

## THE DISCLOSURES TRIBUNAL

### Procedures of the Tribunal:

#### 1. **General:**

1.1 The Tribunals of Inquiry (Evidence) Acts, 1921 to 2004 do not lay down any detailed model of procedures to be adopted by a Tribunal in carrying out its functions. It therefore is appropriate for the Tribunal to set down in an open and transparent way how, in general, it intends to carry out its functions under the Terms of Reference given to it.

1.2 The essence of a Tribunal of Inquiry has been encapsulated by the Chief Justice, Mr. Justice Hamilton, in the case of *Haughey v. Moriarty* [1993] 3 IR 1, where he stated, giving the Judgment of the Supreme Court:

*“... the principal function of such Tribunals has been to restore public confidence in the democratic institutions of the State by having the most vigorous possible enquiry consistent with the rights of its citizens into the circumstances which give rise to the public disquiet.”*

1.3 The Chief Justice also goes on to describe the procedural phases of a Tribunal of Inquiry as follows:

(1) *“A preliminary investigation of the evidence available;*

(2) *The determination by the Tribunal of what it considers to be evidence relevant to the matters into which it is obliged to enquire;*

(3) *The service of such evidence on persons likely to be affected thereby;*

- (4) *The public hearing of witnesses in regard to such evidence and the cross-examination of such witnesses by or on behalf of persons affected thereby;*
- (5) *The preparation of a report and the making of recommendations based upon facts established at such public hearing.”*

**Representation:**

- 1.4 The Tribunal has already had a sitting on the 30<sup>th</sup> of March, 2017 to hear applications for representation, as a result of which it made a number of orders providing for such, both on a full and a limited basis. The Tribunal website at [www.disclosuretribunal.ie](http://www.disclosuretribunal.ie) has the ruling of the Tribunal on it, as well as the transcript of the hearing for interested parties. This does not exclude the possibility of the Tribunal hearing further applications for representation on behalf of persons who may believe that they are entitled to same, whether on a full or a limited basis or for only one part or one issue within paragraphs (a) to (o) of the Terms of Reference. Any such application should be made, in the first instance, by letter in writing clearly identifying the interest of the party concerned and the reasons upon which an Order for representation is sought. The Tribunal will, at its discretion and at an appropriate time, if necessary, hear submissions upon such applications having regard to the progress of its enquiries to date, the information available to the Tribunal and any other relevant matter.

**2. Preliminary Investigation:**

- 2.1 The Tribunal has, at its first sitting, on the 27<sup>th</sup> of February 2017, called for the cooperation and assistance of all persons who have any information or knowledge of or material related to any of the Terms of Reference of the Tribunal. The Tribunal will, to the greatest extent possible, consistent with its duties under the Act, conduct its investigation by seeking and facilitating the voluntary cooperation of any person who is or may be in the possession of relevant information, knowledge or material relating to the Terms of Reference.
- 2.2 The Tribunal will therefore seek to ascertain, as appropriate, from interested persons, parties who have been given representation, or anyone else who may be able to assist the Tribunal, all relevant information and the names of potential witnesses who may be able

to give relevant evidence in regard to the subject matter of the Inquiry or who may have documents relevant to such subject matter.

2.3 The Tribunal may invite persons who may be in a position to assist the Tribunal to do all or any of the following things:

- (a) To furnish a statement of proposed evidence;
- (b) To answer questions in writing;
- (c) To attend a private meeting with legal representatives of the Tribunal where deemed appropriate and on a voluntary basis. In all cases, the person requested under this paragraph shall be under no obligation to comply with the request. The person requested to attend the meeting with legal representatives of the Tribunal shall be invited to have his or her legal representatives present if he or she so wishes. The foregoing is without prejudice to the provisions of paragraph 8 below relating to the Tribunal's investigators.

3. **Fair Procedures:**

3.1 The Tribunal will at all times respect the right to fair procedures of any person in relation to its preliminary investigation and in due course in relation to its public sitting.

4. **Powers of the Tribunal:**

4.1 The Tribunal has all the necessary powers of the High Court to make such Order as is necessary for the performance of its functions.

