Has Curiosity Killed the Cat? The Powers and Functions of Ireland's Tribunals of Inquiry.

By Claire Mc Hugh

Tribunals of Inquiry have become an ubiquitous part of Ireland's legal and political landscape in the last decade as a variety of allegations of malpractice, both in government and the private sector, have been made. In order to meet the public demand that these matters be inquired into, the Oireachtas has seen fit to establish several Tribunals of Inquiry[1]. Despite Wade's view that tribunals of inquiry are 'a procedure of last resort[2]', this mechanism of investigation is being increasingly invoked.

Cooper identified four objectives of holding a tribunal of inquiry:
(i) To establish the facts; (ii) To identify an individuals culpability; (iii) To survey the arrangements that led to the scandal, disaster or abuse; (iv) To provide the symbolic purpose of holding up to obloquy the particular event that induced the crisis of public confidence [3].

It is questionable to what extent a public inquiry will achieve these objectives but it is also recognised that this peculiar creature, a hybrid possessing legal, political, investigative and adversarial characteristics is the only suitable method of inquiry into certain matters. The unique nature of tribunals of inquiry and their essential role in

[1] S.1(1) of the Tribunals of Inquiry (Evidence) Act, 1921. This section provides that a tribunal of inquiry may be established to inquire into a 'definite matter of urgent public importance."
[2] Wade. 'Administrative Law' (Oxford, 1994) p.1007.
[3] Cooper, 'Public Inquires' (1993) C.L.P. 204, at 205

ensuring accountability was recognised in *Haughey v Moriarty*[4]. The Supreme Court cited with approval the statement expressed in the Salmon Report that public inquiries are necessary "to preserve the purity and integrity of our public life, without which a successful democracy is impossible[5]".

The fundamental objective of any public inquiry is to establish the truth of a particular matter but to this may be added the requirement that the Tribunal respect the principles of natural justice. It is widely recognised that although the findings of a Tribunal are 'sterile of legal effect'[6], they possess exceptional inquisitorial powers[7] and may expose citizens to the risk of having their private affairs made public and having unfounded allegations made against them. The need to ensure that the rights of individuals are not imperilled by the Tribunal's investigation has led to the adoption of several procedural safeguards[8], which in turn have led to spiralling costs and lengthy oral hearings. This has been the source of much public dissatisfaction with Tribunals of Inquiry[9].

[4] [1999] 3 I.R. 1.
[5] Report of the Royal Commission of Tribunals of Inquiry Cmnd 3121 (1966) para. 28.
[6] *Victoria v Australian Bldg Construction Employees* (1982) 152 C.L.R. 25 at 553 per Brennan J.
[7] s.4 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979. See *Redmond v Flood*, [1999] 3 I.R. 79, at 87 *per* Hamilton CJ
[8] Examined later in essay.
[9] Brady identifies two fundamental concerns associated with tribunals (i) Costs and (ii) the erosion of individual right of privacy and confidentiality "Inquiries: The Rights of Individuals, Privacy and Confidentiality, Reform of the Law of Tribunals" p.443-444, The Bar Review, July 1999. If one compares the costs of the Finlay BTSB Hepatitis C Inquiry and the Parliamentary DIRT Inquiry, both of which sat for twenty-six days, the disparity in costs was mainly due to legal representation of witnesses. This accounted for £2,257,436 of the total cost of the BTSB Inquiry which were £3,670,004. The total cost of the DIRT Inquiry was £1,121,527 despite the fact it heard evidence from 142 witnesses compared to 71 at the Tribunal. See *Dáil Eireann Committee of Public Accounts Comparative Study into Tribunals of Inquiry and Parliamentary Inquiries* (Dublin, 2001), Cost Comparison Report p.5.

The Minister for Justice, and former Attorney General, Michael McDowell has recently put proposals before the Cabinet for a new form of statutory inquiry[10]. This is a response to the growing litany of allegations against the Catholic Church regarding its handling of sexual abuse cases, and the mounting public demand for an inquiry by the State. McDowell has suggested a statutory form of inquiry that would sit in private and would not necessarily be chaired by a judge or even a lawyer. This inquiry would encourage voluntary co-operation[11], but would retain powers to compel witnesses and the production of documents where co-operation was not forthcoming. It is envisaged that legal representation would not be required, as the inquiry would occur in private. It is unlikely that this form of halfway-house will present a viable and sufficient alternative to tribunals of inquiry. In the absence of legal representation, it will have heavily circumscribed ability to establish culpability and responsibility. Furthermore, a full tribunal of inquiry will be necessary where there is conflicting evidence from different institutions.

