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# Designing Effective Parliamentary Inquiries: Lessons Learned from the Oireachtas Banking Inquiry

## Abstract

Ireland's Oireachtas inquiry mechanisms are generally regarded as having been hamstrung by the decision of the Supreme Court in *Ardagh v Maguire*. This perception of a "legal straightjacket" has been heightened by the public's reluctance to entrust politicians with investigative powers, as embodied in the loss of the thirtieth amendment vote. In this article, however, we argue that a marginalised or weak parliamentary inquiry mechanism is not an inevitable consequence of the *Ardagh* decision. We analyse the manner in which the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013 has produced a self-imposed restrictive inquiry structure oversensitive to possible litigation. Reflecting on the operation of the Banking Inquiry, we trace how inquiry design is unduly shaped by the "chilling effects" of litigation rather than other variables. We argue that the Banking Inquiry experience stands as an object lesson as to the importance of developing clear terms of reference which match the qualities of parliamentary investigation to an appropriate subject matter. Overall, this article highlights that, for the Irish constitutional order, greater engagement is needed with the full range of variables which shape the creation, operation and effectiveness of parliamentary review.

## Introduction

The role of Parliament has been termed the "least examined" branch of the constitutional separation of powers,<sup>1</sup> with parliamentary inquiries often constituting one of the least probed areas of constitutional frameworks. The past decade, has however, seen the Irish Courts and the general public confront the core issues of whether parliamentary inquiries can escape a narrow party political focus or embed fair procedures into their investigations. The Irish public underlined their mistrust in politicians as investigators, by rejecting the recent proposed constitutional amendment to strengthen the Oireachtas' inquiry powers. The reaction of government was to create a new legislative framework, the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013, which sought to refocus the mechanism. Nevertheless, the completion of the first inquiry to be held under this new framework, the high profile Oireachtas Joint Committee of Inquiry into the Banking Crisis (Banking Inquiry), saw some Committee members argue that no further inquiries should be held under the 2013 Act.<sup>2</sup> The current government indicated that the "limited and constrained" experience

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<sup>1</sup> See Richard W. Bauman and Tsvi Kahana (eds.), *The Least Examined Branch – The Role of Legislatures in the Constitutional State*, (New York: Cambridge University Press, 2006).

<sup>2</sup> See comments by Joe Higgins T.D. and Senator Marc MacSharry. Sarah Bardon, 'Finalised Bank Report calls for action against ECB', *Irish Times*, (Dublin, December 7 2015).

may mean a further referendum on inquiries is necessary.<sup>3</sup> While such interventions carry with them an implication that the Supreme Court, in *Ardagh v Maguire*<sup>4</sup> has effectively outlawed strong parliamentary inquiries, in this article we argue that this was not the inevitable outcome. The threads of law, administration and politics underpinning the operation of parliamentary inquiries can be difficult to untangle and the easy allegation that parliamentary investigations are unavoidably sclerotic exercises encrusted by legalism should be avoided.

The current challenges facing parliamentary inquiries should be understood as reflecting a broader failure of legislative constitutionalism, rather than as a product of judicial rulings alone. While Irish debates regarding the separation of powers have often focused upon allegations of judicial activism, a key variable contributing to juricentric constitutionalism is often legislative passivity, where legislative action which is core to the proper expression and delivery of constitutional values is not taken. We argue that the reaction to the 2002 Supreme Court ruling of *Ardagh* reveals worrying trends in the quality of constitutional deliberation in the Oireachtas. As has been argued in the United States context, the separation of powers requires “the constant, creative interplay between the judiciary and the political system” where Parliament acts as a stimulus to constitutional innovation and thinking.<sup>5</sup> This branch of constitutional law scholarship stresses the obligation of each branch of government to interpret the Constitution in pursuing its actions. The struggles of the Oireachtas to reflect upon and integrate the *Ardagh* ruling into its oversight functions illustrates the damaging impacts of a legislature which is overly sensitive to the “chilling effects” of litigation. Where such legal proofing becomes the primary stimulus on constitutional deliberation in the Oireachtas, the legislative branch is reduced to:

“...an echo of the courts, not an alternative center of legislative constitutionalism...not so much interested in getting the Constitution right as in

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<sup>3</sup> Comment of Taoiseach Enda Kenny, Eoin Burke-Kennedy, ‘Kenny hints at re-run of Oireachtas Inquiries referendum’, *Irish Times*. (Dublin, January 28 2016).

<sup>4</sup> [2002] 1 IR 447. Hereinafter *Ardagh*.

<sup>5</sup> Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process*, (Princeton University Press, 1988), at 4.

anticipating what the judges will do. When it comes to constitutional law, legislators are Oliver Wendell Holmes's paradigmatic "bad man."<sup>6</sup>

The analysis which follows thus seeks to highlight the importance of what West has termed "the legislated Constitution"; the parliamentary action which should accompany the adjudicated Constitution.<sup>7</sup>

We thus restart and broaden the conversation concerning parliamentary inquiries in the aftermath of the failed referendum. The challenges facing inquiry committees are not solely attributable to legal restrictions but also reflect an overarching failure to carve out a clear identity for the mechanism, the unfortunate design of the 2013 Act and the political dynamics surrounding the creation of terms of reference. While the parliamentary inquiry represents an imperfect oversight mechanism, often providing only an incomplete lens on governmental failures, we argue that it should remain a cornerstone of the inquiries landscape. Recent scholarship also points to the continuing impact of investigatory parliamentary committees, distinct from other activities such as legislative drafting.<sup>8</sup> Though recent years have seen increased reliance upon the independent public inquiry, this also suffers from deficiencies, and remains fundamentally reliant upon a supportive political culture.<sup>9</sup> We argue that for the Irish constitutional order, greater engagement is needed with the variables which shape the creation, operation and effectiveness of parliamentary review. Our starting point must be to ask: to what extent did the Banking Inquiry produce a positive self-conception of the modern parliamentary inquiry?

### **The Poor Functioning of Parliamentary Oversight Prior to the Economic Crash**

In the Irish context, the parliamentary inquiry has suffered from a lack of public confidence, with it being viewed as shaped by party political factors rather than an

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<sup>6</sup> Keith E Whittington, 'James Madison Has Left the Building', 75(3) (2005) University of Chicago Law Review, 1155. Quoting Oliver Wendell Holmes, 'The Path of the Law', 10 (1897) Harv L Rev 457, 460-61:

"What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England .... But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact."

<sup>7</sup> Robin West, 'Toward a Study of the Legislated Constitution', 72 (2011) Ohio State L.J. 1343-1366.

<sup>8</sup> Meghan Benton & Meg Russell, 'Assessing the Impact of Parliamentary Oversight Committees: The Select Committees in the House of Commons', (2013) 66 *Parliamentary Affairs*, 772-797. Hereinafter Benton & Russell.

<sup>9</sup> See Stephen Sedley QC "Public Inquiries: A Cure or a Disease?" (1989) 52 MLR 469, 472.

investigatory culture oriented towards accountability. This is despite Article 29 of the Irish Constitution expressly requiring that the Government “shall be responsible” to the lower house of parliament, Dáil Éireann. This undesirably laconic endorsement of a Westminster model of accountability has, however, been undercut by modern political realities. Public cynicism regarding the Oireachtas’ oversight role developed alongside revelations of corruption and incompetence in the early 1990s. Signature scandals involving widespread tax evasion, political collusion with the beef industry and corruption in the planning system, were viewed as emblematic of the failure of parliament to interrupt the abuse of public office. The failed attempts by the Oireachtas to scrutinise the links between Ministers and the beef industry, resulted in the comment of the Chair of the resulting Beef Tribunal that:

“I think that if the questions that were asked in the Dáil were answered in the way they are answered here, there would be no necessity for this inquiry and an awful lot of money and time would have been saved.”<sup>10</sup>

While party loyalty is not peculiar to Ireland, statistics in the lead up to the economic crash indicated that it was higher than the European average.<sup>11</sup> Its effect is ironically shown by the counterfactual success of the Dáil Committee on Public Accounts (PAC), which is made up of thirteen members: six Government backbenchers, six opposition backbenchers and a chair who is by convention a leading member of the opposition. This unusual operation reflects the fact that its existence dates back before party control was dominant. The Committee is tasked with examining the accounts of Government departments, which is achieved through the audit reports of the Comptroller and Auditor General, an independent constitutional office. Outside of this, Ireland’s electoral and political culture has not incentivised committee work, with the emphasis being upon politicians’ role as constituency representatives.<sup>12</sup> A cycle of redundancy developed, with the low impact of committees reinforcing the focus upon intercessionary work over broader accountability functions.

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<sup>10</sup> See Fintan O’Toole, *Meanwhile, Back at the Ranch* (Vintage, London, 1995), 241.

<sup>11</sup> David Farrell, Peter Mair, Séin Ó Muineacháin & Matthew Wall, “Courting, but not always serving: Perverted Burkeanism and the puzzle of Irish Parliamentary Cohesion”, (2012) Paper presented at a conference in UBC, Vancouver to mark Ken Carty’s retirement. Available at [http://researchrepository.ucd.ie/bitstream/handle/10197/4329/Carty\\_chapter\\_final.pdf?sequence=1](http://researchrepository.ucd.ie/bitstream/handle/10197/4329/Carty_chapter_final.pdf?sequence=1) accessed 16 June 2014.

