

**Third interim report of the 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) Acts 1921 to 2004, on 17<sup>th</sup> February 2017 by instrument

**Chairman: The Honourable Mr Justice Peter Charleton**

Report on matters dealing with the conduct of the Health Service Executive, the Child and Family Agency (TUSLA), Raidió Teilifís Éireann, Garda Headquarters, and Garda officers concerning Sergeant Maurice McCabe and related matters pursuant to terms of reference (a) to (o)

Solicitor to the tribunal: Elizabeth Mullan

Registrar to the tribunal: Peter Kavanagh



**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 17<sup>th</sup> February 2017 by instrument

**The Hon Mr Justice Peter Charleton**

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Dublin Castle  
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**Re: Tribunal of inquiry into protected disclosures made under the Protected Disclosures  
Act 2014 and certain other matters**

Thursday, October 11<sup>th</sup> 2018

*A char,*

Please find enclosed herewith a printed paper copy of the 3<sup>rd</sup> interim report of the tribunal of inquiry into protected disclosures made under the Protected Disclosures Act 2014 and certain other matters. The tribunal therein reports on terms of reference (a) to (o).

As is required by law, the tribunal has inquired whether there are any criminal proceedings current or pending arising out of any matter discussed in this report. It is understood that there are no such proceedings either in being or contemplated; see the letter from the solicitor to the tribunal to Detective Superintendent Brian Woods of 20 June 2018 and his reply. That correspondence is an appendix to this report.

Once you have confirmed to the tribunal that the report has been laid in the library, it will be available immediately thereafter in digital format on the tribunal's website and printed copies of the report should also be available within a few weeks to anyone wishing to buy it in hard-copy format. The tribunal's website is [www.disclosuretribunal.ie](http://www.disclosuretribunal.ie).

Is mise le meas,

*Peter Charleton*

Mr Peter Finnegan  
Clerk of the Dáil  
Dáil Éireann  
Leinster House  
Kildare Street  
Dublin 2

Solicitor to the Tribunal: Elizabeth Mullan

Registrar: Peter Kavanagh



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info@disclosuretribunal.ie

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

**Our ref: DT-1**  
**Your ref:**

Dear Detective Superintendent Woods,

We refer to the tribunal hearings concerning all the terms of reference apart from terms  
of reference (n), (o), (already reported on) and term of reference (p). I enclose a copy of  
the terms of reference.

The tribunal will be delivering a report on those terms of reference to the Clerk of the  
Dáil.

Under the legislation, a report may not be published or may have to be redacted if it  
might prejudice ongoing criminal proceedings relating to any matter discussed during the  
hearings.

We understand that there are no such ongoing criminal proceedings arising out of any  
matter discussed during the hearings into these matters. Please be so kind as to confirm  
this as soon as possible but within 7 days from the date of this letter.

Yours sincerely,

Elizabeth Mullan  
Solicitor to the Tribunal

20<sup>th</sup> June 2018

Detective Superintendent Brian Woods  
Garda Liaison Officer  
Garda Headquarters  
Phoenix Park  
Dublin 7  
By post

17896

# An Garda Síochána

Coimisinéir Cúnta  
Dlí agus Comhlíontacht  
Ceanncheathrú An Garda Síochána  
Páirc an Fhionnuisce  
Baile Átha Cliath 8  
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*Bi linn/Join us*



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Ríomh-phoist./Email:  
[GPDT@garda.ie](mailto:GPDT@garda.ie)

Your Ref DT/1

Dear Ms. Mullan,

**Re: Correspondence from the Tribunal of Inquiry into Protected Disclosures made under the Protected Disclosures Act, 2014 and certain other matters**

In reply to your letter dated the 20<sup>th</sup> June 2018 in respect of your enquiry into any ongoing criminal proceedings arising out of the matters discussed during tribunal hearings concerning all the terms of reference apart from terms of reference (n), (o), (already reported on) and term of reference (p).

I can confirm from enquiries made within An Garda Síochána that there are no ongoing criminal proceedings at this time arising out of any matter discussed during the hearings.

Yours sincerely,

Handwritten signature of Brian Woods.

**Brian Woods**  
**Detective Superintendent**  
**Garda Liaison Officer**  
**Garda Headquarters**  
**Phoenix Park**  
**Dublin 8**

27<sup>th</sup> June 2018

27 JUN 2018  
RECEIVED

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## **A note on structure**

It is best to regard what follows as three separate reports, each with its own chronology and other appendices following in part 4. While logically this is the first of three reports, it may be necessary to repeat certain matters in subsequent reports. In doing this, it is important to read the entirety of all of the reports in order not to lose the sense of the overall findings and the particular, and detailed, context in which these occur. Any recommendations are set out in part 4 and arise out of the consideration of all of the issues, evidence and documents throughout the currency of the entire tribunal since February 2017. Hence, this report has four parts:

1. The HSE and TUSLA affair;
2. The O'Higgins Commission and what happened there;
3. Attacks on the character of Sergeant Maurice McCabe;
4. Conclusions from all reports, including that into Garda Keith Harrison, and recommendations.

Thus, this is part 1. Comments as to rank, names, the quotation of documents in exact but ungrammatical form, the approach of the tribunal to evidence, its powers and function, finding facts, engagement, credibility and judicial restraint are set out in this part. These are more than introductory and apply to all the parts of this volume. Thus, this part needs to be read to understand parts 2, 3 and 4.

### **Part 1: Report on the TUSLA file and Sergeant Maurice McCabe**

This tribunal was set up by instrument under the Tribunals of Inquiry (Evidence) Act 1921, as amended, by the Minister for Justice and Equality on 17 February 2017 following resolutions of Dáil Éireann and Seanad Éireann on the previous day. The tribunal is tasked by those resolutions with urgently inquiring into a series of controversies which all pivot on how the top officers within our national police force react when issues are aired as to the performance of the organisation.

The central concern is whether such reaction has not only been one of distaste, but of active and calculating malice and bullying, and whereby media briefings took place against individuals who disclosed inefficiencies within the police. That was suspected to encompass the undermining of the family life of concerned officers through the abuse of social services.

This particular report concerns Sergeant Maurice McCabe, a sergeant at the time in the Cavan/Monaghan Division and a highly respected and hardworking police officer.

#### **The relevant terms of reference**

The terms of reference with which the tribunal has been tasked are now set out:

[a] To investigate the allegation made in a Protected Disclosure under the Protected Disclosures Act 2014, on the 30<sup>th</sup> of September, 2016, by Superintendent David Taylor, wherein he alleges that he was instructed or directed by former Commissioner Martin Callinan and/or Deputy Commissioner Nóirín O'Sullivan, to contact the media to brief them negatively against Sergeant Maurice McCabe and in particular to brief the media that Sergeant McCabe was motivated by malice and revenge, that he was to encourage the media to write negatively about Sergeant McCabe, to the effect that his complaints had no substance, that the Gardaí had fully investigated his complaints and found no substance to his allegations and that he was driven by agendas.

[b] To investigate the allegation of Superintendent Taylor in his Protected Disclosure, that he was directed to draw journalists' attention to an allegation of criminal misconduct made against Sergeant McCabe and that this was the root cause of his agenda, namely revenge against the Gardaí.

[c] To investigate what knowledge former Commissioner Callinan and/or Commissioner O'Sullivan and/or other senior members of the Garda Síochána had concerning this allegation of criminal misconduct made against Sergeant McCabe and whether they acted upon same in a manner intended to discredit Sergeant McCabe.

[d] To investigate the creation, distribution and use by TUSLA of a file containing false allegations of sexual abuse against Sergeant Maurice McCabe that was allegedly sent to Gardaí in 2013, and whether these false allegations and/or the file were knowingly used by senior members of An Garda Síochána to discredit Sergeant McCabe.

[e] To investigate whether the false allegations of sexual abuse or any other unjustified grounds were inappropriately relied upon by Commissioner O'Sullivan to discredit Sergeant Maurice McCabe at the Commission of Investigation into Certain Matters in the Cavan/Monaghan district under the Chairmanship of Mr. Justice Kevin O'Higgins.

[f] To investigate whether senior members of An Garda Síochána attempted to entrap or falsely accuse Sergeant McCabe of criminal misconduct.

[g] To investigate such knowledge which former Commissioner Callinan and Commissioner O'Sullivan had concerning the matters set out in [a], [b], [c], [d], [e] and [f] above.

[h] To investigate contacts between members of An Garda Síochána and:

- Media and broadcasting personnel,
- members of the Government,
- TUSLA,
- Health Service Executive,
- any other State entities,
- or any relevant person as the Sole Member may deem necessary to carry out his work relevant to the matters set out in [a], [b], [c], [d], [e] and [f] above.

[i] To examine all records relating to the telecommunications interactions used by Superintendent Taylor, former Commissioner Callinan and Commissioner O'Sullivan, in the period from the 1<sup>st</sup> of July, 2012, to the 31<sup>st</sup> of May, 2014, to ascertain whether there are any records of text messages or other telecommunication interactions relating to the matters set out at [a], [b], [c], [d], [e] and [f] above and to examine and consider the content of any such text messages or other telecommunication interactions.

[j] To examine all electronic and paper files, relating to Sergeant Maurice McCabe held by An Garda Síochána and to consider any material therein relevant to [a], [b], [c], [d], [e] and [f] above.

[k] To investigate whether Commissioner O'Sullivan, using briefing material prepared in Garda Headquarters, influenced or attempted to influence broadcasts on RTE on the 9<sup>th</sup>

of May, 2016, purporting to be a leaked account of the unpublished O'Higgins Commission Report, in which Sergeant McCabe was branded a liar and irresponsible.

[l] To investigate whether a meeting took place between former Commissioner Callinan and Deputy John McGuinness on the 24<sup>th</sup> of January, 2014 in the carpark of Bewley's Hotel, Newlands Cross, Co. Dublin and to examine and consider the circumstances which led to any such meeting, the purpose of such meeting and matters discussed at such meeting.

[m] To investigate such knowledge which Commissioner O'Sullivan had of the meeting referred to in [l] above.

[n] To investigate contacts between members of An Garda Síochána and TUSLA in relation to Garda Keith Harrison.

[o] To investigate any pattern of the creation, distribution and use by TUSLA of files containing allegations of criminal misconduct against members of An Garda Síochána who had made allegations of wrongdoing within An Garda Síochána and of the use knowingly by senior members of the Garda Síochána of these files to discredit members who had made such allegations.

[p] To consider any other complaints by a member of the Garda Síochána who has made a protected disclosure prior to 16<sup>th</sup> 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.

In comparison to issues concerning Sergeant Maurice McCabe, and the other concerning Garda Keith Harrison, term of reference [p] is separate. The tribunal has asked for and has received a number of complaints from retired or serving Garda officers as to how they were treated on making a protected disclosure up to the relevant date of 16 February 2017. The tribunal is not now reporting on that matter. This is a report on terms of reference [a] through to [m] with particular reference to social work in this report, with particular reference to the O'Higgins Commission in the second report, and with particular reference to the allegation of calumny against Sergeant Maurice McCabe in the final report. These are the matters for which this tribunal has accepted responsibility. Term of reference [p] was excluded by the Oireachtas from the responsibility of this chairman.

The tribunal, bound as it is by the Supreme Court decision in *Haughey v Moriarty*,<sup>1</sup> interpreted its terms of reference on 12 May 2017. This appears on the website at [www.disclosuretribunal.ie](http://www.disclosuretribunal.ie). It is unnecessary to refer to it in any detail here as it speaks for itself. No issue has been raised by any party in relation to the ambit of the tribunal's inquiries in pursuance of its interpretation of its terms of reference. On the same date, the tribunal also published its memorandum of procedures adopted for the purposes of the tribunal. Again, no issue has arisen, to date, in connection with this.

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<sup>1</sup> [1999] 3 IR 1

## **Public response**

All of the preliminary steps of gathering information and documents were preceded by an almost immediate announcement in relation to the establishment of the tribunal and an urgent public call for the cooperation of all concerned and the provision of all necessary information, documentation and relevant devices etc. as outlined in the tribunal sitting on 27 February 2017.

The response to this public call for cooperation on patriotic grounds was heartening. Key evidence thereby emerged. While some have held back or reverted to deceit, considerations of the good of the country motivated others.

The tribunal thanks those who did come forward with information.

## **Debate on tribunal reports**

Term of reference [n], the inquiry on issues concerning Garda Keith Harrison and TUSLA, was reported on by the tribunal in a document furnished to the Clerk of Dáil Éireann on 30 November 2017. There was no evidence arising from that inquiry whereby it might be said that the treatment of Garda Keith Harrison might begin to lay down any pattern under term of reference [o].

It was disappointing that the tribunal having been tasked with investigating the Garda Keith Harrison matter, there was no debate on the report in Dáil Éireann. That task came from the Houses of the Oireachtas. Once a report is furnished, the Oireachtas should collectively respond. That is done by debate.

After first reporting on the explosives planting allegation laid before the Morris Tribunal, there was again no debate. Mr Justice Frederick Morris rightly complained of that failure. Future reports were debated in the Oireachtas. The report on Garda Keith Harrison merited the same consideration. Setting up a tribunal involves a vast expenditure of public money. Were the Oireachtas to debate reports, experience would be gained on when or if the ultimate step of a public inquiry might reasonably be merited.

## **Jurisdiction and the original allegation by Ms D**

A tribunal is a creature of statute. It is entitled to exercise its powers under legislation only for the purpose of furthering inquiries into what it is tasked by the Oireachtas to report on. This means, for instance, that the tribunal could not inquire into the original Ms D allegation. She came from a Garda family. An assault by Sergeant Maurice McCabe was claimed by her to have happened around Christmas 1998, in substance 20 years ago now. All the parties and the legal representatives of Ms D expressly concurred that the tribunal could make no finding as to whether anything at all happened, or what it may have been or may not have been.

## **Tribunals and gardaí**

There have been a number of previous tribunals which have been established to inquire into matters related to An Garda Síochána. These include three previous tribunals of inquiry into the facts and circumstances surrounding the death of citizens and the involvement of the police force of the State.

The first of these was the tribunal of inquiry in 1928 to inquire into the shooting of Timothy Coughlan at Dartry Road, in what is now Dublin 6. Three serving judges were appointed to

inquire into this shooting. The second was the tribunal in 1967 to inquire into the death in garda custody of Liam O'Mahony. Again, this was presided over by three serving members of the judiciary. The third of these was the tribunal of inquiry into the fatal shooting of the late John Carthy in Abbeylara, presided over by the late Mr Justice Barr. Sitting for part of the same period of time was the Morris Tribunal, which produced ten reports. The Smithwick Tribunal then dealt with allegations of garda collusion in relation to the murders of Chief Superintendent Harry Breen and Superintendent Bob Buchanan by the IRA in Northern Ireland. More recently a number of commissions of investigation were established: one, for instance, to deal with the Dean Lyons issue as to false confessions.

More recently, and connected to some of the *dramatis personae* and events dealt with by this tribunal were, in the order in which these occurred, the documentary inquiry conducted by Seán Guerin SC, the independent review mechanism established by the Minister for Justice and Equality, and the O'Higgins Commission, followed by the Ó Néill scoping inquiry, which ultimately led to the decisions and resolutions establishing this tribunal. These all comprise matters, consisting of other statutory and administrative inquiries, which, with the exception of term of reference (e) above, the tribunal cannot inquire into.

It can be accurately observed that no previous tribunal has had to deal with matters which directly concern former commissioners of the force, a former garda press officer and several other senior ranking officers of An Garda Síochána. Also centrally involved are Sergeant Maurice McCabe, TUSLA, the Health Service Executive, Raidió Teilifís Éireann, the former Chairman of the Public Accounts Committee, John McGuinness TD, the Comptroller and Auditor General, and others.

### **Quantum of costs and tribunals of inquiry**

Under section 6(1) of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979, as amended:

Where a tribunal ... is of opinion that, having regard to the findings of the tribunal and all other relevant matters (including the terms of the resolution passed by each House of the Oireachtas relating to the establishment of the tribunal or failing to co-operate with or provide assistance to, or knowingly giving false or misleading information to, the tribunal), there are sufficient reasons rendering it equitable to do so, the tribunal ... may ... on application by any person appearing before the tribunal, order that the whole or part of the costs—

(a) of any person appearing before the tribunal by counsel or solicitor, as taxed by a Taxing Master of the High Court, shall be paid to the person by any other person named in the order;

(b) incurred by the tribunal, as taxed as aforesaid, shall be paid to the Minister for Finance by any other person named in the order.

(1A) The person who for the time being is the sole member of a tribunal or is the chairperson of a tribunal consisting of more than one member-

(a) may make an order under subsection (1) in relation to any costs referred to in that subsection that were incurred before his or her appointment as sole member or chairperson and that have not already been determined in accordance with that subsection, and

(b) shall for that purpose, have regard to any report of the tribunal relating to its proceedings in the period before his or her appointment.

(1B) Paragraph (b) of subsection (1A) shall not be taken to limit the matters to which regard is to be had under subsection (1).

The default position for costs is that as a tribunal of inquiry is set up in the public interest, the Minister for Finance, in other words the taxpayers of Ireland, should ordinarily pay the legal costs of all of the parties granted representation. The tribunal has a general discretion in relation to any order it may make for the payment of costs. The tribunal is exercising the High Court discretion in relation to costs, as limited by that principle and informed by the relevant legislation.

Truth, in that regard, remains paramount. Even though a person is required in the public interest to appear and testify as to matters of public moment before a tribunal of inquiry, those giving evidence are still obliged to be witnesses of truth. If a person has engineered a situation unfairly or deceitfully which results in the public expense of a tribunal of inquiry, that fact should be capable of being reflected in a costs order. Where a person makes serious and unjustifiable allegations against another party to the tribunal, an order as between those parties may be made, allowing also for an order, if appropriate, in a proportionate way against the Minister for Finance.

Since the establishment of the tribunal on 17 February 2017, the solicitor for the tribunal and counsel for the tribunal have worked tirelessly and on an exclusive basis from the time of their engagement on various dates. Their fees were negotiated in good faith on matters of the highest public importance and on the basis of complete application, with rare exceptions, to the work of the tribunal. As of this moment, but pending submissions, it is difficult to see a basis upon which any higher refresher fee or higher brief fee could possibly be payable to other counsel appearing for represented parties. Further, for many, appearance was not for the entirety of the tribunal but on a basis severely limited by time and by interest.

### **Tribunal personnel**

An especial word of thanks is due to tribunal counsel, tribunal solicitor, and to the investigators, registrar, office manager and office staff. Those working for the tribunal are noted in the appendices. All did extraordinary work and the tribunal thanks them.

The Forensic Science Northern Ireland acted as consultants to the tribunal and the service was unstinting in their efforts and inventive in seeking out solutions to the problems which emerged. The tribunal could not have had a better service.

Through the courtesy of Ms Justice Mary Ellen Ring of the Garda Síochána Ombudsman Commission, two really excellent investigators were lent to the tribunal. These have proved invaluable and the tribunal wishes to acknowledge this very real help.

### **Tribunal function**

In accordance with its mandate under the terms of reference, the tribunal's function is to inquire into the facts and to report thereon, making such findings and recommendations as appear appropriate. A tribunal is "a simple fact finding operation, reporting to the Legislature" according to Finlay CJ in *Goodman International v Mr Justice Hamilton*.<sup>2</sup> In that case, ultimately decided by the Supreme Court, the analysis of Costello J in the High Court was concurred with as to the function

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<sup>2</sup> [1992] 2 IR 542 at 588

of a tribunal. This is the reasoning of Costello J:

4. The functions of the Tribunal are to inquire, report and if appropriate to make recommendations. When reporting on allegations of wrongdoing it expresses an opinion as to whether the allegations are true or false, but this opinion is of no legal effect. The Tribunal determines no legal rights; it imposes no legal obligations. It expresses conclusions for the guidance of the legislature and the executive.
5. There are no parties before the Tribunal, although persons accused of wrongdoing in the allegations being investigated will have the same rights as if they were parties against whom a charge had been made. The Tribunal is seised of no *lis*. Its functions are inquisitorial which means that the Tribunal itself has to make inquiries relevant to its terms of reference. The witnesses produced at its hearings are the Tribunal's witnesses and are not produced by any party to whom representation has been granted. All witnesses called are subject to being cross-examined as permitted by the Tribunal.
6. ... The terms of reference in this case required the Tribunal to inquire into the truth or falsity of a number of allegations of wrongdoing including assertions that the criminal law has been breached. But in inquiring into these allegations and in reporting its opinion of them, the Tribunal is not imposing any liabilities or affecting any rights. It is not deciding any controversy as to the existence of any legal right. It is not making any determination of any rights or liabilities. It is not imposing any penalties. It may come to the conclusion that some or all the allegations of wrongdoing are true, but this opinion is devoid of legal consequences. Its functions of inquiring, reporting and recommending cannot therefore be regarded as the "administration of justice". The Tribunal is not exercising a "judicial function" in the case of allegations of criminal behaviour. It is not trying anyone on a criminal charge. In my judgment Parliament did not direct the establishment of a Tribunal that is to exercise judicial functions.<sup>3</sup>

While possessing a plenitude of powers equivalent to the High Court, a tribunal is not a court of law. Thus it does not impose civil or criminal sanctions. While it has powers in relation to awarding costs against parties, or in their favour, the purpose of a tribunal is to examine matters of high public moment and, where possible, in the light of the evidence, make findings on the facts and, if thought appropriate, make recommendations based on the established facts.

The tribunal's inquiry is not a trial of alleged wrongdoing by any particular person or group of persons unless relevant to the terms of reference, and nor is it a general trawl into the very many matters outside the terms of reference or such as might arise in public controversy as the tribunal proceeds with its work.

### **How a tribunal differs from a court case**

In a court proceeding, one party alleges that a civil wrong was done. That is not what happens at a tribunal. It is important to know the difference as otherwise it will not be known why tribunals of inquiry last considerably longer than litigation in the courts.

In a court case, simple facts are set out in legal documents giving a precise summary of the facts: a civil bill in the Circuit Court, or statement of claim, if it be in the High Court, followed by a defence in either court. The parties will seek all relevant documents from each other and may get a court order in that regard. Having read the pleadings prior to the case, the judge will know what

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<sup>3</sup> [1992] 2 IR 542 at 555-557

the issues are: what was alleged to have happened; whether there was any permission; whether there was an unequivocal representation such as to give rise to estoppel; was that such that it would be unfair to apply legal rights; whether an injunction should be granted to remove, for instance, a structure; or whether any other solution such as damages or a declaration is in accordance with law.

In a court case, all the work of pre-trial preparation is done by the parties. The parties may decide to settle their differences. If the claim goes to court, it will take only a limited time. This is because of that preparation and because of the definition in concise form of the issues. Such a case might occupy a day or two of court time.

A tribunal is different.

It is not a contest between represented parties, each of whom prepares for the hearing. Instead it is an inquiry into what is generally a broad issue or, as in this case, a broad series of issues. The tribunal does not, and cannot, rely on the parties to present a case. The issues before this tribunal are not such where, for instance, there is a plaintiff alleging that a smear campaign was launched and carried through by particular people against an identified victim. If that were so, then those accused might deny matters, plead alternative facts to those alleged against them, readily admit of their conduct, or offer an excuse or respond with a counterclaim.

Instead, the entire focus of a tribunal is broadly into what happened on a matter of public controversy. The tribunal's inquiry will impact not just on any putative plaintiff or defendant, as in a court case, but on several people. An examination of the ruling of the tribunal as to the parties entitled to representation of 30 March 2017 and subsequent grants of representation, all on [www.disclosuretribunal.ie](http://www.disclosuretribunal.ie), will indicate that instead of a plaintiff and a defendant as in a court case, there are over a score of people who are entitled to representation. This extends the time which a tribunal needs to conclude its business. That is always markedly longer than in a court hearing. The parties, unlike in a court case, do not prepare their case for transmission to the opposition, but rather do little, being content to await the outcome of the tribunal's preliminary inquiries. Often none of these parties do anything more than respond to the tribunal's work in gathering and distributing documents. Sometimes, a tribunal feels lucky if people even respond to letters.

The fundamental differences in the use of judicial time between a court case and a tribunal of inquiry is in the gathering, analysis and distribution process, the multiplicity of parties and the need to protect their rights, and in the open detective process which devolves on a tribunal but which in a court case, in contrast, is presented to a presiding judge in the form of alternatives.

### **A tribunal is a final resort**

When a public controversy arises, the first option should be always to ask whether there are structures in place within the administration of public life which can enable facts to be found with such degree of certainty as to enable satisfaction at a reasonable level that the truth has been discovered. There are many such statutory options, referable to various of the sectors which are likely to be called into controversy on a matter of public disquiet.

It is also the task of those proposing to call for a tribunal, particularly one that is likely to attract public notoriety, to ascertain that whatever brief they are being asked to put forward has a foundation in solid fact. That, in any event, is not anything new for a professional lawyer; as that exercise is necessarily conducted as a preliminary to issuing litigation. Those involved in public

representation may not necessarily have that experience of being disappointed when they discover in court how much of their client's case is without foundation. But, fundamentally, cold consideration is called for before a tribunal of inquiry is set up, as is an internal analysis within the administrative sector which appears to have given rise to the problem.

### **The parties to a tribunal must engage meaningfully**

Once, however, the preliminary phase of a tribunal's work, which may take several months, has been completed, the tribunal will outline what it then knows. This is reflected in an opening speech by counsel. Here, the potential facts were outlined in counsel's opening statement of 14 June 2017. This detailed what the tribunal was about. A further opening statement was made on 8 January 2018 by Kathleen Leader, counsel to the tribunal, as a matter of priority, on the issue of whether Sergeant Maurice McCabe had been traduced before the O'Higgins Commission. Public ferment in December 2017 had rendered it responsible that the tribunal re-order its business. By the time the tribunal came to hear these matters, the Minister for Justice and Equality had selflessly decided to resign in the national interest in November 2017.

Even still, despite counsel for the tribunal laying issues out before them, parties have a duty to put their side of the controversy to witnesses. This tenet fundamental to the conduct of any litigation accords with fundamental principles of fairness. A witness cannot be allowed to finish his or her testimony without those who have an alternative view of the facts, or of the motivation of the witness, explicitly putting questions detailing their position in express terms.

The work of a tribunal is not a wide-ranging and unfocused exercise. Parties will have points of view that they wish to air, conclusions which they feel the tribunal should pursue, and factual contradictions which run counter to particular witnesses' testimony or points of view. It is required that these be made clear.

A public inquiry is not a forum for holding cards close to the chest. Counter allegations, in particular, must be put to witnesses. This is the rule in every civil and criminal case and it cannot be shied away from. In *McNamee v Revenue Commissioners*,<sup>4</sup> the judgment of Laffoy J approves the decision of the House of Lords in *Browne v Dunn*<sup>5</sup> which is encapsulated in the following statement of Lord Halsbury:

To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity often to defend their own character, and not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.<sup>6</sup>

This was most recently affirmed by the Supreme Court in *McDonagh v Sunday Newspapers*.<sup>7</sup> That was a libel action where a newspaper had published allegations that the plaintiff was a criminal. He had been arrested for drug dealing and had apparently made certain contested statements about his conduct to the interviewing gardaí. These appeared in the newspaper article. In a defamation case, a newspaper which diminishes someone's character can plead justification: that is that the allegations published are true in substance. The newspaper sought to justify what they had

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<sup>4</sup> [2016] IESC 33

<sup>5</sup> (1893) 6 R 67

<sup>6</sup> (1893) 6 R 67 at 76-77

<sup>7</sup> [2017] IESC 46

published by reference to alleged admissions made by the plaintiff while in custody. But, while denying that he had said what was ascribed to him, the plaintiff did almost nothing to assert why he had actually said what was ascribed to him or to clarify whether he had confessed to the police by way of admissions in garda custody, or if he had made damaging concessions perhaps mistakenly or unthinkingly; perhaps due to duress or tiredness. That was what was central to the case. The fulcrum of the case by the plaintiff was turned instead into which garda officer had passed information to the newspaper, enabling their defamatory report. This was a side issue. The central issue of how the statement came to be made and was it true or had it been made due to garda error or misconduct was not put by the plaintiff's counsel to the gardaí giving evidence.

Charleton J, in the majority, affirmed the rule that parties who have an opposing set of instructions to what a witness is saying must put that case to that witness, thus:

It only needs a few sentences putting core instructions as a matter of a few questions. Were that done, the procedures would have been fair since, then, there would have been an aspect of what was wrong with the interviews according to the plaintiff and what the Garda response was. Laffoy J also approved another passage from *Browne v. Dunn*, that of Lord Herschell LC at page 71. There, he stated a rule that if you intend to impeach a witness, you are bound, whilst that testimony is live, to give that witness an opportunity of making any explanation which is open. This was characterised as not only a rule of professional practice in the conduct of the case, but as essential to fair dealing:

... but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point which is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling. Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity to give an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted.<sup>8</sup>

There was increasing adherence to this rule as the tribunal's hearings proceeded. The strongest reason to uphold the rule that opposing facts must be put to a witness is one of ethics. When a client goes to a lawyer, he or she goes with a set of facts. No lawyer is entitled to invent a better set of facts for them. To do that is to engage in a conspiracy to pervert justice. In the same way, counsel, whether of the view that a set of facts is unlikely or unhelpful, must put such facts to all relevant witnesses.

## **Finding facts**

During a court case or before a tribunal, there will be many disputed areas of fact or areas of evidence where a conflict as to what occurred exists between witnesses. Where these are of relevance, these will become obvious during hearings. Where these are central to the resolution of the public controversy with which the tribunal is tasked, identified controversies will be pursued to conclusion. The resolution of any such conflict is the task of the tribunal in deciding

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<sup>8</sup> [2017] IESC 46 at paragraph 41

what the primary facts are. The second level of fact finding which the tribunal must engage in is drawing inferences or reaching conclusions from the facts directly established by the primary evidence.

Tribunals of inquiry are not bound by the rules of evidence. In common with the Nuremberg Trials, a tribunal is entitled to “admit any evidence which it deems to have probative value.”<sup>9</sup> Hearsay evidence, the rules of which have increasingly lost their justification, is, for instance, admissible. In relation to tribunals of inquiry, the standard which has been laid down as the basis for fact is long established. For instance, in *Goodman International*, Hederman J noted that:

The Tribunal will doubtless adopt the same approach as the Tribunal of Inquiry into dealings in Great Southern Railway Stock (Prl. 6792; 1943), the members of which were Mr. Justice Overend, Judge Davitt and Judge Barra O’Brian. While it sifted through rumor and hearsay, it relied only on admissible evidence for its findings.<sup>10</sup>

McCarthy J, there, stated the following:

I do not accept that the determining of truth or falsity is, necessarily, a judicial act in the sense that it may only validly be performed by Judges. It does require the application of judicial standards, but it is an everyday occurrence that a variety of tribunals, collegiate or otherwise, have to decide disputes of fact.<sup>11</sup>

The former President of the High Court, Mr Justice Hamilton, in his conduct of the tribunal which sat to inquire into the beef processing industry, likewise defended and asserted his right to receive hearsay evidence, but also indicated repeatedly that he would only act on legally admissible evidence when he came to make his findings; see *Attorney General v Hamilton (No 2)*,<sup>12</sup> and *Goodman International v Hamilton (No 3)*.<sup>13</sup>

It is fairness to the parties that is the touchstone of a tribunal. Parties are not to be condemned without being given the opportunity to defend their conduct. It must be noted that this is an indispensable component of constitutional justice and fair procedures and was recognised as such by the Supreme Court in the case of *In re Haughey*.<sup>14</sup> These are set down as follows in that decision:

(a) that he should be furnished with a copy of the evidence which reflected on his good name; (b) that he should be allowed to cross-examine, by counsel, his accuser or accusers; (c) that he should be allowed to give rebutting evidence; and (d) that he should be permitted to address, again by counsel, the Committee in his own defence.<sup>15</sup>

Of these Ó Dálaigh CJ said:

[A] person whose conduct is impugned as part of the subject matter of the inquiry must be afforded reasonable means of defending himself. What are these means? They have

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<sup>9</sup> Glanville Williams - *The Proof of Guilt: a study of the English criminal trial* (London, 1963) 208

<sup>10</sup> [1992] 2 IR 542 at 603

<sup>11</sup> [1992] 2 IR 542 at 607

<sup>12</sup> [1993] 3 IR 227 at 289

<sup>13</sup> [1993] 3 IR 320 at 330

<sup>14</sup> [1971] 1 IR 217

<sup>15</sup> [1971] 1 IR 217 at 263

been already enumerated at (a) to (d) above. Without the two rights which the Committee's procedures have purported to exclude, no accused – I speak within the context of the terms of the inquiry – could hope to make any adequate defence of his good name. To deny such rights is, in an ancestral adage, a classic case of *clocha ceangailte agus madraí scaoilte*. Article 40, s. 3, of the Constitution is a guarantee to the citizen of basic fairness of procedures. The Constitution guarantees such fairness, and it is the duty of the Court to underline that the words of Article 40, s. 3, are not political shibboleths but provide a positive protection for the citizen and his good name.<sup>16</sup>

In the case of *Goodman International v Hamilton (No 2)*,<sup>17</sup> Geoghegan J considered how the rights of, inter alia, the applicant company were to be vindicated by the tribunal. He stated:

I turn now to an important argument made by counsel for the applicants that the right to vindication of one's good name and the right to fair procedures at a tribunal in which that good name was being questioned are separate constitutional rights and that the Tribunal must respect and vindicate both of those rights at all times. I agree with that proposition but, in my view, in the context of a tribunal hearing there is no difference in the manner in which the tribunal must discharge its constitutional obligation to respect and vindicate both of those constitutional rights. In each case the tribunal discharges its constitutional obligation by ensuring that there is a fair hearing in which, where appropriate, the protections identified by Ó Dálaigh C.J. in *In re Haughey* are afforded, and are reflected in the ultimate report of the tribunal.<sup>18</sup>

Geoghegan J further noted:

It does not seem to be suggested in the Haughey case that Chief Superintendent Fleming should not have been permitted to give evidence at all of a hearsay nature and therefore the former Chief Justice was obviously concerned to ensure in the vindication of Mr. Haughey's good name that that good name would not be destroyed except on the basis of evidence from the real accusers, duly tested by cross-examination if that was desired.

O'Dálaigh C.J., referred to:

“the well established procedure, adopted by the several tribunals of inquiry set up by Dáil Éireann to inquire into matters of public importance.”

He pointed out that in that case persons accused in connection with the subject matter of the inquiry were granted the rights of parties and were allowed to appear by counsel to cross-examine and to address the tribunal.<sup>19</sup>

The tribunal has followed these strictures. That is only appropriate.

Less time is wasted, however, where a tribunal adheres rigidly to its terms of reference: as it ought. A tribunal should ask itself: what are the questions to be resolved; what facts impact on that; what is the necessary background to such facts; is any of what happened after the central facts relevant to deciding them; to what extent does the motivation of a witness or his or her credit impact on the accuracy or truthfulness of what they are saying; and how will it help to

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<sup>16</sup> [1971] 1 IR 217 at 264

<sup>17</sup> [1992] 3 IR 307

<sup>18</sup> [1992] 3 IR 307 at 313

<sup>19</sup> [1992] 3 IR 307 at 316

pursue an issue that does not seem of immediate relevance?

A tribunal is not a general inquiry. Its task will be clear from its terms of reference. While it starts by trying to gather documents and trying to induce relevant witnesses to come forward, it should have a clear idea what it is looking for. Thereafter, focus must be maintained as there are too many temptations for any kind of hearing to lose sight of what it is about. Essentially, a tribunal is not to be led down blind alleys or to chase after attractive hares in its search for facts which do not directly impact on central issues of controversy.

While a tribunal may start, as is often said, with a blank sheet of paper, as time goes on the facts in controversy, through apparently supporting one side or the other, and the relevant documentation begin to achieve focus. It is that on which the tribunal should concentrate.

### **Matters of credibility**

It is central to the work of a tribunal to disclose relevant documents, having gathered these for the benefit of the inquiry. The documents are disclosed to the represented parties when these are identified because it is these parties who may be the subject of adverse comment in the ultimate tribunal report.

Central to any investigation is actual fact. But fact depends on who is asserting the truth of any such apparent fact. This brings into question not only their means of knowledge, but also any reason they may have to speak contrary to the truth or to conceal the full truth. Where documents impact on the credibility of key witnesses, there is a necessity for the tribunal to also distribute such documents to the impacted parties. Without these, as Ó Néill J stated in *O'Callaghan v Mahon*:<sup>20</sup>

The applicant cannot bring in to the evidence through cross-examination, any inconsistency or indeed the absence of any reference in these undisclosed statements to the allegations later made in oral evidence, for the first time, so as to enable the Tribunal to consider the impact on the credibility of a notice party of the absence from the undisclosed statements of these references. The non-disclosure of these earlier statements has the effect of excluding from the consideration of the Tribunal the impact which the material, or lack of material in these undisclosed statements should have on the credibility of the notice party.

The applicant is also deprived of the benefit of having his lawyers consider the probative value, in relation to the credibility of the notice party, of these undisclosed statements.

This is in my view a real detriment to the applicant. The fact that the Tribunal itself considers the relevance, admissibility and probative value of particular material and forms a judgment on it, for the benefit of a person affected, is an inadequate substitution for the exercise of the professional judgment by the lawyers engaged by a person affected, who had the benefit of instructions from that person and therefore is in a better position to assess both relevance and probative value from the point of view of that person.

I am satisfied that in a forensic contest, as in this module of the inquiry, where the credibility of the notice party is of crucial importance the foregoing inhibitions resulting from the ruling of the Tribunal are very real impairments of the capacity of the applicant to cross-examine the notice party and I am satisfied therefore that the applicant has

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<sup>20</sup> [2004] IEHC 134

demonstrated to my satisfaction that the ruling of the Tribunal has had the consequence that his right to cross-examine the notice party has been in the words of Hardiman J. in the case of Maguire v. Ardagh, been "Unreasonably confined or hampered...."

An instance may help: matters which show that a witness may have been fraudulent in the past should be disclosed, as should matters showing poor character such that it might be reasonable to put such matters to a witness with a view to testing the trustworthiness of a person apparently seeking to undermine the good name of a party to a tribunal.

There is a limit, however, to what needs to be done. What is irrelevant and what is far removed from the issues in the case need not be disclosed. However, if a party wants to make an inquiry with a view to introducing cross-examination as to credit, they may do so of the tribunal and then the matter will be considered on its own merits. In its opening statement of 27 February 2017, this is how the tribunal described the limits of the scrutiny a witness may be subjected to:

Any examination by counsel of what a witness says is subject to the rule that it should be based on instructions and directed towards what a represented party wishes to assert as an explanation as to what happened, or to present a contrary point of view. Where focus is kept, cross-examination of witnesses is concise. Any party examining a witness is expected to come to the point, with reasonable latitude, and to be polite, with no latitude. Examination should converge on what is important. While cross-examination is an instrument for finding the truth, it can also be used to obfuscate and to divert attention away from the central issues. It is expected that represented parties will provide their legal representative with clear instructions; that they will tell them what facts they will later testify to. Cross-examination as to credit can be legitimate. That may, or may not, be in the discretion of counsel. It may depend on the client or it may be within counsel's hands. The credit of a witness may be important, apart from their opportunity of observation, sureness of memory or possible motive. Where is a witness coming from may be germane to some cases. If, for instance, a prisoner sharing a cell with an accused person on remand on a charge of murder claims that the accused confessed his motive to him for killing the victim, then the fact that the prisoner as a witness himself has a previous fraud convictions, is important. It would be less important if he had been unfaithful to his girlfriend, or perhaps had done something discreditable while under strain or while young. The law of evidence allows the control of cross-examination as to the credit of a witness based on its usefulness to the determination of the facts at issue and its length. That is a rule of commonsense.

### **The task of finding facts**

Every judge is conscious that the task of judging others is a human function. As such, it is fallible.

A judge is not gifted with any special powers beyond those of other people. All that he or she can bring to the task of judging is a lifetime of experience in practice, a proper knowledge of the law and the humility that comes with knowing that often the judiciary is the last port of call for citizens seeking justice. Independence and integrity are assumed. Every court operates with the national symbol of the harp on the wall behind the judge. This is a statement that the law is what is being applied and that a judgment is not as to right or wrong but as to what is due under the law.

A judge will be conscious that within the community there may be a range of individual personalities, ranging from sober, truthful and objective to emotional, deceitful and close to paranoid. It is a rare person who invariably tells the truth all of the time in their business and

domestic lives.<sup>21</sup> While people coming to court swear or affirm to the truth, that does not have any inevitable impact on the reliability of testimony. People may be party to the same conversation or may witness the same event and relate very different accounts. Where an individual has an animus against another, objectivity will flee, to be replaced with prejudice even where events are seemingly plain. In work situations, it often happens that co-workers have issues with each other: as to promotion, as to who is bearing the brunt of the tasks to be done, as to management and supervision, as to competency for the rank held, as to supports for each other, and as to resources. Human emotion can also tend to undermine relations between neighbours due to people being too close, physically and emotionally.

Added to that may be the bile that undermines human relations on entirely illogical grounds. Group dynamic, the expectation of serving not the public, but the avocation or job, may render support for schemes of coordination of evidence and protection of the organisation a paramount consideration far beyond truth-telling. That is a particular consideration in disciplined groups where people identify more with members of the group than with the general public.

Courts, in short, are not strangers to lies, half-lies, concealment and pretended cooperation that conceal self-righteousness or group loyalty. Above all, in attempting to judge facts, despite the blizzard of legal rules, sometimes jumbled narratives from witnesses, and mountains of electronic and paper documentation, there is an obligation to be shrewd and to at all times keep common sense in mind.

In *Macbeth*, on hearing a report on the unexpectedly courageous death of Cawdor, a traitor, Duncan remarks: “There’s no art to find the mind’s construction in the face. He was a gentleman on whom I built an absolute trust.”<sup>22</sup> This remains the case. Not only do people act out roles deceitfully, but ascertaining where truth reposes in a witness is an uncertain task and not one easily answered by facile resort to how they look; or the demeanour of a witness, in legal-speak. There can be times, however, especially with listening to a witness over hours or days where the nature of a denial can show itself as inescapably false. This approach to evidence, and to raising an opposite inference from an obvious lie, must be sparingly used.

Rather, more certain tests for ascertaining the validity of an account include: how testimony fits in to the background against which it is given; how what a witness says corresponds with what is likely or expected, or if unexpected, the reason behind such a turn of events; whether there are indisputable or highly reliable facts on the ground, such as forensic evidence, or basic circumstances such as even something so simple as the layout of premises, and how what is said squares with those; how likely or unlikely it is that people confide in each other based on their mutual experience; whether facts are reported as such at a time that would be appropriate; how memory can be fallible; considerations of the flow of conversation and how remarks rarely appear without preparation or context; whether, in reporting something, ordinary or sober language is used, as opposed to indications of self-promotion; if detail is sparse or apparently constricted to events or conversations that are essential to a result sought, as against the normal experience of those who are genuine witnesses tending to report details beyond what is essential; whether a witness seems to be reliving an event, turning inwards for memory as opposed to stonewalling questions or blustering away from awkward issues; if there is appropriate affect at times where that may emerge, noting that people often approach a court hearing in as detached a frame of mind as can be summoned. These considerations apply to live testimony and are also useful in the analysis of documents.

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<sup>21</sup> Shakespeare - *Hamlet*, act 2 scene 2: “Ay, sir. To be honest, as this world goes, is to be one man picked out of ten thousand.”

<sup>22</sup> Act 1 scene 4

Every judge will be a student of human nature. As both Walter Scott and Robertson Davies have remarked, literature is an illumination through the maze of human behaviour.<sup>23</sup> Essential also to judicial self-education are studies of cases where the vagaries of human nature have been revealed in consequence of a major event or within a court setting.

Two might usefully be mentioned. Those old enough to remember the assassination of President John Fitzgerald Kennedy, which happened shortly after his visit to Ireland in 1963, will also recall that people in the United States of America found it hard to believe that such a gifted man could be murdered at the hand of a lone gunman who had made a success of little or nothing in his life. Harder still was the possibility that his murderer in turn could be dispatched by a nightclub owner with the stated ambition of sparing the victim's wife Jacqueline Kennedy the further ordeal of a court appearance. Conspiracy theories abounded, with plain facts being submerged in such florid events as the attempted trial of a selection of apparent mafia bosses by a district attorney who thereby garnered to himself enormous publicity. What was going on? Was this an excess of the human psyche or was it the kind of ordinary opportunism that allows people to demand attention on a false basis? No view is expressed here. It took the application of forensic detail by the great prosecutor Vincent Bugliosi for the actual facts to be elucidated in his masterly book *Reclaiming History: The Assassination of President John F Kennedy*.

Here is another instance. What might happen when a child who is refused admittance to a nursery school but is simply left on its doorstep, in defiance of the lack of a place and of parental responsibility, can be a decade-long saga of accusations of sexual abuse which ruins several lives.<sup>24</sup> At the least, the reader might be reminded that not all who profess themselves expert in a supposed skill are actually sources of sense and that false accusations can happen even in human sexual relations.

In the context of a written judgment or report, it is beyond possible to detail every fact or response from a witness that underpins any finding either against or in favour of that witness. Actually experiencing testimony from the sitting point of a judge who can hear and see not only that witness but also interactions with counsel and the reactions of others puts a judge in a unique position that is not replicated in a transcript.

This is acknowledged in the leading Supreme Court decision on the role of appellate review. In *Hay v O'Grady*,<sup>25</sup> the issue arose as to whether, in conferring appellate jurisdiction on the Supreme Court, Article 34.4.3° of the Constitution mandated or required an appeal by re-hearing to substitute facts found by the trial judge with the view of the facts to which members of the court might come on reading the transcript. In the view of the Supreme Court, it did not. McCarthy J set out three principles which were established in existing case law but which, because of the clarity of his expression, have been often repeated since. The principles are as follows:

1. An appellate court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial judge who hears the substance of the evidence but, also, observes the manner in which it is given and the demeanor of those giving it. The arid pages of the transcript seldom reflect the atmosphere of a trial.
2. If the findings of fact made by the trial judge supported by credible evidence, this Court is bound by those findings, however voluminous and, apparently, weighty the

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<sup>23</sup> Walter Scott - Guy Mannering, Robertson Davies - *The Manticore*

<sup>24</sup> Richard Beck - *We Believe the Children: A Moral Panic in the 1980s*

<sup>25</sup> [1992] IR 210

testimony against them. The truth is not the monopoly of any majority.

3. Inferences of fact are drawn in most trials; it is said that an appellate court is in as good a position as the trial judge to draw inferences of fact. (See the judgment of Holmes LJ in “Gairloch,” *The S.S., Aberdeen Glenline Steamship Co. v Macken* [1899] 2 I.R. 1, cited by O’Higgins C.J. in *The People (Director of Public Prosecutions) v. Madden* [1977] I.R. 336 at p. 339). I do not accept that this is always necessarily so. It may be that the demeanor of a witness in giving evidence will, itself, lead to an appropriate inference which an appellate court would not draw. In my judgment, an appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence or a recollection of fact and a different inference has been drawn by the trial judge. In the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge.<sup>26</sup>

Similarly, while penetrating a jury verdict is harder than the reasoned narrative of a judge, again the experience of actually being in court requires decisions to be treated with respect. In *Barrett v Independent Newspapers Ltd*,<sup>27</sup> Henchy J warned against the danger of an appellate court thinking that a jury verdict should be “condemned as perverse merely because it does not accord with that of a judge.” Such a verdict was “to be deemed perverse only when no jury of reasonable men, applying the law laid down for them by the judge and directing their minds to such facts as are reasonably open to them to find, could have reached the conclusion that the words were not defamatory”; see also the judgment of Denham J in *Cooper Flynn v RTE*,<sup>28</sup> where she emphasised that “in defamation actions ... the role of the jury is pivotal.”

