



Comptroller and Auditor General

Special Report

Tribunals of Inquiry

December 2008

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This report was prepared on the basis of information, documentation and explanations obtained from the public bodies referred to in the report. The draft report was sent to the Department of Finance, the Office of the Attorney General and the Chief State Solicitor's Office. Relevant sections were sent to the Department of the Environment, Heritage and Local Government, the Department of Justice, Equality and Law Reform, the Department of the Taoiseach, and the Mahon, Morris and Moriarty Tribunals. Where appropriate, the comments received were incorporated in the final version of the report.

Report of the Comptroller and Auditor General

Tribunals of Inquiry

I have, in accordance with the provisions of Section 9 of the Comptroller and Auditor General (Amendment) Act, 1993, carried out an examination of Tribunals of Inquiry. The examination reviewed the Mahon, Morris and Moriarty Tribunals.

I hereby submit my report on the above examination for presentation to Dáil Éireann pursuant to Section 11 of the said Act.

A handwritten signature in black ink, appearing to read 'John Buckley', with a stylized flourish at the end.

John Buckley
Comptroller and Auditor General

16 December 2008

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Summary of Findings

Summary of Findings

The report examined the timescale, cost and efficiency of three major tribunals that are nearing completion. The tribunals examined were the Mahon, Morris and Moriarty Tribunals.

Timescale of Tribunals

Based on current information the duration of the Mahon and Moriarty Tribunals will be 12 years while the duration of the Morris Tribunal will be seven years. These tribunals were projected to last only a fraction of that time at their inception.

Their extended timescale was affected by the nature of the investigations, adversarial procedures and practice and legal challenges in many instances. Apart from this, the duration of these tribunals was variously attributed to

- wide terms of reference and a broadening of scope as the work of the tribunals progressed
- the unavailability of certain witnesses
- obstruction by or non-cooperation of witnesses
- extended cross-examination in the course of hearings
- certain procedural shortcomings which resulted in orders being quashed and requiring re-work or additional work by the tribunal.

There is scope for further delay in circumstances where a tribunal chooses to circulate its draft report for clearance prior to publication.

Procedural Efficiency

The 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 that it is satisfied that the cost and duration of those additional enquiries are likely to be justified by the 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.

Tribunals cannot impose penalties and their primary utility is to establish facts and thereby provide information to improve public administration. This might suggest that the design of tribunals take account of what would constitute a sufficiency of relevant and reliable information for this purpose. While it is recognised that 'court-type' procedure is necessary when a person's good name is in issue, evidence gathering procedures that mirror those in auditing or other investigation work might be appropriate and efficient for much of this work.

There also appeared to be some scope for the improvement of practice and procedure related to evidence gathering and the challenge of that evidence. Options include

- providing for the 'reading-in' of evidence already available in written form and not disputed
- providing for witness evidence to be delivered by sworn affidavit
- providing for the making of legal submissions in written form

- drafting an initial statement of facts based on statements and material discovered and isolating facts in contention for examination in a focused oral procedure involving witnesses.

Despite the provision for concurrent sittings in the case of the Mahon Tribunal there has been no recourse to this procedure. Notwithstanding this, there appears to be scope to use concurrent sittings where a tribunal has a number of members and where discrete issues can be identified. As well as this, the ultimate cost of representation could be curtailed by providing for jointly representing shared interests and/or limiting the funding of bodies or organisations whose primary function it is to protect and defend the same or similar interests.

Finally, since a primary purpose of the tribunal is to establish facts designed to allow public administrations to mitigate risks to good governance and remedy shortcomings in control of public programmes rather than hold individuals accountable (which is a matter for the courts) it would be worth considering whether efficiency could be improved by only proceeding to oral hearing in instances where a party after due notice asserts that their reputation or interests may be adversely affected.

Cost of Tribunals

It is recognised that, due to their investigatory nature, the cost of tribunals is 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 counsel. There appears to be scope to achieve economies by

- using less expensive paralegal or professional staff for research and investigation work
- moving away from the 'exclusive attention' basis of hiring counsel and engaging counsel for discrete modules
- implementing a scheme of pre-determined fee rates for future tribunals which takes account of the certainty of tribunal work in determining those rates.

Third Party Representation and Related Costs

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. The grant of representation might be limited to instances where a tribunal is satisfied that

- a person's evidence is likely to be relevant to its enquiries and/or
- a person's constitutional or legal rights are likely to be affected by the proceedings before the tribunal, and/or
- there are exceptional stated circumstances which warrant granting representation.

There is also a need to clarify the circumstances in which a tribunal may award costs by establishing criteria to guide the Chairman in determining whether or not to authorise the payment of costs. Criteria which might be set could include

- costs of representation should only be allowed as specified in a tribunal's original determination except in exceptional circumstances
- the award of costs should not exceed maximum amounts set by a designated Minister.

In circumstances where a person contributed to the duration of hearings by knowingly or recklessly providing false or misleading information or otherwise failed to provide appropriate cooperation, the existing statutory provision allowing costs to be awarded against that party for the benefit of the Exchequer, could also reduce the public cost of tribunals.

Likely Cost of Tribunals

The ultimate cost of the three tribunals examined is inherently difficult to estimate. However, assuming the tribunals conclude on the dates currently predicted

- 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 million¹
- third party costs could range from €157 million to €182 million based on the pattern of awards observed in the Morris and Mahon Tribunals.

As well as costs incurred on the administration of the tribunals, State respondent costs are projected to amount to some €19 million while other State costs related mainly to facilities and judges salaries are estimated at approximately €22 million.

Overall, 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 €336 million to €366 million.

It is important to emphasise that the foregoing are estimates which should be read in the light of the caveats and contingencies outlined in Chapter 2. The major area of uncertainty pertains to third party costs. In the case of those costs, there is a risk that, due to the extended timescale, their ultimate cost could rise for future settlements and 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.

General Conclusion

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.

¹ No estimate has been included for possible future litigation costs.

The recommendations outlined above and specified in detail in Chapter 3 of the report are presented as a range of options. However, it is recognised that these options will require detailed scrutiny and not all options will necessarily be compatible or legally feasible.

Legislation has been initiated in the Oireachtas designed to address a number of these issues.

Tribunals of Inquiry

1 Introduction

1.1 19 public inquiries have been instituted in the period 1997 to 2007. These are set out at Appendix A. While some have been relatively limited in scope, others are projected to cost material amounts of money. For purposes of this review I examined the administrative arrangements for and sought to estimate, to the extent possible, the likely cost of three major tribunals.

- The Tribunal of Inquiry into Certain Planning Matters and Payments (The Mahon Tribunal)
- The Tribunal of Inquiry into Complaints concerning some Gardaí of the Donegal Division (The Morris Tribunal)
- The Tribunal of Inquiry into Payments to Politicians and Related Matters (The Moriarty Tribunal)

1.2 The foregoing tribunals were established under the Tribunals of Inquiry (Evidence) Acts². The legislative basis for the tribunals is outlined at Appendix B.

Nature of Tribunals of Inquiry Examined

1.3 The tribunals considered in this report are investigative in nature having been established to ascertain the facts about matters referred to them and to make recommendations as appropriate.

1.4 The general basis upon which these tribunals operate is summarised below

- Tribunals are established following resolutions of the Houses of the Oireachtas and appointed by a relevant Minister of Government. In general, tribunals are established to inquire into matters of urgent public importance.
- A tribunal may consist of one or more persons – while generally those conducting tribunals are lawyers they may also be lay people. Each of the tribunals examined was conducted by a Judge or Judges.
- Tribunals are vested with the powers, privileges and rights of the High Court in respect of enforcing the attendance of witnesses, examining them and compelling the production of documents.
- Sittings are usually in public but may be held in private where a tribunal is satisfied that it is expedient in the public interest to do so for reasons connected with the subject matter of the tribunal or the nature of the evidence to be given.
- Because the administration of justice is reserved to courts, the work of tribunals is solely fact finding and investigative. Findings of tribunals of inquiry are ultimately reported to the Oireachtas – through the Clerk of the Dáil or a specified Minister.
- Any statement or admission made at a tribunal cannot be used in evidence at criminal or civil proceedings. However, findings can give rise to other investigations leading to separate criminal or civil proceedings.

Subject Matter of Tribunals Examined

1.5 The issues which the three tribunals were established to investigate are set out in detail in Appendices C to E. The general scope of their work is outlined in Figure 1.1.

2 Currently, tribunals are regulated by the Tribunals of Inquiry (Evidence) Acts 1921 to 2004.

Figure 1.1 General Scope of Tribunals

Tribunal	Subject Matter
The Mahon Tribunal	Inquiry into alleged planning irregularities and payments.
The Morris Tribunal	Inquiry into complaints concerning the activities of some Gardaí of the Donegal Division.
The Moriarty Tribunal	Inquiry into payments to certain politicians and related matters.

Funding of Tribunals of Inquiry

1.6 Once a tribunal has been established, the cost of its administration is borne on public funds. In practice, this involves assigning financial responsibility to a Government Department and meeting its costs from a subhead in the Vote for that Department³. The relevant Department with financial responsibility for each tribunal is set out in Figure 1.2.

Figure 1.2 Financial Responsibility for Tribunals

Tribunal	Responsible Department	Report Reference ^a
The Mahon Tribunal	Department of the Environment, Heritage and Local Government	DEHLG
The Morris Tribunal	Department of Justice, Equality and Law Reform	DJELR
The Moriarty Tribunal	Department of the Taoiseach	–

Note:

a These references are used to identify the sponsoring Department in Part A of the Report.

1.7 Each tribunal sets up its own administrative arrangements including certain arrangements for banking and procurement. These are explained more fully in the chapters that follow. Because tribunals are established under the authority of the Oireachtas, the role of the relevant government department is more facilitative than supervisory.

Main Costs of Tribunals of Inquiry

1.8 Tribunals give rise to three broad categories of cost

- the cost of their own direct administration and investigations – made up of the costs of both administrative staff and those of the Tribunal legal team
- the cost of third party witnesses who assist them in their investigations
- the costs borne by State Bodies in supporting the tribunals and in responding to their investigations.

1.9 In addition, litigation related to the conduct of tribunals can arise to clarify rights or defend rulings, thereby giving rise to litigation costs.

3 The legislation provides that in the case of tribunals, any amount payable by the Minister for Finance pursuant to a cost order is payable out of moneys provided by the Oireachtas.

Revenue Raised as a Consequence of the Tribunals Examined

1.10 Tribunals can bring material to light which leads to revenue flows. Drawing on information emanating from tribunals, the revenue authorities may, in practice, be able to independently establish facts leading to tax settlements. For instance

- An Garda Síochána have indicated that the Criminal Assets Bureau (CAB) has collected approximately €18.7 million arising directly or indirectly from the Mahon Tribunal.
- The Revenue Commissioners have reported that they have collected €32.5 million in relation to the Mahon Tribunal and €8.5 million in relation to the Moriarty Tribunal⁴.

Other revenue impacts are outlined in Chapter 6.

Sources of Information

1.11 Information was made available by each tribunal and its sponsoring Department. The Chief State Solicitor's Office (CSSO), the Office of the Attorney General and the Department of Finance were also consulted.

Examination Methodology

1.12 The examination was carried out by staff of the Office of the Comptroller and Auditor General. The Office used the assistance of a firm of legal cost accountants to advise it on the cost estimation methodology. The estimation methodologies used to arrive at a gross projected cost for each tribunal are set out in Appendices F to H.

1.13 The final draft of the report was sent to each tribunal, its sponsoring Department, the CSSO, the Office of the Attorney General and the Department of Finance. Observations where provided and appropriate have been included in each Chapter.

Report Structure

1.14 The report is set out in two parts. Part A considers the administration of tribunals in general while Part B deals with the administration of specific tribunals.

4 These figures were provided in February 2008.

Part A – General Administration of Tribunals

2 Cost of Tribunals

2.1 This chapter identifies the cost of the three tribunals to the end of 2007 and describes the main factors that contribute to their cost. It gives an overview of their projected costs to completion, specifying the contingencies and caveats that attach to these projections. The gross projected cost of each individual tribunal is examined in Chapters 4 to 6.

Cost of Tribunals

2.2 Costs totalling €19 million had been incurred directly on the three tribunals up to 31 December 2007. A further €36 million was identified as having been incurred by State Bodies as a result of the tribunals, including €17.6 million in responding to tribunal enquiries. Further projected costs will accrue up to the date of finalisation of the tribunals' business. For the purposes of estimation the finalisation dates have been taken as outlined in Figure 2.1.

Figure 2.1 Projected Finalisation Date

Tribunal	Establishment Date	Projected Finalisation Date^a
The Mahon Tribunal	November 1997	April 2010
The Morris Tribunal	April 2002	December 2008
The Moriarty Tribunal	September 1997	June 2009

Note:

a This is the latest projected wind-up date based on information supplied by the tribunals.

2.3 The projected cost excluding third party costs is estimated at between €179 million and €185 million as set out in Figure 2.2. Further detail is given in Chapters 4 to 6.

Figure 2.2 Projected Costs excluding Future Third Party Costs

Category of Cost	The Mahon Tribunal		The Morris Tribunal		The Moriarty Tribunal		Total	
	Low	High	Low	High	Low	High	Low	High
	€m	€m	€m	€m	€m	€m	€m	€m
Administration	26.27	27.35	16.16	16.81	7.74	7.94	50.17	52.10
Legal Team Fees	46.01	48.12	10.18	10.60	27.54	28.39	83.73	87.11
Litigation Costs	3.17	3.17	0.38	0.38	0.56	0.56	4.11	4.11
State Respondent Costs ^a	0.74	0.74	11.93	11.93	6.47	6.47	19.14	19.14
Other State Costs ^{ab}	10.85	10.85	5.55	5.55	5.70	5.70	22.10	22.10
Total	87.04	90.23	44.20	45.27	48.01	49.06	179.25	184.56

Notes:

- a 60 State Bodies were asked to provide details of costs incurred in connection with the tribunals. The details have been categorised into State Respondent Costs and Other State Costs. Those who incurred costs and quantified them are outlined at Appendix I.
- b Other State Costs consist primarily of the cost of the provision of premises to the Tribunals and the salaries of Tribunal Members.

2.4 In addition considerable third party costs will arise out of the representation of witnesses. These costs account for the major portion of tribunal costs. In three completed tribunals⁵ they have represented between 63% and 85% of total costs.

2.5 While tribunals establish their own rules, the practice regarding third party costs, in the case of the tribunals being examined, has been

- to confer entitlement to costs on persons represented by lawyers⁶
- to determine the percentage of costs allowable primarily on the basis of cooperation and
- to establish the quantum of costs by negotiation or, in a small number of cases by taxation.

Tribunal Legal Teams

2.6 The three tribunal legal teams are projected to cost something of the order of €4 million to €7 million by the time the business of the tribunals is concluded.

5 The Tribunal of Inquiry into the Beef Processing Industry, the Tribunal of Inquiry – Dunnes Payments (the McCracken Tribunal) and the Tribunal of Inquiry into the Blood Transfusion Service Board (the Finlay Tribunal).

6 Entitlement can arise both in cases where representation has been formally granted and in cases where entitlement is established when orders for costs are considered.

2.7 Tribunal legal teams are generally appointed by a tribunal after consultation with the Attorney General. Counsel for tribunals are engaged under contracts for services. Accordingly, they are professionals in a relationship similar to that which pertains in litigation cases.

2.8 The remuneration of legal teams consists of a brief fee and a standard daily fee. With the exception of the Moriarty Tribunal, senior counsel are currently paid €2,250 per day and junior counsel receive €1,500 per day. In the case of the Moriarty Tribunal a senior counsel rate of €2,500 was notified to the tribunal in error in June 2002 (it should have been €2,250). The Department of Finance sanctioned the higher rates quoted to the individuals involved on a personal basis. Junior counsel in the Moriarty Tribunal are paid €1,100 per day⁷.

2.9 The CSSO provides some of the solicitors who work for the tribunals. Private sector solicitors have, on occasion, been engaged by the Mahon and Moriarty Tribunals. The rate paid to private sector solicitors is €1,000 per day.

2.10 While legal teams are remunerated by way of a daily fee and a key determinant of their overall remuneration is the amount of time devoted to the work of the tribunal it was not possible to vouch the payments to underlying attendance records except in the case of the Moriarty Tribunal to the extent outlined in Chapter 6. It is recognised that counsel are engaged under contracts for services and that time input of counsel may be difficult to capture in the case of work performed outside the tribunal offices or at weekends. However, it is good practice in public administration that time-based claims for services should be evidenced both as information for management and to provide an audit trail capable of demonstrating that services paid for have been duly delivered.

Third Party Costs

2.11 €14.5 million has been incurred on third party costs up to the end of December 2007. €8 million of this relates to the Mahon Tribunal and €6.5 million to the Morris Tribunal.

2.12 Future third party costs are contingent upon cost award decisions of the tribunals. Based on the pattern of awards observed in the Mahon and Morris Tribunals, further third party costs of the order of €142 million to €167 million could arise (in addition to the €14.5 million already incurred) in the case of the three tribunals.

2.13 A particular estimation difficulty arises in the case of the Moriarty Tribunal. This Tribunal has made no cost orders to date. In order to construct an estimate the average costs being experienced in the Mahon and Morris tribunals were combined with the pattern of representation at the Moriarty Tribunal.

2.14 It is acknowledged that it is open to tribunals to refuse to award future costs on the basis of non-cooperation. While this is likely in some cases, no allowance has been made for it in the calculations.

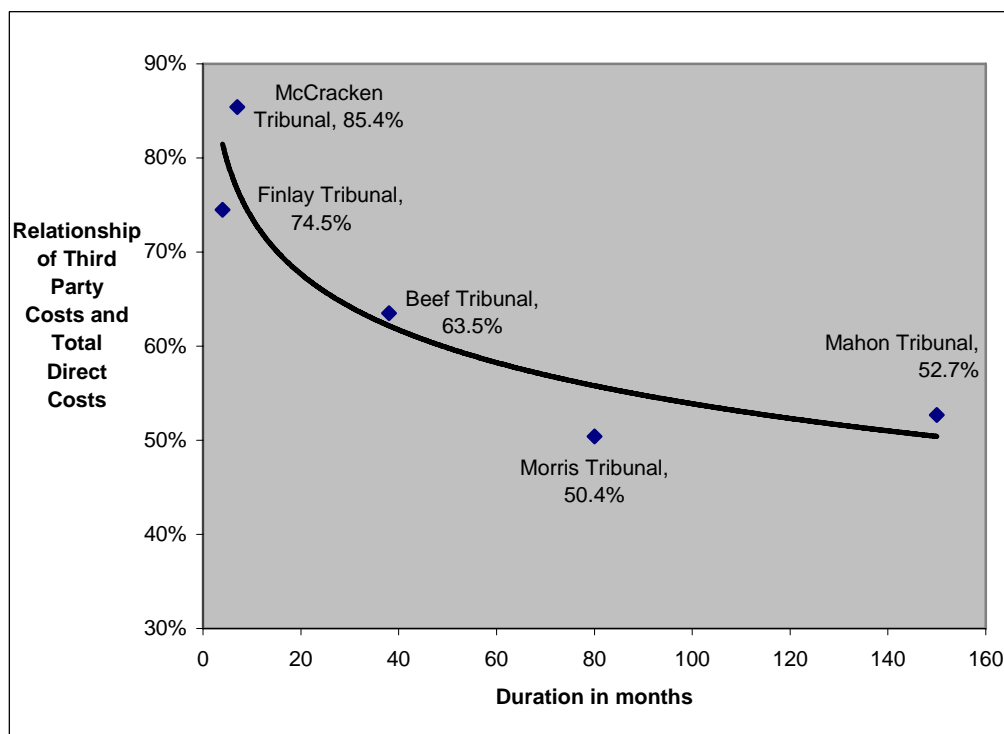
⁷ One junior counsel in the Moriarty Tribunal was paid at 80% of the senior counsel rate i.e. €2,000. The higher rate was sanctioned as it was considered that the person involved would have been appointed senior counsel by then but for the fact they were working for the Tribunal. In October 2003, the individual was appointed senior counsel but continues to be remunerated at the daily rate of €2,000. The other two junior counsel were upgraded from documentary research counsel in 2005 and 2006 and remuneration was sanctioned at a rate of €1,100 per day.

Third Party Costs – Comparison with Completed Tribunals

2.15 Information regarding tribunals which have completed their work can be drawn upon when estimating third party costs. They are the Beef Processing Industry Tribunal, the McCracken Tribunal and the Finlay Tribunal. Further details relating to these Tribunals are outlined at Appendix A.

2.16 When the relationship between third party costs and total costs for the tribunals are associated with those for the completed tribunals the trend line that emerges is consistent with a conclusion that increased tribunal duration will lead to a lower overall percentage of third party costs. This is represented graphically in Figure 2.3.

Figure 2.3 Duration and Third Party Costs



Note: The graph line represents a line of best fit for the percentage of the third party costs to total costs for tribunals of different durations. The relationship may also be impacted by the fact that the Finlay Tribunal and the McCracken Tribunal had almost universal counsel representation.

2.17 The apparent trend in third party costs (as a percentage of total costs) over time suggests that the nearest available comparator for the three uncompleted tribunals is likely to be the Beef Processing Industry Tribunal. Caution must, however, be exercised in treating it as a comparator. A material distinction is that the Beef Processing Industry Tribunal reported in 3 years. As a result it appears reasonable that the percentage of third party costs to total costs of the uncompleted tribunals would be lower than those experienced by the Beef Processing Industry Tribunal.

Figure 2.4 Comparison of Beef Processing Industry Tribunal with Uncompleted Tribunals

Tribunal	Expected Duration	Level of Counsel Representation ^a	Third Party Cost Percentage ^b
Uncompleted Tribunals			
Mahon Tribunal	12 years	40%	52.7%
Morris Tribunal	7 years	58%	50.4%
Moriarty Tribunal	12 years	62%	53.5%
Beef Processing Industry Tribunal	3 years	60%	63.5%

Notes:

- a Percentage of third party witnesses represented by counsel.
- b This is based on the outturn to date in the case of the Beef Processing Industry Tribunal and estimated outturns for the uncompleted tribunals and is the percentage of total costs which relates to third party costs.

2.18 For the reasons outlined above, it is likely that the proportion of third party costs in the Beef Processing Industry Tribunal outturn would represent the outside limit for third party costs in each uncompleted tribunal. Based on that proportion upper levels are set out in Figure 2.5.

Figure 2.5 Upper Limit Estimates – Total Third Party Costs

Tribunal	Experience Based Third Party Costs ^a	Beef Processing Industry Tribunal based Estimate ^b
	€m	€m
Mahon Tribunal ^c	104	137
Morris Tribunal	35	48
Moriarty Tribunal	43	64

Notes:

- a This represents an upper limit estimate based on costs experienced to date in the Mahon and Morris Tribunals.
- b The comparative upper limit estimate is based on the assumption that third party costs as a percentage of total costs could mirror those of the Beef Processing Industry Tribunal.
- c The level of counsel representation in the Mahon Tribunal is considerably lower than that of the Beef Tribunal. Due to information deficiencies, it was not possible to isolate the impact of this on the comparator but it would be likely to reduce it further.

Estimation Caveats and Contingencies

2.19 The foregoing estimates of gross projected costs are provisional and are grounded in extrapolations based on outturns to date. They should be read in the light of the estimation assumptions outlined in Appendices F to H.

2.20 To the extent that the Sole Member or Chairman of a Tribunal refuses orders for costs or orders that the costs of a tribunal or other third party should be borne by a non-cooperating witness there may, ultimately, be a lower cost to the State. It is not possible, at this stage, to anticipate the extent of any such adjustment and no allowance has been made for it in the estimates.

2.21 To the extent that the future pattern of third party settlements may deviate from that currently being experienced it will be necessary to update the estimates on an ongoing basis. For instance, future third party settlements could well be higher than the initial settlements due to the cost associated with extended timeframes and the possibility that improving cooperation could result in lower levels of cost refusals. It would therefore be necessary to keep these estimates under continuous review.

2.22 In particular, in the case of the Moriarty Tribunal where no third party settlements have been made to date, the estimates take account of the outturns in the Mahon and Morris Tribunals and the costs which are emerging for third party legal representation in those tribunals. This cost pattern may not be representative of the Moriarty Tribunal. The estimate is therefore dependent on the extent to which third party costs ultimately awarded by the Moriarty Tribunal correlate with those of other tribunals.

2.23 In addition to the foregoing, further possible costs could also arise. These depend on the outcome of litigation, the result of which is currently uncertain.

2.24 The contingent liabilities could crystallise in the event of an adverse ruling being given by the Supreme Court in the appeal of the case of *Joseph Murphy, Frank Reynolds and Joseph Murphy Structural Engineers Limited V Feargus Flood, Alan Mahon, Mary Faherty and Gerard Keys (The Members of the Tribunal of Inquiry into Certain Planning Matters and Payments) Ireland and the Attorney General (The JMSE Case)*. The knock-on effect could be that all parties who were refused their costs by the tribunal in connection with the second and third interim reports would become entitled to recover those costs from the tribunal.

2.25 The cost associated with an adverse judgement has been estimated at €22 million (exclusive of VAT) in the case of the Mahon Tribunal. The outcome of the JMSE case could also have implications for the Morris and Moriarty Tribunals. It is estimated that a contingent liability of approximately €10 million could arise in the case of the Morris Tribunal.

2.26 The cost projection for all tribunals is based on the assumption that, in future cost determinations, each tribunal will award costs to all third parties. However, the award of costs is, ultimately, a matter entirely for each tribunal based on its assessment of the substantive content of the proceedings of the tribunal.

2.27 The estimates include a provision of 5.5% to cover miscellaneous elements of third party bills of cost for items such as loss of earnings, professional fees, transcription costs, witness expenses, postage and miscellaneous outlay.

2.28 An emerging trend is for claims for loss of earnings to be submitted in respect of tribunal witnesses. A restrictive interpretation of the cost recovery rules would limit claims for loss of earnings to witnesses such as engineers, architects, accountants etc. However, there is potential for upward cost pressure if awards are made to other claimants.

2.29 A further contingency arises in respect of indemnities for the tribunal administration and legal teams. The same indemnification arrangements as existed for civil servants under the appendix to General Council Report 1357 (Civil Service Conciliation and Arbitration Scheme) has been expressly sought and granted to the legal team of the Mahon Tribunal. This provides a State indemnity against any reasonable legal expenses necessarily incurred by them and against any damages and/or costs awarded against them in the event of civil proceedings being taken for the manner in which they discharge their duties, provided that an examination of the circumstances establishes that they acted bona fide in the execution of their duties and did not act with gross negligence or gross neglect of their duties.

Overall Conclusion on Cost

Subject to the foregoing caveats and contingencies, the tribunals could cost something in the order of

- €36 million to €66 million for the three tribunals based on the costs being experienced to date by the tribunals themselves,
- €18 million to €34 million if the pattern of third party costs experienced in the Beef Processing Industry Tribunal were to emerge in these cases also.

These figures take no account of revenue that has been or may in future be gained from the Tribunals' work.

