

An Coimisiún Imscrúdúcháin
(CORPARÁID na hÉIREANN um
RÉITEACH BAINC)



Commission of Investigation
(IRISH BANK RESOLUTION
CORPORATION)

The Hon. Mr. Justice Brian Cregan
Sole Member

FINAL REPORT

25 May 2023

Submitted to An Taoiseach pursuant to section 32
of the
Commissions of Investigation Act, 2004

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INTRODUCTION

1. This is the Final Report of the IBRC Commission. Under Section 43(1) of the Commissions of Investigation Act, 2004, the Commission is dissolved on the submission of this Final Report to An Taoiseach.
2. This Final Report deals with two matters. These are:
 - (i) the costs of the Commission; and
 - (ii) some suggestions for reform of the commission of investigation process.

COSTS

3. This Report sets out the total costs of the Commission from its establishment to the date of this Final Report. It includes (a) all the Commission's own costs; and (b) the legal costs of all the witnesses before the Commission.
 - (i) The Commission's own costs

The Commission's own costs amount to (approximately) €12,566,000 (including VAT). (There is a small amount of final costs yet to be paid not included in this total.)

The breakdown of these costs is set out in the table below.

	€
Salaries	2,125,167
Senior/Junior Counsel	4,972,175
Advisory costs	1,527,798
Stenography	962,914
Premises	1,189,016
Hearing room	63,132
Office equipment	328,450
Postal/telecom costs	84,599
IT	756,957
Incidentals (including file storage)	296,450
Travel/subsistence	7,670
Judicial review costs (approx.)	250,000

As set out in the Commission's Sixth and Seventh Interim Reports, judicial review proceedings were taken against the Commission by companies owned and controlled by Mr Denis O'Brien. Those proceedings were settled. The €250,000 judicial review costs in the table above relate to those proceedings

(ii) Third party costs

The Commission received claims for legal costs from various witnesses who had given evidence to it. It appointed the State Claims Agency to assess those claims to ensure that they were in accordance with the Guidelines on Legal Costs recoverable by each such witness. The State Claims Agency reviewed each of the claims for legal costs and, where necessary, met with the legal advisers to those witnesses to consider their claims for costs. The State Claims Agency then made recommendations to the Commission about the appropriate amount of costs which were recoverable by those witnesses under the Guidelines. The Sole Member, having considered those recommendations, then made directions for the payment of those costs by the relevant Minister.

The amount of third party (i.e. witnesses') costs which the Commission has directed to be paid is €4,896,000 approximately (exclusive of VAT).

4. Thus, the total costs of the Commission – the aggregate of the Commission's own costs and these third party costs – amount to (approximately) €17.5 million. This includes VAT in relation to the Commission's own costs. The Commission does not have precise details of the amount of that VAT. However, it estimates it to be at least €1,500,000. Thus, the total costs of the Commission are €16 million approximately (excluding VAT).

SUGGESTIONS FOR REFORM OF THE COMMISSION PROCESS

5. The Commission notes the concerns expressed by members of the Oireachtas in the Dáil and Seanad debates (on the Commission's Report on Siteserv Plc) about the considerable length of time which it took the Commission to complete its Report. The Commission shares these concerns. It is a matter of concern that an investigation which the Oireachtas stated to be of "urgent public importance" should take a period of seven years to be completed. (The Commission has already set out in its previous

reports some of the reasons for this (including the need for new legislation which delayed the Commission by over a year) and it is not necessary to repeat these reasons here.)

6. In the considered view of the Commission, it is now impossible to conduct a commission of investigation in the modern era (involving, as most do, hundreds of thousands of documents) into a matter of urgent public importance (i) in an expeditious manner whilst (ii) complying with the onerous requirements of fair procedures laid down by the courts, and (iii) complying with the requirements of the Commissions of Investigation Act, 2004.
7. The Commission is of the view that this is a highly undesirable state of affairs. It frustrates the rights of the people expressed through the Oireachtas to investigate matters of urgent public importance. The Commission is of the view that when the Oireachtas sets up a commission to investigate a matter of significant public concern, it should be able to report within a reasonable period of time (e.g. within two years).
8. If the Oireachtas wishes to ensure that commissions of investigation complete their work within a reasonable period of time (e.g. two years) then it will be necessary to reform the process to enable this to happen. This will require amending legislation. It will also require that the amending legislation and the new approach is approved by the courts in any future challenge. There is a greater chance of such court approval if there is no significant erosion of the rights to fair procedures enjoyed by witnesses appearing before a commission.
9. The Commission is of the view that, in light of its experience in investigating the Siteserv transaction, it might be of assistance to the Government, the Oireachtas, and to the wider public, to set out some suggestions for the reform of the commissions of investigation process.
10. Accordingly, this Report considers:
 - (i) the vital importance of clear and focussed terms of reference in promoting efficient and timely investigations;
 - (ii) the impact on investigations of constitutional requirements of fair procedures;

