



Tribunal of Inquiry into protected disclosures made under the Protected Disclosures Act 2014 and certain other matters

Established by the Minister for Justice and Equality under the Tribunals of Inquiry (Evidence) Act 1921, on 17th February 2017 by instrument

Opening Statement of Counsel for the Tribunal

INTRODUCTION

Sir, it is now my function to address you to deliver an opening statement on behalf of the Tribunal. I will be aided in this task by your other counsel, Mr Patrick Marrinan SC and Ms Kathleen Leader BL. The purpose of this is to outline in public the progress the tribunal is making in relation to the issues comprised in the terms of reference, an overview of the evidence and issues that have emerged so far, without drawing any conclusions in relation to those and to lay out, fairly I hope, the factual landscape that appears to be emerging. This is subject to all the evidence that will emerge in the course of the public hearings that you, sir, are about to embark on. Anything, therefore, that I or my colleagues say is subject to the evidence as it emerges and is tested, but also to the whole process that a tribunal must necessarily bring to bear in relation to that. I shall, as a matter of necessity and fairness, have to outline what is involved in such a process, albeit as briefly as I can.

Scope of Inquiry and the Terms of Reference

The scope of the tribunal's inquiries have necessarily been defined and thereby limited by the terms of reference conferred on it by the resolutions of each of the Houses of the Oireachtas. These are set out below for convenience:

[a] To investigate the allegation made in a Protected Disclosure under the Protected Disclosures Act 2014, on the 30th of September, 2016, by Superintendent David Taylor, wherein he alleges that he was instructed or directed by former Commissioner Martin Callinan and/or Deputy Commissioner Nóirín O'Sullivan, to contact the media to brief them negatively against Sergeant Maurice McCabe and in particular to brief the media that Sergeant McCabe was motivated by malice and revenge, that he was to encourage the media to write negatively about Sergeant McCabe, to the effect that his complaints had no substance, that the Gardaí had fully investigated his complaints and found no substance to his allegations and that he was driven by agendas.

[b] To investigate the allegation of Superintendent Taylor in his Protected Disclosure, that he was directed to draw journalists' attention to an allegation of criminal misconduct made against Sergeant McCabe and that this was the root cause of his agenda, namely revenge against the Gardaí.

[c] To investigate what knowledge former Commissioner Callinan and/or Commissioner O'Sullivan and/or other senior members of the Garda Síochána had concerning this allegation of criminal misconduct made against Sergeant McCabe and whether they acted upon same in a manner intended to discredit Sergeant McCabe.

[d] To investigate the creation, distribution and use by Túsla of a file containing false allegations of sexual abuse against Sergeant Maurice McCabe that was allegedly sent to

gardaí in 2013, and whether these false allegations and/or the file were knowingly used by senior members of An Garda Síochána to discredit Sergeant McCabe.

[e] To investigate whether the false allegations of sexual abuse or any other unjustified grounds were inappropriately relied upon by Commissioner O'Sullivan to discredit Sergeant Maurice McCabe at the Commission of Investigation into Certain Matters in the Cavan/Monaghan district under the Chairmanship of Mr Justice Kevin O'Higgins.

[f] To investigate whether senior members of An Garda Síochána attempted to entrap or falsely accuse Sergeant McCabe of criminal misconduct.

[g] To investigate such knowledge which former Commissioner Callinan and Commissioner O'Sullivan had concerning the matters set out in [a], [b], [c], [d], [e] and [f] above.

[h] To investigate contacts between members of An Garda Síochána and: - Media and broadcasting personnel, - members of the Government, - Túsla, - Health Service Executive, - any other State entities, - or any relevant person as the Sole Member may deem necessary to carry out his work relevant to the matters set out in [a], [b], [c], [d], [e] and [f] above.

[i] To examine all records relating to the telecommunications interactions used by Superintendent Taylor, former Commissioner Callinan and Commissioner O'Sullivan, in the period from the 1st of July, 2012, to the 31st of May, 2014, to ascertain whether there are any records of text messages or other telecommunication interactions relating to the matters set out at [a], [b], [c], [d], [e] and [f] above and to examine and consider the content of any such text messages or other telecommunication interactions.

[j] To examine all electronic and paper files, relating to Sergeant Maurice McCabe held by An Garda Síochána and to consider any material therein relevant to [a], [b], [c], [d], [e] and [f] above.

[k] To investigate whether Commissioner O'Sullivan, using briefing material prepared in Garda Headquarters, influenced or attempted to influence broadcasts on RTÉ on the 9th of May, 2016, purporting to be a leaked account of the unpublished O'Higgins Commission Report, in which Sergeant McCabe was branded a liar and irresponsible.

[l] To investigate whether a meeting took place between former Commissioner Callinan and Deputy John McGuinness on the 24th of January, 2014 in the carpark of Bewley's Hotel, Newlands Cross, Co. Dublin and to examine and consider the circumstances which led to any such meeting, the purpose of such meeting and matters discussed at such meeting.

[m] To investigate such knowledge which Commissioner O'Sullivan had of the meeting referred to in [l] above.

[n] To investigate contacts between members of An Garda Síochána and Túsla in relation to Garda Keith Harrison.

[o] To investigate any pattern of the creation, distribution and use by Túsla of files containing allegations of criminal misconduct against members of An Garda Síochána who

had made allegations of wrongdoing within An Garda Síochána and of the use knowingly by senior members of the Garda Síochána of these files to discredit members who had made such allegations.

[p] To consider any other complaints by a member of the Garda Síochána who has made a protected disclosure prior to the 16th of February, 2017 alleging wrong-doing within the Garda Síochána where, following the making of the Protected Disclosure, the garda making the said Protected Disclosure was targeted or discredited with the knowledge or acquiescence of senior members of the Garda Síochána

The terms of reference having been set down, the tribunal, in accordance with the Supreme Court decision in *Haughey v Moriarty* [1999] 3 IR 1, duly interpreted its terms of reference in its Interpretation of the Terms of Reference of the Tribunal on the 12th of May 2017. It is unnecessary to refer to it in any detail here as it speaks for itself and no issue has been raised by any party in relation to the ambit of the tribunal's inquiries in pursuance of its interpretation of its terms of reference. On the same date, the tribunal also published its memorandum of procedures adopted for the purposes of the tribunal. Again, no issue has arisen, to date, in connection with this. These steps were all preceded, Sir, by your immediate announcement in relation to the establishment of the tribunal and your urgent call for the cooperation of all concerned and the provision of all necessary information, documentation and relevant devices etc as outlined by you in your sitting on the 27th of February 2017.

Function of Tribunal

In accordance with its mandate under the terms of reference, the tribunal's function is to inquire into the facts, make such findings and recommendations as appear appropriate and report thereon.

As Finlay CJ said in the case of *Goodman International v Mr Justice Hamilton* [1992] 2 IR 542 at page 588: "It is a simple fact finding operation, reporting to the Legislature."

The decision in the High Court of Mr Justice Costello in that case, both in his conclusions and in the reasoning by which he came to those conclusions, was approved by the Supreme Court. He said at page 555-557:

4. The functions of the Tribunal are to inquire, report and if appropriate to make recommendations. When reporting on allegations of wrongdoing it expresses an opinion as to whether the allegations are true or false, but this opinion is of no legal effect. The Tribunal determines no legal rights; it imposes no legal obligations. It expresses conclusions for the guidance of the legislature and the executive.

5. There are no parties before the Tribunal, although persons accused of wrongdoing in the allegations being investigated will have the same rights as if they were parties against whom a charge had been made. The Tribunal is seised of no *lis*. Its functions are inquisitorial which means that the Tribunal itself has to make inquiries relevant to its terms of reference. The witnesses produced at its hearings are the Tribunal's witnesses and are not produced by any party to whom representation has been granted. All witnesses called are subject to being cross-examined as permitted by the Tribunal.

6. ... The terms of reference in this case required the Tribunal to inquire into the truth or falsity of a number of allegations of wrongdoing including assertions that the criminal law has been breached. But in inquiring into these allegations and in reporting its opinion on

them, the Tribunal is not imposing any liabilities or affecting any rights. It is not deciding any controversy as to the existence of any legal right. It is not making any determination of any rights or liabilities. It is not imposing any penalties. It may come to the conclusion that some or all the allegations of wrongdoing are true, but this opinion is devoid of legal consequences. Its functions of inquiring, reporting and recommending cannot therefore be regarded as the “administration of justice”. The Tribunal is not exercising a “judicial function” in the case of allegations of criminal behaviour. It is not trying anyone on a criminal charge. In my judgment Parliament did not direct the establishment of a Tribunal that is to exercise judicial functions.”

As you, Sir, indicated in your opening statement, the tribunal, though having many of the powers of the High Court, is not a court of law, it is a Tribunal of Inquiry, the purpose of which in the instant case is to examine and, where possible, in the light of the evidence, make findings on the facts and, if thought appropriate, to make recommendations based on the established facts. As you also recognised, Sir, the tribunal’s inquiry is not a trial of alleged wrongdoing by any particular person or group of persons, nor will you, Sir, I am sure, allow it to be turned into one. There are many, many matters outside your terms of reference and you, Sir, will be vigilant to ensure that neither the parties stray outside them and that you are not enticed into error by doing so yourself.

Finding the Facts

Not unusually, there are many disputed areas of fact or areas of evidence where a conflict exists between witnesses as to what occurred. Where these occur and are of relevance, these will be identified in the appropriate place throughout the hearings and appropriately pursued to conclusion. The resolution of any such conflict in accordance with the appropriate legal principles is, of course, a matter for you, Sir, in deciding what the primary facts are. The second level of fact finding which the tribunal must engage is what has been described as secondary fact finding, ie drawing inferences or reaching conclusions from the facts directly established by the primary evidence. In relation to Tribunals of Inquiry, the standard which has been laid down as the basis for fact finding by tribunals has been long established and approved of by the Courts, eg in *Goodman International*, cited above, Hederman J at page 603 noted that:

The Tribunal will doubtless adopt the same approach as the Tribunal of Inquiry into dealings in Great Southern Railway Stock (Prl. 6792; 1943), the members of which were Mr. Justice Overend, Judge Davitt and Judge Barra O’Briain. While it sifted through rumour and hearsay, it relied only on admissible evidence for its findings.

Mr Justice McCarthy also said, at page 607:

I do not accept that the determining of truth or falsity is, necessarily, a judicial act in the sense that it may only validly be performed by Judges. It does require the application of judicial standards, but it is an everyday occurrence that a variety of tribunals, collegiate or otherwise, have to decide disputes of fact.

The former President of the High Court, Mr Justice Hamilton, in his conduct of the Tribunal of Inquiry into the beef processing industry likewise defended and asserted his right to receive hearsay evidence, but also indicated repeatedly that he would only act on legally admissible evidence when he came to make his findings (see *Attorney General v Hamilton (No 2)* [1993] 3 IR 227 at page 289, and see also *Goodman International v Hamilton (No 3)* [1993] 3 IR 320 at page 330).

The Rights of Parties to Fair Procedures

It must be noted that this is an indispensable component of constitutional justice and fair procedures and was recognised as such by the Supreme Court in the case of *In re Haughey* [1971] 1 IR 217. These are set down at page 263:

- (a) that he should be furnished with a copy of the evidence which reflected on his good name; (b) that he should be allowed to cross-examine, by counsel, his accuser or accusers;
- (c) that he should be allowed to give rebutting evidence; and (d) that he should be permitted to address, again by counsel, the Committee in his own defence.

Of these Ó Dálaigh CJ said, at page 264:

[A] person whose conduct is impugned as part of the subject matter of the inquiry must be afforded reasonable means of defending himself. What are these means? They have been already enumerated at (a) to (d) above. Without the two rights which the Committee's procedures have purported to exclude, no accused – I speak within the context of the terms of the inquiry – could hope to make any adequate defence of his good name. To deny such rights is, in an ancestral adage, a classic case of *clocha ceangailte agus madraí scaoilte*. Article 40, s. 3, of the Constitution is a guarantee to the citizen of basic fairness of procedures. The Constitution guarantees such fairness, and it is the duty of the Court to underline that the words of Article 40, s. 3, are not political shibboleths but provide a positive protection for the citizen and his good name.

In the case of *Goodman International v Hamilton (No 2)* [1992] 3 IR 307, Geoghegan J was considering how the rights of, inter alia, the applicant company there were to be vindicated by the Tribunal. He stated at page 313:

I turn now to an important argument made by counsel for the applicants that the right to vindication of one's good name and the right to fair procedures at a tribunal in which that good name was being questioned are separate constitutional rights and that the Tribunal must respect and vindicate both of those rights at all times. I agree with that proposition but, in my view, in the context of a tribunal hearing there is no difference in the manner in which the tribunal must discharge its constitutional obligation to respect and vindicate both of those constitutional rights. In each case the tribunal discharges its constitutional obligation by ensuring that there is a fair hearing in which, where appropriate, the protections identified by Ó Dálaigh C.J. in *In re Haughey* are afforded, and are reflected in the ultimate report of the tribunal.

At page 316, he states:

It does not seem to be suggested in the Haughey case that Chief Superintendent Fleming should not have been permitted to give evidence at all of a hearsay nature and therefore the former Chief Justice was obviously concerned to ensure in the vindication of Mr. Haughey's good name that that good name would not be destroyed except on the basis of evidence from the real accusers, duly tested by cross-examination if that was desired.

O'Dálaigh C.J., referred to:—

“the well established procedure, adopted by the several tribunals of inquiry set up by Dáil Éireann to inquire into matters of public importance.”

He pointed out that in that case persons accused in connection with the subject matter of the inquiry were granted the rights of parties and were allowed to appear by counsel to cross-examine and to address the tribunal.

Duty of Chairman

There have been a number of previous tribunals which have been established to inquire into matters related to An Garda Síochána. These include three previous Tribunals of Inquiry into the facts and circumstances surrounding the death of citizens and the involvement of the police force of the State. The first of these was the Tribunal of Inquiry in 1928 to inquire into the shooting of Timothy Coghlan, at Dartry Road. Three serving Judges were appointed to inquire into this shooting. The second was the Tribunal of Inquiry in 1967 to inquire into the death in Garda custody of one Liam O'Mahony. Again, this was presided over by three serving members of the Judiciary. The third of these was the Tribunal of Inquiry into the fatal shooting of the late John Carty in Abbeylara, presided over by the late Mr Justice Barr. Sitting at least for part of the same period of time was the Morris Tribunal, at which you were one of the counsel for the tribunal and which produced several very high quality reports. The Smithwick Tribunal then dealt with the allegations of Garda collusion in relation to the murders of Chief Superintendent Harry Breen and Superintendent Bob Buchanan by the IRA in Northern Ireland. More recently a number of commissions of inquiry were established: one to deal with the Dean Lyons issue, presided over by Mr George Birmingham SC (as he then was).

More recently and connected to some of the *dramatis personae* that you will be dealing with were events which led to the Independent Review Mechanism established by the Minister for Justice and Equality, the O'Higgins Commission itself, followed by the O'Neill scoping Inquiry which ultimately led to the decisions and resolutions establishing this tribunal. These all comprise matters, which, with the exception of term of reference (e) above, you cannot enquire into.

It can be accurately observed that no previous tribunal has had to deal with matters which concern directly both the serving and the former Commissioner of the force, the Press Officer and potentially all other senior ranking officers of An Garda Síochána. Also centrally involved are Sergeant Maurice McCabe, the former Chairman of the Public Accounts Committee, Mr John McGuinness TD, the Child and Family Agency (or Tusla), the Health Service Executive, RTE and others.

Also involved in the tribunal's terms of reference are the media. It remains to be determined whether, and if so, to what extent an essential element of the Tribunal's inquiries, as determined by the Oireachtas, can legitimately put itself beyond the scope of those inquiries as laid down by the law of the land in the Tribunals of Inquiry (Evidence) Act 1921, as amended.

In all of these matters, Sir, I know you will be guided by the law as it is, your patience, experience and above all by the guiding principle of your solemn judicial declaration to fulfil your duty "without fear or favour to any". Rank or position, high or low will count for nothing in this process. As is said "Be you ever so High the Law is above you." You have already announced your intention to make fairness your watchword for the tribunal and to treat all equally in this respect.

SUMMARY

Sir, on the 17th of February 2017 this Tribunal of Inquiry into protected disclosures made under the Protected Disclosures Act 2014 and certain other matters was established by the Minister for Justice and Equality by instrument under the Tribunals of Inquiry (Evidence) Act 1921, as amended. The establishment of the tribunal followed what it might be fair to say were months of controversy about how the Garda establishment allegedly treated those who chose to break ranks and to disclose, through the mechanisms established following the Morris Tribunal, serious failings within that organisation. While this period of disquiet was intense in itself, it should be pointed out that it was preceded by the resignation of former Commissioner Martin Callinan on the 24th of March 2014, the Commissioner having appeared before the Publics Accounts Committee on the 23rd of January 2014 and having referred to an officer at the centre of this entire controversy, Sergeant Maurice McCabe, together with another officer, as “disgusting” and contrasting their conduct with that of 13,000 other police officers. As outlined above a number of other commissions of inquiry were set up in the aftermath of these events, the details of which do not concern us. But, briefly, a commission of investigation under Mr Justice Nial Fennelly was set up on the 25th of March 2014, initially to inquire into an issue as to the recording of telephone conversations in Garda stations and then to inquire into the circumstances of the resignation of the former Commissioner; Mr Seán Guerin SC recommended the establishment of a commission of investigation which, in due course, was set up under the chairmanship of Mr Justice Kevin O’Higgins on the 3rd of February 2015 and reported on what was essentially a review of the internal Byrne-McGinn garda inquiry on the 25th of April 2016.

Sir, it is not the purpose of this tribunal of inquiry to revisit work that has already been done. You will be aware that under section 45 of the Commissions of Investigations Act 2004, you are entitled to regard as evidence matters that the O’Higgins Commission have made available for the work of this tribunal. However, you are not tasked with re-investigating such matters as the Kingscourt bus incident, an assault at the Lakeside Manor Hotel, the savage attack on a taxi driver by a man later convicted of murder, the assault on a 17-year-old girl in Cootehill, the misuse of the Pulse system, and other incidents covered in that comprehensive inquiry. These are in the past and we say that they are not subject to reanalysis within the context of the hearings which will now follow. Apart from the futility of spending huge sums on a public re-examination of work that has already been conducted with great efficiency and application by the O’Higgins Commission, you will be aware, Sir, that the tribunal of inquiry established under the relevant legislation is a creature of statute. Therefore, you have jurisdiction to investigate only those particular matters which are set out in the terms of reference.

Sir, in any reading of the terms of reference, it is clear that the subject of Sergeant Maurice McCabe and his treatment by senior officers of the garda is a central issue. Sir, you will be aware that on the 30th of September 2016 the confidential recipient designated to deal with communications from garda officers received a protected disclosure from Superintendent David Taylor. Earlier, a revelation as to the text of what Superintendent Taylor was to say had been received from Sergeant Maurice McCabe. Both documents were in substantially the same terms. We will refer to the text of this in due course, and the investigations that have subsequently been done with a view to establishing the basis for these. In summary, Superintendent Taylor alleged in broad terms that the current head of the garda force, Commissioner Nóirín O’Sullivan and her immediate predecessor former Commissioner Martin Callinan had abused their position of authority and their standing within the community as unimpeachable sources of reliable information to damnify the character of Sergeant McCabe.

