

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

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1921, ON 17 FEBRUARY 2017

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

HELD IN DUBLIN CASTLE
ON TUESDAY, 13TH FEBRUARY 2018 - DAY 58

58

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1 THE HEARING RESUMED, AS FOLLOWS, ON TUESDAY, 13TH
2 FEBRUARY 2018:

3
4 SUBMISSION BY MR. MCDERMOTT

5 MR. MCDERMOTT: Good morning, sir, I appear on behalf 09:30
6 of Tusla and I'd like to make some closing remarks on
7 behalf of my client.

8
9 The term of reference these remarks relate to is term
10 of reference (d). That is: The creation, distribution 09:30
11 and use by Tusla of a file containing false allegations
12 of sexual abuse against Sergeant Maurice McCabe that
13 was allegedly sent to Gardaí in 2013 and whether those
14 false allegations and/or the file were knowingly used
15 by senior members of An Garda Síochána to discredit 09:30
16 Sergeant McCabe. And that term of reference seems
17 naturally to fall into two parts, and it appears on the
18 face of it that it is the first part that is most
19 relevant to my client, which is the creation,
20 distribution and use of the false allegations in the 09:31
21 file that were sent to the Gardaí. And then the second
22 part of the term of reference, insofar as it deals with
23 how the Gardaí then used that information, logically
24 that would appear to be a matter for other parties in
25 the room to deal with. So, my remarks will focus on 09:31
26 the first part. At this point the Tribunal has carried
27 out an extensive investigation into the creation,
28 distribution and use by Tusla of the file containing
29 the false allegations. Tusla hopes the Tribunal will

1 accept that it has cooperated with the investigation to
2 the fullest extent possible, it's tried to identify
3 every relevant witness and to make them available and
4 it's tried to identify every document that could be of
5 assistance and sought to make it available. At all 09:32
6 times, Tusla has accepted that deficiencies existed in
7 the case management of the file and that a sequence of
8 errors occurred in respect of how it dealt with the
9 matter. These errors initially arose from a failure to
10 identify the erroneous information received from Rian, 09:32
11 and then consequent failures to correct the error when
12 opportunities arose, and Tusla accepts full
13 responsibility for each of the errors it made. It
14 recognises that it is entirely a matter for you, sir,
15 to make findings of fact and the only submission it 09:32
16 wishes to make in that regard is it submits the
17 evidence shows that the errors made were bona fide,
18 that there isn't evidence of a conspiracy of any
19 malicious or deliberate plan on the part of Tusla to
20 harm Sergeant McCabe, that the errors were errors. 09:33

21
22 Tusla acknowledges the time and effort of the Tribunal
23 in examining the matter and looks forward to its
24 report. And in particular, Tusla wishes to apologise
25 to those who have been affected by the sequence of 09:33
26 errors that was made, and in particular, it wishes to,
27 again, in public, apologise to Sergeant McCabe and to
28 each member of his family for the impact on them of
29 Tusla's errors in this regard and Tusla is sincerely

1 sorry that its standards did not meet those which might
2 reasonably be expected, in particular which might
3 reasonably be expected by Sergeant McCabe and his
4 family.

5
6 The final thing I want to inform the Tribunal of, is
7 that at the moment Tusla is seeking to introduce a
8 revised procedure for dealing with how it addresses
9 retrospective allegations of abuse. This new procedure
10 is being informed in part by court decisions which are 09:34
11 delivered from time to time, and the Court will be
12 aware that like any public body, Tusla is the subject
13 of judicial reviews and receives judgments where the
14 courts indicate their view on what it's doing or not
15 doing, but equally, it will be informed by the report 09:34
16 of this Tribunal because it seems likely this Tribunal
17 is going to make comments and findings relating to what
18 Tusla did in this case, and clearly, that will form an
19 important part of any new policy. And obviously, the
20 new policy has to balance two things: It has to 09:34
21 balance the protection of children, which is, I
22 suppose, the paramount concern, but equally Tusla is
23 aware it has to ensure fair procedures for those
24 persons who find allegations made against them and to
25 ensure those persons know what is happening, are told 09:35
26 what is happening, are told accurately about what is
27 happening, and are given a full opportunity to engage
28 properly and to have their position explained and
29 understood. And so, hopefully those new procedures

1 will improve the practices adopted by Tusla. And
2 another development in common with every public body,
3 it's perhaps of lesser importance but I think every
4 public body now has to introduce new procedures because
5 of the General Data Regulation which is coming in and 09:35
6 that will have some impact because, for example, the
7 new regulation makes it clear that if a body holds data
8 on you they have to immediately tell you. So there
9 can't be a situation where the body holds a piece of
10 information about someone but the person has no idea 09:36
11 that that particular purported allegation or purported
12 fact has been written down somewhere. So, again, that
13 hopefully will feed into better procedures. But I
14 don't propose to make any particular submission on the
15 facts because you have heard all of the witnesses over 09:36
16 a very large number of days, they have been fully
17 cross-examined, examined in chief by the Tribunal team
18 and the other legal representatives here, and Tusla is
19 happy that you, sir, will make your own findings as to
20 those facts. May it please you. 09:36

21 CHAIRMAN: I was proposing, ladies and gentlemen,
22 Mr. McDermott in particular, just to hear people out
23 and then if I have any questions that particularly on
24 my mind, that I think you might help me with, just to
25 address that at the end. 09:36

26 MR. McDERMOTT: Yes, sir.

27 CHAIRMAN: So as we know, Ms. D returned to counselling
28 on I think it was the 6th of August 2013, but what
29 worries me is the revival of the file on, is it the

1 30th of April 2014, in the context of everything that
2 is going on there. And not to worry for a moment in
3 relation to any particular exactitude in relation to
4 dates because we know that the letter to Sergeant
5 McCabe was sent on 29th December 2015 and arrived 09:37
6 sometime early in January 2016, and that happened. But
7 what worries me at the moment is the whole notion of
8 whether the revival - in other words, this being
9 plucked out of the files of Measuring the Pressure
10 filing cabinet - was accidental, was inspired by 09:37
11 something. And certainly the evidence has been that it
12 is denied that either of a number of people who could
13 have been involved inspired it, I'm expected to accept
14 that it was a coincidence and that is worrying me. So
15 I don't know whether you want to say anything about 09:38
16 that.

17 MR. McDERMOTT: Yes, sir. My recollection is the
18 evidence was that after the referral from Rian came in,
19 and I think it came in in August 2013, that between
20 September 2013 and April 2014 the case was unallocated, 09:38
21 there was then some activity in April and May 2014 when
22 the intake records were completed for the children, and
23 the notification was made to the Gardaí. That was then
24 the time when Rian forwarded their correction and
25 indicated that wrong information had been given and you 09:38
26 will recall that, at that point, the file was
27 corrected, an amended notification was sent to the
28 Gardaí but then the case is unallocated for a second
29 period of time between July 2014 and May 2015.

1 CHAIRMAN: Yes.

2 MR. McDERMOTT: And my recollection is: Cases were
3 unallocated because there weren't sufficient resources.
4 So cases were simply going into a file -- into a
5 waiting area, and then, as resources were available, 09:39
6 cases were taken out to then be worked on and somebody
7 would open a file and see what needed to be done. And
8 whilst again it's entirely a matter for the Tribunal,
9 it was accidental in the sense it came out on the day
10 it did but it wasn't accidental in the sense it was 09:39
11 always going to be looked at again. So it was in this
12 holding pattern with, it appears, a large number of
13 other unallocated files, and at particular points in
14 time those files were being worked on. But my
15 understanding is, again subject to any findings you 09:40
16 make, sir, is, it was always going to be looked at
17 again, it was just a question of when persons were
18 available. You have heard from the people involved and
19 I think they were cross-examined and questioned was
20 there any particular reason on a particular day why 09:40
21 that file was taken out as opposed to the file in front
22 of it or the file after it, and my recollection is none
23 of the witnesses could offer any particular explanation
24 that it was Sergeant McCabe's file in particular they
25 were looking for. They were simply seeking to address 09:40
26 files that had work done. I don't know if that assists
27 the Tribunal.

28 CHAIRMAN: Yes, it is of assistance. Thank you. The
29 second matter that was on my mind, Mr. McDermott, was

1 the whole question of social workers who apparently
2 spend a lot of time in the car going from place to
3 place being unaware of Sergeant Maurice McCabe and the
4 relevant controversy at the time in question. And you
5 will be aware of the evidence on that, which is that 09:41
6 they weren't, they don't read the newspapers, etcetera.
7 And that was another thing that was worrying me. And
8 then there was a third thing but maybe you would like
9 to -- if you have anything that you could put that.

10 MR. MCDERMOTT: I can't put it any further than 09:41
11 obviously social workers I imagine in the most part
12 have degrees, are professional people, have
13 qualifications and in the normal course one would
14 expect people operating in the public sphere to be
15 aware of important public events, but I think the 09:41
16 Tribunal will then have to reach its own conclusion on
17 evidence given by any one witness. But I think Tusla
18 would accept that its personnel, its employees, are
19 working in a public service and it follows, I think,
20 that any member of the public service, in the normal 09:41
21 course, one would expect to be aware of important
22 public events. So, I think, I can't disagree with the
23 Tribunal's comments in that regard.

24 CHAIRMAN: Yes. And then the third and the last thing
25 is, and it's this: I think everybody realises, who is 09:42
26 I suppose not a child and certainly anyone who has done
27 legal practice for 20 years or more realise that
28 coincidences do occur, but this coincidence in the
29 context in which it does occur, namely the report, for

1 instance, by Assistant Commissioner O'Mahony at that
2 time, the entire movement of this into a position where
3 it was being one of a series of controversies that was
4 going to emerge above the waves, if you like, is a very
5 strong coincidence; in other words, that the mistake is 09:42
6 made in relation to Ms. Y, translated into Ms. D, and
7 it occurs at a time -- I mean, it may be said,
8 Mr. McDermott, that if it was going to happen at all,
9 it was going to happen at some stage, and that perhaps
10 Tusla had nothing to do with the fact that Ms. D 09:43
11 returned to counselling on the 6th August 2013 and it
12 was in that context that the error occurred.

13 MR. MCDERMOTT: Yes.

14 CHAIRMAN: But I don't know if you can help me at all
15 on that. 09:43

16 MR. MCDERMOTT: I can. And could I add one addendum to
17 my previous answer, just to be fair to, I think there
18 was one particular witness the Court may have in mind,
19 about their knowledge of current affairs. whilst I
20 stand over the general comments I made, I think in 09:43
21 fairness to that witness, it's a matter for the
22 Tribunal as to whether there was any evidence she
23 wasn't telling the truth when for whatever reason she
24 simply said she wasn't listening to the news and wasn't
25 aware of these matters. And I think she was saying her 09:43
26 job was very difficult at the time, she was overworked
27 and that was her evidence in any event. So I simply
28 want to be fair to the witness to suggest, and it's
29 only a suggestion, it's a matter for the Tribunal,

1 there was no particular, I think, piece of evidence
2 that would suggest she wasn't telling the truth when
3 she said, look, she simply wasn't aware of these
4 matters. That was her evidence and obviously you have
5 to weigh that.

09:44

6
7 Turning then to the question of cost, Tusla recognises
8 the coincidence of events and I think that is what gave
9 rise to the public concern and that is what gave rise
10 to this module of the Tribunal; in other words, could
11 such a series of errors possibly be a coincidence or
12 does the sheer number of errors coming at the time they
13 did mean that something else was happening? And I
14 think all I can say are two things: Firstly, is to
15 hope now that all of the evidence has been fully
16 examined that it will be apparent, both to the Tribunal
17 and to Sergeant McCabe, that there wasn't a conspiracy,
18 that Tusla wasn't deliberately making mistakes, that
19 these mistakes happened but it wasn't being done in
20 connection with anything the Gardaí were doing. But
21 secondly, to indicate, as the Tribunal has already
22 adverted to, there were certain events which could not
23 have been controlled by Tusla. So, for example, the
24 original error made by Rian, and it was simply an
25 error, where the wrong allegation was cut and pasted
26 in, again no one in Tusla could have prevented that.
27 The moment they realised it was an error of course they
28 should have acted immediately to deal with it. Again,
29 Tusla would have had no control over the movements of

09:44

09:44

09:45

09:45

1 Ms. D insofar as at points in her life when she engaged
2 with the issue and points of her life when she didn't.
3 So, there are features where Tusla is responsible fully
4 for what happened, but equally, there are features
5 where events occurred entirely without the control of 09:46
6 Tusla, and obviously we would lay emphasis on those as
7 showing that this was a coincidence that Tusla was
8 making this series of errors at the same time as other
9 things were happening in Sergeant McCabe's life that
10 were causing him distress and concern and worry. And 09:46
11 clearly, Tusla's series of errors added to his problems
12 in that regard and we fully accept that.

13 CHAIRMAN: Well, at the end of the day, it may be that
14 things occur which are beyond what might normally
15 occur, I suppose you would make the point that if they 09:46
16 were to occur they were going to occur at some stage,
17 so there was never a good time. This is a particularly
18 bad time, and at the end of the day it may resolve down
19 to a matter of credibility. Would that be fair?

20 MR. MCDERMOTT: Yes, sir. 09:46

21 CHAIRMAN: All right. Thank you very much,
22 Mr. McDermott.

23 MR. MCDERMOTT: Thank you.

24 CHAIRMAN: You want to go last, Mr. McDowell, I
25 presume? 09:47

26 MR. MCDOWELL: I thought so.

27 CHAIRMAN: Yes. That seems fair. Are there any
28 submissions on behalf of Ms. D? Mr. Cush, did you want
29 to go first.

1 MR. CUSH: I have no issue on the order, but I do want
2 to say something on behalf of the HSE.

3 CHAIRMAN: All right. Well, I am happy to hear things
4 in any order that anybody wants. If you want to defer
5 to the HSE then please go ahead.

09:47

6
7 SUBMISSION BY MR. CUSH

8 MR. CUSH: Chairman, you are concerned under the terms
9 of reference with the creation, distribution and use by
10 Tusla of the file, and there's just no getting away
11 from the fact that it was the error made by Ms. Brophy
12 that is the catalyst for the creation, distribution and
13 use of the file. And I want, therefore, just to say
14 something about that error, if I may. The Tribunal was
15 correctly concerned to investigate whether it was
16 simply an error or whether it might have been an error
17 with some motive, and ultimately that is a matter for
18 your assessment but if you will permit me I just wanted
19 to point to some aspects of the evidence that I suggest
20 bear on this idea of it being just an error. And I
21 will just highlight them, if I may.

09:47

09:47

09:48

22
23 Firstly, Ms. Brophy had no personal or family
24 connection with the Gardaí.

09:48

25
26 Secondly, he she had little prior connection with the
27 area, having only recently commenced working in the
28 area.

1 Thirdly, she had no prior knowledge of Sergeant McCabe
2 personally or professionally. And you may recall, I
3 think your own investigation, Chairman, identified that
4 it was really around the beginning of 2014 before
5 Sergeant McCabe came to any public prominence, and we 09:48
6 are speaking about events in August 2013.

7
8 Fourthly, then, just looking at some of the detail of
9 it, the oral referral from Ms. Brophy which preceded
10 the inaccurate written referral was accurate and 09:49
11 recorded as being accurate by Tusla.

12
13 Fifthly, Chairman, there is an intake record completed
14 by Briega Tinnelly and signed off by Keara McGlone, and
15 these are two Tusla employees, if you recall, and that 09:49
16 form confirms that Ms. Brophy was told, confirms her
17 own evidence that she was told that this child/family
18 was not previously known to the Social Work Department.
19 And that of course was the reason why she sent in the
20 written report. And her own evidence was, had she got 09:49
21 a different answer and had she been told that this was
22 previously known she wouldn't have sent in a written
23 report.

24
25 And then when it comes to the written report, Chairman, 09:49
26 the forensic evidence I suggest is at a minimum
27 consistent with Ms. Brophy's own evidence as to how the
28 error occurred. Although, frankly, she remained
29 unclear right to the end and through her evidence as to

1 precisely how it occurred.

2
3 And then lastly, there is her own evidence, Chairman, I
4 suggest it's a matter for you ultimately, that she was
5 manifestly honest; her evidence revealed a woman who 09:50
6 had made a terrible error and who was horrified on
7 discovering it, and who reacted in a way of a person
8 who was horrified, did everything in conjunction with
9 her supervisor, Ms. Ward, to retrieve the situation as
10 best they could, and, at the end of their efforts, they 09:50
11 had good reason for believing they had done so. If you
12 recall they -- I am saying they, but collectively, they
13 ensured that letters were written to Tusla and the
14 Gardaí separately, in each case informing them of the
15 error and in each case enclosing an amended report. 09:51
16 They also sought return of the incorrect report. They
17 did achieve its return from Tusla, but unbeknownst to
18 them, Tusla had created its own report and forwarded it
19 to the Gardaí.

20
21 And then, there is the fact that Ms. Brophy never 09:51
22 attempted to conceal her error, either at the time of
23 its disclosure in 2014 or more recently on the
24 establishment of the Tribunal. And I do suggest to you
25 therefore, Mr. Chairman, this was a terrible error but 09:51
26 an error without motive, and that the evidence also
27 suggests that.

28
29 Just on a point of detail, Chairman, you will recall

1 some of my witnesses dealt with the transfer of the
2 file in May of 2014 onwards to Waterford, and there is
3 little enough perhaps that turns on that, save one
4 point of detail, in that, you will recall the evidence
5 to the effect that there was a letter of apology on the 09:52
6 file when it arrived in Waterford. It's just a small
7 point of detail, there was some discrepancy perhaps
8 between the evidence of Ms. D and Ms. Brophy as to the
9 receipt, and it's not the same thing as the sending but
10 Ms. D said she did not receive an apology, and 09:52
11 Ms. Brophy was clear that she had sent an apology. And
12 again, just a point of detail; the copy was on the file
13 when it arrived in Waterford. And she did also give
14 evidence that she had apologised orally to Ms. D.
15 CHAIRMAN: Well, one was certainly living away from her 09:52
16 normal residence, and then her normal residence had --
17 a lot of households have a chaotic system in relation
18 to dealing with post.
19 MR. CUSH: Yes, Chairman. Chairman, just a point of
20 detail, if I may, on the terms of reference. You are 09:53
21 clearly directed to what is described as the false
22 allegations in 2013.
23 CHAIRMAN: Mm-hmm.
24 MR. CUSH: And I suppose part of the narrative,
25 certainly, is the allegation made way back in 2006, and 09:53
26 its handling perhaps is again part of the narrative,
27 but just to say that it doesn't appear to be part of
28 the investigative part of the Tribunal, if you follow
29 me. It's directed to the 2013 allegations. And you

1 will recall there was some evidence from some of my
2 witnesses in relation to the 2006 allegation.

3 CHAIRMAN: Well, it's a necessary part of the
4 background but as to any fact in relation thereto, I'm
5 not at liberty to go beyond anything, for instance, the 09:53
6 DPP said, and I think that is part of the background
7 but that is where it ends. I can't have any opinion
8 beyond that.

9 MR. CUSH: I respectfully agree, Chairman. That is as
10 much as I wanted to say, unless I can help the Tribunal 09:54
11 in any other way with any other matter.

12 CHAIRMAN: Yes. There just may be a couple of matters.
13 You referred to the forensic evidence, you are talking
14 about the Forensic Service of Northern Ireland evidence
15 which indicated that in terms of everything Ms. Brophy 09:54
16 said had happened to the file, the computer history as
17 recorded on the hard drive indelibly shows precisely
18 the same thing.

19 MR. CUSH: Yes.

20 CHAIRMAN: And was there anything else apart from that, 09:54
21 that you felt was worthwhile to be taken into
22 consideration on that?

23 MR. CUSH: I don't think so, Chairman.

24 CHAIRMAN: Okay. Thank you very much, Mr. Cush.

25 MR. CUSH: Thank you, Chairman. 09:54

26
27
28
29 SUBMISSION BY MR. BUCKLEY

1 MR. BUCKLEY: Chairman, Niall Buckley on behalf of
2 Ms. D, instructed by Fanning Kelly Solicitors. For
3 convenience sake I have prepared a very brief written
4 submission with reference to the appropriate date to
5 the evidence and they will be handed in. If I might 09:55
6 very briefly speak to the few matters that bear on
7 Ms. D's evidence.
8 CHAIRMAN: Do you want me to look at those,
9 Mr. Buckley, as you are speaking? would that help?
10 MR. BUCKLEY: Certainly. My solicitor can hand them 09:55
11 up. A summary can be quite brief, Chairman.
12 [SAME HANDED]
13 CHAIRMAN: I have that now, thank you.
14 MR. MCDOWELL: I would like to see the written
15 material. 09:56
16 CHAIRMAN: Yes, it's fair that you would. Have we got
17 a copy for Mr. McDowell?
18 MR. BUCKLEY: There is some additional copies.
19 [SAME HANDED]
20 09:56
21 So obviously it's a matter for the Tribunal to arrive
22 at such findings it thinks fit but insofar as Ms. D and
23 members of her family are concerned in respect of the
24 evidence I submit as follows. That, Ms. D had salient
25 interactions with Rian in the summer of 2013 and May 09:56
26 2014. The evidence, it is respectfully submitted, was
27 that the Tusla file came to contain a particularly
28 serious allegation which had never in fact been made
29 and the genesis of that mistaken allegation was

1 erroneous content in a retrospective referral generated
2 by Rian Counselling Service. And that was the clear,
3 unchallenged evidence of Ms. Brophy. And I say the
4 contemporaneous notes disclose that the true content of
5 the discussions in those attendances between Ms. D and 09:57
6 Ms. Brophy and both their evidences were consistent
7 with that, and the subsequently, I would say,
8 retrospective referral came to be generated because it
9 was understood to constitute a proper discharge of
10 Rian's duties rather than on the urging of Ms. D. And 09:57
11 Ms. D then was unaware of its erroneous content until
12 May 2014, and immediately when it was brought to her
13 attention, through a contact from her father, she made
14 contact with the Rian service to try and ensure its
15 prompt correction. 09:57

16
17 Those are essentially the submissions on the evidence,
18 unless I can help the Tribunal. They are set out in
19 some greater detail but I don't think there is any need
20 to traverse all the matters addressed in the written 09:57
21 submissions.

22 CHAIRMAN: They are. And I think I am going to find
23 this very helpful, so thank you, Mr. Buckley. So, was
24 there anything on my mind? Yes, there was just a
25 couple of things. You will be aware that what was 09:58
26 alleged to have happened occurred sometime around
27 Christmas time in 1998, and that a complaint was
28 ultimately made on 4th December 2006 and that matters
29 continued on effectively with some clusters of facts

1 around the DPP's letter of the 5th April 2007, and then
2 that, if you like, was the end of matters for a
3 considerable period of time. I think it's not correct
4 to say that on 19th of February 2014 the dossier of
5 cases handed to the Taoiseach from Micheál Martin had 09:59
6 anything to do with Ms. D, I think that is correct.

7 MR. BUCKLEY: Yes.

8 CHAIRMAN: It was other cases, it was the Cavan cases.

9 MR. BUCKLEY: That's correct, Chairman.

10 CHAIRMAN: And that the D matter revived in consequence 09:59
11 of an article by Paul Williams following on his visit
12 in April of 2014 to the D household, which was arranged
13 through a chief superintendent and Mr. D, the father of
14 his D.

15 MR. BUCKLEY: That's correct. 09:59

16 CHAIRMAN: And then that, thereafter, there was the
17 GSOC complaint of the 29th April 2014, essentially a
18 complaint against Superintendent Noel Cunningham, that
19 he hadn't investigated matters properly. And then
20 further articles came out and then Ms. D went into Dáil 10:00
21 Éireann, met certain politicians, the matter was raised
22 in the Dáil on 19th June 2014. And I'm just wondering,
23 in the context of a ruling by a responsible public
24 official charged with the duty of ruling on criminal
25 cases, have you anything to say as to whether that 10:00
26 series of events was justified or fair or in the public
27 interest? Just that.

28 MR. BUCKLEY: Well, I suppose Ms. D subsequently made
29 complaints around the handling of the original

1 complaint and insofar as there was any airing of that
2 criticism of how the original complaint had been
3 handled, I think the prospective of Ms. D was that she
4 was entitled to progress it and once subject matters
5 became the subject of public interest she was entitled 10:01
6 to ventilate her position on it. But she's also
7 engaged the process of the Garda Ombudsman in relation
8 to these complaints as well and she also raised the
9 matters with Mr. Guerin previously, and decisions were
10 taken in respect of those various courses of actions 10:01
11 pursued.

12 CHAIRMAN: And you also appear on behalf of Mrs. D and
13 you appear on behalf of Mr. D, who is himself a Garda
14 officer.

15 MR. BUCKLEY: That's correct, Chairman. 10:02

16 CHAIRMAN: Now, in that regard, you will be aware of
17 the two scenes that have been referred to in evidence;
18 one occurring in Bailieboro District Court, where
19 Sergeant McCabe was traversed publicly and the other
20 involving Ms. D and a scene on the Main Street in 10:02
21 Bailieboro spilling over into a scene actually in the
22 Garda station in 2007. You will also be aware that
23 Mr. D, in whatever way it is characterised, was
24 involved in bringing in further publicity some seven
25 years after these events had been ruled on by the DPP, 10:02
26 and do you want to say anything about any of that?

27 MR. BUCKLEY: Well, Chairman, I wonder if I might
28 reserve my position, I might file slight supplemental
29 submissions dealing with that, partly because I have

1 principally prepared dealing with the issues in
2 relation to the creation of the Tusla file rather than
3 any other, I suppose, airing of differences between the
4 D family and Tusla. I think it can be dealt with very
5 briefly. But --

10:03

6 CHAIRMAN: What I am particularly interested in is the
7 whole notion of, we have Superintendent O'Reilly and
8 Mr. D meeting as fellow Garda officers and that leading
9 to the involvement of Paul Williams, the public airing
10 of this matter and that is not uncoincidental, in fact
11 it's very coincidental with the GSOC allegations coming
12 out, and whether you want to say anything in relation
13 to whether that was fair or not fair, given that the
14 Director of Public Prosecutions had ruled on this
15 matter and ruled definitively in the strongest possible
16 terms back in April 2007, how can that be right, is the
17 question that is on my mind.

10:03

10:04

18 MR. BUCKLEY: Well, I suppose, Chairman, the DPP
19 exercises a prosecutorial function and makes
20 assessments about what action and what processes should
21 be pursued, and family members of affected people may
22 have different perspectives on those things. It's not
23 a judicial determination, it's a prosecutorial
24 discretion decision and it's clear that members of the
25 D family have a different perspective on events. But I
26 don't think there is any expectation that this process
27 would make substantive findings in relation to those
28 matters or that it really, I suppose, bears precisely
29 on the overarching terms of reference insofar as they

10:04

10:04

1 concern the use of the false allegations contained in
2 the Tusla file, which I think are all commonly
3 understood to involve the specific serious allegations
4 which were referenced and circulated which were never
5 made against Sergeant McCabe. 10:05

6 CHAIRMAN: Well, thank you for you. No, well, I
7 suppose, what might worry someone listening to the
8 evidence is: Given that a number of people in
9 Cavan-Monaghan, particularly members of the Gardaí,
10 would know, referable to the Paul Williams articles, 10:05
11 that what was being talked about was Sergeant McCabe,
12 was it right or wrong to engage in that exercise at
13 that time, a time of particular strain in Sergeant
14 McCabe's life? And, was it right or wrong to not leave
15 things as decided by the DPP and to move on? And, was 10:06
16 it right or wrong to keep this series of events
17 effectively before the public eye through measures
18 which, on scrutiny, turned out to be without
19 foundation; namely, that GSOC ultimately found that any
20 complaint in relation to an improper investigation 10:06
21 against Superintendent Noel Cunningham was completely
22 misplaced? So those are things that are worrying me.
23 I just thought it might be right just to mention them
24 to you, and representation was granted to Mr. D, to
25 Mrs. D and to Ms. D in that context. In other words, I 10:07
26 suppose if you put it into a very short and pithy
27 question: Why not leave things be? Was it right to
28 revive this? Is there anything behind reviving this at
29 a time when Sergeant McCabe is becoming a public figure

1 when it was very, very likely to hurt him?

2 MR. BUCKLEY: well, I suppose, I'd submit that there is
3 certainly no evidence that there was any coordination
4 in relation to that. The evidence of Ms. D has been
5 that she was not happy with the manner in which 10:07
6 Sergeant McCabe was being portrayed in the media at
7 that time, and that the contact which led to the
8 interview with Paul Williams emanated from a certain
9 discontent that he was being portrayed in perhaps a
10 glorified manner by certain sections of the media as 10:08
11 engaged in heroic whistle-blowing and she felt there
12 was a different perspective on matters. Her focus
13 particularly was -- I suppose her perspective on the
14 investigative process ultimately that led to the GSOC
15 conclusion which arrived at certain conclusions and 10:08
16 those are matters of record.

