‘INQUIRING, RECORDING AND REPORTING’: CAN THE BANKING INQUIRY DELIVER PRACTICAL REFORMS OF OIREACHTAS OVERSIGHT OF GOVERNMENT?

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Dear Editor,

In the aftermath of the banking crisis the question of how we develop effective oversight systems for our administrative state stands as an essential, overarching, and yet largely unresolved question. While the issue is posed as a single question, in fact it is a series of questions which require critical examination of the many diverse parts of our public sector and reflect the multiple methods of delivering administrative justice – whether through the operation of judicial review in the High Court or complaints to the Ombudsman. However, I wish to focus in this letter on a central and undervalued accountability mechanism in the Irish state, that of the Oireachtas.

Article 28.4.1° of the Constitution clearly acknowledges the role of the Oireachtas in stating that the “Government shall be responsible to Dáil Éireann”. This reflects the generally accepted ideal that administrative decision-making at central level should be subject to Parliamentary oversight. However, in practice the Oireachtas has been inadequate in this regard. That weakness flows in part from a failure within the Constitution to support this fundamental accountability role with clear provisions setting out the machinery by which is can be translated into practice.

Further problems flow from the internal culture of the Oireachtas, not least the dominance of party politics and the related control of the whip system. Party loyalty is not peculiar to our

jurisdiction but is a significant aspect of how our Parliament works. TDs are highly likely to follow the party line for fear of expulsion from their party and the belief that this is ultimately fatal to their chances of future re-election. Research undertaken by Professor Farrell and colleagues at UCD found only 54 examples of TDs having lost the whip after rebelling against their party in a thirty year period — 3.3% of TDs over that period. The consequence of this party discipline is that Government TDs will naturally seek to support their Government while opposition TDs will generally seek to score political points against the Government. In this environment, scrutiny of the Government and its work becomes a more marginalised task prioritised when it coincides with these other strategic interests, particularly the opportunity to undermine an opposition party.

Criticism of the role played by the Oireachtas both pre and post the banking crisis as an oversight mechanism is therefore widespread, but perhaps most starkly demonstrated by the recent attitudes towards the Oireachtas Inquiries referendum in 2011. A commitment to strengthen Parliamentary oversight had been made by the Fine Gael/Labour Government when they took office and included the proposed 30th amendment to the Constitution designed to broaden the inquiry powers of Oireachtas Committees. That change should have been a relatively straightforward one. However, it was rapidly destabilised by poor drafting which seemed to deny the court a supervisory role over such inquiries, particularly on the basis of constitutional justice and a right to reputation. Ultimately the amendment was rejected not because of a lack of public desire for effective political reform, but rather a lack of trust in politicians and the Oireachtas apparatus to effectively implement reforms particularly those that appear to give extensive power to politicians.

The loss of the referendum in 2011 forced the Government to bring forward changes at a legislative level in order to run the banking inquiry through an Oireachtas Committee rather than opting for an external accountability tribunal of inquiry mechanism. The Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013 seeks to better facilitate committee inquiries within the legal context set out by the Supreme Court in *Maguire v Ardagh* [2002] 1 IR 385 which had concluded that the powers of the Oireachtas to engage in inquiries were limited to the activities of Government departments. That Supreme Court decision fundamentally changed the landscape of Committee inquiries imposing a chilling effect on their operation. Even after the 2013 Act the fear of overstepping the *Ardagh* decision haunts Committee work, seen most vividly in the Public Account Committees (PAC) attempts to question former senior executives of the Rehab Group. In April 2014, former senior executives of that voluntary organisation refused to appear before a PAC hearing to answer questions about their pay structure and the use of public funds. Their stated reasons were that they were 'ordinary citizens' and that PAC was going beyond its remit and ignoring constitutional justice. Thus far the Committee on Procedure and Privilege, which has responsibility for authorising powers of compellability for committees upon request, has refused PAC such authorisation on the basis that the inquiry was 'outside the remit' of the PAC and, perhaps most tellingly, that 'a mis-step will cost the taxpayer'. Interestingly, judicial review proceedings have also been initiated in the High Court by a former Rehab Executive against PAC members on the basis of harm done by this core accountability body.