### **The guarded nature of judicial pronouncements**

In writing judgments, in pursuit of the ordinary obligation of humanity, a judge rarely comes out and calls a witness a liar. Sometimes it may be necessary to state that testimony is an affront to sanity but, more usually, indications are given in terms of a particular witness being preferred to another, or of one witness having a better recollection, or of particular evidence better fitting other facts. A tribunal, tasked with reporting on matters of high public moment that ostensibly justify extraordinary public expenditure, does not have that comfort. A tribunal is required to actually state where the truth lies.

Finally, every judge is aware that leaping to conclusions is inappropriate. A decision against a person is a blow to that individual and may only be made if it is supported. Where a range of explanations as to why someone did something is available, then it is the duty of a judge to take the mildest probable elucidation that the nature of the facts allows. That process, of course, must take the entirety of all the relevant facts into account. When stating facts, facts need to be stated as facts, but when it comes to inferences from facts, then caution is required in pursuit of a measured elucidation.

### **Quotes, background, ranks and chronology**

In what follows, mistakes in grammar, punctuation and the use of capital letters and misspellings of proper names in documents quoted are neither corrected, nor are left uncorrected and followed by “(sic)”. The tribunal is not responsible for any illiteracy in quoted documents. It is the document

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<sup>26</sup> [1992] IR 210 at 217

<sup>27</sup> [1986] 1 IR 13 at 23

<sup>28</sup> [2004] 2 IR 72 at 121

itself which is important and is thus quoted as it was. This comment, made in part 1 of a 4 part report, applies to all of what follows in this volume. Effectively, there are reports 1, 2 and 3; and part 4 summarises these and adds recommendations.

Basic chronologies to this report, and to reports 2 and 3 are set out in the appendices. The chronologies are no more than a ready-reckoner on dates and events. No chronology forms part of the report. Further, it is based on the documents distributed by the tribunal prior to hearings and on tribunal hearings. The report is based on the hearings and none of the chronologies of documented events appended to the various sections of the report are more than merely indicative. These chronologies have not influenced the report.

It should also be noted that footnotes to this report reference the transcript as of the day of the hearing and not any particular section of the tribunal's work; while references to documents by page number are to those particular to this section, unless otherwise marked. As each section of the report proceeds, the references are to that particular section of the tribunal's work.

Within the gardaí, people have ranks. The rank held at the time of an event is what is given here. If the rank has changed by the time an officer gives evidence, the rank at the time of testimony is given; thus Sergeant Patrick O'Neill may become Superintendent Patrick O'Neill. Where a person has retired, they are referred to in giving evidence by the last rank which they held.

Sergeant Maurice McCabe is referred to multiple times in this report. For simplicity's sake, he is referenced by his name. He has specifically agreed to this.

Some basic background needs, first of all, to be set out. Since the terms of reference necessarily are cast in a format that challenges immediate understanding, some introductory text is appropriate. While a detailed chronology is attached to this report, a narrative may be more digestible. By way of introduction, a brief summary as to the origin of the causes for public disquiet is appropriate.

## **Social services**

Some confusion may arise over the various agencies in social services involved in the Garda Keith Harrison matter and in relation to the issues that concern Maurice McCabe.

Rian is a counselling service operating in Cavan. It operates independently under the Health Service Executive. Rian could not make reports to the gardaí when it happened that someone came in looking for assistance and alleged or disclosed that a particular person had sexually abused them. Rian, instead, was obliged to report the alleged fact of the abuse and the alleged name of the abuser to Children and Family Services, a department in the Health Service Executive. On entering counselling for the first time, it was the practice to tell people that the confidentiality of the counselling service had limits. Thus abuse could be discussed without the need for onward referral, but only if the name of the alleged abuser was not disclosed. Clients were to be told that Rian had a duty to pass on details to the Health Service Executive. In turn, the high likelihood, if the abuse had been sexual, was that the Health Service Executive would report details of the alleged abuse and the identification of the alleged abuser to the gardaí. There were standard forms in that respect.

The Child and Family Agency, also known as TUSLA, sometimes also called Tusla or Túsla, from 1 January 2014 took over the functions of the Health Service Executive in respect of child protection and family support. While the agencies were now different and TUSLA operated

independently of the Health Service Executive, there was continuity in the personnel working in this area.

### **Purpose of introductory explanation**

Having completed this introductory explanation, necessary in the context of a tribunal procedure, the tribunal will now analyse the relevant evidence and report its findings of fact.

Because of their close relationship in time, and the possible inferences that might be drawn due to coincidence with other facts, in order to give a background as to the service done to the State by Maurice McCabe, and to give an indication as to the state of the national police force, a précis will be given in this report on the issues which led to the establishment of the O’Higgins Commission. The full facts in relation to these are to be found in the final report of the commission delivered to the Minister for Justice and Equality on 25 April 2016.<sup>29</sup>

### **Garda Keith Harrison: a brief summary**

As public disquiet as to the basic narrative about Maurice McCabe unfolded, it came to a head in February 2017 following the Raidió Teilifís Éireann Prime Time programme of 9 February.<sup>30</sup> While debate among the public and by public representatives was taking place as to whether the appropriate response would be by way of commission of investigation or tribunal of inquiry, a garda who had been serving in Donegal, named Garda Keith Harrison, alleged through his solicitor that social services had been misused through manipulation by police chiefs to undermine his life and that of his domestic partner.

Garda Keith Harrison explicitly made the claim that any comparison as to how he was supposedly treated led him to the view that: “the similarities are so alike” with the Maurice McCabe controversy that “it couldn’t be coincidence and considering the geographical locations of us such treatment had to come on orders from the highest level.” In other words, Garda Keith Harrison asserted that there was abuse of power by colleagues of his in Donegal and that this was directed by Headquarters in Dublin. Furthermore, he claimed that this abuse extended to inappropriately involving TUSLA, the Child and Family Agency, the State agency tasked with child protection, which had formerly come under the remit of the Health Service Executive, in his personal and domestic relationships. The extent of this, apparently, was that he and his domestic partner met with a social worker and that this lady visited their home and spoke for about fifteen minutes with the children of the household. This was not at all serious in the context of what other people who come to court may have suffered. Nonetheless, the couple claimed this to have had profound effects upon them. Central to all of this was the regrettable necessity for the tribunal to inquire into the state of tranquillity or otherwise of that household. His domestic partner had made allegations to gardaí that he had been abusive towards her and more. Were such allegations made or were they forced out of her by improper pressure from the gardaí, and if so how did that happen? Did he make threats against her, and if so of what kind?

In addition, any issue as to these domestic circumstances needed to be seen against a background of disquiet by his domestic partner. Both Garda Keith Harrison and his domestic partner were born in the early 1980s and had met while at college. She had later married another man but their relationship revived late in 2010. He moved to Donegal in March 2011 to be near her. His transfer application did not mention her or that her brother was awaiting trial at that time for the homicide

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<sup>29</sup> Available at [www.justice.ie/en/JELR/Pages/Commission-of-Investigation-Certain-Matters-relative-to-the-Cavan-Monaghan-Division-of-the-Garda-S%C3%ADoch%C3%A1na-Final-Report](http://www.justice.ie/en/JELR/Pages/Commission-of-Investigation-Certain-Matters-relative-to-the-Cavan-Monaghan-Division-of-the-Garda-S%C3%ADoch%C3%A1na-Final-Report)

<sup>30</sup> This episode of the Prime Time programme is available at [www.rte.ie/news/player/prime-time-web/2017/0209/](http://www.rte.ie/news/player/prime-time-web/2017/0209/)

by motor vehicle of a young garda on duty. When that was discovered by those he was working with, there was disquiet. In February 2012, social services received an anonymous letter concerning the children of his domestic partner. This was discussed by social services with gardaí. Social services conducted inquiries which did not result in any further action being taken, because at that stage it was felt that there was not any cause for concern. Early in April 2013, there was a very serious row at the home of Garda Keith Harrison and his domestic partner. She later claimed that she was put out of the house by him onto the road in the countryside. Other such incidents were reported by family members to the gardaí as occurring. There were perhaps three such incidents but there may have been more. A family member complained to the gardaí in Letterkenny. A family wedding that October was the context of another row, with serious threats put into text messages by his domestic partner as having been said by Garda Keith Harrison. At this time, an anonymous caller reported, on the phone to gardaí in Letterkenny, a death threat against Garda Keith Harrison, supposedly overheard by this caller. This call was repeated over two nights in October.

On 6 October 2013, the domestic partner of Garda Keith Harrison made a formal statement of complaint to Letterkenny gardaí. While this was later withdrawn in January 2014, it was nonetheless affirmed as true in the statement of withdrawal. That statement was referred by the Garda authorities to the Garda Síochána Ombudsman Commission, though it was not acted on, ostensibly due to a lack of cooperation from the maker of the statement. The gardaí made a referral to social services on 10 October 2013, but at that stage the practice was that statements of complaint that might be the subject of a criminal prosecution were not also forwarded to the Health Service Executive, later TUSLA. Social services visited the home of Garda Keith Harrison and his domestic partner in mid-February 2014 and spoke to the young children. There were considered to be “no issues of concern noted in the observations of the children.” Garda Keith Harrison and his domestic partner claimed that the investigation by social services was due to manipulation by garda officers. Garda Keith Harrison and his domestic partner also claimed harassment due to garda attention to their home. This complaint was made notwithstanding that for security reasons, the death threats against Garda Harrison required attention to where they were living.

There has been a separate report on this matter which was published on 30 November 2017. The allegations were untrue. That happens.

### **Maurice McCabe and another garda family**

Maurice McCabe has been a member of An Garda Síochána since August 1985. He is married with five children. His service has been one of quiet application. He is a fine police officer. Superintendent Noel Cunningham, for example, spoke of him as being a first-class sergeant, a person on whom he could depend to get work done. He is also a genuinely public-spirited individual; a man of integrity. At some of the times relevant to this report, he was stationed in Bailieboro in County Cavan. In January 2000, he was promoted to sergeant and moved in consequence to Clones in County Monaghan. He returned to Bailieboro as sergeant in charge of the station in October 2004. He later moved to Mullingar in July 2008 where he has been stationed ever since.

During some of the time that Maurice McCabe was stationed in Bailieboro, his family were on friendly terms with the family of a colleague: the D family, consisting of Mr D, a serving garda, Mrs D and a small child, later a young lady, Ms D, who was born in the 1990s. That friendship was not maintained into the early 2000s. There seems to have been no particular reason for this, none certainly relevant to this report, apart from the common human experience of friends drifting apart. By 2006, however, it would be very hard to think that there were warm relations between

the families. It was quite the opposite. In January 2006, there had been an incident whereby Maurice McCabe had to report inappropriate behaviour while on duty involving Mr D and other gardaí at the scene of a suicide and immediately following on the funeral of a murder victim.<sup>31</sup>

While this friendship subsisted, there would have been family visits by the Ds to the home of Maurice McCabe. In November 2005, seven years after a visit as a young child to the McCabe house, possibly as far back as 1998, Ms D asserted to a cousin that she had remembered what was claimed to be an incident, which she much later nominated as involving Maurice McCabe, on a couch during an alleged game of hide and seek. Maurice McCabe denied that this incident ever occurred.<sup>32</sup> Lorraine McCabe later told gardaí that this claimed incident would not even have been possible, due to the age and needs of their then two small children.<sup>33</sup> The incident was claimed by Ms D to consist of Maurice McCabe gyrating against her from behind while both were fully clothed, over a very short time, others being present just outside of the room. No groping or manual interference or putting hands under clothes was ever alleged. It is common case that while making this allegation, Ms D was experiencing a very troubled adolescence.

On 4 December 2006, eight years after the alleged incident, a complaint was made to the gardaí by the D family. That happened immediately after Ms D first spoke of this allegation to them in that month. Ms D made statements to the gardaí on 5 and 21 December 2006 and, as is required, social services were informed by the gardaí. The matter was investigated by the gardaí.

Social services did not investigate the matter in terms of conducting any credibility assessment of the person alleging an assault. Instead the complaint of Ms D was taken by them at face value. She was given some counselling on the assumed basis that her complaint was true. In April 2007, the Director of Public Prosecutions directed no prosecution against Maurice McCabe on the basis that no assault or sexual assault was disclosed and that credibility issues also arose. The D family were not content with this decision. Two public attacks on the character of Maurice McCabe apparently followed in October 2007; by verbal accusations on the streets of Bailieboro by Ms D and in Bailieboro courthouse by Mrs D. These were public events, the details of one of which was later repeated to the Garda Síochána Ombudsman Commission by Ms D. The result of these attacks was to demean Maurice McCabe. Meanwhile, in social services, a decision was ultimately made that no further action was warranted and the file was closed. Ms D ceased in counselling over that matter.

## **Events unfold**

This series of events broadly coincided with complaints of gross inefficiency made by Maurice McCabe as to the conduct of several police investigations in the district in which he served. In addition, the penalty points system for disciplining and bringing order to road traffic offences disquieted him as he considered that it was being misused. This system is often referred to as the fixed charge penalty notice system, or FCPN. These complaints eventually were considered by internal garda inquiries. The results were less than completely satisfactory. The issue of loss of revenue to the State due to the cancellation of fixed charges for motoring violations, and the serious safety issues involved, also were brought to the attention of the Road Safety Authority and to the Public Accounts Committee, a very important Oireachtas body chaired by John McGuinness TD. These matters went on for several years.

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<sup>31</sup> Evidence of Inspector Noel Cunningham, transcript day 12 page 21 and tribunal documents page 15-16

<sup>32</sup> Tribunal documents from page 50

<sup>33</sup> Tribunal documents page 47-48

Eventually, on 3 February 2015, a commission of investigation was set up under Mr Justice Kevin O'Higgins, a former judge of the European General Court and of the High Court, and by report of 25 April 2016, many of the complaints of Maurice McCabe were substantially upheld, including reports as to unwarranted discrepancies in relation to multiple offences as revealed on the garda computer system, called PULSE; from police using leading systems effectively. This was but one of a series of national scandals generated by the national police force. One other, which broke during the early days of this tribunal, was that of the falsification on a vast scale of records of breath testing for drunken driving which misstated the work done by members of An Garda Síochána, claiming for the discharge of duties which never took place.<sup>34</sup> It was following on the public scrutiny into the gardaí that was initiated by Maurice McCabe that others looked closely into garda conduct. A report by Assistant Commissioner Michael O'Sullivan into this controversy published on 11 August 2017, tasked with examining the recording of breath testing at checkpoints between 7 June 2009 and 10 April 2017, found that almost 1.5 million more breath tests were recorded on PULSE than had actually been carried out at garda checkpoints over this period of time.<sup>35</sup> This matter had first gained media attention in the spring of 2017 and led to that internal garda inquiry.

The complaint by Ms D resurfaced in July 2013: a gap of another seven years. This happened at a time when internal garda inquiries into the revelations of Maurice McCabe were ongoing. Ms D returned to counselling and named Maurice McCabe as central to ongoing coping issues she was then experiencing. Some of these were specifically related to her claim about the alleged incident which she had dated as having taken place about fifteen years previously. This was then reported by the counselling service to social services. The social services body then passed it to the gardaí so that they could investigate Maurice McCabe; despite the fact that the matter had already been investigated by the police in 2006/2007. As will be recalled, a referral to social services had been made by the gardaí seven years previously when the initial complaint by Ms D had been made.

While preparing the report for social services, Ms D's counsellor made a mistake. When using a report relating to another client, Ms Y, as a template, she included the details of this client on the form for Ms D. This meant that two inconsistent names appeared on the paperwork, along with a senseless jumble of allegations. This unrelated person, Ms Y, had been subject to a rape offence, consisting of digital penetration of her anus and her vagina, by a Mr Z, who, in the way of maintaining secrecy common to child abuse, threatened her father with violence should she disclose the abuse. Mr Z was not a garda or in any way connected to the D family or to Maurice McCabe and there was not a suggestion of any kind that Ms Y had ever met either the D family or Maurice McCabe. The report to the gardaí from social services consequently named Maurice McCabe as the alleged perpetrator of this rape offence. A contemporaneous letter to the relevant superintendent from social services sought clarity as to the status of the prior investigation. This letter was never answered and was supposedly only discovered four years later.

This matter was an unbelievable coincidence. Yet, as it emerges, despite its bizarre nature, this was a genuine mistake.

In 2012 and 2013 there was an official disciplinary process against Maurice McCabe over the custody of a computer relating to an investigation into a child abuse case against a cleric, a process which terminated in August 2013 and was, according to the O'Higgins Commission, difficult to

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<sup>34</sup> An internal garda report examined this issue after it gained media attention in the spring of 2017. See Examination of the recording of Breath Tests at Mandatory Alcohol/Intoxicant Testing (M.A.T./M.I.T.) Checkpoints by Assistant Commissioner Michael O'Sullivan, 11 August 2017 to be found at [www.garda.ie/en/roads-policing/fixed-charge-notice/mat-checkpoint-examination-report-2017.pdf](http://www.garda.ie/en/roads-policing/fixed-charge-notice/mat-checkpoint-examination-report-2017.pdf)

<sup>35</sup> MAT/MIT Checkpoint Examination report page 90

comprehend. This was one of the cases in which Maurice McCabe was complaining about lack of application to ordinary work within our police force. In those years, Maurice McCabe was becoming well-known in garda circles through newspaper and other media reports. The first time he was in fact named was in *The Sunday Times*, Irish edition, in November 2010. There was considerable talk about him in media and political circles, especially from January 2014 when he became identified in the public mind as “a whistleblower”.

In early 2014, public disquiet over garda scandals resulted in several hearings before the Public Accounts Committee of the Oireachtas and at one of these in January 2014, a public televised hearing, Garda Commissioner Martin Callinan described the process of Maurice McCabe and another garda making public revelations of misconduct, instead of following accepted garda channels, as “disgusting”. Notoriety grew. Commissioner Callinan retired early in March 2014.

Citing upset over this and seeking to supposedly unmask him, through a superintendent who was a friend of her father Mr D, Ms D gave a detailed interview to Paul Williams, a distinguished journalist in March 2014. Four articles in the *Irish Independent* resulted in April and May 2014. While these were supposedly about the inefficiency of the investigation of her case, in reality any of the many people who then had some knowledge of her allegation would have recognised Maurice McCabe as the alleged perpetrator. Claiming that the investigation into her case was poor, Ms D made a complaint to the Garda Síochána Ombudsman Commission in late April 2014. She claimed incompetence in the investigation of her claim due to bias and also alleged that once she had made a complaint, the details of the claimed crime and the name of the alleged offender, Maurice McCabe, should have been put on the PULSE system. Had this been done in December 2006, the result would have been to have such information before every serving police officer in the country. At that time, the most public complaint of Maurice McCabe was in relation to fixed charge penalty notices, FCPNs, and the failure to enforce these as detailed from his analysis of the PULSE system.

The tribunal has been asked to believe that in that very month, April 2014, by sheer coincidence, social services decided to progress the referral by Rian, containing the rape offence allegation against Mr Z, ascribed by a bizarre mistake to Maurice McCabe, and to action it for garda attention. Consequently, TUSLA notified Maurice McCabe’s garda colleagues that a rape offence had been alleged against him. It never had been. But it was reported to gardaí as if it were fact. The local superintendent spoke to Mr D in relation to the supposed rape allegation made by his daughter. Mr D made a very angry phone call to Ms D. She denied ever claiming digital penetration, anal and vaginal; this was the allegation of Ms Y against Mr Z. Mr D informed the superintendent that she had never made this allegation. Even still, the allegation of a rape offence was notified in those repellent terms to Garda Headquarters and to the new Garda Commissioner Nóirín O’Sullivan by the assistant commissioner for the Northern Region. While that is astonishing enough, even more so is the fact that it was never corrected up to the start of 2017; that is three years later. In contrast, the Garda Síochána Ombudsman Commission acted correctly, investigating the claim of Ms D in an efficient and prompt manner, deciding in April 2015 that the investigation into Ms D’s complaint in 2006 was carried out properly and was unbiased.

The counselling service, Rian, sought to correct the error on the Ms D referral, mixing her allegation up with Ms Y’s complaint against Mr Z, when they realised that there was an error. The actual counsellor who made the mistake, by leaving in the allegation of digital penetration of multiple orifices made by Ms Y which resulted in two mutually inconsistent names appearing on the Ms D referral, did her very best to stop a chain of error cascading through the TUSLA system. Through no fault of her own, she failed. In 2015, the erroneous report had an afterlife within TUSLA despite these efforts, as senior staff in social services later actioned it for notification by way of letter to the alleged perpetrator, Maurice McCabe, who had never been accused by Ms D

or anyone else of this rape offence; namely Ms Y's allegation against Mr Z. TUSLA sent him a letter accusing him of this, opened by his wife in January 2016. The apparent point of this letter was to seek a meeting with Maurice McCabe in order to ascertain whether he posed a risk to children. He was never a risk to children. Intake records had previously been opened by social services on four children of the McCabe family, as if they were at risk. Such intake records should not be opened on adults, unless they are vulnerable adults. But intake records were opened on all the McCabe children even though two were known at that time to be over 18 years of age. Social services were not aware that another child had been born; hence they did not open a risk file on that youngest child.

In or around New Year's Day of 2016, the explicit allegation of digital penetration of the anus and vagina of Ms Y, mistakenly ascribed to Maurice McCabe instead of Mr Z, arrived in the form of a letter from social services to the McCabe household. Maurice McCabe had never even met Ms Y, nor had he known of her or Mr Z. The letter was opened by Mrs McCabe. It was deeply shocking.

When a justifiably angry letter of protest was sent in response by solicitors for Maurice McCabe, social services made no proper response and never wrote to the McCabe family pointing out how the error was made. That situation continued all the way up to the start of this tribunal. It was only then that the sequencing of the error was uncovered by the tribunal investigators. Local social services in Cavan/Monaghan failed in their duty to report the error to administrative headquarters in Dublin up until 24 January 2017. This was extraordinary because less significant issues continued to be notified at regular monthly meetings between local and national management.

Had an admission as to what had happened then been made by TUSLA, this tribunal might not have been necessary. TUSLA were slow to respond to the public request for cooperation by the tribunal. Statements made were laconic to the point of being mysterious. The tribunal had to seek further information and identify witnesses who might cast light on matters, who had not yet revealed themselves. These then had to be called in evidence, as from them emerged important evidence. This kind of holding back is bad enough from a private citizen, never mind a public body. In June 2017, the error involving the use of a template by Ms D's counsellor was scrutinised by the tribunal. This was later verified as having occurred by experts from Forensic Science Northern Ireland carrying out an examination of the relevant Rian computers.

### **Public concern**

It was justifiable for the people of Ireland to suspect at the time of the setting up of this tribunal in early 2017 that the ostensible capacity to destroy members of An Garda Síochána exercised by Garda Headquarters extended even to using national social services for that end.

Public disquiet was added to by the protected disclosure made in September 2016 by Superintendent David Taylor, the former garda press officer for the period 17 July 2012 to 31 May 2014; he left office officially on 10 June 2014. He quickly ensured that his supposedly confidential disclosure was made as public as possible. He met press people. He interacted with concerned public representatives. He claimed that he had been tasked by Commissioner Martin Callinan to use every opportunity possible to brief the media negatively about Maurice McCabe. He also claimed that Deputy Commissioner Nóirín O'Sullivan had, tacitly or otherwise, acceded to this strategy. The allegation to be spread, according to Superintendent David Taylor, was that Maurice McCabe was a child sex abuser, had been investigated by fellow gardaí and was thus motivated by revenge against the gardaí in making complaints about garda corruption, misconduct or malpractice.

Unfortunately, notwithstanding three interviews with tribunal investigators over the course of three days of questioning, Superintendent David Taylor did not supply definite detail as to which journalists he allegedly briefed and in what form or when. He claimed he had not read the investigation file into the Ms D matter. In a letter, he nominated nine journalists. He later added another two when confronted by tribunal investigators with two particular names that the tribunal had found through its own efforts. During hearings of the tribunal, he added another one. This was on day 94, the second last day of evidence.

Maurice McCabe and others had claimed in good faith that Superintendent David Taylor had explicitly told them that the nature of his negative briefings at the behest of Commissioner Callinan would be discovered by the interrogation of mobile phones and computer devices. The tribunal, naturally, followed that up as a serious lead. There was nothing to be found on any telecommunications record. This claim caused the expenditure of hundreds of person hours by Forensic Science Northern Ireland in the expert examination of multiple devices and electronic accounts. Superintendent David Taylor also claimed that Commissioner Nóirín O’Sullivan had set out to destroy him through trumped up charges, involving the manipulation of evidence, including through her husband, which led to his arrest. He accepted during evidence to the tribunal that the charges were validly investigated and that he had committed serious wrongs in leaking details of investigations to the media at a time when he had been removed from his post as garda press officer by Commissioner O’Sullivan. All of these allegations were then withdrawn.

When the leaked unpublished O’Higgins Commission report was discussed on Raidió Teilifís Éireann on 9 May 2016, the RTÉ crime correspondent Paul Reynolds repeated that there had been a finding of an untruth on the part of Maurice McCabe in the text of that report. That had been said in the report, but the use of the word “lie” caused disquiet. The word “irresponsible” ascribed to Paul Reynolds also caused disquiet despite it never having been used in any report.

While the O’Higgins Commission was at hearing over 34 days from 14 May 2015 to 17 December 2015, attempts were made in cross-examination by counsel for the Garda Commissioner and other senior officers to reference Maurice McCabe’s motivation for making complaints of serious corruption. There were a number of important exchanges between counsel for the Garda Commissioner and Mr Justice O’Higgins in this regard.<sup>36</sup> This related to the aftermath of the Ms D investigation, and the request by Maurice McCabe to his superior officer to have the directions of the Director of Public Prosecutions conveyed in full to himself and the D family. The questions put by counsel on behalf of the Garda Commissioner were in an attempt to test the credibility of the testimony of Maurice McCabe in his complaints against senior officers, which included corruption. Maurice McCabe apologised to one of these senior officers at the Commission hearings, and withdrew certain complaints. He also complained of gross inefficiency in the Cavan/Monaghan Division and of misuse and improper termination of investigations as evidence by the PULSE system.

### **The O’Higgins Commission issues**

As to what follows, what matters is not the detail of any crime committed and incompetently investigated by gardaí, but the fact that the person calling the police to account, thus involving a direct criticism of other serving police officers, was Maurice McCabe. This generated considerable animosity towards him. On any reasonable view and in the light of the eventual findings of the

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<sup>36</sup> O’Higgins Commission transcripts day 2, day 3, day 5, day 27, and day 29

O'Higgins Commission, in calling for proper standards of policing, Maurice McCabe was not only right but was courageously setting about serving the people of Ireland.

Animosity continued against him, however, from the time when he first made his revelations and over several years. While many individual witnesses have sworn to this tribunal that they had no problem with him, or similar expressions, this background must nonetheless be always borne in mind.

On 25 February 2007, a lady driving a late night bus for a living contacted the gardaí concerning public order and assault offences. The issues involved passengers not paying, insulting women passengers with “filthy talk and talking about their privates”, assaulting a girl in a sexual manner, assaulting another girl and creating general mayhem on the bus. Despite a garda investigation, some weeks later this lady was contacted and told that there was essentially no point in her going to court. She was later offered a meal voucher in compensation, through the gardaí, from one of those identified as being involved. Then she was asked to calculate a loss of earnings by the gardaí and was given a brown envelope containing €150 and a note of apology. She was then presented with a pre-prepared statement withdrawing her complaint. Mr Justice O'Higgins concluded that the driver of the bus was entitled, having undergone a harrowing experience, to have the matter dealt with professionally and competently by the gardaí, but that her legitimate expectations in that regard were not met.<sup>37</sup>

On 13 April 2007, there was an assault at a hotel in Virginia, County Cavan. The person assaulted possibly lost consciousness. There was a failure to access video footage and to properly investigate the incident, which would be correctly classified as an assault causing harm. Mr Justice O'Higgins found that the investigation of the incident was one characterised by delay and error, resulting in the undermining of the prosecution case.<sup>38</sup>

On 30 April 2007, a lady taxi driver took a man to an isolated location near Virginia, County Cavan. He then got out of the taxi and savagely assaulted the taxi driver, whose injuries included bruising to her left eye and puncture marks to her shoulder and, in addition, clumps of her hair had been pulled out of her scalp. The perpetrator was later arrested but denied the assault. Following an admission, the most minor charge of assault possible was proffered and the defendant was released on station bail on his own bond of €300. It was claimed that the minor assault charge had been proffered on the directions of the Director of Public Prosecutions, but this was not so. Later, that official directed that more serious charges be proffered because of the “savagery of the attack.” While on bail, the accused committed further offences, including murder. Mr Justice O'Higgins found that the investigation of the assault offence was characterised by delay and lack of effective supervision. The victim was denied the right to be present when the matter was ultimately dealt with in court. There was a lamentable failure to effectively communicate the correct information to the assault victim. While the case was ultimately correctly dealt with in court, the closest relation of the murder victim seeking information was left in the dark for an excessive period by the gardaí.<sup>39</sup>

On 5 August 2007, three men went into a restaurant in Bailieboro. One of the men emptied out the contents of a vinegar bottle into a toilet and replaced it with their own urine. Ultimately, having pleaded guilty, all three were ordered to pay compensation, which the owner of the restaurant

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<sup>37</sup> O'Higgins Commission report from page 30

<sup>38</sup> O'Higgins Commission report from page 60

<sup>39</sup> O'Higgins Commission report from page 81

asked to be forwarded to the Garda Benevolent Trust Fund. Such investigation as was carried out was extremely poor and, as Mr Justice O'Higgins found, the victim felt let down by the gardaí.<sup>40</sup>

On 2 September 2007, a teenage girl was walking home in the early hours of the morning in Cootehill, County Cavan and a man grabbed her, put his hand over her mouth and attempted to pull her towards an isolated area. It is hard to infer that his motive was anything other than sexual assault on this vulnerable girl. While the suspect was arrested, he was interviewed for only 22 minutes and released without charge. No prosecution resulted. Mr Justice O'Higgins found that the victim was not well served by this investigation's lack of an identification parade, the interview was not prepared for or conducted well, information reported by the victim's father as to sightings of the assailant was not properly passed on and the legal basis for the arrest and detention of the suspect was doubtful.<sup>41</sup>

On 27 December 2007, a car driven by an individual who, together with others, had been ejected from a hotel in Virginia, County Cavan, was driven at speed towards a crowd, hitting three people, who fortunately received only minor injuries. There was confusion and uncertainty as to who had been appointed to take charge of the investigation and the wrong officer was described in the Garda PULSE system in that regard. Mr Justice O'Higgins also characterised the investigation as flawed due to delays which resulted in the appropriate charge being statute barred by the time a garda had been directed to investigate.<sup>42</sup>

On 23 May 2007, a man was assaulted in a public house in Bailieboro, County Cavan, suffering injuries to his head and face. Ultimately, for some reason, a garda officer persuaded the victim to withdraw the complaint of assault and, again, the statement of withdrawal was pre-prepared. Mr Justice O'Higgins found that the gardaí had let down the public so that the trust of the victim and his family in the gardaí was not justified.<sup>43</sup>

On 11 September 2007, a complaint was made by a man that his son had been sexually abused by a cleric. In July 2009, the priest pleaded guilty to one count of defilement of a child under the age of 15 years, one count of defilement of a child under the age of 17 years and one count of possession of child pornography on a computer. The computer in question was apparently a parish computer and the priest's bishop sought the return of it in September 2010. It contained parish records, presumably. By then, despite the fact that it was officially a garda exhibit, it had disappeared. Mr Justice O'Higgins found that notwithstanding a seriously flawed investigation, the culprit was nonetheless convicted of serious offences.<sup>44</sup>

The person drawing the attention of the garda authorities to the flaws in these investigations was Maurice McCabe. In one instance, that of the missing computer, he was subjected to a disciplinary process, and a disciplinary process also appeared to be a possibility in relation to another of the investigations examined by the O'Higgins Commission.<sup>45</sup>

In addition to this, Maurice McCabe complained of a failure to correctly use the PULSE computer system by gardaí.<sup>46</sup> He complained of offences being detected but not prosecuted within the statutory time limit or at all; of summonses or charges not issuing despite offenders admitting their guilt; of incidents being mis-described as criminal when they were not; of the mis-description of

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<sup>40</sup> O'Higgins Commission report from page 126

<sup>41</sup> O'Higgins Commission report from page 151

<sup>42</sup> O'Higgins Commission report from page 176

<sup>43</sup> O'Higgins Commission report from page 204

<sup>44</sup> O'Higgins Commission report from page 236

<sup>45</sup> O'Higgins Commission report from page 198 in relation to the dangerous driving incident at a hotel in Virginia

<sup>46</sup> O'Higgins Commission report from page 261

individuals as suspects when there was no evidence to support that categorisation; of negative drug searches being entered on the system as if positive; of the wrongful inflation of crime figures through the manipulation of the system; of incorrect narrative entries; of incorrect updates; of corruptly updating the system in order to cover up wrongdoing; and of a failure to independently investigate his complaints. Mr Justice O’Higgins found with the vast majority of complaints and regarded them as having been borne out, at least in part. He found a clear pattern of members of the public being stopped for having no insurance or some other deficit in the documentation in relation to tax or license to drive but, despite an admission, there was a failure to prosecute in many instances. A common example occurred over the narrative update field, stating that the driver did not have insurance/tax on the day they were stopped and that such documents had been produced at a later date. In almost all of the motoring offences where there had been an update to suggest the documents had been produced, there was no corresponding entry in the relevant database.

Mr Justice O’Higgins was able to detect a clear pattern in relation to entries involving drug offences whereby in minor matters involving the possession of very small amounts of controlled drugs or where no drugs were found, the incidents were entered as a detection; and even on a negative search, the owner of the premises was referred to as a suspected offender. As to public order incidents, Mr Justice O’Higgins found a pattern showing incidents which were not the subject of prosecution being marked as detected and describing members of the public as suspected offenders. Narrative updates purported to explain the failure to prosecute as the person concerned was cautioned. Mr Justice O’Higgins found that there was a sufficient basis for concluding that there were genuine issues of concern as to other investigations evidenced in the use of the PULSE system.<sup>47</sup>

In referencing the O’Higgins Commission findings, no more than a background and update is intended. Findings of fact are, in contrast, made on the basis of testimony and relevant documents and have been uninfluenced by any such background or updated material.

### **Chronology and correspondence of issues**

While the detailed chronology drawn from documents, but not influencing this report, in Appendix 1 will assist in the examination of what follows, the foregoing narrative serves to show the coincidence of events with the central facts that are at issue in this inquiry. It is worth noting that on 20 March 2008, Maurice McCabe vacated his position as sergeant in charge of Bailieboro. On 28 April 2008, he made a complaint of bullying against a senior officer, and on 13 May 2008, Chief Superintendent Terry McGinn was appointed to investigate this complaint. In due course, on 6 November 2008, Assistant Commissioner Derek Byrne was appointed to oversee the completion of Chief Superintendent McGinn’s investigation. This, of course, predated the O’Higgins Commission. On 23 March 2009, Maurice McCabe complained to the Minister for Justice, Equality and Law Reform about remarks publicly made in the newspaper by a senior garda that any complaints about the gardaí in Bailieboro were, as the media interpreted it, “absolute rubbish”. On 25 August 2009, Maurice McCabe made a complaint of harassment or victimisation to Garda Headquarters.

Shortly afterwards, a photograph of a rodent appeared on social media, purporting to be an image of Maurice McCabe. Apparently, this could have been some kind of caricature mascot from a

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<sup>47</sup> O’Higgins Commission report page 281

public house.<sup>48</sup> Even still, it had to be hurtful. There was no prosecution because no offender could be detected.

On 11 October 2010, the limited findings of the Byrne/McGinn investigation were released to Maurice McCabe. Following a complaint by him, Deputy Commissioner Rice was appointed to review these findings, but that was only a desk exercise. Of the 42 complaints made by Maurice McCabe, the earlier analysis had upheld only eleven. The desk exercise upheld the Byrne/McGinn report on 8 March 2011, finding no fault with that investigation. Maurice McCabe had also complained of issues evidenced on PULSE and a meeting was planned for 25 March 2011 with senior officers, but Maurice McCabe did not attend. On 6 April 2011, the wife of Maurice McCabe wrote to the Minister for Justice and Equality about issues in Cavan and about how he was being treated. On 9 June 2011, there was a report by a senior officer on the PULSE issues. The O'Higgins Commission later dealt with some of the issues but not with the fixed charge penalty notices. This issue, meanwhile, continued to grow in importance.

On 12 January 2012, Maurice McCabe made a confidential communication accusing Commissioner Callinan of corruption because a particular officer from his division, whom he considered less than excellent, had been put on a promotions list. On 10 February 2012, disciplinary proceedings were commenced against Maurice McCabe in relation to the disappearance of a computer in the defilement and child pornography prosecution brought against a priest. On 4 September 2012, Maurice McCabe wrote to the Minister for Justice and Equality seeking a statutory inquiry under the garda legislation. In early December 2012, Maurice McCabe's access to the PULSE system was restricted.

On 15 May 2013, an assistant commissioner reported that there was no evidence of crime, of corruption, of deception or of falsification on the PULSE system. On 6 August 2013, disciplinary proceedings against Maurice McCabe in relation to the custody of the missing computer were terminated. Prior to Christmas 2013, Commissioner Callinan appeared on the television 'Crimecall' program, the successor to 'Garda Patrol' and 'Crime Line'. In conversation with Philip Boucher-Hayes beforehand, he was supposed to have made denigratory remarks about Maurice McCabe. On 23 January 2014, Commissioner Callinan appeared on television before the Public Accounts Committee and it was there that the "disgusting" comment was made. Other people in conversation with Commissioner Callinan claim that he said much worse things about Maurice McCabe to them during conversation.

On 24 January 2014, Commissioner Callinan met John McGuinness TD in the car park of Bewley's Hotel at Newlands Cross in Dublin. There further remarks about Maurice McCabe were supposed to have been made. On 24 March 2014, Commissioner Callinan resigned. In February 2014, a dossier of information was given by Maurice McCabe to the leader of the opposition and on 19 February 2014, the dossier was forwarded to the Taoiseach Enda Kenny. On 6 May 2014, Seán Guerin SC, having been appointed in that regard on 27 February 2014, recommended the establishment of a commission of investigation.

By 3 February 2015, the O'Higgins Commission had been established and had commenced its work. On 29 December 2015, a letter sent by social services to Maurice McCabe accused him of digital penetration offences of the vagina and anus of a young girl. Around New Year's Day 2016, that letter was opened in his household by his wife.

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<sup>48</sup> Some may feel justified in bitter revenge, as Horace states in Odes III: Poena, claudio pede, non saepe schelestum antecedentum deseruit, but this kind of thing is wrong.

## **The Maurice McCabe issues**

It seems reasonable that the correct way to approach these matters is to deal with the original complaint of Ms D in December 2006; then to consider the investigation; to then assess the conclusion to that investigation in terms of the garda work into 2007; and, from the point of view of counselling and social services, to then consider the revival of the complaint in 2013; to then detail the mistake that was made; consequently, to outline the garda response to it; to then outline the response of the HSE and TUSLA on being told that it was a mistake; and, finally, to reach a conclusion as to what happened.

This part of the narrative is expressly directed to the issue as to how a false allegation came to be made and sent to the garda authorities in 2014 and as to whether this was knowingly used by senior members of the force to discredit Maurice McCabe; paragraph (d) of the terms of reference refers. Later sections or reports will deal with the proceedings before the O'Higgins Commission and the final section will centre around the allegations of Superintendent David Taylor.

## **The complaint of Ms D in 2006**

It is not appropriate to give the date of birth of Ms D. It suffices to record that as of 2006 she was a young teenager who was experiencing a very turbulent adolescence. As of the time of making a complaint against Maurice McCabe in 2006, she had been in counselling. Her father was a serving garda and her mother was a homemaker. Her father, Mr D, is so referred so as not to disclose any identifying details including his rank. He had served with Maurice McCabe in the same station. As both men had families and were serving the same area, quite naturally they became friendly. The friendship did not last. That happens. No blame is ascribed as to that.

During the same year as Ms D made a complaint about Maurice McCabe, an incident had occurred. This was an event which Inspector Noel Cunningham, the investigating officer into Ms D's complaint, felt it appropriate to record in the file of papers sent to the Director of Public Prosecutions in 2007 when the investigation was complete.<sup>49</sup> On 8 January 2006, a young man with emotional difficulties had fatally stabbed his father. The deceased man was buried on 11 January of that year.<sup>50</sup> Because the deceased was well-liked, the funeral had a huge attendance and included Mr D and other gardaí serving in Bailieboro. It was clearly a very sad event with much emotional overlay. Afterwards, these gardaí went to a pub "and consumed alcohol."<sup>51</sup> Entirely separately, while this was happening, a young man in the locality killed himself. Word then came of this. These gardaí travelled to the scene "and on arrival were highly emotional and intoxicated."<sup>52</sup> The gardaí referred to were Mr D and two others. The sergeant in charge of the scene of the suicide was Maurice McCabe and an "embarrassing situation developed when all three had to be removed from the scene". Maurice McCabe then reported the matters.

To mark this serious departure from correct garda conduct, Mr D together with another garda were reverted by the divisional officer to regular uniform duties from their previously designated detective work.<sup>53</sup>

On 4 December 2006, Mr D made contact with Detective Sergeant James Fraher of Cavan garda station and outlined an allegation which his daughter was making against Maurice McCabe. A

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<sup>49</sup> Tribunal documents pages 15-16

<sup>50</sup> The principal evidence here is that of Superintendent Noel Cunningham, day 12 from page 21

<sup>51</sup> Tribunal documents page 15

<sup>52</sup> Tribunal documents page 15

<sup>53</sup> Tribunal documents page 16

statement was taken on 5 December 2006 from Ms D at her home by Sergeant Denise Flynn and Detective Sergeant Fraher. That statement outlined the past friendship of her parents with the McCabes and looked back to an alleged event which she said she had recently remembered from the time when she was six years of age. She placed the scene of what happened as being in the McCabe family home in the context of the two families having a get-together. This was in what was a very normal and ordinary-sized family home. A dog was mentioned. The statement describes seeing a Christmas tree and claims that there was “a game of hide and seek” with Maurice McCabe “and his two girls.”<sup>54</sup> She claimed that her mother and father were in the kitchen with Mrs McCabe while this alleged game was going on. It is appropriate to quote the statement:

I went and hid in the sitting room. What I can remember of this room was that there was a couch. It was a long seated chair. I have drawn a picture of what I remember of the room. I was the only one there. I remember hearing him coming for fear he would find me. This fear was from the game, nothing else. The next thing I remember I am bent over the arm of the couch, my feet on the ground and my face down. I remember his, Maurice McCabe’s arms around my waist tickling me. I did not see his face. He was behind me. I can remember him pressing against me. I could not get up the pressure was too strong. He was pressing himself against me. Humping. I can’t remember how long it lasted. I remember somebody running down the hall. He stopped. He said nothing to me. I can’t remember anything else about it. I knew Maurice McCabe before that as he was often in my house with daddy. I remember when we went back to the kitchen he was talking at the table. Maurice was asking what I was going to get for Christmas. He, Maurice said I should get a puppy for Christmas as I was a good girl. I did get a puppy, not at Christmas though. I can remember also a puppy at their house.<sup>55</sup>

This statement goes on to outline what Ms D says as to why she finally came to make the allegation only several years later. She claimed that she had heard about sexual activity in primary school but she said that she only realised at the very end of primary school that what had allegedly happened was wrong.<sup>56</sup> That would have been a few years prior to the first report to gardaí.

As he knew both men, Maurice McCabe and Mr D, Inspector Noel Cunningham was perturbed at being tasked by his divisional officer, Chief Superintendent Colm Rooney, with this investigation. He raised the matter with the divisional clerk, but the direction stood. In passing, it might be noted that the choice by the divisional officer of the investigating officer was not motivated in any way by any emotional drive towards any of the parties. The intention was to choose personnel who would pursue a competent investigation.<sup>57</sup>

That is exactly what happened. Inspector Noel Cunningham was noted as a highly skilled investigator. The results of his investigation support that reputation. His report to the state solicitor, for onward transmission to the Director of Public Prosecutions, evidences a most thorough and intelligent investigation.

Almost eight years later, Ms D complained to the Garda Síochána Ombudsman Commission that the investigation was biased. This added to a sense of ongoing strain on that officer.

That is wrong. There is not the slightest doubt that all of the gardaí involved pursued the task with diligence, competence, objectivity and fair-mindedness. The entire investigation file has been read

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<sup>54</sup> Tribunal documents page 36

<sup>55</sup> Tribunal documents page 36-37

<sup>56</sup> Tribunal documents page 37

<sup>57</sup> Tribunal documents page 112-113

by the tribunal.<sup>58</sup> It is a textbook example of exacting and determined police work. During the course of evidence, some criticism was offered by Ms D that Detective Sergeant Fraher had not immediately put the complaint which she had made on the garda PULSE system as a reported crime. Prior to the tribunal hearings, she had made that complaint to the Garda Síochána Ombudsman Commission. Putting details of the complaint on the garda PULSE system, of course, would have named Maurice McCabe as a suspected criminal to every garda in the country. In deciding whether to put a matter on the PULSE system, the overriding consideration was to protect a vulnerable police officer from unwarranted gossip. The decision taken by Detective Sergeant Fraher cannot be faulted.

On 6 December 2006, a notification of suspected child abuse was completed and sent by Cavan gardaí to the childcare manager at community care in Monaghan.<sup>59</sup> This then was part of the Health Service Executive.<sup>60</sup> The document is date stamped as having been received on 2 January 2007 by the Health Service Executive. Orla Curran, a senior social worker, and Emer O'Neill, a senior clinical psychologist of the Child Sexual Abuse Team, were assigned to the case by Rhona Murphy, the social worker in charge. Mr and Mrs D, on behalf of their daughter, signed a written consent form for the Health Service Executive to obtain copies of Ms D's garda statement on 4 January 2007.<sup>61</sup> The consultant paediatrician in Cavan General Hospital was written to by the Health Service Executive to obtain "an up to date medical report" of his contact with Ms D "and any concerns" that he might have.<sup>62</sup>

The background to the complaint and the possible attendant circumstances were looked into with the utmost thoroughness by the gardaí. By 14 December 2006, the gardaí had examined Ms D's social work file and had been granted permission to take extracts from relevant reports.<sup>63</sup>

Inspector Cunningham then telephoned Rhona Murphy of the Health Service Executive. She made a note of their conversation, which puts him as saying that he was approaching the matter "with an open mind and is not making judgments."<sup>64</sup> He is noted as having asked her opinion, firstly, as to whether anything had happened and, secondly, as to the behaviour of Ms D. She also wrote down that he was having difficulties "getting to the bottom of the situation as there are times it appears that Ms D was spinning different stories."<sup>65</sup> An issue has arisen as to whether Inspector Cunningham sent on the statement of Ms D to the Health Service Executive. There is no reason to doubt the records, which indicate that he did so on 24 January 2007.<sup>66</sup> This was the right thing to do in this context.

