



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 Mr Justice Peter Charleton, on Monday 27th February 2017

By instrument under the Tribunals of Inquiry (Evidence) Act 1921, as amended, the Minister for Justice and Equality on the 17th day of February 2017 appointed this Tribunal, following resolutions of Dáil Éireann and Seanad Éireann of the previous day. The Tribunal is tasked by that resolution with urgently inquiring into a range of matters all of which hinge on how the top officers within our national police force react when concerns are aired as to the performance of the gardaí. The central concern is whether such reaction has, possibly, and this is now unknown, not only been one of distaste, but of active and thought-through malice whereby media briefings take place against individuals who rock the boat. As if that were not enough, there is an additional question as to whether those who air concerns about poor policing may also be targeted and attacked as to their family life and as to their adherence to basic standards of human decency. Certain disclosures are protected through procedures and safeguards laid down in the Protected Disclosures Act 2014 and this legislation had its origin in the six reports of the Morris Tribunal which worked between 2002 and 2008 on corruption and deceit within An Garda Síochána. As much of the focus of that tribunal was on the Donegal division, and was reported on as such, it may have been possible to regard the findings and recommendations of that tribunal as somehow isolated from Ireland and its police force by some feature of geographical remoteness.

The tribunal has been working since the day of its establishment and orders were made, letters sent and evidence gathered, as appropriate. There is more work to do and the purpose of this statement is to give necessary assurance as to how this tribunal will go about its work and what the general plan of work is.

The terms of reference of the Morris Tribunal covered an apparent homicide investigation, the police interrogation of twelve people, the planting of apparent explosive devices around Donegal for recovery and a false show of good police work, putting a bomb on a television mast to further an agenda, planting an aged and very dangerous firearm in an encampment of the Irish Travelling Community to enable arrest, the improper use of police agents, making threats through a ‘silver bullet’ ruse, alleged corruption at high level, disclosure by politicians, and the effectiveness of police structures to deal with such failings. These events spanned over a decade of police activity.

The Morris Tribunal completed 10 modules in 6 years. Here there are 2 modules and responsibility rests here for the completion of the first of these; terms of reference (a) to (o). The second, and catchall module, module (p), generally and non-specifically concerns whether gardaí who have made protected disclosures were mistreated. The first module concerns the response of Commissioner Nóirín O’Sullivan, ex-Commissioner Martin

Callinan and others at the highest command level to disclosures made by Sergeant Maurice McCabe. In particular, this is focused on the manner in which the character of a person may possibly have been undermined by calumny or detraction. Both Sergeant Maurice McCabe and another officer, Garda Keith Harrison, may have had dealings with, or have been the subject of discussions at, the Child and Family Agency and some aspect of those discussions may also have involved the Health Service Executive. This needs to be explored.

All are aware that this tribunal was preceded by a commission of investigation under the Hon Mr Justice Kevin O'Higgins, former judge of the High Court and of the European General Court, a person for whom it is impossible not to feel the highest regard. His commission sat long hours for 34 days and produced a report of model clarity and characteristic restraint. Prior to that, in consequence of the uncovering of work that did not meet the standards that a modern police force would adhere to, and that a business would tolerate only in the sure knowledge of its early demise, there were internal enquiries, disciplinary proceedings and an investigation by Chief Superintendent McGinn and Commissioner Byrne. Those went on for years. The commission was the final step, established on the 3rd of February 2015 and issuing its final report on the 25th of April 2016. One of the issues before this tribunal is how counsel for the commissioner treated Sergeant Maurice McCabe when he was testifying.

The central witness in this tribunal as to the aspect of this affair involving media briefings was Superintendent David Taylor who, it is understood, was Garda press officer from the 1st of July 2012 to the 31st of May 2014. Superintendent Taylor had a meeting with Sergeant McCabe on the 20th of September 2016. There, essentially, what Superintendent Taylor said in his protected disclosure of the 30th of September 2016 was relayed to Sergeant McCabe, echoing those matters in his own, but earlier, protected disclosure of the 26th of September 2016.