<sup>12</sup> The growth in Independent T.D.s in the past two elections, however, may result in greater incentives for rebellion – recent parliamentary reforms both underline and, may benefit from, this development.

In addition to a lack of political incentives, the conduct of parliamentary inquiries is heavily regulated. The landmark case of *Re Haughey*<sup>13</sup> laid down strict natural justice requirements where fundamental rights, including the constitutional right to good name, are affected. As allegations pertaining to Mr Haughey's involvement in gun running had been made before the parliamentary inquiry the Court held that he was entitled to extensive procedural protections. These included a copy of the evidence which had reflected on his good name, the right to cross examine his accusers, the opportunity to adduce rebutting evidence and to address the Committee. These features in effect constitutionalise the "cardinal principles" to minimise the risk of injustice identified by the 1966 Royal Commission on Tribunals of Inquiry in the United Kingdom.<sup>14</sup>

The *Haughey* case led to increased complexity in the conduct of inquiries, but more serious and comparatively unique constitutional developments took place in the landmark case of *Ardagh v Maguire*.<sup>15</sup> This arose out of the inquiry by a subcommittee of the Joint Committee on Justice, Equality, Defence and Women's Rights into a fatal shooting by Gardai. The Supreme Court endorsed the power of the Oireachtas to operate committees, but significantly narrowed their investigatory remit and ability to make findings of fact. While the majority held that the Dáil could make findings of fact and culpability within the immediate sphere of central government departments, outside of this, it had only a limited power to conduct inquiries where this would directly aid its function of legislating. We will discuss the reasoning underpinning the case in our discussion of the recent referendum that sought to overturn the effects of the ruling.

The weaknesses in parliamentary oversight led, in part, to a knock-on reliance upon Tribunals of Inquiry, and latterly, the Commission of Investigation. The experiences of the 1990s and 2000s, however, led to the effective disavowal of the tribunal mechanism as unwieldy and expensive. Tribunals were increasingly viewed as a crisis management tool for politicians, not least because the extensive delays inherent in their final reporting facilitated the dissipation of the very public concern that triggered the inquiry. A Comptroller and Auditor General report into their operation attributed the delays to "wide terms of reference" and the amendment of the investigations' scope while they

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<sup>13</sup> [1971] IR 217.

<sup>14</sup> Report of the Royal Commission on Tribunals of Inquiry (Cmnd. 3121 November 1966).

<sup>15</sup> *Ardagh v Maguire* (n 3).

were still in progress.<sup>16</sup> While formally independent, tribunal investigations were marred by negative political dynamics. The Mahon Tribunal Report acknowledged that a “sustained and virulent attack” had been made on it by senior Government ministers, in order “to undermine the efficient conduct of the Tribunal’s inquiries, erode its independence and collapse its inquiry”.<sup>17</sup> The de facto replacement of the tribunal model with new Commission of Inquiry mechanism, which eschews public hearings with the aim of achieving expedited process, will feature in our discussion of Ireland’s investigatory response to its economic collapse.

Against this backdrop, there have been few landmark parliamentary inquiries which have captured widespread public attention. The most instanced example is the DIRT inquiry, where the PAC investigated the use of bogus non-residential bank accounts established to avoid payment of the Deposit Interest Retention Tax (DIRT). That inquiry was facilitated by the passing of the *Comptroller and Auditor General and Committees of the Houses of the Oireachtas (Special Provisions) Act 1998* which gave the PAC powers to compel people to give evidence. Generally regarded as an accountability success story, it must be stressed that the committee benefitted from an extensive initial investigation by the Comptroller and Auditor General. The Comptroller’s report did not make any conclusions on the events surrounding the failure to pay tax, but left it to the Committee to carry out oral hearings based on its findings. The success of the resulting PAC investigation was in large part because the CAG report provided a sound base for those hearings. Significantly, however, while inquiry is held up as a model for future inquiries, its final report failed to censure or sanction any civil servant or minister for their actions in relation to the events. Condemnation was reserved for the financial institutions – an emphasis which was arguably endangered by the later *Ardagh* ruling.

Those advocating for a renewed appreciation of the importance of the institution have thus relied upon comparative developments. In the aftermath of *Ardagh*, O’Dowd undertook an extensive analysis of how that decision threatened to place the Oireachtas

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<sup>16</sup> Comptroller and Auditor General, *Special Report: Tribunals of Inquiry* (Stationery Office, Dublin, 2008). The Mahon Tribunal took over ten years to finalise, with some of its core recommendations still remaining unimplemented.

<sup>17</sup> Alan Mahon, *Final Report of the Tribunal of Inquiry into certain Planning Matters and Payments* (The Stationary Office, Dublin, 2012), 22.

out of step with European jurisdictions.<sup>18</sup> The Irish position certainly contrasts the increasing status of, and emphasis upon, parliamentary inquiries in the United Kingdom. These have attracted greater resourcing and increased media attention. Recent high profile inquiries include the News of the World hacking scandal, the banking crisis and the collapse of the “Kid’s Company” charity. The latter two subject matters have equivalent Irish inquiries we discuss later in this article – underlining the divergence between the two jurisdictions.

A landmark study of the Select Committee system by Russell and Benton provided an insight into their distinct contribution to, and overall influence upon, policy reform. The report’s quantitative analysis found that 40 per cent of inquiries’ recommendations were accepted by the UK government, of which 44% went on to be implemented – a figure amounting to 450 recommendations a year.<sup>19</sup> In terms of added value, only 20 per cent of recommendations related to policies covered by manifestos or Queen’s speeches – indicating that the committee’s work was inhabiting a distinct focus upon the “detailed delivery of policy”.<sup>20</sup> Significantly, however, the study moved beyond a simple analysis into the qualitative sphere – permitting a more subtle evaluation of the forms of influence exerted by Committee members and the preventative and prospective regulatory effects of having an active inquiry mechanism upon everyday government. These were found to include:

- Influencing policy debate
- Spotlighting issues and altering policy priorities
- Brokering in policy disputes
- Providing expert evidence
- Holding government and outside bodies accountable
- Exposure
- Generating fear (anticipated reactions).

The study revealed that the anticipated reactions of a committee exerted a powerful influence upon government and administrators in ‘getting across their brief’ and

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<sup>18</sup> John O’Dowd, ‘Knowing How Way Leads onto Way: Some Reflections on the *Abbeylara* Decision’ (2003) *Irish Jurist* 162.

<sup>19</sup> Benton & Russell (n.8), 9. The report found over 60% of small or no change recommendations were accepted while only around a third of those calling for medium or large change were accepted.

<sup>20</sup> *Ibid* at 8.

abandoning policies. The emerging work which surrounds the “age of the select committee”<sup>21</sup> in the United Kingdom, thus underlines that the marginalising of the parliamentary inquiry mechanism, whether due to legal restraints or political culture, would have negative impacts upon regulatory and policy evaluation.

This historical analysis of Ireland’s inquiries landscape has underlined a number of critical trends, which recur across jurisdictions. While their relative strength may be idiosyncratic to Ireland, the impact of party political discipline, the low valuing of oversight work and the difficulty of acting quasi judicially in conducting investigations, represent key constraints upon effective parliamentary oversight. The use of judicial led inquiries to diffuse initial controversy, and their overburdening with expansive terms of reference has often produced prominent instances of delay, followed by dulled political and public reception of recommendations. Ireland is unique however, for the manner in which its economic collapse saw the question of effective inquiries gain unprecedented public prominence, commencing with the 2013 constitutional referendum on parliamentary inquiries.

### **The Ghosts of McCarthyism? Parliamentary Inquiries and the *Ardagh* Decision**

The proposed 30<sup>th</sup> Constitutional amendment sought to overturn the restrictions imposed on the Oireachtas by the Supreme Court in *Ardagh*. The proposed amendment granted the power to conduct inquiries “into any matter...of general public importance”, and permission “to make findings in respect of the conduct of [any] person”.<sup>22</sup> In order to understand the eventual rejection by the people of this amendment, it is necessary to discuss the legal and policy reasons for the 2003 Supreme Court ruling.

The ruling that the Constitution granted no inherent power to the Oireachtas to investigate and make findings of culpability against private individuals, was primarily motivated by a desire to protect the individual against excessively politicised

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<sup>21</sup> Meg Russell & Meghan Benton, ‘Selective Influence: The Policy Impact of House of Commons Select Committees’, UCL Constitution Unit (London, UCL, 2011), Patrick Dunleavy & Dominic Muir ‘Revisiting Rebuilding the House: the impact of the Wright Reforms’ (Report, HC82, 2013).

<sup>22</sup> Wording published in the Schedule to the Thirtieth Amendment of the Constitution (Houses of the Oireachtas Inquiries) Bill 2011 as initiated. The proposal inserted three new subsections into subsection 10 of Article 15 of the Constitution.

investigation. The Supreme Court's emphasis upon the individual's right to a good name has its roots in Article 40.3.2 of the Irish Constitution:

"The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

This duty is qualified on its terms, but the members of the majority, manifested a concern at the ability of the Oireachtas to make the personalised findings which had marked the era of Senator McCarthy and the House of Representatives Committee on Unamerican Activities.<sup>23</sup> The specific circumstances of the inquiry at the centre of the case led to a judgment of unduly broad consequence. Stressing the 'adjudicative' character of the Committee's work, the Court pointed to the close relationship between a finding of "unlawful killing" envisioned by the inquiry's terms of reference, and the criminal offence of manslaughter.<sup>24</sup> While counsel for the committee argued that any findings would be legally sterile in that no legal rights would be directly affected, the Court rejected this as something of a fiction given the likely practical impact on individual reputations.<sup>25</sup> The majority also did not view the *re Haughey* rights as an adequate protection of the right to a good name.