For a period from the 1st of July 2012 to the 31st of May 2014, under former Commissioner Callinan, the head of the garda press office was Superintendent Taylor. He was therefore the official to whom members of the media had resort when they wished to ascertain the progress of particular investigations, and if they were to inquire into matters of internal structure, discipline and resourcing of our national police force or any other matters relating to policing. His word, Sir, might therefore reasonably be taken as one of high reliability when it came to anything to do with matters internal to the police. Superintendent Taylor was also a person who could reasonably be regarded as an individual who would have inside knowledge as to the character and background of individual officers since, it might reasonably be supposed, he might either have access to or might inquire in an official way into matters, files, internal documents or events and acquire information that would be regarded as more than mere barroom gossip. Therefore, from the rank which he held, his position within the police and his means of knowledge, his say-so on a matter would carry particular weight. That, at least, is what one might have thought.

Superintendent Taylor alleges that he was required by former Commissioner Martin Callinan and with the knowledge of then Deputy Commissioner Nóirín O'Sullivan, in the course of his role as Garda Press Officer, to brief the media negatively against Sergeant McCabe and to tell them that he was motivated by malice and revenge to make complaints about garda malpractice which had no substance and that the gardaí had fully investigated these complaints, finding them to be groundless, and therefore that he was driven by agendas of his own.

Sir, it is a regrettable fact of human nature that many people do not approach gossip with healthy scepticism, nor do they apply the maxim central to the administration of justice, that people are presumed to be innocent till proven guilty. Instead, many believe that there is no smoke without fire. This shibboleth, in our day and age, finds particular traction when it comes to some allegations of which, perhaps, financial irregularity and sexual misconduct towards children are prime examples.

Thus for his time as Garda press officer, Superintendent Taylor alleges that he was briefing the media negatively to the effect that an allegation of criminal misconduct had been made against Sergeant McCabe in December 2006 that supposedly referred to an event which had taken place in his house as far back as 1998. Sir, it is appropriate to record as of this point that when this complaint was referred to the Director of Public Prosecutions in 2007, the analysis by that office was that even on the facts alleged, taken at their height, no sexual assault was disclosed.

Sir, if such instructions were given to Superintendent Taylor, but that he, acting under his own motivations, had chosen to misrepresent these facts, it would be shocking. Even more shocking would be the lack of fair mindedness, professionalism and adherence to basic and civilised standards were those tasked with the direction of the national police force at the very highest level to ignore everything which they were taught as to appropriate behaviour and to resort instead to the adoption of a culture of deceit in order to destroy those whom, it might be thought, were making life uncomfortable for them. As it happens, despite anxious scrutiny of the media in all of its formats, we have been unable to find any mention in any published source from a professional organisation, at the relevant time, which took up and ran with the allegation that was supposedly being widely disseminated on the instructions of the then Commissioner and Deputy Commissioner by Superintendent Taylor.

Nonetheless, Sir, you are tasked with inquiring into whether any direction was given to Superintendent Taylor in that form, whether he acted on same by contacting particular members of the media and briefing them in a particular way, what reception he received from journalists in

the event that he did indeed follow through on this and if any of this happened, from what source ultimately came the direction or motivation for this conduct.

Sir, as if this were not bad enough, public controversy surrounds the creation, distribution and use of a file by certain agencies, namely Rian which is a counselling agency under the Health Service Executive, the Health Service Executive, and later, on statutory transfer, the Child and Family Agency or, as they refer to themselves, Tusla. While this will be referred to in detail at a later stage in this statement, it is convenient now to indicate that in July 2013 the young lady who had made the allegation which the Director of Public Prosecutions had decided in April 2007 did not amount to a sexual assault, returned to counselling with Rian because of an unrelated matter. Sir, you are not investigating whether anything happened in 1998 which led to this young lady making a complaint in December 2006, nor is anything concerning the private life of this young lady, and we will call her Ms D, anything to do with the terms of reference. What is, however, central to the terms of reference is the fact that on returning to counselling, it so happened that in the course of discussion with her counsellor, the earlier alleged incident was mentioned which led, in turn, to the invocation of certain and particular procedures which had been set up with a view to the protection of families and children.

Some of this, Sir, might be regarded as part of the mandatory reporting culture which is central to the way in which society now responds to allegations of harm to children. While this will be referred to in greater detail shortly, it suffices to say that while the original allegation made by Ms D was one of being grabbed while clothed and what were described as humping motions made, through some dreadful alchemy in making an official typed report of the counselling session to refer on to child protection services, this became recorded therein as digital penetration, both anal and vaginal. Ms D never alleged this and never came close to making any such allegation. Nor did she make an allegation also recorded that in the event that she reported this matter that her alleged abuser would threaten her father. Furthermore, she has told your investigators, Sir, and there is no reason to disbelieve her, that when she learned of this perversion of what she said, that she took immediate steps to rectify what was none of her doing. In this respect, Sir, it is clear that she appears to have done more than her duty and acted in the correction of this error in the public interest and with a view to protecting her integrity.

Sir, there has been speculation, and indeed it might be reasonable to say from the coincidence of dates and circumstances that the speculation might be based on a potentially open inference, that this further attempt at damnification of Sergeant McCabe was inspired by Garda headquarters. It is fair and appropriate, at this juncture, to record that the various agencies involved claim no connection with or direction by Garda headquarters, instead saying that as regards to any of the individuals involved, they have almost no relations who are gardaí, do not act under the direction of the garda and are entirely independent in the exercise of their functions, but that an unfortunate error was made. While, shortly, we will outline the manner in which this was alleged to have occurred, as recounted to your investigators, it would be appropriate now to briefly record that what was said to have happened was a word processing error. Sir, as a person trained in word processing and in typing to a professional level, you will perhaps appreciate that people often use templates for standard reports. The creation and availability of templates can save time in necessary paperwork and this is especially so where several boxes need to be ticked. Having in front of you a checklist when creating or completing particular paperwork can be very valuable and can ensure that nothing is left off. What is said to have happened is that another young lady, and we will call her Ms Y, had indeed reported that she had been subject to this deeply regrettable form of abuse and was receiving counselling in consequence. What is said is that the template from Ms Y was used in filling in the details in relation to Ms D but that the two had been mixed up. Surely, you might say, sir, that any such egregious error would or could not happen and would be stopped and

that any organisation which did not have a system of checks and balances to ensure against such mistakes would be a construction of eminent stupidity. Be that as it may, this is the case that is being made. Nonetheless, this necessitates inquiry and cannot be accepted at face value.

Sir, we have received correspondence from the solicitor acting on behalf of Ms Y who is anxious that her identity be protected. Naturally, she is annoyed by any risk of being dragged closely into what might seem to be a public arena through what is said to be a mistake. While your investigators have been tasked with inquiring into whether there ever was a Ms Y, what file was created in relation to her and what steps were taken within the relevant organisation to assure her welfare, you have Sir, we understand, made a decision that no one within the tribunal staff apart from the investigators is to know anything of her identity and that no document relevant to her confidential interactions in counselling is to be brought back to Dublin Castle or is to be disclosed or distributed to any other party.

Sir, these allegations of the systematic destruction of the character of Sergeant McCabe are to some extent supported by some witnesses, including journalists, who have come forward with a view to assisting the tribunal by disclosing conversations which they had with former Commissioner Callinan at a time when he was Commissioner of the national police force. We will refer to these, shortly, in detail and it is also fair to immediately record that these are vehemently denied by him. One of these conversations is alleged to be that which took place on the 24th of January 2014 in the car park of Bewley's Hotel in Newlands Cross in Dublin with the head of the Public Accounts Committee of the Oireachtas, Deputy John McGuinness TD. And if this occurred, sir, it would indicate, depending upon the view taken by the tribunal in the context of other evidence, inappropriate comment, evidence of material from which it could be inferred that Commissioner Callinan did indeed have the motivation and emotional charge to attack the character of Sergeant Maurice McCabe and might, perhaps, have instructed his press officer to do likewise. What did Commissioner O'Sullivan know of this meeting? She appears not to have known of it and what did she do in consequence of what the former Commissioner perhaps might have felt in relation to Sergeant Maurice McCabe? These are questions you have to consider. It is fair to record, as of this juncture, however, that Commissioner O'Sullivan is not alleged by direct evidence by any potential witness to the tribunal to have spread unpleasant or nasty comments about this officer. A question which must loom large in your mind, however, Sir, is as to whether, if it happened at all, former Commissioner Callinan was disturbed to the extent of making the statements which several witnesses claim, and which he vehemently denies, how could it be that the person with whom he worked most closely, namely then Deputy Commissioner O'Sullivan, could not have known of his expressed state of mind that is described in such graphic terms to others, and why there is no mention of this in statements to the tribunal thus far? It could easily happen, however, that the choice of those who were to be regarded as confidants of these unproven allegations might be limited or targeted.

If so, in what terms and whether the reach of his power extended to other agencies, such as those mentioned in the terms of reference, namely media and broadcasting personnel, members of the government, Tusla, the Health Service Executive, other state agencies and any other relevant personnel is a matter that you will have to decide in the context of all of the evidence. The issue as to whether it will perhaps be supported by telecommunications interactions between Superintendent Taylor, former Commissioner Callinan and Commissioner O'Sullivan are, as we speak, subject to investigation and analysis pursuant to a contract entered into by this tribunal with the Forensic Service of Northern Ireland.

Related to this, Sir, is the extent to which Garda headquarters is in a position to influence media broadcasts. Particularly, you are tasked with considering broadcasts on RTÉ on the 9th of May

2016 when a leaked account of the unpublished O'Higgins Commission report was traversed and discussed in radio and television broadcasts. Because the O'Higgins Commission held its hearings in private, another aspect of the terms of reference is as to whether false allegations of sexual abuse or any other unjustified grounds were inappropriately relied upon during the course of those hearings by Commissioner O'Sullivan for the purpose of undermining the testimony of Sergeant McCabe.

Sir, one of the other issues for you to consider is whether more than one garda officer has been made the subject of inappropriate attention of social workers in consequence of an allegation involving him in allegedly inappropriate contact or behaviour with children, or whether two garda officers being dragged into this sphere is justified or carelessness and more or perhaps evidence of conspiracy. Indeed, Sir, you are tasked with investigating whether there are any patterns to the creation, distribution and use of these social work files containing allegations of criminal misconduct against garda officers who had become a thorn in the side of garda headquarters by making allegations of wrongdoing. Clearly, gardaí, while trained observers and persons who ought to be highly motivated in the service of their country, are also human. You will be aware, Sir, that there is a garda disciplinary procedure and that many of these cases have ended up from time to time in the High Court and, indeed, as a judge of that court over a period of eight years you will perhaps have dealt with some of them in the judicial review list. This is simply a way of saying that gardaí are as human as anybody else. Thus, gardaí may get drunk, may commit assaults, may neglect their duty and may also, shocking as this is, abuse their spouse or domestic partner. One of the matters which you are tasked with investigating is the contacts between the national police force and Tusla as the state agency tasked with the protection of child welfare. Briefly, according to Garda Keith Harrison, because of concerns which he had while stationed in Athlone, which are outside your terms of reference and his relationship with a woman who lived in Donegal, he sought a transfer to Donegal. While there he claims that he was targeted by senior officers and that social workers were brought into the equation due to the manipulation of his situation and the extraction of an unfair and untrue series of allegations of serious domestic misconduct by his domestic partner. You must consider whether these interactions were simply those of people doing their duty to ensure the protection of children, or whether the influence of senior Garda officers extended into the social work services of the State enabling manipulation of procedures in order to undermine and destroy a decent and upstanding officer.

That, Sir, briefly, is an outline of the inquiry, which you are tasked with investigating. While it is not appropriate to traverse the detail of this with the extreme particularity of which you are aware, it is appropriate, in the context of impending public hearings to now refer to some of the details in a way which will give fair notice to those involved as to what we are tasked to consider in a concise manner. As all will be aware from the first interim report of this Tribunal on the 17th of May 2017, you had proposed to divide the work of the tribunal into five sections. While these may be related to each other and to some degree intersect with each other this is done from the point of view of convenience for potential witnesses and with a view to disposing of some of the more serious controversies in a public forum. It is, of course, a matter for you, Sir, as to what decision you make in relation to these but it is certainly to be hoped that by witnesses being given an opportunity to give evidence relevant to the terms of reference, and we must repeat that you are limited to that, otherwise you would be exceeding your jurisdiction, that the grave matters of public controversy which have led to the establishment of this tribunal may be somewhat quieted. We thus quote what you then said:

Of pressing public concern is whether or not files in certain State agencies, who here might be identified as Rian, the Health Service Executive and the Child and Family Agency, otherwise Túsła, were created and distributed or otherwise used by senior members of our

police force in inventing or furthering a false allegation of sexual abuse against Sergeant Maurice McCabe. This will be the first section of public hearings. It is hoped to engage in these and to complete them in July of this year. Progress on this matter has moved very far but the analysis of relevant computers is essential and there are further interviews to be conducted by our investigators.

Concerns in relation to Garda Keith Harrison and his family and the same State agencies might be regarded as being similar in kind, if not in detail, and it is hoped to engage in public hearings on that issue in September of this year. Again, considerable work has been done.

As to what may have been briefed to the then Garda Press Officer, Superintendent David Taylor for dissemination to journalists by former Commissioner Martin Callinan and then Deputy Commissioner Nóirín O'Sullivan, this is the subject of an inquiry in respect of which public hearings are hoped to be held, perhaps following a short break, in November. Allied to this section are concerns in relation to an engagement between former Commissioner Martin Callinan and John McGuinness TD that is said to have taken place on the 24 January 2014, in a very specific location, according to the terms of reference. These sections do not seem to be divisible and evidence on one may be of assistance in the determination of what attitude was taken by those senior officers to Sergeant Maurice McCabe, if any, and as to how they responded or acted.

A specific, and it would seem relatively short inquiry, is to be made in relation to broadcasts on RTÉ of 9 May 2016. This, in fact, consisted of several broadcasts and commentaries, and as to whether Commissioner Nóirín O'Sullivan was influencing, or had dictated, the terms of these in some way.

The O'Higgins Commission was of course the subject of the commentary in relation to these broadcasts. It may be logical to consider that with the question as to whether false allegations of sexual abuse or any other unjustified grounds were inappropriately relied upon by the Commissioner during the hearings before Mr Justice Kevin O'Higgins. It is hoped to dispose of these matters in December of this year. It is not within the terms of reference to re-run the O'Higgins Commission but, instead, that report is part of the evidence before the tribunal. It might usefully be read by all interested parties.

We now move on, sir, to a more detailed consideration of various aspects of the work in hand.

Rian, the HSE and the Child and Family Agency (Tusla)

Sir, term of reference (d) requires the tribunal to investigate files held by certain state bodies, Rian, the Health Service Executive and the Child and Family Agency, otherwise Tusla, and the creation, distribution and use of files containing a false allegation of sexual abuse against Sergeant Maurice McCabe, and whether such allegations were knowingly used by senior members of the gardaí to discredit Sergeant McCabe.

This matter is also relevant to other terms of reference of the tribunal, as to the knowledge of Commissioner O'Sullivan and former Commissioner Callinan of this matter, and whether they and/or other senior members of the gardaí acted upon such knowledge in order to discredit Sergeant McCabe. The sequence of events could possibly lead to the conclusion that in consequence of Sergeant McCabe's complaints of malpractice and low standards of policing in Cavan/Monaghan, which were the subject of the O'Higgins Commission, there was a campaign to use allegations of child sexual abuse to undermine the reputation of Sergeant McCabe and

discredit his complaints. Another matter which will be dealt with in further detail below is whether such allegations of sexual abuse were later relied upon by Commissioner O'Sullivan in order to discredit Sergeant McCabe at the O'Higgins Commission in 2015.

Sir, while this tribunal is not tasked with re-examining in any way the allegation of sexual abuse against Sergeant McCabe made by Ms D in 2006, the 2006 allegation lays the foundation for other aspects of the tribunal's work that have just been mentioned. A background of the circumstances and investigation of this complaint is relevant in order to consider how the referral to Tusla came from Rian counselling in 2013 and how a subsequent notification to the gardaí came to be made in 2014.

By way of background, Maurice McCabe became a member of An Garda Síochána in August 1985. He began to serve at Bailieboro garda station in 1989 and was promoted to the rank of sergeant in 1999. He became sergeant in charge at Bailieboro garda station in October 2004.

On the 4th of December 2006, Ms D, the daughter of someone known to Sergeant McCabe, then aged 14, made an allegation of sexual abuse against Sergeant McCabe dating back to around Christmas 1998, when she would have been 6 years of age. This incident was alleged to have occurred in the McCabe's family home. Ms D made two statements, in the first of which she describes the alleged incident as follows from the 5th of December 2006:

It was Christmas time when we visited. Mam, Dad and [sibling]. I don't remember [being] in [the McCabe's home] before. I was about 6 years of age at the time ... I remember we played a game of hide & seek. Me, [sibling], Maurice McCabe and his two girls. Mum and Dad were in the kitchen with Lorraine [Sergeant McCabe's wife]. I went and hide in the sitting room. What I can remember of this room was that there was a couch, it was a long seated chair ... I was the only one there. I remember hearing him coming for fear he would find me, this fear was from the game nothing else. The next thing I remember I am bent over the arm of the couch, my feet on the ground and my face down. I remember his, Maurice McCabe's arms around my waist tickling me. I did not see his face. He was behind me. I can remember pressing against me. I could not get up the pressure was too strong, he was pressing himself against me. Humping, I can't remember how long it lasted. I remember somebody running down the hall. He stopped.

Ms D made a further statement on the 21st of December 2006. Ms D's mother and father also made statements in their home on the 19th of December 2006. Sergeant McCabe was cautioned and made a statement on 22nd of December 2006 in which he fully denied the allegation. While he stated that Ms D's family had visited their home but by the time Ms D was aged six this no longer occurred. He also stated that he did not have any recollection of a game of hide and seek taking place at their home nor did he have any memory of Ms D's family visiting his home in Christmas 1998. He fully denied the allegation of sexual assault:

It did not happen, it did not happen, [it's a] horrendous allegation to make and it did not happen.

Sergeant McCabe's wife Lorraine made a statement to gardaí on the 23rd of December 2006. She recalled the following:

[Ms D's] family would have visited this house about half a dozen times that I can recall and on one occasion I can remember their having two children with them and it was in the evening time. I recall [Ms D's sibling] being a toddler around 2 years of age and the girl

maybe 4 or 5 years. I am aware of the allegation that has been made against my husband which surrounds a game of hide and seek. I have never seen Maurice playing hide and seek with any other children apart from our own and my two nieces and I am absolutely 100% sure of that.

A notification of suspected child abuse was sent to the HSE in late December 2006 and was received by the Health Board on the 2nd of January 2007. It appears to have previously arisen first at a meeting on the 12th of December 2006 of the Child Protection Strategy Risk Management Committee and was again considered on the 27th of April 2007 at which time it had been decided to offer Sergeant McCabe the opportunity of an assessment. Ms D had been met and by this time the DPP had directed there should be no prosecution. At this time, Child and Family Services in the HSE did not contact Sergeant McCabe about the allegations. An entry relating to this referral had been made and a decision was later made to close the file with a letter dated the 10th of October 2007 from Rhona Murphy, noting that this was being done without meeting Sergeant McCabe and apparently contrary to the applicable procedures at the time.