Already, there have been several tribunals. Many were scrutinised and informed as to the appropriate procedures by litigation in the High Court and on appeal. In consequence of multiple court applications, the law as to how tribunals should go about their work is clear. The basic touchstone is fairness and balance of application of procedures. There should be no need for yet further judicial reviews. If a person has a problem, that person should, first of all, apply to the tribunal in a genuine manner. Of course, there is a right of access to the courts. But, nevertheless, we cannot be naïve. This tribunal intends to focus on the existing law and to abide by its full strictures.

The entitlement to be represented will be afforded to everyone whose reputation is in any reasonable sense likely to be adversely affected by the report of the tribunal. It should be noted that the tribunal has the task of seeing through the business of the investigation from beginning to end and that, consequently, legal representation should be tailored with regard to the level of representation and as to attendance, based on how central the person represented is reasonably thought to be. The tribunal intends to afford represented persons either with copies of, or the entitlement to inspect, witness statements or any other documents relevant to their reputation. The tribunal intends to afford cross examination rights to all represented parties. It is expected, however, that the bulk of examination will be done by tribunal counsel. Since this is not a civil case, there are no adversarial parties. That does not obviate the need for focus. Counsel for the tribunal are entitled to cross examine witnesses called by the tribunal because the tribunal is not a party. Examination by other parties should take that into account and

focus on matters of particular relevance to the issues which impact on them. Each party is entitled to make a written or oral submission, or both, at the conclusion of evidence.

There has been some question as to whether the tribunal should prepare a written report in draft form and then circulate it to the parties prior to the publication of the final report. Any draft report can be misinterpreted and, after all, is only a communication designed to seek comment; see term of reference (k). Circulation of a draft judgment does not happen following a civil trial. The judge hears the parties and considers the result. Then there is a judgment. It should also be borne in mind that a judge is entitled to disbelieve a witness, to say that an expert witness is not truly an expert or to disagree with an expert opinion without those people having representation. Witnesses, in any criminal or in any civil case, of whatever kind, are open to acceptance by the court, or to rejection, partial acceptance or partial rejection without any of their rights being affected. Just because you are a witness who may be disbelieved does not entitle you to representation. Were the court system to operate otherwise, every case would have multiple parties. All courtrooms would have to be enlarged. This tribunal will abide by the existing court rules. That is implied, in any event, by the relevant legislation in the several references to the tribunal having the powers and functions of the High Court.

The rules of evidence do not apply. The rules of logic and good sense do. Documentary evidence is to be considered for what it is worth, even though it may be hearsay. Where someone relays what another individual said, that is admissible. The value of such evidence depends on the scepticism which the absence of that witness may invoke and the inability to test statements relayed by another as to their sureness in fact. Such evidence may have little or no weight. One rule of evidence says that people cannot corroborate themselves. An exception to this is where a person is alleged to be fabricating the truth, then what he or she said long before can be repeated by another witness. As a matter of ordinary sense, however, the fact, for instance, that a person claims something and repeats that claim to five people and those five people give evidence of what was said to them, does not necessarily turn what the original person relayed into the truth. Any such circumstance will be looked at closely.

Any examination by counsel of what a witness says is subject to the rule that it should be based on instructions and directed towards what a represented party wishes to assert as an explanation as to what happened, or to present a contrary point of view. Where focus is kept, cross-examination of witnesses is concise. Any party examining a witness is expected to come to the point, with reasonable latitude, and to be polite, with no latitude. Examination should converge on what is important. 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 is a witness 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.

This rule is worth mentioning because term of reference (e) asks for a determination as to whether “false allegations of sexual abuse or any other unjustified grounds were inappropriately relied upon by Commissioner O’Sullivan to discredit Sergeant Maurice McCabe” when he was being examined before the O’Higgins Commission. Is there a privilege against disclosing instructions given by a client to their lawyer as to what is to be pursued in cross examination? Submissions will be heard on that matter since it is now a matter of conjecture as to what happened. The original transcript is in the possession of the tribunal and is being read in full. The matter will be further explored.