Keane CJ, in dissent, argued that the right to a good name had to be balanced against "the right, and indeed the duty" of the Oireachtas to inquire and inform itself as may be necessary to perform its constitutional role.<sup>26</sup> The majority, stressed however, that while Article 28.2 provides that "The Government shall be responsible" to the lower house, the term "Government" refers merely to the fifteen members of the cabinet and their related departments. Outside of this immediate sphere of central government, the Oireachtas had only a limited inherent power to conduct inquiries, where these directly aid their legislative functions.<sup>27</sup>

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<sup>23</sup> See the judgment of Hardiman J. in *Ardagh* (n 3) at 693. While stressing that the conduct of the Committee was in no way comparable to such a witch hunt, His Honour warned that "in neither...the United Kingdom and the United States, where an "inherent" parliamentary power of inquiry is or has been acknowledged, has its record been an inspiring one from the point of view of human rights or civil liberties."

<sup>24</sup> *ibid* 563 (Denham J), 588-590 (Murray J) and 662-64. (Hardiman J).

<sup>25</sup> *ibid* 668 (Hardiman J).

<sup>26</sup> *ibid* 501 (Keane J).

<sup>27</sup> Under Article 15.2.1, Parliament is vested with sole law-making power in the State.

The majority did not view findings of individual culpability as generally connected to the question of whether legislation needed to be passed. Murray J argued that the Oireachtas could investigate and “make extensive findings and recommendations of great public and legislative import”, but failed to see the “necessity of making findings of personal culpability” against individual police officers.<sup>28</sup> Geoghegan J stressed that “the all important point” was for the inquiry to “be merely for the purpose of considering whether any new legislation was required and for no other purpose”.<sup>29</sup>

The Supreme Court’s attempts to separate direct findings against individuals from a factual finding about a system or institution from which individual blame may be inferred has since emerged as the key faultline in the conduct of inquiries. Geoghegan J accepted that an inquiry convened for a permissible legislative purpose “might in some circumstances inevitably and unavoidably lead to implied blame being attached to an individual”.<sup>30</sup> For instance a finding of failure in a management system would involve an “implied attachment of blame to the relevant manager”.<sup>31</sup> Hardiman J, similarly endorsed the idea of “implied blame”, but underlined that:

“So long as this is genuinely incidental, and not a mere device, this incidental overlap does not, in my view, even potentially invalidate [an exercise of inquiry power]”<sup>32</sup>

As we shall see, the sophistry of separating blame inferred from systemic findings from the direct attribution of individual wrongdoing can culminate in extensive parsing and semantic redrafting in committee reports. As Morgan argues “implied blame is a very slippery standard for a lawyer to advise upon or for a court to rule upon.”<sup>33</sup> This is underlined by the judicial statements above, which require that the attribution of blame be “inevitably” or “unavoidably” required for creation of new legislation (Geoghegan) or that it be “genuinely incidental” to that function (Hardiman). Ultimately the Supreme Court provided little practical guidance to the Oireachtas as to how the drafting of inquiry findings can establish or prove this connection; a failure which has contributed to the hollowing out of final reports in the face of reputational litigation. Differentiating

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<sup>28</sup> *Ardagh* (n 3), 605 (Murray J).

<sup>29</sup> *ibid* 708.

<sup>30</sup> *ibid* 718.

<sup>31</sup> *ibid*.

<sup>32</sup> *ibid* 659.

<sup>33</sup> David G Morgan, ‘Parliamentary Inquiries: The Context of the Joint Oireachtas Committee’s Proposals’ [2011] *Cork Online Law Review*, 11.

issues relating to an individual's culpability on the one hand and wider systemic failures and government errors on the other is fundamental to characterising the underlying cause of government errors. While reaching findings directly linked to criminal culpability may be harder to justify, the Oireachtas, will often need to determine the blameworthiness of past actions as this helps it to properly characterise the mischief to be addressed in future legislation or to avoid the passing of misdirected legislation.

The failure of the 2013 referendum underlined some public support for the Court's fear of political overreach. Crucially, in addition to providing an unrestricted right to inquire into any matter of "general public importance", the proposed amendment attempted to loosen the fetters of *re Haughey* by permitting a balancing of procedural fairness against the public interest:

"It shall be for the House or Houses concerned to determine, with due regard to the principles of fair procedures, the appropriate balance between the rights of persons and the public interest for the purposes of ensuring an effective inquiry..."<sup>34</sup>

This wording attracted controversy, as it was considered vague by many commentators - a fact acknowledged by the independent Referendum Commission.<sup>35</sup> While the principle of harmonious interpretation of constitutional provisions meant that the protection of the individual's good name would be taken into account, the proposed wording appeared designed to attract judicial deference when reviewing the balance struck.

In a surprising result (given the levels of support in initial polling) the amendment was defeated. An official study into the reasons found firstly a prominent belief<sup>36</sup> amongst 'No' voters that the proposed wording gave too much power to politicians. Secondly, voters split according to their trust in legal experts versus politicians; the former group more likely to vote no, with the latter group more likely to vote yes.<sup>37</sup> The role of legal commentators in leading opposition had attracted criticism from Government, with the

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<sup>34</sup> Above n 22.

<sup>35</sup> The Chair of Commission, Justice McMahon commented in a radio interview that it was "not possible to state definitively what role, if any, the courts would have in reviewing procedures if adopted." See Harry McGee, 'Five Reasons Why Referendum was Lost', *The Irish Times*, (Dublin, November 1 2011).

<sup>36</sup> This belief was cited as the primary reason for their vote by 27% of No voters. Michael Marsh, Jane Suiter & Theresa Reidy, *Report on Reasons Behind Voter Behaviour in the Oireachtas Inquiry Referendum 2011*, (2012). Available at <http://per.gov.ie/wp-content/uploads/OIReferendum-Report-Final-2003-corrected.pdf> accessed 28 June 2016, 2.

<sup>37</sup> *Ibid.*

then Minister for Foreign Affairs attributing it to “particular sections of the legal profession who have done very well financially from the judicial tribunals in the past”.<sup>38</sup> This comment reflected Government efforts to project the renewal of parliamentary inquiries as a replacement for tribunals - underlining a recurring failure to appreciate the division of labour between two institutions of distinctive character and purposes.

Ultimately, the compressed timeline for discussion of the proposal led to a lack of knowledge on the part of public, which led to a crucial portion voting ‘no’.<sup>39</sup> The study found there was still widespread ‘in principle’ public support for providing inquiry powers to the Oireachtas.<sup>40</sup> The Government’s terminal error, therefore, lay in conflating the issue of freedom to reach findings with that of the standard of procedural fairness to be applied by committees.

#### **Lost in Translation? The Flaws of the 2013 Act**

In the absence of a constitutional amendment, the Government set about clarifying the prevailing nature and scope of inquiries in the *Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013*. This legislation, however, adopted a strict structure which, in our view, is an unhelpfully constricted translation of the *Ardagh* decision. Rather than affirming the necessity of implied blame, and the connection of inquiry findings with legislative functions, elements of the Act adopt a defensive approach which embody the chilling effect of potential litigation rather than a positive vision of a renewed forum.

Part 2 of the act establishes the new forms of parliamentary inquiry, including:

- *Inquire, Record and Report inquiry* (section 7);
- *Legislative inquiry* (section 8);
- *Inquiry to Hold the Government to Account* (section 11).<sup>41</sup>

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<sup>38</sup> Michael Brennan & Dearbhail McDonald, ‘Top legal experts call for No vote in new poll’, *Irish Independent* (Dublin, 24 October 2011).

<sup>39</sup> Above n 36 at 3. Large numbers of ‘yes’ voters could not recall the arguments for a ‘yes’ vote (42%) or ‘no’ voters for a ‘no’ vote (42%).

<sup>40</sup> *ibid.*

<sup>41</sup> In this article we are focusing on general parliamentary inquiries not inquiries which are anchored in the misconduct of certain constitutional offices such as parliamentary members or the judiciary.

These inquiry forms are sealed from one another, and are an attempt to provide legislative underpinning for the *Ardagh* restrictions. The first point of distinction is the character of findings which may be made. A section 7 inquiry is permitted to arrive at facts only where they are uncontested. A section 8 inquiry allows contested fact finding including findings of relevant misbehaviour against public office holders, where the terms of reference for the inquiry expressly provide for that power.<sup>42</sup> A section 11 inquiry, the only directly tied to accountability, reflects the Supreme Court's definition of Government in Article 28.4, allowing for vigorous review of core government departments and office holders.

This basic segmentation must, however, be overlaid with section 17(3).<sup>43</sup> This attempts to funnel some of the unfortunate sophistry from the *Ardagh* judgment by stating that committees remain free to:

“...make a finding that any matter relating to systems, practices, procedures or policy or arrangements for the implementation of policy which fall within the subject [of the inquiry] ought to have been carried out in a different manner.”<sup>44</sup>

This wording is opaque, as it is arguable that an individual manager's oversight or negligence could constitute a “matter relating to” policy or systems which needed to be avoided. Such findings of fact may be inevitable accompaniments to systemic findings about institutional failings. Where inquiries are mandated to explore legislative reform they need to be able to identify the general character of the mischief any legislative amendment would be combatting; findings which include implied blame may therefore be an inevitable and essential component of this process.