On 22 December 2006, Sergeant Ann Friel and Inspector Cunningham met Maurice McCabe in Carrickmacross for the purpose of a formal interview under caution. The meeting was in a hotel. He was not arrested or detained under the Criminal Justice Act 1984 for the purpose of interview. Again, while some criticism was tentatively offered for not arresting Maurice McCabe in the complaints from the D family side to the Garda Síochána Ombudsman Commission, nothing would have been gained thereby. The gardaí are not to be criticised for their humane approach,

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<sup>58</sup> Tribunal documents from page 4

<sup>59</sup> Tribunal documents page 207

<sup>60</sup> As of 1 January 2014, the function of the Health Service Executive dealing with children and the support of families became the responsibility of a new body, essentially with the same relevant personnel, the Child and Family Agency or TUSLA; see the Child and Family Agency Act 2013

<sup>61</sup> Tribunal documents page 213

<sup>62</sup> Tribunal documents page 231

<sup>63</sup> Tribunal documents page 5

<sup>64</sup> Tribunal documents page 189

<sup>65</sup> Tribunal documents page 189

<sup>66</sup> Tribunal documents page 235

where such an approach is consistent with a proper investigation. At a remove of eight years, Maurice McCabe had no idea what was being alleged. During the course of the interview, Maurice McCabe said: that he had no memory of the particular Christmastime alleged in Ms D's statement; that the relationship with the D family had petered out probably before this was alleged to have happened; that everyone plays hide and seek with their children; that they did have a dog at or around that time; and that the allegation against him should be specifically put to him. There was nothing to indicate that the questions put lacked insight or thoroughness but, more fundamentally, there was nothing in the circumstances known to the gardaí which would have required them as a matter of duty to arrest Maurice McCabe and subject him to an interrogation in custody over possibly 12 hours as the relevant statute provides. Any explicit or implied criticism in that regard is rejected.

Maurice McCabe said in answer to the allegation:

Horrific, horrific for me, Noel it didn't happen, it didn't happen an horrific allegation against me and it didn't happen.<sup>67</sup>

Inspector Cunningham completed his investigation and signed off on his report on 19 February 2007. In that report he details: the investigation; the allegation; the alleged game that was claimed to lead to some clothed exterior contact between Ms D and Maurice McCabe; the relevant law; his own disquiet at having been assigned the work; the personal relationship between Mr D and Maurice McCabe; and the troubled adolescence of Ms D. He concluded that:

Taking all matters into consideration including the question of whether the event, if it happened constituted a breach of the criminal law it is felt there is no ground for a criminal prosecution.<sup>68</sup>

The investigation file went from the garda authorities to the state solicitor for transmission on to the Director of Public Prosecutions.

A similar opinion to that of Inspector Cunningham was expressed by the very experienced state solicitor. He commented in a letter to the Director of Public Prosecutions of 1 March 2007 that a "number of inconsistencies arise on the file and the alleged victims credibility is strained in all of these circumstances". He expressed the view that "the allegation itself is unclear and even on the alleged victims own account amounts to horse play and no more." He pointed out that the game "allegedly took place in a house full of children with four adults present in close proximity" and gave his opinion that he did "not think any case arises for prosecution."<sup>69</sup>

There is nothing whatsoever to suggest that any of this was less than both honest and thorough. These garda and legal opinions were expressed conscientiously in the discharge of professional duties.

### **The DPP's ruling on the D complaint**

On 5 April 2007, in a letter to the state solicitor, which is the proper channel, the relevant professional officer of the Director of Public Prosecutions ruled that there should be no prosecution. She wrote:

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<sup>67</sup> Tribunal documents page 50

<sup>68</sup> Tribunal documents page 16

<sup>69</sup> Tribunal documents page 3

I agree with you and the Guards, that the evidence does not warrant a prosecution. There are no admissions. The incident as described by the injured party is vague. It appears that it was only when she was eleven/twelve that she decided that whatever occurred was sexual in nature. Even if there wasn't a doubt over her credibility, the incident that she describes does not constitute a sexual assault or indeed an assault. Further, the account given to her cousin, [name redacted], differs in a number of respects to that given to her parents and the Guards.

There is no basis for a prosecution.<sup>70</sup>

For any fair-minded individual, this was, and now remains, the definitive ruling on the matter. But the world is not universally populated by fair-minded people.

There was thereafter no basis upon which anyone could legitimately accuse Maurice McCabe of having assaulted or sexually assaulted a young girl. Thereafter, there was no basis for accosting Maurice McCabe with this allegation or seeking to demean him.

For a professional policeman or woman, the place to look would have been the garda file, should any allegation revive as to this alleged incident. For those in the criminal justice system, that would be the first place to look. It was practically the first document read by the tribunal. Should anyone hear any gossip and be in a position to call for the file, it would ease their minds that there was no basis to traduce the character of Maurice McCabe. Nor was there any hint from reading the file that the investigation by Inspector Noel Cunningham had been anything less than completely thorough and professional.

While the rule of law dictates, and while fair-mindedness commands, that people are to be presumed innocent until they are found guilty, unfortunately this fundamental structure to our constitutional system can sometimes wrongly be treated as a mere shibboleth that can be thrown around in legal argument, but ignored in practice. That was not the attitude of the investigating gardaí in Cavan. They were scrupulous in their approach to this complaint.

### **The nature and effect of a sexual abuse allegation**

In the realm of what is provable and what is to be more than doubted, professional and public opinion has shifted over many decades since the 1980s as to the veracity of complaints of sexual violence made by children. The watershed moment in that regard was the publication of the brilliant consultation paper on child sexual abuse by the Law Reform Commission in 1989.<sup>71</sup> For persons professionally concerned with this troubling area, the up-to-date research was helpfully set out by the Law Reform Commission. The tenor of the report leant towards accepting the general credibility of children. Furthermore, having removed the barriers to them giving evidence in consequence of the later report that was accepted in government as a basis for legislation,<sup>72</sup> the experience of practitioners dealing with these distressing cases has been that there is a preponderance of credibility in favour of those who make allegations that they were sexually abused in childhood. That, however, does not mean that allegations do not have to be examined in context.

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<sup>70</sup> Tribunal documents page 1

<sup>71</sup> Law Reform Commission Consultation Paper on Child Sexual Abuse <http://www.lawreform.ie/fileupload/consultation%20papers/cpChildSexAbuse.pdf> and final report of September 1990, Report on Child Sexual Abuse <http://www.lawreform.ie/fileupload/Reports/rChildSexAbuse.pdf>

<sup>72</sup> Criminal Evidence Act 1992, in particular sections 13 and 27

Not absolutely every allegation is true. There have been false allegations and it is fair to recall that one of the most notorious of these to come before the courts occurred in the context of a dispute over land which led to bad blood between two families.<sup>73</sup> An allegation was made and a person pleaded guilty but years later the young lady in question withdrew the allegation. She disclosed that it had been false and referenced the particular context of the dispute between the two families. Every family law practitioner will also have come across cases where, on a bitter separation, one parent will accuse the other of having sexually abused their children. The tribunal has no jurisdiction to comment on the D allegation and expressly makes no finding and offers no opinion.

Regrettably, perhaps, a small minority of people take an ideological position that no allegation of sexual violence is false. This position is as bad as the opposite polarity of dismissive misogyny. If someone makes an allegation that a man murdered a relation, the investigation will first of all look for a body, or at least for a disappearance that is inexplicable on the basis of the ordinary course of human life. If somebody makes an allegation of fraud, documents and bank accounts can be scrutinised in order to substantiate a supporting pattern of deceit and gain. When an allegation is made about what happened allegedly in a room in the course of a fleeting encounter some ten or more years before, if the complaint is one of inappropriate sexual touching, experience has shown that detective work will yield nothing or close to nothing. Sometimes an admission may be made in garda custody by an accused person but that cannot be expected where an allegation is groundless. Just as memories of abuse can be suppressed, to later surface when a context occurs, a different thing to so called recovered memory, people who repeat allegations over years can come to believe in their truth. Again, we are dealing with human nature.

Another factor should be born in mind. Experience over decades has demonstrated that a single allegation of child abuse is rare. Like troubles, these allegations arrive in clusters or even battalions.<sup>74</sup> The perversion is such that a single incident does not satisfy the perpetrator.

Why are false allegations of sexual violence made, as in some rare cases they are, especially as this makes convictions on those which are true so much more difficult? Why is the presumption of innocence not applied in ordinary conversation? Why do people gossip? And why do many come to the conclusion that there is no smoke without fire? Human nature has regrettable facets.

### **Conclusion on the D investigation**

The evidence before the tribunal demonstrates that the criminal justice system, the gardaí, the state solicitor and the Director of Public Prosecutions dealt fairly and appropriately with the complaint of Ms D. The complaint was a nightmare experience for Maurice McCabe. The matter was thoroughly investigated by the gardaí. No bias in favour of or against either Ms D or Maurice McCabe was present in anyone dealing with the matter.

The opinion of the professional officer of the Director of Public Prosecutions was arrived at after a proper Garda file had been sent to her and appropriate professional opinion proffered by the state solicitor. The decision of the Director of Public Prosecutions was faultless.

The shame is that this entire matter did not end there.

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<sup>73</sup> That case was referred to in newspapers as *The People (DPP) v FH*; see the Irish Times on 9, 12, 14 and 16 August 1997. There was also a disturbing rape allegation that was later admitted as false from the time when Irish soldiers were on peace-keeping duties in the divided island of Cyprus; see “Sharp division of opinion on sentence in Cyprus rape case”, Irish Times, 16 August 1997

<sup>74</sup> Shakespeare - Hamlet, act 4 scene 5 “When sorrows come, they come not single spies, but in battalions”

## The aftermath of the 2006 complaint

The complaint generated a criminal investigation. The drawing to a close of the complaint, through the ruling of the Director of Public Prosecutions, left the D family dissatisfied. From the point of view of Maurice McCabe, he had been put in the position of being accused of foul conduct. Even though matters were rightly kept by the investigating gardaí within a tight circle of knowledge, it was inevitable that stories about him would spread. Mr D took a definite view. He was certain that once Ms D had made a complaint against Maurice McCabe, details of the complaint ought to have been recorded on the PULSE system. This would have had her name and his name and the nature of the allegation. He did not understand, apparently, why Detective Sergeant Fraher had taken the decision not to upload the complaint. The tribunal has already expressed the view that Detective Sergeant Fraher acted correctly. This was Mr D's testimony to the tribunal:

*I checked, Ms. D asked me to check and I checked, and the matter, to my knowledge, to this day, it's still not on PULSE. ... If an incident is reported to the guards, you're obliged to record it on PULSE. It's a crime. You're obliged to record it on PULSE. ... I didn't really realise for some time ... that it wasn't done, and by the time I found out, things had moved on. I honestly don't know. I just know an incident normally like that would be recorded on PULSE.*<sup>75</sup>

The PULSE system is, of course, confidential to gardaí. It deals with sensitive data and is controlled by legislation. It is difficult to know how a view can be taken, notwithstanding the direction of the Director of Public Prosecutions, that the details of an allegation which was ruled upon as not constituting a crime, ought to today be recorded on the Garda PULSE system, supposing the credibility issues were overcome and it was supposed to be true. The evidence of Mr D made no sense at all.

According to an official report by Maurice McCabe dated 25 February 2008, he was in Bailieboro District Court on 15 October 2007 when Mrs D accosted him. Two days later, according to his report, Mrs D dropped off Ms D at Bailieboro garda station but he was not there, because he was on traffic or foot patrol, but when he was spotted from their car, Ms D got out and spoke to him in the street.<sup>76</sup> He did not wish for any action to be taken on this. This section of the report reads as follows:

On the 15<sup>th</sup> October 2007 I was then verbally attacked in Bailieboro District Court by Mrs D and on the 17<sup>th</sup> October 2007 Mrs D dropped off her daughter at Bailieboro Garda Station and realising I was not there she drove her around Bailieboro town until she observed me, let her out, and Ms D attacked me. ...

I am a very dedicated member of An Garda Síochána and each Officer I have worked with can vouch for this. I am married with five children and this scurrilous allegation has ruined my life forever. I am a completely changed person in that I don't trust anyone anymore. I urge you, if you can, to asked the Director of Public Prosecutions to allow the Full D.P.P Directions to be conveyed to me and the other party, in particular Mrs D, in this particular case due to the fact that all parties work in close proximity and I would really appreciate it. That is all I am asking.

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<sup>75</sup> Transcript day 10 from page 105

<sup>76</sup> Tribunal documents page 3245 and transcript day 12 page 117

I have no desire to have Ms D prosecuted for her attack on me. All I seek is fairness and the decision of the outcome of the investigation to prevent further attacks on me.<sup>77</sup>

However, Maurice McCabe in his evidence to the tribunal gave a different version of events.<sup>78</sup> In relation to 15 October 2007, Maurice McCabe said the following:

*Question: Would you just describe very briefly what happened on that day [at Bailieboro courthouse]? ...*

*Answer: So we seen [Mrs D] in court and she looked over at me and walked over to me, and Inspector Cunningham seen her and he had investigated the case and he advised us, so he said leave the court and she left the court after, I'd say, about two or three minutes.*

*Question: And was anything said by her to you?*

*Answer: No, there was nothing said.*

*Question: Was there any incident of any note?*

*Answer: No there wasn't.*

*Question: So it was her mere presence there, is it, that you felt in some way threatened by?*

*Answer: Intimidated.<sup>79</sup>*

Maurice McCabe also gave evidence in relation to the incident of 17 October 2007:

*Question: ... And then two days [following meeting Mrs D at Bailieboro District Court] there was an incident in Bailieboro Garda Station, is that right?*

*Answer: Yes, that's correct ... Well, I was walking up the town and I seen the Ds' car pulled up and Ms. D hopped out of the car and walked over to me. I didn't want a confrontation, so I walked to the station, I went inside. I learned then, earlier she had been in the station in Bailieboro.*

*Question: Was there any sense – because we have heard some evidence in relation to this - that you had been chased into the station by Ms. D?*

*Answer: No, I wouldn't --*

*Question: Mrs. D?*

*Answer: I wouldn't use the word chase, no. I wouldn't use it. I was almost at the station.*

*Question: Well, did she follow you to the station?*

*Answer: She did follow me to the station, yeah.*

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<sup>77</sup> Tribunal documents from page 3245

<sup>78</sup> Transcript day 59 from page 16

<sup>79</sup> Transcript day 59 page 17-18

**Question: Yes. And did you have to lock yourself behind a door?**

**Answer: No, I hadn't. I walked into the station.**

**Question: And how did you feel about this at the time?**

**Answer: I felt it was awful, do you know? I couldn't understand it.<sup>80</sup>**

In that letter of 25 February 2008, Maurice McCabe, having been the subject of an allegation which had been definitively ruled on by the Director of Public Prosecutions, asked that the letter containing the directions should be circulated to him and the D family. The entire matter had soured relations between Maurice McCabe and Inspector Noel Cunningham. That situation was not of the making of either of them. It certainly did not help policing in the Cavan/Monaghan area.

There was a delay in passing on the ruling of the Director of Public Prosecutions to Maurice McCabe because Inspector Cunningham was in Bailieboro and not Monaghan, where the directions had been sent. At that time, the protocol was to inform the complainant first. In the meantime, the state solicitor had already telephoned Maurice McCabe and relayed the ruling. It seems that he read out the letter and this seems to the tribunal to have been the right thing to do. This must have come as a relief; but there remained the rumours and whether anything could be done in relation to those. There was some difficulty arranging a meeting between Inspector Cunningham and Maurice McCabe in order for the directions to be relayed. This meeting eventually did happen on 8 May 2007. Superintendent Cunningham gave this evidence to the tribunal:

***I think ... when I met with Sergeant McCabe to tell him of the directions... he asked that I not meet him in the Garda station, which I agreed; he asked that I meet him in a local hotel in Bailieboro, which I agreed, and I went and met him. On arrival ... there was a second sergeant present, which I thought --- you know, this was a sensitive investigation, I didn't believe maybe Maurice wanted everybody to know about it, but there was a second sergeant present. And I asked the question, why she was present, to which the first response was that she was a member of the Association of Garda Sergeants and Inspectors and she was there to represent Maurice ... But I can't answer what happened Maurice McCabe as a result of this investigation... As I said, I still—I did the investigation, I did it fairly, professionally, and that was the GSOC's finding. But subsequently things certainly did change with Sergeant McCabe, and I think it's best illustrated in a comment of his own ... where he said that the investigation had changed him completely, that he trusted nobody, and that obviously included me.... I'm not attributing fault ... I am simply saying a change in the way the relationship, as you adverted to.<sup>81</sup>***

Inspector Cunningham then conveyed the direction of the Director of Public Prosecutions to Maurice McCabe. By this stage, as outlined previously, Maurice McCabe already knew it, but the question then arose as to what he was entitled to officially know. According to Superintendent Cunningham:

***Absolutely I didn't read it, because that was the clear directions to us at the time. There was a document came to us, Instructions for Prosecutors, came from the Director's office ... and it clearly outlined the manner by which we would convey***

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<sup>80</sup> Transcript day 59 page 18

<sup>81</sup> Transcript day 12 from page 33

*to persons the instructions or the directions of the DPP, and that was that no prosecution, and I think it was essentially that. It had—things have changed since then and there's clearly an appeal process, etcetera, but at that time ... the instructions were very clear. And I complied with the instructions ... I was only entitled to tell him what I was entitled to tell him ... I gave it to him in a professional manner, in accordance with the guidelines to me ... I told him there was no prosecution, I believe it was due to lack of evidence, I didn't actually take a note of it. It was a simple process ... to inform him that.*<sup>82</sup>

Some issues arose on that evidence. A ruling of “insufficient evidence” is not what the Director of Public Prosecutions had made. The ruling was instead that no crime was disclosed and that there were credibility issues. It is possible that in softening the news for the D family, Inspector Cunningham had used those words and then repeated them to Maurice McCabe. Inspector Cunningham knew, by the time of meeting him, the ruling that no prosecution should be taken had been made because there had been no offence. Naturally, Maurice McCabe's reputation having been besmirched, he wanted complete vindication. This the ruling represented. Rumours having spread, it was natural for him also to want what amounted to as close as possible to a vindication to be more available to the families on both sides. The probability on the evidence, however, is that Inspector Cunningham assured Maurice McCabe that he had been completely cleared.

No one has suggested that Inspector Cunningham was not adhering scrupulously to instructions in passing on only the most limited information to Ms D, through her parents, and to Maurice McCabe. Whatever the result, it would have been understandably annoying to Maurice McCabe because it would have appeared as a euphemism when he already knew that even if what he had been accused of was true, no crime had been committed by him.<sup>83</sup> Faced with a barrier between him and the ruling, he knew that the direction would not be circulated. Before the O'Higgins Commission, this matter was pursued by detailed evidence as to the attitude of Inspector Cunningham.<sup>84</sup>

The tribunal, however, can adopt no attitude on this beyond recording that the decision of the state solicitor to outline the Director of Public Prosecution's letter to Maurice McCabe was understandable and that the decision of Inspector Cunningham and other senior officers to adhere to guidelines cannot be faulted.

### **The 2006 complaint and social services**

It was on 4 December 2006 that Mr D and Mrs D met Detective Sergeant Fraher about the complaint of Ms D. Once she had given a statement, it was necessary for the purposes of the criminal investigation for Inspector Cunningham to get access to the records as to whatever counselling and interactions she had already had with social services.<sup>85</sup> In that regard, contact was made with social worker Rhona Murphy. She had already been assigned to Ms D in respect of other issues for which she was receiving counselling. Formally, the relevant notification of Ms D's allegation against Maurice McCabe was sent from the Cavan/Monaghan Garda Division to the childcare manager of community care in Monaghan by Superintendent Fergus Healy on 6 December 2006; the document being marked as having been received on 2 January 2007.<sup>86</sup> In terms of detail, the form simply states that the subject had reported “that she was the victim of an

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<sup>82</sup> Transcript day 12 from page 110

<sup>83</sup> Transcript day 13 from page 38

<sup>84</sup> O'Higgins Commission transcript day 3

<sup>85</sup> Tribunal documents page 189

<sup>86</sup> Tribunal documents page 207

inappropriate act by male family friend when on visit to house.” Detective Sergeant Fraher was named as the garda dealing with the matter and his telephone number was given.

While the guidelines have changed a number of times over the intervening decade, no one disputes that the referral by the garda authorities to the Health Service Executive was required back in 2006. The problem is that the Health Service Executive did not, then and there, do what they should have done. Basically, they should have conducted an assessment of the credibility of the Ms D allegation. Instead, they offered Ms D therapy on the assumption that everything that she had said about Maurice McCabe was fact. Nor did the Health Service Executive contact Maurice McCabe to put the allegation to him.

Rhona Murphy had already known of the allegation from Mrs D as of 8 December 2006. On 12 December 2006, the matter was discussed by a large social work team. Two of the team had already been assisting Ms D in respect of another, and entirely unrelated, matter. This was called a “strategic child protection risk management meeting.”<sup>87</sup> The action agreed by the meeting was noted as: “Rhona Murphy to refer Ms D to the [Child Sexual Abuse] Team”; the minutes were to be copied to her; and the matter was to be reviewed “at next meeting”. On the same date, Rhona Murphy met with Mr and Mrs D at their home and discussed the details of the alleged case with them. By that stage, all that Rhona Murphy knew was that the alleged perpetrator was a work colleague of Mr D, the given name of his wife and that he had four children, all still minors.<sup>88</sup> What stands out from the note of this meeting is that social services expressed a need to have “details of his family”. There was a reason for this.

### **What should have happened: what did happen**

Two matters should be noted. Firstly, a credibility assessment in relation to the complaint of Ms D was never carried out. Secondly, in terms of fair process, and in terms of assessing whether the alleged perpetrator was a risk to other children, it was necessary to interview the alleged assailant, Maurice McCabe. Neither of these was ever done. Had Maurice McCabe been then interviewed, back in 2006/2007, the confusion and unpleasantness arising from the further, and later on in time, mistakes made by the Health Service Executive from 2013 on, after it had become TUSLA, would have been avoided.

A number of meetings were arranged by the Health Service Executive. On 4 January 2007, Orla Curran, who was the acting senior social worker, and Emer O’Neill, who was the senior clinical psychologist, met with Mr and Mrs D in order to assess the need of Ms D for future treatment. According to their reports, she was noted as appearing in good form and also noted as appearing happier since she made her statement to the gardaí.<sup>89</sup> Under the heading of “Worries/anxiety/phobias” it is noted that Ms D’s parents “are anxious not to initiate conversation re allegations because they don’t wish to upset her”.<sup>90</sup>

On 24 January 2007, Ms D attended an appointment with Orla Curran and Emer O’Neill. This was a professional session designed to assist with the issues which she had in consequence of what had become, in social services’ eyes, the presumed incident of abuse.<sup>91</sup> By that stage, the Health Service Executive had not yet had sight of the detailed statements made by Ms D to the gardaí. According to the evidence of Superintendent Noel Cunningham, he believes that he sent on that

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<sup>87</sup> Tribunal documents page 182

<sup>88</sup> Tribunal documents page 184-5

<sup>89</sup> Tribunal documents from page 214

<sup>90</sup> Tribunal documents page 220

<sup>91</sup> Tribunal documents from page 233

statement as of 24 January 2007.<sup>92</sup> He does not recall giving the statement to Mrs D to bring to an appointment with Ms D on that date.<sup>93</sup> There is no reason to doubt Superintendent Cunningham: the statement was passed to social services.

### **Effective closure of the D case in 2007 by social services**

There was a further meeting with Ms D on 21 February 2007. This was again a therapeutic session at which she was offered “an intervention session treatment”.<sup>94</sup> This she declined.

On 21 March 2007, her parents attended for feedback on their daughter’s attendance at the service. They were advised that their daughter had been offered the therapeutic service but had refused. They were told, however, that while the professionals had concerns, Ms D could at any stage reengage in the event of the emergence of future difficulties.<sup>95</sup> There was a letter sent to Rhona Murphy from Orla Curran on 2 April 2007 outlining the contact with Ms D and her parents and stating that Ms D had now been discharged from the service.<sup>96</sup>

After the Director of Public Prosecutions issued a direction on the Garda file on 5 April 2007, Mrs D contacted the service on 24 April 2007 and informed Emer O’Neill that there was to be no prosecution. She asked for assistance as to how to inform her daughter.<sup>97</sup> There was a social services meeting on that date to deal with the Ms D issue. What is noted under the heading “Actions Agreed” was the following:

- Mary O’Reilly to contact Catherine Sweeney, Principal Social Worker in Meath, to ask her to nominate a member of her team to deal with Mr McCabe.
- Social Worker to offer Mr McCabe a Risk Assessment and to inform he that the HSE are aware of the allegations against him.
- Contact the Gardai re current address for Mr McCabe.<sup>98</sup>

Shockingly, none of the above happened.

It should have. Some of this might be down to interpersonal relations. The social workers were in something of a dilemma because at least some of those at the meeting had interacted with Maurice McCabe in his role as investigating officer on a number of other cases over the years.<sup>99</sup> Some also thought that he was the official garda liaison officer for child abuse cases; but that turned out to have been an honest misconception. Thus the idea was to get an outside social work department to get involved: the suggestion floated was Meath. Thereafter, according to Mary Tiernan, Mary O’Reilly had informed her that she had difficulties getting anyone in Meath to involve themselves in the case.<sup>100</sup> In the result, there was a decision made to close the case.

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<sup>92</sup> Tribunal documents page 235

<sup>93</sup> Transcript day 12 page 17

<sup>94</sup> Transcript day 8 from page 103

<sup>95</sup> Transcript day 8 page 104

<sup>96</sup> Transcript day 8 page 104

<sup>97</sup> Transcript day 8 page 104 and tribunal documents page 256

<sup>98</sup> Tribunal documents page 257

<sup>99</sup> Transcript day 1 from page 45 and tribunal documents page 260

<sup>100</sup> Transcript day 18 page 58 and tribunal documents page 2600

Despite the self-directed tasks being incomplete, on 10 October 2007, a decision was made to close the case. This was noted in a letter from Rhona Murphy to Mary O'Reilly of the same date.<sup>101</sup> In her evidence to the tribunal, Rhona Murphy said:

*I had received a letter from my colleagues on the CSA team outlining that they had discharged Ms. D from their service, and I had no further role with regard to Ms. D; therefore, the case was formally closed to the social work department in October 2007... I suppose, with respect, it's not that they're no longer interested. They had met with Ms. D as part of their assessment process and therapeutic intervention. They felt that there was nothing more they could offer Ms. D. She had stated herself that everything had settled down, she had no further issues and she no longer wanted the intervention of the CSA team. ... there was nothing further that we could offer from a child protection perspective, and her case was formally closed.... On the case review forms there is one of three options: confirmed, unconfirmed or inconclusive. The reason I ... had noted Ms. D's case to be inconclusive is that we did not have any admission from an alleged perpetrator. Ms. D had not undergone a credibility assessment with the child sexual abuse assessment team. The reason being is they did not deem it fair to carry out a credibility assessment as they were basing their interventions on the Garda statement that Ms. D had made to An Garda Síochána earlier. Therefore, my outcome of my assessment was therefore inconclusive....*<sup>102</sup>

In evidence to the tribunal, it was claimed that the reason for not carrying out any assessment as to the credibility of the allegation was that the statement had been made by Ms D to gardaí. Doing a credibility assessment, as to appropriate affect and other social work criteria, was supposed to be potentially detrimental to a young person.<sup>103</sup> It might be remembered, however, that there are other rights involved, including that of presuming people innocent of allegations that are almost impossible to deny in a credible and definitive way. In addition to that, it was then the procedure that an alleged perpetrator should be written to. As the summary above indicates, this did not happen then but occurred much later, in December 2015, that letter being opened in January 2016 to devastating effect. This occurred because of the failure to follow the established procedure in 2007. There is no excuse for this. Evidence to the contrary from the Health Service Executive is disingenuous.

As noted above, by a letter dated 29 December 2015, Maurice McCabe was written to and accused on the basis of the mix-up of allegations between that of Ms D and Ms Y; thereby accusing him of a rape offence. The following exchange occurred between the tribunal and Rhona Murphy:

*Question: All right. ... you said that you didn't think it was the practice at the time to send what is now called a Barr letter, apparently arising from a case in 1998 decided by Mr. Justice Barr in the High Court. I was wondering did I hear you correctly. Because you were in fact writing as late as October 2007 to the team leader to say, look, effectively the Barr procedure, which is meet the person, get the person's side of events ... and see is that person a risk to children. ... So it seems to have been around back then in 2006/2007.*

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<sup>101</sup> Tribunal documents page 258

<sup>102</sup> Transcript day 1 from page 46

<sup>103</sup> Transcript day 1 from page 61

***Answer: Yes. We would have based our procedures on the Barr judgment around that time with meeting with adults, with whom an allegation had been made against.***

***Question: So you would not seem to be correct in saying that that procedure didn't exist at that time?***

***Answer: Sorry, that must have been an error on my part, I don't recall stating that.... We would have had procedure in place for dealing with adults at that time. Based on the Barr judgment.... I think I actually referenced that in my letter to Ms. O'Reilly, highlighting that Mr. McCabe hadn't been ... [written to].<sup>104</sup>***

While there were excuses offered during the hearing as to the problems of dealing with teenagers and their credibility and accepting a garda complaints statement at face value, failing to follow this standard procedure makes no sense. There is no sense in claiming, as was asserted in evidence by the Health Service Executive, that where a teenager makes an allegation to the police, social services should always accept it as true. Nor can it reasonably be claimed, as was asserted before the tribunal, that because making a statement to gardaí is so difficult, that provides some verification in itself. That assertion is senseless. A false allegation can be made to the gardaí and the context of the allegation does not provide verification. While gardaí have a great deal of experience, the process of criminal investigation is one of verification; to look for assisting evidence, forensic evidence and corroborative statements. Gardai may have a shrewd idea, but generally do not pursue an in-depth interview for the purpose of assisting in discovering whether a complaint made is justifiable. Social workers do that. That should be done: and it should have been done here. It was a standard procedure but it was simply ignored. In addition to that, if this was believed to be true at the time, then what has been said about the likelihood of repetition where one child has been sexually abused would surely have been in the mind of the team dealing with this matter at the Health Service Executive in Cavan/Monaghan. Thus there was a duty to protect children by taking the matter forward. That was ignored.

There is a correct procedure. The tribunal can do no more than note that it was not followed on this occasion. As is apparent, it led to unfortunate results in 2013 and thereafter, with people in social services not knowing whether the gardaí had already dealt with the matter when it had already been investigated, and a debate about meeting with Maurice McCabe for investigation purposes because he had not been met in 2007. This resulted in the erroneous pursuit of writing the unpleasant letter received in the McCabe household in early 2016. That letter was justified by social services, wrongly, as the pursuit of some kind of unfinished business. This would much better have been sent at this time in 2007 since then it was at least proximate to and part of the allegations with which Maurice McCabe had been faced in consequence of the statements of Ms D of December 2006. Between them, the Health Service Executive and TUSLA managed to elongate this unpleasantness over a full decade.

Linda Creamer, as service director of TUSLA, gave the definitive view as to what should have happened. She said that, firstly, a credibility assessment of all complaints ought to be done by social services. This principle applies to sexual abuse and all serious physical abuse cases; there could only be a debate as to where neglect cases might fit in. Their policy had been developed over a period of time and required a consistent approach. She said:

***Well, the difficulty was at the time, and to acknowledge the front-line staff, given the demands in the services certainly they were left and they did drift and that's***

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<sup>104</sup> Transcript day 1 from page 62

*consistent across the country as we have identified recently. But in relation to how it should be done, the Barr judgment was there previously, the letter to the person of concern was there previously, it should have been done, that's not anything new. Confirm doing a credibility assessment, meeting the complainant, that's not new, that would be something that we would do all the time. And this procedure was to support ...*

*Well, if you get past the preliminary inquiry part. You know, you do a preliminary inquiry and then you'll decide at that point if you need to do an initial assessment. [You don't move on if it is determined that it is ...] unfounded or that there isn't any credibility in it. ...*

*[This should have been done] In the first instance back in 2006. ... When we're working with teenagers, we need to meet with them and see what's going on with them, and particularly young teenagers, they've a lot of challenges in life, they're going to secondary school, they've a lot of changes, they're coming to terms with their sexuality, so we would spend a lot of time getting to know them and then dig deep into their allegation then, you know.<sup>105</sup>*

Two very bad mistakes had already been made in this case as of 2007. What, however, did this situation have to do with Garda Headquarters or any individual garda? Nothing in the evidence suggests that these errors were in any way inspired by the gardaí or were in any way concerned with the personality or work in the public interest of Maurice McCabe. Furthermore, at that time, there was nothing in what he was concerned about that impacted in any way on social workers or on the Health Service Executive, or indeed on the public consciousness through the media.

What were the mistakes? Firstly, while certainly the social workers were under pressure and were dealing with very serious matters, the policy of speaking to a complainant of sexual abuse with a view to obtaining some idea as to the credibility of allegations was a long-standing one which went back way before 2006. A lot of hours were spent in meetings discussing the allegation of Ms D but some of these could have been diverted to conducting a credibility assessment of her allegation. Secondly, the relevant case law requiring that someone accused of sexual abuse of a child should be given an opportunity to state his or her side of the case goes back to 1998.<sup>106</sup> Again, this would not take long. It only requires a face-to-face interview. Admittedly, this can be difficult to arrange if someone is peripatetic or has a substance abuse problem. In this instance, that was not the case. Anyone could have met Maurice McCabe at a day or two's notice.

#### **The years between 2006 and 2014**

From the point of view of social services, anything to do with the complaint of Ms D had been, in effect, signed off as requiring no further action from November 2007.<sup>107</sup> During that year and in subsequent years, Maurice McCabe became disturbed as to the level of inefficiency and lack of application by gardaí within the district in which he served. The particular issues have been summarised above in the context of the O'Higgins Commission and essentially involve a range of investigations into offences which occurred between February and December 2007. His official complaints started in January 2008 with a meeting with Superintendent Michael Clancy to discuss issues as to poor investigations, files not being completed, lack of supervision, PULSE records failing to be created for incidents, calls not being attended to, gardaí reading newspapers and

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<sup>105</sup> Transcript day 9 from page 70 and see in particular pages 72-74

<sup>106</sup> *MQ v Gleeson* [1998] 4 IR 85

<sup>107</sup> Tribunal documents pages 258-259

watching television rather than attending to the public office, and inadequate investigation of reported incidents.<sup>108</sup> This references the majority, but not all, of the issues later considered in 2015-16 by the O'Higgins Commission.

Maurice McCabe was asked to make “a business case” by Superintendent Clancy for the circulation of the ruling of the Director of Public Prosecutions of 5 April 2007 to the D family and to him. On 25 February 2008, Maurice McCabe complained to Superintendent Clancy about the encounters he had had with the D family, Ms D and Mrs D, private matters where there were refreshments at a summer barbeque, and of the difficulty of working side-by-side with Mr D as a garda. Other matters were also mentioned but were not discussed in evidence before the tribunal. In that letter, he said:

This allegation has ruined my life forever. I am a completely changed person in that I don't trust anyone anymore.<sup>109</sup>

Superintendent Clancy turned to Superintendent Noel Cunningham as his trusted investigator and again asked him to look into this. Superintendent Cunningham, regrettably, did not know of the earlier meeting or of the requirement on Maurice McCabe to make out a case for releasing the ruling of the Director of Public Prosecutions. He had never heard about him making “a business case”. In a meeting on 25 August 2008 with Superintendent Noel Cunningham and Sergeant Yvonne Martin, Maurice McCabe discussed the D family issues and stated that the complaints to Superintendent Clancy concerning the D family had been made in order to make out a case for circulating the letter of the Director of Public Prosecutions to himself and the D family. He said this because it had been said to him. Coming out of the blue, this must have seemed more than strange.

Maurice McCabe vacated his position as sergeant in charge of Bailieboro in March 2008. He made a complaint against Superintendent Michael Clancy, essentially of inaction on his complaints, the following month and this resulted in the appointment of an investigation team under Chief Superintendent Terry McGinn. This resulted in the Byrne/McGinn report. There followed interactions with the Minister for Justice and Equality in March 2009 and a complaint of victimisation to Garda Headquarters in August 2009. The Byrne/McGinn inquiry reported in October 2010 and a review of this followed, reporting in March 2011. Further interactions have already been summarised. This account is only for the purpose of providing context.

An important escalation occurred in January 2012 when Maurice McCabe accused Commissioner Martin Callinan of “corruption” in consequence of Superintendent Michael Clancy having been put on a promotions list. The idea was, it may be supposed, that Commissioner Callinan had caused Superintendent Clancy to get on the promotions list. While no further summary is necessary, this series of issues raised by him did not go down at all well among many gardaí, either locally or nationally.

While many before this tribunal have sworn that they had no problem with Maurice McCabe, there were certainly others who very definitely did. These were not a few. Maurice McCabe's justifiable complaints about garda inefficiency were certainly playing on some people's minds. This was not necessarily positive. People naturally had opinions. No one is to be blamed for having an opinion. That is not the point. It is what is done that matters. In this context, even gossip can be harmful.

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<sup>108</sup> Tribunal documents pages 5019-5020 for term of reference (e)

<sup>109</sup> Tribunal documents page 3247

Some gardaí were in favour of standing up for high standards. Others felt that it was merely trouble that had been caused.

Two pieces of evidence are illustrative. During the course of the hearing, Michael McDowell SC on behalf of Maurice McCabe, had this exchange with Mr D:

***Question: Well, in the course of that interview [by the journalist Paul Williams with Ms D on 8 March 2014] she seems to have stated that Maurice McCabe’s allegations were tearing the Garda family in Bailieboro/Cavan apart and that he had caused decent people’s careers to be ruined. Is that something that she heard from you?***

***Answer: She may have heard me saying that there was young fellas in trouble on foot of all these allegations, but, no, careers being ruined would have been a bit strong. Now, I didn’t say that; Ms. D said it, but I’d imagine that’s—maybe Ms. D heard me say something like that, but, I mean, I can’t answer for what she said in the interview. [As to talk about Sergeant Maurice McCabe hanging around girls’ secondary schools in suspicious circumstances] No, she didn’t hear that from me.***<sup>110</sup>

Mr D was also asked about a rumour which had been repeated by Ms D that Maurice McCabe had been involved in another incident. This was also discussed within the family:

***Yeah, I told her I had heard a rumour. It was actually—I think it was working at a football match in Clones and it was a guard, who has retired since, had said to me that he had heard a whisper that some other girl had made an allegation against McCabe. Now, he never said any more. I didn’t ask him any more. He said it was a whisper, he didn’t know where he heard it. I mentioned it in passing. I never passed any more remarks on that.***<sup>111</sup>

Another bizarre rumour which surfaced in a later statement of Ms D to the Garda Síochána Ombudsman Commission was of Maurice McCabe loitering in the vicinity of a girls’ school.<sup>112</sup> Mr D denied, however, that this was discussed in the D home.

Here, a prior comment requires expansion. Experience over decades within the criminal justice system has demonstrated that the crime of sexual abuse of children is only very rarely isolated. When there is one victim, there are usually several others. When one victim has the courage to come forward, others may follow him or her. The talk in the D household unfairly and unjustifiably presumed that pattern. No one has ever come forward to claim anything against Maurice McCabe: only Ms D. Once gossip starts, however, people will talk. Like feathers blown on the wind, they can never be recovered. The currency of gossip, however, can do terrible harm. It is doubtful that if the ruling by the Director of Public Prosecutions of 5 April 2007 had been handed to the D family, or read in its entirety to Mr and Mrs D by the local state solicitor, this would have changed the later course of events.

During a later complaint to the Garda Síochána Ombudsman Commission made on 29 April 2014, Ms D said that the source of that allegation of ogling schoolgirls was her father, quoting a report from Detective Superintendent John O’Reilly.<sup>113</sup> In turn, Detective Superintendent O’Reilly told

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<sup>110</sup> Transcript day 10 from page 92

<sup>111</sup> Transcript day 10 from page 94

<sup>112</sup> Statement of Ms D to the Garda Síochána Ombudsman Commission on 3 July 2014, tribunal documents page 105

<sup>113</sup> Tribunal documents page 108

the tribunal that he was “absolutely flabbergasted” by this allegation. He said that he “neither said it nor have any knowledge about it, on a personal or any other level.” He regarded this rumour about Maurice McCabe as incredible: “as far as I’m concerned that is not true.”<sup>114</sup>

Inspector Patrick O’Connell was, during these times, divisional clerk and training sergeant for the Cavan/Monaghan Division. He was asked about morale within the division and gave refreshingly direct evidence:

*Yes, the mood would have been—and if I can go back even before that ... in 2007 and ‘8 in particular, the issues that Sergeant McCabe were raising, I would have had knowledge of those because of my direct involvement as a training sergeant, so I would have been familiar with the issues that he was raising. That certainly there was—it was hugely divisive in Bailieboro then at that time. Complaints started to be made. A blame-game essentially emanated between local management and Sergeant McCabe, in my view, and in April/May 2014 the mood was that it had escalated, and it certainly was a case that, you know, nobody knew where this was going to end, and there was probably a reluctance to get involved, certainly, you know, to approach Sergeant McCabe about anything, I would be of the view ... I guess Sergeant McCabe felt he had no option but to pursue it through those avenues because he had—there was avenues that had been tried at local level and had failed ... Like, there is no doubt, I mean, that there’s huge negativity been cast on the organisation, and there is a lot of very good work still going on behind the scenes... In terms of Maurice bringing it to that level, my own view on it was, listen, the man feels that he needs to bring – that he needs to bring it to that route, then obviously he feels that he is being forced into that route. I mean, there is a certain amount ... of information relating to this ... There would have been a lot of people who wouldn’t have been happy. And even, like, I mean, when the initial divisiveness in Bailieboro, I could sense that when I used to go [there] as a training sergeant, that there was a divide there, and obviously people wouldn’t have been happy that this was casting so much negativity on the organisation. That would be a given.<sup>115</sup>*

### **Ms D returns to counselling in 2013**

It would be wrong to ascribe in any way the series of mistakes which occurred within the Health Service Executive, and later TUSLA, between 2013 and 2016 to Ms D or to her family. Ms D had benefited, as have many, from their counselling service in the past. She felt the need to return in July 2013 in consequence of the stresses of life. At Rian in Cavan, there was a backlog on appointments. By this stage she had grown up and had gone to college in another part of the country. Eventually, she was offered some counselling sessions there.

On 24 July 2013, Ms D was initially assessed in Cavan by Laura Brophy, a counsellor who worked for Rian, an organisation under the remit of the Health Service Executive. On 7 August 2013, there was a second appointment.

As between Laura Brophy and Ms D, an issue has arisen as to whether a warning was passed relating to the limits of confidentiality between them. The tribunal is satisfied that Laura Brophy told Ms D that if she were to disclose a named person as someone who she complained had

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<sup>114</sup> Transcript day 11 page 121

<sup>115</sup> Transcript day 15 from page 101

sexually assaulted her, then a report would have to be made to social services who could then pass the matter on to the gardaí.<sup>116</sup>

Further, the relevant form signed by Ms D as of that first session states that where “a client discloses identifiable information about current or past child abuse”, the National Counselling Service “is required to pass on any details it receives to Children and Family Social Work Services.”<sup>117</sup> Ms D thus unambiguously understood that in later mentioning Maurice McCabe’s name in this context, there would be consequences. Laura Brophy’s notes of the sessions, with necessary redactions, read as follows:

The abuse occurred on a single occasion at the home where the alleged perpetrator was living at this time. Ms D was approximately six or seven years old at the time of the alleged incident. The alleged is a former colleague of Ms D’s father and she and her parents were visiting his family. Ms D was playing ‘Hide & Seek’ with the alleged and his two daughters at the time of the incident. The incident involved the alleged molesting Ms D and “dry humping” her, in which she explained he had her pressed against a surface and was rubbing himself up against her. Ms D didn’t recall the incident of abuse until she was approximately twelve years of age and she remembers “getting really uncomfortable” in primary school. ... This man formerly worked in Bailieborough Garda Station but moved to another location in Cavan when the allegations against him came out. ... Ms D informed me that at the time of the alleged abuse Mr. McCabe had two daughters then aged 3 years and 5 years. ... Ms D recalls that when she remembered the abuse she thought nobody would believe her because the alleged was a Garda - however she was relieved when she was believed. Ms D reported the incident when she was 12 or 13 years of age. ... Ms D reports that she felt angry at the time because she wanted to know “why he did what he did”.<sup>118</sup>

As a matter of fact, Maurice McCabe had not in any way been forced out of his role in Bailieboro in consequence of any allegations. It is yet another unpleasant myth. Why Ms D had thought that is unknown. What the origin of this kind of unpleasant gossip might have been is unknown.

The evidence of Laura Brophy was that she had been told by Ms D that there was some garda involvement back in 2006/7 but that the case had been closed. Ms D was unsure as to whether social work teams were involved at that time. Laura Brophy told Ms D that she would need to check the matter. In consequence, she spoke to Briege Tinnelly in August 2013 as to whether she needed to send on a report or whether this would be duplication if social workers had previously been involved in the matter.<sup>119</sup> No record, however, was found after a gap of six years and this ultimately resulted in a report being made by social services to the gardaí regarding precisely the same alleged incident which had been investigated and ruled on by the Director of Public Prosecutions as not having involved a criminal offence. As will be recalled, in 2006, the complaint of Ms D went directly to the gardaí and the gardaí referred it pretty much immediately to social services. Briege Tinnelly told the tribunal that she had checked to see if there was a file on Maurice McCabe: but she had found none. On this basis, she assumed that the Health Service Executive had not previously been involved and advised Laura Brophy to send in a written referral to the Health Service Executive for onward transmission to the gardaí.<sup>120</sup>

Yet another serious mistake had been made by social services to the detriment of Maurice McCabe.

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<sup>116</sup> Transcript day 1 pages 125-126

<sup>117</sup> Tribunal documents page 280

<sup>118</sup> Tribunal documents from page 337

<sup>119</sup> Transcript day 1 from page 134

<sup>120</sup> Transcript day 8 from page 160

## Articles by Paul Williams in 2014

While some controversy has arisen as to when Maurice McCabe was first named in the media as being the sergeant who was concerned with PULSE issues relating to fixed charge penalty notices, and with inefficiencies and lack of follow-up by senior officers, it is clear that as and from the time he first complained about these matters, which dates back to January 2008, members of the gardaí and their families would certainly have been increasingly aware of him. His first being mentioned in a newspaper in November 2010 has already been noted. Thus, while Ms D may be incorrect as to his name appearing in this specific context in the media as of August and September 2013, she would certainly have known that he was the person being referred to in the context of complaints locally of garda incompetence. As of February 2014, a number of people from the media had called to her house in Cavan. These were the journalists Debbie McCann, from the Irish Mail on Sunday, and Eavan Murray of The Irish Sun. How did they know to speculate as to what was going on and, more specifically, how were they to get a lead to this address? That will be commented on in the third report in this volume, dealing with the allegations of Superintendent David Taylor.