The tribunal is tasked with examining relationships between the gardaí and “media and broadcasting personnel”, term of reference (h), a broadcast on RTÉ television on the 9th of May 2016, term of reference (k), and contacts with the media “to brief them negatively that Sergeant McCabe was motivated by malice and revenge” in order to encourage negative comment and to point out his supposedly criminal conduct, terms of reference (a), (b), and (c). Is there a privilege against giving evidence, including relevant records, where someone communicates in confidence, or off the record, as the phrase goes to a journalist? If that privilege exists, does it exist because of the public interest in protecting investigations by the media? Does journalistic privilege attach to communications to a journalist where that communication by the source may not be in the public interest but, instead, where the source is perhaps solely motivated by detraction or calumny? Submissions will be heard on this issue and a ruling may be necessary. For that ruling to be made, facts will need to be established. A primary source of such facts would appear to be the journalists to whom such allegations were allegedly made. This, according to the terms of reference, looks as if it may need to be pursued. The tribunal has been specifically tasked in the public interest to find out whether the media was used as an instrument for the dissemination of lies. That, however, may not be the only avenue of investigation.

In informer privilege, because of the danger to the life of those who confidentially help the police, the privilege is that of the informer and even lasts beyond death, according to some cases from abroad. The only person, in our law, who can waive the privilege, is the informer. In legal professional privilege, similarly, the client holds the privilege, and not the lawyer who gives legal advice on the basis of confidential instructions. Only the client can waive the privilege and reveal the confidential instructions: not the lawyer. Here, the privilege, if there is one, may attach to a communication to a journalist in the interests of providing truthful information to the public, but is it possible that such a privilege does not apply to using the media as an instrument of naked deceit? That may or may not have happened. Either way, the existing law suggests that the privilege is that of the confidential informant and not that of the journalist. However, the tribunal has no settled view on the matter and careful consideration will have to be given to the issue after submissions are heard.

On privilege and kindred issues, lastly, certain safeguards are provided by legislation, and certain safeguards inure under the Constitution, to those who find it difficult or impossible to access the system of justice, by reason of the subject matter of what they may need to testify to. Restricted hearings may take place, in terms of attendance and reporting, under section 2 of the 1921 Act, as amended. Submissions may need also to be heard on this as it will have to be carefully considered as to if there may be such a

situation here; see terms of reference (d), (h), (n) and (o). Before we reach that stage, preliminary work will need to be done. The tribunal will approach this task with appropriate circumspection.

It is not now appropriate to ask for applications for representation. The reason is that matters are still unclear as to exactly whose reputation may be put in jeopardy in a manner beyond that of the tribunal's analysis of their witness testimony. But, we must make progress.

The terms of reference make it crystal clear as to what is at issue. Here are the terms of reference:

- [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 TUSLA 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,
 - TUSLA,
 - 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 RTE 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 TUSLA in relation to Garda Keith Harrison.
- [o] To investigate any pattern of the creation, distribution and use by TUSLA 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 16th 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.

Tá cónaí orainn i dtír agus táimid mar sliocht de daoine a luachálann an oideachais chomh mór leis an fhírinne. Ach, is í an fhírinne atá uachtaracha. Ghlac ár sinsear leis an mana a d'fhoghlaim gach páiste Éireannach: glaine ár gcroí, neart ár ngéag, agus beart de réir ár mbriathar. Ba é sin ár bród, uair amháin. Tá an binse fiosrúcháin anseo chun an fhírinne a shocrú: ní féidir an dubh a chur ina gheal, ach seal.

Is draein é an binse fiosrúcháin seo ar acmhainní muintir na hÉireann, agus beidh an costais íoctha tré géilleadh na ndaoine do na struchtúir dhaonlathacha, ina bhfuil an cánachas mar chuid shuntasach, in ár dtraidisiún. Beidh gach bréag a chuirfear in iúl don binse fiosrúcháin seo ag cur amú an méid a bhfuil íoctha ag gnáth fir agus gháth mná tríd a n-iarrachtaí gan staonadh. Is mar gheall ar sin nach bhfuil fáilte roimh aon neamh-chomhoibriú, aon atreorú na fócais nó aon dorchaim. Tá an pobal ag súil orainn ár obair a dheanamh faoi luas, agus conclúidí a bhaint amach go tapa. Agus muid ag tabhairt faoi ar an obair seo, ní féidir ach chuimhnigh ar laige an duine; agus an dóchas a bheith againn: is mór í an fhírinne agus bufaidh sí: the truth is powerful and will be victorious. Níl aon noisín réamh-cumadh sa binse fiosrúcháin seo i dtaobh cé a bhfuil ina bithiúnach, más é, agus cé a bhfuil ina íospartach, más é. D'fhéadfadh nach taitneoidh cinntí an binse fiosrúcháin seo le gach duine: bíonn an fhírinne searbh ach ní fhaigheann sí náire go deo, the truth is bitter though not shameful.