The veneer of section 17 masks powerful constitutional undertows. It can lure committees into unnecessarily abstract institutional findings, or it can mask the requirement that findings related to individuals be tangibly linked to the legislative function. The very existence of a section 7 inquiry model is itself illustrative of the

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<sup>42</sup> Section 8(3) of the Act.

<sup>43</sup> For example in section 11 an inquiry can make findings impugning the good name of “an officeholder ... of the government in his or her capacity ... as such officeholder” (section 11(2)(i)(II)) or “the chief executive officer ... of a public body that is subject to scrutiny by the Committee of Public Accounts” (section 11(2)(i)(III)).

<sup>44</sup> Section 17(3)(a). Section 27 requires that the committee give reasons in writing for any findings of fact.

Oireachtas' struggle to integrate the Supreme Court ruling into its deliberations. As conceived under the 2013 Act, Section 7 is in many respects the very type of inquiry the Supreme Court was keen to repudiate: the construction of a factual narrative simply for the purposes of the public record. While a section 7 inquiry cannot find facts which have been contested during the course of its evidence gathering, the existence of section 17(3) complicates this picture. The Banking Inquiry ultimately struggled to navigate the nature of section 17(3) findings and their interconnection with individuals' conduct.

In this context, it was surprising the Oireachtas chose to designate the Banking Inquiry as a section 7 inquire, record and report inquiry. Given that the fact finding powers of this type of inquiry are so limited, why was the inquiry not established under section 8? Why not carry out an inquiry focused not on story telling but instead on the failure of the legislative and regulatory system with a view to designing a better financial framework? This would have allowed the inquiry to make findings of fact, at least in relation to public office holders. It would also have embedded an institutional focus upon practical legislative reforms in learning from the crisis. A review of parliamentary debates contains further insight into the potential for the separate models to confuse the constitutional position and misdirect politicians as to its focus. When questioned as to whether a "hybrid inquiry" involving section 7 (IRR) and section 8 (legislative) could be run in relation to the Banking Inquiry, the Minister for Reform and Public Expenditure responded that "one cannot intersperse the two types of inquiry because one has to have a constitutional grounding for each bit of it."<sup>45</sup>

The picture is further confused by the fact that the terms of reference for the Banking Inquiry ultimately called for the Joint Committee to make recommendations, including ones calling for legislative action. One might question what the point of recommendations are in a section 7 inquiry where the primary purpose of investigation is to provide a public record. As recommendations must arise from a committee's findings, there is an argument that the committee was more limited in the recommendations it could make than if a section 8 framework had been applied. Why did the Oireachtas choose to confine itself within a section 7 straightjacket? This question haunted the Banking Inquiry and their frustration is apparent in their final

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<sup>45</sup> Statement of Minister Brendan Howlin during the Select Sub-Committee on Public Expenditure and Reform debate on the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Bill 2013, June 5 2013.

report where, as we discuss later, they included a flawed proposal for yet another form of inquiry to be created through amending the 2013 Act. Ultimately, the structural focus of the legislation is artificial, and committees will have to closely reason through the *Ardagh* ruling in creating their final reports and recommendations.

There is little evidence that the 2013 Act has led to increased clarity in Committees' role or promoted a sense of legal security which would encourage inquiry teams to press the penumbral concepts at the heart of *Ardagh*. The Oireachtas' reaction to the Supreme Court judgment has been a practical timidity, which is fed by a rhetoric of institutional defeatism. The Banking Inquiry channelled this climate in its final report by stating that *Ardagh* had "effectively sounded the death knell for parliamentary inquiries over the next decade".<sup>46</sup> This places too heavy a responsibility on the Supreme Court decision, ignoring the scope for the court's judgment to be effectively integrated into the Oireachtas' workings. Morgan, notes a similar pessimism on the part of the Mini-CTC Signalling Inquiry, which in abandoning its investigation after *Ardagh*, provided a "swansong [taking] the form of an impassioned *Interim Report* which reached no conclusions on the issues before it but instead offered a heartfelt lament, with lavish references to the separation of powers, at the lack of capacity to which it had been reduced."<sup>47</sup>

A climate of confusion, combined with a fear of overstepping, remain evident even following the introduction of the 2013 Act. In April 2014, former senior executives of the voluntary organisation, the Rehab Group, having initially participated in committee proceedings, refused to appear before a PAC hearing to answer questions regarding their pay structure and the use of public funds. The head of the organisation, Ms Angela Kerins, argued that following her resignation, she and other ex-members were "ordinary citizens" and could avail of the *Ardagh* precedent. The PAC sought authorisation from the Committee on Procedure and Privilege to compel the attendance of Ms Kerins and others. This, however was refused on the basis that questioning them would be "outside the remit" of PAC and that "a mis-step will cost the taxpayer".<sup>48</sup>

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<sup>46</sup> The Committee of Inquiry into the Banking Crisis, *Report of the Joint Committee of Inquiry into the Banking Crisis*, Volume 2, para 4.1. (Dublin: Houses of the Oireachtas, January 2016).

<sup>47</sup> Morgan (n 33), 6.

<sup>48</sup> See Shane Phelan, 'PAC members claim it is being nobbled in its attempts to investigate rehab' *Irish Independent*, (Dublin, 12 June 2014). The decision of the Committee on Procedure and Privilege, interesting Standing Order 160 is extracted at para 31 of the High Court decision in *Kerins v Mc Guinness & Ors* [2017] IEHC 34.

Despite this, Ms Kerins nevertheless issued proceedings against PAC against their earlier hearing into the matter, terming it a “witch hunt” and alleging that the committee members were affected by bias and a lack of procedural fairness.<sup>49</sup>

The eventual High Court ruling in *Kerins* did not modify the *Ardagh* principles, but rather focused upon when a committee can be said to be exercising what it termed “adjudicative” or “compulsory and determinative” jurisdiction, and thus be bound by the rules of constitutional justice.<sup>50</sup> The Court stressed that outside of the interactions in which the person has been compelled to appear, individual parliamentarians’ views attract privilege, even if stridently expressed.<sup>51</sup> While media coverage focused upon the vindication of this tradition of parliamentary privilege, the *Kerins* case is, in our view, likely to produce a formalization of parliamentary interactions. Given that representatives’ comments to those voluntarily appearing before committees attract privilege, legal representatives of these individuals are likely to advise them not to attend out of caution for their reputation. It is likely that future appearances before committees have to rely upon statutory requests to appear.

#### **Matching the Forum to the Fuss – Towards the Effective Design of Oireachtas Inquiries**

Beyond the specific choice of inquiry format there remains the question of how an inquiry is individually designed to match “the fuss”. The design of suitable and effective terms of reference is critical to ensure that an inquiry firstly understands its purpose, and secondly, can achieve that purpose in producing focused findings and realisable recommendations. At the commencement of the banking inquiry the Joint Committee stressed the need for “realistic and achievable” aims, a “clear purpose” and an investigation which “should be capable of completion within a realistic timeframe and take account of the lifetime of the current Dáil and Seanad”.<sup>52</sup> In practice, however it became an example of an inquiry that wanted to do too much, too quickly.

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<sup>49</sup> Ann O’Loughlin, ‘Former Rehab CEO Kerins lost her job over PAC “witch hunt”’ *Irish Examiner* (Cork, 22 July 2016).

<sup>50</sup> *Kerins v McGuinness & Ors* above n. 48 at paras 61 and 72.

<sup>51</sup> *Kerins v McGuinness*, above n. 48 at para 111.

<sup>52</sup> Joint Committee of Inquiry into the Banking Crisis, *Report of the Joint Committee - Relevant Proposal to the Committees on Procedure and Privileges of Dáil Éireann and Seanad Éireann for the conduct of an inquiry in accordance with the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013 into certain aspects of Ireland’s Banking Crisis*. (2014), 3. Available at: <<https://inquiries.oireachtas.ie/banking/wp-content/uploads/2014/12/BI-Relevant-Proposal.pdf>> accessed 5 September 2016.

The Banking Inquiry is also highly instructive regarding the critical question as to what should be the focus of a parliamentary inquiry in the era of independent public inquiry. There had already been multiple inquiries into various elements of the banking crisis, the most high-profile being the Nyberg Commission of Investigation. The Joint Committee viewed this work as a solid departure point, allowing itself to focus on answering “the key questions that remain behind the banking crisis”.<sup>53</sup> The debate regarding the terms of reference thus began promisingly, by considering how existing investigatory work could intersect with the parliamentary element.

In debating the added value of a parliamentary inquiry, one unifying theme across political parties was the need for public hearings or visible accountability. The Nyberg Commission had elected, at the outset, to grant anonymity to its interviewees in its final report. While the Commission was seeking to stave off potential litigation, it also presented privacy and anonymity as positive virtues for effective investigation. Mr Nyberg argued that anonymity “was important to get engagement and for discussing sensitive issues”<sup>54</sup> As the first witness before the Banking Inquiry, Mr Nyberg testified that he felt it was unlikely that witnesses would be as forthcoming as they were to the Commission. While he himself felt there was little need for a parliamentary inquiry into the crisis, he accepted that the committee could look at established issues “in greater depth” as well as focusing upon forming “a good and solid view on what to do to avoid something like this another time”.<sup>55</sup>

Thus the process of public questioning emerged as a primary motive in creating and designing the inquiry. In debates concerning the terms of reference, the independent T.D. Peter Matthews argued that while the public did not have time to read the extensive technical reports of independent experts, they did “need to see visibly those who had

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<sup>53</sup> Statement of Chairman Ciaran Lynch T.D. in response to Motion Establishing the Joint Committee of Inquiry into the Banking Crisis, Dáil Deb 14 May 2014 Vol. 841(2) Col 48.

