



Comptroller and Auditor General

Special Report

Tribunals of Inquiry

December 2008

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

Report of the Comptroller and Auditor General

Tribunals of Inquiry

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

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

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

John Buckley
Comptroller and Auditor General

16 December 2008

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Summary of Findings

Summary of Findings

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

Timescale of Tribunals

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

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

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

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

Procedural Efficiency

The report makes a range of suggestions for the more efficient conduct of tribunals. Apart from having more focused terms of reference, there may be merit in limiting new lines of enquiry to instances where the tribunal has reported that it is satisfied that the cost and duration of those additional enquiries are likely to be justified by the relevance to the tribunal's terms of reference of the matters to be investigated. This together with the provision of periodic interim reports by each tribunal on its general progress would allow the Oireachtas to review the cost-justification of new lines of enquiry and the progress being achieved on the tribunal's core mandate.

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

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

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

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

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

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

Cost of Tribunals

It is recognised that, due to their investigatory nature, the cost of tribunals is difficult to estimate. Nonetheless, good financial management demands that mechanisms be established to make tribunal costs more predictable and transparent. One possible approach would be to require the production of a formal public statement of estimated costs, timescale and milestones, at all key stages, beginning with the tribunal's establishment. This statement could be subsequently updated to take account of significant developments or proposed new lines of enquiry.

Much of the support work at tribunals is done using counsel. There appears to be scope to achieve economies by

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

Third Party Representation and Related Costs

Third party costs represent the major portion of the cost of tribunals. These costs are awarded and their amount determined in retrospect.

While the process in other countries varies, application for legal fees to be met from the public purse is required prior to participation in the public inquiry process in Australia, Canada and the UK.

It would be worth exploring the feasibility of providing for the up-front grant of legal representation and determining its extent based on an application that gives reasons why a person considers he or she should be represented. The grant of representation might be limited to instances where a tribunal is satisfied that

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

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

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

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

Likely Cost of Tribunals

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

- administration costs will amount to between €50 million and €52 million
- tribunal legal teams will cost between €84 million and €87 million
- litigation will cost approximately €4 million¹
- third party costs could range from €157 million to €182 million based on the pattern of awards observed in the Morris and Mahon Tribunals.

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

Overall, the likely cost to the State of the three tribunals based on the pattern of costs experienced to date is estimated to be in the range of €336 million to €366 million.

It is important to emphasise that the foregoing are estimates which should be read in the light of the caveats and contingencies outlined in Chapter 2. The major area of uncertainty pertains to third party costs. In the case of those costs, there is a risk that, due to the extended timescale, their ultimate cost could rise for future settlements and awards by the Taxing Master. If the ratio of third party costs to direct costs experienced in the Beef Processing Tribunal was taken as a guide the ultimate cost could increase by a further €8 million.

General Conclusion

The State faces a considerable challenge to achieve predictability and financial control in the case of tribunals of inquiry which operate under the authority of the legislature without compromising their independent investigations or the constitutional rights of witnesses.

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

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

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

Tribunals of Inquiry

1 Introduction

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

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

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

Nature of Tribunals of Inquiry Examined

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

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

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

Subject Matter of Tribunals Examined

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

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

Figure 1.1 General Scope of Tribunals

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

Funding of Tribunals of Inquiry

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

Figure 1.2 Financial Responsibility for Tribunals

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

Note:

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

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

Main Costs of Tribunals of Inquiry

1.8 Tribunals give rise to three broad categories of cost

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

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

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

Revenue Raised as a Consequence of the Tribunals Examined

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

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

Other revenue impacts are outlined in Chapter 6.

Sources of Information

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

Examination Methodology

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

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

Report Structure

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

4 These figures were provided in February 2008.

Part A – General Administration of Tribunals

2 Cost of Tribunals

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

Cost of Tribunals

2.2 Costs totalling €19 million had been incurred directly on the three tribunals up to 31 December 2007. A further €6 million was identified as having been incurred by State Bodies as a result of the tribunals, including €7.6 million in responding to tribunal enquiries. Further projected costs will accrue up to the date of finalisation of the tribunals' business. For the purposes of estimation the finalisation dates have been taken as outlined in Figure 2.1.

