

THE DISCLOSURES TRIBUNAL

Procedures of the Tribunal

In relation to

TERM OF REFERENCE (p)

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

1. General

1.1 The essence of a Tribunal of Inquiry was encapsulated by the then Chief Justice, Mr. Justice Hamilton, giving the Judgment of the Supreme Court in the case of *Haughey v. Moriarty* [1999] 3 I.R. 1, when he said that

“... the principal function of such Tribunals has been to restore public confidence in the democratic institutions of the State by having the most vigorous possible enquiry consistent with the rights of its citizens into the circumstances which give rise to the public disquiet.”

1.2 The Chief Justice described the procedural phases of a Tribunal of Inquiry as follows:

- (1) *“A preliminary investigation of the evidence available;*
- (2) *The determination by the Tribunal of what it considers to be evidence relevant to the matters into which it is obliged to enquire;*
- (3) *The service of such evidence on persons likely to be affected thereby;*

- (4) *The public hearing of witnesses in regard to such evidence and the cross-examination of such witnesses by or on behalf of persons affected thereby;*
- (5) *The preparation of a report and the making of recommendations based upon facts established at such public hearing.”*

1.3 In his Opening Statement on 27th February 2017 Mr. Justice Charleton explained that the Tribunal was firstly proceeding to examine Terms of Reference (a)-(o) of the Tribunal and that Term of Reference (p) was being left over. Consideration of Terms of Reference (a)-(o) has now been completed (save for issues relating to costs) and Reports published.

1.4 Term of Reference (p) is now to be addressed. Mr. Justice Sean Ryan, the former President of the Court of Appeal was appointed by the Tribunals of Inquiry (Evidence) Act 1921 (Appointment of Tribunal) (Amendment) Instrument 2018 and is the chairperson for this purpose. The Tribunal is inquiring into term of reference [p] as set out above.

2. Consideration of Complaints

2.1 Consideration of a complaint by the Tribunal involves firstly deciding whether it is covered by term of reference [p] and is thus admissible. This process includes an examination of

- (a) the details of the making of a Protected Disclosure;
- (b) the parties to whom the Protected Disclosure was made;
- (c) the circumstances of the alleged targeting or discrediting.

2.2 Where the Tribunal proposes to determine that a complaint or any part of a complaint is not relevant to Term of Reference (p), the person who has made the complaint will be duly informed.

2.3 The Tribunal may if it requires such assistance invite written submissions on admissibility in respect of any issue or arrange for oral argument thereon or do both, as it thinks appropriate.

2.4 Where the Tribunal determines that a complaint, or any part of a complaint, is relevant to Term of Reference [p] and warrants a public hearing, the Tribunal will determine the order of any such public hearings and may decide to hear issues (including preliminary issues) or issues arising in respect of two or more complaints together in circumstances where the Tribunal is satisfied that a common issue arises or where it is otherwise just and reasonable that the issues be heard together.

3. Powers of the Tribunal:

3.1 The Tribunal has all the necessary powers of the High Court to make such Orders as are necessary for the performance of its functions.

3.2 In this regard the Tribunal can make, inter alia, Orders enforcing the attendance of witnesses and examining such witnesses on oath, affirmation or otherwise.

3.3 The Tribunal can further make, inter alia, Orders for the preservation, production, inspection, examination and discovery of documents. It is envisaged that, in the first instance, a request for voluntary discovery will be made where practical. Where it is proposed to make an Order for discovery, the Tribunal will, insofar as it is practicable, put any party affected thereby on notice and insofar as is possible and will provide in any such Order for any party to whom it is directed to make application as to its scope or breadth or duration or to raise any issue connected therewith if necessary.

4. Compliance With Discovery:

4.1 The Tribunal will allow such period as appears appropriate in the circumstances and will fix the time for such compliance in its Order. Any application for an extension of the time necessary may be made in writing to the Tribunal explaining the basis thereof.

5. Form of Discovery:

5.1 Discovery, when made, should be, as far as practicable, in the form required for an Affidavit of Discovery under the Rules of the Superior Courts, 1986, as amended.

6. Discovery Documents:

6.1 A person making discovery shall make available to the Tribunal all documents other than those in respect of which a claim for privilege is asserted and accepted by the Tribunal.

6.2 Where discovery is made by any party or person, he or she shall swear an Affidavit of Discovery. Such Affidavit should contain an individual listing of the documents with a brief description of each item. When privilege is claimed, the category of documentation and the ground for so doing should be briefly stated.

6.3 Where documents are to be made available to the Tribunal, either pursuant to an Order for Discovery or for inspection or voluntarily, the person doing so shall normally retain the original and make a photocopy available to the Tribunal. The original should be kept available for inspection if necessary.

