



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

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

First Interim Report

Introduction

This tribunal was established by instrument made by the Minister for Justice and Equality on the 17th February 2017. The chairman is Peter Charleton, a judge of the Supreme Court.

This report is required under the terms of reference of the tribunal as passed by both Houses of the Oireachtas whereby it was resolved that “the tribunal shall report to the Clerk of the Dáil on an interim basis not later than three months” after establishment and then further report after there have been 20 days of witness testimony. This first report is required to be on:

- (a) the number of parties then represented before the tribunal,
- (b) the progress which will then have been made in the hearings and work of the tribunal,
- (c) the likely duration (so far as may then be capable of being estimated) of the proceedings of the tribunal, and
- (d) any other matters that the tribunal considers should be drawn to the attention of the Houses of the Oireachtas at the time of the report (including any matters relating to its terms of reference).

While the tribunal is exhorted to complete its work “in as economical a manner as possible” and “at the earliest possible date consistent with a fair examination”, that would have been, and is, the intention in any event. It must be appreciated that the completion of the work of a tribunal of inquiry requires challenges unique to that institution to be met.

Nature of a tribunal of inquiry

It is essential, first of all, to understand that a tribunal of inquiry is radically different to any form of litigation that may take place before the courts. Where parties to a court case essentially run that case, a tribunal is in the position where it must direct each step of its enquiries and procedures. Such a tribunal, additionally, carries the responsibility of protecting the rights of all the parties before it. No one may be criticised to the extent of diminishing their good name without what are essentially the entitlements of a person accused of a serious crime. These rights enure to the benefit of those who may be criticised despite the fact that a tribunal has no powers of sanction and cannot award damages for a civil wrong. A tribunal is limited to finding facts and to making any

recommendation that appears beneficial to avoiding future disquiet or to improving any institution or body on which it reports.

The maxim in relation to a tribunal is that every tribunal starts out with a blank piece of paper. At commencement, a tribunal knows nothing and has no case to make. A tribunal is tasked with the investigation of precise events and has jurisdiction only in relation to inquiring into those events in consequence of the setting by the Oireachtas of terms of reference. It is the task of the tribunal at every stage of an inquiry to seek out those who may have information and to use the powers of the High Court, granted to it by the relevant legislation, to draw forth relevant documents and potential witness statements through the use of investigators. This takes time. The time is taken in, first of all, uncovering the nature of the potential conflicting cases that possibly might be made in relation to any particular term of reference. That is only possible after preliminary investigations have been conducted.

Tribunals must firstly identify who might be regarded as being equivalent to a party in litigation. Generally, the test is as to whether such an individual may have the constitutionally guaranteed right to a good name undermined by negative comment in the ultimate tribunal report. A tribunal must be alive at all times to the prospect that, apart from rejecting evidence as being unreliable or untruthful, any party who may be found to be at fault must be afforded the rights arising from the case law. In shorthand, these are not less than the rights of someone facing a serious criminal charge. These include:

- the right to be represented at and to take part in the tribunal's proceedings,

- the right to have sight of, and a copy of, any documents which are relevant to any potential critical findings against them,

- the right to have sight of documents undermining the credit, as opposed to the factual merit, of another party that may be making a contrary case against them,

- the right to cross-examine witnesses,

- the right to make closing submissions,

- the right, subject to cooperation, to seek legal costs on completion.

There is, secondly, a positive duty on a tribunal to seek out relevant documents, including computer records, to inspect these and to bring in to the offices of the tribunal all those which seem to bear any potential relevance to what may be a range of differing public controversies that constitute the terms of reference. There are no parties, as in a court case, to seek out and to specify the kinds and categories of documents that they find worthwhile to demand from each other. Discovery in the ordinary course of litigation before the courts is fraught with problems that may result in the gathering together not of relevant documents but those which are entirely peripheral to the issues. In a tribunal of inquiry the issues are not set forth in legal pleadings by the main parties but require to be discovered through the exploration as to what might be relevant to any case which a party might be considered likely to make. In litigation the parties make discovery of

documents to each other. In a tribunal of inquiry the tribunal must seek out any relevant documents and then distribute them itself to any relevant party. This includes, it seems, not just documents relevant to loosely defined issues but also any document which could reasonably be regarded as affecting the credit of any party or witness who might testify against a represented individual. It also has to be remembered that people have privacy rights and that there is a duty on a tribunal not to distribute matters touching on confidential communications with medical or counselling personnel save where legally required to do so but having regard to the protection of the identity of the affected party.

The privileges which attach to litigation before the courts also arise. These must be enforced by a tribunal of inquiry. The privilege against self-incrimination does not arise before a tribunal. The main privilege which arises before a court, in terms of frequency, is that of legal professional advice. This is to be distinguished from mere legal assistance, such as that which is usefully engaged when drafting a contract. That privilege is not to be undermined and it enures to the benefit of the client and not the lawyer. The client, however, has an entitlement to waive it. A tribunal has an entitlement to ask that consideration be given to the waiver of such a privilege.