Third Parties – Costs of Representation

2.30 Usually, third parties make an application seeking authorisation for legal representation before a tribunal. The tribunal may grant or refuse representation. The principal effect of being granted legal representation is to allow cross-examination of other witnesses at a public hearing of the tribunal. Where representation is granted, it may be in full or to a limited extent. Full representation generally applies where an applicant is affected by all of the issues under investigation. Limited representation is given where an applicant is affected by particular issues only.

2.31 Even in cases where representation is granted, there is no automatic entitlement to costs. In the case of *Frank McBrearty Snr V The Honourable Mr Justice Frederick Morris and the Attorney General*, (High Court, 13 May 2003) the applicants argued that it was unfair that many of the Gardaí who had appeared at the tribunal had their legal costs paid by the State while they as victims in the whole affair did not have the same guarantee. The court concluded the matter in the following terms '*I am completely satisfied that the Tribunal has no power under the section as contended for by the applicant, namely to make provision for or at least guarantee in advance the costs of the applicant's legal representation or those of his family or his extended family*'.

2.32 Consequently, the legal position appears to be that while the State, through legislation⁸, has conferred a right to apply for the award of costs and, when awarded, a right to have those costs measured by the Taxing Master of the High Court, there is no automatic right to costs.

Imposing Limits on the Extent of Representation

Mahon Tribunal

2.33 In September 1998, Justice Flood set out the extent of legal representation costs which would be met by the Tribunal where an order granting costs was made to a person appearing before the Tribunal. Other than in exceptional circumstances, this was to be limited to one solicitor, one junior counsel and one senior counsel. This guideline appears to have been generally followed by the Tribunal when making cost orders following the publication of its reports⁹.

⁸ Section 6 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979 (as amended by Tribunals of Inquiry (Evidence) (Amendment) Act, 1997).

⁹ An exception was in the case of one recent cost settlement, where despite the fact that the tribunal cost order was limited to one junior counsel, the cost of three junior counsel appear to have been allowed in subsequent negotiations between legal cost accountants on both sides. However, the Registrar has

2.34 In a cost ruling in June 2005, Judge Mahon stated that it was for the Taxing Master to decide the level of professional fees properly payable in any particular case having regard to the circumstances peculiar to that case. He was of the view that the Chairman after making an order on the extent of representation had no further role in determining the amounts which would be paid to any party in respect of that representation – his role was limited to determining if parties were entitled to their costs in whole or in part.

Morris Tribunal

2.35 In the case of the Morris Tribunal, the Chairman does not appear to have issued any direction or guidance to the parties on the extent of legal representation which would be allowable. With the exception of a number of instances in connection with the detention of suspects sub-module, in general each of the parties to whom representation had been granted were given an opportunity by the Tribunal to seek an order for costs following publication of the Tribunal's reports. Apart from initial orders and some restrictive ones, the cost orders made by the Morris Tribunal were of a general nature referring to the entitlement to costs of solicitor and counsel without specifying the type or number of counsel allowed. However, some restrictive cost rulings limited the extent of representation costs which could be claimed¹⁰.

2.36 In regard to the nature of representation, the Morris Tribunal has pointed out that the function of the Chairman of a tribunal is to allow an individual 'representation' before the tribunal. The way in which the individual chooses to avail of that right is a matter for him. He can represent himself or can choose to be represented by a solicitor or barrister. He may choose to engage senior counsel or indeed a number of senior counsel. The depth or extent of this representation is not a matter for the Chairman. At taxation stage it was a matter for the taxing master to consider whether the degree of representation was excessive and disallow part of it.

2.37 However, Judge Morris has on occasion tended to take a restrictive view of representation. When one third party, already represented by one senior counsel and one junior counsel, made an application to him to certify for a second senior counsel to appear, he ruled that in his view such representation was unnecessary bearing in mind that the substantive work in a tribunal is done by tribunal counsel. He pointed out that counsel representing individual parties do no more than ensure that their clients get a fair hearing and clarify any point, which may arise in evidence as well as cross-examining other witness whose evidence conflicts with that of their client.

2.38 In relation to witnesses summoned to appear before the Morris Tribunal, in practice, not all witnesses were awarded a right of legal representation. It was only those witnesses who were classed as C witnesses, i.e. those who could on a certain interpretation of the evidence be the subject of criticism, who were given the right to be represented before the Tribunal by solicitor and counsel. The Tribunal also heard evidence from a large number of ordinary witnesses, none of whom were represented by solicitor or counsel.

Moriarty Tribunal

2.39 The Moriarty Tribunal has not yet considered the issue of third party costs. Justice Moriarty has informed me that he indicates to third parties that the extent of legal representation would be limited to matters which are likely to affect the interests of an individual seeking

indicated that while three junior counsel were paid – his recollection is that they were working at different stages on the module rather than simultaneously.

10 For example, in the case of one party to the tribunal who had been represented by two different firms of solicitors, the Chairman ruled that this could not affect the overall amount of costs to which the party was entitled. In another case, the taxing master disallowed senior counsel fees claimed due to the fact that Judge Morris, in his order for costs, specified representation by junior counsel instructed by solicitor.

representation. It is on the basis of the extent to which such an individual is affected, or likely to be affected, by evidence at the Tribunal's public sittings, that the level of representation will ultimately be judged appropriate on an application for costs (assuming that an order for costs in that individual's favour were to be made). Individuals are entitled to have as many lawyers as they wish but a right to representation does not entail a recognition or acknowledgement by the Tribunal that every such lawyer is properly required to vindicate the interests of the individual by whom he has been retained.

Establishing Entitlement to Costs

2.40 In general and irrespective of whether a party before a tribunal has been granted representation, a party is required to make application to the tribunal to have their entitlement to costs determined. This is usually carried out at the conclusion of the tribunal or following the completion of specific modules and the publication of a report thereon. In the case of the Morris Tribunal however, the Chairman appears to have adopted a different procedure in some later sub-modules of the Tribunal's inquiries. For instance in the sub-module dealing with the detention of suspects, the Chairman awarded costs to two parties at the conclusion of the hearing of the sub-module and prior to the publication of his report on the issue. He took this decision on account of their cooperation with the Tribunal. In addition, in his report issued in April 2008 dealing with the detention of suspects, Judge Morris awarded costs to a further three parties without the necessity for them to make an application for their costs. All other interested parties were required to make application for their costs.

The Award of Costs Without Grant of Representation

2.41 In the two tribunals that have made cost awards each has taken a different approach to the association of costs and the prior grant of representation. This may be related to the different nature of the proceedings at the two tribunals.

Mahon Tribunal

2.42 Justice Flood had indicated in January 1998 that he would be favourably disposed to meeting the legal costs of persons, whether granted representation or not, who had incurred legal expense in assisting the Tribunal in its work. He stated

"Without fettering my discretion in any way, I would indicate that, in general, where any person or body, whether represented before the Tribunal or not has realistically and reasonably incurred any legal expense in fully and promptly assisting the Tribunal in its work, I would be favourably disposed to providing for indemnity in respect of such expense".

2.43 In line with Justice Flood's indicated position, Judge Mahon awarded costs to 65 parties who had not been granted legal representation by the Tribunal but who nonetheless, had co-operated with the Tribunal and incurred legal costs in their dealings with it. In his ruling on this issue, Judge Mahon concluded that Section 6 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979 meant that the Chairman of a tribunal had power to consider an award of costs to any person who had appeared before the tribunal by counsel or solicitor and was not limited to considering applications by parties who had been granted representation to appear at a public hearing of the tribunal by counsel or solicitor. He considered that the term 'appearing before the tribunal' was intended to and did include parties who never applied for nor were granted representation before the tribunal. He believed that an appearance before the tribunal by a party could arise once that party or his solicitor has communicated to the tribunal that that solicitor was representing the interests of the party in the party's dealings with the tribunal. He said he was precluded from making an award of costs to nine parties who although fully cooperating with the Tribunal did not have dealings with the Tribunal through counsel or solicitor.

Morris Tribunal

2.44 Following publication of the Tribunals reports, only the parties to whom representation had been granted were given an opportunity by the Tribunal to seek an order for costs.

Submissions of the Department of Finance

2.45 In the course of a hearing by Judge Mahon in May 2003 to take submissions on costs, the Minister for Finance through the CSSO put forward the principles which in his opinion should be considered by the Tribunal when ruling on costs. These included the proposed principle that any party who did not seek representation or who was refused representation by the Tribunal should not ordinarily be entitled to costs.

2.46 Following a further request from the Tribunal for a submission on costs in September 2003, the CSSO again made a formal submission to the Tribunal in October 2003, along similar lines. The submissions of the CSSO on behalf of the Minister for Finance were rejected by the Tribunal in relation to the issue that only persons granted representation should be awarded costs.

Summary – Cost Entitlement of Third Parties

Both the Mahon and the Morris Tribunals, have ruled on the proportion of costs which will be allowed to each party. This has been as low as 25% where a proportion of costs has been awarded and, in some cases, parties have been refused all of their costs. The Moriarty Tribunal has not yet considered the issue of costs. Details of costs awarded by the tribunals are further discussed in chapters 4 to 6. However, the overall position can be summarised as follows.

- The Mahon Tribunal has set a guideline for the number and type of legal representatives and its cost orders to date follow that guideline.
- The cost orders in the Morris Tribunal tend to be general in nature. Only in some instances have those orders dealt with the number and type of legal representation.
- Mr Justice Moriarty has indicated that it is by reference to the extent to which an individual is affected, or likely to be affected by evidence that the level of legal representation will be judged appropriate on an application for costs. However, he has not yet considered cost orders.
- At the Mahon Tribunal costs were awarded to parties who were not formally given representation.
- Following the issue of cost orders by the tribunals the quantification of cost is a matter for taxation or negotiation.

Overall, the procedure makes the estimation of the cost of third party representation difficult due to the absence of a straightforward relationship between entitlement to representation and entitlement to the costs of representation.

Determination of Third Party Costs

2.47 After cost orders have been granted by tribunals the amount of costs still has to be determined. Bills in respect of the cost of representation are generally submitted by the solicitor for a third party. These are passed by the tribunals to the relevant sponsoring Department for processing. The practice in regard to the determination of the costs varies. A notable trend is that, in general, substantial reductions are achieved at negotiation or taxation. In the Mahon Tribunal

average reductions of 25% on the original bills of costs submitted had been achieved in the course of settlements to date. The equivalent reduction in the case of the Morris Tribunal was 39%¹¹. The scale of reductions in the case of settled bills for the Mahon and Morris Tribunals to date is outlined in Figure 2.6. No bills have yet been settled in respect of the Moriarty Tribunal.

Figure 2.6 Percentage Reductions on Claimed Costs

Tribunal	Senior Counsel		Junior Counsel		Solicitor
	Reduction		Reduction		Reduction
	Brief	Refresher	Brief	Refresher	Instruction Fee
The Mahon Tribunal	22%	25%	27%	9%	22%
The Morris Tribunal	40%	20%	43%	29%	29%

2.48 In practice, since the amount of costs is based on negotiation in most cases, the process has features of a bargaining round. However, over time precedents have evolved which are taken into account in the course of negotiation.

2.49 Indicative costs were provided by third parties when seeking costs from the Mahon Tribunal. When the bills of costs subsequently submitted for a sample of 40 third parties were compared with their related indicative cost figures furnished to the Tribunal in July 2003, it showed that the actual bills of cost were on average 52% higher than the indicative cost figure previously provided.

2.50 The process of cost determination involves the State engaging a legal cost accountant to examine all bills of cost submitted to the tribunals in order to establish, following a review of the nature and extent of work carried out, that they are fair and reasonable. This entails analysing the bills to establish that all expenditure was necessary and that the quantum of fees claimed is reasonable. While most costs are determined by negotiation – in a small number of cases they are decided through a process of taxation. Appendix J outlines the taxation process.

Views of Legal Costs Working Group

One of the recommendations in a report in November 2005 of the Legal Costs Working Group, established by the Minister for Justice, Equality and Law Reform, was that provision 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 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 profession, of the likely levels at which bills of cost in different categories of proceedings or stages within proceedings, may tax.

2.51 The detailed arrangements for dealing with third party costs are set out in the chapters that follow. The average fees settled, up to March 2008, for legal representation of parties at the Mahon and Morris Tribunals is as set out in Figure 2.7.

¹¹ This includes one large settlement where an overall reduction of 72% had been made. If this were excluded the average reduction would be of the order of 30%.

Figure 2.7 Average Fees Settled for Representatives of Third Parties^a

Legal Representative	Fee Type	Mahon	Morris
		€	€
Senior Counsel	Brief Fee	21,178	47,750
	Refresher Fee per diem	2,488	2,928
Junior Counsel	Brief Fee	10,647	26,333
	Refresher Fee per diem	1,591	1,920
Solicitor ^b	Instruction Fee	96,545 ^c	395,223

Notes:

- a Up to 31 March 2008 in the Mahon Tribunal and 12 March 2008 in the Morris Tribunal.
- b Solicitors are paid an instruction fee. However, there is a large variation in solicitor instruction fees paid to date. Solicitors engaged by the tribunals are paid a daily rate which is not comparable to the solicitor instruction fee of a third party.
- c The Mahon Tribunal Solicitor Instruction Fee average does not include discovery costs which are separately identified.

Potential for Cost Recovery

2.52 Section 6 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979, as amended¹², allows a tribunal where it is equitable to do so, to order that

- all or part of the costs of any person appearing before it by counsel or solicitor, as taxed by a Taxing Master of the High Court, be paid by any other person named in the order, or
- costs incurred by the tribunal as taxed by the Taxing Master of the High Court, be paid to the Minister for Finance by any other person named in the order.

2.53 The legislation specifies that the criteria to be used in assessing whether such a measure is equitable are the findings of the tribunal and all other relevant matters including

- the terms of resolution passed by each House of the Oireachtas relating to the establishment of the tribunal
- failing to cooperate with or provide assistance to the tribunal
- knowingly giving false or misleading information to the tribunal.

2.54 The terms of reference of the tribunals being examined include a provision that all costs incurred by reason of failure of individuals to cooperate fully and expeditiously with the tribunal should be borne by those individuals so far as is consistent with the interests of justice.

2.55 The implications of the provision were considered in the context of the Mahon Tribunal.

2.56 In its submission to the tribunal in May 2003, the Minister for Finance accepted that the power to recover costs should only be used in special circumstances and with due regard to the principle of proportionality. The submission by the Minister indicated that where a party was

¹² By Section 3 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1997.

found to have obstructed or hindered the tribunal or failed to cooperate with it, the Tribunal should consider making an order¹³ that

- additional costs incurred by the tribunal in consequence of such misconduct should be payable by that party
- additional costs of any third party incurred as a consequence of such misconduct should be payable to that third party by the non-compliant party.

The quantification of these costs, on an equitable and proportional basis, would be a matter for the tribunal.

2.57 The Department of Finance later became concerned at the extent of cost orders being made in favour of third party legal representatives who appeared before the tribunal. In its view, some of these orders appeared to entail additional costs attributable to non-compliance with the tribunal. It considered that those bills should ultimately be discharged by parties who had key findings of non-cooperation made against them¹⁴.

2.58 In the meantime, the JMSE case was being pursued in the High Court. As part of its decision delivered in February 2006, the Court concurred with the State and concluded that the applicants lacked the *locus standi* to challenge the legislative provision in relation to the making of ‘costs over’ awards, since no particular ‘costs over’ rulings had yet been made by the Tribunal. The overall decision has been appealed to the Supreme Court. The outcome of the JMSE case generally, is likely to have a bearing on whether ‘costs over’ orders are pursued.

2.59 In February 2006, the Management Advisory Committee in the Department of Finance concluded that if the Attorney General advised that the move to obtain ‘costs over’ orders would jeopardise the progress made in having non-compliant parties own costs refused, the matter should not be pursued.

2.60 In May 2006, the CSSO wrote to the Mahon Tribunal urging it to consider the issue of ‘costs over’ as soon as possible as there were very substantial sums of money involved and the Minister was required to make substantial payments to persons in whose favour orders for costs had been made and was anxious to recoup those costs as quickly as possible. The letter indicated that the Minister intended, once the JMSE proceedings were completed, to apply to the tribunal for orders for payments of costs pursuant to Section 6 of the 1979 Act, as amended.

Litigation

2.61 Litigation has been a feature of all the tribunals. Just over €4 million was spent on litigation to the end of December 2007¹⁵. Litigation impacts on the conduct of a tribunal from both a financial and a time delay perspective. In general, tribunals have tended to engage external counsel to represent them at judicial review proceedings. In some instances however, the tribunal’s own counsel may be involved¹⁶.

2.62 It has been difficult as part of this examination to get clear information on the measurement of costs where costs are being recouped from a party who has been unsuccessful in litigation

¹³ Such orders are referred to as ‘cost over’ orders.

¹⁴ Pursuant to Section 6 of the Tribunal of Inquiry (Evidence) (Amendment) Act 1979, as amended.

¹⁵ No provision has been made for any future litigation costs.

¹⁶ This occurred particularly in the early years of the Mahon and Moriarty Tribunals. The junior counsel engaged by the Morris Tribunal for litigation was working on a part-time basis for the Tribunal at the time. Fees were separately charged in respect of this work.

involving a tribunal. The details of the litigation costs and the recovery arrangements are set out in Chapters 4 to 6.

2.63 To the end of December 2007, there have been 39 legal challenges involving the three tribunals. A total of €4.11 million has been incurred on court costs excluding the cost of tribunal solicitors. Where the tribunals have been unsuccessful they have met the costs of the other party. In other cases both sides have borne their own costs.

2.64 The tribunals are entitled to recoup costs incurred on 16 cases. The total court costs incurred by the tribunals in these was €2.26 million excluding solicitor costs. To date €0.49 million has been recovered in cases where the tribunals have been awarded costs.

Conclusions

2.65 Based on the costs being experienced by the Mahon and Morris Tribunals and subject to the caveats outlined in the chapter the cost of the three tribunals could be of the order of €336 million to €366 million. However, this assumes all parties represented before tribunals whose costs have not been determined will be awarded costs. This is unlikely given the refusal rates experienced to date.

2.66 Third party representation accounts for a high proportion of the total projected costs. The cost of this representation could rise in later cases partly due to participation over a longer timescale. No allowance has been made for this in the estimates.

2.67 While the governing legislation provides for costs of third parties to be taxed, in practice, most costs have, to date, been based on settlements.

2.68 Caution must be exercised in regard to the estimates since the experience in the case of the three completed tribunals was that third party costs represented, on average, 69% of total costs. However, there was a marked difference between those and the three tribunals considered in this report in terms of duration.

2.69 Two of the completed tribunals reported in less than one year. The third (the Beef Processing Industry Tribunal) produced its report within three years. An apparent trend is that as the duration increases third party costs as a percentage of total costs diminish. This is because direct tribunal costs accrue more or less evenly over the full duration of the tribunal while third party costs are in general episodic.

2.70 The overall cost of tribunal legal teams could be of the order of €87 million assuming the tribunals finalise within the timescale set out in Figure 2.1. An estimated €0.09 million will also have been incurred on representing the Garda Commissioner and the Minister for Justice, Equality and Law Reform before the Morris Tribunal.

2.71 Sponsoring Departments, advised by the CSSO and the Attorney General have actively monitored and challenged third party cost claims. Based on the advice of legal cost accountants, substantial reductions on the claims submitted have been negotiated in the course of settlements. The overall reductions ranged from 25% in the case of the Mahon Tribunal to 39% in the case of the Morris Tribunal.

2.72 The practice of tribunals in guiding the cost measurement process, through indicating the acceptable extent and type of representation warranted, varies

- in the case of the Mahon Tribunal the rulings give guidance on the number and type of legal representatives
- the Morris Tribunal considers the extent and type of representation is a matter for the Taxing Master – the Tribunals role is to allow representation, or not.

3 Managing Tribunal Costs

3.1 The ultimate cost of a tribunal is a factor of its timescale as well as arrangements for the remuneration of the inquiry team and for the payment of witnesses who assist the tribunal in its deliberations. Timescale impacts on the cost of a tribunal's legal team and its administration costs with each additional year giving rise to an incremental cost increase. Although tribunals are fact finding in nature, constitutional protections apply. Consequently, witnesses have a right to representation in order to ensure that their evidence is fairly heard and clarified and that the evidence of other witnesses whose testimony conflicts is challenged. This chapter examines the factors which contribute to the cost of inquiries under the following headings

- Scope of inquiries
- Administration and financial control
- Composition of inquiry teams
- Remuneration of inquiry teams
- Timescale of inquiries
- Cost of representation
- Procedural issues

It also examines the international practice in regard to the funding of public inquiries.

Scope of Inquiries

3.2 The scope of each inquiry is set out in terms of reference. The efficiency of an inquiry is heavily influenced by the precision of the terms of reference. These are difficult to alter once an inquiry has become seized of a matter. In addition, within the defined scope there is of necessity considerable latitude to open lines of enquiry.

There may be merit in requiring a tribunal to keep the Oireachtas informed at periodic intervals of the general lines of enquiry which it is pursuing within its established scope (in terms of issues, an outline methodology and tentative cost). In this respect, consideration might be given to

- providing for the request and delivery of periodic interim reports on the general progress of an inquiry, or of a particular aspect of an inquiry
- precluding new lines of enquiry unless the inquiry reports that it is satisfied that the cost and duration of those enquiries are likely to be justified by the relevance of the facts likely to be established in the context of the inquiry's terms of reference.

Administration and Financial Control

3.3 Because tribunals are facilitated and funded by different government departments depending on their subject matter they give, as Judge Morris observed, an appearance of novelty since each new inquiry appears to be breaking new ground. This can lead to delays in evolving a structure for inquiries in general and for sponsoring departments.

There may be merit in consolidating the knowledge that now exists across the system about tribunal administration. In regard to financial control, it would be desirable to

- make provision for cost estimation at all key stages, beginning with the inquiry's establishment, and providing a timescale and milestones. It should be a requirement that this statement be subsequently amended to take account of significant developments or new lines of inquiry as outlined above
- eliminate current inefficiencies, including making a provision for the 'reading-in' of evidence already available in written form and not disputed^a.

Note:

- a Currently, all evidence taken other than at public hearings of the tribunal e.g. outside the jurisdiction, must be read into the record at a public hearing of the tribunal.

Constitution of Inquiry Teams

3.4 Tribunals can consist of a sole member or a number of members. Where a number of members are appointed it is often with the objective of achieving efficiency through the use of concurrent sittings. For this strategy to work effectively, a detailed examination of the lines of inquiry and the linkage between issues would need to have been conducted. At the level of preparatory work, a considerable part of the investigatory work is undertaken by counsel.

Matters which might be considered include

- using paralegal staff for research and investigation work
- using concurrent sittings where the tribunal has a number of members and discrete issues can be identified
- moving away from the 'exclusive attention' basis of hiring counsel and perhaps in future, engaging counsel for discrete modules.

3.5 Since the subject matter is often technical or financial there may be merit in making provision for multi disciplinary teams guided by counsel in future inquiries so that the subject matter is probed from multiple viewpoints.

Remuneration of Inquiry Teams

3.6 In July 2004, the Government approved a new structure for the payment of legal fees at tribunals and other forms of inquiry. With effect from September 2004, the cost of all legal representation, including that of third parties, at newly established inquiries was to be paid by reference to the annual salary of a High Court Judge (plus an element in respect of pension contributions). Based on this, a set fee would be established for each type of legal representative¹⁷ and pro rata fees would be paid where legal personnel work less than the full calendar year.

3.7 With regard to existing inquiries, the effective date for the introduction of the new fee structure was to be determined by Government following communication between the Attorney General and the Chairman of each inquiry. The proposed new rates represented approximately 43% of the daily rates then being paid to tribunal counsel. In addition, no brief fee would be paid in respect of legal representation at a new tribunal.

¹⁷ The set fee for senior counsel was to be based on the annual salary at that time of a High Court Judge and totalled €213,098 after an adjustment for pension contribution. Based on 220 days per annum, this would have resulted in a daily rate of €969. Junior counsel would be paid at two-thirds of the senior counsel rate.

3.8 The new arrangements envisaged that where the timescale of an inquiry was extended the reduced fees would be payable for the remaining element. This did not occur. The new fee structure has never come into effect for inquiries in existence at the time of the decision. The timescale of all inquiries being examined has been extended by Government on a number of occasions without altering the existing fee rates.

It is recognised that there were constraints, in terms of continuity to the application of the revised fee rates to existing inquiries. However, considerable savings could be achieved by implementing such fee rates in future inquiries.

Timescale of Inquiries

3.9 Extended timescales of inquiries contribute substantially to their cost. The longer a tribunal lasts the greater the direct cost of tribunal resources. Many of the factors which impacted on timescale in individual inquiries will be discussed in Chapters 4 to 6. In addition, some general matters also impact

- investigations give rise to additional material becoming available throughout the period of investigation
- witnesses become unavailable or indisposed
- difficulties can arise in scheduling the attendance of witnesses
- evidence taken at private sittings held outside the jurisdiction must subsequently be read into the record at public sittings of the tribunal in this jurisdiction
- a tendency to repetition by counsel in cross-examination of witnesses because multiple interests are represented thereby prolonging public hearings. This was noted by the Sole Member or Chairman in two inquiries.

Once a tribunal has reported, there would be merit in reviewing with the tribunal the procedural and administrative approaches that could be used to improve timeliness. This could provide valuable information for the organisation of future tribunals.

Cost of Representation

3.10 The cost of representation of third parties is by far the largest element of inquiry costs. It has constituted over two-thirds of direct costs of inquiries completed in recent years.

Overall, it would be worth considering approaches to cost determination on the lines of those employed in the systems of public inquiries that are operated within Australia, Canada, New Zealand and the UK. These would suggest that for future public inquiries of this nature, there would be merit in establishing fair legal representation costs at the outset of the inquiry process, with continued assessment of costs as an inquiry progresses.

Apart from capping the amount of legal fees recoverable by third parties, possible means of addressing this might include

- providing for up-front granting of legal representation and determining its extent based on an application giving reasons why a person considers he or she should be represented. The grant of representation might be limited to instances where a tribunal is satisfied that
 - a person's evidence is likely to be relevant to its enquiries and/or
 - a person's constitutional or legal rights are likely to be affected by the proceedings before the tribunal, and/or
 - there are exceptional circumstances which warrant the granting of representation in the case of the person.
- clarification of the situation with regard to award of costs by an inquiry by providing
 - that except in exceptional circumstances, costs of representation should only be allowed at the level specified in the inquiries original determination
 - that the award of costs must not exceed maximum amounts set
 - for the establishment of criteria to guide the Chairman in determining whether or not to authorise the payment of costs

Where a person adds to the duration of hearings by knowingly or recklessly providing false or misleading information or otherwise fails to provide appropriate cooperation, the cost of inquiries could be reduced by invoking the existing statutory provision for the award of costs against that person for the benefit of the Exchequer.

3.11 Legal cost accountants interviewed in the course of the examination were strongly in favour of a practice of issuing interim cost orders at the same time as interim reports. In their view, this would allow closer scrutiny of costs as a public inquiry continues and could give greater accuracy in that costs would be assessed closer to the time in which they were incurred.