4.2 In this regard the Tribunal can make, inter alia, Orders for preservation, production, inspection, examination and discovery. It is envisaged that, in the first instance, a request for voluntary discovery will be made where practical. Where it is proposed to make an Order for discovery, the Tribunal will, insofar as it is practicable, put any party affected thereby on notice and insofar as is possible and will provide in any such Order for any

party to whom it is directed to make application as to its scope or breadth or duration or to raise any issue connected therewith if necessary.

5. **Compliance With Discovery:**

- 5.1 The Tribunal will allow such period as appears appropriate in the circumstances and will fix the time for such compliance in its Order. Any application for an extension of the time necessary may be made in writing to the Tribunal explaining the basis thereof.

6. **Form of Discovery:**

- 6.1 Discovery, when made, should be, as far as practicable, in the form required for an Affidavit of Discovery under the Rules of the Superior Courts, 1986, as amended.

7. **Discovery Documents:**

- 7.1 A person-making discovery shall make available to the Tribunal all documents other than those in respect of which a claim for privilege is asserted and accepted by the Tribunal.
- 7.2 Where discovery is made by any party or person, he or she shall swear an Affidavit of Discovery. Such Affidavit should contain an individual listing of the documents with a brief description of each item. When privilege is claimed, the category of documentation and the ground for so doing should be briefly stated.
- 7.3 Where documents are to be made available to the Tribunal, either pursuant to an Order for Discovery or for inspection or voluntarily, the person doing so shall normally retain the original and make a photocopy available to the Tribunal. The original should be kept available for inspection if necessary.
- 7.4 All documents made available to the Tribunal are potentially liable to be put in evidence in the course of the public hearing of evidence before the Tribunal. This is subject to the proper resolution of any claim of privilege or protection from disclosure as may be made and which require to be adjudicated upon by the Tribunal. Appropriate redaction of documents will be made in cases where this is necessary to protect rights of privacy or

confidentiality or in other cases where there is material therein which is wholly irrelevant to any issue.

- 7.5 Documents received by the Tribunal and documents forwarded to or circulated to any party or person shall be treated as confidential unless and until they are put in evidence in the course of the public hearing of evidence.
- 7.6 The Tribunal may make copies of documents received by it available to such persons as it considers necessary for the purposes of the Tribunal on the strict basis that the documents will be used solely for the purpose of the Tribunal and that neither the documents nor any material contained in them will be disclosed to any third party without the express permission of the Tribunal. This requirement will no longer apply in respect of any particular document or part thereof if and when that document or part thereof is accepted into evidence in the course of the public hearing.
- 7.7 On the basis set out herein, the Tribunal will endeavour to provide in advance to parties with full representation, the relevant parties with limited representation and to a proposed witness the documents, which will be referred to during the course of evidence of such witness.
- 7.8 A party or a proposed witness who believes that a relevant document or documents has or have been omitted from documents provided pursuant to paragraph 7.7 should bring this to the attention of counsel for the Tribunal at the earliest opportunity. If counsel for the Tribunal does not agree to include any such document or documents in the documents provided pursuant to paragraph 7.7, an application may be made to the Tribunal for a direction that the document or documents should be included. Such an application normally should be made before the witness in question begins giving evidence.
- 7.9 A witness may not refer in giving evidence or be referred in questioning to a document which is not included in the documents provided pursuant to paragraph 7.7 except by permission of the Tribunal. If the Tribunal decides to grant such permission, it may, at its discretion, require that arrangements are made for the witness and relevant parties to have an opportunity of examining and considering the document before it is referred to in evidence.

8. **Tribunal Investigators:**

8.1 The Tribunal has, pursuant to Section 6 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 2002, appointed two investigators to assist it in the performance of its functions and subject to its direction and control. Accordingly, the Tribunal may, when it thinks necessary and appropriate, request one or more of its investigators to carry out a preliminary investigation of any matter material to the Inquiry to which the Tribunal relates. An investigator appointed by the Tribunal has the following powers under the 2002 Act:

“Section 6:

*(4) An investigator may, for the purposes of a preliminary investigation under subsection (3), require a person to—*

- (a) give to him or her such information in the possession, power or control of the person as he or she may reasonably request,*
- (b) send to him or her any documents or things in the possession, power or control of the person that he or she may reasonably request, or*
- (c) attend before him or her and answer such questions as he or she may reasonably put to the person and produce any documents or things in the possession, power or control of the person that he or she may reasonably request,*