17 CHAIRMAN: Okay. well, thank you for those
18 submissions. There was just one other question that I
19 had on my mind and that was this. In consequence of
20 this particular process, the investigation file by 10:09
21 Superintendent Cunningham, then Inspector Cunningham,
22 has been circulated. Now, I have a tentative view in
23 relation to that, that it was nothing less than
24 completely thorough. GSOC said it was completely
25 thorough, there was nothing wrong with it. 10:09
26 Nonetheless, an allegation has been made against
27 Superintendent Cunningham and publicly aired that there
28 was something wrong with this; in other words, that
29 it's on a parallel with the truly ghastly

1 investigations that are dealt with in detail in the
2 O'Higgins Commission reports, nothing could seem on a
3 tentative view to be further part. Do you want to say
4 anything as to whether there was anything wrong in any
5 way with the investigation by Inspector Cunningham, now 10:10
6 Superintendent Cunningham, of the D complaint back
7 in -- from December 2006?

8 MR. BUCKLEY: I suppose, we certainly didn't
9 cross-examine, in the context of this Tribunal,
10 Mr. Cunningham on the conduct of the investigation. 10:10
11 There are, I suppose, always certain challenges when
12 various parties are known to the subject matters in an
13 investigation, but I don't think the D family are
14 agitating any particular criticisms beyond anything
15 they have previously aired in relation to it and are 10:10
16 not looking to this Tribunal to make any findings in
17 respect of the handling by Superintendent Cunningham of
18 the complaint, the investigation at the time.

19 CHAIRMAN: Well, there was a second investigation as
20 well in relation to the D family by Superintendent 10:10
21 Cunningham, wasn't there? And that was to say that
22 when Sergeant McCabe was agitating in relation to
23 whether the DPP's directions of the 6th of April 2007
24 ought to be circulated he wrote to Superintendent
25 Clancy and he indicated to them that certain incidents 10:11
26 had occurred and that there was certain difficulties
27 that he was having in terms of a working relationship
28 and, again, Superintendent Cunningham was tasked by
29 Chief Superintendent Rooney with investigating that,

1 notwithstanding his protest that had been made in
2 relation to the earlier D investigation. Do you want
3 to say anything as to whether that particular
4 investigation -- or are you now saying it was in any
5 way lacking in rigour? Do you know what I am referring 10:12
6 to, Mr. Buckley?

7 MR. BUCKLEY: I am afraid I am not quite clear as to
8 what the Tribunal is referring to. I apologise.

9 CHAIRMAN: Maybe just give me a wee minute and I will
10 just -- 10:12

11 MR. McDOWELL: I think, Chairman, most of that came in
12 the last module. Mr. Buckley wasn't here.

13 CHAIRMAN: I appreciate it did, yes. I appreciate it
14 did. Well then, I think you can't indeed have any view
15 on that, Mr. Buckley, and that is fair enough. No, 10:12
16 Mr. Buckley, I'm not --

17 MR. BUCKLEY: I don't think Mr. D was aware of those
18 formally prior to --

19 CHAIRMAN: No, I don't think he was, but I mean, just
20 to complete the picture: As you are aware, there were 10:12
21 the incidents, there was a certain working difficulty,
22 I don't think that Mr. D has denied that in the
23 witness-box, and there was complaint to Superintendent
24 Clancy about that, which Sergeant McCabe said he didn't
25 want to go any further; in other words, no charges, but 10:13
26 nonetheless, Chief Superintendent Rooney asked
27 Superintendent Cunningham to investigate that. It was
28 investigated, and then there was the meeting in
29 Mullingar which led to other things, perhaps a mistake

1 or perhaps something else. I don't know. But I think
2 it is fair of you to say, Mr. Buckley, that it has
3 nothing to do with your client. It did, however, arise
4 out of the incidents immediately following the DPP's
5 letter.

10:13

6 MR. BUCKLEY: I am not sure Mr. D would have been aware
7 of certain other incidents the Tribunal may be
8 referring to. There's some matters he was aware of
9 that involved members of his family, but beyond that --
10 the court, Bailieboro court and the Garda station, but
11 beyond that I don't think Mr. D was aware of any other
12 matters. And I suppose, in respect of those,
13 obviously, as Mr. Cush has indicated, those reference
14 back to events in 2006 that are perhaps part of the
15 narrative but not part of the investigation, I'd
16 respectfully submit. As to their conduct, I suppose
17 family members have perspectives on what their other
18 family members tell them about events, regardless of
19 DPP decisions and insofar as they impacted or
20 influenced on their subsequent conduct or behaviour I
21 think that has to be understood; that family members
22 may rely on the accounts provided to them by close
23 family members, and that they will continue to have a
24 bearing on their perspectives.

10:14

10:14

10:15

25 CHAIRMAN: All right. Thank you for your help,
26 Mr. Buckley. So who wants to go next? Garda sergeants
27 and inspectors, maybe?

10:15

28 MR. DOCKERY: Well, perhaps I might hear first or the
29 Tribunal might hear first from the Garda Commissioner's

1 team. It's a suggestion.

2 MR. O'HIGGINS: No difficulty with that, Chairman, if
3 that suits.

4
5 SUBMISSION BY M. O'HIGGINS

10:15

6 Chairman, on behalf of An Garda Síochána and certain
7 senior members of the force, we have prepared a written
8 note which I propose simply speaking to, but hopefully
9 it will be of assistance to the Tribunal and to you,
10 Chairman.

10:16

11 CHAIRMAN: Do you want me to have it, Mr. O'Higgins?

12 MR. O'HIGGINS: Yes. And there's copies available for
13 the other parties that are relevant to these matters.

14 [SAME HANDED]

15
16 Chairman, we have endeavoured to set out in the
17 contents page the role played by individual named
18 members of An Garda Síochána in the matters the
19 Tribunal is investigating in this module. They being
20 principally Superintendent Cunningham, Superintendent
21 McGinn, Chief Superintendent Jim Sheridan, Assistant
22 Commissioner Kieran Kenny, Superintendent Frank Walsh,
23 former Commissioner O'Sullivan and Detective
24 Superintendent O'Reilly. With your leave, Chairman, I
25 propose to pass from the genesis of the false rape
26 allegation, which is primarily a matter for other
27 parties. We hope, in providing with you this analysis
28 of the evidence, that we are not in any sense
29 trespassing on your functions, but nonetheless,

10:16

10:16

10:17

1 hopefully it is useful insofar as we have sought to
2 identify what are relevant portions of the transcript
3 with respect to the main issues and with respect to the
4 principal players in the controversy.

5
6 So, the first, I suppose, relevant matter concerning
7 Garda involvement was Noel Cunningham, Superintendent
8 Cunningham, and we treat of that at paragraph 11 and
9 onwards of the written note. You will be aware, you
10 will recall, Chairman, that Keara McGlone had sent --
11 had prepared a letter, which was marked "private and
12 confidential" to Superintendent Cunningham, and that
13 was on 15th August 2013. And a degree of, I won't say
14 criticism, but, focus was placed upon that in
15 questioning by counsel for the Tribunal and I think
16 Mr. McDowell's side. The Tribunal may take the view
17 that this letter was perhaps something of a red
18 herring; however, nonetheless, it is proper to treat of
19 it and we have endeavoured to do that in the paragraphs
20 that follow. Importantly, I think the letter suggested
21 that they were the allegations that Superintendent
22 Cunningham had already investigated back in 2007, and
23 that is plain from the reading of the document itself.
24 And while it's a matter for you, Chairperson, we say
25 that the superintendent could not have known about
26 Ms. Brophy's error, well, I think that is possibly
27 common case across the room, because even the author of
28 the letter, Ms. McGlone, was unaware at the time of
29 drafting her letter of that. And she indicated in her

10:17

10:17

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10:18

1 letter that it was to discuss the case, a case which,
2 as far as An Garda Síochána was concern, had been
3 closed since April 2007 when the DPP had given the
4 direction that he gave.

5
6 It is the case, of course, that Superintendent
7 Cunningham did not respond to the letter, and nor did
8 he at any stage meet with Ms. McGlone. He remained
9 unaware of the false rape allegations until after media
10 coverage of the matter in the form of the 'Prime Time' 10:19
11 television programme in 2017. He gave evidence of his
12 regret in failing to respond to this letter, and
13 confirmed that the failure occurred through
14 inadvertence on his part. I would ask you -- I would
15 suggest to you, Chairman, that on a reasonable 10:19
16 construction of the evidence, it would appear that
17 Superintendent Cunningham placed the letter on the
18 investigation file that he had personal custody of
19 since the 2000 investigation. He had kept the file
20 secure in a press in his office and no one had access 10:20
21 to this press but him. And you heard evidence from him
22 that between July and September 2013 personal matters
23 had resulted in him being absent from work. His
24 extended absence from his office and his desire to
25 protect the confidentiality of the complaint, which was 10:20
26 of course for the benefit of both Sergeant McCabe and
27 Mr. D, combined together, with the result that the
28 letter effectively slipped his mind. And the Tribunal
29 will be aware as to his acknowledgement of the error in

1 that regard, that he had put it on the long finger and
2 then he put forward the view that it wasn't his normal
3 practice but he acknowledged it was an error on his
4 part. And we simply say, Chairman, that while it's of
5 course a matter for you, I think every day experience 10:21
6 tells us that in many walks of life, a professional
7 person will sometimes not respond to a letter, or will
8 put it to one side and forget to come back to it at a
9 later date. While this of course should not happen, an
10 everyday omission such as this we say hardly warrants 10:21
11 serious criticism, still less a finding of misconduct
12 or intentional wrongdoing. And we say if that is the
13 case for barristers or solicitors or doctors or
14 accountants or anybody else, it's difficult to see why
15 a more exacting standard of criticism should apply to a 10:21
16 Garda superintendent who has to deal with a large
17 number of items of correspondence on a weekly basis.

18
19 It was put to Superintendent Cunningham by Tribunal
20 counsel, obviously doing their job entirely 10:22
21 appropriately, it was suggested perhaps that his
22 failure to address the letter was deliberate as
23 Sergeant McCabe was a thorn in his side. And we say
24 that perhaps these suggestions were put in an effort to
25 tease out the issues and to afford the witness an 10:22
26 opportunity to address the range of possible
27 interpretations that might be placed upon his actions.
28 Nonetheless, we say that any finding to the effect that
29 this was a deliberate act would be a speculative leap

1 and one which would, in our respectful submission, not
2 be based on evidence and we offer the view that any
3 such conclusion in fact perhaps even would be outside
4 the terms of reference of the Tribunal, which is
5 primarily directed to investigate if members of An 10:22
6 Garda Síochána used the sexual abuse allegations to
7 discredit Sergeant McCabe. And we mention this at
8 paragraph 21 on page 8 of the note, Chairman, that
9 entirely properly, Mr. McDowell, for Sergeant McCabe,
10 acknowledged openly during the hearing that it was 10:23
11 never being suggested to Superintendent Cunningham that
12 he filed the letter away out of some animus towards
13 Sergeant McCabe. That case was simply never made and
14 that acknowledgement was fairly received by our side,
15 as it were, and we simply mention that at paragraph 21. 10:23
16

17 Now, also before I move off Superintendent Cunningham,
18 it was also suggested again by counsel for the
19 Tribunal, again doing their job properly, that perhaps
20 history would have been different if the letter had 10:23
21 been answered and we have endeavoured to treat of that
22 issue at paragraphs 22 and onwards. And I won't dwell
23 on that. It's spelt out in detail and we offer the
24 view that it was something of a red herring and that is
25 treated of in the succeeding paragraphs. 10:24

26 CHAIRMAN: well, it would help if you would address
27 that, if you wouldn't mind.

28 MR. O'HIGGINS: Certainly, yes. We mention on page 8
29 there at paragraph 23 of the note that Keara McGlone,

1 as the team leader, had directed the opening of a file
2 on Sergeant McCabe. The McCabe file had not been
3 opened by the HSE when they considered the matter in
4 the aftermath of the allegations in 2006. The purpose
5 of it appeared to be -- arising from Keara McGlone's 10:24
6 evidence, appeared to be to commence a risk assessment,
7 a job that had not been carried out by the HSE in 2007.
8 And she gave evidence of having reviewed the file, the
9 Ms. D file, in August of 2013, and of her intention to
10 direct the completion of work that had not been 10:24
11 completed in 2007.

12
13 Now, the notation on the intake record made by
14 Ms. McGlone to notify An Garda Síochána was made
15 immediately on receipt of the verbal referral from 10:25
16 Ms. Brophy, and before the incorrect Rian notification
17 containing the false rape allegation was received. And
18 so, we suggest that her decision to write the letter
19 was not taken on the basis of a belief in a more
20 serious accusation. The Tribunal will be aware that 10:25
21 the Gardaí were formally notified by Tusla as
22 anticipated by the intake record, but this was not
23 until May of 2014.

24
25 Now, Sergeant McCabe was, as anticipated by 10:25
26 Ms. McGlone, eventually written to in December of 2015,
27 but unfortunately the letter also contained details of
28 the false rape allegation, that is the Barr letter,
29 notwithstanding that the error had been brought to

1 Tusla's attention. The errors that were made in the
2 creation of each of the critical documents that
3 incorrectly carry the false rape allegation - which
4 were, the notification of suspected child abuse sent by
5 Rian to the HSE on the 9th August 2013, the 10:26
6 notification of suspected child abuse dated 2nd May
7 2014 sent by Tusla to the Gardaí and the Barr letter
8 sent by Tusla to Sergeant McCabe on 29th December 2015
9 - were created by the relevant HSE or Tusla employees,
10 and no member of the Gardaí was directly or indirectly 10:26
11 involved in their creation. And we suggest that there
12 is simply no evidence that in any way links or
13 implicates any member of the Gardaí with the creation
14 of these documents and each author of each of the
15 relevant incorrect documents quite properly accepted 10:26
16 this to be the case. And we make that point at
17 paragraph 29.

18
19 And we offer the view in paragraph 30 that whether or
20 not there was any need to notify the Gardaí as a result 10:26
21 of the referral to the HSE by Ms. Brophy in August 2013
22 at all was a matter that was explored during the module
23 D hearings. There appeared to be little agreement
24 between social workers about the issue perhaps, but the
25 Gardaí had made a formal notification to the HSE in 10:26
26 January 2007 in accordance with its guidelines, shortly
27 after Ms. D first complained about Sergeant McCabe in
28 late 2006. And we say perhaps as a matter of common
29 sense, if the Ms. D file from 2006/2007 had been

1 properly examined and if the allegations made in
2 2006/2007 by Ms. D were substantially the same as the
3 allegation that was repeated in 2013 to Ms. Brophy, we
4 suggest that there could be little point in notifying
5 the Gardaí in 2013. And we say a cursory examination 10:27
6 of the Ms. D file would have revealed that a police
7 investigation had already been carried out into these
8 allegations and that no prosecution had been directed
9 by the DPP. Though it was noted on the file as being
10 in the possession of the HSE since 2007, the statements 10:27
11 made by Ms. D to the Gardaí in 2007 were not retrieved
12 by Ms. McGlone and examined before the decision was
13 made to Garda notify. And we say that none of the
14 persons involved in the creation of the Tusla Garda
15 notification or the Barr letter ever examined the 10:27
16 statements made by Ms. D in 2007. And similarly, we
17 suggest that whether there was an obligation pursuant
18 to the Barr judgment to notify Sergeant McCabe about
19 the allegations was also a matter that few of the
20 social workers, although it's a matter for the 10:28
21 Tribunal, perhaps agreed on in their evidence.

22
23 And at paragraph 31 we instance the fact that Cormac
24 Quinlan from Tusla gave evidence to the effect that
25 prior to a retrospective notification of the type 10:28
26 received, the first step that ought to have been
27 carried out was a preliminary assessment and part that
28 have process would have been to review the Ms. D
29 statements. At the end of that assessment a decision

1 could have been made as to whether there was any need
2 to take the matter further. He also indicated that
3 before approaching Sergeant McCabe he would expect that
4 as a preliminary step in the assessment the complainant
5 would have been contacted. And other Tusla witnesses 10:28
6 also shared his view. Linda Creamer was questioned
7 about this by Tribunal counsel and we mention that at
8 paragraph 31. And we say that this approach was
9 evident in actual practice when the SART team took over
10 management of the file, after attempts were made to 10:29
11 contact Ms. D and she refused to engage with the
12 service, the file was closed with no further action --
13 with no further need for action. And the SART team
14 identified a number of matters that are relevant, and
15 we outline that at paragraph 32. And we say in 10:29
16 paragraph 33 that whilst it's evident that staff from
17 the HSE and the Child and Family Agency made a number
18 of perhaps errors in drafting the documents concerned,
19 it might also have been unwise to have placed a
20 notation on the file to precipitately suggest that 10:29
21 Garda notification was required without allocating the
22 file to a social worker to carry out a preliminary
23 assessment. And we mention the evidence of Lisa
24 O'Loughlen from the SART team who reviewed the file, we
25 mention that at paragraph 34, following the letter that 10:29
26 had been received from Seán Costello & Company,
27 solicitors for Sergeant McCabe, who had confirmed
28 that -- and she confirmed what she would have done had
29 she reviewed the file in 2013, and we instance her

1 evidence there in paragraph 34.

2
3 And we mention in paragraph 35 that the Tribunal was
4 also concerned to investigate if a cover-up had taken
5 place because of what appeared to be evidence 10:30
6 concerning the removal and replacement of documents
7 from the McCabe file. That is really not a matter for
8 the Garda team to address, that has already been
9 addressed by Mr. McDermott quite properly.

10 10:30
11 And at paragraph 36 we mention that the serious
12 consequences and disruption caused to Sergeant McCabe
13 that followed the creation of the document containing
14 the false rape allegation was, we suggest, not in any
15 way caused, contributed to or orchestrated by any 10:30
16 member of An Garda Síochána let alone by any senior
17 officer within that organisation. And we say in that
18 sense, whilst it was a legitimate matter to canvass, we
19 say that it cannot crisply be suggested that history
20 would have been different had that letter been 10:30
21 answered. But in any event, it was one item of
22 correspondence that was not followed up on and I don't
23 mean this as a matter of criticism, it's just the
24 facts, it was not followed up on by the person who sent
25 it, but that doesn't take away from the fact that 10:31
26 Superintendent Cunningham quite properly acknowledged
27 it was a miss on his part, it was an error on his part
28 in not responding to the document, but I would ask you,
29 Chairman, to take into account the context in which he

1 was being assiduous in, as he put it, protecting the
2 interests of Sergeant McCabe in keeping in his press
3 all documents pertaining to that particular file, which
4 is something he had done over the years. And in terms
5 of framing matters in the overall charge, so to speak, 10:31
6 within the terms of reference, I think that it is of
7 relevance, that Superintendent Cunningham's intention,
8 far from broadcasting far and wide any matters
9 sensitive to Sergeant McCabe, clearly his intentions
10 and desires, and actions, were in the opposite 10:31
11 direction; it was with a view to protecting Sergeant
12 McCabe that he kept the documents confidential and safe
13 in his own press in his office.

14
15 On page 13, then, Chairman we treat of Superintendent 10:32
16 McGinn. I won't dwell on that in any tremendous detail
17 unless you prefer that I did.

18
19 At paragraph 37 we outline his role in matters. And we
20 have sought to treat of the role of Superintendent Leo 10:32
21 McGinn, Chief Superintendent Jim Sheridan and Assistant
22 Commissioner Kieran Kenny as a unit of three, because,
23 as it were, they were the participants in the Mullingar
24 meeting, a different Mullingar meeting from the
25 Mullingar meeting the subject of the last module. And 10:32
26 the Tribunal already have the notes of that meeting,
27 which featured with a degree of prominence in the
28 Tribunal in module (d).

1 We have offered our submissions as to the various
2 possibilities as to how the evidence might be
3 construed, and we hope that doesn't trespass upon your
4 function too much. And that is dealt with at
5 paragraphs 39 and onwards and I won't dwell on that.

10:33

6
7 Superintendent McGinn, at paragraph 47, we mention his
8 response to -- on receipt of what was revealed to be a
9 notification containing the false allegation he gave a
10 particular recommendation, but that was then overtaken
11 by events. And then, in paragraph 47, he also spoke --
12 I think this is well-established in the evidence, he
13 spoke with Mr. D and through that contact indirectly
14 put in train a process whereby the false rape
15 allegation ought to have been forever arrested and
16 corrected. At least it did commence the process but
17 regrettably it didn't altogether arrest it at source,
18 so to speak, and further actions took place thereafter.

10:33

10:33

19
20 At paragraph 48 on page 16 we mention the fact that
21 Laura Brophy quite properly made contact with him and
22 explained the error. She also requested the return of
23 the incorrect Rian notification that Superintendent
24 McGinn had never in fact received at this point. At
25 this point when he received an amended Rian
26 notification from Laura Brophy with details of the
27 actual allegation that had been made by Ms. D he
28 forwarded it to Chief Superintendent Sheridan in his
29 letter of the 20th May 2014. Tusla then sent a new

10:34

10:34

1 Garda notification dated 10th June '14, that was signed
2 by Séamus Deeney, and that was received in the
3 superintendent's office in June, on 24th June 2014.
4 Superintendent McGinn then forwarded the new
5 notification to the chief superintendent's office in 10:34
6 Monaghan on the day of receipt and dealt with that in a
7 prompt fashion. He also attended the Mullingar meeting
8 as the junior officer and contributed to what might be
9 loosely described as a brainstorming exercise to
10 wrestle with the implications for An Garda Síochána 10:35
11 following the more recent referral. And while
12 Superintendent McGinn initially advocated a review of
13 the McCabe case in May 2014, it is likely that this
14 recommendation was in all probability made before he
15 realised or was informed, we suggest, that the 10:35
16 incorrect Tusla notification contained the false rape
17 allegations. And his evidence was that he believes he
18 likely spoke to Mr. D on 8th of May '14 and on 12th of
19 May. And we suggest that no action taken by
20 Superintendent McGinn could remotely be interpreted as 10:35
21 an action to discredit Sergeant McCabe.

22
23 And then in paragraph 52 and onwards we treat of the
24 position of Chief Superintendent Jim Sheridan. And,
25 Chairman, you will recall that he, that particular 10:35
26 officer was in a position to -- he had a better
27 understanding of matters arising from the discovery
28 role he had played, that is to say the role he had
29 played in preparing for the discovery of, I think it

1 was the Seán Guerin Report or investigation, and now
2 retired Superintendent Sheridan was Superintendent
3 McGinn's immediate superior line officer. He was based
4 in Monaghan. And he received Superintendent McGinn's
5 report on 8th of May 2014 which he in turn forwarded to 10:36
6 his line manager, Assistant Commissioner Kieran Kenny
7 of the Northern Region in Sligo, and he did that by
8 letter of the 14th May 2014. And he stated that the
9 allegations contained in the incorrect Tusla
10 notification had been the subject of a previous Garda 10:36
11 investigation which resulted in the DPP directing no
12 prosecution against Sergeant McCabe. And we have set
13 out what he said there in paragraph 52. He also gave
14 evidence that he spoke to no one about this referral
15 other than Superintendent McGinn. And he had 10:36
16 additional knowledge of matters concerning Sergeant
17 McCabe, as I have pointed out, because of dealing with
18 the discovery raised by Seán Guerin. He also gave
19 evidence that he had spoken to Superintendent McGinn
20 prior to writing the letter who told him about the 10:36
21 error in the notification and that the false rape
22 allegation was incorrect. And we say that a review of
23 the transcript, we mention at paragraph 55, shows that
24 on a number of occasions a theory was put to Chief
25 Superintendent Sheridan to the effect he and his 10:37
26 colleagues may have been pleased to use the incorrect
27 Tusla referral for the purpose of discrediting Sergeant
28 McCabe. And again, we don't cavil about that, that was
29 done as a proper exercise for teasing out the arguments

1 by Tribunal counsel. In that connection Chief
2 Superintendent Sheridan was asked why, if he knew that
3 the false rape allegation was an error, that he
4 neglected to address that matter in his letter to the
5 assistant commissioner and the chief superintendent 10:37
6 gave his response, which we have reprised at paragraph
7 56. At paragraph 55 and 56 and in paragraph 57 we
8 mention that in answer to the suggestion that the
9 Gardaí had used the referral to put new life into the
10 old allegations the chief superintendent responded very 10:37
11 clearly. And we have repeated it there in paragraph
12 57. He utterly rejected that and indicated that that
13 simply wasn't the position. And perhaps, actually it's
14 more fully covered in paragraph, the quotation in
15 paragraph 56, where it was suggested to him that, it 10:38
16 was put to him that there might be a theory that the
17 incorrect allegation was being deployed to more senior
18 officers at a time when his district was more than
19 likely to be subject to an investigation by the
20 Commission of Inquiry, and his response to that was 10:38
21 saying that:

22
23 "Nothing could be further from the truth. I was trying
24 to find out how this error occurred. I accept in
25 hindsight that perhaps I should have outlined in the 10:38
26 report what the information was, but there was
27 certainly no malice in anything that I was doing in
28 relation to the matter."
29

1 And it will be a matter for you, Chairman, to assess
2 whether that evidence was given bona fide, whether it
3 was correct, and obviously we are urging the view that
4 that was genuine evidence which there really is very
5 little evidence against and we suggest that ought be
6 accepted. 10:38

7
8 At paragraph 58 we suggest that one way of testing
9 matters is to assess not just the words of Chief
10 Superintendent Sheridan but also the evidence as to the 10:39
11 actual steps he took to deal with the incorrect
12 referral. And we say that the chief superintendent at
13 all times had the interests of Sergeant McCabe in mind
14 firstly, in not broadcasting the Tusla referral to the
15 wider world; secondly, in not disseminating the Tusla 10:39
16 referral to anyone other than his immediate superior
17 officer; thirdly, no not ordering a review of the Ms. D
18 file; and fourthly, not reopening the entire Garda
19 investigation or referring it on to the DPP for a
20 possible reconsideration. 10:39

21
22 And we submit at paragraph 59 that the steady and calm
23 manner with which the chief superintendent dealt with
24 the issue, by effectively closing the matter down and
25 not giving it oxygen, represented a reasonable and 10:39
26 responsible approach which at all times was designed to
27 protect the interests of Sergeant McCabe and the D
28 family. And we submit that it would be unsound to
29 imbue that reasonable and professional manner in which

1 Chief Superintendent Sheridan treated these matters
2 with any sinister connotation. And moreover, when one
3 looks at the correspondence that was received in his
4 office relating to the issue, we suggest the evidence
5 indicates this was dealt with promptly and in a 10:40
6 responsible fashion. And we instance the communication
7 of the 20th May 2014 where Superintendent McGinn had
8 sent a copy of the new Rian referral received from
9 Laura Brophy on to the chief superintendent and then in
10 turn he sent a short update to the assistant 10:40
11 commissioner and pointed out that the previous referral
12 contained incorrect information and should therefore be
13 withdrawn and replaced. And he referred to the fact
14 that the referral by Tusla related to an incident which
15 was reported and investigated by An Garda Síochána back 10:40
16 in 2006 and 2007. The DPP had directed there should be
17 no prosecution. And he referred to the attached
18 referral and indicated that it did not disclose any new
19 information or evidence in regard to these matters, and
20 therefore, at this time, did not require any further 10:41
21 action by An Garda Síochána. So essentially, his
22 position was it should be closed down and that was, we
23 say, a reasonable position to adopt.

24
25 And then paragraph 62 we mention the role of Fiona 10:41
26 Ward, I can pass from that.

27
28 Chief superintendent received a letter from Assistant
29 Commissioner Kenny cautioning against dealing with the

1 matter by email and directed that no document should be
2 destroyed. It had been the request of Chief
3 Superintendent Sheridan that it perhaps ought be. And
4 the assistant commissioner set out his position there
5 on paragraph 64 and onwards, and we say he gave a clear 10:41
6 order to his officers beneath his rank that nothing
7 should be destroyed because it represented an original
8 document effectively and we say that was a perfectly
9 reasonable position to adopt, but nonetheless a very
10 practical step was taken by Chief Superintendent 10:42
11 Sheridan to line through the particular incorrect
12 referral so that a reader of the file from thereafter
13 would be clear that an error had occurred and that no
14 consequential steps should be take on foot of that, and
15 that is mentioned in the written note as well. 10:42
16 CHAIRMAN: You don't have a second copy of this, by any
17 chance, Mr. O'Higgins? Do you have another copy of
18 this.
19 MR. O'HIGGINS: Oh sorry, Chairman, I thought you had a
20 copy. 10:42
21 CHAIRMAN: I have a copy, but I want another copy.
22 MR. O'HIGGINS: Yes. We will provide it to you
23 straightaway. [SAME HANDED]
24
25 And at paragraph 67 -- just, we might deal with the 10:42
26 matter warts and all, as it were. At paragraph 67 we
27 refer to the fact that counsel for the Tribunal, again
28 discharging their function, directed a degree of
29 criticism about Chief Superintendent Sheridan for

1 failing to send the assistant commissioner a copy of
2 the new notification from Tusla of the 10th June '14
3 with his detailed report of the 3rd July '14. And we
4 suggest, however, that from the evidence it would
5 appear that, and indeed from his letter of the 22nd of 10:43
6 May 2014, that that had already been done, because that
7 letter, and we quote it at paragraph 67, says:

8
9 "The previous referral contained incorrect information
10 and should therefore be withdrawn and replaced with the 10:43
11 attached."