3.12 Consideration could be given to establishing an agency with the mandate to manage legal costs. Recommendations to establish a legal costs regulatory body have been made in both the 2005 Report of the Legal Costs Working Group¹⁸ and the subsequent 2006 Report of the Legal Costs Implementation Advisory Group¹⁹. This recommendation alongside the other suggestions within the report could help combat the escalation of legal costs, promote regulation, and provide a structure in which future estimation could be carried out. An outline of the main recommendations of the Legal Costs Advisory Group is set out at Appendix K.

18 Report of the Legal Costs Working Group, November 2005. The group was established in 2004 by the Minister for Justice, Equality and Law Reform and was chaired by Mr Paul Haran.

19 Report of the Legal Cost Implementation Advisory Group, November 2006. The group was established in 2006 by the Minister for Justice, Equality and Law Reform to progress the recommendations of the Report of the Legal Costs Working Group and was chaired by Mr Desmond Miller.

Procedural Issues

3.13 If a purpose of tribunals is to give a reasonably comprehensive account of the facts sufficient to allow a view to be taken on desirable system modifications, then procedural adjustments might need to be considered which focus on getting a sufficient quantum of relevant and reliable evidence as quickly as possible.

Possibilities that might be explored include

- providing for witness evidence to be delivered by sworn affidavit
- drafting an initial statement of facts based on those statements and material discovered, designed to isolate those facts in contention in the course of a clearance procedure involving witnesses
- proceeding to oral hearing only in instances where a party considers that their reputations or interests may be adversely affected
- providing for the making of legal submissions in written form.

International Comparison

3.14 Research into seven public inquiries in the UK²⁰, three public inquiries in Canada²¹ and New Zealand²², and two in Australia²³ would suggest that the procedures relating to third party legal costs in public inquiries in Ireland differs significantly. Comparisons with other EU countries are not readily available, and institution-wide inquiries within the EU itself focus more on issue-based committees and thus do not present useful comparisons for analysis. In all of the inquiries examined, an emphasis is placed on legal fees being fair, reasonable, and proportionate, with a particular focus on cost effectiveness. It was not possible to assess the number of bills of costs which have proceeded to taxation, however, the guidelines within the UK system suggest a willingness to do so where necessary.

3.15 With some minor caveats within each, the arrangements for the conduct of the public inquiries examined differed somewhat from that of the three which are the subject of this report in regard to prior application, fee capping, vouching and the payment of costs to large organisations.

Prior Application

3.16 Payment from the public purse within the UK system requires prior disclosure of the proposed fees by both solicitors and Counsel. For example, in the case of the Billy Wright Inquiry, the size and composition of particular legal teams and the hourly rate afforded to them had to be agreed in advance with the solicitor of the inquiry. Similarly, the Robert Hamill Inquiry required written application for funding of legal costs prior to the commencement of the Inquiry, subject to terms agreed by the State Solicitor.

20 The Billy Wright Inquiry, the Robert Hamill Inquiry, the Zahid Mubarek Inquiry, the Bloody Sunday Inquiry, the Kerr/Haslam Inquiry, the Deepcut Review and the Rosemary Nelson Inquiry.

21 The Commission of Inquiry into the Sponsorship and Advertising Activities (the Gomery Commission), the Arar Commission and the Indian Claims Commission.

22 The Commission of Inquiry into Police Conduct, the Gisborne Cervical Screening Inquiry and the Waitangi Tribunal.

23 The Inquiry into Certain Australian Companies in Relation to the UN Oil and Food Programme (the Cole Inquiry) and the Clarke Inquiry.

3.17 In Australia, the Attorney General makes decisions as to who will receive funding support in line with a similar application process. In Canada the inquiry Chairman makes recommendations for funding.

3.18 The system in New Zealand differs somewhat in that inquiries do not award legal costs. Instead, as was the case in the Commission of Inquiry into Police Conduct and the Gisborne Cervical Screening Inquiry, the inquiry appoints and covers the costs of counsel to represent state and third party interests. The inquiries do not object to participants having independent representation but the financing of that representation is not within the power or control of the inquiries.

3.19 In all 15 inquiries examined, there was no presumption that parties would be awarded costs from the public purse. Similar to the situation in Ireland, there was a general emphasis upon the need to fund those participants key to the process of the public inquiry who would otherwise be unable to participate, or would be exposed to prejudice in light of the findings of the inquiry. Judgements as to who should be recommended for funding falls within the remit of the Chairman of the inquiry.

While the process in each country varies, application for legal fees to be met by the public purse is required prior to participation in the public inquiry process in Australia, Canada and the UK. None of the inquiries had to deal with the issue of legal costs to be met by the public purse retrospectively.

Fee Capping

3.20 The amount of fees awarded to third parties is limited to some extent in each country. In general, UK public inquiries assess fees in line with the seniority of legal representation, which is similar to the situation in Ireland. However, the Robert Hamill Inquiry and the Billy Wright Inquiry were more specific in stipulating maximum fees for counsel and solicitors. For example, the Robert Hamill Inquiry capped hourly rates at €250 for senior counsel, €125 for junior counsel, €220 for leading junior counsel and €90 for solicitors, within a maximum of 40 hours per week. In the case of the Commission of Inquiry into the Sponsorship and Advertising Activities in Canada, counsel fees were limited to one senior counsel and one junior counsel and a maximum of 50 hours per week, with a maximum of 10 hours apportioned to the initial application at the Commission. Australia has a clear guideline setting out the fee caps for public inquiries applied to both the Cole and Clarke Inquiries. Solicitor fees are limited to 80% of the federal court scale and are thus set at hourly rates of €120. Senior counsel and junior counsel rates are set at a maximum of €230 and €60 per hour respectively. They are not to exceed maximum daily rates set by the Commission of €1,370 to €1,825 for senior counsel and €1,030 to €1,255 for junior counsel²⁴.

Fee capping is an approach that has the merit of providing some certainty to all the parties involved in regard to the likely scale of the cost.

Vouching

3.21 Prior application for costs to be met by the public purse in the UK is accompanied by vouching regulations. In the Rosemary Nelson Inquiry, for example, legal representatives are required to submit bills on a monthly basis to the inquiry solicitor. Bills are to be submitted no later than 14 days after the month end and must include

²⁴ All costs are given in Euros, based on a currency conversion from www.xe.com as of September 2008. All figures have been rounded up or down to the nearest five euro.

- a breakdown of the number of hours worked and the specific work undertaken
- the level of seniority of the representative and their hourly rate
- the disbursements claimed, and
- where represented by counsel, a detail of fees with supporting written particulars.

3.22 Where disputes arise they are addressed by the inquiry solicitor. However, where agreement cannot be reached they are referred to the inquiry Chairman. Where agreement is still not reached, a request is made to a senior costs judge to arrange an assessment.

3.23 Explicit in the Australian arrangements and implicit in the other countries, is the breakdown of minor fees and contingencies such as travel, photocopying and accommodation costs for third party legal representation.

More detailed vouching and cost submission provisions could introduce greater timeliness and certainty as to costs to be borne on public funds.

Entitlement of Bodies to Representation

3.24 The UK system of costs does not award funding to public bodies or ‘substantial’ organisations or associations, such as Trade Unions. This was consistent across the UK public inquiries examined with the exception of the Zahid Mubarek Inquiry where the Prison Officers Association (POA) was considered to be a special case. Prior to the inquiry being established, Ministers had assured the POA that their legal costs would be met by the public purse. In the case of the Arar Commission in Canada, organisations were encouraged to form coalitions of similar interests to be granted costs for joint representation.

There may be some scope for jointly representing shared interests and/or limiting the funding of bodies or organisations whose function it is to protect and defend an interest, in any event.

Report of the Law Reform Commission

3.25 The Law Reform Commission²⁵, as part of the Commission’s Programme of Law Reform 2000-2007, examined the law on public inquiries and tribunals and reported in May 2005²⁶. A number of recommendations would be worth considering from the viewpoint of efficient investigation of issues. Key recommendations, some of which may overlap with those above, are outlined in Appendix L.

25 The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established in October 1975.

26 Report on Public Inquiries including Tribunals of Inquiry, May 2005.

General Conclusion

3.26 All delivery systems within the executive have inbuilt checks and balances which help promote cost control in the application of public funds. The challenge is to achieve something along similar lines in the case of bodies established under the authority of the legislature without compromising their independent investigations or the constitutional rights of witnesses.

3.27 The most appropriate way of addressing this appears to be through legislation enacted by the Oireachtas which could set procedural rules in advance perhaps drawing on some of the recommendations in this chapter.

Part B – Administration of Specific Tribunals

4 The Mahon Tribunal

4.1 The Mahon Tribunal was established by the Minister for the Environment, Heritage and Local Government²⁷ in November 1997 – following the passing of resolutions by both Houses of the Oireachtas. The Tribunal commenced as a sole member tribunal under the chairmanship of the Honourable Mr Justice Feargus Flood. In October 2002, the composition of the Tribunal was changed to a three-member tribunal with one reserve member who would become a full member in the event that any existing member, for whatever reason, was unable to act.

4.2 The initial terms of reference of the Tribunal were to inquire into

- the beneficial ownership and planning history of 726 acres of land in north County Dublin which were the subject of a letter written by developer Mr Michael Bailey to Mr James Gogarty of Joseph Murphy Structural Engineering (JMSE) in June 1989
- any payments made to political parties, members of either House of the Oireachtas, members or officials of a Dublin Local Authority or other public official by Mr Bailey or Mr Gogarty or a connected person or company
- any other acts of possible corruption committed on or after 20 June 1985 in relation to the planning process of which the Tribunal became aware in the course of its inquiries.

It was also required to make recommendations in regard to amendments to legislation as deemed appropriate.

4.3 Subsequently, its terms of reference were amended on four occasions. Two of the amendments related to membership of the Tribunal. The other two related to the substantive issues under investigation²⁸. The amended terms of reference of the Mahon Tribunal are set out at Appendix C.

Organisational Structure of the Tribunal

4.4 The current members of the Tribunal are Judge Alan Mahon, Judge Mary Faherty and Judge Gerald Keys.

4.5 The organisational structure of the Tribunal at December 2007 is set out at Figure 4.1. The Tribunal legal team was appointed by the Chairman in consultation with the Attorney General.

²⁷ In 1997 the title was Minister for the Environment and Local Government.

²⁸ See paragraphs 4.9-4.13.

Figure 4.1 Organisational Structure of Tribunal 31 December 2007

Position	No of Persons	Total
Members		
Chairperson – Judge Alan Mahon	1	
Others	<u>2</u>	3
Legal Counsel		
Senior Counsel	4	
Junior Counsel	5	
Legal Research Counsel	5	
Paralegals	2	
Qualified Paralegals as Legal Research Assistants	2	
Solicitors	<u>3</u>	21
Civil Servants – Administrative Staff		
Registrar	1	
Clerical Officers/Service Officer/Tipstaff for each of the Judges	<u>9</u>	10
Tribunal and Agency Staff		
Document Room Manager	1	
Data Indexers	6	
Legal Secretaries	4	
Office Support Staff	1	
IT Support Staff	2	
Accountants ^a	<u>2</u>	16
Total		50

Note:

- a Initially accountants were engaged by selecting a firm of accountants following a tender competition. Subsequently, the Chairman engaged a different firm of accountants and in late 2003, the Tribunal directly sourced and engaged two accountants, one of whom had been an employee of the latter firm of accountants due to their experience from working in the Tribunal fulltime. No contracts of employment were entered into. The accountants submit fee notes to the Tribunal on a regular basis, in a similar manner to the Tribunal legal team.

Timescale and Current Status of Inquiry

4.6 On 29 October 2008, Judge Mahon indicated that the Tribunal had effectively marked the end of the Tribunal's sittings²⁹. The Tribunal had sat for a total of 916 days and had generated 60,000 pages of evidence and 76,000 pages of correspondence with 400 witnesses. The three judges were expected to take up to a year in drawing up the report and the adjudication of costs

29 The only piece of testimony left was a short cross-examination by former council official George Redmond of a witness from the Carrickmines Module.

issues could take a further four to six months. However, the Tribunal indicated that unforeseen delays could prolong the estimated duration.

4.7 The Tribunal has published four interim reports to date. These were published in February 1998, September 2002, January 2004 and June 2004 respectively. The second and third interim reports dealt with findings of the Tribunal on the issues under investigation. The first and fourth interim reports dealt with the status of the inquiry at February 1998 and June 2004 respectively.

Factors Impacting on Timescale

4.8 A number of specific factors impacted on the cost and timeframe of the Mahon Tribunal

- it had one particular term of reference which made it very open ended from the outset. This term was amended subsequently in July 1998 to make it even more so by eliminating the period from which the Tribunal was required to investigate possible acts of corruption
- in certain instances, parties whose cooperation was sought were slow to respond or uncooperative
- representation, by lawyers, of multiple interests on particular modules increased the cost beyond that which might pertain in court proceedings which generally involve only two main parties
- litigation taken against the Tribunal or initiated by the Tribunal
- procedural shortcomings
- the inability of the Tribunal to hold parallel public sessions.

Expansive Terms of Reference

4.9 The open-ended nature of the inquiry is illustrated by the text of one of the terms of reference

‘In the event that the Tribunal in the course of its inquiries is made aware of any acts associated with the planning process which may in its opinion amount to corruption, or which involve attempts to influence by threats or deception or inducements or otherwise to compromise the disinterested performance of public duties, it shall report on such acts and should in particular make recommendations as to the effectiveness and improvement of existing legislation governing corruption in the light of its inquiries’.

4.10 Initially this was confined to possible acts of corruption committed on or after 20 June 1985. In 1998 an amendment enabled the Tribunal to inquire into possible acts of corruption prior to 20 June 1985. The 1998 amendment also enabled the Tribunal to inquire into whether any substantial payments were made or benefits provided to Mr Raphael Burke which, in the opinion of the Tribunal amounted to corruption or were intended to compromise the disinterested performance of public duties and whether Mr Burke in public office made any decisions which benefited persons making such payments.

4.11 In his second interim report in September 2002, Justice Flood noted that the subject matter of its inquiries, to that point, had extended to cover a period of over 30 years and ranged over topics as diverse as land rezoning, radio broadcasting and offshore trusts and corporations.

4.12 In 2004, an attempt to curtail the open-ended nature of the Tribunal was made by setting out the specific modules with which the Tribunal would proceed³⁰. It was also required to decide what additional matters would be proceeding to public hearings. After recording its decision no new matters would be investigated. An element of flexibility was also introduced in that the Tribunal could at its discretion decide not to investigate matters in instances where public hearing had not commenced. Factors to be considered in exercising that discretion were set out and included the age or state of health of witnesses, cost and likely duration.

4.13 The Tribunal was the subject of a court challenge by Fitzwilton Ltd on the manner in which it had complied with the amended terms of reference with regard to the obligation to record its decision on those additional matters which would be proceeding to public hearing. Judgement was delivered in the Supreme Court in July 2007. The judgment held that the Tribunal did not specifically ‘record’ a decision on additional matters to go to a public hearing as required by its amended terms of reference, but by virtue of the wording used in a document produced by the Tribunal, ‘reserved’ a decision until a future date. The Supreme Court held that on that basis the Tribunal had no jurisdiction to proceed with the Fitzwilton Module. Overall, the impact of this decision was that no new matters other than those duly recorded by the Tribunal under its amended terms of reference could proceed to public hearing.

Dependence on Cooperation

4.14 A further matter which impacted on the duration and cost of the Tribunal, was the non-cooperation of some parties to the Tribunal. In his second interim report dated September 2002, Mr Justice Flood stated that

‘This Tribunal continues its work more than four and a half years after its inception, not only because of the multiplicity and complexity of matters which it is obliged to investigate under its terms of reference, but also because of the failure of persons who have been required to provide information to the Tribunal, either documentary or otherwise, to provide such information expeditiously or, in some instances, at all.’

4.15 Justice Flood concluded in his second interim report, that in respect of the modules on which he had heard evidence a total of 10 parties³¹ had hindered, obstructed or not cooperated with the Tribunal to varying extents. Findings of hindrance and obstruction were made against one additional party in the third interim report in January 2004. These findings included

- failing to provide a truthful account
- colluding with other parties to give false accounts
- failing to make proper discovery of documents to the Tribunal or to provide a proper Affidavit of Discovery
- failing to comply with a witness summons requiring attendance at a public session of the Tribunal
- failing to provide full explanations
- falsely constructing an alibi which was untrue
- failing to respect the confidentiality of documents provided by the Tribunal by disclosing them to a journalist with the intention that the integrity of the Tribunal would be damaged

30 The relevant motion to amend the terms of reference was approved by both Houses of the Oireachtas on 17 November 2004.

31 JMSE, its associated companies, Directors, Officers and Auditor have been counted as one party. Likewise, Michael Bailey, Thomas Bailey, Caroline Bailey and Bovale Developments Limited have been counted as one party.

- preparing false documents.

Representation of Multiple Parties

4.16 Under Section 2 (b) of The Tribunal of Inquiry (Evidence) Act, 1921 the Tribunal has the power to authorise or refuse representation by counsel or solicitor, of any person appearing before it. The principle entitlement attaching to the grant of legal representation is that it allows a party to cross-examine other relevant witnesses. Where multiple parties are involved this can become a prolonged affair. It also led to some duplication.

4.17 In June 2004, Judge Mahon stated his concern at the tendency of counsel and parties to repeat questions when cross-examining witnesses, in instances where the same questions had been previously asked of that witness by either counsel for the Tribunal or by one of the parties or by counsel for one of the parties. Judge Mahon stated that a consequence of such repetitive cross-examination was to prolong the public hearings. He directed that counsel desist from this but did not impose further limitations.

4.18 The Tribunal have indicated that since the issuing of the ruling it has, in general, been adhered to. Where appropriate, the Chairman has reminded counsel appearing before the Tribunal of the requirement to avoid repetitive questioning of witnesses.

Litigation involving the Tribunal

4.19 The Tribunal has claimed that the length of time taken to complete its work has been added to significantly by the multiplicity of cases either taken against the Tribunal or initiated by the Tribunal to achieve compliance with its orders. In general, most cases have culminated in appeals to the Supreme Court with consequent delays.

Procedural Shortcomings

4.20 Certain procedural shortcomings were highlighted in the course of judicial reviews. These shortcomings resulted in re-work or additional work for the Tribunal. For example, in the case of *Bailey (No 1) V Tribunal* in 1998 the court quashed orders of discovery and production made by the Tribunal on the grounds that they were in contravention of the requirements of constitutional justice and because fair procedures had not been adopted. As a result, the Tribunal was obliged to return documentation already furnished to it by some parties and issue new orders of discovery and/or production. The Tribunal stated that this was time consuming but necessary.

4.21 In another case, *Lawlor V The Tribunal* in 1999, the courts quashed two out of three orders served on Mr Lawlor. One of the orders requiring Mr Lawlor to attend at the offices of the Tribunal to answer questions put by members of the Tribunal's legal team was quashed on the grounds that the sole member could not delegate powers to counsel for the Tribunal. Subsequently, the Tribunal was required to review all of its orders that were affected by the decision. The Tribunal have stated that fortunately, most parties invited to attend for interview with members of the Tribunal did so voluntarily and consequently, very few such orders had been made by the Tribunal. However, insofar as an order of the Tribunal was considered to have been affected, the Tribunal vacated the orders and informed the persons affected that material (if any) obtained on foot of the said orders would not be relied upon by the Tribunal. The overall effect appears to be that interviews held in private by counsel, where the party was ordered or directed to attend, in the absence of the sole member were unlawful and had to be discarded and held again.

Inability to Hold Parallel Sessions

4.22 Despite the amendment of the Tribunal legislation in 2004 to allow tribunal members to sit in parallel to hear evidence on more than one module at a time, the Tribunal has informed me that the activation of this provision did not become feasible due to the interlinked nature of its modules of inquiry.

4.23 The Tribunal have also stated that had parallel hearings proved possible considerable additional costs were likely to have been incurred. For example, two additional hearing rooms would have been required and additional staff would have been necessary in order to permit parallel hearings proceed on a regular basis.

Projected Costs of the Tribunal

4.24 The Tribunal, based on information available at February 2007 estimated that the cost of the inquiry would be of the order of €221 million, excluding VAT on third party costs. Drawing on the most up to date information supplied by the Tribunal, I sought to estimate its gross projected cost.

4.25 Up to 31 December 2007, €64.8 million, excluding third party costs, had been directly incurred on the conduct of the Tribunal. A further €8.8 million has been identified as having been incurred by other State Bodies including €0.74 million in responding to tribunal enquiries. However, considerable costs are likely to have accrued in respect of third party representation and discovery of documents. The gross projected cost of the Tribunal excluding third party and discovery costs as estimated by my staff is set out in Figure 4.2.

Figure 4.2 Gross Projected Cost of the Tribunal excluding Third Party and Discovery Costs

Category of Cost	Incurred to end 2007	Projected Further Costs ^a		Total Projected Cost		
		Low	High	Low	High	Average
	€m	€m	€m	€m	€m	€m
Administration	22.66	3.61	4.69	26.27	27.35	26.81
Tribunal Legal Team Fees	38.94	7.07	9.18	46.01	48.12	47.06
Litigation Costs ^b	3.17	—	—	3.17	3.17	3.17
State Respondent Costs	0.74	—	—	0.74	0.74	0.74
Other State Costs	8.09	2.76	2.76	10.85	10.85	10.85
Total	73.60	13.44	16.63	87.04	90.23	88.63

Notes:

- a Based on information supplied by the Tribunal the projections assume that the Tribunal will complete its business in April 2010.
- b Litigation costs include cheques of €174,205 which were returned to the Department of the Environment, Heritage and Local Government (the Department). The uncashed cheques have been posted to Appropriations in Aid in the Department's Appropriation Accounts for 2007.

4.26 Appendix F sets out the estimation methodology for all costs.

Third Party Costs

4.27 €8 million has been incurred on third party costs up to the end of December 2007.

Contingent Liability for Third Party and Discovery Costs

4.28 The gross contingent liability for third party costs, based on a presumption of the continuance of the pattern of cost awards observed in this Tribunal, has been estimated in the range of €46 million to €56 million. A further contingent liability of the order of €30 million to €40 million could arise in respect of discovery costs. The total contingent liability for third party and discovery costs is estimated at between €76 million to €96 million.

4.29 The extent to which the gross contingent liability will arise depends on the future award pattern. There has been a significant refusal rate in respect of costs ruled on to date. In all, 15% of parties who applied for costs representing 67% of original cost estimates³² were refused their costs. 3.5% of parties who applied for costs representing 1% of original costs estimates were awarded partial costs. Consequently, there could be a considerable reduction of the gross estimate if this pattern prevails in subsequent modules. Refusals have been the subject of appeal in one case. That case is before the Supreme Court.

The overall cost of the Tribunal based on the pattern of awards to date is likely to be €171 million to €194 million comprising

	Low	High
Third Party Costs Incurred	€8 million	€8 million
Contingent Liability for Third Party and Discovery	€76 million	€96 million
Other Costs (Figure 4.2)	€87 million	€90 million

However, this cost could rise if a final pattern resembling that of three completed tribunals^a were to emerge.

Note:

a The tribunals referred to are the Finlay Tribunal, the McCracken Tribunal and the Beef Processing Industry Tribunal.

Comparison with Completed Tribunals – Third Party Costs

4.30 In the case of the completed tribunals, third party costs represented 69% of total costs. However, there was a marked difference between these tribunals and the Mahon Tribunal in terms of duration and the extent of counsel representation.

4.31 Two of the completed tribunals reported in less than one year. The third (the Beef Processing Industry Tribunal) produced its report within three years. By comparison the Mahon Tribunal is now projected to last for 12 years. An apparent trend is that as duration increases third party costs as a percentage of total costs diminish. This is because direct tribunal costs accrue incrementally while third party costs are based on the level of representation necessary in respect of an issue or for a module being dealt with by a tribunal.

32 The Tribunal had notified parties it believed had incurred costs arising from the Second and Third Interim Reports to indicate whether they wished to apply for costs and to estimate the possible level of their claim (if any). As a result indicative costs were compiled by the Tribunal.

4.32 On this basis and subject to the reservations about differences in duration, the nearest relevant comparator for costs is likely to be provided by the Beef Processing Industry Tribunal. If a similar relationship pertained between third party and direct costs as occurred in the Beef Processing Industry Tribunal a total liability for third party costs of the order of €31 million to €37 million could arise.

Administrative Costs

4.33 Administrative costs are projected to amount to around €27 million. €23 million of this had been incurred up to 31 December 2007. An analysis of administration expenses incurred in 2006 and 2007 indicated that approximately

- 61% related to salaries and wages of staff including temporary contract staff,
- 13% was for professional/legal and financial services,
- 18% related to general services (advertising, couriers, taxis, telephone, hire of equipment, stationery etc), and
- 8% was incurred on transcripts and stenography charges.

Cost of Tribunal Legal Team

4.34 Fees of the Tribunal's legal team are projected to cost around €48 million. €39 million of this had been incurred by 31 December 2007. In regard to fee rates, the Minister for Finance following discussion with the Attorney General, established the fees to be paid to senior and junior counsel appointed to the Tribunal in December 1997. An initial brief fee of €31,743 and €20,951 was payable to senior and junior counsel respectively. Daily fees following the first 50³³ days of public hearings were set at €1,714 and €1,143 respectively. Non-sitting days were also set at €1,714 and €1,143 respectively.

4.35 Those rates remained in place until new rates were approved for the Tribunal with effect from October 2002. At that time, the daily fee increased by approximately 31% for senior and junior counsel to €2,250 and €1,500 respectively. Those rates remain in force today. The rates quoted are exclusive of VAT.

State Respondent Costs

4.36 State Respondent Costs are projected to amount to €0.74 million. These costs include the cost of representing the public interest and the interests of Government Departments together with the cost to Government Departments and Local Authorities of compliance with Orders of Discovery issued by the Tribunal.

Other State Costs

4.37 Other State Costs are projected to cost up to €1 million. This category of costs consists primarily of the cost of the provision of premises to the Tribunal and the salaries of Tribunal Members.

³³ During the first 30 days of hearings senior counsel and junior counsel were paid daily refresher rates of €1,841 and €1,206 respectively. For the following 20 days, these daily refresher rates were adjusted to €1,778 and €1,175 respectively.

Third Party Costs

4.38 The Mahon Tribunal has processed cost orders which led to awards of €8 million to parties associated with the second and third interim reports of the Tribunal. The procedure employed was as follows

- Parties to the Tribunal were invited to submit indicative estimates of the costs incurred by them in connection with those modules of inquiry covered by the second and third interim reports. This figure was estimated at €1.5m, exclusive of VAT, in June 2003³⁴.
- Written and oral submissions were requested on the principles which the Chairman should apply in the exercise of his discretion in determining applications for costs. Submissions were requested from persons who had indicated that they would be applying to the Tribunal for their costs notwithstanding that findings of corruption and/or findings of non-cooperation had been made against them in the second and third interim reports of the Tribunal as well as from the Minister for Finance as the person who would be primarily liable to pay any such costs and the Attorney General representing the public interest.
- At the end of June 2004, Judge Mahon ruled on the principles which he would apply in respect of applications for costs.
- Applications for costs were sought within seven days of that ruling, after which their application was listed for hearing in public. The onus of establishing entitlement to costs rested with the applicant.