*and the person shall comply with the requirement.*

*(5) An investigator may examine a person mentioned in subsection (4) in relation to any information, documents or things mentioned in that subsection and may reduce the answers of the person to writing and require the person to sign the document containing them.*

*(6) Where a person mentioned in subsection (4) fails or refuses to comply with a requirement made to the person by an investigator under that subsection, the Court may, on application to it in a summary manner in that behalf made by the investigator with the consent of the tribunal concerned, order the person to comply with the requirement and make such other (if any) order as it considers necessary and just to enable the requirement to have full effect.*

*(7) A person to whom a requirement under subsection (4) is made shall be entitled to the same immunities and privileges as if he or she were a witness before the Court.*

*(8) An investigator shall not, without the consent of the tribunal by which he or she was appointed, disclose other than to that tribunal any information, documents or things obtained by him or her in the performance of his or her functions under this section.*

*(9) An investigator shall be furnished with a warrant of appointment and when performing a function under this section shall, if so requested by a person affected, produce the warrant or a copy of it to the person.*

8.2 The following provisions also relate to investigators appointed by the Tribunal:

*Section 7:*

*(1) A person who, without reasonable cause, by act or omission obstructs or hinders an investigator in the performance of his or her functions under section 6 , or fails or refuses to comply with a requirement made to the person under subsection (4) of that section, shall be guilty of an offence.*

*(2) A prosecution for an offence under this section may be brought only by or with the consent of the Director of Public Prosecutions.*

*(3) A person guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding €3,000 or imprisonment for a term not exceeding 12 months or both.*

*Section 8:*

*A statement or admission made by a person before an investigator shall not be admissible as evidence against the person in any criminal proceedings.”*

8.3 The Tribunal will determine what it considers to be evidence relevant to the matters into which it is obliged to enquire having regard to documents which it has received, statements furnished to it and any other relevant information.

9. **Sittings of the Tribunal:**

- 9.1 Where necessary during the course of its preliminary investigations the Tribunal will sit, whether in public, or in private, if necessary and if appropriate under the Act, to determine any matter necessary or relevant to any of its functions or to the making of any Orders necessary in pursuit of its preliminary investigation.

10. **Interpretation of Terms of Reference:**

- 10.1 The Tribunal has published its interpretation of its Terms of Reference. These procedures should be read in conjunction with both the Opening Statement of the Tribunal on the 27<sup>th</sup> of February 2017 and the interpretation of Terms of Reference published on the 12<sup>th</sup> day of May 2017. This interpretation by the Tribunal has been made at this stage without having completed its preliminary investigation.

- 10.2 The Tribunal therefore reserves the right as its work progresses to add to, alter or further clarify its interpretation of the Terms of Reference in the light of facts or information that may have emerged. Any interested party may seek clarification from the Tribunal at any time as to its interpretation of a particular provision in the Terms of Reference. Such request should be, usually, made in writing to the solicitor for the Tribunal.

11. **Public Hearings:**

- 11.1 The Tribunal intends later to make appropriate public statements in relation to which aspects of the Inquiry require to be or are likely to be pursued in the course of future public sittings.

- 11.2 The Tribunal will hold public oral hearings as necessary to allow it to carry out its work. Such hearings shall be in public save as may be otherwise decided by the Tribunal in accordance with law. Counsel will make an opening statement on behalf of the Tribunal in advance of the public hearings and before they first commence.

- 11.3 The Tribunal shall decide which of the relevant Terms of Reference, or which issues within any of those terms, will be the subject of any public sitting as it thinks appropriate



having regard to the progress of its investigations and enquiries to date and having regard to the material and witnesses available to it at any particular point in time.

12. **Service of Evidence:**

12.1 The Tribunal will serve copies of all proposed relevant evidence on parties with representation, on relevant parties with limited representation and on other persons likely to be affected thereby. In preparation for each public sitting relative to any Term of Reference or any issue therein, the Tribunal will identify persons likely to be affected by the available evidence and will contact all such persons who are legally represented or, if not legally represented, will make every effort to contact them personally. It is therefore envisaged that all such persons likely to be affected by material will, in so far as practicable, be furnished with all of the evidence, which is in the possession of the Tribunal relative to that sitting.