It appears from some material available to the Tribunal that Sergeant McCabe, while stationed at Clones and Bailieboro, had been acting on several occasions in 2004, 2005, 2006 and up to 2009, as the Garda/ HSE liaison officer for family/child protection issues and attended meetings with a number of those HSE staff who were later to have significant dealings with the file when the 2013/2014 referrals took place. The possible relevance of this will be explored by the Tribunal.

On the 19th of February 2007, Superintendent Noel Cunningham completed an investigation file in relation to Ms D's complaint in this case and stated that "[t]aking all matters into consideration including the question of whether the event, if it happened, constituted a breach of the criminal law, it is felt there is no ground for a criminal prosecution". On the 1st of March 2007, Rory Hayden, state solicitor for Cavan, sent the garda investigation file to the Director of Public Prosecutions, concluding in a letter: "I do not think any case arises for prosecution".

On the 5th of April 2007, a letter from the DPP stated that there was no basis for prosecution of Sergeant McCabe for the allegations made by Ms D. The letter stated the following:

I agree with you [state solicitor] and the Guards, that the evidence does not warrant a prosecution. There are no admissions. The incident as described by the injured party is vague. It appears that it was only when she was eleven/twelve that she decided that whatever occurred was sexual in nature. Even if there wasn't a doubt over her credibility, the incident that she describes does not constitute a sexual assault or indeed an assault. Further, the account given to her cousin ... differs in a number of respects to that given to her parents and the Guards. There is no basis for prosecution.

Sir, at and subsequent to this time, Sergeant McCabe's complaints relating to a number of investigations in the Cavan district later became the subject of the O'Higgins Commission. Sergeant McCabe made a number of complaints to senior gardaí, Garda HR, and to the confidential recipient and made contact with various members of government in relation to these complaints. These matters were also the subject of investigation internally by gardaí in the Byrne/McGinn inquiry. Sergeant McCabe came to prominence in 2013 and 2014 and became known as a "garda whistleblower", receiving media attention during the course of the Public Accounts Committee, which examined alleged penalty points inconsistencies brought to the fore by Sergeant McCabe and Garda John Wilson.

Sir, the matters relevant for your consideration relate in the first part to Ms D's attendance at counselling in July 2013 with RIAN, a free counselling service under the remit of the HSE, described as a specialised counselling service for adults who have experienced abuse in childhood. Ms D began to attend counselling with this service for unrelated personal matters, and it appears that she attended two appointments with a counsellor Laura Brophy on the 24th of July 2013 and the 7th of August 2013. During the course of the initial assessment in July 2013, Ms D discussed the 2006 allegation and Ms Brophy accurately recorded it in her own handwritten notes.

Sir, the Children First Guidelines place various obligations on members of organisations such as the HSE to refer allegations of child abuse on to the appropriate authorities. Within the HSE, if there is suspicion of child abuse or neglect, gardaí may also be notified of the suspected abuse. In this case, it seems that initially, a verbal referral of the actual allegations which had been made in 2006 were conveyed to a social worker, Briege Tinnelly in the HSE by Laura Brophy. Ms Brophy made a verbal referral which was recorded as follows in an intake record completed by Briege Tinnelly, signed off by HSE line manager, Keara McGlone:

Laura advised that she has a client called [Ms D] ... [who] told Laura that she was abused when she was 6 or 7 by [Sergeant McCabe] ... it was reported to Gardaí and there was no prosecution from the DPP ... [Ms D] was playing hide and seek in [Sergeant McCabe's] house when [he] put her on the couch, tickled her and touched her inappropriately whilst gyrating on top of her with clothes on ... Laura agreed to send in standard notification form.

The intake record also noted a "duty to Garda notify & await allocation".

Sir, a crucial event occurred which resulted in an allegation of digital penetration being sent to gardaí, distributed within Tusla, and later being wrongfully put to Sergeant McCabe in December 2015. After making a verbal referral on 9th of August 2013, Ms Brophy completed a typed retrospective disclosure of abuse report on the same date which provided the following under the heading of "Description of abuse":

[redacted] informed me that she suffered sexual abuse in childhood. The abuse involved digital penetration both vaginal and anal. The alleged would also threaten [redacted's] father if she said anything.

According to Ms Brophy, a genuine mistake was made, that in filling out the report to forward to social workers in the HSE, she states that she used the template of a retrospective disclosure of abuse report relating to another one of her clients, Ms Y, and that she mistakenly failed to remove the "Description of abuse" section which related to that client and therefore did not include the correct information about Ms D's allegation, which she had verbally conveyed to Ms Tinnelly on that day. This form was sent to the HSE on the 9th of August 2013. It appears that nothing was done, in house, as it were, in relation to this matter until the following year as the file awaited allocation within what became the Child and Family Agency, or Tusla. However a letter dated the 15th of August 2013 from Keara McGlone was sent to the Superintendent in Monaghan, who at the time was Superintendent Cunningham, referring to Ms D by her actual name and to "MMcC", seeking a meeting with him. This referred to the criminal investigation that he had carried out in 2007 but did not contain any detail let alone the inclusion of an allegation of digital penetration in the referral, allegedly included in error from the Ms Y file. Superintendent Cunningham was not on duty for extended periods in or around that time and did not apparently see the letter in this period. He, however appears to have had possession of it and produced it from a safe in early 2017. It is accurate to record here that both Ms McGlone and the Superintendent have each

confirmed to the Tribunal that Superintendent Cunningham did not reply to the letter and that Ms McGlone did not make any further contact with him in relation to this matter.

Sir, in early 2014, some journalists sought to contact Ms D, at whose instigation is not yet entirely clear. However, Ms D engaged in contact with a journalist in relation to her initial complaint in 2006. This appears to have been as a result of an inquiry made by her father of her as to whether she'd be prepared to speak to a Mr Paul Williams. He in turn appears to have been nominated to her father by a friend of his, who is a Detective Superintendent in the gardaí. On the 12th of April 2014, an article by Paul Williams entitled "Girl wants new probe into alleged sex assault by garda" appeared in the Irish Independent containing comments by Ms D about her dissatisfaction with the 2006 investigation by gardaí into her complaint against Sergeant McCabe. Ms D sought inclusion of this matter within the terms of reference of the Guerin report, carried out by Seán Guerin SC who ultimately recommended the establishment of the O'Higgins Commission. In this article, Ms D complained that Sergeant McCabe had not been formally arrested and that her complaint was not recorded on the garda PULSE system in 2006.

On the 29th of April 2014, Ms D made an official complaint to the Garda Síochána Ombudsman Commission, on the basis that the complaint she made against Sergeant McCabe in 2006 was "not properly investigated" for two reasons: the first being the appointment of Superintendent Cunningham to investigate the allegations when he personally knew both her father and Sergeant McCabe and secondly, the failure to record the case on PULSE. Ms D made a statement to GSOC on the 3rd of July 2014. However, on the 16th of April 2015, GSOC found that no disciplinary proceedings should be commenced against Superintendent Cunningham or Detective Sergeant James Fraher, to whom the initial complaint was made on the 4th of December 2006.

Sir, on the following day, the 30th of April 2014, Laura Connolly, duty social worker in Cavan town, reviewed the Ms D file and noticed that intake records had not been completed on Sergeant McCabe's children in 2006/7, the time of the initial allegation, nor in 2013 when the matter came to HSE attention once more. Ms Connolly states that she sought the direction of Eileen Argue, Social Work Team Leader, on opening intake records on four of Sergeant McCabe's children and was advised to open these. The inclusion of the incorrect allegation of digital penetration was recorded on these records in the following terms:

[Ms D] is attending counselling with Rian, during the course of counselling she alleged that she experienced sexual abuse in childhood, that this abuse involved digital penetration both vaginal and anal. This abuse is alleged to have occurred on one occasion in 1998-1999. [Ms D] reports being aged 6/7 years old at the time of this alleged abuse.

A garda notification form was then completed by Laura Connolly on this date. According to Ms Connolly in her statement to the tribunal of 20th of March 2017, "the content of this Notification was based on the Standard Referral Form forwarded by Rian to Tusla. Notifying An Garda Síochána of allegations of child sexual abuse was standard procedure". She emailed the garda notification to Linda Dewhirst, social work administrator, to be signed off by Séamus Deeney, principal social worker, and sent to gardaí on the 2nd of May 2014. The garda notification form of the 2nd of May 2014 contains the following:

Laura Brophy, Counsellor with RIAN Counselling Service reported the following information to the Child and Family Agency in August 2013. [Ms D] is attending counselling with Rian, during the course of counselling she alleged that she experienced sexual abuse in childhood, that this abuse involved digital penetration both vaginal and anal. This abuse is alleged to have occurred on one occasion in 1998-1999. [Ms D] reports being aged 6/7 years old at the time of this alleged abuse. [Ms D] alleges that the alleged

perpetrator of this abuse threatened her father if she said anything. [Ms D] alleges that this incident of alleged abuse occurred whilst she and her parents were visiting the home of the alleged perpetrator, [Ms D] alleges that her parents and the alleged perpetrator's wife were in another part of the house, that she was playing hide and seek and the alleged perpetrator and his two daughters who were then aged approx 3 years and 5 years of age.

The above notification therefore combined aspects of the 2006 allegation, in relation to the allegations that there had been a sexual assault during a game of hide and seek, with incorrect information, claimed to have been mistakenly included from the report of another client, Ms Y, relating to digital penetration, as well as an allegation that the perpetrator of the abuse had threatened her father if she told anyone about the abuse. Allegations of digital penetration or threats against her father were never made by Ms D against Sergeant McCabe. This appears clear from, inter alia, the statements of Ms Brophy, Ms D and her father.

Soon after the garda notification had been received, on the 14th of May 2014, it appears from Laura Brophy's notes that a person (identified as "client") contacted her to inform her that there was an error on the retrospective report sent to social services in Cavan which was subsequently the basis for the garda notification. There was a second phone call on this date from "client" along the same lines. Ms Brophy told the client that she, Ms Brophy, had made an error in the form and would take steps to remedy this. It seems that Ms D was informed of the inclusion of an allegation of digital penetration by a relative of hers following notification to the gardaí, and subsequently contacted RIAN counselling service to have the report amended.

It appears that Ms Brophy took a number of steps following these contacts to rectify what she claims was a genuine error that she only became aware of on this date. She prepared an amended Standard Report Form and sent this to Eileen Argue. The amended report under the heading "Description of abuse" now contained the correct details of the 2006 allegation:

[Ms D] informed me that there was a single incident of sexual abuse. At the time of the incident both [Ms D] and the alleged were fully clothed and the incident involved inappropriate contact as the alleged rubbed himself up and down [Ms D] in a sexual manner.

Ms Brophy also sent a letter to Eileen Argue on this date requesting the return of the erroneous report and any copies of same. On the 16th of May 2014, there would appear to be a third phone call from "client" informing Ms Brophy that the Superintendent in Bailieboro had not been informed of the fact that there was the inclusion of a more serious allegation which Ms D had never made against Sergeant McCabe. Ms Brophy then spoke to Superintendent Leo McGinn and also sent a letter explaining the error, attaching a copy of the corrected report which she had completed.

In May 2014, Fiona Ward, Director of Counselling, wrote to the Child and Family Agency seeking the return of all copies of the report of the 9th of August 2013 to the National Counselling Service and also from the gardaí, writing directly to Chief Superintendent Sheridan. Ms Ward has informed your investigators that the original report was never returned by gardaí. This was a course of action decided upon by Assistant Commissioner Kieran Kenny who had been kept informed of matters by Chief Superintendent Sheridan and presided over a meeting in Mullingar on the 16th of July 2014 to consider the HSE error, the result of which was to the effect that the Assistant Commissioner would seek legal advice and Chief Superintendent Sheridan would seek to ascertain the intentions of Tusla in relation to the matter. It is clear that the Commissioner was kept informed of these developments at that time.

Sir, the first part of this term of reference has related to the re-surfacing of the initial 2006 allegation against Sergeant McCabe in 2013 and the inclusion of much more serious allegations in the referral from Rian counselling to TUSLA and therefrom to the gardaí; whether this was a genuine mistake as is claimed by the counsellor and social workers involved up to that point is a matter for you. The second aspect of this term of reference relates to the actions of various personnel in Tusla once Ms Brophy had been contacted on the 14th of May 2014 and had taken a number of steps to remedy what she claims was a genuine error which resulted in a much more serious allegation being included in her report sent to Tusla and the gardaí.

On the 7th of June 2014, Eileen Argue sent an amended garda notification form, which she appears to have completed, to Linda Dewhirst, in order for this to be signed off by Séamus Deeney before being sent to gardaí. In the meantime, the gardaí sought clarification as to how this had occurred and come to light subsequently. On the 9th of June 2014, Chief Superintendent Sheridan sought clarification as to how a notification was sent to gardaí which contained wrong information, and how the alleged error came to light.

On the 20th of June 2014, now more than 6 weeks after the first garda notification, the amended garda notification form (now dated 10th June) was signed off by Séamus Deeney and sent to the Superintendent at Bailieboro. The more serious allegation had been removed, however the reference to threats made by the alleged perpetrator were still included. This was a further error as the reference to threats should not have been included, given that according to Ms Brophy's account, the description of the abuse contained in the initial report related to another client in its entirety. The amended report sent to gardaí provided:

[Laura Brophy] stated that during the course of counselling [Ms D] alleged that she experienced sexual abuse in childhood. This abuse is alleged to have occurred on one occasion in 1998-1999. [Ms D] reports being aged 6/7 years old at the time of this alleged abuse. [Ms D] alleges that the alleged perpetrator of this abuse threatened her father if she said anything.

On the 24th of June 2014, Ms Ward spoke to Inspector Pat O'Connell regarding the return of the incorrect retrospective report form of the 2nd of May 2014 and gives an account as follows:

He was seeking clarification around the administrative error, he wanted to know how it came about, he asked me was it a typographical error of a cut and paste type, these were the words Inspector O'Connell used when querying the error with me. I stated that it was a typographical error, that it was a cut and paste from another report. I know that this description is not entirely accurate, my understanding now of what actually happened is that what should have been a blank report form used by Laura Brophy was not in fact blanked out, but contained the sentences that referred to another client and a previous report made by Laura Brophy to Social Work in 2013, prior to the [Ms D] retrospective report form. ... Inspector O'Connell stated that the previous report received by the Garda Síochána was sent to the Commissioner in Sligo and that they needed to clarify the nature of the error before any report could be destroyed or returned given the nature of the report. In respect of the previous report referred to by Inspector Pat O'Connell above, I can confirm that I do not know what that report looks like or what the content of that report was. I should clarify that RIAN counselling service did not send the original retrospective report form [completed by Laura Brophy] containing the incorrect information to the Gardaí. Our process is to send it to the Social Work department, who then make a decision to refer it to the Gardaí. Inspector O'Connell again sought clarification regarding whether the retrospective report form made to the Social Work department in 2013 related to the

2006 allegations to Gardaí. I understood this to be the same query made by Chief Superintendent Sheridan ... I clarified that it was the first report received by RIAN but seemed to relate to a previous report made by [Ms D] to the Gardaí. Inspector O'Connell said he would pass on this information to Chief Superintendent Sheridan and revert if any further clarification was needed.

... . On 21/07/2014 I telephoned Inspector Pat O'Connell and my notes indicate that he stated that the Chief Superintendent was querying whether there was any subsequent action in relation to the original referral; my understanding is that this was the original retrospective report form made by RIAN to the Social Work department in August 2013. He specifically asked if there was any subsequent action by the HSE such as strategy meetings with the Gardaí. I informed Inspector O'Connell that such action would be the remit of the Social Work department, i.e. TUSLA and that RIAN counselling would not be involved in any such actions. I agreed to obtain the contact details regarding the Social Worker dealing with these matters in TUSLA and to pass them on to Inspector O'Connell.

It appears that the corrected garda notification was appropriately filed in a separate file kept by the HSE for that purpose in their Monaghan office, however when apparently sent to Cavan it was not associated with or put on the file relating to either Miss D or Sergeant McCabe.

Sir, nothing further seems to have occurred in relation to the Ms D file until the 7th of May 2015, when a review of the file took place by social workers in Tusla. It is important to note that Sergeant McCabe had not been informed of the decision to refer the case to gardaí nor was he aware of any of these matters. At this time, a decision was made to respond to the referral and to write to Sergeant McCabe about the allegations. Kay McLoughlin, Social Work Team Leader, drafted a letter to Sergeant McCabe. On the 8th of May 2015, Séamus Deeney outlined the five steps to be taken in the Ms D case in correspondence with Ms McLoughlin. It was advised that she contact Ms D to conduct a credibility assessment, to determine whether anyone of relevance would need to be interviewed in this matter, such as Ms Brophy, to inform Sergeant McCabe on review of the above steps, and to make a plan around informing third parties such as Sergeant McCabe's wife, Lorraine McCabe, of the allegations.

On the 11th of May 2015, Kay McLoughlin offered Ms D an appointment as "[a] matter has been brought to the attention of the Social Work Department which we would like to discuss with you". Ms D did not attend this meeting.

Sir, it was only 7 months later, on the 29th of December 2015, that Kay McLoughlin sent a Barr letter to Sergeant McCabe, stating that the CFA was:

obliged to investigate allegations of abuse and to reach a determination as to whether there are sufficient grounds for believing you may potentially pose a risk to children.

The allegations made by [Ms D] are as follows:

That on one occasion between 1998 and 1999 at the Home of Maurice McCabe [Ms D] alleged that Maurice McCabe sexually abused her. The abuse allegedly involved digital penetration and the victim was aged 6/7 years old.

The letter stated that Ms McLoughlin wished to meet with Sergeant McCabe to give him an opportunity to respond to the allegations and further stated that relevant third parties, such as his employer or family would be informed if the CFA assessment determined that Sergeant McCabe

posed a risk to children. This letter was the first time that an allegation of digital penetration had ever been made to Sergeant McCabe. In a context where the inclusion of such an allegation had been brought to the attention of Ms Brophy some 18 months earlier, sir, it is for you to consider how such an egregious error could have been made again in putting this allegation to Sergeant McCabe where Ms D herself was shocked by its inclusion in the report and had never made such an allegation against him. In addition, it does not appear that the first two of the five steps contemplated by Mr Deeney had been completed prior to this being done.

On the 28th of January 2016, Sergeant McCabe's solicitors responded to Tusla letter, stating that the allegation of digital penetration was "wholly untrue", and had never been made before by Ms D, highlighting Sergeant McCabe's astonishment at receiving this letter.

Sir, this is the crucial event in this second part of this term of reference. Ms McLoughlin claims that she realised she had made an error when, on the 2nd of February 2016, she sought a copy of Ms D's 2006 statement to gardaí from the HSE. Following this, on the 9th of February 2016, Ms McLoughlin realised that the amended 14th of May 2014 report by Ms Brophy had removed the digital penetration allegation. As such, it appears that the CFA had returned the incorrect report made by Ms Brophy on the 9th of August 2013, but the incorrect garda referral ie; the one made to the gardaí, of 2nd of May 2014 had remained on file. According to Ms McLoughlin, she based the contents of the Barr letter on the incorrect garda notification of 2nd May 2014.