4.39 Between September 2004 and July 2005, Judge Mahon ruled on costs in relation to the second and third interim reports of the Tribunal³⁵ in respect of 113 third parties. This includes 65 parties who had not been granted legal representation by the Tribunal but to whom the chairman awarded costs. The Chairman refused to award costs to nine parties who had cooperated fully with the Tribunal but did not have dealings with the Tribunal through counsel or solicitor. He considered it was open to the Minister for Finance to make an ex gratia payment to those parties if the Minister so wished.

4.40 In June 2005, Judge Mahon ruled that costs awarded by the Tribunal, unless stated otherwise, were awarded on a ‘party and party’ basis³⁶.

4.41 The total amount paid up to 31 December 2007 on foot of tribunal cost orders is €8 million. Figure 4.3 summarises the outcome of determinations of cost made by the Tribunal Chairman to date.

34 This figure did not include indicative costs for two key parties to the Tribunal – JMSE Limited (and associated persons/companies) and Bovale Developments Limited (and associated persons/companies). Both parties had declined to furnish an estimate of their costs though they did confirm they would be seeking their costs from the tribunal.

35 This covered the work of the Tribunal in relation to the Gogarty, Century and Brennan and McGowan modules of the Tribunal which were heard in public in the period 1999 to 2001.

36 Party and party costs cover all costs, charges and expenses reasonably incurred by one party for the purposes of the relevant proceedings which the other side is obliged to pay. The party claiming costs must justify why they were incurred and why those costs should be allowed. The party and party costs may not cover the whole of the costs incurred in an action.

Figure 4.3 Summary of Tribunal Cost Determinations between September 2004 and July 2005

Cost Determination	Number	Percentage
Costs Awarded in full ^a	92	81%
Partial Costs Awarded	4	4%
Costs Refused	17	15%
Total	113	100%

Note:

- a One party was awarded full costs with the exception of costs relating to an Order of Discovery with which he did not comply.

4.42 The partial cost award ranged from 25% to 70% of costs. For example, in one particular case, the Chairman ruled that the applicant could not realistically expect, on the basis of the level of cooperation afforded to the Tribunal, to have an award of costs made in his favour. However, based on factors such as age, personal financial situation, limited role in the Tribunal and the fact that no adverse findings on any substantive issue had been made by the Tribunal, he was awarded 30% of his costs as assessed by the Taxing Master.

4.43 A profile of the manner in which those cost awards have been processed to the end of December 2007 is set out in Figure 4.4.

Figure 4.4 Status of Cost Awards at 31 December 2007 (Relating to Second and Third Interim Reports)

Bills Settled Outside Taxation	44	
Bills that went to Taxation	2	
Bills being examined by State's legal cost accountant/Going to Taxation ^a	<u>15</u>	61
Bills of Costs Outstanding		35
Total Parties Awarded Costs (Full or Portion)		96

Note:

- a This includes one case which is proceeding to taxation.

4.44 There have been considerable delays in the submission of bills of cost by some third party representatives. There were delays of over two and a half years in submitting bills of cost to the Tribunal in some cases. The reasons for the delay are unclear. There is no legislative time limit within which bills of cost must be submitted. Only 33% of successful cost awards made between September 2004 and July 2005 had been settled and paid at 25 April 2007. This rose to 47% by November 2007.

4.45 Two instances were noted with a gap of approximately four years between the bills of costs being received by the Tribunal and their submission to the State's legal costs accountant. It transpired that the bills of cost had been received by the Tribunal nearly two years in advance of the Chairman's cost rulings and were only discovered when a review of files was carried out.

Settlement and Taxation of Costs

4.46 Notwithstanding the provision in Section 6 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979, that a party's entitlement is to costs as taxed by the Taxing Master of the High Court, very few cases are listed for hearing by the Taxing Master. Most are settled through a

process of negotiation involving the State's legal cost accountant, outside of the High Court taxation process.

4.47 An analysis of third party cases settled and paid up to the end of March 2008 showed that an average reduction of 25% had been achieved on the original bill of cost submitted through the process of negotiation by the State's legal cost accountant or through taxation of costs.

4.48 As at March 2008, only two cases involving third party cost claims had been settled at taxation. In the first case, an additional 9.6% reduction on top of the 19% reduction negotiated by the State's legal cost accountant was made. The gross value of the reduction in third party fees achieved at taxation was €35,562. After adjusting for stamp duty of €20,101 on the taxation, the net benefit from taxation was €15,461.

4.49 In the second case, however, there was a negative impact on costs arising out of taxation. The Taxing Master awarded an amount of €65,000 which was 30% greater than that proposed by the State's legal cost accountant in respect of the solicitor instruction fee element of the bill of costs.

4.50 One bill was settled for in excess of €3.5 million. The possibility of going to taxation with this case was considered at a meeting of the Office of the Attorney General, the CSSO, the Department of Finance and the Department in February 2006. In opting for a settlement outside of taxation, at that point, the State had to balance the fact that the legal cost accountant had negotiated a significant reduction amounting to 21% on the original bill of costs against the possibility that higher costs could be allowed at taxation which would create a precedent for other claims which would tend to discourage claimants from negotiating a settlement.

Legal Challenges

4.51 Up to the end of December 2007, the Mahon Tribunal has been involved in 29 legal challenges and approximately €3 million gross in court costs had been incurred up to that date³⁷.

4.52 In eight cases in which the Tribunal was unsuccessful costs of €1.5 million had been incurred up to the end of 2007. This included costs paid to the other parties as well as the Tribunal's own litigation costs. In a further nine cases in which the Tribunal was successful costs of €1.4 million had been incurred by it. The Tribunal will bear its own costs in the eight cases in which it was unsuccessful and in a further eight cases where each side agreed to bear their own costs. Four other cases were ex parte applications or were discontinued³⁸.

Recovery of Litigation Costs

4.53 In a letter to the Tribunal in April 2006, the Department sought assurance that where the Tribunal successfully defended cases and secured orders entitling it to recover those costs from the plaintiffs concerned, that the Tribunal did in fact pursue such costs (including costs in respect of solicitor's instructions).

4.54 In reply, the Tribunal confirmed that it had in the past pursued costs where appropriate and agreed to forward a list of the position in all cases litigated in early course. The letter stated that the Tribunal had expended considerable resources in the recovery of outstanding costs and

37 To date in 2008, a further €0.88 million has been paid from the Tribunal subhead in relation to litigation. This includes costs paid to other parties as well as Tribunal's own litigation costs.

38 One further case took place in 2008 and costs were awarded against the Tribunal.

suggested that consideration be given to the Department undertaking the task of recovering outstanding costs of the Tribunal.

4.55 In May 2006, the Department replied stating that it did not consider it appropriate that the Department undertake the task of recovering costs awarded to the Tribunal, not least because relevant cost orders, would, presumably, be made in favour of the Tribunal.

4.56 To the end of 2007, court costs totalling €1.4 million as well as solicitor instruction costs³⁹ were incurred by the Tribunal on nine cases in respect of which it was entitled to recover costs. Only €243,803 has been recovered to date. The amounts recovered relate to three cases which occurred in 2000 and 2001.

Costs in the Case of the Late Liam Lawlor

4.57 Over €600,000 was sought to be recovered from the estate of the late Liam Lawlor. These costs were awarded as a result of court orders arising out of proceedings against Mr Lawlor in the period 2000 to 2002 for non-attendance as a witness at the Tribunal and failure to discover documents. Those court orders were taxed by the Taxing Master and Mr Lawlor failed to pay the amounts due on foot of the certificates of taxation. Judgment mortgages were registered by the Tribunal against the late Mr Lawlor's interest in his home at Somerton, Lucan, Co. Dublin.

4.58 On 30 July 2008, the High Court ruled that the Mahon Tribunal cannot pursue its claims against the late Liam Lawlor's home and lands to meet legal costs owed by him. The Court found that when he died his interest in his lands, valued at up to €4 million, ceased and the property he jointly owned with his wife passed entirely to her.

Representation of Tribunal in Litigation

4.59 In general, the Tribunal engages external representation for litigation⁴⁰. The extent and level of representation has been the subject of considerable interaction with the Department.

4.60 In one case the Tribunal engaged two senior counsel and sought sanction for brief fees of €75,000 and per diem refreshers of €5,000 together with other miscellaneous fees and three junior counsel at brief and refresher rates which were approximately two-thirds of the rates charged by their seniors. Subsequently, the Tribunal submitted amended fee notes to the Department for the three junior counsel following an assessment and report by a legal cost accountant engaged by the Tribunal. The amended fee notes were 77% of the original fee notes in the case of two of the junior counsel and 74% of the original fee notes in the case of the third.

4.61 In October 2006, the Department of Finance granted sanction to pay 30% of all external fees outstanding as a 'payment on account' pending the outcome of a review of the fees by the State's legal costs accountant.

4.62 In November 2006, the State's legal cost accountant provided a report of a review of the fee notes in this particular case⁴¹. The legal cost accountant proposed a reduction of the brief fees for senior counsel from €75,000 to €50,000 and refresher fees from €5,000 to €4,000. It also proposed that brief and refresher fees for junior counsel be reduced from €50,000 and €3,300 respectively to €25,000 and €2,000 respectively. Overall a reduction of approximately 38% on

39 It was not possible to precisely quantify these costs in the course of audit.

40 In a number of early cases the Tribunal was represented by its legal team.

41 The Tribunal informed me that a copy of this report was sought by the Tribunal from DEHLG but has not been made available.

bills totalling €825,643 inclusive of VAT was proposed. Further reductions on those bills were subsequently sanctioned by the Office of the Attorney General leaving the total proposed reductions at almost 47% of the amounts originally claimed. In December 2006, the Department of Finance conveyed sanction for the payment of €34,511 subject to the deduction of the money already transmitted as payments on account.

4.63 In a letter to the Tribunal conveying details of payments sanctioned, on 5 December 2006, the Department stated that it was accepted, given the complexity and importance to the Tribunal of the case that two senior counsel were appointed to lead the case but that the Attorney General could not sanction the engagement of three junior counsel in any judicial review (notwithstanding its nature), particularly for a matter that was heard on affidavit and in a situation where two senior counsel were already engaged. The Department indicated that fees would be paid only in respect of two junior counsel and at only half the rate of senior counsel, rather than the normal two-thirds rate.

4.64 The Tribunal subsequently informed the Department that counsel were not agreeable to the fees suggested. It was stated that counsel had pointed out that the level of commitment required for the case was unprecedented and the level of preparation required for the hearing was both prolonged and intense. Counsel further took the view that account had not been taken of the fact that there was an order for costs made in favour of the Tribunal in this case which meant that (assuming it was upheld by the Supreme Court) the Department would not ultimately have to bear the burden of those costs.

4.65 The chairman proposed that the reduced amounts be paid but regarded as payments on account only, since in his opinion the matter would ultimately be sent forward for taxation on the completion of a Supreme Court appeal of the matter. Cheques for the five counsel, in the overall amount notified to the Tribunal by letter in December 2006, were transmitted to them by letter in February 2007, to be regarded as full and final settlement. In June 2007, the Tribunal indicated that counsel were not prepared to accept the amounts set out in the cheques and that they were returning same. Cheques with a value of €174,205 (inclusive of withholding tax) remain uncashed.

4.66 The case came for hearing before the Supreme Court in January 2007 and judgment in favour of the Tribunal was delivered in March 2007. Costs of the appeal and the hearing in the High Court were awarded to the Tribunal in July 2007.

Proposed Revised Arrangements

4.67 Partly arising out of its concern at the level and cost of representation in the foregoing case the Department, following consultation with the Department of Finance and the Office of the Attorney General, wrote to the Tribunal in April 2006, proposing revised arrangements for the engagement of external counsel to work on the Tribunal's behalf.

- Where it was proposed to engage more than one senior counsel and one junior counsel in a case, prior sanction would be required from the Department.
- Per diem rates and brief fees needed to be agreed with counsel concerned before they were engaged.
- Prior sanction from the Department was required where proposed per diem rates exceeded those payable to senior counsel or junior counsel (as the case may be) directly employed by the Tribunal or where brief fees in excess of €15,000 were proposed.

4.68 The Tribunal maintained that the arrangements proposed were likely to be unworkable. It expressed its concern that the new arrangements should not impede the prompt and proper defence of actions instituted against the Tribunal or interfere with its independence. Without a significant

degree of discretion, the ability of the Tribunal to successfully defend certain litigation could be potentially compromised and restricted. The letter noted that cases involving the Tribunal had been afforded a priority listing by the President of the High Court. Consequently, it was usually necessary that the Tribunal be in a position to brief counsel at very short notice. Furthermore, only a small pool of sufficiently expert senior counsel were available to the Tribunal in such cases because of short notice and many of these would have to be excluded because they had represented persons who were or had been the subject of inquiry by the Tribunal.

4.69 In response the Department pointed out that its Secretary General, as Accounting Officer, was answerable before the Public Accounts Committee for the costs of the Tribunal, and as such it was incumbent on the Department to ensure that reasonable arrangements were in place to control such costs. The letter indicated that the Department would seek to ensure a very rapid response to requests for sanction to engage external counsel. The letter also proposed slightly revised sanction arrangements. In particular, the following additional guidelines were introduced

- having regard to its terms of reference, the Tribunal was required to seek to secure legal representation at the lowest possible cost
- in agreeing a brief fee, the Tribunal was required to seek to obtain the best possible arrangement with counsel having regard to the overall cost to the taxpayer.

The Tribunal would also be allowed to agree brief fees up to €25,000 without prior sanction.

4.70 The Tribunal wrote to the Department in June 2006 requesting that its correspondence be brought to the attention of the Minister. The letter stated that

- the capacity of the Tribunal to defend judicial review proceedings brought against its decisions was of paramount importance
- the selection of counsel best qualified to achieve this end and the number of counsel required were operational decisions to be made by the Tribunal alone
- counsel engaged by the Tribunal should be paid their fees at the rate appropriate and no more
- the application of the proposed sanctions would compromise the Tribunal's capacity to deal expeditiously with its defence of any judicial review proceedings and result in delays.

4.71 The letter stated that the Tribunal wished to have equality of arms with parties who mounted a well-funded challenge and that the restrictions proposed on its independence to engage suitable counsel would impede its capacity to do so and that if the Department wished to be satisfied that the fees charged were appropriate, it had the facility through the Tribunal, or independently, of engaging the services of a legal cost accountant to advise on the level of fees charged by legal counsel or have the fees taxed by the Taxing Master of the High Court.

4.72 In line with the request from the Tribunal, the Minister was informed of the proposed procedures and the Tribunal's response and his direction was sought. The Minister agreed with the course of action proposed by the Department believing that the level of representation and cost should be agreed and sanctioned upfront. The Minister's view was notified to the Tribunal in August 2006.

4.73 The Department informed me that the Tribunal has never formally accepted or agreed to those procedures and in practice has not fully implemented them. However, since February 2008, the Tribunal are seeking counsel fee estimates and Department agreement in advance of engagement. Since 2006, the Department refer all external counsel fee notes to the State's legal cost accountant for negotiation and this process had resulted in reductions in the charges being achieved.

Tribunal Administration

Approval of Expenditure

4.74 The bulk of payments by the Tribunal are processed through the accounting systems of the Department after being certified by appropriate officials in the Tribunal.

4.75 With the exception of tribunal legal team fee notes, all tribunal related expenditure is certified by the Registrar to the Tribunal. A covering letter attached to each schedule of invoices certifies that the expenses *“were incurred properly by the Tribunal of Inquiry and as such are payable by your Department”*

4.76 Fee notes of the Tribunal legal team are certified by the Chairman of the Tribunal as well as the Registrar to the effect that the person named in the fee note *“worked a minimum of eight hours per day on behalf of the Tribunal on the days specified herein, or otherwise for the hours specified”*. Although the Tribunal legal team are paid a per diem rate based on attendance, no specific attendance records are maintained by the Tribunal. The reason put forward for this is the professional nature of their engagement.

4.77 In this regard, the Tribunal has stated that all tribunal counsel have worked solely for the Tribunal save in rare instances. It also pointed out that the workflow is directed by the Members of the Tribunal and is monitored by them and that attendance at public sittings is noted by the Registrar to the Tribunal. The Members and the Registrar are, therefore, aware of the attendance patterns of the Tribunal legal team and believe that the minimum requirements have been met.

4.78 The Tribunal also believes that the maintenance of attendance records would not have been practical. It pointed out that frequently unremunerated hours have been worked by the Tribunal legal team. Since the commencement of the Tribunal, fee notes submitted to the Department are monitored using an electronic records system which records the period covered by the invoice, the counsel or solicitor who raised the invoice and the amount claimed.

Bank Account

4.79 A small number of transactions are processed through a bank account maintained by the Tribunal. This was established in 1999 for the making of confidential payments and it was agreed with the Department at that time that documents supporting payment would be made available to the Department at the conclusion of the Tribunal. A total of €21,713 has been lodged to this account since its inception and payments totalling €13,340 had been made up to the end of February 2008.

Procurement

4.80 A competitive tendering process is not always carried out by the Tribunal prior to initiating procurements. Tender competitions had been carried out in five cases out of a sample of ten of the larger suppliers of goods and services to the Tribunal in the period 2004 to 2006. However, the Tribunal has pointed out that in relation to the remaining services, one service was based on existing procurement arrangements of government offices, one service (typing) was occasional, based on interviews and subject to Department of Finance sanction, another was occasional (the engagement of stenography services in the High Court) and the remaining two being in relation to investigatory assistance were based on interviews.

Current Procedure for Processing Third Party Claims

4.81 A protocol for the processing of third party bills of cost was drawn up in 2006⁴² by the Department following consultation with the CSSO, the Office of the Attorney General and the Department of Finance.

4.82 On receipt of a bill of costs, the Tribunal is required to refer it together with a copy of the relevant order for costs made by the Chairman, to a firm of Legal Cost Accountants engaged by the CSSO on behalf of the Minister for Finance.

4.83 Following assessment and negotiation of the bill of costs, the Legal Cost Accountants are required to submit to the Tribunal a report and recommendations in relation to settlement. The Tribunal in turn, is required to forward this submission to the CSSO and the Department together with an appropriate recommendation from tribunal staff regarding the rationale for the proposed settlement.

4.84 In practice, almost all Legal Cost Accountant reports are reviewed by the Department and the CSSO and a consensus decision is sought with regard to the next steps – settlement or taxation. The Department of Finance sanctions proposed settlements in excess of €100,000 since February 2008.

Procedure for Processing Litigation Costs

4.85 Where litigation arises the Tribunal engages external counsel to represent it. Up to October 2001, the practice was that the Tribunal referred counsel fee notes in connection with litigation cases to the Department as ‘being in order for payment’ without any specific endorsement as to the appropriateness of the fees charged. The Department would then seek sanction for the payment from both the Office of the Attorney General and the Department of Finance.

4.86 In October 2001 this procedure changed. The Office of the Attorney General expressed concern that it was remote from legal proceedings involving the Tribunal and would not necessarily know whether the fees submitted were commensurate with the complexity of the work involved in a particular case. It considered that it should be a matter for the Tribunal, which was close to the litigation, to make a recommendation as to counsel’s fees. The Attorney General recommended that the solicitor for the Tribunal should at least recommend the level of fees to be paid in any particular case involving the Tribunal and that this procedure should be adopted in the future. The requirement for Department of Finance sanction remained.

4.87 This procedural arrangement was adopted by the Tribunal. Thereafter, a solicitor to the Tribunal referred fee notes to the Department with an endorsement that they appeared reasonable in all the circumstances or a like phrase⁴³.

4.88 In December 2005, the Office of the Attorney General raised further concerns in relation to the certification of legal fee invoices. The Office of the Attorney General stated it was not in a position to deal with the approval of two specific fee notes, since the Office had no knowledge in relation to the case involved or as to the work carried out by counsel. It considered it a matter for the Department to decide whether or not it could accept the solicitor to the Tribunal’s pro forma representation to the effect that the fee notes appeared to be reasonable in all the circumstances.

42 The vast bulk of bills were settled after this date.

43 Up until June 2006, the Department was not aware of any case where the tribunal sought advice on or recommended a reduction in any fees marked by counsel.

4.89 Further fee notes, in relation to another case, were subsequently submitted to the Department seeking payment of brief and refresher fees at rates which the Office of the Attorney General had refused to give prior sanction.

4.90 Following discussions involving the Department, the Office of the Attorney General, the CSSO and the Department of Finance, it was agreed that the Office of the Attorney General would consider certain fee notes on hand and advise on appropriate settlements and having ascertained that there was no prior agreement between counsel and the Tribunal regarding fees, the remaining fee notes would be referred by the Department to the State's legal cost accountant for recommendations on settlement. The Department subsequently referred all fee notes to the State's legal cost accountant for reports as to their reasonableness.

Department Administration

4.91 On receipt of invoices the Department checks that they have been certified by the Tribunal. Third party settlements or external counsel fee notes are checked by the relevant Principal Officer in the Department. The Department also carries out checks to ensure that valid tax clearance certificates are held where appropriate, that calculations are correct, and that Department of Finance sanction exists for the payment.

4.92 A sample of 7.24% of the total administrative expenditure by the Tribunal in 2006 was examined as part of the review. All expenditure was appropriate and properly authorised.

4.93 It would appear that the Principal Officer in the relevant section of the Department dealing with the Tribunal has authority to sanction all third party payments regardless of the size of the payment. In one particular case this amounted to approximately €3.6 million. Formal Department of Finance sanction had not been sought for the payment or for the making of any third party payments prior to 2007. However, settlements including that for €3.6 million referred to above had been discussed at meetings, through email or by phone with the Department of Finance, CSSO and the Office of the Attorney General. In January 2007, the Department of Finance conveyed delegated sanction to the Department for the payment of legal fees of up to €100,000 in any individual case deriving from third party legal costs incurred by a witness before the Tribunal as well as fee notes presented for payment for external counsel engaged by the Tribunal.

4.94 The Department of Finance sanction used as the basis for most of the Tribunal payments had been a general delegated sanction given to the Department in February 2000 enabling it to authorise tribunal expenditure providing it did not result in the allocation for the subhead of the Vote being exceeded in any year.

4.95 In February 2008, it was agreed with the Department of Finance that where sanction is required for payments in excess of €100,000, this would be sought and conveyed by formal correspondence. It was also agreed that formal sanction in respect of past payments of over €100,000 would not be required, having regard to the Department of Finance's involvement in the payment approvals process.

Conclusions

4.96 The Mahon Tribunal which was established in November 1997 is currently projected to complete its business in 2010. The extended timescale has been attributed to a variety of factors including

- open ended terms of reference
- lack of cooperation by certain parties
- representation of multiple interests at hearings
- litigation taken against the Tribunal or initiated by the Tribunal
- some procedural shortcomings and related court challenges
- the inability of the Tribunal to hold parallel public sessions.

4.97 €1.6 million had been spent on conducting the Tribunal up to 31 December 2007.

4.98 Based on the pattern of cost awards experienced to date and subject to the caveats set out in the report the likely cost has been put in the range of €71 million to €94 million. There could be considerable downward adjustment to these figures depending on the extent to which costs are refused for non-cooperation.

4.99 No adjustment has been made in the above calculations for future refusals. Of the costs ruled on to date 15% of parties⁴⁴ were refused their costs and 3.5% of parties were only awarded partial costs.

44 15% of parties represented 67% of original cost estimate.

5 The Morris Tribunal

5.1 Following resolutions of Dáil Éireann and Seanad Éireann, the Morris Tribunal was established by the Minister for Justice, Equality and Law Reform on 24 April 2002. It was set up under the Tribunals of Inquiry (Evidence) Acts⁴⁵ to look into allegations of unethical and criminal behaviour by some members of the Garda Síochána in its Donegal Division. An independent review by Mr Shane Murphy SC, on behalf of the Minister for Justice, Equality and Law Reform which looked at relevant papers and progress on internal Garda investigations, had recommended the establishment of a tribunal of inquiry. Judge Frederick Morris, a retired former president of the High Court, was appointed as Sole Member of the tribunal.

5.2 The issues to be investigated were divided into a number of modules for the purpose of investigation and broadly covered

- The making of extortion and hoax telephone calls to the home of Michael and Charlotte Peoples in November 1996 and the subsequent Garda investigation into that complaint.
- Investigations into the death of Mr Richie Barron, of Raphoe, County Donegal in October 1996 with particular reference to the arrest and treatment of persons in custody in connection with that investigation together with the progress, management and effectiveness of the Garda investigation with particular reference to the management of informants.
- Allegations of harassment of the McBrearty family and of relatives, associates and agents of the family by members of the Garda Síochána following the death of Mr Barron.
- The circumstances surrounding the arrest and detention of Mark McConnell in October 1998 and Michael Peoples in May 1999.
- Complaints that some Gardaí may have been involved in hoax explosives and bomb making equipment finds and a review of the management and investigation of those issues.
- The circumstances surrounding the arrest and detention of Frank McBrearty Jnr in February 1997 and his subsequent prosecution in the Circuit Criminal Court for an alleged assault in December 1996 with particular reference to the Garda investigation and the management of both the investigation and the role of the Gardaí in the subsequent prosecution.
- Allegations relating to the Garda investigation of an arson attack on property situated on the site of a telecommunications mast at Ardara in October/November 1996.
- Allegations contained in documents received by Deputy Jim Higgins and in information received by Deputy Brendan Howlin that two senior members of An Garda Síochána may have acted with impropriety.
- The circumstances surrounding the arrest and detention of seven persons at Burnfoot, County Donegal on 23 May 1998 and the investigation relating thereto.
- The effectiveness of the Garda Síochána complaints inquiry process vis-à-vis the complaints made by Frank McBrearty Snr and his family between 1997 and 2001.

The tribunal was required to report to the Minister for Justice, Equality and Law Reform and to make such findings and recommendations as it saw fit in relation to the above matters. The terms of reference are set out at Appendix D.

⁴⁵ The Tribunals of Inquiry (Evidence) Acts 1921 to 2004.

Organisational Structure of the Tribunal

5.3 The organisational structure of the tribunal at December 2007 is set out at Figure 5.1. The tribunal legal team were identified and nominated by the Sole Member in consultation with the Office of the Attorney General.

Figure 5.1 Organisational Structure of Tribunal 31 December 2007

Position	No of Persons	Total
Sole Member – Judge Morris	<u>1</u>	1
Legal Counsel		
Senior Counsel	2	
Junior Counsel	1	
Research Counsel	1	
Solicitor ^a	<u>1</u>	5
Administrative Staff^b		
Registrar	1	
Higher Executive Officer/Staff Officer/Clerical Officers/Judge's Tipstaff /Legal Secretaries/Indexers ^c	<u>13</u>	14
Investigation Staff		
Investigators ^d	<u>2</u>	2
Total		22

Notes:

- a Solicitor provided by the CSSO.
- b An IT Manager is engaged on a contract basis but is not a member of staff therefore has not been included in the staff numbers.
- c Three legal secretaries and two indexers are engaged through a recruitment agency.
- d A retired Garda Superintendent and a former Assistant Commissioner from the Royal Canadian Mounted Police are engaged directly by the Tribunal as provided for under Section 6 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 2002.