Ms D, for reasons which she explained to the tribunal, personally wanted what she saw as a different side to Maurice McCabe to become known. This motivation, she said, had not come from Mr D, her father, though she claimed that he had identified an outlet through which she could air her grievances:

*It's not that he came up with the suggestion. I had explained to my father I would imagine from roughly December time [2013], I think it could have been earlier perhaps, maybe October/November, I was sitting in a lecture having returned to college, and I had to get up and walk out of a college lecture because they were discussing Maurice McCabe, and what an honourable man that he was. So I had to get up and walk out and leave that lecture, having only returned to college in 2013. Now, I was furious. I have a personal grievance against Maurice McCabe for what occurred, that is my own grievance. I was fed up of listening to him being portrayed as a saint and an honourable man and I wanted to vent, I wanted someone to listen to me. My father advised me to be careful of reporters because, no disrespect, I know they have their own agendas and things can be twisted. As I said to you, when he suggested Paul Williams, as I have already explained, I knew of Paul Williams, I felt he was a credible reporter, I was happy to speak with him.<sup>121</sup>*

How had this come about? From social and work arrangements, Detective Superintendent John O'Reilly had known the D family for decades. On an intermittent but friendly basis, he kept in touch with Mr D. He had known about the allegation of Ms D. Sometime in early 2014, they met in a social way, probably in a paid-hospitality setting rather than at the D family home. This is his account of the meeting:

*There was just general chat. And at that time there was quite a lot of newspaper articles around Sergeant McCabe, and in the course of conversation I asked Mr. D how Ms. D was, and he described how she was not in good shape, and then he went on to outline that a number of journalists had called to their home, I don't know who they were, Chairman, he never said, I didn't ask, and we had a conversation around that. He then asked me did I know Paul Williams—no, sorry, Chairman, he said that Ms. D wanted to give her account but she didn't want to go public. And I—it was kind of—it was a bit of contradictory statement of sorts, I*

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<sup>121</sup> Transcript day 10 from page 26

*thought, but he said that they were talking about Paul Williams, and then he said to me, do you know him? And I said, I do. He said, what do you think of him? I said, any dealings that I had with him, I found him okay. He then asked me did I have a contact number for him. I checked the phone and obviously I did. He says, can I take it from you? And I gave him the number. And what he said to me at that point was that he was going to talk to—again to Ms. D to see if she wanted to talk to him, and that, if she did, would I make contact with Mr. Williams to see would he take a call from either Mr. D or Ms. D. I didn't know who was going to make the phone call. I can't remember if it was that evening, the next day or two days later, I don't remember but I did get a call from Mr. D asking me to ring Paul Williams to see would he take a phone call from him, which I did. ... Obviously he knew who I was from our previous engagements. I explained to him that a friend of mine, and I identified Mr. D by name, that he had asked me to make contact with him to see could he talk to him. As far as I can recall, Mr. Williams may have said to me, well who is he? And then my reply, I think, Chairman, and again I can't be certain, it's over three years ago and I'd completely forgotten about it until very recently, I would have imagined—I imagine I would have said, he is the father of Ms. D, who made the allegations against Sergeant McCabe. Now I had little or no knowledge around the allegations and I certainly didn't elaborate any further because I wouldn't have had much knowledge. He said, fair enough, tell him to ring me. And that was it.<sup>122</sup>*

Detective Superintendent O'Reilly's other involvement, apart from effecting this very unwise introduction, was to take a telephone call some days later from Paul Williams who was searching for the D house and needed some directions. He had known him through work. In consequence of exposing criminal activity publicly, Paul Williams had spent a considerable time under police protection. Thereafter, some articles appeared in the Irish Independent newspaper. Detective Superintendent O'Reilly said he had no recollection of ever reading them.<sup>123</sup>

Mr D also gave evidence about this encounter and he said:

*In late 2013/early 2014, Maurice McCabe would have become very prominent in the media. It was -- it was basically wall-to-wall coverage, and I think maybe late January/early February, the first contact, from recollection, is that Mrs. D told me that a journalist had called to our house out of the blue, Debbie McCann, and asked if we would be willing to speak to her, and Mrs. D. now said she politely declined. That was the first. I know Eavan Murray contacted us ... [Another person] sent me a message on Facebook, but we didn't discuss the case. At the time, Ms. D had become very angry, very upset. She felt Maurice McCabe was being held up as a hero, a national hero. She was extremely annoyed. She said to me, she said she'd love to speak to somebody and get her side—get the side of—that there was another side to this man, that he wasn't this national asset that everybody seemed to think so in the media. ...*

*I had met with John O'Reilly, which would have been not an unusual occurrence; we meet fairly regularly. There is a day or two between us, our birthdays, and we meet up every year for a couple of drinks and a catch-up. I would often call to his house if I was passing and he'd call to my house if he was passing. I can't remember was it exactly in the house or out perhaps having a pint with him during this time,*

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<sup>122</sup> Transcript day 11 from page 117

<sup>123</sup> Transcript day 11 from page 119

*and I remember him saying to me, how is Ms. D coping with all this media hype at the moment? And I said, John, not very well, she is in bits, basically, she is very angry, she is very annoyed, she is frustrated, she just feels her—that the side to Maurice McCabe that she is aware of, has been just brushed under the carpet and nobody—that her voice is lost and that she would love to have spoken to somebody. And I did tell him that journalists had contacted us and contacted Ms. D but that I was counselling her to be very wary about speaking to journalists about it, I said maybe that wasn't the best thing to do, just to be very wary. ...*

*There was no campaign [against Maurice McCabe]. All I wanted, my only concern was, and still is, for my daughter. She was extremely, extremely upset and distraught and angry at that time ... I told him she wasn't very good, that we had been approached by journalists but I was very reluctant for her to speak in public about it because I was just wary, and John O'Reilly said to me would she speak to someone maybe like Paul Williams, who—would she be aware of his standing in the public eye, shall we say; he was well-known. I says, I don't know, John, I said, but I will certainly ask her if she wants to, and I said maybe you'd contact Williams and see would he be willing to meet with her. So I undertook to talk to my daughter, John undertook to speak to Paul Williams. And when I asked Ms. D, she said, yeah, she would like to speak to him, he was a journalist that—she was aware of his work, she knew who he was and that she would like to speak with him.<sup>124</sup>*

The tribunal does not accept that any idea about talking to the media or any idea as to a suitable person within the media came from anyone other than Mr D. This was, however, put on the agenda by the calls by journalists that had already been made to the D household. While Eavan Murray claims that she had not called to the D household by this time, the tribunal regards that evidence as in error.<sup>125</sup>

As regards, however, the involvement of Detective Superintendent O'Reilly, as he later said in evidence, it was unwise of him to have set up this encounter between a crime journalist and Ms D.<sup>126</sup> The tribunal would have to go further. It did no service to anyone. It caused further and completely unjustified pain to Maurice McCabe and to his family. The right advice from Detective Superintendent O'Reilly would have been to leave matters that belong in the past to the past; that is even supposing that some event had occurred. It should be remembered that he was a policeman. Why did Detective Superintendent O'Reilly not support the integrity and thoroughness of his honest police inquiries? Why did he imagine that there could be anything wrong with the investigation? Given that a thorough investigation had been undertaken, and that over fifteen years had passed since the time of the alleged event, nothing positive could have come out of this.

Nothing positive did come of it. Paul Williams was contacted by Detective Superintendent O'Reilly and, as journalism was his vocation, he made contact with Mr D and arranged for an appointment to speak to Ms D. They met on 8 March 2014. He had taken the trouble to engage a videographer in case any controversy should arise in relation to the interview and was accompanied by a female videographer to the D family home. Initially, his plan seems to have been to consider possibly publishing an exposé on Maurice McCabe, if that were capable of being defended, but on speaking to Ms D, it was not pursued. Paul Williams had arranged with his editor on the Irish Independent

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<sup>124</sup> Transcript day 10 from page 62

<sup>125</sup> Transcript day 89 from page 135

<sup>126</sup> Transcript day 11 page 131-132

to pursue the story. He was asked as to whether he had told the editorial team of the purposes for which she was doing the interview. He said:

*Yes, I would, I would have said all that I knew. I didn't know anything about—I didn't know the text of or the substance of Ms. D's allegations until I went down on the Saturday, because I didn't really go into them with the parents.... So I said it was to do with this lady who had made an allegation against Maurice McCabe and she wanted to speak to me.... There were vague rumours going around that—various rumours that Maurice McCabe, the reason he was involved in the dispute with the Gardaí and exposing the penalty points and other issues was that, and malpractice issues, was because of a grievance that began several years beforehand during an investigation, there was -- they were very vague rumours. [These were not as to any allegation of digital penetration]. The allegation Ms. D made was as in accordance with the allegations we have heard coming from this tribunal [and I first learnt of the completely false allegation of digital penetration] This year. ... When it was reported in the media ... it was February anyway, and I read about it [and I had not heard about it before 2017]. ... No, absolutely not.<sup>127</sup>*

The tribunal accepts that evidence. What was spoken about with Ms D was her original allegation and in terms that seem to have been similar to what she had repeated to Laura Brophy in her first meeting with her in July 2013. It will be recalled that Ms D made her original allegation in December 2006, as a teenager, of what she claimed was an encounter on a couch with Maurice McCabe when she was six or seven years of age in perhaps 1998, and that allegation was investigated by Inspector Noel Cunningham in late 2006/early 2007. It will also be recalled that the allegations of poor policing and investigations into crimes committed in or around Bailieboro generally concerned the year of 2007, and that Maurice McCabe's first complaint in relation to malpractice that generated the first tranche of serious controversy was in January 2008.

Within the Irish Independent, the editorial team decided that the right way to present these articles was that yet another person, not named as Ms D, not naming Maurice McCabe as an alleged assailant, had an issue as to the competence of the investigation by the gardaí of her allegation of child sex abuse. In consequence, on 12 April 2014 an article by Paul Williams appeared in the Irish Independent under a headline which is largely self-explanatory: "Girl wants new probe into alleged sex assault by Garda".

The substance of this article was Ms D and her dissatisfaction with the investigation in 2007. Maurice McCabe was not asked for his side of this. Superintendent Noel Cunningham was not asked his side of this. Perhaps he would not have been able to answer, but perhaps some kind of a response might have been constructed with the press office in Garda Headquarters. Normal journalism contemplates reporting a story, not just one side of it. Both should have been asked because, given the widespread nature of the rumours, it was clear to people who knew about the allegation that it referred to Maurice McCabe and alleged a poor investigation. Certainly, almost everyone who actually read these articles, whether in journalism or police work, put two and two together. There would also have been a not insignificant number of them in Garda Headquarters, to which the criminal investigation had to be referred in 2007 and which resided on his personnel file, and in the Cavan/Monaghan Division.

On 15 April 2014, another article appeared in the Irish Independent; and again the headline was largely self-explanatory: "Alleged Garda sex victim wants to meet Martin", a reference to the leader of the opposition. Thereafter an arrangement was made that Ms D should meet Micheál Martin

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<sup>127</sup> Transcript day 11 from page 13

TD, leader of the Fianna Fáil political party. Paul Williams facilitated this, something he had done, he said, for other people in similar circumstances. So, he met Ms D at the station and drove her to Dáil Éireann, where the meeting took place on 30 April 2014. This had been preceded by an article of 16 April 2014 in the Irish Independent with the largely self-explanatory title: “FF leader to meet woman at centre of claims she was abused by Garda”.

After Ms D’s meeting with Micheál Martin TD, another article was published in the Irish Independent on 3 May 2014 under the by-line of Paul Williams. This stated that An Taoiseach was supposed to be setting up a “probe into Garda sex abuse claims” into allegations that “a young woman was sexually abused by a serving Garda”. Paul Williams told the tribunal that by this stage he had received confirmation from Micheál Martin’s office that a letter in relation to his meeting with Ms D had been passed on to the office of An Taoiseach. While it had been, this did not mean that An Taoiseach was proposing to do anything about it and so the article could, be described as speculative.

But, paper does not refuse ink. As a matter of good journalistic practice, Maurice McCabe should have been asked for his side of this set of articles before they were published and a query should have been forwarded to the investigation team. They would have constituted unwelcome attention in the shape of a clear identification of Maurice McCabe by those who were aware of the Ms D matter and the return of an allegation long since dealt with.

### **Paul Williams and Superintendent David Taylor**

Paul Williams did, however, contact Superintendent David Taylor as head of the Garda Press Office. According to Paul Williams, the first set of his questions to Superintendent David Taylor were: whether an investigation into Ms D’s allegation had taken place; who had been involved in the investigation; what decision had been made by the Director of Public Prosecutions; had Inspector Noel Cunningham been involved because Ms D had complained to Paul Williams about his involvement; had Maurice McCabe been arrested; and, finally, whether the allegation had been put on the PULSE system.<sup>128</sup> He said that Superintendent David Taylor telephoned him back and confirmed “that the investigation had taken place, a file has been sent to the DPP and there were no charges.”<sup>129</sup> There followed a cross-examination by John Ferry BL for Superintendent Taylor of Paul Williams:

***Mr Ferry: Mr. Williams, I put it to you that Superintendent Taylor instructs us that there was only the one phone call, which occurred on the Saturday that you were at Ms. D’s house?***

***Answer: That’s not true.***

***Question: And he also instructs that you telephoned him and told him that you were at Ms. D’s house and had interviewed her, that Maurice McCabe had destroyed this person and that you were going to write an article that was going to be very damaging to Maurice McCabe?***

***Answer: That’s completely untrue.***

***Question: It’s also Superintendent Taylor’s instructions that –***

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<sup>128</sup> Transcript day 11 from page 17

<sup>129</sup> Transcript day 11 page 18

*Chairman: Well, can I just stop you, I'm sorry, Mr. Ferry, but was there any discussion at all about Sergeant McCabe destroying anybody's life?*

*Answer: No.*

*Chairman: Or anything like that—*

*Answer: No.*

*Chairman: --that you can remember?*

*Answer: No, no, there was not, Chairman.*

*Chairman: Or anything similar to that, or in that ballpark?*

*Answer: No.*

*Mr Ferry: And he also instructs us that the nature of the call was that you were informing him of what had just happened and that you did not ask Superintendent Taylor to confirm anything specific or confirm or deny any facts in that call.*

*Answer: That's totally untrue.*

*Question: And basically that the nature of the call was, you were telling him what you had just done, in that you had interviewed her, and what you were going to do, that you were going to write an article?*

*Answer: Untrue.*

*Chairman: So the instructions are, Superintendent Taylor didn't say anything to him?*

*Mr Ferry: Well, that Superintendent Taylor will say that he took note of what you had told him and that he passed on to his superior, who was then -- Commissioner Martin Callinan, and also Deputy Commissioner O'Sullivan, by way of text message.*

*Chairman: But as for any reference to whether there was an investigation involving Sergeant Maurice McCabe, whether there had been a file sent to the DPP, what the DPP had said, which is now said to be no prosecution for insufficient evidence, was any of that said? What are your instructions on that?*

*Mr Ferry: No. Our instructions are simply that Mr. Williams notified Superintendent Taylor that he had been at the house, that he had interviewed her and that -- in relation to Maurice McCabe and that he would be writing an article that would be damaging to Maurice McCabe.*

*Chairman: And was there any instructions from Superintendent Taylor as to what the point of such a phone call might be, if it's merely Mr. Williams telling Superintendent Taylor information as opposed to the Garda Press Office giving information or confirming information?*

*Mr Ferry: The instructions are that he was providing information and that information was relayed on to a superior.*

**Chairman:** *Thank you for that clarification, Mr Ferry. Do you want to say anything about that, that you were simply ringing up to tell him you were out to destroy Maurice McCabe, or words to that effect?*

**Answer:** *Number one, I didn't ring him on the day he says I rang him. I had regular conversations with him after that when I started making inquiries. He suggests there that I rang him up and made a declaration or a statement to him that Maurice McCabe allegedly destroyed somebody's life. I don't see any logic in saying that to anybody, especially a press officer. I rang him to clarify details with him, and that's it.*

**Chairman:** *So it's fair that we have the case put, unless you want to ask any other questions, Mr. Ferry?*

**Mr Ferry:** *The only other matter is that he instructs that he didn't receive any further telephone call prior to the publication of the article on, I think, 2<sup>nd</sup> April or 3<sup>rd</sup> April ... Superintendent Taylor instructs that he didn't receive any further telephone call from you, Mr. Williams, prior to the publication of the article in early April, 2<sup>nd</sup> or 3<sup>rd</sup> April?*

**Answer:** *He got no more phone calls from me in relation to this matter until the 12<sup>th</sup>*  
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**Question:** *In relation to this matter?*

**Answer:** *Up to 12<sup>th</sup> April?*

**Question:** *I think it was 2<sup>nd</sup> or 3<sup>rd</sup> April was the article.*

**Answer:** *That is untrue, Chairman.*<sup>130</sup>

Superintendent David Taylor has denied this conversation occurring in the manner described by Paul Williams.<sup>131</sup> The tribunal does not believe him. The pattern of contacts as revealed by telephone records indicates that while Superintendent Taylor claims that Paul Williams actually rang him from the D household, or shortly afterwards, saying "guess where I am", this did not happen. There is no evidence of a telephone contact on 8 March 2014. There was a phone call on 10 March 2014.<sup>132</sup> This coincides with the evidence of Paul Williams that he called Superintendent David Taylor some days after being in Ms D's house on the Saturday, 8 March 2014. That would have been done to check facts, as Paul Williams said. It contradicts the frankly silly evidence of Superintendent Taylor. There would not be the slightest reason for Paul Williams to curry some kind of favour with the Garda Press Office by gleefully announcing the news that bad news was imminent for Maurice McCabe. That does not fit with the evidence, or with the character, of Paul Williams.

While it is astonishing that Superintendent Taylor denies Paul William's version of this conversation, a similar query was made of him by the journalist Cathal Mc Mahon and answered in the same way.<sup>133</sup> On day 94 of the tribunal hearings, Cathal McMahan admitted that conversation. Superintendent Taylor also suggested to Cathal McMahan that he take a trip "to Cavan" in order to learn more about the Ms D allegation. That is what Cathal McMahan says and

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<sup>130</sup> Transcript day 11 from page 103

<sup>131</sup> Transcript day 74 from page 88

<sup>132</sup> Transcript day 91 from page 66, tribunal documents page 7421 for term of reference (a)

<sup>133</sup> Transcript day 94 from page 135

that is what Superintendent Taylor denies. The tribunal does not believe his denial. This is shocking conduct by a serving officer. It also has a very definite tinge of a strong impulse of detraction against Maurice McCabe. As will emerge in the third section of this report, the tribunal has the gravest difficulty in accepting the evidence given by Superintendent David Taylor as anything approximating to the truth. The evidence of Paul Williams on this matter is fully accepted, as is the evidence of Cathal McMahon.

### **Ms D complains in 2014 about Inspector Cunningham and PULSE**

The other significant event was the previously referenced complaint by Ms D to the Garda Síochána Ombudsman Commission on 29 April 2014. This was about the investigation into her December 2006 complaint about the couch encounter alleged by her. Her allegations were that the investigation was incompetently carried out; that the matter should have been recorded on the PULSE system and that Inspector Noel Cunningham should not have been the investigating officer as he knew both Mr D and Maurice McCabe.<sup>134</sup>

The tribunal is definitive in its view. The investigation was a model of efficiency and fairness. Further, the PULSE system which would have recorded her and Maurice McCabe's names was properly bypassed by Detective Sergeant Fraher. Inspector Cunningham acted professionally and decently to all parties in a truly difficult situation. The Garda Síochána Ombudsman Commission issued a ruling on 21 April 2015 and rejected the complaints of Ms D.

Ms D claimed that her decision to go public on her allegations was her own.<sup>135</sup>

The tribunal is satisfied that while the matter was discussed between herself and Paul Williams during the interview of 8 March 2014, he did not in any way or at all lead her into making this further complaint.

### **Ms Y complains against Mr Z: word processing errors**

In 2013, a Ms Y was also attending for counselling with Laura Brophy at Rian. This had nothing to do with Maurice McCabe. She did not even know of him. This young lady had been sexually abused by a Mr Z and the abuse involved digital penetration of her anus and vagina. On 5 June 2013, Laura Brophy had completed on her computer what is properly known as a Retrospective Disclosure of Abuse form in relation to this client and had printed it out and sent it to social services in Cavan. That was the right thing for her to do in respect of Ms Y.

This Ms Y form remained on Laura Brophy's computer. On 9 August 2013, following a phone call with Brieghe Tinnelly where the correct details of Ms D's 2006 allegation were given, Laura Brophy had to produce a written document in order to further matters. She went to her computer and produced a completely jumbled written referral to the Health Service Executive supposedly about Ms D and Maurice McCabe. She used her own computer for this. She had no formal training in word processing.

To save time she used a template. She used the Ms Y report. Laura Brophy gave evidence in relation to her use of templates in completing reports of abuse to social services:

***I can't say definitively exactly how I input the data. There was a template or a few templates it would seem, on my desktop, my PC at the office, so I would have***

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<sup>134</sup> Tribunal documents from page 64 for the online complaint, followed by a statement from page 103

<sup>135</sup> Transcript day 10 from page 15

*opened one and presumably written in the information relevant to the client I was making the report about.*<sup>136</sup>

Laura Brophy used the Ms Y referral form as a template to complete the Ms D referral form. In doing so, she typed over the information relating to Ms Y and input information relating to Ms D under the relevant headings. However, in completing the Ms D report, Laura Brophy made a serious error which resulted in Ms Y's allegation of digital penetration appearing on the form. They were on the Maurice McCabe form for no better reason than that she was using a template in a generic fashion. That was wrong. Every allegation of child sex abuse is different to every other. This referral jumbling up Ms D with Ms Y and dishing it all up against Maurice McCabe was sent to the Health Service Executive. It supposedly described an allegation by Ms D against Maurice McCabe. Later it was forwarded to senior gardaí as a live accusation and, later still, Maurice McCabe was accused of this rape offence in the letter of 29 December 2015 from TUSLA opened in early January 2016.

Under the heading "Description of abuse", Laura Brophy did not remove the Ms Y allegation against Mr Z. The form read, with necessary substitution of Ms Y and Ms D for the real surnames which appear on the original form dated 9 August 2013:

Description of abuse:

Ms Y informed me that she suffered sexual abuse in childhood. The abuse involved digital penetration both vaginal and anal. The alleged would also threaten Ms Y's father if she said anything.

Name of alleged abuser: Maurice McCabe ...

Date/Year/period when abuse is alleged abuse to have taken place Approximately 1998/1999 ...

Relationship of alleged abuser to client (if any): Ms D's father's work colleague

Ms D informed me that she was with her parents and they were visiting the alleged's home at the time of the incident. Ms D informed me that her parents and the alleged's wife were in another part of the house and that she was playing 'hide and seek' with the alleged and his two daughters who were approximately 3 years and 5 years of age at the time. ...

Ms D remembered the abuse when she was approximately 11/12 years and informed her parents. Ms D made a statement to the Gardai at this time and the file was sent to the DPP however Ms D was later informed [redacted]

Name & Address of Garda dealing with this matter: Ms D did not inform me of this information but is willing to be contacted in relation to this report.

Previous Reports made [to Gardai/SW] ( square brackets here in original) ✓Yes ✓No ...  
As mentioned above a statement to Gardai was made however it is not known if this was communicated to social workers at the time.

Any additional information?

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<sup>136</sup> Transcript day 1 page 143

Mr. Maurice McCabe was a member of The Gardai at the time of the incident and although he left Bailiboro Station where he worked with Ms D's father it is not know if he is still an active member of the Gardai.<sup>137</sup>

As will be noticed, there are two inconsistent names as to the victim alleged: here substituted for privacy reasons as Ms Y and Ms D. It should have been spotted. This should have been an immediate and serious source of alarm to anyone reading the report. But that just did not happen in social services. It would have happened, it is to be hoped, anywhere else. The result of this error was that the serious allegation of a rape offence appeared on the Ms D referral form sent to the Health Service Executive on 9 August 2013. Some of the form is incorrect, ascribing the abuse suffered by Ms Y against Maurice McCabe and some of the form contains the correct information relating to Ms D and her, very much less serious, 2006 complaint against Maurice McCabe. The result is that the clothed encounter on the couch, if an encounter of any kind ever happened, became a rape offence involving penetration.

### **Credibility and coincidence**

Immediately, two very serious questions arise. Firstly, was there ever a Ms Y? Secondly, did an error really occur in the manner described?

The reason such questions are asked is because the tribunal is tasked with discovering whether Garda Headquarters, or any senior garda, abused power to undermine Maurice McCabe's integrity as a decent and honourable person. Were it to be the case that Laura Brophy was lying as to the origin of the error which ultimately caused such anguish to Maurice McCabe and his family, and which also rightly caused a storm of public revulsion, questions would need to be asked as how and why he was falsely accused of a rape offence. In the event that this apparent mix-up was found to be deliberate, then inferences perhaps leading to a suspicion of a conspiracy might be drawn.

In the result, however, the evidence establishes that everything Laura Brophy testified to as to the origin of her mistake is borne out in evidence. What happened was a hideous coincidence. That testimony of Laura Brophy was also accepted by Maurice McCabe as true in submissions made by his counsel. It is, however, for the tribunal to make up its own mind.

As to the first question, the tribunal sat in a private sitting on 31 May 2017. The tribunal had asked for Ms Y to be represented. She turned out to be a real person who had instructed a firm of solicitors. Her solicitor swore an affidavit that she existed and that she had instructed that firm to represent her interests.<sup>138</sup> The tribunal did not want to know more than that since she is entitled to her privacy. The tribunal is not investigating Ms Y. As to Ms Y, the tribunal investigators later became aware, in strictest confidence, of further details in their examination on 8 June 2017 of the Ms Y paper file, which did exist, in the ordinary way, within Rian. These details were not passed on to the tribunal and for good reason. The tribunal does not want to invade the privacy of Ms Y. It is not necessary. Sufficient and credible evidence exists that there was a Ms Y and that she had, as the sworn evidence puts it, "attended for counselling at Rian Counselling Services, Cavan between 2013 to 2014" and that this was "a direct result of alleged sexual abuse sustained by Ms. Y at a young age."<sup>139</sup>

The second question involved a detailed forensic examination on a confidential basis of the hard drive of the computer used by Laura Brophy. This happened in order to determine if the pattern

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<sup>137</sup> Tribunal documents from page 345

<sup>138</sup> Affidavit of Fiona Baxter, a partner in the firm of John J Quinn solicitors, tribunal documents page 2466

<sup>139</sup> Tribunal documents page 2466

of use testified to was borne out by scrutiny of the indelible record on the computer's hard drive. Hence, the tribunal tasked Forensic Science Northern Ireland, a service which the tribunal came to value highly, to carry out an examination of the relevant documents and computer records in order to determine whether "evidence supports the proposition that a document produced with Ms Y's details was used as a template for a document produced for [Ms D]."<sup>140</sup> After a comprehensive examination which ranged into all aspects of the digital and written records, Mark McConnell of Forensic Science Northern Ireland provided a written report on 30 June 2017. He gave this evidence to the tribunal:

***Question: Now, in terms of your own overall finding in relation to the brief that you had, what is your professional opinion in relation to the two documents and whether or not your examination supports the proposition that the Ms. D document was prepared from a template from the Ms. Y document?***

***Answer: Well, looking closely at the documents and looking at their content and looking at a lower forensic level, I found that the documents did not appear to have been interfered with in any way, and looking at the metadata, corresponded to the fact that one document was a copy of the other document. The Ms. Y document was used as a template to produce the Ms. D document.***<sup>141</sup>

The forensic scientist also confirmed that both documents were genuine and that nothing suggested that either had been created by way of promoting "a lie or an illusion".<sup>142</sup>

Laura Brophy's error was not discovered within the Health Service Executive, which had then become TUSLA, until 14 May 2014 when it was brought to their attention. By this time, the gardaí had already been notified by a report from TUSLA reproducing the Ms Y complaint but naming the person complaining as Ms D. In transcribing the allegation onto the relevant official garda notification form, the Laura Brophy error was further compounded by the fact that the inconsistent names of Ms Y and Ms D were rolled into one name: that of Ms D. When Laura Brophy found out about her own error, believing, incorrectly, that her own original form had gone directly to the gardaí, she tried very hard to ensure that the error did not cause any harm.

This is further independent evidence of Laura Brophy's good faith and that the error was in fact an error.

### **The afterlife of the word processing error**

The document prepared by Laura Brophy on 9 August 2013, quoted above, is one for notification from Rian to social services in the Health Service Executive. In that report the obvious error of two different names, Ms Y and Ms D, sticks out like the proverbial sore thumb. Before filling out this erroneous written report on 9 August 2013, Laura Brophy of Rian had telephoned Briege Tinnelly of the Health Service Executive in order to fulfil her duty to notify social services. They were supposed to look into the matter and, if a garda notification had not already been made, one would then ordinarily be made. As is to be noted, yes, the gardaí had indeed investigated the Ms D 2006 allegation and had in fact notified that complaint to social services, specifically the Health Service Executive.

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<sup>140</sup> Tribunal documents page 2595

<sup>141</sup> Transcript day 16 page 12

<sup>142</sup> Transcript day 16 page 13

Laura Brophy had accurately relayed over the phone to Briège Tinnelly in August 2013 a fully correct account of what Ms D had told her. There was, in other words, in that oral report, no mix-up with any other person reporting abuse; Ms Y or otherwise. As she was listening, Briège Tinnelly typed up an intake record, the operative part of which reads with Ms D substituted for the real name:

Laura advised that she has a client at present called Ms D who is now 21. She self-referred to the service. Ms D told Laura that she was abused when she was 6 or 7 by Garda Morris Mc Cabe who was her father's garda partner at the time (Ms D's father is a Garda) Morris Mc Cabe was stationed in Bailieboro at the time and has 2 daughter who were 3 and 5 at the time. Ms D had blocked out the abuse and it came back to her when she was approximately 11 when she has sex education at school and it was reported to Gardai and there was no prosecution from the DPP. The details of the abuse is: Ms D was playing hide and seek in Morris Mc Cabe's house when Morris put her on the couch tickled her and touched her inappropriately whilst girating on top of her with clothes on. Ms D's phone number is [redacted] Laura agreed to send in standard notification form.<sup>143</sup>

This account differs from the 2006 Ms D account; she had not then alleged inappropriate touching and gyrating. It is accurate as to the report of Ms D to Laura Brophy in August 2013; that is seven years after her initial complaint to the gardaí.

Then came a written report from Laura Brophy. That written report contrasts in an obvious way with the telephone report of the same day. The evidence of Briège Tinnelly, however, was that the written report did not go to her but was later received by social services at the Cavan office. Briège Tinnelly informed her team leader, Keara McGlone of the verbal referral. She acted on the basis of the oral report as typed by Briège Tinnelly. She wrote in to that report: "Duty to Garda notify and await allocation."<sup>144</sup>

The written report with the Ms Y details mixed in to the Ms D allegation, and both their names inconsistently appearing, did not arrive by post at the Health Service Executive in Cavan town until the afternoon of Monday, 12 August 2013. When it did arrive, no one compared the two reports, the first conveyed orally but noted in writing from the phone call, and the second written report completed by Laura Brophy. No one, therefore, spotted the glaring inconsistencies between them as to what was supposedly the same report from the same person about the same allegation. Thus, everyone then was acting at that moment on the basis of the oral report from Laura Brophy, which was correct as to what Ms D was then saying, as opposed to the mistaken written report from Laura Brophy mixing up Ms D and Ms Y.

It might here be noted that at that time, clients at Rian counselling service did not get to see the reports before they were sent on to social services, and for onward transmission to gardaí: now they are allowed to check them beforehand. The processes were changed when the presence of two inconsistent reports on the one file in this case caused the controversy into which the tribunal is inquiring.

The referrals meeting of the morning of Monday, 12 August 2013 was a general referrals meeting at which the team leader Keara McGlone and other social workers were present in order to discuss whatever new cases of allegations of abuse had come in during the previous week. In preparation, the old file relating to Ms D and her allegations of 2006 had been taken up and reviewed by Keara McGlone. Thus, the meeting had the old file, the old allegation in relation to the couch, repeated

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<sup>143</sup> Tribunal documents page 1305

<sup>144</sup> Tribunal documents page 1307

again to Laura Brophy in 2013, and information that the gardaí had referred such an allegation to social services on 6 December 2006. This old Ms D file was reviewed by Keara McGlone and the information that the Director of Public Prosecutions had ruled that there should be no prosecution was on this file. The name Noel Cunningham was also on the file, because he was mentioned as the investigating garda who had been in contact with social services about Ms D's 2006 allegation. A file was opened on Maurice McCabe as a potential child abuser based solely on the Ms D allegations in the written record of the phone call from Laura Brophy.

Keara McGlone then decided to contact the gardaí and the query in her mind had nothing to do with the erroneous written report from Laura Brophy, the one with the two different names, as she had not received it yet. Rather she was asking herself if the new oral Ms D report in 2013 was the same allegation as the one reported to social services in 2006.

Sensibly, Keara McGlone wrote to Superintendent Noel Cunningham. Her letter is dated 15 August 2013 and is headed, substituting Ms D for the correct name, as referring to the "Criminal investigation into allegations of child sexual abuse made by Ms D against M. McC (an adult) in 2007". Superintendent Cunningham was then in Monaghan. Again substituting Ms D for the real name, the body of the letter reads:

Health Service Executive Child & Family Services have received a recent referral from RIAN (a therapeutic counselling service for adult survivors of childhood abuse).

The referral states that Ms D (now aged 21) has discussed during counselling sessions that she was sexually abused during her childhood by an adult male M. McC.

I note from the Social Work file that you conducted a criminal investigation into these allegations in 2007. however, it appears that the alleged perpetrator was not met with by the Health Service Executive at that time.

I would like to meet with you to discuss the case prior to making any contact with the alleged perpetrator.

I would appreciate if you could contact me to arrange a date to meet in Monaghan that is suitable for you. I can be contacted on [mobile number redacted] or in the office on (Cavan [land line number redacted] or Monaghan [land line number redacted])<sup>145</sup>

Bizarrely, this letter remained unanswered by Superintendent Cunningham. It will be necessary to return to why.

Keara McGlone told the tribunal that had the letter been answered: "I suppose it would have been the end of the matter in relation to guard notification. I suppose we still had a social work piece to complete which is separate to guard notification, yes."<sup>146</sup> Having put an instruction to complete and send a garda notification on the oral report from Laura Brophy, she ought to have amended that by cautioning that this should not happen until Superintendent Cunningham reverted.<sup>147</sup>

Since that instruction was not amended, the gardaí were indeed notified; but not until 2 May 2014. The notification which they got was in respect of digital penetration of the anus and vagina of Ms D by Maurice McCabe; in other words the allegation of Ms Y arising from childhood abuse by Mr

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<sup>145</sup> Tribunal documents page 414

<sup>146</sup> Transcript day 4 page 64

<sup>147</sup> Transcript day 4 page 27-28

Z. Again, it is right to be suspicious as to how and why that happened and to ask whether it occurred in consequence of collusion with sinister forces within the gardaí.

### Measuring the pressure

Reference needs to be made here to a system of dealing with files in Cavan/Monaghan which was called “measuring the pressure”.<sup>148</sup> Several inconsistent pieces of evidence were heard about this system. Basically, and trying to strip away the testimony to the agreed basics, high priority or urgent cases were dealt with by the Health Service Executive pretty much immediately. Medium priority cases and low priority cases were filed away if they could not then be immediately allocated to a social worker. This was a physical operation in a filing cabinet in a duty room in the Cavan premises. When, as of 1 January 2014, TUSLA took over child protection functions from the Health Service Executive, that system remained. A very serious case would be followed up on immediately and never reach that cabinet. An example of a high priority case would be a report that a child was being kept at home in a cage or that an adolescent in sexual education class had told the teacher that her daddy “did that” to her three times a week.<sup>149</sup> These are examples from real life, regrettably. Where the evidence diverged was in relation to how the cases which reached the filing cabinet were processed. According to some it was random: once a social worker had free time, he or she went in and plucked out any file. According to others, there was a system, be it chronological or in terms of seriousness or a bit of both. The evidence was most unimpressive and at times required belief to be suspended.

The tribunal is satisfied that there was a random allocation of files and that this cannot be dignified by calling it a system, given that a low priority file could thus be chosen over a medium priority case.<sup>150</sup>

Then, it is right to wonder how this case remained unallocated to a social worker and was left languishing in a filing cabinet for eight months before there was any consideration of what was wrongly thought to be the need to notify the gardaí?

The answer here is that some social workers gave evidence that by 2014 they had never heard of Maurice McCabe.<sup>151</sup> Apparently, they lived in this country but had an eminent ignorance of the news. The tribunal does not accept that all of them could genuinely be so isolated. The date here is important. On 30 April 2014, the file on Maurice McCabe was taken out of the cabinet by Laura Connolly, who was a social worker who happened to be on duty that particular day. There was abundant coverage of Maurice McCabe in the media for several months before that: the relevant chronology refers. For instance, the Garda Commissioner had resigned on 24 March 2014. Laura Connolly said, initially, that her dealing with the file when she did was a coincidence,<sup>152</sup> but then thought that it was possible that she had received a direction from her team leader Eileen Argue to work on the Maurice McCabe file.<sup>153</sup> She said she had no positive memory of either. Eileen Argue did not recall giving such a direction.<sup>154</sup> If that is so, then it is also reasonably possible that someone suggested to her dealing with the outstanding Maurice McCabe business which TUSLA

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<sup>148</sup> See evidence of Gerry Lowry, transcript day 5 from page 110 and from page 124, Laura Connolly day 5 from page 79

<sup>149</sup> Evidence of Linda Creamer, transcript day 9 page 99

<sup>150</sup> Transcript day 4 from page 128

<sup>151</sup> For example, see the evidence of Laura Connolly, transcript day 4 page 130

<sup>152</sup> Transcript day 4 page 131

<sup>153</sup> Transcript day 4 from page 157

<sup>154</sup> Transcript day 9 from page 121

had. On the file appears a Post-it sticky note in Eileen Argue's handwriting, stating "Duty to notify allegations on to An Garda Siochana & file in cabinet Eileen".<sup>155</sup>

The tribunal cannot identify the mind behind the decision to revive the matter at that point but the tribunal regards the explanation of mere coincidence as wholly unconvincing. As to whether it was either Laura Connolly or Eileen Argue or someone directing either of them, there is insufficient evidence to make a decision. The reality is that someone within TUSLA realised that they had what they perceived to be unfinished business with Maurice McCabe and decided that for the avoidance of trouble, the business should then be dealt with. This was not, as was related to the tribunal, a coincidence. It is very disappointing that the tribunal could not have been told by TUSLA what actually happened.

### **Another series of derelictions of duty**

If that business had then been dealt with competently, there would have been less trouble: but it was not. What needed to be done was to get the Ms D file and find out if it was necessary to inform the gardaí.

On this there were two views: firstly, that every allegation, even if it had been reported before, had to be renotified in the event of it being repeated to a counsellor and, secondly, that allegations already notified to the gardaí did not need renotification.<sup>156</sup> Again, the tribunal has been expected by TUSLA personnel to believe something that does not make sense of any kind. It is plain sense that the same allegation does not need to be notified to the gardaí twice. As for TUSLA knowing that, this would have been easier to tell had Superintendent Cunningham answered the letter from Keara McGlone, but he did not. It would also have been easier had they had the 2007 Health Service Executive child abuse file, which had the original statements to the gardaí by Ms D in it. But that was in the Monaghan office.<sup>157</sup> That, after all, is not very far away from where they were.

Ms D's 2013 complaint, as put on the file in unawareness of its prior referral, according to social workers, would then have been a first-time notification of an historic incident. It would also, it is to be hoped, have accurately reproduced Ms D's allegations. That would have been bad enough. Instead, the gardaí were notified that, in effect, Maurice McCabe was the Mr Z who had sexually abused Ms Y by digitally penetrating her anus and vagina but making Ms Y into Ms D and making Mr Z into Maurice McCabe. This false allegation of a rape offence came about through people not reading the file properly. Neither Laura Connolly nor Eileen Argue noticed the inconsistent names and the inconsistent allegations on Laura Brophy's written referral of 9 August 2013.

On 30 April 2014, looking at the Laura Brophy written report to the Health Service Executive, not the typed-up version of the telephone report, Laura Connolly typed the following for notification to the gardaí, with Ms D substituted for the original name:

Laura Brophy, Counsellor with RIAN Counselling Service reported the following information to the Child and Family Agency in August 2013. Ms D is attending counselling with Rian, during the course of counselling she alleged that she experienced sexual abuse in childhood, that this abuse involved digital penetration both vaginal and anal. This abuse is alleged to have occurred on one occasion in 1998-1999. Ms D reports being aged 6/7 years old at the time of this alleged abuse. Ms D alleges that the alleged perpetrator of this

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<sup>155</sup> Tribunal documents page 2229

<sup>156</sup> In relation to the first view, see the evidence of Laura Connolly, transcript day 4 from page 144, and in relation to the second view, see the evidence of Keara McGlone, transcript day 4 from page 53

<sup>157</sup> Transcript day 4 page 170

abuse threatened her father if she said anything. Ms D alleges that this incident of alleged abuse occurred whilst she and her parents were visiting the home of the alleged perpetrator, Mr D alleges that her parents and the alleged perpetrator's wife were in another part of the house, that she was playing hide and seek with the alleged perpetrator and his two daughters who were then aged approx 3 years and 5 years of age. Ms D identified the alleged perpetrator as Mr Mauric McCabe – specific address for Mr McCabe not provided, Ms Brophy reports that Mr McCabe resides in Co. Cavan. Mr McCabe and Ms D's father were work colleagues, both members of An Garda Síochána. Ms D informed her parents of this alleged abuse when she was aged 11/12 years of age. Ms D made a statement to An Garda Síochána at the time, a file was sent to the DPP however no prosecution was directed.<sup>158</sup>

This report states clearly: a report was made to the gardaí when Ms D was about 12 years old. It is mystifying why a report was again being made to the gardaí.

It is also extraordinary that in typing up a transcript of Laura Brophy's written report that Laura Connolly did not notice that there were two different names there for the alleged victim. In her evidence to the tribunal, Laura Connolly stated that she based the garda notification on the Laura Brophy written report "for the simple fact being that when a professional puts something in writing, that is something that they are prepared to stand over and that would appear to be the more accurate account."<sup>159</sup>

When asked about the appearance of two different surnames of Ms D and Ms Y on Laura Brophy's report, Laura Connolly told the tribunal:

*If I can state at this point that the first I became aware that Ms. Y's name was located in two places in this form was at my interview with the [tribunal] investigators on the 23rd June [2017]. Up until then, I had assumed that the description of the abuse -- I wasn't aware that another person's surname was located in two places in the form. ... I am now aware that there's -- the surname of Ms. Y and Ms. D is very similar.<sup>160</sup> ... I accept that I did not detect the error in the Rian report ... I am of the belief that in the busyness of the office environment and in scanning this report to elicit the detail to put in to the Garda notification, that I overlooked that in the body of that report there was the reference to another person.<sup>161</sup>*

Laura Connolly further stated that had she noted the presence of two different surnames in Laura Brophy's report, she "absolutely would have made inquiries with Rian".<sup>162</sup> The two names start with the same letter of the alphabet and end with the same two letters. In between, there are a number of different letters. In the national phone book, the names would have been several pages apart.

In addition, on 30 April 2014, four intake records were opened in respect of Maurice McCabe's children by Laura Connolly.<sup>163</sup> Intake records are opened on children under 18 years of age, yet such records were opened on two of Maurice McCabe's children who were over 18 years of age.

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<sup>158</sup> Tribunal documents page 430

<sup>159</sup> Transcript day 4 page 138

<sup>160</sup> Transcript day 4 page 151

<sup>161</sup> Transcript day 4 page 152

<sup>162</sup> Transcript day 4 page 153

<sup>163</sup> Tribunal documents from page 421

The direction in that regard was apparently given by Eileen Argue.<sup>164</sup> This was a compounding of the original mistake made by Laura Brophy. It is also shocking administrative incompetence.

Reviewing this account of error upon error, of not attending to duty upon not attending to duty, of not abiding by guidelines and of reporting the same matter multiple times to the police, when the police had in fact originally referred the matter to social services, the tribunal is left utterly dispirited.

### **Initial garda reaction to the rape offence complaint**

The 2 May 2014 notification of child abuse was received in Bailieboro garda station on 7 May 2014. The complaint had been made to Cavan and Inspector Noel Cunningham as investigating officer was based in Monaghan, which was the divisional headquarters for Cavan/Monaghan. It was there that the original investigation file was held. Laura Connolly, who drafted the garda notification, told the tribunal that it was sent to Bailieboro as the appropriate station to which to send such notifications “is based on the address ... where the alleged incident is alleged to have occurred. So the notification, [according to] my understanding, would go to the district in which the alleged abuse occurred, for investigation.”<sup>165</sup>

The notification was opened by Superintendent Leo McGinn, who was officer in charge of that division. In that year, 94 referrals of child abuse made their way through Bailieboro. Superintendent McGinn had only been in Bailieboro for a year and whereas he had simply heard that an allegation had once been made against Maurice McCabe, he had not been involved in and did not have any knowledge of the investigation. On opening the notification he was genuinely puzzled. He did not “know the gravity” of the prior allegation.<sup>166</sup> What he knew was that an allegation had been made in 2006 and had been investigated then by Inspector Noel Cunningham and that the Director of Public Prosecutions had directed that there should be no prosecution. The tribunal accepts that he knew nothing about the prior allegation of Ms D beyond rumour and that he acted in a state of puzzlement, but in good faith. His “firm mind” was that this rape offence report was to do with the 2006 allegation.<sup>167</sup> Because there was “quite an amount of media coverage written and indeed broadcast devoted to Sergeant Maurice McCabe”,<sup>168</sup> on the arrival of this referral, he felt it best to notify it up the line to the divisional commander, Chief Superintendent James Sheridan.

An efficient man, Superintendent McGinn tended to do things on the day action was demanded. Hence he wrote that day to the divisional commander. After summarising the allegations, this is the operative part of the letter, with Ms D substituted for the original name:

In an unknown date in 2007 Ms D with the support of her parents made a formal complaint of sexual assault to Gardaí and named the perpetrator as Maurice McCabe (Reference BB 26/3/07).

The allegation was investigated from Monaghan Garda Station by then Inspector Noel Cunningham who is now District Officer at Monaghan.

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<sup>164</sup> Transcript day 5 page 17 and transcript day 9 from page 131

<sup>165</sup> Transcript day 5 page 69

<sup>166</sup> Transcript day 13 from page 96

<sup>167</sup> Transcript day 13 page 97

<sup>168</sup> Transcript day 13 page 98

The completed investigation file was submitted to the Director of Public Prosecutions who directed no prosecution.

No copy of the investigation file is held or was held at Bailieboro District. On interrogation of the correspondence register here only records of documentation received here to notify Maurice McCabe of the D.P.P.'s directions (Ref. No. BB 84/6/07) and a few other similar type items of correspondence were noted. It is believed the investigation file with all subsequent relevant documentation is held at Monaghan Garda Station.