Is tréith úsáideach é den aigne dlí go bhfuil sé coinníollaithe chun fianaise a lorg, chun fianaise thacaíoctha a lorg, chun patrúin a léiríonn an fhírinne a lorg, agus gan léimeadh go dtí cinneadh, agus gan dearbhú go bhfuil rud míchlúiteach déanta ag duine gan chruthúnas leordhóthanach. Is é sin ar gcaighdeán agus beidh muid ag cloí go deimhin leis.

We live in a country as the descendants of a people who value education as almost as high a virtue as the truth. But, the truth is supreme. Our ancestors adopted the motto once learned by every Irish child: Glaine ár gcroí, neart ár ngéag, agus beart de réir ár mbriathar; purity of heart, strength and adherence to our word. That was once our pride. This tribunal is here to establish the truth: Ní féidir an dubh a chur ina gheal, ach seal; black can be made white but not convincingly. This tribunal is a drain on the resources of the Irish people, and it is paid for by their submission to the democratic structures of which taxation has been a central part in our tradition. Every lie told before this tribunal will be a waste of what ordinary men and women have paid for through their unremitting efforts. Every action of obfuscation, of diversion of focus, and of non-cooperation is unwelcome for that reason. We are expected to get on with our work with dispatch and to reach conclusions rapidly.

In embarking on this task, one can only be reminded of human frailty and can only hope: is mór í an fhírinne agus bufaidh sí, the truth is powerful and will be victorious. There are no pre-conceived notions in this tribunal as to who is a villain and who is a victim, if there are such. And it may be that what the tribunal finds will not be to everyone's taste:

Bíonn an fhírinne searbh ach ní fhaigheann sí náire go deo, the truth is bitter though not shameful. One useful aspect of the legal mind is that it is conditioned to look for evidence, to seek supporting evidence, to look for patterns indicative of truth, to not leap to conclusions and to not declare that someone has done something discreditable without sufficient proof. That is our standard and we will abide by it.

Are you a witness to this matter? Then, the tribunal needs your help and needs it urgently. Many have already indicated publicly and in various circumstances that they have some knowledge. Now the opportunity has arrived to cooperate in this inquiry. The tribunal wants to know the detail of that; who did what, who said what, when, in what terms, who communicated with whom, by whatever means, and in what terms. What evidence have you of this beyond what you are saying? The details are central. The tribunal needs the detail. Today, the tribunal is calling for all those people with knowledge of the matters in the terms of reference (a) to (o) inclusive to provide a written statement and to forward this to Elizabeth Mullan, solicitor to the tribunal at Dublin Castle, Dublin D02 Y337. That statement should be detailed and should be received by close of business on this day fortnight, the 13th of March 2017. In that statement, every person should indicate whether they wish to assert any form of ostensible legal professional privilege against disclosure of evidence or documents or any form of ostensible journalistic privilege. If there is any such assertion against giving a complete account of events, then that's not ruled out, but at least we know what needs to be further explored.

While the tribunal has already made a range of orders preserving or requiring the handing over of documents, if any person has a phone, computer, electronic records or paper records, relevant to the terms of reference, then these should be brought to the tribunal within the same timeframe.

The tribunal has witnesses it needs to interview, and that will be done professionally; it has documents that it needs to examine. With the furnishing of witness statements, what is important to who will become clearer. Those whose reputation is impacted upon will be circulated with the relevant material. Then the tribunal will be in a better position to hear applications for representation. That is why there are no such applications and no other applications today. Any application, in any event, should be preceded by a letter to Elizabeth Mullan, solicitor to the tribunal at Dublin Castle, Dublin D02 Y337.

Thereafter, once the volunteered statements that have now been clearly called for are read, and further documents are examined, and circulated counsel for the tribunal will make an opening statement. There will then be a short pause, following which the tribunal will begin public hearings, subject to the need that may arise to hear some evidence in restricted circumstances.

Let me finally say, term of reference (p) is not now being considered unless there is some extraordinary striking similarity that someone wishes to bring in unambiguous terms to the tribunal's attention. For the moment, p stands for parked. This statement will shortly appear on www.disclosuretribunal.ie.