

TRIBUNAL OF INQUIRY INTO PROTECTED DISCLOSURES MADE UNDER  
THE PROTECTED DISCLOSURES ACT 2014 AND CERTAIN OTHER  
MATTERS FOLLOWING RESOLUTIONS PASSED BY DÁIL ÉIREANN AND  
SEANAD ÉIREANN ON 16 FEBRUARY 2017

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1921, ON 17 FEBRUARY 2017

SOLE MEMBER: MR. JUSTICE PETER CHARLETON, JUDGE OF THE  
SUPREME COURT

PRIVATE & CONFIDENTIAL  
HELD IN DUBLIN CASTLE  
ON THURSDAY, 1ST JUNE 2017

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1           THE HEARING COMMENCED ON THURSDAY, 1ST DAY OF  
2           JUNE, 2017 AS FOLLOWS:

3  
4           **MR. MCGUINNESS:** Good afternoon, sir. If I might just,  
5           as a courtesy, and as a piece of information to all my  
6           colleagues and the representatives here, if I might  
7           just introduce the team for the Tribunal. My name is  
8           Diarmuid McGuinness, senior counsel, and I appear with  
9           Mr. Patrick Marrinan, senior counsel, Ms. Kathleen  
10          Leader BL, instructed by Ms. Elizabeth Mullan,  
11          solicitor. And we are also helped in our task by our  
12          documentary junior Ms. Emma Toal, and Ms. Lalita Morgan  
13          Pillay. And you, Chairman, are assisted by your  
14          judicial researchers, Ms. Ní Gowan and Ms. Herlihy in  
15          that regard.

13:59

13:59

14:00

16  
17          If I can just refer briefly to the Terms of Reference  
18          of the Tribunal, because they are relevant to the  
19          business of the Tribunal today, and it's to focus on  
20          primarily the first four Terms of Reference, firstly:

14:00

21  
22          *"(a) To investigate the allegation made in a Protected*  
23          *Disclosure under the Protected Disclosures Act 2014, on*  
24          *the 30th September, 2016, by Supt. David Taylor,*  
25          *wherein he alleges he was instructed or directed by the*  
26          *former Commissioner Martin Callinan and/or Deputy*  
27          *Commissioner Nóirín O'Sullivan, to contact the media to*  
28          *brief them negatively against Sgt. Maurice McCabe and*  
29          *in particular to brief the media that Sgt. McCabe was*

14:00

1 *motivated by malice and revenge, that he was to*  
2 *encourage the media to write negatively about*  
3 *Sgt. McCabe to the effect that his complaints had no*  
4 *substance, that the Gardaí had fully investigated his*  
5 *complaints and found no substance to his allegations* 14:01  
6 *and that he was driven by agendas."*

7  
8 And it would be seen from that, Chairman, that the  
9 focus of the Tribunal's work is directed to the  
10 allegations made by the Supt. Taylor in relation to the 14:01  
11 Commissioner and the former Commissioner, about what he  
12 was tasked to do, as he has alleged.

13  
14 Terms of Reference (b):

15 14:01  
16 *"To investigate the allegation of Supt. Taylor in his*  
17 *Protected Disclosure, that he was directed to draw*  
18 *journalists' attention to an allegation of criminal*  
19 *misconduct made against Sgt. McCabe and that this was*  
20 *the root cause of his agenda, namely revenge against* 14:01  
21 *the Gardaí."*

22  
23 Again that centres on Supt. Taylor's allegation to draw  
24 journalists' attention to that the matter. And I will  
25 come back to what that matter is in a moment. 14:02  
26

27 *"(c) To investigate what knowledge former Commissioner*  
28 *Callinan and/or Commissioner O'Sullivan and/or senior*  
29 *members of the Garda Síochána had concerning this*

1 *allegation of criminal misconduct made against*  
2 *Sgt. McCabe and whether they acted upon same in a*  
3 *manner intended to discredit Sgt. McCabe."*

4  
5 Again, that's based upon the existence of an allegation 14:02  
6 of criminal misconduct, but specifically to require the  
7 Tribunal to inquire into the knowledge of the  
8 Commissioner, the former Commissioners and all other  
9 senior members there.

10  
11 Paragraph (d):

12  
13 *"To investigate the creation, distribution and use by*  
14 *TUSLA of a file containing false allegations of sexual*  
15 *abuse against Sgt. Maurice McCabe that was allegedly* 14:03  
16 *sent to Gardaí in 2013 and whether these false*  
17 *allegations and/or the file were knowingly used by*  
18 *senior members of An Garda Síochána to discredit*  
19 *Sgt. McCabe."*

20  
21 Now it appears from that, sir, that this term of  
22 reference is specifically related to the TUSLA file  
23 that was created and whether and in what circumstances  
24 it may or may not have been used in a manner by senior  
25 officers to discredit Sgt. McCabe. 14:03

26  
27 I am going to pause because I don't intend to refer to  
28 any of the other Terms of Reference at this stage,  
29 important as they are and incidental as they are to

1 some of the other allegations, and separate as they are  
2 to some of the other Terms of Reference.

3  
4 But I think it is important in the context of this  
5 discussion to outline that in the view of counsel to 14:04  
6 the Tribunal, it follows from these Terms of Reference  
7 that there are certain matters which are, it would  
8 seem, clearly outside the Terms of Reference of the  
9 Tribunal. And obviously the terms that I have referred  
10 to, they refer to an allegation of criminal misconduct, 14:04  
11 and, I think as everyone here is aware, an allegation  
12 of criminal misconduct was made by a young lady whom we  
13 are referring to as Ms. D throughout the proceedings,  
14 and that allegation was made and it was made in  
15 relation to Sgt. McCabe at the time in 2006 and it was 14:04  
16 investigated by An Garda Síochána at that time,  
17 resulting in a report compiled by and completed by  
18 Insp. Cunningham, forwarded to the State solicitor and  
19 forwarded onwards to the Director of Public  
20 Prosecutions, who decided and concluded that there was 14:05  
21 no basis for any prosecution of Sgt. McCabe.

22  
23 Now, what arises from that, sir, it seems to us, that  
24 what is completely outside the scope of the inquiry of  
25 your Tribunal, sir, is the truth or otherwise of that 14:05  
26 accusation, the investigation into Ms. D's accusation  
27 by An Garda Síochána, the basis of the Director's  
28 decision and the reasons for it. Obviously outside the  
29 Terms of Reference, therefore, is the guilt or

1 otherwise of Sgt. McCabe in relation to that  
2 accusation. That matter clearly cannot result in this  
3 Tribunal being turned into a trial of Sgt. McCabe or of  
4 any other person in relation to any other allegation,  
5 not within the Terms of Reference.

14:05

6  
7 It also follows, sir, in our submission, that what is  
8 outside the Terms of Reference is also a review of the  
9 adequacy of the Garda investigation. It's, I think,  
10 common knowledge that a complaint was made to GSOC in  
11 relation to the investigation, and what is outside the  
12 Terms of Reference in our view is also a review of that  
13 GSOC investigation. I think it's common knowledge that  
14 an effort was made - and I make no criticism of anyone  
15 in this regard - to include the allegation originally  
16 made into the Guerin Terms of Reference and into the  
17 O'Higgins Terms of Reference. And likewise, sir, it is  
18 our submission to you that it is no part of your  
19 function to inquire either into the inclusion or  
20 non-inclusion of it into those Terms of Reference  
21 relating to Mr. Guerin or the O'Higgins Commission.  
22 And nor is it within your Terms of Reference to  
23 investigate whether any private campaign outside the  
24 scope of the Terms of Reference has been waged in  
25 relation to Sgt. McCabe to discredit him or otherwise.

14:06

14:06

14:07

14:07

26  
27 So these things are put before you, Chairman, in the  
28 context of the letter which has been written to the  
29 various parties who had a direct interest in the term



1 of reference (d). The parties will know, and have been  
2 informed by letter, that it's intended to commence the  
3 work of the Tribunal beginning in July to inquire into  
4 the investigation -- to investigate the creation,  
5 distribution and use by TUSLA of the file containing 14:07  
6 false allegations of sexual abuse. And it's in that  
7 context for the purpose of hearing the views of the  
8 parties, Chairman, that a letter was written informing  
9 them that you would sit today to hear submissions of  
10 the parties on the following matters: 14:08

11 1. The extent to which it may be necessary that the  
12 person who made the allegation of criminal misconduct  
13 against Sgt. McCabe, hereinafter referred to as Ms. D,  
14 gives evidence before the Tribunal.

15 2. The extent to which the Terms of Reference of the 14:08  
16 Tribunal encompass the necessity to hear the extent of  
17 the allegation or resolve any conflict of fact in  
18 relation thereto.

19 3. Any ancillary matters for the case management in  
20 relation to the issues. 14:08

21  
22 So, might I respectfully suggest, sir, that at this  
23 stage, subject to your directions, that it might be  
24 considered appropriate for you to seek the views of the  
25 parties in that regard in whatever order you think 14:08  
26 appropriate in relation to those matters.

