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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 FRIDAY, 29TH JUNE 2018 - DAY 97

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Gwen Malone Stenography
Services certify the
following to be a
verbatim transcript of
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action.

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1 THE HEARING RESUMED, AS FOLLOWS, ON FRIDAY, 29TH JUNE
2 2018:

3
4 SUBMISSION BY MR. MURPHY, CONTINUED:

5 MR. MURPHY: Yesterday I came to the end of page 26 and 10:34
6 27 of the speaking note and if I just deal with one
7 point very briefly. Mr. O'Higgins yesterday made the
8 point that Superintendent Taylor was, in his words, a
9 whistleblower and he also invited you to consider that
10 he was a brave whistleblower, and it was an interesting 10:34
11 submission insofar as it indicates the effect that that
12 word has had on the political establishment prior to
13 the establishment of this Tribunal. It is live in the
14 public discourse, the use of that word conveys some
15 sense of mystical strength and goodness to a 10:35
16 whistleblower. Now, even if that was to be true it
17 would only apply if the whistleblower told the truth.
18 And in this case it's our submission that this
19 whistleblower has not.

20 10:35
21 Turning if I could, Chairperson, to paragraph [c] of
22 the terms of reference, paragraph [c] indicates that
23 the Tribunal is asked to investigate what knowledge
24 former Commissioner Callinan or Commissioner O'Sullivan
25 or other senior members of An Garda Síochána had 10:35
26 concerning this allegation of criminal misconduct made
27 against Sergeant McCabe and whether they acted upon it
28 in a manner -- upon the same in a manner intended to
29 discredit Sergeant McCabe.

1
2 Now, Chairman, the Tribunal has made it clear that it
3 interprets the phrase "allegation of criminal
4 misconduct" as relating to the terms of the 2006
5 allegation of sexual assault as made by Ms. D. And so, 10:35
6 we say that the paragraph charges the Tribunal with
7 investigating the former Commissioners' knowledge and
8 whether they acted on that allegation in a manner
9 intended to discredit Sergeant McCabe. The Tribunal is
10 not charged with investigating finding whether the 10:36
11 former Commissioners had or expressed other negative
12 views about Sergeant McCabe. For example, it's not
13 charged with investigating and finding whether
14 Commissioner Callinan was correct or incorrect or was
15 unfair to Sergeant McCabe in saying that he should not 10:36
16 have been circulating Pulse material or that he did not
17 cooperate with the O'Mahony investigation. Of course
18 those matters fall to be assessed by you in the overall
19 contemplation of the facts of this case but we say they
20 are not central to the terms of reference. We draw 10:36
21 attention, Chairman, to the fact that both Mr. Callinan
22 and Ms. O'Sullivan have said in their evidence that
23 were aware of this allegation and each has set out the
24 circumstances as how they came into possession of that
25 knowledge. 10:36
26

27 Evidence was given to the Tribunal of conversations
28 between Commissioner Callinan and two other people,
29 Deputy McGuinness and Mr. Séamus McCarthy, in which

1 Commissioner Callinan allegedly expressly referred to a
2 sexual allegation against Sergeant McCabe in a manner
3 intended to discredit Sergeant McCabe. And these are
4 obviously relevant to the task of the Tribunal. But
5 evidence was also given by Deputy John Deasy, 10:37
6 Mr. Boucher-Hayes, Mr. Gerald Keane of conversations
7 with Commissioner Callinan, in which he allegedly spoke
8 disparagingly of Sergeant McCabe, but it is submitted
9 on the above, we submit that the Tribunal is not
10 examining whether Commissioner Callinan spoke 10:37
11 disparagingly of Sergeant McCabe, but whether he acted
12 upon his knowledge of the Ms. D allegation in a manner
13 intended to discredit Sergeant McCabe. Deputy Deasy,
14 Mr. Boucher-Hayes, Mr. Kean, none of them have given
15 evidence that Commissioner Callinan referred to this or 10:37
16 any sexual allegation and in fact, Deputy Deasy and
17 Mr. Kean expressly said that he did not do so.

18
19 These conversations couldn't form the basis of a
20 finding that Commissioner Callinan used the 2006 10:37
21 allegations in a manner intended to discredit Sergeant
22 McCabe, what is implicitly alleged in the terms of
23 reference. However, we say that they are nonetheless
24 potentially relevant and while they don't fit
25 comfortably within a discussion of the terms of 10:37
26 reference we propose to deal with them.

27
28 But in respect of the term of reference [c], the only
29 allegation ever advanced that Ms. O'Sullivan used her

1 knowledge of the Ms. D allegation in a manner intended
2 to discredit Sergeant McCabe is a hearsay suggestion
3 from Ms. Alison O'Reilly that Ms. Debbie McCann told
4 her that Ms. O'Sullivan had told Ms. McCann about the
5 allegation. This evidence is vigorously contested 10:38
6 between Ms. McCann and Ms. O'Reilly but Ms. O'Sullivan
7 is quite clear in her evidence that no such
8 conversation of the kind relayed by Ms. O'Reilly took
9 place -- sorry. She, however, is quite clear that no
10 such conversation of the kind by relayed by 10:38
11 Ms. O'Reilly ever took place between her and
12 Ms. McCann.

13
14 Therefore, the only direct evidence before the Tribunal
15 is that there was no conversation which Ms. O'Sullivan 10:38
16 sought to discredit Sergeant McCabe to Ms. McCann,
17 whether on the basis of the 2006 allegation of criminal
18 misconduct or at all.

19
20 First, both Ms. McCann and Ms. O'Sullivan have given 10:38
21 evidence that they never in fact discussed Sergeant
22 McCabe with each other. In addition, the Tribunal
23 itself has established that there was no phone contact
24 between Ms. McCann and Ms. O'Sullivan during the
25 relevant period. 10:38
26

27 Third, we say there is no evidence of Ms. O'Sullivan
28 seeking to discredit Sergeant McCabe to any journalist.
29 There is no evidence at all to suggest that

1 Ms. O'Sullivan used or attempted to use her knowledge
2 of the Ms. D allegation and investigation to discredit
3 Sergeant McCabe. And accordingly, we submit the
4 Tribunal should make a finding in clear terms that she
5 did not do so, having regard to the fact of this 10:39
6 particular allegation which always at its height was
7 based merely on a hearsay account, was publicised
8 widely and repeatedly with the benefit of Oireachtas
9 privilege.

10
11 If I could deal with two points that arose yesterday,
12 Chairman, with regard to Mr. Ó Muircheartaigh. He was
13 very careful to say that the furthest he was putting
14 the proposition about the conversation between
15 Ms. O'Reilly and Ms. McCann was that Ms. O'Reilly was 10:39
16 putting this forward not as evidence of the truth of
17 its contents but of the fact that such words were said.
18 Mr. Murphy on behalf of Ms. McCann submitted that there
19 could be a whole variety of reasons why even if those
20 words were said, they were said but they were not 10:39
21 evidence as to the truth of their contents.

22
23 I think in the course of dialogue yesterday there was
24 two references made, one to the case of R v. Christie,
25 and could I perhaps assist the Tribunal in that regard. 10:40
26 R v. Christie is referred to in the case of People v.
27 O'Shea, which is in volume 1 in Frewen at page 54. And
28 I can circulate a copy to the Tribunal legal team
29 later. The Court of Criminal Appeal, Chief Justice

1 o'Sullivan, summarised R v. Christie, a 1914 case, as
2 saying this:

3
4 "A statement made in the presence of an accused person
5 is not evidence against him of the truth of that
6 statement unless by his words, actions or demeanour he
7 indicates that he admits that statement to be true."

10:40

8
9 So effectively for R v. Christie to apply it has to be
10 a statement made in the presence of a person. That
11 could never apply to Ms. O'Sullivan. So we
12 respectfully say that that case isn't of assistance to
13 the submission made by Mr. Ó Muircheartaigh in that
14 regard. Interestingly, for example, in the case of
15 People v. Harry Gleeson, in that case the trial judge
16 admitted evidence from a superintendent about what a
17 child had said, relying upon the rule against R v.
18 Christie, in circumstances where Mr. Gleeson denied
19 liability and therefore, that clearly violated that and
20 resulted in the grim satisfaction for the executed
21 Mr. Gleeson of a posthumous pardon years later. But
22 ultimately the case of O'Shea, which followed on from
23 Gleeson, included a restatement of the correct
24 position, which is outlined in that judgment.

10:40

10:41

25
26 The second point, Chairman, just in relation to
27 declarations against interest: Again we respectfully
28 say that that particular rule is probably not
29 applicable in this case. And if I could give

10:41

1 references to you to assist the Tribunal team, in
2 particular Mr. McGrath's second edition of Evidence at
3 page 318 has a very clear recital of all of the case
4 law, but ultimately the predominant deployment of that
5 rule appears to be in circumstances where -- sorry,
6 which is at page 318 of that book:

10:41

7
8 "The dominant application of the rule appears to be in
9 circumstances where the declaration is a declaration
10 made by a deceased person and there may be argument
11 that it may be deployed elsewhere, but it's a
12 declaration then contrary to pecuniary interest,
13 contrary to proprietary interest..."

10:41

14
15 whatever one may take from that particular doctrine, it
16 can't apply to Ms. O'Sullivan because she wasn't
17 present. So if, for example, the Tribunal was to
18 consider that Mr. Ó Muircheartaigh's submission is
19 correct and that the words were actually said, that
20 doesn't indicate that it proves the truth of their
21 contents and it certainly doesn't prove anything in
22 relation to Ms. O'Sullivan, because that is not
23 something that was said in her presence, not a
24 declaration made by her and would be inadmissible
25 evidence against her on any view of the applicability
26 of the law in relation to admission.

10:41

10:42

10:42

27
28 So, we urge the Tribunal not to follow that lead, that
29 particular approach, on the basis of those two cases.

1
2 Chairman, if I could move then please, turn to
3 paragraph [1] of the terms of reference, at page 29,
4 and that deals with-- excuse me, [1] and [m]
5 incorporate a number of different details, but [1] 10:42
6 requires the Tribunal to investigate whether a meeting
7 took place between former Commissioner Callinan and
8 Deputy McGuinness on the 24th January of 2014, in the
9 car park at Bewley's Hotel, and to examine and to
10 consider the circumstances which led to any such 10:42
11 meeting, the purpose of such meeting and the matters
12 discussed at such meeting.

13
14 The second allegation that was made by Deputy
15 McGuinness was developed significantly, only recently, 10:43
16 in his statement to the Tribunal on the 28th March of
17 2018. It relates to an alleged utterance by
18 Commissioner Callinan on 23rd January 2014 after the
19 Public Accounts Committee hearing had broken up on that
20 day. And we say that although it's not perhaps 10:43
21 strictly relevant to paragraph [1], it's clearly
22 relevant to the work of the Tribunal and we propose to
23 deal with it.

24
25 The first point we deal with at paragraph 52 relates to 10:43
26 the alleged comment after the PAC committee meeting
27 broke up. And we say that it would be a matter of
28 grave concern that Deputy McGuinness has given
29 radically different accounts of his interaction with

1 Commissioner Callinan at the end of the PAC meeting.
2 We submit that it's of fundamental importance to recall
3 that the account which Deputy McGuinness has now come
4 closest to resting on was given as recently as 28th
5 March 2018 and, crucially, only after Commissioner 10:43
6 Callinan had volunteered his account of his
7 conversation with Deputy McGuinness to the Tribunal.
8 The account that was belatedly given by Deputy
9 McGuinness reflects details that had been given by
10 Commissioner Callinan to the Tribunal and had not been 10:44
11 previously given by Deputy McGuinness. The second
12 statement was given by Deputy McGuinness months after
13 Commissioner Callinan had given his account of the
14 conversation of where Commissioner Callinan said:

15
16 "I do recall that I inquired from Mr. McGuinness as to
17 whether former John Wilson would be called to give
18 evidence. Mr. McGuinness replied 'You must be joking,
19 sure he's an effing header'. This took me by surprise
20 in circumstances where Mr. McGuinness had been scathing 10:44
21 in his criticism of An Garda Síochána for the manner in
22 which whistleblowers generally are treated."

23
24 However, we point out that in his statement to the
25 Tribunal on 28th March 2018 Deputy McGuinness said the 10:44
26 following about Commissioner Callinan, he said:

27
28 "He was in the flow of conversation about former Garda
29 John Wilson. Commissioner Callinan was relating a

1 story about how John Wilson was called with other
2 gardaí to a disturbance in Grafton Street involving
3 horses. And when John Wilson went to Grafton Street,
4 Commissioner Callinan in his own words said that he
5 (John Wilson) 'pulled the knackers off the horse...' 10:44

6
7 And goes on to recite what those words were. He said:

8
9 "That was said in a very loose group of people. I
10 recall Nóirín O'Sullivan was in that group and David 10:45
11 Taylor was there as well."

12
13 In his first statement on 28th March 2017, one year
14 earlier, and prior to Commissioner Callinan's
15 statement, Deputy McGuinness had simply said: 10:45

16
17 "At the conclusion of the hearing on the 23rd January
18 2014, as my usual practice, when Chairman of the
19 Committee, I approached Mr. Callinan to thank him for
20 attending the Committee. Mr. Callinan was with 10:45
21 Ms. Nóirín O'Sullivan and David Taylor and he said to
22 me 'this man fiddles with children, this is
23 outrageous'. I took the reference to 'this man' to
24 refer to Mr. McCabe."

25 10:45
26 Commissioner Callinan in his evidence and in his
27 statements has denied both versions of the allegation
28 and we say his account is very clear. And we urge the
29 Tribunal to consider that, for a number of reasons, it

1 can and should prefer the evidence of Commissioner
2 Callinan over that of Deputy McGuinness. And the
3 reasons we outline are as follows:
4

5 1. We say it's striking that Deputy McGuinness made no 10:45
6 reference at all to an utterance of this type by
7 Commissioner Callinan after the PAC hearing prior to
8 his statement to the Tribunal. We say it's

9 particularly noteworthy, given the subject-matter of
10 the alleged utterance, that Deputy McGuinness made no 10:46
11 reference to this alleged utterance in his speech to
12 Dáil Éireann on 26th May 2016, when he revealed for the
13 very first time his allegation about a meeting that the
14 two men had had in Bewley's car park, the very day
15 after the PAC hearing. Deputy McGuinness also made no 10:46
16 reference to any such remark having been made after the
17 PAC meeting during any of his subsequent radio
18 interviews that week or in the months following, during
19 which he was closely questioned about the allegation he
20 had made about what was said at the meeting in Bewley's 10:46
21 car park. He also made no reference to it to his PAC
22 colleagues.
23

24 Second, we say it's also noteworthy in his first
25 statement to the Tribunal Deputy McGuinness made no 10:46
26 reference to his allegation as to what Commissioner
27 Callinan allegedly said about former Garda John Wilson.
28 In his second statement on the 28th March 2018 Deputy
29 McGuinness supplements his original account with a

1 suggestion that Commissioner Callinan had also told a
2 particularly colourful story about Garda John Wilson.
3 It was only when Deputy McGuinness had the opportunity
4 of viewing Commissioner Callinan's statement and seen
5 the reference therein to the fact that Deputy
6 McGuinness had in fact dismissed former Garda John
7 Wilson as a "headbanger", that Deputy McGuinness
8 responded by alleging derogatory comments had been made
9 by Commissioner Callinan about former Garda John
10 Wilson. Remarkably, we say Deputy McGuinness then
11 alleged that Commissioner Callinan had described Garda
12 Wilson in similar terms to what Commissioner Callinan
13 had already described to Deputy McGuinness. There was
14 no mention of this in Deputy McGuinness's original
15 statement. Commissioner Callinan has made it clear in
16 his evidence that he told no such story about former
17 Garda Wilson, that he himself whilst aware of the
18 nickname was not aware of the incident on Grafton
19 Street which gave rise to it.

10:47

10:47

10:47

20
21 In his evidence-in-chief to this Tribunal, Deputy
22 McGuinness was asked precisely when or what he recalled
23 Commissioner Callinan saying in relation to his
24 evidence of the use of the phrase "this is outrageous".

10:47

10:47

25
26 In those circumstances we say that the account given by
27 Deputy McGuinness is highly implausible. It suggests
28 that in the busy circumstances of a committee room of
29 Leinster House, just after a tense, lengthy and at

1 times politically charged meeting, that the
2 Commissioner openly spoke either to a group of people
3 or directly to the Chairman of the Committee with whom
4 he had been in serious dispute for weeks, if not
5 months, in these stark and vulgar terms about Sergeant 10:48
6 McCabe. It was a setting where many politicians and
7 journalists if not in earshot were in the room. We
8 submit that to make such an utterance in such a set to
9 go a Dáil deputy, who was someone that the Commissioner
10 had no reason to believe would keep the remark 10:48
11 confidential, would have been an extraordinarily
12 reckless thing for an experienced person in
13 Commissioner Callinan's position to have done. He
14 would have been leaving himself open to the real
15 possibility that Deputy McGuinness or anyone who 10:48
16 happened to hear the remark could publicise the making
17 of the remark or report it to those with political
18 authority over him as Commissioner and would have been
19 correct to have done so if the event had actually
20 happened. There is no evidence before you of a 10:48
21 relationship of mutual confidence and trust between
22 Commissioner Callinan and Deputy McGuinness which would
23 provide a credible context for such conversation. On
24 the contrary, it's submitted that the correspondence
25 between both men in November of 2013 regarding the 10:48
26 material which Sergeant McCabe had forwarded to the
27 Committee suggests the opposite.

28
29 Fourth, the language which it's alleged Commissioner

1 Callinan used, particularly the expanded version of his
2 account, was of a type which, on the evidence of a
3 number of witnesses, Commissioner Callinan was not
4 known use.

5
6 Fifth, even on Deputy McGuinness's account of the
7 conversation in the car park the very next day, there
8 was no reference to these utterances in the Committee
9 room and we submit that it's unbelievable that
10 Commissioner Callinan would not have referred back to 10:49
11 it and that Deputy McGuinness would have not referred
12 to it, even if only in the context of rebutting what he
13 alleges what was improperly said by Commissioner
14 Callinan. We say it's lacking in credibility that
15 Deputy McGuinness would not have included a reference 10:49
16 to these utterances in his notebook when allegedly
17 recording the car park conversation.

18
19 Also, we invite you to consider that it's not credible
20 that he would not have told Deputy Micheál Martin o the 10:49
21 listening public when revealing that Commissioner
22 Callinan had made accusations against Sergeant McCabe
23 during the conversations at Bewley's Hotel he had also
24 the previous day made a similar allegation.

25
26 The only other person who claims to have heard any
27 other aspect of the derogatory remarks allegedly made
28 by Commissioner Callinan after the PAC meeting on 23rd
29 January 2014 is Superintendent Taylor, and we have

1 already submitted that the evidence of Superintendent
2 Taylor should be discounted in weighing any of the
3 evidence as between Deputy McGuinness and Mr. Callinan.
4 And we submit that the established absence of
5 Superintendent Taylor's credibility generally and 10:50
6 because of the nature of the evidence on the subject,
7 including the manner in which it emerged, we also point
8 out the fact that Superintendent Taylor made no
9 reference to any utterance by Commissioner Callinan
10 after the PAC committee in his protected disclosure in 10:50
11 September of 2016. Superintendent Taylor made no
12 mention of this either in his first statement to the
13 Tribunal. He referred to it for the first time in his
14 statement to the Tribunal on 13th March 2017 but this
15 was at a point when Superintendent Taylor and 10:50
16 Mrs. Taylor had already met with Deputy McGuinness in
17 the Skylon Hotel. In his statement after that
18 Superintendent Taylor recounts Commissioner Callinan
19 saying:

20 10:50
21 "There was a conversation between John McGuinness and
22 Commissioner Callinan and I heard the Commissioner say
23 to Mr. McGuinness that Sergeant McCabe was a kiddie
24 fiddle. "

25 10:51
26 His account of the words used is different and starker,
27 therefore, to that of Deputy McGuinness.
28 Superintendent Taylor claims to have heard this remark
29 but claims not to have heard anything with the

1 Commissioner said before or immediately after this
2 isolated sentence. The use of the word "kiddie
3 fiddler" by Commissioner Callinan, if uttered, would
4 immediately have been expected to spike his interest in
5 what the Commissioner was saying. This would 10:51
6 especially have been the case one would have expected
7 since as the Garda Press Officer he would have been
8 very mindful of the Commissioner saying such a thing in
9 a room where there were politicians and media present.
10 Superintendent Taylor has sought to explain away the 10:51
11 fact that he heard nothing before hearing the sentence
12 by suggesting he turned away to retrieve the
13 Commissioner's hat and satchel. We say that he offers
14 no explanation at all for having heard nothing of what
15 the Commissioner said after the remark even though 10:51
16 Deputy McGuinness's account makes it clear that
17 Mr. Callinan did not stop speaking at that point.

18
19 Moving then to the meeting in Bewley's car park on 24th
20 January 2014. We submit this, Chairman, that this 10:52
21 meeting has to be assessed in the context of ongoing
22 concerns which Commissioner Callinan and An Garda
23 Síochána, at a corporate level, had about the then
24 controversial proposal - which was still under active
25 consideration by the Public Accounts Committee - that 10:52
26 Sergeant McCabe would give public evidence to the PAC
27 in a public session. It has to be seen in the context
28 of the Commissioner's dealings and exchanges with the
29 Public Accounts Committee at the time. We point out

1 that the documentation before the Tribunal illustrates
2 and as stated in his evidence by Mr. Callinan, that he
3 had significant and bona fide concerns, both in terms
4 of the material in the possession of the PAC and also
5 regarding the proposed appearance of Sergeant McCabe at 10:52
6 a public hearing of the PAC. There was significant
7 correspondence on the record between An Garda Síochána
8 and the PAC and indeed between the Data Protection
9 Commissioner and the PAC on the same issue. Much of it
10 was informed and shaped by legal advice obtained by all 10:52
11 parties. As the data controller for An Garda Síochána,
12 the Commissioner had concerns in respect of the large
13 scale leaking of data from the Pulse system about the
14 penalty points system to politicians in the first
15 instance and the risk of further disclosures in the 10:53
16 public realm generally. The concerns about Sergeant
17 McCabe giving public evidence to the PAC arose in the
18 context of An Garda Síochána being a command
19 structured, uniformed, disciplined organisation. What
20 was at issue here was the then unprecedented scenario 10:53
21 where a member of An Garda Síochána, other than the
22 Commissioner as accounting officer, would give evidence
23 to the PAC, thereby bypassing the structures and
24 discipline of An Garda Síochána. The concerns about
25 Sergeant McCabe giving evidence in public were also 10:53
26 shared by some within the Public Accounts Committee
27 itself; that was clear from public comment from members
28 at the time and evidence given to this Tribunal. That
29 was the import, for example, of some of Deputy John

1 Deasy's contribution during the PAC meeting on the 23rd
2 January 2014, and, for example, Deputy Eoghan Murphy in
3 his statement referred to similar concerns which he had
4 as a member of the PAC.

5
6 Ultimately of course it transpired that Sergeant McCabe
7 gave his evidence to the Committee in private session.
8 The Commissioner had appeared before the Committee the
9 day before the meeting in Bewley's car park and at
10 times the exchanges at that committee hearing between 10:53
11 him and the politicians, including, Chairman, Deputy
12 McGuinness, had been robust. It was in this intense
13 political context that the meeting with Deputy
14 McGuinness on the 24th January arose. 10:54

15
16 An early-embedded narrative which emerged from the
17 political and media commentary after Deputy McGuinness
18 spoke at this meeting first in the Dáil on the 26th May
19 2016 was that this meeting between Commissioner
20 Callinan and Deputy McGuinness was in the nature of a 10:54
21 clandestine or secretive meeting or was somehow
22 inappropriate. The need for the meeting, however,
23 arose in a rapidly developing context. The
24 Commissioner was reacting to something that the
25 Chairman had said the previous day. He wanted to know 10:54
26 if a proposal which he had devised would be a runner
27 and might avoid or delay the need for Sergeant McCabe
28 to be called before the Committee. This proposal was
29 in response to a suggestion made by the Chairman the

1 previous day at the end of the Public Accounts
2 Committee that the Commissioner should engage with
3 Sergeant McCabe directly, just like any employer would
4 do with an employee. The decision in relation to
5 calling Sergeant McCabe was to be made the following 10:55
6 Tuesday. Thus, if it transpired that it was worthwhile
7 formally sending the proposal there was a limited
8 amount of time to do so. The meeting was arranged,
9 arising from contact that day from Commissioner
10 Callinan to Deputy McGuinness. The location was chosen 10:55
11 because of the commitments which both men had elsewhere
12 that day. Deputy McGuinness was travelling back to
13 Kilkenny to his constituency and was under some time
14 pressure, the Commissioner was travelling down from
15 Dundalk for the meeting and back afterwards. Newlands 10:55
16 Cross was therefore less inconvenient than a meeting in
17 the centre of Dublin. The time pressure is also, it
18 seems, the explanation for the fact that the
19 Commissioner sat into the deputy's car, thereby
20 obviating the need to go into the hotel itself. 10:55

21
22 Commissioner Callinan has said that he never understood
23 or intended the fact or the content of the meeting to
24 be secret, he never asked the deputy to keep it as
25 such. Before the meeting it was openly discussed in 10:55
26 advance by Commissioner Callinan with Superintendent
27 Taylor and Mr. McLindon, and in the presence of others,
28 at Dundalk Garda Station. The Commissioner was
29 accompanied to the meeting point at Bewley's Hotel by

1 his official Garda driver. The fact that the meeting
2 was taking place was also known to the Department of
3 Justice in advance. This is reflected in the text
4 received by Commissioner Callinan from the Secretary
5 General, Brian Purcell, shortly after the meeting
6 inquiring how it had gone. The text said:

10:56

7
8 "Martin, know you are en route to Dundalk, can you call
9 me if possible, just wondering how you got on with
10 JMcG, Brian."

10:56

11
12 In addition then, Assistant Commissioner John O'Mahony
13 also told the Tribunal he had been made aware of the
14 meeting by Commissioner Callinan himself the following
15 week. Deputy McGuinness confirmed in evidence that at
16 no time was he asked to keep the fact of the meeting or
17 its content confidential. The deputy chose for his own
18 reasons not to tell PAC committee colleagues or anyone
19 else about the meeting at the time and not because he
20 had been asked to treat the meeting a secret.

10:56

10:56

21
22 The fact and the nature of the meeting is therefore not
23 in dispute. It's not disputed that reference was made
24 during the conversation to the existence of a previous
25 allegation of sexual abuse against Sergeant McCabe.
26 Commissioner Callinan's clear and consistent
27 recollection is that Deputy McGuinness raised the
28 existence of such an allegation and that he,
29 Commissioner Callinan, if he knew about the file that

10:57

1 went to the DPP, he knew what the DPP had decided.
2 Deputy McGuinness however says that Commissioner
3 Callinan raised the matter and said there existed an
4 ongoing investigation into allegations.

10:57

6 Now, Deputy McGuinness alleges that Commissioner
7 Callinan suggested that "I and my fellow Committee
8 members might not be aware of Mr. McCabe's personal
9 background". This would be a strange thing for the
10 Commissioner to say, if as is alleged by Deputy
11 McGuinness just the previous day, he already told
12 Deputy McGuinness that Sergeant McCabe "fiddles with
13 kids". Deputy McGuinness further alleges that
14 Commissioner Callinan said that he couldn't sit down
15 with Sergeant McCabe because "of what he knew about

10:57

16 McCabe". Deputy McGuinness further alleges that
17 Commissioner Callinan asked him if he knew about
18 Sergeant McCabe's personal life to which he says he
19 responded saying that he had heard "vague rumours and
20 gossip that Sergeant McCabe had abused somebody, that
21 he was a paedophile, but I had been assured by
22 Mr. McCabe these rumours were all lies... stated the
23 rumours were true, that Mr. McCabe had sexually abused
24 someone and that he was not a credible person". And
25 Deputy McGuinness alleges the Commissioner said that an
26 investigation into Sergeant McCabe's activities was
27 underway. He went on to say "I was extremely shocked
28 and troubled by what Mr. Callinan was telling me
29 because the allegations being made were extreme".

10:57

10:58

10:58

1
2 we respectfully say notwithstanding that clash of
3 evidence we would invite you, Chairman, to assess each
4 of these conversations, which I will come to in turn,
5 on their own. And I will come back to why we say that 10:58
6 is appropriate in law.

7
8 We say that there are reasons why Mr. Callinan's
9 evidence should be preferred over that of Deputy
10 McGuinness in relation to this conversation, and they 10:58
11 are as follows:

12
13 First, the evidence suggests that Deputy McGuinness did
14 not act on what he says happened at the meeting. He
15 told nobody at the time. He didn't speak publicly 10:58
16 about the meeting for two-and-a-half years. And even
17 when he did, his account of events was inconsistent
18 with what he now says. Deputy McGuinness told RTÉ's
19 Richard Crowley on the This Week programme, in an
20 interview on 29th May 2016, that he was not asked to 10:59
21 keep the meeting private or secret. It is striking
22 that despite this, Deputy McGuinness kept both the fact
23 of and the incendiary nature of the Commissioner's
24 alleged conduct secret from all of the other members of
25 the PAC and the officials of the PAC. He also kept the 10:59
26 facts and the alleged content of the meeting secret
27 from politics and the public generally for 26 months
28 until May 2016.

1 Secondly, we submit that Deputy McGuinness has been
2 inconsistent about whether he made a note of the
3 meeting and he has made diametrically opposite
4 statements on this issue. He made no reference to
5 having made a note in his Dail contribution on the 26th 10:59
6 May 2016. But more fundamentally, three days earlier,
7 he had publicly denied making a note of the meeting in
8 the car park when asked by Richard Crowley on the This
9 Week radio programme on 29th May 2016. Deputy
10 McGuinness sought to suggest in his evidence that there 10:59
11 was an ambiguity in what he was being asked by
12 Mr. Crowley, but we would say that any normal reading
13 of Mr. Crowley's question makes it clear there was no
14 ambiguity about what he was being asked by the
15 interviewer, Mr. Crowley. The question was very 11:00
16 specific and clear and Deputy McGuinness's answer was
17 definitive. And the question can briefly be recited
18 as:

19
20 "MR. CROWLEY: Did you record it or take a note or 11:00
21 write out notes later about this meeting?
22 DEPUTY MCGUINNESS: No, I did not."
23

24 Notwithstanding this denial on national radio of having
25 made a note, Deputy McGuinness produced a note of the 11:00
26 meeting with a statement of 28th March 2017. In that
27 statement he says nothing about denying the existence
28 of the note previously, and says: "I kept a note of
29 the meeting."

1
2 In his evidence before you, Chairman, Deputy McGuinness
3 says he felt the need to make a note because of his
4 shock at what had been said and his need to remember
5 the details of it. It bears emphasis that Deputy 11:00
6 McGuinness also said that he had already heard rumours
7 along the same lines and indeed already discussed them
8 with Sergeant McCabe. It's therefore very difficult to
9 understand what he was shocked by, except presumably
10 that it was the Commissioner who was now spreading 11:01
11 false allegations against Sergeant McCabe. If it was
12 this that caused the shock, which would be entirely
13 understandable, his inaction is incomprehensible. The
14 note is curiously squeezed into the side of a page
15 notwithstanding the fact that the next page of the book 11:01
16 is to this day blank. Although placed in the notebook
17 before a note dated 25th January 2014 the note of this
18 important entry is itself undated. Notwithstanding the
19 purpose for which he said he made the note, the deputy
20 maintained that he didn't refer back to the note in 11:01
21 advance of his Dáil contribution of the 26th May 2016,
22 in advance of his speaking to Maurice McCabe about the
23 matter or in advance of or indeed after a series of
24 radio interviews when he was asked for details of the
25 meeting. Furthermore, if he felt such a shock at what 11:01
26 he claims was said to him it's strange and perhaps
27 incomprehensible that he didn't feel such a shock at
28 the statement which he attributes to Commissioner
29 Callinan on the previous day, on the 23rd January of

1 2014, and yet, there is no reference back to this in
2 his note.

3
4 Third, we submit that it's implausible that Deputy
5 McGuinness heard something so damaging from the mouth 11:02
6 of the Commissioner of An Garda Síochána himself and
7 then did nothing about it. He didn't report it to the
8 Minister or to anyone in authority so that they would
9 be aware of what the Commissioner was doing, that it
10 should be stopped, that the Commissioner should be held 11:02
11 to account for saying such things about Sergeant
12 McCabe. His evidence now and the evidence of Deputy
13 Micheál Martin is that Deputy McGuinness mentioned it
14 in passing to Deputy Martin some weeks later, Deputy
15 McGuinness had previously publicly denied telling 11:02
16 Deputy Martin. Deputy McGuinness may have considered
17 there to be a valid political reason for keeping the
18 fact of this meeting in the car park from his
19 colleagues before Sergeant McCabe gave evidence to the
20 PAC perhaps because it could potentially derail Deputy 11:02
21 McGuinness's firm intention to have Sergeant McCabe
22 called before the PAC. However, if the things he
23 claims were actually said surely they would have
24 overridden any other political or public interest
25 motives for keeping the fact of the alleged contents of 11:02
26 the conversation quiet, particularly after Sergeant
27 McCabe had given evidence. While several witnesses,
28 including Deputy McGuinness, have spoke of a general
29 rumour circulating about Sergeant McCabe having been

1 the subject of child abuse allegations what
2 distinguishes Deputy McGuinness's position is he claims
3 he heard the allegation that Sergeant McCabe was a
4 child abuser from the Commissioner himself. If Deputy
5 McGuinness's account were true then he would have been 11:03
6 in possession of knowledge about behaviour on part of
7 the Garda Commissioner which was completely
8 inappropriate. One would have thought it likely that
9 if he were in possession of this information, if he was
10 as shocked as he claimed he was, he would have brought 11:03
11 such a significant policing and political matter into
12 the public domain or reported it to the Minister for
13 Justice. As a member of the Oireachtas Deputy
14 McGuinness had direct access to those in Government who
15 have the sole statutory authority to remove a serving 11:03
16 authority and yet supposedly armed with this
17 information he did nothing.