12
13 And as I mentioned already at paragraph 68, we instance
14 I think quite an important fact when one looks at the
15 overall actions of Jim Sheridan. Chief Superintendent 10:43
16 Sheridan placed two large lines in ink through the face
17 of the file copy of the incorrect Tusla notification of
18 the 2nd May 2014 and in large handwriting marked the
19 notification as "withdrawn, see referral 16/5/14". And
20 we again suggest this was a simple and practical step 10:43
21 to take which was designed to alert anybody reading the
22 file to the fact that an error had occurred, and far
23 from indicating a plan to discredit Sergeant McCabe
24 this practical step perhaps speaks volumes and shows
25 that he was anxious to protect the sergeant's position 10:44
26 and ensure the error was not compounded further.

27
28 And then at paragraph 70 we treat of the Mullingar
29 meeting. This of course had been originally scheduled

1 to take place on an earlier date, in June. It
2 eventually took place on 16th July '14. And the
3 parties discussed the errors -- the parties who were
4 present discussed the errors that were made by
5 Ms. Brophy and by Tusla. The notes of the meeting were 10:44
6 recorded by Sergeant Karen Duffy, and we suggest showed
7 this was a wide-ranging discussion about matters
8 concerning Sergeant McCabe, including the Ombudsman's
9 investigation into the complaint lodged by Ms. D, the
10 appointment of a local, Inspector Cunningham to 10:44
11 investigate the Ms. D complaint of 2006, the failure to
12 record the original allegations in 2006 on Pulse and an
13 incorrect belief on the part of all of those present
14 that the Gardaí had failed to formally notify the HSE
15 of the Ms. D complaint in 2006. Superintendent McGinn 10:45
16 is recorded as having made a query "Is there a risk?"
17 I just pause there, Chairman. I think that is
18 important. In large measure, in large measure, the
19 focus, perhaps understandably, of matters at this
20 Mullingar meeting was on possible Garda exposure as to 10:45
21 potential inadequacies in the 2006/2007 treatment of
22 matters, which I say is a far remove from any
23 conspiracy theory that those present were engaged in
24 some class of malicious conspiracy to do down Sergeant
25 McCabe. It appeared to be substantive issues of 10:45
26 potential Garda exposure stemming from possible
27 failings back in 2006/2007, in large measure that form
28 the subject matter of this wide-ranging discussion. It
29 largely took the form of a brainstorming, I suggest,

1 rather than any terribly organised discussion, perhaps
2 in a part, to borrow language that has been used
3 perhaps by you, Chairman, in the past, perhaps chaos
4 theory was ruling rather than any conspiracy, but that
5 will be a matter for you to assess the evidence.

10:46

6
7 At paragraph 70/71 we mention the minutes of the
8 meeting, which mentioned that some further legal advice
9 would be sought. I won't dwell on that. That is
10 there. At paragraph 73 we do mention an up-to-date
11 matter, suggestion made by Mr. McDowell for Sergeant
12 McCabe, who sought to make something of this, of this
13 meeting when questioning retired Commissioner
14 O'Sullivan on day 46 in the module just gone by.

10:46

15 CHAIRMAN: Yes.

10:46

16 MR. O'HIGGINS: And it was suggested to
17 Ms. O'Sullivan that Kieran Kenny was investigating the
18 matter, as to whether Sergeant McCabe was a risk to his
19 own children. And we offer the submission,
20 respectfully, that that is an exaggeration and somewhat
21 of an unfair appraisal, to conclude that the diverse
22 comments that were noted down during the discussion in
23 Mullingar amounted to anything even close to an
24 investigation. We say a better, a fairer construction
25 would be that the facts demonstrate there was no such
26 investigation by the Gardaí, the facts demonstrate that
27 these discussions were in effect the end of the matter
28 as far as the Gardaí were concerned and it appears
29 plain that it did not result in any subsequent action

10:47

10:47

1 on the part of any member of the Garda Síochána to the
2 detriment of the Sergeant McCabe following the
3 brainstorming exercise that took place in Mullingar.
4

5 we do acknowledge, at paragraph 74, that Superintendent 10:47
6 Sheridan was asked to liaise with the HSE in order to
7 determine what their intentions were on the matter. In
8 evidence to the Tribunal the retired chief
9 superintendent accepted that he did not do this. He
10 formed the opinion after the meeting that the matter 10:48
11 was from a Garda perspective completed and required no
12 further action. He had said as much in his detailed
13 report of the 3rd July 2014 and he took no further
14 action on the matter as he considered no further action
15 was required. And we have instanced in an exchange 10:48
16 with counsel for the Tribunal, which we suggest makes
17 clear, and it's at paragraph 74, that his decision not
18 to take the matter any further was not motivated by any
19 desire to keep the allegations against Sergeant McCabe
20 alive. And that quotation is there, and I needn't open 10:48
21 it up.
22

23 At paragraph 75, we mention that counsel for the
24 Tribunal also queried why he or any member of the
25 Gardaí failed to bring the errors made by Rian and 10:48
26 Tusla to the attention of Sergeant McCabe and Chief
27 Superintendent Sheridan gave his response, he said that
28 it was certainly his opinion that it was a matter for
29 the HSE to address, there may have been data issues in

1 relation to the issue, and the other way he looked at
2 it he said, was that if he had gone or somebody from
3 the Guards had gone to Sergeant McCabe to tell him
4 about it "we may not have been in a position to answer
5 all of his questions in relation to what had happened 10:49
6 as well" because "as we had only the information that
7 was provided to us by the HSE on how this happened" and
8 as far as Jim Sheridan was concerned, that was a matter
9 for the HSE.

10
11 Chairman, you might take the view, and it is of course
12 a matter for you, that it would have been preferable to
13 go to Sergeant McCabe. We couldn't demur from that,
14 but we say that again, locating it in terms of the
15 overall jigsaw, of the overall charge contained within 10:49
16 the term of reference we say there is simply no
17 evidence under this heading that there was any
18 organised conspiracy or any malicious plan to discredit
19 Sergeant McCabe.

20
21 At paragraph 76, and I will be finishing up quite
22 shortly --

23 CHAIRMAN: Yes. We are moving from the Mullingar
24 meeting about now.

25 MR. O'HIGGINS: Yes. 10:49

26 CHAIRMAN: Yes. Was that in the same room as the
27 meeting of 25th August 2018?

28 MR. O'HIGGINS: It was in the same county, I can
29 reliably answer. But I am not sure if it was in the

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same room.

MR. MCDOWELL: It was in the same station.

MR. O'HIGGINS: Maybe it was --

CHAIRMAN: It's just a bit of a coincidence that this room comes up on two occasions and causes trouble.

10:50

MR. O'HIGGINS: Yes. The room is not separately represented but we'll endeavour to find out the answer to that, Chairman.

At paragraph 76 and onwards, we treat of the position of Kieran Kenny, Assistant Commissioner Kieran Kenny. And his first involvement with the Tusla referrals came about when he received a copy of the referral on 2nd May '14. And I needn't perhaps dwell on this too much but we outline from paragraph 76 and onwards, up as far as paragraph 80, his role in matters, and we respectfully offer the view that the role, the position he took was appropriate, was reasonable, and was correct, and that there is simply again no evidence that could implicate him in any suggestion of a conspiracy or larger plan to do down Sergeant McCabe.

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10:51

Then, on paragraph 81, we treat of the position of Superintendent Frank Walsh, who was private secretary to the Commissioner, and he indicated that he brought the letter from Assistant Commissioner Kenny to the attention of the then Commissioner Nóirín O'Sullivan and acknowledged it. He sent a further note to Assistant Commissioner Kenny on 17th July and we

10:51

1 mention that at paragraph 82, and that unfortunately
2 was not replied to. And we offer the view at paragraph
3 83 that it would appear that everyone at that time,
4 shortly after the Mullingar meeting, had reached the
5 point where they each considered that no further action 10:52
6 was required in relation to the matter. The assistant
7 commissioner confirmed in evidence that he did not have
8 any further dealings relating to the particular matter
9 though he did meet Sergeant McCabe on other matters
10 after that. And that is mentioned at paragraph 83. 10:52

11
12 And then the last two persons whose role I will treat
13 of, Chairman, are former Commissioner Nóirín
14 O'Sullivan, and we treat of that commencing at
15 paragraph 84 on page 27 of the note. Retired 10:52
16 Commissioner O'Sullivan confirmed to the Tribunal that
17 she had no memory of reading the Tusla notification
18 with the false rape allegation that was sent to Garda
19 Headquarters by Kieran Kenny. She certainly took no
20 action on foot of it and she confirmed that at no stage 10:52
21 did she share any such information with the Department
22 of Justice. And when asked by you, Chairman, I think
23 in the last module to comment on Superintendent Walsh's
24 evidence that she had read the letter without comment
25 and just proceeded on, she stated that: 10:52

26
27 "If a Tusla referral comes to the Commissioner's office
28 it would normally be dealt with by local Garda
29 management."

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she offered the view that in relation to this piece of correspondence the relevance of the letter was not evident to her when it was brought to her attention by Superintendent Walsh. And we say it is of some significance that when later cross-examined by counsel for Sergeant McCabe, the former Commissioner was not challenged on her evidence that she had no memory of reading the document which was brought in by Superintendent Walsh in the normal course of dealing with the post. And we instance the relevant excerpts from the transcript in the footnotes to paragraph 85.

10:53

10:53

And then, Chairman, we treat of a matter you have already canvassed with Mr. Buckley, and that is the meeting with Paul Williams and Ms. D, and we treat of that at paragraph 86 and onwards. And we suggest what is important when considering the evidence of Mr. Paul Williams and Ms. D is that the articles that Mr. Williams wrote and the meetings he arranged for Ms. D with public figures were not written or arranged for the purpose of damaging Sergeant McCabe, their purpose as far as Ms. D was concerned was a desire on her part to publicise her view that her criminal complaint against Sergeant McCabe had not been investigated properly or that persons within An Garda Síochána had conspired to cover up her allegations against Sergeant McCabe. And we say two things about that, effectively, Chairman. We say that Ms. D's

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10:54

1 complaint was that the Gardaí had effectively been
2 guilty of a cover-up and had failed to investigate her
3 allegations against Sergeant McCabe. So I suppose --
4 CHAIRMAN: I wonder did she ever go as far as to say a
5 cover-up. I don't mean to interrupt your submission, 10:54
6 but it's just that is a bit --
7 MR. O'HIGGINS: Sorry, I think that's fair. That is
8 perhaps unnecessarily dramatic language. That it had
9 not been properly investigated was the gist of her
10 complaint. And we say perhaps that could be regarded 10:55
11 as being the very antithesis of the core allegation
12 facing An Garda Síochána in this Tribunal; namely, that
13 they spread word of the false allegations far and wide
14 in order to discredit Sergeant McCabe. And we say
15 there is a certain irony in that and intention in that 10:55
16 which perhaps could be regarded as a point of defects,
17 as it were, to the allegations facing An Garda
18 Síochána.
19 CHAIRMAN: I am sorry, again, if you don't mind me just
20 asking you at that point, I'm just not getting this 10:55
21 thing about were the Gardaí trying to spread
22 allegations far and wide. I mean, where is that based
23 on? I mean, the evidence has been certainly that
24 things were kept within a very tight circle.
25 MR. O'HIGGINS: Yes. 10:55
26 CHAIRMAN: But you are referring to an allegation that
27 things were spread far and wide. I am sorry,
28 Mr. O'Higgins, but I just don't understand what you
29 mean by that.

1 MR. O'HIGGINS: The point I am not making terribly
2 well, is this, Chairman: That locating the evidence as
3 you have heard it within the overall, overall charge,
4 so to speak, contained within the terms of reference,
5 namely that An Garda Síochána wrongfully used -- just 10:56
6 looking at the terms of reference:

7
8 "...whether the false allegations and/or the Tusla file
9 were knowingly used by senior members of An Garda
10 Síochána to discredit Sergeant McCabe." 10:56

11 CHAIRMAN: Just direct me to the paragraph number,
12 please.

13 MR. O'HIGGINS: Well, sorry, I have lifted that from
14 paragraph 2 of our written note, the actual term of
15 reference. 10:56

16 CHAIRMAN: Oh. Sorry --

17 MR. O'HIGGINS: The term of reference is:

18
19 "To investigate the creation, distribution and use by
20 Tusla of a file containing false allegations of sexual 10:56
21 abuse against Sergeant McCabe that was allegedly sent
22 to the Gardaí in 2013, and whether these false
23 allegations and/or the file were knowingly used by
24 senior members of An Garda Síochána to discredit
25 Sergeant McCabe." 10:57

26 CHAIRMAN: Okay.

27 MR. O'HIGGINS: So locating them in that framework, I
28 was seeking to make the point that if it be your
29 conclusion, and of course it is a matter for you, but

1 if it be your conclusion that the view that was taken
2 by the relevant Garda actors in the matter was to close
3 it down, was to not give it oxygen, was to confine it
4 to a small a number of persons as possible, we say that
5 is the opposite of the charge within the terms of 10:57
6 reference being made out, in effect. And that the
7 concern was at all times to maintain the dignity of
8 matters from the point of view of Sergeant McCabe and
9 also Ms. D, and to, as I say, not give the matter
10 oxygen, and we say that the evidence you have heard is 10:57
11 consistent with that overarching position. And we say
12 that we do acknowledge that -- sorry, we do offer the
13 view, at paragraph 90, that any suggestion of a Garda
14 conspiracy to discredit Sergeant McCabe involving, for
15 instance, Paul Williams, we suggest have been set at 10:58
16 naught, really, following the evidence before the
17 Tribunal in module (d), and we reprise the quotation
18 from -- at paragraph 90 referable to that. And we say
19 that, at paragraph 91, irrespective of who it was that
20 the Tribunal ultimately concludes initially suggested 10:58
21 that Ms. D meet with Paul Williams, the evidence was
22 clear that Ms. D alone was the one who sought to meet
23 with the member of the media that she could trust so
24 that she could have an opportunity of venting her
25 grievances against the Gardaí, and we suggest there is 10:58
26 no evidence to suggest that her meeting with the
27 journalist was part of a conspiracy involving the
28 Gardaí to denigrate Sergeant McCabe. And then,
29 Chairman, we treat of the position of Detective

1 Superintendent John O'Reilly --

2 CHAIRMAN: Just before we go on to there,
3 Mr. O'Higgins, please, what is the quote you have there
4 at footnote 85, is it, or is it footnote 86?

5
6 "As I said to you, when he suggested Paul Williams, as
7 I have already explained, I knew of Paul Williams. I
8 felt he was a credible reporter. I was happy to speak
9 with him."

10
11 That is from Ms. D?

12 MR. O'HIGGINS: Ms. D, is my understanding of matters.

13 CHAIRMAN: There is other evidence as well, obviously.

14 MR. O'HIGGINS: Oh, there is.

15 CHAIRMAN: No, you are entitled to obviously point to
16 this and say, look, that is what your case is, and that
17 is fine.

18 MR. O'HIGGINS: Yes. And we have also, hopefully in a
19 balanced way, Chairman, we have also itemised where we
20 think there is not just tension but actual conflict on
21 the evidence. For instance, there is one aspect of
22 conflict between Mr. D and Detective Superintendent
23 John O'Reilly, and that is, and we've mentioned
24 actually at paragraph 94, that Mr. D and Superintendent
25 O'Reilly were not in exact agreement in evidence to the
26 Tribunal as to the circumstances that led to the
27 initial call being made by Mr. D to Paul Williams.
28 Mr. D's position was that he told Superintendent
29 O'Reilly that Ms. D had indicated to him that she

1 wished to tell her side of the story, possibly to a
2 journalist. He stated that he referred to this desire
3 on the part of his daughter during a social encounter
4 with Superintendent O'Reilly, and Mr. D stated that
5 Superintendent O'Reilly then inquired if she would like 11:00
6 to talk to Paul Williams, and we have reproduced the
7 quote there at the bottom of paragraph 94, the bottom
8 of page 29. And Mr. D stated -- we say at paragraph 95
9 that Superintendent O'Reilly then gave him Paul
10 Williams' number. When Mr. D went home and talked to 11:00
11 Ms. D following this conversation, she asked that her
12 father arrange a meeting, and this meeting then took
13 place on 8th of March '14 at the home of Mr. and
14 Mrs. D. The Tribunal is furnished with a transcript of
15 the meeting and it revealed that Ms. D was motivated to 11:01
16 have the investigation into Sergeant McCabe reopened as
17 she considered the matter was not taken seriously or
18 properly investigated by the guards in 2006/2007. And
19 the Tribunal -- Chairman, you will be aware that Paul
20 Williams thereafter published a number of articles 11:01
21 which were considered by the Tribunal and he also
22 arranged for Ms. D to meet with Micheál Martin, TD, to
23 seek assistance in having her case reopened, and that
24 meeting took place in April of '14, and that meeting is
25 also heralded in one of his articles on the 15th April 11:01
26 2014, and Ms. D also subsequently made a complaint to
27 GSOC, which she initiated on 30th April 2014,
28 complaining about the quality of the initial
29 investigation, and her statement to GSOC was made on

1 3rd July 2014. And I think it is important, and we
2 mention this at paragraph 97, that Ms. D confirmed in
3 evidence to the Tribunal that no one prompted her to
4 complain to either Mr. Martin or to GSOC. She also
5 later met with former Commissioner Alan Shatter in June 11:02
6 of '14 and that was -- former Minister Shatter, I
7 should say, and that meeting was also arranged through
8 Paul Williams, but Ms. D understood that Mr. Shatter
9 had requested the meeting. And later on, she also
10 spoke with Conor Lally, journalist, who published an 11:02
11 article in The Irish Times in February of 2017.

12
13 And we mention at paragraph 99, and I have already
14 referred to Mr. D's version of this, which is in
15 conflict, Superintendent O'Reilly's recollection 11:02
16 differed from that of Mr. D in one respect, and his
17 clear recollection was that it Mr. D who first brought
18 up the name Paul Williams, and he stated that:

19
20 "He --" that is Mr. D "-- said to me 'we were thinking 11:02
21 about Paul Williams'. He asked did I know him, to
22 which I replied, yes, I did."

23
24 And Superintendent O'Reilly's recollection was that
25 when Mr. D returned to him having talked to his 11:03
26 daughter, Superintendent O'Reilly contacted Paul
27 Williams by phone and asked if he would take a call
28 from Mr. D or Ms. D, and he gave evidence that that was
29 the end of his involvement in the matter, other than

1 giving him directions to the D home by telephone.

2

3 And we offer the view, Chairman, and again this is of

4 course a matter for you, but we offer the view at

5 paragraph 100 that what is accepted by all witnesses, 11:03

6 Mr. D, Ms. D, Mrs. D, Superintendent O'Reilly and Paul

7 Williams, is that the first contact made to Paul

8 Williams was made by Mr. D.

9 CHAIRMAN: No, that is not accepted by everybody,

10 Mr. O'Higgins. 11:03

11 MR. O'HIGGINS: All right. Sorry.

12 CHAIRMAN: No, sorry, I don't mean to challenge you,

13 and obviously I am getting great value out of these

14 submissions, but, in fact, I think Superintendent

15 O'Reilly rang Paul Williams to say, there is a phone 11:03

16 call which you might expect from Mr. D.

17 MR. O'HIGGINS: Excuse me. That is accepted.

18 CHAIRMAN: So that is the first contact with Paul

19 Williams.

20 MR. O'HIGGINS: That is undoubtedly -- we have said 11:04

21 elsewhere, Chairman, I hope this didn't in any sense

22 mislead -- that was loose.

23 CHAIRMAN: But, Mr. O'Higgins, my problem is, we have

24 had a mountain of facts and they are all over the

25 place. 11:04

26 MR. O'HIGGINS: Of course.

27 CHAIRMAN: I am not upset if anyone gets anything wrong

28 because unfortunately I am struggling to get things

29 right myself, so please don't worry about that.

1 MR. O'HIGGINS: I think elsewhere in the submissions we
2 had mentioned that -- yes, we had understood that, and
3 I think it's abundantly clear from the transcript
4 evidence that it was, of course, accepted that he had
5 played an introductory role.

11:04

6 CHAIRMAN: Yes.

7 MR. O'HIGGINS: Yes. And we say, indeed we stated
8 there, Chairman, in paragraph 99, that Superintendent
9 O'Reilly contacted Paul Williams by telephone and asked
10 if he would take a call from Mr. D or Ms. D. And we
11 hope that is a faithful reflection of the evidence that
12 you heard.

11:05

13 CHAIRMAN: Mm-hmm.

14 MR. O'HIGGINS: There was a second issue, and we hope
15 this again is helpful in terms of our warts-and-all
16 appraisal of matters, at paragraph 101 we mention a
17 second issue that involved Superintendent O'Reilly
18 insofar as Ms. D was recorded to have said during a
19 GSOC interview that Superintendent O'Reilly had told
20 her father that, and we mention that allegation there,
21 relating to some suggestion that Sergeant McCabe would
22 go to a local secondary school, and of course Mr. D
23 denied ever stating such a conversation had taken place
24 with Superintendent O'Reilly, and we have reproduced at
25 paragraph 102 the relevant excerpts from that with the
26 relevant transcript references.

11:05

11:05

11:06

27 CHAIRMAN: Well, it went, unfortunately -- it became
28 official when it was reported to GSOC and it's
29 ascribed.

1 MR. O'HIGGINS: Yes. Not by any member for whom the
2 Garda team is acting, Chairman. And we say that it's a
3 matter for you, of course, but that the unequivocal
4 direct evidence of both Superintendent O'Reilly and, in
5 fairness to him, Mr. D, we suggest, at paragraph 103, 11:06
6 should be preferred over what appears to have been a
7 hearsay statement purportedly recorded by a third party
8 who indeed was not a witness before the Tribunal. And
9 we say that Ms. D's understanding concerning this
10 comment, Ms. D's understanding appears to be simply a 11:06
11 misunderstanding on her part, but that, of course, is a
12 matter for you, Chairman, to form a view on.
13 I think it has relevance --
14 CHAIRMAN: Well, I am sorry, Mr. O'Higgins, Ms. D was a
15 witness before the Tribunal. I mean, are you referring 11:07
16 to her or to somebody else?
17 MR. O'HIGGINS: She was, but insofar as it appeared in
18 the GSOC materials, there was no additional witness,
19 other than Ms. D, produced in relation to that. And I
20 think we instance at paragraph 104, Chairman, that 11:07
21 Mr. Williams, Paul Williams that is, was unequivocal
22 that his involvement with Ms. D and the stories that he
23 subsequently wrote, the articles that he wrote, were
24 written by him as an independent journalist and were
25 not motivated by any external influences such as by 11:07
26 members of An Garda Síochána, and again the relevant
27 exchange with counsel is reproduced at 104, hopefully
28 of assistance to the Tribunal. Mr. Williams, at
29 paragraph 105 we mention, confirmed that he did not

1 discuss Sergeant McCabe with former Commissioner
2 O'Sullivan or with former Commissioner Callinan at any
3 stage and he also confirmed that the meeting with Ms. D
4 did not come about directly or indirectly through any
5 intervention on the part of Superintendent Taylor. 11:08
6 Subsequent to the meeting, he did make contact with
7 Superintendent Taylor in an attempt to seek further
8 information concerning the McCabe investigation, but
9 the contact was made on his initiative and yielded no
10 new information. And at paragraph 107, we mention the 11:08
11 fact that Mr. Williams also confirmed that at no stage
12 did he have access to the Garda investigation file from
13 2006/2007, and he confirmed that there was no ulterior
14 motive to, as far as he was concerned, to
15 Superintendent O'Reilly's involvement in the case, and 11:08
16 again, the relevant excerpt is reproduced at paragraph
17 108. And that is our -- that is what we have to say in
18 relation to the role of -- Detective Superintendent
19 O'Reilly's role in matters.

20
21 And finally then, Chairman, we conclude the final page
22 of the document of the written piece to respectfully
23 submit that the evidence heard by you in this module
24 appears to support no conclusion other than the guards
25 had no involvement whatsoever in the creation or 11:09
26 dissemination of the false rape allegation, and it's
27 our respectful position that the input from the Gardaí
28 and the senior officers, for whom we are acting, was at
29 all times motivated not by any malice or animus towards

1 Sergeant McCabe, but by a desire on the part of those
2 concerned to ensure that any issue concerning Sergeant
3 McCabe was dealt with sensitively and in a professional
4 manner. And returning finally then to the terms of
5 reference, we offer the view that there is no evidence 11:09
6 to justify a conclusion that the false allegations
7 against Sergeant McCabe or the Tusla file were
8 knowingly used by senior members of An Garda Síochána
9 to discredit Sergeant McCabe in any way.

10 CHAIRMAN: Thanks, Mr. O'Higgins. I had a couple of 11:09
11 questions. I just was trying to find something, if I
12 just may detain you for a moment, please.

13 MR. O'HIGGINS: Certainly.

14 CHAIRMAN: It's probably right to say that not too much
15 significance should be attached to any question. It's 11:12
16 a question. It's not that I am actually thinking this;
17 it's something that is going through my mind as being
18 something worthy of being asked. That doesn't mean
19 anything more than that.

20 11:12
21 First of all, in relation to Superintendent Cunningham,
22 now we have the investigation file. I am not sure all
23 of it -- in fact, I know all of it wasn't distributed
24 in the context of this module, for very obvious
25 reasons, because there are other persons involved, a 11:12
26 lot of it is very private, and that is the right
27 decision to make. But have you any submission to make
28 as to whether Superintendent Cunningham's investigation
29 was thorough or not, of the original D allegation?

1 MR. O'HIGGINS: I have nothing further to add on that,
2 Chairman. I simply submit that a third-party agency
3 was tasked with looking into that, GSOC, and they
4 appear to have formed the view it passed muster. It
5 was a professional --

11:13

6 CHAIRMAN: Yes, but it may be important in the sense
7 that, obviously the job of someone deciding facts is to
8 try and nit things together, not to take things in
9 isolation. But, Mr. O'Higgins, you will be aware of
10 the situation that used to occur in the past where four
11 people were saying "I was sexually abused by A/B", and
12 bizarre applications were made to split the trial so
13 the jury never knew there were four people making the
14 same allegation as opposed to one. So you can draw an
15 inference from things appropriately, provided you
16 exercise caution. But if it was, let us say, a very
17 thorough investigation, if it was, let us say, a model
18 of how a garda should conduct an investigation of this
19 kind, then certainly, as of the time when he submitted
20 it and as of the time we come up to the DPP's ruling on
21 the matter on the 6th of April 2007, it would seem from
22 that that he had absolutely no animus whatsoever
23 against Sergeant McCabe.

11:13

11:13

11:13

24 MR. O'HIGGINS: I would respectfully agree, Chairman.
25 And it may be that it was -- Sergeant McCabe was
26 unaware of quite how comprehensive and detailed a
27 professional job had been done by Superintendent
28 Cunningham, and that may have played a part in how
29 matters unfolded thereafter.

11:14

1 CHAIRMAN: The preliminary view that I have taken,
2 having read the whole thing, and as I say the whole
3 thing wasn't actually circulated or discussed here, was
4 that it would be a very good example, for teaching
5 purposes, as to how to conduct an investigation of this 11:14
6 kind. If that indeed is the case, it's hard to see
7 how, at that remove, he had anything whatever against
8 Sergeant McCabe, in fact quite the opposite, although,
9 at the same time, there was an objective consideration
10 of each fact, each supporting fact, each fact in 11:15
11 relation to credibility. That's one thing that I
12 wanted to ask you about.

13 MR. O'HIGGINS: Yes. Well, I think it's not without
14 significance, Chairman, that in his ultimate -- in his
15 report, in his ultimate recommendation on the file to 11:15
16 the Director, Superintendent Cunningham recommended
17 against a prosecution, but didn't leave it at that; he
18 gave a basis for that recommendation, which ultimately
19 appears to have been acted on or accepted by the
20 Director's office. 11:15

21 CHAIRMAN: Well, then again, so did the State
22 solicitor. Now, this, on the face of it, doesn't seem
23 to be, this is against a fellow officer so, therefore,
24 that is an allegation that could be made in these
25 circumstances, and perhaps people might think that. 11:16
26 But rather, it seemed to be a genuine drilling in to
27 whatever facts might be relevant and a determined
28 pursuit of any fact that could assist in casting light
29 on the matter.

1 MR. O'HIGGINS: And I think as well, Chairman, it is
2 clear from the file that has been circulated, or the
3 portion of the file that has been circulated in the
4 materials, that great care was taken in obtaining
5 statements from all necessary and relevant witnesses 11:16
6 and put onto the file and summarised for the Director's
7 consideration ultimately when the file went in to the
8 DPP. I think that was an appropriate course to adopt.
9 CHAIRMAN: Okay. Well, it is to be appreciated, as
10 well, that, in a way, the ball hadn't been set rolling 11:16
11 at that point, in the sense that Sergeant McCabe first
12 wrote to Superintendent Clancy saying, look, there is a
13 number of things that have happened in this station
14 over the course of the last six months that are well
15 below standard - gardaí reading newspapers in the 11:17
16 public office, watching the television, not turning up
17 for duty, not wearing uniforms, not completing
18 investigation files - and then these are referable,
19 obviously, to the ten incidents that were considered by
20 O'Higgins, Mr. Justice O'Higgins, but that was set in 11:17
21 motion as of the 25th February 2008, which is nine
22 months, or so, later - well, ten months later. So is
23 it possible that the inference that I draw, therefore,
24 would change as one goes along, or what -- do you want
25 to say anything about that? 11:18
26 MR. O'HIGGINS: Chairman, you are speaking about the
27 position that followed after the closing of the file
28 and the DPP's decision not to direct a prosecution?
29 CHAIRMAN: Yes. In other words, the first port of call

1 for Sergeant McCabe, and I'm taking it as a given
2 because it is in the O'Higgins Commission report, that
3 he was well-motivated and motivated in a public spirit
4 to engage with the Garda authorities and then to go
5 further when that apparently met with no response that 11:18
6 addressed his concerns, that this happened on the 25th
7 February '08. You know the letter I am referring to, I
8 think, Mr. O'Higgins?