Timescale and Current Status of Inquiry

5.4 On 13 December 2007, when the tribunal announced that it had concluded hearing evidence covering each of its terms of reference, a total of 686 days of public hearings had been held. The tribunal has issued eight reports to date. The first two reports were issued to the Minister for Justice, Equality and Law Reform in July 2004 and May 2005 respectively. Three further reports were issued in May 2006 and the sixth report was issued in April 2008. The Tribunal presented its final two reports to the Minister on 25 September 2008 and they were published on 7 October 2008. The work of the Tribunal is therefore substantially complete. It is expected that the remaining cost orders will be made during November and any residual orders necessary in relation to the disposal of Tribunal documentation will then be considered.

Factors Impacting on Timescale

5.5 In an interim report to the Minister for Justice, Equality and Law Reform on 24 July 2002, Judge Morris stated that if the Tribunal was appropriately supported and permitted to conclude its

work uninterrupted, he expected it to finish in twelve to eighteen months. However this did not prove possible and the Tribunal completed its public hearings in December 2007.

5.6 A number of factors impacted on the timeframe for the Tribunal

- representation by lawyers of multiple interests on particular modules increased the timescale beyond that which might pertain in court proceedings where generally only two main parties are involved
- certain parties failed to cooperate fully with the Tribunal
- litigation was taken against the Tribunal
- interruptions by counsel, applications on matters outside the terms of the Tribunal's business and extended cross-examinations also caused delay.

Representation of Multiple Parties

5.7 Persons appearing before the Tribunal are entitled to apply for legal representation particularly if they feel that their character or good name is in danger of being impugned in any way. Persons are granted representation so that they might be in a position to refute any criticism made of them, to cross-examine the person making the criticism and to give evidence in opposition.

5.8 The Morris Tribunal granted representation to 170 persons or organisations in connection with one or more sections of the Tribunal's terms of reference. Although several persons were represented by the same counsel and solicitors the involvement of multiple parties (including representation of An Garda Síochána) with interests to protect slowed the process.

Dependence on Cooperation

5.9 A number of parties to the Tribunal failed to cooperate fully which extended the timeframe and caused the Tribunal considerable difficulty in its search for the truth. For example, parties were found to have been uncooperative by failing to tell the full truth, deliberately withholding valuable information, giving evidence in an effort to mislead the tribunal, giving false testimony, making unfounded allegations in statements – some of which were not repeated in evidence and others which were formally withdrawn in evidence. Some witnesses walked out of the Tribunal during their examination or cross-examination. This led to disruption of the Tribunal's schedule but also forced the Tribunal to disregard part of the evidence given because it was not tested in cross-examination.

Litigation taken against the Tribunal

5.10 In July 2002, shortly after its establishment, Judge Morris stated that it had become the norm for interested parties to seek judicial reviews of the decisions of tribunals. He anticipated that if this occurred in the case of the Morris Tribunal, it would prolong the Tribunal's length. There have been six pieces of litigation taken against the Morris Tribunal.

Interruptions and Extended Cross-Examinations

5.11 Concerned at the rate of progress of the tribunal in examining two particular witnesses, Judge Morris made a ruling in December 2004, with a view to moving more expeditiously in the future. He said it was important for any hearing to establish a rhythm. Constant interruptions for the sake of objections to what was being said, applications on matters essentially outside the Tribunal's business and extended cross-examinations had destroyed the progress of its work. He set out the following procedures which were to apply when hearings resumed.

- No applications would be heard from any party. If any applications needed to be made by any party, then notice in writing would be required. If necessary, a date would be fixed for hearing any such application.
- No further interruptions of the evidence of any party would be heard. Any objections should be made in writing and these would be considered at breaks in the hearing of evidence.
- A time limit was placed on all cross-examinations. The Tribunal's legal team was limited to three days and one hour on re-examination. Any other party would be limited to one day.
- There was no general right to cross-examination unless a witness attacked a represented party. The duty of cross-examination, including testing the credit of a witness in order to uncover facts rested with the Tribunal legal team. If on completion of their examination, no attack had been made by a witness on a third party, then the Sole Member reserved the right to curtail any general trawl through the evidence.

Other Factors Impacting on Timescale

5.12 In addition to the above factors, a number of other matters operated to extend the cost and timeframe for the Tribunal including

- as witnesses gave evidence and new material came to light, the volume of work required to be undertaken by the Tribunal increased substantially
- there was a slight delay at the outset in obtaining sanction to employ administrative personnel. This was noted by Judge Morris in his first interim report in July 2002 – three months after the Tribunal's establishment.
- a need for the Tribunal to postpone some of its work to allow Mr McBrearty Jnr to pursue a High Court action. The Sole Member of the Tribunal stated that Mr McBrearty made the case with considerable justification that it was unreasonable to expect him to divide his time between the High Court and the Tribunal. On that basis the Tribunal was required to pass from consideration of the matters in which Mr McBrearty Jnr was involved to other modules of investigation.
- the Tribunal re-located to County Donegal on three occasions in order to facilitate witnesses there. This required the temporary re-location of tribunal personnel and the establishment of a public hearing room. 28 public hearing days were held in County Donegal in the years 2002, 2003 and 2006.

In general, the novelty of inquiries can lead to delays in evolving a structure. Judge Morris observed that the establishment of his Tribunal gave the appearance of breaking new ground. As procedures had not been established based on the experience of earlier tribunals, they only came to light through trial and error.

Projected Costs of the Tribunal

5.13 The Department of Justice, Equality and Law Reform (the Department), based on information available at January 2008 estimated that the total third party costs of the Tribunal would be of the order of €40 to €45 million. Drawing on the most up to date information supplied by the Department, I sought to estimate the gross projected cost of the Tribunal.

5.14 Up to 31 December 2007, approximately €23.4 million, excluding third party costs, had been directly incurred on the conduct of the Tribunal. A further €15.9 million has been identified as having been incurred by other State Bodies including €1.25 million in responding to tribunal

enquiries. Considerable costs are likely to have also accrued in respect of third party representation and discovery of documents. The gross projected cost of the Tribunal, excluding third party costs as estimated by my staff is set out in Figure 5.2.

Figure 5.2 Gross Projected Cost of the Tribunal excluding Third Party Costs

Category of Cost	Incurring to end 2007	Projected Further Costs ^a		Total Projected Cost		
		Low	High	Low	High	Average
	€m	€m	€m	€m	€m	€m
Administration	14.22 ^b	1.94	2.59	16.16	16.81	16.49
Tribunal Legal Team Fees	8.82	1.36	1.78	10.18	10.60	10.39
Litigation Costs	0.38	—	—	0.38	0.38	0.38
State Respondent Costs	11.25	0.68	0.68	11.93	11.93	11.93
Other State Costs	4.67	0.88	0.88	5.55	5.55	5.55
Total	39.34	4.86	5.93	44.20	45.27	44.74

Notes:

- a Based on information supplied by the Tribunal the estimates assume that the Tribunal will complete its business in December 2008.
- b This figure includes €0.20 million for the legal cost accountant who assesses the third party costs on behalf of the Minister for Finance.

5.15 Appendix G sets out the estimation methodology for all costs.

Third Party Costs

5.16 €6.5 million has been incurred on third party costs up to the end of December 2007.

Contingent Liability for Third Party Costs

5.17 The gross contingent liability for third party costs based on a presumption of continuance of the pattern of cost awards observed in this Tribunal has been estimated in the range of €27 million to €28 million.

5.18 The extent to which the gross contingent liability will arise depends on the future award pattern. There has been a significant refusal rate in respect of costs ruled on to date. In all, 9% of parties who applied for costs were refused their costs. 14% of parties were awarded partial costs.

There could be a considerable reduction of the gross estimate depending on the extent of refusals⁴⁶.

The overall cost of the Tribunal based on the pattern of awards to date is likely to be €77.5 million to €79.5 million comprising

	Low	High
Third Party Costs Incurred	€6.5 million	€6.5 million
Contingency Liability for Third Party Costs	€27 million	€28 million
Other Costs (Figure 5.2)	€44 million	€45 million

However, this cost could rise if a final pattern resembling that of three completed tribunals^a were to emerge.

Note:

- a The Tribunals referred to are the Finlay Tribunal, the McCracken Tribunal and the Beef Processing Industry Tribunal.

Comparison with Completed Tribunals – Third Party Costs

5.19 In the case of the completed tribunals third party costs represented 69% of total costs. However, there was a marked difference between these tribunals and the Morris Tribunal in terms of duration and the extent of counsel representation.

5.20 Two of the completed tribunals reported in less than one year. The third (The Beef Processing Industry Tribunal) reported within three years. By comparison the Morris Tribunal is now projected to last for 7 years. An apparent trend is that as duration increases third party costs as a percentage of total costs diminish. This is because direct tribunal costs accrue incrementally while third party costs are based on the level of representation necessary in respect of an issue or module being dealt with by a tribunal.

5.21 Subject to the reservations about differences in duration, the nearest relevant comparator for costs is likely to be provided by the Beef Processing Industry Tribunal. If a similar relationship pertained between third party and direct costs as occurred in the Beef Processing Industry Tribunal, total third party costs of the order of €46 million to €48 million could arise.

Administrative Costs

5.22 Administration is projected to cost up to €17 million of which over €4 million had been incurred up to 31 December 2007. Based on an analysis of administration expenses incurred in 2006 those costs break down as follows

- 38% related to staffing of the Tribunal (both civil servants and temporary/agency staff)
- 16% related to stenography and transcript charges
- 12% was incurred on witness expenses
- 9% related to travel and subsistence costs

⁴⁶ In the modules where cost rulings have been made 13% of senior counsel appearances, 12.5% of junior counsel appearances and 12% of solicitor input were refused.

- 6% related to building security
- 4% was incurred on transport, and
- 4% related to rental/lease of accommodation.

The balance comprised various miscellaneous expenses such as cleaning, maintenance, printing and stationery, Government publications and reporting, telephone charges etc.

Cost of Tribunal Legal Team

5.23 Legal fees of the Tribunals legal team are projected to cost over €10 million by the conclusion of the Tribunal. The fee rates payable to the Morris Tribunal legal team have remained fixed since the Tribunal was established in 2002. The rates for senior and junior counsel are the same as those applied to the Mahon Tribunal from 2002 onwards. The fees payable to senior counsel include a brief fee of €60,000 – payable in two moieties at the outset and completion of the tribunal and a daily refresher fee of €2,250. The brief and daily refresher fees payable to junior counsel are €40,000 and €1,500 respectively⁴⁷.

State Respondent Costs

5.24 State Respondent Costs are projected to amount to in the region of €12 million. These costs include the cost of representing the Garda Commissioner, the Minister for Justice, Equality and Law Reform and the public interest at the Tribunal, together with the cost to Government Departments of compliance with Orders of Discovery issued by the Tribunal.

5.25 Two separate legal teams act for the Garda Commissioner and the Minister for Justice, Equality and Law Reform. The fee rates payable are the same as those of the Morris Tribunal legal team. The Garda Legal Team consists of two Senior Counsel, one Junior Counsel, one Documentary Junior and one Solicitor from the CSSO. In addition, An Garda Síochána provide two clerical staff.

5.26 The Departments Legal Team consists of one Senior Counsel, one Junior Counsel, one Documentary Counsel and one Solicitor from the CSSO. The Departments team, with the exception of the Solicitor do not attend the Tribunal on a daily basis. An agreement was reached that they be paid the daily rate on days when they are required to attend and receive one-third of the rate when they do not attend but are required to read the daily transcript. The Documentary Junior Counsel is only engaged as and when required.

5.27 The Department estimate that administration costs of €0.92 million and €0.49 million respectively were incurred in respect of the office costs of the separate Garda and Department legal teams. Legal fees of €8.43 million were incurred in respect of those two teams up to the end of 2007. The solicitors provided by the CSSO at a cost of €0.95 million to the end of 2007.

Other State Costs

5.28 Other State Costs are projected to amount to over €5 million. This category of costs consists primarily of the cost of the provision of premises to the Tribunal, the salary of the Sole Member and the provision of solicitors to the Tribunal.

⁴⁷ The amounts stated are exclusive of VAT.

Cost of Investigators

5.29 Section 6 of the Tribunals of Inquiry (Amendment) Act, 2002 empowered the tribunal with the consent of the Government or the Minister of the Government by whom it was appointed with the consent of the Minister for Finance, to appoint investigators to assist it in its work.

5.30 In September and October 2002 respectively, two investigators were appointed to the Tribunal – a retired Garda Detective Superintendent and a Chief Superintendent on secondment from the Royal Canadian Mounted Police (RCMP). A former Assistant Commissioner from the RCMP replaced the latter after one year.

5.31 Their duties included

- interviewing witnesses and taking statements
- reviewing information provided to the tribunal by An Garda Síochána
- assessing the action taken by members of An Garda Síochána in respect of which complaints had been made
- advising the Tribunal as required.

5.32 The retired Garda Detective Superintendent was paid at a rate equivalent to the difference between his Garda pension (€31,652 in July 2002) and the maximum point of the Superintendent pay scale (€58,757 in July 2002). In addition, he received an annual allowance of €1,000. The cost of engaging this investigator between July 2002 and December 2007 was €0.30 million.

5.33 The remuneration package payable to the secondees from the RCMP was their salary at the RCMP as well as accommodation, car hire, a per diem allowance of €100 and flights home. The total cost of engaging the two RCMP secondees to the end of December 2007 was €0.75 million.

Third Party Costs

5.34 With the exception of a number of instances in connection with the detention of suspects sub-module, where costs were awarded without the need for parties to make application for their costs, in general, each of the parties to whom representation had been granted were given an opportunity by the Tribunal to seek an order for costs after the publication of the tribunals reports.

5.35 Judge Morris ruled on applications for costs in relation to completed modules of his terms of reference in September 2004, June 2005, November 2006 and June 2008. The cost orders made by Judge Morris were on a ‘party and party’ basis. This, he considered was the most equitable basis as it would enable a party in whose favour an order was made to obtain costs in respect of legal work reasonably undertaken by their legal advisers and at a reasonable rate.

5.36 The total amount paid up to 31 December 2007 on foot of tribunal cost orders is €6.5 million. Figure 5.3 summarises the rulings on applications for cost made by the Sole Member to date.

Figure 5.3 Summary of Tribunal Cost Rulings^a

Module^b	Parties Seeking Costs	Parties Granted 100% of Costs	Parties Granted a proportion of Costs	Parties Refused Costs
(a) and (b)	15	10	4	1
(c)	9	6	0	3
(d)	6	4	2	0
(e)	10	6	2	2
(b), (d) and (f)	36	31	2	3
(g)	4	3	0	1
(i)	7	5	1	1
(h)	10	7	0	3
(j)	3	2	0	1
Total	100	74	11	15

Notes:

- a In some cases, a party may consist of several members of a family or grouping. For example, the extended McBrearty and McConnell families are treated as one party in the above table but comprises 42 persons, 40 of whom were granted representation for seven modules of the investigation and two of whom were granted representation for one particular module. Another example is the Association of Garda Sergeants and Inspectors (AGSI) which is treated as one party in the above table but comprises 17 individuals in addition to the association itself, who were formally granted legal representation. The AGSI would also include a number of other individuals who, although not formally granted legal representation, were granted costs in respect of their representation by the legal team of the AGSI.
- b Based on the terms of reference, the work of the tribunal was broken down into 10 modules designated (a) to (j). In some instances a term of reference was broken down into parts and hearings were conducted in respect of a combination of modules. Where this occurred costs rulings were made in respect of these combinations.

5.37 A profile of the manner in which those cost awards have been processed to 31 December 2007 is set out in Figure 5.4.

Figure 5.4 Status of Cost Awards at 31 December 2007

Bills Settled Outside Taxation	9	
Bills that went to Taxation	4	
Bills being examined by State Legal Cost Accountant	<u>3</u>	
Total Bills of Costs Submitted^a		16
Bills of Costs Outstanding		46
Total Parties Awarded Costs (Full or Portion)		62

Note:

- a Includes one case where no cost order appears to have been made by the Sole Member. Costs had been discharged in ten of the above cases by 31 December 2007.

Settlement and Taxation of Costs

5.38 An analysis of the fifteen bills of cost which had been settled and paid at 19 May 2008 shows that an average reduction of 39.1% has been achieved⁴⁸, before allowing for stamp duty on taxed settlements, through the process of negotiation by the legal cost accountant or through taxation of costs. The amount of stamp duty incurred on the four cases taxed by the Taxing Master was €244,081.

Provision of Indemnities

5.39 In March 2003, in a Memorandum for Government, the Minister for Finance had proposed that an indemnity be given to two members of the Oireachtas (Deputy Howlin and Senator Higgins) in regard to the costs which might arise in consequence of

- their appearance at the Morris Tribunal to contest the decision that they must make available their papers in connection with allegations made to them against members of An Garda Síochána operating in Donegal
- instituting and pursuing legal proceedings in the High Court and possibly the Supreme Court to challenge any order of the Tribunal
- any financial penalty or charge imposed on them to meet the expenses incurred by the Tribunal as a result of delays in its proceedings in consequence of their legal challenge to or non-compliance with the Tribunal's order.

The Government approved this proposal on 4 March 2003 and agreed on 1 April 2003 that no changes be made to existing arrangements as regards costs of the representation of members of the Oireachtas in relation to the Morris Tribunal.

5.40 An indemnity was also provided to the RCMP and the seconded investigators in respect of all claims, losses, damages, demands and expenses arising directly or indirectly from an investigator's conduct in carrying out the duties of the secondment, provided that an examination of all the circumstances established that the secondees acted bona fide in the execution of his duties.

⁴⁸ This includes one large settlement where an overall reduction of 72% had been achieved. If this were excluded the average reduction would be of the order of 29.7%.

Legal Challenges

5.41 The Tribunal has been involved in six instances of litigation. One action was struck out and fees for counsel acting on behalf of the Tribunal in this case have not been submitted to date. The total legal costs incurred in respect of the remaining five cases up to the end of December 2007 was €376,224.

5.42 The Tribunal was awarded its costs in four of those cases. No costs have been recovered to date. One of those cases involved a challenge to an order of the Tribunal, by Deputy Brendan Howlin TD, and Senator Jim Higgins MEP, that they disclose material relevant to anonymous allegations received by them on matters into which the Tribunal was inquiring. Dáil privilege in relation to the source of the allegations was claimed by Deputy Howlin and Senator Higgins. The case was ultimately decided in favour of the Tribunal and the costs of litigation were to be borne by the other parties. The costs incurred by the Tribunal in this case have not yet been recouped from the Oireachtas under the indemnity approved by the Government.

5.43 The Tribunal engaged external senior counsel in connection with all cases. A member of the Tribunal legal research staff acted as junior counsel and charged additional fees in respect of work on litigation cases.

5.44 The Department have indicated that the junior counsel in question was engaged by the Tribunal to undertake research work on a part-time basis from time to time between the establishment of the Tribunal in 2002 and December 2006 when she commenced working on a full-time basis for the Tribunal. She had been selected by the Tribunal to act as junior counsel in relation to these cases because of her extensive background knowledge of the subject matter and her familiarity with the documentation. They indicate that there was no overlap between fees charged for her work as an external junior counsel for the Tribunal in the litigation cases and her work as junior counsel for the Tribunal following her appointment to that position in December 2006.

5.45 The Department have indicated that it is a matter for the Tribunal's solicitor and the Cost Recovery Section of the CSSO to arrange for the recovery of any costs awarded to the State in these actions.

Tribunal Administration

5.46 All tribunal related expenditure (with the exception of tribunal legal team fee notes) is approved by the Registrar of the Tribunal prior to being forwarded to the Department for payment processing. The Department has a delegated sanction from the Department of Finance for tribunal expenditure as follows

- an amount up to €125,000 where an open competition takes place and the lowest tender (as opposed to the lowest suitable tender or the most economically advantageous tender) is preferred and
- in all other cases, an amount up to €30,000.

5.47 Invoices with a total value of €176,310 and representing 6.7% of total payments on administration in 2006 were examined as part of this review. Department of Finance sanction had not been received in respect of two invoices which slightly exceeded the €30,000 limit set in the

delegated sanction from the Department of Finance. The Department has assured me that tenders were sought and lowest tender was selected in these cases⁴⁹.

Procedure for Processing Third Party Costs

5.48 In April 2006, the Department of Finance recommended to the Department that it should put a similar process in place to that which operates in the Mahon Tribunal for the processing of third party bills of cost as well as including provision for the Tribunal to give its view on the rationale advanced by the Legal Cost Accountant for his proposed settlement.

5.49 The Tribunal when consulted considered that the independence, integrity and authority of the Tribunal could be undermined by becoming involved in such action, that its important work could be called into question and that it would be inappropriate for personnel at the Tribunal to be involved as suggested and in particular to partake of the proposed protocol. The difficulty pertained to a potential clash with the Sole Member's function, in particular his function of making orders for costs. It was considered that it would be placing Tribunal personnel in an invidious position to comment on the work of other legal representatives attending the Tribunal as the work undertaken by Tribunal personnel and legal counsel was not comparable to that of legal representation of third parties. The Tribunal suggested employing a Legal Cost Accountant for the purpose proposed by the Department of Finance.

5.50 The protocol established by the Department is similar in many respects to that in the Mahon Tribunal. Having secured an order for costs, the third party solicitor submits a bill of costs to either the CSSO or the Tribunal itself. A copy is sent to the Department. The bill is forwarded to the legal cost accountant retained by the CSSO on behalf of the Minister for Finance. The legal cost accountant examines the bill, negotiates a settlement and issues a report to the CSSO. Costs are taxed by the Taxing Master in default of agreement between the parties.

5.51 The Department obtains the views of the CSSO, the Office of the Attorney General and the Department of Finance with regard to the recommendations of the legal cost accountant or the decision of the Taxing Master. Where the proposed settlement is considered to be fair and reasonable, sanction of the Minister for Finance is sought. The general aim in reaching a settlement or proceeding to taxation is to ensure that costs are minimised and that precedent setting cost awards are avoided. Following receipt of sanction from the Minister for Finance, the bill is processed for payment.

5.52 Due to the use of shorter modules, there are fewer delays in the award of costs in the Morris Tribunal. However, one bill of costs relating to cost rulings made in September 2004 for the first module has not yet been submitted.

Tribunal Legal Team

5.53 Tribunal legal team fee notes are certified by the solicitor and the Sole Member of the Tribunal prior to being sent to the Garda Accountability Unit of the Department for authorisation and to the Department's accounts branch for payment processing. No specific attendance records are maintained by the Tribunal in respect of its legal team. The Morris Tribunal point out that where any counsel is unable to attend a day at the Tribunal for any reason, they must inform Judge Morris so that when certification of attendance is required, Judge Morris is in a position to verify its correctness.

49 However, the audit noted that one of these procurements was based on a single tender only.

5.54 A sample of legal fee invoices representing 76% of all legal fees paid in 2006 was examined as part of this review. Processing was generally in order. However some minor issues were noted

- there appeared to be an overcharge of €550 on one particular fee note
- one fee note had been certified by the Sole Member only (the additional certification of the tribunal solicitor was not provided)
- one fee note, while signed by both the solicitor and the Sole Member, could not be directly linked to the fee note on which certification was being provided – it was on a separate page.

Procurement

5.55 Evidence of tendering was requested in respect of a number of suppliers to the Morris Tribunal. There were some departures from strict public procurement norms.

- In the case of tendering for the provision of stenography services seven companies had been invited to tender in September 2002. Only one company subsequently submitted a tender. It was awarded the contract in January 2003 on the basis of the tender. Ultimately, payments exceeded the EU thresholds in all years from 2003 to 2006 inclusive.
- On-site system support is provided to the Tribunal on a daily basis through Dell Computer Ireland (Dell). SureSkills Ltd, a Dell Technology Partner, provide the relevant person. A rate of €285 per day, excluding VAT, is charged which amounts to approximately €83,000 per annum. No tender competition was held. However, both companies had pre-existing draw-down contracts with the Department and their services were secured on foot of the contracts. The Department point out that one over-riding concern at the time was that the Tribunal was seen to be independent of the Department, therefore ongoing management of the IT system could not be provided by Departmental IT staff.
- Three quotes were obtained in September 2002 in connection with the purchase and installation of audio visual equipment. The lowest quote was from Pearl Communications in the amount of €204,889 inclusive of VAT. This exceeded the EU public procurement threshold of €162,293. Department of Finance sanction had been obtained in September 2002. The tribunal have stated that due to time constraints, it had not been feasible to have an open EU tender competition.

Attendance of Representatives

5.56 The Registrar attends all hearings of the Tribunal and maintains attendance records. Unlike other tribunals, legal representatives of third parties are required to sign an attendance sheet. Attendance is taken by the Judge's tipstaff on the instruction of the Registrar at a point during the hearings. It does not record the comings and goings of legal representatives.

Administrative Support

5.57 Of the 14 administrative staff engaged by the Tribunal at 31 December 2007, nine were on secondment from other Government Departments and Agencies and five were engaged through recruitment agencies. A recruitment agency provides the legal secretaries and indexers.

Bank Account

5.58 The bulk of payments by the Tribunal are processed through the accounting systems of the Department having been certified by appropriate officials in the Tribunal. In addition, the Tribunal operates a bank account. This was established in December 2002 and is used to pay

‘viaticum’⁵⁰ and other expenses to witnesses summoned to appear before it. The total value of payments processed through the Tribunal’s bank account from 2003 to 2007 was €750,144.

Department Administration

5.59 The Department’s role is to monitor expenditure and to authorise and process payments, other than those processed through the Tribunal’s own bank account. Fee notes of the Tribunal legal team are authorised by an Assistant Principal Officer in the Garda Accountability Unit of the Department before being sent to the Department’s accounts branch for payment.

5.60 In addition to the cost of the Tribunal’s own legal team, the costs of the legal teams representing the Commissioner of An Garda Síochána and the Minister for Justice, Equality and Law Reform are paid from the Tribunal subhead in the Appropriation Account of the Department. Fee notes of the legal team representing the Garda Commissioner and the Minister for Justice, Equality and Law Reform are certified by the relevant CSSO Solicitor and are sent to the Garda Accountability Unit of the Department for authorisation and payment processing. The sample of legal fee notes examined showed that the account coding applied by the Department to some of the fee notes to indicate tribunal costs, Garda Legal Team Costs or Department costs was not always correctly applied.

5.61 The procedure in respect of travel and subsistence expenses of members of An Garda Síochána who are called as witnesses to the Morris Tribunal is that they are paid from the Tribunals and Special Commissions subhead of the vote for the Department. Claims from individual Gardaí are first submitted to their Chief Superintendent for certification. A deduction is made for the amount of the viaticum (€30) paid by the Tribunal to the individual Garda witness. The certified claim is then submitted to the accounts branch of the Department for payment processing.

Related Issues

5.62 Of 46 members criticised to differing degrees by the Tribunal in the first five reports

- five have been dismissed (one Superintendent, four Gardaí)
- 21 have retired (three Chief Superintendents, five Superintendents, one Inspector, three Sergeants, eight Gardaí)
- two have resigned (two Gardaí)
- two have been transferred (two Gardaí)
- three were disciplined (one Superintendent, one Inspector and one Sergeant)
- in a further 13 cases no disciplinary action was deemed necessary.