<sup>54</sup> Testimony of Mr Peter Nyberg before the Joint Committee of Inquiry into the Banking Crisis, 17<sup>th</sup> December 2014. Available at: <https://inquiries.oireachtas.ie/banking/hearings/joint-committee-of-inquiry-into-the-banking-crisis-wednesday-17-december-2014/> accessed 5 September 2016.

<sup>55</sup> Ibid.

the fiduciary responsibility.”<sup>56</sup> The Chairman of the Inquiry ultimately fell back upon the public nature of the proceedings as having “set this inquiry apart”, allowing the Irish people “for the first time to hear the story, in their own words, from those who were involved”.<sup>57</sup>

As Elliot has argued, the use of public hearings affirms the important links between accountability and transparency:

“the ascription of responsibility function potentially served by inquiries, while not unimportant, [can] shade into – in some senses, exists in the shadow of – the broader transparency function...which serves to equip the public, politicians and media to form their *own* views”<sup>58</sup>

In the Irish context, the most significant impacts produced by the much criticized Tribunals of Inquiry was the coverage of the hearing phase rather than the publication of the highly technical, much delayed final reports.<sup>59</sup> The general tone of media coverage of the banking inquiry was that oral hearing produced no ‘silver bullets’,<sup>60</sup> but the mere appearance of a number of banking figures who had previously never commented publicly was nonetheless viewed as important as a matter of principle. While academics may be drawn to substantive findings, the holding of hearings recognizes that political accountability is not an objective idea, but is rather, as Black comments, a “relational concept” which is “socially and discursively constituted”.<sup>61</sup>

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<sup>56</sup> Establishment of Joint Committee of Inquiry into the Banking Crisis: Motion, Dáil Deb 14 May 2014, vol 841.

<sup>57</sup> *Chairman’s Summary* (n 57), 3.

<sup>58</sup> Mark Elliott, ‘Ombudsmen, Tribunals, Inquiries: Re-Fashioning Accountability Beyond the Courts’ in Nicholas Bamforth & Peter Leyland, *Accountability in the Contemporary Constitution* (Oxford: Oxford University Press, 2013), 254.

<sup>59</sup> Examples of such “accountability moments”, would include the public’s reaction to former Taoiseach Bertie Ahern’s attempts to account for his money and to the tears of a one of his female aides during her evidence.

<sup>60</sup> The most commonly instanced highlight of the Committee’s exchanges was the testimony of Minister for Finance Michael Noonan that the former ECB President Jean-Claude Trichet had warned him in late March 2011 that “a bomb” would go off in Dublin’s financial sector if Ireland implemented haircuts on unsecured, unguaranteed senior debt connected to the Irish Banking Resolution Corporation. See Sarah Bardon, ‘Noonan told “bomb would go off” if bondholders burned’, *Irish Times* (Dublin, 10 September 2015).

<sup>61</sup> Julia Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’ in Anne Peters, Lucy Koechlin, Till Forster & Gretta F Zinkernagel, *Non State Actors as Standard Setters*, (Cambridge: Cambridge University Press, 2009), 243.

A second aspect which emerged was the need to, within the constraints of the constitutional framework, facilitate a broader societal discussion of underlying responsibility. This reflected the fact that the Nyberg Commission had interpreted its mandate as being “to identify the causes for failures, rather than to assign individual blame or responsibility”.<sup>62</sup> The Commission’s report had not named any politician or political party within its pages, a fact which attracted much public and media criticism. Its strongest statement regarding political responsibility was strikingly opaque:

“People in a position to make decisions are and must be ultimately responsible for them regardless of what advice or suggestions they have received ... the higher and more influential their position, the greater their responsibility.”<sup>63</sup>

The confusion around the Commission’s characterisation of professional misjudgement and political responsibility persisted in testimony before the Joint Committee. When asked why his report found excessive risk taking to have been motivated by “ignorance or a lack of knowledge”, rather than “negligence”, Mr Nyberg responded that “negligence implies some sort of wilfulness, and I don’t see it”.<sup>64</sup> These comments underline the difficulty a technical expert faces in handling concepts of political responsibility and blameworthiness. If a public inquiry is tasked with moving beyond a bare analysis of legality, and its terms of reference do not address what is to be understood as culpable action, the question of how the inquiry is to generate a legitimate yardstick for ascribing responsibility inevitably results in contestation.

While the joint committee’s emphasis upon transparency and political accounting was welcome, the terms of reference debate quickly tipped over into an unqualified need to have a “full telling” of all elements of the crisis. Deputy Lynch had originally stressed that the inquiry “should be understandable in what it will set out to achieve and measureable in its objectives and terms of references”.<sup>65</sup> However, its ultimate scope was relatively unconfined:

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<sup>62</sup> *Misjudging Risk: Causes of the Systemic Banking Crisis in Ireland*, Report of the Commission of Investigation into the Banking Sector in Ireland, March 2011. Available: <<http://www.bankinginquiry.gov.ie/Documents/Misjudging%20Risk%20-%20Causes%20of%20the%20Systemic%20Banking%20Crisis%20in%20Ireland.pdf>> accessed, 26 June 2016, para 1.5.1.

<sup>63</sup> *ibid.* para 1.5.3.

<sup>64</sup> Nyberg, n 58.

<sup>65</sup> Lynch n 57.

“The subject matter of the inquiry shall be to inquire into the reasons Ireland experienced a systemic banking crisis, including the political, economic, social, cultural, financial and behavioural factors and policies which impacted on or contributed to the crisis, by investigating relevant matters relating to banking systems and practices, regulatory and supervisory systems and practices, crisis management systems, and policy responses and the preventative reforms implemented in the wake of the crisis.”<sup>66</sup>

It had initially appeared that the terms of reference for the inquiry would be narrower; focused upon the 2008 decision to bail out the banks. This, however, attracted the criticism that a longer term perspective was required in order to effectively understand how those decisions were made. The inquiry was ultimately divided into four broad “modules”:

- context
- banking systems and practices
- regulatory systems and practices
- crisis management and policy responses.<sup>67</sup>

The terms of reference were thus largely permissive rather than targeted, with the inquiry covering areas reviewed by past investigations. The first module in particular involved restatements of the broad context of the banking crisis presented by experts who were not directly implicated or involved in key decisions. This tended to reinforce the public view of the inquiry as providing nothing new. The final module, however, was more activist as it extended the inquiry not only in terms of time but also complexity, requiring analysis of the actions of the current government, and their interaction with the Troika (IMF, ECB and European Commission).

The settling of the terms of reference is inevitably marked by political dynamics – but research into their character often does not match the public’s expectations. The leading study on the appointment and design of inquiries in the United Kingdom found that short term political considerations are often dominant over the more long term political

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<sup>66</sup> Above n 56, Volume 1, Appendix 4, 381-2.

<sup>67</sup> Above n 56, Volume 2, para 6.14.

risk of a critical report in the future.<sup>68</sup> This dynamic was borne out in the banking inquiry, as the government yielded to political pressure to submit its own actions to review. The political preoccupation was to present an image of the inquiry as representing a “full accounting” of the controversial events. Unfortunately, the resultant breadth and vagueness of the terms of reference did not seem to indicate a forensic or well-focussed process with a clear sense of its potential value add over other inquiry mechanisms.

Despite the call to “leave our club jerseys at the committee room door”,<sup>69</sup> the inquiry also suffered an immediate politicisation over the election of its membership. After two government senators failed to attend the Senate sub-committee electing representatives for the inquiry, and were denied a ‘pair’, the opposition parties voted two of their number onto the inquiry committee. The Government, condemning the opposition’s action as a ‘stroke’ immediately added two of its own senators, aiming to preserve its majority on the inquiry committee.<sup>70</sup> This move triggered the resignation from the inquiry of prominent Independent TD Stephen Donnelly, who argued that such interference underlined that the inquiry would be politically motivated.<sup>71</sup> While the Government stressed that the whip would not be applied to its members in the Committee, the dispute around the election of the members seemed to reiterate the undertow of party political concern moving participants.

### **Prisoners of Legalism? Politicians as Investigators**

The eventual establishment of the inquiry was regarded as a landmark moment for the self-identity of the parliamentary inquiry mechanism. Chairman Ciaran Lynch TD stated it was “an opportunity for our Parliament to demonstrate that it can carry out a fair and balanced inquiry to answer the key questions that remain behind the banking crisis”.<sup>72</sup> The loss of the 30<sup>th</sup> amendment had focused the attention of the Oireachtas on the fact that the public was fearful of politicians with too much power and too strong a

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<sup>68</sup> Raanan Sulitzeanu-Kenan, ‘Reflection in the Shadow of Blame: When Do Politicians Appoint Commission of Inquiry?’, 2010 *British Journal of Political Science*, 40(3) 613-634, 632.