Sir, it is important to note the context in which the above events took place. From 2015 onwards, and in 2016, Sergeant McCabe continued to be a prominent person in the media as the O'Higgins Commission was ongoing. In particular in May 2016, the report of the O'Higgins Commission was leaked and subject to much comment. However, there was no response to the January letter from Sergeant McCabe's solicitors until the 22nd of June 2016. Ms McLoughlin replied stating that there was a "mistake" in previous correspondence, and said that "no allegation of 'digital penetration'" had ever been made against Sergeant McCabe by Ms D. The letter did not address how the allegation had come to be included on the file or how this had occurred.

Sir, this second part of the term of reference requires you to consider the dissemination from Rian to Tusla and the gardaí of an allegation of digital penetration against Sergeant McCabe. It may be that the inclusion of this allegation was a genuine mistake made initially by Rian counsellor Laura Brophy, which was compounded and repeated by a series of further errors and omissions on the part of Tusla personnel despite her best attempts to rectify this; or it may be that there was a deliberate attempt to keep matters live at a time when Sergeant McCabe was a household name, and that the ongoing pursuit of this matter by state agencies was part of the overall aim of discrediting Sergeant McCabe and destroying his reputation. It should be noted that this latter possibility has been canvassed with all the Tusla witnesses involved to date and no knowledge or evidence of such seems to have emerged to date.

Sir, the matter did not end with the incorrect Barr letter from Kay McLoughlin. In July 2016, the Ms D file was referred to the Sexual Abuse Regional Team (SART), a regional team set up initially by Tusla to manage and respond to retrospective cases of child sexual abuse under Lisa O'Loghlen, Regional Social Work Team Leader.

Correspondence in relation to the Barr letter was ongoing at this time between Tusla and Sergeant McCabe's legal team, who queried why the HSE had not contacted Sergeant McCabe in 2006/2007 if they had concerns about any risk to his children. The solicitors again sought an explanation for the inclusion of the allegation of digital penetration in the 29th of December 2015 letter.

On the 2nd of August 2016, the Ms D file was considered by SART to be of high priority given the “complex legal issues” involved and Sergeant McCabe’s “profession and high media profile”. As a result, the case was “risk escalated” by Lisa O’Loughlen. The risk escalation form outlined concerns around the issue of fair procedures given the failure to contact Sergeant McCabe until December 2015. The Ms D file was then allocated to Claire Tobin, Regional Social Worker in SART. On review of the file, Ms Tobin criticised the failure to contact Sergeant McCabe earlier, and the fact that Ms Brophy’s report from August 2013 included allegations which had not been recorded in 2006. In her view, a credibility assessment of Ms D’s allegations should have taken place before any contact was made with Sergeant McCabe.

A number of attempts were made to meet with Ms D on this matter by Tusla staff, to discuss the case’s transfer to SART. Ms D however did not attend any of these appointments and in August 2016, Ms D contacted Tusla to state that she did not wish to pursue the matter any further. On the 22nd of September 2016, SART conducted a review of the Ms D file. The report found that Sergeant McCabe was “not afforded Fair Procedures with regard to the allegation made by [Ms D] – initially in 2006 and [when the case was referred again to] the Social Work Department in 2013”.

Ms D was again invited to attend an appointment in order to conduct an assessment and to establish whether she wished to proceed with the matter. However, Ms D did not attend a scheduled appointment and contacted the social work department to state that she did not wish to pursue the matter any further. In light of this, a decision was made to close the file.

On the 22nd of September 2016, Sergeant McCabe was informed that Tusla would “not be proceeding with its assessment of the allegations” and informed them of the decision to close the file, confirming that there were “no outstanding allegations or findings” recorded against Sergeant McCabe.

Sir, on one view it could be thought possible that the gardaí and state agencies involved deliberately sought to blacken the character of Sergeant McCabe by making such allegations resurface at a time when he was a prominent person in public discourse in order to discredit and undermine him; it may also be thought possible that a genuine mistake was made by one person, which resulted in a more serious allegation being forwarded to the gardaí in 2014, and that a further series of errors resulted in these then being put to Sergeant McCabe in 2015 and the case being kept open within the Child and Family Agency until late 2016.

Sir, in this module, you will expect to hear from relevant witnesses from Rian, the Health Service Executive and Tusla, who will claim that the sequence of events which unfolded was the product of a series of genuine errors. You must however consider whether this was not the case. You may also hear from Ms D and her parents, if need be, and from relevant gardaí, to the extent necessary to give as full a picture of the events as possible surrounding the Tusla file. This will then be a matter for you.

The tribunal hopes to deal with this matter in July.

The actions of Tusla in Donegal and the role of the gardaí

Sir, the issues which concern Garda Keith Harrison are expressed in the terms of reference in broad terms. You are tasked with investigating “contacts between” gardaí and the Child and Family Agency in relation to that officer.

Keith Harrison joined the gardaí in April 2000 and was attested in June 2001. It was in consequence of certain statements made in relation to him in the public media that this term of reference was

inserted. Garda Keith Harrison made a statement to the tribunal on the 1st of March 2017. Much of that statement is outside the terms of reference. It contains direct allegations against colleagues within the gardaí while he was serving in the traffic division of Athlone where he began in 2008. Sir, it is fair to say that he does not hold back in relation to what he says about colleagues, all of whom are named, and about the difficulties which he says that he had with his superior officers. None of this, however, is within the terms of reference. It would seem that Garda Keith Harrison did make a protected disclosure to the confidential recipient in May 2014 but, Sir, you are not asked to investigate the terms of that complaint. Rather, it can be taken as a fact that such a complaint was made in the terms in which it was made.

This aspect of the tribunal's work concerns family circumstances and it is regrettable, but unfortunately inescapable, that reference will have to be made to Garda Keith Harrison's private life. Indeed, in his statement to the tribunal he complains about intervention by Garda colleagues, the involvement of the Child and Family Agency, and makes the claim that how he was treated in comparison to Sergeant Maurice McCabe leads him to the view that "the similarities are so alike it couldn't be coincidence and considering the geographical locations of us such treatment had to come on orders from the highest level." In other words, Garda Harrison is alleging that there was abuse of power by colleagues of his in Donegal and that this was directed by headquarters in Dublin. Furthermore, he claims that this abuse extended to inappropriately involving the Child and Family Agency in his personal and domestic relationships. The extent of this, apparently, was that he and his domestic partner met with a social worker called Donna McTeague and that this lady visited their home and spoke for about 15 minutes with the children of the household. This is said to have had profound effects upon him and upon his domestic partner.

A brief sketch of the background is required. While Marisa McDermott, a young lady whose family is from Raphoe in County Donegal, was a student at the National University of Ireland, Galway she met Keith Harrison. According to her statement to the tribunal made on 7th of March 2017, they "went out together for about a year" before she took "a year out in second year and Keith joined [the gardaí] and we lost contact." Garda Keith Harrison then married somebody else and she married a man from Donegal and adopted his surname of Simms. Garda Keith Harrison and his wife apparently divorced in November 2011. These other people, Sir, do not have to be brought into this narrative. In late 2010, the couple began to see each other again and, as she puts it, "Keith and I decided we wanted to give things a proper go and to do this Keith agreed to seek a transfer to Donegal. In March 2011 Keith told me he had got a transfer to Buncrana." There was a certain wariness attached to this which she ascribes to the fact that her "brother had been involved in a traffic accident with a Garda patrol car two years previously that resulted in the death of a Garda."

Sir, it may very well be that this is how she saw the matter but, insofar as it may be relevant, what was involved was much more than a traffic accident. In December 2009, a Garda patrol spotted Martin McDermott travelling at excessive speed out of a petrol station at Bridgend and followed him. He failed to stop and chase ensued. The car in which he was driving reached speeds of up to 180 km an hour and averaged over a 30 km chase 150 km/h. The pursuit ended when he smashed head-on into a uniformed garda car at Lisfannon, near Burt. The driver of that car was the late Garda Gary McLoughlin, an officer who was simply doing his duty and his life was snatched from him in consequence of the deliberate actions of Martin McDermott. The offending driver was arrested and in July 2011, he was convicted of the manslaughter of the late garda and was sentenced to 8 years imprisonment. He was driving while disqualified, had no insurance and was over the legal limit for alcohol consumption.

Sir, the view was taken by Garda management, and provided for in the Garda code, is that before requesting a transfer to Buncrana in early 2011, in order to be closer to Marisa Simms, Garda Keith Harrison under sections 8.3 and 8.4 of the Garda code should have informed garda management

of “any family connections or relationships” which might mean that a Garda should not serve in a particular district or station. Garda Harrison did not inform anyone in garda management that he was in a relationship with the sister of the person who had been guilty of the homicide of a locally serving and much respected officer. According to Chief Superintendent Terry McGinn, the relationship was only discovered in May 2011 when a request was made by Garda Harrison to be permitted to finish work early because of family difficulties, which turned out to be connected to Marisa Simms’ previous marriage. Garda Keith Harrison alleges that in consequence of this discovery, he was asked to meet Superintendent Kevin English for a cup of coffee in the Mount Errigal Hotel. Garda Harrison’s expectations of this meeting were that because, according to himself, he “had been working well in Buncrana”, he “assumed he wanted to meet perhaps to offer me a position in a specialist unit”. This is Keith Harrison’s narrative:

Superintendent English said, “look Keith I am not going to beat around the bush, we know about Marisa’s connection, we know her brother is Martin McDermott and it’s causing me difficulties in that a number of members in Buncrana are very angry about it and some have indicated to me that they won’t work alongside you anymore, I have to consider their feelings and your safety”. I was stunned and hurt that after such a good start that I would be [j]udged over something I had no part to play in, I had no contact or relationship whatsoever with Martin McDermott. I explained to Superintendent English that Marisa and I were our own people, we did not engage in any way with her brother, we led our own lives privately and who I am in a relationship with should not impact on my professional life. Superintendent English said “well Keith it’s not just me who has a problem with this, Chief Superintendent Jim Sheridan ... who is in situ for Chief Superintendent McGinn is very angry about it and wants to see you, you’ll be moving station”. I told him I didn’t want to move that I was happy where I was and would continue to work alongside each and every member in Buncrana and if they chose to do otherwise that was a matter for them.

Afterwards, Garda Harrison “pleaded”, to use his own words, with Chief Superintendent Sheridan to stay in Donegal, and in the end he was moved to the southern end of the county, to Donegal town, where he began work in June 2011.

Sir, at this time other things were happening. In September 2011, Garda Harrison met with Chief Superintendent Terry McGinn, where Garda Harrison says he “requested a move closer to home and ... was told this wouldn’t be possible because of Marisa’s brother”. In January 2012, an anonymous letter was sent to the Health Service Executive concerning the children of Marisa Simms. Gardaí in Milford were made aware of this letter on the 9th of February 2012, and a copy of this anonymous letter was furnished by Úna Coll of the HSE to Sergeant Bridget McGowan. The letter stated the following:

It has come to my attention that the wellbeing of [the two children] is questionable. Their mother, Marisa Simms (nee McDermott) is having an extra-marital affair with a Garda Keith Harrison, who has a barring order against him from his estranged wife. She leaves and returns to the family home ... on a regular basis, causing great upset to her two children, and husband, Andrew Simms obviously. Their father, Andrew Simms’ prime concern is to get his wife back, and is at breaking point. My gut feeling is that while Andrew is caring for the children physically, and working full time, he needs help. Thankfully he has the help of his mother.

I would call you but I am aware that all calls are recorded. I have been advised not to leave myself open to Garda Harrison on any level, as I believe him to be a dangerous individual. I would fear, in his post, that he might obtain a recording of the call, and so therefore, I

do not wish to put myself or my own family in danger. [One of the children] has become very withdrawn and [mentions various health issues] ... I believe the stress of everything is far too much for [the child] to handle, without proper help.

I feel it my duty to inform you of this situation, and so let you decide on what action might be taken, whether it be to inform the school, provide counselling etc. I feel that the children have suffered so much already and that maybe you are the people to help.

On the 10th of February 2012, Sergeant McGowan forwarded a report to Superintendent Eugene McGovern, attaching the anonymous letter, which was in the following terms:

On the afternoon of the 09/02/12, I met with Ms. Coll and she handed me a copy of the letter which they had received ...

The matter was discussed and based on the contents, the member informed Ms. Coll that in their view there were specific concerns raised in the letter pertaining to the health and welfare of the children, in particular [one of the children], which would need to be addressed. The HSE informed me that they would call and speak to both parents of the children to ensure that the children were being adequately cared for and that they would inform me of the outcome of their enquiries.

On the 14th of March 2012, a meeting occurred between gardaí and Nora Roarty, Social Work Team Leader, and Una Coll in which they informed Sergeant McGowan that they had met with Marisa and Andrew Simms regarding the letter and discussed the welfare of the children. Following on from this, the matter was closed as there were no further child protection concerns. According to Bridgeen Smith, social worker, the matter was not taken any further following a screening as there was “no information to substantiate the referral allegations”.

Sir, while we do not know the origin of this letter, on a number of occasions in 2013, relatives of Marisa Simms contacted gardaí in Letterkenny to express concern in relation to the conduct of Garda Keith Harrison towards her. These contacts came from the uncle, cousin, sister and mother of Marisa Simms. At around this time, on the 29th of February 2012, Chief Superintendent Sheridan reprimanded Garda Harrison for inappropriate use of the PULSE system to enquire about Marisa Simms, a matter which had been referred to him by Superintendent Eugene McGovern.

Regarding the first phone call, on the 1st of April 2013, it is claimed by gardaí that Marisa Simms’ uncle told gardaí that Marisa Simms had been “forcibly removed from her home by Garda Harrison”, and that her cousin said that Marisa Simms was being pursued by Garda Harrison in her car around Letterkenny and that she “feared for her cousin’s safety”. On the 24th of August 2013, gardaí state that Rita McDermott contacted Donegal town garda station and expressed concern about Garda Harrison’s behaviour towards her daughter, saying that he had thrown Marisa out of their home on multiple occasions over the past three months. On the 24th of September 2013, Marisa Simms’ sister Paula McDaid alleged that Garda Harrison had “threatened to cause a disturbance at the wedding” as he was not invited. As there was no formal complaint, a garda investigation was not commenced into these matters. This last contact was the most serious because it is said by the gardaí that Paula McDaid called to Letterkenny Garda station on the afternoon of the 30th of September 2013 and reported to Garda Brendan Mahon that on the evening of the 28th of September 2013, Garda Harrison had threatened Marisa Simms in front of one of her children by saying that he was going to burn her and bury her and her sister. According to Garda sources, Paula McDaid appeared “visibly upset”.

All of this happened, it would seem, in the context of a row which occurred because of a family wedding on her side of the family to which Garda Keith Harrison was not invited, for whatever

reason. While it is understandable that there might be tension over such a decision, especially as according to Marisa Simms an invitation had been withdrawn, the reference in a Donegal context of a threat to burn someone may resonate with a notorious case from January 2004, where a woman called Dolores McCrea had been murdered by her husband and her body burned on a pyre, almost destroying every trace of her remains, this action resulting in Gary McCrea's conviction for murder in November 2005.

Following the complaint made by Paula McDaid on the 30th of September, the gardaí then claim that they made contact with Marisa Simms and asked her to come in and make a statement about the incident, and say that Marisa Simms later voluntarily attended to make a statement. However, Sir, there are conflicting accounts on the incident itself as well as how Marisa Simms came to make a statement, and indeed in relation to the content of the statement itself. Garda Keith Harrison describes whatever happened as a "normal family row". He describes how Marisa Simms was pestered by certain members of the gardaí to attend and make a statement about the incident. In particular he says:

As a result of Marisa going to her sisters, a complete fabrication of events was transmitted to Sergeant David Durkin, that I had been violent to Marisa and threw her and the children out. This false version of events was forwarded to Inspector Goretta Sheridan of Letterkenny a relation of Chief Superintendent Jim Sheridan. Inspector Sheridan then bombarded Marisa with phone calls to meet though Marisa didn't want to. She even offered to send a patrol car out to her sister's house the night before the wedding at which point Marisa agreed to meet with Inspector Sheridan the day after the wedding to get her to stop calling. Marisa attended Letterkenny Garda Station as requested, she was taken to the Superintendent's office which is quite unusual, and over the course of the next eight and a half hours she was pressurised and coerced into making a statement without any breaks and was told that this statement was for the Chief Superintendent only. We both have since read this statement and Marisa is shocked by it as she states that there are parts of it which she never said and other parts of it where what she said was manipulated to portray me in a bad way. During this time, on the 4th October 2013 I was informed over the phone by Sergeant Tony Cornyn that he had received information from Letterkenny Garda that there had been a phone call to the 999 line and that I was going to be shot tonight.

Sir, if this happened, it would be indeed shocking. Marisa Simms describes the particular row as "tense and we both exchanged words, there was no violence just words exchanged in the heat of the moment". Nonetheless, she moved into her sister's house for a time prior to the wedding. Marisa Simms claims that she was threatened by the gardaí and in particular by Inspector Goretta Sheridan.

Sir, it is appropriate before we quote from what Marisa Simms has to say that we record that all of the gardaí involved in these incidents have furnished statements which indicate that they followed procedures and that they took action not only out of an ordinary duty in terms of criminal law, but also because they were concerned with the welfare of the children in question. According to Chief Superintendent Terry McGinn, an intervention by the gardaí was necessary. As the relevant officer ultimately responsible, she had, through officers under her command, apparently learned of the previous contacts made by family members although there had been no formal complaint following these incidents. After the complaint of the 30th of September 2013, Gardaí also spoke with Rita McDermott on the 2nd of October 2013 who made a witness statement, and then sought to interview Marisa Simms. In relation to this interview, Marisa Simms says:

I stated a number of times during that time of taking the statement I questioned if this was appropriate to which Bridget McGowan replied “you should think of your children”. My understanding at all times was that this was for the chief superintendent’s eyes only, I never sought or wanted any Garda intervention into my private life. Goretta Sheridan and Bridget McGowan took advantage of me at a very vulnerable time where I was mentally and physically exhausted and my emotions were heightened due to extraordinary circumstances. A few days later, I had to go to hospital due to complications related to the loss of our baby.

Sir, the 23-page statement made by Marisa Simms to the gardaí on 6th of October 2013 does not record happy domestic circumstances. She describes an occasion when Garda Harrison banged the dashboard of the car so hard with his fist that she thought that he had actually cracked it. She describes him as being “in a complete out of control rage.” She describes been woken out of her sleep by Keith Harrison and goes on to say:

[t]he next thing I do remember is being woken out of my sleep by Keith. He was roaring and shouting at me about getting into the car earlier with the fellas and why did I leave the pub. He pulled the quilt off me and grabbed my arm and pulled me out of the bed and told me to get out of the house. I tried to reason with him and told him that I wouldn’t be able to get a taxi and asked if I could stay until the morning. He kept telling me to get out and caught me by the arm. I kept pleading with him to get a coat as I only had pyjamas on and he allowed me to get my coat. At one point he had a hold of my arm and was shouting and roaring at me. I was terrified of him and the only other time I had seen him like this was on the night of his brother’s 21st in Galway. I got my phone which is beside the locker and rang my mother and asked her to come and collect me.