- (iii) a suggestion for a new approach to the conduct of investigations;
- (iv) suggested reforms to the 2004 Act;
- (v) the establishment of a permanent commission of investigations body; and
- (vi) the use of anonymous sources in future commissions.

TERMS OF REFERENCE

11. The first and most critical issue in the establishment of any commission of investigation is the formulation of its terms of reference. It is vital that such terms of reference are clear and focussed.
12. The IBRC Commission's terms of reference required it to investigate the following (in relation to the Siteserv transaction):
 - (i) the processes, procedures and controls which were operated by IBRC, to ascertain whether the appropriate internal IBRC governance procedures and controls were adhered to and whether they were fit for purpose;
 - (ii) whether there was *prima facie* evidence of material deficiencies in the performance of their functions by those acting on behalf of IBRC, including the IBRC board, directors, management, the staff of its wealth management unit and agents;
 - (iii) whether the Siteserv transaction was not commercially sound in respect of the manner in which it was conducted, the decisions made and the outcome achieved;
 - (iv) whether any unusual share trading in Siteserv shares occurred which would give rise to an inference that inside information was improperly provided to, or used by, any persons; and
 - (v) whether the Minister for Finance or his Department was kept informed where appropriate, and whether he or officials on his behalf took appropriate steps in respect of the information provided to them.

13. In the Siteserv investigation, the inclusion of the term “not commercially sound” in the Commission’s terms of reference added years to the completion of its Report.

14. That is because:

- (i) the meaning of that term was susceptible of different interpretations, both as to its scope and as to the standard to be applied in relation to it; and
- (ii) its practical effect was to require the Commission to investigate the Siteserv transaction not just for its commercial outcome but also for impropriety, wrongdoing and unlawful activity.

15. The Commission’s experience from the Siteserv investigation is that terms of reference that are:

- (i) clear and focussed; and
- (ii) confined to matters of fact

will promote more efficient and expeditious investigations. By contrast, terms of reference that are more broadly based and/or involve significant matters of interpretation will inevitably lead to delays in the completion of investigations.

16. Therefore, the Commission recommends that, in future, proposed terms of reference should be scrutinised by reference to the criteria set out above – in consultation with, either (i) an ad hoc committee consisting of past chairpersons of commissions of investigation or tribunals of inquiry (and/or senior counsel retained by any such commission/tribunal) or (ii) a permanent commission of investigation body (if one is established).

CONSTITUTIONAL JUSTICE AND FAIR PROCEDURES

17. The second critical issue in considering reform of the commission of investigation process is to consider how best to implement the constitutional requirements of fair procedures which have been set out by the Courts in numerous decisions.

18. The starting point for any commission of investigation in relation to the constitutional requirement of fair procedures is the classic statement of principle by O'Dálaigh CJ in *Re Haughey*.¹

19. In the Supreme Court, O'Dálaigh CJ stated:

“In all the circumstances, the minimum protection which the State should afford his client was

(a) that he should be furnished with a copy of the evidence which reflected on his good name;

(b) that he should be allowed to cross-examine by Counsel, his accuser or accusers;

(c) that he should be allowed to give rebutting evidence; and

(d) that he should be permitted to address, again by Counsel, the committee in his own defence”.

20. This meant, in effect, that all relevant witnesses attending before the IBRC Commission:

(i) had to be furnished with a copy of all the evidence about the Siteserv transaction, because any part of it might reflect on their good names;

(ii) had to be allowed to cross-examine their “*accusers*” (i.e. any persons who gave evidence adverse to them);

(iii) had to be allowed to give rebutting evidence; and

(iv) had to be permitted to address the Commission by counsel.