27 **CHAIRMAN:** Yes. Thanks, Mr. McGuinness. Perhaps in  
28 addition to what -- perhaps in addition to what you  
29 have said it may be helpful to clarify the following.

1 That, when you are referring - and perhaps you would  
2 confirm whether I am correct or not, please - to  
3 criminal misconduct as at (b) and as at (c), that in  
4 terms of the alleged facts that relates to an alleged  
5 encounter on a couch in Sgt. McCabe's house, when  
6 everyone was fully clothed, a complaint made in 2006,  
7 as you said, but relating to a memory that came back in  
8 relation to an event in 1998, isn't that correct?

14:09

9 **MR. MCGUINNESS:** Yes, sir. That is correct.

10 **CHAIRMAN:** Yes.

14:09

11 **MR. MCGUINNESS:** And that formed the subject matter of  
12 the statement of Ms. D at the time, originally taken on  
13 the 5th December 2006, which resulted in the  
14 investigation that I've referred to.

15 **CHAIRMAN:** Yes. And when we, therefore, refer to false  
16 allegations of sexual abuse against Stg. Maurice McCabe  
17 and a TUSLA file containing these at paragraph (d) --

14:10

18 **MR. MCGUINNESS:** Yes.

19 **CHAIRMAN:** -- that is an allegation involving a false  
20 allegation, and everyone agrees that it is a false  
21 allegation, of digital penetration which was something  
22 that was never said by Ms. D.

14:10

23 **MR. MCGUINNESS:** Yes.

24 **CHAIRMAN:** Yes.

25 **MR. MCGUINNESS:** That is correct, Chairman.

14:10

26 **CHAIRMAN:** Yeah. Okay. I hope everyone understands  
27 that; that that is the distinction that is being drawn.  
28 Thank you very much, Mr. McGuinness.

1 So, it seems very useful to me to have this hearing and  
2 to hear what people's views are. Now we have had some  
3 correspondence from Kelly Fanning and I think Mr. Kelly  
4 is here.

5 MR. KELLY: I am, Chairman.

14:10

6 CHAIRMAN: Yes.

7 MR. KELLY: Front row. It is Fanning & Kelly,  
8 actually, solicitors. That's correct. I'm here for  
9 Ms. D.

10 CHAIRMAN: Yes.

14:10

11  
12 SUBMISSION BY MR. KELLY

13 MR. KELLY: I have heard what Mr. McGuinness has to  
14 say. I have no difficulty whatsoever in what he has  
15 outlined. We would agree with all -- I'm not quite  
16 what he means about the last part of his mention about  
17 there being a private campaign, I'm not sure what's  
18 meant by that. But --

14:11

19 CHAIRMAN: It may help, Mr. Kelly, I think what may be  
20 meant by that is -- I have read a lot of statements and  
21 for instance there was a website and an  
22 unpleasantness --

14:11

23 MR. KELLY: I see.

24 CHAIRMAN: -- referring to Sgt. McCabe on that.

25 MR. KELLY: I see.

14:11

26 CHAIRMAN: That could have been by other members of the  
27 Garda Síochána, but it seems that paragraphs (a), (b),  
28 (c) and (d) are concerned with specific Commissioners  
29 and ex-Commissioners and senior members of the Gardaí.

1           So the fact that people are gossiping, for instance --  
2           **MR. KELLY:** I see.  
3           **CHAIRMAN:** -- doesn't come within it. That is what I  
4           am thinking at the moment.  
5           **MR. KELLY:** well, insofar as the original complaint of 14:11  
6           Ms. D, the GSOC complaint and the issues where Ms. D  
7           made representations about the Guerin Report, we would  
8           agree with Mr. McGuinness's views. We don't feel that  
9           has any role to be played here. It shouldn't be part  
10          of the Tribunal's Terms of Reference. That is our 14:12  
11          position.  
12          **CHAIRMAN:** And, is it as simple as that, Mr. Kelly?  
13          **MR. KELLY:** It is as simple as that.  
14          **CHAIRMAN:** Yes.  
15          **MR. KELLY:** Yes. 14:12  
16          **CHAIRMAN:** I'm not suggesting you're saying anything or  
17          leaving anything out --  
18          **MR. KELLY:** No, no.  
19          **CHAIRMAN:** -- but can I just look at it this way?  
20          **MR. KELLY:** Sure. 14:12  
21          **CHAIRMAN:** It may be important that such a complaint  
22          was made, it may be important that it was not in the  
23          terms of paragraph (d) but was in fact that referred to  
24          in (b) and (c), and it may be important that your  
25          client became aware that a different complaint was now 14:12  
26          being adumbrated in 2013, and that in consequence of  
27          that she took certain steps to make certain  
28          corrections.  
29          **MR. KELLY:** Yes.

1           **CHAIRMAN:** Yes. Now, if your client was to give  
2           evidence to that effect would she consider that it as  
3           the job of the Tribunal to go back and --  
4           **MR. KELLY:** Absolutely. Sorry, if I was unclear on  
5           that, Judge, no, absolutely. I understood we were only 14:12  
6           dealing with term of reference (d), that's the letter  
7           that I received.  
8           **CHAIRMAN:** Yes.  
9           **MR. KELLY:** In terms of, let's say, the 2006 complaint,  
10          the complaint was made and I don't think there's any 14:13  
11          issue over that.  
12          **CHAIRMAN:** Yes.  
13          **MR. KELLY:** That's not to be --  
14          **CHAIRMAN:** I can't decide whether it is true or false.  
15          **MR. KELLY:** Correct. Absolutely. I accept that fully. 14:13  
16          **CHAIRMAN:** Yes.  
17          **MR. KELLY:** And it shouldn't be necessary to ventilate  
18          that I suppose before the Tribunal. But in terms of  
19          those matters arising in (d) --  
20          **CHAIRMAN:** Yes. 14:13  
21          **MR. KELLY:** -- there's probably going to be some cross  
22          over on that. We're not going into the substance of  
23          what did or did not happen, we accept the position.  
24          **CHAIRMAN:** What role do you see, Mr. Kelly, your client  
25          having as a witness? I know it is unusual to talk 14:13  
26          about these things, I just want to see where we are at.  
27          **MR. KELLY:** I'm at a disadvantage, I guess. There's a  
28          certain deficit here --  
29          **CHAIRMAN:** Yes.

1 MR. KELLY: -- because, as you know, my client has made  
2 statements and cooperated with the investigators of the  
3 Tribunal and those statements have been -- I can't  
4 really answer that fully unless I understand is there  
5 something going to be said about Ms. D, for example, 14:13  
6 that might warrant intervention on her part. Sorry, do  
7 you need this [REFERRING TO MICROPHONE]?

8 CHAIRMAN: No, I can't see that anyone would be  
9 attacking her character in any way. Because the fact  
10 that a complaint is made doesn't mean the complaint is 14:14  
11 true.

12 MR. KELLY: Correct.

13 CHAIRMAN: This obviously cuts both ways; because to  
14 make a false complaint is a criminal offence because it  
15 wastes Garda time, to be the subject of sexual abuse is 14:14  
16 clearly something that is a criminal offence and highly  
17 unpleasant. But the fact that this complaint was in  
18 terms that were radically different to the terms as  
19 eventually emerged in 2013, in other words between 2006  
20 and 2013 they somehow changed -- 14:14

21 MR. KELLY: Yes.

22 CHAIRMAN: -- which is what I am inquiring into - how?  
23 - into something completely different. It may be that  
24 by laying down the template a complaint was made.

25 MR. KELLY: Yes. 14:14

26 CHAIRMAN: And identifying the complaint, here it is,  
27 don't need to go into it, and then: Did you make the  
28 following complaint? The answer might be no. And,  
29 when did you learn that a complaint is being falsely

1 ascribed to you? And, what did you do about it? And  
2 perhaps are there other matters since then?

3 **MR. KELLY:** I think they are all central to term of  
4 reference (d) and I think they are matters that have to  
5 be investigated. My client will have a role to play in 14:15  
6 answering questions and providing information to the  
7 Tribunal on those factors, absolutely.

8  
9 And in that respect, I did mention in the letter I  
10 think perhaps it's appropriate for me to seek some form 14:15  
11 of limited representation for Ms. D. I held my powder  
12 dry until I understood where we were going here, but I  
13 think if we could maybe just in Terms of Reference (a)  
14 to (d) at the moment, given the way this was opened,  
15 but I see (d) as being the primary area of concern for 14:15  
16 Ms. D.

17 **CHAIRMAN:** Mr. Kelly, again forgive me if these  
18 questions seem intrusive or if I in any way seem to be  
19 undermining what you have said, but you're saying that  
20 on specific instructions your client did have a view in 14:15  
21 relation to the O'Higgins Commission, but she does not  
22 have a view --

23 **MR. KELLY:** I have to say - sorry, Chairman, to  
24 interrupt you - I don't know about the O'Higgins  
25 Commission. 14:16

26 **CHAIRMAN:** You don't know.

27 **MR. KELLY:** I don't have instructions on that.  
28 Certainly the Guerin Report, yes, she did.

29 **CHAIRMAN:** Yes, okay. well, that's probably what I am

1           referring to then.

2           **MR. KELLY:** Yes.