9 MR. O'HIGGINS: Yes.

10 CHAIRMAN: It is the letter which says: Dear 11:19
11 Superintendent Clancy, there are a number of things
12 that are happening in the station that I need to have
13 an urgent meeting with you about. And then there is a
14 whole load of bullet-points listed, there is about 15
15 or 20 of them, including files not being investigated, 11:19
16 matters not being followed up, evidence not being
17 gathered, Gardaí sitting around doing no work, not
18 justifying the money that the taxpayer pays them. In
19 other words, is there any sense in which the inference
20 resulting from a very, very thorough investigation file 11:19
21 by Superintendent Cunningham at that stage should
22 change as these matters go on or could change as these
23 matters go on and Sergeant McCabe is apparently
24 required to take matters further and higher and
25 eventually to Byrne/McGinn, to -- then ultimately to 11:19
26 the O'Higgins Commission? In other words, that some
27 bitterness may be building up against. And that is the
28 question, really.

29 MR. O'HIGGINS: Sorry. Well, Chairman, I say that it

1 appears to be common case between the parties that
2 certain tensions flowed from the mere fact that an
3 investigation had taken place --

4 CHAIRMAN: Yes.

5 MR. O'HIGGINS: -- and straining of relations, indeed I 11:20
6 think it was in what might be termed the D letter
7 penned by Sergeant McCabe himself, as to the straining
8 of relations, without using unnecessary language in
9 relation to that, and that perhaps did strain
10 relations. But nonetheless, in my submission, the 11:20
11 professionalism and competence displayed by
12 Superintendent Cunningham in the file that he submitted
13 to the DPP and the manner in which he investigated the
14 matter, was mirrored by many of the steps taken by him
15 and his colleagues in later dealings with the issue 11:21
16 when it arose subsequently. But I say that the --
17 insofar as, Chairman, you are referring to the letter
18 of the 25th February 2008, you are not talking there
19 about the D letter, you are talking about the
20 complaints concerning -- I wonder is that the January 11:21
21 letter?

22 CHAIRMAN: Let me just go back on it so that I am -- on
23 the 28th January '08, Sergeant McCabe writes a letter
24 to Superintendent Clancy basically about supervision,
25 non-completion of work and the Pulse issues. Now, what 11:22
26 happens after that is that Superintendent Clancy asks
27 Sergeant McCabe to make a business case in relation to
28 releasing the DPP letter.

29 MR. O'HIGGINS: Yes.

1 CHAIRMAN: Now, that is then followed up by the letter
2 of the 25th February '08 to Superintendent Clancy re
3 the D family and the problems that are occurring, and a
4 lot of that hasn't been gone into, quite properly,
5 because it's nothing to do with the Tribunal. And 11:22
6 Sergeant McCabe asks for no prosecution of Mrs. D or
7 anybody else. And he says: this allegation has ruined
8 my life forever. I am a completely changed person in
9 that I don't trust anyone any more. And then
10 Superintendent Cunningham is tasked by Chief 11:22
11 Superintendent Rooney with investigating that, and the
12 upshot of that is the first Mullingar meeting of the
13 25th August '08.

14 MR. O'HIGGINS: Yes.

15 CHAIRMAN: Perhaps in the same room, indeed, as the 11:23
16 later meeting of the 16th July 2014. But I suppose
17 that's the chronology of the events. And I suppose the
18 question I'm asking you is, even if I do draw an
19 inference that the thoroughness, the fairness, the
20 objectivity, the textbook example of investigation, if 11:23
21 that be the case, of the Superintendent Cunningham
22 police work on the D allegation shows that he was a
23 decent and fair-minded person as well as a first-class
24 investigator, let's suppose I am of that view, all I'm
25 really asking you is, do matters not shift as time goes 11:23
26 on?

27 MR. O'HIGGINS: In my submission, matters don't shift
28 in terms of the core allegation, so to speak, within
29 the terms of reference, as to whether there was any, in

1 the (d) module, as to whether false allegations and/or
2 the file were knowingly used by senior members of the
3 guards to discredit Sergeant McCabe. In my submission,
4 and I would remain firm on that, nothing shifts in
5 relation to that. I don't offer the view, in my 11:24
6 submission, nor should I, having regard to the evidence
7 that you have heard, that everything was perfect in
8 terms of how letters were responded to or matters
9 followed up. That isn't the position I'm offering to
10 you, Chairman. But I say, nonetheless, that with 11:24
11 respect to the role, for instance, played by
12 Superintendent Cunningham, clearly on foot of the
13 business case, so to speak, that was made by Sergeant
14 McCabe for obtaining the DPP's directions so that he
15 might provide it to other parties, on foot of that it 11:25
16 is clear from the evidence that Superintendent
17 Cunningham was tasked with the job of investigating the
18 allegations surrounding, if I could call it, the Ds or
19 the D allegations contained within the letter of 25th
20 February 2008 from Sergeant McCabe, and I say that it 11:25
21 was in -- the whole controversy that subsequently
22 became something of a media issue where perhaps there
23 was rather inaccurate reporting surrounding that issue,
24 the whole controversy concerning the Mullingar meeting
25 stemmed from what I say was a legitimate, proper and 11:25
26 necessary step taken by Superintendent Cunningham to
27 investigate what were, on their face, serious
28 allegations. He sought a statement from Sergeant
29 McCabe. It wasn't forthcoming. And in fairness to

1 him, he offered the view, look, that is the end of it,
2 and he wasn't anxious to progress the matter further,
3 notwithstanding that he had made those allegations as
4 recently as 25th February 2008. Superintendent
5 Cunningham's position was, he was there at that meeting 11:26
6 to take a statement, to action that further, and then
7 when that didn't happen, he reported appropriately to
8 his line manager, and I say that was an appropriate
9 step, and again, shows the absence of any malice or
10 wrongdoing on the part of Superintendent Cunningham 11:26
11 with respect to that aspect of the transaction.
12 CHAIRMAN: Well, yes, I understand what you are saying.
13 I suppose it may be more a matter for the O'Higgins
14 Commission, but was there no sense in which somebody
15 could have stepped in at that point and ensured that 11:26
16 matters didn't go off the rails --
17 MR. O'HIGGINS: Chairman --
18 CHAIRMAN: -- within the Gardaí?
19 MR. O'HIGGINS: -- are you talking --
20 CHAIRMAN: I am talking about the Garda. 11:26
21 MR. O'HIGGINS: Are you referring to the DPP directions
22 issue?
23 CHAIRMAN: No, the way everything then escalated out of
24 that point, in the sense that if Sergeant McCabe felt
25 he was being ignored, if things were really as bad as 11:27
26 the O'Higgins Commission later reported, and they were,
27 I am taking that as a given, what is it about the
28 Gardaí that would have allowed all of this to escalate
29 in the way that it has done, as opposed to people

1 coming in appropriately addressing it and thereby at
2 least having a chance of stopping it?

3 MR. O'HIGGINS: Well, I say that an appropriate and
4 reasonable attempt at addressing it was made, in the
5 form of the investigation that was carried out in the 11:27
6 Byrne and McGinn investigation, into these matters.

7 Now, again, we are not suggesting that it was pristine
8 and perfect, but we say it represented a reasonable
9 effort. Now, obviously Sergeant McCabe was not happy
10 with the Byrne/McGinn conclusions, or certain of them, 11:27

11 but we say that, nonetheless, it represented a
12 reasonable effort at addressing these matters. It
13 wasn't as if the complaints made, many of which were
14 found to be legitimate and well-founded, by Sergeant
15 McCabe were ignored or that nobody looked into the 11:28

16 matter. It was taken very seriously at a high level
17 and two senior officers were tasked with investigating
18 these local issues and carried out a very thorough
19 investigation, aspects of which were not ideal, as
20 found by the O'Higgins Commission ultimately, but I say 11:28

21 that that represented a reasonable attempt at that,
22 and, again, could not be regarded as simply ignoring
23 Sergeant McCabe's complaints, in my respectful
24 submission. And you will be aware, Chairman, as well,
25 that matters weren't left at that, because following 11:28
26 the delivery of the Byrne/McGinn report, there was a
27 further review of matters by Nacie Rice.

28 CHAIRMAN: Assistant Commissioner Rice.

29 MR. O'HIGGINS: Assistant Commissioner Rice. Which

1 again represented a reasonable effort at addressing
2 these matters.

3 CHAIRMAN: Well, it was a desk study.

4 MR. O'HIGGINS: Yes.

5 CHAIRMAN: Well, I suppose one wonders in the overall, 11:29
6 and again it is only a question, whether, if the Gardaí
7 have standards, and certainly Superintendent Cunningham
8 emerges as having standards that things are to be done
9 a particular way, and other people fall short, is it a
10 question that the Gardaí avoid scandal by not literally 11:29
11 washing their dirty linen in public, or, perhaps by not
12 doing that, they cause much bigger trouble down the
13 line? In other words, does the organisation protect
14 itself, Mr. O'Higgins, as opposed to actually saying,
15 we have standards and we are going to abide by them, 11:29
16 and anyone who falls short of them, I'm afraid we are
17 just going to call that out? That is, I suppose, the
18 bigger question.

19 MR. O'HIGGINS: Well, I say that, Chairman, there was a
20 reasonable effort made in Byrne/McGinn. It was an 11:30
21 investigation that took place over a lengthy period.
22 It was, of course, the subject -- its adequacies were
23 the subject of the O'Higgins Commission in certain
24 respects. Many, many of the findings of Byrne/McGinn
25 were adopted and upheld; some of the findings were not, 11:30
26 and indeed there was some criticism directed at aspects
27 of the report. But I say that it is relevant as well,
28 of course, that there was a full participation, of
29 course, in the O'Higgins Commission, not just on behalf

1 of individual Gardaí but also at corporate level in An
2 Garda Síochána, and again I say this -- it couldn't be
3 suggested of the force that they simply failed to
4 engage with matters. They did engage, not in an ideal
5 fashion, undoubtedly, but they did engage and made 11:30
6 reasonable efforts at addressing the concerns that had
7 been made quite properly by Sergeant McCabe. And I
8 think it is important to restate, Chairman, that at all
9 times throughout this Tribunal the position of An Garda
10 Síochána has been to accept the findings made by 11:31
11 Mr. Justice O'Higgins, even those findings that were
12 critical of the approach adopted by the force, and of
13 course to accept the findings where the force were
14 cleared in relation to many of the high level
15 allegations of corruption made by Sergeant McCabe that 11:31
16 were ultimately found to be unfounded or not borne out
17 by any evidence.

18 CHAIRMAN: And is there any sense of where the buck
19 stops, in the sense that it was quoted, what
20 Mr. Justice Morris said in the Morris Tribunal Report, 11:31
21 that if there is a superintendent in charge of a
22 district, anything that happens is ultimately that
23 person's responsibility and that person should take
24 responsibility?

25 MR. O'HIGGINS: Yes. Well, I think perhaps the best 11:31
26 answer to that, Chairman, is the evidence that you
27 heard from former Commissioner Nóirín O'Sullivan
28 herself, who accepted responsibility for the Garda
29 conduct of matters at the O'Higgins Commission, who

1 accepted the findings made that were critical of the
2 approach that was taken, of the subject matter of the
3 O'Higgins Commission concerning the local issues that
4 were the subject of that, in one sense, and also the
5 findings that were made concerning the high level 11:32
6 allegations, the macro allegations that were made by
7 Sergeant McCabe as well. It has at all times been the
8 position of An Garda Síochána in this Tribunal that,
9 particularly from former Commissioner O'Sullivan, that
10 she accepts responsibility and was in charge of all 11:32
11 matters, and we say that that was a reasonable position
12 to adopt, not in any sense shirking responsibility,
13 which we say was shared by the senior officers who gave
14 evidence before you, who did not seek to minimise their
15 role in matters and gave their evidence as to their 11:32
16 individual role in the various issues that arose by way
17 of controversy.

18 CHAIRMAN: Okay. Can I go on then - I have just a few
19 more questions, Mr. O'Higgins, and thank you for your
20 help - to a question that was asked by Mr. Marrinan of, 11:33
21 I think, Chief Superintendent Sheridan, and which I
22 think certainly inspired some of the questions asked by
23 Ms. Leader of Assistant Commissioner Kenny. Maybe she
24 didn't take Assistant Commissioner Kenny, but perhaps
25 it was Mr. Marrinan all along. So if this is a 11:33
26 difficult question, you have got to blame Mr. Marrinan,
27 not me. And again, it is only a question. But it may
28 be that you say, this is the first aspect of it, that
29 the same thing would have happened had Superintendent

1 Cunningham answered the letter of the 15th August 2013,
2 and obviously I am going to consider that, and I have
3 your submissions on that and they are very interesting
4 and thank you for them. But I have a wonder, which is
5 this, and again it is a question of, like in the trial 11:34
6 where you have four separate trials of four separate
7 children who are alleging abuse against one person,
8 forgive me for using this analogy, it's not to say that
9 that is particularly pertinent to this case, it is
10 that, when looking at things on an individual basis, 11:34
11 it's very often the case that one can fail to see the
12 bigger picture. One has to try and see the bigger
13 picture, and this is the bigger-picture question. So
14 Chief Superintendent Sheridan doesn't contact the HSE
15 after the meeting in Mullingar on the 16th July 2014. 11:34
16 We know that. Now, we just go on to the next one.
17 Superintendent Cunningham doesn't open and then forgets
18 about the letter, which remains unanswered, of the 15th
19 August 2013. Inspector O'Connell does not read or act
20 on his email from Fiona Ward re Eileen Argue, 11:34
21 et cetera, on 28th July 2014. Assistant Commissioner
22 Kenny sends a rape-offence notification to Garda
23 Headquarters, but never retracts it when he learns that
24 it is wrong as of the 16th May 2014. Am I not entitled
25 to look at all of those facts together and then ask 11:35
26 myself the question, what is actually going on here?
27 MR. O'HIGGINS: Well, I say, Chairman --
28 CHAIRMAN: In other words, are there too many
29 coincidences?

1 MR. O'HIGGINS: Well, again, the construction to put on
2 the evidence that you have heard, is, of course, a
3 matter for you, but, in my submission, a fair
4 construction supports the proposition that the Gardaí
5 who were involved with matters when the incorrect 11:35
6 notification came in from Tusla, namely Superintendent
7 McGinn, Chief Superintendent Jim Sheridan, Assistant
8 Commissioner Kenny, ultimately when one -- when the
9 matter shakes out, when the Mullingar meeting takes
10 place, and even before that in the context of the clear 11:36
11 input from Jim Sheridan, it is clear that the overall
12 position of An Garda Síochána is, they come to a
13 realisation, this is -- this is reheated old dinner;
14 this is 2007 -- 2006/2007 allegation. There has been a
15 mistake here, this should not go further. And Chief 11:36
16 Superintendent Sheridan goes to the practical step of
17 scratching on the incorrect notification that there is
18 an error and puts that on the file. And I say all of
19 these actions -- I take your point concerning there
20 could have been further liaison with the HSE, and Jim 11:36
21 Sheridan acknowledges that, that he did not do this,
22 but he formed the opinion that, after the meeting, that
23 from a Garda perspective, it required -- no further
24 action was required at all. So no further input or
25 steps were needed from An Garda Síochána. And 11:37
26 ultimately, and I say that the evidence supports this
27 when viewed in its totality, the Garda position was,
28 this is -- this has come in by mistake, this is the
29 stuff from 2006/2007, no further step be taken. Now, I

1 do acknowledge that, if you like, the outcome from the
2 Mullingar brainstorming was that certain steps be
3 taken, and they weren't taken, and perhaps there was a
4 degree of dis organisation in that, but again, the
5 evidence from the witnesses concerned was to the effect 11:37
6 that ultimately the view was taken that it wasn't
7 necessary to take any further steps, and Jim Sheridan
8 had already corrected things with Rian and the HSE,
9 and, in our submission, was undoubtedly entitled to
10 believe that they had corrected their records, and, 11:37
11 quite properly, the HSE witnesses have acknowledged
12 that where they did -- and /Tusla, I am using that
13 umbrella term -- where errors had occurred, each HSE or
14 Tusla official acknowledged the error was theirs, and
15 there was no input from An Garda Síochána or no wider 11:38
16 influence involved in the making of that error. And we
17 say, to borrow from the title of the book, this was a
18 series of most unfortunate events. That is a matter
19 for you to assess in terms of the HSE role in matters,
20 but these were not Garda errors, and they took steps, 11:38
21 reasonable steps, to correct it, and ultimately decided
22 not to give the matter further oxygen and closed it
23 down, and we say that was a reasonable position to
24 adopt, and is again the antithesis of any suggestion of
25 a conspiracy or a wider plan to discredit Sergeant 11:38
26 McCabe.

27 CHAIRMAN: In that context, again arising out of that
28 concern, and it is simply a concern, it should be taken
29 only as a concern, the non-correction by Assistant

1 Commissioner Kenny of a rape allegation sent about
2 Sergeant McCabe to Headquarters and him saying that a
3 person who is a sergeant and who is acting effectively
4 in a secretarial role, and there is nothing wrong with
5 that, had the responsibility of correcting it, is there 11:39
6 an inference to be drawn from that in the event that I
7 find facts a particular way, as to what attitudes may
8 have been in Garda Headquarters towards Sergeant
9 McCabe?

10 MR. O'HIGGINS: I say not, respectfully, Chairman. We 11:39
11 acknowledge that was an error, undoubtedly. And it's
12 no part of my submission, and I think this appears from
13 the written note, to suggest the error was that of his
14 assistant in the office, Ms. Duffy. Ultimately, it
15 ought to have been sent up. But again, we say, having 11:40
16 regard to an overall appraisal of Assistant
17 Commissioner Kenny's position, he took the reasonable
18 step of organising the Mullingar meeting, and perhaps,
19 perhaps a fair construction would be that, when the
20 meeting eventually happened, events had been overtaken 11:40
21 by the corrections that had finally been made on the
22 file and by dint of the appropriate communication that
23 took place between An Garda Síochána and Tusla/HSE.
24 And we say that even if there was a slip on the part of
25 the assistant commissioner in not sending that up, 11:40
26 there is no evidence that that formed part of any
27 conspiracy or any attempt to keep the matter
28 percolating with a view to damaging Sergeant McCabe, as
29 was canvassed as a possibility in evidence.

1 CHAIRMAN: Thank you. Could I move on then to the
2 actual reading of the allegation in Garda Headquarters
3 by Commissioner Nóirín O'Sullivan.

4 MR. O'HIGGINS: Yes.

5 CHAIRMAN: Superintendent Walsh, his evidence was that 11:41
6 she read through it making absolutely no reaction and
7 making absolutely no comment. The evidence of
8 Commissioner Nóirín O'Sullivan is that she never
9 remembered reading the rape allegation. Now, I'm not
10 asking people making submissions to put themselves in 11:41
11 the place of anybody, but I am simply making reference
12 to how a reasonable person would react or could be
13 expected to react to something. The allegation as sent
14 up by Assistant Commissioner Kenny is horrible, it
15 concerns a person in the public eye, and yet I'm told, 11:42
16 on the one hand, that the Commissioner simply read
17 through it making absolutely no comment and not in any
18 way reacting to it, and secondly, I am expected to
19 accept that she has absolutely no recollection of
20 reading it. Do you want to make any submission about 11:42
21 that?

22 MR. O'HIGGINS: We have endeavoured to treat of that,
23 Chairman, in the written note at paragraphs 84 and 85.
24 I will simply say, Chairman, that it's not, of course,
25 binding on you in any sense, but I think it is of 11:42
26 relevance that when former Commissioner O'Sullivan, and
27 obviously she gave her evidence in the module just
28 completed, as to her role in matters in the (d) module,
29 she gave evidence that she had no memory of reading the

1 Tusla notification with the false rape allegation that
2 had been sent to Garda Headquarters by Assistant
3 Commissioner Kenny. I think the evidence displays
4 clearly that she certainly took no action on foot of
5 it. It also displays -- well, her evidence was that at 11:43
6 no stage did she share any such information with the
7 Department of Justice, which again is a further
8 indicator that -- supporting her position that she did
9 not recollect it. And I think actually, Chairman, on
10 the transcript, I should note, in reviewing matters 11:43
11 last night, and these will be fresh perhaps in your own
12 mind, but when asked by you to comment on
13 Superintendent Walsh's evidence that she had read the
14 letter effectively without comment and had proceeded
15 on, she had offered the evidence that if a Tusla 11:43
16 referral comes to the Commissioner's office, it would
17 normally be dealt with by local Garda management. And
18 she offered the view that, in relation to this
19 correspondence, the relevance of the letter was not
20 evident to her when it was brought to her attention. 11:44
21 She doesn't for a moment disagree with the evidence of
22 Frank Walsh, Superintendent Walsh, that he did bring it
23 to her attention. She doesn't disagree with that. And
24 I think it is significant that when later
25 cross-examined on the point by Mr. McDowell, she -- it 11:44
26 was not suggested to her and she was not tackled on her
27 evidence that she had no memory of reading the document
28 which was brought in by Superintendent Walsh
29 effectively in the normal course of dealing with the

1 post. I take the point, Chairman, this wasn't -- this
2 wasn't a, as it were, bog standard letter that one
3 receives every day. But I think it is important to
4 point out that former Commissioner O'Sullivan didn't,
5 unlike others, for instance Jim Sheridan, didn't know 11:45
6 the content of the 2006 allegation, but was aware, I
7 think, of the DPP direction in a broad sense, and, of
8 course, was aware of there having been some class of
9 investigation but wasn't aware of the substance or
10 content of it, and that also may have played its part 11:45
11 in her perhaps non-reaction or modest reaction to
12 matters and her failure to recollect it when brought to
13 her attention. But I simply would ask you to take into
14 account that we are dealing with somebody who is in
15 charge of the force and all its aspects, has a lot of 11:45
16 correspondence to deal with, has a lot of duties in
17 terms of the security of the State, and this was done
18 as part of an appraisal of the post that day. It was
19 perhaps not trivial, I accept, trivial post, but
20 nonetheless, it didn't dawn on her as to its absolute 11:45
21 relevance to matters, and she, I say, wasn't
22 cross-examined on that to any significant context by
23 parties at the Tribunal.

24 CHAIRMAN: Right. Then the last matter is really in
25 relation to Chief Superintendent O'Reilly. Now, I know 11:46
26 what you have said about that, and what you have said
27 is helpful in the sense that we have one person saying
28 one thing, the other saying another, and then you have
29 Ms. D saying a report, indeed, of something entirely

1 different. But was it a good idea vis-á-vis bringing
2 the press into this thing? Is that how a
3 superintendent ought to behave? That is the question.
4 MR. O'HIGGINS: Well, I think --
5 CHAIRMAN: I mean, an officer rank member of An Garda 11:46
6 Síochána.
7 MR. O'HIGGINS: I think, Chairman, while you might
8 perhaps have understandable misgivings about that,
9 could I say this: a consideration of it can't be
10 divorced from the human relationships -- in fact, many 11:47
11 of these issues had their origins in local issues,
12 personal relationships and sometimes the breakdown of
13 personal relationships. But on this particular issue,
14 I think it is relevant to point out that Superintendent
15 O'Reilly was a friend of Mr. D for over 20 years and a 11:47
16 friend of Mrs. D for, it seems, approximately 30 years,
17 as they have been school friends, and he met regularly
18 with Mr. D, often for a drink and a chat. And the
19 evidence, and I don't think it has been challenged, was
20 that Mr. D called Paul Williams and arranged for him to 11:47
21 come to his house and meet with Ms. D, and
22 Superintendent O'Reilly, when asked, had provided Mr. D
23 with Mr. Williams' telephone number, and, if you like,
24 done that introduction. He had also spoken to Paul
25 Williams and inquired if he would take a call from 11:48
26 Mr. D. So undoubtedly he was the introducer. But I
27 say, Chairman, that insofar as the question of
28 putting -- - being critical, inquiring as to whether
29 that was a misstep or wrong step, even if, Chairman,

1 you take the view that it was a misstep, and ideally
2 the advice back might have been, listen, what are you
3 going to the press about, I think it's fair to point
4 out this was something which had its origins, or
5 appeared to have its origins, in a request coming from 11:48
6 Ms. D. In turn, her parents had asked for some help
7 and had gone to a guard with whom they were friendly,
8 in this case Superintendent O'Reilly. And perhaps in a
9 perfect world he might have stopped to think, is that a
10 great idea? And might have given the human advice, 11:48
11 perhaps it isn't a tremendous idea. But I say that,
12 whatever step he took in introducing them to
13 Mr. Williams, I say should be viewed in the context he
14 was asked to do that by the D family, on behalf of
15 their daughter, who at that time had -- was agitating a 11:49
16 certain position and intended to go to the press. And
17 it may be, Chairman, in terms of this issue as to
18 whether history would have been different, had he not
19 done that, there is every chance that a journalist
20 would have been contacted by some alternative means. 11:49
21 As it happened, he was that means, ultimately. But I
22 say that it would be difficult to draw the conclusion
23 that history would have been any different, because it
24 seems at this point in time Ms. D was intent on
25 agitating her position, and she wished to do so, and I 11:49
26 think the subsequent contact with politicians bears
27 that out. So perhaps ultimately, even if it was a
28 misstep by Superintendent D [sic], and perhaps, looking
29 back, he might prefer if he hadn't got involved from

1 his perspective, but, in any event, it doesn't appear
2 at any rate that that actually altered history one jot,
3 but we don't know.

4 CHAIRMAN: I appreciate the work you have put in, and
5 your colleagues, Mr. O'Higgins. Thank you. 11:50

6
7 FURTHER SUBMISSION BY MR. BUCKLEY

8
9 MR. BUCKLEY: Sorry, Chairman, just to supplement those
10 comments insofar as they relate to the journalistic 11:50
11 contact. I think the evidence on day 10 was also that
12 calls had been made by journalists to the house of the
13 D family before that contact was made.

14 CHAIRMAN: Yes, that is certainly the case, including a
15 lady who I think was expecting. 11:50

16 MR. BUCKLEY: Yes, I think who was identified as Debbie
17 McCann, the journalist.

18 CHAIRMAN: Again, I am not saying anything against her,
19 and, as appreciated, I don't want to drag her into
20 things, but you are correct in pointing that out. 11:51
21 Thanks. So I think it's the AGSI next.

22
23 SUBMISSION BY MR. DOCKERY

24
25 MR. DOCKERY: Yes, Chairman, very briefly. Sergeant 11:51
26 O'Connell submitted -- Inspector O'Connell, as he is
27 now, submitted three statements to the Tribunal, sir:
28 one on the 8th May 2017, which I might term an initial
29 statement; a more complete and comprehensive statement

1 on the 3rd July 2017; and a further very detailed
2 statement on the 15th July 2017. Inspector O'Connell
3 held sergeant rank at the time in what was an
4 administrative role as the divisional clerk to the
5 chief superintendent in the Cavan-Monaghan division. 11:51
6 He reported to that chief superintendent, who was Chief
7 Superintendent Sheridan. He was not a party to any
8 decisions made by senior Garda management with regard
9 to the original incorrect referral. He was not present
10 at the Mullingar meeting of the 16th July 2014. And he 11:52
11 had no direct contact at any time with Assistant
12 Commissioner Kenny with regard to the assistant
13 commissioner's view of the original incorrect material
14 or whether it should be returned or destroyed. He had
15 no direct contact with Garda Headquarters at any stage, 11:52
16 either. His only contact with anyone other than the
17 chief superintendent was with Fiona Ward of the HSE.
18 He had no direct contact with anybody from Tusla or
19 from Rian Counselling. And his contact with Fiona
20 Ward, sir, arose purely and simply from her letter of 11:52
21 the 22nd May 2014 to the Chief Superintendent, in
22 essence calling for a return of all copies of the
23 incorrect report. And Inspector O'Connell's only
24 involvement after that was merely to type the Chief
25 Superintendent's reply as dictated and sent to Fiona 11:53
26 Ward on the 9th June 2014, seeking clarification as to
27 (a) how the error occurred, and (b) how it came to
28 light. And you will recall, sir, that her response to
29 that query was on the 18th June 2014. And on one

1 reading, it was partially incomplete, or somewhat
2 incomplete, in that it addressed the question posed as
3 to how the error had come to light, but was entirely
4 silent on the question of how the error had occurred in
5 the first place. And arising from that, the Chief 11:53
6 Superintendent asked Inspector O'Connell, or Sergeant
7 O'Connell as he was then, to contact Fiona Ward
8 directly, which he did on the 30th June. She says, I
9 think, the 24th June. And arising from that telephone
10 conversation, or discussion, sir, Ms. Ward corresponded 11:54
11 again with the chief superintendent on the 1st July
12 2014 and clarified that question of how the error
13 occurred, as she understood it, and again, repeated her
14 request for a return of the original report. Now, then
15 on the 21st July 2014, Inspector O'Connell emailed 11:54
16 Fiona Ward at the request of the chief superintendent,
17 and this was ostensibly to ascertain, at the behest of
18 the chief superintendent, further details concerning,
19 or any details concerning how the HSE proposed at that
20 juncture to address the error. And arising from that 11:54
21 email of the 21st July, Ms. Ward telephoned Inspector
22 O'Connell the same day and they had a discussion, and
23 Inspector O'Connell has accepted the reliability of
24 Fiona Ward's notes of that telephone conversation. And
25 according to Ms. Ward, further action, if needed, lay 11:55
26 within the remit of the Social Work Department and the
27 HSE would not be involved in that, and she said she'd
28 contact -- she would obtain contact details for the
29 Social Work Department and pass them on to Inspector

1 O'Connell. She did so then on the 28th July. And the
2 inspector fully admits and accepts that he has no
3 recollection of ever receiving that email. He cannot
4 explain how that is so or why he was unable -- or did
5 not get it. He has carried out extensive searches and 11:55
6 trawls to try and establish where it went or where it
7 might have gone. Now, when he and Fiona Ward had that
8 telephone conversation on 21st July 2014, it was
9 Inspector O'Connell's last day in the Cavan-Monaghan
10 division and it seems likely that this would have been 11:56
11 mentioned to Fiona Ward in passing. The telephone
12 conversation was received by Inspector O'Connell while
13 he attended a lunch to mark his departure.

