

28th June 2012

Mr John McGuinness TD
Chairman
Committee of Public Accounts
Leinster House
Dublin 2



Dear John,

Following the result of the referendum seeking to provide the Oireachtas with full powers of inquiry last October my Department has, in consultation with the Office of the Attorney General, been assessing the options that may be available for the Oireachtas to carry out parliamentary inquiries consistent with the existing constitutional position. This analysis built on a very significant amount of work which had been carried out on the powers of Oireachtas inquiries in advance of the referendum.

I am, therefore, writing to update you and the members of your committee on the outcome of this work in light of the work your committee is currently finalising in relation to proposals for a banking inquiry.

As you will of course be aware I strongly support the objective of undertaking an effective and legally robust parliamentary banking inquiry and this represented a central consideration in the design of the proposed constitutional change which I sponsored last year. My own thoughts are that such an inquiry would involve a narrow focus on the events leading up to and following the introduction of the bank guarantee. While it would be possible to address a number of themes, too complex or wide-ranging a terms of reference for any proposed inquiry runs the risk of a long drawn out and ultimately unsatisfactory inquiry process. The further analysis which has been carried out strongly endorses my assessment that a constitutional amendment was necessary to allow Oireachtas Committee carry out full inquiries with powers to make adverse findings against any individual.

The very considerable work carried out over the past number of months in consultation with the Attorney General's Office does, however, make clear - notwithstanding the constraints arising from the Supreme Court's judgment in the Abbeylara case - that there is scope for the Oireachtas to undertake for a banking inquiry which is both potentially effective and legally workable.

In overall terms, two main options have been identified which can be characterised as follows:-

- An Oireachtas Committee could potentially hold what is sometimes referred to as an "Inquire, Record and Report" Inquiry, that is an inquiry simply designed solely to record

people's evidence for the purpose of putting it on the public record without additional interpretation of that evidence, commentary, findings of fact or recommendations being made by the Committee.

- An Oireachtas Committee could also conduct an inquiry to inform itself on matters relevant to their parliamentary functions such as for example possible legislative measures that might be required. Such an inquiry must relate to the future but the inquiry could draw on past experience in order to make recommendations for further policy development or legislative measures. As distinct from the first option summarised above, an inquiry of this type would be entitled to make forward-looking findings and recommendations but these must relate to the exact legislative purpose of the inquiry.

Obviously any committee, either existing or specifically established could be mandated to undertake an enquiry modelled on 'Inquire, Record and Report'. The latter approach might more suitably involve the Finance and Public Expenditure and Reform Committee. While any inquiry will, in my view, be placed on a stronger footing with a specific statutory mandate, an order of the house empowering a specific committee would be sufficient to enable it conduct an inquiry.

You will no doubt be cognisant of the constitutional case law and in particular the *Abbeylara* judgment which makes clear that these options would, of course, not involve fact findings or recommendations which would have a direct impact on the reputations of individuals. In the former case, by its very nature, no implications for the reputations of persons could arise. In the second example a policy or legislatively oriented inquiry could result in inferences that might have an adverse impact on the reputation of an individual. This is permissible provided such inferences were attendant on the primary legislative or policy related purpose of the inquiry. I have no doubt that you and the members of the Committee are also fully cognisant of the fact that the terms of reference should be carefully drafted to meet constitutional requirements and will of course also need to benefit from legal consideration. The conduct of the inquiries would need to be carried out in a manner that fully respects those terms of reference.

It hardly needs to be emphasised that any inquiry would also need to respect the constitutional rights of all individuals appearing before any Oireachtas inquiry. For example, if there was a risk of inferences arising from the inquiry which could impact adversely on the reputation of any witness it would be prudent to provide for some level of fair procedures. In addition, it will be necessary to deal in the design of any inquiry with issues such as compellability and specifying procedures to be adopted. Needless to say these points will need to be elaborated further as the proposal for an inquiry develops.

Based on the legal analysis which has been carried out, I have summarised above my analysis of the options for a legally robust inquiry in order to assist your deliberations into what options are legally feasible and potentially effective in best meeting the critical objective of achieving appropriate public accountability. It is very important to highlight that key features of the above options are not mutually exclusive, and it would appear to be possible to have a single inquiry which combined both elements providing these were consistent with over-arching constitutional requirements.

On receipt of your Committee's proposals in relation to a banking inquiry, I will obtain further advices from the Office of the Attorney General on the matter and will consult with Government colleagues and will revert to you with the Government's views at the earliest possible date.

Subject to whatever decision the Government may make it is also my intention to examine what legislative underpinning to the framework for inquiries generally needs to be put in place. Any such general legislation, if a decision were to be made to proceed with it, would needless to say be a significant strengthening of the legal framework within which inquiries such as an Oireachtas banking inquiry would take place and could have the potential to make any such inquiry significantly more robust in legal terms.

I hope that the outline of the current position as understood by my Department is of benefit to you and your Committee in your ongoing deliberations on this matter.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Brendan Howlin', with a long, sweeping horizontal line extending to the right.

Brendan Howlin TD
Minister for Public Expenditure and Reform