3           **CHAIRMAN:** Yes. And so, she doesn't -- it's not her  
4           desire to come in and to go through matters from 1998.

5           **MR. KELLY:** No. 14:16

6           **CHAIRMAN:** Yes.

7           **MR. KELLY:** No.

8           **CHAIRMAN:** All right. Is that anything I can usefully  
9           help you with in terms of --

10          **MR. KELLY:** I don't think so. I mean, we have had the 14:16  
11          advantage I suppose of speaking with the  
12          investigators --

13          **CHAIRMAN:** Yes.

14          **MR. KELLY:** -- and a lot of this has been outlined and  
15          I think the position is consistent with what I have 14:16  
16          said and the information she has furnished so far,  
17          which in due course I suppose will be circulated to the  
18          appropriate parties who have been interest in this,  
19          will see that this is precisely the position she has  
20          taken. So there's no question of us rehashing an 14:16  
21          investigation that was concluded with the DPP's letter,  
22          which she has never seen, incidentally.

23          **CHAIRMAN:** Yes. well, I mean, apart from the helpful  
24          clarification you have given, you understand it is very  
25          important that we do not, from whatever source, send 14:17  
26          out documents relevant to her --

27          **MR. KELLY:** Of course.

28          **CHAIRMAN:** -- which are private.

29          **MR. KELLY:** Of course.



1           **CHAIRMAN:** And that, simply we would now know what is  
2           irrelevant very definitely, and that obviously has an  
3           impact on the volume of documentation.  
4           **MR. KELLY:** Absolutely.  
5           **CHAIRMAN:** And clearly the Tribunal must protect her           14:17  
6           privacy as well.  
7           **MR. KELLY:** Absolutely.  
8           **CHAIRMAN:** And she has no objection to being called  
9           Ms. D, does she?  
10          **MR. KELLY:** No, she doesn't.           14:17  
11          **CHAIRMAN:** All right. Thanks. Thank you, Mr. Kelly.  
12          Then I understand Mr. McDowell appears for Sgt. Maurice  
13          McCabe, is that correct?  
14          **MR. MCDOWELL:** I do, yes.  
15          **CHAIRMAN:** Yes.           14:17  
16          **MR. MCDOWELL:** I appear with Mr. McGarry and  
17          Mr. Gordon, instructed by Sean Costello & Company.  
18          **CHAIRMAN:** I can hear you very well, Mr. McDowell, yes.  
19  
20          **SUBMISSION BY MR. MCDOWELL**           14:17  
21          **MR. MCDOWELL:** Can I say at the outset that we received  
22          your letter and it would have been helpful, sir, if we  
23          had had a clear view of what Mr. McGuinness has just  
24          stated to put flesh on the bones, so to speak, of the  
25          letter. But if we look at the first question:           14:18  
26  
27          *"The extent to which it may be necessary that the*  
28          *person who made the allegation of criminal misconduct*  
29          *against Sgt. Maurice McCabe hereinafter referred to as*

1           *Ms. D gives evidence before the Tribunal."*

2  
3           well, that question -- I don't know whether it's being  
4           suggested that she should not give evidence before the  
5           Tribunal. If Mr. McGuinness is -- if I am to infer 14:18  
6           from Mr. McGuinness's submission that it is his  
7           position that she may not need to give evidence before  
8           the Tribunal that's one thing, but I'm not clear that  
9           that is being suggested.

10  
11           And in that context, if I may say, from what Mr. Kelly  
12           has just told us she has made a statement and has been  
13           interviewed by investigators. We are utterly in the  
14           dark as to what she has told the Tribunal, either in  
15           written statements or in interview by investigators 14:19  
16           from the Tribunal. So it strikes me that it is a bit  
17           premature to ask us to make submissions as to whether  
18           it is necessary that she should be a witness. I don't  
19           hear from Mr. Kelly -- and I think I was listening  
20           carefully to what he is said, that he is not suggesting 14:19  
21           that she should not be a witness before the Tribunal.  
22           So, that is the very first thing

23           **CHAIRMAN:** well, I think paragraph number 1,  
24           Mr. McDowell -- maybe I could say two things, it may  
25           help to have a dialogue on this -- 14:20

26           **MR. MCDOWELL:** Yes.

27           **CHAIRMAN:** -- because this is almost in the view of a  
28           case management meeting. But if you look at number 1,  
29           it's the extent to which it may be necessary, in other

1 words how far is her evidence relevant? Now the second  
2 thing I need to say is this: You will be aware that  
3 one of the fears that prompted the creation of this  
4 Tribunal is that -- well, I suppose I need to put it  
5 bluntly. That the tentacles of malice emanating from 14:20  
6 Garda Headquarters - I say that is an allegation,  
7 that's a possibility, I'm certainly not saying that  
8 there is any truth to it at all - extends as far as  
9 TUSLA and the HSE, and something that was a particular  
10 allegation, which I have described as an encounter on 14:20  
11 the couch where everyone was dressed, and allegation  
12 that suddenly becomes allegations of digital  
13 penetration of orifices, as between the first  
14 allegation being made in 2006 and what's referred to in  
15 paragraph (d), which is in 2013. So, was that a 14:21  
16 mistake? Did it happen by malice? Was it a question  
17 of a conspiracy? I have to inquire into that clearly.  
18 **MR. MCDOWELL:** well, first of all, there are two  
19 factual issues about which there can be no doubt. One  
20 is that Ms. D gave an interview to Paul Williams in 14:21  
21 March of 2014 in which she alleged that the allegations  
22 that she had originally made were true, had been  
23 covered up by Gardaí and that they had been badly  
24 investigated, that she was as of that time - and this  
25 is important, that the Tribunal should bear it in mind 14:22  
26 - as of March 2014 of a mind to have the matter  
27 ventilated in public with a view to ascertaining -- or,  
28 to establishing that her original allegation was  
29 wrongly handled, covered up in a biased way by members

1 of An Garda Síochána and that she was determined that  
2 this should be investigated in the context of the  
3 Guerin Inquiry. Furthermore, that she was anxious at  
4 that time to have the matter the subject of a proposed  
5 meeting between herself and Micheál Martin, the leader 14:22  
6 of the opposition, with a view to bringing about such  
7 an investigation. And thirdly, that she was proposing  
8 at that point to sue An Garda Síochána and to sue  
9 Sgt. Maurice McCabe arising out of the allegation of  
10 sexual assault, described as sexual assault in that 14:23  
11 article. Now, there's two issues arising from that.  
12 That took place, that interview took place nine months  
13 after the interview with Laura Brophy, the TUSLA -- the  
14 HSE/TUSLA counsellor.

15 **CHAIRMAN:** Yes. So nine months after the August 2013 14:23  
16 interview.

17 **MR. MCDOWELL:** Yes.

18 **CHAIRMAN:** Okay.

19 **MR. MCDOWELL:** And two issues arise from that  
20 confluence of dates. One of which is this: That it 14:23  
21 would appear that it was subsequent to her interview  
22 with Ms. Brophy that she took this belligerent stance  
23 in an interview with Mr. Williams, who published it,  
24 and evinced her determination to bring this matter into  
25 the public domain against my client, and to have the 14:24  
26 matter investigated. And the Tribunal is aware that in  
27 addition to going to Mr. Martin she also went to GSOC  
28 at the time with a view to getting them to re-open the  
29 matter on the basis that it had been improperly

1 investigated.

2  
3 Now, two specific issues arise in relation to that:  
4 why did Mr. Williams go to her? Did she seek him out  
5 or did he seek her out inspired by An Garda Síochána? 14:24

6 Those are very serious issues. And it must be that  
7 they must be resolved. Because if Mr. Williams was  
8 directed to her or inspired to go to her and inspired  
9 to extract from her that belligerent attack on my  
10 client's character and good name and statement of 14:25  
11 intent to impugn it further in the public domain, if  
12 that was done by Mr. Williams at the instance of  
13 members of An Garda Síochána, it has very, very serious  
14 implications for all of the other Terms of Reference in  
15 this Tribunal. 14:25

16  
17 Secondly --

18 **CHAIRMAN:** Yes, I know there's a two, can I just  
19 perhaps --

20 **MR. MCDOWELL:** Can I just come to the second point? 14:25

21 **CHAIRMAN:** No, please.

22 **MR. MCDOWELL:** Because she subsequently gave an  
23 interview to another journalist, Mr. Conor Lally, of  
24 The Irish Times, in which she gave a very different  
25 account of events in 2013 and 2014. In the interview 14:25  
26 that she gave to Mr. Lally - and I presume that this  
27 material is available to the Tribunal - she said that  
28 she had been encouraged to go and see Ms. Brophy by her  
29 mother, that the interview with Ms. Brophy had turned

1 in an unexpected way into -- an undesired way, into an  
2 inquiry into her original allegation, that she was  
3 very, very hostile to -- sorry, that she was very, very  
4 dissatisfied with the tone of her account, with the  
5 intent to re-open this the matter, because she regarded 14:26  
6 it as over and done with and not to be reopened. Now,  
7 that account was published this year, but it gives an  
8 entirely different account of how it came that the 2013  
9 interview with Ms. Brophy took place, what her  
10 attitude -- what her motivation in having that 14:27  
11 interview was. And it suggested strongly that her  
12 dominant motive was to be left alone, that she did not  
13 wish to go any further with her original allegation and  
14 accepted the Director of Public Prosecutions' decision  
15 in respect of it. That is the second scenario. 14:27  
16

17 Now, Judge, when it comes to whether or not she should  
18 give evidence or be required to give evidence or the  
19 extent to which she should give evidence, well firstly,  
20 the issue as to whether she sought Mr. Williams out or 14:27  
21 he sought her out at the instance of An Garda Síochána  
22 is central to the other Terms of Reference to which  
23 this Tribunal has been established.