18
19 We say in those circumstances by April or May of 2014
20 Deputy Martin had met Ms. D, was aware of the 11:03
21 allegations and the Williams articles had been
22 published and according to the evidence heard by the
23 Tribunal it was widely known that these referred to
24 Sergeant McCabe.

25 11:04
26 Fourth, we say in his interview with the Tribunal
27 investigators in April 2018, Deputy McGuinness spoke of
28 how he was dismissive of the generalised rumours
29 circulating about Sergeant McCabe. He says he

1 dismissed these because "whoever was talking about it
2 was not an authority on the matter, it was simply
3 tattle and gossip". However, in contrast, the
4 allegations which he claims were uttered by the
5 Commissioner himself were from an authoritative source 11:04
6 and therefore there was every reason why Deputy
7 McGuinness would have sought to make sure that they
8 didn't continue to be made. Furthermore, this
9 dismissal of the allegation against Sergeant McCabe
10 ignores the seriousness of the allegation Deputy 11:04
11 McGuinness is making against Mr. Callinan. We say that
12 the fact that the sexual abuse allegation was untrue
13 doesn't alter the fact it was being made by the
14 Commissioner about one of his own members allegedly.
15 If anything, we say the falsity of the allegation 11:04
16 highlights what, on Deputy McGuinness's account, would
17 have been an extraordinary breach of duty on the part
18 of Commissioner Callinan which makes his failure to act
19 all the more inexplicable.

20 11:05
21 Fifth, Deputy McGuinness has also been inconsistent in
22 his recollection and account of whether or not he told
23 his party leader Deputy Micheál Martin about the
24 matter. Deputy McGuinness specifically denied on the
25 This Week programme with Richard Crowley that he ever 11:05
26 told Deputy Martin about the meeting. Again the
27 question from Mr. Crowley was clear. There can be no
28 doubt but that Deputy McGuinness knew specifically what
29 he was being asked about. And we set out the relevant

1 exchange where Mr. Crowley says:

2
3 "MR. CROWLEY: Did Martin Callinan swear you to secrecy
4 about this?

5 DEPUTY MCGUINNESS: No.

11:05

6 MR. CROWLEY: Did you tell anyone about this meeting or
7 the contents of the meeting subsequently?

8 DEPUTY MCGUINNESS: No.

9 MR. CROWLEY: Did you tell your party leader Micheál
10 Martin about this?

11:05

11 DEPUTY MCGUINNESS: No. I don't believe I did, no."

12
13 Then at a later stage when challenged as to why he
14 didn't tell his party leader, in the same interview,
15 Deputy McGuinness made it clear that he considered
16 telling Deputy Martin but a conscious decision not to
17 tell him. Again an extract from the interview:

11:05

18
19 "MR. CROWLEY: Did you think you should have told
20 Micheál Martin?

11:05

21 DEPUTY MCGUINNESS: No. Because firstly, it was a
22 matter between me and McCabe about he would bring
23 forward the evidence and what he was doing and my
24 judgment call was..."

11:06

25
26 And the answer tapered off.

27
28 So, we say that not only did Deputy McGuinness deny
29 ever telling Deputy Martin about the matter, but he

1 also advanced detailed rationale for not doing so. As
2 it happens, however, an account emerged to the Tribunal
3 last December that Deputy McGuinness had in fact told
4 Deputy Martin about the meeting in Bewley's car park
5 some weeks after the meeting, that he also told Deputy 11:06
6 Martin about the comments Commissioner Callinan made
7 about Sergeant McCabe. We submit that it's curious
8 that Deputy McGuinness didn't himself first offer an
9 account of this conversation with Deputy Martin to the
10 Tribunal, particularly when he described himself as 11:06
11 making "a judgement call" not to tell him. It was
12 Deputy Martin who informed the Tribunal that Deputy
13 McGuinness had told him this information. Deputy
14 Martin did so in a special supplementary statement on
15 the point made to the Tribunal as recently as 22nd 11:06
16 December 2017. But also, Deputy Martin appears to have
17 chosen to do nothing about the revelation that he
18 claims was made to him, that the Commissioner of An
19 Garda Síochána had maligned Sergeant McCabe to Deputy
20 McGuinness in this way. In fact, on both of their 11:07
21 accounts, Deputy Martin didn't even ask Deputy
22 McGuinness any follow up questions when being told that
23 the Garda Commissioner had essentially alleged that
24 Sergeant McCabe was a child abuser. Deputy Martin
25 offers the same explanation as Deputy McGuinness for 11:07
26 not bringing the Commissioner's behaviour to the
27 attention of the Government, and we repeat the points
28 made previously in that regard. Deputy McGuinness told
29 the Tribunal he only remembered telling Deputy Martin

1 about the matter after he had read Deputy Martin's
2 correspondence on this point to the Tribunal earlier
3 this year.

4
5 we say that in those circumstances, all of this 11:07
6 evidence is material that has to be considered by you,
7 Chairman, but we say that if the chairman of the PAC
8 had in fact become aware that the Garda Commissioner
9 was directly and repeatedly badmouthing Sergeant McCabe
10 in a manner that was outlined then one would have 11:07
11 expected him immediately to inform appropriate members
12 of Government at the highest level and to bring this
13 matter to public attention and that never happened.

14
15 we say furthermore, Chairman, that there are what we 11:07
16 submit are striking inconsistencies in how Deputy
17 McGuinness has described each of the two alleged
18 events. Secondly, there is a striking divergence in
19 how he claims to have responded to each of the two
20 alleged utterances. In his interview with the 11:08
21 investigators to the Tribunal in March 2018, Deputy
22 McGuinness is entirely inconsistent with what he had to
23 say about how he felt the need to make a note of the
24 meeting in the car park. When asked whether he had
25 made a note of the alleged "fiddles with children" 11:08
26 comment made on the 23rd January after the PAC meeting,
27 Deputy McGuinness said to the investigators "I didn't
28 go around making notes of such gossip". Deputy
29 McGuinness then goes on to tell the investigators "this

1 type of comment doesn't require a note being made, it
2 sticks in your head".

3
4 However, when later asked in the same interview with
5 the Tribunal about the note which he latterly revealed 11:08
6 he made of the comments allegedly made in the car park
7 he said "I was disturbed by what he said and therefore
8 I took a note of it". He went on to say "Again, I was
9 thinking of the gravity of what was said and what it
10 meant for me and the PAC and in that context I made the 11:08
11 note".

12
13 So the distinction Deputy McGuinness draws between the
14 comment allegedly made on 23rd January and that made on
15 the 24th January, the need for one to be noted but the 11:09
16 other not to be noted, and his concern in relation to
17 the implications for the Public Accounts Committee
18 itself is strange.

19
20 For the reasons set out we would respectfully invite 11:09
21 the Tribunal to disregard the testimony insofar as it
22 makes allegations against Commissioner Callinan, but we
23 say that insofar as the evidence is concerned those
24 points we have sought to outline in our submission
25 indicate a degree of unreliability and a factor which 11:09
26 would justify you in deciding not to rely upon that
27 evidence.

28
29 However, an important part of this section of your

1 assessment, Chairman, is one which has been referred to
2 by a number of other colleagues on behalf of other
3 parties: Is it open or should this Tribunal consider
4 all of the different conversations together and does
5 the conversation of one person tend to corroborate the 11:09
6 other? I propose to deal with the other conversation
7 very briefly and I will come back, if I can, to that
8 legal issue as well.

9
10 If I could ask you to turn to page 45 of the speaking 11:09
11 note, Chairman. We seek to address the conversation
12 between Commissioner Callinan and Séamus McCarthy of
13 the 23rd January of 2014. Mr. McCarthy's evidence to
14 this Tribunal was to the effect that during a brief
15 conversation of no more than five minutes shortly after 11:10
16 they both met, and in advance of the PAC meeting, that
17 the Commissioner raised Sergeant McCabe's name in
18 conversation. He said:

19
20 "Along the lines that Sergeant McCabe is not to be 11:10
21 trusted, that he had questions to answer and that there
22 were sexual offences allegations against him."

23
24 And then Mr. McCarthy said:

25
26 "Sexual offences was my recollection of it." 11:10
27

28 On the other hand Mr. Callinan in his evidence believes
29 that there is a misunderstanding between the two

1 parties and that Mr. McCarthy's recollection is
2 incorrect. Mr. Callinan recalls that he had offered a
3 view to Mr. McCarthy that some of the allegations made
4 by Sergeant McCabe in relation to the penalty points
5 being quashed were questionable and had proven to be 11:10
6 incorrect. This is a matter of fact. He also recalled
7 that Mr. McCarthy had raised during the conversation
8 that he had -- sorry, Mr. McCarthy had raised during
9 the conversation that he had heard of rumours about
10 Sergeant McCabe being investigated over allegations of 11:11
11 a sexual nature but that Commissioner Callinan pointed
12 out that the matter had been concluded with a decision
13 by the DPP not to prosecute.

14
15 We respectfully submit that on the balance of the 11:11
16 evidence this Tribunal could and should reasonably
17 conclude that Mr. McCarthy was mistaken in his
18 recollection for the following reasons:

19
20 First, Mr. McCarthy did not consider the comments 11:11
21 so significant at the time to commit them to writing,
22 nor did he seek to report them to anyone in authority.
23 Though there is a dispute as to which of the two men
24 brought the issue of the allegation of sexual nature up
25 in the conversation Mr. McCarthy's recollection 11:11
26 is nonetheless made some three years later with an
27 intervening time where there has been considerable
28 surrounding publicity which has taken place in relation
29 to the matters concerning Sergeant McCabe.

1
2 Secondly, not only was the suggestion made that
3 Commissioner Callinan directed a campaign to malign
4 Sergeant McCabe prominent in the media over the course
5 of the three years between the conversation and 11:12
6 Mr. McCarthy making his statement to the Tribunal, but
7 also Mr. McCarthy is a regular attender in the environs
8 of the Oireachtas. While Mr. McCarthy's recollection
9 is that he had not heard the rumours which other
10 witnesses had said were swirling around Leinster House, 11:12
11 there is, we say, at least a possibility he may have
12 heard those remarks from a source other than
13 Commissioner Callinan and over the passage of time has
14 somehow confused the conversation with the rumour.

15
16 Third, the evidence suggests that Mr. McCarthy's
17 understanding of the conversation at the time was not
18 clear. Mr. McCarthy said he attributed the alleged
19 comment by Mr. Callinan that there were sexual offence
20 allegations against Sergeant McCabe as being a 11:12
21 reference to the recently covered media story
22 concerning the controversy over the loss of a computer
23 in a sexual abuse investigation. As this Tribunal is
24 aware, that story did not in any way suggest that
25 Sergeant McCabe was the subject of any allegation of 11:12
26 sexual abuse and in fact a lengthy newspaper article
27 just three days later, which Mr. McCarthy confirmed in
28 evidence that he had read, had made clear that this
29 investigation was concluded.

1
2 Fourth, the comments attributed to Mr. Callinan, if
3 true, were actually made, would have had far-reaching
4 consequences for Mr. Callinan if they had been reported
5 or revealed by constitutional officer such as 11:13
6 Comptroller and Auditor General to any of the people in
7 the room or elsewhere. Mr. Callinan and Mr. McCarthy
8 had never had a conversation before this one. If, as
9 alleged, Mr. Callinan was such a person seeking to
10 badmouth Sergeant McCabe it is, we would say, a 11:13
11 situation where he would not have been expected to
12 understand that any remarks he would make to
13 Mr. McCarthy would have been kept confidential. We say
14 it's highly unlikely in those circumstances that
15 Commissioner Callinan would have made these remarks as 11:13
16 recalled by Mr. McCarthy. Mr. McCarthy had already
17 completed his report on the penalty points issue, there
18 was nothing to be gained in persuading someone like
19 Mr. McCarthy Sergeant McCabe was being investigated for
20 any offence. 11:13

21
22 But crucially we say this conversation and all accounts
23 of it was a very short conversation which happened in a
24 public area that was filled with other people and we
25 say those surrounding circumstances are relevant and we 11:13
26 respectfully submit greatly increase the risk and
27 likelihood of Mr. McCarthy having made a mistake.

28
29 The third conversation I wish to come to is that of

1 Commissioner Callinan and Deputy John Deasy of the 23rd
2 January 2014. In the course of correspondence to the
3 Tribunal of the 10th March 2017, Mr. Deasy explained
4 that he was a member of the Public Accounts Committee
5 and that he mentioned the fact that:

11:14

6
7 "I spoke with the then-Commissioner Martin Callinan.
8 Mr. Callinan made reference to Sergeant Maurice McCabe.
9 He referred to Sergeant McCabe as being someone who
10 could not be believed or trusted. That's my best
11 recollection of the conversation regarding Sergeant
12 McCabe. "

11:14

13
14 It is of course we say crucial to note that Deputy
15 Deasy did not suggest that Commissioner Callinan
16 referred to any suggestion or allegation of sexual or
17 criminal misconduct on the part of Sergeant McCabe. We
18 say, therefore, that the conversation is not directly
19 relevant to the terms of reference and in particular
20 paragraph [c].

11:14

11:14

21
22 Mr. Callinan has always clear stated that he cautioned
23 people that some of the allegations made by Sergeant
24 McCabe were questionable and had turned out to be
25 untrue. Even if he expressed this caution in the terms
26 recalled by Deputy Deasy it does not amount to
27 Commissioner Callinan acting upon the 2006 allegation
28 of criminal sexual misconduct against Sergeant McCabe
29 in a manner intended to discredit Sergeant McCabe.

11:15

1
2 The fact that a brief conversation between Commissioner
3 Callinan and Deputy Deasy which lasted, according to
4 Deputy Deasy, as "less than a minute" is not in
5 dispute. That the conversation took place in a busy, 11:15
6 noisy coffee shop near the Leinster House committee
7 room is not in dispute. Mr. Callinan's evidence by way
8 of statement and his evidence to this Tribunal was that
9 Deputy Deasy had misconstrued what he said.

10 Mr. Callinan's clear recollection is that he cautioned 11:15
11 Deputy Deasy in the following words:

12
13 "I also mentioned of course that it is the case that
14 not all of the allegations of Sergeant McCabe turned
15 out to be correct and I cautioned about the 11:15
16 inaccuracies of some of the information."

17
18 We respectfully submit that Commissioner Callinan's
19 recollection should be preferred by the Tribunal over
20 that of Deputy Deasy for a number of reasons. 11:16
21

22 First, we say Deputy Deasy's recollection of how he
23 came to be speaking to Commissioner Callinan has a
24 number of inconsistencies. In his initial letter he
25 said that Commissioner Callinan approached him, however 11:16
26 he was very clear in his evidence that he in fact
27 approached Commissioner Callinan who it seems had his
28 back to him as he approached. We say this tends to
29 suggest, firstly, that Deputy Deasy's memory is not as

1 clear as he might now think; secondly, it seems to
2 undermine any suggestion that could be made that
3 Commissioner Callinan was going around seeking people
4 out in an effort to discredit Sergeant McCabe.

11:16

6 Deputy Deasy first mentioned the matter on public radio
7 on an RTÉ broadcasts on 15th February 2017, some three
8 years after the event when he recounted the alleged
9 remarks told him by a senior garda that Sergeant McCabe
10 "was not to be trusted", and those were the words he 11:16
11 used at that stage. Almost a calendar month later he
12 set out in a letter to the Tribunal his recollection in
13 similar terms and it might be considered relevant that
14 Deputy Deasy's recollection came to him in the middle
15 February 2017 in the wake of this Tribunal being 11:17
16 established after Commissioner Callinan retired and
17 following a barrage of publicity over other
18 allegations, some of which were directed against
19 Mr. Callinan. And we say that again, taking into
20 account this issue of the general febrile background of 11:17
21 the political landscape over this period of time, that
22 there is a considerable risk that Deputy Deasy's
23 recollection of events may have been affected by the
24 passage of time and perhaps ultimately contaminated by
25 events in the media or perhaps he simply misconstrued 11:17
26 them at the relevant time, particular given the
27 surroundings in which the conversation with
28 Commissioner Callinan took place.

1 Towards the very end of his evidence to the Tribunal
2 Deputy Deasy gave a very different flavour of the
3 remarks than what he had previously given. Towards the
4 end of his evidence he said of the remarks "I couldn't
5 believe it, it took my breath away". He did not then 11:17
6 think the remark important enough to write it down. He
7 didn't report the remarks to his other PAC committee
8 members at the time, even when the controversy was
9 raging over Commissioner Callinan's reference to the
10 word 'disgusting' on the same day. When led in 11:18
11 cross-examination by Mr. McDowell he supplemented the
12 conversation in a significant way by saying that
13 Commissioner Callinan had told him that Sergeant McCabe
14 was not to be trusted "on anything". We say that is
15 obviously capable of carrying a different 11:18
16 interpretation to what he had originally said.

17
18 Mr. Callinan's recollection about this conversation
19 with Deputy Deasy has been consistent throughout.
20 Equally important is the fact that Commissioner 11:18
21 Callinan's remarks were entirely consistent with the
22 account recorded on the transcript that day and there
23 is no reference made by Mr. Deasy to the allegation now
24 being made to him on the transcript, which could have
25 been pursued at the meeting if it had actually occurred 11:18
26 on that day. We invite you, Judge, to consider
27 that the evidence of Commissioner Callinan should be
28 preferred to that of Deputy Deasy.

1 The next issue, Chairman, I would like to deal with is
2 the references to conversations with Mr. Gerald Kean.
3 The Tribunal has examined how it was that Gerald Kean
4 came to come in contact with Commissioner Callinan and
5 the purpose behind the interaction between the 11:18
6 individuals in or about Mr. Kean's appearance on the
7 Marian Finucane show in January of 2014. And the
8 Tribunal has heard all of the evidence about this
9 issue. Mr. Callinan's position is that Superintendent
10 Taylor told him that Gerald Kean had contacted the 11:19
11 Press Office indicating that he wanted to talk to
12 someone with knowledge about the O'Mahony investigation
13 before going on a radio programme. Mr. Callinan states
14 it was as a result of this approach that he ultimately
15 made contact with Mr. Kean and discussed only events 11:19
16 that were in the public domain.

17
18 Retired Chief Superintendent Diarmuid O'Sullivan's
19 position is that he doesn't have a clear memory as to
20 whether he assisted in accommodating the initial 11:19
21 contact with Gerald Kean and Martin Callinan. He did
22 accept in evidence to the Tribunal that his apparent
23 contact with Gerald Kean at the time was likely to be
24 in connection with the radio programme. He considers
25 it's more likely that he would have diverted an 11:19
26 approach of the kind mentioned by Gerald Kean to the
27 Garda Press Office. He doesn't accept that his calls
28 to Martin Callinan at the time were necessarily related
29 to Gerald Kean and the radio programme, but he did

1 accept that this was a possibility. And the events of
2 that weekend did not stick out in his memory.

3
4 Gerald Kean's memory is that Diarmuid O'Sullivan was
5 the point of contact between him and Martin Callinan, 11:20
6 that he contacted Mr. O'Sullivan seeking a
7 recommendation as to who he might talk to about the
8 issues, he thought that Mr. O'Sullivan had contacted
9 Commissioner Callinan in pursuance of this request who
10 in turn contacted him directly. Gerald Kean did accept 11:20
11 it was possible he might have contacted the Press
12 Office and spoke to David Taylor but he had no memory
13 of it. Mr. Kean and Commissioner Callinan both have
14 given evidence that they were in direct telephone
15 contact about the relevant issues in advance of the 11:20
16 radio programme and after it. Mr. Kean is clear that
17 at no stage was there any mention on the part of
18 Commissioner Callinan concerning any sexual abuse
19 allegation or investigation into Sergeant McCabe.
20 Mr. Kean told the Tribunal that Commissioner Callinan 11:20
21 told him that Sergeant McCabe had "not cooperated with
22 the investigation, that he was troublesome, obstructive
23 and difficult". Commissioner Callinan in his evidence
24 denies this. In this situation the Tribunal we say at
25 all times has to focus on the terms of reference. The 11:20
26 claim that Commissioner Callinan said that Sergeant
27 McCabe hadn't cooperated with the investigation or that
28 he was troublesome, obstructive or difficult, of itself
29 is not such as to amount to Mr. Callinan using the 2006

1 allegation in a manner intended to discredit Sergeant
2 McCabe. And we say that ultimately it's not a matter
3 that the Tribunal is directly asked to investigate or
4 make findings on. But we say that insofar as the issue
5 concerns the fundamental point in respect of 11:21
6 Commissioner Callinan's exchanges with Mr. Kean from
7 the point of view of the terms of reference is this:
8 The Commissioner did not make any reference whatsoever
9 to any sexual allegations in respect of Sergeant
10 McCabe, yet this on one view would have been an ideal 11:21
11 opportunity to do so if one takes the conspiracy theory
12 view of Commissioner Callinan's behaviour. This would
13 have been, on the conspiracy theory view, an
14 opportunity to speak to somebody who was a regular
15 contributor to media panels with the cause of 11:21
16 establishing that Sergeant McCabe was a discreditable
17 person because an allegation of sexual misconduct had
18 been made against him. But Commissioner Callinan did
19 not do so.

20 11:21
21 Commissioner Callinan has been clear that he doesn't
22 consider his interactions with Mr. Kean to have been
23 his finest hour. It was clear from his evidence that
24 he regrets this error of judgment on his part.
25 However, even in that context it must be emphasised 11:22
26 that Commissioner Callinan did not mention the sexual
27 allegation and in suggesting points to be included in
28 Mr. Kean's reply to the letter from Seán Costello &
29 Company he only suggested points which were in the

1 public domain and which he himself had made publicly.
2 It is regrettable that Commissioner Callinan did not
3 tell the Tribunal of this exchange with Mr. Kean. The
4 Tribunal has received Mr. Callinan's evidence on this
5 and we say that bears emphasis that as far as 11:22
6 Mr. Callinan is and was concerned, his exchanges with
7 Mr. Kean were dealing with matters which he had stated
8 publicly which were not directly the subject matter of
9 the Tribunal's terms of reference. And he says that in
10 those circumstances the relevance of this conversation 11:22
11 did not occur to him to be relevant and he did not
12 remember them until reminded when shown the written
13 material.

14
15 It's respectfully submitted that it would be wrong to 11:22
16 conclude that Commissioner Callinan did anything to
17 hide his interaction with Mr. Kean. If he wished to do
18 so, then that would have been achieved by disposing of
19 Mr. Kean's letter and notes and that would of course
20 have been improper, but that didn't happen. The 11:23
21 documents were reserved and remained available in the
22 Commissioner's office.

23
24 On one occasion, if not two, counsel for the Tribunal
25 has made a point that Commissioner Callinan's 11:23
26 interactions with Mr. Kean became known through the
27 documents that were provided by An Garda Síochána to
28 the Tribunal, but that the documents were only found
29 amongst the discovery made by An Garda Síochána due to

1 the diligence and hard work by counsel for the
2 Tribunal. An implicit suggestion was made that these
3 documents should have been specifically brought to the
4 attention for counsel for the Tribunal. We
5 respectfully say that that was an unfair criticism. We 11:23
6 say a system of discovery which requires the party
7 making discovery not to just discover all relevant
8 documents but also to emphasise to a tribunal any
9 documents which the party considers the Tribunal might
10 find particularly relevant or interesting, would be 11:23
11 quite simply unworkable. The documents were in the
12 discovery of the documents that came from the
13 Commissioner's office and that was where they were
14 found. Crucially, they were very clearly described in
15 a schedule of documents that accompanied the batch of 11:23
16 discovery from the Commissioner's office and that was
17 obviously highly relevant to the terms of reference.
18 An extract of the discovery schedule, which illustrates
19 the clarity of description and context is attached to
20 the speaking note as Appendix 1 and we say that it's 11:24
21 clearly identified as documents coming from the
22 Commissioner's file and indicating the communications
23 between Gerald Kean, correspondence from Sergeant
24 McCabe and Gerald Kean's correspondence and also points
25 in issue. 11:24

26
27 The next conversation is that of Mr. Boucher-Hayes.
28 And we submit that the evidence of Mr. Boucher-Hayes
29 concerning the conversation between himself and

1 Commissioner Callinan does not assist the Tribunal
2 under the term of reference which deals with whether
3 the former Commissioner acted upon knowledge of the
4 Ms. D allegation in a manner intended to discredit
5 Sergeant McCabe. And we invite you, Chairman, to 11:24
6 consider, for the reasons which I will outline, that
7 Mr. Boucher-Hayes' account is so inconsistent that it
8 ought not to be relied upon on its own. We submit that
9 Mr. Callinan's recollection of this conversation is to
10 be preferred as the more reliable and we say that there 11:24
11 are a number of inconsistencies in Mr. Boucher-Hayes'
12 evidence and these factors are set out at page 53
13 onwards, but if I could briefly summarise them
14 as follows.

15 11:25
16 First, the statement from Mr. Boucher-Hayes giving an
17 account of the conversation of the 17th December 2013
18 was made almost three-and-a-half years after the event.
19 His first statement did not include many of the details
20 recalled by Commissioner Callinan and even 11:25
21 Mr. Boucher-Hayes' second statement in which he
22 expressed himself as providing additional information
23 in relation to Mr. Callinan's statement did not include
24 much of the information he subsequently chose to give
25 in the witness-box on 1st June 2018. Mr. Boucher-Hayes 11:25
26 chose to colour his account of the conversation when he
27 came to give evidence by, for example, referring for
28 the first time to hand gestures made by Commissioner
29 Callinan, dismissive of former Garda Wilson or

1 suggesting for the first time that the Commissioner did
2 not make eye contact with him during the conversation,
3 and in his evidence he also raised a number of
4 additional points that were significantly missing from
5 both of the statements previously provided.

11:25

6
7 Secondly, Mr. Boucher-Hayes' first statement suggested
8 that the only issue he raised with Commissioner
9 Callinan was one which should be dealt with during the
10 Crimecall interview was the penalty points issue.

11:25

11 Commissioner Callinan has said in his statement to the
12 Tribunal that Mr. Boucher-Hayes had also raised other
13 matters which he felt should be dealt with in the
14 interview, including the Smithwick Tribunal. It was
15 only after Commissioner Callinan's statement that
16 Boucher-Hayes appeared to recall that these other
17 matters had also been raised by Mr. Boucher-Hayes.

11:26

18
19 The suggestion and recollection from Mr. Boucher-Hayes
20 that the broadcast that night hinged on a conversation
21 with the presenter and the Commissioner Callinan of An
22 Garda Síochána we say is highly implausible. The
23 programme was a monthly programme, it was scheduled to
24 be broadcast that night at the 9:30 prime audience
25 slot. We submit it's extremely unlikely that RTÉ would
26 allow the programme to be broadcast because of the view
27 which a particular presenter or presenters had taken
28 about how the interview with the Commissioner should be
29 conducted. There was a producer, an executive

11:26

11:26

1 producer, managing the programme for an independent
2 production company involved. There was a commissioning
3 editor also for RTÉ. All of these people would have
4 been likely to have been involved in resolving
5 outstanding issues with the Commissioner if they 11:26
6 persisted on a scale such as to threaten the broadcast
7 itself up to the point in the evening when the
8 Commissioner had actually arrived in RTÉ for the
9 interview. We also say it's inconsistent with the
10 evidence of Mr. McLindon who said the matter had been 11:27
11 resolved earlier in a meeting which included the
12 representative of Garda Community relations, the
13 presenters, the production company and the head of RTÉ
14 factual, that is to say the individuals you would
15 expect to be the editorial decision-makers. 11:27
16 Mr. McLindon wasn't challenged on this evidence. While
17 Mr. Boucher-Hayes may have remained unhappy or angry at
18 the editorial decision we respectfully say he was wrong
19 to say that the broadcast was hanging in the balance at
20 a stage when he had his conversation with Commissioner 11:27
21 Callinan.

22
23 Fourth, we say that rather than there being any
24 evidence that Mr. Boucher-Hayes was someone who was
25 close to Commissioner Callinan, we say that the 11:27
26 evidence is much to the contrary. On his account, the
27 conversation between Mr. Boucher-Hayes and Commissioner
28 Callinan occurred following disagreement between them
29 as to the content of the Crimecall interview and we say

1 that the evidence suggests that Commissioner Callinan
2 had no reason whatsoever to believe he could count on
3 Mr. Boucher-Hayes' discretion, thereby giving him
4 material which would be of the type Mr. Boucher-Hayes
5 says was tendered to him.

11:27

6
7 Fifth, we say it's also noteworthy Mr. Boucher-Hayes'
8 suggestion that he managed to persuade the Commissioner
9 to another position, that is to say, to deal with
10 matters which he had not intended to deal with, is
11 wrong. It's not borne out by the content of the
12 interview as broadcast. The greater strength of
13 Mr. Callinan's recollection of the conversation is
14 evident from the fact that his recollection is he did
15 not alter his position on the type of interview he
16 would engage in. The programme proceeded to be
17 broadcast in that way and was presented by
18 Mr. Boucher-Hayes and Ms. Seoige notwithstanding, and
19 it was consistent with the original formula and the
20 standard type of information that was given at that
21 time of the year.

11:28

11:28

11:28

22
23 Sixth, in his two statements to the Tribunal
24 Mr. Boucher-Hayes made no reference to having informed
25 anyone else of his conversations with the Commissioner.
26 No statements were offered or made by anyone else in
27 RTÉ regarding knowledge of such conversations before
28 Commissioner Callinan gave evidence to the Tribunal.
29 Even when presented with a full denial of the contents

11:28

1 of his first statement and the replying statement of
2 Mr. Callinan, Mr. Boucher-Hayes didn't offer any
3 details of any person to whom he may have spoken about
4 the matter. Mr. Colum Kenny, a person with more than
5 thirty years experience in journalism and broadcasting 11:28
6 regulation, has given evidence before Mr. Boucher-Hayes
7 was called and he offered a view that if he himself had
8 at any point heard a senior garda officer make an
9 allegation of sexual assault against Sergeant McCabe
10 and had established that the allegation was untrue, he 11:29
11 would have immediately talked to his editor with a view
12 to publication. Mr. Boucher-Hayes first mentioned
13 telling other people about what the Commissioner had
14 said when he was in the witness-box.

15
16 Seven, the evidence of Ms. Niamh O'Connor,
17 Mr. Boucher-Hayes' commissioning editor, we say gives
18 no more than limited support for Mr. Boucher-Hayes'
19 account. She gave her evidence on day 94. In the
20 first instance she was unaware that she was going to be 11:29
21 named by Mr. Boucher-Hayes as a person to whom he had
22 allegedly spoken about the conversation with the
23 Commissioner at the time. The first she learned of her
24 potential involvement was when she was talking to one
25 of his colleagues, day 94, page 28, line 5. Secondly, 11:29
26 whatever Mr. Boucher-Hayes told her about the
27 conversation doesn't appear that he was particularly
28 concerned about the matter when relaying it to her.
29 That relevant evidence is at day 94, page 29.

1
2 Third, the extent of Ms. O'Connor's recollection was
3 that during the conversation "the Commissioner had made
4 some derogatory remarks regarding Sergeant McCabe in
5 terms of him having issues, psychological and 11:30
6 psychiatric issues". That is day 94, page 23. And
7 significantly here we say, Chairman, that there was no
8 mention of the Commissioner having said that the
9 sergeant was motivated by a set of grievances against
10 Garda management; there is no mention of the 11:30
11 Commissioner having said that Sergeant McCabe was
12 famous within An Garda Síochána for this; there was no
13 mention of a warning that Sergeant McCabe was not to be
14 trusted; there was no mention of the Commissioner
15 having said that there were other things he could tell 11:30
16 Mr. Boucher-Hayes "horrific things, the worst kind of
17 thing"; and there was no mention of any reference to
18 any sexual allegation, whether express or implied. So
19 we say that on that basis, if anything, the evidence of
20 Ms. O'Connor tends to undermine rather than corroborate 11:30
21 the substance of Mr. Boucher-Hayes' account.

22
23 Eight, we say it's also of note that in his evidence,
24 the series producer of Prime Time, Mr. Tom Donnelly,
25 said he didn't perceive that Mr. Boucher-Hayes was 11:30
26 "particularly concerned" about the Callinan
27 conversation when allegedly relaying it to
28 Mr. Donnelly. He did say Mr. Boucher-Hayes was
29 surprised at what had been said to him but he didn't

1 perceive that he was concerned by it.

2
3 And if we then move on to paragraph 9, we say that
4 there is no statement from Ms. Seoige.

5
6 At number 10 we say that, in the two statements that he
7 had produced Mr. Boucher-Hayes offered no view as to
8 what he understood the purported reference by
9 Commissioner Callinan to Sergeant McCabe having done --

10 CHAIRMAN: Mr. Murphy, I am sorry to interrupt you but, 11:31
11 I mean, you have an entitlement to call for someone to
12 be called as well, and you didn't ask for Ms. Seoige to
13 be called.