14
15 Insofar as anything turns on it, Chairman, one could 11:56
16 make the case that, perhaps that Fiona Ward was already
17 well aware of the contact details she required in
18 Tusla. The contact point in Tusla at all times to that
19 stage was Ms. Eileen Argue, and, on one reading,
20 perhaps that information was readily to hand, readily 11:56
21 to hand so far as Fiona Ward was concerned and it was
22 information she was already well familiar with and
23 could perhaps have given to Inspector O'Connell there
24 and then on the telephone. But in any event, it was
25 followed up a week later, but at that stage Inspector 11:57
26 O'Connell had left and he was acting divisional officer
27 in Listowel at that stage, one week later, and it's
28 regrettable that email was not received. He has no
29 recollection of ever reading it. In my submission,

1 Inspector O'Connell was a very assiduous officer, and
2 it's a matter of great disappointment to him that he
3 cannot account for that email. But I think the tenor
4 and character of his evidence and the way he approached
5 all matters indicates that he was a conscientious, 11:57
6 upright and reliable officer who carried out his duties
7 to the best of his ability and to the satisfaction,
8 apparent satisfaction of his superiors.

9
10 The only other thing I want to add, Chairman, is that 11:58
11 one step Inspector O'Connell did take was to follow up
12 on a request from the divisional office at Monaghan to
13 the assistant commissioner's office at Sligo for a
14 return of the erroneous Tusla referral. A Garda
15 Patricia Maguire had, in the divisional office, had 11:58
16 sent an email to the assistant commissioner's office in
17 Sligo, attaching Fiona Ward's letter of 22nd May 2014,
18 calling for a return of the material, and Inspector
19 O'Connell followed up on that, he believes on the 5th
20 June 2014, and he did so with Sergeant Karen Duffy in 11:58
21 Assistant Commissioner Kenny's office in Sligo. And to
22 that extent, he was clearly trying to give effect to
23 the divisional office's intention to carry out or to
24 act on Fiona Ward's request to return the material.
25 But Assistant Commissioner Kenny took a different view. 11:59
26 Mr. O'Higgins has alluded to it. Assistant
27 Commissioner Kenny gave reasons for that; he sent a
28 letter on the 10th June 2014 to that effect. And it
29 was followed by the Mullingar meeting. And as I say,

1 Inspector O'Connell was not present at that.

2

3 So I will just conclude by saying that, in the round,
4 despite the unsatisfactory fact that he cannot account
5 for the email of the 28th July 2014, I submit that 11:59
6 Inspector O'Connell was well-disposed towards Sergeant
7 McCabe, gave evidence that he didn't believe the
8 contents of the original allegation, he didn't believe
9 that Chief Superintendent Sheridan accepted it either.
10 He was well-disposed towards Sergeant McCabe, and was 11:59
11 not involved in any conspiracy or any effort, subtle or
12 express, to frustrate Sergeant McCabe or to damage his
13 reputation, sir. That is my submission.

14 CHAIRMAN: Thank you very much, Mr. Dockery.

15 Mr. McDowell, maybe the right thing to do is to break 12:00
16 for an hour now because we have been on the go since
17 half past nine.

18 MR. MCDOWELL: That is a good idea.

19 MR. CUSH: Chairman, one point, if I could mention a
20 matter? 12:00

21 CHAIRMAN: Yes, please do.

22 MR. CUSH: This morning, Mr. McDowell very fairly
23 indicated to me that, in one particular respect, his
24 submissions would be critical of my client, and that
25 relates to the non-compliance with the National 12:00
26 Counselling Guidelines introduced in December 2012, and
27 I do have something to say about that. I haven't said
28 it so far, and I can say it relatively quickly.

29 CHAIRMAN: Do say it now if you like, yes.

1 MR. CUSH: Thank you, Chairman.

2 CHAIRMAN: I must say, there has been so many sets of
3 guidelines and there is so many references to so many
4 sections of them, I'm -- well, the head swims, and
5 maybe you'd try and lead me to shore on that, please. 12:01

6 MR. CUSH: I will certainly try and do that, Chairman.

7

8 FURTHER SUBMISSION BY MR. CUSH

9

10 MR. CUSH: These guidelines were introduced in December 12:01
11 2012, so shortly before the events with which you are
12 concerned. They are National Counselling Service

13 guidelines. Now, the National Counselling Service is
14 run by Rian out of the HSE, so they are my clients'
15 guidelines, if you like. And what they envisage, and 12:01

16 this I think was the relevant of part of the
17 proposition, is, they envisage communications - in
18 fact, regular meetings, monthly or bimonthly, between

19 the National Counselling Service and the Social Work
20 Department, and that is Tusla. So that was the -- that 12:01
21 is what is envisaged by the guidelines. And in this

22 particular case -- or, sorry, in or about this time, no
23 such regular meetings were being held, and that became
24 a feature of something in the case. So could I just

25 make four points, if I may, about that, Chairman. 12:02
26

27 Firstly, the whole point of these regular meetings as
28 envisaged by the guidelines is to ensure communication
29 between the counselling service and the social work

1 Department, but in this case there was communication
2 because Laura Brophy telephoned the Social work
3 Department on four occasions and on the fourth occasion
4 finally got to speak to Briega Tinnelly. And I will
5 just give you the book reference where you see the 12:02
6 diary entries for those four telephone calls. It's on
7 page 963 of the book, you will see that she telephoned
8 on the 26th July, the 30th July, the 8th August, and
9 finally made contact with Briega Tinnelly on the 9th
10 August 12:02

11 CHAIRMAN: But she was saying what exactly, Mr. Cush?

12 MR. CUSH: She was discussing with Briega Tinnelly what
13 had been reported to her, and crucially, and this is
14 borne out by the intake form to which I referred
15 earlier, she was inquiring was this child/family known 12:03
16 to the Social work Department before. Because the
17 evidence was, if previously known, if this was
18 previously known, then there is no need to do a written
19 report, whereas if it's not previously known, she'd
20 have to follow up with a written report. And that is 12:03
21 the intake form. It's signed off by Briega Tinnelly
22 and her supervisor, Keara McGlone. So there was, in
23 fact, communication, and unfortunately there was an
24 error in it. So that is the first point I would like
25 to make. The underlying purpose of the guidelines was, 12:03
26 in fact, met in a different way here.

27
28 Secondly, Chairman, and I will say this with a caveat I
29 will identify in just a moment, if there had been a

1 meeting, a monthly or bimonthly meeting, the assumption
2 seems to have been that the error would have been
3 discovered earlier than it was discovered. And the
4 caveat, I must identify this, is that Ms. Fiona Ward
5 appeared to accept that in evidence as a probability. 12:03

6 CHAIRMAN: Yes.

7 MR. CUSH: But could I just identify something for you,
8 and it's a submission that has to be seen in the light
9 of that evidence: what the guidelines envisage is
10 meetings of this bimonthly type in respect of cases 12:04
11 where there is a lack of clarity as to what course of
12 action should be recorded. Now, the guidelines say
13 that in two different places, and again I will give you
14 a page reference on the book, they are both on page
15 807. So it's not certain to me, making a submission at 12:04
16 least, that this is one such case, in the light of the
17 communication that had already been had, and, in
18 fairness to my client, Ms. Ward, who said what she
19 said, she did also identify that communication as
20 having taken place. 12:04

21
22 The second thing, just on that aspect of matters, is to
23 say that the personnel envisaged in these meetings is
24 either the director of counselling or a team rep on the
25 counselling side and then a representative of the 12:04
26 social work side. So it's by no means certain that the
27 particular person who attended the meeting on behalf of
28 the counselling side would have picked up the error had
29 the case been discussed at all. So not certain that it

1 would have resulted in earlier discovery, that is the
2 second point I want to suggest.

3
4 The third point, Chairman, is, would earlier discovery
5 have made a difference in this case? And I suppose I 12:05
6 would point simply to the fact that a great deal of
7 what you are concerned about in this Tribunal concerns
8 what happened after the discovery of the error in this
9 case.

10 CHAIRMAN: Yes, it is, yes. 12:05

11 MR. CUSH: And that, I suggest, speaks for itself. And
12 then lastly, the fourth point, in terms of the reasons
13 for non-implementation of the regular bimonthly
14 meeting, Ms. Ward did say something about that; she
15 did, we did meet internally on the clinical side, the 12:05
16 counselling side as she put it, but the difficulty was
17 organising the other half of the meetings. I am very
18 grateful to you for that opportunity.

19 CHAIRMAN: Right. So it's what? Ten past one we
20 resume, if that is suitable. 12:06

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THE HEARING ADJOURNED FOR LUNCH

1 THE HEARING RESUMED, AS FOLLOWS, AFTER LUNCH:

2
3 SUBMISSION BY MR. MCDOWELL

4
5 MR. MCDOWELL: Good afternoon, Chairman. The 13:13
6 submissions that I want to make on behalf of Sergeant
7 McCabe fall into four broad categories. Firstly,
8 there's the circumstances in which Laura Brophy of Rian
9 came to initiate reengagement with Tusla arising from
10 two sessions that she had in July and August of 2013. 13:13
11 And secondly, the handling by Tusla of the notification
12 that it received from Ms. Brophy and the Rian service.
13 The third area is the manner in which An Garda Síochána
14 dealt with the notification of allegations of rape
15 offences in relation to Sergeant McCabe by Tusla. And 13:14
16 the last category deals with the actions of the Ds, D
17 family, Paul Williams, and some general observations on
18 the effect on Sergeant McCabe and his family of the
19 matters referred to at 1 to 3.

20 13:14
21 Now, the Tribunal heard evidence from Ms. Laura Brophy
22 and from Ms. Fiona Ward on the 4th, 5th and 6th July
23 2017. And I suppose I can cut to the chase, Judge, and
24 say this: that Sergeant McCabe accepts that the
25 evidence establishes that the inclusion of the Ms. Y 13:15
26 material on the written notification, as distinct from
27 the verbal notification, made by Ms. Brophy, was some
28 form of cut-and-paste error by Ms. Brophy, and he also
29 accepts that that error, which he believes was a very

1 grave and negligent error, was not the result of any
2 deliberate action or malice or ill-will or deliberation
3 of any kind on the part of Ms. Brophy. And to add to
4 the, I think, six reasons mentioned by Mr. Cush, there
5 is, of course, the most persuasive reason of all: that 13:15
6 if there was any such intention, Ms. Y's name would not
7 have been used in the written notification.

8
9 But having said all of that, Judge, I do make this
10 submission: that this is an error which, nonetheless, 13:16
11 however unintentional, was one which should never have
12 occurred. And if, as appears to be the case, one
13 highly sensitive file was used as a template for
14 another highly sensitive file, this was the kind of
15 error that could occur if you start using templates, 13:16
16 one file as a template for another, in whatever shape
17 or form. And I know that Ms. Brophy wasn't clear that
18 she had used one as a template for another, but she
19 wasn't really clear about how the cut-and-paste error
20 took place at all. But it is our submission that the 13:16
21 written document should have been carefully checked
22 before it was sent, and it's also our submission that
23 it should have been at some stage, at some proximate
24 stage, either before it was sent or immediately after
25 it was sent, the subject of a careful check by Ms. 13:17
26 Brophy's supervisor, Fiona Ward, and that failure to do
27 that has had very significant consequences for the
28 McCabe family, as the Tribunal will see.

1 So therefore, what I am saying in relation to that is
2 that, undoubtedly, Ms. Brophy presented, and not merely
3 presented but appeared to be in every respect a decent,
4 honest, honourable witness who was contrite for what
5 happened, and that is accepted. But nonetheless, the 13:17
6 error, such as it was, that was made, shouldn't have
7 been made, should have been checked upon, should have
8 been the subject of some kind of review proximate to
9 the time that it was made, and, if any of those things
10 had happened, the sequence of events that followed from 13:18
11 it would not have happened.

12
13 Now, the next thing I want to say, and this was what
14 Mr. Cush was referring to just before lunch, is this:
15 that Ms. Ward gave evidence to the Tribunal about the 13:18
16 guidelines that had come into effect in December, I
17 think late December or early January of 2012/2013. And
18 if those guidelines had been followed, if there had
19 been adherence to those guidelines, including
20 face-to-face meetings between Rian and the Tusla 13:19
21 service, even if, as Mr. Cush says, they wouldn't
22 always consist of the same people or people who would
23 have firsthand knowledge of everything that was
24 described at those meetings, again it is quite likely
25 that the files would have been brought out on the table 13:19
26 and the error would have been noticed some time
27 proximate to its occurrence. And it is striking that
28 these were new guidelines and the evidence was that
29 they were already falling into desuetude by July/August

1 of the year in which they were in effect adopted.
2 So I hope it's not seen as churlish in any way to say
3 that while one accepts that Ms. Brophy was being
4 truthful and that the error was hers and she accepts
5 responsibility and has apologised for it, nonetheless 13:20
6 for an arm of the HSE to make such an error and not to
7 have systems which pick up on such an error, is a
8 matter of deep concern obviously to Sergeant McCabe.
9

10 Now, there's one thing I want to say strongly in favour 13:20
11 of Rian, and that's this: that when the error came to
12 light, Ms. Brophy was required to complete an incident
13 report outlining what had happened. And when I come on
14 to the next section of my submissions, that is in stark
15 contrast to what happened in Tusla. None of the staff, 13:20
16 the Tribunal will be aware, who individually or jointly
17 were responsible for the preparation of the Garda
18 notification which purported to record that Ms. D had
19 alleged that Sergeant McCabe had raped her, was asked
20 at any proximate time or required by their superiors to 13:21
21 create any form of incident report or written
22 explanation for their behaviour and for the extreme
23 carelessness which happened on their watch and in their
24 organisation. And that's not just an observation,
25 Judge. Because I'm going to ask the Tribunal to ask 13:21
26 itself why did that not take place? why did nobody in
27 Tusla inquire of the people involved in the generation
28 of the notification document that went in in May -- of
29 the 30th April and went in in May 2014, why were none

1 of them at the time asked for any explanation as to
2 what they had done? It's not simply just a query for
3 its own sake; I'm going to ask the Tribunal to draw
4 some inferences from it, which I will come to in a
5 moment.

13:22

6
7 The Tribunal has heard evidence, the overwhelming
8 consensus of which is -- on the part of witnesses, is
9 that there was absolutely no need to engage in a Garda
10 notification arising from the Rian retrospective
11 notification if Tusla had been aware that the matter
12 had been notified to the Gardaí in 2007 and
13 investigated by them, and that indeed Inspector
14 Cunningham, as he then was, had interacted extensively
15 with the child protection services in the course of his
16 investigation, and that there was complete awareness on
17 the part of the child protection services and social
18 workers at that time of the Ms. D allegations.

13:22

13:23

19
20 I stop there just to say, Judge, that this Garda
21 notification was something which was absolutely
22 unnecessary and should have been known to be
23 unnecessary if any elementary analysis of the situation
24 had taken place within Tusla. Because Ms. McGlone, on
25 the Monday following the receipt of the oral
26 notification, drafts a letter to Superintendent
27 Cunningham clearly indicating that Ms. McGlone knew of
28 a prior Garda investigation into this matter and wanted
29 to speak to Superintendent Cunningham about it. And

13:23

13:23

1 yet, a number of days earlier, Ms. Tinnelly, in a
2 telephone interview with Ms. Laura Brophy, had
3 indicated that there was no file in relation to this
4 matter. And the Tribunal has been given evidence that
5 while this information came in orally on Friday, it was 13:24
6 considered at a routine meeting on a Monday and the
7 written notification may not have come to hand
8 containing the Ms. Y error until later in that day, and
9 that, in consequence, somebody ticked a box saying
10 "Garda notify", or something to that effect, and a 13:25
11 process kicked off then which was almost automatic,
12 automatic pilot, leading to the events of the 30th
13 April. That is the picture that is effectively being
14 proffered to the Tribunal for acceptance. And I
15 imagine that the Tribunal will have no difficulty in 13:25
16 coming to the view that many very, very serious errors
17 were made in Tusla and many inexplicable steps were
18 taken, and, in that context, that Tusla will come in
19 for some criticism, which Mr. McDermott has said they
20 will accept if it is coming their way. But I would ask 13:26
21 this Tribunal not to simply say that things were so
22 awfully bad and things were so chaotic and the
23 administration was so poor in Tusla that this was a
24 kind of an error which is as innocent as is made out,
25 and the reason that I am saying that is the following: 13:26
26
27 while there's massive evidence of a gross systems
28 failure on the part of Tusla in the manner in which it
29 dealt with the Rian notification, sloppiness,

1 procrastination, whatever you want to call it, and
2 while much of what happened seems to paint a kind of
3 chaotic and totally unacceptable standard of
4 professional behaviour, I submit that the Tribunal
5 should not merely be sceptical about some of that 13:26
6 evidence, but reject some of it as untrue as given by
7 certain witnesses, whom I propose to identify to the
8 Tribunal. And I say that there is a danger that the
9 Tribunal might justly condemn Tusla for the slipshod
10 and chaotic administration that they have and not 13:27
11 analyse the evidence of a number of key witnesses, and
12 they include Laura Connolly, they include Gerard Lowry
13 and, most especially, Ms. Argue, Eileen Argue.

14
15 Chairman, the picture that is painted for you by all of 13:27
16 the, if I may say, the group of people who first dealt
17 with the Rian referral, is that they had a Measure the
18 Pressure system, which somehow was supposed to
19 prioritise which files were taken and when they were
20 dealt with. But I don't think that I need push very 13:28
21 far with the argument that the Measure the Pressure
22 system seemed not to be a system at all; it seemed to
23 have virtually no measurement attached to it at all,
24 except in distinguishing between retrospective cases
25 and live emergency cases on the day, so to speak. And 13:28
26 that when the Tribunal is asked to explain how the
27 Measure the Pressure system routinely operated, you're
28 invited to accept the proposition that files which
29 weren't going to be dealt with as a matter of extreme

1 urgency, were filed together in no particular order in
2 a filing cabinet, that when a duty social worker had
3 nothing more immediate to do, that some form of
4 lottery, hand into the cabinet,
5 take-out-a-file-to-work-on system operated, and that 13:29
6 that was how the work of Tusla was prioritised and
7 organised.

8
9 Now, that is a very convenient explanation for what
10 happened on the 30th April, because it would suggest 13:29
11 that, although there was a confluence of events
12 nationally in relation to Sergeant McCabe, that his
13 file was, so to speak, the lucky or unlucky winner of a
14 random lottery on the 30th April, and that
15 Ms. Connolly, not knowing what file she was dealing 13:30
16 with, just randomly selected his file and decided to
17 work on it on that day, that's the picture you're being
18 asked to accept. And the problem with that picture is
19 that there are two pieces of physical evidence which
20 strongly suggest that that is not so, and I refer in 13:30
21 particular to the presence on her draft Garda
22 notification document of a Post-It file written in
23 the -- sorry, a Post-It sticker, written in the
24 handwriting of Eileen Argue, apparently directing
25 somebody to prepare a Garda notification and replace a 13:31
26 file/the file in a cabinet. Now, there are two
27 possible explanations for the presence of that Post-It
28 on that particular draft prepared by Ms. Connolly. One
29 is, and I hope you won't mind me repeating myself, that

1 it fluttered in from another file accidentally and just
2 appeared on a page to which it appears to have been
3 highly relevant, or the other, and this was the subject
4 of extensive cross-examination, that it was a direction
5 from Ms. Argue to somebody to work on that file, 13:31
6 prepare a notification and to replace the file in the
7 cabinet. Of course, if it were the latter, it would
8 mean that Sergeant McCabe's file had been taken out,
9 read, in part at least, by Ms. Brophy -- or, sorry, by
10 Ms. Argue, a decision made that a Garda notification 13:32
11 was to be carried out on it, and that it was thereafter
12 to be replaced in the filing cabinet. And as to the
13 date of that yellow Post-It, Ms. Connolly, in
14 cross-examination, admitted, and I think Ms. Argue
15 accepted as well, that it could not have been 13:32
16 contemporaneous with the original intake of the Rian
17 referral, because Ms. Argue was not in a position at
18 that stage, her position -- she was not the senior
19 social worker who would have given such an instruction
20 at that time. I think you'll find that in the 13:33
21 cross-examination, Judge.

22
23 Now, if the accidental fluttering-in theory is
24 discounted, Judge, it suggests that Ms. Argue, as I
25 said, had possession of the file at some time 13:33
26 immediately proximate to the 30th April and directed
27 that work was to be done on it and it was to be
28 replaced in the cabinet. And if that is accepted, if
29 the Tribunal accepts that that Post-It is not just a

1 major coincidence appearing on that page, it suggests
2 that the evidence given by Ms. Connolly as to selecting
3 it randomly from a filing cabinet is not to be accepted
4 and must be rejected. And if that evidence is to be
5 rejected, there are certain consequences which flow, 13:34
6 and I will come back to them in a moment.

7
8 But on the file, too, was a document which was a note
9 in Ms. Connolly's handwriting of an interaction which 13:34
10 she must have had on the 30th April with Ms. Argue, and
11 this was the manuscript note going to two pages, headed
12 "McCabe children". And in that note, she records that
13 she has elicited that there are four children, not two,
14 that two are adults and two are minors. And that
15 having discovered that information, she sought 13:35
16 directions from Ms. Argue as to whether all four
17 children were to be the subject of an entry intake, a
18 separate entry intake for each of them in the records
19 of Tulsa.

20 13:35
21 And in order, and I'll be brief on this, Chairman, in
22 order for Ms. Connolly to become aware that there were
23 four McCabe children, it required her to take out the
24 file in which Mr. D's statement, which was the only
25 evidence of the existence of four children, was 13:36
26 present, to be carefully read to that point. And the
27 question that you have to ask is, in those
28 circumstances, I submit, is: how come Ms. Connolly was
29 reading, not merely one file but two files to elicit

1 that information? If we discount the random taking out
2 of the filing cabinet idea, we have at this stage two
3 files in the possession of Ms. Connolly, and she gave
4 evidence that, having written out that request for a
5 direction from Ms. Argue, she placed it in a tray, it 13:37
6 was taken off to Ms. Argue, she must have had a
7 conversation with Ms. Argue about it, and she was told
8 that she was to open a file or an entry
9 documentation -- intake documentation, whatever the
10 phrase is, in respect of all four children. 13:37

11
12 Now, Chairman, those interactions are very notable from
13 one point of view: that Ms. Connolly did not seem to
14 be aware of it when she made a statement to the
15 Tribunal, and Ms. Argue seemed to be wholly unaware of 13:38
16 it when she made a statement to the Tribunal, and both
17 of them gave as an explanation that they had forgotten
18 about the matter. But in the case of Ms. Argue, if she
19 had indeed, as is evidenced by her Post-It document,
20 requested Ms. Connolly to deal with files which were 13:38
21 already out of the filing cabinet, on or about the 30th
22 April, and if she had indeed directed that intake
23 documentation in respect of the four McCabe children
24 should be prepared on that day, and directed
25 Ms. Connolly to do it, she could not possibly have 13:39
26 forgotten that when, within two weeks, or I think 14 or
27 15 days, she is told that the notification prepared by
28 Ms. Connolly was grossly wrong and was accusing
29 Sergeant McCabe, in the wrong, of a rape offence.

1 whatever about the passage of time from those events to
2 when she made a statement to the Tribunal, she could
3 not have possibly forgotten, I submit to this Tribunal
4 now, at the time, that she had had this interaction
5 with the McCabe file just two weeks earlier, and nor 13:39
6 could she have forgotten that the person who appeared
7 to have prepared that document was Ms. Connolly, and
8 yet you're asked to believe, Chairman, that nobody ever
9 informed Ms. Connolly that she had made this colossal
10 error, not merely at the time when it came to light in 13:40
11 Tusla and Mr. Lowry and Mr. Deeney and Ms. Argue were
12 analysing what to do, not merely when Mr. Lowry was
13 dealing with the file in 2014, 2015 and 2016, and it
14 was being sent off to SART, but that Ms. Connolly was
15 kept in the dark that she was the perpetrator of this 13:41
16 mistake, until, I think, the 27th June of 2017, when,
17 for the first time, she says she became aware that she
18 was the person who had written out the rape offence
19 notification.

20
21 Now, Chairman, that is astonishing, and that is why I 13:41
22 contrast it with what happened to Ms. Brophy; at least
23 she was asked to make out an incident report. But in
24 this case, it would appear that Ms. Connolly was never
25 ever apprised of the fact that she personally had made 13:41
26 a huge error because she had not merely -- she'd not
27 merely taken the written notification from Rian, she
28 had ignored the fact that it referred to Ms. Y in two
29 parts and she had inserted into it the text, her

1 narrative text, the reference to six and seven years of
2 age, and had produced this conflated document naming
3 Ms. D as the victim and Sergeant McCabe as the
4 perpetrator.

5
6 Now, I stop there and just ask: what organisation
7 would not ask the person who made that mistake for some
8 account of it, or, even if it was the most
9 non-judgmental organisation, mention to that person, by
10 the way, you seem to have made a terrible mistake a
11 fortnight ago which has now come to light and which has
12 caused some, I use the phrase crisis, and you asked me
13 was there a crisis when I used it in examining some
14 witness, but a mini crisis, if I may use that phrase,
15 about the wrong notification to Bailieboro Garda
16 Station in May of 2014? what organisation would keep
17 the person who did that in the dark and why would they
18 do it? And if I can leave that question hanging for a
19 moment, Judge, and then ask you to deal with another
20 issue, and that is this: that Mr. Lowry claims that
21 he, and he's the only person who volunteered this, that
22 he was aware that the Sergeant McCabe who was the
23 subject of national publicity was also the subject of a
24 referral to his organisation. He says that he was
25 aware of that. And when asked how he became aware that
26 there was a referral and that he linked the two
27 together, he claimed that he believed he had spoken to
28 a Ms. Louise Carolan and that she had informed him of
29 these matters and that he knew it was a re-referral,

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13:44

1 according to his evidence. Now, he said, and you will
2 find it at day 5, page 129, he says that he gave a
3 direction in these circumstances to whoever informed
4 him of this matter, deal with that case in the normal
5 way. And again, Judge, that must have happened before 13:44
6 the 30th April, because he certainly didn't say after
7 the 30th April, deal with that case in the ordinary
8 way, once the mistake became apparent. Now, if he's to
9 be believed about that, it suggests that he certainly,
10 and whoever he gave that direction to, which we're left 13:45
11 in the complete dark about, because Ms. Carolan
12 emphatically rejected that she was given any such
13 direction or that she had any such knowledge, that he
14 was aware of that, but that he told somebody to deal
15 with this case in the ordinary way. 13:45

16
17 And the other leg in this factual situation is
18 Ms. Argue, because she gave evidence, Judge, that she
19 had understood that there was a correlation, as she put
20 it, between Sergeant McCabe, the national figure and 13:46
21 the subject of the Rian referral. And so you have two
22 people, Ms. Argue and Mr. Lowry, who both -- and if you
23 look at Ms. Argue's evidence, she seems to suggest
24 that -- in her testimony, as to her awareness of this
25 correlation, that she might have mentioned it to 13:46
26 Ms. Connolly as well. But again, Ms. Connolly says
27 that was absolutely not so. But it does appear that
28 there were at least two people in Tulsa who knew that
29 there had been a referral relating to Sergeant McCabe

1 and knew that this was the sergeant who was high
2 profile. And it does appear, if, Judge, the Tribunal
3 is so minded to accept, that the yellow Post-It
4 direction was in the handwriting of Ms. Argue, that it
5 was on or about 30th April that it was given and that 13:47
6 Ms. Connolly set about preparing the Garda notification
7 and the intake documentation that day.