24 **CHAIRMAN:** Right, Mr. McDowell, this is only a  
25 question -- 14:28

26 **MR. McDOWELL:** Yes.

27 **CHAIRMAN:** -- I'm not seeking to contradict you, I am  
28 here to learn, but why is that central? Mr. McGuinness  
29 I think drew a distinction between -- and the Terms of

1 Reference refer to two Commissioners, they refer to  
2 senior members of An Garda Síochána, and he drew a  
3 distinction between that and, let us say, private  
4 gossip and in interchange with Mr. Kelly I said well  
5 there was a website. And there was, there was a  
6 website with a rat on it and people were putting  
7 messages.

14:28

8 **MR. MCDOWELL:** well --

9 **CHAIRMAN:** That is a private thing and I said well,  
10 that is gossip. So, how does investigating how Paul  
11 Williams or the other gentleman, Conor Lally, came to  
12 be talking to her affect Terms of Reference (a), (b),  
13 (c) or (d)? As I say, it is a question, Mr. McDowell.

14:28

14 **MR. MCDOWELL:** You are asking the question. This  
15 interview with Mr. Williams took place before the  
16 establishment of the Guerin Report, before the  
17 establishment of the O'Higgins Report. It took place  
18 in circumstances where we believe, it's Sgt. McCabe's  
19 strong belief that people in An Garda Síochána directed  
20 Mr. Williams to do that and that he was encouraged so  
21 to do.

14:28

22 **CHAIRMAN:** And, are we talking about senior officers?

23 **MR. MCDOWELL:** People acting on behalf of -- well, I  
24 don't know. People at Supt. Taylor's level, yes. And  
25 people encouraging them --

14:29

26 **CHAIRMAN:** Yes.

27 **MR. MCDOWELL:** -- and expressing satisfaction that he  
28 had done this.

29 **CHAIRMAN:** Supt. Taylor never says that he got in fact

1 with Paul Williams to do that.

2 **MR. McDOWELL:** Well, we will come -- that is a matter,  
3 just because Supt. Taylor -- I haven't seen  
4 Supt. Taylor's statement to you and I haven't seen any  
5 statement from Mr. Williams to you. 14:29

6 **CHAIRMAN:** You have seen the Protected Disclosure of  
7 Supt. Taylor.

8 **MR. McDOWELL:** I have seen the Protected Disclosure  
9 only and I haven't seen anything over and above that.

10 **CHAIRMAN:** Yes. Not much changes. 14:30

11 **MR. McDOWELL:** No. Well, that may be an economical  
12 statement to this Tribunal, but it is emphatically our  
13 position that that was not just a spontaneous decision  
14 by a crime correspondent, who was heavily dependent  
15 professionally on his relationship with An Garda 14:30  
16 Síochána, senior officers in An Garda Síochána and  
17 Supt. Taylor, that he went to visit this woman and got  
18 this interview from her at that time.

19 **CHAIRMAN:** All right. So you feel it is necessary to  
20 call her at least from that point of view to see how 14:30  
21 that was done?

22 **MR. McDOWELL:** Absolutely. Absolutely.

23 **CHAIRMAN:** Yes. And I suppose, Mr. McDowell, one of  
24 the things any lawyer would think of is: Is there any  
25 proof or is this simply belief? I mean, you may 14:30  
26 reserve your position on that. That may well be your  
27 position. You may well feel that in terms of other  
28 aspects of evidence that may emerge that this could  
29 amount to circumstantial -- there could be



1 circumstantial evidence of that.

2 **MR. MCDOWELL:** well, of course. And I don't want the  
3 Tribunal now to examine --

4 **CHAIRMAN:** No.

5 **MR. MCDOWELL:** -- the implications of evidence which -- 14:31

6 **CHAIRMAN:** That is the only reason I mention that.

7 That it wasn't in Supt. Taylor's --

8 **MR. MCDOWELL:** Yes, that's the point. I mean, but  
9 let's be clear about this. I wasn't suggesting that

10 Mr. Lally was sent down there by members of An Garda 14:31

11 Síochána to interview her a second time. But if his

12 second interview with her is truthful, if she was

13 trustful with him in respect of the second interview,

14 which was published concerning my client, it certainly

15 raises questions as to why and how she would have given 14:31

16 the first interview to a crime correspondent such as

17 Mr. Williams.

18 **CHAIRMAN:** Okay.

19 **MR. MCDOWELL:** And it can't be avoided, because it goes  
20 to the very, very heart of what was going on in respect 14:31

21 of my client. It is simply not a private matter, that

22 a senior correspondent of a newspaper whose

23 relationship with An Garda Síochána made him a

24 dependant of theirs for information, should suddenly at

25 a critical point in deciding whether there should be an 14:32

26 inquiry into the Guerin allegations, if I may use that,

27 should go and interview Mr. Kelly's client and publish

28 a story not mentioning my client by name but everybody

29 knew who it was and the debate in Dáil Éireann makes it

1 very clear that Minister Shatter subsequently, after he  
2 resigned, knew to whom this allegation referred and  
3 supported the conferring of powers on Guerin to look at  
4 this issue. For, if everybody knew who Mr. Williams  
5 was referring to in that context, Judge, if they did, 14:32  
6 of course you could take, you could draw the inference  
7 that this was a private grudge somehow nothing to do  
8 with senior members of An Garda Síochána. But, it is  
9 my client's strong belief that the campaign of  
10 vilification against him resulted in that interview 14:33  
11 being sought and published in the terms in which it  
12 was, and that it was an attempt not merely to discredit  
13 him but to deter him from proceeding with the inquiry.  
14 It was designed to say 'yes, if you want to go ahead  
15 with all your complaints in Guerin, remember this, that 14:33  
16 there are people out there who are going to investigate  
17 complaints about you and who are going to seek a public  
18 investigation of this matter'. Now, if that was her  
19 own idea, by herself, if she is sitting at her home in  
20 the part of the country that she lives in and said 'I'd 14:34  
21 like to speak to Mr. Williams and I'd like to say if  
22 this man proceeds with this inquiry this is all going  
23 to come out', that is one thing, but a much more likely  
24 and probable inference to be drawn is that other people  
25 were signalling strongly to Sgt. McCabe 'you go down 14:34  
26 this road, Sgt. McCabe, and this is what you are going  
27 to be faced with'.

28 **CHAIRMAN:** And you're saying this is by inference,  
29 they're not actually explicitly saying that to him?

1 MR. MCDOWELL: I am saying --

2 CHAIRMAN: And again, it is a question, Mr. McDowell.

3 MR. MCDOWELL: Can I make a point to you, just?

4 CHAIRMAN: Yes.

5 MR. MCDOWELL: If as we -- we now know from very 14:34  
6 limited information, from redacted information from the  
7 HSE and from TUSLA, we know that the digital  
8 allegations were communicated to An Garda Síochána, we  
9 know from a HSE file that they were sent for

10 investigation to a unit, a different unit, from a 14:35  
11 different region of An Garda Síochána. We know that  
12 members of An Garda Síochána in April, May and June of  
13 2014 were investigating this. And it is of crucial  
14 importance to any assessment of the way in which my  
15 client was subsequently treated, it is of crucial 14:36

16 importance that it be established whether the digital  
17 allegation was transferred from a local police to  
18 police outside unit, who in An Garda Síochána was aware  
19 of that fact, what circulation within An Garda Síochána  
20 the digital allegation had received, and it feeds into, 14:36  
21 if the Court, if the Tribunal looks at all of the  
22 sequence of events and a timeline, the confluence of  
23 events is of huge significance and the possibility that  
24 there were merely a few unfortunate coincidences tends  
25 to disappear into extreme unlikelihood. 14:36

26  
27 And therefore, on that issue, if we are dealing with  
28 the first point in the Tribunal's question - the extent  
29 to which it is necessary that she should give evidence

1 - it must be of significance whether she volunteered  
2 that allegation in August 2013 or she didn't. And the  
3 Tribunal should -- I don't want to go into personal  
4 matters, but Mr. Lally's account includes a statement  
5 that this interview was effectively arranged for her by 14:37  
6 her mother, who is the wife of a colleague of  
7 Sgt. McCabe.