21. This statement of procedural rights and constitutional justice set out in *Re Haughey* has been re-stated and approved by the courts in many cases since then and it represents settled law in this jurisdiction. However, the application of these principles

¹ [1971] IR 217

to commissions of investigation in recent times has been very problematic – and was for the IBRC Commission.

22. This is particularly the case given the enormous proliferation of documentation available in investigations/inquiries – as indeed is also the case in litigation before the courts – since the time of the judgment in *Re Haughey* in 1971. For example, the IBRC Commission received hundreds of thousands of documents in discovery and circulated approximately 15,000 pages of documents (59 lever arch files) to relevant witnesses, who then had to review and assimilate them before they prepared their witness statements.

23. Moreover, the requirement set out in *Re Haughey* that witnesses should be furnished with a copy of the evidence which reflected on their good names has been expanded by the provisions of the Commissions of Investigation Act, 2004.

24. Section 12(1) of the 2004 Act provides that:

“A Commission shall disclose to a person –

(a) who is directed to attend as a witness before the Commission;

(b) who attends voluntarily to give evidence to the Commission; or

(c) about whom evidence is given to the Commission,

the substance of any evidence in its possession that, in its opinion, the person should be aware of for the purposes of the evidence that person may give or has given to the Commission”.

25. That is a considerable broadening of the requirement in *Re Haughey*.

26. Section 12(3) of the 2004 Act provides that:

“A Commission shall give a person to whom it discloses the substance of evidence under sub-section (1) an opportunity to comment by written or oral submissions on the evidence”.

27. This meant not only that the Commission had to furnish to all relevant parties the 15,000 pages of documents referred to above, but also that, when the Commission was

taking oral evidence from a particular witness, it had to put to that witness all the evidence given by all other witnesses as required by *Re Haughey* or by the 2004 Act.

28. Unsurprisingly, the process of taking evidence from witnesses in accordance with these requirements became very laborious indeed and contributed to the 250 days it took for the Commission to hear evidence from all relevant witnesses.
29. Thus, as a result of the constitutional requirements of fair procedures set out in *Re Haughey* (and other cases) as well as of the provisions of the 2004 Act, a considerable array of rights in relation to fair procedures has been granted to witnesses whose reputations may or may not be damaged by findings of a commission. Indeed, the full panoply of rights in civil litigation are afforded to persons who are only witnesses as to fact before a commission.
30. As Charleton J. stated in *Menolly Homes v Appeal Commissioners*:

*“The procedures of civil plenary hearings, as imported to tribunals of enquiry ... have led to lengthy, contentious and burdensome hearings. They involve the distribution of sometimes hundreds of thousands of documents to multiple parties at potential risk of being adversely commented upon as to their reputation, cross-examinations that may amount almost to interrogations ... and the over-complication of issues whereby relevance is argued to be the most elastic of concepts ... the result is an almost impossible burden borne by the tribunal body which is supposed, of its nature, to be investigative as well as adjudicatory”.*²

31. The Commission agrees with these comments.
32. The Commission is of the view that a new approach has to be considered to these requirements of fair procedures so that commissions of investigation can proceed more quickly. One suggested new approach is set out below.

² [2010] IEHC 49

A NEW APPROACH

33. A new approach to the conduct of future commissions of investigation might be as follows:
- (i) as described above, clear and focussed terms of reference are settled;
 - (ii) based on those terms of reference, the commission issues discovery orders and obtains documents on discovery;
 - (iii) the commission circulates discovery documents to witnesses as it deems necessary;
 - (iv) the commission obtains witness statements from relevant witnesses; these are circulated to other witnesses as appropriate;
 - (v) the commission takes evidence from relevant witnesses in private on deposition (rather than in oral hearings with all parties present);
 - (vi) these depositions could be taken by senior counsel to the commission and/or by the sole member of the commission. This would speed up the gathering of evidence, not least because it would allow simultaneous hearings of evidence on deposition. (As matters stand however, all evidence can be taken only by the sole member as he/she must administer the oath for that purpose);
 - (vii) no other witnesses or their legal advisers are present at such depositions, but the transcripts are circulated as necessary;
 - (viii) the commission prepares a draft report of its findings and circulates it to all the relevant parties;
 - (ix) those parties (and their lawyers) can then:
 - (a) make written submissions to the commission on the draft report;
 - (b) give further evidence in response to specific issues on matters in the draft report; and