<sup>69</sup> Chairman Ciaran Lynch T.D., (n 57).

<sup>70</sup> Harry McGee, Mary Minahan & Marie O’Halloran, ‘Government adds two senators to banking inquiry committee’, *Irish Times*, (Dublin, June 12 2014).

<sup>71</sup> Ciarán D’Arcy, “Donnelly’s decision to quit banking inquiry criticised” *Irish Times*, (Dublin, June 15 2014).

<sup>72</sup> Lynch, n 57.

desire for political grandstanding, with Mary Lou McDonald TD reminding the Select Sub-Committee examining the 2013 Bill:

“I recall the public commentary and angst at the time of the referendum. There was a sense that committees could become Star Chambers or a facility for a witch hunt...”<sup>73</sup>

The deep scepticism of the idea of politicians as principled investigators appears to have led to a highly cautious approach to *Re Haughey* during the conduct of the inquiry. Members complained about the “highly legalistic” requirements including a requirement that parties who were likely to be criticised during the hearings should have advance notice of these potential comments and the relevant line of questioning.<sup>74</sup> It is important, however, particularly in the aftermath of the inquiries referendum campaign, to separate the requirements of procedural fairness from debates concerning *Ardagh*. Despite political rhetoric of legal roadblocks, there are also, as we shall discuss, a range of practical measures which can moderate the impact of *re Haughey* requirements.

In appraising the investigative discipline of the committee, we would argue that the two signature moments of the inquiry were procedural missteps. Both grew out of a desire to pursue distinctive lines of inquiry and to deliver accountability ‘moments’ which would connect with the public. The first controversy related to the efforts of the Committee to obtain evidence from Jean Claude Trichet. Mr Trichet, former Governor of the European Central Bank, initially refused to appear before the committee on the grounds that the ECB was accountable to European structures, not to national parliaments. In the event, following interventions by the Taoiseach, an informal event was hosted by Irish Institute of International and European Affairs. At this event, Mr Trichet gave a general speech, followed by two other speakers, with a question and answer session following. This took the form of two questions submitted by the Institute, six questions by Committee Members, two questions submitted by the Institute, and six questions by Committee Members. The decision of the Committee to participate in this event drew criticism, particularly from the family of the late Minister

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<sup>73</sup> Select Sub-Committee on Public Expenditure and Reform, *Houses of the Oireachtas (Inquiries, Privileges and Procedures) Bill 2013*, 5 June 2013. 14.

<sup>74</sup> Daniel McConnell, ‘Inquiry told to inform witnesses of any criticism’, *Irish Independent* (Dublin, 15 December 2014).

Brian Lenihan.<sup>75</sup> As Mr Trichet's testimony was in contradiction to statements previously made by Mr Lenihan, the family criticised the failure to administer an oath and argued that "the setting was wrong".<sup>76</sup> It was also reported that many committee members were unhappy with the format, but had accepted it as a "workable compromise".<sup>77</sup>

During the event, the Chairman of the Inquiry indicated that the evidence would play a role in the Inquiry's deliberations:

"The purposes of this event were at all times to provide the inquiry with an engagement that would be evidential, that would be admissible in terms of our final report..."<sup>78</sup>

Deputy Lynch noted that the event would form a basis for follow up with the Vice President of the European Central Bank when he also "engaged informally" with Inquiry Members as part of his appearance before another parliamentary committee.<sup>79</sup>

The above comments however, triggered the withdrawal of the ECB from this informal engagement. ECB Governor Mario Draghi attributed this to Deputy Lynch's comments which, he argued, underlined that further engagement "would have amounted to the ECB de facto participating in the inquiry and hence discharging accountability to the Oireachtas, which is the prerogative of the European Parliament".<sup>80</sup> While the ECB was willing to engage in "an exchange of views" concerning "the ECB's monetary policy in the euro area", it would not attend any session whose agenda was to address "the ECB's mandate in the context of Ireland's Banking Crisis 2006-2013".<sup>81</sup> The

<sup>75</sup> Juno McEnroe, 'Lenihan Name "Sullied" by Trichet', *The Irish Examiner* (Cork, May 4 2015).

<sup>76</sup> *ibid.* Comments of Mr Lenihan's aunt and former TD, Ms Mary O'Rourke.

<sup>77</sup> Michael McGrath TD, publicly acknowledged that the format was an "unsatisfactory compromise" and that the "stark choice" was to accept the option or not get any testimony from Mr Trichet. John Downing, 'Lenihan's relatives will not get audience at banking inquiry', *Irish Independent*, (Dublin, May 4 2015).

<sup>78</sup> Testimony of Jean Claude Trichet before the Joint Committee of inquiry into the Banking Crisis, April 30 2015. Available at: <https://inquiries.oireachtas.ie/banking/hearings/jean-claude-trichet-iiea-event-not-an-official-inquiry-hearing/> accessed June 26 2016.

<sup>79</sup> *ibid.*

<sup>80</sup> Mario Draghi, President of the European Central Bank, *Follow Up Letter from Mario Draghi to Marian Harkin MEP*, 23 July 2015. Available at: [https://www.ecb.europa.eu/pub/pdf/other/150729letter\\_harkin.en.pdf?5d342d415e35bbb5aa7d3336baec0d64](https://www.ecb.europa.eu/pub/pdf/other/150729letter_harkin.en.pdf?5d342d415e35bbb5aa7d3336baec0d64) accessed June 26 2016.

<sup>81</sup> *ibid.*

Oireachtas Committee had already displayed extraordinary flexibility around procedures in its treatment of Mr Trichet, and the limited statutory remit for any fact finding against ECB actors seemed to underline that the distinction between “accountability” and “an exchange of views” was dubious. The Committee’s difficult balancing act between pragmatic negotiation and investigatory legitimacy collapsed, damaging public esteem and the exhaustiveness of the evidence base on key issues.

The inquiry’s public standing was further damaged by the controversy which erupted around the potential giving of evidence by David Drumm, the former head of Anglo Irish Bank, who had left Ireland following the collapse of the bank and declared bankruptcy in the United States. Mr Drumm had refused to return to Ireland to answer questions from Gardai regarding Anglo Irish Bank and the State was pursuing his extradition. Mr Drumm contacted the inquiry and indicated his willingness to present evidence by videolink.<sup>82</sup> Following initial indications by some members that they were inclined to accept the offer of video evidence, the Committee ultimately decided against this but committed to admitting his written statement into evidence. This approach was likely due to the need to avoid inequality of arms for those whose reputation could be affected by the testimony, as well as the fear of seeming to provide ‘light touch’ treatment to one of the most prominent actors in the banking crisis. It took a dramatic late intervention by the Director of Public Prosecutions, however, to prevent the publication of Mr Drumm’s written statement. The Director warned that its contents could “reasonably be expected to prejudice” pending criminal proceedings against members of Anglo Irish Bank, resulting in a hasty retreat by the Joint Committee.<sup>83</sup>

The Trichet and Drumm controversies seem to underline that the committee was relying upon accessing new information streams to stake a clear identity for the investigation. They should, however, also be set in the overall context of inquiry which had heard from 128 witnesses over 49 days, drawing together over 50,000 documents.

Beyond these two specific instances, however, the Joint Committee did, in its final report, reflect critically upon the practical ability of parliamentarians to carry out the

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<sup>82</sup> Mark Regan, ‘Ex Anglo’s David Drumm Offers to Provide Evidence via Videolink’, *Irish Independent* (Dublin, 24 July 2015). Media leaks indicated that the statement would contradict evidence by former Taoiseach, Brian Cowen.

<sup>83</sup> This advice is outlined the Committee’s final report n 56, Volume 2, paras 5.19-5.26.

investigative phase of the inquiries. It also decried the legalism surrounding the investigatory process, leading to the recommendation that:

“The 2013 Act should be amended to create a specific type of “inquire, record, report” inquiry, with power to make findings in relation to systems, practices, procedures or policy only. While this type of inquiry would have no power to make findings of fact in relation to a person who was not a member of the Houses, it would be subject to less onerous obligations in terms of fair procedures and consultation as a result.”<sup>84</sup>

Confusingly, this recommendation appears predicated upon a bright line separation between systemic findings and findings of fact impacting on individuals’ reputation. Yet, the Supreme Court ruling itself implies that the two are entangled (hence its recognition of the concept of implied blame). Those in management positions and relevant institutions can thus argue that *re Haughey* entitlements are still triggered.<sup>85</sup>

The perception that procedural fairness obligations obstruct the efficacy of public inquiries needs to be engaged with on substantive policy grounds. The public comments made by former members of the Public Accounts Committee that the *Kerins*<sup>86</sup> decision was a vindication of their “robust” questioning, suggests that many politicians view procedural requirements as a legal imposition rather than a positive scaffold for committee findings.<sup>87</sup> Officials working within the Oireachtas argued that the Kerins affair illustrated the need for some self-regulation through the amendment of the Dail’s standing orders, but this was dismissed by politicians who viewed as a vindication of their freedom of action. There is a danger that undervaluing the need to embed fairness into Committee behaviour, whether in voluntary participation or the more formalised *re Haughey* contexts, could reinforce existing public mistrust of the politician as an investigator.

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<sup>84</sup> *ibid.*, para 4.18.

<sup>85</sup> *ibid.*, para 4.12.

<sup>86</sup> Above n 48.