In light of the referral received on foot of Ms D's disclosures to a professional I feel it is appropriate to have the investigation reviewed. I suggest that the file and investigation, in its entirety, be reviewed at Officer level within An Garda Síochana or that it be referred to the Cold Case Unit, N.C.B.I. In any case, if a review of the case is to be conducted, I suggest it be conducted external of personnel within the Cavan/Monaghan Division.<sup>169</sup>

There was nothing inappropriate about the actions of Superintendent McGinn in referring the matter to his chief superintendent. That was the right thing to do at the time. The letter is dated 8 May 2014 and was perhaps received on 12 May 2014. Superintendent McGinn continued to wonder about this matter even after the letter was sent. He decided, some day or two later, to call Mr D into his office to talk to him garda to garda:

*I have my weekly accountability meeting in which [Mr D] attended, and there would be an opportunity to meet that day but specifically at that meeting.... I called him in -- one of the days I mentioned, probably the 8<sup>th</sup>. ... And I showed him the referral and he read it, and although I think he says he remained mute, my recollection, and it's my recollection, he said "I will have to check this". ... [He says that I said "Is this your lassie?"] Well, 'lassie' isn't a word I use in normal pronounce -- it's not the part of south Ulster where I hail from. But it's used, surely, but it's -- probably I would say, is that your young one? But it means the same.... I'm not sure of specific day or date, but he returned to me and said, what I remember was, he said spoken to Ms. D and that -- I don't know his exact words, but certainly there was a dispute that, perhaps we could call it the inflated version, was wholly incorrect.... That's my recollection of it. He told me what he had learned from Ms. D, that the vaginal or anal penetration did not happen.... I think before he had a chance to ask me, I used an expletive and said I would ring them.... I will ring; in other words, ring Tusla or the HSE. I was somewhat shocked as well.<sup>170</sup>*

Mr D gave the following evidence about that encounter with Superintendent McGinn and its aftermath:

*He handed it to me, Chairman, and firstly -- I remember him saying to me, just firstly, as he handed it, 'is that your lassie?' And at the top of the form you will see the child's name, DOB, address. And I read it and I said yes, that is Ms. D, that is my daughter. And then I read down in the body of the -- the actual body of the report, and I read about digital penetration, vaginal and anal, and I almost collapsed, Chairman. I was absolutely reeling. I had never heard this before, this is the first time. So I thought to myself, like, has Ms. D told the counsellor this and not told us, has this actually happened to my daughter and we know nothing about*

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<sup>169</sup> Tribunal documents page 1752-3

<sup>170</sup> Transcript day 13 from page 113

*it. And I couldn't wait to get out of the office, and I said nothing to Leo, I handed him back the referral, I left the office and went to sort of compose myself for a few minutes. Then I rang my wife, who was at home, and I told her I was coming home, I told her, 'Mrs. D, I have something to tell you, I have to come home, I will talk to you when I get home'. And I went home and told Mrs. D what I had seen, and she broke down completely and she cried and she said, you know, 'what is going on?' 'Mrs. D', I said 'I don't know. I have read this in black and white, that this is what Ms. D has told this counsellor'. ... She was in the southeast at the time. ...*

*I said to Mrs. D, I'm going to have to obviously -- we are going to have to speak to Ms. D and see what the hell is going on, basically. And Mrs. D said, 'I can't ask her that', she said, 'I can't ask that'. So I said, look, I will ring her. So I eventually got her, maybe that evening -- she wouldn't be great at answering the mobile phone -- so I eventually got in contact with her and I said Ms. D -- I was so annoyed, Chairman, I was so distraught at the time, I remember saying, like, 'what the F did you say to that counsellor?' Or words to that effect. And she said, 'What do you mean? What counsellor?' I said, 'The counsellor you went to last summer'. And she said, 'I told her what happened between me and Maurice McCabe'. 'Well', I said, 'Ms. D, there is stuff on that form about digital rape and vaginal and anal'. And she was absolutely -- the phone just went silent. And I said -- she said, 'What are you talking about? I never said that. That is nothing to do with me.' Well, I said, 'Ms. D, I have read the counsellor's report and this is all in it'. But she said, 'I absolutely didn't say that. That's nothing got to do with me, that is not my complaint'. ... She was absolutely gobsmacked...*

*I would have contacted Leo McGinn and told him that this was incorrect, this referral was incorrect.... Soon after - now, when, I don't know exactly - but I remember speaking to Leo McGinn and saying - the words - I remember the words I used to him was it's an almighty cock-up. Now, whether -- I thought as that stage he didn't know and he was to get on, immediately on to Tusla in connection with this completely erroneous allegation that my daughter never made... My understanding at the time was obviously -- yeah, if a mistake of that magnitude was brought to the attention of somebody, I just presumed it would be fixed. I couldn't actually conceive that it wouldn't be fixed. I mean, it was a massive mistake, a massive error, and I thought, okay, it's been brought to their attention, it will be done away with, it will be finished with.<sup>171</sup>*

Probably, at that stage, Superintendent McGinn rang Rian or TUSLA. Perhaps he did not understand the distinction, which was that Rian was a counselling service under the Health Service Executive and that referrals were made by Rian to TUSLA and that latter service then referred allegations to the gardaí. In any event, he may have spoken to Eileen Argue, but while this is uncertain, he cannot be faulted for what he did.<sup>172</sup>

### **Laura Brophy responds to the error**

As it happened, TUSLA became aware of the dangerous error that had been made in consequence of a phone call to Rian from Ms D.

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<sup>171</sup> Transcript day 10 from page 67

<sup>172</sup> Transcript day 13 page 118

Early on 14 May 2014, Ms D contacted the Rian service. Laura Brophy spoke to her and was informed as to the nature of the error made by her in using another case as a template.<sup>173</sup> Ms D made it perfectly clear that she had never alleged a penetration offence against Maurice McCabe. In her evidence, Laura Brophy said:

*Well, as I said, I tried to reassure Ms. D on the phone that I would do my best to resolve the issue. I acknowledged the mistake. I knew immediately that it was a complete mistake on my behalf. So I suppose the first thing I would have done was to try and contact – I made contact with several people that day. So my line manager, Fiona Ward, social services, in attempts to try and resolve it.*<sup>174</sup>

On this date, Laura Brophy completed an incident report in relation to the error,<sup>175</sup> and sent an amended report to TUSLA. Under the heading “Description of abuse”, this now read:

Ms D informed me that there was a single incident of sexual abuse. At the time of the incident both Ms D and the alleged were fully clothed and the incident involved inappropriate contact as the alleged rubbed himself up and down against Ms D in a sexual manner.<sup>176</sup>

The rest of the form was the same as that of 9 August 2013 and did not need to change.<sup>177</sup> Laura Brophy understood that her report had been directly forwarded to the gardaí, as opposed to a separate TUSLA notification.<sup>178</sup> Fiona Ward, her manager, thought the same thing; but both were wrong. Forms received by TUSLA from Rian were retyped onto paper headed with the Garda crest and sent on by TUSLA to the gardaí. On realising what had happened, Laura Brophy told the tribunal that she felt “a wave of panic”.<sup>179</sup>

While Laura Brophy had made a mistake, she did everything possible to ensure it was corrected. Had the systems within TUSLA not been utterly chaotic, what she had done would have been enough. She cannot be blamed for what subsequently happened.

### **TUSLA react to notification of the error**

The first thing Laura Brophy did was to ring TUSLA within minutes of the call from Ms D. She spoke to Pamela Armitage, who emerged in evidence as an intelligent and competent administrator. She told her of the error but her main purpose was to speak to someone in social work. Pamela Armitage then emailed Eileen Argue in her capacity as team leader in that particular section of TUSLA. Here is the relevant email, with Ms D substituted for the original name:

Laura Brophy, RIAN - just called to say that she has made an error in her report to us re D. The line “that this abuse involved digital penetration both vaginal and anal” is an error and should not be in the referral, it is in fact a line from another referral on another adult that has been pasted in in error. Laura has apologised and is sending us an amended report asap.<sup>180</sup>

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<sup>173</sup> Tribunal documents page 291

<sup>174</sup> Transcript day 1 page 163

<sup>175</sup> Tribunal documents page 303

<sup>176</sup> Tribunal documents page 298

<sup>177</sup> Tribunal documents from page 345

<sup>178</sup> Transcript day 1 page 171-172

<sup>179</sup> Transcript day 1 page 163

<sup>180</sup> Tribunal documents page 439

This was immediately notified up the line by Eileen Argue to the area manager, Gerry Lowry and principal social workers, Séamus Deeney and Louise Carolan. Again substituting Ms D for the original name, the operative part of this email read:

Please see information below, this information is in relation to MMcC who allegations were made against him by an adult, D who alleged that she was sexually abused as a child by him.

A garda notification was forwarded by our department based on the information received from Laura Brophy, RIAN services. As stated below, Laura Brophy contacted our department today in relation to her referral and the content of same. She advised that there was information provided which did not relate to D and was in relation to another person against another man and is not the man MMcC.

This notification needs to be amended as soon as possible and the relevant superintendent needs to be updated with regard to same.

Laura Brophy also spoke to Fiona Ward, who was her line manager, in an attempt to resolve this matter. She is not to be faulted either for what followed. Laura Brophy then wrote a letter to Eileen Argue of TUSLA explaining what had happened and attaching to it the correct form of referral from Rian to TUSLA.<sup>181</sup> She left the office and personally hand-delivered this letter. With the usual substitution of Ms D for the correct name, it read:

I am writing to inform you that it has come to my attention that a report I made to your service on the 9<sup>th</sup> of August 2013 contains an administrative error which I wish to address. On page one of the original report I sent on behalf of Ms D under the title 'Description of abuse' the sentence which begins with "Ms ... *informed me...*" and ends with "*.....she said anything?*" is incorrect information and should be disregarded. I have amended the report to include the correct information as given to me by Ms D and I have enclosed the correct report with this letter.

I would like to take this opportunity to apologise for this error and any confusion or inconvenience caused. I would ask that the original report containing the error and any copies made or distributed be retracted and replaced with the correct version of the report enclosed. If you have any further queries in relation to this matter please don't hesitate to contact me.

Her request in relation to the erroneous report was that it be shredded or returned to Rian. On arriving at the TUSLA offices in Cavan, she delivered the letter but did not get to speak to Eileen Argue. On the afternoon of that day, Laura Brophy received a second phone call from Ms D. She, according to Laura Brophy, was "interested to know was there another allegation from somebody else about the same person."<sup>182</sup> Laura Brophy clarified that the Ms Y complaint was not against Maurice McCabe, but was an allegation against an entirely unrelated person.

Laura Brophy made out an incident report for Fiona Ward. As her manager, Fiona Ward prepared a written query in relation to the data protection obligations of the service. Laura Brophy then attempted to follow up the matter with the gardaí but could not make contact. She remained concerned as to whether she needed to take any further action. An email to Fiona Ward from Laura Brophy on the next day, 15 May 2014, indicates what happened next:

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<sup>181</sup> Tribunal documents page 440

<sup>182</sup> Transcript day 1 page 165 and tribunal documents page 291

I just wanted to update you of my contact with Eileen Argue Team Leader in the Cavan Social Work Service. I had some difficulty getting a hold of Ms. Argue so it was just minutes ago I was able to speak with her directly. Ms. Argue informed me that she contacted the Chief Superintendent in charge of this investigation and he informed her that the alleged has not yet been contacted in relation to this case as they were just beginning to look into the report from Social Services yesterday. Ms. Argue informed him of the error on the report and has told him she will issue him with the new amended report and a copy of my letter to Social Work explaining the administrative error. I requested that we get the original copy with the errors on it back to be destroyed and she said they were doing that on their end but could not guarantee that the Chief Superintendent will return it but she will request this. Ms. Argue informed me that he mentioned something about keeping the original along with the updated report. If you have any questions about this I'm on the mobile after 4:30pm today.<sup>183</sup>

This reference to a chief superintendent is probably a reference to Superintendent Leo McGinn, though this is uncertain.<sup>184</sup>

The next day, on 16 May 2014, Laura Brophy recorded that she had received another phone call from Ms D: "Client contacted me to inform me that the superintendent in Bailieborough had not yet been informed of the error and requested I contact him."<sup>185</sup> This was a reference to Superintendent Leo McGinn who had received the notification from TUSLA dated 2 May 2014. Laura Brophy then spoke on the phone to Superintendent McGinn. She recorded that encounter in another email to Fiona Ward:

Just a quick update. I tried Eileen Argue again but unfortunately she is out of the office today so I sent her an email to update her. I received a call back from the Superintendent and he informed me that he had not been told about the error so I explained the issue to him. He told me that the matter has now been given over to the Commissioner and a separate team to investigate the case outside the region however I agreed to send him a copy of the amended report by registered post today and he will contact those with a current copy of the erroneous report to inform them. I have sent the amended report and he will have it by Monday morning and will copy it to the relevant parties.<sup>186</sup>

By registered post that same day, Laura Brophy wrote to Superintendent Leo McGinn and explained the nature of the error and apologised for it. The form of the letter was the same as the letter that she had written to Eileen Argue on 14 May 2014 as quoted above.<sup>187</sup>

At this stage, Laura Brophy was entitled to believe that she had corrected the error. Nonetheless, she remained concerned. Personally, she had heard nothing apart from the conversation with Superintendent McGinn. Fiona Ward took over and tried to retrieve from the gardaí all incorrect copies of the referral and also asked TUSLA to send back any erroneous documents.<sup>188</sup> TUSLA sent back the incorrect Laura Brophy report but, as will later emerge, the erroneous garda notification prepared by Laura Connolly dated 2 May 2014 remained on the TUSLA file in a kind of nuclear half-life that had later damaging consequences. That kind of administrative incompetence is shocking. Plainly, if it was to be retained on the TUSLA file, it should have been

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<sup>183</sup> Tribunal documents page 987

<sup>184</sup> See for instance tribunal documents page 328 but the resolution of this tiny detail does not matter

<sup>185</sup> Tribunal documents page 291

<sup>186</sup> Tribunal documents page 988

<sup>187</sup> The letter to Eileen Argue is at tribunal documents page 440 and that to Superintendent McGinn at page 314

<sup>188</sup> Tribunal documents page 333, letter to gardaí and page 326, letter to TUSLA

stamped as erroneous or mistaken or those words should have been plainly written across the relevant documents.

The garda attitude ultimately, and it is hard to take a view that it was wrong, was that once they had received a document they had a responsibility to keep a copy.<sup>189</sup> Laura Brophy wrote to Fiona Ward on 20 May 2014 stating:

I'm just emailing you to let you know I am still waiting to hear back from Eileen Argue about the Chief Super in Bailieborough - I could always ring Superintendent Leo McGinn to ask but I would be just worried it isn't the same person as he knew nothing of it when I was in touch with him on Friday last. Let me know how you would like to proceed.<sup>190</sup>

She then heard that the relevant chief superintendent was James Sheridan. She was relieved and reported to Fiona Ward that "social services in Cavan" had been in contact with him.<sup>191</sup> On 28 July 2014, she passed on to Fiona Ward that the person dealing with the Ms D referral in TUSLA was Eileen Argue and she gave her full contact details.<sup>192</sup>

Laura Brophy also wrote a letter apologising for her error to Ms D.<sup>193</sup> As far as any reasonable person would have been concerned, as far as any functioning organisation might act, this should have been the end of the matter. It was not.

### **The Garda reaction to the corrected report**

To recap in order to move forward: Superintendent Leo McGinn had received the incorrect garda notification from TUSLA in Bailieboro on 7 May 2014; this is the notification falsely attributing digital penetration to Maurice McCabe. On that date, Superintendent McGinn wrote to Chief Superintendent Sheridan, making a recommendation that the investigation into the initial complaint from 2006 be reviewed.<sup>194</sup> This letter is quoted above. On 8 May 2014, or some proximate date, he showed the TUSLA notification to Mr D, who a day or two later told him that upon speaking with his daughter, Ms D, the information contained in the TUSLA notification was incorrect: Ms D stated she had never made a complaint of digital penetration against Maurice McCabe. According to Chief Superintendent Sheridan, on or about 12 May 2014, Superintendent McGinn also advised him of this correction.<sup>195</sup>

Chief Superintendent Sheridan gave evidence of his surprise and disbelief when he received Superintendent McGinn's report of 8 May 2014 along with the TUSLA notification.<sup>196</sup> There was then another process going on as to garda competency and honesty in the division, a paper study conducted at the behest of government by Seán Guerin SC. This has been previously mentioned. This had just finished and had reported on 6 May 2014. Chief Superintendent Sheridan had that year read the investigation file into the 2006 complaint of Ms D as part of disclosure of the file to Seán Guerin SC in March 2014 and was therefore familiar with its contents and the nature of Ms D's allegation against Maurice McCabe.<sup>197</sup>

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<sup>189</sup> See the evidence of Assistant Commissioner Kenny at transcript day 16 page 39

<sup>190</sup> Tribunal documents page 996

<sup>191</sup> Tribunal documents page 998

<sup>192</sup> Tribunal documents page 1002

<sup>193</sup> Tribunal documents page 319

<sup>194</sup> Tribunal documents page 1752, letter in full set out above

<sup>195</sup> Transcript day 14 page 16-17

<sup>196</sup> Transcript day 14 pages 13 and 20

<sup>197</sup> Transcript day 14 page 9-10

Despite the fact that Chief Superintendent Sheridan had been informed by Superintendent McGinn that Ms D had not made the rape offence complaint as contained in the TUSLA notification, he forwarded the incorrect notification up the line. This kept alive in garda administration files an allegation of a rape offence that no one had ever made against Maurice McCabe. This was inappropriate and extraordinary.

In a letter dated 14 May 2014, Chief Superintendent Sheridan wrote the following to the assistant commissioner for the Northern Region, Kieran Kenny, again substituting Ms D for the real name:

The allegations contained in the attached referral have been the subject of a previous Garda Investigation which resulted in the Director of Public Prosecutions directing no prosecution against the alleged offender, Mr. McCabe.

It is my understanding that Ms D has made a complaint based on the allegations set out in the attached referral form to the following parties:

- Mr. Micheal Martin, TD and that he has subsequently referred the matter to An Taoiseach, Mr. Enda Kenny, TD
- An Garda Síochána Ombudsman Commission

In the circumstances, I recommend that we await further communication from the parties listed above prior to commencing a review of this investigation. A full copy of the Garda Investigation file is available at this Office.

Forwarded for your information and consideration<sup>198</sup>

In the above letter, Chief Superintendent Sheridan did not make any reference to his knowledge that the TUSLA referral form attached to the letter was completely incorrect. The assistant commissioner did not know that no one had ever accused Maurice McCabe of digital penetration, a rape offence, but yet this notification passed on that allegation as if it had been made by Ms D. It never was. A sense of the extraordinary nature of that action emerges from the examination of Chief Superintendent Sheridan by Kathleen Leader BL for the tribunal:

***Question: Now, you've already told us this morning that you knew the allegations in the attached referral had never been made by Ms. D, isn't that correct?***

***Answer: That's correct, yeah.***

***Question: Now, why, at that stage, didn't you tell the assistant commissioner that the allegations contained in the attached referral had actually never been made by Ms. D?***

***Answer: Well, perhaps I should have, but I was trying to establish how the actual error occurred, and Superintendent McGinn was to communicate with the HSE in that regard. And, in hindsight, perhaps I should have put it in.***

***Question: But surely it was extremely important to set out that the allegations which you were causing more inquiries to be made with the HSE, be set out clearly, that they were incorrect. Surely it was of paramount importance that you, informing your superiors, informed them as well that those allegations were incorrect?***

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<sup>198</sup> Tribunal documents page 1764

*Answer: Well, I accept perhaps I should have put it in, but I was still conducting or having inquiries conducted to try and establish how it got to be in that referral in the first place. ...*

*Question: Did you at that time think that Ms. D had made a complaint based on the digital allegations, if I can put it that way --*

*Answer: No.*

*Question: -- to the following parties, the following parties being Micheál Martin and GSOC?*

*Answer: No, not in relation to the digital penetration.*

*Question: Why didn't you say that in the letter?*

*Answer: I accept, in hindsight, I probably should have put it in, but, as I say, there was no -- there was no malice in what I did. I was still trying to get to the bottom of how it happened to be in the referral in the first place, and I accept, in hindsight, that I possibly should have put it in there.<sup>199</sup>*

There is no explanation other than that a false allegation against Maurice McCabe of a rape offence had been passed from a chief superintendent to an assistant commissioner. This is incomprehensible. He later corrected this; as will be seen.

On 16 May 2014, Sergeant Karen Duffy of Assistant Commissioner Kenny's office for the Northern Region forwarded the notification to Garda Headquarters for the attention of the Garda Commissioner.<sup>200</sup> At that stage, Assistant Commissioner Kenny had read the original file in relation to the allegation of Ms D in full for the review by Seán Guerin SC.<sup>201</sup> At that stage, but only at that stage, it could be said, as Assistant Commissioner Kenny testified, he did not really know if this new notification of a rape offence was somehow an extension of the prior allegation of Ms D.<sup>202</sup> If that was so, then he should have paused and sought further information before reporting this false allegation as fact. This suggests to the tribunal that Maurice McCabe was outside the ranks of those entitled to ordinary consideration. The letter attached from Assistant Commissioner Kenny to Garda Headquarters stated as follows:

RE: Tusla Referral Notification of Suspected Child Abuse  
Injured Party Ms D D.O.B. [redacted]  
(Daughter of Mr D [reference to garda rank] at Bailieboro Garda Station)  
Suspected Offender Sergeant Maurice McCabe

The attached report from Chief Superintendent Sheridan, Monaghan is forwarded for your information.

It concerns a notification of suspected child abuse received by Superintendent L. McGinn, Bailieboro, from TUSLA Child and Family Agency on the 7<sup>th</sup> May 2014.

You will note that the allegation identifies the alleged perpetrator as Mr. Maurice McCabe and the victim is Ms D.

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<sup>199</sup> Transcript day 14 pages 23-25

<sup>200</sup> Tribunal documents page 1765

<sup>201</sup> Transcript day 16 page 27

<sup>202</sup> Transcript day 16 pages 30-31

I am considering this matter at the present time and I will keep you informed of developments.<sup>203</sup>

On the same date, the private secretary to the Commissioner, Superintendent Frank Walsh, acknowledged receipt of this correspondence from Assistant Commissioner Kenny:

I am directed by the Commissioner to refer to e-mail correspondence from your office of 16 May 2014, the content of which has been noted by the Commissioner.

It is noted that you are considering this matter and that you will keep the Commissioner informed of developments.<sup>204</sup>

The email from Sergeant Duffy, under direction of Assistant Commissioner Kenny, also attached Superintendent McGinn's report of 8 May 2014 and the incorrect TUSLA notification containing the false rape offence allegation. Official correction to the Assistant Commissioner's office of that false report very quickly followed on; that made by Chief Superintendent Sheridan. One of the most disturbing aspects of this is that on later receipt of the correction, which definitively stated that no one had ever accused Maurice McCabe of a rape offence, the false rape offence having been reported by Assistant Commissioner Kieran Kenny to Garda Headquarters, Assistant Commissioner Kenny never disclosed to Headquarters that the allegation had been made in error.

The allegation of the rape offence should not have been notified to the assistant commissioner. The allegation of the rape offence, further, should never have been notified to Garda Headquarters by the assistant commissioner. When the corrected notification had been received from social services, the assistant commissioner was notified by Chief Superintendent Sheridan. That notification was in the clearest possible terms. Assistant Commissioner Kenny left the administrative centre of the national police force with false information that a person from within garda ranks who was complaining about police standards had been the subject of a rape offence allegation.

On 20 May 2014, Superintendent McGinn forwarded the amended Laura Brophy report to Chief Superintendent Sheridan along with Laura Brophy's letter of 16 May 2014, with the fully corrected notification reporting what Ms D had claimed was a clothed encounter on a couch in 1998. Laura Brophy also clarified that she had made an error in her report to social services.<sup>205</sup> Chief Superintendent Sheridan then took a pen and wrote across the text of the allegation of a rape offence from TUSLA of 2 May 2014: "Withdrawn. See Referral of 16/5/14".<sup>206</sup> On 22 May 2014, Chief Superintendent Sheridan forwarded the amended Laura Brophy report to Assistant Commissioner Kenny. Chief Superintendent Sheridan wrote the following:

The previous referral contained incorrect information and should therefore be withdrawn and replaced with the attached.

This is a referral made by Tulsa relating to an incident which was reported to and investigated by An Garda Síochána in 2006/07. The Director of Public Prosecutions directed that there should not be a prosecution in the case.

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<sup>203</sup> Tribunal documents page 1766

<sup>204</sup> Tribunal documents page 1772

<sup>205</sup> Tribunal documents page 1776

<sup>206</sup> Tribunal documents page 1716

The attached referral does not disclose any new information/evidence in regard to these matters and therefore at this time does not require any further action by An Garda Síochána.

It is my understanding that Ms D has made a complaint based on the allegations set out in the attached referral form to the following parties:

- Mr. Micheal Martin, TD and that he has subsequently referred the matter to An Taoiseach, Mr. Enda Kenny, TD
- An Garda Síochána Ombudsman Commission

A full copy of the Garda Investigation file is available at this office. I also wish to advise that a complete copy of the Garda Investigation file was disclosed to the Guerin Inquiry.<sup>207</sup>

On that date also, Fiona Ward of Rian had written directly to Chief Superintendent Sheridan regarding the error in Laura Brophy's report and sought to have "all copies of the incorrect report including any copies made as part of Garda procedures in following up on this report."<sup>208</sup>

On 29 May 2014, an email was sent by Sergeant Patricia Maguire, on behalf of Chief Superintendent Sheridan, to Superintendent Leo McGinn and to Sergeant Duffy of Assistant Commissioner Kenny's office stating the following:

Reference above and attached correspondence received from HSE dated 22<sup>nd</sup> instant.

The report in question is dated 13<sup>th</sup> August 2013 [in original] and if you could confirm that all copies of same have been retracted and destroyed. If an original copy is on hand please forward same to this office so that it can be returned to the HSE.<sup>209</sup>

Unambiguously, in a manner which could admit of no uncertainty, the allegation against Maurice McCabe of a rape offence had officially been notified to the assistant commissioner as a mix-up. He had further been told that the allegation of a clothed encounter made by Ms D had been already investigated. On 10 June 2014, Assistant Commissioner Kenny responded to the email sent on behalf of Chief Superintendent Sheridan in relation to the retraction of the incorrect report:

With reference to the above I am in receipt of an email from your office on the 29<sup>th</sup> May 2014. I am concerned that a confidential matter such as this is dealt with by way of email.

Under no circumstances should any material in Garda custody be retracted or destroyed regarding this matter.

No materials will be returned to the H.S.E. without permission from this office.

I intend to hold a meeting at my office in Sligo on Monday the 16<sup>th</sup> June 2014 at 10am. I request that both you and Superintendent McGinn attend and are in possession of all materials, correspondence regarding this matter.<sup>210</sup>

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<sup>207</sup> Tribunal documents page 1781

<sup>208</sup> Tribunal documents page 1782

<sup>209</sup> Tribunal documents page 1784

<sup>210</sup> Tribunal documents page 1793

Assistant Commissioner Kenny did not pass the correction on to Garda Headquarters. Nor did he ever write to the Commissioner that one of her officers, whom he had reported as being the subject of a rape offence allegation, had been accused in the wrong. A rape offence allegation against Maurice McCabe was passed up the line. A correction had, shortly after that, been passed up the line to Assistant Commissioner Kenny by Superintendent Sheridan. That correction did not get to Garda Headquarters.

The gardaí then planned to meet about the matter. The meeting did not take place until 16 July 2014, and was held in Mullingar.

Should all of the documentation containing the allegation of a rape offence that no one had ever made against Maurice McCabe have been destroyed? In relation to Assistant Commissioner Kenny's order that no documentation was to be destroyed, he gave the following evidence to the tribunal:

*Well, I suppose, the word destroyed was the first word that jumped out at me, out of this document. [referring to Chief Superintendent Sheridan's email] And Chairman, I have 41 years' service in An Garda Síochána, I conducted and was involved in many major investigations and my personal opinion is that when a document is generated, it's a record, and I certainly -- I don't see any circumstances that I would be allowing the destruction of a document that has been created. I have no difficulty whatsoever with retracted, withdrawn, or any other words that somebody wants to use, but certainly once a document is created, it's a record, it's appropriately filed with whatever action has been taken in respect of the document written on it. But once it's a record, it remains a record. And that's the reason that I took that view in respect of the document, Chairman.<sup>211</sup>*

This was a reasonable view.

What was not right was leaving Garda Headquarters and the Garda Commissioner with an allegation of a rape offence against Maurice McCabe which no one had ever made.

### **The Laura Brophy error explained**

At around this time, Chief Superintendent Sheridan was in contact with Fiona Ward. Naturally, he was seeking clarification as to how the error in Laura Brophy's original mistaken report had arisen.<sup>212</sup> This was clarified to Chief Superintendent Sheridan by Fiona Ward by letter of 18 June 2014.<sup>213</sup> In that letter, she set out that the error had occurred in the course of administration. In a later letter of 1 July 2014, she clarified that the error "occurred when information from a report template was cut and pasted into another template." She also said that the inaccurate information "does not relate to the above named in anyway", referring to Maurice McCabe.<sup>214</sup>

On 3 July 2014, Chief Superintendent Sheridan sent a report, quoted with bold writing as in the original, on the TUSLA referral to Assistant Commissioner Kenny setting out the history of the complaint and the errors which had later occurred:

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<sup>211</sup> Transcript day 16 page 39

<sup>212</sup> Tribunal documents page 1789

<sup>213</sup> Tribunal documents page 1794

<sup>214</sup> Tribunal documents page 1804

Reference above and further to your correspondence dated 10<sup>th</sup> June 2014 I wish to advise as follows;

On Monday the 4<sup>th</sup> December 2006 an alleged indecent assault upon a child, Ms D D.O.B. [redacted] of [place name redacted] Co. Cavan was reported to Gardai at Cavan Garda Station. It was alleged that she was aged about six years at the time of the assault. Superintendent Fergus Healy, District Officer, Cavan directed D/Sergeant Jim Fraher, Cavan accompanied by Sergeant Denise Flynn, Monaghan to interview the alleged injured party Ms D.

The injured party was interviewed and a written statement taken from her on the 5<sup>th</sup> December 2006.

In the statement she alleges that ... [Extract from the statement detailing the allegation]

On the 8<sup>th</sup> December 2006 Chief Superintendent Colm Rooney appointed Inspector Noel Cunningham to conduct a criminal investigation into the allegations and also to advise him if any disciplinary issues arose,

On the 19<sup>th</sup> February 2007 Inspector Cunningham forwarded the Investigation File to the State Solicitor Cavan for onward transmission to the Director of Public Prosecutions for direction. He also advised Chief Superintendent, Monaghan that nothing of a disciplinary nature arose against Sergeant McCabe. [Directions of the Director of Public Prosecutions from letter of 5 April 2007 quoted in full]x

All parties were subsequently advised of the directions of the Law Officers.

The incident was not recorded on Pulse at the time it was reported and it has not been recorded on Pulse to date.

It also appears that no referral was made to the Health Service Executive ( Health Board) at the time of its report to the Gardai.

The Health Service Executive/ Health Board/ TULSA would therefore have no knowledge of the allegations made by Ms D

In August 2013 Ms D attended for counselling with the H.S.E./NCS and disclosed the alleged sexual assault on her by Sergeant Maurice McCabe.

On the 2<sup>nd</sup> May 2014 TULSA using Standard Notification Form for use by Child & Family Agency in notifying cases to An Garda Siochana notified Superintendent, Bailieboro of a case of suspected Child Abuse...

The Referral made by TULSA relating to the disclosures made by Ms D to the Superintendent, Bailieboro contained allegations which were not consistent with the allegations investigated by An Garda Siochana in 2006/2007...

On the 16<sup>th</sup> May 2014 Laura Brophy wrote to Superintendent, Baileboro and stated as follows - ...

I am writing to confirm that a report I made to the Social Work Service, Cavan on the 9<sup>th</sup> August 2013 contained an administrative error which I wish to address. On page one of the original report I sent on behalf of Ms D under the title 'Description of Abuse' the

sentence which begins with ‘Ms ... informed me...’ and ends with ‘ ...she said anything’ is incorrect information and should be disregarded. I have amended the report to include the correct information as given to me by Ms D and I have enclosed the correct report with this letter’.

The Referral received from TULSA on the 16<sup>th</sup> May 2014 contains the allegation which was investigated by the Gardai in 2006/2007. The report contains the following information which was provided by Ms D.

Ms D remembered the abuse when she was approximately 11/12 years and informed her parents. Ms D made a statement to the Gardai at this time and the file was sent to the D.P.P. however Ms D was later informed that there was insufficient evidence to proceed any further’...

On the 22<sup>nd</sup> May 2014 Ms Fiona Ward, Director of Counselling wrote to me confirming that an administrative error had occurred in this report and confirming that a corrected report had issued...

To remove any ambiguity in regard to these matters on the 9<sup>th</sup> June 2014 I wrote to Ms Fiona Ward seeking clarification on how this Administrative error occurred which led to the issuing of the Referral dated 2<sup>nd</sup> May 2014.

In correspondence dated 18<sup>th</sup> June 2014 & 1<sup>st</sup> July 2014 Ms Ward outlines that - ...

‘the information which was reported in error on the first report you received, relates to a different client and a different alleged perpetrator.’

From verbal communication with them the error occurred using ‘cut and paste’ method on the computer and obviously a failure to fully check the correspondence prior to issue.

Arising from written and verbal communication with Ms Ward and TULSA it is clear that the Referral of the 16<sup>th</sup> May 2014 refers to the allegations of Ms D investigated by the Gardai in 2006/2007. The referral does not contain any new allegations.

The referral of the 2<sup>nd</sup> May 2014 was issued in error and is not relevant to the allegations of Ms D

I understand Ms D had a meeting with Mr Micheal Martin T.D. and made him aware of the allegations she had made and he referred them to An Taoiseach Enda Kenny T.D.

I also understand that Ms D made a complaint relating to these matters to the Garda Siochana Ombudsman Commission.

They have indicated that they will not be investigating the allegation made by Ms D against Sergeant Maurice McCabe but that they will be investigating the original Garda investigation of her complaint.

Ms D has not requested An Garda Siochana to reinvestigate her complaint or to review it.

TUASLA have requested the return of the Referral which contained the incorrect information.<sup>215</sup>

To this report, Chief Superintendent Sheridan attached the Director of Public Prosecution's directions of 5 April 2007, the original of the incorrect TUSLA notification, Laura Brophy's letter of 16 May 2014 and her amended report, and correspondence from Fiona Ward.<sup>216</sup> This was an efficient letter and one which left no room for doubt. Where it is in error is in the expression of the belief that no notification had been originally made by the gardaí to the Health Service Executive, later TUSLA. Of course, such a notification had been made by the gardaí on 6 December 2006. It would have been easy to check that. Nobody bothered to do so.

On 10 July 2014, Assistant Commissioner Kenny replied, "I have noted your correspondence of the 3<sup>rd</sup> inst."<sup>217</sup> The report of Chief Superintendent Sheridan was not forwarded on to the Commissioner or to Garda Headquarters. That was Assistant Commissioner Kenny's responsibility.

The tribunal cannot accept that there was any reason consistent with the proper and fair-minded discharge of duties that could explain why Garda Headquarters and the Garda Commissioner were left with a report against Maurice McCabe that a young woman had alleged he had committed a rape offence. The following exchange between Patrick Marrinan SC for the tribunal and Assistant Commissioner Kenny took place:

***Question: ...did you advise the Commissioner that the allegation that is now being sent to the Commissioner's office does not correspond with the allegation in the file that you'd examined in March?***

***Answer: Not at that time, no.***

***Question: Why not?***

***Answer: Chairman, again, I suppose this was moving and I just -- I was always of the impression that that matter had -- that that had been done, and I wasn't aware that that hadn't gone to the Commissioner's office until I actually studied the materials for this Tribunal.<sup>218</sup> ...***

***Question: So until 2017 when this matter erupted in the media and in Dáil Éireann, the Commissioner's office, even at that stage, had documentation from you including an allegation of penetrative abuse, isn't that right?***

***Answer: That's correct.***

***Question: How can that be? Why didn't you notify the Commissioner's office of the error and false accusation against Sergeant McCabe?***

***Answer: As I said, Chairman, I was under the impression right up to the time of making my statement for this Tribunal that that notification had been sent to the***

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<sup>215</sup> Tribunal documents from page 1805

<sup>216</sup> Tribunal documents from page 1809

<sup>217</sup> Tribunal documents page 1833

<sup>218</sup> Transcript day 16 page 42

***Commissioner's office. I mean, I just -- that was my impression, I just can't put it any more than that. I just say at that time, I mean, the amount of responsibilities I had - and I am not making this in any way as an excuse for it - it's just, it's something that I assumed or I was of the impression that it had been forwarded from my office, Chairman, genuinely.***<sup>219</sup>

A notification of this importance could not have been made without an express order from Assistant Commissioner Kenny. The erroneous rape offence report passed on to Garda Headquarters and to the Garda Commissioner required Assistant Commissioner Kenny to withdraw it. In his evidence he claimed that he had thought that this correction should have been made by his staff. His staff could not, however, in a matter of this importance, have acted without his direction.

At the time, the person in charge of correspondence in the assistant commissioner's office, which was based in Sligo, was Sergeant Karen Duffy. It is the tribunal's view that neither could she have been expected to have somehow known what was in Assistant Commissioner Kenny's mind, nor could she write contradicting something which her superior officer had written to his superior. In evidence, she said:

***I was a sergeant at that time. I certainly would have had no authority or autonomy to send something of such grave nature to the Commissioner's office without being directed or requested by the assistant commissioner to do so. It's evident that he had dealt with all other correspondence in relation to this matter and was quite adamant that it was all to be signed correspondence, which he duly signed, and it was all to be sent as attachments. So, I certainly had received no instruction or direction from Assistant Commissioner Kenny to send something like that off to the Commissioner, without his knowledge. ... As previously stated, the only two people that would have access to this file, because of the confidential matter, would have been Assistant Commissioner Kenny and myself.***<sup>220</sup>

The tribunal accepts that evidence. As a matter of official record, this false notification of a rape offence against Maurice McCabe remained on file in Garda Headquarters up to the commencement of this tribunal in February 2017.

## **Garda Headquarters**

It was the responsibility of the secretary to the Garda Commissioner to bring important correspondence to her attention. At that time, that role was filled by Superintendent Frank Walsh. His evidence was that he brought this false notification of a rape offence to the attention of Commissioner Nóirín O'Sullivan shortly after it was received by email on 16 May 2014. She read the incorrect notification and, according to him, he could not recall her saying anything or reacting in any way.<sup>221</sup> Commissioner O'Sullivan told the tribunal that she could not remember reading this.<sup>222</sup>

A few months later, Commissioner O'Sullivan met with Maurice McCabe in relation to bullying and workplace issues. Possibly, she did not read the notification properly. Superintendent Walsh

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<sup>219</sup> Transcript day 16 page 44-45

<sup>220</sup> Transcript day 17 from page 29

<sup>221</sup> Transcript day 16 page 161

<sup>222</sup> Transcript day 46 page 90

was clear in his evidence that he drew the specific allegation to her attention. Possibly, this could have been a case of unpleasant allegations going in one ear and out the other. She would have had at least a vague impression in meeting Maurice McCabe that this was a man who had been accused of a rape offence. That, however, was in no way her fault. She could only go on what was reported to her. Possibly, she regarded the decision of the Director of Public Prosecutions as the key fact.

There was a meeting on 7 August 2014 with Maurice McCabe and Commissioner O'Sullivan and Assistant Commissioner Kenny up in Garda Headquarters. This was after Martin Callinan had retired early and when Nóirín O'Sullivan had stepped into his shoes as commissioner. At the tribunal, Breffni Gordon BL on behalf of Maurice McCabe questioned Assistant Commissioner Kenny in relation to this:

***Question: Mr. Kenny, this situation developed a little further to a point where you, in fact, met with Maurice McCabe on the 7th August, you met with the Commissioner in his presence?***

***Answer: Yes.***<sup>223</sup> ...

***Question: Why didn't you tell Maurice McCabe, Sergeant McCabe, that there was a very live unpleasant file passing between you and the Commissioner in relation to a rape allegation?***

***Answer: Because, as I said at the outset, my view on that was that the onus and responsibility to inform Sergeant McCabe of the error that was made, that responsibility, in my view, rested with the HSE.***

***Question: But don't you see, and you must have seen at the time, I suggest to you, that Maurice McCabe's employer, the Commissioner, was sitting there with him present with a rape allegation file on her desk.***

***Answer: Yes.***

***Question: And are you seriously suggesting to this Tribunal that you never had any discussion with the Commissioner about that?***

***Answer: Yes, on oath, I am.***<sup>224</sup>

The tribunal is not, however, in a position to conclude what discussion took place with the Commissioner or whether any such was memorable to her. The preponderance of evidence emerging in the later hearings of the tribunal was that the new Garda Commissioner was determined to put a new regime in place for dealing with Maurice McCabe. She took her own counsel on this matter. One of her first actions was to get rid of Superintendent David Taylor as head of the press office. He reacted severely and dishonestly against her in consequence.

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<sup>223</sup> Transcript day 16 page 123

<sup>224</sup> Transcript day 16 page 125

## The Mullingar meeting of 16 July 2014

On 16 July 2014, a meeting was held in Mullingar garda station in relation to the TUSLA referral. There has been a huge volume of questions directed to this meeting. It is more than puzzling as to what precisely it was about. What is extraordinary is that no one requested that the original investigating officer, Superintendent Noel Cunningham, attend. What is also astonishing is that no one took the trouble to call up the original investigation file into the Ms D allegation of December 2006. It was in the safe in Superintendent Noel Cunningham's office. If it had been retrieved, it would have been clearly seen that back in 2006, the gardaí had notified the Health Service Executive about Ms D's allegation of a short and fully clothed encounter on a couch during an alleged game of hide and seek.

No doubt, had Superintendent Cunningham been invited, he would have come with the complete file. That is the kind of efficient person he is. He also might then have been inspired to answer the letter seeking clarification which Keara McGlone of TUSLA had written to him on 15 August 2013. Certainly, the importance of it would have been brought home to him. The tribunal can only infer that some among the gardaí attending made a decision to exclude him.

The meeting was attended by Assistant Commissioner Kieran Kenny, Chief Superintendent James Sheridan, Superintendent Leo McGinn, and Sergeant Karen Duffy who took minutes of the meeting. Assistant Commissioner Kenny was asked about the necessity for a meeting given that he had been informed that the gardaí had already investigated the complaint of Ms D in 2006/2007 and that there was no fresh allegation:

*...what was in my head at that time was that I decided I wanted to sit down with the people, with my officers on the ground who were dealing with this at operational level, Chief Superintendent Sheridan and Superintendent McGinn, in order that they would brief me and bring me up to date in respect of all aspects of the matter. I just wanted to be -- I suppose, clarity on the issues, I wanted to be assured that the situation was as it was portrayed to me, and an opportunity to tease out matters and discuss it in a format face-to-face with the Garda officers concerned.<sup>225</sup>*

If that was so, then Superintendent Noel Cunningham should have been at this meeting. His absence, and the complete absence of any rational excuse for not inviting him, casts a pall of unreality over testimony about that gathering.

The minutes of the meeting taken by Sergeant Duffy provide as follows:

Assistant Commissioner Kenny outlined that we need to deal with this matter given the people involved. It is unbelievable that the H.S.E completed the referral via copy and paste. He outlined that he doesn't accept that the referral was passed through three different people in the H.S.E. and it was not noticed.

Chief Superintendent J. Sheridan outlined that the counsellor completed the referral, and that the names were only changed by the H.S.E. and the details of the incident were forgotten / overlooked and it passed through a few hands before it was picked up.

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<sup>225</sup> Transcript day 16 page 40-41

Assistant Commissioner Kenny outlined that no correspondence will be destroyed and nothing will be retracted. He outlined that he accepts that the H.S.E. made a mistake and they have amended it. He outlined that he was aware that G.S.O.C. are now carrying out an investigation into the original investigation file, and how the matter was investigated. There are a few issues Chief Superintendent C. Rooney, Cavan / Monaghan Division appointed Superintendent N. Cunningham to investigate the matter. Superintendent Cunningham informed Chief Superintendent Rooney that he was of the view that the matter should be investigated outside the Cavan / Monaghan Division, however Chief Superintendent Rooney directed Superintendent Cunningham to complete the investigation. The incident was not recorded on the PULSE system, and the matter was not referred to the H.S.E.

The file was completed and submitted to the Director of Public Prosecutions who directed no prosecution. Assistant Commissioner Kenny outlined that he was of the view that the two issues arising are that the incident was not recorded on PULSE and there was no referral made to the H.S.E. What we An Garda Siochana have now is a referral from the H.S.E.

Chief Superintendent J. Sheridan outlined that the injured party went for counselling in August 2013 at which stage she was an adult. He outlined that no referral was made to the H.S.E. In 2006/2007 nor did any meeting take place with the H.S.E. in 2006/2007. If there had been a referral made on the matter in 2006/2007 we would not be getting the referral now. Chief Superintendent Sheridan raised the issue of do we need to have a meeting with the H.S.E. now.

Assistant Commissioner Kenny outlined that he had concerns that the injured party went for counselling and a referral was made the H.S.E., and a referral was then made to An Garda Siochana. He outlined that he was of the view that this referral should be dealt with as a new referral, that we can't just take it as the same incident.

Chief Superintendent Sheridan outlined that referral does state that the matter was investigated and that there was no prosecution. He raised the issue that if An Garda Siochana meets with the H.S.E. would social services and the suspects family need to be informed as he has children.

Assistant Commissioner Kenny outlined that safety issues don't appear to be on the H.S.E.'s radar/agenda.

Chief Superintendent Sheridan outlined that if there are safety issues An Garda Siochana didn't do anything for the last 6/7 years.

Superintendent L. McGinn raised the issue that the suspect has access to kids in relation to his job etc, is there a risk?

Assistant Commissioner Kenny stated that he agreed and that this matter needed to be dealt with properly.

Superintendent L. McGinn outlined that the Garda investigation has been completed.

Assistant Commissioner Kenny outlined that he was of the view that legal opinion and advice would be necessary.

Chief Superintendent Sheridan outlined that he agreed and that advice should be sought from Mr. Ken Ruane, Head of Legal Affairs. He outlined that the big issue is the referral not being completed at the time of the alleged incident, and G.S.O.C. might request that the matter is re-investigated. He also outlined that he feels the bigger issue is that no referral was made, and that we need to get advice on this matter.

Assistant Commissioner Kenny raised the issue of the possibility of the need to liaise with the injured party to establish if the referral is the same as her complaint in 2006/2007.

Chief Superintendent Sheridan outlined that the referral received is the same as her statement made in 2006/2007 and the referral states that a file was completed. The referral and the risk posed is a problem. He suggested that we liaise with the H.S.E. to establish what their intentions regarding this referral.

Assistant Commissioner Kenny raised the question what would we do if this was a new referral?

Superintendent L. McGinn outlined that a criminal investigation would commence and An Garda Síochána would meet with the H.S.E.

Assistant Commissioner Kenny outlined that the notification of the matter is the concern.

Superintendent L. McGinn outlined that the suspected offender was not arrested at the time of the investigation and this may be an issue, and also the fact that the matter was investigated by members with the Cavan / Monaghan Division.

Assistant Commissioner Kenny suggested that a meeting needs to be arranged with Mr. Ken Ruane, Head of Legal Affairs.

Chief Superintendent Sheridan was in agreement.

Assistant Commissioner Kenny outlined that An Garda Síochána has accepted that it was an error on the part of the H.S.E.

Chief Superintendent Sheridan outlined that he would liaise with the H.S.E. to establish what their intentions /strategy is.

Assistant Commissioner Kenny outlined that advice is needed and the matter needs to be dealt with correctly.

Superintendent McGinn outlined that the matter has been published in the Newspapers.

Chief Superintendent Sheridan outlined that the injured party reported the matter to G.S.O.C. so that the matter would be re- investigated and that the suspected offender may be exposed.

Superintendent L. McGinn outlined that the injured party has had meeting with Mr. Michael Martin T.D. and he wrote to the Taoiseach.

Assistant Commissioner Kenny outlined that he will make contact with Mr. Ken Ruane, Head of Legal Affairs and that Chief Superintendent Sheridan will liaise with the H.S.E. to establish what their intentions / strategy is. The correspondence will have to be acknowledged and we need to deal with the situation and the matter correctly. He outlined that we might also need to deal with what was done with the matter since 2006/2007.<sup>226</sup>

A naïve interpretation of this meeting might be that it was to no effect and served little purpose.

It is disheartening, however, to note the absence of the correct file and the person central to the investigation of the original allegations: Superintendent Cunningham. Nothing new had come up. With Superintendent Cunningham absent, there was little to be learned.

Continuing, the meeting poses the task of what to do as “What we An Garda Síochána have now is a referral from the H.S.E.” In consequence, Assistant Commissioner Kenny “outlined that the notification of the matter is the concern”. Well, it was not and he should have known that. The meeting seemed concerned that “the matter has been published in the Newspapers.” Tasked with the job of liaison with the Health Service Executive “to establish what their intentions/strategy is” was Chief Superintendent Sheridan.

After an email was sent to Inspector Patrick O’Connell by Fiona Ward of Rian giving the correct contact details for a TUSLA social worker, Chief Superintendent Sheridan said he was not notified and so nothing further happened. Inspector O’Connell claims to have been busy, transferring out of the district and celebrating that with a gathering, and says that he perhaps deleted the relevant email. He claims no recollection of ever seeing the email.<sup>227</sup> The tribunal does not accept his evidence in this respect. To Chief Superintendent Sheridan, the minutes of the meeting ascribe the extraordinary statement that since “the injured party” had “reported the matter to” the Garda Síochána Ombudsman Commission “the matter would be re- investigated and that the suspected offender may be exposed.” To that, it might usefully have been pointed out by someone that the Director of Public Prosecutions had ruled that no sexual assault or any assault had been committed, even if the Ms D allegation were true and raised no credibility issues. Exposure was not in prospect. Nor was it desirable since no offence had been committed.