The other major row that is detailed in her lengthy and highly particularised statement is that which occurred in the context of the wedding, which she dates as occurring on Saturday, 28th of September 2013. Just before this, she describes collecting her children from her husband’s house and a row beginning concerning a financial contribution, it seems, to the wedding. This is described by Marisa Simms as the “first time that he [ever] started going on in front of [the children].” She went on in her statement to the gardaí:

[H]e kept making comments and ranting on about my sister saying “Who does she think she is, I will take down a peg or two”, and also said “I’m going to bury her and you”. He kept repeating this and I told him to stop but it was as if he went into a total rant. He then said “I am going to burn you” and at that point I could see [one of the children’s eyes] filling up and she was getting upset, so at that stage I put their coats over their pyjamas and told them they were going to the car. I remember [that child] was asking me if I was okay after having him threatening to burn me and it appeared to me that she didn’t know whether to go to the car or not as she was worried whether I would follow her out are not. I brought [the children] to the car and strapped them in. At that point I knew once I left I wouldn’t be back to the house but I went back to get [one of the children’s] school uniform[s] out of the tumble dryer. When I lifted it out he wouldn’t let me back into the kitchen from the utility room again. He prevented me from going back in by physically grabbing my wrist. I was really frightened of him at this stage as he was in such a rage it was as if he was not in control of himself and he was crazy.

Sir, if this statement was not coerced or invented by members of the gardaí, whether Keith Harrison was a Garda officer or not, you may regard it as being appropriate that in the interests of child protection and safety that there should be some social work involvement. Would it be appropriate, in this context, to blame the Health Service Executive or the Child and Family

Agency? Is there evidence here that all of these contacts with state agencies were deliberately set up in Garda headquarters in Dublin with a view to undermining the personal and family life of Garda Keith Harrison as, indeed, he alleges? Certainly, having social workers visit one in the privacy of one's home would not be pleasant. Sir, you will have to think of the alternatives as to whether it would have been appropriate that no action was taken following this statement. Before you make any of these decisions, however, you need to establish whether there is a factual basis for the two radically conflicting accounts which have been given by the parties involved, bearing in mind the terms of reference and your lack of jurisdiction to stray outside these.

On the 8th of October 2013, Marisa Simms' statement was referred to GSOC, however Ms Simms later contacted GSOC stating that she did not want their involvement in the matter. On the 9th of October 2013, formal referrals to the HSE were completed by Sergeant McGowan arising out of Marisa Simms' statement. A standard notification form was filled out in respect of both children for suspected "Emotional Abuse", providing that the children were "present during argument between mother & partner. (HSE to contact gardaí on receipt of notification to confirm contact details)". These were signed off by Superintendent McGovern the following day and sent to what was, at the time, HSE Child and Family Services.

On the 16th of October 2013, intake records on the Simms children were opened and a request for further information was made by the HSE to the gardaí. Gerry Hone, Principal Social Worker, states this was standard practice where garda referrals did not contain sufficient information, and that this was done "prior to the social workers intervening with any family". On the 21st of October 2013, a strategy meeting was held between gardaí and the HSE regarding the Simms children, attended by Sergeant McGowan, Bridgeen Smith and Donna McTeague, social workers. Ms Simms had been hospitalised around this time and as a result it was decided that the social work department would liaise with gardaí and that they would not contact Ms Simms or progress the matter until they received confirmation from Sergeant McGowan that Marisa had regained health.

On the 11th of January 2014, Marisa Simms withdrew her statement of 6th October 2013. She said:

I want to say that everything I told them on 6th October 2013 and that recorded in the statement is true. These things did happen and I was honest in what I told them at the time. Today, 11th January 2014 I wish to inform you that I no longer wish to pursue a complaint against Keith Harrison. I wish to withdraw the statement I made on 6th October 2013. I am making this statement of my own accord. No one is pressurising me to do so and I am not under duress.

According to Ms Simms, on this date, Inspector Sheridan was "cold and short" with her and that had a pre-prepared statement of withdrawal for her to sign. She also says the following:

[I] told her I wanted to retract my statement and that I was put under a lot of pressure at the time of making it at this she began to recount a story to me about a local couple who had a row in front of their children and now social services were involved and said she couldn't guarantee this wouldn't happen with Keith and I. I felt sick to my stomach, she was basically telling me if I took back my statement social services would get involved. I confirmed that it was my wish to take back the statement, I did not dictate the statement of retraction, those are all the words of Goretta Sheridan, I again wanted to just get out of there so I signed it and left to go home to my family. I left feeling relieved as I thought that was an end to the matter, but Goretta Sheridan's threat of social services getting involved played on my mind.

On the 27th of January 2014, Donna McTeague contacted Sergeant McGowan for purpose of ascertaining the “current status regarding garda investigation so as to allow [the social work department] to proceed with investigation”. Ms McTeague states that she advised that the HSE needed a report from gardaí with specific information regarding the 28th of September incident in order to progress the matter. She was also informed of the withdrawal of the 6th October statement. An initial assessment of the Simms children was then commenced on the following day. On the 3rd of February 2014, Ms McTeague wrote to Marisa Simms requesting a meeting on the 6th of February as the social work department had “received information in relation to your family which we would like to discuss” and asked that Garda Harrison also attend, “so as to explore the referral information in detail”.

Following this meeting between Donna McTeague, Marisa Simms and Garda Harrison on the 7th of February 2014, discussion seems to have taken place between Ms McTeague and Bridgeen Smith and it was agreed that Ms McTeague would meet the children in order to complete the assessment. This home visit took place on the 19th of February 2014, and Ms McTeague reported that there were “no issues of concern noted in the observations of the children”. Ms McTeague’s view following the initial assessment and meeting with Marisa Simms and Garda Harrison found that the children were “not at risk of ongoing significant harm and [both] have ... taken steps to ensure disagreements/arguments will not happen again in front of the children”. The file was closed on the 27th of February 2014 with no further action to be taken.

Both Marisa Simms and Garda Keith Harrison allege that there were very serious consequences to the involvement of social workers from Tusla with their private and family life. Ms Simms says of her meeting and subsequent contact with social workers:

I couldn’t sleep, I was stressed and very emotional and upset. Everything Keith and I do is for the children. I was scared the children would be taken from us. I wished I had never agreed to meet with Goretti Sheridan. Keith and I attended the meeting with Donna McTeague a social worker, she said she’d been asked to meet with us over a row that happened in September 2013. She explained she dealt with families with children were at immediate risk but was confused as to her role in this instance as the incident occurred over four months previously. Keith and I explained what happened was a normal row, that there was nothing untoward and was not a common thing to happen between us and that it occurred at a very stressful time for both of us, which she accepted...

I asked Donna McTeague that she visit our home immediately as I didn’t want this hanging over me, she stated she wasn’t able to do that but would do so in the next few days. When she did visit, she apologised to me on her arrival saying she had no choice in the matter, she spoke to our children for about ten or fifteen minutes, I am to this day extremely upset and angry my children had to do this. Donna McTeague then left but before she did she spoke with me in our kitchen and assured me that would be the end of the matter but I remain sceptical. Every day I fear receiving another letter from [the Child and Family Agency] or phone call or a fictitious complaint.

Complaints have also been made in the statements of both Garda Harrison and Marisa Simms in relation to garda attention to their home. Sir, you should be aware that a number of death threats were made against Garda Harrison, whether these are credible threats or not is a matter for you to decide. The first was on the 4th of October 2013, when an anonymous male made a phone call to Letterkenny garda station. The anonymous caller said that he had overheard a conversation in a pub, to the effect that Garda Harrison would be shot that night. Gardaí state that this matter was investigated but they were unable to identify the caller. On this date, Garda Harrison was put on office duties and remained on such duties until he went on sick leave in May 2014. The following

day, the 5th of October 2013, an anonymous caller who identified himself as the same male who had called the previous night, phoned Letterkenny garda station and said that Garda Harrison would be killed on that night, as opposed to the 4th of October. He stated that a person, a relation of Martin McDermott, was arranging to have Garda Harrison killed as he had “been harassing his sister”. On the 24th of February 2015, Garda Harrison was informed of a further threat, that a man had contacted Donegal town garda station to say he was going to “put a bullet in [Garda Harrison]”.

Garda Harrison describes the garda attention to his home with Marisa Simms in the following terms:

[Following December 2014] we endure[d] patrol cars passing our home and following us and in general intimidating us ... In July 2015 my family and I moved home and for the first time in a long time we enjoyed a life of no passing patrol cars or daily intimidation as Garda management were not aware of our new address ... [in August 2015] over ... four days various patrol cars passed our home nine times, I rang Letterkenny Garda Station and told them to stop, as on one occasion as my partner and daughter were out in the front garden a patrol car drove very slowly past smiling in at them making my partner very uncomfortable. Patrol cars passing our home on a regular basis became the norm again.

According to Marisa Simms:

Since Keith reported incidents of Garda malpractice and corruption, we have been continually harassed with patrol cars driving slowly past our home, we have been following by patrol cars ... An Garda Síochána have us living in fear as they have told us there are death threats against Keith but have failed to investigate them. As two individuals, as a couple, as parents and as a family An Garda Síochána have tried to break us emotionally, mentally and financially.

Sir, in this module, you will hear from relevant members of the gardaí, from relevant witnesses most especially from Garda Keith Harrison and Marisa Simms and from the relevant social workers. They defend their position but they do not seek to blame the gardaí in relation to what happened. Since Garda Harrison blames these events on inappropriate, malign and unjustified action on foot of senior gardaí and Garda HQ, sir you must anxiously consider what evidence there may be for this.

The allegations of Superintendent David Taylor

Sir, much of the reason why this tribunal was established may be traced to Superintendent David Taylor’s protected disclosure of September 2016. In that protected disclosure he alleged that during his time serving as the garda press officer, he was, and I quote, “instructed or directed to contact the media to brief them on the particular line that the Commissioner had instructed, namely to brief negatively against Sergeant McCabe”, and that he was:

directed to draw journalists’ attention to the complaint of sexual assault made against Sergeant McCabe and that this was the root cause of his agenda- revenge against the gardaí.

You are tasked, Sir, by terms of reference (a) and (b) with investigating the allegations made by Superintendent Taylor in that protected disclosure.

David Taylor joined An Garda Síochána in 1985, and rose through the ranks to become a superintendent. He was appointed press officer in July 2012 and remained in that post until his transfer to the traffic division in June 2014.

In May 2015, Superintendent Taylor was suspended from duty and arrested for offences contrary to s.62 of the Garda Síochána Act 2005.

Section 62 makes it an offence for a garda to:

disclose, in or outside the State, any information obtained in the course of carrying out duties of that person's office, employment, contract or other arrangement if the person knows the disclosure of that information is likely to have a harmful effect.

The section defines "harmful effect" in a number of ways, including impeding the prevention, detection or investigation of an offence, and impeding the apprehension and prosecution of a suspected offender.

The investigation which led to the arrest and suspension of Superintendent Taylor commenced in 2013, when gardaí in Tallaght temporarily took a Roma child into care, after a member of the public expressed concern to a journalist that the child may not be kin to the people who were ultimately determined to be her biological parents. A leak from inside the Gardaí to the press resulted in an exclusive article appearing in the Sunday World the following day. This report led Emily Logan, then the Children's Ombudsman, to investigate whether there had been an unlawful leak to the media of the child's identity. This investigation in turn led gardaí to investigate Superintendent Taylor, who was Press Officer at the time.

On the 13th of February 2017 the DPP, after considering a voluminous and very detailed report from the investigating officers directed that no prosecution be brought against Superintendent Taylor. He returned to work in the traffic division the following day.

Sir, some witnesses who are to be called by us have remarked on the lack of detail in Superintendent Taylor's protected disclosure, which does not contain the names of any journalists, the exact nature of his alleged instructions to brief journalists against Sergeant McCabe, nor any specific instances when such briefings took place

Former Commissioner Callinan, in his statement to the tribunal expressed concern that:

The terms of reference are based on allegations that have been made against me in extremely vague and broad terms... In circumstances where very little by way of specific detail has been set out in relation to the allegations it is difficult to do any more at this stage than refute them by way of denial.

Commissioner O'Sullivan similarly says, in her statement to the tribunal on the 13th of March 2017, that:

Insofar as Superintendent Taylor makes two core allegations which are to be investigated by this tribunal, namely that he was directed to brief negatively against Sergeant McCabe and to draw allegations of criminal misconduct made against Sergeant McCabe to the attention of journalists, his Protected Disclosure is entirely bereft of any details, particularly in relation to me. As will be appreciated, this presents difficulties in responding to same.

Sir, it seemed to us that these concerns may be legitimate. Therefore, your investigators were requested to interview Superintendent Taylor at some length. When specifically asked by your investigators if he had any evidence of former Commissioner Callinan's instructions, Superintendent Taylor stated that he would need access to his emails, currently archived by the gardaí, and his phones, in order to assist the tribunal. However, Superintendent Taylor maintains that the instructions given to him were always given verbally, and were never recorded in writing:

The instructions referred to were verbal in nature...the instruction by Commissioner Callinan in this regard was always verbal. The instruction was never documented in writing, text or email.

In his statement to tribunal investigators, Superintendent Taylor clarified some aspects of his protected disclosure as follows:

Deputy Commissioner O'Sullivan never instructed me to brief the media negatively about Sergeant McCabe though as far as I am concerned she was aware of the instruction by Commissioner Callinan...Deputy Commissioner O'Sullivan never instructed me to brief journalists against Maurice McCabe, however she was aware of the strategy through my updates to her.

Sir, it is perhaps worth noting that this is the height of the allegation made by Superintendent Taylor against Commissioner O'Sullivan, namely, that she was aware of former Commissioner Callinan's instructions. It is not suggested or even implied that she issued such orders herself. No witness has thus far come forward and directly alleged that Commissioner O'Sullivan herself spread rumours or misinformation about Sergeant McCabe.

Sir, Superintendent Taylor also told your investigators that Andrew McLindon, a civilian who was director of communications in the garda press office during the relevant period, was aware of the alleged instructions to brief journalists negatively about Sergeant McCabe, as they discussed the instructions. This matter is currently under investigation.

The most detail given by Superintendent Taylor with regard to his alleged instructions from former Commissioner Callinan was provided to tribunal investigators and I quote:

Commissioner Callinan would have said to me we need to hit back [at Sergeant McCabe] so that when I was talking to the media in whatever environment it presented itself, I would take advantage and I was to say that Maurice McCabe was driven by agendas, he is motivated by revenge, and that revenge is driven by the allegation, the sexual allegations, made against him by someone else's daughter a number of years ago, I would say that I did always clarify to the journalists that a file had gone to the DPP and that there was no prosecution, however, this was the narrative. It was put in such a way that there was no smoke without fire, I would drop that in when talking to journalists. I will clarify I never saw the Garda investigation file into the complaint of sexual assault against Maurice McCabe, what I got was always verbally from the Commissioner. I would also say that I believed what the Commissioner told me about Maurice McCabe, I had no reason to question what he was telling me...My briefing to journalists was where an opportunity arose I would make them aware as detailed above of the instruction from Commissioner Callinan in respect to Maurice McCabe. I don't think this would have included details of the parties involved, it was more in the general, about McCabe, to draw people's attention towards McCabe and his agendas. The genesis of this agenda was revenge for the fact that a complaint of sexual assault had been made against him, he had been criminal investigated

and a file had gone to the DPP. I can confirm that I was never aware of any complaint made to Tusla regarding Sergeant McCabe in 2013...When journalists were talking to me they knew they were talking to the Garda Press Officer of An Garda Síochána. I would not have advised them that I was acting on foot of instructions. They were speaking to the Garda Press Officer and not David Taylor in a personal capacity. I would also have said to journalists that anything they said to me would be reported up the line.

Sir, the tribunal still has not received specific details of the times Superintendent Taylor “spoke to various journalists on foot of instructions...to encourage them to write negatively about Sergeant McCabe and to brief against him.” Furthermore, what is he supposed to have been said? To whom did he say it, and when? Why can he now not remember it?

Sir, these are obvious questions that need to be asked but of considerable importance is whether the other parties to these alleged conversations can assist you in coming to the truth. And, in order to investigate the matter thoroughly it is absolutely necessary to ask the journalists about their dealings with Superintendent Taylor during the relevant period of time. Unfortunately, that has proved problematic, because of journalists’ alleged privilege.

Sir, of importance in this regard, and perhaps crucially, on the 28th of April 2017 Superintendent Taylor provided the tribunal with a waiver of any journalistic privilege. It is in the following unambiguous terms:

I wish to confirm that I do not claim and have not claimed any privilege over my identification as the source of any information, briefing, allegation or belief communicated to journalists in the print, broadcasting or other media directly or indirectly relating to Sergeant Maurice McCabe.

For the avoidance of any doubt I also confirm hereby that, in so far as may be necessary I waive and abandon any such right to claim privilege, or have it asserted on my behalf or in relation to me, in so far as it relates to my identity as the source of same.

I understand I am giving this confirmation

- (a) For the purposes of the Tribunal’s preliminary inquiries into the matters included within the Tribunal’s Terms of Reference, which are attached hereto.
- (b) For all other purposes of the Tribunal, including the taking of evidence from myself or any other person, whether in public or private sittings.

This waiver, and the similar waivers signed by Commissioner Nóirín O’Sullivan and former Commissioner Callinan, have been notified to several journalists.

The journalists named by Superintendent Taylor are Paul Williams, Paul Reynolds, Conor Lally, John Mooney, Michael O’Toole, Cormac O’Keefe, John Burke, Daniel McConnell, and Juno McEnroe. In particular Superintendent Taylor reiterated in his statement to tribunal investigators that Paul Reynolds and Conor Lally would have received negative briefings by him about Sergeant McCabe.

Sir, the tribunal has also identified from telephone data other journalists that Superintendent Taylor contacted during the relevant period.

Arising out of its investigations to date the tribunal has now written to the following journalists: Sarah Bardon, Ali Bracken, Tom Brady, Jennifer Bray, Stephen Breen, John Burke, Paul Connolly, Dyanne Connor, Ken Foy, Fran Greany, Mark Hilliard, Mick McCaffrey, Juno McEnroe, Cathal McMahan, Emma McMenemy, John Mooney, Eavan Murray, Niall O'Connor formerly of the Irish Sun, Niall O'Connor currently of the Irish Independent, Mick O'Toole, Paul Reynolds, Joe Walsh, Debbie McCann, Alison O'Reilly, Paul Williams, and at a later date, Conor Lally, Daniel McConnell and Cormac O'Keefe.

In the first instance, the tribunal wrote to most of these journalists on the 15th of March 2017 and requested statements from anyone who may have information relevant to the terms of reference. Regrettably, many of these letters went unanswered.