Figure 2.1 Projected Finalisation Date

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

Note:

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

2.3 The projected cost excluding third party costs is estimated at between €79 million and €85 million as set out in Figure 2.2. Further detail is given in Chapters 4 to 6.

Figure 2.2 Projected Costs excluding Future Third Party Costs

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

Notes:

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

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

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

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

Tribunal Legal Teams

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

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

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

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

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

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

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

Third Party Costs

2.11 €4.5 million has been incurred on third party costs up to the end of December 2007. €3 million of this relates to the Mahon Tribunal and €1.5 million to the Morris Tribunal.

2.12 Future third party costs are contingent upon cost award decisions of the tribunals. Based on the pattern of awards observed in the Mahon and Morris Tribunals, further third party costs of the order of €42 million to €67 million could arise (in addition to the €4.5 million already incurred) in the case of the three tribunals.

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

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

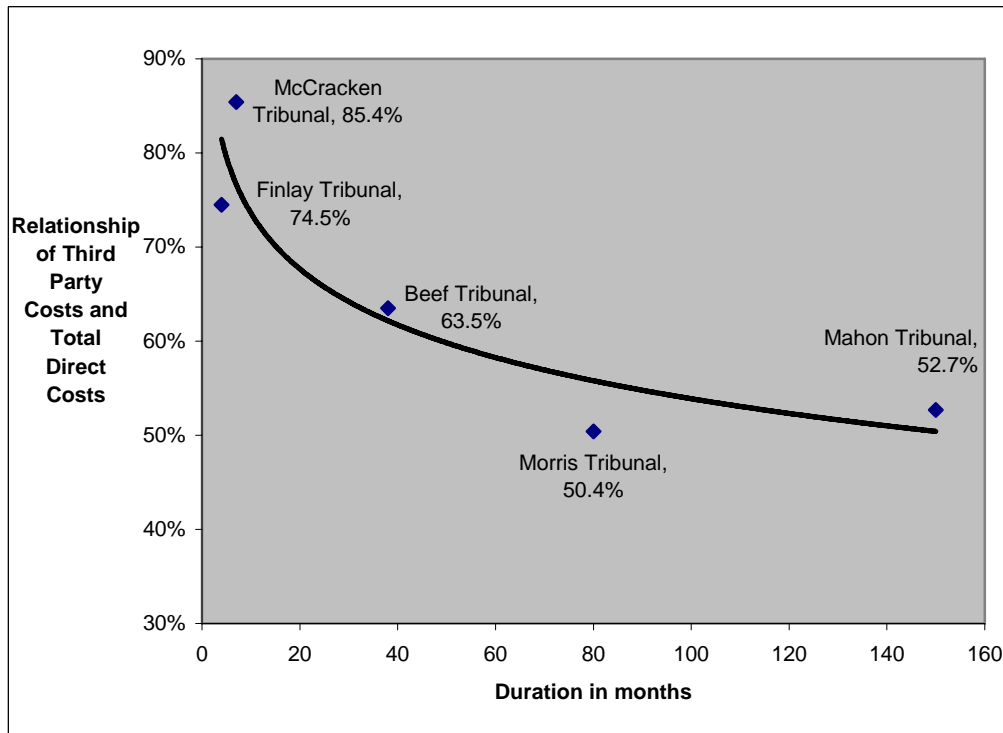
⁷ One junior counsel in the Moriarty Tribunal was paid at 80% of the senior counsel rate i.e. €2,000. The higher rate was sanctioned as it was considered that the person involved would have been appointed senior counsel by then but for the fact they were working for the Tribunal. In October 2003, the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

Third Party Costs – Comparison with Completed Tribunals

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

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

Figure 2.3 Duration and Third Party Costs



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

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

Figure 2.4 Comparison of Beef Processing Industry Tribunal with Uncompleted Tribunals

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

Notes:

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

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

Figure 2.5 Upper Limit Estimates – Total Third Party Costs

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

Notes:

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

Estimation Caveats and Contingencies

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

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