Enough time was spent during the tribunal hearings on this meeting to offer some enlightenment. No enlightenment came.

The tribunal is not content to accept any one of the several broadly conforming accounts as to the purpose and content of this meeting. Little of that testimony struck home in the context of the already listed infirmities of the meeting. Certainly, the meeting would have been a reminder to Assistant Commissioner Kenny that he had made an incorrect report of a rape offence to Garda Headquarters against Maurice McCabe. But it resulted in nothing.

Also, it might have reminded any sensible person that Superintendent Noel Cunningham would be worth talking to. No one did that. On its face, the minutes of the meeting display, at very best, a lack of clear thinking and an eminent level of inefficiency and woolly thinking.

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<sup>226</sup> Tribunal documents from page 1835

<sup>227</sup> Transcript day 15 page 44-5

### **Maurice McCabe in the dark**

On 17 July 2014, Superintendent Walsh from the Commissioner's office wrote to Assistant Commissioner Kenny to "enquire on the current status of the matter."<sup>228</sup> This had to be a reference to the rape offence falsely reported to the Commissioner; there was nothing else in issue. The Assistant Commissioner replied on 28 July 2014 and stated that a meeting in relation to the matter had been held and that as a result he would be "consulting with Mr. Ken Ruane, Head of Legal Affairs in relation to this matter. Chief Superintendent Sheridan will be liaising with the H.S.E. to establish what their intentions are in relation to the referral Developments will be reported."<sup>229</sup>

The office of the Commissioner replied on 31 July 2014, noting the contents of the 28 July letter and asking that Assistant Commissioner Kenny "[p]lease report further following consultations with the Head of Legal Affairs and the H.S.E."<sup>230</sup> There was no further correspondence in relation to this matter from Assistant Commissioner Kenny. He did not seek advice from Ken Ruane, an utterly reliable person and a highly competent solicitor, and Chief Superintendent Sheridan did not revert back to him in relation to any developments from the Health Service Executive.<sup>231</sup>

Whatever was being tossed around in Mullingar, it is impossible to conclude that what was afoot was some kind of plan to deliberately do down Maurice McCabe. No matter how any reasonable person may look at it, there could be no inkling that in consequence of the return of Ms D to counselling in 2013 and the word processing error in 2014, TUSLA would be so incompetent that a letter from them accusing Maurice McCabe of a rape offence would arrive at his home in January 2016. That, certainly, had nothing to do with the gardaí. Nor could anyone have predicted it.

As regards Garda Headquarters, is it right to question whether the making of, and the failure of someone of assistant commissioner level to correct, a plainly false but extremely damaging report of a rape offence testifies to a febrile atmosphere at the top levels of the organisation? There is insufficient evidence to state that on the basis of what is in this report alone.

The tribunal is, however, driven to doubt bald assertions that fellow gardaí had no problems with Maurice McCabe. Some certainly did have problems with him. There is no doubt about that. As regards feelings in respect of him, some testimony did help. Chief Superintendent Sheridan was asked as to why he personally had not contacted Maurice McCabe in relation to this matter and he said:

***Well, my assessment of it was that it wasn't our job to do that, that it was the HSE's job to do that. It could have legal implications for them and whatever else, and I could go to Sergeant McCabe and try and answer his questions but I may not have the answer. I could answer A, B, C, he could have further questions that I would not be in a position to answer. ... But, in my view, the HSE made the error, catastrophic error, and they should have rectified it and gone to Sergeant McCabe.***<sup>232</sup>

Inspector Patrick O'Connell was asked if it was "a case of fearing to go" to Maurice McCabe "without every single answer that might be available, for fear that you'd be part of yet another review"? He answered:

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<sup>228</sup> Tribunal documents page 1838

<sup>229</sup> Tribunal documents page 1839

<sup>230</sup> Tribunal documents page 1840

<sup>231</sup> Transcript day 16 page 72-73

<sup>232</sup> Transcript day 14 from page 136

*Well, from a personal perspective ... and I can only give you from a personal perspective, there would certainly have been a reluctance and an element of fear that if you made contact, that you were going to find yourself embroiled into further controversy, and that was a genuinely-held fear at that time, because the situation was now gone to national prominence at Commissioner level, and there was a reluctance and a fear, a general fear, that if you contacted Sergeant McCabe you might end up embroiled in something that you had nothing to do with.*<sup>233</sup>

The last aspect of this is Superintendent Cunningham not answering the letter of 15 August 2013 from Keara McGlone of TUSLA asking him to make contact. According to him, this is supposed to have happened because he had taken extended leave to assist one of his children moving to another European city and because of the death of his father on his return.<sup>234</sup> The tribunal cannot understand this. Had contact been made, then Superintendent Cunningham would have cleared up some of the misunderstandings of TUSLA. On the other hand, Superintendent Cunningham had always tried to do the right thing throughout all of his dealings with Maurice McCabe. His mindset would always be to do the decent thing. Had he been invited to the Mullingar meeting of 16 July 2014 by Assistant Commissioner Kenny, he would have attended and would undoubtedly have put people right. At the least, he would have been reminded to attend to the letter in his safe. So carefully did he file it away, it seems, that by the time Garda Headquarters became aware of its existence and asked for it by way of a letter dated 1 March 2017,<sup>235</sup> a search of the file did not apparently reveal it. According to Superintendent Cunningham, he found the letter from Keara McGlone on 3 March 2017.<sup>236</sup>

### **Senior officers and Maurice McCabe**

The facts do not amount to an exoneration of the gardaí in their treatment of Maurice McCabe. Some factors are too much to be a coincidence. Chief Superintendent Sheridan should have contacted TUSLA after the Mullingar meeting of 16 July 2014; he should never have communicated an incorrect allegation to Assistant Commissioner Kenny, though he later corrected it; Inspector O'Connell claims not to have read, nor to have a record of, nor did he act on the email from Fiona Ward of 28 July 2014 providing to the gardaí the point of contact in TUSLA as Eileen Argue;<sup>237</sup> Assistant Commissioner Kenny unaccountably sent an allegation of a rape offence to the Garda Commissioner and when definitively told in writing that it was false, never retracted it; and no one at all felt it a good idea to contact Maurice McCabe and tell him that a rape offence allegation had mistakenly been made against him.

### **The afterlife within TUSLA of the incorrect report**

To recap: Laura Brophy made an error in 2013 in using the Ms Y template to report to TUSLA that Ms D had returned to counselling after six years and was repeating her 2006 allegation against Maurice McCabe. Thus the allegation of Ms D of what she said was a clothed encounter as a small girl with Maurice McCabe on a couch, during what she said was a game of hide and seek with other people nearby, became an allegation against him that no one had ever made: that he had digitally penetrated her anus and vagina. That was Ms Y's allegation against Mr Z. Laura Brophy did all that she could to stop the error which she made having any consequences. She could not

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<sup>233</sup> Transcript day 15 pages 109-10

<sup>234</sup> Transcript day 12 from page 58

<sup>235</sup> Tribunal documents page 2041

<sup>236</sup> Tribunal documents page 2100

<sup>237</sup> Transcript day 15 page 44-5

be asked to have done more than she did. All of the catastrophic errors which followed within TUSLA are entirely the responsibility of that organisation.

Any reasonable person, with knowledge of basic management principles, would confidently expect that, the error having been identified, the wrongful notification of this to the gardaí would be withdrawn and corrected; that all the documents within official social work files containing the wrong allegation would be filleted out of the file or marked 'WITHDRAWN'; that, since the matter had previously been considered and no file opened on Maurice McCabe as a risk to children, or his children as being at risk from him, no intake records on any of his children would be opened; that the file on Ms D and her allegation, having been closed in 2007, would not be reopened; and that if it were reopened, it would be reopened on the basis of the correct allegation, that of Ms D and not of Ms Y; that a file intended to be actioned according to the "measuring the pressure" system would be accurate; that senior social services personnel in directing what to do on the file would actually read it in full and would ask pertinent questions; and that any plan of action for that file, accurate or not, would be followed up on according to the letter.

Apart from competently withdrawing the incorrect allegation from the gardaí, TUSLA acted completely contrary to all of these reasonable expectations.

Debate around this matter at the time of setting up the tribunal in February 2017 centred on whether what happened to Maurice McCabe was in consequence of garda interference in internal social work affairs in TUSLA. Certainly, the manner in which the allegation that was known to be false was sent to Garda Headquarters, and was left uncorrected, is a responsibility of the garda organisation. The incompetence of TUSLA, however, and the consequences generated by poor management within TUSLA has nothing to do with the gardaí. As Linda Creamer told the tribunal when asked if there was any chance that this was due to garda interference:

***To be honest with you, it would be easier if I could say that that is what I believe is happening, but it's not what I believe is happening. I believe it to be completely and absolutely incompetence.... I believe it to be incompetence on the management of the file. I don't believe that there is collusion.... Well, I would like to think that we could -- This to me is a file, people have seen it as a file, they have taken on tasks as it as a file, I don't see that they have a face behind it, that this is a person with a family and it wasn't seen like that, it was just seen as a file with a task as opposed to the human nature of it, which is extremely disappointing.***<sup>238</sup>

Having been asked by Rian, and specifically Fiona Ward, to return the incorrect report from Laura Brophy, TUSLA did so.<sup>239</sup> What any reasonable person might expect is that every document falsely ascribing against Maurice McCabe the allegation made by Ms Y against Mr Z would be removed from the file entirely or would be overwritten or noted so as to alert anyone later reading it that this allegation had been made against him by no one. That did not happen.

The Laura Brophy reports were removed from the TUSLA file, but the incorrect report of 2 May 2014 from TUSLA to the gardaí was maintained on the file. It might reasonably be asked why? There is no answer to this matter save the chaotic nature of the systems involved.

Furthermore, any reading of the file, and this is not a long file, would disclose that two notifications had been sent to the gardaí and that these were mutually inconsistent and therefore mutually exclusive. Despite some extraordinary evidence from TUSLA officials attempting to obfuscate the

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<sup>238</sup> Transcript day 9 page 101-2

<sup>239</sup> Transcript day 3 page 7

issue, both notifications could not be right. At the very least, a question should have been asked about this. If there ever was such a question posed by anyone in TUSLA, it was not followed through on competently.

Again, for the sake of clarity, it will be recalled that the 2 May 2014 notification to the gardaí from TUSLA reproduced the incorrect written report of Laura Brophy, jumbling up and naming both Ms D and Ms Y, as opposed to her correct telephone report. Thus, this report of Laura Brophy had put in two inconsistent names, those of Ms Y and Ms D, and had described the alleged encounter on the couch with other people close by as involving digital penetration of the anus and vagina. In copying this report for garda notification, TUSLA, through Laura Connolly, had used only the name Ms D but had conflated the alleged encounter on the couch with the rape offence allegation of digital penetration that Ms Y had made against another person, Mr Z. When, within about a week, the nature of this notification had been drawn to the attention of Mr D, he had asked his daughter about it and she had confirmed that she had never made any such allegation against Maurice McCabe. Hence, on TUSLA being notified of the error, a second report was received from Laura Brophy. This time she made no error and correctly reproduced the 2013 version of Ms D's allegation that had resurfaced from 2006 and been reported to her in July 2013.

There followed from TUSLA another garda notification in the wholly mistaken belief that the 2006 allegation was unknown to them, this despite the fact that a full reading of the file in Cavan would have disclosed that back in 2006 it was in fact the gardaí that notified social services of the allegation. Failure to read that file fully, or even flick through the pages, was a dereliction of duty to the taxpayer. These errors are simple and should easily have been dealt with.

TUSLA had sent a corrected notification to the gardaí on 20 June 2014 and this was basically correct; though it did describe Maurice McCabe as threatening “her father if she said anything”. Again, this is yet another inexplicable mistake as Ms D had never said that about Maurice McCabe in 2006 or since.<sup>240</sup> Ms Y had said that about Mr Z. This was a further example of utter administrative incompetence by TUSLA.

There things were left. The two inconsistent garda notifications on the Ms D social work file were to have consequences. When Kay McLoughlin came to do an analysis of unallocated files in May 2015, she had no prior knowledge of the 2006/7 file concerning Ms D and had no idea that the file had been closed off by Mary O'Reilly and Rhona Murphy. When she was social work team leader with responsibility for the duty intake team for Cavan/Monaghan in late 2014 she attempted a review of all outstanding cases in order to allocate those which had yet to receive attention. At that time, a few extra staff became available, enabling such a review. There was a “Waiting List Review Form” to be ascribed to those cases.<sup>241</sup> As of 7 May 2015, that form was completed as being an “Allegation of CSA against Maurice McCabe”.

The management decision as to what to do was to contact Ms D “re checking the reliability and accuracy of allegation made” and to review the “information” while Maurice McCabe had a letter “prepared” in respect of him which was to be sent after establishing his “current address”.<sup>242</sup> It will be recalled that the evidence as to correct procedures from Linda Creamer was that basic to this process of contacting an alleged abuser was to first of all do a credibility assessment in relation to the allegation with the complainant and that a letter to the alleged abuser was not to be sent

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<sup>240</sup> Tribunal documents page 448

<sup>241</sup> Tribunal documents page 450

<sup>242</sup> Tribunal documents page 450

until such time as that had been carried out.<sup>243</sup> A later Post-it appended to the file notes that while Ms D had been offered an appointment, she had “Failed to attend 2.6.15. Offer another app”.

That same day, Kay McLoughlin emailed on her concerns to Séamus Deeney and to Gerry Lowry. They occupied the roles, respectively, of principal social worker and area manager for Cavan/Monaghan. The email read:

I along with Gail have been reviewing files on the MTP today. One relates to Maurice McCabe and I would like to discuss this case with you both before taking any action as it appears that this concern was referred to us in 2007 and Mr. McCabe was never met. It has come back in again due to media coverage of Mr McCabe. The outstanding actions are that Mr McCabe be written to outlining the allegations and then be met and afforded an opportunity to respond. We would have to advise him that we would need to tell his wife about this information so as she can be protective. It is likely she is aware of the allegations as a file was sent to the DPP however no prosecution was directed. Mr McCabe has female children and the victim was a seven year old child when the alleged incident occurred.

My issues are that we are proposing to tell this woman that we have concerns after not doing it for possibly up to 8 years and also I am not confident about sending the Barr letter to an address that may be out of date.

I attach my draft Barr letter to Mr McCabe.<sup>244</sup>

There was a file of 43 pages, containing about 30 pages that needed to be read, with the error on four documents, or on six pages, including on the draft notifications.<sup>245</sup> A number of these pages are about correcting the error. So, the error is fully obvious to anyone reading the file. Kay McLoughlin missed the correction of the notification to gardaí. In evidence, she said she had no reason to suspect an error in the file. In fact, on finding an allegation of “digital penetration” she highlighted that.<sup>246</sup> The draft letter to be sent to Maurice McCabe late in 2015 which she supplied with the email to her direct line manager and to the area manager read as follows, with Ms D substituted for the real name:

I am a Child Protection Social Worker employed by the Child and Family Agency and I am investigating allegations made by Ms D.

The CFA has responsibility for the protection of children under the Child Care Act, 1991. The CFA is obliged to investigate allegations of abuse and to reach a determination as to whether there are sufficient grounds for believing that you may potentially pose a risk to children.

The allegations made by Ms D are as follows:

That on one occasion between 1998 and 1999 at the Home of Maurice McCabe Ms D alleged that Maurice McCabe sexually abused her. The abuse allegedly involved digital penetration and the victim was aged 6/7 years old. It is reported that this allegation was investigated by An Garda Síochána some years later, a file was sent to the Director of Public Prosecutions who directed that no prosecution take place.

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<sup>243</sup> Transcript day 9 from page 71

<sup>244</sup> Tribunal documents page 451

<sup>245</sup> Transcript day 7 page 14-15

<sup>246</sup> Transcript day 7 page 16-17

I would like to meet with you to discuss the allegations and allow you an opportunity to respond. A decision has not yet been reached with regard to the allegations and the purpose of this proposed meeting is to give you an opportunity to respond. On this basis I would like to meet with you on..... in the CFA office (name venue).

If you intend to be accompanied by a supporting person for this meeting, please notify me. If you do not wish to attend or provide a response in writing a determination will have to be made as to whether you may pose a risk to children without the benefit of your views.

It may be necessary to carry out further investigations in light of information you provide. I will inform you of any proposed further investigations.

I will provide you with the outcome of the Social Work Department's assessment and give you an opportunity to respond to it either by way of a further meeting or in writing.

If the assessment outcome is that you may pose a risk to children I will have to bring this view to the attention of any relevant third party. This may include your employer or your family. You will be notified prior to this being done.

Please note for the purposes of confidentiality the details of any allegations will not be discussed over the phone should you choose to phone prior to your appointment.<sup>247</sup>

This astonishing letter is, with a minor and irrelevant amendment, the one dated 29 December 2015 actually sent to Maurice McCabe and opened at home by his wife in early January 2016. Gerry Lowry told the tribunal that he never read the letter, sent in attachment form to him in the email.<sup>248</sup> That lack of attention requires no comment. He replied to Kay McLoughlin's email stating:

Thanks for the update and bringing this matter to my attention.

I have a memory that this matter was reported to An Garda Síochána at some stage so we would need to co-ordinate with them before taking the steps outlined below.

I will discuss with you.<sup>249</sup>

Discussions came later, after the letter was sent. His approach was that the actual person responsible was the line manager. He "was maintaining myself ... as service manager as opposed to getting involved with the detail on it."<sup>250</sup> The other person sent the email was the principal social worker, Séamus Deeney. He said that he had read the draft letter.<sup>251</sup> This is the exchange which he had with Patrick Marrinan SC for the tribunal:

***Question: I mean, if you read the letter surely this would leap out at you as being a wrong allegation?***

***Answer: Sure, but I think -- if you want to move on, you know, into my response to that, the email that would have come, that was sent to Gerry and myself, I outlined steps that I felt should happen before --***

***Question: Are you saying you didn't read this letter?***

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<sup>247</sup> Tribunal documents page 452-3

<sup>248</sup> Transcript day 5 page 148

<sup>249</sup> Tribunal documents page 454

<sup>250</sup> Transcript day 5 page 160

<sup>251</sup> Transcript day 18 from page 108

*Answer: I open -- it was an attachment and I remember opening the attachment, I remember scanning down through it. Now, I don't remember going into the -- because it was a draft letter, it's not that I wasn't concerned about it, I was concerned, but I was -- I wanted the five steps or those steps to be outlined. The first one was to contact the alleged victim, first of all, and determine whether we need to interview anybody else to review that information, and on the basis of that, therefore, the content of the letter could change, so --*

*Question: Well, you see, you were sort of in a unique position here in relation to this because in 2014, in May, you were aware that an error had been made and you were aware that there had been an allegation sent in the notification of a rape offence when it wasn't that, and you had signed off on the correction, isn't that right?*

*Answer: That's right.*

*Question: And you knew that this was Sergeant Maurice McCabe, a person in the media spotlight, and here it is leaping out that here is an allegation of a rape offence. This is the incorrect information. Did you just not notice it?*

*Answer: I suppose, I mean, when I did open the attachment, I was cognisant of the section 3 policy, and I was cognisant of the template letter that was at the back of it, that would be sent to the -- to the alleged abuser, and I suppose I was checking to see whether Kay had followed that particular formula. Now, it's not that I am saying that I wasn't that concerned about the content. I wanted her to, first of all, check with the -- with the alleged victim and I suppose, raise any discrepancies so that in the future when the steps were taken sequentially, that the letter could be different, actually, that the information might even be different.<sup>252</sup>*

Those in TUSLA tasked with making informed decisions did not do what they were given the responsibility for doing.

### **The five-point plan ignored**

Séamus Deeney replied to Kay McLoughlin's email on 8 May 2015, the day after she had sent the draft Barr letter, outlining a five-point plan for dealing with the case. That was never followed through. Here is the plan:

We discussed this case yesterday. We decided that;

- 1) We would contact the alleged victim as there is some discrepancy in the allegations forwarded to us . This will allow us to check the reliability and accuracy of the allegations and determine whether there is a foundation to the allegations.
- 2) Determine whether we need to interview anyone else who may be of relevance e.g. the counsellor
- 3) On review of the above - inform the alleged abuser of the allegations.

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<sup>252</sup> Transcript day 18 from page 108

- 4) Plan the action to be taken to inform third parties in relation to the allegations e.g. his wife.
- 5) Determine protective action and plan for the case.

The above should be carried out using the Policy & Procedures for Responding to Allegations of Child Abuse & Neglect - Sept 2014.<sup>253</sup>

While all of this makes sense, the problem resided in a failure to read the entire file before giving directions. Séamus Deeney had known of the error and the correction of the error. He had signed off on the incorrect garda notification on 2 May 2014, the nature of the error and why this happened had been explained to him in May 2014, and he had then signed off on the corrected garda notification on 20 June 2014. While this contained the mistake from the Ms Y file about the father of the abuse victim being threatened, this corrected notification was basically correct. It is beyond understanding as to why he did not then point that out to Kay McLoughlin. It is more than strange to refer to something that Séamus Deeney knew to be a serious mistake as “some discrepancy”. There is no basis, however, on which the tribunal could conclude it was because of any animus against Maurice McCabe.

Kay McLoughlin had gone to Séamus Deeney for assistance and the facts that she needed to know were known to him but were never passed on to her. The levels of non-application to duty are alarming.

On 11 May 2015, Kay McLoughlin wrote to Ms D offering her an appointment for 2 June 2015, stating that a matter had been “brought to the attention of the Social Work Department” that she wished to discuss with her.<sup>254</sup> On 15 May 2015, Ms D was contacted by the social work department and Kay McLoughlin recorded the conversation as follows:

TC to Ms D who stated she could not attend who wanted to know what happened I outlined process under Barr judgement. She said she is doing exams in June but will meet us there after. I agreed. I asked her to call me when exams were over.<sup>255</sup>

Ms D did not contact Kay McLoughlin at any stage after this phone call to arrange an appointment. It was within her rights, however, to engage or not engage. It could be understood that she may have felt that she had engaged enough; that is from a therapeutic point of view. From a social work point of view, there had been no verification process on the Ms D allegations. No one contacted Laura Brophy at this point in time, as the counsellor and as the person who had originally met Ms D and who had key information. While Séamus Deeney describes this in the five point plan as a question of “whether we need to interview ... the counsellor”, in the context of what he knew about the case, this was an imperative. He should have required that be done. It is very probable that had he required that, Laura Brophy would have been rung up, or otherwise contacted. She could then have cleared up what for Séamus Deeney was mysterious but what for anybody else might have been standing out as a mistake.

Thus, the first two points in the five-point plan had come to nothing. Down that list was informing “the alleged abuser of the allegations.” The plan envisaged that being done only when the first two steps had been completed. That was the only thing that was done. The prior steps were not completed. Then the matter was simply left to languish.

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<sup>253</sup> Tribunal documents page 456

<sup>254</sup> Tribunal documents page 458

<sup>255</sup> Tribunal documents page 460

There was no further step taken in relation to this matter until Kay McLoughlin raised it with Sergeant Anthony Byrne at a garda liaison meeting in October 2015. Sergeant Byrne was the TUSLA liaison officer for the gardaí at this time. He had nothing to do with the original investigation in 2006/7. According to Kay McLoughlin, while the Maurice McCabe file was not on the agenda, she “just wanted to know whether the Gardaí had done anything since we had Garda notified them in 2014” and that her intention “was to find out what status the Garda investigation was at, whether it was opened or closed.”<sup>256</sup> Sergeant Byrne knew nothing of the matter and did not want to be engaged in the matter. This is what Kay McLoughlin said in answer to Diarmaid McGuinness SC for the tribunal:

*Question: Okay. Well, I mean, I think you had -- you had been able to glean yourself from the file that there had been no prosecution, the matter having been the subject-matter of a submission of a file to the DPP and a decision not to prosecute?*

*Answer: Yes, I was aware of that, yes. I was just confirming that; that that was still the case.*

*Question: Okay. Well, Sergeant Byrne does have a recollection that you mentioned the matter in the context of you saying to him that you were having to go to talk to Mr. McCabe, and essentially what was the position in relation to Mr. McCabe. And I think he is saying that all he told you was that it predated his arrival in Bailieboro and that he knew nothing about what had transpired.*

*Answer: Yes.*

*Question: Do you recollect him saying something along those lines to you?*

*Answer: Well, from my memory, I think that's -- yes, that is a fair account.*<sup>257</sup>

Clearly, while social workers are busy, basic procedures still have to be followed. Furthermore, it is the task of management to set clear goals and to ensure that these are followed through. Kay McLoughlin made no further attempt to contact Ms D and had not contacted anyone in Rian.

### **The letter received in January 2016 and the response**

About six months later, on 29 December 2015, the letter accusing Maurice McCabe of a rape offence, passed as suitable by Séamus Deeney and by Gerry Lowry, subject to the five-point plan that was never followed through on, was sent to him at his home. This, opened shortly afterwards in early 2016, came as a terrible shock. In it, Maurice McCabe was accused of the rape offence of digital penetration of the vaginal and anal orifices of a young girl. The letter suggested a formal meeting with Kay McLoughlin. Clearly, the purpose of that meeting would be to consider whether Maurice McCabe posed a risk to children. The letter was answered in an understandably puzzled way by the solicitors for Maurice McCabe on 20 January 2016.<sup>258</sup>

The solicitors followed up with a letter of 28 January 2016. Justifiably, this letter was a philippic. The letter asserted that the allegation of digital penetration was “wholly false and malicious” and “wholly untrue”; set out the history of the 2006 complaint and subsequent garda investigation; outlined the direction of no prosecution by the Director of Public Prosecutions; noted that

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<sup>256</sup> Transcript day 7 page 40

<sup>257</sup> Transcript day 7 pages 40-41

<sup>258</sup> Tribunal documents page 465

Maurice McCabe’s family and employer had always been fully aware of the Ms D allegation; and, finally, asked TUSLA to outline the legal basis upon which it was dealing with the matter.<sup>259</sup> While an urgent reply was sought by the solicitors acting on behalf of Maurice McCabe, no reply was received until 20 June 2016, five months later.

On 2 February 2016, Kay McLoughlin sought a copy of Ms D’s 2006 statement to gardaí from Emer O’Neill, who had dealt with the Ms D file in 2006/2007. In seeking the statement she said that she was “currently assessing what risk if any Maurice McCabe poses to children.”<sup>260</sup> She received a copy of the statement on 3 February 2016.<sup>261</sup> On 4 February 2016, Kay McLoughlin wrote a draft response to Maurice McCabe’s solicitors and sent this to Gerry Lowry.<sup>262</sup> On 8 February 2016, Gerry Lowry asked Kay McLoughlin to review Ms D’s garda statement and revert to him.<sup>263</sup> On 9 February 2016, Kay McLoughlin responded to this email, noting that the allegation of digital penetration “was made erroneously by RIAN counsellor Ms. Brophy in august 2013”. The email set out the history of errors following her review of the file and garda statements.<sup>264</sup> On 26 February 2016, Kay McLoughlin again emailed Gerry Lowry reminding him of the need to discuss a response to the Maurice McCabe solicitors’ letter of 28 January.<sup>265</sup> At a supervision meeting held on 8 April 2016, the record noted that Gerry Lowry needed to review the Maurice McCabe matter in order for a response to be sent to Maurice McCabe’s solicitors: “Srg McCabe case has been communicated to me by Kay. I have not looked at it. I need to do so.”<sup>266</sup>

Then the letter of reply to the solicitors was prepared and was sent on 20 June 2016. While that replying letter recorded section 3 of the Child Care Act 1991 as the legal basis upon which Kay McLoughlin was dealing with the matter, it did not clarify how the error had occurred. That is plainly what then should have happened. Instead the letter concluded: “I apologize that a mistake was made in my previous correspondence. I can confirm to you that no allegation of “*digital penetration*” has been made in relation to your client.”<sup>267</sup> The letter did not provide any further clarification on the error despite a review of the file and Ms D’s garda statement having been undertaken. Further, the replying letter did not describe how the error had occurred even though both Kay McLoughlin and Gerry Lowry were aware that the error had arisen from the initial written referral to social services by Laura Brophy of 9 August 2013.

Maurice McCabe’s solicitors responded to Kay McLoughlin’s letter on 20 July 2016.<sup>268</sup> The letter began by stating that they were “shocked and taken aback” by the letter’s contents and implications. It stated that the suggestion that Kay McLoughlin was undertaking an assessment as to any risk posed by Maurice McCabe to children was “legally unfounded”. In particular, the letter noted the failure of TUSLA to act at any stage over the past ten years if there had been any grounds for believing that Maurice McCabe posed a risk to children. The solicitors’ letter also criticised the letter of 20 June in its lack of explanation as to how an allegation of digital penetration had been sent to Maurice McCabe in the letter of 29 December 2015:

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<sup>259</sup> Tribunal documents page 468

<sup>260</sup> Tribunal documents page 471

<sup>261</sup> Tribunal documents page 473

<sup>262</sup> Tribunal documents page 484-485

<sup>263</sup> Tribunal documents page 491

<sup>264</sup> Tribunal documents page 490

<sup>265</sup> Tribunal documents page 492

<sup>266</sup> Tribunal documents page 495

<sup>267</sup> Tribunal documents page 498

<sup>268</sup> Tribunal documents from page 502

Your letter ... claims that the allegation of digital penetration was a “mistake” in your “previous correspondence”. You go on to say that “no allegation of digital penetration had been made in relation to your client”. With respect, that simply will not suffice.

Either you imagined or invented the allegation of a rape offence or it was made on the basis of false information given to you. It could not have appeared in your letter by some clerical error.

It is also astonishing that it took you five months to advert to what you now call “a mistake”. Even now you make no explanation for the making of that false allegation. Your apology without explanation is both wrong and bewildering. ...

We are dealing with what, on our instructions, is a false and malicious allegation of sexual abuse which you have revived and exaggerated to a claim of a rape offence.<sup>269</sup>

This letter from the solicitors for Maurice McCabe further asserted that the letter of 29 December 2015 was evidence of an “egregious misfeasance in public office”, and stated that the matter would be brought to the attention of the Chief Executive of TUSLA “in the expectation that decent standards of public administration will be adhered to.” The letter concluded by seeking confirmation that TUSLA were “no longer pursuing an investigation into this entirely false claim”, as well as an “urgent and immediate reply.”<sup>270</sup>

### **Failure to face the problem**

Here a comment is necessary. Within TUSLA, speaking collectively, those responsible for the series of errors that led to a direct accusation against Maurice McCabe of a rape offence knew: firstly, that he had never been accused of a rape offence by anyone; secondly, that a word processing error had led to an erroneously attributed accusation being recorded in a written file; thirdly, that this error had been passed on to the gardaí; fourthly, that when the error was identified, a correction and retraction were sent to the gardaí; fifthly, that this mistaken attribution remained on the TUSLA file as two mutually inconsistent reports to gardaí; sixthly, that within TUSLA there were senior personnel who knew or ought to have known of the origin and mistaken nature of these two inconsistent reports but did not share that information at an appropriate time; and, seventhly, that multiple failures to read the file fully resulted in the letter of 29 December 2015.

It would have been very easy to respond to the justifiable disquiet expressed in the letters on behalf of Maurice McCabe by stating simply: a counsellor in Rian was in error in using as a template a completely unrelated document involving an allegation of another person and mistakenly ascribing a complaint of a rape offence against Maurice McCabe and that TUSLA, having carried it forward negligently into a referral to gardaí, is indeed sorry for its errors.

Had that happened, yes, there would have been some kind of investigation but probably not a tribunal of inquiry. The result of failure to face the facts, of a complete lack of black box thinking that demands to precisely know when an aircraft has gone down why that happened, has been justifiable public disquiet together with a gigantic expenditure of public money. This happened through not facing up to the problem and not being forthright about mistakes internal to TUSLA.

In fact, as previously noted, it was only on the establishment of this tribunal in February 2017 that the investigation into the matter confirmed the original template word processing error. That

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<sup>269</sup> Tribunal documents page 503

<sup>270</sup> Tribunal documents page 504

happened when the tribunal’s investigators visited the offices of a firm of solicitors in Dublin and examined the Ms Y paper file on 8 June 2017.<sup>271</sup> Forensic Science Northern Ireland examined the electronic computer files in June 2017 and issued a report on 30 June 2017.<sup>272</sup> All of that could have been done within Rian through cooperation with, and at the suggestion of, TUSLA.

A public body, paid for by the taxpayer, has a fundamental duty of self-scrutiny in pursuit of the highest standards. The administration of TUSLA was sorely lacking in application and in dedication to duty.

### **The file goes to SART**

In July 2016, the Maurice McCabe file was transferred to the Sexual Abuse Regional Team, or SART. This was a regional team set up by TUSLA initially to deal with retrospective cases of child sexual abuse which were not allocated to a social worker. At one point, the tribunal began to suspect that SART had been initiated apparently deliberately coincidental to the fuss surrounding the Maurice McCabe issue. That is not so. A group to consider old cases was necessary. It did not just relate to having a vehicle into which to jettison the embarrassing conduct of the Maurice McCabe matter. It is clear, moreover, that the initiative was needed and was not a smoke screen for any one particular case.

The file on Maurice McCabe had been brought to a meeting on 28 June 2016 by Michael Cunningham, a social work team leader, with social workers Claire Tobin and Lisa O’Loghlen from SART. The file was then accepted by them and officially transferred the following week, on 5 July 2016. All of these actions were proper and in accordance with the new procedures and within the aims of SART. According to Michael Cunningham, he was directed by Kay McLoughlin to bring the file to the SART meeting.<sup>273</sup> According to Kay McLoughlin, Gerry Lowry had wanted the case to go to SART and had discussed this with her.<sup>274</sup> On 20 July 2016, Gerry Lowry inquired by email to Kay McLoughlin as to whether the file had been “passed on to the Retrospective Team.”<sup>275</sup> This appears to be on receipt of the letter from Maurice McCabe’s solicitors of the same date which was also forwarded to SART the following day.<sup>276</sup>

The tribunal cannot say in what exact form the file went up to SART. What is clear, however, is that where a file is kept, it should constitute a complete record of all dealings recorded on that file. An incomplete file, or a filleted file, is contrary to every basic rule of administration. Whoever made the decision to transfer the file to SART was acting incorrectly. According to Linda Creamer:

***The reality is, this case should never have ended up with SART. It wouldn’t be my expectation that our frontline staff are involved in legal letters. That is an area manager’s responsibility. ... It should never have been on the list [going to SART] ... In my opinion Mr. Lowry absolutely would have known that, yes.***<sup>277</sup>

Asked whether she thought that the file was being handed over to SART as a “hot potato”, she expressed the view that “the principal social worker and the area manager should be well able to

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<sup>271</sup> Transcript day 3 from page 39

<sup>272</sup> Tribunal documents page 2595

<sup>273</sup> Transcript day 18 from page 78

<sup>274</sup> Transcript day 18 page 16

<sup>275</sup> Tribunal documents page 500

<sup>276</sup> Tribunal documents page 505

<sup>277</sup> Transcript day 9 from page 84

manage a file like this.”<sup>278</sup> She also expressed the view that there should have been “some sort of due diligence report handed over with the file.”<sup>279</sup> This was not done.

The most stinging criticism from Linda Creamer was that she had been kept out of all knowledge of the difficulties which had arisen, particularly from the start of the correspondence with Maurice McCabe’s solicitors from January 2016. Her view was that the file should have been discussed with her, rather than passed to the SART team. In consequence, as service director, she was deprived of the ability to carry out any review. According to her, the responsibility of those who led the team in Cavan was to have brought this matter to her attention at an early stage, rather than letting the matter fester.

It was only on 24 January 2017 that Linda Creamer was made fully aware of the history of TUSLA’s handling of the Maurice McCabe case by Gerry Lowry. This, according to the documents gathered by the tribunal, came in an email attaching a briefing note and chronology outlining the “category of errors made on the case.”<sup>280</sup>

The opening of intake records on the McCabe children was unacceptable, she said. From the point of view of her responsibility, and of her duty to deal with matters as they arose, such minor matters as occasionally occur, for instance such as a file being left behind in a toilet, would have been drawn to her attention: but this concatenation of errors was not. She told the tribunal:

*I suppose if I wanted to add something to it, and it’s not really a concern, Chairman, that it’s just to put into some sort of context the duty system around the country at the time and in terms of what some of the frontline staff are dealing with. I’m not sure that that has been caught as well as it could be, in the sense that they are coming on duty for that week and they would have the files that are unallocated, but they also have allocated themselves, which cases could blow up and they may be distracted to go and do something there. But the other thing is, the high priority coming in the door is very significant. You know, if a Public Health Nurse, for example, walks into a house and we have a three-year-old in a cage that needs an immediate response. We have a lot of difficult teenagers who are suicidal. That needs an immediate response. You could have a young girl, which would be high priority, you know, at a sex education class in school come in and says ‘My Daddy does that to me three times a week, I didn’t know that was wrong’. So that is the kind of calibre of stuff that is coming into them on a daily basis. They have to deal with that while on duty and they also have to go to court while on duty to take those children into care or, you know, to do whatever is next, and set up a case conference. So although this file was in the unallocated drawer, and I know what you’re saying, it just got plucked out, which is unacceptable, but I can see how it drifted on duty. What I don’t accept is that the management of the waiting list should have known what was in on those files. And a case such as this, which such sensitivity, should have been taken out and allocated as a priority within the service. When these kind of cases -- these are sensitive -- you know, the fact that Sergeant McCabe was in the Gardaí, but we have cases where staff of our own have allegations made against them, certainly with teachers or many high-profile people within the community, that would be on the media as well, when those cases come in, there is a nervousness around them, there absolutely is, and there is a head in the sand behaviour at some time not to deal with it because it is so sensitive and it*

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<sup>278</sup> Transcript day 9 page 85

<sup>279</sup> Transcript day 9 page 86

<sup>280</sup> Tribunal documents page 3411

*could blow in the media. But the reality is, the management should take them out and allocate them to a senior practitioner on the team to get the work done and to see the file through from beginning to end. This is a 36-page file, the work could have been done very quickly. But in the context of the responsibility for the frontline workers I can see how errors are made because it is such a fast pace. But I don't accept it at the management level. ... I believe it to be completely and absolutely incompetence. ... I believe it to be incompetence on the management of the file. I don't believe that there is collusion.*<sup>281</sup>

The tribunal agrees with that devastating assessment.

One other matter requires comment. As has been noted, on 28 June 2016 Lisa O'Loughlen and Claire Tobin of the SART team went to Cavan to see the files to be considered for transfer to SART. Among these was the Maurice McCabe file. Michael Cunningham told them that this was a high-profile file and passed on the reasons. There is no suggestion that he is to blame for what was then discovered. Together with Claire Tobin, Lisa O'Loughlen audited the file. Her view was that fair procedures had not been followed, that timelines and details were given in the wrong order, that the file was not in proper order, and that incorrect details had been given to Maurice McCabe. She had not then reviewed the file in relation to Ms D. She thought that a new offer of an appointment should be made to Ms D and expressed the view that it was absolutely wrong to simply accept an allegation of historic child sexual abuse without carrying out any credibility assessment of the allegation. Part of the reason for the review, she said, was to consider whether the alleged perpetrator had been contacted, whether a risk to children was high, whether there were other people who had not been contacted who might be at risk and whether the file had been managed so badly that it constituted an organisational risk to TUSLA itself. This file certainly fitted in the latter category.<sup>282</sup>

Lisa O'Loughlen completed a risk escalation form, from the point of view of these factors, but emphasising the risk of the matter becoming prominent through media attention.<sup>283</sup> A glaring absence from that report is the lack of reference to the gardaí having been incorrectly notified of the matter. Claire Tobin also gave evidence that certain details were not on the file when she reviewed it and these, again, related to both the incorrect and corrected garda notifications. She said that it is possible that a draft was there, but not the actual documents as sent to the gardaí.<sup>284</sup>

Claire Tobin's evidence was:

*I don't know if it was through intention. I can't explain it. Stuff wasn't put on the file when it should be. It's not unique to this case, unfortunately. There would be stuff missing from files, not unique to the Cavan region. People fail to put things on file. Unfortunately the things that weren't put on this file were quite significant ... I don't know whether it was just professional negligence to not put it on the file or whether it was intentional, I can't comment. I don't know the people in Cavan well enough in terms of their professionalism, in terms of how their practice is on a day-to-day basis. I just know from my own practice if a file is transferring out of the region, particularly out of your office, no matter where it is going, if it's going to a new team, if you are going from a duty team to a child protection team to a children in care team, you make sure everything is on that file that needs to be on*

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<sup>281</sup> Transcript day 9 from page 99

<sup>282</sup> Transcript day 38 page 27-28

<sup>283</sup> Tribunal documents page 511

<sup>284</sup> Transcript day 9 page 19-20

*file, and anything that you come across in the meantime you forward on to the team that has that file.*<sup>285</sup>

Lisa O’Loughlen agreed with that view. She regarded the matter as very concerning. She had no opportunity to refer to a mis-referral to the gardaí because she had not seen the relevant documents. In consequence, as she agreed, there was a gap in her risk escalation report.<sup>286</sup> That report is otherwise very competent. It was not the kind of stark fact that she could ever have missed. Asked whether she thought there was a cover-up, her view was that there was. As to who covered up, she could not say:

*Chairman: It's kind of hard to reach the conclusion isn't it –*

*Answer: Yes, yes, I accept that.*

*Chairman: -- that somehow these documents were lost, all about the same thing, and suddenly come back in the right order in the file. That's the problem. I don't know whether you would like to comment on that. That was the whole purpose of Mr. Marrinan's questions.*

*Answer: Yes.*

*Chairman: Would you like to?*

*Answer: I can absolutely see how it looks that that is the way that it happened, yes. I just can't point a finger at any individuals in particular.*

*Mr Marrinan: Very well.*

*Chairman: So, I mean, so your view is it looks like a cover-up but you can't say who was doing the cover-up.*

*Answer: Yeah, because if they'd been on the file I absolutely would have reported on them, and that's why I'm so sure that they weren't on the file.*

*Chairman: And do you think it was a cover-up?*

*Answer: I don't think that there is a -- between Tusla and the guards no. I do think it was poor management and incompetence.*

*Chairman: Well, I mean, if anybody makes a mistake, I mean it's hard to own up to it, but sometimes one also can cover oneself in paper or remove the paper –*

*Answer: Yes.*

*Chairman: -- that shows the mistake.*

*Answer: Yes.*

*Chairman: In administration we all realise that that kind of thing happens. Does it look as if this has happened here? Without having to point the finger at anybody, does it look as if that's what happened.*

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<sup>285</sup> Transcript day 9 page 67-68

<sup>286</sup> Transcript day 38 page 47

*Answer: That there was a cover-up?*

*Chairman: Yes.*

*Answer: It looks that way to me, yes.*

*Chairman: But you can't say who may have –*

*Answer: I can't say, yeah. I can't.*

*Chairman: Fair enough.*<sup>287</sup>

The tribunal notes that while Kay McLoughlin had custody of the file, she has sworn that she did not remove any documents from it and the tribunal also notes that Gerry Lowry denied interfering with the file before it went to SART.<sup>288</sup> By the time that the file came to the tribunal, it was in its complete form and with all the documents present and in the correct order.

In reality, prior to the tribunal getting the file, it was filleted by someone. The tribunal is not in a position to state by whom and, because of the unsatisfactory nature of the evidence from TUSLA, cannot indicate who among a range of people might have been responsible. It could, in reality, have been almost anybody.

The file was officially closed by the SART team on 22 September 2016 as Ms D did not wish to engage with the team following the offer of an appointment in August 2016.<sup>289</sup> Maurice McCabe's solicitors were informed by TUSLA that the file was closed on the same date.<sup>290</sup>

That, so to speak, was the end of the affair. Apart, that is, from the lack of upfront honesty and failure in self-analysis and self-criticism leading to a tribunal of inquiry.

### **Conclusions on the Health Service Executive/TUSLA affair**

A complaint had been made by Ms D and her family against Maurice McCabe to the gardaí in Cavan in December 2006. Ms D had already been undergoing counselling. The complaint was of a single, brief, alleged clothed incident back when she was six or seven, in perhaps 1998. In December 2006, the gardaí had reported this complaint of an alleged encounter to the Health Service Executive, predecessor in this respect of TUSLA. The criminal investigation into the Ms D complaint ended when the Director of Public Prosecutions decided in April 2007 that no offence had been disclosed; even taking the complaint at face value. Social services thereafter decided to take no further action. That should have been the end of any allegation that Maurice McCabe had ever sexually assaulted a child.

Ms D returned to counselling because of the stresses of life in 2013. Within the counselling organisation, Rian in Cavan, a mistake was made in transcribing an account of Ms D by mixing that up with the account of a Ms Y. In the result, the complaint of Ms D about an alleged and brief fully clothed encounter became a complaint of vaginal and digital anal penetration: a rape offence.

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<sup>287</sup> Transcript day 38 page 51-52

<sup>288</sup> Transcript day 18 page 10-11 for Kay McLoughlin and tribunal documents page 3373 and for Gerry Lowry transcript day 38 page 78

<sup>289</sup> Tribunal documents page 524, letter of 5 August; tribunal documents page 516

<sup>290</sup> Tribunal documents page 523

Maurice McCabe by 2013 had become, or was increasingly becoming, a public figure. He was seen as a serving sergeant complaining about poor police investigations and failure to properly enforce fixed charge penalty notices for driving offences. He was, consequently, much disliked by some gardaí. Yet, the transcription error turning the fully clothed alleged encounter, which the Director of Public Prosecutions had described as not disclosing an offence, became a rape allegation through a mistake. While many gardaí had a serious problem with Maurice McCabe and his complaints, a rape allegation was conjured out of nowhere. This must be one of the most unlikely coincidences ever to be accepted by any judicial tribunal. Yet, coincidence it was. All of the witnesses were honest. The computer analysis checks out absolutely correctly. So do the paper files. When the mistake was discovered nearly a year later in 2014 when Maurice McCabe was even better known, the person who made it did all she could to rectify it. It was given continued life, notwithstanding her efforts, because of startling inefficiency and indolence within social services. In consequence, serious upset was caused to Maurice McCabe and his wife and family because the rape allegation took on a life of its own and resulted in a letter from TUSLA being delivered to his household accusing him of a rape offence that no one had ever laid against him.

Rian had been obliged to pass on any sexual offence allegation against identified individuals to the Health Service Executive. The allegation of a rape offence was thus passed up the line on 9 August 2013. This did not happen under any influence from anyone in the national police force.

The Ms D allegation had been investigated from December 2006 in a highly competent and objective fashion by the gardaí. The file against Maurice McCabe was locked away. The allegation was never put on the PULSE computer system whereby gardaí are informed of allegations of alleged criminality. Because in 2006, the gardaí had reported the correctly described Ms D allegation to the Health Service Executive, in 2013/2014 there was therefore no need for Rian or for the Health Service Executive to further report this matter to the police.

At the start of 2014, TUSLA, or the Child and Family Agency, took over the functions of the Health Service Executive in respect of child protection. It was nothing to do with the changeover, which largely maintained the same personnel and the continuity of the same files, which inspired TUSLA to report to the gardaí for a second time what was described as the alleged encounter between Maurice McCabe and Ms D. Procedures were so chaotic that the first report from the gardaí to TUSLA's predecessor, from the time of the 2006/07 garda investigation, was unknown. Nor was there any great effort to uncover the accurate situation. Communication to the gardaí seeking information in good faith went unanswered. Consequently, a mistaken report was made to the gardaí by TUSLA on 2 May 2014 alleging that Maurice McCabe had been accused by Ms D of a rape offence and that this had been reported to Rian by Ms D. No such thing had ever been reported by anyone against Maurice McCabe.