Five weeks later on the 21st of April 2017, the tribunal wrote again to these journalists, informing them of the waivers referred to earlier and asking the following series of questions:

1. Can you confirm your mobile phone number and work phone number?
2. Was this number your mobile phone number in the years from July 2012 until Feb 2017?
3. Were you briefed negatively about Sergeant McCabe by anyone? And if so, by whom?
4. Have you any information or evidence about an orchestrated campaign directed by senior officers of the Garda Síochána, to discredit Sergeant Maurice McCabe by spreading rumours about his professional and personal life?
5. Were you contacted by Superintendent David Taylor in relation to Sergeant Maurice McCabe?
6. Were you briefed negatively by Superintendent David Taylor in relation to Sergeant Maurice McCabe?
7. Were you briefed negatively by Superintendent David Taylor in relation to Sergeant Maurice McCabe to the effect that his complaints had no substance?
8. Were you briefed negatively by Superintendent David Taylor in relation to Sgt McCabe to the effect that the Gardaí had fully investigated complaints and had found no substance to his allegations and that he was driven by agendas?
9. Was your attention drawn by Superintendent Taylor to an allegation or suggestion of criminal misconduct made against Sergeant McCabe in any respect?
10. Was your attention drawn by Superintendent Taylor to an allegation that the root cause of Sergeant Maurice McCabe's agenda was revenge against an Garda Síochána?
11. Were you informed by Superintendent David Taylor that he was instructed/directed by former Commissioner Callinan and /or (then) Deputy Commissioner Nóirín O'Sullivan to contact the media to brief the media negatively against Sgt Maurice McCabe?
12. Are you aware and have you any evidence of any attempt made by former Commissioner Callinan or Commissioner O'Sullivan or any other senior member of an Garda Síochána to discredit Sergeant Maurice McCabe by reference to an allegation of criminal misconduct made against him ?
13. Were you informed by a journalist or any other person of any matters referred to in the questions above?
14. Have you any knowledge, information or evidence relating to any of the matters above?
15. Have you any knowledge, information or evidence relating to any matters within the Terms of Reference of the Tribunal?
16. Have you any records (however made, wherever stored) of any communications from or with Superintendent Taylor or former Commissioner Callinan, Commissioner O'Sullivan or any other senior Gardaí relating to any of the above matters?

With a few exceptions, the journalists have either ignored these letters, or refused to answer these questions, citing journalistic privilege. Many of them nonetheless wish to make generalised academic arguments about the nature of journalistic privilege to the tribunal.

Sir, as you said during the applications for representation on the 30th of March 2017:

That's what court cases never do. That's what judges never do. ... issues are never tried on the basis of a hypothesis...what you are suggesting is that I listen to an exegesis on journalistic privilege, which may be very important, which may be protected under the European Convention on Human Rights and then I rule in abstract, as opposed to hearing from people without even knowing if they have anything to tell the Tribunal which is relevance.

We will return to this topic later in our opening statement.

Sir, it must be stated that the claim of journalistic privilege has not been raised universally. Some, for instance, have written saying that they have no relevant information to offer. Others have regarded what they know as having been learned on an occasion to which privilege does not attach and have made helpful statements to the Tribunal.

Phillip Boucher-Hayes of RTÉ made a statement to the tribunal on the 13th of March 2017, detailing a conversation he had with former Commissioner Callinan on the 17th of December 2013, as part of the Crimercall programme. A disagreement had arisen between the programme's producers and gardaí, about whether Mr Boucher-Hayes could ask the Commissioner about the penalty points allegations made by Sergeant McCabe. In his statement to the tribunal, he says the following:

When the Commissioner arrived in RTÉ I asked to speak to him alone, without any of his advisers present, in an attempt to resolve what had become a row that was by that stage at risk of knocking the programme off the air.

We talked privately, out of earshot of all others, but in a public corridor outside the studio 4. I explained to him that from the perspective of the journalist/presenters it was wholly unacceptable that Gardaí were seeking to determine what questions we could and could not ask.

He offered me background information on the penalty point story. But the majority of his information related solely to the two whistleblowers, John Wilson and Maurice McCabe, not to the substance of the story. He offered a negative but cursory impression of John Wilson, before speaking at some length on Maurice McCabe's character. I had not asked any questions to elicit this information.

He told me that McCabe was a troubled individual and that he had a "lot of psychological issues and psychiatric issues". He claimed that McCabe was motivated by a set of grievances against Garda management and that he was famous with An Garda Síochána for this. He warned me that McCabe was not to be trusted and went onto add that there were other things he could tell me about him "horrific things, the worst kind of thing" but he did not elaborate further.

As our conversation was ending he added that if there was anything else I wanted to know about Maurice McCabe or the penalty points issue that I should ask Superintendent Dave Taylor from the Garda Press Office who was also present that evening.

Almost immediately afterwards Superintendent Taylor buttonholed me and asked “Now do you understand what the problem with Maurice McCabe and the penalty points is?”

I took no immediate action on foot of what Commissioner Callinan has said to me as my instinct about the encounter told me that the information passed on to me wasn’t true.

Sir, Martin Callinan responded to this statement on the 14th of June 2017, where he confirms that he had a conversation with Mr Boucher-Hayes on the night of his scheduled appearance on *Crimecall*, but he denies the account of Mr Boucher-Hayes, stating the following:

I did not speak “at some length” on Sergeant McCabe’s character as indicated.

I did not state that Sergeant McCabe had “a lot of psychological issues and psychiatric issues,” and was “motivated by a set of grievances against Garda management and that he was famous within An Garda Síochána for this.” I did not indicate to Philip Boucher-Hayes that Sergeant McCabe was not to be trusted, nor did I state there were other things I could tell him about “horrific things, the worst kind of thing.” I do not know what Philip Boucher-Hayes is referring to.

I certainly did say to Philip Boucher-Hayes that if he had any questions on either of the topics raised, ie the Smithwick Report or the penalty points issue, that he could forward them to the Garda Press Office or Superintendent David Taylor, whom I was aware that he was in contact with prior to me speaking with him.

On Sunday the 30th of May 2017, I read on the front page of *The Sunday Times* (Irish edition) an article by John Mooney titled ‘RTE journalist links Callinan to McCabe smear.’ The article claimed “Boucher-Hayes’ statement is the first independent verification of claims made by Taylor that he was directed by Callinan to discredit McCabe by smearing his reputation”. I was shocked and alarmed to read this.

Sir, in addition, Anne Harris, former editor of the Sunday Independent, wrote to the tribunal on the 11th of March 2017 stating:

In the years 2013 and 2014, matters raised by whistleblower Sergeant Maurice McCabe, such as the termination by senior gardaí of fixed penalty points, as well as allegations of murder and abductions not properly investigated, came to prominence. From the first instance that the Sunday Independent began to report on these matters, certain journalists came to my office to warn me off Sergeant McCabe. I was given varying accounts of an alleged case of child sex abuse by him, which was apparently being investigated. This was repeated several times by a very reputable journalist, one who had shown great courage in exposing incidents of corruption and terrorism. I made enquiries and was satisfied that the matter had been investigated by the DPP, and the complaint found to be without grounds. The Sunday Independent continued to report on Sergeant McCabe’s concerns and the consequent treatment of him.

In 2013, the allegation that Sergeant McCabe as a “paedophile” was stated in my office by senior executive from the wider “Group” editorial hierarchy of Independent Newspapers.

I am certain that a whispering smear campaign was being conducted and that the media were being used. The pressure on me was less about publishing the sex abuse allegation – it would have been difficult within the laws of libel- but had the clear purpose of discrediting him, and therefore censoring the issues he was raising.

Sir, it is important to note that former Commissioner Callinan has responded to these allegations, which he denies. In a statement to the tribunal on the 30th of May 2017 he states the following:

I have no knowledge of the allegation that Sergeant McCabe was referred to as a “paedophile” in 2014, as referenced by Ms Harris in her correspondence.

Commissioner O’Sullivan, in a letter to the tribunal on the 2nd of June 2017, stated that she had “no response” to Ms Harris beyond the statements she had already provided to the tribunal. This effectively amounts to a denial of the allegations.

Sir, Mr Brendan Howlin TD has made a statement to the Tribunal in which he outlines a conversation with a journalist, Alison O’Reilly of the Mail on Sunday, on the 8th of February 2017.

According to Mr Howlin, Ms O’Reilly informed him that another journalist, Ms Debbie McCann, had told her “that the Commissioner had given information to her claiming serious sexual misconduct on the part of Sergeant McCabe.” Ms O’Reilly then informed Mr Howlin that Ms McCann described Sergeant McCabe in very derogatory terms following a conversation with Commissioner O’Sullivan and that these matters were being discussed generally in the Mail on Sunday office. Ms O’Reilly also told Mr Howlin that Superintendent Taylor and Commissioner O’Sullivan had both provided this type of information to Ms McCann. Obviously some of what Ms O’Reilly recounted to Mr Howlin was hearsay evidence.

Last week, in response to Mr Howlin’s statement, Ms Alison O’Reilly sent a very helpful and detailed statement to the Tribunal which covers not only her account of her conversation with Mr Howlin, but also her knowledge of events from 2013 until the present as seen from the perspective of the media. This statement is of great assistance to the Tribunal and has opened up a number of avenues of enquiry. Some of the information is hearsay but is nevertheless helpful in identifying journalists who it appears have first-hand knowledge of who may have been behind a campaign to blacken Sergeant McCabe’s good name.

Sir, Gemma O’Doherty, who is a journalist, wrote to the tribunal stating that she was:

Well aware of the whispering campaign against Sergeant McCabe and when I was informed about the allegations of child sexual assault against him, I put them to him. He immediately informed me as to what happened and when I did some further investigation into the allegations, I found them to lack credibility entirely.’

Ms O’Doherty elaborated on this in a subsequent letter to the tribunal, on the 18th of May 2017:

It was in 2013 that I first became aware that Sergeant McCabe was being associated with an allegation of child sexual assault. Rumours about this were circulating in a number of Dublin newsrooms at the time. It is my understanding that a copy of the garda file concerning the allegations had been provided to Mr Paul Williams (Special Correspondent) by senior gardaí in Garda Headquarters and that was how ‘the word’ got out.

The fact that a Garda investigation file was said to exist and that it contained damaging details concerning Sergeant McCabe, gave the story certain credibility but knowing Sergeant McCabe, I was in no doubt that this was a malicious campaign against him orchestrated by certain people who wanted to silence him and knew they couldn't.

I spoke to Garda Wilson about the allegations that I had heard concerning Sergeant McCabe. He was aware of them. He said that a number of journalists were on the story but that it was untrue. One such individual was Paul Williams. Paul Williams has significant garda connections which both he and [Independent News and Media] rely upon for exclusive information...

It is my understanding that the same firm of solicitors represents Paul Williams, [Independent News and Media] and the woman who was purportedly behind the allegations of sexual abuse concerning Sergeant McCabe...

Rumours circulated that a copy of the garda file had been given to Paul Williams and that it revealed that Sergeant McCabe was under investigation for child sexual abuse...

Garda Wilson also informed me that a reporter named Debbie McCann, who worked for the Irish Daily Mail and whose father was a senior garda, was allegedly one of the journalists that was putting the word out that Sergeant McCabe was a child sex abuser. He said that she called him a 'paedo'.

Sir, former Commissioner Callinan also responded to these allegations in his statement to the tribunal on the 30th of May 2017:

At the outset it is unclear to me as to how all of the matters recited by Gemma O'Doherty fall within the terms of reference. Nonetheless, I propose to deal with the matters of which I have direct knowledge and which would seem to be of relevance to me.

I recall that in 2007 I was using my private car to attend to an urgent operational matter when I was recorded as exceeding the speed limit. I subsequently applied to have the Fixed Charge penalty cancelled. I became aware that Ms Gemma O'Doherty had been furnished with details and that she had called to my home late one night looking for me at a time when I was out of the country on state security business. I was unhappy that a journalist, firstly had my home address and, secondly, called to my home in relation to a matter that could have been dealt with during the hours of business and through the Press Office in a normal way.

I contacted the Press Officer, Superintendent David Taylor and informed him of the visit to my home. I asked him to make contact with the newspaper to inform them that the Garda Press Office is open from early morning until late at night to deal with any press queries, in addition to having an email service facilitate queries from journalists. Superintendent Taylor subsequently informed me that he had spoken to the newspaper concerned and conveyed my message.

Commissioner O'Sullivan also responded to Ms O'Doherty's statement, pointing out that she does not and has not had a close relationship with Paul Williams.

Sir, some of Superintendent Taylor's phones, phone bills, laptop and emails have been made available to the tribunal, and are being examined, including those already examined as part of the section 62 criminal investigation. The tribunal has also received former Commissioner Martin

Callinan's phone, which was previously with the Fennelly Commission. That phone was not forensically examined as part of that Commission, but will now undergo analysis as part of the tribunal's work. The Tribunal has recently received a further phone which was formally used by former Commissioner Callinan which will also undergo analysis.

Sir, Superintendent Michael Flynn of the Telecommunications Section of An Garda Síochána provided a statement to the tribunal on the 16th of May 2017, in relation to a number of phones that the tribunal wished to take possession of in order to thoroughly investigate the matters within its terms of reference. The statement indicates that there were six phones granted to Commissioner O'Sullivan throughout the relevant period, with an additional six allocated to former Commissioner Callinan and three allocated to Superintendent Taylor.

Sir, not all of these phones have been located. In total, there are fifteen mobile phones which are of interest to the tribunal, only four of these have been located by gardaí, including one delivered to the tribunal just yesterday along with an iPad, both of which were assigned to Commissioner O'Sullivan and will be sent to the Forensic Service of Northern Ireland for examination.

Superintendent Flynn indicates that a full search is ongoing for the remaining phones. In the meantime, Superintendent Flynn has instructed technicians "[t]o ensure that no mobile phones are disposed of when replaced or returned." Previously, various schemes had been in place to donate "old, obsolete and broken mobile phones" to charities such as the Jack and Jill foundation.

Sir, Superintendent Taylor's protected disclosure of the 30th of September 2016 also refers to a meeting between John McGuinness and former Commissioner Callinan in the carpark of Bewley's hotel. Superintendent Taylor's statement to the tribunal states that he was not present at the meeting, but he recalls that it was arranged in haste, and in what might seem to be quite unusual circumstances.

Term of reference (l) requires the tribunal:

[t]o investigate whether a meeting took place between former Commissioner Callinan and Deputy John McGuinness on the 24th of January, 2014 in the carpark of Bewley's Hotel, Newlands Cross, Co. Dublin and to examine and consider the circumstances which led to any such meeting, the purpose of such meeting and matters discussed at such meeting.

In your interim report of the 17th of May 2017, Sir, you point out that this issue is indivisible from the question of Superintendent Taylor's alleged briefings. Superintendent Taylor stated:

A few days before Sergeant McCabe was due to attend the PAC hearing in January 2014, I recall that I attended Dundalk Garda Station as we were to conduct a press conference. ...The Commissioner was to attend for that Press Conference but I had travelled in advance to make preparations...After the Commissioner arrived, I briefed him in the Superintendent's Office in Dundalk Garda Station. During that briefing I was informed by the Commissioner that he had a telephone conversation with John McGuinness, then Chairman of PAC, who he informed me had agreed to meet with him. The location of the meeting was Bewley's Hotel at Newlands Cross as it was on Mr McGuinness's route home. I knew the Commissioner had been trying to reach out to Mr McGuinness in his capacity as Chairman of PAC concerning Sergeant McCabe. The Commissioner never discussed with me what he wanted to discuss with Mr McGuinness. He had mentioned Mr McGuinness quite often in the previous days.

I had to delay the Press Conference as the Commissioner decided to leave Dundalk and to immediately travel to meet Mr McGuinness. The Commissioner returned later that day, perhaps at about 4:00pm or after, and the press conference was held then. The Commissioner never discussed the meeting with me save to confirm it took place.

Deputy McGuinness and former Commissioner Callinan confirm that the meeting took place at the time and place specified in the terms of reference. They also agree that Sergeant McCabe was discussed at that meeting. They differ fundamentally, however, in their accounts of how the subject was broached. Deputy McGuinness gave a statement to the tribunal on the 28th of March 2017 in which he recalls the meeting:

Mr Callinan asked if I was aware of issues surrounding Mr McCabe's personal life. I stated that I had heard vague rumours and gossip that Mr McCabe had abused someone and that he was a paedophile but that I had been assured by Mr McCabe that these rumours were lies, that he had heard them before and that they were malicious falsehoods. Mr Callinan stated to me that the rumours were true, that Mr McCabe had sexually abused someone and that he was not a credible person. Mr Callinan stated that an investigation into Mr McCabe's activities was underway. Mr Callinan then asked me was I aware that Mr McCabe had sexually abused family members. I was shocked and extremely troubled by what Mr Callinan was telling me because the allegations being made were extreme and the person relaying them to me, as well as the fact that an investigation had commenced, was the Commissioner of An Garda Síochána. When he left my car, Mr Callinan put his hand on my arm and stated that Mr McCabe was not reliable and could not be trusted and suggested that I had gotten myself and the Public Accounts Committee into a lot of trouble by pursuing the penalty points issue.

Deputy McGuinness's statement to the tribunal states that he kept a handwritten note of the meeting. A copy of that handwritten note is now with the tribunal. The relevant part of that note reads:

Callinan
McCabe
Sexual abuse!
Individual + family
Don't trust him
Story not credible
Investigations ongoing
He's not credible

Sir, former Commissioner Callinan, for his part, in his statement to the tribunal of the 13th of March 2017, describes the meeting as follows:

During the course of the meeting Deputy McGuinness asked why was Sergeant McCabe raising these issues. He asked if it was because of the file that went to the DPP. It was clear he was already aware prior to our meeting that Sergeant McCabe had been the subject of a criminal investigation. His query in this regard was not in response to nor was it prompted by anything I had said. I responded by telling him that if he knew about the file that went to the DPP he knew what the DPP had decided. He indicated to me that he knew all about the allegation underlying the investigation.

The former Commissioner provided the tribunal with an additional statement on 30 May 2017, further responding to the allegations made by Deputy McGuinness, which he denies.

At paragraph eleven, McGuinness alleges that I asked him if he was aware of issues surrounding Mr McCabe's personal life. This is not correct. As I indicated in my previous statement Mr McGuinness already appeared to be aware of the fact that Sergeant McCabe had been the subject of a criminal investigation and the nature of that investigation. He said that he had been assured by Sergeant McCabe that these rumours were all lies, that he had heard them before and that they were malicious falsehoods. Mr McGuinness was the one to raise the issue at our meeting. However, the word "paedophile" never entered the conversation.

I did not at any time state to Mr McGuinness that Mr McCabe had sexually abused anyone or that he was not a credible person.

I never at any stage indicated to Mr McGuinness that "an investigation into Mr McCabe's activities was underway". Indeed this would have been entirely contrary to my understanding of matters at that time. I was aware that the investigation in 2006 had long since completed from reading the reference to it in what is referred to by the O'Higgins Commission as the Byrne/McGinn report. I am clear in my mind that there was no new investigation ongoing at that time in relation to allegations of sexual assault against Sergeant McCabe, nor was I aware of any fresh allegation of any description against him.

I never at any stage indicated to Mr McGuinness that Sergeant McCabe had sexually abused family members.

As I indicated previously, I never stated that Sergeant McCabe was not reliable and could not be trusted. What I did say to Mr McGuinness was that some of the allegations made by Sergeant McCabe in relation to the Fixed Charge Penalty System was questionable in that a number of those allegations turned out to be untrue and Assistant Commissioner O'Mahoney's report highlighted some of those issues.