To fully appreciate the value of a tribunal as a method of investigation, one must consider the alternative method, which has previously been used by the legislature: the Parliamentary inquiry. Indeed the 1921 Act was enacted because of perceived deficiencies in the use of parliamentary committees to investigate matters[12]. When allegations were made by a M.P. against officials in the Ministry of Munitions, the 1921 Act was enacted to put in place machinery for an independent investigation of

[10] *Irish Times*, Dec 4th 2002.
[11] Inquiries purporting to rely upon voluntary co-operation are often frustrated. The Parents for Justice group recently withdrew support for the Dunne Inquiry into the retention of organs. This private, non-statutory inquiry is reliant upon the co-operation of hospitals and medical personnel, which is not forthcoming. *Irish Time*s, Dec 2nd 2002.
[12] The Marconi Committee, consisting of parliamentarians from both the Liberal and Conservative parties, inquired into allegations of political corruption in 1912. The Liberal majority found the allegation to be false while the Conservative minority were of the opposite opinion. This did much to discolour parliamentary committees as an acceptable form of investigation.

the allegations. It has developed as a convention, though it is not required by law[13] that Tribunals of Inquiry are chaired by a judge of the superior courts. This reinforces public perception of the tribunal as an independent, impartial and fair form of investigation in which the rights of the individual will be safeguarded[14].

In contrast, there is an inherent danger that parliamentary inquiries will become overshadowed by party political considerations. This concern is even more pressing in the era of modern party discipline and the party whip. An unsuccessful return to the use of parliamentary inquiries was made by the Dáil to inquire into the circumstances leading to the fall of the Fianna Fáil / Labour coalition government, in November 1994. The report of the sub-committee did not make any conclusion as to the facts, but confined itself to reporting the evidence received[15]. This was because the procedures adopted by the sub-committee were not believed to sufficiently adhere to constitutional justice[16]. The use of adversarial procedures in tribunals of inquiry results in a costly and lengthy process. However, the episode above lends support to the view that this is necessary to ensure that a thorough investigation is conducted, without endangering adherence to natural justice.

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[13] s2 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979 provides that the Tribunal may consist of one or more persons sitting with or without an assessor. There is no statutory requirement that the Tribunal be chaired by a judge or even a lawyer.

[14] In *Goodman v Hamilton (No 1)* [1992] 2 I.R. 542, the fact that the Beef Tribunal was being chaired by the President of the High Court was regarded by Finlay CJ as significant in ensuring that fair procedures were followed and the principles of constitutional justice observed.

[15] Report of the sub-committee of the Select Committee on Legislation and Security (Pn. 1478, 1995)

[16] More recently, litigation concerning the inquiry by an Oireachtas subcommittee into the shooting of John McCarthy by Gardaí at Abbeylara, Co. Longford has thrown into doubt the ability of Parliamentary committees to undertake such investigations. The High Court found that the Oireachtas had no power to set up inquiries likely to lead to findings of fact or expressions of opinion adverse to the good name of persons who are not members of the Oireachtas. In the current state of the law, such an inquiry must be conducted by an independent person or body. *Maguire v Ardagh*, Unreported, High Court, 23 November 2001. This decision is currently the subject of an appeal to the Supreme Court.

Admittedly 'there is an inevitable tension between on the one hand, the requirements of fairness, and, on the other the need for an efficient process'[17]. In order to ensure that the Tribunal is fully equipped with the necessary armoury for conducting a meaningful investigation, it is permitted to 'make such orders as it considers necessary for the purposes of its functions' and is rested with the same 'powers, rights and privileges' as the High Court in this regard[18]. As a corollary of these extensive inquisitional powers, procedural safeguards are required to ensure that individual rights are not unjustifiably impinged upon. While is it often asserted that tribunals of inquiry do not involve a *lis inter partes*, in practice a witness appearing before a tribunal will have an interest in protecting their reputation and answering allegations made against them[19].