<sup>87</sup> F Kelly, “Rehab investigation became ‘battle between egos’”. *Irish Times*, 31 January 2017.

We believe it would be more beneficial to consider how non-legal measures could moderate the burden of *re Haughey*, not least the careful design of terms of reference so that they do not duplicate prior inquiries and are focused in their subject matter and objectives. A Joint Committee recommendation of such a character was for the number of members of a Committee conducting an inquiry to be capped at seven.<sup>88</sup> While this could adversely affect the diversity of membership at a time when independents and smaller parties are at historic levels of electoral support, it would concentrate public visibility upon those parliamentarians participating and avoid fragmentary or duplicative questioning.

Another recommendation in this sphere was that a preliminary investigation phase be conducted “by expert staff of the Committee” through “appropriate delegation of powers to staff, where constitutionally permissible”.<sup>89</sup> We would argue, however, that the work involved in transitioning to public hearings, and ensuring that all relevant matters are assimilated into the Committee’s reasoning is unlikely to lessen the administrative burden involved in preparing a final report. The recommendation also fails to consider the interaction of parliamentary reviews with statutory inquiries. Where an investigation is on the scale of the banking inquiry, a hybrid model should be adopted, with the Commission of Investigation conducting the fact finding phase, followed by a more focused parliamentary inquiry. The role of this political review would be to provide a public airing of the matters involved and to develop regulatory and legislative reforms. This demarcation would ensure that the investigatory burden falls upon the more forensic institution – the Commission - while the parliamentary review is reserved for transparency, public accounting and critically, policy reform. The need for this division of labour is further illustrated by flaws in the substantive findings, and public impact of, the Banking Inquiry’s Final Report.

#### **The Banking Inquiry Final Report: Straitjacketed Findings or Distinct Value Add?**

Finally, we evaluate how the shadow of *Ardagh* shaped the substance of the Committee’s final’s Report. The inquire, record and report model, coupled with the undeveloped nature of the Committee’s recommendations, frustrated the Inquiry’s efforts create a distinctive analysis of the causes of Ireland’s regulatory failures.

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<sup>88</sup> Ibid, para 6.55.

<sup>89</sup> Ibid, para 6.34.

Nevertheless, the Joint Committee did extend the existing public record in a number of respects, with the political ownership of the process and the expressive function of public hearings adding additional benefits to existing investigations.

Efforts to assess the lessons learned from the substance of the final report must first recognise the practical difficulties which the Committee faced. The approaching general election and the burdensome nature of the terms of reference produced delays and conflicts, with time pressures and the density of material nearly causing the Committee to fail to agree upon a final draft. The initial draft of the report was described as “completely rushed” with elements of it termed “weak” and “confusing”, causing several members to publicly doubt whether one would be produced at all.<sup>90</sup> Significant portions of this initial seven hundred and fifty page draft were ultimately discarded. The inquiry formed a “finalisation team” consisting of two committee members, two parliamentary assistants, a legal expert and two members of the inquiry’s administrative staff. The tight timeline was also contributed to by the legislative requirement that the report be sent to those directly affected fourteen days before its publication. In the final version, a chairman’s introduction had to replace the intended executive summary, which could not be completed due to the time constraints.

The consultation period on the final report produced an exchange illustrating the negative interaction between the complex legal restraints and the compressed timeline faced by the Committee. Two of the country’s most prominent property developers requested alterations, threatening legal action if the Committee refused.<sup>91</sup> They argued that the report as written accepted the evidence of the National Asset Management Agency (NAMA) without question and requested an opportunity to contest the findings. The Committee agreed to remove its references to a letter from NAMA which had rejected the developers’ claims.<sup>92</sup> It also removed a finding alleging that the relationship between bankers and developers was too informal. This move likely pointed towards the chilling effects of the legal and time constraints it was operating under, as the Committee had previously considered the requests and refused to change

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<sup>90</sup> Niall O’Connor & Philip Ryan, ‘Banking Inquiry in crisis over “weak and confusing” draft report’, *Irish Independent*, (Dublin, 19 October 2015).

<sup>91</sup> Sarah Bardon, ‘Developers Threaten Legal Action over Banking Inquiry Report’, *Irish Times*, (Dublin, 1 January 2016).

<sup>92</sup> The correspondence remained on the Inquiry’s website, with a footnote noting the objections of the two developers

the report. Other findings relating the standard of property valuations reflected the Committee's inability to arbitrate contested evidence.<sup>93</sup>

In the event two members of the eleven person committee refused to sign the report.<sup>94</sup> One member who did sign commented that it should be understood as “an account of the evidence from the public hearings and written testimony”, describing his signing as “the signing a body of work. Nobody could be entirely happy with it. I am certainly not”.<sup>95</sup> Pearse Doherty T.D., argued that the report lacked analysis, and that “it was never the intention that you would take verbatim what people said before the inquiry”.<sup>96</sup> This latter comment illustrates that an inquire, record, report model can, at worst, be viewed as the construction of a narrative of least resistance.

We would argue that the character of the report is more layered, but its contents were adversely affected by the sheer breadth of the terms of reference and the reality that, with the Oireachtas about to dissolve, any litigation would frustrate publication. Reflecting a desire to avoid individualised findings the Report tended towards institutional or system level statements. Some of the most prominent findings amounted to opaque statements regarding institutional failures. For instance, the report's treatment of the Financial Regulator, commonly accepted as the most strongly criticised entity in it, provided limited analysis of its conduct:

“Breaches of prudential limits and requirements...were identified by the Financial Regulator. However, they relied on moral suasion and protracted correspondence, (sometimes for as long a decade) rather than an escalation in the level of formal enforcement action. In the years 2000-2008, there was no enforcement action taken against any institution for prudential breaches. This reflected an aspect of regulatory capture.”<sup>97</sup>

This final sentence illustrates the dangers of the overly abstract drafting which may emerge in the post *Ardagh* climate. The concept of “regulatory capture” is not explained

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<sup>93</sup> The findings that property valuations across the property sector were poorly conducted as the boom progressed was qualified immediately by the report noting that “a number of developers gave evidence that they continued to rely upon professional valuations”.

<sup>94</sup> These were Joe Higgins T.D. of the Socialist Party and Pearse Doherty T.D. of Sinn Féin.

<sup>95</sup> Senator Marc MacSharry, (n 2).

<sup>96</sup> Sarah Bardon, ‘Banking Report “a disservice to the Irish People”’, *Irish Times*, (Dublin, 28 January 2016).

<sup>97</sup> n 56, Volume 1, 11.

or referenced elsewhere in the final report – and is furthermore obscured by finding that only “an aspect” of it was at play. The use of the term “regulatory capture” is in essence the allegation that an agency initially formed to act in the public interest has instead begun to advance the commercial or political concerns of dominant special interest groups. This certainly does not lack aggression, but the power of the allegation is negated by the lack of any further explanation or reflection upon the underlying causes of such capture. The finding, unless carefully developed, could be challenged as impugning the motivations of senior management without accompanying findings of fact regarding the nature of motivations. Such a finding, in reviewing the execution of a legislative mandate, is also far more secure if made in the context of a section 8 inquiry.

In terms of the attribution of blame or statements of overarching managerial failure, the Committee generally elected to provide basic statements of corporate leadership:

“Bank failure...was the responsibility of senior executive management and the boards of directors”<sup>98</sup>

“Government, including individual Ministers, made policy decisions...and ultimately accepted overall responsibility for decisions made”<sup>99</sup>

The committee did not move to probe the source of these failings. Despite the scope offered by the *Ardagh* ruling, and the utility for future regulatory interventions of determining the role which internal leadership and individual agency played, the Committee eschewed any findings on individuals’ role in institutional failure. For instance the Report noted that while Financial Stability Reports did “identify key risks”, the overall assessment and tone of the reports were too reassuring and did not warn of systemic risks to the banking sector or structural imbalances in the economy.<sup>100</sup> This system or policy finding is significant in the manner in which it identifies the particular approach to drafting which led to a failure to attend to the relevant risks. It does not however, reflect upon what caused the reports to be structured in such a manner (e.g lack of knowledge, overconfidence, or office culture).

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<sup>98</sup> *ibid* 67,

<sup>99</sup> *ibid* 195.

<sup>100</sup> *ibid* 10.

Upon publication of the report, most media coverage was devoted to the relatively stern charges it levelled against the European Central Bank. The Committee found that letters from the ECB to Minister Brian Lenihan “threatened” that it would not continue to provide liquidity support for Irish banks were Ireland not to enter a bailout programme and that the withdrawal of support “was used as an explicit threat” to prevent the Government from imposing losses on senior bondholders in March 2011.<sup>101</sup> These findings were not based upon revelations in Committee hearings, but rather upon access to four letters from Jean Claude Trichet, which had been already secured through the European Union ombudsman. This signature finding, could however be viewed as a matter of semantics. What the Committee presented as a “threat”, a charge carrying with it a tone of heavy handedness, was viewed by the ECB, as indicated by Mr Trichet, as simple “advice” on how an independent institution would apply its rules, including its responsibility to protect the Euro.<sup>102</sup> Significantly, there was a further semantic drift in the introduction by the Chairman of the Committee, which held that “undue pressure” had been placed upon Ireland by the ECB.<sup>103</sup> This phrase featured prominently in media coverage, despite not being a formal finding or even featuring in the main body of the Report. Arguably the testimony of Mr Trichet had contested the idea that any “undue” pressure was placed upon Ireland, meaning that the Chairman’s summary could be construed as ultra vires section 7 of the 2013 Act.<sup>104</sup>

Despite the strictures of the inquire, record and report model, the development of recommendations for future reform represented a key opportunity for the Committee to apply an analytical lense. The future oriented elements of any parliamentary investigation provide an opportunity to escape the inevitable politicisation of past actions, which may fragment the unity of the Committee. If the Oireachtas is to argue persuasively, in the courts or to the public, that its investigatory powers are inevitably connected with effective legislative action, inquiry recommendations should be seen as a culmination of the entire process. In this context, the underdeveloped and subsidiary nature of many of the Committee’s recommendations cannot be attributed to legal restrictions.

