduce only in the event of the death, retirement or resignation of one or two of its Members, or alternatively if provided for in newly enacted legislation.

The Members of the Tribunal are concerned that the erroneous content of paragraph 2.5 of the Report is not only misleading, but very clearly implies incompetence and mismanagement on the part of the Tribunal, with consequential increased costs of the Exchequer.

In these circumstances, and having regard to the above clarification, I request that the Committee take steps to publicly correct paragraph 2.5 of the Report, including notification of that correction to the three main national newspapers, RTE and TV3, and to other parties to whom the Committee has provided copies of its Report.

Yours sincerely



Susan Gilvarry
Solicitor to the Tribunal

CC. Darragh O'Brien, Michael D'Arcy, Michael McGrath, Sean Fleming, Brendan Kenneally, Niall Collins, Olwyn Enright, Pat Rabbitte, Jim O'Keeffe, Roisin Shorthall, Ned O'Keeffe,

Tribunal of Inquiry into Certain Planning Matters and Payments Binse Fiosrúcháin um Chúrsaí Pleanála agus Íocaíochtaí Áirithe

Appointed by instrument of The Minister for the Environment and Local Government dated the 4th day of November 1997 as amended by instruments dated the 15th day of July 1998, the 24th day of October 2002, the 7th day of July 2003 and the 3rd day of December 2004.



Ceaptha de réir Ionstraim an Aire Comhshaoil agus Rialtais Áitiúil dar dáta an 4ú lá de Shamhain 1997 a leasaíodh de réir Ionstraimí dar dátaí an 15ú lá de Iúil 1998, an 24ú lá de Dheireadh Fómhair 2002, an 7ú lá de Iúil 2003 agus an 3ú lá de Mhí na Nollag 2004.

His Honour Judge Alan P. Mahon S.C. (Chairperson)
Her Honour Judge Mary Faherty S.C.
His Honour Judge Gerald B. Keys

Correspondence 3.3 Meeting – 14/07/2011

A Onóir an Breitheamh Alan P. Mahon S.C. (Cathaoirleach)
A hOnóir an Breitheamh Mary Faherty S.C.
A Onóir an Breitheamh Gerald B. Keys

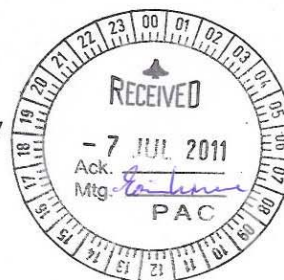
6th July, 2011

PAC-R-32

Our Ref: PTB/292

Strictly Private & Confidential – To Be Opened by Addressee Only

Mr. Ted McEnery
The Clerk to the Committee of Public Accounts
Leinster House
Dublin 2



Re: Third Interim Report on the Procurement of Legal Services by Public bodies

Dear Mr. McEnery

I refer to previous correspondence herein, resting with your letter to me of the 14th February 2011 which was accompanied by a copy of the transcript for the sitting of the Committee on the 2nd July 2009. I apologise for the delay in responding further, which was, mainly due to the fact that the Committee ceased to exist at the time of the General Election on the --- February 2011, and, as I understand it, has only recently been reconstituted subsequent to that General Election.

In any event, the Members of the Tribunal have considered the entire matter in greater detail, and particularly in the light of the transcript of the proceedings of the Committee meeting of the 2nd July 2009.

I understand from your letter to me of the 8th February 2011, that the content of Chapter 4 of the Committee's Report on legal services was based purely on the evidence given by the Accounting Officer of the Department of the Environment, Heritage & Local Government to the Committee on the 2nd July 2009. Ms. Geraldine Tallon, Secretary General of the Department of the Environment, Heritage & Local Government was the Accounting Officer in question.

As indicated in the Tribunal's letter to you of the 2nd February 2011, the Members of the Tribunal were particularly concerned with the section of the Report entitled "*Procedural Shortcomings*". These are to be found in Chapter 2, page 19 of the Third Interim Report on the Procurement of Legal Services by Public Bodies. The Finding in question is as set out under paragraph 2.5 "*Procedural Shortcomings*", and in particular the following:

"The Committee is not satisfied that after the Oireachtas making legal provision for a new procedure, to discover that the Tribunal in question then decided that it was not practicable to use it and yet because the two extra judges have now been involved in hearing around 60,000 pages of evidence, the view of the Department is that the

1

three member operation is necessary to bring the huge volume of work to completion in terms of producing a Final Report. The Committee is of the view that the two extra judges retained by the Tribunal should have been released when the proposal to have parallel sittings did not proceed".