Commissioner O'Sullivan, in her statement to the tribunal of the 13th of March 2017, says:

I was not aware of any meeting between Commissioner Callinan and Deputy McGuinness as outlined by Deputy McGuinness...I was not at, and had not been invited to participate in, the press conference which Commissioner Callinan is alleged to have postponed for this purpose, and I had no knowledge of any proposed arrangements for a meeting or indeed of the meeting between former Commissioner Callinan and Deputy McGuinness. I first became aware of such a meeting when the matter was reported in the media following a statement made at that time by Deputy John McGuinness.

Sergeant McCabe's protected disclosure of 26th September 2016 reports Superintendent Taylor stating that "Commissioner O'Sullivan "would have known" of the meeting in the car park of Bewley's hotel "because Commissioner Callinan always kept her informed of such matters." Superintendent Taylor told your investigators that:

I would have sent out a press invite 24 hours before [the press conference] that would have been sent out to all the media, and to the Garda senior management team, including the Deputy Commissioner.

Sir, Superintendent Taylor, in a statement taken by your investigators, reiterated that he was not at the meeting in Bewley's car park on the 24th of January 2014, but was present at the Public Accounts Committee meeting the previous day. You will recall that this was the meeting at which then Commissioner Callinan described whistleblowers as "disgusting," which he subsequently clarified:

was not in reference to the character of either Sergeant McCabe or former Garda Wilson, but the manner in which personal and sensitive data was inappropriately appearing in the public domain without regard to due process and fair procedures.

According to Superintendent Taylor, after the PAC meeting, and with then Deputy Commissioner O'Sullivan, then Garda communications director Andrew McLindon, Assistant Commissioner John O'Mahoney and Deputy McGuinness all present in the room, Commissioner Callinan referred to Sergeant McCabe as a "kiddie fiddler" in conversation with Deputy McGuinness. The tribunal is currently attempting to establish whether any of these other persons present heard the comments allegedly made by former Commissioner Callinan to Deputy McGuinness.

Former Commissioner Callinan provided an additional statement to the tribunal on 30th May 2017, denying the allegations made by Deputy McGuinness in relation to their conversation on the 23rd of January 2014. He asserts the following:

Mr McGuinness states that at the conclusion of the hearing on the 23rd of January 2014, he approached me to thank me for attending the Committee. This is correct and it was certainly his normal practice to do so after such meetings. I recall that we exchanged pleasantries and engaged in mundane conversation about it having been a long day and so on. While I believe the then Deputy Commissioner Nóirín O'Sullivan and other colleagues were in the vicinity preparing to leave, I am unsure as to whether they were party to any conversation I had with Mr McGuinness. His assertion that I said "This man fiddles with children, this is outrageous" is simply incorrect and untrue.

Sir, the Comptroller and Auditor General, Seamus McCarthy, also gave a statement to the tribunal on the 13th of March 2017, recalling the PAC meeting of the 23rd of January 2014:

Commissioner Callinan appeared at the meeting as Accounting Officer. In the lobby outside the Committee meeting room, I met Commissioner Callinan, and we spoke briefly. No one else was party to the conversation, which lasted probably not more than about five minutes. I had previously had no direct personal communication or conversation with Commissioner Callinan about my report [about the penalty points allegations]. I do not recall any conversation (beyond normal social greetings) on the day with other senior Garda personnel.

Early in his conversation with me, Commissioner Callinan referred to Sergeant McCabe by name and made statements to the effect that Sergeant McCabe was not to be trusted, that he had questions to answer, and that there were allegations of sexual offences against him.

I responded to the effect that my report was not an investigation of any of the whistleblower's allegations; that it was based on analysis of random sample of fixed charge notice cases extracted by my Office's examination team from Garda records; and that my findings were not affected or influence by the whistleblower's motives. I did not probe the nature of the alleged sexual offences to which he had referred, and he did not provide any

further information in that regard. I did not acknowledge Sergeant McCabe as being the whistleblower who had contacted my Office...

During the subsequent Committee meeting, I thought about what Commissioner Callinan had said to me personally about Sergeant McCabe, and realised that the words he had used meant that Sergeant McCabe was accused of, and was being (or would be) investigated for alleged sexual offences. I concluded that his statement referred to the alleged involvement of Sergeant McCabe in the loss of a computer in a paedophile case in Cavan Monaghan, of which I was previously aware.

Sir, former Commissioner Callinan has responded to this statement in his additional statement, in which he recalls meeting Mr McCarthy, but denies introducing the allegations against Sergeant McCabe into the conversation.

I recall meeting Mr McCarthy outside the Committee Room on 23rd January, 2014 on the stairs leading down to the lobby and the Committee rooms. Mr McCarthy spoke about his audit and we briefly chatted about a number of Fixed Charge Penalty Notices and previous audits where weaknesses in the system were highlighted. He mentioned a file he had received from a whistleblower in 2012, which prompted the audit he conducted. Even though Mr McCarthy did not name the whistleblower, I was satisfied that Sergeant McCabe was a party, I believe that this would have been obvious to all concerned at this point.

I indicated to Mr McCarthy that some of the allegations made by Sergeant McCabe on the Fixed Charge Penalty System were questionable, as a number of the allegations made were subsequently proved to be incorrect. Mr McCarthy said he had heard the rumours about Sergeant McCabe being investigated over an allegation of a sexual nature. He did not elaborate on nor specify what these rumours were. I indicated to Mr McCarthy that was several years ago and that the Director of Public Prosecutions directed no prosecution. That was the extent of the conversation on that subject.

I did not at any point state that Sergeant McCabe was not to be trusted nor that he had questions to answer. I did not state that there were any allegations of sexual offences against him.

Sir, former Commissioner Callinan vehemently denies all allegations made against him. He says:

I wish to state categorically that I did not direct Superintendent Taylor to brief the media to the effect that Sergeant McCabe was motivated by malice or revenge. Nor did I direct Superintendent Taylor to encourage the media to write negatively about Sergeant McCabe. It is also incorrect to allege that I instructed Superintendent Taylor to encourage the media to report that Sergeant McCabe was therefore driven by his own improper agendas. It is undoubtedly a matter of public record that I did disagree with the manner in which Sergeant McCabe was disclosing personal, sensitive data pertaining to members of the public to the Public Accounts Committee and other third parties. However, I reject any suggestion that I directed Superintendent Taylor to engage in any improper campaign to negatively brief the media to the effect that he was driven by an improper agenda.

I note in Superintendent Taylor's Protected Disclosures that he alleged that there was a campaign at the highest level in An Garda Síochána involving me as the Commissioner and the then Deputy Commissioner, Nóirín O'Sullivan, to discredit Sergeant McCabe. I

absolutely refute that allegation. I have no knowledge of any such campaign, nor have I ever received any report of such a campaign within An Garda Síochána...

I specifically wish to state that I did not direct Superintendent Taylor to draw journalists' attention to the complaint of criminal misconduct made against Sergeant McCabe. Nor did I direct him to suggest to journalists or others that this was the root cause of his agenda.

It is striking that this allegation made by Superintendent Taylor is made without any reference to the surrounding detail, context or the circumstances in which the purported direction was made. Given the extraordinary nature of this allegation that I gave him such a direction it is remarkable that the account he has given is devoid of any such detail and puts me in the position of being able to do little more than simply deny it which I do fully...

I was not aware of the creation, distribution and use by TUSLA of a file containing false allegations of sexual abuse against Sergeant McCabe that was sent to Gardaí in 2013. Therefore, the implication that I used such information to discredit Sergeant McCabe in some way is wholly unfounded.

The former Commissioner does however, admit to once sharing information about the allegation made against Sergeant McCabe in his statement:

In late 2013 I spoke with the then Minister for Justice Alan Shatter TD. This was in connection with the report prepared by Assistant Commissioner John O'Mahony, which I believe Minister Shatter received on the 28th of March, 2013.

This was in the context of a briefing with the Minister. I believe that on the occasion in question we spoke by telephone. During the course of the conversation Minister Shatter specifically asked me if there was anything in the background relating to Sergeant McCabe that he should be aware of. In response I told him that there had been an allegation of inappropriate contact by Sergeant McCabe with a child in 2006. I made it clear to him that the matter had been investigated and that a file had been sent to the DPP who had directed no prosecution.

Sir, it will be apparent from the foregoing that there are substantially different accounts of the same incidents being given by the various protagonists. We hope to hold hearings on this matter in October and November of this year and to explore the contradictions with a view to making your task of deciding where the truth lies easier.

The broadcasts on RTÉ on the 9th of May 2016 on the leaked O'Higgins Report

Sir, the report of the O'Higgins Commission was delivered to the Minister for Justice and Equality on the 25th of April 2016. As in many previous instances, it may be fair to note that the publication of this report was perhaps precipitated by the leaking of the report and discussion on Raidió Teilifís Éireann throughout the 9th of May 2016.

Sir, what is involved in your investigation here is whether "briefing material prepared in Garda Headquarters influenced or attempted to influence" these broadcasts. It is said that, contrary to the duty of the media, the reports were not accurate and in particular, that Sergeant Maurice McCabe "was branded a liar and irresponsible."

The only place to begin in such an inquiry is with the actual text of the broadcasts concerning the O'Higgins Report. On the television news at 13:00 hours on RTÉ, the word "lie" was indeed used, in the following context: And we quote as follows:

Paul Reynolds: "It was the allegations of Sergeant Maurice McCabe, of corruption and malpractice in the Garda Síochána that threatened public confidence in the police service. These led to the establishment of the O'Higgins commission.

Its report, seen by RTÉ news, has found there were problems with garda management and resources at many levels but no evidence of garda criminality or corruption. It identified serious failings in eight criminal investigations from Bailieboro garda station. These included assaults, dangerous driving and child abuse. The most serious began with the report called "a savage attack" on taxi driver Mary Lynch by Jerry McGrath, who was only charged with a minor assault. This was strongly criticised by the report. While on bail for that, McGrath first abducted a five year old child but was given bail again and then went on to murder Sylvia Roche Kelly. The commission found the investigations were led by junior, inexperienced or probationer gardaí, and the commission said the failings were at a human level, caused by poor individual performance and in many cases by poor supervision. The investigations were characterised by errors and delays and the report found that victims of crime were not well served by garda or GSOC investigations.

On Sergeant Maurice McCabe, the commission says, he acted out of genuine and legitimate concerns and is a dedicated and committed member of the gardaí. It also said he was prone to exaggeration and while some of his complaints were upheld, others were found to be overstated, exaggerated, unfounded, and were withdrawn.

On the former garda commissioner, the report says "it must be stated, clearly and ambiguously [sic] there is not a scintilla of evidence to support an allegation of any corruption against the former commissioner" and that Martin Callinan was entitled to have his reputation vindicated. The commission also found the former Minister for Justice Alan Shatter's actions were entirely reasonable and appropriate, and that he took the allegations of garda whistleblowers very seriously. The report concluded that much of what happened could have been avoided or resolved if a garda inspector had been appointed to Bailieboro garda station"

John Finnerty: "And Paul is in studio now. Paul, first of all, where does this leave complaints by whistleblower Maurice McCabe."

Paul Reynolds: "Well, Sergeant Maurice McCabe is described in this report as the central figure in this investigation and it says that he acted out of genuine and legitimate concerns, he showed courage, he performed a public service at considerable personal cost and that he is due the gratitude of the general public and the Garda Síochána. It does also say that while some of his complaints were upheld, others were found to be exaggerated, overstated and were withdrawn. And it also said while the sergeant was never less than truthful in his evidence to the commission, it did highlight a number of incidents, including cases where he wrongly claimed that a minor assault was a rape, he alleged there had been an attempt to poison a father and son when there was no evidence to support this, the commission found, and also the commission says that he lied in a report to a senior officer."

Sir, on the program known as RTÉ Six One, in other words the ordinary television news that people may watch if they're back home from work in time, that notion of a lie was repeated but it was not repeated on the 21:00 hours news bulletin on television. Here is the relevant extract:

Sharon Ní Bheoláin: “Well Paul Reynolds is with us here in studio. Paul, we’ve had internal garda reports, we’ve had the Sean Guerin report, we have this commission report now, is this the end of the saga as far as garda failure allegations are concerned?”

Paul Reynolds: “Well in this case it looks like it. I mean if you look at where we are today, the former Commissioner Martin Callinan lost his job, the former Minister for Justice Alan Shatter lost his job, and the former garda confidential recipient Oliver Connolly lost his job, and they’re not going to get those jobs back.

In relation to Sergeant Maurice McCabe, the commission’s report has found that he displayed great courage, that he acted in the interests of the public service and that he should be commended and trusted by the public and within An Garda Síochána. But it also highlights a certain amount of criticisms in relation to him, it says a lot of his complaints aren’t upheld, and perhaps most damning of all, it does say in the report that he told a lie in an internal garda report.

However, he still remains a serving member of An Garda Síochána and the report says he is a dedicated and committed member of the force. On the broader issue though, this commission’s report has raised fundamental questions about how the gardaí investigate serious crime and particularly in these cases their ability to investigate serious crime has fallen well short of what the public demands from an organisation charged with this responsibility. Interestingly enough, similar questions and similar findings were made in the internal garda report, the Byrne/McGinn report, which is referenced in the commission report, but that was never published, the public didn’t know about it and we are only now aware of the detail of all these cases thanks to the publication of the commission’s report, and indeed thanks to the work of Sergeant Maurice McCabe and the fact that he did blow the whistle on this sort of thing and pushed it so far. However, in relation to this, perhaps if the gardaí had been more open about their own failings, perhaps if they had acted quicker, if they had, as the report says, appointed an inspector in 2006 when one was looked at, we wouldn’t be in the position we’re in today.”

Sir, there were also a number of relevant radio broadcasts on the same day. On Morning Ireland, Paul Reynolds again refers to Sergeant McCabe telling a lie:

Fran McNulty: “It’s just gone half past eight, we’ll come to news headlines presently. Paul, chapter ten details an assault at Crossan’s pub in Bailieboro in Co. Cavan on the 23rd of May in 2007.”

Paul Reynolds: “Yeah this was a probationer garda again investigated this case. A probationer garda is a trainee garda, just out of Templemore. In some of these cases, the probationer who investigated these cases, it was their first case. On the 23rd of May 2007, Mr R was attacked in a pub. He received injuries to his face and head, he was helped from the pub by a friend, collected by his wife. He went hospital two days later and was diagnosed quote “minor head injury and concussion.” Ten months later, two suspects were arrested. One was charged and remanded on bail at Monaghan District Court. The victim, however, later withdrew his complaint and the DPP directed the charge be withdrawn. Now it transpired that the probationer garda had in fact encouraged the victim to withdraw his statement, and the victim was misled in relation to evidence in the case. The

commission found that quote “unfortunately in this instance, the trust the victim and his wife had in the garda” quote “was not justified.”

Fran McNulty: “And what about Sergeant Maurice McCabe’s claims in this case?”

Paul Reynolds: “Well it says, the report says, that Sergeant McCabe was quite right to be suspicious of the fact that the complaint had been withdrawn. Quote “it is clear from the evidence of AC Derek Byrne that he considered Sergeant McCabe’s complaints in this matter substantiated.” But also the details the Sergeant submitted in his complaints were exaggerated and wrong. The commission found that Sergeant McCabe was quote “incorrect to say that” quote “an ambulance was called and that the injured party was rushed to hospital that night.” Quote “he did not attend hospital until two days after the incident.” It also pointed out that Sergeant McCabe said the victims were linking a personal trauma to an assault but it later emerged that this was not the case. This trauma was not being linked to the investigation. Also, while on the one hand the commission says Sergeant McCabe was quote “never less than truthful in his evidence” that he gave to the commission, it also says that he lied during this case, or as the commission puts it quote “told this untruth” in a report to a senior officer. On the 3rd of March 2008 the commission report says, the Sergeant reported that a complaint had been made to GSOC, end quote when he knew, the commission says, he was quote “aware” that this was not the case. He told the commission that the reason for the untruth was that he felt the victim and his wife had been badly treated and that he knew the reference to GSOC would ensure the matter would receive attention. Quote “while his concern was genuine and commendable, “the commission said, it was unacceptable to furnish false information in a report.”

Later, on the Today with Sean O’Rourke program, presenter Keelin Shanley, in posing a question to the reporter Mick Clifford, referred to Sergeant McCabe having told a lie:

Keelin Shanley: “And just Mick to put some of what we understand to be in the report, it says that the sergeant, Sergeant McCabe, was never less than truthful in his evidence, it highlighted though a number of incidents including cases where he wrongly claimed a minor assault was a rape, he alleged that there had been an attempt to poison a father and a young son when there’s no evidence to support it, and he lied in a report to a senior officer. The commission said that while his concerns were genuine and commendable, it was unacceptable to furnish false information in a report.”

As to the word “irresponsible”, Sir, this does not occur anywhere in any of the broadcasts. The description does, however, appear in Sergeant McCabe’s protected disclosure of the 26th of September 2016.

While the word “lie” does not appear in relation to Sergeant McCabe in the O’Higgins Commission report, we would point out that an equivalent expression does indeed occur at one point.

This was where the commission was reporting on an investigation into an assault on the 23rd of May 2007 in a public house in Bailieboro, when a man suffered injuries to his head and face. This man was helped back to his flat and was collected there by his wife who then brought him to Cavan General Hospital. In March 2008 two suspects were arrested in connection with the assault and detained for questioning. However, on the 28th of November 2007, the injured party made a statement withdrawing his complaint in controversial circumstances which were criticized by Mr Justice O’Higgins. Other aspects of the investigation were deemed unsatisfactory including the delay in compiling the file, which was described as “inordinate and inexcusable”. There was also

inordinate delay in interviewing witnesses and internal communications during the investigation were poor. A lack of professionalism was shown in taking statements, including that many were unsigned and the supervision of the relevant garda officers was regarded as inadequate. Sergeant McCabe had complained to Superintendent Clancy on the 20th of January 2008 about the investigation files not being completed or being very poor, together with the non-performance of officers in relation to their work.

Sir, apparently with a view to getting Superintendent Clancy to take this case seriously, Sergeant McCabe informed him that the victims had lodged a complaint with the Garda Síochána Ombudsman Commission. This was not so and, as Mr Justice O’Higgins found, Sergeant McCabe knew full well that it was not so. In plain parlance, this was a lie. Perhaps, in the context of the call to duty and the findings by the Commission in favour of the complaints made Sergeant McCabe it was a very small matter. Indeed, one would wonder, in the context of a report lasting 362 pages, how a journalist might manage to find this one flaw. Was it reported with emphasis? That, sir, is a matter for you. Here, in any event, is the relevant paragraph, 10.86, on page 223/224 of the report:

In a report of 3rd March 2008, Sergeant McCabe informed Superintendent Clancy of the complaints which had been made to him by [the victim of the assault and his wife]. He reported that a complaint had been made to [the Garda Síochána Ombudsman Commission] although he was aware that this was not the case. He told the commission that the reason for this untruth was that he felt [the victim and his wife] had been badly treated and that he knew that the reference to [the Garda Síochána Ombudsman Commission] would ensure that the matter would receive attention. While this concern was genuine and commendable it is unacceptable to furnish false information in a report.

Sir, we have nothing more to say about this matter. We hope to hold hearings on this matter in October/November when the issues will be explored in detail.