8
9 So two things, in my submission, follow from that. We
10 have an almost invincible amnesia on the part of 13:47
11 Ms. Connolly, who claims to have known nothing, seen no
12 significance, been totally unaware of Sergeant McCabe,
13 on the one hand. We have a very similar situation in
14 relation to Ms. Argue. She actually claimed that when
15 she prepared her statement for the Tribunal and went 13:47
16 through the file to refresh her memory, she didn't
17 notice the reference in handwriting to herself or her
18 own direction to Ms. Connolly to take in all four
19 children. You have that evidence. If it the Tribunal
20 accepts that this was not a coincidence, that what 13:48
21 happened on the 30th April was not a random selection
22 from a filing cabinet but a direction to Ms. Connolly
23 to deal with it, a number of clear implications follow
24 from that: that the random selection evidence as given
25 to the Tribunal is wrong and should be rejected, and 13:48
26 that Ms. Argue was the person who directed Ms. Connolly
27 to carry out this operation, and that, if you add into
28 that, that Ms. Argue was aware that the national -- to
29 use her phrase, that there was a correlation between

1 the Sergeant McCabe in the headlines and the Sergeant
2 McCabe in the referral, the random explanation simply
3 falls apart.

4
5 And I then go back to the point that I left hanging, if 13:49
6 I may, earlier, if I may say so, earlier, and that is:
7 why would Ms. Connolly not be contacted about this
8 matter within the following 14 to 20 days to ask her
9 what had gone wrong? And in my respectful submission,
10 the obvious person who should have done it was 13:49
11 Ms. Argue and Mr. Lowry. They didn't. They didn't
12 seem to want to know what had happened that day. And
13 as I will ask the Tribunal later to infer, they didn't
14 want to be reminded about the incident at all.

15 13:50
16 Now, under cross-examination, Ms. Argue did accept, and
17 this is of some importance, Judge, she said that while
18 she had no recollection of it and she accepted that it
19 was possible that somebody had mentioned the case to
20 her in or about 30th April. Of course, she was forced 13:50
21 to that position because she was claiming to have no
22 memory whatsoever, and, confronted with the fact that
23 she appeared to have directed Ms. Connolly to carry out
24 the Garda notification via the Post-It and that she'd
25 interacted with Ms. Connolly on the day by directing 13:51
26 the intake documentation for the four children,
27 confronted with that she couldn't then exclude and
28 categorically state that nobody had mentioned the
29 matter to her.

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Now, if, then, the Tribunal examines the reaction -- or, sorry, there's one other matter that I wanted to just mention to you, Chairman, and that was the use of the letters "M McC" in an email from Ms. Argue to Mr. Lowry when the mistake came to light, and I just ask the Tribunal to draw the inference from that that both Ms. Argue and Mr. Lowry knew that the letters "M McC" were sufficient for her to impart to him about whom they were talking in the circumstance.

13:51

13:52

So one is left with the situation that neither -- Mr. Lowry never asked for an explanation from Ms. Connolly as to what had happened, Ms. Argue didn't either, neither of them seemed to want to know what had gone wrong on the 30th April, how Ms. Connolly had further developed the error in the original Rian notification from Ms. Brophy and developed it into a fully-blown explicit notification of a rape offence against Sergeant McCabe.

13:52

13:53

So either the evidence on the balance of probabilities, or whatever standard, Chairman, you're going to apply to this, and I know that there are theories about bringing things well down the line or just past the 51/49% point, but either this Tribunal comes to the conclusion that the random explanation is the true one, however chaotic and unjustifiable it is, or the Tribunal examines, I submit, the alternative evidence,

13:53

1 which is that there was a direction proximate to the
2 30th April, that there was an interaction between
3 Ms. Connolly and Ms. Argue, and yet, within two weeks
4 of the matter, no attempt at an internal inquiry as to
5 what had gone wrong happened and no notification to 13:54
6 Ms. Connolly that she'd made a mistake happens and no
7 attempt is made to do what at least Ms. Brophy did, and
8 that was to carry out an incident report at the time
9 which would describe who was responsible for taking out
10 this file, who was responsible for working on it, who 13:54
11 was responsible for the error and for some acceptance
12 of -- not some acceptance of responsibility, some
13 picture of the actual sequence of events laid out at a
14 time when it was demanding, crying out, for somebody to
15 say, what happened here? How have we done this to this 13:54
16 man? No attempt was made to do any of that.

17
18 Now, the next thing that you have to, in my submission,
19 look at it in context, Judge, is the evidence of
20 Ms. Creamer. And it's in this respect; it wouldn't 13:55
21 immediately leap off the page as relevant to this
22 issue, except that she, from a totally outside
23 perspective within Tusla, looks at the decision to
24 prepare intake documentation in respect of four
25 children, two of whom are minors and two of whom are 13:55
26 adults, and she -- her evidence, and the Tribunal will
27 find it, is that this was highly unusual; that to open
28 intake documentation in respect of an adult was
29 certainly very unusual and to open intake documentation

1 without any credibility assessment was unusual. As
2 against that, evidence, I think, was given by
3 Ms. Argue, or maybe Ms. Connolly, that this was
4 standard practice in Cavan-Monaghan as regards
5 preparing the intake documentation without any 13:56
6 assessment of credibility of the allegation, but nobody
7 seems to have suggested that it was anything other than
8 highly unusual for intake documentation to be prepared
9 in respect of two adults. And I needn't remind the
10 Tribunal that the intake documentation that was 13:56
11 prepared in respect of each of the four McCabe children
12 also set out the digital, anal and the vaginal
13 penetration rape offence.

14
15 And if it was so unusual, no explanation has been 13:57
16 given, and none was attempted, Judge, that I can recall
17 in any event, and I hope I'm not missing something in
18 the transcripts, as to why intake documentation would,
19 in highly unusual circumstances, be opened in respect
20 of adult people by Tusla, and yet that particular 13:57
21 transaction was the subject of a written request for
22 guidance by Ms. Connolly directed to Ms. Argue, and the
23 subject of an oral direction, which was recorded in
24 writing, that all four were to be the subject of intake
25 documentation. No explanation is given for that. 13:58
26 Highly unusual event. And again, that seems to have
27 completely faded from the mind of Ms. Argue and indeed
28 it seems to have completely faded from the mind of
29 Ms. Connolly, despite its unusual nature, and yet all

1 of that took place on the 30th April 2014. well, it
2 does come down, Judge, to this: you have two competing
3 theories; the random selection out of a filing cabinet
4 by somebody who had no other duties on a particular day
5 of this file, or the other theory, which I suggest has 13:59
6 a far more probable ring to it, that the yellow Post-It
7 did refer to that file - and I just put in brackets
8 there, Judge, both Ms. Connolly and Ms. Argue argued
9 that it might not have been, that it might have been a
10 Post-It that came in from some other file or somehow 13:59
11 obtruded itself onto the relevant page - and that there
12 was a direction, a highly unusual direction, given by
13 Ms. Argue on that day to include adults in the intake
14 documentation prepared for each of the four McCabe
15 children. And these two competing theories, in my 14:00
16 respectful submission, on the balance of what is
17 reasonable to believe, I am asking this Tribunal to
18 reject the random selection from the filing cabinet
19 explanation and to accept that the Post-It referred to
20 the document to which it was attached, and to accept 14:00
21 that the interaction between Ms. Connolly and Ms. Argue
22 showed unusual steps being taken in respect of the
23 McCabe children on this day and that none of these
24 things could have been forgotten about two weeks later
25 when it's discovered that Ms. Connolly has made her 14:00
26 terrible mistake. It could not be forgotten about.
27 CHAIRMAN: That Ms. Brophy?
28 MR. McDOWELL: Sorry?
29 CHAIRMAN: That Ms. Brophy had made a terrible mistake?

1 MR. MCDOWELL: No, Ms. Connolly. Ms. Connolly, on foot
2 of Ms. Brophy's original mistake.
3 CHAIRMAN: Oh, yes.
4 MR. MCDOWELL: But Ms. Connolly brought it -- just to
5 be absolutely clear about this, Ms. Connolly found a 14:01
6 reference to Ms. Y on a document and she stitches
7 together the two sentences from Ms. Y narrative and
8 puts in the middle a reference to Ms. D, and produces a
9 coherent -- an apparently coherent rape notification
10 concerning Sergeant McCabe, which she puts into the 14:01
11 system. And, Judge, in case there's any doubt about
12 Ms. Argue's memory on this matter, it is Ms. Argue who
13 actually has to produce the corrective notification in
14 June to An Garda Síochána. And you're asked to believe
15 that she has forgotten all of these things. And the 14:01
16 point I had here in my notes, Judge, is: these surely
17 must be memorable events, that you're accusing a man
18 who you definitely know -- or, sorry, you're not
19 accusing. You're notifying the guards about a man who
20 you definitely know is at the centre of public 14:02
21 attention and you've misnotified them that he's alleged
22 to have committed a very serious rape offence, and you
23 have to yourself prepare, as Ms. Argue did, the
24 corrective notification within weeks of the event, and
25 all of this to have simply been obliterated from your 14:02
26 mind and never remembered as a stand-out event in your
27 life, well I suggest to you that is not acceptable.
28 That any professional social worker who did such a
29 thing or was involved in such a series of events would

1 remember those events. And the strange thing is, that
2 Ms. Connolly would certainly have had every reason to
3 remember it because she would have been at the very
4 centre of things were it not for the fact that you're
5 asked to accept that nobody bothered to tell her she 14:03
6 had made that mistake for three years or to draw it to
7 her attention for three years, and that she only found
8 out about it after she had made her original statement
9 for this Tribunal and when she was studying the
10 documentation in the run-up to giving evidence here in 14:03
11 June of 2017. That's when she says she first realised
12 that she was the person who had prepared the rape Garda
13 notification.

14
15 Now, I'm also asking the Tribunal to look at the 14:03
16 actions of Mr. Lowry thereafter. Firstly - I don't
17 want to labour the point - he takes no retrospective
18 action whatsoever. He doesn't attempt to assemble the
19 facts to put on one piece of paper anywhere an account
20 of what had gone wrong. Secondly, he gives this 14:04
21 Tribunal a short statement, which to say it is utterly
22 uninformative would be charitable, Judge. It is a
23 statement which doesn't deal with any of the relevant
24 facts hardly at all, and gives no explanation
25 whatsoever for what had gone wrong at all. And nobody, 14:04
26 in fact, committed, apparently, to paper that
27 Ms. Connolly had made this mistake or indeed ever
28 notified her that she had made this mistake at all.
29

1 And one has to ask -- I mean, there are two possible
2 explanations for that kind of behaviour: that this was
3 a complete disaster and there was a psychological
4 unwillingness to revisit it in any shape or form and a
5 desire to wash hands completely, or, alternatively, 14:05
6 that Mr. Lowry did give that direction, deal with this
7 case in the ordinary way, knowing it was Sergeant
8 McCabe, that he did so at some stage prior to the 30th
9 April, that that instruction was given to Ms. Argue,
10 and that she was the person who told Laura Connolly to 14:05
11 work on that document that day, to prepare a Garda
12 notification and to carry out an intake, a highly
13 unusual intake in respect of adult children, two adult
14 children and two other children.

15
16 And Mr. Lowry says, Judge, that he was aware, and he
17 says this in his evidence, that he was aware that it
18 was a re-referral. In my respectful submission, these
19 are the actions -- Ms. Argue's actions and his actions,
20 especially in failing to mention the matter to 14:06
21 Ms. Connolly, are the actions of people who are
22 probably the alternative explanation to the random
23 taking out of the file explanation, these are the
24 people who were somehow concerned in the generation of
25 action on the 30th April. Mr. Connolly with his -- 14:06
26 remembering that he said this case was to be dealt with
27 in the ordinary way, Ms. Argue as the person who told
28 Ms. Connolly to take action in respect of a file which
29 was already out of the cabinet, and Ms. Argue as the

1 person who directed the intake documentation be
2 prepared in respect of two children and two adults.

3
4 So that's my broad submission on that point, Judge,
5 that there are two conflicting scenarios. One of them 14:07
6 is highly improbable. And the slightly beguiling thing
7 is, Judge, that you might think, or you might be
8 invited to think, that this was such an appallingly-run
9 organisation that the random out of the filing cabinet,
10 dressed up as Measure the Pressure, was the explanation 14:07
11 for what happened. But the physical evidence of the
12 documentation on file, coupled with both Ms. Argue
13 saying that she saw a correlation between Sergeant
14 McCabe the national figure and Sergeant McCabe the
15 subject of the referral, and Mr. Lowry's similar 14:08
16 evidence that he was aware that it was a sensitive case
17 and had given a direction that it was to be dealt with
18 in the usual way, is much more consistent, in my
19 respectful submission, with a probable explanation of
20 what actually happened on this occasion 14:08

21 CHAIRMAN: Mr. McDowell, as you are finishing on that
22 point, I mean, I suppose what is on my mind is: let's
23 suppose that I find the whole notion of chaos
24 attractive but not tenable, and let's suppose you're
25 right in relation to all of these things that were said 14:08
26 from the three individuals most closely involved, what
27 does it all amount to, except for, I mean, an inference
28 that could be drawn is that, lo and behold, we have
29 unfinished business?

1 MR. MCDOWELL: Yes.

2 CHAIRMAN: And this unfinished business is Maurice
3 McCabe, and we haven't dealt with it and we'd better
4 deal with it now.

5 MR. MCDOWELL: Exactly. Because he's in the headlines 14:09
6 now.

7 CHAIRMAN: And then, when we get around to it, we deal
8 with it in utterly chaotic fashion, but is there
9 anything more sinister than that involved in it?

10 MR. MCDOWELL: Judge, I'm not going to move from that 14:09
11 to the smoking gun theory that somebody in An Garda
12 Síochána rang up and said, where is your referral in
13 respect of Sergeant McCabe, we are expecting it? I'm
14 not suggesting that.

15 CHAIRMAN: Well, I don't think you need to do that, 14:09
16 Mr. McDowell. I mean, I think if the reality is that
17 this is out in a public forum and there is a
18 realisation of unfinished business, well then, with a
19 view to ensuring that there is no criticism, action is
20 taken which unfortunately may result in a worse 14:09
21 situation than simply ignoring it totally in the first
22 place.

23 MR. MCDOWELL: Yes.

24 CHAIRMAN: Well, I'm posing that as a question.

25 MR. MCDOWELL: Well, can I put it this way, Judge: 14:09
26 what I am saying to you is that the
27 random-selection-out-of-the-filing-cabinet explanation
28 doesn't stand up to scrutiny. And you have to ask
29 yourself why was it proffered to this Tribunal as an

1 explanation of what happened on the 30th April. And
2 that it is more likely that there is a different
3 explanation and that the different explanation is
4 corroborated by the yellow Post-It and the non-inquiry
5 into what happened on the day and that is that somebody 14:10
6 in Tusla said, we have done nothing with this file,
7 this man is now in the headlines, we'd better notify
8 the guards. Now, that may not bring the Tribunal very
9 far, but I'm asking the Tribunal at least to do this,
10 to reject the suggestion that it was a purely random 14:10
11 act and that it was wholly unrelated to what was
12 happening in the national sphere at the time in the
13 sphere of national politics. That's as far as I can
14 put it, Judge. I can't now ask the Tribunal to
15 speculate as to who or what caused that action on the 14:11
16 30th April. What I am asking the Tribunal to do,
17 though, is to reject the suggestion that it was a
18 purely random act and to prefer the explanation that
19 Tusla, as an organisation, decided it had better get
20 its act together, this man is in the headlines, we have 14:11
21 done nothing with the file, of which we are aware that
22 we have been sitting on now for six months or seven
23 months, or whatever it was, and we'd better get on with
24 the notification. That's as far as I am putting it,
25 Judge. 14:11

26 CHAIRMAN: I know.

27 MR. MCDOWELL: In my respectful submission, it's a
28 preferable explanation to the one which Tusla has given
29 you.

1 CHAIRMAN: But if Gerry Lowry knew it was a
2 re-referral, then the puzzle becomes even more
3 peculiar.
4 MR. McDOWELL: well, he did accept it was a
5 re-referral. 14:11
6 CHAIRMAN: well, maybe he did. Maybe he's wrong.
7 MR. McDOWELL: And that is the second point I'm coming
8 to, Judge.
9 CHAIRMAN: In which case, what is going on? I mean,
10 sometimes -- you know, sometimes, one is just left with 14:12
11 a situation which there's no point in saying the
12 following happened because literally you're just
13 sticking a pin in a - well, whatever you stick a pin
14 in, I don't know.
15 MR. McDOWELL: well, Chairman, I do accept the 14:12
16 proposition. What I'm suggesting is, this isn't a
17 matter of sticking a pin in explanations. I do accept
18 the proposition that, in the end, you're going to be
19 left with an unresolved mystery as to what spurred the
20 action on the 30th April. But I'm inviting you to 14:12
21 reject the suggestion, which you were asked to take by
22 a number of witnesses, that this was an entirely random
23 event.
24 CHAIRMAN: Right. well, before you go --
25 MR. McDOWELL: Can I deal then with the re-referral 14:12
26 bit, Judge, because this is relevant.
27 CHAIRMAN: No, please do. I asked you, yes.
28 MR. McDOWELL: You see, all of the evidence was that if
29 the Gardaí already knew about this, there was no point

1 whatsoever in referring the case back to them -- or,
2 sorry, doing a second notification. And Keara McGlone
3 was certain that it had been investigated before
4 because she writes to Superintendent Cunningham about
5 it. Eileen Argue was part of the original 2006/2007 14:13
6 social work intervention and must have known that the
7 Gardaí were aware of it at the time, because it was the
8 Gardaí who brought it to the attention of the social
9 workers at the time. Mr. Lowry says that he was aware
10 that it was a re-referral, and the implication is that 14:13
11 quite a number of people in Tusla were aware of the
12 fact that the Gardaí had been involved in the Ms. D
13 allegation some, whatever it is, seven years
14 previously.

15 CHAIRMAN: Yes, that is the problem, it is seven years 14:14
16 before.

17 MR. McDOWELL: I know. But quite a number of them were
18 so aware, and yet nobody -- and the real thing,
19 Chairman, if you look at this question; in order for
20 Ms. Connolly, let's take Ms. Connolly, to go through 14:14
21 the files and find out that there were four McCabe
22 children, two of which were unnamed, but they were --
23 sorry, I think they were named by Mr. D, he seemed to
24 know their names, or whatever, and two of whom were
25 adults, she had to go through the file and had to have 14:15
26 been aware that there had been a Garda reference at the
27 time.

28 CHAIRMAN: No, I get that point, Mr. McDowell, and
29 you've made it very well.

1 MR. MCDOWELL: It's just a huge mystery as to why
2 anybody thought that a Garda referral was needed in the
3 circumstance. The only explanation is that somebody
4 ticked a box saying "Garda referral", and that's
5 supposed to give rise to, as I say, the random lottery 14:15
6 extraction of the file out of a filing cabinet by
7 Ms. Connolly to work on it and she sees the box to be
8 ticked and she works on it. But Ms. Argue directed
9 that there should be a Garda notification on the yellow
10 Post-It if the Tribunal accepts that that is what that 14:15
11 was.

12
13 And this is the second point I want to make in relation
14 to this. The whole idea of making a Garda notification
15 at this stage seems very, very strange. It requires a 14:16
16 kind of an amnesia coupled with an automatic process
17 with nobody applying their intelligent mind to what
18 they are doing, and it raises the question why was a
19 second -- why was a notification being prepared at all
20 in April 2014. 14:16

21 CHAIRMAN: I mean, there are some books which say that,
22 you know, large organisations are like that. They are
23 utterly mindless in the way they go about things. So
24 that is why if things are going wrong, like, say, in
25 some part of the world they have actually no sense of 14:16
26 what is right and wrong in relation to that.

27 MR. MCDOWELL: But isn't it strange, if I may ask this
28 question rhetorically, isn't it strange that, as soon
29 as the second notification caused an incident, I won't

1 call it -- a mini crisis in May 2014, that nobody even
2 then said why were we doing this notification in the
3 first place? Why was Ms. Connolly asked to do this?
4 Who asked her to do this? In which case it might have
5 emerged that Ms. Argue had asked her to do it and had
6 put the Post-It on the file. 14:17

7 CHAIRMAN: Okay. Just, I know you are moving on to the
8 second point, but I take it the other point that you're
9 making in relation to this is that if you consider just
10 the various things that were happening at these
11 dates -- 14:17

12 MR. MCDOWELL: Yes.

13 CHAIRMAN: -- 23rd January, Commissioner Callinan
14 before the Public Accounts Committee; then, shortly
15 after, Maurice McCabe in private; then there's the
16 dossier to the Taoiseach in February; there's the
17 Government appointing the Guerin investigation; there's
18 the resignation of Commissioner Callinan on the 24th
19 March; there's the Fennelly Commission report on the
20 25th May. 14:18

21 MR. MCDOWELL: Yes.

22 CHAIRMAN: There's the Ms. D articles in relation to
23 Paul Williams. No, I'm sorry, I'm getting this wrong.

24 MR. MCDOWELL: No.

25 CHAIRMAN: Yes, there are the Ms. D articles then that
26 appear, I think there's four of them. And then there
27 is a complaint to GSOC by Ms. D on the 29th April, and
28 then on the 30th April the file is somehow --

29 MR. MCDOWELL: Well, I heard what you asked of the

1 Garda counsel in relation to coincidence and the like,
2 Judge, but it is a remarkable coincidence that a wholly
3 unnecessary action is taken in highly suspect
4 circumstances that I submit -- on the 30th April, which
5 seems to be -- I mean, supposing the notification had 14:18
6 been correct, supposing Ms. Connolly hadn't made her
7 error, even then you'd wonder what was she doing.
8 CHAIRMAN: Okay.
9 MR. MCDOWELL: I mean, supposing she had put down the
10 original sofa facts, or whatever, you'd have to ask 14:19
11 yourself, what was this about and why was it being done
12 on the 30th April 2014? And I just -- again, Judge,
13 I'm not going to start speculating and dreaming up wild
14 conspiracy theories, but I am asking the Tribunal to be
15 extremely circumspect about the explanation it has been 14:19
16 given, because it doesn't seem to stand together.
17 CHAIRMAN: Okay. So you're going to go on to number
18 two, which was the handling by Tusla of the
19 notification.
20 MR. MCDOWELL: I am on number two, really. 14:19
21 CHAIRMAN: Well, that's really done that then.
22 MR. MCDOWELL: I'm coming to the end of number two,
23 except to say this, Judge --
24 CHAIRMAN: Okay. And then it's three - how did the
25 Garda deal with the social work notification -- 14:19
26 MR. MCDOWELL: Exactly. And I don't want to waste the
27 Tribunal's time at all.
28 CHAIRMAN: Yes.
29 MR. MCDOWELL: But I do ask the Tribunal, when

1 examining Mr. Lowry's behaviour, to look to what he did
2 thereafter, and, in particular, to look at his claimed
3 failure to read Ms. McLoughlin's Barr letter. Why he
4 would fail to read it is very difficult to understand.
5 Because if he had done that, Judge, no letter would 14:20
6 have been sent to the McCabe family in the end. If
7 he'd looked at it, he'd have said: for heaven's sake,
8 you're repeating the same mistake as Ms. Connolly and
9 Ms. Argue caused us to make in April 2014, why are you
10 writing that again? 14:20

11 CHAIRMAN: well, there was others involved in that,
12 too --

13 MR. McDOWELL: Yes.

14 CHAIRMAN: -- you know, Mr. McDowell.

15 MR. McDOWELL: And there were, and there was Mr. Deeney 14:21
16 and there were other people, Judge. And I don't want
17 to waste the Tribunal's time, but I just want the
18 Tribunal to remind itself in this context that then you
19 had the SART episode, and the file, or parts of the
20 file, are sent off, sanitised or hoovered, or whatever, 14:21
21 to a different agency to complete the social work, an
22 agency which was established, Judge, for the purpose of
23 dealing with backlogs of cases, and this is sent off in
24 those circumstances to that body in what appears to be
25 a sanitised state, and, when it arrives there and they 14:21
26 begin to examine the whole matter, the people in SART
27 say it should never have been sent to them in the first
28 place.

29 CHAIRMAN: well, I have the evidence of Linda Creamer

1 in that regard.

2 MR. MCDOWELL: Exactly.

3 CHAIRMAN: And really that comes from the inside and is
4 very critical of the organisation.

5 MR. MCDOWELL: Of course it is. 14:22

6 CHAIRMAN: But there it is.

7 MR. MCDOWELL: And I am not querying that, but I'm just
8 saying that there is a pattern here of utter denial and
9 evasion of responsibility, and it starts before 30th
10 April and carries on until the infamous letter is sent 14:22
11 to the McCabe household, arriving in early January
12 2016. I think I have said enough about that now,
13 Judge. Could I then go on to An Garda Síochána, Judge.

14 CHAIRMAN: I'm going to enable people to have a short
15 right of reply, Mr. McDowell -- 14:22

16 MR. MCDOWELL: Of course.

17 CHAIRMAN: -- in the event that they feel they want to
18 say something. That applies, obviously, to Rian and to
19 Tusla, the HSE, the lot.

20 MR. MCDOWELL: And, Judge, I had intended to have a 14:22
21 fully footnoted submission, but logistics crept up on
22 me, I'm sorry.

23 CHAIRMAN: Mr. McDowell, all I need is basically what
24 your thoughts are on the matter, and that is much more
25 valuable than yet another lengthy piece of paper. 14:23

26 MR. MCDOWELL: Now, Judge, could I come to what
27 actually happened when this -- sorry, there is one
28 thing I do want to say, Judge, though, and, I mean, I
29 think it is important just to put down this marker,

1 that we are going next into a module and some of the
2 potential evidence may suggest that Sergeant McCabe was
3 reported to some people in authority as being a threat
4 to his own children, and I am just asking the Tribunal
5 to bear in mind that we haven't yet dealt with that. 14:23
6 But again, that would be yet another major coincidence,
7 if we had intake documentation of those children
8 prepared in a semi-State agency and somebody tells
9 Deputy McGuinness something along the same lines, and I
10 won't push that any further because I don't want to 14:23
11 prejudice or ask this Tribunal to prejudice.
12 CHAIRMAN: I'm not sure there's any allegation that
13 anyone is supposed to have said that Sergeant McCabe is
14 a threat to his own children.
15 MR. MCDOWELL: Well, we will see what Mr. McGuinness' 14:24
16 evidence is.
17 CHAIRMAN: Well, yes, but I have read it.
18 MR. MCDOWELL: Well --
19 CHAIRMAN: But I think don't worry about it --
20 MR. MCDOWELL: There's no point in us being sidetracked 14:24
21 on it now.
22 CHAIRMAN: No, I agree. Don't worry about it for the
23 moment.
24 MR. MCDOWELL: Now, the evidence is that Superintendent
25 Leo McGinn gets the notification on the 7th or 8th May 14:24
26 2014 at Bailieboro Garda Station. And you have an
27 indication, either that day or in a corrected version
28 the next day, he sends off his missive to Chief
29 Superintendent Sheridan, recommending that the matter

1 be reviewed possibly by the cold cases unit of An Garda
2 Síochána in the NCBI.

3
4 Now, Superintendent McGinn, reading that reference or
5 reading the notification and until he spoke to Mr. D, 14:25
6 must have taken the view this is a very serious
7 offence, the reference he received, because it was a
8 rape offence that he was reading about and he hadn't
9 yet had an opportunity to speak to Mr. D, who would,
10 over a few days, disabuse him of the possibility that 14:25
11 Sergeant McCabe had committed a rape offence. And
12 Superintendent McGinn -- there are just a few pieces --
13 bits of evidence that I just want to remind the
14 Tribunal about -- he did indicate that there was a
15 current view in Bailieboro, and, Judge, in case there's 14:26
16 any media people here, I'd ask you to give a direction
17 that this should not be reported --

18 CHAIRMAN: I'm --

19 MR. MCDOWELL: Just let me finish.

20 CHAIRMAN: No, forgive me for being -- maybe it's 14:26
21 better not to say it.

22 MR. MCDOWELL: No, no --

23 CHAIRMAN: I can read between the lines.

24 MR. MCDOWELL: Mr. D had a particular position in the
25 station by this time. 14:26

26 CHAIRMAN: Yes. Right.

27 MR. MCDOWELL: Sorry, I just don't want to identify --

28 CHAIRMAN: No, I know you're not identifying it. I
29 mean, the reality is, I have given a direction that his

1 rank should not be reported. So let's say he has a
2 particular responsibility, so that is fine.

3 MR. MCDOWELL: He has a particular responsibility. But
4 Superintendent McGinn tells this Tribunal that there
5 was a general view in 2014 that the original case had 14:27
6 not been properly investigated in Bailieboro.

7 CHAIRMAN: Really?

8 MR. MCDOWELL: You'll find that, yes, he did. He said
9 there was a general view that it had not been -- that
10 the investigation had not been proper, the original 14:27
11 investigation.

12 CHAIRMAN: Really?

13 MR. MCDOWELL: Yes, Judge.

14 CHAIRMAN: I'm surprised to hear that, Mr. McDowell, I
15 really am. I mean, I know -- I mean, we've heard tons 14:27
16 of evidence. I mean, we're day 58 now, or something
17 like that.

18 MR. MCDOWELL: He did, Judge. I mean, I think -- now
19 it may be that he was just simply dealing with the fact
20 that there was a general view that Noel Cunningham 14:27
21 shouldn't have done the investigation.

22 CHAIRMAN: Well, that is a different thing. Yes.

23 MR. MCDOWELL: Yes. But that there was a
24 dissatisfaction with the investigation in the station.

25 CHAIRMAN: Well, it could be, or it could be there was 14:28
26 a dissatisfaction with Chief Superintendent Rooney
27 telling Noel Cunningham to do it despite his protest.
28 I mean, I can understand that, but that's a different
29 thing. I mean, I think it's kind of dangerous to

1 allege there was anything wrong with this
2 investigation, because it seems to me there wasn't; on
3 the contrary.