The Members of the Tribunal are concerned with this finding. Their reasons are as follows:

1. The Members of the Tribunal were appointed to the Tribunal on foot of legislation enacted by the Houses of the Oireachtas in 2002. They were appointed for the duration of the work of the Tribunal, and save for particular circumstances which might have arisen, but have not yet arisen, their number cannot be depleted in the absence of new legislation. The appointment of additional Members in 2002 took place at a time when there was no legislative provision for the Tribunal to sit in more than one division, so that the decision of the Oireachtas to appoint additional Members was on the basis that they would conduct their inquiry as a single unit. The legislative provision in 2004 which, from that time, enabled the Tribunal Members to divide into separate divisions (and which was included in the legislation at the request of the Tribunal) was intended to facilitate the sitting in divisions by the Members of the Tribunal in the event that an opportunity arose where divisional sittings became possible, having due regard for practical (including matters relating to cost) and legal considerations. For the reasons which have been explained to the Department (and, indeed, the former Attorney General, the late Mr. Rory Brady S.C.) the opportunity to sit in separate divisions did not arise prior to the conclusion of the Tribunal's public hearings in December 2008.

2. At page 54 of the transcript, the Department's Accounting Officer, Ms. Tallon, in response to Deputy Sean Fleming briefly referred to the practical and legal issues which militated against the Tribunal sitting in separate divisions in the post 2004 – 2005 period. Deputy Fleming then asked Ms. Tallon why, in 2007, a decision was not then made to *"let the two judges return whence they came..."* Ms. Tallon advised the Committee that a view was taken that because of the huge volume of documentation involved (approximately 60,000 pages of transcripts of evidence since 2002) it was deemed necessary that the Tribunal remain as it was legally constituted at that time, that is, consisting of three Members. Deputy Fleming said that he interpreted Ms. Tallon's explanation as, in effect, meaning that, referring to the three Members *"they had their feet in the door but it was to difficult to extract them"*.

Deputy Fleming then questioned Ms. Tallon as to why three judges were necessary to deal with the 60,000 pages of documentation, while the Chairman of the Tribunal was entitled to alone deal with costs. She was asked by Deputy Fleming *"Why is the number of judges a moveable feast?"* Ms. Tallon explained that the issue of costs was a separate and distinct issue which followed the completion of the Report. In fact the relevant legislation provides that, in the case of a three person Tribunal, determinations relating to costs are the sole preserve of the Chairman of the Tribunal.

The *"Procedural Shortcomings"* identified by the Committee at page 19, expressed in clear terms a criticism of the Tribunal's failure to sit in separate divisions, when it stated that it *"is not satisfied that after the Oireachtas making legal provision a new procedure, to discover that the Tribunal in question then decided that it was not practicable to use it..."*

It appears to the Tribunal that Ms. Tallon's explanation for the Tribunal's decision not to sit in separate division was ignored by the Committee. There was no evidence given to the Committee which could reasonably justify this criticism of the Tribunal.

The Committee also expressed "*the view that the two extra judges retained by the Tribunal should have been released when the proposal to have parallel sittings did not proceed*". This finding by the Committee ignores the fact that the "release" of two of the three judges was not possible for both practical and legal reasons.

The Members of the Tribunal respectfully request that

- i. Copies of this letter and my letter of 2nd February 2011 be published on the Committee website and,
- ii. That copies of this letter and the letter of the 2nd February 2011 be placed as an appendix to the Report of the Committee and a reference to that appendix be inserted in paragraph 2.5 of the Committee's Report.

In effect, the Tribunal, requests that your proposals as suggested in your letter of 8th February 2011 as an interim measure, be adopted as a permanent measure, and on the basis that this letter is also included therein.

Yours sincerely



Susan Gilvary
Solicitor to the Tribunal