14 MR. MURPHY: No, we didn't. I accept that.

15 CHAIRMAN: well, there you go. 11:31

16 MR. MURPHY: I am simply commenting on the state of the
17 evidence.

18 CHAIRMAN: If you have any evidence to say that she is
19 going to flatly contradict everybody well then --

20 MR. MURPHY: No, I can't say that, Chairman. I am not 11:31
21 making that point, Chairman.

22
23 And number 10, importantly in the two statements
24 Mr. Boucher-Hayes offered no view as to what he
25 understood the purported reference by Commissioner 11:31
26 Callinan to Sergeant McCabe having done "horrendous
27 things, the worst kind of things was". Commissioner
28 Callinan gave evidence in advance of Mr. Boucher-Hayes
29 giving evidence and Commissioner Callinan himself was

1 caused to observe during his evidence that he found it
2 strange that Mr. Boucher-Hayes didn't ask any follow-up
3 questions seeking to establish what exactly the
4 Commissioner was referring to as one might expect of an
5 experienced reporter at that time, if those things had 11:32
6 actually been said to him.

7
8 At point 11, we say that the position is that
9 Mr. Boucher-Hayes, after Mr. Callinan had given
10 evidence, gave evidence-in-chief, he advanced the 11:32
11 notion that he had come to the conclusion that the
12 matters been referred to as horrendous or the worst
13 type of things were in fact allegations of sexual
14 assault or rape. Again while one could of course infer
15 that these words could refer to sexual acts, no basis 11:32
16 was advanced by Mr. Boucher-Hayes as to why he came to
17 that view to any other.

18
19 Number 12, in both his first and second statements
20 Mr. Boucher-Hayes said nothing of any follow-up steps 11:32
21 he took in response to the content of the conversation
22 with Commissioner Callinan but for the first time in
23 the witness-box he informed the Tribunal that he had
24 informed Sergeant McCabe months later about the
25 contents of the Commissioner's conversation with him. 11:32
26 More importantly, in the letter from RTÉ's solicitor
27 the Tribunal was informed that in fact
28 Mr. Boucher-Hayes's recollection was that he had in
29 fact not informed Sergeant McCabe about the alleged

1 derogatory remarks made by Commissioner Callinan until
2 April 2016, almost a year-and-a-half after the event.

3
4 In his evidence Mr. Boucher-Hayes also said he had
5 written to the Chief State Solicitor's Office in 2017, 11:33
6 more than three years after the conversation, seeking
7 to interview former Commissioner Callinan, but he
8 didn't have the letter. When challenged as to whether
9 there was a letter he expected, he said, to be able to
10 locate it on his computer but he was not. 11:33

11
12 We say that if one looks at the totality of the
13 evidence, that it's implausible that the content of
14 this short conversation, as described by
15 Mr. Boucher-Hayes, taking into account his experience 11:33
16 and understanding is accurate or is reliable. And we
17 then say that Mr. Boucher-Hayes' recollection of
18 matters after this passage of time is different, and we
19 say that for the reasons outlined in the course of the
20 submission that there are a number of factors which 11:33
21 could lead you, Chairman, to consider that this is not
22 evidence to be relied upon.

23
24 Moving away from the individual interviews, Chairman,
25 at paragraph 90, you have asked a question at question 11:34
26 12 as to whether the Tribunal is in a position to say
27 that the allegation of Deputy McGuinness,
28 Mr. Boucher-Hayes, Mr. McCarthy, Deputy Deasy,
29 corroborate or support each other. We respectfully say

1 that they do not because of the alleged contents of
2 what is described this in these different discussions.
3 The first point we wish to make is that each of the
4 conversations is different. The classic application of
5 similar-fact evidence, whether in criminal trials or 11:34
6 elsewhere, would involve a situation where a number of
7 people were called to give evidence about facts which
8 were strikingly similar, and which would deal with
9 identical types of activity, but there are differences,
10 and we say for the reasons previously outlined those 11:34
11 are material. So, for example, Deputy Deasy is
12 absolutely clear Mr. Callinan did not mention sexual
13 allegations. If we then look at that position, it's
14 then suggested that a few minutes later he did bring up
15 sexual allegations to Mr. McCarthy. In a sense, 11:34
16 Chairman, what we would say is that the differences
17 between the conversations is reflective of strong
18 evidence that the Commissioner wasn't seeking to
19 discredit Sergeant McCabe by reference to the 2006
20 allegation and that there wasn't any coherent simple 11:35
21 message that was being delivered. If this was a case
22 involving similar-fact evidence, the same message would
23 be delivered in the same terms to the five or four
24 different people. In this situation, that did not
25 occur, even on the evidence of those people. And we 11:35
26 make reference at paragraph 91 to the fact that the
27 test in law for the admissibility of similar-fact
28 evidence is on the basis of "the inherent improbability
29 of several persons making up exactly similar stories",

1 or because it shows a practice which would rebut
2 accident, innocent explanation or denial. And that is
3 an extract from the judgment of Mr. Justice Barron in
4 People (DPP) v. BK [2000] 2 Irish Reports at page 211.
5 And simply put, Chairman, what we say is that if one 11:35
6 applies the law to this particular element of the
7 matters under your review, the accounts of the
8 individuals are not, as the legal principles require,
9 exactly similar. They differ in several material and
10 striking respects. And we furthermore say that it must 11:36
11 be borne in mind, given the amount of publicity that
12 has taken place on these matters in the public domain,
13 that there is a significant possibility that the
14 individuals who heard the remarks have since overlaid
15 their reaction with a public narrative, and we say that 11:36
16 is the only plausible version consistent with the
17 otherwise inexplicable failure of any party to act at
18 the time on what they now believe they heard. And we
19 do say in this section, as with many of the other
20 sections of the terms of reference, the impact on 11:36
21 memory, the impact on understanding caused by public
22 controversy and the repetition which is in the public
23 domain, allied to the presence of rumour within media
24 and political circles, is a factor which has been
25 expressed by a number of witnesses who are not central 11:36
26 to these issues but who have commented on those matters
27 as being a matter of fact, and again I think I referred
28 yesterday to the evidence of Mr. Fionnan Sheahan, to
29 Mr. Michael O'Toole, to Mr. Lally. That is not in

1 dispute and we say that that is a factor which could
2 apply in those circumstances.

3 CHAIRMAN: Sorry, I am not quite following your point
4 there.

5 MR. MURPHY: The point I am making is that, ultimately, 11:37
6 the issue we made, Chairman, in relation to the effect
7 on memory of public controversy is that, in this case,
8 a number of witnesses have said that there was rumours
9 about Sergeant McCabe and matters being said about
10 Sergeant McCabe as far back as 2010, not coming from 11:37
11 Garda sources, and that by the time one gets to 2013,
12 one has a major public controversy, by the time these
13 witnesses come to give evidence in 2017 and 2018 there
14 has been a vast tsunami of public comment and
15 discourse, and it's only after that has happened these 11:37
16 witnesses come forward. And human nature being what it
17 is, I am not suggesting any mala fides but I am saying
18 that it's possible and conceivable in those
19 circumstances that people are in a position where their
20 memories and recollections are affected by subsequent 11:37
21 circumstances, and this is amplified by the fact that
22 there is no evidence of him taking any action about
23 what are meant to be stark confrontations in 2013, in
24 the intervening period.

25
26 I think in terms of Deputy McGuinness, I think it's
27 fair to say that there is perhaps more of a critique of
28 his position concerning the level of inconsistencies in
29 his action, and he is different, but I think, in fact,

11:38

1 if one looks at his evidence and looks all the other
2 witnesses, it amplifies the need, we say, to take care
3 in terms of assessing the evidence. So we would invite
4 you, Chairman, firstly, to consider each of these
5 witnesses individually; secondly, to take into account 11:38
6 the need for caution when assessing whether memory can
7 be affected by public events; and thirdly, in terms of
8 the process to disregard the invitation that you may
9 receive to consider this evidence on the basis it's
10 similar-fact evidence, because when one looked at the 11:38
11 actual facts of the interviews themselves, we say that
12 those matters are not covered by the doctrine because
13 they are different issues.

14
15 We say in relation to question 12 also that the issues 11:38
16 that arise there are issues which are important. And
17 just to summarise, we say the allegation made by each
18 witness is materially different in a number of
19 respects. Secondly, a common feature of each of the
20 witnesses: they didn't come forward with the 11:39
21 allegations at the time but did so three years later,
22 at a point in time when the allegations against former
23 Commissioner Callinan had received widespread coverage
24 and, to a significant degree, had already become
25 embedded in a sort of public narrative in the wake of 11:39
26 the reportage of Superintendent Taylor's disclosure.
27 So, in that situation, Chairman, we would invite you to
28 consider each of these matters on their own. We say
29 one does not corroborate the other. And for the

1 reasons we have previously outlined, we say each of the
2 individual conversations reflects facts, circumstances,
3 inconsistencies, frailties which we say are to be
4 contrasted with the clarity of Commissioner Callinan's
5 response, and we would urge you to prefer his evidence
6 to theirs.

11:39

7
8 Chairman, if I can move briefly to the next term of
9 reference, [m], and this is at page 60. Very briefly,
10 this requires you, Chairman, to investigate "such
11 knowledge which Commissioner O'Sullivan had at the
12 meeting referred to at [l] above."

11:40

13
14 In response, we say, simply, that there isn't a shred
15 of evidence to support any knowledge on the part of
16 Ms. O'Sullivan. The uncontested evidence that she gave
17 was that the first time that she heard of a meeting
18 between Commissioner Callinan and Deputy McGuinness was
19 when the media reported Deputy McGuinness's
20 contribution to the Dáil on the 26th May 2016; that is
21 to say, his first public utterance about the meeting.

11:40

11:40

22
23 Moving then, Chairman, if I can, to paragraph [k], and
24 I propose to deal with this paragraph briefly because I
25 think many of the submissions made by Mr. Gillane in
26 that regard are appropriate in relation to this
27 particular term of reference, and that says:

11:40

28
29 "To investigate whether Commissioner O'Sullivan, using

1 briefing materials prepared in Garda Headquarters,
2 influenced or attempted to influence broadcasts on RTE
3 on the 9th May 2016 purporting to be a leaked account
4 of the unpublished O'Higgins Commission Report in which
5 Sergeant McCabe was branded a liar and irresponsible. " 11:41

6
7 So, at first sight, the task assigned to you, Chairman,
8 can be broken into two parts. The first is to examine
9 the suggestion that the reports broadcast by RTE
10 relating to the then-unpublished final report of the 11:41
11 O'Higgins Commission, on the 9th May 2016, branded
12 Sergeant McCabe as a liar and irresponsible. But on
13 closer examination, we say it can be seen that the
14 words of the terms of reference appear to operate on
15 the premise that the questions did, in fact, brand 11:41
16 Sergeant McCabe as a liar and irresponsible. Listening
17 to or viewing the broadcasts establish that this is an
18 extraordinary assertion, and primarily it's a matter
19 for RTE to deal with, which has already taken place
20 through Mr. Gillane's submissions. We say that it's 11:41
21 clear that the contents of the broadcast, which this
22 Tribunal has broadcast to all attending here in the
23 course of its hearings, show that, far from branding
24 Mr. McCabe in any terms, the broadcasts merely reported
25 what the O'Higgins Commission had made in its findings 11:42
26 and what it said in its findings about Sergeant McCabe.

27
28 Again, coming back to the use of language in the terms
29 of reference point, Chairman, that you have raised in

1 the earlier sittings in January and February and March,
2 we say that perhaps it's unfortunate that this
3 paragraph of the terms of reference seems to be
4 predicated on an assumption, which, on any view of the
5 broadcasts, is entirely wrong.

11:42

6
7 And this assertion that RTÉ branded Sergeant McCabe a
8 liar and irresponsible is itself extraordinary, to the
9 extent that it seeks to align the national broadcaster
10 and the individuals involved who have given evidence to
11 you. It's also damaging insofar as it tries to suggest
12 that the then-Garda Commissioner was minded to and was
13 able to influence, or attempt to influence, the RTÉ
14 reportage and to brand Sergeant McCabe as a liar. And
15 if one looks at the actual terms of reference itself as
16 well, it seems clear that the language is personalised
17 very much to Commissioner O'Sullivan. The language is
18 ultimately saying:

11:42

11:42

19
20 "Whether Commissioner O'Sullivan, using briefing
21 material prepared in Garda Headquarters, influenced or
22 attempted to influence broadcasts in RTÉ."

11:43

23
24 So it specifically sources the fons et origo of this
25 entire broadcast as Garda Headquarters, a proposition
26 for which there is no evidence whatsoever.

11:43

27
28 we also say that it's clear from Sergeant McCabe's
29 evidence that he was very unhappy with Mr. Reynolds'

1 reportage from the very moment that he saw it on-line
2 that morning, and I think it's only fair to say that,
3 looking at all of the evidence given by the witnesses
4 from RTÉ, especially from the editorial perspective, it
5 demonstrated the existence of a careful operation by 11:43
6 RTÉ to review the copy of the report which they had and
7 to ensure that they sourced and balanced all of their
8 reportage in the events, which was the report, in the
9 terms of the report itself. Now, we also note the fact
10 that the controversy that's arisen from Sergeant 11:43
11 McCabe's complaint about the use of the word 'lie' has
12 been addressed by the witnesses, and we say that that
13 is something which is entirely reasonable on their
14 part, and again, there is no evidence to demonstrate
15 that anyone else, in particular no evidence whatsoever 11:44
16 that Commissioner O'Sullivan was anywhere near the RTÉ
17 newsroom influencing any of the people involved, in
18 communication with them in any way, and yet the
19 allegation is still before you this afternoon, a point
20 I will return to at a later stage. 11:44

21 CHAIRMAN: well, Mr. Murphy, I appreciate the point you
22 are making there, but I think it is like a habeas
23 corpus; once the Oireachtas sends it here, I have to
24 deal with it, one way or the other.

25 MR. MURPHY: Oh, I accept that. 11:44

26 CHAIRMAN: I don't think it's a question of people
27 withdrawing it. And even if they did, I think I would
28 have to go ahead. It may help, but nonetheless, I
29 think I would have a duty to say something about it.

1 MR. MURPHY: Yes, Chairman. What we do say in terms of
2 the approach, we draw your attention to the fact, as
3 Mr. Gillane said, no legal proceedings were ever
4 brought in relation to the broadcast itself. But at a
5 point where the evidence in that sense has crumbled 11:44
6 completely, one is reminded of the episode some 25
7 years ago this year where a house on a cliff in
8 England - it has been shown recently on television -
9 collapsed into the sea over a three-day period, and,
10 piece by piece, as the cliff gave way, the case 11:45
11 collapsed. And of all the Terms of Reference, [k] was
12 one where I had that sense, looking at the witnesses
13 and their evidence. But what we still have at the end
14 is somebody still trying to push around in the rubble
15 to say, oh, there is still a case on this point, and 11:45
16 that is done by the attempt to refer to Mr. Barrett's
17 evidence, and we say that in terms of the position, all
18 that Mr. Barrett has said in the past, in the previous
19 sections of this process, has been amicable or friendly
20 towards Sergeant McCabe, he has also been an assiduous 11:45
21 notetaker and he has said that this particular
22 conversation that is referred to in paragraph 101
23 didn't happen, and that is a clash that you will have
24 to resolve, but it's a very simple clash, we submit,
25 because ultimately Mr. Barrett has no materials to 11:45
26 support that proposition being put forward by Sergeant
27 McCabe and every other piece of evidence indicates in
28 one direction only: that Commissioner O'Sullivan had
29 no influence or input in relation to the process of the

1 programme -- the preparation of the programme by RTÉ.

2
3 where does this come from? A question that the
4 Tribunal has asked in previous hearings. At paragraph
5 102, Chairman, we point out the fact that the 11:46
6 provenance of this paragraph of the terms of reference
7 clearly lies in the protected disclosure made by
8 Sergeant McCabe. Whereas I said to you yesterday the
9 vast bulk of the material in this part of the Tribunal
10 refers to Superintendent Taylor, this one comes from 11:46
11 Sergeant McCabe's protected disclosure, and there he
12 says in his statement, and I quote:

13
14 "I am currently on work-related stress due... [in part]
15 to a disgraceful series of broadcasts on RTÉ on the 9th 11:46
16 May 2016 purporting to leak an account of the
17 unpublished O'Higgins Commission Report in which I was
18 branded as a liar and irresponsible."

19
20 And in his protected disclosure he then said: 11:46

21
22 "I am now satisfied on impeccable authority those RTÉ
23 broadcasts were planned and orchestrated by the
24 Commissioner, Nóirín O'Sullivan, personally" --
25 personally -- "using briefing material prepared at 11:47
26 Garda Headquarters."

27
28 So we say that it's clear on the protected disclosure
29 that Sergeant McCabe does much more than merely repeat

1 an allegation that he claims was made to him by
2 Mr. Barrett. In the protected disclosure, he seems to
3 be asserting that the RTÉ reportage was disgraceful,
4 that RTÉ had branded him a liar and irresponsible and
5 expressed himself satisfied by what Mr. Barrett had
6 told him. And the evidence, we say, is that, at this
7 stage of the process, that all of the information
8 obtained by Mr. Reynolds on that day was decided upon
9 and shaped by him in accordance with RTÉ's rigorous
10 editorial processes and careful compliance with its
11 statutory obligation to fairness. And if, as RTÉ have
12 said in their evidence, that everything contained in
13 the broadcast was sourced in the O'Higgins Report, what
14 makes the persistence of this complaint all the more
15 remarkable is that you will recall, Chairman, how on
16 the day that he gave evidence, on Day 59, Sergeant
17 McCabe said that he accepted the O'Higgins Report 100
18 percent. It then begs the question: how on earth can
19 there be a controversy about a broadcast which
20 reflected 100 percent the O'Higgins Commission's
21 reports? But once again, Chairman, it's a matter for
22 you to assess. But there does appear, in this
23 situation, we say, to be the promotion of a complaint
24 but no evidence.

11:47

11:47

11:47

11:48

25
26 So we say ultimately that this is another example where
27 a complaint is made without any evidence, that the
28 broadcasts were influenced by Commissioner O'Sullivan
29 and we say there is no evidence whatsoever to

11:48

1 demonstrate that she attempted in any way to influence
2 them at all.

3
4 Chairman, there are a number of other brief points I
5 wish to make before addressing your questions, but I am 11:48
6 just mindful of the time factor, and with the
7 permission of you, Chairman, I might just simply refer
8 to the headings we address in the speaking note.

9 CHAIRMAN: well, I actually think -- I have just looked
10 at that, Mr. Murphy. I think those things are actually 11:49
11 important, and I think if you did address them, I think
12 I would be happier, if you wouldn't mind.

13 MR. MURPHY: I am happy to do that, Chairman, yes.

14 MR. McDOWELL: I should say, Chairman, I don't have a
15 copy of this speaking note. 11:49

16 CHAIRMAN: All right. It would be appropriate for
17 Mr. McDowell to have it. I am sure you have extra
18 copies.

19 MR. MURPHY: Yes. One has just been furnished to
20 Mr. McDowell. 11:49

21 CHAIRMAN: Is there another copy? I would like a
22 second copy.

23 MR. MURPHY: Certainly. Page, 64 Chairman. We deal in
24 part here with the pre-PAC meeting notes. This is not
25 clearly attributable to any particular term of 11:50
26 reference, but issues have arisen and have been raised
27 in the course of the hearings about them. The first
28 is, that the minutes of the meetings held in
29 preparation for the PAC meeting hearings in January

1 2014 have been referred to on a number of occasions
2 during evidence before the Tribunal. The Tribunal was
3 interested in understanding those notes, which appear
4 to reference Sergeant McCabe directly or indirectly and
5 the 2006 allegation. These are meetings of the 6th, 11:50
6 9th, 14th, 21st and 22nd January 2014. And the note
7 that attracted most attention from the Tribunal was the
8 note that Mr. McLindon made apparently near the start
9 of a pre-PAC meeting on 21st January 2014. And he made
10 a note in the following terms: 11:50

11
12 "Personal injuries claim 2009. 2007-2008, defamation.
13 2006, first incident sergeant serving."

14
15 Retired Assistant Commissioner Jack Nolan had a 11:50
16 corresponding note which said:

17
18 "Start Sergeant McCabe 2006."

19
20 Mr. McLindon was unclear about this note as he didn't 11:51
21 specifically recall the note or indeed the discussion.
22 He accepted that the reference to 2006 might have been
23 a reference to the investigation into the complaint of
24 Ms. D, but he specifically said he did not recall that
25 matter being discussed in any detail at those meetings. 11:51
26 He did confirm that the investigation file had not been
27 produced. He agreed with Tribunal counsel that
28 Assistant Commissioner Nolan's note suggests there was
29 some discussion about the motivation of whistleblowers,

1 but beyond that he had no memory of any detailed
2 discussion concerning Sergeant McCabe. Ms. O'Sullivan
3 in her evidence said she didn't recall any discussion
4 concerning the 2006 investigation in her presence and
5 is sure that if it had occurred, she would have 11:51
6 remembered it. Commissioner Callinan had no
7 recollection of the 2006 investigation being discussed,
8 but he conceded that in the light of the notes made,
9 there may have been some mention of it. And it's
10 submitted to the extent there may have been a mention 11:51
11 of the 2006 investigation into the complaint of Ms. D,
12 there is no evidence that it was discussed in any
13 detail, if at all. There was no evidence to suggest
14 that Ms. D was mentioned, and certainly there was no
15 evidence that the 2006 investigation was acted on in 11:52
16 any way to discredit Sergeant McCabe or that any
17 consideration was given to acting on it. There was, as
18 might have been expected, mention made of
19 whistleblowers and of Sergeant McCabe contained in the
20 minutes considered by the Tribunal, but that was to be 11:52
21 expected that such references might occur in
22 preparation for a public hearing concerning the fixed
23 charge penalty points report by the Comptroller &
24 Auditor General, which had in the first instance been
25 prompted by the delivery of a file by Sergeant McCabe. 11:52
26 It's entirely natural that there would have been
27 discussion of the person who was bringing the
28 complaints to the fore. Those discussions might extend
29 beyond what a lawyer might or consider to be entirely

1 relevant to the specific matter.

2
3 And given the focus of this Tribunal, it's important to
4 emphasise that the reference to 2006 allegations is not
5 an isolated or standalone reference, but appears 11:52
6 together with other facts relating to Sergeant McCabe.
7 To the extent that the notes are of assistance, they
8 show there that was no focus on the allegation against
9 Sergeant McCabe, they show there was a general
10 discussion about Sergeant McCabe. It's respectfully 11:52
11 submitted it would be artificial to expect there would
12 be not such a discussion. It would be also artificial
13 to read something sinister into the fact of such a
14 discussion.

15 11:53
16 The pre-PAC meetings could be described as a high level
17 assembly of senior personnel within An Garda Síochána,
18 whose role was to prepare for a very public hearing
19 before a joint Oireachtas Committee. The discussion
20 and the output of the pre-PAC meetings for An Garda 11:53
21 Síochána can best be measured by the speeches prepared
22 and possibly also the anticipatory question sheet
23 prepared by Mr. McLindon, which was headed "Potential
24 Questions from PAC re FCPN". This list was prepared to
25 assist the Commissioner in dealing with possible 11:53
26 questions that might be raised at the public hearing.
27 We say nothing unusual or strange about that.

28
29 The ultimate output of the meetings, illustrating the

1 issues that An Garda Síochána wished to deal with, can
2 only be measured by the speech delivered by
3 Commissioner Callinan, and we submit that that speech
4 can in no way be described as anything other than
5 proper. As one might expect, it doesn't seek in any 11:53
6 way to denigrate Sergeant McCabe, whether within the
7 meaning of the terms of reference or at all. The
8 Tribunal was interested in these notes in order to
9 explore whether they were evidence of a mindset or an
10 intention on the part of Mr. Callinan and 11:54
11 Ms. O'Sullivan in respect of Sergeant McCabe. However,
12 the undisputed evidence is that neither of them recall
13 any discussion, and the notes indicate that, if it was
14 mentioned, any mention was brief, and crucially, this
15 did not make its way, directly or obliquely, into the 11:54
16 Commissioner's address or his evidence to the PAC.

17
18 So, in summary, what we say is that there is nothing in
19 the evidence considered by the Tribunal surrounding the
20 pre-PAC meetings which would suggest there was any 11:54
21 attempt to smear Sergeant McCabe.

22
23 In relation to the use of the word 'disgusting' by
24 Commissioner Callinan, the suggestion was advanced to
25 former Commissioner Callinan during questioning that 11:54
26 the fact that he'd used the word 'disgusting' in
27 relation to the behaviour of the whistleblowers reveals
28 an attitude towards them which would in some way make
29 it appear more likely that he would say even more

1 negative things about Sergeant McCabe in private; that
2 is to say, the fact that he would say this in public
3 corroborates the received public truth that he
4 improperly discredited or directed the discrediting of
5 Sergeant McCabe by reference to a sex allegation in 11:55
6 private. We say the drawing of such a strained
7 inference would of course offend the requirement for
8 actual evidence but also would be based on an ongoing
9 misrepresentation of what the Commissioner said at the
10 meeting. In using this phrase, the Commissioner was 11:55
11 speaking about the action or behaviour of the
12 whistleblowers in the context of the inappropriate
13 manner by which personal sensitive data was being
14 disclosed to third parties, some of which appears in
15 the public domain and contains serious allegations of 11:55
16 wrongdoing with regard to due process and fair
17 procedures.

18
19 The Commissioner, in using the adjective 'disgusting',
20 was referring not to the whistleblowers themselves or 11:55
21 to their character but in fact to their behaviour in
22 providing confidential Pulse entries in unredacted form
23 to politicians seeking to have their complaints about
24 the fixed charge penalty notices dealt with in the
25 public realm. Indeed, it is clear from the Public 11:55
26 Accounts Committee transcript itself that the adjective
27 'disgusting' was clearly understood by the deputies and
28 the Committee to be a reference to the behaviour by the
29 whistleblowers.

1
2 An example: In the questions that were asked shortly
3 thereafter, Deputy Mary Lou McDonald said the
4 following:

5
6 "Q. 'I ask the Chair to bear with me for two more
7 minutes. The Commissioner described their behaviour as
8 disgusting. It's a strong thing to say that they have
9 carried themselves in a manner which is disgusting?' "

10
11 And then:

12 "MC: 'In the context of the manner in which they
13 decided to pursue what they are pursuing that is
14 something which I cannot accept at any level.' "

15
16 In her next question, Deputy McDonald asked the
17 following question:

18
19 "'... Does the Commissioner not accept that it would be
20 difficult for them to hear him use a word like
21 'disgusting' to describe their behaviour?' "

22
23 So the questions reflected an understanding of the
24 process as not being one which was attacking their
25 character but referring to the process of the criticism
26 of bypassing the ordinary system of communication
27 within An Garda Síochána and going into the political
28 realm with personal data, and that is the nature of the
29 criticism that had been made by Commissioner Callinan.

1
2 The next brief issue I would like to deal with,
3 Chairman, is the question of the Williams articles.
4

5 Counsel for the Tribunal have explored in great detail 11:57
6 whether Mr. Callinan, Ms. O'Sullivan or Superintendent
7 Taylor were involved in causing Ms. Debbie McCann,
8 Ms. Murray or Mr. Paul Williams to go to the D
9 household in February or March of 2014. The Tribunal's
10 interest was sparked by the fact that Mr. Williams 11:57
11 published some articles about Ms. D's complaints in
12 relation to the quality of the 2006 investigation of
13 her complaints against Sergeant McCabe and, of course,
14 the claim in Superintendent Taylor's protected
15 disclosure that Mr. Williams called him while he was 11:57
16 still in Ms. D's house, that Superintendent Taylor
17 immediately texted Mr. Callinan and Ms. O'Sullivan with
18 that news and that Ms. O'Sullivan immediately phoned
19 Superintendent Taylor back. In the course of inquiring
20 into these matters, the Tribunal discovered that, in 11:57
21 fact, Ms. McCann and Ms. Murray had also visited the D
22 household. Strikingly, Superintendent Taylor has never
23 claimed that he prompted or suggested that they should
24 visit Ms. D, which one would have expected him to
25 claim if he had any involvement because it would have 11:57
26 been consistent with the alleged campaign which he
27 alleges he was directed to conduct.

28
29 Ms. D's evidence was, and the submissions made on her

1 behalf to you, were that her engagement with
2 Mr. Williams and with politicians with Mr. Williams'
3 assistance was due to a desire on her part to publicise
4 her view that her criminal complaint against Sergeant
5 McCabe had not been investigated properly and/or that 11:58
6 persons within An Garda Síochána had conspired to cover
7 up her allegations against Sergeant McCabe.

8 Mr. Williams gave evidence that the provision of such
9 assistance by him was not unusual. The record shows
10 that the Garda investigation of 2006/2007 conducted by 11:58
11 Superintendent Cunningham was a thorough and
12 comprehensive one. The Tribunal itself has offered
13 that view during the hearing and the GSOC report on
14 this matter reported that:

15
16 "GSOC established that Inspector Cunningham carried out
17 appropriate inquiries and uncovered no evidence of any
18 criminality on the part of him in the investigation or
19 any other gardaí and how the investigation was
20 conducted." 11:58

21
22 We submit that there is no evidence of a Garda
23 conspiracy to discredit Sergeant McCabe involving
24 Mr. Paul Williams. As the Tribunal is aware, the phone
25 records show that the account given by Superintendent 11:59
26 Taylor cannot be correct. The evidence is that the
27 decision to approach a journalist, Mr. Williams in
28 particular, was one made by the D family. Ms. D
29 herself said:

1
2 " As I said to you, when he suggested Paul Williams, as
3 I have already explained, I knew of Paul Williams, I
4 felt he was a credible reporter, I was happy to speak
5 with him. "

11:59

6
7 We say that the evidence is clear that Ms. D alone was
8 the one who sought to meet with a member of the media
9 that she could trust so that she could have the
10 opportunity of venting her grievances against the
11 gardaí. There is not a shred of evidence to suggest
12 that her meeting with Mr. Williams was part of any
13 alleged conspiracy involving the gardaí to discredit
14 Sergeant McCabe. Superintendent O'Reilly's assistance
15 to Mr. D in this regard does not constitute such
16 evidence.

11:59

17
18 The evidence in relation to Detective Superintendent
19 John O'Reilly is that he was a friend of Mr. D for over
20 20 years, a friend of Mrs. D for approximately 30
21 years, they had been in school together. He says he
22 met with Mr. D regularly, on socially. He provided
23 Mr. D with Paul Williams' telephone number after
24 checking with him that he would take a call from Mr. D.
25 Mr. D called Paul Williams, arranged for him to come to
26 his house to meet with Ms. D. Mr. D and Superintendent
27 O'Reilly were not in exact agreement in evidence to the
28 Tribunal as to the circumstances that led to the
29 initial call being made by Ms. D to Paul Williams.

11:59

11:59

12:00

1 Mr. D's position was that he told Superintendent
2 O'Reilly that Ms. D had indicated to him that she
3 wished to tell her side of the story, possibly to a
4 journalist. He stated that he referred to this desire
5 on the part of his daughter during a social encounter 12:00
6 with Superintendent O'Reilly and Mr. D stated that
7 Superintendent O'Reilly then inquired if she would like
8 to talk to Paul Williams.

9
10 "' John O'Reilly then said to me would she speak to 12:00
11 someone maybe like Paul Williams, who -- would she be
12 aware of his standing in the public eye, shall we say;
13 he was well-known. I says, I don't know, John, I said,
14 but I will certainly ask her if she wants to, and I
15 said maybe you'd contact Williams and see would he be 12:00
16 willing to meet with her. So I undertook to talk to my
17 daughter, John undertook to speak to Paul Williams.
18 And when I asked Ms. D, she said, yeah, she would like
19 to speak to him, he was a journalist that -- she was
20 aware of his work, she knew who he was and that she 12:01
21 would like to speak with him.' "

22
23 He then stated that Superintendent O'Reilly gave him
24 Mr. Paul Williams' number. Superintendent O'Reilly's
25 recollection differed from that of Mr. D in one 12:01
26 respect - he remembers that it was Mr. D who first
27 brought up the name Paul Williams. He stated that "He
28 [Mr. D] said to me we were thinking about Paul
29 Williams. He asked me did I know him, to which I

1 replied yes, I did." His recollection was that when
2 Mr. D returned to him having talked to his daughter,
3 Superintendent O'Reilly contacted Mr. Paul Williams by
4 telephone and asked if he could take a call from Mr. D
5 or Ms. D. He then gave Mr. Williams' number to Mr. D. 12:01
6 That was the end of his involvement in the matter,
7 other than possibly giving him directions to the D home
8 by telephone. When Mr. D went home and talked to Ms. D
9 following the conversation, she asked that her father
10 arrange a meeting. This meeting then took place on the 12:01
11 8th March 2014 at the home of Mr. and Mrs. D. The
12 Tribunal was furnished with a transcript of the
13 meeting. It revealed that Ms. D was motivated to have
14 the investigation into Sergeant McCabe reopened. She
15 considered the matter was, in her words, not taken 12:02
16 seriously or properly investigated by the gardaí in
17 2006/2007. Mr. Williams thereafter published a number
18 of articles which were considered by this Tribunal. He
19 also arranged for Ms. D to meet with Micheál Martin TD
20 to seek assistance for having her case reopened. That 12:02
21 meeting took place on 30th April 2014. Ms. D also
22 subsequently made a complaint to GSOC which she
23 initiated in April 2014 complaining about the quality
24 of the 2006/2007 investigations. Her statement to GSOC
25 was made on the 3rd July 2014. Ms. D confirmed to the 12:02
26 Tribunal that no one prompted her to complain to either
27 Mr. Martin or to GSOC. She also later met with former
28 Minister Alan Shatter on the 17th June 2014. This
29 meeting was also arranged through Paul Williams, but

1 Ms. D understood that Mr. Shatter had requested the
2 meeting. Later on, Mr. D also spoke to Conor Lally,
3 who published an article in The Irish Times on the 20th
4 February 2014.