5.63 Following consideration by the Commissioner of the sixth, seventh and eighth reports, further disciplinary action as he deems necessary may be taken.

5.64 The reports to date have influenced Government policy on the drafting of the Garda Síochána Act 2005 and related regulations. That Act incorporates a number of provisions specifically designed to address failures identified in the previous Morris Tribunal Reports as follows

50 A viaticum is a travel and subsistence allowance.

- The establishment of an Ombudsman Commission to replace the Garda Síochána Complaints Board.
- The establishment of a Garda Inspectorate as a source of independent and expert advice for the Minister in relation to Garda Síochána practices and procedures by reference to international standards.
- Statutory effect has been given to a core recommendation of the Morris Tribunal that Gardaí should be required by law to account for their actions on duty without delay.
- The Act provides for new streamlined discipline procedures which are now in place.
- The Act also empowers the Garda Commissioner, with the consent of the Government, to dismiss a member of garda, sergeant or inspector rank where he or she has lost confidence in the capacity of the member to discharge his or her duty and where dismissal is considered necessary to maintain public confidence in the force.
- Whistleblowers regulations were signed into law in April 2007 and a Confidential Recipient was appointed in March 2008. The system will become operational once a Confidential Reporting Charter, currently being prepared by the Commissioner, is submitted to and approved by the Minister.
- A new system of promotions has been put in place to provide for greater input from persons outside the force.
- A new provision for greater accountability of the Commissioner to the Government and the Minister for Justice, Equality and Law Reform has been created.

Clearance of Report

5.65 The Tribunal was invited to comment on a final draft of the report. In reply the Registrar indicated that the Chairman to the Tribunal had asked him to say that his remit as Chairman of the Tribunal was strictly limited by the Resolution passed by both Houses of the Oireachtas under which he was appointed and it does not extend to commenting upon the draft report. Accordingly the Chairman took the view that it would be improper for him to do so.

Conclusions

5.66 The Morris Tribunal, which was established in 2002, presented its final two reports to the Minister on 25 September 2008. The work of the Tribunal is therefore substantially complete.

5.67 €46 million had been spent on conducting the Tribunal up to 31 December 2007.

5.68 Subject to the caveats in the report the projected overall cost of the Tribunal could be of the order of €80 million based on the pattern of awards to third parties to date.

5.69 Should future third party costs be settled or taxed at levels higher than those of the initial determinations the costs could rise. On the other hand, no adjustment has been made for future refusals. Of the cost rulings to date, 9% of parties were refused their costs and 14% of parties were awarded only partial costs.

5.70 The extended timescale of the Tribunal was ascribed to the following

- failure of certain parties to cooperate fully with the Tribunal
- representation of multiple interests in tribunal proceedings
- litigation taken against the Tribunal delaying its proceedings.

Interruptions by counsel, applications on matters outside the terms of the Tribunal's business and extended cross-examinations also caused delay.

6 The Moriarty Tribunal

6.1 The Moriarty Tribunal was established by the Taoiseach on 26 September 1997 following a resolution in Dáil Éireann on 11 September 1997 and Seanad Éireann on 18 September 1997 and arising from the Report of the McCracken Tribunal⁵¹. The Honourable Mr Justice Michael Moriarty was appointed as sole member of the Tribunal.

6.2 The terms of reference of the Moriarty Tribunal are set out at Appendix E.

In addition to making findings and reporting conclusions on the matters set out in its terms of reference, the Tribunal was required to make whatever broad recommendations it considered necessary or expedient

- to ensure that the integrity of public administration was not compromised by the dependence of party politics on financial contributions from undisclosed sources
- for the reform of the disclosure, compliance, investigation and enforcement provisions of company law (including in particular those which relate to directors' duties).
- for maintaining the independence of the Revenue Commissioners in the performance of their functions while at the same time ensuring the greatest degree of openness and accountability in that regard that is consistent with the right to privacy of compliant taxpayers
- for enhancing the role and performance of the Central Bank as regulator of the banks and of the financial services sector generally
- for the effective regulation of the conduct of their members by such professional accountancy and other bodies as are relevant to these terms of reference, for the purpose of achieving the highest degree of public confidence, and
- for the protection of the State's tax base from fraud or evasion in the establishment and maintenance of offshore accounts, and to recommend whether any changes in the tax law should be made to achieve this end.

Organisational Structure of the Tribunal

6.3 The organisational structure of the Tribunal at December 2007 is set out at Figure 6.1. The Tribunal legal team was appointed by Justice Moriarty in consultation with the Attorney General.

⁵¹ The McCracken Tribunal was established to investigate reports of secret payments by Ben Dunne to former Taoiseach, Mr Charles Haughey and former Cabinet Minister Mr Michael Lowry. The Tribunal heard evidence in July 1997 and produced a report the following month. It found that Mr Haughey had given untrue evidence under oath and that Mr Lowry was knowingly assisted by Mr Dunne in evading tax. As a result of the findings and revelation of substantial funds in secret Ansbacher accounts held by Mr Haughey, the Government established a more extensive follow-up, the Moriarty Tribunal to investigate the financial affairs of the two politicians.

Figure 6.1 Organisational Structure of Tribunal 31 December 2007

Position	No of Persons	Total
Sole Member – Justice Moriarty	<u>1</u>	1
Legal Counsel		
Senior Counsel	3	
Junior Counsel	2	
Documentary Research Counsel	1	
Solicitors ^a	<u>1</u>	7
Administrative Staff		
Registrar	1	
Assistant Principal/Executive Officers/Clerical Officer/Legal Secretary ^b /Judge's Tipstaff ^c	<u>5</u>	6
Total		14

Notes:

- a In addition to the resources set out above, a solicitor from the CSSO has provided certain services to the Tribunal.
- b The legal secretary was engaged through a recruitment agency.
- c The Tipstaff is a personal aide to the Judge but has been included in administrative staff.

Timescale and Current Status of Tribunal

6.4 Up to 11 March 2008 the Tribunal held 260 days of public hearings. The Tribunal published its first report in December 2006. It primarily related to the terms of reference as they pertained to Mr Charles Haughey. The Tribunal has indicated that it hopes to produce a final report by the end of 2008.

Factors Impacting on Timescale

6.5 At the initial public sitting of the Tribunal on 31 October 1997, it was anticipated that the Tribunal would conclude its public sittings and furnish its report not later than July 1998. The Tribunal has pointed out that while the Sole Member did indicate his hope that it would be possible to conclude his work by the end of the then current legal year, it is clear from both the terms in which the Sole Member's statement was framed and the reservation to which he made it subject, that what he stated was not intended to be a considered estimate of the likely duration of the Tribunal, but was an aspirational objective. At that time, before the Tribunal had even commenced its substantive private investigations, it was believed that there was very little to be done over and above the finalisation, as it were, of material arising from the McCracken Tribunal, and that, notwithstanding the extremely extensive and elaborate terms of reference, the cooperation afforded to the McCracken Tribunal would be continued. In April 1999, when preparing a cost estimate for the Tribunal, it was anticipated that Justice Moriarty would produce his report early in 2000. A number of specific factors impacted on the cost and timeframe for the Tribunal

- Legal Challenges
- Additional work covering matters dealt with in the Ryan Investigation
- Ill Health of Mr Haughey

- Private Investigation Work.

Legal Challenges

6.6 The Moriarty Tribunal has been involved in four legal cases. This litigation impacted on both the cost and timescale of the Tribunal. The nature and cost of these proceedings is outlined later in this chapter.

Additional Work Covering Matters Dealt with in the Ryan Investigation

6.7 The Tribunal estimate that an additional input of about eight to ten months resulted from its consideration of those matters that had been the subject of the Ryan Investigation⁵².

Ill Health of Mr Haughey

6.8 In his first report, Justice Moriarty indicated that although initial public sittings relating to the terms of reference as they pertained to Mr Haughey largely concluded by the end of May 2001, later sittings were considerably delayed by unavoidable issues concerning Mr. Haughey's state of health. It proved necessary to hear his testimony in short sessions, initially in public, and at a later stage on a more abbreviated basis at hearings held in private which were subsequently read into the public record.

6.9 Lengthy public sittings subsequently ensued in regard to the major part of the evidence relating to the terms of reference referable to Mr Michael Lowry, although this module had commenced in 1999. On virtual completion of those sittings in 2005, evidence was then heard in relation to the remaining matters referable to Mr Haughey.

Private Investigation Work

6.10 In his first report, Justice Moriarty indicated that considerable time and endeavour had been expended by the Tribunal in private investigation of matters which ultimately did not, either by reason of insufficient evidence, or because they fell outside the terms of reference, or for other reasons of substance, proceed to public hearing. He said that numerous such matters came to, or were brought to, the attention of the Tribunal and, after careful investigation in private, were found not to require a public hearing. In general, such investigations required interviews with potential witnesses, in addition to examination of documentary files or financial records, which had to be obtained from the Departments of State or financial institutions that were involved. Accordingly, what was addressed in his first report did not represent the totality of transactions and evidential material that required examination by the Tribunal.

Projected Costs of the Tribunal

6.11 Up to 31 December 2007, €30.5 million had been directly incurred on the conduct of the Tribunal. A further €10.9 million has been identified as having been incurred by other State Bodies including €5.3 million in responding to Tribunal enquiries. While no third party costs have been paid to date, considerable costs are likely to have accrued in respect of representation and discovery of documents.

6.12 No estimation has taken place of the potential liability for third party and discovery costs associated with the Tribunal. The Department of the Taoiseach (the Department) has pointed out

⁵² Mr Gerard Ryan examined the books and documents of Ansbacher (Cayman) Limited under section 19 of the Companies Act 1990.

that on many occasions, in particular in the context of the annual Estimates process, it has asked the Tribunal secretariat for an estimate of what the 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.

6.13 The Tribunal has informed my office that it is no part of the function of the Tribunal to compute potential liability for costs, as the Tribunal does not have the expertise to compute or estimate any liability, whether actual or potential, for costs. In the legal arena the estimation of costs is a specialised activity, conducted by experts under the supervision of the High Court Taxing Masters. Whatever view the Sole Member were to take in relation to costs in no case would he become involved in the calculation or estimation of costs, his role being limited to the exercise of his discretion to fix the liability for costs.

6.14 The Tribunal regards any estimate of third party costs as premature maintaining that the making of any estimate by or with the cooperation or acquiescence of the Tribunal would be inappropriate in advance of submissions from parties likely to be affected by orders for costs and might run the risk of interfering with their rights. The Tribunal, therefore, intends to complete its hearings and produce a final report before making any determination in relation to costs.

6.15 Notwithstanding this, I consider that in order to plan for future costs it is necessary to have a working estimate of the likely cost outturn of each tribunal. Drawing on the most up to date information supplied by the Tribunal, my Office estimated its gross projected cost excluding third party costs. This cost as estimated by my staff is set out in Figure 6.2.

Figure 6.2 Gross Projected Cost of the Tribunal excluding Third Party Costs

Category of Cost	Incurred to end 2007	Projected Further Costs		Total Projected Cost ^a		
		Low	High	Low	High	Average
	€m	€m	€m	€m	€m	€m
Administration	6.74	1.00	1.20	7.74	7.94	7.84
Tribunal Legal Fees ^b	23.17	4.37	5.22	27.54	28.39	27.97
Litigation Costs ^c	0.56	–	–	0.56	0.56	0.56
State Respondent Costs	5.61	0.86	0.86	6.47	6.47	6.47
Other State Costs	5.30	0.40	0.40	5.70	5.70	5.70
Total	41.38	6.63	7.68	48.01	49.06	48.54

Notes:

- a The total projected cost assumes that the Tribunal will cease to operate at the end of June 2009.
- b Includes both tribunal legal team and litigation costs relating to the Haughey proceedings.
- c This comprises litigation costs met from the Tribunal subhead which relate to three of the four legal proceedings involving the Moriarty Tribunal. This does not include costs incurred by the CSSO relating to litigation. The costs in the case of the fourth are included in legal fees.

Third Party Costs

6.16 Ultimately, the award or refusal of costs is a matter for the sole member taking account of the outcome of substantive proceedings. The liability of the State for third party costs is therefore contingent on a number of factors including

- the view of the sole member on cooperation by third parties
- the extent to which non-cooperating parties might be ordered to bear the costs of the Tribunal or other third parties.

6.17 Nonetheless, there is a contingent liability the exact amount of which cannot be precisely estimated for the reasons outlined above. If the costs actually being experienced in the Mahon and Morris Tribunals were replicated in the Moriarty Tribunal it would, taken with the actual representation pattern in the Tribunal, suggest a possible liability of between €39 million and €43 million. Because no cost orders have been made there is insufficient evidence to ground an estimate with any greater precision.

6.18 The nearest comparator in the case of completed tribunals is likely to be provided by the Beef Processing Industry Tribunal. In that case, third party costs represented 63% of total costs. If that pattern occurred in the Moriarty Tribunal third party costs could be of the order of €62 million to €64 million.

6.19 On the basis of the three completed tribunals, if the same relationship pertained between third party costs and total direct cost the potential liability for third party costs would be of the order of €78 million to €80 million⁵³.

6.20 Appendix H sets out the estimation methodology for all costs.

Administrative Costs

6.21 It is estimated that up to €7.9 million will be incurred on administrative costs up to the end of December 2008. An analysis of administration expenses incurred in 2007 indicated that approximately

- 59% related to salaries and wages of staff
- 16% related to office machinery and supplies (including purchase of assets)
- 6% related to stenography fees.
- 4% related to equipment hire
- 4% related to running expenses
- 3% related to legal charges.

6.22 The remaining 8% comprised various miscellaneous expenses including the costs of travel and subsistence, training and development, library and information services, postal and telecommunications and office premises.

⁵³ In respect of the Beef Processing Industry, the McCracken and the Finlay Tribunals third party costs accounted for 69% of total costs.

Cost of Tribunal Legal Team

6.23 Fees of the Tribunals legal team are projected to cost over €28 million by the conclusion of the Tribunal. In December 1997, fee rates were agreed for the Moriarty Tribunal legal team⁵⁴. Those rates comprised an initial brief fee of €31,743 and €20,951 for senior and junior counsel respectively together with daily refresher fees following the first 50 days of public hearings at €1,714 and €1,143 respectively.

6.24 Revised fee rates were agreed for the Moriarty Tribunal with effect from 24 May 2002. Concluding brief fees were set at €30,000 and €20,000 for senior and junior counsel respectively. The senior counsel daily refresher fee agreed was €2,250 but a rate of €2,500 was notified to the Tribunal in error. The Department of Finance sanctioned the higher rate quoted to the two senior counsel involved on a personal basis.

6.25 Although the revised junior counsel daily refresher fee agreed for all tribunals in 2002 was €1,500, a junior counsel in the Moriarty Tribunal received a daily rate higher than equivalent junior counsel because it was felt that the individual would have been appointed senior counsel but for the fact they were working for the Tribunal. The rate was effectively 80% of the senior counsel rate i.e. €2,000. In October 2003 the individual was appointed senior counsel but continues to be remunerated at a daily rate of €2,000.

6.26 In 2005 and 2006, two members of the legal team were upgraded from documentary research counsel to junior counsel at a rate of €1,100 per day. This was less than the rates being paid to equivalent junior counsel already engaged on tribunals.

State Respondent Costs

6.27 State Respondent Costs are projected to amount to €6.47 million. The costs include the cost of representing the public interest and the interests of Government Departments at the Tribunal together with the cost to Government Departments and Local Authorities of compliance with Orders of Discovery issued by the Tribunal.

Other State Costs

6.28 Other State Costs are projected to cost up to €6 million. This is mainly comprised of costs associated with the salary of the Sole Member of the Tribunal, the provision of a solicitor to the Tribunal and a notional rent charge for the occupancy of office and hearing space at Dublin Castle using rates applied generally by OPW.

Views of the Tribunal

6.29 The Tribunal has stated that counsel are retained on the basis of a day-to-day commitment and are paid a daily rate. However, whereas in the case of ordinary litigation counsel would be entitled to payment of per diem fees in respect of a full day whether the proceedings had lasted for the full day or not, tribunal counsel are paid on the basis of an eight hour day or any proportionate part thereof. This means that where counsel work, for example, for four hours they become entitled only to half the daily rate. However, where counsel work in excess of eight hours, they are entitled to no further fees either at a proportionate rate or at any rate. The Tribunal stated that almost invariably the work of the Tribunal cannot be completed in the course of an ordinary eight

⁵⁴ The rates quoted are exclusive of VAT.

hour day and frequently entails counsel working for well in excess of this commitment. Consequently, the State can benefit from the delivery of service in excess of that paid for.

6.30 The Tribunal also stated that a related gain accruing to the Exchequer arises from the fact that the number of counsel engaged is small having regard to the extensive terms of reference of the Tribunal and the extent of the work entailed in carrying out its inquiries since November 1997. At that time, it was hoped that the work of the Tribunal could be carried out with the same number of senior and junior counsel as were required to do the work of the McCracken Tribunal on the assumption that very little work remained to be completed in the case of either of the two named individuals in the Tribunal's terms of reference.

6.31 The Tribunal acknowledged that the length of time it has taken to conduct the Tribunal's inquiries is a matter of considerable importance and one which will require the most wide ranging consideration in the Tribunal's Report. In the case of the Mr Haughey element of the inquiry it was not appreciated at the time the Tribunal was established that the total amount of funds likely to require examination by the Tribunal would be in excess of €1.5 million as opposed to the approximate €1.2 million identified in the Report of the McCracken Tribunal, nor that Mr Haughey would institute a legal challenge to the entire basis of the Tribunal thus delaying the real start of the Tribunal's work, nor that, in the carrying out of its inquiries, the Tribunal would become involved in a much wider examination of the basis of the Ansbacher accounts, nor that Mr Haughey's health would become a factor in the expeditious conduct of the Tribunal's work.

6.32 While, from time to time, it appeared that the size of the Tribunal's legal team was likely to prove a limiting factor in the conduct of its work, it was recognised by the Sole Member that considerable advantages flowed from having a small legal team. The Tribunal considered that one of the advantages which accrued stemmed from the fact that had the number of senior counsel retained been increased while it would have reduced the requirement for counsel to devote more than eight hours per day to the work of the Tribunal it would have increased the per diem costs to the State arising from the retention of additional counsel.

6.33 While there are deficiencies in the configuration of legal assistance provided to the Tribunal in particular having regard to the duration of the work of the Tribunal, overall, the Tribunal considered that there is likely to have been a saving to the State.

Legal Challenges

6.34 Four separate sets of legal proceedings have been instituted against the Moriarty Tribunal. The cost of litigation in three out of four of those cases was €0.56 million⁵⁵.

Haughey Proceedings

6.35 In December 1997, prior to the commencement of public sittings relating to the terms of reference pertaining to Mr Charles Haughey, Mr Haughey challenged the constitutionality of the Tribunals of Inquiry Acts in both the High Court and the Supreme Court. These proceedings occupied the greater part of 1998. The commencement of public sittings was delayed until early 1999.

6.36 The outcome of the case was that the constitutionality of the Tribunals legislation was upheld but orders of discovery made by the Tribunal were quashed. A new order of discovery process had to be carried out by the Tribunal. The Tribunal has stated that this was completed within a short time of making the order.

⁵⁵ Details of the cost of the fourth case were not available.

Desmond Proceedings

6.37 In 2003, judicial review proceedings were taken in the High Court by Mr Dermot Desmond and subsequently appealed to the Supreme Court. Both the High Court and the Supreme Court refused the reliefs sought by Mr Desmond and costs were awarded in favour of the Tribunal.

O'Brien Proceedings

6.38 Two judicial reviews were taken by Mr Denis O'Brien in the period 2004 to 2006 and when unsuccessful in the High Court, he challenged the outcome in the Supreme Court. In both cases, the Tribunal was successful and was awarded its costs.

Cost of Legal Challenges

Haughey Proceedings

6.39 The court awarded costs to the plaintiffs in respect of the action itself but not the associated interlocutory injunctions. The tribunal was represented by its own legal team in the judicial review proceedings for which separate fees were charged. In response to a query from the Office of the Attorney General, the Tribunal pointed out that where fees were claimed on the same date for litigation and the ordinary work of the Tribunal, work in both areas had been carried out on that day and the payment for ordinary tribunal work was limited to a proportion of the daily rate. It was not possible to definitively quantify the fees paid to tribunal counsel in relation to the Haughey proceedings but the cost is included in legal fees. It has been estimated at approximately €200,000.

Desmond Proceedings

6.40 The costs incurred by both the Tribunal and the CSSO in dealing with the Desmond case were €277,862. Following taxation of costs, an amount of €249,719 was agreed with the CSSO. This was a reduction of 10% on the amount sought. This amount was recovered in March 2006.

6.41 At the request of the external counsel engaged, the Tribunal was represented by one of its own senior counsel in those proceedings. The Tribunal counsel was paid a brief fee of €25,000 in respect of both the High Court and Supreme Court challenges. The daily refresher fees paid were €3,000 – 20% more than his daily attendance fee at the Tribunal. The Tribunal indicated that there was no duplication of payment in that, while the member of the legal team engaged in the Court proceedings continued to work in addition on ordinary tribunal work, no fees were charged in respect of this work except in respect of one day.

O'Brien Proceedings

6.42 The costs incurred by the Tribunal were €353,732. Mr O'Brien withdrew an initial settlement and in June 2008 certificates of taxation were issued in respect of three out of the four challenges. In relation to the first set of judicial review proceedings a certificate of taxation in respect of the High Court proceedings was issued in the sum of €364,574, the finalisation of the Supreme Court order for costs in relation to this set of legal proceedings is awaiting the production of a formal Supreme Court Order. In relation to the second set of judicial review proceedings, a certificate of taxation in respect of the High Court and Supreme Court proceedings issued in the sums of €164,307 and €81,950 respectively.

6.43 The certificates have been served on Mr O'Brien's solicitors. The Tribunal has been advised that interest at a rate of 8% per annum runs on the total sum of €610,831 from 9 June 2008 until the date of payment.

Tribunal Administration

Procurement

6.44 The Tribunal informed me that, where possible, public sector guidelines in relation to tendering are followed, but that due to the nature of the Tribunal's work it is not always possible to adhere to those regulations. Occasionally, the Tribunal will 'piggyback' on the result of competitions held by the Department or use the Government Supplies Agency where possible.

6.45 There was no evidence of a competitive tendering process having been used in the selection of two of the larger value suppliers in 2006. The Tribunal stated that the suppliers involved were selected based on the fact that

- quotes in respect of them which had been previously obtained for the McCracken Tribunal and the contract was 'carried over' by the Moriarty Tribunal. In addition, the provider in question was the only firm providing a real-time transcript service which was considered necessary by the Tribunal.
- a recommendation had been made by the OPW and highly satisfactory service had been provided to the Dunnes Payments Tribunal.

6.46 One high value tender awarded for the provision of computer equipment was examined from a listing of the 13 competitive tender competitions held since the Tribunal's inception. It was found to be in order.

Approval of Expenditure

6.47 All invoices of the Tribunal are certified for payment by the Tribunal prior to being forwarded to the Department for payment processing.

6.48 Invoices relating to administration and totalling €63,948 and paid in 2006 were selected for review as part of this examination. All payments were found to be in order.

6.49 Fee notes of the Tribunal legal team are certified by both the Sole Member of the Tribunal and the Registrar prior to being forwarded to the Department for payment processing.

6.50 The certification currently provided by Justice Moriarty and the Registrar is that the legal team member worked a minimum of eight hours per day on behalf of the Tribunal or otherwise for the hours specified between two particular dates.

6.51 A sample of fee notes representing 68% of fee notes paid in 2006 were examined as part of this review and the correct rates were found to have been paid. In all cases, the certification was given on a separate page.

6.52 A record of the attendance of tribunal legal team members is kept by the Tribunal. It does not take account of arrival and departure times, work performed by the legal team outside of the office or at weekends.

Engagement of Administrative Staff

6.53 The Department have informed me that the Department of Finance levied 'non-involved' Departments to supply administrative and clerical staff for the Tribunal. Most of the Moriarty Tribunal staff have come from other Government Departments or Offices and their costs are recouped from the Tribunal. One member of the administrative staff is engaged through a recruitment agency.

Bank Account

6.54 The Tribunal has its own bank account used to pay ‘viaticums’ to persons summoned to attend the hearings of the Tribunal. Only 36 cheques have been written with a total value of €1,482. Only 12 of these were cashed with a value of €343. The balance on this account at 31 March 2007 was €462. The Registrar and the Office Administrator are the cheque signatories.

Department Administration

6.55 The role of the Department has centred on seeking sanction from the Department of Finance for changes in staffing/legal team numbers and the appropriate rates payable and approving counsel fee invoices on a recurring basis in accordance with the Department of Finance sanction.

6.56 Fee invoices of the Tribunal legal team are examined and authorised in the Protocol and General Division of the Department prior to being forwarded to its Finance Unit for payment processing. The Finance Unit processes the payment of all tribunal invoices and monitors expenditure throughout the year.

6.57 Since 2004, in common with other tribunals, a return of tribunal expenditure is forwarded to the Department of Finance every two months.

General Comments of the Tribunal

6.58 The Tribunal drew attention to the downstream gains to the Exchequer arising from its establishment and the conduct of its proceedings. The Tribunal noted from the evidence of the Chairman of the Revenue Commissioners to the Tribunal in April 2006 that apart from specific sums of the order of €8.5 million recovered from individuals directly connected with the Tribunal’s proceedings, the work of and the proceedings of the Tribunal have contributed to the cultivation of a new climate or culture of disclosure in the financial and fiscal arenas. This has been reflected in the recovery of substantial sums of money by the Revenue Commissions in the order of €2.2 billion.

6.59 The Chairman of the Revenue Commissioners, in evidence at the Moriarty Tribunal in April 2006, indicated that it would be difficult to identify what percentage of this was due exclusively to the activity of the Moriarty Tribunal or indeed of a number of other inquiries being conducted at the same time but that a figure mentioned in the media in the order of €900 million might be the correct one. The Tribunal considered it worth observing that much of the money directly arising from the Ansbacher investigations and amounting to something in the order of €60 million stemmed from the work of the Moriarty Tribunal, as well as from the work of the McCracken Tribunal and the Inquiry of the Ansbacher Inspectors.

6.60 The Tribunal added that from discussions with the Revenue Commissioners, the Tribunal has been informed that one of the main features of the relationship between the financial community and investigative bodies, and in particular the Revenue Commissioners over the last eight or nine years is the change in the degree of responsiveness of financial institutions to requests for information or disclosure.

Conclusions

6.61 The Moriarty Tribunal which was established in September 1997 intends to report in December 2008. The extended timescale of the Tribunal has been attributed to the follow main factors

- Legal Challenges
- Additional work covering matters dealt with in the Ryan Investigation
- Ill Health of Mr Haughey
- Private Investigation Work.

6.62 €41 million has been spent on conducting the inquiry up to 31 December 2007.