Clearly then, the *Ardagh* decision has significantly hamstrung the powers of Oireachtas committees. They do not have the power to make findings of fact which could potentially damage the good name of persons who were not members of the Oireachtas. The result tends towards a situation by which an Oireachtas Committee Inquiry can provide a sweeping

assessment of institutional failing, but never quite come to terms with the specifics of who is responsible. This is clearly recognisable in the Banking Inquiry currently being run under section 7 of the 2013 Act as an 'inquiry, record and report inquiry'. This type of inquiry operates in relation to a specific issue and can make findings of fact, so long as they are uncontested. The belief is that an inquiry that simply records evidence is less likely to engage with guilt, good reputation and justice. Yet even here reputational issues may arise, not least because of the surrounding medial and political context of large, set piece type inquiries. Indeed, the nexus stage of the Banking Inquiry examining Banking Systems & Practices, Regulatory Systems, and Crisis management systems and policy responses will inevitably shine a spotlight on the issue of reputational damage and the effectiveness of the 2013 Act to deal with the constitutional justice limits on inquiries in our State.

Even before the inquiry got underway, however, the operation of this legislation had already come into sharp focus. The banking inquiry faced a significant reputational problem with the very selection of members to the committee being overtaken by political infighting. The Government's decision to impose extra members on the committee in order to ensure a Government majority unsurprisingly led to allegations of 'gerrymandering' from opposition parties, and concerns about the credibility of the inquiry. It is therefore interesting to note that after this turmoil, the opening stages of the inquiry have been remarkably low-key. The feared showboating and political point scoring has, to date, been minimal.

The low-key nature of the inquiry thus far is likely to be because the really controversial elements of the inquiry are yet to come. Much of the recent hearings have involved political science experts giving evidence on the failure of the Oireachtas to provide adequate oversight of government decision-making. That evidence has been insightful and reflects the real

challenges of reform within the Oireachtas. Yet in part the hearings have a sense of déjà vu to them - the sight of an Oireachtas Committee once again gathering evidence that we are in need of reform of Dáil procedures for oversight tends to reinforce the fear that inquiry mechanisms provide background noise for business as usual. We have been here before, not least with the much praised DIRT inquiry which carried out an examination of an earlier banking scandal and published recommendations for reform of the Oireachtas back in 1999. Although some of those reforms were introduced little real change was implemented, and allowing an environment lacking in real accountability to make possible yet more crises.

The Banking Inquiry therefore has a heavy weight on its shoulders. A failure to effectively discharge its constitutional mandate of oversight will ultimately be viewed by the public as retrospectively justifying the decision to vote down the inquiries referendum in 2011. In the last line of our new book *Law and Public Administration in Ireland,* Dr Darren O'Donovan and I stress the fact that when considering the current problems within our administrative state "[f]uture generations will judge us not by our rhetorical condemnations, but by our practical reforms." So in the aftermath of the economic crash the questions regarding our governance structures cannot simply be allowed to remain discordant background music to business as usual. Rather they must lead to real and effective change. Yet history shows that oversight inquiries, whether in Parliament or in the form of Tribunals of Inquiry, tend to result in only limited implementation of recommendations and reforms.

In considering the potential of the Banking Inquiry to produce clear and discernable positive outcomes, it will need to publish a report, drawn from very wide terms of reference, and delivered relatively quickly, that offer real and effective reforms. This process is within its powers. However, the next step remains outside the power of the Banking Inquiry and requires

Government to act on reform recommendations. However, historical experience underlines that while many governments feature the rhetoric of administrative justice reform, all have remained content to maintain a weak legislature. Unfortunately for the Oireachtas, Government's likely response will be to implement limited reforms; an outcome which will undermine its own credibility as much as that of Government. Thus to achieve a successful outcome, particularly regarding Parliamentary reform, the Oireachtas will need to set aside partisan interests and mobilise public support to demand the implementation of effective reforms.

The Oireachtas has a long way to go in self-critically rebuilding a parliamentary culture which engages seriously and effectively with accountability and oversight. The Banking Inquiry has the potential to be part of the process. However, even where structural change is developed, it is important to recognize the limits of the law against the wider cultural context of our administrative system. We need to acknowledge that we cannot simply constitutionalise or legislate our way to effective parliamentary scrutiny; such change may ultimately raise false hopes where there is no overarching change in the political and administrative cultures.

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