5
6 what is accepted by all relevant witnesses to the
7 Tribunal - that's Mr. D, Ms. D, Mrs. D, Superintendent
8 O'Reilly and Paul Williams - is that the first contact
9 between the Ds and Mr. Williams was made by Mr. D.

10 Even though there is some slight disagreement about who 12:03
11 first suggested contacting Mr. Williams, what is clear
12 is that the possibility of talking to the media was a
13 matter that was first mentioned in the D household in
14 advance of any contact with Superintendent O'Reilly and
15 that the contact with Mr. Williams was merely 12:03
16 facilitated by Superintendent O'Reilly. He did not in
17 any way, we say, contribute to or have any input into
18 the content of the meeting or its outcome and was not
19 involved in the publication of the newspaper articles
20 that followed. 12:03

21
22 Mr. Williams in his evidence was unequivocal that his
23 involvement with Ms. D and the stories he subsequently
24 wrote were written by him as an independent journalist.
25 They were not motivated by any external influences such 12:03
26 as by members of An Garda Síochána. He was asked very
27 specific questions, which we outline in the course of
28 page 72, but ultimately he was asked:
29

1 "Had you ever been briefed negatively about him" --
2 Sergeant McCabe -- "by any members of the Guards?"

3 A. No.

4 I am going to deal with this directly now and
5 immediately Mr. Williams, in relation to your position. 12:04
6 Did you consult with any senior member of the Guards
7 before you went down?

8 A. No.

9 A suggestion might be made or floated that you were in
10 some way acting as a puppet of the Guards in 12:04
11 participating, willingly or otherwise, in a smear
12 campaign relating to Sergeant McCabe?

13 A. I have read that extensively and that is absolutely
14 false.

15 Q. Is there any basis for it at all as far as you are 12:04
16 concerned?

17 A. Absolutely not.

18 Q. And after you had interviewed Ms. D, did you
19 discuss her interviews with any member of the Guards?

20 A. No. 12:04

21 Q. -- or brief anyone in any senior position about
22 them?

23 A. No. "

24
25 And Mr. Williams confirmed that he did not 12:04
26 discuss Sergeant McCabe with former Commissioner
27 O'Sullivan or former Commission Callinan at any stage.
28 Superintendent John O'Reilly did likewise.
29 Mr. Williams also confirmed that the meeting with Ms. D

1 did not come about directly or indirectly through any
2 intervention on the part of Superintendent Taylor.
3 Subsequent to the meeting, he did make contact with
4 Superintendent Taylor in an effort to seek further
5 information concerning the McCabe investigation, but 12:05
6 the contact was made on his initiative and yielded no
7 new information.

8
9 He stated in his evidence:

10
11 "He [Superintendent Taylor] came back to me and 12:05
12 confirmed that the investigation had taken place, a
13 file had been sent to the DPP and there were no
14 charges.

15 Q. And did he say anything negative about Sergeant 12:05
16 McCabe to you?

17 A. No. "

18
19 He also confirmed that he did not at any stage have
20 access to the Garda investigation file from 2006/2007. 12:05
21 He said:

22
23 "I am aware of that allegation that's been made and
24 it's completely and absolutely without truth. It's
25 completely baseless. " 12:05

26
27 He also confirmed there was no ulterior motive behind
28 Superintendent O'Reilly's involvement in any
29 communications when he was asked the question:

1
2 "Q. Did you go back to Detective Superintendent
3 O'Reilly and discuss what had happened or what you
4 gleaned or what she had said or --

5 A. No. Because, as I said, when Detective 12:05
6 Superintendent O'Reilly contacted me it was very clear
7 he didn't want -- he didn't want to know, he didn't
8 want to be involved."

9
10 The only incident that Superintendent Taylor offers as 12:05
11 a specific incident of him communicating with the
12 Commissioner or Deputy Commissioner in relation to
13 anything which could be said to relate to a campaign of
14 negative briefing against Sergeant McCabe is this

15 allegation that he was contacted by Mr. Williams 12:06
16 immediately after Mr. Williams' interview with Ms. D.
17 Superintendent Taylor's account is that Mr. Williams
18 called him during or immediately after this visit and
19 that he, Superintendent Taylor, then texted both

20 Commissioner Callinan and Deputy Commissioner 12:06
21 O'Sullivan to tell them of this fact and that
22 Ms. O'Sullivan had immediately called him to discuss
23 the matter. Mr. Callinan and Ms. O'Sullivan have given
24 evidence that they received no such call or telephone
25 contact and that Superintendent Taylor never briefed 12:06
26 them about a visit by Mr. Williams to Ms. D's home.

27 The billing records for these individuals make it
28 absolutely clear these telephone contacts simply did
29 not occur.

1
2 Furthermore, in his evidence, Mr. Williams told the
3 Tribunal that he had not called Superintendent Taylor
4 on the day that he visited Ms. D but he had done so
5 with follow-up queries some days later. The billing 12:06
6 records which have been produced to this Tribunal are
7 inconsistent with Superintendent Taylor's account and
8 they are consistent with the evidence given by
9 Mr. Williams. The contact between Mr. Williams and
10 Superintendent Taylor when Mr. Williams sought 12:07
11 confirmation of these follow-up queries has caused some
12 parties to suggest this was an example of negative
13 briefing referred to in the terms of reference, a form
14 of detraction. We say this could not be the case.
15 Superintendent Taylor's allegation is that he was 12:07
16 directed to proactively go out and to brief the media,
17 and which he described as him doing so when
18 opportunities presented themselves. In this case,
19 Mr. Williams sought confirmation of facts from
20 Superintendent Taylor. It's tempting to say that 12:07
21 Superintendent Taylor could simply have said in
22 response that An Garda Síochána do not comment on
23 individual cases, that might have been the proper
24 response, but, however, if, for example, the answer to
25 the question "has an allegation of sexual assault made 12:07
26 against Sergeant McCabe" had been "no comment", or if
27 the response had been "An Garda Síochána don't comment
28 on individual cases", the point in the particular
29 circumstances of the case could be made that this could

1 have left an impression that Sergeant McCabe had indeed
2 been the subject of such an allegation. This could
3 have been very damaging, particularly if there was no
4 clarification that the DPP had directed no prosecution.
5 So we say that providing answers to specific questions 12:08
6 which are formally asked by Mr. Williams which provided
7 the full picture, cannot be described as negative
8 briefing in the terms used in the terms of reference,
9 nor can they be regarded as any form of calumny or
10 detraction. 12:08

11
12 And if I could turn, Chairman, to deal with your
13 questions very briefly in the time that I have
14 available.

15 12:08
16 Insofar as the question of calumny or detraction is
17 referred to also, I think it's referred to in your
18 questions, Chairman, it's interesting that I think the
19 classic definitions are that detraction is the unjust
20 violation of the good reputation of another by 12:08
21 revealing something true about him. Calumny or slander
22 differs from detraction in that what is said or imputed
23 is not true. But often in the same context there is a
24 third element that is considered, and that is what is
25 referred to as a close connection with that and a 12:09
26 concept known as rash judgment, and rash judgment is
27 where a person goes beyond the evidence available to
28 judge the culpability of the action and attributes evil
29 motives and decides against the character or moral

1 integrity of the person whose conduct is observed.

2
3 Now, we say there may be plenty of evidence of rash
4 judgment, we would say, in the public mind in relation
5 to the issues which are before you, but there is no 12:09
6 evidence of detraction or calumny on the part of
7 members of An Garda Síochána. And in the concept of
8 detraction itself, to put forward something which is
9 true, indicating a matter that might actually be of
10 benefit to a third party, is not itself an example of 12:09
11 that form of detraction which is wrongful.

12
13 Chairman, you raised a number of questions and sought
14 to address those. Not all of them, perhaps, will focus
15 on my clients' position, but very briefly in the time 12:09
16 available if I could address those.

17 CHAIRMAN: well, you have addressed most of them, I'd
18 say, Mr. Murphy, but if you'd like to go through them
19 kind of seriatim and just say whatever you want to say.

20 MR. MURPHY: Yes. The first question, Chairman, you 12:10
21 have raised in relation to what is the full extent of
22 any calumny or detraction against Maurice McCabe that
23 could be regarded as proven as a matter of probability?

24
25 We say that the first part of that question is 12:10
26 addressed in the opening section of our written
27 submissions where we say that the value of this process
28 has been in separating through analysis of the evidence
29 between talk and innuendo, and also in Section 4, where

1 we stress the importance of sifting any evidence of a
2 direction to give negative briefings, as alleged, from
3 a widespread knowledge of undefined rumours about
4 Sergeant McCabe. We believe, therefore, that the
5 various accounts that the Tribunal has heard of such 12:10
6 widespread knowledge are not evidence of an instruction
7 to negatively brief the media and are not probative of
8 the allegations within the terms of reference.

9
10 within the second part of the question, we are of the 12:10
11 view, as we have submitted at paragraph 135 of our
12 written submission, that confirmation that the DPP had
13 directed no prosecution against Sergeant McCabe doesn't
14 amount to either calumny or detraction.

15 CHAIRMAN: And your reason for saying that is because 12:11
16 it's better to say that than to leave the thing
17 floating?

18 MR. MURPHY: Yes.

19 CHAIRMAN: Just as, I suppose, in the case of
20 journalists who investigated the matter and came to the 12:11
21 conclusion there is nothing in this.

22 MR. MURPHY: Yes, Chairman.

23 CHAIRMAN: Is that the idea?

24 MR. MURPHY: It is, Chairman. But also, it's true, and
25 it has an added benefit to person of removing the -- 12:11
26 very briefly, Chairman, in terms of the evidence, for
27 example, given by Mr. O'Toole, by Mr. Lally, by any of
28 the crime journalists, who said that when they inquired
29 at a very early stage when they heard rumours from

1 non-Garda sources and were told there was no finality -
2 you may recall Mr. O'Toole's phrase: it was dead to me
3 from that point onwards - so that is the effect of the
4 benefit of doing something of that kind and confirming
5 if there is no investigation or that there has been an 12:11
6 investigation and that the matter is closed, and that
7 couldn't be regarded as detraction or unfair to
8 Sergeant McCabe.

9
10 Secondly: To what extent are political, journalistic 12:11
11 and Garda rumours or talk necessarily to be considered?

12
13 And again, we say that the Tribunal should proceed on
14 foot of evidence rather than such rumours.

15 12:12
16 Third, you ask: Is there any truth in the protected
17 disclosure of Superintendent Taylor and is he a witness
18 whose evidence can be accepted?

19
20 I think I have addressed that in the first part of our 12:12
21 submissions. We say that ultimately, for the reasons I
22 have outlined, Superintendent Taylor is not a witness
23 whose evidence is in any way credible or that it could
24 be safely relied upon, even subject to a corroboration
25 warning, and in some respects, Chairman, and I know 12:12
26 there was discussion yesterday about corroboration, but
27 truly, when one looks at the scale of the gaps in
28 Superintendent Taylor's evidence, another question
29 arises: If there was a criminal trial, would that

1 evidence be allowed go to a jury, given its
2 inconsistencies and internal inconsistencies, and a
3 number of matters that have been have been abandoned
4 and departed from by Superintendent Taylor himself?
5 And I am saying that particularly yesterday, you will 12:12
6 note that in the submissions made by Mr. O'Higgins
7 concerning Commissioner O'Sullivan, as I read those
8 submissions, no case was being made against
9 Commissioner O'Sullivan and a rather vestigial case was
10 being made against Commissioner Callinan by 12:13
11 Superintendent Taylor himself as of yesterday. But we
12 say we would invite you, for the reasons outlined in
13 the written submissions, not to rely upon his evidence.

14
15 In terms of question 4, we don't necessarily think that 12:13
16 is a question that we need to address in relation to
17 the submissions we have made, but if the -- if the
18 Chairman has any further issue on that, we would be
19 happy to assist.

20 CHAIRMAN: Sorry, just before you move off it, I mean, 12:13
21 let's suppose it's a criminal trial -- and, Mr. Murphy,
22 I don't mean to detain you but I have got a couple of
23 questions on your submissions in any event, but as we
24 are going through this, a dialogue might be a wee bit
25 more suitable. Let's suppose, for instance, an 12:13
26 accomplice is in the witness-box and the issue is that
27 he, let us say, prepared a murder weapon and the murder
28 weapon was later used by his confrere to go to a house
29 and to murder somebody in their bed and let's suppose

1 cross-examination proceeded to the point where the
2 accomplice was asked: did you go to the house? And
3 the manner of answering that question left the jury
4 certain that he did. Is that a correct or judicial
5 possibility in terms of the finding of fact?

12:14

6 MR. MURPHY: well, in terms of a finding of fact, it
7 would be a matter in relation to what the accomplice
8 himself did. But whether that evidence could be relied
9 upon would have to be subject to an accomplice warning
10 and would also have to be considered based on whatever
11 evidence existed in relation to the previous character
12 of the accomplice - for example, previous convictions,
13 whether there was any inducement. Every case can vary,
14 and therefore, a trial judge in that situation would
15 have to look at all of the different elements, but I
16 think that all of the case law would suggest that
17 accomplice evidence is always treated with particular
18 care and caution.

12:14

12:14

19 CHAIRMAN: well, perhaps adding in accomplice evidence
20 in this context is perhaps complicating matters. But
21 if you look at The Crown v. Lucas, for instance, and
22 the whole notion of lies being cable of corroboration,
23 if one is certain, therefore, that a denial is a lie,
24 can one, in the context of evidence, come to the
25 conclusion that the opposite is the truth? That is all
26 I am asking, as a matter of principle.

12:14

12:15

27 MR. MURPHY: I think in our submission, Chairman, the
28 position is that a jury could make findings on other
29 evidence but not in relation to the denial that you

1 have mentioned. If one looks at Lucas, and I think,
2 Chairman, you have the edition that I have, which is of
3 McGrath, and if I could just draw your attention to
4 page 269, please, which is at paragraph 4, 269, and
5 that deals with something that was referred to 12:15
6 yesterday, the Lucas warning. And Lord Lane, in the
7 case of R v. Lucas, identified four conditions
8 governing the use of lies as corroboration:

9
10 "To be capable of amounting to corroboration, the lie 12:15
11 told out of court must first of all be deliberate.
12 Secondly, it must relate to a material issue. Thirdly,
13 the motive for the lie must be the realisation of guilt
14 and a fear of the truth. The jury should, in
15 appropriate cases, be reminded that people sometimes 12:16
16 lie, for example, in an attempt to bolster up a just
17 cause or out of shame or out of a wish to conceal
18 disgraceful behaviour from their family. Fourthly, the
19 statement must be clearly shown to be a lie by evidence
20 other than that of the accomplice who is to be 12:16
21 corroborated; that is to say, by an admission or by
22 evidence from an independent witness."

23
24 So we say that Lucas has been referred to in the
25 context of why people may give lies, but actually a 12:16
26 level of protection put by the courts on this issue is
27 very, very sophisticated because of the risk of an
28 unjust conviction being obtained.

29 CHAIRMAN: Mr. Murphy, I do appreciate that, and

1 perhaps adding accomplice into it again has complicated
2 matters and adding corroboration into it has
3 complicated matters, but it's not an unusual
4 occurrence; let's suppose a man comes out of a room
5 with a knife where, inside that room, unwitnessed by 12:16
6 anybody else, a person is dead, having been knifed, and
7 the man, let us say, goes out with his friends for a
8 drink and tells them that what happened was, he was
9 waving a knife in order to ward off an imminent assault
10 but that the deceased ran at him and somehow became 12:17
11 transfixed through the heart with the knife. Now, in
12 the event that a question was asked as to what happened
13 and the accused denied assaulting the victim in the
14 witness-box in trial, and the jury were absolutely
15 certain that that was a lie, are they not entitled to 12:17
16 act upon it?

17 MR. MURPHY: In term of the jury's own assessment of
18 the credit of an accused defendant talking about
19 himself, an issue could arise as to whether that was
20 past inconsistent conduct with the testimony he had 12:17
21 given at the trial. But that ultimately, even in that
22 situation, a Lucas warning might be applied -- would
23 have to be applied to say that there could be a variety
24 of reasons why he had said what he had said earlier on.

25 CHAIRMAN: No, it's his own direct evidence. So there 12:18
26 is nobody else witnessing it, it's just the accused,
27 the knife, the dead person. And the jury are certain
28 that his account of someone running at him and being
29 transfixed through the heart with a knife is just not

1 tenable, even if it's unlikely in the first place and
2 it's simply the way that the matter is put in court, is
3 a complete and utter lie, are they not entitled to come
4 to the conclusion, yes, the case is proven?

5 MR. MURPHY: I think your question, Chairman, has
6 perhaps moved on, because the first question, as I
7 understood it, related to an accomplice giving evidence
8 and whether that evidence would be admissible against
9 an accused. 12:18

10 CHAIRMAN: No, no, I think accomplice doesn't help us. 12:18
11 It was only an instance.

12 MR. MURPHY: So, in this case, this question, Chairman,
13 is a question asked about an accused person, and, as I
14 understand it, this perhaps relates to the
15 McCann/O'Reilly conversation -- well, if -- 12:18

16 CHAIRMAN: No, no.

17 MR. McCANN: In that situation -- if that is not the
18 case, I say it can only apply -- an admission can only
19 apply to a person who is the person who has made that
20 admission. It can't apply to a third party. So an 12:19
21 admission by one witness does not necessarily involve
22 an admission by an accused person. An accused person
23 is ring-fenced by the type of protections set out in
24 Lucas, for very good reason, that there can be all
25 sorts of reasons why other witnesses would give 12:19
26 evidence about that person and that one has to approach
27 such evidence with great care.

28 CHAIRMAN: All right. Thanks, Mr. Murphy. I didn't
29 mean to delay you on that.

1 MR. MURPHY: Not at all, Chairman. I hope that was of
2 assistance.

3
4 Number 5: Is what Superintendent Taylor claims to have
5 been done on behalf of Commissioner Callinan an
6 understatement of the reality of what he in fact did?
7 Did he do whatever he did at the behest of Commissioner
8 Callinan or did he do it with the acquiescence or any
9 knowledge of Deputy Commissioner O'Sullivan?

10
11 And we say that is dealt with at section 7 of our
12 written submissions and we say that the evidence of
13 Superintendent Taylor is false, that he didn't do
14 anything "on behalf of Commissioner Callinan" in the
15 manner which is alleged, and we say the evidence in the 12:19
16 case indicates that Superintendent Taylor's narrative
17 is unreliable and we urge you to consider there is no
18 view of his evidence which should be accepted as
19 proving matters contained in the protected disclosure.

20 12:20
21 6. To what extent, if at all, is the account of
22 Maurice McCabe as to what he was told by superintendent
23 reliable and accurate despite contradiction by
24 Mrs. Taylor and Superintendent Taylor?

25 12:20
26 We say that is a matter, Chairman, for you to assess in
27 your jurisdiction as the investigator and
28 decision-maker in this case.
29

1 Sergeant McCabe's recollection on matters has not
2 always proved to be accurate. We would observe,
3 however, that in assessing their contradictory
4 accounts, the Tribunal should consider that
5 Superintendent Taylor is an unreliable, uncreditworthy 12:20
6 witness, and that the account of Sergeant McCabe is
7 supported in material respects by Mr. Wallace TD,
8 Ms. Daly TD and separately by the evidence of the
9 journalist Mick Clifford, who sent a draft chapter of
10 his book to Superintendent Taylor for fact-checking, 12:20
11 and we submit the contemporaneous notes taken by all
12 three witnesses of their conversations with
13 Superintendent Taylor at that relevant time support
14 Sergeant McCabe's account in relation to that over
15 Superintendent Taylor. But as previously said in our 12:20
16 submissions, that doesn't end there because Sergeant
17 McCabe has very frankly said on Day 59 he has no
18 evidence against the Commissioners other than what
19 Superintendent Taylor has said. So if Superintendent
20 Taylor's evidence collapses, then any other evidence 12:21
21 put forward by Sergeant McCabe on that part is purely
22 hearsay, purely repetitive and of no probative value
23 whatsoever.

24
25 7. To what extent do Maurice McCabe's reports of 12:21
26 Superintendent Taylor in relation to phones or
27 electronic devices influence Superintendent Taylor's
28 creditworthiness? Should a preference be made of what
29 might be the effect of making a preference for Sergeant

1 Maurice McCabe's protected disclosure?

2
3 And again perhaps amplifying the last point, Chairman,
4 we say that Sergeant McCabe's reports of Superintendent
5 Taylor in relation to phones and electronic devices has 12:21
6 an important bearing on Superintendent Taylor's
7 creditworthiness. We submit that Superintendent Taylor
8 provided a false narrative to Sergeant McCabe in
9 relation to the issue. Sergeant McCabe's protected
10 disclosure was expressly and totally dependent upon the 12:21
11 information provided to him by Superintendent Taylor.
12 If you conclude, Chairman, that Superintendent Taylor's
13 evidence is untrustworthy, unreliable and false, then
14 there can be no question of making what might be termed
15 a preference for Maurice McCabe's protected disclosure, 12:22
16 which represents a simple heralding of a story which
17 was to be delivered by Superintendent Taylor. And
18 going back to Day 59, Sergeant McCabe could not have
19 been clearer and fairer in that sense, that all he was
20 doing was telling you what he had been told by 12:22
21 Superintendent Taylor, because nothing else himself to
22 support or validate what was said. If the Tribunal is
23 satisfied that Superintendent Taylor gave a false
24 account to Sergeant McCabe, an unreliable account in
25 relation to phones and electronic devices, that further 12:22
26 undermines any confidence that the Tribunal may have in
27 Superintendent Taylor's evidence. And again, the very
28 thorough work done by the Tribunal, allied to the fact
29 that Superintendent Taylor's -- one of his many changes

1 or zigzags in his evidence, has indicated that the text
2 messages was now not central to what he was said he was
3 alleging to have done. That has again been a factor to
4 be considered by you in the assessment of the
5 importance of that technical information.

12:22

6
7 Question 8 we say is dealt with at page 23 of our
8 written submission. That is to say, what of the
9 allegations of Superintendent Taylor as to his phones
10 and the seizures thereof. And we have dealt with that
11 in detail at page 23.

12:23

12
13 Paragraph 9: Of what relevance are the allegations of
14 Superintendent Taylor as to Commissioner O'Sullivan,
15 Detective Superintendent McGowan, Chief Superintendent
16 Clerkin on his false High Court application?

12:23

17
18 And we have dealt with that from page 16 onwards of the
19 written submission.

12:23

20
21 10. why were the disciplinary proceedings against
22 Superintendent Taylor withdrawn and what are the terms
23 of that withdrawal?

24
25 In our view, Chairman, having regard to the terms of
26 reference, we respectfully say it's not necessary for
27 the Tribunal to determine this question, and our
28 clients would have a concern that anything that might
29 be said as to why disciplinary proceedings have been

12:23

1 discontinued may impact or compromise any steps An
2 Garda Síochána wish to take in relation to the matter
3 in the future. So I would prefer not to elaborate on
4 that issue at this time, with the permission of the
5 Chair.

12:23

6
7 11. Is there any inference to be drawn from changes of
8 phones, loss of computers or phones or failure to
9 remember PIN numbers by Commissioner Callinan,
10 Commissioner O'Sullivan or Superintendent Taylor, or is 12:23
11 there any other phone or computer evidence of
12 relevance?

13
14 So we say again largely because of the change, and you
15 may recall when Superintendent Taylor began, he 12:24
16 suggested that the heart of the alleged smear campaign
17 was the dictation by Commissioner Callinan of hundreds
18 if not thousands of text messages and their
19 transmission to other persons by him. That then
20 changed. And as a result of that change we say there 12:24
21 is no inference, positive or adverse, to be from
22 changes of phones, loss of computers or phones or
23 failures to remember PIN numbers, by Commissioner
24 Callinan, Commissioner O'Sullivan, Superintendent
25 Taylor. The only other phone and computer evidence 12:24
26 which is of use has been presented to the Tribunal from
27 the Clerkin investigation materials. All of that
28 evidence tends to support the reasonableness, the
29 efficacy of the Clerkin investigation, and we say that

1 is a further undermining of the credibility of
2 Superintendent Taylor.

3
4 12. To what extent can the allegations of
5 Mr. McGuinness, Mr. Boucher-Hayes, Mr. McCarthy and 12:24
6 Mr. Deasy be relied upon? And even though you are
7 guided by the Rules of Evidence and not bound by them,
8 are you in a position to say that they corroborate or
9 support each other?

10
11 This we have dealt with, I hope, at paragraphs 90 to 92
12 of the speaking note. We submit, Chairman, that the
13 Tribunal is not in a position to find that the evidence
14 of each one of those witnesses corroborates or supports
15 the other. First, we say that the allegations made by 12:25
16 each witness is materially different in a number of
17 respects.

18
19 Second, we say a common feature of each of the
20 witnesses is they didn't come forward with their 12:25
21 allegations at the time, but rather, only did so three
22 or more years later, at a point in time when the
23 allegations against former Commissioner Callinan had
24 received widespread coverage and, to a significant
25 degree, had already become embedded in the established 12:25
26 narrative in the wake of the subsequent reportage of
27 Superintendent Taylor and Sergeant McCabe's allegation,
28 and we say that for that reason it would be unsafe to
29 conclude that the account of each witness is unaffected

1 by other events or accounts and the risk of inadvertent
2 cross-contamination from matters in the public domain
3 cannot be safely excluded.
4

5 Question 13, you asked: If these are to be believed or 12:25
6 accepted, what is the full extent of allegation of
7 calumny against Sergeant McCabe? Is Superintendent
8 Taylor reducing his role, and if so, does this factor
9 lessen or completely dissolve his credibility?
10

11 And we think in the light of our answer to question 12,
12 we don't propose to add to that.
13

14 14 deals with the question relating to what led to the
15 visits of Ms. McCann, Ms. Murray and Mr. Williams to 12:26
16 the home of Ms. D, and you have raised the question --
17 CHAIRMAN: Yes, you have dealt with that.

18 MR. MURPHY: I think I have.
19

20 15: To what extent does the evidence of the D family 12:26
21 members remain relevant.
22

23 We say the evidence remains relevant to the overall
24 picture of what transpired in relation to the
25 allegations made by Ms. D. It demonstrates that Ms. 12:26
26 D's complaints in public about Sergeant McCabe, whether
27 in the street in Bailieboro in 2007 or in the course of
28 communications with journalists or public
29 representatives thereafter, were the consequence of a

1 free and voluntary decision by Ms. D to discuss her
2 complaint in public. And it should be remembered,
3 Ms. D's complaint was against An Garda Síochána and
4 against the way in which her original complaint had
5 been investigated. It was critical of the gardaí. 12:26
6 However, there is no evidence to demonstrate that the
7 communications by Ms. D were encouraged or incited by
8 Commissioner Callinan or Commissioner O'Sullivan or by
9 the senior gardaí. We say the D family evidence tends
10 to lend support for the evidence of a number of 12:27
11 witnesses, including Michael O'Toole, Conor Lally, John
12 Mooney and other journalists who reported that they
13 became first aware of the existence of a complaint
14 against Sergeant McCabe from media and political
15 sources and not from Garda Headquarters. One example 12:27
16 also, Mr. Ó Muircheartaigh yesterday twice I think
17 suggested that the fact that there was a reference in
18 some aspect of publications to tickling indicated this
19 could only have come from a Garda source, but the
20 relevance of the D family and any testimony that might 12:27
21 given by them is that there were many stages in the
22 past where Ms. D was publicly willing to discuss with a
23 range of people the details of investigation, which
24 that was one, and must have been known to her as well,
25 not just to the gardaí. So each of those points we 12:27
26 say, Chairperson, demonstrates that evidence before you
27 from Mr. O'Toole, evidence before you from Mr. Lally,
28 from Mr. Mooney, which really hasn't been challenged by
29 anybody, demonstrates the existence of a whole host of

1 sources of information, non-Garda-related,
2 non-Nóirín-O'Sullivan- or Martin-Callinan-related,
3 years in advance of any controversy arising to consider
4 these particular points.

5
6 16. To what extent is any incorrect invocation of
7 journalistic privilege such as to give rise to any
8 inference, and, if so, what inference does any
9 incorrect invocation of journalistic privilege give
10 rise to?

11
12 And this is an interesting or unusual point, Chairman,
13 but insofar as it arises, we say that if you consider
14 that a witness has incorrectly invoked journalistic
15 privilege, we say, respectfully, it's not open to you
16 to make any inference adverse to any third party. The
17 jurisdiction to determine whether there has been an
18 incorrect invocation of journalistic privilege is
19 envisaged, it seems to us, to repose with the High
20 Court following a reference from a tribunal of inquiry.
21 But even if a finding was made by you that there had
22 been an incorrect invocation of journalistic privilege,
23 we say that would not give an evidential basis to make
24 any findings adverse to former Commissioner Callinan or
25 O'Sullivan or to any senior members of An Garda
26 Síochána. To draw an adverse inference against the
27 Commissioners, the former Commissioners, would be
28 inconsistent with the legal principle and would also be
29 unwarranted on two further grounds. First, to do so

1 would involve engaging in impermissible speculation in
2 a manner inconsistent with the preponderance of the
3 evidence. And secondly, to draw an adverse inference
4 in circumstances where both Garda Commissioners have
5 expressly waived their privilege and called for the 12:29
6 journalists to answer the questions put would be
7 unfair. A journalist who ultimately was responsible
8 for maintaining a claim of privilege is the only person
9 who bears any responsibility if that's done
10 inappropriately. 12:29

11
12 And we say that there is nothing to demonstrate that if
13 you were to take a view that a claim of privilege
14 raised before you was incorrectly raised, that that
15 would enable you to make a finding adverse to any third 12:29
16 party other than the journalist him or herself because
17 that is exclusively a call made by that journalist for
18 the reasons tendered to you in evidence. But there
19 isn't any authority which we can identify which would
20 enable or justify a finding against a third party 12:30
21 merely because of that fact. It is a discrete issue.
22 The reasons for that invocation of privilege may vary
23 enormously, but they are not necessarily or as a matter
24 of probability connected to the issue of finding of
25 fact pertaining to third parties who have not invoked 12:30
26 that privilege.

27
28 17. What is the relevance of question 5 as to any
29 incorrect or dishonest invocation of journalistic

1 privilege?

2
3 We say that question 5 isn't relevant to this. It
4 doesn't provide any evidential foundation to justify a
5 finding that Superintendent Taylor acted at the behest 12:30
6 of Commissioner Callinan or with the acquiescence or
7 knowledge of Deputy Commissioner O'Sullivan in any
8 negative briefing against Sergeant McCabe. This is
9 particularly so where it's submitted that all the
10 evidence tends to suggest that Superintendent Taylor's 12:30
11 primary claim in his protected disclosure about the
12 existence of a smear campaign allegedly directed by
13 former Commissioner Callinan and O'Sullivan against
14 Sergeant Maurice McCabe was untrue. If any finding was
15 made in relation to the invocation of journalistic 12:31
16 privilege, it could and should only apply to the
17 relevant journalist and not to any other party. And we
18 would amplify that submission also by urging you to
19 rely upon the wide body of evidence in relation to the
20 factual issues which are for you to assess separate 12:31
21 from any invocation of privilege.

22
23 In that regard also we would ask you to take into
24 account that our clients have gone a long distance in
25 relation to issues of privilege, not just journalistic 12:31
26 privilege but also legal professional privilege, to
27 facilitate the work of the Tribunal. There is nothing
28 in those decisions which we say could give rise to an
29 adverse conclusion or inference.

1
2 18. To what extent do journalistic clashes - seven of
3 them now today - apart from that between Alison
4 O'Reilly and Debbie McCann, require to be resolved or
5 even recorded in a report to the Houses of the
6 Oireachtas, and, if so, why?

12:31

7
8 Again, this is not a matter which my clients have any
9 direct involvement in at all, and perhaps in that sense
10 we should not make a submission, but, on reflection,
11 our position is this:

12:32

12
13 We say, firstly, it's a matter for you to decide
14 whether these issues need to be resolved. There is
15 just one respect in which we suggest that you might
16 wish to give some consideration. The very fact that
17 there are such clashes is a matter which we would
18 invite you to take into account in assessing the
19 variety of understandings held by different individuals
20 about rumours about Sergeant McCabe between 2010 and
21 2014 and beyond. In short, we say the fact that there
22 were different journalistic conversations,
23 recollections, about the nature of different
24 journalists' understanding or rumours about Sergeant
25 McCabe, tends to undermine the false allegation made by
26 Superintendent Taylor about the existence of a highly
27 organised campaign to smear Sergeant McCabe, operated
28 by Superintendent Taylor at the behest of his superior
29 officers. But in essence we say it is a matter for you

12:32

12:32

12:32

1 to determine, but the very fact of those controversies
2 and the complexities of them demonstrates a point in
3 support of the proposition that there is a whole host
4 of different views in relation to Sergeant McCabe which
5 are not sourced and not emanating from An Garda 12:33
6 Síochána and not emanating from Commissioner O'Sullivan
7 or Commissioner Callinan.

8
9 19. In relation to whether the Tribunal should report
10 on or comment on political involvement of the acts of 12:33
11 any individual public representative.

12
13 we don't think it's necessary for the Tribunal to make
14 any adverse findings against individual public
15 representatives, but, Chairman, we respectfully suggest 12:33
16 that you may consider it important to report on the
17 facts and the chronology of the political crisis and
18 furore which led to the establishment of this Tribunal
19 and perhaps to consider the question of what degree of
20 scrutiny was exercised by individual public 12:33
21 representatives in assessing the merits of the
22 protected disclosure made by Superintendent Taylor and
23 as heralded by the protected disclosure made by
24 Sergeant McCabe before they demanded that this Tribunal
25 must be established as a matter of urgent public 12:34
26 importance.