6.63 Costs excluding third party costs are projected to amount to around €49 million. Because the Tribunal has made no orders so far in respect of third party costs, there is no internal information from the Tribunal to inform the estimation of such costs. However, based on the pattern of representation before the Tribunal and the levels of cost being experienced in the Mahon and Morris Tribunals a contingent liability of the order of €39 million to €43 million could exist. The cost experienced in the nearest comparable completed tribunal (The Beef Processing Industry Tribunal) suggests a larger figure – something of the order of €62 million to €64 million.

The potential liability of the State appears therefore, to be somewhere in the region of €100 million.

Appendices

Appendix A Public Inquiries in Ireland

Figure A.1 Public Inquiries Instituted since 1997

Public Inquiry	Year Established	Subject Matter
McCracken Tribunal	1997	Alleged payments by Mr Ben Dunne to senior politicians (Mr Charles Haughey and Mr Michael Lowry)
Moriarty Tribunal	1997	Alleged Payments to Politicians
Flood/Mahon Tribunal	1997	Alleged Planning Irregularities
Lindsay Tribunal	1999	Infection with HIV and Hepatitis C of persons with Haemophilia and Related Matters
Commission to Inquire into Child Abuse	1999	Child Abuse in Institutions of the State
Barron Inquiry	2000	1974 Dublin-Monaghan bombings
Dunne Inquiry	2000	Organ Retention
Morris Tribunal	2002	Complaints concerning some Gardaí of the Donegal Division
Barr Tribunal	2002	Facts and circumstances surrounding the fatal shooting of John Carthy at Abbeylara, Co Longford.
Ferns Inquiry	2003	Allegations of clerical sexual abuse in the diocese of Ferns in Co Wexford.
The Lourdes Hospital Inquiry	2004	An inquiry into peripartum hysterectomy at Our Lady of Lourdes Hospital, Drogheda
Commission of Investigation into the Dublin and Monaghan Bombings	2005	Dublin and Monaghan bombings in 1974 (Successor to Barron Inquiry)
Madden Inquiry	2005	Post Mortem Practice and Organ Retention
Rossiter Inquiry	2005	Inquiry into the circumstances surrounding the late Brian Rossiter's arrest, treatment and detention in Clonmel Garda Station in September 2002.
Smithwick Tribunal of Inquiry	2005	Inquiry into suggestions of collusion in the fatal shooting of two RUC Officers - Breen & Buchanan
Commission of Investigation into the Dean Lyons Case	2006	The circumstances surrounding the confession by Dean Lyons (Deceased) about the deaths of Ms Mary Callinan and Ms Sylvia Sheils in March 1997 in Grangegorman.
Commission of Investigation into the Dublin Archdiocese	2006	Investigation into the handling of complaints of child sexual abuse involving Catholic priests in or attached to the Archdiocese of Dublin.
Commission of Investigation into Leas Cross	2007	Investigation into the management, operation and supervision of Leas Cross Nursing Home.
Commission of Investigation into the death of Gary Douch	2007	Investigation into the death of a prisoner in Mountjoy Jail.

Figure A.2 General Information on Comparative Tribunals

Tribunal	Subject Matter	Establishment Date	Date Report Presented to Relevant Minister
Tribunal of Inquiry into the Beef Processing Industry (The Beef Tribunal)	Allegations regarding illegal activities, fraud and malpractice in and in connection with the beef processing industry	May 1991	July 1994
Tribunal of Inquiry into the Blood Transfusion Service Board (The Finlay Tribunal)	Circumstances surrounding the contamination of blood and blood products	October 1996	March 1997
Tribunal of Inquiry – Dunnes Payments (The McCracken Tribunal)	Payments made to certain politicians or connected persons or political parties by Dunnes Holding Company or any associated enterprises and/or by Mr. Ben Dunne	February 1997	August 1997

Figure A.3 Direct Costs of Comparative Tribunals

Tribunal	Administration €m	Tribunal Legal Costs^a €m	Third Party Legal Costs €m	Total €m	Third Party Costs as a Percentage of Total Costs
The Beef Tribunal	5.32	4.63	17.28	27.23	63.5%
The Finlay Tribunal	0.10	0.86	5.60	6.56	85.4%
The McCracken Tribunal	0.50	0.70	3.50	4.70	74.5%
Total	5.92	6.19	26.38	38.49	68.70%

Note:

Tribunal legal costs includes fees paid to the legal team at the tribunals and all other legal costs incurred by the tribunals.

Appendix B Legislation Governing Tribunals

Tribunals of Inquiry

Tribunals of Inquiry (Evidence) Act, 1921

Tribunals of Inquiry (Evidence) (Amendment) Act, 1979

Tribunals of Inquiry (Evidence) (Amendment) Act, 1997

Tribunals of Inquiry (Evidence) (Amendment) Act, 1998

Tribunals of Inquiry (Evidence) (Amendment) (No 2) Act, 1998

Tribunals of Inquiry (Evidence) (Amendment) Act, 2002

Tribunals of Inquiry (Evidence) (Amendment) Act, 2004

Appendix C Terms of Reference of the Mahon Tribunal

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

‘That Dáil Éireann resolves

A. That it is expedient that a Tribunal be established under the tribunals of Inquiry (Evidence) Act, 1921, as adapted by or under subsequent enactments and the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979, to inquire urgently into and report to the Clerk of the Dáil and make such findings and recommendations as it see fit, in relation to the following definite matters of urgent public importance:

1. The identification of the lands stated to be 726 acres in extent, referred to in the letter dated 8th June, 1989 from Mr. Michael Bailey to Mr. James Gogarty (reproduced in the schedule herewith) and the establishment of the beneficial ownership of the lands at that date and changes in the beneficial ownership of the lands since 8th June, 1989 prior to their development
2. The planning history of the lands including
 - (a) their planning status in the Development Plan of the Dublin local authorities current at the 8th June, 1989
 - (b) the position with regard to the servicing of the lands for development as at the 8th June, 1989
 - (c) changes made or proposed to be made to the 8th June, 1989 planning status of the lands by way of
 - (i) proposals put forward by Dublin local authority officials pursuant to the review of Development Plans or otherwise
 - (ii) motions by elected members of the Dublin local authorities proposing re-zoning
 - (iii) applications for planning permission (including any involving a material contravention of the Development Plan),
3. Whether the lands referred to in the letter dated 8th June, 1989 were the subject of the following
 - (a) Re-zoning resolutions
 - (b) Resolutions for material contravention of the relevant Development Plans
 - (c) Applications for special tax designations status pursuant to the Finance Acts
 - (d) Applications for planning permission
 - (e) Changes made or requested to be made with regard to the servicing of the lands for development
 - (f) Applications for the granting of building by-law approval in respect of buildings constructed on the lands
 - (g) Applications for fire safety certificateson or after the 20th day of June, 1985.

And

- (i) to ascertain the identity of any persons or companies (and if companies, the identity of the beneficial owners of such companies) who had a material interest in the said lands or who had a material involvement in the matters aforesaid

- (ii) to ascertain the identity of any members of the Oireachtas, past or present, and/or members of the relevant local authorities who were involved directly or indirectly in any of the foregoing matters whether by the making of representations to a planning authority or to any person in the authority in a position to make relevant decisions or by the proposing of or by voting in favour or against or by abstaining from such resolutions or by absenting themselves when such votes were taken or by attempting to influence in any manner whatsoever the outcome of any such applications, or who received payments from any of the persons or companies referred to at (i) above
 - (iii) to ascertain the identity of all public officials who considered, made recommendations or decisions on any such matters and to report on such considerations, recommendations and/or decisions
 - (iv) to ascertain and report on the outcome of all such applications, resolutions and votes in relation to such applications in the relevant local authority.
4. (a) The identity of all recipients of payments made to political parties or members of either House of the Oireachtas, past or present, or members or officials of a Dublin local authority or other public official by Mr. Gogarty or Mr. Bailey or a connected person or company within the meaning of the Ethics in Public Office Act, 1995, from 20th June 1985 to date, and the circumstances, considerations and motives relative to any such payment
- (b) whether any of the persons referred to at sub-paragraphs 3(ii) and 3(iii) above were influenced directly or indirectly by the offer or receipt of any such payments or benefits.
5. In the event that the Tribunal in the course of its inquiries is made aware of any acts associated with the planning process ~~committed on or after the 20th June, 1985 [1]~~ which may in its opinion amount to corruption, or which involve attempts to influence by threats or deception or inducement or otherwise to compromise the disinterested performance of public duties, it shall report on such acts and should in particular make recommendations as to the effectiveness and improvement of existing legislation governing corruption in the light of its inquiries.
6. And the Tribunal be requested to make recommendations in relation to such amendments to planning, Local Government, Ethics in Public Office and any other relevant legislation as the Tribunal considers appropriate having regard to its findings.

‘payment’ includes money and any benefit in kind and the payment to any person includes the payment to a connected person within the meaning of the Ethics in Public Office Act, 1995.

- B. And that the Tribunal be requested to conduct its inquiries in the following manner, to the extent that it may do so consistent with the provisions of the Tribunals of Inquiry (Evidence) Acts, 1921 and 1979:
- (i) to carry out such preliminary investigations in private as it thinks fit using all the powers conferred on it under the Acts, in order to determine whether sufficient evidence exists in relation to any of the matters referred to above to warrant proceeding to a full public inquiry in relation to such matters,
 - (ii) to inquire fully into all matters referred to above in relation to which such evidence may be found to exist, dealing in the first instance with the acknowledged monetary donation debated in Dáil Éireann on the 10th September, 1997 Dáil Debates Columns 616-638 and to report to the Clerk of the Dáil thereupon,

- (iii) to seek discovery of all relevant documents, files and papers in the possession, power or procurement of said Mr. Michael Bailey, Mr. James Gogarty and Donnelly, Neary and Donnelly Solicitors,
 - (iv) in relation to any matters where the Tribunal finds that there is insufficient evidence to warrant proceeding to a full public inquiry, to report that fact to the Clerk of the Dáil and to report in such a manner as the Tribunal thinks appropriate on the steps taken by the Tribunal to determine what evidence, if any, existed and the Clerk of the Dáil shall thereupon communicate the Tribunal's report in full to the Dáil,
 - (v) to report on an interim basis not later than one month from the date of establishment of the Tribunal or the tenth day of any oral hearing, whichever shall first occur, to the Clerk of the Dáil on the following matters:
 - the number of parties than represented before the Tribunal
 - the progress which has been made in the hearing and the work of the Tribunal
 - the likely duration (so far as that may be capable of being estimated at that time) of the Tribunal proceedings
 - any other matters which the Tribunal believes should be drawn to the attention of the Clerk of the Dáil at that stage (including any matter relating to the terms of reference).
- C. And that the person or persons selected to conduct the Inquiry should be informed that it is the desire of the House that:
- (a) the Inquiry be completed in as economical a manner as possible and at the earliest date consistent with a fair examination of the matters referred to it, and, in respect to the matters referred to in paragraphs 1 to 4 above, if possible, not later than the 31st December, 1997, and
 - (b) all costs incurred by reason of the failure of individuals to co-operate fully and expeditiously with the Inquiry should, so far as is consistent with the interests of justice, be borne by those individuals.
- D. And that the Clerk of the Dáil shall on receipt of any Report of the Tribunal arrange to have it laid before both Houses of the Oireachtas immediately on its receipt.
- E. The Tribunal shall, in addition to the matters referred to in paragraphs A (1) to A (5) hereof, inquire urgently into and report to the Clerk of the Dáil and make such findings and recommendations as it sees fit, in relation to the following definite matters of urgent public importance:
1. Whether any substantial payments were made or benefits provided, directly or indirectly, to Mr. Raphael Burke which may, in the opinion of the Sole Member of the Tribunal, amount to corruption or involve attempts to influence or compromise the disinterested performance of public duties or were made or provided in circumstances which may give rise to a reasonable inference that the motive for making or receiving such payments was improperly connected with any public office or position held by Mr. Raphael Burke, whether as Minister, Minister of State, or elected representative,
 2. Whether, in return for or in connection with such payments or benefits, Mr. Raphael Burke did any act or made any decision while holding any such public office or position which was intended to confer any benefit on any person or entity making a payment or providing a benefit referred to in paragraph 1 above, or any other person or entity, or procured or directed any other person to do such an act or make such a decision.

And that the Tribunal be requested to conduct its inquiries in the following manner to the extent that it may do so consistent with the provisions of the Tribunals of Inquiry (Evidence) Acts 1921 to 1998:

- (i) To carry out such preliminary investigations in private as it thinks fit (using all powers conferred on under the Acts), in order to determine whether sufficient evidence exists in relation to any of the matters referred to in paragraphs E1 and E2 above to warrant proceeding to a full public inquiry in relation to such matters,
- (ii) To inquire fully into all matters referred to in paragraphs E1 and E2 in relation to which such evidence may be found to exist
- (iii) In relation to any matters where the Tribunal finds that there is insufficient evidence to warrant proceedings to a full public inquiry, to report that fact to the Clerk of the Dáil and to report in such a manner as the Tribunal thinks appropriate on the steps taken by the Tribunal to determine what evidence, if any, existed and the Clerk of the Dáil shall thereupon communicate the Tribunal's report in full to the Dáil.
- (iv) To report on an interim basis to the Clerk of the Dáil on the following matters:
 - the number of parties then represented before the Tribunal
 - the progress which has been made in the hearing and the work of the Tribunal
 - the likely duration (so far as that may be capable of being estimated at that time) of the Tribunal proceedings
 - any other matters which the Tribunal believes should be drawn to the attention of the Clerk of the Dáil at that stage (including any matter relating to the terms of reference)
 - and to furnish such further interim reports as the Tribunal may consider necessary.

F. And that the Sole Member of the Tribunal should be informed that it is the desire of the House that:

- (a) The inquiry into the matters referred to in paragraph E hereof be completed in as economical a manner as possible and at the earliest date consistent with a fair examination of the said matters, and
- (b) All costs incurred by reason of the failure of individuals to co-operate fully and expeditiously with the Inquiry should, so far as is consistent with the interests of justice, be borne by those individuals.

G. And that the Clerk of the Dáil shall on receipt of any Report from the Tribunal arrange to have it laid before both Houses of the Oireachtas immediately on its receipt.

H. The Tribunal shall consist of not more than three Members as follows:

- (a) His Honour Judge Alan Mahon and Her Honour Judge Mary Faherty who were appointed by instrument made on the 24th October, 2002 by the Minister for the Environment and Local Government pursuant to the Tribunals of Inquiry (Evidence) Acts, 1921 to 2002, and
- (b) His Honour Judge Gerald Keys, from a date to be specified by instrument made pursuant to the Tribunals of Inquiry (Evidence) Acts 1921 to 2002 by the Minister for the Environment, Heritage and Local Government.

I. His Honour Judge Alan Mahon shall be the Chairperson of the Tribunal from a date to be specified by instrument made pursuant to the Tribunals of Inquiry (Evidence) Acts 1921 to 2002 by the Minister for the Environment, Heritage and Local Government.

J.

- (1) The Tribunal shall, subject to the exercise of its discretion pursuant to J(6) hereunder, proceed as it sees fit to conclude its inquiries into the matters specified below (and identified in the Fourth Interim Report of this Tribunal) and set out its findings on each of these matters in an interim report or reports or in a final Report:
 - (a) The Carrickmines I Module
 - (b) The Fox and Mahony Module
 - (c) The St Gerard's Bray Module
 - (d) The Carrickmines II Module and related Issues
 - (e) The Arlington/Quarryvale I Module
 - (f) The Quarryvale II Module
 - (g) Those modules that are interlinked with the modules set out in paragraphs (a) to (f), and that are referred to in paragraph 3.04 of the Fourth Interim Report of the Tribunal.
- (2) The Tribunal shall, subject to the exercise of its discretion pursuant to paragraph J(6) hereunder, by 1 May 2005 or such earlier date as the Tribunal shall decide, consider and decide upon those additional matters (being matters in addition to those set forth at J(1)(a) to (g) above and in respect of which the Tribunal has conducted or is in the course of conducting a preliminary investigation as of the date of the decision) that shall be proceeding to a public hearing and shall record that decision in writing and shall duly notify all parties affected by that decision at such time or times as the Tribunal considers appropriate
- (3) The Tribunal may in the course of investigating any additional matter under paragraph J(2) or a matter being investigated under paragraph J(1) investigate any other matter of which it becomes aware when it is satisfied that such further investigation is necessary for the Tribunal to make findings on any such additional matter referred to in paragraph J(1) above.
- (4) Notwithstanding any other provision of these Terms of Reference the presentation to the Clerk of the Dáil of an interim report or reports, as the case may be, and of the Final Report on the matters identified at paragraphs J(1)(a)-(g), J(2) and, where applicable, J(3) shall constitute compliance by the Tribunal with all of its Terms of Reference, as hereby amended, and no further investigation, or report shall be required of or from the Tribunal on any other matter.
- (5) Nothing in these amended Terms of Reference shall preclude the Tribunal from conducting hearings or investigations into any compliance or non-compliance by any person with the orders or directions of the Tribunal.
- (6) The Tribunal may in its sole discretion - in respect of any matter within paragraphs J(1), J(2) and J(3) of these amended Terms of Reference – decide:
 - (I) To carry out such preliminary investigations in private as it thinks fit using all the powers conferred on it under the Acts, in order to determine whether sufficient evidence exists in relation to the matter to warrant proceeding to a public hearing if deemed necessary, or
 - (II) Not to initiate a preliminary investigation and/or a public hearing of evidence in relation to the matter notwithstanding that the matter falls within the Tribunal's Terms of Reference, or
 - (III) Having initiated a preliminary investigation in private (and whether or not same has been concluded) but prior to the commencement of any public hearing of evidence in the matter, to discontinue or otherwise terminate

its investigation notwithstanding that the matter falls within the Tribunal's Terms of Reference.

In exercising its discretion pursuant to this paragraph the Tribunal may have regard to one or more of the factors referred to below:

- (i) The age and/or state of health of one or more persons who are likely to be in a position to provide useful information (including, but not confined to, oral evidence to be given privately or publicly), including the age and/or likely state of health of any such person at such date in the future when that person or persons might be expected to be called upon to give oral evidence or to otherwise cooperate with the tribunal, and in particular the issue as to whether or not their age and/or state of health is or is likely to be an impediment to such person being in a position to cooperate with the Tribunal or to give evidence to the Tribunal in private or in public
 - (ii) The likely duration of the preliminary investigation or public hearing into any matter
 - (iii) The likely cost (or other use of the resources of the Tribunal) of such investigation or any stage of the investigation into any matter
 - (iv) Whether or not the investigation into the matter is likely to provide evidence to the Tribunal which would enable it to make findings of fact and conclusions and/or to make recommendations
 - (v) Any other factors which in the opinion of the Tribunal would, or would be likely to, render an investigation, or the continued investigation into any matter inappropriate, unnecessary, wasteful of resources, unduly costly, unduly prolonged or which would be of limited or no probative value.
- (7) Subject to paragraph J(3) any matter not brought to the attention of the Tribunal or of which it is not aware by the 16th day of December 2004 shall not be the subject of any investigation by the Tribunal.

SCHEDULE

Kilinamonan House,
The Ward,
Co. Dublin.

8th June, 1989.

Dear Mr. Gogarty,

PROPOSALS FOR DISCUSSION

Re: Your lands at Finglas, Ballymun, Donabate, Balgriffin and Portmarnock, Co. Dublin.

I refer to our many discussions regarding your following six parcels of land:-

- Lot 1: 100 acres (approx) at North Road, Finglas, including 'Barrett's Land'.
- Lot 2: 12 acres (approx) at Jamestown Road, Finglas.
- Lot 3: 100 acres (approx) at Poppintree, Ballymun.
- Lot 4: 255 acres (approx) at Donabate (Turvey House and Beaverton House).
- Lot 5: 250 acres (approx) at Balgriffin.
- Lot 6: 9 acres (approx) at Portmarnock.

I submit the following proposals for your consideration:-

PROPOSAL NO. 1 Purchase Proposal

Lots 1, 2 and 3	Purchase Price £4,000 per acre 10% deposit payable on the signing of the contract Completion 1 year from date of contract.
Lot 4	Purchase Price IR£1 Million Deposit 10% on contract Completion 2 years from date of contract.
Lot 5	Purchase Price IR£750,000 Deposit 10% on contract Completion 3 years from date of contract.
Lot 6	Option to be granted for nominal consideration (£100) for a period of 2 years at a purchase price of £30,000 per acre.

PROPOSAL NO. 2 Participation Proposal

As an alternative to the outright proposal above I am prepared to deal with Lots 1-5 (inclusive) above on the basis that I would be given a 50% share in the ownership of the said lands in exchange for procuring Planning Permission and Building Bye Law Approval. The time span which I would require to be allowed to obtain Permission and Approval and my anticipated financial expenditure (apart from my time input) in respect of the different lots would be as follows:-

Lots 1,2 and 3

A period of 2 years within which to procure a buildable planning Permission and Bye Laws Approval for mixed development including housing, industrial and commercial.
My financial expenditure up to figure of £150,000 (to include Architect's fees, Consulting Engineer's fees, Planning and Bye Law charges etc.).

Lots 4 and 5

Time required	3 years.
Financial Expenditure	up to £150,000

In considering the above proposals the following points of information should be borne in mind by all parties:-

1. From the point of view of obtaining Planning Permission the entire lands (1-6 inclusive) have the following shortcomings:-
NO zoning for development purposes
NO services.
NO proposal in current draft development plans (City and County) for the zoning of the lands or any part thereof for development purposes.
2. We face a very severe uphill battle to arrange for the availability of services and for the ultimate procurement of Planning Permission.
3. The steps to be taken on the way to procuring a buildable Planning Permission and Building Bye Laws Approval are notoriously difficult, time consuming and expensive. Material Contravention Orders must be obtained and this involves the procurement of a majority vote at 2 full Council Meetings at which 78 Council Members must be present and it involves satisfactory compliance with extensive requirements and pre-conditions of the Planning Authority and the inevitable dealing with a protracted Appeals to An Bord Pleanala.
4. It is essential that the Planning Application should be brought in the name of an active house building company which enjoys good standing and good working relationship with

the Planners and the Council Members and in this regard I confirm that in the event of our reaching agreement regarding the within proposals that all Planning Applications would be made by one of my Companies which meets the said requirements.

5. In the case of all of the lands the applications will be highly sensitive and controversial and we can realistically expect strenuous opposition from private, political and planning sectors. One of my active companies will have to take the limelight in such applications and withstand the objections and protests which will inevitably confront it. Apart from the anticipated financial expenditure as outlined above it should be borne in mind that I will personally have to give extensively of my time and efforts over the entire period of the applications including the necessary preliminary negotiations in regard to services and zoning. It must be borne in mind that I will have to abandon other projects which would be open to myself and my companies in order to give proper attention to this project. If I am successful in changing your lands from their present value status of agricultural lands with very little potential even for agricultural use into highly valuable building lands I would have to be rewarded with a minimum 50% stake in the ownership of the lands. Our advisors would have to work out the details as to how this can be effected in the most tax efficient manner.

I look forward to hearing from you in relation to the above proposals. In the case of the first proposal which relates to the outright purchase of the lands (excluding Lot 6) I would not be averse to a proposal which would involve the vendors retaining a participation stake of up to 20% in the purchasing company if you felt that an ongoing interest in the future development of the lands would be more acceptable to the present owners.

Yours sincerely,

MICHAEL BAILEY,
Mr. Jim Gogarty,
Clontarf,
Dublin 3.

[1] Deleted by resolution of Dail Eireann.

Appendix D Terms of Reference of the Morris Tribunal

WHEREAS a resolution in the following terms was passed by Dáil Éireann on 28 March 2002 and by Seanad Éireann on the same day:

That Dáil Éireann

- bearing in mind the serious public concern about allegations that members of the Garda Síochána in the Donegal Division engaged in unethical and criminal behaviour,
- noting the decision of the Minister for Justice, Equality and Law Reform in November, 2001, to request Mr Shane Murphy, SC, to conduct an independent review of all the relevant papers and the progress on the investigations into these allegations generally with a view to the Minister receiving expert independent advice as to whether there are measures that might now be taken to bring matters to finality sooner rather than later,
- noting that having completed his review, it is the opinion of Mr. Shane Murphy, SC, that a Tribunal of Inquiry represents the only comprehensive method of inquiry to resolve outstanding issues of fundamental public importance,
- mindful that a number of criminal proceedings have been instituted arising from some of these allegations, and mindful of the ongoing investigation into the death of Mr Richard Barron, and not wishing to prejudice these or related criminal proceedings,

resolves that it is expedient that a tribunal be established under the Tribunals of Inquiry (Evidence) Acts, 1921 to 2002, to inquire urgently into the following definite matters of urgent public importance.

In the resolution of Seanad Eireann, the reference is to Seanad Eireann

- (a) The making of extortion and hoax telephone calls to the home of Michael and Charlotte Peoples on 9th November, 1996 and the subsequent Garda investigation into that complaint,
- (b) Investigations in relation to the death of Mr. Richie Barron of Raphoe, Co. Donegal on 14th October, 1996 with particular reference to the arrest and treatment of persons in custody in connection with that investigation, the progress, management and effectiveness of the Garda investigation with particular reference to the management of informants,
- (c) Allegations of harassment of the McBrearty family of Raphoe, County Donegal and of relatives, associates and agents of that family by members of the Garda Síochána subsequent to the death of Mr. Barron including the issue and prosecution of summonses relating to offences alleged to have occurred between 28th October, 1996 and 28th September, 1998,
- (d) The circumstances surrounding the arrest and detention of Mark McConnell on 1st October, 1998 and Michael Peoples on 6th May, 1999,
- (e) Complaints that some Gardaí in County Donegal may have been involved in hoax explosives and bomb-making equipment finds (in particular discoveries on 11th September, 1993, 19th November, 1993, 11th January, 1994, 14th March, 1994, 4th June, 1994, 13th June, 1994 and 18th July, 1994) and a review of the management and investigation of these issues,
- (f) The circumstances surrounding the arrest and detention of Frank McBrearty Jnr. on 4th February, 1997 and his subsequent prosecution in the Circuit Criminal Court in relation to an alleged assault in December, 1998 on Edward Moss with particular reference to the Garda investigation and the management of both the investigation and the role of the Gardaí in the subsequent prosecution,
- (g) Allegations relating to the Garda investigation of an arson attack on property situated on the site of the telecommunications mast at Ardara, County Donegal in October/November 1996,

(h) Allegations contained in documents received by Deputy Jim Higgins on 25th June, 2000 and in information received by Deputy Brendan Howlin on 25th June, 2000 that two senior members of An Garda Síochána may have acted with impropriety,

(i) The circumstances surrounding the arrest and detention of seven persons at Burnfoot, County Donegal on 23rd May, 1998 and the investigation relating thereto,

(j) The effectiveness of the Garda Síochána Complaints inquiry process viz-a-viz the complaints made by Frank McBrearty Snr. and his family between 1997 and 2001,

and to report to the Minister for Justice, Equality and Law Reform and to make such findings and recommendations as it sees fit in relation to these matters,

and further resolves that –

(I) the Tribunal shall report to the Minister for Justice, Equality and Law Reform on an interim basis not later than four months from the date of establishment of the Tribunal and also as soon as may be after the tenth day of any oral hearings of the Tribunal on the following matters:

- (a) the number of parties then represented before the Tribunal,
- (b) the progress which will then have been made in the hearings and work of the Tribunal,
- (c) the likely duration (so far that may then be capable of being estimated) of the proceedings of the Tribunal,
- (d) any other matters that the Tribunal considers should be drawn to the attention of the Houses of the Oireachtas at the time of the report (including any matters relating to its terms of reference),

(II) the inquiry shall be completed in as economical a manner as possible and at the earliest possible date consistent with a fair examination of the matters referred to it,

(III) all costs incurred by reason of the failure of individuals to co-operate fully and expeditiously with the Tribunal should, as far as it is consistent with the interests of justice, be borne by those individuals,

(IV) the Minister for Justice, Equality and Law Reform shall within 14 days of receipt of any Report from the Tribunal either apply to the High Court for directions regarding publication of the Report or arrange to have it laid before both Houses of the Oireachtas.