- (c) request permission to cross-examine witnesses who have given evidence adverse to their own clients;
 - (x) the commission schedules further oral hearings to permit such cross-examination/rebuttal evidence;
 - (xi) if it so determines, the commission can issue a further draft report to all relevant parties following such hearings/evidence; and
 - (xii) the commission finalises its draft report and submits it to the Government.
34. The Commission is of the view that all of the four requirements of constitutional justice set out in *Re Haughey* would be afforded to all relevant parties by such a procedure – albeit in a different, more streamlined, manner.
35. The Commission is of the view that the adoption of such a procedure would require legislative change.

SUGGESTED REFORM OF THE 2004 ACT

36. The operation of the 2004 Act was subjected to considerable scrutiny during the course of the Siteserv investigation. In many ways, the Act stood up to this scrutiny and could be regarded as a good template to carry out investigations – subject to the reservations set out in this Report.
37. The Commission would, however, suggest a number of reforms to the 2004 Act as set out below.
- (i) An alternative approach

The Commission would recommend amending the 2004 Act to allow the alternative approach to the conduct of investigations described above.
 - (ii) Confidentiality Claims

The Oireachtas passed the Commissions of Investigation Act 2016 specifically to allow the IBRC Commission to deal with the problem of assertions of confidentiality over documentation needed by the Commission for its work and to allow the Commission to admit such documents into evidence.

However, it is highly likely that future commissions will face a similar problem and therefore, the Commission would recommend that the 2004 Act be amended so that these provisions of the 2016 Act relating to claims of confidentiality apply to all commissions.

(iii) Circulation of draft Report

The Commission would also recommend that Section 8 of the Commissions of Investigation (IBRC) Act, 2016 (dealing with circulation of draft reports only to persons in respect of whom adverse findings have been made) should apply to all commissions. It is unduly burdensome and unnecessary to circulate a draft report to every single person mentioned in it.

(iv) Review of Legal Costs Guidelines

The Commission would emphasise that the establishment of a commission can create enormous burdens on private individuals. These burdens include having to comply with discovery requests, reading significant amounts of documents, preparing witness statements, following the evidence of other witnesses, giving evidence and making legal submissions. This involves an enormous commitment of time and energy. Many witnesses, understandably, retained legal advisers. However, the guidelines of legal costs for such witnesses do not permit instruction fees, brief fees, fees for legal submissions or other significant elements of legal costs to be paid. The Commission is of the view that the current guidelines on legal costs are inadequate and operate an unfairness on parties who retained legal advisers but who find that a significant portion of their legal costs will not be paid, leaving such individuals to pay the balance of these legal costs themselves. The Commission would recommend that these Legal Costs Guidelines should be reviewed.

(v) Costs

The Commission would also recommend an amendment to the legislation to allow a commission make directions about the payment of legal costs on a regular basis in the course of its investigation (e.g. once a year). The Commission is of the view that it is unfair on witnesses to have to wait until

the conclusion of the commission to receive payment in respect of their legal costs.

THE NEED FOR A PERMANENT COMMISSION OF INVESTIGATION

38. The Commission is of the view that the Oireachtas should establish a permanent Commission of Investigation body.
39. This matter was considered by the Law Reform Commission in its report on Public Inquiries, including Tribunals of Inquiry (LRC 73-2005) dated 24 May 2005. As this was only one year after the Commissions of Investigation Act, 2004, had passed, it is clear that the Law Reform Commission was not in a position at that time to fully evaluate how commissions of investigation would operate. The Law Reform Commission concluded that there was no need for a permanent body but did recommend that a “central enquiries office” be established to collect and manage a database of records and information in respect of public enquiries. The IBRC Commission is of the view that, almost twenty years after the passage of the Commissions of Investigation Act, 2004, it is time to revisit that finding.
40. It is beyond the scope of the IBRC Commission to make recommendations about how best to structure and/or staff a proposed permanent Commission of Investigation. That is a matter which requires further consideration.
41. The IBRC Commission would however, make some general remarks as follows:
 - (i) the Commission would recommend that the permanent Commission of Investigation body should be chaired by a Judge of the Superior Courts (or a retired Judge), ideally with experience in previously conducting a tribunal of inquiry or commission of investigation. This need only be a part-time role or, indeed, a role which only requires work on an *ad hoc* basis as the need for any new commissions arises;
 - (ii) such a permanent Commission of Investigation would also need to appoint a solicitor from the Chief State Solicitor’s Office – again, ideally one with previous experience in working for a tribunal of inquiry or commission of investigation. Such a person could be on secondment, either part-time or full-

time or on an “*as needed*” basis to the permanent Commission of Investigation; and