12.2 Parties represented before the Tribunal may suggest to the Tribunal in writing the names of any particular witness or witnesses or on any other step, which it thinks the Tribunal might consider taking.

12.3 The Tribunal shall decide which witnesses should be called to give oral evidence to the Tribunal. In deciding which witnesses shall be called, the Tribunal will consider all such suggestions.

12.4 Oral evidence will be given on oath or by affirmation.

12.5 All witnesses will first be questioned by counsel for the Tribunal. Parties are free to inform counsel for the Tribunal before the evidence of a witness is given of matters or questions, which they feel, should be raised with a witness. The witness may then be cross-examined by the legal representative of parties affected by such evidence. The right to question any witness shall be determined by the Tribunal having regard to all of the circumstances, including, inter alia, the nature of the evidence given, the extent to which such evidence affects any person and the obligation to adopt fair procedures. Following

questioning a witness, if represented, shall be entitled to be examined by her or her own legal representative.

12.6 Counsel for the Tribunal may further examine the witness in regard to any new matters that have arisen during questioning by other parties or which otherwise appears appropriate or necessary.

12.7 The Tribunal will consider in an appropriate case, having regard to the nature of any evidence proposed to be given by a witness, the giving of an opportunity to the witness to adopt his or her statement as part of his or her evidence, subject to any modification or clarification, which he or she may wish to make. It shall be a matter for the Tribunal to decide whether any particular piece of evidence is relevant and/or admissible and/or subject to any legally recognised form of privilege.

12.8 The Tribunal may seek, in appropriate circumstances, to admit into evidence the written statement of a person where there is agreement that it is not necessary to call such a witness *viva voce* or in other appropriate circumstances.

12.9 The Tribunal is free to accept any item, document or testimony in evidence, which will assist it in its inquiries.

12.10 The Tribunal may at any stage raise any issue at a public sitting with the legal representative of a party and may ask such questions of any witnesses as he thinks fit and proper.

12.11 At the conclusion of all of the public sittings, the legal representatives of any party granted representation before the Tribunal will be entitled to make a closing submission to the Tribunal in which he or she will be given an opportunity to deal with and to comment upon any evidence affecting his or her client.

### 13. **Reports of the Tribunal:**

13.1 The Tribunal will furnish its first interim report to the Clerk of the Dáil not later than the 17<sup>th</sup> of May 2017.

13.2 The Tribunal will furnish its second interim report as soon as may be after twenty days of witness testimony on the matters set out at (I)(a) to (d) of the Terms of Reference.

13.3 The Tribunal will, in accordance with its Terms of Reference, endeavour to complete in as economical a manner as possible, and at the earliest date possible, its Report consistent with the fair examination of the matters referred to it and furnish such Report (including its findings and recommendations) to the Clerk of the Dáil as required.

14. **Costs:**

14.1 Any application for an Order for costs pursuant to Section 6 of the Tribunals of Inquiry (Evidence) Act, 1979 may be made following the final report of the findings of the Tribunal. The fact that the Tribunal has granted representation to any person or body does not of itself in any way confirm their entitlement to an Order for costs in the matter. Any Order made by the Tribunal will, ordinarily, be on a party and party basis in the usual form. In relation to the issue of costs, the Tribunal shall have regard to the Terms of Reference which provide that: *“(III) All costs incurred by reason of the failure of individuals to cooperate fully and expeditiously with the Tribunal should, as far as it is consistent with the interests of justice, be borne by those individuals”* and having regard to the provisions of the Tribunal of Inquiries (Evidence) Acts, 1921 to 2004 and all relevant case law.

15. **Amendment of Procedure:**

15.1 The foregoing statement of the procedures of the Tribunal is neither exhaustive nor definitive and may require to be adapted or amended as is necessary. The Tribunal may therefore add to, alter or amend the procedures in the course of its work. The Tribunal may depart from these procedures to avoid unfairness or to achieve the efficient discharge of its business. Subject, of course, to fair procedure, if the Tribunal departs from these procedures, it will state that it is doing so and why.

15.2 These procedures are not rules of law but are intended to guide the Tribunal, the public, parties who are represented and witnesses or proposed witnesses as to how the Tribunal is likely to discharge its business.

16. Any question or clarification may be sought from the Tribunal in writing in relation to any matter relevant to these procedures.

Dated the 12th day of May, 2017.