Another privilege that is claimed is in respect of those who engage with journalists in the public interest to enable them to carry out the vital role of calling democratic and executive institutions to account. Some journalists have given witness statements in which they have helpfully specified conversations that have taken place outside of what they perceived to be the cloak of any such privilege, if it exists. Others have refused to say whether there is any relevant testimony which they might offer. The extent of that privilege and the circumstances under which it arises are both likely to occupy time.

Of interest, in this regard, is the fact that those persons at issue in the terms of reference, namely former Commissioner Martin Callinan and Commissioner Nóirín O'Sullivan have both signed documents waving any privilege they may have in relation to any allegedly confidential communication with the journalists, as has Superintendent David Taylor.

Tribunal's work to date

The Tribunal has been granted offices in Dublin Castle and it intends to vacate these immediately on finishing its work. The Tribunal has an experienced solicitor, Elizabeth Mullan. The Tribunal has an administrative staff consisting of a registrar, an office manager and clerical officer, all on secondment to the tribunal. The work of managing documents and of establishing the relationship between events set out on paper has been undertaken, generally, by two researchers borrowed from the Supreme Court. Documentary counsel will be necessary to put together the relevant briefs for distribution to the multiple parties represented. This is no small task. The Tribunal has engaged counsel and each has worked on tribunals in the past. The Tribunal has two investigators who have been borrowed from the Garda Síochána Ombudsman Commission with the kind permission of its chair Ms Justice Mary Ellen Ring. From the first working day of its establishment, and subsequently the tribunal has made preservation orders, disclosure orders, discovery orders and inspection orders in relation to a range of documentation and material from likely concerned parties. The Tribunal believes that these orders have been or will be complied with. Plain reality, however, indicates that time is required for compliance with these orders and several requests for

extension of time have already been received and, in the main, granted or granted subject to attenuation.

It is fair to say that as of this point an outline of the various possible scenarios attached to each of the terms of reference has emerged and these have been considered and analysed by the Tribunal with the assistance of counsel without, of course, any preliminary view being formed.

On 27 February 2017, the Tribunal made an opening statement outlining the work of the Tribunal, the issues it might face, and above all calling for immediate cooperation from all interested parties and witnesses by a particular date, which was two working weeks thereafter. There were many useful pieces of correspondence received, including from concerned members of the public, though the general level of response was very disappointing.

On 30 March 2017, the Tribunal sat to hear applications for representation from interested parties. To be entitled to representation, a person who is a potential witness must be more than someone with relevant evidence to offer, or a person whose evidence may be rejected as unreliable or untruthful, but must instead be someone who potentially is at risk of their reputation being undermined in consequence of the findings of the tribunal. On that day, several representatives of journalists indicated an intention to apply for representation but declined to answer any questions from the tribunal as to whether the individual or organisation seeking representation even had any relevant testimony to offer the tribunal. It is important to record that not all journalists or media organisations took that approach. The full transcript of that hearing and the ruling of the tribunal as of 3 April 2017 are both available on the tribunal's website: www.disclosuretribunal.ie.

Outline of work and likely duration

The Tribunal is grateful for the cooperation of parties in its work to date and it is hoped the Tribunal will conclude hearing evidence before the end of this year.

It appears useful to the work of the Tribunal to divide its consideration of matters into about five substantial sections. What follows is only an outline.

Of pressing public concern is whether or not files in certain State agencies, who here might be identified as Rian, the Health Service Executive and the Child and Family Agency, otherwise Túsla, were created and distributed or otherwise used by senior members of our police force in inventing or furthering a false allegation of sexual abuse against Sergeant Maurice McCabe. This will be the first section of public hearings. It is hoped to engage in these and to complete them in July of this year. Progress on this matter has moved very far but the analysis of relevant computers is essential and there are further interviews to be conducted by our investigators.

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

As to what may have been briefed to the then Garda Press Officer, Superintendent David Taylor for dissemination to journalists by former Commissioner Martin Callinan and then Deputy Commissioner Nóirín O'Sullivan, this is the subject of an inquiry in respect of which public

hearings are hoped to be held, perhaps following a short break, in November. Allied to this section are concerns in relation to an engagement between former Commissioner Martin Callinan and John McGuinness TD that is said to have taken place on 24 January 2014, in a very specific location, according to the terms of reference. These sections do not seem to be divisible and evidence on one may be of assistance in the determination of what attitude was taken by those senior officers to Sergeant Maurice McCabe, if any, and as to how they responded or acted.