6.4 Documents received by the Tribunal shall be treated as confidential unless and until they are put in evidence in the course of the public hearing of evidence.

6.5 The Tribunal shall make any appropriate redaction to such documents where there is material therein which is irrelevant to any issue and / or where this is necessary to protect rights of privacy or confidentiality of any party or person. Documents may be redacted in any other case where the justice of the case so requires.

6.6 All documents received by the Tribunal are therefore potentially liable to be put in evidence in the course of the public hearing of evidence before the Tribunal. Any claim of privilege or protection from disclosure as may be made shall be adjudicated upon by the Tribunal.

6.7 Relevant documents will be circulated by the Tribunal strictly on the basis that they will be used solely for the purpose of the Tribunal and that neither the documents nor any material contained in them will be disclosed to any third party without the express permission of the Tribunal. This requirement will no longer apply in respect of any particular document or part thereof if and when that document or part thereof is accepted into evidence in the course of the public hearing. Where this material is redacted as outlined above, any interested party may seek clarification in writing from the Tribunal in respect of this redaction.

7. Tribunal Investigators:

7.1 The Tribunal has, pursuant to Section 6 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 2002, appointed investigators to assist it in the performance of its functions and subject to its direction and control. Accordingly, the Tribunal may, when it thinks necessary and appropriate, request one or more of its investigators to carry out a preliminary investigation of any matter material to the Inquiry to which the Tribunal relates. An investigator appointed by the Tribunal has the following powers under the 2002 Act:

“Section 6:

(4) An investigator may, for the purposes of a preliminary investigation under subsection (3), require a person to—

(a) give to him or her such information in the possession, power or control of the person as he or she may reasonably request,

(b) send to him or her any documents or things in the possession, power or control of the person that he or she may reasonably request, or

(c) attend before him or her and answer such questions as he or she may reasonably put to the person and produce any documents or things in the possession, power or control of the person that he or she may reasonably request,

and the person shall comply with the requirement.

(5) An investigator may examine a person mentioned in subsection (4) in relation to any information, documents or things mentioned in that subsection and may

reduce the answers of the person to writing and require the person to sign the document containing them.

- (6) Where a person mentioned in subsection (4) fails or refuses to comply with a requirement made to the person by an investigator under that subsection, the Court may, on application to it in a summary manner in that behalf made by the investigator with the consent of the tribunal concerned, order the person to comply with the requirement and make such other (if any) order as it considers necessary and just to enable the requirement to have full effect.*
- (7) A person to whom a requirement under subsection (4) is made shall be entitled to the same immunities and privileges as if he or she were a witness before the Court.*
- (8) An investigator shall not, without the consent of the tribunal by which he or she was appointed, disclose other than to that tribunal any information, documents or things obtained by him or her in the performance of his or her functions under this section.*
- (9) An investigator shall be furnished with a warrant of appointment and when performing a function under this section shall, if so requested by a person affected, produce the warrant or a copy of it to the person.*

7.2 The following provisions also relate to investigators appointed by the Tribunal:

Section 7:

- (1) A person who, without reasonable cause, by act or omission obstructs or hinders an investigator in the performance of his or her functions under section 6 , or fails or refuses to comply with a requirement made to the person under subsection (4) of that section, shall be guilty of an offence.*
- (2) A prosecution for an offence under this section may be brought only by or with the consent of the Director of Public Prosecutions.*

(3) A person guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding €3,000 or imprisonment for a term not exceeding 12 months or both.

Section 8:

A statement or admission made by a person before an investigator shall not be admissible as evidence against the person in any criminal proceedings.”

8. Representation:

8.1 The Tribunal will notify interested parties of dates of hearings. Applications for legal representation should be made in writing clearly identifying the interest of the party concerned, the basis upon which the Order is sought and the extent and duration of the representation requested. The Tribunal will deal with applications by correspondence as far as possible and will hear other applications in public or in private session.

9. Public Hearings:

9.1 The Tribunal will hold public oral hearings as necessary to carry out its work. Such hearings shall be in public save as may be otherwise decided by the Tribunal in accordance with law. Counsel will make an opening statement on behalf of the Tribunal in advance of public hearings.

9.2 The Tribunal shall decide which issues within Term of Reference (p) of the Tribunal, will be the subject of any public sitting as it thinks appropriate having regard to its investigations and enquiries and having regard to the material and witnesses available to it at any particular time.

10. Service of Evidence:

10.1 The Tribunal will determine what it considers to be evidence relevant to the matters into which it is obliged to enquire having regard to documents which it has received, statements furnished to it and any other relevant information.