4 MR. McDOWELL: I'm not suggesting that, I'm not
5 suggesting that at all. But I'm suggesting that two 14:28
6 things happened: You have the evidence of
7 Superintendent McGinn that he liked to see timber by
8 the end of the day, as he put it, and that he cleared
9 his desk, and that, therefore, he processed this in
10 very quick order and made his recommendation of a 14:28
11 review and the like. And secondly, you have evidence
12 that, unusually in this case, the Garda notification
13 did not go to the sergeant in Bailieboro Garda Station
14 whose function it was to receive, deal with and
15 acknowledge Garda notifications. Effectively between 14:28
16 himself and his secretary, he seems to have kept it to
17 himself and put it up the line.

18
19 Judge, he sends it to Chief Superintendent Sheridan,
20 who, coincidentally, because of the Guerin Commission, 14:29
21 was very definitely conversant with the Ms. D file and
22 had recently studied it again. And Chief
23 Superintendent Sheridan, he says that almost as soon as
24 he saw of the notification, he believed it was
25 erroneous, not an inflation of the original allegation, 14:29
26 but was simply erroneous. But he flags it on to his
27 superior, who is Assistant Commissioner Kenny,
28 initially without stating that to him, although he
29 later does communicate and, as was pointed out by my

1 friend earlier here today, he goes to the trouble of
2 scrawling lines through the document on his file to
3 point out that it is an error, lest it lie in that
4 condition.

5
6 And I want quickly, Judge, to move on to the Mullingar
7 meeting, whichever room in Mullingar Garda Station it
8 took place in, in July. There's one thing that I think
9 that the Tribunal should take into account in respect
10 of that meeting: that it was very definitely in the 14:30
11 shadow of an already-commenced GSOC investigation as to
12 whether the original Ms. D allegation had been properly
13 investigated. She was claiming that it hadn't been.
14 And as you know from the documentation, she was making
15 a number of claims that Sergeant McCabe hadn't even 14:31
16 been interviewed in relation to the matter at the time.
17 And she made the claims -- she had made the claims that
18 were published by Mr. Williams in articles which had
19 all been published before the July meeting in
20 Mullingar. And I'm asking you, Chairman, to look very, 14:31
21 very carefully at the minute of that meeting. It was
22 prepared by then-sergeant, now Inspector, Karen Duffy.
23 Some attempt was made I think by Assistant Commissioner
24 Kenny to suggest that the language was hers rather than
25 the participants' language. Inspector Duffy told this 14:32
26 Tribunal that that was not the case, that she had
27 recorded what happened at that meeting faithfully and
28 that she had submitted the note that she had prepared
29 to Assistant Commissioner Kenny and that he had

1 approved of it. Some allowance, I concede, Chairman,
2 must be made for the fact that the participants were
3 not to know whether GSOC would say that the original
4 Cunningham investigation was all wrong and got
5 everything wrong, and whatever. There must have been a 14:33
6 sense among the participants at that meeting that this
7 was business which was not going to be concluded other
8 than by a GSOC report, that there was a question-mark
9 over whether GSOC might say this should all be
10 re-investigated. There could have been many outcomes 14:33
11 to the GSOC investigation for all the people sitting
12 around that table knew. And some allowance must be
13 taken -- must be made, and this is a concession I am
14 making, Judge, for the fact that they were discussing
15 this matter in the shadow of the possibility that 14:34
16 everything might be turned upside down again and people
17 would look at the whole process and the Garda's
18 performance and be critical of it, GSOC being an
19 independent organisation. But that having been said,
20 the language that was used in that room does have one 14:34
21 common thread to it; none of them seems to have said,
22 once, anything sympathetic to Sergeant McCabe. None of
23 them ever said, this poor man, he's been the subject of
24 a wrongful rape allegation, what an injustice. None of
25 them, even -- unless, unless this was left out of the 14:34
26 note, none of them seem to have thought an innocent man
27 has been the subject of a very, very serious flawed
28 notification accusing him of a rape offence, what about
29 him? And I think you hinted at it earlier, Judge, they

1 did seem to be looking at it from a Garda perspective,
2 or at least that inference is to be drawn, and an
3 organisational perspective; you know, how are we going
4 to come out of this? Have we done all the right things
5 in respect of these matters? But it is strange indeed 14:35
6 that he was referred to as the suspect. He was an
7 innocent man. Chief Superintendent Sheridan knew he
8 was an innocent man, and they are talking about the
9 accused and suspect and they're talking about should we
10 treat this as a new notification. They are talking 14:36
11 about -- they are raising the issue, should we be
12 looking at the question is he a risk to children? None
13 of them seems to have -- and the picture that was
14 painted by Mr. O'Higgins to you today was that this was
15 a session where they were effectively closing down on 14:36
16 the issue. They weren't closing down on the issue.
17 Everything was open on this issue. This was not the
18 last word on the subject, except that, in one sense, it
19 turned out to be the last word because no further
20 actions were taken thereafter. But if the Tribunal 14:36
21 looks at the language and the questions and the issues
22 that were being considered at that meeting, none of
23 them operated on the basis an innocent man is being
24 re-accused in the wrong of a far more serious offence,
25 what do we do about him? That tone, that question, 14:37
26 that very obvious question, in my respectful
27 submission, simply doesn't surface at that meeting. It
28 appears that different considerations, and maybe
29 entirely reasonably, were being looked at, like: how

1 is the organisation going to appear if this is
2 reopened, or whatever? How are we going to have dealt
3 with the issues that have arisen arising out of the
4 re-notification of this offence? But the very fact
5 that they were asking themselves should we consider 14:37
6 this as the same notification or a new notification,
7 and should we be on inquiry as to whether Sergeant
8 McCabe constitutes a risk to children, those -- the
9 very fact that those questions are being raised speaks
10 volumes, Judge. 14:38

11
12 Now, I did use the word, and I was wrong, when I asked
13 the Commissioner, former Commissioner O'Sullivan, I
14 said, but sure weren't they investigating whether he
15 was a risk to children. They weren't investigating it, 14:38
16 Judge. They were asking should they be inquiring as to
17 whether he was a risk to children. And I used the word
18 "investigate" and it should be, should they be
19 inquiring on this issue. But the bottom line on that
20 memo, Judge, or that minute of a meeting, or however 14:38
21 way you want to describe it, is that there was
22 absolutely no sense of the injustice being done to
23 Sergeant McCabe. There was purely -- that was probably
24 the only issue that wasn't considered in their
25 discourse. And it is equally striking that two 14:39
26 decisions were actually made at the meeting: one, that
27 Assistant Commissioner Kenny would consult Ken Ruane
28 about the legal situation they were in at the time, and
29 that went absolutely nowhere, apparently. Mr. Ruane,

1 who I think the Tribunal will probably take the view
2 was a very sensible head on sensible shoulders, was
3 never bothered with the issue at all and his advice
4 wasn't sought on it. And the second issue, the second
5 decision for action item coming out of it was that 14:39
6 Chief Superintendent Sheridan was to establish contact
7 with, I think it's the HSE, which was slightly wide of
8 the mark, because it was Tusla would have been the much
9 more important body to contact, with a view to seeing
10 what their strategy was, how they were going to deal 14:40
11 with this matter thereafter. And Chief Superintendent
12 Sheridan in his evidence said that as far as he was
13 concerned, it was a matter for, I'm not sure whether he
14 said it was HSE or for Tusla, but it certainly wasn't a
15 matter so much for the Gardaí, but for the other State 14:40
16 agencies to deal with the matter thereafter and to deal
17 with the wrong that had been done to Sergeant McCabe,
18 that was not a Garda matter. And curiously, Judge, in
19 a parallel universe occupied by Mr. Lowry, he is saying
20 to Ms. McLoughlin, we should be finding out from the 14:41
21 guards about what they are doing about this matter.
22 That is what he wants to do at the same time. And yet,
23 these two bodies, Mr. Lowry and the Gardaí, seem to
24 miss each other completely and inspector or Sergeant
25 O'Connell or -- Inspector O'Connell is sent off on what 14:41
26 turns out to be a cul-de-sac engagement with Fiona
27 Ward, which goes nowhere.

28
29 And, Judge, you asked Mr. O'Higgins the question, you

1 asked what is to be made of the fact that Assistant
2 Commissioner Kenny had notified the Commissioner of An
3 Garda Síochána of the false notification without any
4 indication that it was false and took no further action
5 to retrieve the situation, so to speak, up the line 14:42
6 from himself. And it's quite clear from Chief
7 Superintendent Frank Walsh's evidence that no action
8 was taken, despite the fact that the Commissioner's
9 office was sending reminders asking to be kept fully --
10 or I think two reminders, well maybe one, asking to be 14:42
11 kept -- sorry, I think Mr. Costello is right, it was
12 one request for information and one reminder. That no
13 attempt was made to correct the record up the line.
14 Now, the comment was made here that when former
15 Commissioner O'Sullivan testified in the way she did, I 14:43
16 won't try to summarise what she said, but I think she
17 said at one stage she had no memory of reading the
18 letter and then she accepted that whatever Chief
19 Superintendent Walsh said about her reading it, she
20 didn't question the correctness of his evidence, but 14:43
21 she implied that it didn't register with her in some
22 sense, but that Sergeant McCabe's counsel - I presume
23 myself - did not cross-examine her on this subject.
24 She was clear in her answers to Tribunal counsel, and
25 there was, with the greatest of mock modesty, I don't 14:44
26 think I was going to change her mind on that by asking
27 searching questions and produce the answer: oh, yes,
28 Mr. McDowell, I now do recall that I did read it
29 carefully, and the like. So I don't think anything is

1 to be written into my failure to pursue the points she
2 had made in evidence to the Tribunal's counsel.

3
4 But it is extraordinary that somebody in Sergeant
5 McCabe's position could be left with that material 14:44
6 sitting in the Commissioner's office and no attempt
7 made to correct it. And the suggestion, and I think
8 the Tribunal is alert to this, that the sergeant clerk,
9 Karen Duffy, was supposed to have, on her own
10 initiative and without instruction, somehow initiated a 14:45
11 correction of the situation, is, in my submission, not
12 merely unfair to her but it's unfair to common sense.
13 She could not possibly take it upon herself,
14 uninstructed, to write to the Commissioner on this
15 subject. 14:45

16
17 Judge, it was never corrected, and one of the great
18 ironies of the whole matter is this: that if Sergeant
19 McCabe hadn't received the Tusla letter at the
20 beginning of January 2016, for all we know nothing 14:45
21 would have been corrected in Tusla and nothing would
22 have been corrected in Garda Headquarters. And as
23 Mr. McGarry reminds me, the Commissioner, whatever
24 registered in her mind and however she did or did not
25 take in what she read on that day, she was meeting with 14:46
26 Sergeant McCabe later that year, in the company of his
27 solicitor, and to have such a thing uncorrected or to
28 leave it uncorrected, was a very serious matter indeed,
29 and I'd ask this Tribunal to take the view that it is

1 all of apiece with regarding Sergeant McCabe as not
2 really being at the centre of their concerns when it
3 came to dealing with the matters which were dealt with
4 in Mullingar or the informing up to the Commissioner.
5 He doesn't seem to have been the priority that many 14:47
6 people have claimed he was in Garda thinking at the
7 time, and certainly no effort was made to contact him
8 and say, look, somehow you may learn at some stage that
9 a disastrous error was made and we just want to give
10 you our account now and tell you that this has 14:47
11 happened. Again, there seems to have been a kind of a
12 willingness to hope that somebody else would deal with
13 the issue and that An Garda Síochána would never have
14 to disclose to Sergeant McCabe that they had received
15 this wrong notification, hope that Tusla/HSE would deal 14:47
16 with this issue and put the record straight with
17 Sergeant McCabe, whether they could have told him - and
18 they couldn't have told him - that Assistant
19 Commissioner Kenny had sent matter up to the
20 Commissioner and left it uncorrected, nothing that they 14:48
21 could have done could have alerted Sergeant McCabe to
22 that state of affairs.

23
24 Now, Judge, I'd ask the Tribunal, therefore, to -- in
25 respect of the Garda treatment of this matter, not to 14:48
26 just simply say that these things happen. There was
27 fault in the way in which it was dealt with. It was --
28 the minute from Mullingar is not happy reading from the
29 point of view of being vigilant to protect the

1 interests of Sergeant McCabe, and I won't put it
2 further than that.

3 CHAIRMAN: Well, Mr. McDowell, if you're on that, I
4 don't know whether you're drawing to a close on number
5 three? 14:49

6 MR. MCDOWELL: I am. I am finishing on the Garda bit,
7 yes.

8 CHAIRMAN: Yes. The question, I suppose, that would be
9 uppermost on my mind, and it's probably better that I
10 ask you as we go along with each section as opposed to 14:49
11 waiting until the end, in which case we have to
12 reiterate a lot --

13 MR. MCDOWELL: Yes.

14 CHAIRMAN: -- but let's suppose that a false
15 notification was sent, knowing it was wrong, that a 14:49
16 false notification was sent further on, knowing that it
17 was wrong, up to Garda Headquarters, let's suppose it
18 was left uncorrected, let's suppose Garda Headquarters
19 raised a query, sent a reminder and it's left
20 uncorrected, and let's suppose I am expected to believe 14:50
21 that a sergeant should overrule an assistant
22 commissioner and correct things herself when she's
23 acting in a position of being a, it's not incorrect to
24 say a servant.

25 MR. MCDOWELL: Yes. 14:50

26 CHAIRMAN: Because a secretary is a servant, and I know
27 it is now a derogatory term.

28 MR. MCDOWELL: Yes.

29 CHAIRMAN: But it is not.

1 MR. MCDOWELL: No.

2 CHAIRMAN: And was never intended to be. You are
3 serving someone, you were doing their will. What is
4 behind it all? I mean, what do you say is behind it
5 all, if anything? I mean, just a couple of 14:50
6 possibilities, Mr. McDowell, in terms of the evidence.
7 There is some evidence to say that people couldn't
8 approach Sergeant McCabe because if they didn't have
9 all the answers they might find themselves enmeshed in
10 a spider's web, whereby, if this is how people felt 14:50
11 about it, and I'm not saying it was true, it was like
12 the judge who deals with the lay litigant's case who
13 suddenly finds himself at the receiving end of yet
14 another case --

15 MR. MCDOWELL: Yes. 14:51

16 CHAIRMAN: -- where he is named, together with the
17 President of Ireland, etcetera, as being part of
18 things. So there is that possibility. Another
19 possibility is that they couldn't be bothered. Another
20 possibility is that he had made himself -- he had put 14:51
21 himself outside the fold, kind of a heretic thing.
22 Another possibility is, it is just a simple error or a
23 series of errors. Another possibility is that the mood
24 in Headquarters was dead against him and this is
25 evidence of it. Now, I don't know in relation to any 14:51
26 of those things, I mean, on the evidence, or do you
27 want to make any submission on that? That is, I'm not
28 going to say cornucopia, I know that word has been
29 misused already, you could say smorgasbord, perhaps, of

1 possibilities. Now, you don't have to take those, you
2 can put something else on the menu if you want, but I
3 can't go there unless there is something to indicate
4 it.

5 MR. MCDOWELL: Well, I fully appreciate the point the 14:52
6 Tribunal is making. Can I just go back to one
7 proposition that I put before the Tribunal earlier,
8 which should be among -- put out on the smorgasbord as
9 well, if I may put it that way, Judge, and that is
10 this: that GSOC was hanging over the Mullingar 14:52
11 meeting. It was quite possible that everything was
12 going to unravel. It was possible that -- I mean, you
13 have had the privilege of reading the file and coming
14 to the conclusion that it was impeccable, the
15 Cunningham file I'm talking about. But it was possible 14:52
16 that with people making claims to politicians, writing
17 articles in the newspapers -- or, sorry, not writing
18 articles, but giving rise to articles being written in
19 the newspapers, GSOC engaging in the process, GSOC
20 querying Superintendent Cunningham and Superintendent 14:53
21 Rooney, and all the rest of it, about the
22 appropriateness of how the original Ms. D complaint was
23 being dealt with, any garda in the position of
24 Assistant Commissioner Kenny and Chief Superintendent
25 Sheridan would be saying this is not finished business, 14:53
26 this is something which could come back to bite us in a
27 big way, this is something which Ms. D, if she succeeds
28 in getting the independent GSOC to take a different
29 view from the one that you take, Judge, and I don't

1 demur from, that there was nothing wrong with the
2 Cunningham investigation, the whole issue of whether
3 Sergeant McCabe would be, at the end of it all, the
4 innocent man, or, alternatively, the man who benefited
5 from a botched investigation which should never have 14:54
6 been carried out the way it was, was up in the air.
7 And that was -- that must have been of some interest as
8 a possibility to members of An Garda Síochána. He may
9 not be vindicated by a GSOC inquiry. The public may be
10 told that the -- first of all, all of this may come out 14:54
11 into the public, and secondly, Sergeant McCabe may face
12 a reopened inquiry recommended by GSOC on the basis
13 that what happened before was defective and biased and
14 shouldn't have been carried out by Superintendent
15 Cunningham in the first place, and that is reflected in 14:54
16 the documentation, because Assistant Commissioner Kenny
17 notes that Superintendent Cunningham had -- and we
18 don't know where he got this information from, but he
19 notes that he didn't want to do it in the first place.
20 And, of course, if that took wings with GSOC, you could 14:55
21 have a very, very different outcome to all of these
22 events, Judge, a very different outcome, in which GSOC
23 were saying, we're not happy with the way in which
24 Sergeant McCabe was investigated in the first place, it
25 should have been done by somebody more independent, and 14:55
26 happily they didn't come to that view from Sergeant
27 McCabe's perspective and I think from the perspective
28 of decency to Superintendent Cunningham as well. But
29 I'm just making the point to you, Judge, that this was

1 a black cloud hanging over that meeting and it was by
2 no means clear that Sergeant McCabe was in the clear
3 and that, you know, that it was a closed book as far as
4 An Garda Síochána was concerned. I mean, just, if one
5 just develops for a second, Judge, the idea that GSOC 14:56
6 might have said, this is right, Superintendent
7 Cunningham was a wrong man, he knew both people, what
8 in the name of heavens was Chief Superintendent Rooney
9 asking this man to investigate? This woman, Ms. D, has
10 a legitimate cause of complaint. If that had happened, 14:56
11 everything was open and the great public hero, Sergeant
12 McCabe, the poster boy of the liberal media, or
13 whatever, may end up -- may end up in a very different
14 place, publicly stated to have been given the benefit
15 of an unfair investigation. 14:57

16
17 So, I mean, it was in that frame of mind that they met
18 that day, Judge. It wasn't -- they weren't sure that
19 GSOC was going to say, nonsense, this was a model
20 investigation, forget about that. And they couldn't 14:57
21 have been so sure. And therefore, what I'm really
22 saying, Judge, is this: that there was an element of,
23 let's keep our options open here, we don't have to come
24 to a conclusion and close the whole matter down here
25 today in Mullingar, we don't have to, the matter is 14:57
26 open. And, of course, this is only correct if they are
27 looking at the original complaint and not the false
28 complaint. But I'm just making the point that if you
29 look at the Mullingar minute in that context, it's much

1 more understandable than it might be just to someone
2 taking the approach, here is an innocent man who has
3 been wronged, this thing has gone off the tracks. The
4 language used in it, "suspect", they talk about
5 arresting people and the like, these things were live 14:58
6 issues, Judge. This was not idle chatter in that
7 meeting.

8 CHAIRMAN: Yes. So, you know, if one goes back to the
9 two meetings, possibly in the same room in Mullingar --

10 MR. MCDOWELL: Yes. 14:58

11 CHAIRMAN: -- Superintendent Cunningham was presiding
12 at the one on the 25th August 2008, and for good
13 reason, of course, that he had been asked to
14 investigate everything to do with the letter from
15 Sergeant McCabe to do with issues on the D platform, so 14:59
16 to speak, and then on the 16th July 2014 when he was
17 the one who had done the investigation and he knew
18 absolutely everything about it, he wasn't there. So
19 what inference am I to draw from that?

20 MR. MCDOWELL: That was a point that I was going to 14:59
21 raise, because obviously my mind and your mind were
22 working on exactly that point.

23 CHAIRMAN: Well, I hope not, Mr. McDowell, because I'm
24 supposed to be independent and you're representing a
25 client. 14:59

26 MR. MCDOWELL: I had forgotten to make it and I was
27 just thinking to myself.

28 CHAIRMAN: I was just wondering, is there a point to be
29 made about it?

1 MR. MCDOWELL: Well, I think there is, Judge. I think
2 there is one extraordinary thing about that Mullingar
3 meeting in July 2014, and I meant to make it - last
4 night I thought about it but I had forgotten about it
5 by today - the empty chair in that room in Mullingar 14:59
6 was Superintendent Noel Cunningham's. They should have
7 brought him in.

8 CHAIRMAN: Okay. Well, let's suppose it's sane to
9 bring him in, but if they didn't bring him in, and
10 that's not a sensible thing to do, what inference is 15:00
11 open to me in relation to it?

12 MR. MCDOWELL: The strange thing is that none of them
13 actually contacted him or conversed with him on this
14 subject. And what's the inference to be drawn from
15 that? In my belief -- or, sorry, in my submission, 15:00
16 Judge, the inference to be drawn from that is that he
17 would have closed down the issue instanter and they
18 wanted to leave it open.

19 CHAIRMAN: Why did they want to leave it open?

20 MR. MCDOWELL: Because, as I said, the GSOC thing could 15:00
21 change everything; Sergeant McCabe could go from hero
22 to zero, you know. He could have had a totally
23 different outcome if Ms. D had somehow persuaded GSOC
24 that there was something wrong with the original
25 investigation. 15:00

26 CHAIRMAN: But, Mr. McDowell, I mean, how sensible
27 would that -- I think every individual on earth who has
28 had any kind of a life at all realises that they are
29 themselves a flawed individual.

1 MR. MCDOWELL: Yes.

2 CHAIRMAN: And, you know, you mentioned that Sergeant
3 McCabe was the hero of the liberal media.

4 MR. MCDOWELL: You used the liberal media the other
5 day. 15:01

6 CHAIRMAN: No, I didn't.

7 MR. MCDOWELL: You did, I think.

8 CHAIRMAN: I didn't. What?

9 MR. MCDOWELL: I think you did. Anyway.

10 CHAIRMAN: Did I? I'm beginning to doubt myself, 15:01
11 Mr. McDowell.

12 MR. MCDOWELL: I think you did, Judge.

13 CHAIRMAN: In what context? Well, we will just put in
14 the word "liberal" into the search and we will see what
15 comes up. 15:01

16 MR. MCDOWELL: I think they made leaks and all the rest
17 of it.

18 CHAIRMAN: They made what?

19 MR. MCDOWELL: Leaks. I think you did. If I am wrong,
20 I am wrong, Judge, but I think you did talk about the 15:01
21 media.

22 CHAIRMAN: Oh, no, I have been careful not to.

23 MR. MCDOWELL: I think you may have lapsed.

24 CHAIRMAN: On occasion I have, and indeed I made a
25 mistake, which I have had to apologise for. 15:02

26 MR. MCDOWELL: In any event --

27 CHAIRMAN: No, no, the point that I would appreciate
28 your help on, look, is this. Everybody is flawed. If
29 you read the O'Higgins Commission report, it says

1 there's exaggerations, there's an untruth.

2 MR. MCDOWELL: Yes.

3 CHAIRMAN: There is a kind of an emotional reaction to
4 things by times. He apologised, for instance, to
5 Superintendent Cunningham. 15:02

6 MR. MCDOWELL: Yes.

7 CHAIRMAN: He withdrew another allegation against
8 Superintendent Clancy, and then the allegation then
9 against Commissioner Callinan was regarded as made in
10 good faith, but frankly -- 15:02

11 MR. MCDOWELL: Wrong.

12 CHAIRMAN: -- completely lacking in any basis
13 whatsoever in evidence. I mean, those are all flaws.

14 MR. MCDOWELL: Yes.

15 CHAIRMAN: I mean, it may be some people want to 15:02
16 portray people as Cú Chulainn, or whatever, but that is
17 just mythical thinking.

18 MR. MCDOWELL: Sergeant McCabe expressly disavowed
19 that. He never asked to be regarded as a hero.

20 CHAIRMAN: No, I can imagine. Yes, I can imagine. He 15:02
21 hasn't given evidence. I'm sure he's a very nice man,
22 and all the rest of it, but he's a human being, the
23 same way as the rest of us.

24 MR. MCDOWELL: Yes.

25 CHAIRMAN: But I just -- I don't understand this kind 15:03
26 of hero of the liberal media to zero.

27 MR. MCDOWELL: No, I'm saying, Judge, that a person who
28 was a thorn in the side of some people in An Garda
29 Síochána, and, I mean, you can -- I don't want to

1 generalise, but some people in An Garda Síochána, and
2 who had caused the organisation some difficulties, if I
3 may put it that way, Judge, if it were to end up that,
4 in the context of Mr. Williams publishing his articles,
5 that GSOC conducted an investigation which raised a 15:03
6 question-mark over his exoneration by Superintendent
7 Cunningham, a very different picture of Sergeant McCabe
8 might begin to emerge.
9 CHAIRMAN: Right. Okay.
10 MR. MCDOWELL: That is all I am saying. 15:04
11 CHAIRMAN: Okay. No, I see your point. I'm not saying
12 I accept the point, but I see the point. All right.
13 So then number four you were going to.
14 MR. MCDOWELL: Number four, Judge. And I do want to
15 say, Judge, that just before I leave number three, that 15:04
16 no explanation was given by anybody as to why they
17 didn't contact Noel Cunningham.
18 CHAIRMAN: Well, there was explanations given, but
19 whether they are accepted or not is a different matter.
20 MR. MCDOWELL: Well, no -- sorry, maybe I shouldn't 15:04
21 say -- no reasonable explanation. He seemed to have
22 been stationed in the same place or the same -- in
23 Monaghan, to be easily available, and no reasonable
24 explanation was given as to why any of the serious --
25 of the senior Gardaí asked him during any of this 15:04
26 period about any of these matters.
27 CHAIRMAN: All right. Well, he certainly was the
28 expert.
29 MR. MCDOWELL: Yes.

1 CHAIRMAN: So --

2 MR. McDOWELL: Now, can we come to the last bit then,
3 Judge, which is about Paul Williams and the Ds and
4 Sergeant McCabe. I don't want to, Judge, to sort of
5 re-open old wounds here now, and I'm going to be 15:05
6 careful in what I am saying, but I do want to say this:
7 that if you look at the submission that was made to you
8 today on behalf of An Garda Síochána, paragraph 86, it
9 leapt off the page at me as I scanned through it today,
10 Judge, the statement: 15:05

11

12 "What is important when considering the evidence of
13 Mr. Paul Williams and Ms. D is that the articles
14 Mr. Williams wrote and the meetings he arranged with
15 Ms. D with public figures were not written and arranged 15:06
16 for the purpose of damaging Sergeant McCabe."
17

18 Now, I don't know why the Commissioner's team of
19 counsel would say such a thing, because the avowed
20 purpose of Ms. D was that she was tired of hearing 15:06
21 laudatory things about Sergeant McCabe and she wanted
22 the people to see the other side of him. That's what
23 she said. And the idea that he could have been writing
24 those articles other than with a view to raising a
25 question-mark over whether Sergeant McCabe had indeed 15:06
26 sexually assaulted this young woman, and, secondly,
27 been wrongfully acquitted of any responsibility by the
28 DPP for doing it --

29 CHAIRMAN: Well, I mean, I think anyone can make a

1 mistake, but certainly that was the evidence of Ms. D.
2 And indeed I think the evidence of Mr. Williams was
3 that he was considering, first of all, writing an
4 article to the effect that a particular person abused a
5 particular child.

15:07

6 MR. MCDOWELL: Yes.

7 CHAIRMAN: And then considered it and then what he --
8 maybe he discussed it with his editor, I will go back
9 and look at the evidence, but the next aspect was, what
10 about the investigation, was that a bad investigation?

15:07

11 So it moved from one to the other. And you're
12 absolutely right in saying yes, she did say --

13 MR. MCDOWELL: And it's hard to see, Judge -- just
14 being fair to everybody involved, and Mr. McCabe

15 doesn't feel particularly inclined to be leaning over
16 backwards to accept the view of others on the central

15:07

17 issue of the investigation, but being fair on his
18 behalf, one has to say that the purpose of those

19 articles was to raise a very grave question-mark over
20 the probity of Sergeant McCabe, in effect, and to

15:08

21 ventilate a different vision of Sergeant McCabe to

22 people who could identify him from those articles and
23 to say there is another side to this story of the

24 sexual assault. Now, I'm just saying that, and I won't
25 put it any further than that, but I do make the point

15:08

26 that it is strange indeed that Mr. Williams took the

27 view that because he didn't name Sergeant McCabe in his
28 text, that there was no need to go to him and get his

29 side of the story or to give any credence to his side

1 of the story or to give any balance by reference to his
2 side of the story.

3
4 The second thing is, rightly or wrongly, he took up the
5 cause with a degree of enthusiasm that had him 15:09
6 arranging meetings with Micheál Martin and Alan Shatter
7 on behalf of Ms. D.