The status of a person before an inquiry was considered by the Supreme Court in the seminal case of *In re Haughey*[20]. It was held that because Haughey's conduct was the subject matter of an investigation by the Dáil Committee on Public Affairs and his good name and character might be affected by its findings, he appeared before the Committee as more than a mere witness. 'The true analogy, in terms of High Court procedures, is not that of a witness but of a party'[21]. He was thus entitled to basic fairness of procedures, including the opportunity to cross-examine witnesses whose evidence might adversely affect him (by counsel, if he wished), call rebutting evidence and make closing statements.

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[17] Scott 'Procedures at Inquiries – The Duty to be Fair' (1995) 111 L.Q.R. 596, at 597.
[18] s.4 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979. S.3 of the 1979 Act provides that persons who fail to comply with orders of the Tribunal or obstructs the Tribunal in performing its functions may be guilty of an offence.
[19] Howe is of the opinion that it is 'sophistry' to argue that witnesses before an Inquiry are not confronted with an adversarial situation. Howe 'Procedure at the Scott Inquiry' (1996) P.L. 445, at 456-7.
[20] [1971] I.R. 217.
[21] *Ibid. per* O'Dalaigh CJ, at 263.

This case, along with the 'six cardinal principles' recommended in the Salmon Report[22] to ensure fairness to individuals, has influenced much of the decisions of the Irish courts as to how the proceedings of a Tribunal are to be conducted. The approach taken has been to implant adversarial procedures into Tribunals of Inquiry. There is much debate over whether the use of adversarial procedures undermines the fundamental objective of an Inquiry in establishing the truth[23]. Cooper's opinion is that 'the search for the establishment of the truth, without imperilling the basic rights of the individual against damaging criticism… is chimerical'[24].

The issues which have received most attention in the perceived clash between protection of the rights of individuals and the Inquiry's duty to fulfil its objectives are the right to legal representation of witnesses and whether a Tribunal should sit in public. The decision in *re Haughey*[25] recognised the role of legal representation in enabling a person to refute allegations made against him. Similarly, the Salmon Report recognised an "elementary right" to be legally represented[26]. A Tribunal of Inquiry has discretion whether or not to allow interested persons to be represented by solicitor or counsel or otherwise[27]. The exercise of this discretion was considered in

[22] See n.5.
[23] See for example the debate between Scott and Howe over the procedures adopted at the Scott Inquiry. Scott, (1995) 111 L.Q.R. 596; Howe, (1996) P.L. 445.
[24] Cooper, *op.cit.* p.220.
[25] See n.20.
[26] Reflected in the third, fifth, and sixth of the Salmon principles, namely (i) that a person called before an inquiry should be given an adequate opportunity of preparing his case and of being assisted by a legal adviser. His legal expenses should normally be met out of public funds. (ii) Any material witnesses he wished called at the inquiry should, if reasonably practicable, be heard. (iii) He should have the opportunity to testing by cross-examination conducted by his own solicitor or counsel any evidence, which may affect him. Cmnd. 3121, para. 32
[27] S.2 (b) of the Tribunals of Inquiry (Evidence) Act, 1921 It may choose to grant a limited right of legal representation to persons

Boyhan v Beef Tribunal[28]. Denham J. adopted a commonsensical approach to the issue of legal representation. She found that the plaintiffs were not in an analogous position to a party in legal proceedings as no allegations had been made against them. Their rights were sufficiently protected by allowing them a right of cross-examination in areas in which they had a legitimate interest.

It is axiomatic that witnesses appearing before an Inquiry should not have an automatic right of legal representation[29]. While the approach in this jurisdiction has tended to favour the granting of legal representation, some commentators argue that this undermines the Inquiry's fundamental duty to establish the truth of a matter. It has been stated that the implantation of adversarial procedures 'has turned many an inquiry into a series of mini-trials, thus deflecting the inquiry from its central thrust.'[30]

It was with considerations of practicality and thoroughness in mind that Sir Richard Scott determined that witnesses before his Inquiry into the 'Arms to Iraq' affair should 'speak for themselves and not through their lawyers'. This ad hoc Inquiry severely restricted the role of legal representation[31]. The most striking feature of this discarding of established practices by Scott is that it failed to achieve any significant advantage in the efficacy of the Inquiry. Howe points out that the Inquiry, which took three years to complete its work, produced a voluminous and inconclusive report[32].