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

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

Reports and opening statement

The question as to whether it is desirable or appropriate to issue interim reports on the completion of each such section of the work of the tribunal is a matter which needs to be considered over the course of this working schedule. At the moment, no prediction can safely be made.

An opening statement of counsel indicating an outline of the work done by the tribunal, what apparently has been discovered, the shape of potential conflicts and the potential evidence that may assist in the resolution of these issues will be made by counsel for the tribunal in the first or second week of June 2017. The exact date will be posted on the tribunal's website at www.disclosuretribunal.ie. Thereafter, the documents relevant to the work of the various sections will be distributed as soon as possible to enable the work to proceed.

Represented parties

Since the Tribunal is asked to report as to the number of parties represented before the Tribunal, the following is the record relating to the orders made by the Tribunal after its sitting for that purpose:

1. Application was made by Mr. Conor Dignam S.C., instructed by the Chief State Solicitors Office, for full representation on behalf of An Garda Síochána and particularly on behalf of Former Commissioner of An Garda Síochána, Mr. Martin Callinan, and the current Commissioner, Nóirín O'Sullivan. The Tribunal is satisfied that an order for full representation in relation to all of the matters in the Terms of Reference (a) to (o) inclusive should be granted to An Garda Síochána, the former and the current Commissioner and it is so ordered. The Tribunal notes that further applications will be made for

representation in relation to other identified members of An Garda Síochána at a later stage and the Tribunal will rule on those as appropriate.

2. Mr. Brian Gallagher, solicitor, appeared on behalf of Mr. Alan Shatter, former Minister for Justice and Equality, for limited representation in relation to the matters arising at Terms of Reference (h). The Tribunal is satisfied that Mr. Shatter has sufficient direct interest in the matter for a grant of limited representation in respect of (h) and it is so ordered.

3. Mr. Michael McDowell SC, instructed by Sean Costello & Company, solicitors, applied on behalf of Sergeant Maurice McCabe for an order granting him representation in relation to all matters comprised within the Terms of Reference, except those relating to Terms of Reference (n) concerning Garda Keith Harrison. The Tribunal notes other matters raised by Mr. McDowell S.C. but is making no ruling at this time, in relation to any of those matters. The Tribunal is satisfied that it should grant Sergeant Maurice McCabe an order for representation as sought and it so orders.

4. Mr. Sean Gillane S.C., instructed by RTÉ's solicitors, applied for an order for representation on behalf of RTÉ and such employees as may be directly concerned in Terms of Reference (a), (b), (h) and (k), and the Tribunal is satisfied that RTÉ has such a direct interest in those matters that it will grant an order for representation limited to those matters, (a), (b), (h) and (k), and it so orders.

5. Mr. Mark Harty S.C., instructed by Kilfeather & Company, solicitors, applied on behalf of Garda Keith Harrison for full representation in relation to the matter, including, in particular, those Terms of Reference relating to Sergeant Maurice McCabe, in particular Terms of Reference (g), (d) and (h), in addition to (n) and (o). However, the Tribunal is satisfied that Garda Harrison has only a direct interest in being granted the right of representation limited only to (n) and it does not extend to any other matters within the Terms of Reference at present and it will so order.

6. Mr. Paul Anthony McDermott S.C., instructed by Arthur Cox & Company, solicitors, applied on behalf of the Child and Family Agency, otherwise known as TUSLA, as so designated in the Terms of Reference of the Tribunal, and sought an order for representation on behalf of TUSLA limited to Terms of Reference (d), (h), (n) and (o). The Tribunal is satisfied that TUSLA has a direct interest in being represented in relation to those matters and so orders. The Tribunal raised the issue as to whether that grant of representation would extend to or incorporate those matters formerly the responsibility of the Health Service Executive (the HSE) and the Tribunal was informed that TUSLA would further communicate with the Tribunal in that regard. It is noted by the Tribunal that it has since received a letter dated the 31st of March, 2017 from Byrne Wallace, solicitors, acting on behalf of the Health Service Executive, inter alia, stating that it had intended to seek representation on behalf of the Health Service Executive and two named employees but had thought that a letter previously written on its behalf on the 1st of March would suffice. The Tribunal is satisfied that the HSE has a direct interest in being represented in relation to terms of reference (d), (h), and (n) and so orders. The Tribunal asks that their

efforts be co-ordinated with TUSLA so as to assist in the efficient and economic running of the Tribunal.

7. Mr. John Ferry B.L., instructed by Mr. Carthage Conlon of M.E. Hanahoe & Company, solicitors, made application on behalf of Superintendent David Taylor for an order of representation in relation to the Terms of Reference of the Tribunal except (n) as it relates to Garda Keith Harrison. The Tribunal notes that Mr. Ferry made similar observations to that raised by Mr. McDowell S.C. on behalf of Sergeant Maurice McCabe and the Tribunal makes no ruling thereon. The Tribunal is satisfied that Superintendent David Taylor has an interest in those Terms of Reference except (n) and will grant him such representation and the Tribunal so orders.