27
28 Chairman, those are our answers to those questions.
29 And I was just wondering, if you have any other

1 questions, I would be happy to answer those, but, apart
2 from that, those are my submissions

3 CHAIRMAN: I want to just go through it, if you don't
4 mind, because I marked a couple of things. Just one
5 thing: In relation to the reference in the pre-Public 12:35
6 Accounts Committee meetings to 2006, I have just gone
7 through my chronology of affairs, and, of course, that
8 was when the allegation was first made. But anything
9 in relation to the assault on the bus or anything else
10 like that in Bailieboro came in 2007, so I am just 12:35
11 wondering what else it could possibly be a reference
12 to? As far as I'm aware on the state of the evidence,
13 that is the way it lies.

14 MR. MURPHY: I think the witnesses have accepted, as we
15 have indicated in our notes, at least two of them, that 12:36
16 it's likely to have been mentioned. I will just take
17 you back -- that it's likely to be a reference to that.
18 Sorry. If you turn, Chairman, to page -- paragraph 110
19 of our submission, just referring to Mr. McLindon's
20 evidence, and he accepted that the reference to 2006 12:36
21 might have been a reference to the investigation into
22 the complaint of Ms. D, but he didn't recall it being
23 discussed. So I think the state of the evidence
24 certainly from the perspective of Mr. McLindon was that
25 it may have been to do with that. But the evidence of 12:36
26 the other parties is as we have set out at pages 62
27 through 64. And Commissioner Callinan, for example, at
28 paragraph 112, had no recollection of the 2006
29 investigation being discussed, but conceded that in the

1 light of the notes there may have been some mention of
2 it. But I think that would be a matter for you to
3 decide, Chairman. I am not putting forward any
4 alternative to the evidence tendered by the witnesses I
5 represent.

12:37

6 CHAIRMAN: Thank you, Mr. Murphy. Anything else that I
7 marked we have, in fact, discussed. Thank you.
8 Mr. Fanning, will you be long?

9 MR. FANNING: Chairman, I would have thought 30 to 40
10 minutes.

12:37

11 CHAIRMAN: Really? Mr. McDowell? And I am not
12 pressing you. If we need to sit tomorrow, we will sit
13 tomorrow.

14 MR. McDOWELL: I don't propose sitting tomorrow but --
15 I don't propose that you should sit tomorrow.

12:37

16 CHAIRMAN: I think I make the proposals around here.
17 But what do you think is the situation? And it's fair
18 that you have time and, look, if we have to sit on
19 Monday, that's fine.

20 MR. McDOWELL: If Mr. Fanning would be economical,
21 we should be able to finish today.

12:37

22 CHAIRMAN: Yes, I would have thought you could be a
23 great deal more economical than that, Mr. Fanning. I
24 am not sure that you are holding back the attacking
25 forces on whatever the name of the bridge in ancient
26 Rome was. But, look, Mr. Fanning, seriously, I suppose
27 the pressure has moved from Mr. McDowell now to you, so
28 what have you got to say?

12:37

29 MR. FANNING: well, I noted the absence of any time

1 estimate for Mr. McDowell.

2 CHAIRMAN: well, I suppose the longer I sit here, the
3 worse it's going to get. But, Mr. McDowell, what do
4 you think? And --

5 MR. McDOWELL: well, I hope to be shorter than 12:38
6 Mr. Murphy, that is what I would say.

7 CHAIRMAN: I know, but it's not helping me.

8 MR. McDOWELL: well, sorry, Judge, I am not going to
9 constrain myself, because there are things I must say.

10 CHAIRMAN: I know. And I'm anxious to hear you, 12:38
11 actually, so that is the point. I will talk to
12 Mr. Barnes over lunch and see where we stand in
13 relation to time, but I honestly think 30 minutes
14 should be the outside of anything you do, Mr. Fanning.
15 And it may be you have a speaking note? 12:38

16 MR. FANNING: I do, Chairman. And if the Tribunal will
17 accept my speaking note but will permit me to
18 editorialise a little bit --

19 CHAIRMAN: I would be very happy with that,
20 Mr. Fanning. Everybody else has done that and it has 12:39
21 proved very useful. So let's see where we stand in an
22 hour's time. Thank you.

23

24 THE HEARING ADJOURNED FOR LUNCH.

25 12:44
26
27
28
29

1 THE HEARING RESUMED, AS FOLLOWS, AFTER LUNCH:

2
3 CHAIRMAN: Mr. McDowell, if you could finish within the
4 two hours to two-and-a-half-hour mark, it would be
5 great to finish things today, if it is possible. But I 13:43
6 am listening very carefully and I do have an
7 appreciation --

8 MR. McDOWELL: well, Chairman, I was going to say the
9 following. There are two things. There's one thing
10 that I wanted to raise at this point -- 13:44

11 CHAIRMAN: Yes.

12 MR. McDOWELL: -- which is slightly different, and that
13 is that, yesterday, two pages were circulated, 7809 and
14 7810.

15 CHAIRMAN: Yes. 13:44

16 MR. McDOWELL: And these are two letters discontinuing
17 the disciplinary proceedings in respect of the Roma
18 children and the other matters against Superintendent
19 Taylor. They are both dated 12th January 2017 at the
20 top, and I am wondering is that a misprint? It's of 13:44
21 some significance, Chairman.

22 MR. MURPHY: Chairman, we will seek to clarify that
23 point for Mr. McDowell. I'm not aware of --

24 MR. McDOWELL: It's of huge significance, Chairman,
25 because if this letter was composed in 2017 for 13:45
26 transmission, it would put an entirely different gloss
27 on it.

28 CHAIRMAN: Gloss on what?

29 MR. McDOWELL: On how a decision could have been made

1 over a year ago or 18 months ago, in early 2017, to
2 discontinue the proceedings.

3 MR. MURPHY: well, Chairman, I will seek instructions
4 on that point, but I don't see how it affects
5 Mr. McDowell's client.

13:45

6 CHAIRMAN: I thought that, with some publicity,
7 Superintendent Taylor returned to duties during the
8 course of this particular Tribunal. That's what I
9 thought had happened. And indeed it was in -- as I
10 said, it was in the newspapers, etcetera.

13:45

11 MR. McDOWELL: Yes.

12 CHAIRMAN: So that would make it later. But I'm not
13 certain of that fact. well, let's get clarity on it.

14 MR. McGUINESS: Chairman, the date under the signature
15 is February 2018.

13:45

16 MR. McDOWELL: On one of them it is, yes. That is a
17 different date. That is a date --

18 CHAIRMAN: I think it is. well, you know,
19 Mr. McDowell, I suppose --

20 MR. McDOWELL: I don't know. But it is of some
21 significance. I'll tell you why, Chairman: because
22 you yourself asked Commissioner O'Sullivan why that
23 discontinuance had occurred.

13:46

24 CHAIRMAN: And she said it was somebody else.

25 MR. McDOWELL: And she said it happened on somebody
26 else's watch and she couldn't assist you with it, and
27 you have never received any information. And one of
28 the questions you asked was why were the disciplinary
29 proceedings discontinued. And just in looking at the

13:46

1 material we received yesterday, it seemed to raise a
2 question: when was this decision made? And Mr. Murphy
3 has said that for reasons which I apprehend are that he
4 might want to revive the whole process, that he didn't
5 want to comment on why it had been discontinued. I'm 13:47
6 not quite clear about how that follows.

7 CHAIRMAN: well, maybe it's not a question I should
8 have included at all. I really don't think whether the
9 Garda Síochána -- well, look, my position on that is
10 extremely clear. It's already been done in the first 13:47
11 report. I have a view. Mr. Justice Morris had a view
12 in relation to the fact that every time a garda has boo
13 said against him, they have to hold an internal
14 criminal trial. It doesn't happen in private industry,
15 it doesn't happen anywhere. So I perhaps shouldn't 13:47
16 have included that paragraph 19. But we will get stuck
17 on that now, Mr. McDowell, and we will get nowhere.

18 MR. McDOWELL: No, no, I'm not trying to stick us on
19 anything.

20 CHAIRMAN: Yes. 13:47

21 MR. McDOWELL: It's just that it jumped out of the page
22 at me. If it's a misprint, and people do, in January,
23 send letters marked the wrong -- the previous year,
24 because they were updating them or whatever on a
25 system. 13:47

26 CHAIRMAN: It usually takes about six months.

27 MR. McDOWELL: Exactly, depending on how efficient the
28 office in question is. But I just would like some
29 clarity about that.

1 CHAIRMAN: All right.

2 MR. McDOWELL: Chairman, in relation to the other

3 question that you put to me, could I finish this

4 afternoon in two or two-and-a-half hours, if the

5 Tribunal is willing to sit late this evening, I can, I 13:48

6 can finish, but I can't finish by four o'clock, I am

7 just saying that.

8 CHAIRMAN: All right. Well, if you can finish by 4:30.

9 MR. McDOWELL: I am now getting very wary of doing so.

10 CHAIRMAN: Mr. McDowell, I know you will do your best, 13:48

11 but, you see, the point is --

12 MR. McDOWELL: Chairman, the last thing I would do is

13 trespass on anybody's indulgence.

14 CHAIRMAN: I know that, Mr. McDowell. Maybe by asking

15 the 20 questions I made things worse. I was hoping to 13:48

16 make things better.

17 MR. McDOWELL: I won't comment.

18 CHAIRMAN: I didn't require an individual answer to

19 every single one. I think we will just try and do our

20 best. 13:48

21 MR. McDOWELL: We will try and finish.

22 CHAIRMAN: So, Mr. Fanning, you're under real pressure

23 now, so off you go.

24

25 SUBMISSION BY MR. FANNING: 13:49

26 MR. FANNING: Thank you, Chairman. The submission that

27 I am about to make is subtended by a speaking note,

28 which Mr. Kelly has handed in to Mr. Kavanagh, which

29 will be passed up to you now, and it's a submission

1 that is being made, to be precise, on behalf of
2 Independent News & Media plc and six current or former
3 journalists who were represented by the legal team
4 appointed by INM; namely, Paul Williams, Stephen Rae,
5 Ian Mallon, Fionnan Sheahan, Dearbhail McDonald and Tom 13:49
6 Brady.

7
8 If I might say at the outset, Superintendent Taylor has
9 said in evidence in this Tribunal that his intention
10 was to bring about a chilling effect and to seek to 13:49
11 sway the media against Sergeant McCabe. INM has
12 provided the Tribunal with some clippings. The
13 Tribunal has itself reviewed the public press. And
14 whether judged on its own terms or by reference to
15 other contemporaneous media publications, we submit 13:49
16 that any fair analysis of the reporting about Sergeant
17 McCabe across the INM titles demonstrates that INM
18 fully, fairly and comprehensively covered Sergeant
19 McCabe's activities in drawing attention to perceived
20 shortcomings in An Garda Síochána. And the reporting 13:50
21 of matters concerning Sergeant McCabe was
22 overwhelmingly favourable to Sergeant McCabe, without
23 any hint of chill or reluctance to publish articles
24 that were favourable to him.

25 13:50
26 And we might emphatically state, therefore, at the
27 outset, that there is no evidence before this Tribunal
28 to support any suggestion that INM allowed itself, even
29 inadvertently, to become a vehicle of a smear campaign

1 against Sergeant McCabe. That proposition is simply
2 incapable of holding any water on the basis of any fair
3 analysis of the reporting actually engaged in by INM
4 titles in relation to Sergeant McCabe.

13:51

5
6 The second point I want to make to you this afternoon,
7 Chairman, is an issue that I canvassed briefly with you
8 at the very outset of Day 91 and it's recorded on the
9 transcript, and that is the question of the entitlement
10 or jurisdiction of the Tribunal to consider the
11 question of whether INM engaged in irresponsible or
12 inappropriate journalism. And that was an issue that
13 appeared to be canvassed by Mr. McDowell in some
14 questions and I made an objection or an interjection at
15 the beginning of Day 91, and I will come back to that
16 now in a little bit more detail because you indicated
17 that it was something that you would welcome a
18 submission on.

13:51

13:51

19
20 We quote Article 40.6.1 of the Constitution, we quote
21 Article 10 of the European Convention on Human Rights,
22 and we say that, in summary, the law is to the effect
23 that the courts have for a long time accepted that
24 freedom of expression means that, subject to very
25 limited exceptions, the media has a wide latitude to
26 what it can publish, subject only to narrow exceptions
27 that arise where the rights of a third party are
28 contravened. And without labouring a submission before
29 this Tribunal with undue authorities, we draw your

13:51

13:52

1 attention, Chairman, to the judgment of Mr. Justice
2 Fennelly for the majority of the Supreme Court in Mahon
3 v. Post Publications. It's an interesting judgment for
4 lots of reasons, not least because the plaintiffs were
5 the members of the Mahon Tribunal, who sought 13:52
6 injunctive reliefs against a newspaper, the Sunday
7 Business Post, which had been publishing what it deemed
8 confidential information. The injunction application
9 was refused by Mr. Justice Kelly in the High Court,
10 and, on appeal, the Supreme Court, by a majority, 13:52
11 sustained Mr. Justice Kelly's decision. In the course
12 of his judgment, Mr. Justice Fennelly made a number of
13 comments, which we've excerpted. He said:

14
15 "The media are not required to justify publication by 13:53
16 reference to any public interest other than that of
17 freedom of expression itself. They are free to publish
18 material which is not in the public interest. I have
19 no doubt that much of the material which appears in the
20 news media serves no public interest whatsoever. I 13:53
21 have equally no doubt that much of it is motivated, and
22 perfectly permissibly so, by the pursuit of profit.
23 Publication may indeed be prompted by less noble
24 motives."

25 13:53
26 And he goes on, like Mr. Justice Kelly in the High
27 Court, to quote from an English judgment of Lord
28 Justice Hoffman in a case against Central Independent
29 Television. I won't read out all of that quote, but,

1 in essence, Lord Justice Hoffman, as he was then, made
2 the point:

3
4 "A freedom which is restricted to what judges think to
5 be responsible or in the public interest is no freedom. 13:53
6 Freedom means the right to publish things which
7 government and judges, however well motivated, think
8 should not be published."

9
10 So, arising out of that, we say that prima facie in the 13:54
11 absence of any legal right being infringed, and
12 importantly, nobody in this Tribunal has contended,
13 much less instituted proceedings, arising out of any
14 Irish Independent articles concerning Ms. D, we contend
15 that it was self-evidently within the entitlement of 13:54
16 the newspaper to publish those articles. And in
17 circumstances where nobody is in fact even contending
18 for the contrary proposition, it will be clearly very
19 surprising that the Oireachtas would task a tribunal of
20 inquiry to investigate into something that is 13:54
21 manifestly lawful. And we say that the Oireachtas did
22 nothing of the sort and we say that the course which
23 the Tribunal should therefore refrain from embarking
24 upon would involve the Tribunal inappropriately acting
25 as some sort of arbiter of editorial taste and judgment 13:55
26 by reaching a subjective value judgment, simply not
27 mandated by the terms of reference and, in the
28 circumstances, contrary to the rights of INM to publish
29 as it sees fit. And we say that that would be an

1 inappropriate breach of the newspaper's rights.

2
3 strictly in the alternative to that proposition, which
4 is that the Tribunal shouldn't go there, if the
5 Tribunal ruled otherwise and did go there, we do defend 13:55
6 the articles trenchantly, and we say that they
7 represented appropriate and responsible journalism
8 which received careful consideration at an editorial
9 level before publication. And you heard from a number
10 of witnesses to that effect. Mr. Williams, the initial 13:55
11 author of the articles and the source of the story from
12 the newspaper's point of view, was cross-examined
13 vigorously on the publication of the Ms. D interview
14 and it was put to him that he should have checked the
15 story with Sergeant McCabe or sought his side of the 13:56
16 sorry. But that cross-examination, as we now know,
17 proceeded without any acknowledgment, as later emerged,
18 that Sergeant McCabe had been indirectly approached
19 prior to publication through a legal representative as
20 part of the stress-testing approach or process that was 13:56
21 carried out internally in INM prior to publication.

22
23 The then-editor of the Irish Independent, Ms. Clare
24 Grady, gave evidence. She described the interview with
25 Ms. D as a legitimate story, a significant story and an 13:56
26 important story. And whilst she regarded the core
27 allegation as incredibly serious, she believed that the
28 publication of the anonymised story would not impugn
29 the character of Sergeant McCabe in the public eye, and

1 she was cognisant that the media had a duty to report
2 on victims of sexual abuse and that there was a history
3 of such victims not being listened to, and she gave
4 evidence, and was not cross-examined by any party on
5 that aspect of her statement. So none of that is to 13:56
6 say, on conclusion of that issue, that reasonable
7 people could not disagree as to whether or not the
8 newspaper should have published journalism arising out
9 of the Ms. D interview. Certain people gave evidence
10 to the Tribunal to indicate that they would not, if 13:57
11 they were the decisionmaker, have published the story.
12 But that is nihil ad rem. A daily newspaper decides to
13 publish and not to publish hundreds of stories every
14 week, but the Tribunal has no general mandate to
15 concern itself with the review of such decisions. 13:57

16
17 We move then to a series of questions that the Tribunal
18 has posed as part of the 20 questions and we address
19 some of those questions insofar as INM can offer
20 relevant submissions to the Tribunal on them. 13:57

21
22 The first question that we choose to address as
23 relevant to us is the relevance of talk, communication
24 or innuendo to the terms of reference. And we say in
25 our submissions that none of the terms of reference 13:57
26 mandate an investigation into the general state of
27 knowledge of the media as to rumours or allegations
28 relating to Sergeant McCabe in the absence of either
29 evidence or a permissible inference of briefing on the

1 part of Superintendent Taylor or contact with members
2 of An Garda Síochána. You, Chairman, have already
3 observed that evidence as to the circulation of rumours
4 in media circles generally really does not assist the
5 Tribunal very much, apart from showing the currency of 13:58
6 the story or stories about Sergeant McCabe, but that
7 such evidence would be of assistance to you if it could
8 lead back to the identification of anybody who was
9 talking to anyone in Garda Headquarters.

10
11 We say that what the Tribunal has said about its terms
12 of reference appear to us to be correct, and that even
13 leaving aside the question of the terms of reference,
14 evidence as to the mere existence of a rumour being in
15 circulation, divorced from any evidence as to its 13:58
16 original source, is realistically of no probative value
17 to the Tribunal's inquiries. And we say that there is
18 no satisfactory evidence before this Tribunal as to the
19 briefing of any journalist or editor comprised in the
20 INM interests on the part of Superintendent Taylor and 13:59
21 there is no evidence as to briefing of any of the INM
22 journalists or staff members by former Commissioner
23 Callinan or former Commissioner O'Sullivan in any
24 manner that engages the terms of reference.

25
26 We then turn to another question that you've, in an
27 indicative way, indicated is a question that you're
28 going to explore, and that is the question of whether
29 there's any truth in the protected disclosure of

1 Superintendent Taylor and whether or not he's a witness
2 whose evidence can in any respect be accepted. And we
3 set out in some detail our views in these submissions
4 as to why the evidence of Superintendent Taylor is
5 selective, internally contradictory, unsupported by any 13:59
6 corroborative material and so vague and imprecise as to
7 defy contradiction or effective cross-examination and
8 consequently to be unreliable. Obviously, you,
9 Chairman, will be considering Superintendent Taylor's
10 evidence against the backdrop of all of the witnesses 14:00
11 who gave evidence, that engaged that evidence, but our
12 submissions focus necessarily really only on the
13 interplay between what Mr. Williams said about his
14 dealings with Superintendent Taylor and what
15 Superintendent Taylor said. And we point out a number 14:00
16 of contradictions and changes of position on the part
17 of Superintendent Taylor in respect of his evidence
18 insofar as it relates to Mr. Williams. It began with a
19 phone call in February, it moved to a phone call in
20 March. And ultimately he pinned his colours to the 14:00
21 mast to the proposition that, on a Saturday in March,
22 Mr. Williams telephoned him, and not the other way
23 round, and made a comment along the lines of, guess
24 where I am, in the course of relating to Superintendent
25 Taylor that he was at Ms. D's home. Mr. Williams 14:01
26 always denied that he telephoned Superintendent Taylor
27 on that day, which the Tribunal's investigations, I
28 think, made clear could only have been the 8th March of
29 2014, and Mr. Williams was in a position to produce the

1 telephone records subtending his mobile telephone which
2 demonstrated that he was in contact with Superintendent
3 Taylor on that number on other dates but not on the
4 Saturday in question. So once Superintendent Taylor
5 commits to any piece of specific forensic information, 14:01
6 it's capable of being refuted in an effective way.

7
8 Mr. Williams' position is that he did have a number of
9 conversations with Superintendent Taylor in the weeks
10 following the interview of the 8th March, that 14:02
11 Superintendent Taylor came back to him and confirmed
12 that an investigation had taken place, a file had been
13 sent to the DPP, that no charges had been brought.
14 Mr. Williams did state that Superintendent Taylor made
15 a throwaway remark about the fact that the Ms. D 14:02
16 allegation was known in the Park, being the Phoenix
17 Park, in Garda Headquarters, but, beyond that,
18 Mr. Williams was emphatic that he was never briefed by
19 Superintendent Taylor, Nóirín O'Sullivan or Martin
20 Callinan in relation to any adverse matter in respect 14:02
21 of Sergeant McCabe.

22
23 And we set out in some greater detail in the
24 submissions why Superintendent Taylor's evidence in
25 relation to his dealings with Mr. Williams is clearly 14:02
26 inconsistent and unreliable, but we content ourselves
27 ultimately with the proposition that if you are
28 required to prefer the evidence of one or other of
29 Mr. Williams or Superintendent Taylor, we say it is

1 very clear that Mr. Williams' evidence, which is
2 supported by his mobile phone bill, should be
3 preferred, not least because of all of the other
4 credibility issues that are associated with
5 Superintendent Taylor, about whom other counsel have
6 addressed you. 14:03

7
8 Turning to page 10 of the briefing note, we have
9 addressed you on the question that you posed as to what
10 led to Paul Williams' visit to Ms. D's home. And it is 14:03
11 important, I think, I say something to you about this,
12 even though the evidence is now, we say, emphatic and
13 incapable of contradiction.

14
15 At the outset of this Tribunal's life, it was suggested 14:03
16 in private session that there was something sinister or
17 underhand potentially in the context in which Paul
18 Williams came to interview Ms. D. But no evidence was
19 offered then or since to subtend that speculation,
20 which now appears to have been without foundation. The 14:04
21 witnesses who have given evidence as to the genesis of
22 Paul Williams' article have all been consistent. The
23 Tribunal has heard from Mr. Williams, Chief
24 Superintendent O'Reilly, Ms. D and both of Ms. D's
25 parents, as to how the Paul Williams interview came 14:04
26 about. And it was never suggested by any witness in
27 evidence in this Tribunal, on any foundation, that
28 Mr. Williams' visit to the D family was in any way
29 inspired by senior members of An Garda Síochána. And

1 counsel for Sergeant McCabe indicated Mr. Williams was
2 not cross-examined on his account in that regard
3 because an alternative explanation had been offered.
4

5 Mr. Williams was examined by counsel for the Tribunal. 14:04
6 He firmly denied consulting with any senior member of
7 the guards before attending at the D home for interview
8 and, in fact, insofar as Superintendent Taylor is
9 concerned, he and Mr. Williams are ad idem on the
10 proposition that there was no discussion between 14:05
11 Mr. Williams and Superintendent Taylor before
12 Mr. Williams attended at the D house.
13

14 So we say, as a consequence of all of that, that the
15 Tribunal is in a position to make very clear findings 14:05
16 about how Mr. Williams came to visit Ms. D's house and
17 how he came to write that story. The relevant
18 witnesses were all consistent on that. And there is no
19 evidence upon which the Tribunal could conclude that
20 the, as it were, commissioning of the story was part of 14:05
21 some sort of larger Garda smear campaign organised by
22 Superintendent Taylor or either of the former
23 Commissioners, because neither of them had anything to
24 do with the writing of the story.
25

26 You've posed the question for us, Chairman, as to what
27 extent the evidence of the D family is relevant, and we
28 answer that in our submissions also. We say that it is
29 relevant to the extent that it demonstrates how the

1 Ms. D interview came about, and, in circumstances where
2 there was no challenge to that evidence, the D family
3 evidence rebuts the proposition that the Ms. D
4 allegation was concocted at a senior level in An Garda
5 Síochána as part of any smear campaign.

14:06

6
7 The final issue then that I will address, Chairman, but
8 it does have a number of strands associated with it, is
9 the issue of journalistic clashes, as they might
10 euphemistically be described.

14:06

11
12 The Tribunal has identified a number of journalistic
13 clashes or differences of evidence from witnesses who
14 were each journalists or editors, and the first issue
15 that appears to arise in respect of these disputes is
16 the extent to which such conflicts of evidence require
17 to be resolved or even addressed in any way in a report
18 that you would prepare, Chairman, to be presented to
19 the Houses of the Oireachtas, however desirable such
20 determination might be for the participants in what
21 might ultimately be characterised as internecine
22 disputes of no relevance to the Tribunal's ultimate
23 inquiry. There are three such disputes that we
24 identify that concerned INM journalists: one involving
25 Ms. Harris, one involving Ms. O'Doherty and one
26 involving Mr. Kenny. And before I turn to address
27 those three disputes individually, which I will do in
28 very brief terms, my primary submission is that a
29 conflict between witnesses in relation to matters which

14:06

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14:07

1 are not relevant to a term of reference, simply does
2 not require to be resolved by the Tribunal. We submit
3 that the currency of journalistic gossip does not
4 assist the Tribunal in reaching any conclusion on the
5 terms of reference, save and except where the Tribunal 14:07
6 can be satisfied that the source or origin of such
7 rumours was a briefing on the part of Superintendent
8 Taylor or either of the former Commissioners. And we
9 say that journalistic clashes as to the currency of
10 rumours regarding Sergeant McCabe fall squarely into 14:08
11 the category of matters identified by you, Chairman, on
12 Day 83 as not requiring resolution. So one journalist
13 contradicting another as to whether or not that
14 journalist said something about a rumour, we say is
15 really of no probative value to the Tribunal's 14:08
16 inquiries, and we say that you were correct to observe,
17 and perhaps you did so on a tentative or indicative
18 basis, on Day 83, as opposed to observing it as a
19 matter that you had already determined, that you were
20 not minded to form a view on such conflicts and that 14:08
21 such conflicts formed no part of your business, in the
22 sense that they did not advance matters in relation to
23 the terms of reference.

24
25 And the submission that we make in that regard, 14:09
26 Chairman, is also to be considered, I think, carefully
27 against the background of the potential reputational
28 significance for the various journalists affected as to
29 the resolution of the controversies by you. It has

1 been said that reports of tribunals of inquiry are
2 legally sterile, by the late Judge Hardiman, but they
3 are not reputationally sterile. They may be
4 reputationally explosive. And we would say that the
5 Tribunal should exercise caution and restraint in not
6 deciding things that is ultimately not for the Tribunal
7 to decide.

14:09

8
9 Strictly without prejudice to that position, Chairman,
10 if you ultimately take a different view and you
11 determine that it is appropriate for you to descend
12 into the arena, as it were, and adjudicate as to which
13 of different journalists is correct or more likely to
14 be correct in evidence that they have given, on the
15 dispute fundamentally between Ms. Harris and
16 Mr. Sheahan, we have, in our written submissions, set
17 out a number of reasons which we believe to be
18 compelling as to why Mr. Sheahan's evidence ought to be
19 preferred by the Tribunal.

14:09

14:10

20
21 Before I get to those, though, we found the submission
22 advanced by Mr. Lehane yesterday, on behalf of
23 Ms. Harris, as to why the Tribunal should resolve these
24 journalistic clashes, to be most curious. He offered
25 the Tribunal yesterday a number of purported reasons as
26 to why the Tribunal should attempt to resolve these
27 clashes. He said that resolving the conflict was a
28 necessary precursor to making a finding as to the
29 source of rumours regarding Sergeant McCabe as a matter

14:10

14:10

1 of probability. We say there is no warrant whatsoever
2 for that submission. We don't see how that could be
3 so. He said that failing to make a finding of fact in
4 respect of the conflict will have a chilling effect on
5 other publicly-minded citizens considering assisting a 14:11
6 public inquiry in the future. Again, we say that there
7 was no basis whatsoever for that, an entirely
8 speculative proposition.

9
10 without going through all of the reasons he urged, his 14:11
11 final reason, I think, was that had Mr. Sheahan
12 admitted using the word 'paedophile' a line of
13 questioning would have followed and he might have been
14 asked if he had heard it from a member of An Garda
15 Síochána. Now, that is a completely misconceived 14:11
16 reason. It's based upon a hypothesis that Mr. Sheahan
17 could have been asked additional questions which might
18 have been useful to the Tribunal, but, in fact,
19 Mr. Sheahan's uncontested evidence was, firstly, that
20 he heard a rumour regarding Sergeant McCabe in 14:11
21 political and media circles in Leinster House, he could
22 categorically exclude hearing that rumour from Garda
23 circles, that he had never been negatively briefed by
24 any member of An Garda Síochána in the terms of
25 reference sense and nobody briefed him or provided him 14:12
26 with any information that he regarded as worth noting
27 or worth pursuing. And that being Mr. Sheahan's
28 evidence, it's difficult to see why Mr. Lehané made a
29 submission based on the proposition that if you

1 determined this issue, the Tribunal could have elicited
2 more useful evidence from Mr. Sheahan. That is clearly
3 nonsensical.

4
5 In terms of the credibility of Ms. Harris's testimony, 14:12
6 we point out that she changed her story in a number of
7 respects and important respects. She began by alleging
8 that senior executives had stated in her office that
9 Sergeant McCabe was a paedophile. She then moderated
10 that to a single senior executive. She also alleged 14:12
11 that Ian Mallon referred on other occasions, plural, to
12 serious allegations involving a child. In her
13 evidence, she limited herself to alleging a single
14 conversation with Mr. Mallon. Her recollection was
15 ultimately narrowed down to the third week of September 14:13
16 of 2014 after an editorial conference, a week on which
17 Mr. Sheahan was in White's Hotel in Wexford on the
18 Tuesday, the main editorial conference day of the
19 Sunday Independent, and she said that at the conclusion
20 of the meeting he made an abrupt comment to her, saying 14:13
21 that Sergeant McCabe was a paedophile, which she didn't
22 respond to, she told nobody about, made no note of and
23 sent no email to anybody about and didn't do anything
24 with. She said that it struck her, and it was an
25 extraordinary comment. She said, if you look at 66(e) 14:13
26 of our speaking note, to quote directly from her
27 evidence, that she regarded the alleged statement as a
28 very startling thing and completely shocking. Well, we
29 don't know why she was so startled or shocked by it, if

1 she heard it at all, which we say she didn't, because
2 she also said in her evidence that the statement that
3 she attributes to Mr. Sheahan had been the currency in
4 INM for a long time and that people were talking in
5 these terms at water coolers on the corridors. She was 14:14
6 incapable of even specifying the people who were
7 talking about Sergeant McCabe in these terms. So she
8 simultaneously maintained that this word was rife in
9 Independent News & Media, and that she was shocked and
10 horrified when she heard Mr. Sheahan use the word. And 14:14
11 neither of those propositions -- or both of those
12 propositions can't possibly be correct.

13
14 Another telling weakness in the testimony of
15 Ms. Harris, Chairman, is that, in her statement and in 14:14
16 evidence, Ms. Harris stated that there was a clear
17 allegation of paedophilia, an explicit word which
18 denotes a specific act in the wrong file in Tusla, and,
19 on that basis, she speculated that maybe somebody had
20 sight of that file at that time, she speculated that 14:15
21 the file could have leaked out, inviting the inference
22 that it could have leaked out to the inner circle of
23 the editorial group, which appeared to have more
24 information, and she thought that that is maybe why
25 Fionnan used that word, the explicit word. 14:15

26
27 Now, there is no evidence whatsoever to support the
28 proposition that that language was used in the Tusla
29 file, and this marks her out, I regret to say, as

1 somebody who is prone to speculation which is not
2 founded in evidence.

3
4 Mr. Sheahan's evidence was that he never formed the
5 view that Sergeant McCabe was a paedophile. He didn't 14:15
6 express that view in those terms or otherwise. He did
7 not and has never believed that Sergeant McCabe was
8 guilty of any wrongdoing. And Mr. Sheahan has the
9 great advantage, Chairman, of being able to point to
10 the objective record of his actions in support of that. 14:15
11 He wrote about and he commissioned journalism which was
12 extremely favourable to Sergeant McCabe. He assigned
13 journalists to cover the allegations around penalty
14 points and issues around Bailieboro in the third week
15 of September 2014, at the time that Ms. Harris places 14:16
16 the conversation with him. He put that piece on the
17 agenda and the news list for the Sunday Independent of
18 that week. And despite Ms. Harris's assertion that she
19 felt Sergeant McCabe's concerns needed reporting, it
20 was Mr. Sheahan who was putting the piece back on the 14:16
21 news list when it fell off at the editorial end.

22
23 Mr. Sheahan's evidence was that he had never spoken to
24 Superintendent Taylor, former Commissioner Callinan or
25 former Commissioner O'Sullivan about Sergeant McCabe, 14:16
26 and that none of those briefed him to say anything
27 negative concerning Sergeant McCabe or to use his
28 influence to be negative about him and there's no
29 contradiction about that evidence.