8 CHAIRMAN: All right. I think I understand the point.

9 MR. McDOWELL: You see the points I'm making, Judge?

10 CHAIRMAN: I do. 14:37

11 MR. McDOWELL: I don't want to make a very lengthy  
12 speech.

13 CHAIRMAN: Yes.

14 MR. McDOWELL: But I do want to say --

15 CHAIRMAN: No, and I'm not trying to cut you short 14:37  
16 either, Mr. McDowell.

17 MR. McDOWELL: The second point I do want to make  
18 though, Judge, and I find it a fairly fundamental one,  
19 and that is: To ask on an *a priori* basis Sgt. McCabe  
20 to agree that certain areas are entirely outside the 14:38  
21 Terms of Reference of this Tribunal, without seeing any  
22 of the material which exists even now on these issues,  
23 is to put him and his lawyers in a very embarrassing  
24 position.

25 CHAIRMAN: Well no, Mr. McDowell -- 14:38

26 MR. McDOWELL: I'm not saying that critical of the  
27 Tribunal.

28 CHAIRMAN: No, no, no, Mr. McDowell --

29 MR. McDOWELL: I know the Tribunal is trying to cut

1 down the issues and make them narrow and neat.

2 **CHAIRMAN:** I'm not actually. I'm trying to do what my  
3 jurisdiction is. And we have all been in judicial  
4 review cases where the issue is: Did the planning  
5 Tribunal, or whatever, exceed its jurisdiction? My 14:38  
6 jurisdiction is based on that. And I don't know, and  
7 it's a pretty straightforward issue, I don't think  
8 you're saying that as to whether this encounter on the  
9 couch happened in 1998 or not, or whether there was a  
10 false allegation in consequence of it, in 2006 - are 14:39  
11 you saying it's relevant? I can't see it, because it  
12 doesn't seem to be there. But there is a definite  
13 reference, of course, to bullying against your client,  
14 and I am using that loosely, and there's a very  
15 definite reference to a false allegation of sexual 14:39  
16 abuse, which is the digital allegation which occurred  
17 in 2013. Now, it is relevant to know how that came  
18 about and it is relevant to know the response of Ms. D  
19 when she learned as to the fact that what she had  
20 originally said became -- 14:39

21 **MR. MCDOWELL:** Yes.

22 **CHAIRMAN:** -- something very different. But as to  
23 whether or not there was a game of hide and seek,  
24 whether there was an encounter on a couch, I can't  
25 decide any of those issues. 14:39

26 **MR. MCDOWELL:** No.

27 **CHAIRMAN:** And, no matter what documentation you are  
28 given, Mr. McDowell, doesn't change that, it seems.

29 **MR. MCDOWELL:** No, it was my view as well as obviously

1 the Tribunal's view that this Tribunal was not  
2 established to adjudicate on that issue.

3 CHAIRMAN: But are we going to --

4 MR. MCDOWELL: I would say this --

5 CHAIRMAN: Are we going to open it up? 14:40

6 MR. MCDOWELL: No, but I mean --

7 CHAIRMAN: Because there's many ways things can become  
8 relevant, Mr. McDowell.

9 MR. MCDOWELL: There is a difference between opening it  
10 up and not seeing the context of what happened later. 14:40  
11 Because if the victim, alleged victim -- first of all,  
12 I should say, Judge, that you're referring to the false  
13 allegation and the other allegation, or words to that  
14 effect, my client is emphatic both allegations were  
15 false. Now, I just want to make that clear. 14:40

16 CHAIRMAN: well, I am emphatic that there is a  
17 presumption of innocence in relation to any allegation,  
18 so --

19 MR. MCDOWELL: That is what I am going to come to.

20 CHAIRMAN: I don't think I need to be reminded of that. 14:40

21 MR. MCDOWELL: No, no, no.

22 CHAIRMAN: Yes. But I am also emphatic that I can't do  
23 any more than what is set out in the Terms of  
24 Reference.

25 MR. MCDOWELL: No, but it is important -- 14:40

26 CHAIRMAN: Yes.

27 MR. MCDOWELL: It is important, Judge, from my client's  
28 point of view that if there is a public hearing of this  
29 Tribunal, that he is not being seen to avoid issues but

1 that the Tribunal is operating on the presumption of  
2 innocence and that he is -- that this Tribunal operates  
3 on the basis that he engaged in no criminal or sexual  
4 misconduct towards Ms. D at any point in his life.

5 **CHAIRMAN:** I think that case has been made publicly by 14:41  
6 him. And as I say there is a presumption of innocence,  
7 but --

8 **MR. MCDOWELL:** No, no, as I say, it's not by him. It's  
9 by the Tribunal. That the Tribunal can't say 'oh well,  
10 there's this allegation floating around and... 14:41

11 **CHAIRMAN:** Mr. McDowell, there are times, and if one  
12 just thinks back in history, because it does actually  
13 seem like history now, to the Beef Tribunal, and one of  
14 the arguments made before the Supreme Court in relation  
15 to that particular case, which was Goodman v. Hamilton, 14:41  
16 was tribunals can't be set up to decide matters that  
17 are criminal. Okay, the Supreme Court rejected that.  
18 I appreciate that. But the reality is: There's a lot  
19 of things that come up where the presumption of  
20 innocence applies -- 14:42

21 **MR. MCDOWELL:** Yes.

22 **CHAIRMAN:** -- and it makes no difference whether it  
23 applies or not, because, if Mr. McGuinness in his  
24 opening submission is correct, I can't go anywhere near  
25 deciding was there a false allegation or did something 14:42  
26 happen.

27 **MR. MCDOWELL:** Yes.

28 **CHAIRMAN:** I can't go near it, it seems, and I don't  
29 know whether you agree with that.

1 MR. MCDOWELL: Maybe we're not, maybe we're not --  
2 maybe I'm being obscure in the way I'm approaching  
3 this. I am merely saying that from the point of view  
4 of Sgt. McCabe --

5 CHAIRMAN: Yes.

14:42

6 MR. MCDOWELL: -- both allegations are equally false.  
7 And we can't have a situation where there's the  
8 allegation and false allegation, you can't, you cannot  
9 publicly be asked to participate in a process where  
10 there's the allegation and then there's the everyone  
11 agrees to be false allegation, and that a dual standard  
12 as to allegation is adopted.

14:42

13 CHAIRMAN: Yes.

14 MR. MCDOWELL: Both are presumed to be -- are presumed  
15 to be wrong, and he is very much of the view that if he  
16 is not going to be, and clearly it would be -- I'm not  
17 suggesting to the Tribunal that it should go back to  
18 determine what happened, if there was ever a game of  
19 hide and seek -- which, by the way, he denies  
20 absolutely.

14:43

21 CHAIRMAN: No, I am fully aware of that. And he also  
22 said it was unlikely because his eldest child has a  
23 disability.

24 MR. MCDOWELL: Yes.

25 CHAIRMAN: Yes.

14:43

26 MR. MCDOWELL: I mean, confronted with that, all I'm  
27 saying is, Judge, that if we go to what happened in  
28 August 2013 and the interaction between Ms. D, the  
29 circumstances in which Ms. D comes to interact with



1 Ms. Brophy, what was the background to that? why did  
2 that suddenly happen at that point when Sgt. McCabe was  
3 becoming a person of interest? why? And secondly, why  
4 was it that three years later, four years later she  
5 says that she is extremely unhappy with that interview 14:44  
6 when nine months afterwards she was projecting herself  
7 onto the public stage as someone who was most certainly  
8 wholly unhappy with the fact that the Guards had let  
9 her down and had let a crime committed against her go  
10 uninvestigated? And that issue must be, must be 14:44  
11 probed.

12 **CHAIRMAN:** Mr. McDowell, maybe I'm being too legalistic  
13 and I don't want to obviously continue this dialogue  
14 too long, and thank you for being here, but you're  
15 aware that in some circumstances it can be relevant, 14:44  
16 and indeed an exception to the rule against hearsay,  
17 the fact that a complaint was made in particular terms,  
18 as opposed to whether the complaint was true or not,  
19 the complaint --

20 **MR. MCDOWELL:** The public knows that such an allegation 14:45  
21 was made.

22 **CHAIRMAN:** Yes, Yes.

23 **MR. MCDOWELL:** I'm not going to ask for a blacking out  
24 of that.

25 **CHAIRMAN:** Sure. But it is a different thing to say 14:45  
26 'you have to decide whether or not that happened' here  
27 at a remove, by the way, of 19 years.

28 **MR. MCDOWELL:** No, I'm not suggesting that.

29 **CHAIRMAN:** No, no. I mean, once that is clear,

1 Mr. McDowell, that is fine.

2 MR. MCDOWELL: We are *ad idem* on that point.

3 CHAIRMAN: Yes.

4 MR. MCDOWELL: But I am saying that it isn't just a  
5 case -- and again, Mr. McGuinness hasn't made it clear 14:45  
6 what he meant by the extent to which it was necessary  
7 that she should give evidence before the Tribunal. I  
8 cannot imagine -- well, first of all, I can imagine if  
9 there was an agreed statement of facts that she  
10 mightn't have to come here at all. 14:45

11 CHAIRMAN: But then, what about your probe to how did  
12 Paul Williams come to her?

13 MR. MCDOWELL: That is the point. That is the point.  
14 I would have to know what she said about that. If she  
15 said that Mr. Williams arrived down on her doorstep, 14:46  
16 big surprise, and said he proposes to have an interview  
17 and put all this business to her about 'Do you not want  
18 to go to the leader of the opposition? Do you not want  
19 to do X, Y and Z?' that is one thing. But if she says  
20 'Sorry no, that was my genuine position, that was an 14:46  
21 interview I gave and I don't know how I gave that  
22 interview and gave Mr. Lally a totally different  
23 interview a number of years later', that is a different  
24 matter. But I am not trying to embarrass this young  
25 woman at all. 14:46

26 CHAIRMAN: Well, I know you will be gentlemanly to  
27 anyone who appears before the Tribunal, yes.

28 MR. MCDOWELL: I am happy to dispense with her  
29 completely if it was apparent to me from the materials

1           that would come out as to precisely what the agreed  
2           statement of facts were.