8. Mr. Darren Lehane B.L., instructed by Mr. Fintan Lawlor, solicitor, applied on behalf of Mr. John McGuinness T.D. for an order for representation limited to (l) and also extending to (a), (b), (c), (f) and (g) insofar as it relates to or reflects on Mr. McGuinness. The Tribunal is satisfied that Mr. McGuinness has an interest in being represented in relation to (l) and will make an order for representation limited to that. It is not satisfied that it is necessary to make an order in relation to (a), (b), (c), (f) and (g) as it relates to Mr. McGuinness.

9. Mr. Michael Kealey, solicitor, acting on behalf of Associated Newspapers Limited trading as DMG Media Ireland, applied on behalf also of Debbie McCann, Ali Bracken, Jennifer Bray and Alison O'Reilly and sought limited representation in relation to Terms of Reference (a), (b), (c), (f), (h) and (i) insofar as it related to issues of journalistic privilege concerning those parties. The Tribunal has decided at present neither to grant nor refuse an order for representation in this respect but will defer its consideration of same until such time as the Tribunal has further clarified matters in relation to the factual background concerning the same.

10. Mr. Michael Hegarty, solicitor, of Smyth O'Brien Hegarty, solicitors, applied on behalf of Det. Sergeant Yvonne Martin in relation to an application for a grant of representation limited to (e) and (f). The Tribunal is satisfied that it should make an order for representation in relation to those matters in relation to Sergeant Martin and it so orders.

11. Mr. Michael Hegarty, solicitor, of Smyth O'Brien Hegarty, solicitors, also applied in relation to Sergeant Brigid McGowan, Inspector Goretta Sheridan and Det. Sergeant David Durkin for an order for representation limited to Terms of Reference (n) and (p) and the Tribunal is satisfied that those members have sufficient interest in order to make an order for their limited representation on those terms in relation to (n) and it so orders.

12. Mr. Mark Dunne B.L., instructed by Hayes, solicitors, on behalf of the Irish Times and its relevant journalists, indicated that he was seeking limited representation in relation to (h) and (i) and (a), (b) and (c) insofar as it was relevant, but in the light of the Tribunal's exchanges with Mr. Kealey, solicitors, decided that he would reserve his position and did not press the application for representation.

13. Mr. Kieran Kelly, solicitor, of Kelly Fanning, solicitors, appeared on behalf of INM plc and a number of named journalists, Mr. Tom Brady, Mr. Paul Williams, Mr. Ken Foy, Mr. Niall O'Connor, Mr. Cathal McMahon and Mr. Mick McCaffrey, but indicated that he would not press the formal application and would await a further ruling in the matter from the Tribunal and, accordingly, no order has been made by the Tribunal in that regard.

14. Mr. Cullen, solicitor, on behalf of Garda Nicholas Keogh, indicated his intention to make an application for representation under Terms of Reference (p), as did Ms. Cliona Kimber SC, instructed by Moran & Ryan, solicitors, on behalf of Garda Maire O'Reilly, in relation to limited representation under Terms of Reference (p). The Tribunal is prioritising, in accordance with its Terms of Reference, matters related to Terms of Reference (a) to (o) and is accordingly deferring any consideration of matters within Terms of Reference (p) and it will notify these and other interested parties at the appropriate time.

Explanation of the terms of reference

An explanation of the terms of reference, which is given by the tribunal as of this time, and subject to any submission that may be made, any further issue that may arise, or any reorientation of attitude that may be necessary in consequence of evidence, was given by the tribunal on 12 May 2017 and appears on the tribunal's website at www.disclosuretribunal.ie.

An explanation of procedures before the tribunal was given by the tribunal on 12 May 2017 and appears on the tribunal's website at www.disclosuretribunal.ie.

A consolidated set of legislation relevant to tribunals was prepared by the researchers from the Supreme Court and is now posted, and was posted from the beginning, on the tribunal's website at www.disclosuretribunal.ie. It is to be hoped that this will be useful and may avoid heedless legal argument.

Other relevant matters

It is the earnest hope of the tribunal to finish its work in a timely fashion. Nothing increases expense more than delay. With the cooperation of those represented, and to the extent that this may be forthcoming, it is hoped that hearings will not be lengthy and discursive but focused and concise.

As the tribunal stated in its opening statement, while not bound by the rules of evidence, nonetheless the ordinary expectations of fairness and common sense apply whereby no one's character is to be taken lightly and then only through the discovery of cogent evidence which, on analysis, stands up as proof. Whether popular or unpopular, this is the standard applied by the courts universally throughout the history of this State and this is the entitlement of every citizen as a person equal before the law.

Peter Charleton

17 May 2017