1
2 In respect of Mr. Mallon, undoubtedly Ms. Harris
3 retrenched significantly from the indicative evidence
4 supplied in earlier versions of her statements. She
5 curiously advocated for a form of privilege in respect 14:17
6 of news meetings which she chose to conceal the
7 identity of those persons which she wanted to protect,
8 but she didn't extend that courtesy to Mr. Mallon.
9 Ultimately, Mr. Mallon in his evidence said that it was
10 a nonsense to identify him with any sort of a 14:17
11 whispering or muttering campaign about Sergeant McCabe,
12 that there was no such campaign in INM. There was a
13 solitary allegation of child sexual abuse that was
14 well-known, because Paul Williams had written an
15 article about it, albeit that Sergeant McCabe was not 14:17
16 named in the article. Mr. Mallon objected to the
17 suggestion that there were mutterings and whispers,
18 rumours or gossip concerning Sergeant McCabe or that he
19 was a party to any of that. He indicated that
20 journalists have overt and full-on conversations about 14:17
21 matters in the public ether and potential stories.

22
23 So, Chairman, to the extent that you regard it as
24 necessary to determine the issues in controversy
25 between Ms. Harris, Mr. Sheahan and Mr. Mallon, we 14:18
26 would ask you to prefer the version of events of
27 Mr. Sheahan and Mr. Mallon.

28
29 In respect of Gemma O'Doherty, I intend to be very

1 brief. Ms. O'Doherty offered no probative evidence to
2 the Tribunal which the Tribunal ought to base any
3 finding on in respect of its report. She did, though,
4 offer speculative views, which she refused to resile
5 from, even when pressed, as to the basis upon which she 14:18
6 offered them. So she indicated that it was her
7 understanding that Mr. Williams had been provided with
8 a copy of the Garda file relating to Sergeant McCabe.
9 That was her prerogative, I suppose, to say that that
10 was her understanding, but no matter how closely she 14:18
11 was pressed as to the basis that underpinned -- the
12 factual basis that underpinned that understanding, she
13 was unable to offer anything of assistance to the
14 Tribunal.

15
16 Ms. O'Doherty gave evidence about, I suppose, two 14:18
17 important issues from her perspective. One was how she
18 was treated in the aftermath of attending at the home
19 of former Commissioner Callinan, and secondly, how her
20 employment within Independent News & Media came to an 14:19
21 end. We say that the record makes it clear that
22 Ms. O'Doherty's view of both those matters is
23 unreliable and not to be accepted. In the first
24 instance, the Tribunal saw the emails from senior
25 editorial executives describing her story about former 14:19
26 Commissioner Callinan's penalty points as being a
27 cracking yarn, and the Tribunal will have seen the
28 significant prominence it was afforded on the front
29 page of the Irish Independent on a Saturday about ten

1 days after the story was submitted by her. So there's
2 no question of her having been treated abominably, as
3 she sought to suggest to the Tribunal, when you look at
4 the objective record of what occurred in respect of
5 that journalism.

14:19

6
7 In addition, Chairman, in respect of the termination of
8 her employment, there is no objective evidence before
9 the Tribunal that the termination of her employment had
10 anything to do with Garda inspiration or Garda
11 interference. The evidence that has not been
12 challenged is that that was brought of a broader round
13 of redundancies. In any event, the Tribunal's terms of
14 reference, we say, preclude the Tribunal from reporting
15 upon the question of the termination of Ms. O'Doherty's
16 employment. It is covered by a confidential agreement
17 under which she accepted a sum of money in settlement
18 of legal claims that she had brought. And that is all
19 I need to say about Ms. O'Doherty.

14:20

14:20

20
21 The final issue I will be even briefer on, and that is
22 a dispute of fact, a politer dispute of fact, I think
23 it might be said, between Colum Kenny and Tom Brady,
24 who was the last of the six witnesses who I represent
25 to give evidence. There is undoubtedly a conflict
26 between Mr. Kenny and Mr. Brady, insofar as Mr. Kenny
27 informed the Tribunal that he approached two security
28 journalists, later identified as Mr. Brady and
29 Mr. Reynolds of RTÉ, in the vicinity of the committee

14:20

14:20

1 rooms in Dáil Éireann, to solicit their views on
2 matters relating to Sergeant McCabe. Mr. Kenny
3 suggested that they responded by saying: did he not
4 know that McCabe was under investigation for alleged
5 child abuse and that the gardaí were full of this and 14:21
6 that he should talk to gardaí up there. In his
7 statement of the 3rd June, Mr. Kenny stated that this
8 conversation took place outside a meeting of the Dáil
9 Joint Committee on Public Service Oversight and
10 Petitions on the 19th February 2014. Mr. Brady's 14:21
11 evidence on this, though, Chairman, was extremely
12 clear. He has stated that Mr. Kenny is mistaken in his
13 recollection. Mr. Brady did not attend the meeting of
14 the Committee on the date specified. And it was clear
15 from having checked the newspaper that two other 14:21
16 journalists from Independent News & Media attended that
17 meeting. Mr. Kenny stated that he had attended a
18 number of relevant Oireachtas committee meetings before
19 March 2014, and he thinks then that it's one of those
20 occasions that he had a conversation with Mr. Reynolds 14:22
21 and another senior journalist during which he learned
22 of allegations against Sergeant McCabe. But to be fair
23 to Mr. Kenny, he very fairly acknowledged the vagaries
24 of memory and the possibility of making errors of
25 detail. 14:22

26
27 Mr. Brady in his second statement is emphatic that he
28 didn't attend Dáil committee meetings regularly as a
29 matter of practice in the course of his work as a

1 journalist. He did attend a solitary meeting in
2 January 2014, but he is certain that he didn't have a
3 discussion of the nature referred to by Mr. Kenny on
4 that date in the presence of Mr. Reynolds or otherwise.
5 And the only occasion that he can recollect speaking 14:22
6 about Sergeant McCabe with Mr. Kenny was at the meeting
7 in November 2016, about pensions issues in INM, at
8 which he's satisfied that a conversation of the type
9 recollected by Mr. Kenny never took place.

10
11 So the Tribunal has the evidence of Mr. Brady and
12 Mr. Kenny. And again, we say that whilst it's not
13 necessary for the Tribunal to resolve that conflict of
14 fact, to the extent that the Tribunal determines
15 otherwise, we say that Mr. Brady's evidence should be 14:23
16 preferred.

17
18 Subject to any questions you have for me, Chairman, and
19 subject to the slightly greater detail that's in the
20 speaking note, those are the submissions I want to 14:23
21 make.

22 CHAIRMAN: I have no questions. Thank you,
23 Mr. Fanning.

24 MR. FANNING: Thank you, Chairman.

25
26 SUBMISSION BY MR. McDOWELL:

27 MR. McDOWELL: Mr. Chairman, at the outset, I would
28 like to make one point, and that is this: that this
29 Tribunal has split its hearings, for very good reason,

1 into various modules, and the modules have dealt with
2 different topics and different dates. But the Tribunal
3 hasn't made interim reports as it went along, and for
4 good reason -- well, not in relation to this, my
5 client, I am saying -- and for very good reason. That 14:23
6 in my respectful submission to you, Chairman, you
7 should keep all questions of credibility open until the
8 very end in order to determine where you believe the
9 truth lies on any issue of contested fact.

10
11 And it's in that context that I have to start with
12 Mr. Murphy's submissions today in respect of former
13 Commissioner Callinan. Mr. Murphy has presented an
14 admirable, from an adversarial point of view, picture
15 of the facts as he wishes the Tribunal to accept them, 14:24
16 but he faces -- when I use the term 'admirable', I'm
17 going to use it in the Latin term, that you wonder at
18 it, because, in my respectful submission, this is
19 something which causes considerable -- and gives
20 considerable ground for wonderment as to how he can say 14:24
21 some of the things he did. And I start with the
22 submissions he has made in respect of former
23 Commissioner Callinan and the statements allegedly made
24 by Martin Callinan to a number of people in the period
25 December 2013 to January 2014. 14:25
26

27 First of all, these statements were made in a
28 relatively short period of time. They were made,
29 Chairman, on the same subject: my client. They were

1 made to the same effect, that they were deeply
2 disparaging of my client, and they were made to a group
3 of people in relation to whom, despite Mr. Murphy's
4 claim that there was potential for cross-contamination,
5 no such suggestion was based on any real evidence in
6 the case.

14:25

7
8 And so, Chairman, have you to ask you yourself: Is it
9 legitimate to do, as Mr. Murphy has asked this Tribunal
10 to do, to look at each separate statement, utterly
11 isolate it from the fact that other statements are
12 alleged to have been made and to judge each separate
13 statement purely on its own facts as a matter of law?
14 And he has made that submission to you, that, as a
15 matter of law, you're required to do that. Well, he's
16 wrong on a number of issues.

14:26

14:26

17
18 Firstly, the similar-fact evidence rule has nothing to
19 do with this Tribunal at all. Similar-fact is an
20 exclusion to a rule that incriminating matter in
21 respect of accused persons tending to prove they
22 committed other offences is usually excluded. Evidence
23 of a different kind, and that is evidence in civil
24 proceedings on the basis that the facts proven negate
25 the parties' case, does not in any sense rotate or
26 depend on the law relating to similar-fact evidence.
27 It's not an exclusionary rule. It would defy common
28 sense if this Tribunal, in my respectful submission,
29 applied its mind to the four statements that were made

14:26

14:27

1 in a comparatively short period of weeks, and if this
2 Tribunal were to assess each of them without regard to
3 the fact that the others are alleged to have been made.
4 Any more than it would defy if you were determining a
5 civil claim, that you would put out of your mind that, 14:27
6 in the same four-week period, the plaintiff seeking
7 damages for personal injuries seemed to have tripped in
8 a pub, fallen down a stairs in a shop, bumped into a
9 ladder in the street and had whiplash, in the same four
10 weeks. It's a question of whether you want to take it 14:28
11 into account and whether, on a common-sense basis, it
12 is reasonable to take it into account. And I say it
13 defies common sense and is utterly unreasonable of
14 Mr. Murphy to invite you to disregard the fact that all
15 of these statements were made to independent people 14:28
16 within a period of approximately four weeks, and to
17 suggest that there's some legal authority for the
18 proposition that you should do so is completely
19 mistaken and it's asking you to make what I
20 respectfully suggest is an elementary error to drag in 14:28
21 the Court of Appeal's decision to which he refers,
22 delivered by Mr. Justice Barron, in respect of sodomy
23 of a young boy, to drag into the protections for an
24 accused person on a criminal trial into a set of
25 circumstances where it has no application whatsoever. 14:28

26
27 Now, the second point that I wish to make, if I may, is
28 in relation to chronologically going through the
29 various allegations, to take the points that have been

1 made by Mr. Murphy.

2
3 In relation to Philip Boucher-Hayes, his evidence is
4 very simple, and that is that in the course of a
5 discussion in a corridor in Montrose, the Commissioner, 14:29
6 in a short exchange between them, explained to him that
7 Sergeant McCabe had psychological and psychiatric
8 problems and that there were worse things, far worse
9 things, or words to that effect, that he could tell him
10 about Sergeant McCabe, and he indicated that if he 14:29
11 wanted to know more about these things, he could ask
12 Superintendent Taylor, to whom he gestured. That's his
13 evidence. And Mr. Murphy asks you to discount that
14 evidence on a whole series of grounds.

15
16 well, the first thing, on the face of it, no case is 14:30
17 made as to why Mr. Boucher-Hayes should invent this
18 story against Commissioner Callinan. It's not
19 suggested that he was maliciously hostile to him or had
20 any other motive to invent such a story. The second 14:30
21 thing that has to be said about it is that it's
22 suggested that you shouldn't have regard to it because
23 Mr. Boucher-Hayes didn't make a sufficient fuss about
24 it at the time in terms of making a news story about
25 this remark made to him himself. The third point that 14:30
26 is made that there is no note of it. And the fourth
27 point is that the corroborative evidence -- not
28 corroborative evidence, but the evidence negating
29 invention that he reported these remarks to a number of

1 colleagues, was not pre-notified to this Tribunal but
2 only emerged when, in fact, it was elicited from
3 Mr. Boucher-Hayes by, I think, counsel for An Garda
4 Síochána and for Commissioner Callinan. That's not a
5 basis on which to object to evidence at all. The 14:31
6 corroborating witnesses from RTÉ that did come to give
7 evidence were there on foot of a direct challenge to
8 Mr. Boucher-Hayes, suggesting that if he was telling
9 the truth, he would have told somebody else about it.
10 And what you elicit in cross-examination in these 14:31
11 circumstances is your business, but, in the particular
12 circumstance, that evidence was elicited by
13 cross-examination, it stood up and was not in any sense
14 damaged.

15
16 Mr. Murphy throws in the fact that Mr. Boucher-Hayes
17 couldn't produce a letter that he had been composing to
18 send to the Commissioner via the Chief State
19 Solicitor's Office. You had the evidence of
20 Mr. Donnelly that he actually remembered 14:32
21 Mr. Boucher-Hayes typing up that letter at their
22 work-bay in RTÉ.

23
24 But the real question that arises then is: Is there
25 any reason to disbelieve Mr. Boucher-Hayes' account of 14:32
26 what happened? Certainly, there can be no doubt that
27 it can't be a case of mistaken recollection. Secondly,
28 in relation to that, Mr. Callinan has an undoubted
29 interest in denying this story because it is

1 disgraceful behaviour, but has Mr. Boucher-Hayes any
2 equal or opposite improper motive to make an accusation
3 of such disgraceful behaviour against the Commissioner?
4 And the answer, in my respectful submission, is, no
5 such motive has been suggested.

14:33

6
7 And it is also suggested that he sat on this
8 information for a considerable period of time. Well,
9 he didn't sit on it, in the sense that he did report it
10 to work colleagues. But what was to be made of this?
11 Was he seriously to go to the director general or to
12 have a programme saying, you won't believe what the
13 Commissioner said to me in the corridor the day before
14 yesterday, and have a swearing match either on
15 television or in the Four Courts with the Commissioner
16 in respect of those remarks? Because that's really
17 where going public with it would have ended up.

14:33

14:33

18
19 So it was perfectly natural in the circumstances that
20 he would express surprise to colleagues about the
21 statements that were made to him, feel that these were
22 highly inappropriate remarks, and do nothing about
23 them, including not immediately going to Sergeant
24 McCabe to inform him that these remarks had been made
25 about him. And there's nothing in any sense
26 undermining of his credibility arising from those
27 facts.

14:33

14:34

28
29 So I'll just leave it at that in respect of

1 Mr. Boucher-Hayes. His evidence is freestanding. No
2 suggestion is made that he is somehow colluding with
3 other witnesses to invent this evidence. There is no
4 evidence that he did invent it. There is evidence that
5 he reported it to colleagues shortly after these 14:34
6 remarks were made, and there is no basis on which to
7 suggest that he had some deeply hostile agenda to
8 Martin Callinan that would inspire him to come to this
9 Tribunal and to commit perjury here to damage Martin
10 Callinan, because this is not a case, and I will come 14:35
11 to other cases where Mr. Murphy suggests otherwise,
12 this is definitely not a case where it could be a
13 question of an error of recollection or a mistaken view
14 of what Mr. Callinan said to him.

15
16 Now we come to the next conversation, and there are two
17 conversations, one of which is with Seamus McCarthy,
18 the Comptroller & Auditor General, on the 23rd January
19 2014, and the other of which is a conversation at the
20 close of that meeting with Deputy John McGuinness. 14:35

21
22 Starting with the first one, the conversation with
23 Seamus McCarthy. Seamus McCarthy is a holder of high
24 constitutional office and has no basis whatsoever to
25 impugn Commissioner Callinan. He responded, without 14:36
26 any interaction with any of the parties before this
27 Tribunal, to your call at the beginning of this
28 Tribunal to bring -- for anyone with relevant
29 information to bring it to the attention of this

1 Tribunal. Now, I don't say that because he's the
2 Comptroller & Auditor General that he is to be more
3 believed than the cleaner in his office. I'm not
4 saying that because he holds the office that he does
5 that he's more inherently credible. But I do ask this 14:36
6 Tribunal to ask itself the question: would someone in
7 his circumstances if he had any doubt about the nature
8 of the conversation he had with Martin Callinan, for
9 one minute come before this Tribunal and give evidence
10 which was highly damaging to a man who held very senior 14:37
11 office in An Garda Síochána, in circumstances where he
12 himself had any doubt about what he been told? And
13 what he was told was that Sergeant McCabe was not to be
14 trusted because, inter alia, because there were sexual
15 offences against him, being investigated against him. 14:37
16 And the currency of that investigation was a point of
17 some significance because it echos what was said to
18 Deputy John McGuinness on the 24th January in the car
19 park meeting.

20 14:38
21 Now, I should have said, to stay in strict temporal
22 order, that Deputy John Deasy gave evidence here, he
23 also gave an interview on television, which the
24 Tribunal has seen. The gravamen of his evidence is
25 that in a very short exchange before the PAC meeting in 14:38
26 question, that he, Deputy Deasy, was informed by
27 Commissioner Callinan that Maurice McCabe was a man who
28 could not be trusted. And it's suggested here that
29 this is a matter on which Deputy Deasy could be

1 mistaken. Deputy Deasy had exhibited a very
2 sympathetic approach to the issues which had confronted
3 the PAC from Commissioner Callinan's point of view.
4 And in those circumstances, it would be very strange
5 indeed if he had invented, embellished or altered his 14:39
6 recollection of what happened as between himself and
7 Commissioner Callinan. And it's put against him here
8 in a submission that because he later stated in
9 cross-examination by me that he was shocked by the
10 statement or that he had to take a breath, or whatever 14:39
11 the phrase was, and that he said he wasn't to be
12 trusted in any way, that that somehow takes away from
13 the credibility of his evidence. There's no reason to
14 put before the Tribunal, and no evidential basis for
15 suggesting, that Deputy Deasy had any malice whatsoever 14:39
16 against Commissioner Callinan, and if he had any doubts
17 on the matter, all he had to do was simply to say I now
18 am doubtful as to what I heard and therefore I don't
19 propose to make a statement to this Tribunal or to give
20 any evidence to it in respect of this matter, but he 14:40
21 didn't do that.

22
23 I will revert then for a moment to the Comptroller &
24 Auditor General, his evidence, and he was
25 cross-examined by counsel for An Garda Síochána in what 14:40
26 I would suggest from the transcript looks a very
27 feather-duster-like way, asking him could he be
28 mistaken and putting to him that Commissioner Callinan
29 had an alternative view of the matter. The simple fact

1 is that he was adamant that he was not mistaken about
2 what he had heard. And the question the Tribunal does
3 have to ask itself is, whether somebody in his
4 position, and his position does matter in this context,
5 whether somebody in his position would come forward and 14:41
6 volunteer this testimony to the Tribunal if he had any
7 doubt about it or if he had any reservations about the
8 accuracy of his memory or if he had any doubt about the
9 significance of the evidence he was tendering, it would
10 be so, so much easier for someone in his position to 14:41
11 say, on balance, I'm slightly worried about whether my
12 recollection is 100 percent accurate, I won't say a
13 word, and I won't impugn or involve my office in any
14 way by getting involved in the activities of this
15 Tribunal. 14:41

16
17 So again, I say his evidence is credible on its own.

18
19 And then we come to what is said about Deputy John
20 McGuinness in respect of two specific exchanges between 14:41
21 himself and Martin Callinan. And taking them in
22 chronological order again, Deputy McGuinness stated
23 that he did recollect a conversation immediately after
24 the PAC meeting had broken up, where he went over to
25 speak to Martin Callinan and to thank him for 14:42
26 attending, and it was a difficult and protracted
27 meeting. And his account is a very simple one and that
28 is that he -- that Martin Callinan expressed extremely
29 derogatory views about both of the so-called

1 whistleblowers, describing to him an incident involving
2 John Wilson and the horses in Grafton Street, and the
3 like, and as an indication of his eccentricity or
4 madness and, at the same time, referring just briefly
5 to Sergeant McCabe as a person who fiddles with kids.

14:43

6
7 Now, bearing in mind that those rumours about Sergeant
8 McCabe had been rife in political circles at the time,
9 it doesn't -- it shouldn't surprise, in my respectful
10 submission, this Tribunal that there wasn't an
11 immediate explosion of anger on the part of Deputy
12 McGuinness or a scene created when he heard these words
13 about Sergeant McCabe. But what happened on the
14 following day is of crucial importance here, because
15 you're asked to believe, and I submit it's highly
16 improbable, that the reason that Martin Callinan
17 requested the meeting with John McGuinness was in a
18 last-gasp effort to persuade him not to call Sergeant
19 McCabe but to avail of a different process involving a
20 kind of an employer/employee man-to-man process. And
21 he claims that he went to the car park with the
22 intention of raising what was contained in a draft
23 letter by way of proposal as to an alternative course
24 of action which would be better as regards dealing with
25 Sergeant McCabe. Now, he didn't bring the letter with
26 him, and the letter was never sent. But he claims that
27 that was his purpose in going to that car park that
28 day. And Mr. Murphy makes much of whether it was or
29 was not a clandestine meeting, but it is of note that

14:43

14:44

14:44

14:45

1 Mr. McLindon was of the view that it should have been
2 attended by more than one person in the circumstance on
3 each side if it was for the purpose that Mr. Callinan
4 claims he had in going to meet Deputy McGuinness.

14:45

6 Now, I just stop here and ask this Tribunal to consider
7 what Mr. Murphy is asking you to consider more
8 probable, and we are dealing here with the balance of
9 probabilities. He's asking you to consider that it is
10 more probable that John McGuinness invented a highly
11 malicious story as to what happened in that car park
12 and that he is retailing it knowing it to be false.

14:46

13 He's asking you to consider that it is more probable
14 that the note which John McGuinness made in the lay-by
15 on the way back to Kilkenny is a piece of forged
16 documentation invented to corroborate his account.

14:46

17 That is what he is asking you to hold. He is saying
18 that this document is not genuine and he is saying if
19 you were asked to decide on who is telling truth, this
20 document is -- has been produced to corroborate a
21 falsehood on the part of John McGuinness. And in
22 support of that proposition, he points to the fact that
23 Mr. McGuinness claimed he had no note of the meeting,
24 and whether this constitutes a note of the meeting is
25 one thing for you to decide, but secondly, and it is a
26 thing that you should, in fact, Chairman, in my
27 respectful submission, consider carefully, if he had,
28 in fact, said, yes, I do have a note of what he said to
29 me, would he have been asked to produce it? And if he

14:47

14:47

1 was asked to produce it, what would the effect on the
2 McCabe family have been if the substance of that note
3 had been made public unilaterally on the initiative of
4 John McGuinness without context and without reason?

14:48

6 And in addition to that, he asks you to doubt the
7 evidence of Deputy Micheál Martin, who says that he was
8 told about this meeting a few weeks later. Deputy
9 Micheál Martin came here not at the instance of Deputy
10 McGuinness and proffered evidence to this Tribunal
11 saying that he did remember being told about what had
12 been said to him, to Deputy McGuinness, on this
13 occasion. He remembers that happening. And he also
14 indicates that he informed two members of his staff
15 about this immediately after Deputy McGuinness had
16 informed him of this information. And you're asked to
17 believe either that that's not true or, alternatively,
18 that within those few weeks Deputy McGuinness had
19 decided to lay the seeds or sow the seeds for this
20 untrue allegation against Commissioner Callinan, and to
21 prepare, so to speak, an alibi or corroboration for
22 himself, alternatively that Micheál Martin is mistaken
23 or simply wrong in suggesting that such information was
24 conveyed to him.

14:48

14:48

14:49

25
26 Now, stopping there. The suggestion that
27 Mr. McGuinness would invent this story and would invent
28 a very serious and malicious untruth about a man who
29 was a Garda Commissioner and who retired from that

14:49

1 position at a later point, is a hugely damaging
2 suggestion against Deputy McGuinness. We're dealing
3 with reputations here, as Mr. Murphy reminded you. But
4 when you're deciding which is probable and which is not
5 probable, to come to a conclusion that it was more 14:50
6 probable that Deputy McGuinness invented this matter,
7 manufactured a note of a meeting which did not take
8 place, somehow either created a false trail within
9 weeks by telling Micheál Martin about it or,
10 alternatively, that Micheál Martin has come to this 14:51
11 Tribunal to falsely give evidence that he was told
12 about what had happened at this meeting within the
13 following weeks, that has huge reputational
14 consequences for other people. So if we are dealing
15 with reputations, and it's all very well for Mr. Murphy 14:51
16 to say, you know, that people's reputations have
17 suffered as a result of all of these things, the charge
18 made against Sergeant McCabe in respect of the
19 conversations with Philip Boucher-Hayes, with John
20 McGuinness and with Seamus McCarthy, was utterly 14:51
21 destructive of his reputation. So if we are dealing
22 here with reputations, we're dealing with my client's
23 reputation, for starters, and we are dealing with the
24 reputations not merely of Martin Callinan, but of the
25 persons who have come forward at the invitation of this 14:52
26 Tribunal to tell the truth as they see it in respect of
27 whether or not Martin Callinan sought effectively to
28 assassinate the character of my client. So if we are
29 balancing reputations, Chairman, I'm asking this

1 Tribunal to look very, very carefully at where the
2 probabilities lie, and it's the standard of proof on
3 the balance of probabilities that we are dealing with
4 here. And if it is -- it simply cannot be the case
5 that Deputy McGuinness is mistaken in his recollection 14:52
6 as to what happened in the car park. He either has
7 invented this evidence deliberately and maliciously or
8 else he is telling the truth. There is no room for
9 error in respect of evidence here.

10 14:53
11 There is a common thread which follows as well, and
12 that is that Martin Callinan, in respect of three of
13 the people who accuse him of assailing the character of
14 Sergeant McCabe, that in respect of three of them, he
15 says that it was they who raised the question of 14:53
16 Sergeant McCabe's character and that he merely
17 responded to what they said. He said that in relation
18 to Philip Boucher-Hayes, he said that in relation to
19 the Comptroller & Auditor General, and he said that in
20 relation to Deputy John McGuinness. And you have to 14:53
21 decide which is more probable: that three or four
22 disconnected people would tender this evidence falsely
23 against Commissioner Callinan, on the one hand, or that
24 he, on the other hand, did say what he is alleged to
25 have said and is now seeking to avoid the blame for 14:54
26 this by saying that his interlocutors were the people
27 who raised this issue.

28
29 Now, Chairman, it's in that context that I go back to

1 what has been said here about examining each of the
2 allegations separately and not taking them into account
3 as having been made in the same month and to different
4 people to the same effect to some extent. And it's in
5 that context that I strongly urge upon this Tribunal 14:54
6 not to make a fundamental error, not merely of law but
7 of common sense, by somehow bringing into its
8 deliberative process the exclusionary rule that applies
9 to similar-fact evidence in criminal trials. This is
10 not a criminal trial, and although people's reputations 14:55
11 are at stake, it is not a trial that's been conducted
12 on a quasi-criminal basis. It is a trial of the truth
13 of evidence, but the standard to be applied is which is
14 more probable and, in that context, I fully accept what
15 has been said here about the need where serious 14:55
16 allegations are made about somebody or serious
17 reputational consequences may flow, for care to be
18 taken and for the need for solid evidence to be
19 available in discharging the standard of the onus of
20 proof on the balance of probabilities, and I fully 14:56
21 accept what Mr. Justice Hugh O'Flaherty said on that
22 topic. But we're not here dealing with a criminal
23 process and we're not here dealing with a rule of
24 criminal law; you're dealing with a rule, I would
25 submit, of common sense. Would anybody believe that 14:56
26 you should disregard the fact that three independent
27 people received disparaging and highly damaging remarks
28 in the course of a four-week period from Commissioner
29 Callinan in the circumstances that we are dealing with

1 here? And I say absolutely not. It is certainly the
2 case that you are entitled to, and I would say you're
3 obliged to, look at the entirety of the evidence and to
4 consider, in terms of overall probability, whether this
5 sequence of statements were made in this three- or 14:57
6 four-week period and that you are entitled to look to
7 each of them to determine whether it is more probable
8 than not that the witnesses who claim that the
9 statements were made to them are telling the truth,
10 rather than Martin Callinan, who is stating that he 14:57
11 didn't make any of these statements and that it was the
12 people who he was speaking to who raised the question
13 of sexual assaults on the part of -- of sexual assaults
14 on the part of Sergeant McCabe against Ms. D.

15 14:58
16 And in that context, I just would ask the Tribunal to
17 remember the initial response of Martin Callinan to
18 Mr. Justice Iarflaith O'Neill's request that he should
19 give him some views on the allegations that were being
20 made against him and as to how those allegations should 14:58
21 be inquired into and how they should be resolved.
22 There was a retreat into complete legalism to try to
23 suggest that somehow the boat had been missed at the
24 O'Higgins Commission, which had entirely different
25 terms of reference, and that it was not now proper to 14:58
26 investigate these matters any further.

27
28 Now, there is a second point that arises and it applies
29 to both former Commissioner Callinan and former

1 Commissioner O'Sullivan. You have heard here and it's
2 one of your 20 questions, and whatever about some of
3 them, this, in my submission, is a very significant set
4 of questions, the loss of telephonic devices and iPads
5 and laptops. I just want to remind the Tribunal that 14:59
6 former Commissioner O'Sullivan had six phones in a
7 two-year period, she surrendered one to this Tribunal
8 but it appears to be one which related solely to her
9 son, who was using it as his own phone. Five
10 disappeared without trace. When she was asked about 14:59
11 that, she said that she used her phone quite a lot so
12 she had quite a deal of wear and tear on her phone.
13 And I put it to her that even the most phone-centred
14 teenager would have difficulty going through six in two
15 years. There are two iPads, one of which was badly 15:00
16 damaged, the other was surrendered but because the PIN
17 number couldn't be remembered, it had to be opened by
18 the Forensic Service of Northern Ireland. And there
19 were five laptops, none of which were accounted for.

20
21 In the case of Commissioner Callinan, there were six
22 phones, two surrendered, one was bleached when
23 surrendered and had been reissued, the other was given
24 to the Fennelly Commission. There were six laptops in
25 question, four not returned, one was given to the 15:00
26 Tribunal, and it was in a sanitised state, and the
27 other was apparently found sanitised in the incident
28 room in Ashbourne. And the Forensic Service of
29 Northern Ireland found no data from which he could find

1 on any of the materials, apart from what we saw, which
2 was -- other than no longer available or not
3 recoverable. And there was a damaged iPad.

4
5 Now, Chairman, is this coincidence or is there a 15:01
6 deliberate policy to make unavailable phones in these
7 circumstances, perhaps simply to protect privacy,
8 perhaps to protect national security or perhaps to
9 avoid inconvenient examination by others at a later
10 stage? In my respectful submission, it is remarkable 15:02
11 indeed that the two former Commissioners' phones were
12 unavailable -- and instruments, were unavailable to
13 that extent.

14
15 And a further feature of the Tribunal's proceedings 15:02
16 that is relevant in this context is that, in
17 Superintendent Taylor's protected disclosure, he did
18 his best to suggest that there was -- there would be
19 material which would confirm his claim, and he differs
20 with Sergeant McCabe about this, but his claim of 15:02
21 extensive interaction between himself and the two
22 Commissioners showing that he was keeping them informed
23 of his campaign to discredit Sergeant McCabe. Now, you
24 asked eventually at the very end of his testimony, as I
25 recall it, Chairman, was there anything on the phones 15:03
26 that would have shown that they were complicit in a
27 plot against Sergeant McCabe, and he said no. But
28 could I just remind the Tribunal of what he said in his
29 protected disclosure. Mr. Murphy used the phrase

1 "instructed and directed", but at page 2 of his
2 protected disclosure he says:

3
4 "When this occurred the Commissioner would meet with
5 me --"

15:03

6
7 This is when Sergeant McCabe was referred to
8 favourably.

9
10 "-- in his office or call me on the internal phone to 15:03
11 discuss the official response of An Garda Síochána.

12 This also occurred if there were media queries. When
13 that happened I would contact the Commissioner either
14 by phone or by text seeking his instructions or
15 direction. On many occasions there would be a meeting 15:04
16 to discuss the response and Deputy Commissioner
17 O'Sullivan would regularly be in attendance at those
18 meetings. Her office was next door to the

19 Commissioner's office. The Commissioner was quite open
20 in his instructions to me and never directed me to 15:04
21 withhold any information from Deputy Commissioner

22 O'Sullivan. I recall being instructed or directed to
23 contact the media and to brief them on a particular
24 line the Commissioner had instructed; namely, to brief
25 negatively against Sergeant McCabe. In particular, I 15:04
26 recall that I was to brief the media that Sergeant
27 McCabe was motivated by maliciousness and revenge, I
28 was also to encourage the media to write negatively
29 about Sergeant McCabe, that his complaints had no

1 substance and that the gardaí had fully investigated
2 his complaints and found no substance to his
3 allegations."

4
5 Now, that finds its way into the first paragraph of the 15:04
6 terms of reference here. And the first paragraph does
7 not deal with sexual history at all.

8
9 And Then he goes on to say:

10
11 "I was also directed to draw journalists' attention to 15:05
12 the complaint of sexual assault made against Sergeant
13 McCabe and this was the root cause of his agenda -
14 revenge against gardaí."

15
16 And then he goes on to describe his telephone call with 15:05
17 the journalist called Paul Williams and the
18 circumstance of that.

19
20 Could I just remind the Tribunal of what Mr. McLindon 15:05
21 said about this. Mr. McLindon was asked at page 128,
22 sorry, 127 -- no, I should start earlier. He stated
23 that, as far as he was concerned, on page 126:

24
25 "Deputy Commissioner O'Sullivan was aware of it and, as 15:05
26 far as I was aware, Commissioner Callinan was aware of
27 it. So if they wished me to do something in relation
28 to it in terms of putting out a comment or a statement,
29 they could have done so. I suppose the issue was that

1 on a sensitive matter like that, we would not be
2 commenting in any way."