3           **CHAIRMAN:** No but, Mr. McDowell, it is slightly  
4           contradictory if you don't mind me saying so. Because  
5           you say it is essential that I look into why 14:46  
6           Mr. Williams was there.

7           **MR. MCDOWELL:** Yes, yes, exactly.

8           **CHAIRMAN:** But I mean, even if she were to make a  
9           statement to the fact that - I will take a bizarre  
10          scenario - that Assistant Commissioner X -- 14:47

11          **MR. MCDOWELL:** well --

12          **CHAIRMAN:** No, no, just hang on a moment. 'I know from  
13          so and so Assistant Commissioner X rang Paul Williams  
14          and said you can cause trouble by going down there', I  
15          mean she would have to be cross-examined in any event 14:47  
16          by the Garda Commissioner.

17          **MR. MCDOWELL:** Yes.

18          **CHAIRMAN:** I mean, it is inescapable. I just don't  
19          want things wandering off into --

20          **MR. MCDOWELL:** No. 14:47

21          **CHAIRMAN:** Yes.

22          **MR. MCDOWELL:** Then it does appear that she will have  
23          to give evidence in relation to the circumstances in  
24          which she --

25          **CHAIRMAN:** I know, but that's what you said initially. 14:47

26          **MR. MCDOWELL:** well, that is what I am saying.

27          **CHAIRMAN:** I am just asking, are you sticking to that?

28          **MR. MCDOWELL:** Am I sticking to the proposition that  
29          she would have to --

1           **CHAIRMAN:** Yes.

2           **MR. MCDOWELL:** Yes. Unless there was some document  
3           which made her evidence redundant.

4           **CHAIRMAN:** But I mean, that would have to be a document  
5           which would seem to be heavily in your favour in terms 14:47  
6           of the conspiracy theory.

7           **MR. MCDOWELL:** Sorry, it's not --

8           **CHAIRMAN:** In which case, surely, the Garda  
9           Commissioner would be entitled to ask questions.

10          **MR. MCDOWELL:** Judge, is it not a conspiracy theory 14:47  
11          for -- I don't want to be aggressive. Is it not a  
12          conspiracy theory that Mr. Williams went down to elicit  
13          that information?

14          **CHAIRMAN:** You said your client had a very strong  
15          belief that, and conspiracy means -- 14:48

16          **MR. MCDOWELL:** At the prompting.

17          **CHAIRMAN:** And forgive my resort to Latin, conspiracy  
18          means *conspirare*, to breathe together. So, in other  
19          words, this was part of concerted efforts. I mean,  
20          that's what I understood you to say. And forgive me 14:48  
21          for using the word conspiracy, I didn't mean it in a  
22          criminal sense or anything like that.

23          **MR. MCDOWELL:** The phrase 'conspiracy theory', Judge,  
24          my client strongly believes that Mr. Williams was  
25          inspired, to use the other part of Latin there, to go 14:48  
26          down and get that interview and to publish it, and  
27          encouraged by members of An Garda Síochána who took  
28          great pleasure in the fact that he went down, so --

29          **CHAIRMAN:** Yes. So, Ms. D might know that,

1 Mr. Williams might know that.

2 MR. MCDOWELL: Yes.

3 CHAIRMAN: Okay. No, I see your position and I think  
4 it is pretty clear.

5 MR. MCDOWELL: And there's another, just so that the 14:49  
6 Tribunal -- I shouldn't be accused later of not  
7 mentioning it to the Tribunal. It is also the case  
8 that Ms. Brophy seemed to be aware of the fact that the  
9 local superintendent was not aware of the digital  
10 error, if I may use that phrase, in -- 14:49

11 CHAIRMAN: Are you talking about Supt. Cunningham now?

12 MR. MCDOWELL: No. It is just a local superintendent.  
13 In the data protection material that was given to us  
14 Ms. Brophy is informed by somebody on the telephone  
15 that the local superintendent -- 14:49

16 CHAIRMAN: Yes.

17 MR. MCDOWELL: -- is unaware of the error that had been  
18 made and that that local superintendent was due to meet  
19 with the Commissioner to discuss the matter. And  
20 there's a query as to whether it is the full 14:50  
21 Commissioner or an Assistant Commissioner. We read in  
22 the newspapers that it may have been a reference to the  
23 Assistant Commissioner.

24 CHAIRMAN: Yes.

25 MR. MCDOWELL: But regardless, if Ms. D was the source 14:50  
26 of that information given to Ms. Brophy --

27 CHAIRMAN: The information being?

28 MR. MCDOWELL: That the local superintendent was not  
29 aware of the error.

1           **CHAIRMAN:** I see. Okay.

2           **MR. MCDOWELL:** And this, Judge, at a time when a unit  
3 outside the region had been established to look at the  
4 digital allegation. If Ms. D was the source of that  
5 information which went to Ms. Brophy, which she 14:50  
6 recorded, that is of significance because her source of  
7 knowledge would be of significance. How would she know  
8 what the state of mind of the local superintendent was  
9 or was not? So I'm just making that point. Those are  
10 really central issues on the basis of the small amount 14:51  
11 of material that we got heavily redacted from TUSLA and  
12 from the HSE. Those are issues: The fact that there  
13 was an inquiry outside the local Garda district, a  
14 different unit was dealing with it; the implication  
15 that if such extra an regional team was established 14:51  
16 that somebody in An Garda Síochána knew about this and  
17 had directed that the matter should be investigated  
18 from a team outside the local area; and the fact that  
19 Ms. D was in a position, if it is Ms. D who is  
20 identified in that memo, as somebody -- that somebody 14:51  
21 was in a position to indirectly inform Ms. Brophy as to  
22 the state of knowledge of the local superintendent and  
23 of the fact that he or she was due to meet the  
24 Commissioner, those are issues on which her evidence  
25 will be of significance. 14:52

26           **CHAIRMAN:** Okay.

27           **MR. MCDOWELL:** I won't put the matter any further than  
28 that.

29           **CHAIRMAN:** Thank you for your submissions,

1 Mr. McDowell, which touch on a number of issues, but  
2 they were very helpful. Thank you.

3  
4 Okay. So, I understand that -- is it Mr. Dignam or  
5 Mr. O'Higgins? Yes, it is Mr. O'Higgins. 14:52

6 MR. O'HIGGINS: I am dealing with the matter today.

7 CHAIRMAN: For the Commissioner.

8 MR. O'HIGGINS: With Mr. Dignam and Mr. Fitzgerald.

9 CHAIRMAN: Yes.

10  
11 SUBMISSION BY MR. O'HIGGINS 14:52

12 MR. O'HIGGINS: Chairman, just looking first of all at  
13 the letter from the Tribunal I might -- I propose to be  
14 very briefly, first of all. If I might take them out  
15 of order. In relation to question number 2 - "*The* 14:52  
16 *extent to which the Terms of Reference of the Tribunal*  
17 *encompass the necessity to hear the extent of the*  
18 *allegation or resolve any conflict of fact in relation*  
19 *thereto.*" - insofar as the Commissioner is concerned,  
20 Tribunal Terms of Reference (d) has as its focus, as is 14:53  
21 clear from the face of it, whether -- as is put,  
22 whether these false allegations and/or the file were  
23 knowingly used by senior members of An Garda Síochána  
24 to discredit Sgt. McCabe, it is no part of the  
25 Commissioner's submission to suggest that it is 14:53  
26 necessary or at all desirable that the Tribunal should  
27 get involved with carrying out an assessment of the  
28 extent of the allegation or to resolve any conflicts of  
29 facts in relation thereto. That is our position.