- 10.2 The Tribunal will serve copies of all proposed relevant evidence on parties with representation, on relevant parties with limited representation and on other persons likely to be affected thereby. In preparation for each public sitting relative to this Term of Reference or any issue therein, the Tribunal will identify persons likely to be affected by the available evidence and will contact all such persons who are legally represented or, if not legally represented, will make every effort to contact them personally. It is therefore envisaged that all such persons likely to be affected by material will, in so far as practicable, be furnished with all of the evidence which is in the possession of the Tribunal relative to that sitting.
- 10.3 A party or a proposed witness who believes that a relevant document or documents has or have been omitted from documents provided should bring this to the attention of counsel for the Tribunal at the earliest opportunity. If counsel for the Tribunal does not agree to include any such document or documents in the documents provided, an application may be made to the Tribunal for a direction that the document or documents should be included. Such an application normally should be made before the witness in question begins giving evidence.
- 10.4 A witness may not refer in giving evidence or be referred in questioning to a document which is not included in the documents provided except by permission of the Tribunal. If the Tribunal decides to grant such permission, it may, at its discretion, require that arrangements are made for the witness and relevant parties to have an opportunity of examining and considering the document before it is referred to in evidence.
- 10.5 Parties represented before the Tribunal may suggest to the Tribunal in writing the names of any particular witness or witnesses or on any other step which it thinks the Tribunal might consider taking.
- 10.6 The Tribunal shall decide which witnesses should be called to give oral evidence to the Tribunal. In deciding which witnesses shall be called, the Tribunal will consider all such suggestions.
- 10.7 Oral evidence will be given on oath or by affirmation.

- 10.8 All witnesses will first be questioned by counsel for the Tribunal. Parties are free to inform counsel for the Tribunal before the evidence of a witness is given of matters or questions which they feel should be raised with a witness. The witness may then be cross-examined by the legal representative of parties affected by such evidence. The right to question any witness shall be determined by the Tribunal having regard to all of the circumstances, including, inter alia, the nature of the evidence given, the extent to which such evidence affects any person and the obligation to adopt fair procedures. Following questioning a witness, if represented, shall be entitled to be examined by her or her own legal representative.
- 10.9 Counsel for the Tribunal may further examine the witness in regard to any new matters that have arisen during questioning by other parties or which otherwise appears appropriate or necessary.
- 10.10 The Tribunal will consider in an appropriate case, having regard to the nature of any evidence proposed to be given by a witness, the giving of an opportunity to the witness to adopt his or her statement as part of his or her evidence, subject to any modification or clarification which he or she may wish to make. It shall be a matter for the Tribunal to decide whether any particular piece of evidence is relevant and/or admissible and/or subject to any legally recognised form of privilege.
- 10.11 The Tribunal may seek, in appropriate circumstances, to admit into evidence the written statement of a person where there is agreement that it is not necessary to call such a witness *viva voce* or in other appropriate circumstances.
- 10.12 The Tribunal is free to accept any item, document or testimony in evidence which will assist it in its inquiries.
- 10.13 The Tribunal may at any stage raise any issue at a public sitting with the legal representative of a party and may ask such questions of any witnesses as he thinks fit and proper.
- 10.14 At the conclusion of all of the public sittings, the legal representatives of any party granted representation before the Tribunal will be entitled to make a closing submission

to the Tribunal in which he or she will be given an opportunity to deal with and to comment upon any evidence affecting his or her client.

11. Costs:

11.1 Any application for an Order for costs pursuant to Section 6 of the Tribunals of Inquiry (Evidence) Act, 1979 may be made following the final report of the findings of the Tribunal. The fact that the Tribunal has or has not granted representation to any person or body does not of itself determine an entitlement to an Order for costs in the matter. Any Order made by the Tribunal will, ordinarily, be on a party and party basis in the usual form. In relation to the issue of costs, the Tribunal shall have regard to the Terms of Reference which provide that: *“(III) All costs incurred by reason of the failure of individuals to cooperate fully and expeditiously with the Tribunal should, as far as it is consistent with the interests of justice, be borne by those individuals”* and having regard to the provisions of the Tribunal of Inquiries (Evidence) Acts, 1921 to 2004 and all relevant case law.

12. Amendment of Procedure:

12.1 The procedures of the Tribunal may require to be adapted or amended in light of circumstances. The Tribunal may therefore add to, alter or amend the procedures in the course of its work. The Tribunal may depart from these procedures to avoid unfairness or to achieve the efficient discharge of its business, subject, of course, to fair procedure.

Dated the 8th day of March, 2019