3
4 And this was after he said that, on page 124, that
5 Superintendent Taylor had come into his office and told 15:06
6 him about the Williams story, he wasn't sure whether it
7 was before or after the interview with Ms. D, but he
8 said that he got the impression from his demeanour that
9 he thought this might be significant and might be of
10 benefit to the organisation insofar it might show that 15:06
11 there is an issue in relation to Sergeant McCabe.

12
13 And he himself went on to say:

14
15 "I felt that an article wouldn't name Sergeant McCabe, 15:06
16 wouldn't necessarily allude to him because of libel
17 laws."

18
19 And over those pages, Chairman, it becomes very clear
20 that Mr. McLindon was of the view that the two 15:06
21 Commissioners were being kept apprised of this
22 developing story. And the interesting point about that
23 is that when he was finished his testimony, counsel for
24 An Garda Síochána didn't challenge him in any way in
25 relation to that. And he did say in respect of -- 15:07
26 Michael O'Higgins, counsel, that he wasn't -- he made
27 it clear that he was relying effectively on the
28 impression he had got from Superintendent Taylor, that
29 they were aware, but he said that it would be standard

1 procedure for the two Commissioners to be made aware of
2 such a matter.

3
4 Now you are faced with two former Commissioners who say
5 that they had absolutely no knowledge of this. But 15:07
6 Mr. McLindon believed (a) that he discussed it with
7 Superintendent Taylor, and (b) he believed from what he
8 was told by Superintendent Taylor that they were about
9 to be informed about it and that it would be standard
10 procedure in the circumstances that they would be so 15:08
11 informed. So you have to ask yourself, Chairman, where
12 does the balance of probability lie there? And
13 Mr. McLindon was a senior official, civilian official
14 at a rank equivalent to chief superintendent rank in An
15 Garda Síochána at the time. So this is not idle office 15:08
16 chat. This is, he is telling you that he believed that
17 it would have been standard procedure for
18 Superintendent Taylor to have notified the two
19 Commissioners of this development.

20 CHAIRMAN: Sorry, Mr. McDowell, what development are 15:08
21 you talking about there?

22 MR. McDOWELL: Sorry. well, what I am suggesting to
23 you, I'm talking to you about the fact that the
24 Williams story --

25 CHAIRMAN: Oh. 15:08

26 MR. McDOWELL: -- was in the process of developing,
27 this was brought to Mr. McLindon's attention, he
28 discussed it with Superintendent Taylor, who informed
29 him about it, and that both of them believed that the

1 Commissioners, the Commissioner and the Deputy
2 Commissioner, would be informed about it and that it
3 was standard procedure for that to happen.
4

5 Now, the two Commissioners say they never heard a word 15:09
6 of that and they know nothing about it. And I have to
7 ask you, Chairman, to ask which is more probable and
8 why would Mr. McLindon corroborate Superintendent
9 Taylor in that respect?
10

11 Now, could I also just draw your attention to the 15:09
12 correspondence between Hanahoe Solicitors and
13 Mr. Justice Iarflaith O'Neill. This is in relation to
14 a slightly different topic, but it's while I have this
15 book in my hand, in relation to -- and particularly 15:09
16 page 20 of volume 1, where Hanahoes at that stage refer
17 to the fundamental important of the text message
18 correspondence if an inquiry which is established is
19 empowered to obtain the entirety of the interactions
20 between the parties. 15:10
21

22 I should have said, Judge, in relation to the
23 non-available electronic devices, that you have also
24 the testimony of Superintendent Taylor, who produced
25 one -- who held on to one phone only, and all the texts 15:10
26 seem to have been deleted from it and there seems to
27 have been no available text material on any of his
28 telephones that were seized which were relevant to this
29 issue.

1
2 And I pose the question on the balance of
3 probabilities: Are all of these missing devices and
4 all of the missing telephones and the bleaching or
5 deletion, or whatever it is, of all relevant text 15:10
6 messages between the parties relative to this matter,
7 is that pure coincidence or is there more to this than
8 meets the eye?

9
10 And it is strange, indeed, that in his correspondence 15:11
11 with the -- that in his protected disclosure and in his
12 solicitor's correspondence with Iarflaith O'Neill, that
13 at that stage Superintendent Taylor was advancing the
14 view, with a great deal of certainty, that his claim,
15 which differs from Sergeant McCabe's claim, that these 15:11
16 texts would refer to the information campaign in
17 keeping the Commissioners aware of what was happening
18 vis-à-vis Sergeant McCabe, he was saying, with a great
19 deal of certainty, that this would be evidenced by an
20 examination of the relevant parties' phones, and they 15:11
21 all disappear shortly thereafter.

22
23 Now, the next thing in chronological sequence is what
24 happens on Saturday, the 25th January, that is the day
25 after the car park meeting. And there you have the 15:12
26 interaction between Mr. Kean, Gerald Kean, Solicitor,
27 and the former Commissioner Callinan. And suffice it
28 to say that a very strange series of events started
29 there and went on for the next three weeks

1 intermittently, in which the Commissioner of An Garda
2 Síochána was briefing a panelist on the Marian Finucane
3 programme, and you've heard the evidence from Mr. Kean
4 to the effect that Sergeant McCabe, he was told, was
5 obstructive and did not cooperate with the O'Mahony 15:12
6 process, and that is absolutely denied, of course, by
7 Commissioner Callinan. But we do know that he did
8 utter those sentiments himself on the radio and we know
9 that he got into immediate legal trouble, got a
10 question -- got correspondence from a solicitor acting 15:13
11 for Sergeant McCabe, and then he, on the 6th February
12 he writes to the Commissioner asking for his views on
13 his proposed response, and we have a most unusual
14 situation where a practising solicitor with some
15 considerable public profile ends up having his drafts 15:13
16 reworked for him by the Commissioner of An Garda
17 Síochána and substitute paragraphs crafted for him and
18 delivered by Superintendent Walsh, in circumstances
19 that there was no trace left in Garda Headquarters
20 until a search of the materials was done by counsel for 15:14
21 this Tribunal.

22
23 Now, those events took place the day after the car park
24 meeting and in subsequent weeks. Chairman, you then
25 move onto the circumstance in which, suddenly, on the 15:14
26 24th February, it is suggested on RTÉ that there is
27 corroborative evidence that Sergeant McCabe had failed
28 to cooperate with the O'Mahony investigation and
29 somebody shrouded by privilege, journalistic privilege,

1 shows the directive to Paul Reynolds, it's published,
2 Sergeant McCabe responds via Prime Time. But the
3 interesting point about all of that is going back to
4 book number 1, in the things that -- among the things
5 that Superintendent Taylor said he was told to do, was 15:15
6 to brief the public about the fact that -- and this is
7 on page 5:

8
9 "One particular example was the report of Assistant
10 Commissioner John O'Mahony into allegations made by 15:15
11 Sergeant McCabe. I was instructed by the Assistant
12 Commissioner to brief the media that Sergeant McCabe
13 had refused to cooperate with Assistant Commissioner
14 O'Mahony. I later found out this was untrue."

15 15:15
16 Now, somebody senior in An Garda Síochána who had
17 access to that directive showed it to Mr. Reynolds and
18 he made such use of it as he did. So you're left in
19 those circumstances, Judge, wondering - and I will come
20 back to this later - that not everything that is 15:16
21 alleged in his protected disclosure is uncorroborated
22 or unlikely to have taken place.

23
24 Now, Judge, on Day 81, at pages 151 and 152, former
25 Commissioner O'Sullivan was asked about the evidence 15:17
26 which had been given by Superintendent Frank Walsh on
27 Day 16. Sorry, did I say at an early stage there were
28 no questions in respect of a witness? I may have
29 transposed. But in any event, I asked her about some

1 evidence about Superintendent Frank Walsh in respect of
2 the notification which came on foot of the Tusla error,
3 and this is the notification which came via
4 Superintendent McGinn, Chief Superintendent Sheridan
5 and Assistant Commissioner Kenny to the office of the
6 Commissioner. And Superintendent Frank Walsh said:

15:17

7
8 "I brought this file to the notice of the Commissioner.
9 I'd have given her a brief summary and she read the
10 file. I drew her attention to the false allegation,
11 which I assumed was inaccurate, just repetition of the
12 2006 allegation. She showed no reaction, that I
13 remembered. I'm sure the Commissioner read the summary
14 of the 2006 allegation, but I am not sure -- because
15 I'm not sure that I did, but certainly I drew the
16 digital issue to her attention. I am not sure the
17 Commissioner read the summary of the allegation because
18 I'm not sure that I did, but I certainly drew the
19 digital issue to her attention."

15:18

15:18

20
21 Now, she told you -- and he was not cross-examined on
22 that. Mr. Dignam indicated that he had no questions
23 for Superintendent Walsh arising out of that. But she,
24 on Day 81, page 152, said she had no memory of
25 Superintendent Walsh doing that, but she stated that if
26 she had read it, it would have resonated with her as
27 entirely different from the 2006 allegation because she
28 was aware of that from Chief Superintendent McGinn's
29 synopsis, she would have taken a different course of

15:18

15:18

1 action.

2
3 She also told this Tribunal that Assistant Commissioner
4 Kenny never spoke to her re the Tusla allegation and
5 that she had no recollection of ever seeing the Tusla
6 material presented to her by Superintendent Walsh. 15:19

7
8 Now, the problem with all of that is, of course, that
9 at that time she was interacting both with Sergeant
10 McCabe and with Assistant Commissioner Kenny. And it 15:19
11 was during the early summer of 2014, shortly after she
12 had become Commissioner, that the meeting in Mullingar
13 took place, chaired by Assistant Commissioner Kenny,
14 which came to the view that Chief Superintendent
15 Sheridan should liaise with the HSE about the Tusla 15:19
16 complaint, and that he, Assistant Commissioner Kenny,
17 would take the matter up with the Garda legal adviser,
18 Ken Ruane, neither of which step actually took place.
19 But what is of significance in relation to that, Judge,
20 is that the newspapers had carried Paul Williams' 15:20
21 articles. There had been a statement that a complaint
22 had been made to GSOC and that consideration was being
23 given to an inquiry into the matter, and Alan Shatter
24 had called for whatever inquiry was established to
25 examine this issue as well. 15:20

26
27 Now, Chairman, you have to ask yourself, is it likely
28 that the Commissioner, in these circumstances, did not
29 discuss the allegations against Sergeant McCabe and

1 that nobody discussed those allegations with her? And
2 the reason that I raise that, Judge, is that I
3 specifically asked her, on Day 81, page 100, and at
4 page 109 she confirmed that she had never discussed the
5 D allegation in any shape or form with any other member 15:21
6 of An Garda Síochána during the period 2008 to May
7 2015. That is almost a year after the Williams
8 articles, when she was preparing for the O'Higgins
9 events. And you have to ask yourself, is this true?
10 Do I accept that it is likely that she never spoke to 15:21
11 anybody about that? Especially when you hear evidence
12 from Mr. McLindon that it was being spoken about in
13 Garda Headquarters. You have to ask yourself, is it
14 likely that she never heard the matter discussed when
15 she attended a number of the pre-PAC preparatory 15:21
16 meetings, when there was discussion of the 2006
17 allegations, according to the notes, and when
18 Mr. McLindon prepared a series of questions and answers
19 topics for Commissioner Callinan to deal with,
20 including the motivation and background of the 15:22
21 so-called whistleblowers.

22
23 Now, Chairman, on Day 81, pages 112 to 113,
24 notwithstanding what Mr. McLindon said about standard
25 procedures and this conversation with Superintendent 15:22
26 Taylor, she denied having any knowledge at any stage or
27 being told in any way about the fact that Paul Williams
28 was going to the D household or that that process was
29 happening in any shape or form. And what's noteworthy

1 about her evidence as well, Judge, in this respect, is
2 that she was extremely vague about her understanding of
3 whether or not the articles published by Paul Williams
4 in the month of April/May of 2014 referred at all to
5 Sergeant McCabe, and she finally admitted that she must 15:23
6 have inferred at some stage that they did relate to
7 Sergeant McCabe, in which case she must have understood
8 that the GSOC -- the matter was being referred to GSOC,
9 the adequacy or inadequacy of the 2006 allegations was
10 going to be reopened by GSOC and that the matter was 15:23
11 likely to be considered for inclusion in the
12 Independent Review Mechanism, but she is telling you
13 she never discussed this topic with any other member of
14 An Garda Síochána until May of the following year when
15 she was preparing for the O'Higgins Commission. 15:24

16
17 Now, could I ask you then, Chairman, to look at another
18 topic, and that is the evidence of Paul Williams at Day
19 11, Chairman. And at page 38 -- page 33 to 38, there
20 is a discussion of what his dealings were with 15:24
21 Superintendent Taylor in respect of this matter. And
22 you will see on those eight pages a lengthy
23 consideration of what, in fact, he asked Superintendent
24 Taylor to do for him. And he says he rang
25 Superintendent Taylor, he said he had questions for 15:25
26 him, they were straightforward questions in his head.
27 Superintendent Taylor wasn't given advance notice of
28 them, "and he said he would come back to me some time
29 later, I don't know how long". He then said:

1
2 "It was subsequently he came back to me and he took the
3 questions, which is the normal procedure, and he went
4 away and obviously did research, or whatever, and came
5 back to me."

15:25

6
7 This is what Mr. Williams says.

8
9 "I told him what the questions were and I gave them to
10 him and there was no discussion as to whether he could
11 or couldn't answer them. He said he would come back to
12 me. That is the standard procedure with these things."

15:25

13
14 And then there is a discussion as to whether it was
15 appropriate or inappropriate for Superintendent Taylor
16 to tell Mr. Williams about the original investigation
17 to Sergeant McCabe and he says that was a matter for
18 Superintendent Taylor, that he just asked the questions
19 and it was for Superintendent Taylor to sort out
20 whether it was appropriate or not.

15:26

21
22 And then he said at the bottom of page 37:

23
24 "I don't think I was surprised with any of them."

15:26

25
26 This is in respect of the answers that he got.

27
28 "I just got the answer. The answer was it was
29 confirmed the investigation had taken place, who had

1 been involved in it and the DPP had ruled there was no
2 case to answer. "

3
4 And I asked him:

5
6 "What were you told about the DPP's direction?

7 A. I was told there was insufficient evidence. "

8
9 And then there was a suggestion about whether that was
10 the same as saying there was no case at all to answer.

11 And he was asked:

12
13 "Did Superintendent Taylor give you any hint that the
14 DPP had said that there was no basis for a prosecution
15 because of the written direction that had been given?"

16
17 And he said:

18
19 "No. "

20
21 And I asked him:

22
23 "If he had told you that that was the gravamen of the
24 DPP's direction - in other words, that there was no
25 offence shown on the file at all - would it have
26 affected you in any way?

27 A. You would certainly have taken a different view of
28 it, yes," he said.

1 "And you would have taken a different view."

2
3 So I asked him later, did he -- so I will leave it at
4 that. Just to make the point to this Tribunal: there
5 was negative briefing, he was told there was 15:27
6 insufficient evidence, he was given an account of the
7 DPP's direction which was incorrect and he said that if
8 he had been actually told the truth about what the DPP
9 had found, that he would have taken a very different
10 view of the story he was dealing with. And that is 15:28
11 simple negative briefing by anybody's standard.
12

13 He was also asked at page 42 about Superintendent
14 Taylor briefing him that the matter was known to senior
15 gardaí and to members of the public. What was 15:28
16 Superintendent Taylor telling him this for, if it was
17 not negative briefing in respect of Sergeant McCabe?
18

19 So, I mean, it's all very well for Mr. Murphy to give
20 you a kind of a cook's tour of the Williams allegations 15:28
21 and to say that they are -- and articles, and to say
22 that they are as he describes them. But on
23 Mr. Williams' own account, he was without, in my
24 respectful submission, any justification whatsoever,
25 given confidential information about Sergeant McCabe, 15:29
26 he was given it in a manner which misled him, because
27 if he had been told the truth he would have taken an
28 entirely different view of the story, and he was also
29 told that this story was well-known in government

1 circles. And yes, on page 40, Judge, the passage is:

2
3 "Q. He had gone off to research the matter and come
4 back to you, isn't that right?

5 A. That's correct.

15:29

6 Q. If he told that you was the gravamen of the DPP's
7 direction, would it have affected you in any way?"

8
9 And his answer was:

10
11 "You would certainly take a different view of it, yes.
12 You would certainly take a different view."

15:29

13
14 And he said:

15
16 "A different view of it. So you asked him on the phone
17 to give you the DPP's direction and he left you with a
18 very different impression, didn't he?"

15:29

19
20 And he answered:

15:29

21
22 "That's correct."

23
24 Now, that's the testimony that he gave, Judge, to you.
25 And there's one journalist. You also have the
26 evidence, Judge, of Cathal McMahon, and Cathal McMahon
27 gave evidence here that he went to Superintendent
28 Taylor to ask him to confirm the details of a story he
29 had heard from a non-Garda source. And he says two

15:29

1 things happened: Superintendent Taylor confirmed the
2 fact that there had been an investigation, etcetera,
3 etcetera, and directed him -- sorry, pointed him in the
4 direction of Cavan to look at the matter further.

5
6 Superintendent Taylor, in his statements to this
7 Tribunal's investigators, told the investigators that
8 he encouraged Ms. McCann and Ms. Murray to go -- to
9 follow up the matter by going to Cavan to the Ds. That
10 is negative briefing and that is participating in a 15:30
11 story which is -- participating in the dissemination of 15:31
12 a story in circumstances which are wholly
13 inappropriate.

14
15 So you have four journalists - Williams, Murray, McCann 15:31
16 and McMahon - two of whom admit that they were
17 effectively negatively briefed, in the sense that they
18 were given suggestions to go there or to -- given a
19 false account of the DPP's direction in the matter and
20 misled as to the nature of the DPP's direction on the 15:31
21 one hand, and two of whom have pleaded privilege in
22 respect of these matters before you, Ms. McCann and
23 Ms. Murray. They have said that they were never
24 negatively briefed, but they have invoked privilege as
25 to whether they ever had a conversation with 15:32
26 Superintendent Taylor.

27
28 Now, when I made a submission to you, Chairman, about
29 what implications can be drawn from a wrongful

1 invocation of privilege, I did make the point, and I
2 was careful to do so, that it depended on the
3 circumstances that you could draw such inference as it
4 was appropriate in the circumstance. Now, I am not
5 asking you to draw significant inferences in relation 15:32
6 to the three Cork Examiner people, because, who knows,
7 in respect of one of them it seemed no implication
8 could possibly be drawn, bearing in mind the rest of
9 his testimony, but in respect of the other two, there
10 was no story being worked on, no suggestion that a 15:33
11 story was being worked on, no story ever published by
12 them, and they seemed to have been taking a stance on
13 principle. But in respect of Ms. Murray and
14 Ms. McCann, whether or not they were right or wrong
15 legally, and I say they were utterly wrong in the 15:33
16 circumstances and in view of the waivers, to refuse to
17 confirm to the Tribunal what had been said to them on
18 or off the record, or off the record in particular, by
19 Superintendent Taylor, whether or not they were legally
20 entitled to do that, having regard to Article 10 of the 15:33
21 ECHR, in the circumstance that they did travel to the D
22 household, that they did make an attempt to interview
23 Ms. D, and that they had, on Superintendent Taylor's
24 account given to the Tribunal's investigators,
25 discussions with them in which he would have encouraged 15:34
26 them to follow up on the matter with the D family, that
27 the inference that you should draw, in my respectful
28 submission, is that they were so encouraged and that
29 they were directed towards the D family in precisely

1 the same way as Cathal McMahon was, and that it is
2 quite likely in the circumstances that they were given
3 the same background information in relation to the
4 whole question of the D allegation, its investigation
5 and the like, as Paul Williams claims he was given just 15:34
6 for the asking by Superintendent Taylor.

7
8 So those four journalists, Judge, are there. And I do
9 agree with a number of the submissions that have been
10 made here, but it is strange indeed that those four 15:35
11 journalists are clear examples where there was a
12 briefing, in my respectful submission, but that there
13 were a number of other people in respect of whom there
14 was no evidence that they were so briefed.

15 15:35
16 And then on the same day as Cathal McMahon gives his
17 evidence, you have the evidence of his editor, John
18 Kierans, and he tells you that he was satisfied in
19 early 2014 that this story was being hawked around the
20 newsrooms of Dublin by Sergeant McCabe -- sorry, by 15:36
21 Superintendent Taylor. And if you wanted to find that,
22 Judge, it's page 203 to 206 on Day 94, it's all set out
23 there.

24
25 So I'm asking the Tribunal, before it comes to the view 15:36
26 that nothing Superintendent Taylor said could be true,
27 not to leap into a simple binary choice of saying he's
28 either credible or he's incredible. Clearly in respect
29 of a number of issues he's not credible. Clearly in

1 respect of a number of issues he's a witness whose
2 evidence must be taken with circumspection. But those
3 four instances that I referred the Tribunal to just now
4 are clear instances of where the Press Officer of An
5 Garda Síochána appears to have engaged in briefing of 15:37
6 journalists, and it would be entirely reasonable to
7 believe that this was designed to damage Sergeant
8 McCabe in the circumstances.

9
10 I made a submission to you earlier, and I'm not going 15:37
11 to repeat it at length, on an earlier occasion, that
12 the Tribunal should look very clearly at the formulaic
13 denial of negative briefing by a number of journalists
14 here. In respect of two of them at least, when I
15 inquired of them what they meant by 'negative 15:38
16 briefing', under cross-examination they accepted that
17 being told the truth about Sergeant McCabe, i.e.
18 receiving detraction about him, was not negative
19 briefing, but that negative briefing involved
20 effectively some element of calumny, as long as they 15:38
21 were being told the truth it wasn't negative briefing.
22 And as I submitted to you earlier, Chairman, 'negative
23 briefing' is not a term of art, but it is a phrase
24 which has clearly been used on a number of occasions by
25 different witnesses here to mean quite different 15:38
26 things, and I will put it no further than that

27 CHAIRMAN: Who are you referring to there,
28 Mr. McDowell?

29 MR. McDOWELL: I'm referring to, I think it was Paul

1 Reynolds was one of them. And was it Debbie McCann, I
2 think, was the other? I think it was, from memory,
3 Judge.

4
5 Chairman, I just remind you in passing of the evidence 15:39
6 of Sergeant Molloy who stood out among the
7 rank-and-file members of the Press Office to give you a
8 picture of the real attitude of Superintendent Taylor
9 to Sergeant McCabe, his real attitude to reporters who
10 are sympathetic to him and to politicians who are 15:39
11 sympathetic to him and who gave you a clear picture of
12 his close relationship with the Commissioner, which
13 seemed to be a daily interactive relationship, and all
14 of that is to be found in the evidence on Day 71.

15 15:40
16 Chairman, another topic I just want to draw to your
17 attention in this context is the letter which was sent
18 to Sergeant McCabe on the 20th September 2013 by
19 Michael Flahive in the Department of Justice. It's
20 interesting in that context that a number of senior 15:40
21 Garda witnesses all claimed ignorance of that letter
22 and were unaware that it had been sent. I think that
23 includes Superintendent O'Mahony, former Commissioner
24 Callinan and former Commissioner O'Sullivan. And yet,
25 in the interval, and I will just draw the Tribunal's 15:40
26 attention to it now, on the 1st October 2013, no less a
27 person than Minister Shatter had said on the floor of
28 the Dáil, in relation to Sergeant McCabe:
29

1 "It is open to this person, if he so chooses, to make
2 an appropriate presentation to the Joint Oireachtas
3 Committee on Justice, Defence and Equality. He has
4 thus far opted -- he has not thus far opted to avail of
5 that opportunity."

15:41

6
7 And I just ask you to consider in that context the
8 attitude of the Commissioner, who, rightly or wrongly,
9 and he had a different perspective clearly from the
10 Department of Justice and the Minister for Justice, who
11 thought it was entirely inappropriate for a serving
12 member in Sergeant McCabe's circumstance to make such a
13 presentation to a committee. But the Tribunal will
14 remember that the letter from Mr. Flahive and the
15 implication of the statement that I've just drawn the
16 Tribunal's attention to from Minister Shatter was
17 effectively a put-up-or-shut-up approach to his
18 satisfaction with the O'Mahony report and a challenge
19 to him, if he had anything to say to bring it before an
20 Oireachtas committee.

15:41

15:41

15:42

21
22 Now, in that context, I want to make one other point to
23 you, Judge. And that is that, whether he's right or
24 wrong about whether it was appropriate or inappropriate
25 for an Oireachtas committee such as the PAC to receive
26 Sergeant McCabe's evidence in the circumstances the
27 attitude towards discipline in the force and what was
28 and was not appropriate seems to contrast dramatically,
29 Chairman, with the -- it seems to contrast dramatically

15:42

1 with the attitude shown in calling back Superintendent
2 Taylor to duty and discontinuing the disciplinary
3 process against him in the light of the Clerkin
4 report's findings about him. I think, Chairman, with
5 your experience as counsel for the Morris Tribunal and 15:43
6 your general disposition, the idea of An Garda Síochána
7 being a disciplined force is an attractive idea, but
8 discipline in these circumstances must be evenly
9 administered and to have Superintendent Taylor back in
10 position after the Clerkin findings against him, and to 15:44
11 say that's all right, nothing to see here, carry on,
12 even applied to the Garda authority for inclusion in a
13 list for promotion to chief superintendent, as
14 apparently happened, that's all right, but we draw the
15 line at a sergeant accepting a challenge from the 15:44
16 Minister for Justice on the floor of the Dáil to either
17 put up or shut up and to bring his material to an
18 Oireachtas committee, that is unacceptable. It's a
19 very, very differential approach to discipline in An
20 Garda Síochána. That's all I will say in relation to 15:45
21 that. A very, very differential approach.

22
23 And I would have to say, Judge, that the attitude
24 exhibited in the witness box here by Superintendent
25 Taylor seems to have had about it an acquiescence and a 15:45
26 willingness not to fight his corner but to rely on
27 entirely formulaic statements of evidence in
28 circumstances that must attract some degree of
29 suspicion. And I instance the case of Cathal McMahon,

1 Judge. He came in here and said I rang him up, I asked
2 him for confirmation of the D allegation and the
3 investigation, and he directed me or encouraged me to
4 go up to Cavan and find out for myself. Now that
5 should have suited his case, but he put it to the 15:46
6 witness, through his counsel, that that was untrue, for
7 some strange reason, and that all he had ever done was
8 engage in this mantra of saying that he was motivated
9 by revenge, blah-blah-blah, the usual thing.

10
11 And there seems to be something very, very strange
12 indeed about -- and you will see that interaction,
13 Mr. Ferry was putting the questions, I have no doubt on
14 close instructions from his client, putting questions
15 to Mr. McMahon suggesting that his testimony here was 15:46
16 false, when in fact it tended to corroborate the
17 underlying truth of what Superintendent Taylor had
18 disclosed in his protected disclosure, and that was
19 that he was engaged in the business of subverting
20 Sergeant McCabe on the instructions of and with the 15:47
21 acquiescence of the Commissioner.

22
23 I want to bring you just briefly to refer to what is in
24 volume 5 in relation to the various pre-PAC meetings.
25 These meetings were attended on a number of occasions 15:47
26 by Superintendent Taylor, on a number of occasions by
27 former Commissioner O'Sullivan and among the people who
28 participated in them were Chief Superintendent
29 McPartlin, Chief Superintendent Fergus Healy and

1 Assistant Commissioner Jack Nolan who made notes of
2 what happened.

3
4 At page 1214 there's a reference, and this is in the
5 typed version of Superintendent Orla McPartlin's notes, 15:48
6 of:

7
8 "Up-to-date info on the two boys. Wilson 30th May. AC
9 HRM's report 30th May 2013."

10 15:48
11 That is a reference, Judge, to the file of all the
12 wrongdoings, alleged wrongdoings against Sergeant
13 McCabe, among others. On the same line is "social
14 networking sites" and the word "Killian".

15 15:48
16 At page 1246, and these are Assistant Commissioner Jack
17 Nolan's manuscript notes, there's a note "start
18 Sergeant McCabe 2006" and then the following page
19 "motivation of whistleblowers" and there's a reference
20 to Sergeant McCabe in 2010. In Detective 15:49
21 Superintendent Patrick Clavin's notes there's a
22 reference on page 1259 to the directions about data
23 disclosure being read to Sergeant McCabe. At page 1286
24 there are draft questions prepared by Mr. McLindon for
25 the consideration of the Commissioner: 15:50

26
27 "Potential questions from PAC re the fixed charge
28 penalty points."
29

1 And one of the questions that appears is:

2
3 "What is the Commissioner's view of the
4 character/integrity of the whistleblowers?"

5
6 In other places in that book it becomes very clear that
7 on a repeated basis the pre-PAC meetings were used to
8 consider the issue of Sergeant McCabe by reference to
9 the 2006 allegation and the reputation and motivation
10 of the whistleblowers. And when asked about that
11 former Commissioner O'Sullivan, who attended a number
12 of those meetings, said to you, Chairman, that
13 sometimes she would be in a meeting and sometimes she'd
14 be late to a meeting and she can't say was she there on
15 the 21st January, but she makes the point that she has
16 no recollection of these issues ever being raised in
17 those circumstances.

18
19 Chairman, it's been suggested to you here that somehow
20 the story published by Mr. Reynolds on the RTÉ website
21 and on the news about whether Sergeant McCabe had or
22 had not cooperated with the O'Mahony report process is
23 somehow beside the point of this Tribunal. It isn't.
24 Superintendent Taylor in his protected disclosure
25 indicated that he had been briefed to tell the media
26 that he hadn't cooperated in respect of the O'Mahony
27 process. So it's not irrelevant as to whether that
28 story appeared or where it came from.

29 CHAIRMAN: I think, Mr. McDowell, I have a very good

1 grasp of what you are saying, if you don't mind me
2 saying. In terms of old fashioned advocacy, it has
3 been put across, and I'm not asking you to hurry but do
4 you think you will be much longer? Old fashioned, by
5 the way, in my lexicon is a compliment.

15:52

6 MR. McDOWELL: I know old fashioned is in a compliment
7 in the circumstance, but, Judge, I really do think that
8 -- I know it's late in the evening, but I have a fair
9 few more things, is it possible we could come back on
10 Monday? Because I know the Gardaí will want to
11 respond.

15:53

12 CHAIRMAN: I'm trying to organise things, Mr. McDowell,
13 so that I actually -- I'm doing other things on Monday,
14 trying to do. Mr. McDowell, I don't want to hurry you
15 along but a lot of what I have heard in the last two
16 days is stuff I know already and that is certainly, not
17 directed at you, it's not directed at anybody. People
18 have to make their case. The unfortunate thing is
19 people have to be seen to make their case, I do
20 understand that from the point of view of their
21 clients, so I have to listen to a great deal of stuff
22 that is actually making no difference to me at all.
23 What do you think you will be in terms of time?

15:53

24 MR. McDOWELL: I certainly need, I will need until
25 4:30, Judge.

15:53

26 CHAIRMAN: That is fine. That is absolutely fine. I'm
27 sure any points that are made by the Gardaí, I can
28 honestly deal with them on the basis of bullet points.
29 I do have a good grasp of things. Ask me any question,

1 test it out.

2 MR. McDOWELL: I'm not going to do that, Judge.

3
4 Could I ask you then, Judge, to consider that question,
5 as to whether or not the briefing of Paul Reynolds by 15:54
6 somebody who must have been senior in the guards to the
7 effect that Sergeant McCabe had not cooperated, I have
8 to ask you to consider the submission that has been
9 made to you that this somehow is outside the terms of
10 reference -- 15:54

11 CHAIRMAN: Yes.

12 MR. McDOWELL: -- that is wrong, Judge. It's firmly
13 within it, because it's part of the protected
14 disclosure that was put before you.

15 15:54
16 Now I agree with the point that you yourself have made,
17 Chairman, and has been made on the part of RTÉ and on
18 the part of, I think, An Garda Síochána, through
19 Mr. Murphy, that as regards the reportage of the leaked
20 version of the O'Higgins report, that I agree with the 15:55
21 proposition that it's no function of this Tribunal to
22 determine whether it was fair or unfair or whether
23 Mr. Boucher-Hayes' coverage of it was fairer than
24 Mr. Reynolds' coverage or whatever. And I just want to
25 deal with this issue fairly and squarely. 15:55

26
27 Sergeant McCabe, as is clear, was deeply upset by the
28 highly contrived question-and-answer formulation that
29 he heard on the radio on the day, the morning of the

1 day that these matters were covered. And, as I think I
2 indicated at an earlier stage in this Tribunal's
3 proceedings, it was abundantly clear, Judge, that it
4 was not an ordinary interview in which the interviewer
5 was free to ask whatever he wanted, that it was 15:56
6 carefully scripted. And it is clear now, though
7 Sergeant McCabe would never have guessed it, that for
8 instance the phrase that he lied was chosen in
9 remarkable circumstances by Mr. Ray Burke for insertion
10 in the text when that was a phrase that had not been 15:56
11 used by the O'Higgins Commission. And Sergeant
12 McCabe -- and also it is clear from documents which we
13 now have before us that Mr. Burke was at pains to make
14 the question and answer text which had been submitted
15 to him look less biased, because he suggested that a 15:56
16 number of lines be inserted before Mr. Reynolds put the
17 boot into Sergeant McCabe, to use his own phrase.