1           **CHAIRMAN:** By which you're referring to the 2006  
2           allegation in relation to what allegedly happened on a  
3           couch where everyone had their clothes on --  
4           **MR. O'HIGGINS:** Yes.  
5           **CHAIRMAN:** -- in 1998? 14:53  
6           **MR. O'HIGGINS:** Yes.  
7           **CHAIRMAN:** Yes. All right.  
8           **MR. O'HIGGINS:** In relation to the first matter - "*The*  
9           *extent to which it may be necessary that the person who*  
10          *made the allegation of criminal misconduct against* 14:53  
11          *Sgt. McCabe (Ms. D) gives evidence before the*  
12          *Tribunal.*" - that in our view raises a separate issue,  
13          and it seems to us that one issue that the Tribunal is  
14          concerned with is whether and to what extent the  
15          allegation against Sgt. McCabe entered the public 14:54  
16          domain.  
17          **CHAIRMAN:** The allegation being which one now?  
18          **MR. O'HIGGINS:** well, (d) is referable to the false  
19          allegation. I take Mr. McDowell's unhappiness with  
20          that usage, but in any event, term of reference (d) is 14:54  
21          referable to what I might term the later allegation,  
22          the 2013 allegation.  
23          **MR. MCDOWELL:** The digital allegation.  
24          **MR. O'HIGGINS:** Yes.  
25          **CHAIRMAN:** Yes. well, there's the allegation about the 14:54  
26          couch and there's the digital allegation. I'm sorry if  
27          that is disrespectful to anybody but that is a  
28          shorthand way of looking at it.  
29          **MR. O'HIGGINS:** The digital allegation from 2013.



1           **CHAIRMAN:** Yes.

2           **MR. O'HIGGINS:** And the Tribunal is aware from  
3           documentation, and generally, that there appears to be  
4           evidence that Ms. D may have had contacts with certain  
5           different parties - a journalist, Micheál Martin TD, 14:55  
6           GSOC - agitating a certain position, which may or may  
7           not have caused matters to get, this matter to get into  
8           the public domain. And arising from that it occurs to  
9           us that there may well be utility from the Tribunal's  
10          point of view in treating of that issue in relation to 14:55  
11          what extent the allegation itself was ventilated and  
12          brought into the public domain by anybody other than  
13          those charged in this Tribunal with having done so.

14          **CHAIRMAN:** And again, I suppose I'm going to be taken  
15          up on my usage of every single word but again I'm 14:55  
16          simply trying to sort it out. You are saying if you  
17          take the belief as adumbrated by Mr. McDowell that  
18          Sgt. McCabe holds, that the interview was inspired, the  
19          Paul Williams interview was inspired by members of An  
20          Garda Síochána, you say, well, there's other 14:56  
21          explanations open as well, including that perhaps  
22          things were widely discussed and that Paul Williams  
23          heard about and through people who were not members of  
24          the Gardaí --

25          **MR. O'HIGGINS:** Yes. 14:56

26          **CHAIRMAN:** -- and consequently he, pursuing a good  
27          story, came down --

28          **MR. O'HIGGINS:** Yes.

29          **CHAIRMAN:** -- to wherever the person lives.

1       **MR. O'HIGGINS:** Actions taken by persons other than  
2       senior Gardaí had the effect of bringing this matter  
3       into the public domain. That would be a relevant  
4       matter for this Tribunal in my submission to assess.  
5       And that is relevant --

14:56

6       **CHAIRMAN:** And you think Ms. D is essential to that  
7       then? Or that it could be part of it, is what you are  
8       saying?

9       **MR. O'HIGGINS:** It could be part of it. Because of  
10      course the Tribunal will equally, in fairness to her  
11      position, have to assess can that be achieved by other  
12      means. And that is a matter which the Tribunal will  
13      have to form a view on.

14:56

14      **CHAIRMAN:** Yes. Okay.

15      **MR. O'HIGGINS:** Could I say as well, and I propose to  
16      be very brief on this, insofar as Mr. McDowell has made  
17      remarks or submissions that trespass upon substantive  
18      issues, I propose not to reply to them, merely to  
19      indicate that there has been a suggestion that, for  
20      instance, the TUSLA matter, the later allegation, 2013,  
21      involved a Garda investigation and the period was  
22      mentioned of April to June 2014, lest my silence be  
23      taken as acquiescence of anything that is said I simply  
24      note, indicating our position we don't for a moment  
25      accept all that has been said, but that ultimately is a  
26      matter for another day.

14:57

14:57

14:57

27      **CHAIRMAN:** Yes. well, you will appreciate,  
28      Mr. O'Higgins, that the problem with tribunals is that  
29      we don't have pleadings, people are not saying 'The

1 following fact happened' or whatever, and it is  
2 probably helpful that you know what Mr. McDowell has  
3 said today. And I'm certainly taking you as saying  
4 well, I can't possibly accept any of that. And I'm  
5 sure Mr. McDowell understands that too.

14:58

6 **MR. MCDOWELL:** Judge, I'm not using months with  
7 absolute mathematical precision. But you should be  
8 aware that there is documentary evidence that in June  
9 2014 the Gardaí were seeking, seeking explanations from  
10 TUSLA as to why the digital error had been made,  
11 seeking explanations, so they could determine whether  
12 or not they would accept what was being said to them  
13 about this. There's a written record of that.

14:58

14 **CHAIRMAN:** Yes. well, I have a giant chronology,  
15 Mr. McDowell, and I can star those particular dates.

14:58

16 **MR. MCDOWELL:** No, it is just I read it this morning.

17 **CHAIRMAN:** Yes, I know.

18 **MR. MCDOWELL:** That is why June is there.

19 **CHAIRMAN:** And I'm saying I haven't a clue, but thank  
20 you very much.

14:58

21 **MR. MCDOWELL:** Yes.

22 **CHAIRMAN:** Then I understand that, Mr. Cush, you appear  
23 for the HSE and I don't know whether you have a view.

24  
25 **SUBMISSION BY MR. CUSH**

14:59

26 **MR. CUSH:** Yes, thank you, Chairman. Chairman we take  
27 the view, as I think is the consensus, that it is no  
28 part of your Terms of Reference to inquire into the  
29 truth or falsity of the couch allegation, if I can put

1           that way. But certainly that would be our view. But  
2           just from the HSE's perspective, the fact of that  
3           allegation and the existence of the allegation as  
4           distinct from its truth or falsity is part of the HSE's  
5           explanation of what it says is a mistake. So, I don't 14:59  
6           think anyone is suggesting that it be airbrushed from  
7           the record entirely, but just the existence of the  
8           allegation is part of the explanation that we have  
9           already given in our statement to the Tribunal. So  
10          that's just a shorthand way of saying, Judge, if you 14:59  
11          look at paragraph 2 of your letter, like Mr. O'Higgins,  
12          that is the easier place to start --  
13          CHAIRMAN: Did I sign that letter?  
14          MR. MCDOWELL: Mr. Kavanagh did.  
15          CHAIRMAN: Did I have anything to do with this letter? 15:00  
16          MR. MCDOWELL: Sorry, Mr. Kavanagh did it on behalf of  
17          Ms. Mullan.  
18          CHAIRMAN: Yes. They are entirely responsible.  
19          MR. CUSH: The second part, Chairman, at paragraph 2 -  
20          *"resolve any conflict of facts in relation thereto"* - 15:00  
21          if that is meant to mean inquire into the truth or  
22          falsity of that allegation then we respectfully suggest  
23          that is not part of your business. We suggest that.  
24          In relation to the first part of paragraph 2, the  
25          extent of the allegation, we suggest only that the fact 15:00  
26          of it, perhaps the description of it --  
27          CHAIRMAN: So, it's the same as a libel case; the fact  
28          that somebody said something to somebody in consequence  
29          of something that appears in the newspaper, it doesn't

1 mean that it is true --  
2 MR. CUSH: Absolutely.  
3 CHAIRMAN: -- all it means is that it happened: making  
4 the statement.  
5 MR. CUSH: It does. 15:00  
6 CHAIRMAN: And one has to draw that distinction. Even  
7 though I am not bound by the Rules of Evidence.  
8 MR. CUSH: It got said, exactly.  
9 CHAIRMAN: Yes.  
10 MR. CUSH: And then, in paragraph 1, we don't 15:01  
11 particularly have a view on paragraph 1, and I think  
12 that is more for other parties, Chairman.  
13 CHAIRMAN: Yes.  
14 MR. CUSH: And that is our position.  
15 CHAIRMAN: Thank you very much, Mr. Cush. And, 15:01  
16 Mr. McDermott, for TUSLA, I wonder do you have anything  
17 to say.  
18  
19 SUBMISSION BY MR. McDERMOTT  
20 MR. McDERMOTT: Thank you very much for the courtesy of 15:01  
21 inviting us, and I agree with the remarks made by  
22 Mr. Cush. In terms of item 3, case management: Sir,  
23 you will be aware obviously the nature and subject  
24 matter of these issues are sensitive, childcare matters  
25 are normally dealt with in private, and we are sure in 15:01  
26 due course the Commission will take whatever measures  
27 are necessary to preserve that. Thank you.  
28 CHAIRMAN: Yes. I think, Mr. Kelly, you have a right  
29 of reply, I mean if you would like to say anything in

1 reply. I'm not saying you have to, but I think the one  
2 thing that is perhaps of importance is the extent to  
3 which there was I suppose talk, let's say, in ordinary  
4 civilian/Garda circles as opposed to any direction  
5 emanating from Headquarters or people at superintendent 15:02  
6 level that it would be a good idea for Paul Williams to  
7 come down and interview your client in 2014. Now, I'm  
8 sure you don't have instructions on that, I would  
9 expect you wouldn't in any event, but just, that would  
10 seem to be one of the questions that may be asked of 15:02  
11 your client. And I am sure it will be asked very  
12 politely.