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[28] [1993] 1 I.R. 210.
[29]Several factors are to be considered in determining if a right to legal representation arises (i) the nature of the party's interest, (ii) the seriousness of the allegation and (iii) the complexity of the legal issues involved, Grant 'Commissions of Inquiry – Is there a right to be legally represented' (2001) P.L. 377, at 384.
[30] Cooper, *op. cit*. at 215.
[31] For a full account of the procedures adopted, see Scott *op. cit*. at n.17. This provoked a public outcry and resulted in a return to Tribunals of Inquiry established under the 1921 Act.
[32] Howe *op. cit*. p.459.

An Inquiry conducted in this manner is unlikely to allay public disquiet either. A failure to grant adequate rights of legal representation results in the undesirable situation that the chairman of the tribunal must act as 'detective, inquisitor, advocate and judge'[33]. The Salmon Report recognised the inherent danger that the public may then be less likely to accept the Inquiry's findings[34]. There is increasing support for the view that the presence of counsel may assist the Tribunal in its search for the truth[35]. In addition, legal representation of witnesses mitigates against the risk of a miscarriage of justice[36]. If the findings of an Inquiry are to be regarded as valid, it is necessary that individuals the subject of criticism have had an adequate opportunity to rebut allegations made against them.

The decisions of the Irish courts concerning fair procedures at Inquiries which are 'over laden with considerations of constitutional rights'[37] means it is unlikely that an Inquiry in this jurisdiction would adopt Scott procedures. The requirement of adequate legal representation cannot be regarded as an unreasonable restriction on Tribunals of Inquiry. Control will still rest with the Inquiry as to the extent of the right to be granted and the manner in which this right is to be exercised[38]. The Irish courts have recognised that legal representation is not to be unreservedly granted. In

[33] Lord Denning's description of his role as chairman of the inquiry into the Profumo Affair in 1963 Cmnd. 2152. This was the case in the Scott Inquiry where all evidence was adduced in response to question put to witnesses by Sir Richard Scott himself or counsel to the Inquiry.
[34] '[T]he Person will feel, and the public might also feel, that he had a real grievance in that he had had no chance of defending himself. It follows that the odds against any such Tribunal being able to establish the truth, if the truth is bleak, are very heavy indeed, and accordingly the truth may remain hidden from the light of day' Cmnd 3121 para. 28.
[35]'[C]ounsel for parties are often able … to distil the crucial issues. They can, and do, facilitate rather than handicap the process of inquisition' Cooper 'Witnesses and the Scott Inquiry' (1994) P.L. 1, at 2.
[36] Keeton, 'Parliamentary Tribunals of Inquiry' (1959) C.L.P. 12, at 30.
[37] Cooper, 'The Role and Function of Tribunals of Inquiry – An Irish Perspective' (1999) P.L. 175, at 177.
[38] Cooper, *op cit.* at n.35, states that cross-examination of witnesses is not a right but 'a privilege to be exercised under the control of the inquiring body'.

Lawlor v Flood[39], Murphy J. stated *obiter* 'I am far from convinced… that each and every witness required to give evidence… before a tribunal is entitled to the full panoply of *In re Haughey* rights'[40]. This raises the possibility that not every witness before a Tribunal will be granted legal representation[41]. The discretion of the Tribunal in this regard means that its objectives will not be compromised.

The unavoidable conflict between the interests of an individual in protecting one's reputation and the Tribunal's function of allaying public disquiet has manifested itself in the issue of whether the Tribunal's proceedings should be conducted in public or in private. Several commentators have taken the view that a distinction should be drawn between investigations into the conduct of government officials and elected representatives, who 'expect to undergo public scrutiny and accountability for their actions'[42] and investigations into the conduct of private citizens. It is certainly true that conduct of the Inquiry's proceedings in public may have adverse consequences for a person's reputation. Gallagher points out allegations made in the course of an Inquiry are instantly publicised by the media. While one's good name may be ultimately vindicated in the report of the Tribunal, this may receive little public attention and do nothing to mitigate the harm already suffered[43].