The gardaí reacted by passing the rape offence allegation up the line to the assistant commissioner for the Northern Region. In doing so, however, it had already been realised within the gardaí that the report was incorrect and that a rape offence allegation had been improperly ascribed to Maurice McCabe by Rian and later TUSLA. Nonetheless, a report was made to the assistant commissioner for the Northern Region from Cavan/Monaghan. This was passed on to Garda Headquarters. At a time when there was considerable public interest in Maurice McCabe as a person who had disclosed inefficiencies and bad practices within the gardaí, an incorrect report, accusing him of a rape offence, was maintained in Garda Headquarters. When the Northern Region learned of the inaccuracy of that report, the assistant commissioner did not correct it to Garda Headquarters.

The false report had an afterlife within TUSLA. This was not due to any action by gardaí, but was because of the astounding inefficiency of that organisation and the inertia of its management in Cavan/Monaghan. In due course, and very probably because of the media attention surrounding

Maurice McCabe, in April 2014 the file was taken from the filing cabinet in which it was stored. The mistake was discovered almost immediately but that was because Ms D, when she came to know of the rape offence allegation against Maurice McCabe, protested that she had never claimed any such thing. That should have resulted in an immediate and definitive correction within TUSLA: but it did not.

Nothing much happened over the following year but the file was later actioned for attention in May 2015. The correct thing to have done then, in 2015, was to seek a meeting with Ms D in order to engage in a credibility assessment. Contact was made. But it did not result in any such meeting with social workers. No such exercise had been undertaken back in 2006/07, when Ms D had originally made the allegation concerning a fully clothed encounter on a couch during an alleged game of hide and seek. This failure to meet Ms D to conduct a credibility assessment was a clear breach of procedures. Counselling had been given to Ms D in 2007. In 2015, Ms D was contacted by social workers and she was asked to meet them. In any event, Ms D, then a student, was too busy to take up the 2015 request by TUSLA of a meeting.

Another essential procedure was not undertaken back in 2006/07. This was to offer a meeting to the person against whom the allegation was made, Maurice McCabe, in order to take his account of events and to explore whether he might constitute any kind of risk to children.

When TUSLA re-engaged with the file in May 2015, no one read the papers properly; and this despite there being only about 36 pages. Above all, this was a failure in senior management. The counsellor in Rian who made the mistake in 2013 in ascribing, in a word processing error through her use of a template from the different file of Ms Y, a rape offence to Maurice McCabe was not contacted. Thus, the mistake was left on the file to be later treated as reality through 2015. When two inconsistent realities showed up on the file, clashing with each other, senior management exhibited complete inertia. What should have happened was that Maurice McCabe was not contacted until a credibility assessment had been conducted with Ms D. She was offered a meeting but was engaged in exams and the matter was not followed up. Had she been met, the nature of the error left negligently on the file would have immediately shown up and in clear enough terms for even management in TUSLA in Cavan/Monaghan to take notice. That did not happen. Maurice McCabe was then sent a letter that he received in January 2016 accusing him of a rape offence. This letter was opened by his wife.

From 2016, no one within TUSLA considered owning up to the serious mistakes that had been made. The solicitors' letter of complaint on Maurice McCabe's behalf, sent in response to the letter from TUSLA received in January 2016, was an invitation to give a proper explanation of what had happened. Had that happened, had TUSLA senior management sat down and read the file and then forthrightly replied setting out fully the mistakes that they had made, this tribunal of inquiry would most probably have been avoided. Instead, the matter was passed to an outside team, the Sexual Abuse Regional Team, when it should and could have been dealt with locally in Cavan.

In addition, in passing on the file to Dublin, certain documents were taken off by some unidentifiable person in Cavan/Monaghan, so that a review of the file in the head offices of TUSLA did not highlight the incorrect notification to the gardaí that had been made of a rape offence in respect of Maurice McCabe in May 2014. The tribunal received, in due course, the reconstructed file with nothing taken off it. The tribunal realised, however, that the file had been earlier filleted so that the full extent of the inefficiencies in Cavan/Monaghan TUSLA would not be made known to the Sexual Abuse Regional Team based in Dublin who had been transferred the file in 2016.

While certain gardaí knew of this mixing up of the Ms D allegation and the Ms Y allegation to make a false allegation of a rape offence against Maurice McCabe, there was nonetheless an

expectation, on a legitimate basis, that TUSLA ought to be competent enough not to follow through on an obvious error.

An inaccurate report of a rape offence was sent to the assistant commissioner of the Northern Region. That report was later corrected. Garda Headquarters was immediately informed of the false report as if it had been true. When the report to the Northern Region was explicitly corrected and the error explained, the incorrect report to Garda Headquarters was never uncorrected.

While others were informed, and incorrectly informed, Maurice McCabe was never contacted and told that these mistakes had been made.

## **Part 2: Report on the allegations relating to the O’Higgins Commission**

### **A note on structure**

While, logically, this is the second of three reports, it may be necessary to repeat certain matters. In doing this, it is important to read the entirety of all of the reports in order not to lose the sense of the overall findings. Any recommendations are set out in part 4 and arise out of the consideration of all of the issues, evidence and documents. This is part 2 of 4.

Briefly, to recap, Sergeant Maurice McCabe is referred to by his name and other officers are referred to by their rank at the time of an event, or their rank when testifying or, if retired, by their last relevant rank. Quotations are exact and any mistake in grammar or the use of proper names or capital letters are not marked by (sic). Other comments made in part 1 as to structure and approach are applicable here.

### **Term of reference (e)**

A short introduction to the report on term of reference (e) may prove of benefit. The term puts the task of the tribunal in this form:

To investigate whether the false allegations of sexual abuse or any other unjustified grounds were inappropriately relied upon by Commissioner O’Sullivan to discredit Sergeant Maurice McCabe at the Commission of Investigation into Certain Matters in the Cavan/Monaghan district under the Chairmanship of Mr. Justice Kevin O’Higgins.

References to briefing the media “negatively”, to “an allegation of criminal misconduct” and to “false allegations of sexual abuse” occur in terms of reference (a), (b), (c) and (d) about Maurice McCabe. Term of reference (a) requires the tribunal to report on whether the highest levels of the national police force were engaged in briefing the media that Maurice McCabe “was motivated by malice and revenge... and that he was driven by agendas.” This term of reference, (e), seems cognate. A close reading, however, indicates that the purpose of this term of reference was for the tribunal to inquire into what happened at the O’Higgins Commission: an inquiry commenced by resolution of the Oireachtas, the order being made on 3 February 2015, and which reported to the Minister for Justice and Equality on 25 April 2016. The report was made public on 11 May 2016. Before that happened, however, a leaked version of the report was discussed on RTÉ radio and television on 9 May 2016. Leaks of the transcript, which were limited to a very few pages out of 34 days of evidence, were passed to sections of the media. Reports on this infirm foundation led to considerable misunderstanding in the public mind.

What is clear from the drafting of the term of reference is that the matter of public disquiet which led to the inclusion of this paragraph was essentially a widespread belief that the closed private hearings of the O’Higgins Commission were used by the Garda Commissioner to attack Maurice McCabe with false allegations of sexual abuse. That never happened.

### **Commission of investigation, tribunal of inquiry**

A commission of investigation is different to a tribunal of inquiry. A tribunal of inquiry is conducted under the Tribunals of Inquiry Acts 1921-2004. It takes place in public unless, for exceptional reasons, there is a necessity for perhaps a short section of it to be heard privately. Over 102 days of this tribunal sitting, just three days were held in private. A tribunal of inquiry affords a full right of representation to anyone whose reputation may be affected by its ultimate report, including the civil and criminal trial rights of making submissions, cross-examining, applying to

call witnesses, and making a final statement. Hence, it runs in public like a civil or criminal trial but with a hugely unwieldy number of multiple represented parties.

Fairness of procedure does not necessarily require all these rights. Once a tribunal is open, in an even-handed manner, to testimony and documents from any individual that might be affected by the outcome of its inquiry, and does not favour one side over another procedurally and circulates a draft final report for comment, live representation with cross-examination and submissions may become unnecessary. A tribunal of inquiry does not circulate a draft of its final report because all of these rights, of representation in cross-examination and submission, have already been allowed. Thus a tribunal gives what is in effect akin to a judgment at the end of its hearings. A commission, however, circulates a draft report for the purpose of receiving submissions. For these purposes, what is most important in all of that is that a commission takes place in private and a tribunal in public.

The reason for the passing of the Commissions of Investigation Act 2004 by the Oireachtas was to enable matters of public moment to be inquired into and reported on speedily and much more cheaply than a public tribunal. As the long title to the Act states, the purpose of a commission is “to investigate into and report on matters considered to be of significant public concern”. Privacy is central to that approach as provided for by section 11 of the Act:

(1) A commission shall conduct its investigation in private unless—

(a) a witness requests that all or part of his or her evidence be heard in public and the commission grants the request, or

(b) the commission is satisfied that it is desirable in the interests of both the investigation and fair procedures to hear all or part of the evidence of a witness in public.

(2) Where the evidence of a witness is heard in private—

(a) the commission may give directions as to the persons who may be present while the evidence is heard,

(b) legal representatives of persons other than the witness may be present only if the commission—

(i) is satisfied that their presence would be in keeping with the purposes of the investigation and would be in the interests of fair procedures, and

(ii) directs that they be allowed to be present,

(c) the witness may be cross examined by or on behalf of any person only if the commission so directs, and

(d) any member of the commission or a person who has been appointed under section 8 and is authorised by the commission to do so may, orally or by written interrogatories, examine the witness on his or her evidence.

(3) A person (including a member of the commission) shall not disclose or publish any evidence given or the contents of any document produced by a witness while giving evidence in private, except—

(a) as directed by a court,

- (b) to the extent necessary for the purposes of section 12 ,
- (c) to the extent otherwise necessary in the interests of fair procedures and then only with the written consent of the chairperson or, if the commission consists of only one member, the sole member, or
- (d) to a tribunal in accordance with section 45 .

(4) Subsection (3) is not to be taken to prohibit the publication in a report under this Act of any facts established by a commission on the basis of evidence received in private.

(5) A person who contravenes subsection (3) is guilty of an offence.

As has been mentioned, immediately after the currency of the O’Higgins Commission, there were leaks. The tribunal has not been tasked with inquiring into these leaks.

### **Unfairness to the media**

It publicly emerged from November 2017 that, in May 2015, the Department of Justice and Equality, and specifically Minister for Justice and Equality Frances Fitzgerald, had some awareness of a legal strategy on the part of the Garda Commissioner Nóirín O’Sullivan to challenge the motivation of Maurice McCabe at the O’Higgins Commission, and that, in July 2015, a media query had been made about counsel for the Garda Commissioner raising “questions over the motivation of Sgt McCabe”,<sup>291</sup> which became, due to subsequent repetition, unfortunately translated in a radio appearance briefing for the Minister as “an aggressive stance”.<sup>292</sup> In November 2017, all that politicians, the public and the media had to go on were the leaked snippets of transcript; and subsequently, an email sent to the Department on 15 May 2015 regarding a row at the O’Higgins Commission was made public. This had somehow transmogrified over time into an allegation that Maurice McCabe had been maliciously accused before the O’Higgins Commission of multiple and false sexual assault offences with a view to damaging his credit-worthiness; that the Garda Commissioner had authorised this; that the Minister had been informed; and that the Minister had stood back and allowed it to happen. In the result, at a crucial juncture for Ireland in the Brexit negotiations, the Government of our country came close to falling and in the ultimate result Frances Fitzgerald TD, the Tánaiste and the Minister for Business, Enterprise and Innovation, who had formerly been Minister for Justice and Equality, resigned from office on 28 November 2017.

When Bunreacht na hÉireann guarantees fairness of procedures in removing or diminishing fundamental rights, including the right to a good name, it applies that guarantee in the name of the people not just to the courts but to all the organs of government and administration. While term of reference (e) refers in the plural to “false allegations of sexual abuse”, no one, never mind the Garda Commissioner, before the O’Higgins Commission, ever accused Maurice McCabe of any crime, or hinted at it or attempted any innuendo about it.

In February 2017, there was a high level of public disquiet about the treatment of Maurice McCabe before the O’Higgins Commission. Any lawyer receiving a set of papers on a matter of public moment will tend to ignore anything he or she has already heard or read and ask: what actually happened here? Thus, the first task undertaken by the tribunal was to read the full transcripts from the O’Higgins Commission hearings. The transcripts were made fully available to the tribunal.

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<sup>291</sup> Tribunal documents page 2016

<sup>292</sup> Tribunal documents page 3484

There has been media speculation about completeness. The transcripts are and always were complete. Speaking first of paper copies, one day of the transcripts had not been circulated by the commission and one part of one day had gotten lost in the bottom of a box. There was a stenographer present at all times before the commission. Both days were readily available from the stenography service through the Department of Justice and Equality. Secondly, a paper transcript is not all that is available. Nowadays, court cases are recorded on a digital system. Commissions of investigation and tribunals of inquiry follow the same practice.

In opening this section of the tribunal's work on 8 January 2018, Kathleen Leader BL publicly allayed any public fear over missing transcripts. Most importantly, she dissolved the widespread and disquieting discourse about Maurice McCabe being accused in private of "false allegations of sexual abuse".<sup>293</sup> By then, however, much damage had already been done.

### **Chairing the O'Higgins Commission**

Another aspect of the term of reference that is worrying is the apparent requirement on the tribunal to consider how Mr Justice O'Higgins discharged his duty in chairing the O'Higgins Commission. An issue as to whether he had allowed unfairness or had tolerated a series of attacks on the character of Maurice McCabe is inherent in the term of reference.

No judge would allow a witness to be traduced.

From time to time, the emotion of court cases brings forth rows and disagreements and people speak beyond the limits of what is acceptable. Every judge, and every practitioner, is familiar with that. The task of a judge is to calm tense situations: to put matters back on an even keel. That is precisely what Mr Justice O'Higgins did. Maurice McCabe was not traduced before the O'Higgins Commission. Further, any challenge to him never went beyond putting issues to him, asking him if he could support the serious allegations of corruption which he had repeatedly made with facts. That involved tabling a proposition that he had become mistrustful of authority in consequence of his colleagues having the deeply unpleasant duty of investigating an allegation of what was claimed amounted to a sexual assault. That allegation had been reported to the gardaí by Ms D in December 2006.

As in any long court hearing, there were occasions where facts were misstated or became garbled in translation from witness narrative to fact in issue. Some of this was due to the late briefing of counsel for the Garda Commissioner. The commission did not want to waste time and, rightly, insisted on timetables being adhered to.

### **Summary chronology of events**

Again, since so much hinges on it, the tribunal must start with the allegation made by Ms D in December 2006. She is from a police family and her father is a colleague of Maurice McCabe. As this has been dealt with by the tribunal in part 1, only a short summary is necessary.

Ms D alleged that when she was a small girl, perhaps around Christmas 1998, she had been at a social occasion with her family in Maurice McCabe's family home and that in the course of a game of hide and seek, he had rubbed up against her from behind, on a couch, while both were fully clothed. According to later accounts, this allegedly happened over a matter of minutes. Inspector Noel Cunningham had been tasked by Chief Superintendent Colm Rooney with the difficult and unpleasant task of investigating this allegation, including interviewing Maurice McCabe. That task

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<sup>293</sup> Transcript day 39

was discharged to the highest possible standard. His investigation and report were exemplary: taking finding the truth as the only task, finding every relevant fact, holding back on nothing unpleasant and being transparently fair both to the alleged victim and to the accused.

The Director of Public Prosecutions ruled on 5 April 2007 that even if there were “no credibility issues” in the report by Ms D, what was described did not amount to a sexual assault “or indeed an assault at all” if it had happened. Upon the D family being informed later that month that there was to be no prosecution, nonetheless Mr D, as a serving garda with Maurice McCabe, had a duty to continue to interact with him. This was not helped by two incidents reported in writing to his superiors by Maurice McCabe. These allegedly occurred in October 2007. Again, to recap, these involved a confrontation with Mrs D over the alleged incident in a local courthouse and another confrontation on the street with Ms D which had apparently resulted in Maurice McCabe retreating to Bailieboro garda station. These were complained about by Maurice McCabe in a written report to his superior officer, however, a different version of these incidents was given by him in evidence.<sup>294</sup>

While Inspector Cunningham had responsibly done everything that he could, together with the investigating team, not to cause undue embarrassment to Maurice McCabe, the matter had become very public. Maurice McCabe wished to have a copy of the ruling of the Director of Public Prosecutions, but standard procedure only allowed for the parties to be told that the case was not being pursued, as Inspector Cunningham told him, for “lack of evidence”, or some such words as that he was in the clear. Something similar had probably been told to Mr and Mrs D. Maurice McCabe, however, had been told by the local state solicitor what the ruling had been over the phone.

It was around that time, and here the general chronology refers, that Maurice McCabe became very concerned about policing standards within the Cavan/Monaghan division. These included concerns over the eight specific incidents on which the O’Higgins Commission later reported, as well as reporting on allegations of malpractice and alleged corruption in relation to PULSE records and investigations. The commission did not examine the allegations made by Maurice McCabe in relation to the fixed charge penalty notice system, or FCPN.<sup>295</sup> These allegations had been the object of a number of inquiries, including an Oireachtas inquiry by the Public Accounts Committee under the chairmanship of John McGuinness TD. That happened through 2013 and led to Martin Callinan, as Garda Commissioner, giving public evidence in January 2014 and Maurice McCabe giving private evidence later in the same month.

Concerns as to 2007 investigations, then specific to particular criminal investigations in the Cavan/Monaghan area, were reported by Maurice McCabe to Superintendent Michael Clancy in a letter dated 28 January 2008. This letter shows the genuine concerns of Maurice McCabe, as a public servant. He was seeking that proper policing standards be adhered to. As a matter of fact, his concerns in this regard were upheld in the report of the O’Higgins Commission in April 2016. In part, the letter from January 2008 read:

I list a number of issues that need to be addressed at Bailieboro Garda Station:

- Members not turning up for duty on time.

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<sup>294</sup> Transcript day 59 from page 16

<sup>295</sup> Report of the O’Higgins Commission paragraph 12.21-12.22, found at [www.justice.ie/en/JELR/Pages/Commission-of-Investigation-Certain-Matters-relative-to-the-Cavan-Monaghan-Division-of-the-Garda-Síochána-Final-Report](http://www.justice.ie/en/JELR/Pages/Commission-of-Investigation-Certain-Matters-relative-to-the-Cavan-Monaghan-Division-of-the-Garda-Síochána-Final-Report)

- Members not turning up for duty at all.
- Members not signing on or off in diary.
- Members not doing foot patrol.
- Investigation files not being done.
- Investigation files very poor.
- Incidents not being investigated.
- Members constantly hanging around the station.
- Public Officers reading paper and watching television on duty.
- Calls not attended to.
- Garda members making out duty detail.
- Members not performing the duty they are detailed for.
- Summonses not being followed up.
- Warrants not being executed.
- No briefings.
- No supervision on 24 hour basis.
- Crime Unit not performing public order duty at weekends.
- No guidance to junior members.
- Member's non performance.
- Clique forming.
- Coffee/Tea breaks constantly,
- Very unprofessional approach to incidents by P/Gardai.
- Reported incidents to Gardai not created on Pulse.

The above are some of the issues and are quite serious and I can stand by anything I have mentioned. I have tried and attempted to address all the issues but I am failing, through no fault of my own. The above seems to be the acceptable standard in Bailieboro and I am receiving no help addressing same.

I cannot put up with the situation any longer and under the Health and Safety Act I request an hour meeting with you at your convenience to discuss the matters and to see what process you can put in place to deal with the issues.

is unfair on Probationers that these low standards are being accepted, are not being dealt with, and that they are being trained into this system of low standards.<sup>296</sup>

These matters do not form part of the terms of reference of the tribunal and were, in any event, part of what has been reported on by the O'Higgins Commission. There followed communication between Superintendent Clancy and Maurice McCabe.

There was also an exchange of letters between them in relation to the aftermath of the Ms D allegation. According to Maurice McCabe, Superintendent Clancy asked him to make "a business case" for passing the ruling of the Director of Public Prosecutions to both himself and to the D family.<sup>297</sup> Maurice McCabe had already had the Director of Public Prosecutions' letter read out to him over the telephone by the local state solicitor, as noted, but here a copy of the document was sought. As a matter of fact, the guidelines in force at the time did not allow the full reasons as to why a prosecution was not being taken to be passed to the person complaining of an alleged crime or to the alleged perpetrator. In a letter dated 25 February 2008, Maurice McCabe set out the difficulties that he said he was having in maintaining a working relationship with his colleague Mr D following the Ms D complaint and subsequent garda investigation. Much of the letter is not relevant to the terms of reference. In the letter, he records that Inspector Cunningham had "informed me that the D.P.P. determined" that "there was no offence disclosed whatsoever and that I was exonerated".

Maurice McCabe records his version of that conversation as asking Inspector Cunningham "if the other party were given the same as what I was told", but that he replied "No, how could he". Maurice McCabe states that the allegation of Ms D, which he ascribes to Mr D and to Mrs D, was "totally groundless and maliciously made." In the letter he then gave an account of difficulties between Mr D and himself and the proximity of these two other incidents of confrontation with Ms D and Mrs D in October 2007. Again, these are outside the terms of reference and the tribunal can take no view. The letter ends, substituting D for the family name, as follows:

On the 15<sup>th</sup> October 2007 I was then verbally [attacked] in Bailieboro District Court by Mrs D and on the 17<sup>th</sup> October 2007 Mrs D dropped off her daughter at Bailieboro Garda Station and realising I was not there she drove her around Bailieboro town until she observed me, let her out, and Ms D attacked me. ...

I am a very dedicated member of An Garda Siochana and each Officer I have worked with can vouch for this. I am married with 5 children and this scurrilous allegation has ruined my life forever. I am a completely changed person in that I don't trust anyone anymore. I urge you, if you can, to asked the Director Of Public Prosecutions to allow the Full D.P.P. Directions to be conveyed to me and the other party, in particular Mrs D, in this particular case due to the fact that all parties work in close proximity and I would really appreciate it. That is all I am asking.

I have no desire to have Ms D prosecuted for her attack on me. All I seek is fairness and the decision of the outcome of the investigation to prevent further attacks on me.<sup>298</sup>

Here, there was a complaint. The gardaí had to investigate it. Superintendent Clancy turned to Inspector Cunningham to again investigate the matter concerning Maurice McCabe. On the face of it, this made sense as he had shown himself to be a first-class investigator. According to Superintendent Cunningham, in testimony to the tribunal, he was not told, however, that this letter

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<sup>296</sup> Tribunal documents from page 5019

<sup>297</sup> O'Higgins Commission day 3 page 160

<sup>298</sup> Tribunal documents from page 3245 for term of reference (d)

had been sent in the context of a plea by Maurice McCabe for the circulation to himself and the D family of the Director of Public Prosecutions' letter.<sup>299</sup> Thus, he thought that what was involved was some kind of an investigation into whatever was ostensibly disclosed by the letter of 25 February 2008 in relation to Mr D.<sup>300</sup> The tribunal accepts that as honest evidence. This non-communication by senior officers was a cause of considerable confusion to Inspector Cunningham down the line.

On meeting Maurice McCabe in Mullingar, ostensibly in his role as a complainant and not in effect in his role as sergeant, Superintendent Cunningham had difficulty understanding the background of what was on Maurice McCabe's mind.

He made a report to the chief superintendent about this meeting of 25 August 2008, the document being headed "Allegations made by Sergeant Maurice McCabe".<sup>301</sup> The entire issue of the exoneration of Maurice McCabe by the Director of Public Prosecutions was thus blurred. Sergeant Yvonne Martin accompanied Superintendent Cunningham at the meeting. She was similarly uninformed, through no fault of her own. She later signed the notes which Superintendent Cunningham had made as being accurate.

Sergeant Yvonne Martin behaved at all times properly. She has also had the deeply unfortunate experience of being referred to the Garda Síochána Ombudsman Commission. This cannot have been pleasant for her. In certain political and media quarters, she was traduced as somehow being prepared to commit perjury before the O'Higgins Commission. Nothing could be further from the truth. She was at all times intent on giving an accurate account of that meeting in accordance with the notes of Superintendent Cunningham, which she had certified by her signature as being accurate.

Similarly, it would be difficult to imagine that Superintendent Cunningham, having made a careful and accurate note of the meeting, would at any later stage have had any intention of distorting what had happened. Superintendent Cunningham reported to Maurice McCabe at the meeting that it was his duty "to investigate the allegations made by him in his report of 25 February 2008 to Superintendent Clancy, and to obtain a statement from Sergeant McCabe supporting these allegations." This was countered by an explanation given, for the first time, to Superintendent Cunningham that what this whole affair was about was, according to Maurice McCabe, "a bid by him to have the full D.P.P. directions conveyed to him and the Ds in relation to the allegations made against him by Ms D, and the subsequent investigation." It was reported, and correctly reported, that Maurice McCabe did not want any criminal prosecution pursued against any of the Ds. At this point, Superintendent Cunningham was understandably very confused. He told the tribunal that he found the sorting out of any of the facts very difficult.<sup>302</sup>

Among other observations, the report records the following:

Throughout the meeting with Sergeant McCabe, he continuously rubbed his face and put his hands through his hair. He stated that he believed that all matters were completed in May 2007 when he received the directions from the DPP from Superintendent Cunningham. ... Sergeant McCabe stated that he did not want this matter to come back to him. He stated he does not want the State to cause him any further ill health, and he just wanted the matter ended today. ... Sergeant McCabe at all times during the interview, displayed signs of strain and stress. He was advised of the services of Peer Support and of

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<sup>299</sup> Transcript day 55 from page 100

<sup>300</sup> Transcript day 55 from page 98

<sup>301</sup> Tribunal documents from page 4129

<sup>302</sup> Transcript day 55 page 104

the Welfare Service. He was informed by Superintendent Cunningham that the Welfare Officer would be notified if he so wished. Sergeant McCabe stated that he would only require the services of the Welfare Officer if we returned to interview him in relation to this matter. Sergeant McCabe stated that he was now for the first time, in some time, enjoying his work since his attachment to Mullingar Garda Station.<sup>303</sup>

The evidence of Superintendent Cunningham to the tribunal was far from lacking sympathy for Maurice McCabe. Being accused of sexually abusing a child put Maurice McCabe in a position that was particularly difficult for a sergeant in charge of a busy station and the widely-known allegation was impossible for him to disprove, as would be the case with anyone. It was a dreadful experience for him. Superintendent Cunningham was twice put in an unfortunate position. He pursued two investigations to the best of his ability. He at all times tried to act in as decent a manner as regulations permitted.

## Complaints

Some brief further reference to dates will put the O'Higgins Commission into context. On 20 March 2008, Maurice McCabe vacated his position as sergeant in charge of Bailieboro and shortly thereafter moved to Mullingar. On 28 April 2008, he made a complaint of bullying against Superintendent Clancy; a matter to be dealt with in Garda Headquarters. On 13 May 2008, Chief Superintendent Terry McGinn was appointed to look into this matter and on 30 May 2008 was given relevant documents by Maurice McCabe. By July 2008, Maurice McCabe had taken up a post in charge of traffic in Mullingar. On 15 September 2008, the complaint of bullying against Superintendent Clancy was dismissed because it was out of time. This was followed in October 2008 by Maurice McCabe making a confidential report in relation to the Kingscourt bus attacks and the Lakeside Manor incidents which later came before Seán Guerin SC in 2014, together with other incidents. A body referred to as the Independent Review Mechanism to consider complaints of improper garda investigation generally was set up shortly afterwards.

On 15 October 2008, Maurice McCabe made a complaint against Chief Superintendent Colm Rooney. Since an officer holding a rank above chief superintendent was now required to investigate this complaint, Assistant Commissioner Derek Byrne was appointed on 6 November 2008. On 14 January 2009, Maurice McCabe conveyed, to what had now become the Byrne/McGinn investigation, a document which he headed "Brief Proven Facts pertaining to my complaint."<sup>304</sup> This document stated that he had "brought several issues to Supt [Clancy] and he ignored every one of them". He claimed that he was "victimised, bullied and ridiculed for highlighting the issues" and forced "to resign my position due to lack of standards, accountability, duty to public and management support." He said that "certain Garda management" were "Supporting corruption to save themselves" and were also "Suppressing an important document which highlighted wrongdoing ... [and] problems in Bailieboro." Further concerns were that these senior officers were "Allowing drunk Gardai at the scene of Fatal Road accident" and breaching "human and civil rights with prisoners." The document was part of the brief circulated by the O'Higgins Commission as part of its first module. Consequently, it was correct to regard it as central to concerns.

On 11 March 2009, a newspaper local to the region, the *Anglo Celt*, ascribed comments to a senior officer that reports on complaints about gardaí in Bailieboro were "absolute rubbish". That comment had in fact been made by Chief Superintendent Rooney. On 25 August 2009, there was

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<sup>303</sup> Tribunal documents page 4131

<sup>304</sup> Tribunal documents from page 4739

a further complaint of harassment and victimisation made by Maurice McCabe. In November 2009, a website page became apparent on the Internet featuring an unpleasant rat by the name of “Maurice”. While this was derived from some kind of a public house mascot, it was far from a joke.

### **PULSE records**

On 11 October 2010, Maurice McCabe met Assistant Commissioner Byrne and Chief Superintendent McGinn in a hotel in County Monaghan. They told him that out of 42 complaints which he had made, eleven were being upheld. He produced a box of PULSE records by way of further complaint about alleged misuse of the PULSE system. On 2 November 2010, Assistant Commissioner Nacie Rice was appointed to do a desk study of the Byrne/McGinn investigation. On 8 March 2011, Assistant Commissioner Rice found no fault with the Byrne/McGinn investigation. A subsequent meeting planned for 25 March 2011 between Assistant Commissioner Rice and Maurice McCabe on issues concerning PULSE records did not take place.

### **Issues move into the political sphere**

On 6 April 2011, Lorraine McCabe, the sergeant’s wife, wrote to the Minister for Justice and Equality about the issues in Cavan/Monaghan. On 16 June 2011, Maurice McCabe requested the establishment of a commission of investigation because he was dissatisfied with the outcome of the Byrne/McGinn inquiry. He complained over some 22 pages about Superintendent Clancy and Chief Superintendent Rooney. That latter officer, on 4 July 2011, passed around a letter to local gardaí in the Cavan/Monaghan division congratulating everyone involved in the Byrne/McGinn inquiry for their good work. In his testimony before the tribunal, Chief Superintendent Rooney apologised for this letter.<sup>305</sup> That was belated.

On 29 August 2011, the Minister for Justice and Equality wrote to Maurice McCabe refusing his request for the establishment of a commission of investigation because the complaints which he had made had already been put under investigation. Shortly after that, in September 2011, Superintendent Michael Clancy was placed on the list of promotions to the rank of chief superintendent. In December 2011, Maurice McCabe met Oliver Connolly, who was the confidential recipient pursuant to the administrative scheme within the gardaí, and discussed the promotions list with him. On 12 January 2012, Maurice McCabe made a confidential disclosure on the promotions listing of Superintendent Clancy.

On 23 January 2012, the confidential recipient received a complaint from Maurice McCabe. Essentially this claimed that Assistant Commissioner Byrne and Commissioner Callinan were corrupt and that Superintendent Clancy was incompetent. Oliver Connolly, the confidential recipient, again met Maurice McCabe on 9 February 2012. The following day, disciplinary proceedings were commenced against Maurice McCabe in relation to the disappearance of the computer in a clerical sex abuse case in the Cavan area. On 4 September 2012, Maurice McCabe wrote to the Minister seeking a statutory inquiry. The following month he made a complaint to the Department of Transport about “ticket fixing”. In December 2012, Maurice McCabe’s access to PULSE was restricted.

On 15 May 2013, Assistant Commissioner John O’Mahoney, tasked with looking into the fixed charge penalty notice system and its alleged abuse as documented on PULSE, reported that he could find “no evidence ... of crime, corruption, of deception or falsification” on the issue. On 6

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<sup>305</sup> Transcript day 54 from page 139

August 2013, disciplinary proceedings against Maurice McCabe in respect of the Molloy computer were terminated.

On 23 January 2014, Commissioner Callinan gave evidence before the Public Accounts Committee and referred to Maurice McCabe and another whistleblower in terms of the process that they had initiated as “disgusting”. On 27 February 2014, the Government appointed Seán Guerin SC to review garda investigation files from Cavan/Monaghan in light of Maurice McCabe’s complaints. On 24 March 2014, Commissioner Callinan resigned.

From April 2014, a series of articles appeared in the Irish Independent newspaper and on their website, under the by-line of Paul Williams, concerning the D investigation. On 2 May 2014, gardaí in Cavan/Monaghan were first informed of the mistaken allegation of a rape offence due to a transcription error by Ms D’s counsellor in August 2013. The tribunal deals with that in a separate report on that issue, which is part of this volume. On 6 May 2014, Seán Guerin SC recommended the establishment of a commission of investigation into a series of matters already inquired into by the Byrne/McGinn inquiry. On 9 May 2014, then acting Commissioner Nóirín O’Sullivan restored access to the PULSE system to Maurice McCabe. On 14 May 2014, the Rian counsellor who made the transcription error in relation to the rape offence requested the correction of same within social services and within the gardaí. On 16 May 2014, the Independent Review Mechanism was established by the Government, to “consider allegations of Garda misconduct or inadequacies in the investigation of such allegations”.<sup>306</sup> This was agreed as a result of the findings of the Guerin report. It was open to the public to submit complaints where they had a view that their case had not been properly investigated by gardaí. This examination included a complaint by Ms D that her allegation against Maurice McCabe had been badly investigated. On 10 November 2014, barristers working on the Independent Review Mechanism stated that the D case was unsuitable for inclusion in any future commission of investigation. They saw nothing wrong with the investigation into the D allegation conducted by Superintendent Noel Cunningham following an examination of the relevant documents.

On 9 December 2014, the draft terms of reference of the future O’Higgins Commission were laid before the Oireachtas. On 3 February 2015, the O’Higgins Commission was formally established and Mr Justice O’Higgins began his work. He reported to the Minister for Justice and Equality on 25 April 2016. On Maurice McCabe, he said the following:

3.1 Sergeant McCabe is the central figure in this commission of investigation. He is a dedicated and committed member of An Garda Síochána. He has brought to public attention certain investigations where the public was not well served. He has also highlighted certain legitimate concerns about procedures and practices in place at Bailieboro garda station. The events leading up to and including this commission of investigation have been extremely stressful for him and for his family over a long period of time. In particular, he considered that he was being wrongly blamed for certain errors in the investigation of the Fr. Michael Molloy case, and he was subjected to disciplinary proceedings for the first time in a long career. This was especially upsetting for him because he had no part in that investigation. He also had reason to believe that he was being “*set up*” and wrongly implicated in relation to important aspects of the Jerry McGrath investigation. His understandable beliefs in that regard remain unproven. Sergeant McCabe felt that his complaints were not being addressed properly, and this report examines how those complaints were dealt with. In addition, Sergeant McCabe felt that he was subjected

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<sup>306</sup> See further at [www.justice.ie/en/JELR/Pages/IndependentReviewMechanism](http://www.justice.ie/en/JELR/Pages/IndependentReviewMechanism)

to ridicule and odium by certain persons within the force. He felt very isolated as a result of his complaints.

3.2 Sergeant McCabe impressed the commission as being never less than truthful in his evidence, even if prone to exaggeration at times. In common with many other witnesses, his recollection of some events is diminished because of the passage of time.

3.3 Some of the complaints have been upheld in this report, especially in respect of the quality of the investigations examined by this commission. Other complaints made by him have proven to be overstated or exaggerated. Some were unfounded, and some have been withdrawn.

3.4 Some people, wrongly and unfairly, cast aspersions on Sergeant McCabe's motives; others were ambivalent about them. Sergeant McCabe acted out of genuine and legitimate concerns, and the commission unreservedly accepts his *bona fides*. Sergeant McCabe has shown courage, and performed a genuine public service at considerable personal cost. For this he is due the gratitude, not only of the general public, but also of An Garda Síochána. While some of his complaints have not been upheld by this commission, Sergeant McCabe is a man of integrity, whom the public can trust in the exercise of his duties. Assistant Commissioner Byrne told the commission that, "*Sergeant McCabe is regarded as a highly efficient sergeant, competent*". This assessment is shared by the commission.<sup>307</sup>

This tribunal agrees with those comments. This caution as to exaggeration is not misplaced. It has meant that the tribunal has had an especially difficult task. Maurice McCabe remains a public-spirited, decent and kind individual but one suffering from the effects of strain. He is in the tribunal's assessment someone who tries his very best to tell the truth as he sees it.

### **The O'Higgins Commission**

It is clear that the O'Higgins Commission did a very thorough job. It is clear that Mr Justice O'Higgins controlled the commission with judicial authority and was not prepared to let his task be derailed.

In terms of any legal rulings which he made, these were faultless. In terms of the trust which the public service and the public was entitled to put in Mr Justice O'Higgins, that was absolute. He was formerly a leading practitioner, a judge of the Circuit Court on the Midlands Circuit, then the South-Western Circuit, a judge of the High Court in Dublin and a judge of the European General Court in Luxembourg.

Yet, this tribunal has been asked to inquire into whether he allowed a witness to be traduced. That did not happen.

### **Origin of the term of reference**

Central to this term of reference is the issue that at the O'Higgins Commission, counsel appearing on behalf of the Garda Commissioner put "false allegations of sexual abuse" forward and deployed them in the cross-examination of Maurice McCabe in order "to discredit" him. This is what the term of reference is about. The term of reference requires the tribunal to inquire if this was done at the behest of Commissioner Nóirín O'Sullivan. Throughout the hearings, it was emphasised by tribunal counsel that no allegation of sexual abuse had ever been put to Maurice McCabe. The

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<sup>307</sup> Report of the O'Higgins Commission from page 23

tribunal has read the entire transcript from the O’Higgins Commission hearings and has listened to much of the audio. The tribunal agrees.

Colm Smyth SC appeared for the Garda Commissioner and certain named senior gardaí. He told the tribunal that he had not been asked by any client to undermine the credit of Maurice McCabe with any allegation of sexual abuse. He further said that if he had been so asked, he would, in any event, have told them to get another barrister.<sup>308</sup>

This allegation of counsel for the Garda Commissioner’s legal team putting allegations of sexual abuse of children to Maurice McCabe while testifying to Mr Justice O’Higgins is central to this inquiry. Any other matter as to the nuances of the hearing pales into insignificance beside that allegation. The tribunal understands, however, that through a process of strain, the ability of a person to see matters objectively may be affected.

With the leak of selected extracts from the transcript as and from May 2016, public disquiet grew as to the conduct of the commission. Such disquiet was easily aroused simply by reason of the fact that the commission hearings were, as the legislation requires, in private. Thus there was no reporter, for example, to watch and hear and then report as the eyes and ears of the Irish public. That is an important public function and inures to the public benefit. The tribunal is not mandated to inquire into who engaged in any manipulation of the media with selected extracts from those transcripts and has no view as to responsibility for this conduct. There are several possible sources of such leaks. As mentioned, the tribunal is not inquiring into that. Certainly, the tribunal is not blaming any party represented before the tribunal as there is no evidence on this.

What is clear is only that this selective leaking caused serious public disquiet. That kind of disquiet can be exacerbated, and was here, because of the private nature of the proceedings. That was no fault of the commission. The legislation so prescribes. Unfortunately, also, that legislation contains no provision for the commission to set any publicly stated error aright.

### **O’Higgins Commission terms of reference**

In terms of the conduct of the Garda Commissioner, of counsel for the Garda Commissioner, and in any consideration of contacts under term of reference (h) between “members of An Garda Síochána and ... Media and broadcasting personnel [and] members of the Government”, especially the former Minister for Justice and Equality, forced to resign over this issue, the actual terms of reference of the O’Higgins Commission are central. Without a term of reference to cover an issue, neither a commission of investigation nor a tribunal of inquiry has jurisdiction to inquire into that matter or to compel the production of documents or witnesses.

The terms of reference of the O’Higgins Commission required it to look into eight specific incidents in Cavan from 2007 to 2009 and also required the commission to look at allegations of “malpractice and corruption in relation to PULSE records”: these, essentially, were the records in a box taken from Maurice McCabe on 11 October 2010 at a meeting at the Hillgrove Hotel in Monaghan. There was, importantly, also a specific term of reference requiring the O’Higgins Commission to investigate and report on how “the Minister for Justice and Equality and Department of Justice and Equality” investigated “complaints made by Sergeant Maurice McCabe in relation to” those matters. Garda Headquarters was to be similarly investigated.

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<sup>308</sup> Transcript day 48 page 39

Thus it is clear that the Garda Commissioner and the Minister were themselves under investigation by the O'Higgins Commission as to how they had handled the complaints of Maurice McCabe.

### **Cross-examination and limits**

Confusion has arisen as to the limits of cross-examination. Since the tribunal's report on this term of reference is about what happened or did not happen to Maurice McCabe when under cross-examination before Mr Justice O'Higgins, an explanation as to the proper use of this forensic instrument is necessary.

Briefly, in the common law system, a witness who is the plaintiff or defendant, or who appears on behalf of the plaintiff or defendant, or for the prosecution or defence in a criminal trial, is first examined-in-chief by counsel for the side for which they appear. The cardinal rule is that counsel are not allowed to put words into the mouth of witnesses for their own side. That rule is not that questions cannot be asked which are answerable by yes or no. Nor is it that matters which are not in issue cannot be led; meaning asked about directly as opposed to the witness choosing the form of their own testimony. In cross-examination, questions suggesting an answer on the facts in issue can be asked. Cross-examination is of opposing witnesses; that is counsel for the defendant will suggest a fact or an explanation for a fact directly to the plaintiff and counsel for the plaintiff will pursue the same course with defence witnesses. With criminal trials, it is the same but substituting the accused and the prosecution as the parties. It is entirely normal and proper to ask any witness about their means of knowledge, if a witness is an expert then also about their qualifications and experience, the sureness of the observation, the firmness of the recollection and to put to that witness, as the law demands, any opposing case which contradicts the facts to which they testify. This is called cross-examination as to credibility. It is a normal and everyday part of court cases.

This kind of cross-examination does not necessarily cross the line into cross-examination as to credit. That happens where a person is asked whether their perception or recollection is unconsciously influenced by their being, for instance, an expert witness for a particular side of the case or where, in other cases, they are related by ties of blood or friendship to the plaintiff, to the defendant, to the accused or to the victim of the crime. That being so, to ask a question of someone as to whether they are unconsciously influenced in their recollection by a bad experience that is directly related to the issue with which the hearing is concerned does not necessarily always cross the line into cross-examination as to credit. That kind of cross-examination, as its name implies, is designed to undermine the testimony of a witness by suggesting that he or she is not the kind of person whose evidence could be regarded as trustworthy.

Cross-examination as to credit references events and circumstances external to the issues before the court with a view to demonstrating that the witness is unworthy of belief as to what they assert. An example would be putting to a witness who alleges that an accused person told him, while both were on remand in the same prison cell, that he had committed the murder with which he was charged, that the witness had himself been found guilty of manslaughter or fraud or another offence some years previously, or that he was a worthless or untrustworthy character by reason of his personal conduct; such as seducing his best friend's girlfriend or engaging in the sale of narcotics. The questions might run: "You say my client confessed to murder while sharing a cell with you?" "Yes, he did." "But, is it not the case that you were in prison for defrauding a bank when you worked there, a serious breach of trust and a cunning deception?" "Yes, I was charged with that." Et cetera. It is contrary to professional ethics for counsel to put such disparaging questions to a witness unless counsel has specific instructions from his own client that these discreditable facts are true. Such a cross-examination is rarely embarked upon as it can often explode in the advocate's face and may turn the jury or the judge in the other direction.

As to what questions on credit may be put to a witness, a judge has a discretion and may stop a cross-examination of this kind on the basis that it is insufficiently relevant to any fact in issue or is prolix. The judge will have in mind that a witness is entitled to human dignity and that while parties are entitled to legitimately explore issues with a view to seeking justice, limits based on relevancy and sufficiency may be quickly reached.

Cross-examination on an issue is not final. Where a plaintiff or defendant denies signing a contract, a witness who saw them reading it and then appending their signature can be called. Credibility issues are not final either. Thus where a party denies, for instance, that they wear glasses for ordinary use on the street, a witness may be called to contradict their denial. Cross-examination as to credit does not allow a witness to be called in rebuttal of an unpleasant fact put that is not germane to a fact in issue. Where, under cross-examination as to credit, for instance, a witness denies having an affair with his best friend's girlfriend and deceiving everyone to conceal that affair; that is the end of the matter. No witness, girlfriend or not, may be called in contradiction of such a denial. Cross-examination as to credit is final.

Cross-examination on the issues in a case, on credibility and on credit, can unfortunately be used to confuse a witness. That can occur either deliberately, as a matter of forensic trickery, which is improper, or because the cross-examiner is himself or herself confused. It is the duty of the judge both to dampen down any excess of apparent zeal and also to bring matters back into focus. The judge controls a case so that it is about what it should be: the issues between the parties.

Cross-examination can be an instrument for finding the truth but it can also be an instrument that can mislead. Again, the task of every trial judge is to direct matters towards what is useful. Ethics require counsel only to pursue facts on which their client instructs them. Counsel are not entitled to put contradictory facts from their own imagination. Rather, what is put to a witness comes from the instructions of their own client. That client's case must be put in full so that any relevant witness will have a fair opportunity of dealing with the facts that are relevant to them.

As before, the focus of the trial judge is towards relevance and guiding the trial, be it civil or criminal, towards an examination of what is central to any decision on the case.

### **Counsel for the Garda Commissioner instructed**

Where counsel are to be engaged on behalf of a Department of State, that nomination is usually done by the Attorney General. The nomination of counsel to represent the Garda Commissioner at the O'Higgins Commission took place on 30 April 2015. The commission was due to begin hearings on Thursday, 14 May 2015. That is very little time. Papers had to be prepared and passed to counsel: in this case Colm Smyth SC, Garret Byrne BL and Michael MacNamee BL. They accepted instructions on 1 May. Some partial papers came a number of days later. These were confused and gave no information as to what the issues were. These were returned. Some days later, a more comprehensible set arrived. It was then a case of trying to adequately prepare within an inadequate timeframe.<sup>309</sup>

Colm Smyth SC, on examining the terms of reference and on opening the core booklet distributed for the first module by the O'Higgins Commission, came to the conclusion that the commission was not to be an investigation into Maurice McCabe. He also considered that it was inescapable that Maurice McCabe was making very serious allegations. Every core booklet throughout the course of the hearings contained a statement of some kind from Maurice McCabe. He felt that

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<sup>309</sup> Transcript day 47 from page 185

Maurice McCabe had taken on the role of an accuser as against their clients.<sup>310</sup> These included the Garda Commissioner Nóirín O’Sullivan, the former Garda Commissioner Martin Callinan, Assistant Commissioner Catherine Clancy, Chief Superintendent Colm Rooney, Superintendent Michael Clancy and Superintendent Noel Cunningham. Basically, they were to represent anyone who held superintendent rank or above who sought representation.

Sight should not be lost of the fact that the allegations made by Maurice McCabe were extremely serious. These were not limited to individual incidents in counties Cavan and Monaghan, but included an allegation that former Commissioner Martin Callinan was corrupt and that the senior management in the Cavan/Monaghan division had suppressed documents, had allowed indiscipline to escalate, allowed gardaí to degrade victims, had failed in their duty to investigate crime, had singled out particular gardaí and allowed them to go “unaccountable and unsupervised”, had “targeted” Maurice McCabe, had supported “corruption to save themselves” and had “victimised, bullied and ridiculed” Maurice McCabe.<sup>311</sup> The allegation of corruption against former Commissioner Callinan was made on the basis that since Superintendent Michael Clancy had apparently presided over extremely poor policing in his area, listing him for promotion was, in itself, corruption. The principle enunciated by Mr Justice Morris in the several reports of the Morris Tribunal was, after all and whether taken on board by Garda Headquarters or not, that senior officers had responsibility for every failure in policing in their division or district.