13  
14 **REPLYING SUBMISSION BY MR. KELLY**

15 **MR. KELLY:** well, Judge, I think that I tried to 15:02  
16 address the point that Mr. McGuinness made at the  
17 beginning --

18 **CHAIRMAN:** Yes.

19 **MR. KELLY:** -- and Mr. McDowell went considerably  
20 further as he believed he needed to do for his client, 15:02  
21 so I didn't deal with any of those issues. Ms. D is  
22 prepared to give evidence and will do so in relation to  
23 paragraph (d), and if issues which the Tribunal feel  
24 need to be addressed in relation to the other  
25 paragraphs she will give that evidence and answer the 15:02  
26 questions. Simple as that.

27 **CHAIRMAN:** All right. And your earlier position you  
28 stated hasn't changed?

29 **MR. KELLY:** Hasn't changed.

1           **CHAIRMAN:** Yes. well, that is very helpful.

2           **MR. KELLY:** I mean, I suppose when you deal with false  
3           allegations it is an unfortunate turn of phrase which  
4           has been adopted. There was one allegation made in  
5           2006. 15:03

6           **CHAIRMAN:** Yes.

7           **MR. KELLY:** Ms. D's position is that she did not make  
8           any second allegation in 2013 or at any other time. So  
9           it's not a false allegation made by her, so to speak.  
10          She made no allegation at all in 2013. There seems to 15:03  
11          be an unfortunate mistake or error made at that point  
12          in time when she went to counselling in August.

13          **CHAIRMAN:** Yes. Mr. Kelly, are you proposing to appear  
14          for Ms. D and also for her parents who have some  
15          limited peripheral -- they tend to come in and out in 15:03  
16          relation to some of the things.

17          **MR. KELLY:** At this stage I don't have instructions  
18          from mother and father, Judge. I don't have  
19          instructions from them.

20          **CHAIRMAN:** Yes. well, I intend to certainly grant you 15:03  
21          representation in relation to whatever touches on  
22          Ms. D, but I don't think you need to be here --

23          **MR. KELLY:** No.

24          **CHAIRMAN:** -- for the whole of the particular section  
25          that will be dealing with that. And if you also have 15:04  
26          instructions from her parents, and I am not saying you  
27          should have or you need to but in the event that you do  
28          it would seem to follow to me, because it's a family  
29          thing that we are dealing with, that you might be so

1 kind as to represent them as well, unless there's a  
2 particular conflict of interest or instructions.

3 **MR. KELLY:** Very good. I will take instructions from  
4 them.

5 **CHAIRMAN:** All right. well, I think anything I need to 15:04  
6 say shouldn't be said now. And I am very grateful to  
7 the parties for their submissions because I think it  
8 has cleared up a lot of things and put us in a position  
9 as to thinking about what we need to think about. Now,  
10 as I understand it, some people are going on holidays, 15:04  
11 as and from maybe now, which is nice and I wish you all  
12 a happy holiday, but others of us will be doing other  
13 things and I understand counsel for the Tribunal will  
14 be making an opening statement yesterday two weeks.

15 So, it's Wednesday, 14th June. And, the idea is to get 15:05  
16 this going, to give you Books of Evidence immediately  
17 we finish that opening statement, which I think is -- I  
18 don't know how many tens of thousands of words it is  
19 but it might be done in a day if we stuck at it, and to  
20 give you the relevant documents thereafter and to have 15:05  
21 hearings on this matter starting the first week in  
22 July. So, if people would be so kind as to think of  
23 gearing up for that, please. And, there it is. So we  
24 will sit again, unless there is a necessity for a  
25 private hearing -- and of course, Mr. Kelly, you 15:05  
26 mentioned this matter and I think it was mentioned by  
27 Mr. McDermott as well, the reason we sat in private  
28 today was to try and sort out matters in a way which  
29 didn't impinge on anyone's privacy rights, and I would



1 be thinking in a very similar way in relation to any  
2 evidence that Ms. D might give in due course, subject  
3 of course to the necessity on anonymising matters to  
4 ensure that insofar as it is possible to put matters on  
5 the website or whatever that we should also do that. 15:06  
6 So, there it is.

7 **MR. MCDOWELL:** Chairman, in relation to that last  
8 matter, as to evidence on the issues that I have  
9 raised, I hope that the Tribunal is not indicating a  
10 disposition to deal with all of that in private. 15:06

11 **CHAIRMAN:** No. I wouldn't be intending to deal with  
12 all of that in private. But, I mean, I think before I  
13 make any such ruling, Mr. McDowell, I think I would  
14 need to hear submissions.

15 **MR. MCDOWELL:** There is a distinction between anonymity 15:06  
16 of a person --

17 **CHAIRMAN:** Yes.

18 **MR. MCDOWELL:** -- and the evidence being heard in  
19 public.

20 **CHAIRMAN:** well, why don't you see -- 15:06

21 **MR. MCDOWELL:** There is a distinction. One doesn't  
22 necessarily entail the other.

23 **CHAIRMAN:** No. But the Act seems to say it is one or  
24 the other. The 1923 Act.

25 **MR. MCDOWELL:** I would want to look at that. 15:07

26 **CHAIRMAN:** It is on the website.

27 **MR. MCDOWELL:** Yes.

28 **CHAIRMAN:** I will hear submissions on it, Mr. McDowell.  
29 But I don't want people to be distressed unnecessarily.

1 MR. MCDOWELL: well, nor do I --

2 CHAIRMAN: No.

3 MR. MCDOWELL: -- but just remembering, Judge, what we  
4 have heard in the newspapers about the attitude of  
5 certain journalists, is there to be any evidence on 15:07  
6 this if there's a refusal by journalists to become  
7 involved and the public are not to know --

8 CHAIRMAN: well --

9 MR. MCDOWELL: -- what's going on?

10 CHAIRMAN: I don't see any reason for a non-public 15:07  
11 hearing in relation to any such issue as to  
12 journalistic privilege or the availability of  
13 information. I can't at the moment see that.

14 MR. MCDOWELL: Obviously an anonymised transcript is a  
15 different matter. 15:08

16 CHAIRMAN: well, let's get to the point, Mr. McDowell,  
17 and see where we are at.

18 MR. MCDOWELL: Yes.

19 CHAIRMAN: I think today has involved huge progress and  
20 let's take it up from there and see where we are 15:08  
21 standing --

22 MR. MCDOWELL: May it please you.

23 CHAIRMAN: -- when it comes to that. But I think I  
24 would be reluctant for people to be made the object of  
25 contumely simply by reason of giving evidence. So, 15:08  
26 there it is. Thank you.

27  
28 THE HEARING THEN CONCLUDED  
29

	<b>4</b>	32:12, 47:4	47:10	<b>arises</b> [1] - 7:23	<b>based</b> [2] - 6:5, 29:6
<b>'conspiracy</b> [1] - 36:23	<b>43</b> [1] - 3:7	<b>adumbrated</b> [2] - 12:26, 41:17	<b>allegations</b> [15] - 5:5, 5:10, 6:14, 6:17, 7:1, 9:6, 10:16, 19:12, 19:21, 25:26, 27:8, 30:14, 32:6, 39:22, 47:3	<b>arising</b> [4] - 13:19, 20:9, 20:11, 41:8	<b>basis</b> [6] - 7:21, 7:27, 20:29, 28:19, 31:3, 38:10
<b>'do</b> [1] - 34:17	<b>45</b> [1] - 3:8	<b>advantage</b> [1] - 16:11	<b>alleged</b> [5] - 5:12, 10:4, 19:21, 30:11	<b>arranged</b> [1] - 28:5	<b>bear</b> [1] - 19:25
<b>'oh</b> [1] - 31:9	<b>46</b> [1] - 3:9	<b>affect</b> [1] - 23:12	<b>allegedly</b> [2] - 6:15, 40:2	<b>arrived</b> [1] - 34:15	<b>became</b> [2] - 12:25, 29:20
<b>'sorry</b> [1] - 34:20	<b>5</b>	<b>afternoon</b> [1] - 4:4	<b>alleges</b> [1] - 4:25	<b>article</b> [1] - 20:11	<b>become</b> [2] - 30:7, 50:6
<b>'the</b> [1] - 42:29	<b>5th</b> [1] - 10:13	<b>afterwards</b> [1] - 33:6	<b>almost</b> [1] - 18:27	<b>AS</b> [1] - 4:2	<b>becomes</b> [1] - 19:12
<b>'yes</b> [1] - 26:14	<b>A</b>	<b>agenda</b> [1] - 5:20	<b>alone</b> [1] - 22:12	<b>ascertaining</b> [1] - 19:27	<b>becoming</b> [1] - 33:3
<b>'you</b> [2] - 26:25, 33:26		<b>agendas</b> [1] - 5:6	<b>amount</b> [2] - 24:29, 38:10	<b>ascribed</b> [1] - 15:1	<b>beef</b> [1] - 31:13
<b>1</b>		<b>aggressive</b> [1] - 36:11	<b>ancillary</b> [1] - 9:19	<b>aspects</b> [1] - 24:28	<b>beginning</b> [2] - 9:3, 46:17
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