NOW, I John O'Donoghue, Minister for Justice Equality and Law Reform, in pursuance of those resolutions and in exercise of the powers conferred on me by section 1(1) (as adapted by the Tribunals of Inquiry (Evidence) Act 1921 Adaptation Order 1936 (S.R. & O. No. 25 of 1936)) of the Tribunals of Inquiry (Evidence) Act 1921, make the following instrument:

Given under my Official Seal,

24th April, 2002

John O'Donoghue

Minister for Justice, Equality and Law Reform

Appendix E Terms of Reference of the Moriarty Tribunal

WHEREAS a Resolution in the following terms was passed by Dáil Éireann on 11th day of September, 1997 and by Seanad Éireann on 18th day of September, 1997.

‘Bearing in mind the serious public concern arising from the Report of the Tribunal of Inquiry (Dunnes Payments) published on 25 August, 1997, which established that irregular payments were made to and benefits conferred on certain persons who were members of the Houses of the Oireachtas between 1 January, 1996, and 31 December, 1996.

And noting that the said Tribunal established that money was held on deposit in certain Irish banks by offshore banks in memorandum accounts (‘the Ansbacher accounts’) for the benefit of Irish residents including Mr Charles Haughey, (the history of which deposits is set out in Chapter 6 of the Report of the said Tribunal),

And noting further that the Dunnes Payments Tribunal was unable by reason of its terms of reference to investigate the source of the Ansbacher accounts, other than in respect of sums paid by certain persons referred to in the said terms of reference.

Resolves that it is expedient that a Tribunal be established under the Tribunals of Inquiry (Evidence) Act, 1921, as adapted by or under subsequent enactments and the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979, to inquire urgently into and report to the Clerk of the Dáil and make such findings and recommendations as it sees fit, in relation to the following definite matters of urgent public importance:

- a. Whether any substantial payments were made, directly or indirectly to Mr Charles Haughey (whether or not used to discharge monies or debts due by Mr Charles Haughey or due by any company with which he was associated or due by any connected person to Mr Charles Haughey within the meaning of the Ethics in Public Office Act, 1995 or discharged at his direction) during any period when he held public office commencing on 1st January, 1979 and thereafter up to the 31st December, 1996 in circumstances giving rise to a reasonable inference that the motive for making the payment was connected with any public office held by him or had the potential to influence the discharge of such office.
- b. The source of any money held in the Ansbacher accounts for the benefit or in the name of Mr Charles Haughey or any other person who holds or has held Ministerial office, or in any other bank accounts discovered by the Tribunal to be for the benefit of or in the name of Mr Haughey or for the benefit or in the name of a connected person within the meaning of the Ethics in Public Office Act, 1995, or for the benefit or in the name of any company owned or controlled by Mr Haughey.
- c. Whether any payment was made from money held in any of the accounts referred to at (b) to any person who holds or has held public office.
- d. Whether Mr Charles Haughey did any act or made any decision in the course of his Ministerial offices, to confer any benefit on any person making a payment referred to in paragraph (a) or any person who was the source of money referred to in paragraph (b), or any other person in return for such payments being made or procured or directed any other person to do such an act or make such a decision.
- e. Whether any substantial payments were made directly or indirectly to Mr Michael Lowry (whether or not used to discharge monies or debts due by Mr Michael Lowry or due by any company with which he was associated or due by any connected person to Mr Michael Lowry within the meaning of the Ethics in Public Office Act, 1995 or discharged at his direction), during any period when he held public office in circumstances giving rise to a

reasonable inference that the motive for making the payment was connected with any public office held by him or had the potential to influence the discharge of such office.

- f. The source of any money held in the Bank of Ireland, Thurles branch, Thurles, Co. Tipperary, the Allied Irish Bank in the Channel Islands, the Allied Irish Banks, Dame Street, Dublin, the Bank of Ireland (I.O.M) Limited in the Isle of Man, the Irish Permanent Building Society, Patrick Street branch, Cork or Rea Brothers (Isle of Man) Limited, in accounts for the benefit or in the name of Mr Lowry or any other person who holds or has held Ministerial office or in any other bank accounts discovered by the Tribunal to be for the benefit or in the name of Mr Lowry or for the benefit or in the name of a connected person within the meaning of the Ethics in Public Office Act, 1995, or for the benefit or in the name of any company owned or controlled by Mr Lowry.
- g. Whether Mr Lowry did any act or made any decision in the course of any Ministerial office held by him to confer any benefit on any person making a payment referred to in paragraph (e) or any person who was the source of any money referred to in paragraph (f) or any other person in return for such payments being made or procured or directed any other person to do such act or make such decision.
- h. Whether any payment was made from money held in any of the bank accounts referred to at (f) to any person who holds or has held public office.
- i. Whether any holder of public office for whose benefit money was held in any of the accounts referred to at (b) or (f) did any act, in the course of his or her public office, to confer any benefit on any person who was the source of that money, or directed any person to do such an act.
- j. Whether the Revenue Commissioners availed fully, properly and in a timely manner in exercising the powers available to them in collecting or seeking to collect the taxation due by Mr Michael Lowry and Mr Charles Haughey on the funds paid to Michael Lowry and/or Garuda Limited trading as Streamline Enterprises identified in Chapter 5 of the Dunnes Payments Tribunal Report and any other relevant payments or gifts identified at paragraph (e) above and the gifts received by Mr Charles Haughey identified in Chapter 7 of the Dunnes Payments Tribunal Report and any other relevant payments or gifts identified in at paragraph (a) above.

And further in particular, in the light of its findings and conclusions, to make whatever broad recommendations it considers necessary or expedient: -

- k. to ensure that the integrity of public administration is not compromised by the dependence of party politics on financial contributions from undisclosed source
- l. for the reform of the disclosure, compliance, investigation and enforcement provisions of company law (including in particular those which relate to directors' duties)
- m. for maintaining the independence of the Revenue Commissioners in the performance of their functions while at the same time ensuring the greatest degree of openness and accountability in that regard that is consistent with the right to privacy of compliant taxpayers
- n. for enhancing the role and performance of the Central Bank as regulator of the banks and of the financial services sector generally
- o. for the effective regulation of the conduct of their members by such professional accountancy and other bodies as are relevant to these terms of reference, for the purpose of achieving the highest degree of public confidence, and
- p. for the protection of the State's tax base from fraud or evasion in the establishment and maintenance of offshore accounts, and to recommend whether any changes in the tax law should be made to achieve this end.

‘Payment’ includes money and any benefit in kind and the payment to any person includes a payment to a connected person within the meaning of the Ethics in Public Office Act, 1995.

‘Person’ includes any natural or legal person or any body of persons whether incorporated or not.

And that the Tribunal be requested to conduct its enquiries in the following manner, to the extent that it may do so consistent with the provisions of the Tribunals of Inquiry (Evidence) Acts, 1921 and 1979:-

- i To carry out such investigations as it thinks fit using all the powers conferred on it under the Acts (including, where appropriate, the power to conduct its proceedings in private), in order to determine whether sufficient evidence exists in relation to any of the matters referred to above to warrant proceeding to a full public inquiry in relation to such matters,
- ii To enquire fully into all matters referred to above in relation to which such evidence may be found to exist and to report to the Clerk of the Dáil thereupon,
- iii In relation to any matters where the Tribunal finds that there is insufficient evidence to warrant proceeding to a full public inquiry, to report that fact to the Clerk of the Dáil and to report in such a manner as the Tribunal thinks appropriate, on the steps taken by the Tribunal to determine what evidence, if any existed
- iv To report on an interim basis, not later than three months from the date of establishment of the Tribunal or the tenth day of any oral hearing, whichever shall first occur, to the Clerk of the Dáil on the following matters:
the numbers of parties then represented before the Tribunal,
the progress which has been made in the hearing and the work of the Tribunal,
the likely duration (so far as that may be capable of being estimated at that time) of the Tribunal proceedings,
any other matters which the Tribunal believes should be drawn to the attention of the Clerk of the Dáil at that stage (including any matter relating to the terms of reference),

And that the person or persons selected to conduct the Inquiry should be informed that it is the desire of the House that –

- q. the inquiry be completed in as economical a manner as possible and at the earliest date consistent with a fair examination of the matters referred to it, and
- r. all costs incurred by reason of the failure of individuals to co-operate fully and expeditiously with the Inquiry should, so far as is consistent with the interests of justice, be borne by those individuals.

And that the Clerk of the Dáil shall on receipt of any Report from the Tribunal arrange to have it laid before both Houses of the Oireachtas immediately on its receipt.’

NOW I, Bertie Ahern, Taoiseach, in pursuance of those Resolutions, and in exercise of the powers conferred on me by section 1 (as adapted by or under subsequent enactments) of the Tribunals of Inquiry (Evidence) Act, 1921, hereby order as follows:

- 1. This Order may be cited as the Tribunals of Inquiry (Evidence) Acts, 1921 and 1979 (No. 2) Order, 1997.
- 2. A Tribunal is hereby appointed to enquire urgently into and report and make such finding and recommendations as it sees fit to the Clerk of the Dáil on the definite matters of urgent public importance set out at paragraphs (a) to (b) of the Resolutions passed by Dáil Éireann on the 11th day of September, 1997, and by Seanad Éireann on the 18th day of September, 1997.

3. The Honourable Mr Justice Michael Moriarty, a Judge of the High Court, is hereby nominated to be the Sole Member of the Tribunal.
4. The Tribunals of Inquiry (Evidence) Act, 1921 (as adapted by or under subsequent enactments) and the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979, shall apply to the Tribunal.

GIVEN under my Official Seal, this 26th day of September 1997.

Bertie Ahern

TAOISEACH

Appendix F Estimation of Mahon Tribunal Costs

Administration Costs and Tribunal Legal Costs

The likely future administrative and legal costs of the tribunal have been estimated based on the expected resources that will be required, as indicated by the Tribunal.

A key estimation assumption is that with hearings substantially complete in October 2008 and a winding down of all operations will occur during the following eighteen months (to April 2010).

An average monthly cost based on expenditure in 2007 has been used in respect of future costs and an adjustment for inflation of 5% has been made for administration costs. No allowance for inflation has been made in respect of in-house tribunal legal costs as their rates have been fixed since 2002.

Calculation of Contingent Liability for Third Party and Discovery Costs

Two factors affect the cost of third party representation – the time input of the legal representatives and the rates at which they are remunerated. In regard to future costs two estimates (lower and higher) have been made of the contingent liability for third party costs arising from the work of the Mahon Tribunal. These estimates have been based on two separate populations - the costs claimed to date and the costs paid to date. At the time of estimation third party costs had been awarded in relation to costs incurred up to hearing day 329. Third party costs have not yet been awarded for subsequent periods. The estimate based on claimed costs has been adjusted to take account of the level of negotiated reductions during the settlement process. Reductions negotiated to March 2008 by the State Legal Cost Accountant are indicated in Figure F.1 below.

Figure F.1 Mahon Tribunal - Reductions achieved by Legal Cost Accountant

Component of Bill of Costs	Percentage Reduction Achieved ^a
Senior Counsel Brief Fee	22%
Senior Counsel Refresher Fee	25%
Junior Counsel Brief Fee	27%
Junior Counsel Refresher Fee	9%
Solicitor Instruction Fee	22%

Note:

a Overall a reduction of 25% of bills was made.

Third party costs which have not been settled for the period prior to hearing day 329 have been estimated using indicative costs furnished to the tribunal by the third parties and adjusted for the probable reduction during the settlement process.

An average rate for each category of legal representation (senior counsel, junior counsel or solicitor) has also been applied to attendance records for hearing day 329 to hearing day 771. The average cost per day for this period has been used to estimate the cost from hearing day 771 to the completion of the Tribunal. It has been assumed that by the completion of hearings at the end of October 2008 that 925 days of hearings will have been held.

Costs have been included to the extent that parties were represented before the Tribunal⁵⁶. Both lower and higher estimates assume that where costs have not yet been awarded no party will be refused the costs they incurred. Where a party was represented by any category of legal representation (senior counsel, junior counsel or solicitor), costs were allowed for no more than one representative.

A further allowance of 5.5% has been included for other costs such as witness expenses, professional fees, loss of earnings, postage and miscellaneous outlay. This percentage was based on an analysis of such charges in both the Morris and Mahon Tribunals.

The lower end of the range for discovery cost has been estimated based on the claimed cost per page discovered, in one submitted bill of cost. The estimate draws on the Tribunals estimate of the number of pages discovered by third parties (1.6 million pages). The higher end of the range has been estimated based on the average cost per page discovered being 33% higher than the case referred to.

Key assumptions underlying the third party cost estimate are

- Average settlements to date are indicative of future settlements.
- The cost of private hearings is encompassed in the average cost per public hearing day.
- Parties will be awarded costs for no more than one solicitor, one senior counsel and one junior counsel.

Comparison with Completed Tribunals

To provide a benchmark for third party costs, expenditure associated with the Beef Processing Industry Tribunal was reviewed. In that Tribunal third party costs represented 63% of the total direct costs.

All cost projections have been made on a gross basis and include VAT.

⁵⁶ In the case of brief fees, a reduction has been made in formulating the lower estimate on the basis that not all parties have senior counsel and/or junior counsel.

Appendix G Estimation of Morris Tribunal Costs

Administration Costs and Tribunal Legal Costs

The likely future administrative and legal costs of the tribunal have been estimated based on the expected resources that will be required, as indicated by the Tribunal.

A key estimation assumption is that a winding down of all operations will occur by December 2008.

An average monthly cost based on expenditure in 2007 has been used in respect of future costs and an adjustment for inflation of 5% has been made for administration costs. No allowance for inflation has been made in respect of in-house tribunal legal costs as their rates have been fixed since 2002.

Calculation of Contingent Liability for Third Party Costs including Discovery Costs

Two key factors impact on the cost of third party representation – the time input of the legal representatives and the rates at which they are remunerated. In regard to future costs two estimates (lower and higher) have been made of the contingent liability for third party costs arising from the work of the Morris Tribunal. These estimates have been based on two separate populations - the costs claimed to date and the costs paid to date. At the time of estimation third party costs have been awarded in relation to Terms of Reference (e), (a), (b), (d), (g), (i) and (f). Third party costs have not yet been awarded for terms of Reference (c), (h) and (j). The estimate based on claimed costs has been adjusted to take account of the level of negotiated reductions during the settlement process. Reductions negotiated to May 2008 by the State Legal Cost Accountant are indicated in Figure G.1 below.

Figure G.1 Morris Tribunal – Reductions achieved by Legal Cost Accountant

Component of Bill of Costs	Percentage Reduction Achieved ^a
Senior Counsel Brief Fee	40%
Senior Counsel Refresher Fee	20%
Junior Counsel Brief Fee	43%
Junior Counsel Refresher Fee	29%
Solicitor Instruction Fee	29%

Note:

- a Overall a reduction of 30% of bills was made. This excludes one large settlement where a reduction of 72% had been achieved. If this were included the average reduction would be of the order of 39%. This settlement was excluded from the analysis on the basis that it was significantly outside the parameters of normal reductions achieved and its inclusion would distort estimates made.

The average rate for each category of legal representation (senior counsel, junior counsel or solicitor) has been applied to daily attendance records of legal representatives appearing on behalf of third parties, maintained by the tribunal in respect of each public hearing day.

In regard to time input

- One brief fee per counsel per module of investigation (taken from tribunal attendance records) has been used in the estimation of senior and junior counsel brief fees. This assumes that counsel, although they may be representing a number of parties in a particular module, will only be allowed claim one brief fee in respect of that module.

- An adjustment has been made to the attendance records to eliminate multiple counting of appearances by solicitor and counsel on behalf of individuals represented by the AGSI and GRA.

Costs have been included to the extent that parties were represented before the Tribunal. Both lower and higher estimates assume that where costs have not yet been awarded no party will be refused the costs they incurred. Where a party was represented by any category of legal representation (senior counsel, junior counsel or solicitor), costs were allowed for no more than one representative.

A further allowance of 5.5% has been included for other costs such as witness expenses, professional fees, loss of earnings, postage and miscellaneous outlay. This percentage was based on an analysis of such charges in both the Morris and Mahon Tribunals.

Key assumptions underlying this estimate include

- Average settlements to date are indicative of future settlements.
- The cost of private hearings is encompassed in the average cost per public hearing day.
- Figures used in the computation of counsel and solicitor fees take account of costs incurred in responding to orders of discovery (no separate allowance is made for discovery costs).
- Parties will be awarded costs for no more than one solicitor, one senior counsel and one junior counsel.

Comparison with Completed Tribunals

To provide a benchmark for third party costs, expenditure associated with the Beef Processing Industry Tribunal was reviewed. In that Tribunal third party costs represented 63% of the total costs.

All cost projections have been made on a gross basis and include VAT.

Appendix H Estimation of Moriarty Tribunal Costs

Administration Costs and Tribunal Legal Costs

The likely future administrative and legal costs of the tribunal have been estimated based on the expected administration that will be required.

A key estimation assumption is that a winding down of all operations will occur by June 2009.

An average monthly cost based on expenditure in 2007 has been used in respect of future costs and an adjustment for inflation of 5% has been made for administration costs. No allowance for inflation has been made in respect of in-house tribunal legal costs as their rates have been fixed since 2002.

Calculation of Contingent Liability for Third Party Costs including Discovery Costs

Two factors impact on the cost of third party representation – the time input of the legal representatives and the rates at which they are remunerated. No cost awards have yet been made by the Moriarty Tribunal.

Third party attendance records were used to assist in estimating the time input of legal representation.

In regard to future costs two estimates (lower and higher) have been made. Estimated rates of remuneration of legal representation have been drawn from the average of costs claimed to date and costs paid to date in the Mahon and Morris Tribunals. The estimate based on claimed costs has been adjusted to take account of the level of negotiated reductions during the settlement process by the State Legal Cost Accountant in each tribunal.

A further allowance of 5.5% has been included for other costs such as witness expenses, professional fees, loss of earnings, postage and miscellaneous outlay. This percentage was based on an analysis of such charges in both the Morris and Mahon Tribunals.

Key Assumptions

The key assumptions underlying the estimated gross projected cost in respect of third party representation are

- Only third parties who were granted legal representation will be entitled to recover legal costs.
- All third parties granted legal representation will be entitled to recover their costs in full. However, it should be noted that the entitlement of each party to their costs will be known only when the Sole Member rules on costs at the conclusion of the tribunal.
- The average fee figures taken from the Mahon and Morris Tribunal are indicative of future cost awards in the Moriarty Tribunal.
- The extent of legal representation for which brief/instruction fees will be awarded will be limited to one senior counsel, one junior counsel and one solicitor per party. Multiple representation by counsel occurred in just a small number of cases. Attendances data for all representatives however, has been used in compiling the estimate for refresher fees.

- Public hearings are assumed to have occurred under just one module for the purpose of allocating brief/instruction fees.
- No separate allowance is made for private hearings or discovery costs, the method used in the computation of fees for counsel and solicitors encompass the cost of private hearing attendance.

Comparison with Completed Tribunals

To provide a benchmark for third party costs, expenditure associated with the Beef Processing Industry Tribunal was reviewed. In that Tribunal third party costs represented 63% of the total costs.

All cost projections have been made on a gross basis and include VAT.

Appendix I Basis for State Respondent Costs and Other State Costs

Figure I.1 State Bodies who indicated they Incurred Costs and Quantified Costs

Tribunal	State Bodies
Mahon Tribunal	Department of Foreign Affairs Department of Finance Office of Public Works Office of the Revenue Commissioners Office of the Attorney General CSSO Athlone Town Council Cork City Council Cork County Council Limerick County Council Roscommon County Council Dun Laoghaire – Rathdown County Council South Dublin County Council Fingal County Council The Investment and Development Agency, Ireland An Bord Plenála The Property Registration Authority The Central Bank
Morris Tribunal	Department of Foreign Affairs Department of Justice, Equality and Law Reform Office of Public Works Office of the Attorney General CSSO Office of the Garda Commissioners
Moriarty Tribunal	Department of Agriculture, Fisheries and Food Department of Communications, Energy and Natural Resources Department of Foreign Affairs Department of Justice, Equality and Law Reform Department of Finance Office of Public Works Office of the Revenue Commissioners Office of the Attorney General CSSO The Investment and Development Agency Wicklow County Council The Central Bank

Appendix J The Taxation Process

Section 6 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979, outlines the provisions in relation to taxation of costs as follows

- Where a tribunal, or, if the tribunal consists of more than one member, the chairman of the tribunal, is of opinion that, having regard to the findings of the tribunal and all other relevant matters, there are sufficient reasons rendering it equitable to do so, the tribunal or the chairman, as the case may be, may by order direct that the whole or part of the costs of any person appearing before the tribunal by counsel or solicitor, as taxed by a Taxing Master of the High Court, shall be paid to the person by any other person named in the order.
- Any sum payable pursuant to an order under this section shall be recoverable as a simple contract debt in any court of competent jurisdiction.
- Any sum payable by the Minister for Finance pursuant to an order under this section shall be paid out of moneys provided by the Oireachtas.

What is Taxation

- When a party incurs costs as a result of a legal action, they may have those costs taxed by an Officer of the Court known as a Taxing Master.
- Under the Court and Court Officers Act, 1995 (Sections 27(1) and (2)), the Taxing Master has power to evaluate the costs of the solicitor and fees of counsel by examining the nature and extent of the work done or service provided and the fairness or reasonableness of such costs or fees in the circumstances of the case.
- Where a case proceeds to taxation, the Taxing Master hears submissions from both parties in the case and reviews any evidence tendered and supporting documentation. The Taxing Master may give either an immediate oral ruling or a later written ruling. If either party is unhappy with the taxation, they can request a 'hearing of objections'. When the issue of costs is settled, a certificate of taxation is issued by the Taxing Master.
- Fees payable on the taxation of costs are set out in Court Fee Orders. The principal fees payable are €10 on the notice to tax in the Taxing Master's Office, a stamp duty of 6% of the amount allowed on taxation and €50 on the certificate of taxation by the Taxing Master.
- Either side can lodge an appeal to the High Court in a situation where they are not satisfied with the decision of the Taxing Master.

Notwithstanding the provisions in Section 6 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979, and in Section 32 of the Residential Institutions Redress Act, 2002 very few cases are listed for hearing by the Taxing Master. Most are settled through a process of negotiation involving the State's Cost Drawer, outside the High Court Taxation process.

In the case of the Mahon Tribunal, two cases have gone to taxation and in the case of the Morris Tribunal four cases have been taxed by the Taxing Master. Justice Moriarty has not yet made any rulings in relation to costs in respect of the Moriarty Tribunal.

Appendix K Main Recommendations in the Report of the Legal Costs Implementation Advisory Group

In 2006, the Minister for Justice, Equality and Law Reform established the Legal Costs Implementation Advisory Group drawn from the legal, business, academic and public sectors, to progress the recommendations of the Legal Costs Working Group whose report was published in November 2005. Mr Desmond Miller, a Chartered Accountant was appointed as chairman of the Group.

In the November 2006 report of the advisory Group, the Chairman stated that their task had been to elaborate on the general recommendations of the Legal Costs Working Group and to identify suitable structures and processes to implement those recommendations.

Some of the specific recommendations made in that report were that

- the legal costs regulatory body (recommended by the Legal Costs Working Group) be established consisting of three part-time commissioners and appropriate staff and that it be established on an interim or designate basis as soon as possible
- the legal costs regulatory body be tasked, inter alia, with the drawing up of appropriate guidelines governing the items of legal costs recoverable on a party and party basis
- in tandem with the setting of guidelines, the practice by solicitors and barristers of charging global fees such as brief fees and instructions fees be abolished and that, in their place, there be substituted fees and charges set out on an hourly rate or daily rate as appropriate
- that solicitors and barristers be obliged to use time recording in the preparation and compilation of their charges and that the bills containing such charges be supported by these records
- in all civil litigation and immediately subsequent to the taking of initial instructions, solicitors should issue a client engagement letter in accordance with the terms of section 68 of the Solicitors (Amendment) Act 1994 as further enhanced by the recommendations contained in the Report of the Legal Costs Working Group
- upon instructions being received and/or a retainer being accepted, both solicitors and barristers be required to enter into a legal costs agreement with the client
- a legal costs assessment office be established to take over the functions of the existing taxation of costs system and that this body should be separate from and independent of the legal costs regulatory body
- the changes in legislation and Rules of Court governing procedures in court recommended in the Report of the Legal Costs Working Group be implemented as soon as possible
- rules of court should require the court to exercise greater discrimination when awarding liability for costs as between the parties
- the current Appendix W⁵⁷ of Order 99 of the Rules of the Superior Courts be abolished.

⁵⁷ Appendix W was established under Statutory Instrument No. 15 of 1986. It set out a schedule of solicitor's fees applicable in the Superior Courts. It lists 81 items and the prescribed fee for 71 of these. The fee for the ten remaining items is described as discretionary, one of which is the instruction fee. The amounts of fees prescribed had not been revised since 1961.

Appendix L Key Recommendations in the Report of the Law Reform Commission

The principal recommendations in the Law Reform Commission's Report on Public Inquiries including Tribunals of Inquiry were that

- alternatives such as a commission of investigation or civil or criminal court proceedings should be considered before establishing a tribunal.
- the procedures for drafting terms of reference should be reformed in order to make them as precise as possible
- a Central Inquiries Office be established which would publish booklets setting out key administrative and procedural guidance for tribunals.
- a tailored approach to the application of fair procedures should be applied including – considering whether full or limited legal representation is given to interested parties, the extent to which pooled or shared legal representation is appropriate and the extent to which repeated cross-examination is required.
- in relation to private information gathering meetings held at the early stages of an inquiry, a written protocol should be developed on the nature and effect of these meetings.
- the sponsoring department, following consultation with the Department of Finance should set a broad budget figure at the outset of the tribunal.
- the tribunal Chairman should have regard to the need to avoid any unnecessary costs in making any decision as to the planning, procedure or conduct of an inquiry.
- thought should be given to the level of representation a tribunal engages for particular tasks.
- flexible arrangements should be put in place in relation to the engagement and remuneration of lawyers and other personnel involved in tribunals including – a combination of a fee structure, a tendering procedure or an agreed level of remuneration.