18
19 Now it does appear, Judge, that this was internal RTÉ
20 craftsmanship, in terms of language. And it does 15:57
21 appear that it was a highly controlled
22 question-and-answer matter. Sergeant McCabe very
23 reasonably came to the view that this reportage was on
24 a strictly controlled basis. He came to the view,
25 which again is entirely reasonable, that very few of 15:58
26 the factual issues that had been decided in his favour
27 by the O'Higgins Commission had been mentioned at all
28 in the report. And he came to the view that the report
29 served the interests of those who wanted to do him

1 down, rather than those -- and who wanted to put the
2 boot into him rather than those who wanted to uphold
3 him as a man who had done the country some service.
4 And whether he was right or wrong in that view that was
5 his view. And a number of months -- sorry, a number of 15:58
6 weeks after the report was published, he was in the
7 company of John Barrett, who held the rank equivalent
8 to an assistant commissioner, and he drew to his
9 attention the devastating effect that this broadcast
10 had had on him and his children, who had heard that he 15:59
11 had been dubbed a liar on the bus going to school, and
12 he was informed by Mr. Barrett that the programme
13 content came from the front block, which he took to be
14 a reference to Commissioner O'Sullivan's office.

15
16 Now, if you are informed by a senior person that that 15:59
17 is the explanation for the particular programme and
18 that person is somebody who one would expect to know or
19 at least not to make that remark without some reason,
20 it was entirely reasonable for Sergeant McCabe to 16:00
21 include in his protected disclosure these events. And
22 pressure has been put on Sergeant McCabe to withdraw
23 this charge. This is a matter which, Chairman, are
24 obliged to inquire into.

25 CHAIRMAN: I appreciate that. Yes, I know that. 16:00

26 MR. McDOWELL: It's not fair to put Sergeant McCabe in
27 the position of saying withdraw that.

28 CHAIRMAN: No, again, it may help, Mr. McDowell, in
29 terms of the analysis of this if I say, look, I do

1 understand that, but the person has now denied it and
2 what if it is the case that I do accept what Sergeant
3 McCabe says but I think it's the question of someone
4 shooting the breeze, so to speak.

5 MR. McDOWELL: Yeah, you used that phrase and so be it, 16:00
6 Judge, if that is the view you come to but --

7 CHAIRMAN: It is only a question, Mr. McDowell.

8 MR. McDOWELL: -- but it cannot be the case that
9 Sergeant McCabe has to withdraw a charge he has made.
10 He has not made a charge; he has just indicated what he 16:00
11 was told. And that applies as much as to
12 Superintendent Taylor's protected disclosure as it does
13 to what Mr. Barrett told him.

14 CHAIRMAN: well certainly I'm not going to draw any
15 inference if there was any kind of mistake of that 16:01
16 conversation, Mr. McDowell.

17 MR. McDOWELL: No, but you can see, Judge, that if I
18 say 'I withdraw this' the newspapers will say 'oh,
19 Sergeant McCabe withdraws yet another allegation'. And
20 I'm not going that, Judge, very emphatically. Because 16:01
21 he's here as a witness, not as an accuser, as I have
22 stated on many occasions.

23 CHAIRMAN: Mr. McDowell, I never asked you to and you
24 will appreciate the attitude I took.

25 MR. McDOWELL: No, but I have been asked heavily on two 16:01
26 occasions to do it and I just want the media to
27 understand I'm not going to do it, whatever they say.

28 CHAIRMAN: I have got it. Whether they do or not, I
29 have got it.

1 MR. McDOWELL: what I do want to say, Judge, is that in
2 relation to Sergeant McCabe's status as the maker of a
3 protected disclosure, I think Mr. Murphy has fairly
4 conceded that Sergeant McCabe has acknowledged that in
5 recounting what he was told by Superintendent Taylor 16:02
6 that he was doing his best to be truthful and to be
7 accurate in what he has said. And I think that it has
8 been, it is certainly the case here that his version of
9 what he was told, particularly in relation to the use
10 of texts, has been corroborated, as the Tribunal well 16:02
11 knows, by a number of things; two members of the Dáil
12 who got the same impression from Superintendent Taylor
13 and most importantly in terms of certainty is that what
14 he said was put by Superintendent Taylor, by Michael
15 Clifford and that he was asked to check the correctness 16:02
16 of the facts as stated and he failed to demure in any
17 way from the version given by Sergeant McCabe and the
18 version given to the two Dáil deputies.

19
20 There are other aspects of it, Judge, I just want to 16:03
21 remind the Tribunal there are other aspects which there
22 are significant matters, one of which was Sergeant
23 McCabe was told about the Oisín file, that is
24 corroborated; another of which is that there was a file
25 on him in Crime and Security, that has been established 16:03
26 to be true - Crime and Security were involved in
27 sending people to check out the infamous uncle Bernie
28 McCabe's groundless allegations against Sergeant
29 McCabe; there is also the issue that he was, he gave

1 evidence that the Taylors had said to him that they had
2 been offered a way out. And Chairman, it is of
3 significance that he was offered this way out by way of
4 resignation. Sergeant McCabe duly recorded that in his
5 protected disclosure. Interestingly, and strangely, 16:04
6 Mrs. Taylor confirmed that that offer had been made
7 through lawyers by the relevant officer, senior officer
8 of An Garda Síochána, but for some reason you find that
9 Superintendent Taylor denied that. And that's on day
10 76, Judge. Mrs. Taylor agrees that the Commissioner, 16:04
11 Deputy Commissioner Twomey had through lawyers made
12 this offer to Superintendent Taylor, but strangely
13 Superintendent Taylor himself denied this and
14 contradicted Sergeant McCabe. Why is that Judge? And
15 why is it that he has come here dissembling as to his 16:05
16 dealings with An Garda Síochána? I raise this
17 significant issue and I ask the Tribunal to consider
18 it: Has he come here as an entirely free man or has
19 his reinstatement put him under an obligation to dilute
20 his evidence and is it a good explanation as to why he 16:05
21 was so milk and watery in so many respects?
22 MR. MURPHY: Chairman, can I just object to this line
23 of submission, where as far as I can see this was never
24 suggested by Mr. McDowell to Mr. Taylor, not once.
25 MR. McDOWELL: I didn't know, Judge, the circumstances 16:06
26 in which he had been, in which the disciplinary process
27 had suddenly ended in respect of him. And I am just
28 making the point that it is strange indeed that he
29 comes to this Tribunal and contradicts both his wife

1 and Sergeant McCabe about Deputy Commissioner Twomey
2 acting as kind of a peacemaker and offering him a way
3 out of his dilemma by way of resignation, and at the
4 same time we then hear later that we get this letter
5 indicating that the disciplinary proceedings had been 16:06
6 dropped against him.

7 CHAIRMAN: well, it could just be that those making the
8 decision haven't read Confucius's Analects, one of the
9 principles of which is that a dishonest person is of no
10 use in any post in public administration. Maybe they 16:07
11 will get around to reading it, I don't know.

12 MR. McDOWELL: There is one extraordinary feature
13 though too, Judge. I mean, if you look at
14 Mr. McLindon's evidence and former Commissioner
15 O'Sullivan's evidence, there was a remarkable 16:07
16 unwillingness to explain to you at first hand, from
17 both of them, why Superintendent Taylor was shifted in
18 the first place. You will recall you had to stop
19 former Commissioner O'Sullivan from speaking PR speak
20 about his great promotional opportunities and his new 16:07
21 talents down in the traffic department, which was
22 manifestly plámás and evidence which was designed to
23 conceal what really happened. And that was, as it
24 emerged from a text that Commissioner O'Sullivan was
25 far from interested in developing his career but 16:08
26 determined to get him out of the Press Office at the
27 earliest available opportunity.

28
29 I go back to the point that I made earlier: why was

1 his suspension lifted? why was his suspicion lifted if
2 he was so obviously leaking and behaving in a manner
3 which would get any rank and file member of An Garda
4 Síochána, if they were caught doing it, the door almost
5 immediately? They would probably be lucky even to have 16:08
6 an inquiry if the facts were proven against them to
7 that extent, they'd be shown the door for gross
8 misbehaviour and yet this man is back in the force.

9
10 Now, having said all that about him, it's very easy to 16:09
11 kick the remnants of Superintendent Taylor's evidence
12 around and to disparage it, but it is an error, in my
13 respectful submission, to conclude that there is no
14 truth anywhere in it. And we do know from his dealings
15 with at least two journalists, and probably four 16:09
16 journalists, that he was encouraging them to become
17 involved with going to the D family; we do know that he
18 claims he was encouraged to brief against Sergeant
19 McCabe in respect of non-cooperation with the O'Mahony
20 comission; we do know that a story was published and 16:09
21 that somebody senior in the guards showed the
22 Commissioner's direction of December 2012 to
23 Mr. Reynolds at a critical point in the interplay
24 between Sergeant McCabe's public perception and that of
25 the Commissioner. And we know that the account given 16:10
26 of the direction on any view was deeply misleading and
27 damaging to Sergeant McCabe, and it happened shortly
28 after, within a calendar month of the PAC hearing at
29 which the term 'disgusting' was used.

1
2 Now Judge, I think I have already made on a number of
3 occasions, and I don't want to waste your time this
4 afternoon but I think I must reiterate it here again
5 today: The Rooney letter, which was posted to the 16:10
6 stations in the Cavan-Monaghan division in 2011, was
7 designed to belittle and to damage the reputation of
8 Sergeant McCabe. It could have no other purpose and it
9 was deeply, deeply unfair to him and deeply wrong that
10 it should ever have been published. And it was the 16:11
11 subject of an immediate legal protest by Sergeant
12 McCabe's solicitor in the form of a solicitor's letter.
13 It was never brought to the attention of the O'Higgins
14 Commission because Mr. Justice O'Higgins ruled that the
15 fact there was extant litigation prevented him from 16:11
16 receiving any evidence in relation to it at all. And I
17 am not arguing with that decision, but I am saying
18 this: That the result was that until Chief
19 Superintendent Rooney, now retired, came and gave
20 evidence here that letter stood and was stood over by 16:12
21 An Garda Síochána. Commissioner Callinan sought to
22 avoid personal responsibility for it by stating that
23 Nacie Rice was the Deputy Commissioner who dealt with
24 it, but the correspondence was directed to the
25 Commissioner in the first instance and in my respectful 16:12
26 submission it is stretching things to believe that
27 Commissioner Callinan was not aware of the Rooney
28 letter bearing in mind that it actually instanced him
29 as approving the content of the letter itself.

1
2 That letter, Judge, and this is a point that has to be
3 emphasised, it belittled Sergeant McCabe, it told him
4 in public that all of the points that he had made about
5 poor policing in Bailieboro lacked any substance. 16:13
6 what's more, and this was the really offensive aspect
7 of it, it suggested that he brought undeserved
8 suffering and pain to his colleagues in the force and
9 damaged their reputation collectively. And in doing
10 that it singled him out as a person for obloquy among 16:13
11 his colleagues. It can only have that effect. It
12 distorted completely the Byrne/McGinn report's findings
13 and it made it look as if he was a crank and ill
14 motivated and disloyal to the force. And it stood and
15 was stood over until Chief Superintendent Rooney, now 16:14
16 retired, expressed his regret at having issued it. And
17 it took Martin Callinan to come here to give evidence
18 and to say that he certainly wouldn't agree with that
19 letter having been sent, it certainly wouldn't reflect
20 the true position in respect of Assistant Commissioners 16:14
21 Byrne and McGinn, so I wouldn't, I wouldn't have
22 supported that particular letter. But it stood until
23 that happened. And you will recall that in the
24 O'Higgins Commission module, I invited Commissioner
25 O'Sullivan to join in the apology given by Chief 16:15
26 Superintendent Rooney and she said she wouldn't, she'd
27 wait until you dealt with the matter, Judge. I think
28 you will find that in the transcript. Well, now is the
29 time for that to be done. Now is the time for some

1 redress for Sergeant McCabe on that front.

2
3 And when -- and we had this in the O'Higgins module,
4 when the point was made that Sergeant McCabe conflated
5 malpractice with corruption and used the term corruptly 16:15
6 and corruption to describe the failure of his superiors
7 to address the issues that he had raised, it must
8 always be borne in mind that it was in the context of
9 what they had said about him and published about him in
10 the context of the Rooney report. 16:16

11
12 Judge, going back to one thing, and I know you will be
13 going backwards and forwards across the modules, and I
14 would just ask you to bear this in mind: That on the
15 12th June 2015 a written submission based on a 16:16
16 misunderstanding as to counsel's instruction was
17 submitted to the O'Higgins Commission which stated that
18 he was a disaffected, Sergeant McCabe was a disaffected
19 member of An Garda Síochána arising out of their -- a
20 particular misunderstanding of instructions they had 16:17
21 received in respect of Superintendent Clancy, whether
22 there was a complaint to him or about him. To call a
23 member of An Garda Síochána such as Sergeant McCabe
24 disaffected in the circumstances, may be editorially
25 justified if he was somebody who by that stage had just 16:17
26 become soured and embittered with the force and was
27 willing to damage it in order to get even with it. But
28 that was not the case with Sergeant McCabe and he did
29 not deserve to be called a disaffected member of the

1 force in those circumstances.

2
3 And you will recall that towards the end of the
4 O'Higgins Commission in the final submission it was
5 suggested that Sergeant McCabe by his allegations had 16:18
6 caused people to lose their job, and that included
7 Martin Callinan, according to former Commissioner
8 O'Sullivan, which I put to her was a complete untruth,
9 in the strongest of terms. well, now looking back
10 through the other end of the telescope, and seeing what 16:18
11 happened in late 2013, early 2014, to put against
12 Sergeant McCabe that he was the disaffected man and
13 that he had caused other people to lose their job when
14 in circumstances really, Judge, that they were behaving
15 in a manner calculated not merely to lose him his job 16:19
16 but to lose his mind and his reputation and his family
17 life, is something which is remarkable indeed.

18
19 And I would ask you, Chairman, to remember as well in
20 this that Sergeant McCabe, he doesn't come here as a 16:19
21 plaster saint and he doesn't get he got everything
22 right and he doesn't push himself forward as a
23 witness -- you know, that he is somehow in a semi-saint
24 like state, he has never seen himself in that light,
25 but he is entitled to be vindicated as a man who has 16:19
26 been truthful not merely in the O'Higgins Commission
27 but in this commission and to be well motivated. And I
28 would ask this Tribunal just to revisit again the
29 conflict of evidence, Chairman, between Commissioner

1 O'Sullivan and Annmarie Ryan as to the circumstance in
2 which there was an opportunity not to invoke the 2006
3 allegations as the ultimate explanation of Sergeant
4 McCabe being a disaffected garda, as was later alleged.
5 I would ask this commission to look very, very 16:20
6 carefully again at that conflict of evidence and to ask
7 whether Chief Superintendent Healy and Sergeant
8 McCabe -- sorry, and Annmarie Ryan and the
9 Commissioner's account of whether she was or was not
10 available to reconsider that matter over that weekend 16:21
11 is to be accepted. There was a problem here, Chairman,
12 due to joint representation of Chief Superintendent
13 Healy and former Commissioner O'Sullivan, that it was
14 never put to Chief Superintendent Healy that he was
15 wrong in informing Ms. Ryan that the Commissioner was 16:21
16 at all material times not merely available but anxious
17 to participate in a consultation that weekend to see
18 could they deal in a different way with the decision to
19 raise the 2006 allegations as the original kernel of
20 Sergeant McCabe's motivation. And I would say that now 16:21
21 looking back at the events as we know them, Chairman, I
22 would ask you to revisit whether that issue was fairly
23 and squarely dealt with at the time.

24
25 Chairman, just one last thing, and that is: When we 16:22
26 were dealing with the reportage of the O'Higgins report
27 and I said, you know, that there was failure to deal
28 with a number of issues which were favourable to
29 Sergeant McCabe, I just quickly want to remind you

1 that, you know, he was being blamed for letting Gerry
2 McGrath out on bail and for telling his victim, Mary
3 Lynch, that she shouldn't go to court; he was being
4 blamed for losing a computer; he was being blamed and
5 he was put on a disciplinary charge in relation to that 16:22
6 which went well down the line and didn't stop in the
7 circumstances that Superintendent Taylor's discipline
8 stopped; he was accused of letting another prisoner
9 suspected of a serious assault on a young woman out
10 after 23 minutes; he was accused of exaggerating a 16:23
11 serious false imprisonment and sexual assault case; and
12 he was criticised for defending himself in relation to
13 the Pulse records. Those are things that happened to
14 him, Judge. He accepts the outcome of the O'Higgins
15 Commission. But his reputation was damaged by the RTÉ 16:23
16 broadcast and in the circumstance, and maybe it was --
17 if he said -- and the record was that he was so setback
18 by it that he was out on sick leave due to stress as a
19 result of it, and in particular when his children heard
20 that he was being called a liar from other children on 16:23
21 the bus going to school, those things, Judge, are
22 hugely important to him and he hasn't come here other
23 than as a witness: He isn't here as the grand accuser,
24 he isn't here as somebody who has to bring points home,
25 but he is here as somebody whose name and reputation 16:24
26 are hugely at stake in what has happened. And insofar
27 as he has reported the matters disclosed to him by
28 Superintendent Taylor, he has done it in good faith,
29 and quite a deal of what Superintendent Taylor has told

1 him is true in my respectful submission, even though
2 huge questions, question marks must hang over nearly
3 every bit of the contested testimony of Superintendent
4 Taylor.

5
6 So I am very grateful to you, Judge, for hearing me and
7 I hope I haven't gone on too long.

8 CHAIRMAN: No, thank you.

9 MR. McDOWELL: And I hope I haven't been too old
10 fashioned in my advocacy but I think it is important.

11 CHAIRMAN: Mr. McDowell, it is always a pleasure and
12 interesting. Thank you very much. Do you want to make
13 some short points in reply?

14 MR. MURPHY: Chairman, yes, with your permission
15 Mr. Dignam will address you very briefly.

16
17 REPLYING SUBMISSION BY MR. DIGNAM:

18 MR. DIGNAM: Chairman, I'm going to take up the
19 Tribunal's invitation or suggestion that I deal with
20 the points made by Mr. McDowell in reply by way of
21 bullet points. The Court has, the Tribunal has all of
22 the evidence and indeed has all of the points that were
23 made in our submissions that Mr. Murphy made this
24 morning, and I just want to deal with some points that
25 Mr. McDowell made. I'm going to attempt to deal with
26 them in the order in which they were raised by
27 Mr. McDowell. He has covered a vast amount of
28 territory.

1 I think what is striking is that he hasn't, in my
2 respectful submission, really engaged with the
3 conflicts between -- in the evidence between Sergeant
4 McCabe's recollection of what he was told by
5 Superintendent Taylor and Superintendent Taylor's 16:26
6 evidence in that respect and hasn't engaged, in my
7 respectful submission, in a particularly detailed or
8 meaningful way about the discrepancy or disagreement --
9 MR. McDOWELL: Chairman, that is because Mr. Murphy
10 said that he agreed with my view of the conflicts and I 16:26
11 didn't feel it necessary to do that.
12 CHAIRMAN: well, you have a reason, but you're making
13 the point, Mr. Dignam --
14 MR. McDOWELL: Mr. Murphy said that Sergeant McCabe's
15 account was to be preferred to Superintendent Taylor's 16:26
16 and now we're suddenly being told that we didn't engage
17 with all the conflicts.
18 CHAIRMAN: Mr. McDowell, honestly as soon as something
19 is said it comes back to me what was said before.
20 MR. McDOWELL: I don't want to play tennis. 16:26
21 CHAIRMAN: No, I see the point. Mr. Dignam is entitled
22 to make that point, if he wishes. Lots of points are
23 made which may be very good points or perhaps not so
24 bad, or perhaps bad points, but I'm listening.
25 MR. DIGNAM: Yes. Just getting to the meat of what 16:26
26 Mr. McDowell said. He began dealing with the five
27 conversations and you have our submissions in relation
28 to those, Chairman, so I'm not going to go into it in
29 any great detail. He did make the point that the

1 similar fact evidence rule wasn't applicable, etcetera,
2 and he said that it was wrong to drag in R v. Christie.
3 Now as the Tribunal will be aware, that was in answer
4 to a question that the Tribunal had raised in relation
5 to the applicability.

16:27

6
7 Mr. McDowell suggested that the test in relation to
8 corroboration and whether the Tribunal should look at
9 all five conversations together or should take them
10 separately was a test of common sense, as he put it.
11 And dealing with them on that basis, Chairman, as I
12 say, I'm not going to go into detail but dealing with
13 them on that basis I say that even on the test of
14 common sense, where there are significant differences
15 between the accounts that are given by each of the
16 individuals with whom Commissioner Callinan had
17 engagements and conversations between December 2013 and
18 January 2014, there are significant differences which,
19 in my respectful submission, means that it would be
20 unsafe for the Tribunal to countenance
21 cross-corroboration between those accounts.

16:27

16:27

16:28

22
23 In relation to Mr. McDowell's submission about the
24 conversation between Mr. Callinan and Mr. McCarthy, the
25 Comptroller and Auditor General, I think it was meant
26 as a compliment, but I'm not sure, a feather duster
27 approach to the questioning of Mr. McCarthy. I'm
28 taking it as a compliment. He may have thought that I
29 should have brought the knuckle duster rather than the

16:28

1 feather duster, but the Tribunal will appreciate that
2 the case that was being made in relation to the
3 evidence of Mr. McCarthy that he was mistaken and
4 misconstrued the conversation that he had with
5 Mr. Callinan, and it was in those circumstances that 16:29
6 that proposition was put to him and in my respectful
7 submission put in an appropriate fashion.

8
9 The Tribunal will know that Mr. McCarthy himself
10 allowed for the fact that his account of the 16:29
11 conversation is not a verbatim account, he accepted
12 that he had deliberately used the phrase "words to that
13 effect" on a number of occasions in his statement to
14 the Tribunal and therefore wasn't advancing his account
15 of the conversation as a word-perfect or indeed 16:29
16 verbatim account of that conversation.

17
18 He also, it's clear from his statement and indeed his
19 evidence where he understood even on his account of the
20 conversation that Commissioner Callinan was referring 16:29
21 to the missing laptop in a sexual assault case. So
22 even on his account, whatever was said was so unclear
23 that he picked it up to mean something completely
24 different to what it meant.

25 16:30
26 In relation to Deputy Deasy, as the Tribunal will be
27 aware, and Mr. McDowell mentioned in his submissions
28 that it couldn't possibly be said that Mr. Deasy had
29 invented his account of it, you'll know from the

1 detailed notes that you have of all of the evidence and
2 indeed the transcripts that it was never put to Deputy
3 Deasy that he had invented the conversation. The case
4 that was put to Deputy Deasy was that in the
5 circumstances in which that conversation had taken 16:30
6 place, and indeed in what he had learned in the
7 subsequent passage of time and the public narrative, he
8 was mistaken about the import or his belief or
9 understanding of what was said by Commissioner
10 Callinan. 16:31

11
12 Mr. McDowell made the point in his submissions that
13 Commissioner Callinan's account of his meeting with
14 Deputy McGuinness in the car park in Bewley's Hotel
15 shouldn't be believed partly because the reason given 16:31
16 by Commissioner Callinan for that meeting was to put a
17 proposal to Deputy McGuinness and that Commissioner
18 Callinan didn't in fact bring the letters, the draft
19 letters, I should say, with him to that meeting. In
20 fact, Commissioner Callinan, as the Tribunal will know, 16:31
21 explained why he didn't bring those letters; he had
22 come from Dundalk and he hadn't got the letters with
23 him. That is why he didn't bring them to the meeting.

24
25 Mr. McDowell makes the point that Commissioner Callinan 16:31
26 retreated into complete legalism in his initial
27 responses to Mr. Justice O'Neill when he was carrying
28 out his inquiry which led to this Tribunal. But the
29 reason why Commissioner Callinan took that position is

1 clearly set out in his letters to Mr. Justice O'Neill
2 and in fact his concerns in that regard have been
3 proven to be entirely well placed. And the point he
4 was making was: How can I possibly respond to
5 allegations which are entirely bereft and devoid of any 16:32
6 detail and I don't in fact know what is being alleged
7 against me? Ultimately when Mr. Justice O'Neill said
8 essentially, and I am paraphrasing, I just need to know
9 is there a dispute so that I can decide whether I can
10 possibly resolve that dispute or not, Commissioner 16:32
11 Callinan then said, denied, the allegations of
12 wrongdoing are absolutely denied and then Mr. Justice
13 O'Neill said well, in those circumstances my exercise
14 cannot resolve that issue and a different type of
15 inquiry has to be set up. And I say that was an 16:32
16 entirely correct and appropriate, justified position
17 for Commissioner Callinan to have taken.

18
19 In relation to the points that Mr. McDowell made about
20 the telephonic devices, there is now no doubt, 16:32
21 Chairman, that it would have been far more preferable
22 if the Tribunal had had all possibly relevant
23 telephonic devices and I don't think that can be
24 gainsaid, but I just want to make two points about
25 that. The first is that, as the Tribunal knows, it 16:33
26 received full cooperation from An Garda Síochána in
27 relation to the provision of billing and account
28 records for landlines and mobile devices, and the
29 Tribunal was able to get a very, very full picture of

1 contact between the key players and by doing so was
2 then able to ascertain whether contacts which were
3 alleged to have happened did in fact happen. And I
4 might just reference one example without getting into
5 the details, the account that was given by
6 Superintendent Taylor of his contacts with Mr. Williams
7 and Commissioner O'Sullivan and Commissioner Callinan
8 on which he was constructing what we say was an
9 entirely incorrect account of what happened on the
10 weekend of the 8th March, falls away entirely because
11 the Tribunal had in its possession, because the
12 metadata, as I think it has come to be known, shows
13 that the contacts alleged by Superintendent Taylor
14 didn't occur at all or in the manner that he suggests.

16:33

16:34

15
16 The second point in relation to the telephonic material
17 is of course that one of the key reasons, and only one
18 of the key reasons, that the Tribunal would like to
19 have had all of those devices, etcetera, was because of
20 the emphasis placed by Superintendent Taylor in his
21 accounts to Sergeant McCabe, as reported by Sergeant
22 McCabe, and indeed his account to -- his confirmation
23 that Mr. Clifford's book was accurate and, indeed, it
24 seems in his interactions with Deputy Wallace and
25 Deputy Daly that texts played a central part in his
26 alleged smear campaign. But of course that allegation
27 fell away when Superintendent Taylor gave evidence that
28 in fact he didn't do anything by text other than to
29 keep the Commissioners briefed on any reference to

16:34

16:34

16:35

1 superintendant -- Sergeant McCabe, rather, in the
2 media.

3
4 Finally in relation to that, the Tribunal has had an
5 opportunity to visit Garda Headquarters, to deal with 16:35
6 laptop, telephonic issues, IT issues, and indeed has
7 the benefit of several reports from Superintendent
8 Flynn, which, in my respectful submission, and I don't
9 think anybody has suggested to the contrary, has
10 provided full and proper cooperation with the Tribunal 16:35
11 to assist it in its work.

12
13 And the final point in relation to telephonic devices
14 is one that is made by Mr. McDowell, which, he went
15 through the various phones that he made the point were 16:36
16 not available to the Tribunal, but when dealing with
17 some of the phones he used phrases like "sanitised" and
18 "bleached", and I suspect, and I hope I am not being
19 unfair to Mr. McDowell, but he used those terms
20 advisedly. In fact, the phones that he is referring to 16:36
21 were ones which had been returned to the IT section,
22 the telephonic section, of Garda Headquarters, and then
23 reissued to other people. It is entirely appropriate
24 and proper that the phones would be factory reset so
25 that they can then be issued essentially as a new or 16:36
26 blank phone for other members to use.

27
28 very briefly, you have our submissions in relation to
29 the interpretation of paragraphs 1 and 2 of the terms

1 of reference and what we say is that essentially they
2 must be read together and the motivation for the agenda
3 which is referred to in paragraph 1 is expanded upon in
4 paragraph 2 and is clearly put in the context of the
5 sexual allegations.

16:37

6
7 Mr. McDowell, turning to a further topic that
8 Mr. McDowell covered, he referenced Mr. McLindon's
9 evidence about contacts or about the Commissioner's
10 knowledge of the Paul Williams proposed articles or his 16:37
11 visits to the D household. And I think if the Tribunal
12 in due course, when considering the matter, would look
13 at page 126 and 127 of Mr. McLindon's evidence, you
14 will see that Mr. McLindon's view that the
15 Commissioners -- or Commissioner, rather, knew that 16:37
16 Mr. Williams had told Superintendent Taylor about these
17 articles, Mr. McLindon says that knowledge came from
18 Superintendent Taylor, that this wasn't an independent
19 knowledge on the part of Mr. McLindon.

16:38

20
21 In relation to the point, and I think Mr. McDowell
22 might have been making two points in relation to the
23 disciplinary treatment of Superintendent Taylor,
24 vis-à-vis the --

25 CHAIRMAN: Yes, it may help you to know that I don't 16:38
26 think there is anything from which I can say, for
27 instance, that seems to be the inference that was kind
28 of floated out there, that the Gardaí did some kind of
29 a deal with Superintendent Taylor. It's just not

1 there.

2 MR. DIGNAM: Yes.

3 CHAIRMAN: As to whether you're wise in relation to how
4 you run your disciplinary process, well, that is
5 another matter and Mr. Justice Morris has commented on 16:38
6 that.

7 MR. DIGNAM: That is very helpful and I won't labour
8 that point then, Chairman. But I should, just on a
9 slightly separate point, the first point that
10 Mr. McDowell seemed to be making about that was that 16:39
11 there was a remarkable difference in how Superintendent
12 Taylor was dealt with compared to Sergeant McCabe and
13 he put that in the context of the force's unhappiness
14 with Sergeant McCabe dealing with the PAC and coming
15 before the PAC and how he was treated as a result of 16:39
16 that. I would just say, Chairman, that the view at
17 that stage and I think it was canvassed in a letter, I
18 just can't put my finger on the date of the letter,
19 Chairman, was that on its face the disclosure of Pulse
20 information outside the force is a disciplinary matter. 16:39
21 On its face. Now whether that will be made out or
22 not -- but in fact no disciplinary proceedings were
23 brought against Sergeant McCabe at all in relation to
24 that. So the suggestion that Superintendent Taylor was
25 dealt with in some more light-handed fashion than 16:40
26 Sergeant McCabe, in my respectful submission, just
27 doesn't get off the ground.

28
29 Finally, on page 169 of today's transcript Mr. McDowell

1 pointed to certain things that Sergeant McCabe had been
2 told by Superintendent Taylor and he made the point
3 that they have all turned out to be true - and I think
4 he referred to Crime and Security having a file in
5 relation to Sergeant McCabe, the Oisin computer system, 16:40
6 etcetera - in my respectful submission, and the
7 Tribunal will obviously consider all of the evidence in
8 detail, the way that was put by Mr. McDowell in fact
9 mischaracterises the evidence that the Tribunal has
10 heard. Thank you, Chairman. 16:40

11
12 Sorry, Chairman, I should just say, in relation to the
13 queries that Mr. McDowell raised at the beginning,
14 about the notifications to Superintendent Taylor, they
15 in fact should be dated 2018, not 2017. 16:41

16 MR. McDOWELL: I thought so.

17 CHAIRMAN: You're all right, Mr. McDowell?

18 MR. McDOWELL: No more tennis.

19 CHAIRMAN: Right. No more tennis. We will all enjoy
20 watching it, I am sure, from, I think it's next week. 16:41
21 Anyway.

22
23 A lot of Irish events are completely ruined by an
24 endless vote of thanks, but, and my wife says what
25 comes after the 'but' is the important part of the 16:41
26 sentence, a concise statement by me now I think is no
27 harm.

28
29 People will be aware, perhaps, that the audio of

1 yesterday is now on our website. That is due to the
2 cooperation of our audio and technology people and the
3 Department of Justice, and I would just like to thank
4 them for their support throughout. In Dublin Castle,
5 there's assisting us even in housekeeping for their
6 cheerfulness, Rosemary Collier and David Cummins, who
7 we were interacting with. The public attending seems
8 to me to be really very, very important. I don't think
9 that those who attend courts realise how much that
10 judges actually appreciate having members of the public
11 there. The media and the photography people have a
12 constitutional function in keeping us all right and
13 making sure that what we do is done in the open, and
14 thank you very much for being here.

16:42

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15
16 Our stenography throughout has been world class, so I
17 would like to thank Aoife Downes, Niamh Kelly and
18 Charlie Beggs for their attention to literally every
19 word.

16:42

20
21 Behind the scenes there is Susan McCormack and Brenda
22 Byrne are engaged in administration and have helped to
23 make this thing run properly. Attached to me are Ciara
24 Herlihy and Ciara Ní Ghabhann, who have done huge work
25 behind the scenes. Our investigators have done
26 phenomenal work, as is well known, Carl Ryan and Joanne
27 O'Donoghue. Philip Barnes had a position within the
28 Morris Tribunal as office manager, that is retained
29 here and we are incredibly lucky to have him. Peter

16:42

16:43

1 Kavanagh, as registrar, probably knows more about
2 tribunals of inquiry in Ireland than any other living
3 person. Our documentary counsel, producing, for
4 instance, the stuff here, have been Emma Toal and
5 Lalita Pillay. They have done fantastic work, so they 16:43
6 have.

7
8 At the end of this, I am hoping to produce a report
9 sometime in October, but coming to the end of this, the
10 thought that strikes me is that I couldn't have done 16:43
11 any better because I have worked with the best, and in
12 that regard I would like to thank Diarmaid McGuinness,
13 Patrick Marrinan, Kathleen Leader and Elizabeth Mullan
14 in a particular way.

15
16 So sin é. 16:44

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18 THE TRIBUNAL THEN CONCLUDED
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