Despite the potential injustice to individuals and the intrusion into their private affairs, the response of the law has been very much in favour of holding Tribunals of Inquiry in public. Very few restrictions in order to safeguard the privacy of individuals have

[39] [1999] 3 I.R. 107.
[40] *Ibid*. at p.144.
[41] *Comparative Study Into Tribunals of inquiry and Parliamentary Inquiries*, *op cit.* at n.9, p. 27.
[42] Cooper, 'Public Inquiries.' (1993) CLP 204, at 205. Scott is of the opinion that fairness to the individual demands that the latter type sit in private, *op. cit.* at n.17.
[43] Gallagher 'Tribunals and the Erosion of the Right to Privacy', The Bar Review, July 1999, pp. 14 – 19.

been imposed. The holding of an Inquiry in public is regarded as essential to the purpose of allaying public disquiet[44]. s2(a) of the 1921 Act provides that a Tribunal shall not sit in private 'unless in the opinion of the Tribunal it is *in the public interest* expedient to do so for reasons connected with the subject matter of the inquiry or nature of the evidence to be given'. This provision leans in favour of the objectives of the Tribunal rather than the rights of the individual. While the Tribunal has a statutory discretion to conduct its proceedings in private, the criterion for determining if this should be done is 'the public interest[45]'. Gallagher writes that this creates a 'catch–22' whereby the public interest in exposing wrongdoing will usually be sufficient to outweigh the public interest in maintaining confidentiality[46].

The only concession to the rights of individuals in this regard has been in respect of the Inquiry's preliminary investigations. It was held in *Haughey v Moriarty*[47] that these should be conducted in private 'If these [preliminary] inquiries… were to be held in public it would be in breach of fair procedures because many of the matters investigated may prove to have no substance and the investigation thereof in public would unjustifiably encroach on the constitutional rights of the person or persons affected thereby[48].

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[44] *Redmond v Flood* [1999] 3 I.R. 79. Hamilton CJ, at p.88.
[45] An examination of the case law pertaining to s.205(7) of the Companies Act, 1963, which creates an analogous discretion in respect of holding s.205 proceedings in camera, illustrates the impossibly high threshold that an individual will have to meet before this discretion will be exercised. It was held in *Re R Ltd* [1989] I.R. 126, that this discretion cannot be used merely to protect a party from the disclosure of information which it is in his interests to keep private. It must be shown that a public hearing would fall short of the doing of justice.
[46] Gallagher *op. cit*. p.16 See also *Desmond v Glackin (No. 2)* [1993] 3 I.R. 67, concerning the disclosure of confidential information in the course of an investigation under the Companies Acts.
[47] [1999] 3 I.R. 1
[48] *Ibid. per* Hamilton CJ, at p.74.

It cannot be said that this requirement unduly restricts an inquiry. There is no legitimate public interest in having groundless allegations made public. Moreover, the powers of Tribunals were notably enhanced by the decision in *Redmond v Flood*[49] that there is no requirement that a strong *prima facie* case exist against an individual before a Tribunal may proceed to a public inquiry.

It would appear that the Irish courts are attempting to balance the rights of the individual to basic fairness of procedures with the need to ensure that a Tribunal of Inquiry fulfill its objectives. It cannot be said that Tribunals are unreasonably restricted by these procedural safeguards. Conversely, the requirement that fair procedures be adopted has lent a legitimacy to the proceedings of Inquiries, which ensures public confidence in its conclusions. Moreover, the courts and the legislature have recognised the need to allow Inquiries the flexibility to determine their own procedures. The courts will only intervene in the exercise of a Tribunal's discretion where there has been a marked failure to adopt fair procedures[50].

While public dissatisfaction with the costs and length of Tribunals remains, they are an integral part of the 'checks and the balances of our political system'[51]. Heath's opinion was 'the plain fact is that we have never succeeded in finding the perfect form of Inquiry'[52]. However a Tribunal of Inquiry, remains preferable to other methods of investigation which have been adopted. It has the greatest chance of satisfying the

[49] [1999] 3 I.R. 79.
[50] *Goodman v Hamilton (No. 1)* [1992] 2 I.R. 542. Hederman J, at 603, stated 'It would be very unwise for this Court to attempt to fetter the discretion which the Tribunal undoubtedly possesses to regulate its own procedure.'
[51] Brady, 'Reflections on Tribunals of Inquiry.' The Bar Review, December 1997, at p.1.
[52] Edward Heath, H.C. Deb. Vol. 27 C.494.

public demand for an impartial investigation into certain matters of public importance, without imperilling the rights of individuals.