Credit, credibility and the O’Higgins Commission

Sir, as we have mentioned before, you are required to investigate whether “false allegations of sexual abuse or any other unjustified grounds were inappropriately relied upon by Commissioner O’Sullivan” during the hearings of the O’Higgins Commission. In making an opening statement on the 27th of February 2017, Sir, you touched on this matter by recording your expectation that those cross-examining witnesses were expected to come to the point. This can be understood to mean that the parties to the tribunal should concentrate on facts in issue and not on issues of credit unless it is absolutely necessary. You, Sir, went on to say:

While cross-examination is an instrument for finding the truth, it can also be used to obfuscate and to divert attention away from the central issues. It is expected that represented parties will provide their legal representative with clear instructions; that they will tell them what facts they will later testify to. Cross-examination as to credit can be legitimate. That may, or may not, be in the discretion of counsel. It may depend on the client or it may be within counsel’s hands. The credit of a witness may be important, apart from their opportunity of observation, sureness of memory or possible motive. Where a witness is coming from may be germane to some cases. If, for instance, a prisoner sharing a cell with an accused person on remand on a charge of murder claims that the accused confessed his motive to him for killing the victim, then the fact that the prisoner as a witness himself has a previous fraud convictions, is important. It would be less important if he had been unfaithful to his girlfriend, or perhaps had done something discreditable while under strain or while young. The law of evidence allows the control of cross-examination as to the credit of a witness based on its usefulness to the determination of the facts at issue and its length. That is a rule of commonsense.

Evidence of disposition or reputation is tightly controlled by the law of evidence. Reputation as to good character may be introduced by an accused in a criminal case but not by one of the parties to a civil suit. Evidence as to bad character in a criminal trial is restricted to clearly defined exceptions to the general rule that such evidence is inadmissible. Clearly, where an issue arises as to a witness's means of knowledge or perhaps their opportunity for observation, cross-examination may undermine the credibility of a witness's account without, at the same time, attacking the character of the witness. When, however, one moves to credit, counsel is in the realm of undermining the character of a witness with a view to demonstrating that the witness should by reason of unrelated behavior or disposition be disbelieved.

Even textbooks tend towards confusion in this area by mistaking issues as to credibility with the diminution of credibility due to the lack of creditworthiness of a witness. In a civil case, *Clayton v Cashman* [2006] IEHC 360, Peart J referred to the judicial assessment of evidence as including the consistency of the witness's evidence with what is agreed, and clearly shown by other evidence to have occurred, the internal consistency of the witness's evidence, that consistency with what the witness said on other occasions, the credibility of the witness generally, and the witness's demeanor.

There is a clear distinction, Sir, between suggesting to a witness that they are wrong because they had limited opportunity to view an event and clearly stating that a witness is not telling the truth because of unrelated matters. Examples of the latter would perhaps include some previous convictions of the witness, lies told on previous occasions and perhaps some interest in the outcome of the proceedings. The former is designed to demonstrate that a witness cannot be relied upon on this occasion because his testimony is vulnerable to objective scrutiny when contrasted to other known or proved facts. The latter is also designed to expose the witness as someone who because of their bad character is incapable of belief.

Sir, within the terms of reference as set by the Oireachtas, you will find reference to a requirement to consider whether Sergeant Maurice McCabe was "driven by agendas", that agenda being based on "an allegation of criminal misconduct made against" him and that in consequence he wished to take revenge against the gardaí. It may be argued that a cross examination along those lines involves an attack on the character of Sergeant McCabe so as to expose him as someone who should not be believed.

Sir, the tribunal has been in correspondence with Commissioner O'Sullivan as to whether she wishes to waive legal privilege in relation to whatever instructions she gave to counsel appearing on her behalf before the O'Higgins Commission.

Furthermore, it is worth pointing out that counsel on behalf of the Commissioner also appeared on behalf of 24 other members of the gardaí: Assistant Commissioner Catherine Clancy, retired Chief Superintendent Colm Rooney, Superintendent Noel Cunningham, retired Superintendent Maura Lernihan, retired Chief Superintendent John Grogan, Chief Superintendent Michael Clancy, Superintendent Noel Carolan, Superintendent Karl Heller, Assistant Commissioner Kieran Kenny, retired Superintendent John Courtney, Superintendent Gerard Redmond, retired Deputy Commissioner Walter Rice, Chief Superintendent Brendan Cloonan, Assistant Commissioner Dermot Jennings, Chief Superintendent James Sheridan, Superintendent Thomas Maguire, Assistant Commissioner Fintan Fanning, Superintendent John G O'Brien, Superintendent Niall Featherstone, former Commissioner Fachtina Murphy, former Commissioner Martin Callinan, Sergeant Gavin Scott, Assistant Commissioner Jack Nolan and Superintendent Gerard Wall.

As you will be aware Sir, legal privilege as we find it in this context is absolute. Where a party is requested to consider waiving the privilege it is made absolutely clear to them that no adverse inference will be drawn from their failure to assert what is a legal entitlement. However, the

Commissioner, in the circumstances of this tribunal, has taken the exceptional approach of waiving her privilege. This should make your task considerably easier and the tribunal is grateful to the Commissioner for the stance adopted by her.

Sir, the O'Higgins Commission was set up on 3rd of February 2015 and on 25th of April 2016, Mr Justice O'Higgins sent his final report to the Minister for Justice. As in all such exercises, clearly between the setup of the commission and the commencement of hearings there was a period of preparation.

The commission heard 34 days of evidence, and day one commenced on Thursday, the 14th of May 2015. What is of particular interest in relation to the report is that the vast majority of it relates to issues as to what happened or did not happen. There is very little in the report that could be regarded as a contest as to credibility, as where two people have a private meeting or encounter and each later tell diametrically different accounts. Usually, cross-examination as to credit arises in that context.

Sir, on day two of the hearings of the O'Higgins Commission, a reference was made by Chief Superintendent Colm Rooney to the supposed incident of 1998 which, when ultimately remembered and reported by Ms D in 2006 was described by the Director of Public Prosecutions on the 5th of April 2007 as not being an assault let alone a sexual assault.

Against an objection by counsel for the commission, who pointed out that the evidence appeared to be outside the terms of reference, Chief Superintendent Rooney described an incident in late 2007 when he alleged Sergeant Maurice McCabe came to him and I quote "demanded of me that I write to the Director Of Public Prosecutions and challenge the decision that the Director of Public Prosecutions had made in respect of him." Replying to the objection of counsel for the tribunal, counsel for the Garda Commissioner and other gardaí stated:

Can I say, Judge, perhaps you should hear us since this is a private hearing. The relevance may be in [the] context of motivation for certain facts or for certain matters or, indeed, credibility in relation to the certain matters.

Counsel for Sergeant Maurice McCabe intervened at this stage and asked for clarification as to whether the questions proposed were going to be asked "on the firm instructions of the Commissioner and that he knows the answers that he is seeking from this witness." There was also a reference to the appropriateness of this potential line of examination. After a short break, there was some legal argument during which counsel for the Commissioner said the following:

I have instructions from the Commissioner, Judge. This is an inquiry dealing with the allegations of malpractice and corruption on a grand scale by members of [the police]... my instructions are to challenge the integrity certainly of Sergeant McCabe and his motivation.... His motivation and his credibility in mounting these allegations of corruption and malpractice... That is the position, Judge.

There then followed the following exchange between counsel for the Garda Commissioner and Mr Justice O'Higgins:

Mr Justice Higgins: Yes. It seems unless I am mistaken...that your case is in relation to the matters under investigation subject only perhaps to matters to deal with general staffing levels, the condition of the Garda station in Bailieborough that most of the matters deal with factual issues and you are saying that Garda McCabe's complaints on your instruction are motivated, that they are not properly motivated, that they are not genuine, that they are done for improper motives.

Counsel: Whatever the reasons are for it on his side and it runs right through all of the—

Mr Justice O’Higgins: But you are attacking his motivation and you [are] attacking his integrity.

Counsel: Right the way through.

Mr Justice O’Higgins: Full stop.

Counsel: Yes, full stop.

Mr Justice O’Higgins: So be it.

Counsel: Yes.

Following further argument, Mr Justice O’Higgins pointed out that if there was no issue on the facts, the issue of credibility would not arise. Following further argument, a break was sought by counsel for the Commissioner and on resumption he simply said: “My instructions are reconfirmed.”

Sir, on Monday, the 18th of May 2015, which was the third day of hearings, the following question was put by counsel for the Garda Commissioner to Superintendent Cunningham:

Superintendent, you were aware that Sergeant McCabe had a personal grievance with the guards (sic), you don’t have to say what the grievance was but were you aware of that?

Superintendent Cunningham said that he was and was then asked to “put a timeframe on when you became aware of the personal grievance” and replied that it was “[e]arly 2007”.

Sir, as you will be aware from reading the materials before you, the complaint to the gardaí from Ms D was made on the 5th of December 2006 and Sergeant McCabe was interviewed in relation to it on the 22nd of December 2006. Various other statements were taken and a full garda investigation file was sent to the Director for the Prosecutions on the 1st of March 2007.

On day 3 of hearings at the O’Higgins Commission, Sergeant McCabe was giving evidence on one of the modules and was cross-examined by counsel for the Garda Commissioner. The following question was put to Sergeant McCabe:

Then we know that you have a personal grievance with the guards; isn’t that right?

Sergeant McCabe denied this and said that in relation to the letter from the Director of Public Prosecutions that his issue with Superintendent Cunningham was with the fact that the decision of the Director of Public Prosecutions had been with him for three weeks before the news had been passed on.

Later, an issue was introduced into the proceedings as to whether Superintendent Cunningham had been told by Sergeant McCabe that he had only made a complaint against Superintendent Clancy in order to get hold of the actual text of the letter from the DPP. Again on day four of hearings, it was suggested that Sergeant McCabe had sought what was described as “a declaration of his innocence from the Director of Public Prosecutions in relation to the allegation that was made against him.”

Sir, on day 29 of the hearings, which was Wednesday, the 4th of November 2015, Mr Justice O’Higgins returned to the exchange on day three of the hearings referred to earlier concerning the instructions given to counsel for the Garda Commissioner to attack his “motivation and integrity”.

Counsel sought to clarify what he had previously submitted by saying that he had never intended to suggest mala fides on the part of Sergeant McCabe. Is there a difference between a lack of integrity and mala fides? Counsel was asked by Mr Justice O’Higgins as to whether he was continuing by “attacking his motivation and... attacking his integrity”. He replied:

In relation to the corruption and malpractice allegations, yes. He has alleged corruption on the grand scale against Superintendent Clancy as he then was and Superintendent Cunningham and also against former Commissioner Callinan ... among others. He indeed also made allegations of corruption against Assistant Commissioner Byrne and Chief Superintendent McGinn. He withdrew these allegations but he was invited to withdraw allegations of corruption against former Commissioner Callinan and he refused to do so... As far as the Commissioner was concerned at all stages I had instructions to challenge Sergeant McCabe in relation to motivation and credibility.

In response to a mention from Mr Justice O’Higgins of integrity, counsel replied, “No, there was no mention of integrity.”

Mr Justice O’Higgins rightly pointed out that integrity had indeed been mentioned previously by counsel, and if someone was “motivated by malice or some such motive that impinges on his integrity.” While this may be regarded as the introduction of credibility into what is an increasingly cloudy and fraught set of submissions to Mr Justice O’Higgins, counsel for the Commissioner clarified, if clarification it was, that his instructions were to challenge “his motivation and his credibility only” and that this was in relation to “mounting these allegations of corruption and malpractice”.

Mr Justice O’Higgins then confirmed, “[Sergeant McCabe’s] integrity is not now being challenged”. There was then a further clarification from counsel:

Judge the Commissioner has a duty of care to all members. She wasn’t acquiescing and then she has to hold the balance between on the one part she has Sergeant McCabe who she has a concern for and for his welfare. And on the other hand she has a concern for superintendents who are under her control and she has to hold the balance. She cannot come down on the side of Sergeant McCabe and say I agree with everything he says without challenge or I am simply acquiescing [to] everything he says.

Sir, facts may be challenged, and clearly were challenged throughout the rest of the hearings before Mr Justice O’Higgins, but this appears to be the last reference to the sexual assault allegation as a means of undermining Sergeant McCabe as a witness. The only other mention in the transcript occurs on day 32, which was on Tuesday, the 8th of December 2015, and this is in an entirely different context when Superintendent Cunningham agreed that Sergeant McCabe was “a very dedicated member of” the police and that every officer with whom he had “worked” could “vouch for this.” He also spoke about the strain that resulted from the sexual assault allegation.

Sir, such an allegation does have a tendency to ruin lives and cause people to come to the conclusion that because an allegation has been made that it is not baseless but correct. Sergeant McCabe was under enough strain in consequence of the allegation having been made in the first place. It was fairly adjudicated upon by the Director of Public Prosecutions. Any fair-minded person applying the presumption of innocence and looking at the allegation in context would not have mentioned the matter again. Indeed Sergeant McCabe was fully entitled, insofar as he could, to leave it in the past and consign it to history.

Sir, it is for you to decide whether this allegation or indeed if any other unjustified grounds were inappropriately relied upon by Commissioner O'Sullivan to discredit Sergeant Maurice McCabe during the hearings at the O'Higgins Commission..

It is hoped that this matter will be dealt with in December of this year.

Privilege against the revelation of a confidential source

Sir, there are a number of forms of privilege which protect people from disclosing information or documents relevant to court proceedings, notwithstanding their relevance to the proper administration of justice, and this may encompass journalistic privilege. This, however, is heavily dependent on the circumstances. It does not seem to us that there is any blanket privilege against the protection of sources by journalists and nor does it emerge from any decided case either in Ireland or before the European Court of Human Rights that the privilege is absolute. In other words, journalists do have a privilege against the disclosure of sources but this depends on the facts and it may be overridden.

The great American jurist John Henry Wigmore in his *Treatise on the Anglo-American System of Evidence in Trials at Common Law* suggest that there are four conditions that need to be satisfied before a particular relationship of confidence can override the general principle that the law is entitled to the evidence of every person. These conditions are:

1. the communication must originate in a confidence that they will not be disclosed;
2. this element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties;
3. the relationship must be one which in the opinion of the community ought to be sedulously fostered; and
4. the injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of the litigation.

Sir, these general principles have been recognised in a number of Irish cases concerned with sacerdotal privilege, informer privilege and also with journalistic privilege. However every such privilege is subject to the overriding principle that there may be circumstances where the interests of justice override the community's interest in the maintenance of the confidential relationship.

The innocence at stake exception is an example of that in relation to informer privilege; though there the appropriate action by the authorities appears to discontinue a prosecution. Nevertheless an informer may waive privilege by making public declarations as to the subject matter or by voluntarily coming forward to a public forum and seeking to be heard.

Sir, as you are well aware exactly this occurred before the Morris tribunal in relation to the confidential relationship which up to that point had existed between a garda superintendent and a supposed source, who was in fact working on his behalf in a most unconventional way.

Diplomatic privilege may also be waived and as we have referred to earlier Commissioner O'Sullivan has waived her entitlement to legal professional privilege with regard to her instructions to her counsel at the O'Higgins Commission. It should be noted that it is her privilege and not that of the lawyers who represent her.

Sir, you will be aware of the leading case under the European Convention on Human Rights, which is *Goodwin v United Kingdom* App No 28957/95 (ECHR 11 July 2002). There, in a ruling which has been repeated since it was first delivered in 1996, the European Court of Human Rights stated:

Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments and journalistic freedoms ... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has for the exercise of that freedom, such a measure cannot be compatible with Article 10 ... of the Convention unless it is justified by an overriding requirement in the public interest.

Sir, these principles, which bear a kinship, at least in reasoning, with the Wigmore analysis, have been applied by that court whenever the issue of journalistic privilege has been referred to the Strasbourg court. In *Mahon v Keena* [2009] IESC 64, those principles were applied by the Supreme Court in the context of a tribunal of inquiry. The court emphasised in its analysis of the relevant case law that the right to freedom of expression is not unlimited and that the press must not “overstep certain bounds”. Article 10 therefore does not “guarantee a wholly unrestricted freedom of expression even with respect press coverage of matters of serious public concern.”

We would also point out that the High Court has held in *Walsh v News Group Newspapers* [2012] IEHC 353, that a privilege against the disclosure of a confidential source cannot be asserted by a journalist in respect of communications where the identity of that source has been disclosed. Sir, as we have mentioned earlier, exactly this situation arose in the Morris Tribunal. Recent decisions of the European Court seem to suggest that this may be dispositive of the issue.

Do we have the same situation here? You will be aware, Sir, that at the heart of your investigation are two protected disclosures that would be protected by legislation against any form of publication. In reality, what we are concerned with is one particular disclosure namely that of Superintendent David Taylor of the 30th of September 2016. In consequence of various interactions between him and the Garda authorities and with Sergeant Maurice McCabe, he has waived any statutory or any other kind of privilege that he may have.

Therefore, he has voluntarily come forward into the public arena. He has not only identified himself as the source but also the information he claims he was briefed to disseminate. He has also disclosed the manner in which he used journalists to spread what can only be referred to as gossip.

The allegations made by Superintendent Taylor have been widely publicised to the detriment of the character and standing of former Commissioner Callinan and his successor Commissioner O’Sullivan.

Sir, the notion that there is no smoke without fire may be a very powerful one here. Certainly, those against whom unjustified allegations are made in the sphere of sexual violence have cause for complaint because it is very rare, as we have mentioned, that fair-minded people will immediately apply the presumption of innocence. That is part of the training of lawyers and it may not be part of the training of journalists, much less that of the consumers of news.

But what about these allegations? Are these not serious? Are these not allegations which may lead people to conclude that those at the very top in garda headquarters are engaged in determined efforts to destroy any person who would undermine the notion that members of the gardaí can do no wrong. Is there a situation here of overriding public interest in seeking out the truth?

But then we also have the perspective of Superintendent David Taylor. If he is wrong in what he says then he could perhaps be characterised as a most mischievous individual. It is not right to attack and undermine peoples' characters, by which I mean former Commissioner Callinan and Commissioner O'Sullivan, unless such calumny is based in truth.

He has publicly come forward and identified himself as a source. Is this therefore the situation that arose in the Irish courts in *Walsh v News Group Newspapers*? Furthermore, he has waived any privilege through a formal document provided to this tribunal. In what way does the protection of the very important relationship of journalists and their sources come under threat through his actions? Has Superintendent Taylor not come to the public and asked to be believed and does not part of this necessarily involve us asking the journalists he says he sourced information to, to confirm what he is saying. Or perhaps they may refute what he is saying and lay bare a lie.

Sir, these are all questions for you to ultimately decide.

Concluding remarks

We will in a position to distribute relevant documents in relation to the first section of this work which concerns Rian, the Health Service Executive, and the Child and Family Agency, otherwise Tusla tomorrow. The work will thus unfold. People should watch the website because these hearings will take place in two weeks' time and we intend concluding as soon as we possibly can.

Sir, we intend to come directly to the point in terms of what questions we ask witnesses and we would ask our colleagues who need to ask questions, and only if they need to ask questions, to do the same. We hope this opening statement has outlined what the potential issues are and where the lines of controversy may be drawn as between witness and witness.