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<sup>101</sup> *ibid* 17.

<sup>102</sup> n 82.

<sup>103</sup> Chairman’s Summary, n 57, Volume 1, 4.

<sup>104</sup> Which requires that the Committee’s findings be reached only where the relevant facts have not been contested during its hearings.

The Final Report contained thirty one recommendations for reform in total. The chapter on the property sector produced one recommendation – namely that “a detailed and comprehensive property price register should be introduced”.<sup>105</sup> Chapter 10 on “Ireland and the Troika Programme” went unaccompanied by any recommendation. Only one recommendation directly called for new legislation.<sup>106</sup> The disconnect between the inquire, record and report model and legislative action is also underlined by the fact that a quarter of all recommendations call for further legislative reviews by third party actors. On the issue of inadequate parliamentary oversight, which the Committee was well placed to address, it proposed that:

“The Public Service Oversight and Petitions Committee should *review the most recent relevant reviews* undertaken of the Irish parliamentary system and identify, along with an implementation plan, the key reforms necessary to improve accountability and oversight.”<sup>107</sup>

This underlines the sense that the Committee did not, despite its evaluation of past failings and the role given it by its terms of reference, feel best placed to propose legislation. This crowding out of reform measures in the inquire, record and report process further underlines the case for its abandonment.

While the Committee struggled to live up to the challenge to develop “a good and solid view on what to do to avoid something like this another time”,<sup>108</sup> there was evidence of the added value which political ownership of an investigation can bring. This came in the recognition that:

“all the main political parties, whether in opposition or in government, advocated pro-cyclical fiscal policies, including increasing expenditure and reducing taxation, in the years leading up to the crisis”<sup>109</sup>

The measure prescribed to interrupt this pattern of retail politics, was that an Independent Budgetary Office should be established, to provide costings of budgetary

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<sup>105</sup> n 57, Volume 1, 9.

<sup>106</sup> This was the call for “a formal process with clear procedures should be established (“through legislation” for situations “involving exceptional risks” where there are conflicts between advice by the Department of Finance and a proposed action by the Minister. *ibid* 12.

<sup>107</sup> *ibid* 14. Emphasis added.

<sup>108</sup> This challenge was made by Mr Peter Nyberg during his testimony on the first day of the inquiry, n 55.

<sup>109</sup> n 57, Volume 1, 195.

and pre-election proposals of political parties and members of the Oireachtas. The Sub Committee on Dáil Reform has carried this recommendation forward and called for the Office to be fully operational by Spring 2017.<sup>110</sup> This contrasts with institutional reform proposals made by Tribunals which remain outstanding.<sup>111</sup> It must be noted however, that the Joint Committee itself prescribed no mechanism for follow up with its recommendations, and debate upon the report was conducted in the imminent shadow of the dissolution of the Oireachtas of which the Committee were agents. In such a context, drawing direct lines of causation between the report and future legislative action is a fraught exercise.

Our analysis of the Banking Inquiry experience, does not support the idea that legal regulation is an insurmountable barrier to successful parliamentary inquiries. Greater efforts must be made to design inquiries which are deliverable, and focussed upon impact. The parliamentary inquiry, as an institution, must be clearly sited on the most solid ground: the review and introduction of potential legislation. Careful and unrushed drafting of final reports, which press the ambiguities at the core of the *Ardagh* ruling, seem key to ensuring that the identification of institutional flaws are accompanied by sufficient analysis of underlying causes.

## Conclusion

The Joint Committee's Report expressed its firm belief that "there is a clear place for, and value to be gained from, parliamentary inquiries into significant issues of public policy."<sup>112</sup> In this article we have attempted to reflect upon how such a place can most effectively be carved out. Rather than chasing the unlikely prospect of a second referendum, we argue the 2013 Act should be reformed, with the inquire, record and report model being abandoned. This move would underline the need for inquiries to be focussed upon regulatory appraisal alongside the development of reforms, and not merely the recording of narrative of least resistance.

Legal interventions should not, however, be the main focus of reform efforts. In many respects, future developments must begin with a recognition that the two 'hard cases'

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<sup>110</sup> *ibid* 12.

<sup>111</sup> This contrasts with the Mahon Report's recommendation for the creation of an Independent Planning Regulator which has not yet been implemented. Mahon, n 18, at 2545.

<sup>112</sup> n 57, Volume 2, 6.

of *Ardagh v Maguire* and the Banking inquiry should not define the future of the mechanism. In particular, it is important that the Oireachtas understand the very specific context from which *Ardagh* arose, and the ambiguities which feature in that judgment. The prevailing dynamics support our broader thesis that Irish constitutional order should engage with greater depth with how government and the Oireachtas can proactively integrate constitutional values into their actions.

The perceived burdens imposed by *re Haughey or Ardagh* can be counterbalanced by creating terms of reference which match the qualities of parliamentary investigation with appropriate subject matters. Yet in this crucial area, the inquiries landscape has suffered from vagueness and generality, most often produced by a lack of effective targeting or clearly stated yardsticks for evaluating conduct. The former insufficiency relates to the breadth and scope of the inquiry – the banking inquiry underlines the importance of identifying the “value add” of an inquiry where earlier investigations have occurred. The latter insufficiency can be alleviated by a first principles consideration of the *nature* of the inquiry – what is the yardstick against which the events being discussed will be evaluated? – examples could include professional standards, political judgment, probity, economic soundness. While parliamentary inquiries are often rhetorically dismissed as “political witchhunts”, their legitimacy and efficacy is often obstructed by the under development of pre-existing standards of professional conduct or best practice principles regarding regulatory or political conduct. The impact of an underdeveloped administrative state on the functioning of inquiries was evident in the Interim Report of the Fennelly Commission of Investigation, where an analysis of the circumstances surrounding the resignation of the Garda Commissioner floundered due to the standard of record-keeping in government:

“This Commission is, of course, powerless in the matter. It is left in the position of having to reconcile conflicting sworn evidence from responsible ministers and officials at the highest level in the State. It can only register its astonishment at a system of administration which apparently quite deliberately adopts a practice of not keeping any record of a meeting where an important decision is made.”<sup>113</sup>

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<sup>113</sup> Commission of Investigation (Certain Matters relative to An Garda Síochána and other persons), *Interim Report of the Fennelly Commission* (Dublin: The Stationary Office, 2015) at para 32.3.

Commented [f1]: And here Ardagh

Rather than viewing Oireachtas inquiries in isolation therefore, government must ensure that prevailing policy development and administrative processes are of a standard to not merely withstand, but actively *facilitate*, a later parliamentary inquiry.

Finally, the interaction between Oireachtas inquiries and Commissions of Investigation should receive renewed examination. The reality that both these mechanisms represent only a partial response to an overall accountability challenge means that legal scholars should reflect upon the division of labour between them. The differing expertise offered by the two institutions could be facilitated by structural reform: by creating a staged inquiry process. While mapping the detail of such an arrangement is beyond the scope of this article, we believe our analysis highlights its potential. Such an approach was supported by the UK Public Administration Select Committee in 2008, when it proposed the creation of parliamentary commissions of inquiry.<sup>114</sup> In such a model, the parliamentary committee would facilitate and approve the creation of the inquiry's terms of reference – with the core goal of fostering a political constituency to promote its effectiveness. The independent inquiry stage can then be targeted at forensic fact finding, fair process and the application of expertise. Upon the delivery of a final report, the parliamentary inquiry could then be tasked with holding hearings to ensure a public accounting. In addition, it would administer the recommendation or implementation stages, through its greater ability to explore the systemic issues, enhancing policy credibility and political buy in for reforms.

The struggles faced by Oireachtas inquiries signal broader imbalances in Irish constitutionalism. There is a need to reflect on how to practically deliver the relationship of oversight and accountability immanent in the constitutional relationship between legislature and the executive. This underdevelopment is often reflective of the danger, identified by Bovens, that accountability, as an analytical concept of public law, often resembles “a garbage can filled with good intentions, loosely defined concepts and vague images of good governance”.<sup>115</sup> The past experiences and efforts of Oireachtas committees, whether successful or not, provide key insight into the

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<sup>114</sup> Public Administration Select Committee, *Parliamentary Commissions of Inquiry*, HoC 9<sup>th</sup> Report of session 2007-8 HC 473.

<sup>115</sup> Mark Bovens, “The Concept of Public Accountability” in Ewan Ferlie, Laurence E. Lynn Jr. and Christopher Pollitt (eds.), *The Oxford Handbook of Public Management*, (Oxford: Oxford University Press, 2005) at 184.

approaches to design and targeting which can give the inevitably contextual and relational concept of accountability a fuller meaning.