(iii) the permanent Commission of Investigation should also consider the appointment – if necessary on a part-time or “*as needed*” basis – of Senior and Junior Counsel. Again, these persons should have had experience in acting for a tribunal of inquiry or commission of investigation.

42. Previous commissions have now had many years experience of the difficult and intricate task of conducting a commission of investigation in accordance with the complex provisions of the Commissions of Investigation Act, 2004 and all of the requirements of constitutional justice. All this knowledge and expertise, which has been paid for at considerable expense by the State and the Irish taxpayer, is effectively lost as each commission finishes its work.
43. It would be far more advantageous to the Oireachtas, and to the Irish taxpayer, if there were a panel of lawyers who have gained experience in the workings of tribunals/commissions and who would be in a position to advise this permanent Commission of Investigation. Their familiarity with the relevant legislation and case law would increase the speed of such a Commission of Investigation.
44. There would still be a need for the appointment of a second (or third) Member of this permanent Commission of Investigation, if more than one investigation were proceeding at the same time – or if the circumstances of any investigation so required. However, if there were a panel of lawyers readily available, then such a Commission would be in a position to progress its investigation more quickly.
45. In addition, there could also be cost savings on infrastructure if a permanent commission body were established. The IBRC Commission had to set up its own dedicated hearing room for the hearing of evidence. The cost of fitting out this hearing room (with related IT costs) was over €63,000. This is presumably a cost which is replicated across various other commissions. This money is now essentially wasted as the hearing room infrastructure used by the IBRC Commission has now been dismantled.

46. The Commission recommends that some permanent offices be found for future commissions of investigation and that a permanent hearing room be fitted out and available to them if and when required.

ANONYMOUS SOURCES

47. One of the more difficult issues faced by the IBRC Commission arose from the fact that some TDs received documentary evidence from anonymous sources. Those TDs forwarded such documents to the Commission; however, the identities of the providers of the documents to those TDs were not revealed to the Commission. Those TDs, as was their legal right, declined to give evidence to the Commission and declined to disclose the identities of their sources.
48. The Commission was not in a position to establish the identities of these anonymous sources.
49. In many cases, the Commission established that the allegations made by these sources were not true or were not true in substance, although some may have been partially factually accurate.
50. The anonymous nature of what were, in large part, accusations against different witnesses before the Commission raised real difficulties. It hindered the Commission's ability to establish the veracity (or otherwise) of the information provided by those anonymous sources. It also risked undermining the constitutional protections of these witnesses set out in *Re Haughey* – specifically, their ability to cross-examine their accuser(s).
51. For these reasons, the Commission is of the view that the Oireachtas should be very cautious about establishing any future commission or tribunal in reliance, or in substantial reliance, on information from anonymous sources who are not identified to the relevant commission or tribunal.

CONCLUSION

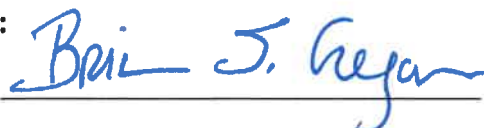
52. It is clear that, on the one part, the requirements of the Oireachtas for commissions of investigation to conduct urgent and speedy investigations into matters of significant public concern, and, on the other, the requirements of constitutional justice and fair

procedures under Irish law, are difficult to reconcile. This Report sets out above some suggestions as to how such a balance might be addressed in future.

53. In summary, the Commission recommends:

- (i) enhanced scrutiny of proposed terms of reference, with a view to their being clear and focussed, and confined to matters of fact;
- (ii) a new approach to commissions of investigation and reform of the 2004 Act, as described above in this Report, in order to promote more expeditious investigations; and
- (iii) the establishment of a permanent Commission of Investigation with the resources needed for commissions of investigation – covering legal expertise, operational matters (such as IT and procurement) and premises.

Signed:



The Hon. Mr. Justice Brian Cregan

25 May 2023