8 CHAIRMAN: Well, Alan Shatter was then the Minister,
9 isn't that right?

10 MR. MCDOWELL: No, he wasn't. He had resigned at this 15:09
11 stage. But he did make reference to Mr. Williams'
12 articles in the Dáil after his resignation on the 19th
13 June.

14 CHAIRMAN: Well, I'd go back on the evidence, but I
15 thought she had met the Minister and said the Minister 15:09
16 had done nothing.

17 MR. MCDOWELL: No.

18 CHAIRMAN: And whereas Micheál Martin had taken the
19 matter more seriously, or something.

20 MR. MCDOWELL: I stand to be corrected, Judge. 15:09

21 CHAIRMAN: Yes.

22 MR. MCDOWELL: I think that Mr. Shatter had already
23 resigned by the time Mr. Williams arranged that
24 meeting.

25 CHAIRMAN: You could be right. I will look back on it. 15:10

26 MR. MCDOWELL: And without dwelling further on the
27 purpose and effect of those articles, I would invite
28 the Tribunal to consider what Sergeant McCabe's
29 attitude and feelings were as he saw those matters

1 being obtruded under a thin-enough veil of anonymity
2 into the public domain in the circumstances.

3
4 And then the question arises, Superintendent O'Reilly,
5 whichever version is taken into account, whether he 15:10
6 suggested Mr. Williams as a journalist to the D family
7 or they suggested to him and asked him did he know it,
8 a Garda officer in his circumstance should have paused
9 before either he made such a suggestion or he
10 facilitated them in making such contact, simply on the 15:11
11 basis of what the likely outcome of press publicity on
12 this matter was likely to be, not least for her but
13 also for Sergeant McCabe.

14
15 I would also ask the Tribunal to bear in mind that 15:11
16 Sergeant McCabe was reading in the newspapers that she
17 was going to bring this into the political domain, she
18 was going to bring it to GSOC, and she was going to
19 bring it -- she was minded to bring it to civil
20 litigation and was consulting lawyers for that purpose. 15:12
21 These were trying times for Sergeant McCabe and his
22 family and it's very difficult to see in retrospect
23 what purpose was served by Mr. Williams' articles at
24 all, what constructive or positive purpose was served.

25 CHAIRMAN: Yes. Just before we go on, do you mind if I 15:12
26 just correct something, because I'm startled to think
27 that it has been ascribed to me that I somehow
28 described the media as the "liberal elite media", I
29 didn't. In fact, I have looked up the transcript. It

1 was a question to Mr. Rogers and Mr. Rogers had
2 complained, and this is on day 55, that he hadn't
3 actually seen the magazine, whatever it is called,
4 Patrol, produced by --
5 MR. MCDOWELL: The GRA. 15:13
6 CHAIRMAN: -- the Garda Representative Association, and
7 he said I haven't had the benefit of reading that, and
8 I think a copy was passed down and he said I don't have
9 enough time, and I said to him, well, I can summarise
10 it, and I then said what the piece seems to say is that 15:13
11 these Gardaí --
12 MR. MCDOWELL: That is my mistake. I didn't see the
13 quotation marks.
14 CHAIRMAN: No, no, no. There are definite quotation
15 marks. That the particular Gardaí who are being 15:13
16 traversed in relation to the ten incidents that are
17 going to be investigated have never had the chance to
18 have their say, while the "liberal elite media" - and I
19 would never use that - and this is a quote from --
20 MR. MCDOWELL: Sorry. 15:14
21 CHAIRMAN: -- the GRA article - are attacking them.
22 MR. MCDOWELL: I'm sorry, Judge.
23 CHAIRMAN: And I also said that the Gardaí in question
24 are interviewed under assumed names, like Bronski,
25 Tango, Mike and Delta. I certainly didn't lick that up 15:14
26 off the floor either. That was a quote too.
27 MR. MCDOWELL: That was clearly my mistake. I just
28 didn't pick up the inverted commas.
29 CHAIRMAN: well, I think I better do something in

1 future then.

2 MR. MCDOWELL: Sorry?

3 CHAIRMAN: I think I better do something in future.

4 MR. MCDOWELL: That is my mistake.

5 CHAIRMAN: Not to worry. 15:14

6 MR. MCDOWELL: I'm sorry. In any event, I was --

7 CHAIRMAN: So it wasn't me saying that, it was the GRA

8 article.

9 MR. MCDOWELL: It was the GRA's view that he was

10 being -- 15:14

11 CHAIRMAN: Cosseted.

12 MR. MCDOWELL: -- cosseted by the media, by the liberal

13 elite media. Sorry, Judge, I didn't see the inverted

14 commas.

15 CHAIRMAN: Well, you did have the article in front of 15:15

16 you, Mr. McDowell.

17 MR. MCDOWELL: I didn't have it to hand.

18 CHAIRMAN: All right. Look, it doesn't matter.

19 MR. MCDOWELL: In fact, I remember when you made those

20 remarks asking Ms. Ward to try and get me a copy of 15:15

21 that immediately because I wanted to check it.

22 CHAIRMAN: Well, that was it. It has to be said, it's

23 actually a well written piece but as to whether the

24 views being expressed in it are good or bad is a

25 different matter entirely. 15:15

26 MR. MCDOWELL: Judge, there's just one other point that

27 I want to make and that is that Superintendent

28 O'Reilly, it has been pointed out here, was a family

29 friend of the D family, and Ms. D did give her

1 interview to GSOC mand at page 108 of the materials she
2 ascribed to Superintendent O'Reilly, via her father,
3 certain views about Sergeant McCabe and hanging around
4 at schools to look at the young ones coming out and the
5 rest. Well now, I don't know, Judge, it is hearsay. 15:16
6 CHAIRMAN: It is double hearsay. And furthermore,
7 Superintendent O'Reilly just said, look, that didn't
8 come from me. And I must say, I tend to believe him.
9 MR. MCDOWELL: Well, whatever she thought she clearly
10 thought that somebody had said, attributed this to him, 15:16
11 which -- and she also, I just want to remind the
12 Tribunal, she also said that some other girl in Clones
13 had been reported to her as the victim of an assault by
14 Sergeant McCabe and she also --
15 CHAIRMAN: And we know that didn't happen either. 15:16
16 MR. MCDOWELL: Exactly. But I mean you will recall,
17 Judge, that when she heard about the Ms. X, Ms. Y --
18 sorry, Ms. D, Ms. Y mistake originally, one of her
19 first queries was, could the Ms. Y be the girl in
20 Clones? That was -- so I mean, these aren't just top 15:16
21 of the head remarks that were being made, Judge, they
22 are of significance.
23
24 Judge, can I deal with one point that --
25 CHAIRMAN: You can come back to it in a second if that 15:17
26 is all right, if you don't mind, Mr. Buckley. I'm
27 inviting you to reply to anything that you feel -- and
28 indeed anybody, feel you need to reply to, please do.
29 It's not going to take long.

1 MR. MCDOWELL: You asked Mr. O'Higgins one question of
2 a general kind during his submissions or at the end of
3 his submissions and that was in relation to, you know,
4 could something not have been done at an earlier point
5 to, you know, stop all this sequence of events in An 15:17
6 Garda Síochána going back, I presume you meant back to
7 2007/2008 could something not have been done to arrest
8 what happened.

9 CHAIRMAN: It's really January 2008 on I suppose.

10 MR. MCDOWELL: Yes, exactly. One thing I would ask the 15:18
11 Tribunal to look at is that that issue in an inchoate
12 form did arise in correspondence between Superintendent
13 Clancy, Chief Superintendent Rooney and Assistant
14 Commissioner --

15 CHAIRMAN: Kenny? No. Assistant commissioner what? 15:18

16 MR. MCDOWELL: -- Byrne.

17 CHAIRMAN: Yes.

18 MR. MCDOWELL: And assistant commissioner Byrne raised
19 the question, here we have a situation on the ground in
20 Bailieboro which really requires to be addressed and he 15:18
21 adumbrated, from memory, and I don't have the papers
22 with me, because they're back down in my office in the
23 Law Library, but he adumbrated could some mediation or
24 something not be attempted to try defuse the situation,
25 and it is interesting to note that Chief Superintendent 15:19
26 Rooney's view was that Mr. D and Sergeant McCabe were
27 two adults who should be able to settle this out among
28 themselves. And, you know, when Ms. D spoke to Laura
29 Brophy her view of the world, right or wrong, was that

1 following her allegations Sergeant McCabe had been, to
2 use her own phrase, forced out of Bailieboro Garda
3 Station. And I know it is probably early in the
4 process of this Tribunal to be looking at the woods and
5 the trees issues at this stage, but I do believe that 15:20
6 that correspondence between those three people if it
7 had been differently handled might have led to a very
8 difficult outcome in this case, this whole matter.

9 CHAIRMAN: Thank you, Mr. McDowell.

10 MR. MCDOWELL: Thank you. 15:20

11 CHAIRMAN: Mr. Ó Muircheartaigh, did you wish to make
12 any submissions? Forgive me for forgetting who you are
13 for, but I know you're for somebody.

14 MR. MCDOWELL: He appears for Alison O'Reilly, Judge.

15 CHAIRMAN: Yes. Who represented Paul Williams then? 15:20
16 Mr. Costelloe.

17 MR. KELLY: I am here for Paul Williams. No, I have
18 nothing to say, Chairman.

19 CHAIRMAN: You're fine?

20 MR. KELLY: Yes, I am. 15:21

21 CHAIRMAN: Grand. Thank you for that. I think that is
22 everybody, is it? Certainly everyone was told today if
23 they wanted to make submissions they could turn up, and
24 I'm not leaving anybody out, am I? No. All right.
25 Did anyone want to say anything brief in reply then? 15:21
26 Mr. Buckley, do you want to start? You wanted to say a
27 couple of things.

28
29 FURTHER SUBMISSION BY MR. BUCKLEY

1 MR. BUCKLEY: Thank you, Chairman, there's two very
2 brief points. The first is obviously I think there
3 were no issues concerning Clones the subject of Ms. D's
4 oral testimony to the Tribunal and there were no
5 questions put to her on that subject. I think there
6 was a single question asked of Mr. D and he said he
7 wasn't the source of that remark. So I think it is
8 important that there wouldn't be conflation of the
9 disclosure material and the testimony given to the
10 Tribunal.

15:21

15:21

11 CHAIRMAN: It's just, okay, thank you for the point, it
12 is a fact, however, that it does appear in the GSOC
13 statement as coming from her.

14 MR. BUCKLEY: That's correct.

15 CHAIRMAN: I mean, how do I get over that? I can't --
16 if it is important I can't ignore it.

15:22

17 MR. BUCKLEY: No, no, I mean, I suppose it is a matter
18 of record.

19 CHAIRMAN: Yes.

20 MR. BUCKLEY: And the Tribunal can treat it as it
21 features in that report appropriately. I suppose it's
22 just careful to bear in mind that there were no
23 questions asked of Ms. D in relation to it, there may
24 be a limit as to what it lends itself to concluding.
25 Although that is obviously for you, Chairman.

15:22

15:22

26
27 The second point, I suppose, is in relation to, there
28 were questions made about media contact that might be
29 taken up again, I don't know if there is going to be

1 separate submissions in respect of terms of reference
2 (h) but just insofar as they were addressed this
3 morning and raised again by Mr. McDowell, I suppose he
4 posited a counterfactual of a different outcome on the
5 GSOC report, and I suppose Ms. D's submission would be 15:22
6 that one perhaps shouldn't look back with the benefit
7 too harshly of hindsight through the prism of that
8 report on her media conduct at the time. It has to be
9 understood in the context of what was happening in
10 February 2014; Mr. Guerin had been appointed to inquire 15:23
11 into whistleblowing allegations, of mishandling of
12 Garda investigations, she felt that her claim fell
13 within that sphere and that there was, I suppose, a
14 certain irony in that Mr. McCabe was being associated
15 as a very prominent whistleblower of the mishandling of 15:23
16 other Garda investigations. It should also be
17 remembered that she wasn't aware of the content of the
18 DPP correspondence from April 2007. It isn't something
19 that had been brought to her attention and there had
20 been approaches by journalists to visit her home and it 15:23
21 was her who made the decision to engage with the media
22 response. I suppose you, Chairman, have already made
23 remarks about the GSOC report, I suppose that report
24 itself we don't look to go behind it, but it does
25 acknowledge some factors which might have led to 15:24
26 queries about the original investigation optically,
27 which included views being expressed about the optics
28 of sergeant Cunningham investigating it, the
29 non-recording on the Pulse system and the practice of

1 reading out a witness complaint to the subject of
2 inquiry prior to interview not according with best
3 practice. Obviously, on a whole, the GSOC report
4 vindicates the investigation, but I suppose just saying
5 in February 2014 there were objective factors that 15:24
6 might have caused her reasonable grounds to entertain
7 dissatisfaction with what occurred.

8 CHAIRMAN: Well, she didn't know about any of those
9 things, did she? Like, who told her that it wasn't put
10 up on Pulse? 15:24

11 MR. BUCKLEY: No, no.

12 CHAIRMAN: I mean, how would she know that?

13 MR. BUCKLEY: No, no.

14 CHAIRMAN: I mean, she's not a garda, she wouldn't be
15 entitled to know, would she? 15:24

16 MR. BUCKLEY: No. I suppose the principal issue might
17 be the personnel handling the investigation and the
18 optics of that, Chairman. The GSOC report addresses
19 all these matters and I'm not looking to re-open it or
20 go behind it. 15:25

21 CHAIRMAN: How would a young lady know about conflict
22 of interest unless somebody had said that to her?
23 Again, you know, where does that thought emerge from?
24 It's not a thought natural to someone of her age, is
25 it, or her profession? I mean, she was a student at 15:25
26 the time. Not a law student.

27 MR. BUCKLEY: She was studying --

28 CHAIRMAN: No, don't tell me. Don't tell me. But go
29 on.

1 MR. BUCKLEY: Yes.

2 CHAIRMAN: Let's supposing she's studying something in
3 the social sciences, which would include law, even
4 still, where does that idea come from?

5 MR. BUCKLEY: I suppose, Chairman, one doesn't 15:25
6 necessarily have to frame it as a formal conflict of
7 interest to understand that someone inquiring into
8 matters who is a professional colleague of the subject
9 of an inquiry might cause a certain discomfort or
10 unsettlement on the part of a complainant. I don't 15:26
11 think one has to necessarily use the language of
12 conflict of interest to suggest or understand a level
13 of dissatisfaction that might be felt on the part of a
14 complainant.

15 CHAIRMAN: If that issue was there though it could have 15:26
16 been raised back in 2007, couldn't it?

17 MR. BUCKLEY: Yes.

18 CHAIRMAN: Rather than waiting for seven years. It's
19 just a query.

20 MR. BUCKLEY: Well, obviously, Ms. D was significantly 15:26
21 younger in 2007, Chairman. I suppose the Tribunal has
22 heard evidence about the reengagement with the Rian
23 services in 2013 and then matters became quite
24 prominent in terms of the media coverage around
25 February 2014 when there was a focus on the appropriate 15:26
26 handling of investigations. I don't think there's
27 specific evidence erred as to what mindset was formed
28 but it was certainly around that time that she
29 expressed a view that her experience might occasion

1 further or might warrant further investigation as to
2 the appropriateness of the investigation.

3 CHAIRMAN: Yes. So you are saying that basically this
4 was a time when there was a general suspicion over
5 Garda investigations and she felt something similar in 15:27
6 relation to her own matter.

7 MR. BUCKLEY: Yes, Chairman.

8 CHAIRMAN: Yes. And that fed into the whole thing.
9 Yes. Thank you, Mr. Buckley. Did you want,
10 Mr. O'Higgins, address a couple of points? 15:27

11
12 FURTHER SUBMISSION BY MR. O'HIGGINS

13 MR. O'HIGGINS: Yes, very briefly, Chairman. Just
14 addressing two points made by Mr. McDowell in his
15 contribution. In relation to the incorrect 15:27
16 notification coming in from Tusla into An Garda
17 Síochána, Mr. McDowell took issue with the suggestion
18 that the evidence did not support a Garda desire to
19 effectively close the matter down. I'd respectfully
20 take issue with that and I would just point you to two 15:28
21 particular documents which I think support the
22 submission I sought to make under that heading.

23 CHAIRMAN: Yes.

24 MR. O'HIGGINS: They are both documents, as it happens,
25 written by Chief Superintendent Jim Sheridan and they 15:28
26 were respectively at 1722 and 1723 of the materials
27 that were circulated, and they are the letters he sent
28 up to his line manager on the 14th May and 22nd May
29 2014. I simply just instance those. I won't read them

1 out.

2 CHAIRMAN: No, do please, if you don't mind.

3 MR. O'HIGGINS: All right.

4 CHAIRMAN: Just to refresh my memory. We're talking
5 about again, we're in 2014, aren't we? 15:28

6 MR. O'HIGGINS: So the first one then.

7 CHAIRMAN: Can you read me out the highlights, if you
8 don't mind.

9 MR. O'HIGGINS: Certainly.

10 CHAIRMAN: I will look at them later, thanks. 15:29

11 MR. O'HIGGINS: Thank you. In the first one then,
12 which was written by, as I say, Chief Superintendent
13 Sheridan to the assistant commissioner based in Sligo,
14 he referred to the correspondence that had been
15 received on the 8th May 2014, and said: 15:29

16

17 "The allegations contained in the attached referral
18 have been the subject of a previous Garda investigation
19 which resulted in the DPP directing no prosecution
20 against the alleged offender, Mr. McCabe." 15:29

21

22 And it says, it treats of the Micheál Martin matter and
23 says:

24

25 "In the circumstances I recommend that we await further 15:29
26 communication from the parties listed above prior to
27 commencing a review of this investigation. A full copy
28 of the Garda investigation file is available at this
29 office."

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Then he followed that up with his communication of the 22nd May, in which he stated that:

"The previous referral contained incorrect information and should therefore be withdrawn and replaced with the attached. This is a referral made by Tusla relating to an incident which was reported to and investigated by An Garda Síochána in 2006/7. The Director of Public Prosecutions directed there should not be a prosecution in the case. The attached referral does not disclose any new information/evidence in regard to these matters and therefore at this time does not require any further action by An Garda Síochána." 15:29 15:30

And he reiterates that: 15:30

"A full copy of the Garda investigation file is available at this office. I also wish to advise that a complete copy of the Garda investigation file was disclosed to the Guerin inquiry." 15:30

CHAIRMAN: Okay.

MR. O'HIGGINS: And I say that that is consistent with the actions, not just judging the man on his words but his actions, of an overall desire to shut the matter down and I say that the Mullingar meeting represented the end of matters and not the start of anything and there's simply no evidence post the Mullingar meeting to justify a contrary conclusion. 15:30

1
2 And finally, Chairman, insofar as it has been suggested
3 by Mr. McDowell, and there was reference to what
4 perhaps might be regarded as new theory or black cloud,
5 as he put it, that the participants in the Mullingar 15:31
6 meeting were under, it is a matter for you, Chairman,
7 but it seems this new theory was not a theory developed
8 with the witnesses concerned during cross-examination.
9 It's a little bit unfair to be introducing it at this
10 late hour. In any event, I say, it's a matter for you, 15:31
11 but I say that there doesn't appear to be any link or
12 substance to that position concerning what might have
13 been the outcome of the GSOC investigation. It is
14 clear that the officers concerned were viewing matters
15 from a corporate level, potential exposure and I say 15:31
16 that if one again searches for evidence post the
17 Mullingar meeting suggestive of opening up matters
18 there appears to be none. And that concludes my
19 submission.

20 CHAIRMAN: Yes. I think maybe just, I should maybe ask 15:31
21 you the same question, and it is a matter in my mind,
22 as you know, I think Mr. O'Higgins, is: why
23 Superintendent Cunningham was completely left out of
24 that particular loop as the person who literally knew
25 more than anybody, and who could possibly -- I mean, 15:32
26 there is a lot of what ifs, in every legal case there
27 is a lot of what ifs, but that is definitely a what if.
28 MR. O'HIGGINS: Well, two things in response, Chairman.
29 I say that if one looks at the participants who were

1 present, they were clearly the Garda officers who were
2 initially in receipt of the relevant notification, and
3 then the immediate two line managers. Jim Sheridan was
4 in a position, because of the knowledge, additional
5 knowledge he had from dealing with the disclosure in 15:32
6 the Guerin inquiry, he knew all about the file. And
7 you heard the evidence, the answers that were given by
8 the witnesses to that question, which was posed during
9 the inquiry, and I say it was a reasonable position
10 taken. Jim Sheridan was au fait with the matter, knew 15:32
11 the substance of it was 2006/2007. It wasn't
12 necessary, it was felt, to contact Noel Cunningham in
13 that context. He wasn't at the meeting, that is
14 acknowledged, they were, and they were the people who
15 participated in the correspondence going up and down 15:33
16 the line.

17 CHAIRMAN: Thank you very much for your submissions.
18 Nobody else has anybody else?

19 MS. MCKECHNIE: I wonder could I address you briefly in
20 reply to a number of matters, Chairman? 15:33

21 CHAIRMAN: Yes, of course you could, and I am sorry, I
22 didn't mean to not call on you. Thank you.

23
24 SUBMISSION BY MS. MCKECHNIE

25 MS. MCKECHNIE: I will be very brief. Ordinarily I 15:33
26 think when you're asked to reject a line of evidence it
27 is normally in favour of an alternate line of evidence.
28 In this case Mr. McDowell is asking you to reject the
29 evidence that was given by Tusla in relation to the

1 random selection of files from the Measuring the
2 Pressure system. He's asking you instead to accept a
3 theory which he says, he refers to in his closing
4 submission, as the other theory with a probable ring to
5 it. And that theory is of course that Sergeant McCabe 15:34
6 was in the news at the time and it was for that reason
7 that his was deliberately selected. In that regard all
8 of the evidence on behalf of Tusla has been that it is
9 not ideal that there are unallocated files at any
10 stage, however that is the reality of the situation. 15:34
11 And the evidence that was consistently given by the
12 witnesses on behalf of Tusla was that those files are
13 selected at random and moved along whenever there is
14 time to do so. The evidence that was pointed to by
15 Mr. McDowell in support of his alternate theory I would 15:34
16 respectfully submit is evidence of the deficiencies in
17 the case management that Tusla has, and always has from
18 the outset, accepted and acknowledged as being
19 deficiencies in their case management system and in the
20 handling of this particular file. In any event, I 15:35
21 think Mr. McDowell fairly accepts in his closing
22 submissions that there is no smoking gun here and Tusla
23 relies on the knowledge that the Tribunal will rely on
24 the totality of the evidence that it has heard before
25 it and will have regard to the number of witnesses that 15:35
26 it heard from on behalf of Tusla with the extensive
27 level of documentation, none of which pointed to any
28 mala fides on the part of Tusla or any malicious intent
29 to disseminate or use the information against Sergeant

1 McCabe or to do so in cooperation with the Gardaí. I
2 would simply ask the Tribunal to bear that in mind.
3 CHAIRMAN: So you what are saying, essentially is - and
4 this is not to be ascribed to me, this is, I am
5 summarising your submission - that what is being asked 15:36
6 for in relation to Tusla is the rejection of testimony
7 in favour merely of a theory.
8 MS. MCKECHNIE: That is exactly it.
9 CHAIRMAN: Thank you.
10
11 FURTHER SUBMISSION BY MR. MCDOWELL 15:36
12 MR. MCDOWELL: Chairman, two things, just to correct
13 myself if I could. What Superintendent McGinn said on
14 day 13, page 101 --
15 CHAIRMAN: This is Leo McGinn? 15:36
16 MR. MCDOWELL: Yes. He said:
17
18 "Just look around Bailieboro station, some said I was
19 told Noel Cunningham was investigating it, who I don't
20 know told me that or who mentioned it to me, even the 15:36
21 commonly held view in Bailieboro, by Bailieboro Gardaí,
22 it should have been investigate from outside of the
23 division or to speak of the district."
24
25 So that is the criticism that was generally held, that 15:37
26 he said was generally held. It wasn't that the
27 investigation was wrong itself.
28 CHAIRMAN: Yes. It was pick someone -- and indeed that
29 is what happened when the thing came up.

1 MR. MCDOWELL: Yes.

2 CHAIRMAN: The Mullingar meeting mentions that, and
3 indeed when the social work thing came up they
4 mentioned another division. That was I think
5 Westmeath, yes. 15:37

6 MR. MCDOWELL: The second thing, Judge, I just want to
7 mention is this, that I forgot in finishing up on
8 Mr. Williams, what I consider to be a very important
9 point if I may respectfully submit, and that is that
10 the assistance given by Superintendent Taylor to him in 15:37
11 confirming facts about the submission of a case to the
12 DPP and the like. Mr. Williams told the Tribunal that
13 he had, after he'd interviewed Ms. D, got assistance
14 from Superintendent Taylor in the sense that he got
15 confirmation of the fact that there was a file in 15:38
16 respect of my client sent to the DPP -- sorry, there
17 had been an investigation, there had been a file sent
18 to the DPP and that Superintendent Taylor confirmed
19 that the DPP had directed that the case should not be
20 proceeded with. And I forgot just to make point, and I 15:38
21 don't want to drop it in any sense, Judge, that that
22 was wholly inappropriate. And you may recall, Judge,
23 that I asked him well, supposing it was Michael
24 McDowell, do you think that seven years ago you can
25 confirm that an unwarranted allegation was made against 15:38
26 me, and you then, Judge, said well, let's use, let's
27 say a parish priest or a teacher, do you think it's
28 appropriate for An Garda Síochána to tell a journalist
29 in a particular case that a prosecution -- sorry, a

1 file had been sent to the Director of Public
2 Prosecutions and directions given. And I reiterate
3 that now, Judge. I think that Mr. Williams had no
4 right to ask that question of Superintendent Taylor and
5 Superintendent Taylor had no right whatsoever -- 15:39
6 CHAIRMAN: Yes.
7 MR. MCDOWELL: -- to tell him about those things.
8 CHAIRMAN: Let's bear in mind that Superintendent
9 Taylor wasn't represented in relation to that.
10 MR. MCDOWELL: Exactly. 15:39
11 CHAIRMAN: He will be represented and you will have a
12 chance to ask him any question arising out of that, but
13 I am certainly not going to raise anything against
14 Superintendent Taylor in relation to this.
15 MR. MCDOWELL: No, no. I'm not suggesting that. 15:39
16 CHAIRMAN: No.
17 MR. MCDOWELL: But you will recall I did raise that.
18 CHAIRMAN: Sorry, he was represented. Superintendent
19 Taylor was represented.
20 MR. KELLY: Sorry, I'm here for Mr. Williams obviously, 15:40
21 and just what was actually stated, Superintendent
22 Taylor denied that conversation occurred at all.
23 CHAIRMAN: He did. The two of them were definitely
24 contradicting --
25 MR. KELLY: He was cross-examined by Mr. Ferry, 15:40
26 Mr. William was cross-examined by Mr. Ferry, and his
27 position is that:
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29 "Our instructions are simply --"

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Sorry, it's at line 18, page 105 of day 11:

"Our instructions are simply that Mr. Williams notified Superintendent Taylor that he had been at the house, that he had interviewed her --" 15:40

That is Ms. D

-- and that, in relation to Maurice McCabe and that he would be writing an article that would be damaging to Maurice McCabe." 15:40

CHAIRMAN: Yes. Yes, I noted the instructions as put to Paul Williams in relation to that. 15:40

MR. KELLY: I think you allowed a break over lunch for Mr. Ferry to take instructions so that he could put that position to Mr. Williams.

CHAIRMAN: I did. Indeed, you're absolutely right about that. And he did indeed put that, and put it very squarely to him, yes. 15:41

MR. KELLY: And I think with respect Mr. McDowell is entitled of course to make a point but I think that is something better held over, there's another module yet to go here to deal with these interactions and Superintendent Taylor will obviously be a key person in that module. 15:41

CHAIRMAN: Yes, indeed.

MR. MCDOWELL: Judge, I don't dispute any of that, I

1 just didn't want it to be later said that I did not --
2 that I had somehow abandoned that point in not making a
3 submission to you about it.

4 CHAIRMAN: No.

5 MR. MCDOWELL: It is my submission, and I won't put it 15:41
6 any further than this --

7 CHAIRMAN: Yes.

8 MR. MCDOWELL: -- that it was highly improper for that
9 to be imparted to a journalist in the circumstances.

10 CHAIRMAN: You appreciate as well that -- 15:41

11 MR. MCDOWELL: I'm not asking you to comment on it,
12 Judge.

13 CHAIRMAN: No, no -- certain denials were put, so I
14 can't actually go there and make any finding against
15 somebody or make any comment against somebody. All 15:41
16 right.

17
18 Mr. Marrinan, I think the tradition is that you don't
19 say anything.

20 MR. MARRINAN: That is so. 15:41

21 CHAIRMAN: Very good. Well, our intention, I believe,
22 is to try and start as soon as possible between two and
23 three weeks, there's a vast amount of work as I said
24 already. As regards this, if I was sitting as a judge
25 in the High Court I would now give a date but what I 15:42
26 intend to do is to prepare a report and as to whether
27 it comes out now or whether it comes out later, I'm
28 afraid that's up to me, but I'm going to think about
29 that. I would like to thank you all very much for your

1 assistance today.

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3 THE HEARING THEN ADJOURNED TO A DATE TO BE CONFIRMED

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