It was appropriate to ask, in the context of preparing for hearings, as to what possible evidence Maurice McCabe had for each and every allegation he was making. Certainly, a considerable public service was done by him in bringing the utterly unacceptable state of policing in the Cavan/Monaghan division to public attention. More generally, the entire issue of fixed charge penalty notices which had been previously the subject of numerous inquiries, and an analysis of the PULSE records by the O’Higgins Commission, later revealed a disturbing situation. Equally, the failure of the garda organisation itself to deal with these matters and bring them to a satisfactory conclusion was extremely worrying in the context of what the O’Higgins Commission ultimately found. But the allegations of Maurice McCabe went further. He claimed not just inattention to duty by gardaí on the ground, but corruption under the direction of garda management. While bribery was not alleged, these allegations of corruption were as serious as could be made against any police officer. While the complaints as to inattention to particular criminal investigations and the PULSE situation were grounded in evidence, the allegations of corruption against garda management appeared to lack a substratum of fact upon which to base them.

As found by the O’Higgins Commission, former Commissioner Callinan was not guilty of corruption. The potentially devastating charges against the other officers were also found to be without any factual foundation.<sup>312</sup> Maurice McCabe was found by the O’Higgins Commission to be honest in making these charges, in the sense that he believed them. While the frustration which he undoubtedly felt in attempting to improve police standards is understandable, in reality, during the hearings he apologised to Superintendent Cunningham and specifically withdrew the allegations which he had made against other officers. The notable exception was former Commissioner Callinan.

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<sup>310</sup> Transcript day 47 page 197

<sup>311</sup> Tribunal documents from page 4739

<sup>312</sup> O’Higgins Commission report paragraphs 3.5 and 3.6

## Approach of counsel for the Garda Commissioner

How was this properly to be approached? Here, the focus of the tribunal, bound as it is by the terms of reference, is on Commissioner O'Sullivan and as to whether she attempted to rely on unjustified grounds to discredit Maurice McCabe in making these allegations. Colm Smyth SC testified:

*This man has made serious allegations. They will, if proven, have serious consequences for one or other or more of them. I need to be able to challenge these allegations as they come up in turn, if they do, and I need to know on what basis they are being made, I need to know the facts, I need to challenge the credibility of these allegations, and I need to know if there is no evidence to support them, it follows naturally that there will be motivation issues raised as to why. Why would anyone make these allegations if there is no evidence to support them? Why? And the question must be there has to be a reason and I needed permission, the green light, to explore that, with Sergeant McCabe. ... None of these allegations were upheld against my clients. None of the corruption allegations. And insofar as serious malpractice is concerned, none of those were upheld against my clients. The malpractice was held against the rank of middle management, including sergeant and sergeant in charge. And it's easy for people to have hindsight and say that I acted in an improper way.<sup>313</sup>*

There is no reason to imagine that Colm Smyth SC, or any other members of the legal team representing the Garda Commissioner, were personally or professionally ill-disposed towards Maurice McCabe. The essence of any instruction received by the legal team on behalf of the Commissioner and other senior gardaí was that Maurice McCabe was a contented sergeant in charge of Bailieboro up to 2007 and that there was a link between his beginning to complain about police standards and the unfortunate experience of being investigated over the Ms D allegation from December 2006. No one, however, thought of using her allegation as an attack on his creditworthiness. Had that allegation been so used, it would have been a classic example of an unrelated issue being used on specific instructions from a client to suggest that a witness was unworthy of belief due to prior improper conduct. That did not happen. As Colm Smyth SC said:

*No. ... Because the fact that this incident really wasn't of concern to me at that stage, it was -- as I say, I can deal with that later if you ask me further about it, but it had no concern to me. Because I was not going to deploy the fact that this man had this difficulty or whatever it may be, how you would describe it. It was not going to deploy it against him as far as I was concerned. ... I was never instructed, nor would I do so, to use any allegation of this nature against him. ... I want to put that firmly on the record.<sup>314</sup>*

## Commissioner O'Sullivan

Multiple references were made during the nineteen days of hearings by this tribunal into this term of reference to sets of notes taken by Chief Superintendent Fergus Healy, as liaison officer for the Garda Commissioner and represented gardaí, by Annmarie Ryan, the highly accomplished solicitor, instructed by Inspector Michael McNamara and others. These have been scrutinised for any hint of wrongdoing by Commissioner O'Sullivan. Since she is the focus of this term of

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<sup>313</sup> Transcript day 48 from page 65

<sup>314</sup> Transcript day 48 page 39

reference, one fact needs to be made clear. While counsel met with some of their clients on Monday, 11 May 2015 and the following days, and while everything was a terrible rush, they did not meet with Commissioner O'Sullivan until much later on. Insofar as they were getting instructions from her, these arose in consequence of a particular dispute where, as the phrase goes, one word borrowed another. That row happened on Friday, 15 May 2015, the second day of hearings at the O'Higgins Commission.

Insofar as instructions came in these early stages, these arrived through the agency of Chief Superintendent Healy, who alone was authorised to ring Commissioner O'Sullivan directly, and these were conveyed to counsel either directly or through Annmarie Ryan. Bizarrely, Commissioner O'Sullivan did not meet with her solicitor and did not give her instructions directly at that time. This was a serious mistake which led to much of the difficulty at the commission. As of that weekend after the row happened, Annmarie Ryan asked for a consultation with her client. This was conveyed through the garda liaison officer, and he has sworn that he asked Commissioner O'Sullivan to make herself available over the weekend. There was no consultation. Annmarie Ryan gave evidence to the tribunal that:

*I was looking for an immediate consultation<sup>315</sup> ... I knew it was a highly sensitive matter and I wanted the consultation with the Commissioner and I would have been on the phone to [Chief Superintendent Healy] keeping the pressure on to see where are we that evening, or that day.<sup>316</sup>*

In cross-examination by counsel for Maurice McCabe at the tribunal, Annmarie Ryan stated that she was informed by Chief Superintendent Fergus Healy on 15 May 2015, following the row, that a consultation with the Commissioner would not be possible over that weekend:

*Question: And am I right in thinking then your own statement indicates it's so, that you were very anxious that Superintendent Healy should arrange for you to have an immediate consultation at which you would be present with the Commissioner?*

*Answer: Well, a consultation, I'd expect to be present for them.*

*Question: Yes.*

*Answer: I do recall Chief Superintendent Healy on the phone, I presume to the Commissioner - well, I took it to be the Commissioner - and I recall saying, like, whispering, I believe I -- like, is she -- immediate consultation.*

*Question: Yes.*

*Answer: And I recall him saying whatever, he shook his head, he shook his head as in to say no.<sup>317</sup>*

*... I spoke to Fergus Healy on Friday evening, it could have been after this matter, because I definitely wanted the consultation, and I know Fergus told me she's busy engaged or she has conferences. I know she was busy for the weekend.<sup>318</sup>*

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<sup>315</sup> Transcript day 42 page 16

<sup>316</sup> Transcript day 42 page 41

<sup>317</sup> Transcript day 42 page 104-5

<sup>318</sup> Transcript day 42 page 121

Chief Superintendent Healy also gave evidence that he had asked the Commissioner about her availability over that weekend for a consultation with Annmarie Ryan and the legal team:

*we had agreed to do this letter, and I then said to her that counsel was available for a consultation over the weekend ... And she advised me that she was otherwise engaged.<sup>319</sup> ... I would say Ms. Ryan was pressing for a consultation. Unfortunately, the Commissioner was otherwise engaged, and, you know, I conveyed that to her ... That is my recollection of it.<sup>320</sup>*

In her evidence to the tribunal, the Commissioner said that she was not made aware by Chief Superintendent Healy of Annmarie Ryan seeking an urgent consultation:

*Question: Ms. Ryan has given evidence that she felt that a consultation, face-to-face, should be had with you in relation to the matter because she felt that there was trouble ahead in relation to what had gone on in the Commission on the Friday evening, the 15th, and, as I understand it, Chief Superintendent Healy relayed that to you?*

*Answer: Well, I've read Ms. Ryan's evidence, and my conversations with Chief Superintendent Healy, and I do appreciate that Chief Superintendent Healy was under a lot of pressure relaying matters to and fro from the Commission, but certainly I was never given the impression that there was such an emphasis on having a meeting, because no matter what I was doing or where I was, I would always make myself available if it had been pressed upon me that there was such a desire on behalf of Ms. Ryan to have a consultation, I certainly would have done that.<sup>321</sup>*

For whatever reason, the Garda Commissioner declined at that stage to meet with her solicitor and counsel. There is no excuse for that. For one thing, it could have cleared up a matter which was allowed to escalate.

At the tribunal, there has been a focus on the consultations with garda clients on Monday, 11 May 2015 and the following days, the O'Higgins Commission having started later that week on Thursday, 14 May 2015. It is difficult for this tribunal to make sense of the matter, given that out of all represented senior gardaí, only Chief Superintendent Colm Rooney, Superintendent Noel Cunningham and Superintendent Clancy did not give a complete waiver of legal professional privilege. They cannot be in any way blamed for asserting rights given to them by law. Nonetheless, it is clear that a narrative was given to counsel and solicitor that described Maurice McCabe in very complimentary terms as a policeman but as someone who changed, not in terms of his competence but instead of his attitude, at a time which generally coincided with the D investigation and its aftermath.

There was nothing wrong with seeking to explore this matter. Perhaps, from the point of view of strategy, it would have been better to focus on precisely what was being alleged in relation to each of the incidents contained in the commission's terms of reference. By focusing on the individual, it may be that facts can get lost but by focusing on the facts, the individual making the allegation becomes less important. That, however, is not a criticism.

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<sup>319</sup> Transcript day 43 page 180

<sup>320</sup> Transcript day 43 page 183

<sup>321</sup> Transcript day 45 page 184-185, see also transcript day 46 from page 117

## One word borrows another

On Friday, 15 May 2015 the row happened before the O'Higgins Commission. While it is now necessary to give details of what happened, the fact of a row during a court or tribunal hearing is really neither here nor there. Courts are familiar with what can happen when emotion travels from one person to another. The job of a judge is then to calm things down. That is precisely what Mr Justice O'Higgins did. The tribunal now quotes the start of this row. It happened when Chief Superintendent Rooney was giving evidence. Here is the relevant transcript:

**Q.** *But before you retired did have you contact with him?*

**A.** *Yeah, Sergeant McCabe came to see me, sought an appointment to come and see me in my office in Monaghan. He contacted my office and made an appointment and I saw him. He came to me. He was very angry, he was very annoyed and he was very upset.*

**Q.** *MR JUSTICE O'HIGGINS: When was this?*

**A.** *It was in late 2006....*

**Q.** *MR SMYTH: Do you think in December or November, was it late in 2006, was it winter time?*

**A.** *No, I am sorry, Judge, it was 2007.*

**Q.** *Was it late 2007?*

**A.** *It was probably late 2007, yes, definitely. He came to my office and he was in that state and he demanded of me that I write to the Director of Public Prosecutions and I challenge a decision that Director of Public Prosecutions had made in respect of him.*

**MR GILLANE:** *I don't mean to cut across the witness but I think just in relation to this matter, unless the parties have a different view, I think it's evidence concerning a matter that the Commission isn't directed to investigate, whether it's relevant or not is a matter for the parties.*

**MR JUSTICE O'HIGGINS:** *Yes.*

**MR SMYTH:** *Can I say, Judge, perhaps you should hear us since this is a private hearing. The relevance may be in context of motivation for certain facts or for certain matters or, indeed, credibility in relation to the certain matters.*

**MR McDOWELL:** *Judge, I wonder could I be heard?*

**MR JUSTICE O'HIGGINS:** *The matter is délicat. I will rise for 10 minutes.*

**MR McDOWELL:** *I want Mr. Smith to inform, since this process is happening now in front of my client, I want Mr. Smith to formally inform you, Judge, that he is asking these questions on the firm instructions of the Commissioners and that he knows the answers that he is seeking from this witness and that*

*on his view as a professional Senior Counsel it is relevant to the module that we are dealing with now. I want that clarified because I will deal with it. Want to consult my own legal team in any event but –*

*MR GILLANE: I think Mr. McDowell wants to be heard on the issue.*

*MR JUSTICE O'HIGGINS: I think that might be reasonable enough but I intend to abide by my original intention tensions and rise for ten minutes. The matter can be perhaps clarified after that.*

A short adjournment followed. This apparently was at 15:10 hours. Chief Superintendent Healy tried to phone Commissioner O'Sullivan on a number of occasions from 15:13 hours on. She contacted him at 15:23 hours but the phone call lasted only two minutes. Commissioner O'Sullivan then phoned Noel Waters, the secretary general of the Department of Justice and Equality, at 15:26 hours and they spoke for fourteen minutes. Noel Waters told the tribunal that he had no recollection at all of this telephone conversation.<sup>322</sup> That is improbable. The commission resumed hearing at 15:36 hours. The hearings continued following the adjournment as follows:

*MR GILLANE: Yes, Judge, sorry for interrupting the flow of evidence. I interrupted on the basis that I apprehended a line of questioning in relation to an area or areas that are not relevant to this module or to any module to which the Commission is concerned.*

*I wish to emphasise obviously I hold no brief for or against any party before the Commission but I interrupted on that basis. And I was mindful of the fact that the Oireachtas has directed the Commission to exercise discretion in relation to the scope and intensity of the investigation that is considered necessary.*

*In the circumstances which arise I recommend to the Commission that Mr. McDowell might be invited to make such a legal objection as arises if it does arise in relation to the apprehended line of questioning and that Mr. Smyth might set out a basis for the line of questioning if he wishes to pursue it and that in relation to both in terms of the topic that is to be canvassed, no detail in relation to it is necessary and it could be dealt with in legal terms.*

*MR McDOWELL: Judge, in relation to the line of questioning which we had arrived at just before the Commission rose, I apprehend that Mr. Smyth is asking this witness questions which relate to my client, his motivation and his character. And if that is to be done, I want to have it very clearly understood that as the Commission stated in the first opening lines, so to speak, this is not an adversarial forum, this is not one in which anything is being investigated except the module which is the nature of adequacy of the Garda investigation of the dealings in relation to Ms. Lorraine Brown by Garda Ferghal McCarthy and what transpired as a consequence. That is what I understand to be the parameters of the investigation that we are dealing with here today*

*In relation to that, my client Sergeant Maurice McCabe has a very, very limited role. In fact, it was not clear to me that he would be either testifying*

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<sup>322</sup> Transcript days 40 and 57

*or that I would be asking any questions based on the core book that is available but Commission I think can see on a fairly, on a growing naked basis that Mr. Smyth is asking a line of questions, which he is entitled to do, to suggest that the problems that arose in relation to probationer Garda Ferghal McCarthy are the responsibility in substantial measure, if not largely, of my client Sergeant McCabe.*

*We have come here to assist the Tribunal or the Commission but not here to be and to give relevant evidence but not to have our character or our motivation impugned save insofar as that is necessary. I have absolutely no notice that the Commissioner of An Garda Síochána, [Nóirín] O'Sullivan, has ever suggested in public or in private that the problems that arise in relation to this particular matter which we are dealing with here are or maybe the responsibility of my client, none whatsoever.*

*I have to say that although crude and rather inept efforts have been made, in my view, and I will be the Commission to take that view in the fullness of time to suggest that somehow Sergeant McCabe was directly responsible for the inadequacy of the actions of probationer Garda McCarthy and the follow up on foot of that and crude efforts have been made to shoehorn him into a position of direct responsibility by people who I think should know better. And no effort whatsoever has been made by Mr. Smyth on behalf of the Commissioner to either request the presence here of Sergeant Burke or to enquire into what he in fact did or did not do. He is content to make elliptical criticisms by way of questions of my client throughout this process. I am happy to deal with that as long as it stops at that because I think there is no substance to it and it is a childish and unworthy line of cross-examination of witnesses.*

*I am shocked that it is coming from counsel instructed by the Commissioner for a variety of reasons, very very deeply shocked that this line of questioning is coming in this way, but so be it, we can deal with that. But if now his character and his motivation is about to be impugned, I am entitled as a matter of simple constitutional and natural justice, firstly, to have full notice of the attack that is going to be made on his character or his credibility or his motivation and I must be in a position to know what is coming, not to have a collusive effort between the Commissioner and senior ex-Gardaí to have examination and cross-examination or, sorry, cross-examination directed to these topics with a view to raising these issues without any notice to my client that this was coming. I haven't been here. Sergeant McCabe is not the complainant here. His legal team have stressed to him at great length that it is not up to him to do the Commission's work, it is for the Commission to enquire -- this is not an adversarial forum in which he must somehow discharge some onus of proof or impugn the investigation or criticise other Gardaí or whatever and he has not done that. And the Commission will note that I have simply in my cross-examination confined myself to clarify his role as, for instance as, his non-role as supervisory sergeant and the role of others in that way and the sequence of events in relation to what has happened.*

*But if it is the case now, and I can well imagine where this is going, if it is the case that Mr. Smyth is instructed by [Nóirín O'Sullivan], the Commissioner*

*of An Garda Síochána, to impugn his credibility, his motivation and his behaviour in relation to this matter, first of all I want that clearly stated before questions are put along those lines.*

*Secondly, if my client's credibility is being called into issue or his motivation, bearing in mind that my client has been told by his own legal advisers that his presence here is largely marginal and his contribution on the facts is going to the marginal in the whole process, that if a collateral attack on his credibility is now going to be launched that Mr. Smyth fully establish his entitlement to do that bearing in mind what the Commission has indicated is the extent of this module. If it is the Commissioner's case that in this multilateral mode of the Commission that that material must be ventilated and those kind of questions must be asked, if that is the Commissioner's case then the entire basis of my participation in this, the requirements of natural and constitutional justice as to notice, as to the nature of the charge that the Commissioner is going to lay against Sergeant McCabe should be very, very clear because in the end, as the Commission well knows, it is an exception to this scheme of the statute that people are given the right to cross-examine anybody else and it is done to protect, it's done to protect their rights. It is done to protect their rights. This is not an adversarial process where the truth is supposed to be elicited by cross-examination by other people's counsel. The purpose, as I submit to the Commission, is very simply that in affording the parties which have been summoned to this session the right to cross-examine it is so as to protect them, not to impugn others, unless that was absolutely necessary for the purpose of protecting the party in question.*

*I find astonishing that Commissioner should feel that in some sense upholding her rights involves questioning the motive and the credibility and the behaviour of Sergeant McCabe in this matter. I find it absolutely astonishing and happily this event is in private, though semi private, there are so many people here but nonetheless it is self contained*

**MR JUSTICE O'HIGGINS:** *It is in private.*

**MR McDOWELL:** *It is in private but I find it, Judge, I find it deeply wrong that the Commissioner would without any notice to me use a witness, a retired witness with a view to launching an attack on my client. What I am asking for is firstly absolutely firm confirmation from Mr. Smyth that he is instructed by nobody else but Commissioner to impugn my client's credibility, to question my client's motivation or to question my client's behaviour in relation to these matters and to ask questions of other witnesses as he has been doing in a mild manner but now is obviously getting to more substantial matters, along those lines. I want that confirmation first.*

*Secondly, if those are his instructions, the second thing is to show how it is remotely admissible or relevant to these proceedings whether how, what my client's motives or behaviour or standards or credibility could be bearing in mind that, as I say, this module could well have taken place without my presence here at all.*

*MR JUSTICE O'HIGGINS: Just one or two preliminary matters. First of all insofar as you canvassed the question about the efforts to put responsibility on Sergeant McCabe in relation to these matters, they are matters to be considered by this module and no doubt you will make those points in relation, they will be better made in relation to your submissions on the module rather than in the course of this application*

*MR McDOWELL: I only say in relation to that that we have had no notice that that was their intention.*

*MR JUSTICE O'HIGGINS: Secondly, the matters that you have raised are important in relation to this -- it is an inquiry. It is not an adversarial thing. The question of credibility of witnesses can be probed in the normal fashion in relation to clearly the accuracy of somebody's memory bears on the credibility of their evidence and so forth but if it goes beyond that, if it is the Commissioner's case that she wishes to impugn the motivation and the integrity of Sergeant McCabe, if those are the instructions that you have Mr. Smyth, I think you should say so in so many words. If they are not your instructions, that is a different matter.*

*If those are your instructions that Sergeant McCabe acted out of improper motivation and that his character is -- so be it if those are your instructions but if not -- if they are, I think the Commission bearing the nature of the Inquiry should be appraised of that.*

*If that stage is arrived at, then the question of notice to the other parties or whether they were taken by surprise will be dealt with by the Commission. As I indicated in my opening statement, nobody is going to be ambushed. But that doesn't arise at the moment.*

*I think in view of the particular nature of the matters under discussion that it is not unreasonable of Mr. McDowell to say whether an attack on the integrity and motivation of Sergeant McCabe forms part of your case or whether you are saying that, no, he is inaccurate or mistaken.*

*MR SMYTH: Do you want to me to respond?*

*MR JUSTICE O'HIGGINS: Please.*

*MR SMYTH: I have instructions from the Commissioner, Judge. This is an inquiry dealing with the allegations of malpractice and corruption on a grand scale by members of an Garda Síochána.*

*MR JUSTICE O'HIGGINS: No, this part of the Inquiry --*

*MR SMYTH: I appreciate that but my instructions are to challenge the integrity certainly of Sergeant McCabe and his motivation.*

*MR JUSTICE O'HIGGINS: The integrity?*

*MR SMYTH: His motivation and his credibility in mounting these allegations of corruption and malpractice.*

*MR JUSTICE O'HIGGINS: There is a difference. In relation to the question of credibility, as I have already indicated, that is an everyday matter. One can suggest to a witness that his evidence shouldn't be believed because of something but an attack on somebody's credibility, on his motivation or integrity is something that really doesn't form part of this Inquiry. It would be necessary I think for you to go further and say that the complaints and the actions of Sergeant McCabe on your instructions were motivated by, his motivation was dishonest or wrong. In other words that he made these allegations not in good faith but because he was motivated by malice or some such motive and that impinges on his integrity. If those are your instructions from the Commissioner, so be it.*

*MR SMYTH: So be it. That is the position, Judge.*

*MR JUSTICE O'HIGGINS: Those are your –*

*MR SMYTH: Yes, as the evidence will demonstrate, Judge.*

*MR JUSTICE O'HIGGINS: Okay, those are your –*

*MR SMYTH: If we are allowed to proceed.*

*MR JUSTICE O'HIGGINS: Those are your instructions from the Commissioner.*

*MR SMYTH: Those are my instructions, Judge.*

*MR JUSTICE O'HIGGINS: Very good.*

*MR SMYTH: I mean this isn't something that I am pulling out of the sky, Judge, and I mean I can only act on instructions*

*MR JUSTICE O'HIGGINS: If those are your instructions, so be it, we will have to deal with them then.*

*MR McDOWELL: If that is the case, I must have advance knowledge of the so-called evidence. I cannot be in a position –*

*MR JUSTICE O'HIGGINS: I am just going on to that, Mr. McDowell. You are entitled to have knowledge of those matters and a reasonable time can be given to you to take instructions on those matters. However, that right that you have, and it will be respected and you will not be ambushed and you will not be taken by surprise, in the particular if I can use the horrible phrase factual matrix of this Inquiry, the obtaining of such instructions might not take as long in particular circumstances than it might if the factual matrix were different.*

*MR McDOWELL: I fully accept, Judge, that –*

*MR JUSTICE O'HIGGINS: So you will be given time to deal with these matters. What I am suggesting is that you may not require as much time as somebody who may not have been familiar with the factual matrix of this Inquiry. So where do we go from there?*

*MR McDOWELL: Could I respectfully submit the following; Judge, as I understood it we were inquiring into Garda Ferghal McCabe's (sic) investigation in relation to a public order incident and it was, as I understood it, a fairly discrete issue in which my client's factual input would be relatively limited because I think that it is common case, I haven't heard a disputed fact yet in relation to what has happened here and I haven't contradicted people on the facts save in relation to the role and function of the sergeant in charge vis-à-vis supervisory sergeants or unit sergeants or whatever.*

*So I would respectfully submit that the Commission proceeds to deal with the facts of the public order incident, the investigation and the like and that this witness be stood down until such time as I am given advanced knowledge of the questions...the issues on which Mr. Smyth proposes on the instructions of the Commissioner to cross-examine because it seems to me that, and I think the Commission will probably agree with this readily, that the point being made now or the line of territory now being traversed would apply to any module in this whole Commission.*

*MR JUSTICE O'HIGGINS: Yes. It seems unless I am mistaken, Mr. Smyth, that your case is that in relation to the matters under investigation subject only perhaps to matters to deal with general staffing levels, the condition of the Garda station in Bailieborough that most of the matters deal with factual issues and you are saying that Garda McCabe's complaints on your instruction are motivated, that they are not properly motivated, that they are not genuine, that they are done for improper motives.*

*MR SMYTH: Whatever the reasons are for it on his side and it runs right through all of the --*

*MR JUSTICE O'HIGGINS: But you are attacking his motivation and you attacking his integrity.*

*MR SMYTH: Right the way through.*

*MR JUSTICE O'HIGGINS: Full stop.*

*MR SMYTH: Yes, full stop.*

*MR JUSTICE O'HIGGINS: So be it.*

*MR SMYTH: Yes.*

*MR JUSTICE O'HIGGINS: Now, in the context of this particular limited module and I have at the very outset said that I considered it to be a limited module, do you think it is necessary to pursue this particular line of questioning or could this particular line of questioning be kept for another module in which*

*case there would be more time for it to be dealt with? In other words, it does appear on the face of it that Sergeant McCabe's involvement in this particular module is very limited indeed though -- it is limited indeed and you have been made the point that, well, he should bear responsibility for supervision. Those are obviously genuine point that I will to adjudicate on in due course. But I am asking you do you believe it necessary to pursue the allegations that these were --the challenges to his integrity in this particular module or not?*

*MR SMYTH: Are relevant, Judge, are relevant because for the simple reason, Judge, there is evidence already adduced that Sergeant McArdle and Sergeant McCabe went to Lorraine Browne and encouraged her, although there is a debate as to whether it encouragement or suggestion or otherwise, to go to GSOC, and I say that that is the matter which is – the bullet has to be bitten on this, Judge, and I think this is the witness –*

*MR JUSTICE O'HIGGINS: Well, the bullet is that Mr. McDowell made an objection.*

*MR SMYTH: Yes.*

*MR JUSTICE O'HIGGINS: And he said if you are so instructed that the integrity and the motivation of Sergeant McCabe is, on the instructions of the Commissioner, to be attacked or to be questioned, you are entitled to do it and the question then arises in relation to the question of notice.*

*MR McDOWELL: There is a slight addition to this point. I have just heard Mr. Smyth say that Sergeant McCabe and Sergeant McArdle went to Lorraine Browne and encouraged her to go to the Ombudsman. That's the evidence that he says has been adduced. I don't remember and I haven't seen that evidence on the transcript yet that that happened but regardless, maybe he wants to put that to my client.*

*MR JUSTICE O'HIGGINS: In relation to that, there has been evidence in relation to the circumstances in which Ms. Browne went to the –*

*MR McDOWELL: I have seen the evidence.*

*MR JUSTICE O'HIGGINS: And there has been a difference in emphasis as to precisely what the circumstances were. On one hand it had been contended that there was some encouragement, on the other hand it being suggested that it was something a little more neutral, less strong.*

*MR McDOWELL: Indeed. I heard her evidence, I heard her being cross-examined on that this morning. But the issue is this, I don't know on what point of fact Mr. Smyth believes that he is going to differ in any way with Sergeant McCabe if he is called to assist the Commission. I have no idea what in relation to these events that we are dealing with –*

*MR JUSTICE O'HIGGINS: And it is precisely because –*

*MR McDOWELL: And the reason I want to mention that is that if there were a conflict of fact between him and others as to what Garda McCarthy did or did not do or whether it was or was not adequate in the circumstances or proper in the circumstances of that, if there was an issue of fact then an issue of credibility would arise. But if there is no conflict on the facts it is not proper to raise the issue of credibility. ...*

*MR JUSTICE O'HIGGINS: If there is no difference in the fact, the issue of credibility doesn't arise*

...

*MR McDOWELL: It seems to me that there has to be some issue of fact before credibility of cross-examination can come an issue. I don't see it. I don't see Mr. Smyth –*

*MR JUSTICE O'HIGGINS: That is a fair observation and we will see what Mr. Smyth has to say.*

*MR SMYTH: That is all well and good, Judge, but I have no control over the manner in which the witnesses were called and this witness happens to be called well in advance of Sergeant McCabe.*

*MR JUSTICE O'HIGGINS: What I'm asking perhaps is if you would clarify what issues of fact –*

*MR SMYTH: Certainly thus far the issues of fact that does raise its head even at this stage –*

*MR JUSTICE O'HIGGINS: Is the issue of responsibility or supervision.*

*MR SMYTH: Yes, well not necessarily the supervision, Judge, but the whole issue surrounding the reason why for nearly one year, or in fact it was over one year, it was May 2008, for the first time that Sergeant McCabe has any hand, act or part in relation to what happened in relation to the incident in the King Court. He marches off or rings up or makes contact in some shape or form, I don't know how precisely he does as he hasn't given evidence but we know from Regina McArdle that both himself and Regina McArdle make contact with a member of the public and encourages them to go to GSOC.*

*MR JUSTICE O'HIGGINS: There is a difference of emphasis at least on that.*

*MR SMYTH: There may well be I have to raise this. I could be criticised Judge.*

*MR JUSTICE O'HIGGINS: I am asking you if you believe there are, on your instructions, issues of fact between you and Sergeant McCabe.*

*Q. On this module, Judge, I believe there is.*

*MR McDOWELL: Can we hear some?*

*MR SMYTH: As I said to you, Judge, the fact of the matter is that we have heard nothing from Sergeant McCabe about any of these incidents of May 2008 and he decides then -- if you had heard, Judge, if you heard the evidence and an objection was raised at a very early stage to the evidence of this witness, but if you heard what he had to say it would become clear that there is a confluence between what was said and demanded of him and the next step in what Sergeant McCabe does. That is the –*

*MR JUSTICE O'HIGGINS: I have a certain understanding of what the position is.*

*MR GILLANE: If it is of assistance to the Commission and the parties I should have indicated because I am in control of the witnesses obviously. Just in relation to the Sergeant McCabe, it wasn't the intention of me as counsel for the Commission to ask him any questions at all about any engagement in this module with the Chief Superintendent, although that might rise in the future, questions were going to be strictly limited to his contact with in fact Sergeant McArdle and then Lorraine Browne and the fact that a complaint was made so it was to the limited to that, if that's of any assistance.*

*MR JUSTICE O'HIGGINS: Well it should be.*

*MR SMYTH: Sorry, Judge, I am just getting instructions.*

*MR JUSTICE O'HIGGINS: Would you like me to rise?*

*MR SMYTH: If I had five minutes, Judge.*

*MR JUSTICE O'HIGGINS: Before you rise you might consider, maybe we are not in position to listen at the time, just the last remarks made by Mr. Gillane who said that he had anticipated that in relation to this module that the evidence that he was going to – that sergeant, to call Sergeant McCabe was essentially confined to the circumstances in which Lorraine Browne went to GSOC and matters of that nature.*

*If that were the case it might be that the issues of integrity, motivation and so forth that you say you are instructed or to be levied against you might not arise in this particular module. In other words, Mr. Gillane is indicating that as far as Sergeant McCabe is concerned in relation to this module he will essentially be confining himself to the circumstances of meeting Lorraine Browne and encouraging her, or otherwise, to go to GSOC. So that might be of some help.*

*Okay look, I realise this matter has arisen I don't want -- would ten minutes be enough for you? Very good.*

There was then a further adjournment. In the meanwhile, the texts and phone calls had continued. The commission had resumed at 15:36 hours; Chief Superintendent Healy continued to make phone calls. Commissioner O'Sullivan texted him at 15:37 hours, he replied at 15:38 hours, she texted again at 15:39 hours, then she telephoned him at 15:41 hours and had a six-minute conversation by mobile. This was followed by a four-minute conversation at 15:52 hours on her landline, followed by another conversation with him at 16:02 hours for two and a half minutes,

which seems to have prompted the comment from Colm Smyth SC about “just getting instructions”.

It would seem that at 15:29 hours, counsel had drafted brief advices as to their approach which was to be sent to the Garda Commissioner. Due to difficulties with Internet access in the building where the commission was holding hearings, it was not until 16:33 hours that Annmarie Ryan was in a position to email these to Chief Superintendent Healy, who had had the letter since 15:29 hours, and to Michael Dreelan from the Office of the Attorney General as of 16:33 hours. The commission recommenced its hearings at 16:34 hours, whereupon Colm Smyth SC indicated that his instructions were “reconfirmed”. Here is the transcript:

*MR SMYTH: My instructions are reconfirmed.*

*MR JUSTICE O'HIGGINS: Very good. Your instructions, as I understand them, are that Sergeant McCabe acted as he did for improper motives.*

*MR SMYTH: Yeah.*

*MR JUSTICE O'HIGGINS: Okay. And that his integrity is being challenge in that respect.*

*MR SMYTH: In that respect*

*MR JUSTICE O'HIGGINS: Okay, fine, so be it. What arises then are two things, initially anyway. First is the question of notice to Mr. McDowell's client and, secondly, the question of the limits of cross-examination in respect of this issue. As has been emphasised, Module 1 is very limited in scope. The differences between apparently what Sergeant McCabe is likely to say concerns the circumstances in which Ms. Browne went to GSOC and the matters you have already agitated in relation to the question of responsibility or supervision and all of this.*

*Now, I am under instructions that the motivation for the conversations with Lorraine Browne, whether there would be suggestions, encouragement or whatever, that's a matter for me, it seems to me that those matters could be dealt with in cross-examination by putting that the motive for the actions was X, as a result of an X conversation, Sergeant McCabe got somebody, described him as being very angry, upset and agitated and that was the motivation without going into unnecessary details in relation to the background of that, because the background or other substance of those allegations does not appear to me, unless otherwise persuaded, to be germane to this or, indeed, any other module of this Inquiry.*

*In other words, that it would seem to be permissible to say that Sergeant McCabe acted out of improper motives or whatever, if those are your instructions, and they are, but the detail in relation to those does not seem to me to be a very relevant matter of cross-examination, but we will have to wait and see that and I can rule on if and when it comes.*

*Now, in relation then to the question of notice. I would like you to do one thing and that is, I think you should persuade me of the relevance of those issues to this particular module. I think I would also like to be addressed by Mr. McDowell on the question of notice and maybe you could respond to that. I would like to be hear you on those things and we may then consider the matters over the weekend.*

*MR SMYTH: The first thing, Judge, in relation to notice, I don't have any power to take statements in this Commission of Inquiry to take statements off any witness, that would be at matter for the Commission, to take statements and to give notice of what was said by certain witness to Mr. McDowell, because that's not a function that I have, I am not entitled to do that under the terms of the Commission.*

*So the second thing is, Judge, in relation to the –*

*MR JUSTICE O'HIGGINS: Mr. McDowell is entitled to know what adverse allegations are being made against him.*

*MR SMYTH: Yes, but you are asking me, Judge, can I take statements from witnesses, I don't have that -- I have no control over that.*

*MR JUSTICE O'HIGGINS: No, I didn't ask you to do that.*

*MR SMYTH: But I can certainly give in a general way notice to Mr. McDowell, as it was, in writing as to what certain witnesses will say. That's as far as I can take it.*

*MR McDOWELL: How can he say that, with respect, unless he has been conferring with a witness. That does call into question what is happening here. If he has been consulting with witnesses in relation -- and I believe that Mr. Smyth may not have been doing it, but others I do believe have, consulting with witnesses as to what they will say if they are asked certain questions. Then, in my respectful submission, I am entitled to have notice of what questions they are intending to put to those witnesses relevant to these issues*

*MR JUSTICE O'HIGGINS: I think [you] are entitled to be furnished with the substance of material that is likely to be adverse to you in order that you could respond.*

*MR McDOWELL: I want to make one thing clear, Judge, I have emphasised to my client, as has Mr. Costello and Mr. Gordon, that he is not here to sustain any case whatsoever. That is the first thing.*

*MR JUSTICE O'HIGGINS: Mr. McDowell, you made that point already and I can tell you that it is taken on board and I accept it.*

*MR McDOWELL: I want to saying following: That as far as I know he proposes to make no criticism of any other person in this room, save to say what he actually did, right, if he is called to give evidence. That's what he proposes to do. Now the Commission may invite him to make criticism of others but it wasn't his intention to proffer them or to volunteer criticism in general terms of other people's behaviour. That's the first thing*

*The second thing is, in relation to this matter what he proposed to do, I mean it's obviously for Mr. Gillane to lead his evidence, such as it is.*

*What he had in mind to do, so that everyone will be clear about this, was to say what his interaction with probation Garda Ferghal McCarthy was in relation to this issue, and it will be very small, very, very short. When we first heard that there was a problem from Sergeant McArdle, I think two conversations or three that he had in relation to these matters, one with Ms. Lorraine Browne, and that is the extent*

*of his proposed evidence. That's the beginning, middle and end of the evidence he proposes to give.*

*Some people here may think here that he is going to lay into everybody and try and attack their integrity or their reputation or whatever, that is not his function in this Inquiry. So if people think they have to get their retaliation in first, to use the football thing, that's completely misguided. Unless the Commission leads him into territory and asks his opinions on matters, which may or may not be relevant, because in large measure it's the opinion of the Commission and the facts that I think is much more relevant than Sergeant McCabe's view of the facts, because he wasn't appointed to the Commission.*

*It seems to me that there is a misconception here that somehow he is the man who is going lay about and criticised, accuse and the like, and he is not, he has done that. He is coming here to answer questions that Mr. Gillane puts to him.*

*MR JUSTICE O'HIGGINS: Two things. I am grateful for that observations, Mr. McDowell, and I just want to add that any impression such as you refer to certainly didn't emanate from the Commission.*

*MR McDOWELL: No, no. I am saying that if people are getting defensive -- the Commission, as I understand it, is here to investigate the facts and to draw conclusions, it is not interested in Sergeant McCabe's view of the facts, which are about as relevant as anybody else's view of facts here. This is an inquisitorial process where the facts are established by the Commission and the inferences from those facts are made by the Commission and drawn by the Commission and it's not a question of there being some quasi accusatorial process here where my client is coming in here with an agenda, he's not.*

*MR JUSTICE O'HIGGINS: I think I have stressed the inquisitorial nature many times.*

*MR McDOWELL: I am not suggesting that you haven't*

*MR JUSTICE O'HIGGINS: No, no, I know that. I intend to do so again and again because I think it is very, very important that is not us against them, this is an Inquiry. I did demand at the outset the assistance of everybody and that wasn't and empty formula of words.*

*MR McDOWELL: It might assist you, Judge, and it just occurs to me, it might assist you if my client was to put on one page what factually he did.*

*MR JUSTICE O'HIGGINS: Yes.*

*MR McDOWELL: So that everybody will know what is coming as far as he is concerned and leave his opinions of these matters out of the matter. It just might, because if we are going have credibility brought into issue, credibility can only be relevant to determine questions of fact.*

*MR JUSTICE O'HIGGINS: Yes.*

*MR McDOWELL: Whether my client was correct originally to take the steps he did to bring these matters into the public domain is not the substance of this Commission. This Commission is looking at these matters afresh.*

*MR JUSTICE O'HIGGINS: Well, credibility does only arise in cases of a question of a conflict in relation to the facts. I gently hinted that perhaps the issue in relation to the motivation of Sergeant McCabe which could go to his credibility might more suitably be canvassed in another module of this, where there may be a more severe conflict in relation to the facts. That was a suggestion that I made in ease of everybody but it was only a suggestion.*

*I would, however, ask, I think are you entitled to notice of the substance of any allegations against you that are adverse to your good reputation, that you are entitled to be furnished with those so that you can deal with them.*

*MR McDOWELL: Subject to the underlying purpose of them being relevant to the tribunal's activities and the to the module itself.*

*MR JUSTICE O'HIGGINS: In this regard I think, Mr. Smyth, I would invite some submission by you, perhaps over weekend, we may need time to consider the matter, as to precisely the relevance of the allegations or the motivations in relation specifically to this module, where, if Mr. McDowell is correct, there doesn't seem to be a difference of fact very much. If there is no difference of fact, the question of credibility, which of course you are allowed to canvas, doesn't really arise.*

*MR SMYTH: Can I say, Judge, first of all it's [a] Commission of Inquiry, I have no control over the calling of witnesses, I cannot call witnesses, I have to seek permission to cross-examine witnesses, those are the rules.*

*This witness, when he has given his evidence and when he has been cross-examined he can up and away and I have no power to call him back. This is the first opportunity we'll have and I could be criticised for not raising it at this stage with this witness as to what conversation he had with Sergeant McCabe, what was the result of that conversation, what was the outcome and what flowed from that thereafter. That's the first opportunity I have to do this, if this witness is cross-examined and away, I have no power to bring him back. I have merely only a side role in this, I am subject entirely to the Commission.*

*It has to raised that point and I could be criticised if I had waited until module, I think it's Module (i) to raise this issue. Mr. McDowell would be up on his feet and saying, look, he never raised it, this is the first we've heard of it.*

*MR. JUSTICE O'HIGGINS: If you say that there are issues where credibility arises that is in relation to where facts are in conflict. Perhaps you would -- and I am not, I am not trying to take you by surprise, perhaps you'd state where those areas of perceived or anticipated conflict are in order that it could be adjudicated as to whether the question of credibility arises in this particular module.*

*MR SMYTH: I think the issue of credibility arises in all modules. Sergeant McCabe has raised serious allegations of malpractice and corruption against An Garda Síochána –*

*MR JUSTICE O'HIGGINS: In this module.*

*MR SMYTH: In this module, Judge, because he made an allegation about the investigation about the number of -- the investigation of this particular offence that occurred in Kings Court, the management of Bailieborough.*

*MR JUSTICE O'HIGGINS: In this module we are enquiring into the investigation of a certain --*

*MR SMYTH: Incident in Kings Court.*

*MR JUSTICE O'HIGGINS: The investigation would be a matter for the Commission to determine the quality of that particular investigation on the evidence that it has heard.*

*MR SMYTH: And within this module there is evidence thus far, limited and all that it is, that he has taken an avert act such as contacting a member of the public who was involved in the incident over a year later and has encouraged or certainly suggested to that witness that they should make a complaint to GSOC, it is motivation for that, Judge, it is the --*

*MR JUSTICE O'HIGGINS: Credibility is --*

*MR SMYTH: Credibility.*

*MR JUSTICE O'HIGGINS: Credibility only arises where there is a conflict in relation to facts. Is there any conflict which so far or anticipated about the fact that, just one second, that Sergeant McCabe talked with Lorraine Browne, so did Sergeant McArdle, they suggested, encouraged or informed, we have had the evidence it is for me to decide, that she go to GSOC, that seems to be common case.*

*MR SMYTH: Judge, can I say this and I don't mean to be tedious or to be difficult about this. I have no controlling of the calling of witness, this witness is up and away once he has finish the cross-examination and I cannot recall him. If Sergeant McCabe had been called, you would be very much aware of what the serious issues are in relation to fact as between my side of the house and Sergeant McCabe.*

*MR JUSTICE O'HIGGINS: And again, it is not any side of the house, this is an enquiry and we are all on the same side helping me.*

*MR SMYTH: I don't meant to be disrespectful, it just a phrase I used.*

*MR JUSTICE O'HIGGINS: Don't worry about that.*

*MR SMYTH: If you look at the terms, if you look Judge at the --*

*MR JUSTICE O'HIGGINS: Mr. Smyth, please, just in relation to this one thing. I don't anticipate from what I have been told, there doesn't seem to be any conflict that Sergeant McCabe and Sergeant McArdle went to Lorraine Browne and that asked, encouraged or suggested that she go to GSOC. You say that, the other side are going to the say that.*

*MR SMYTH: It's not just that, Judge, Sergeant McCabe is critical of the failure to complete an investigation file. He is critical thus far on the evidence.*

*MR JUSTICE O'HIGGINS: There is not any conflict that there was at failure to complete an investigation file and Garda McCarthy himself in the documents that I have has said that he failed to complete and he was sorry about it.*

*MR SMYTH: And in so far as this module is concerned, Judge, he will also be saying as I understand if the [Guerin] report is to be followed that the PULSE record was falsified and he described Garda McCarthy's actions as disgraceful. If he is giving evidence he is going to be challenged in the relation to those issues and there will be disputes in relation the facts and it is then of course that the issue of credibility will arise.*

*And as I say, Judge, it's a premature application in a sense what am I to do if this witness leaves the box he is up and gone I can never get him back. If Sergeant McCabe had been called first in line this would become apparent as to where the issues and where the dispute arises between me and Sergeant McCabe on facts –*

*MR JUSTICE O'HIGGINS: Well certainly, it is certainly likely that there will be an issue over whether the PULSE records were falsified or not or whether that was the correct term, I don't know.*

There may be a legitimate question as to the characterisation of the actions of Garda McCarthy being disgraceful. There does not seem to be an issue in relation to the facts that Garda McCarthy failed to complete his report and that was, to put a neutral word on it, unfortunate. He accepted criticisms in that regard before Superintendent Heller so the factual issues in dispute are very limited.

*MR SMYTH: Judge, you are anticipating, but the fact of the matter is that he is also critical, as I understand it, of Superintendent Cunningham and his handling of matters. You are asking me, Judge, to spell out the facts as they are. If the evidence of Sergeant McCabe is given, I will be challenging Sergeant McCabe in strong terms and there will very quickly appear to be dispute between -- I hope there will be, you will see that there is a serious dispute on the facts from which the issue then of credibility arises to determine which version of events is likely to be the correct one. That is the position, Judge, if this was the normal trial –*

*MR JUSTICE O'HIGGINS: Just one second, it is not a trial, it is not a normal trial and it is not a trial at all.*

*MR SMYTH: If it was in the normal way, if this was a hear in the normal way, the matter would be dealt with in much different way by me. I wouldn't be making this application, I am forced, my hand is forced, because this witness is up and way this is a crucial witness to give evidence as to what was said between himself and Sergeant McCabe.*

*MR JUSTICE O'HIGGINS: Just one second, we are talking about a conflict in relation to the facts.*

*MR SMYTH: To the facts.*

*MR JUSTICE O'HIGGINS: If it emerges the fact that Sergeant McCabe characterised your or Garda McCarthy's actions as disgraceful, clearly you can –*

*MR SMYTH: And that he falsified the PULSE, Judge.*

*MR JUSTICE O'HIGGINS: I think you can take it that I am aware of the general nature of the -- but we are just trying to sort out a specific problem. I am not trying to preclude you from making your case, you have nailed your colours to the mast and said that Sergeant McCabe acted as he did out of not legitimate motives if you*

*like. You are entitled to pursue that. What I am trying to tease out is whether that you are entitled to put those matters in relation to his credibility. What I am trying to tease out is to the relevance of the questions of credibility in relation to this module alone. Now certainly you are entitled to probe his, for example, the question of whether such a conduct was disgraceful but that doesn't necessarily and may not involve issues of credibility at all.*

*The question of if an allegation in relation to the falsification of PULSE there may be no factual difference between the parties as to what happened. So it may be a question of how they were characterised.*

*MR SMYTH: And it certainly will arise, Judge, in relation to his criticism of the Superintendent in his handling of the matter as to why he should make the criticism of that superintendent.*

*MR JUSTICE O'HIGGINS: But those criticisms may or may be justified but they don't seem as of now to be questions of fact.*

*MR SMYTH: Judge, we don't know that until such time as we have heard the evidence with respect.*

*MR JUSTICE O'HIGGINS: That is precisely the point I am making. I am making the point that in relation to the question of cross-examination in relation to credibility it only arises if and when there is a conflict in relation to the facts.*

*MR SMYTH: One other problem I have Judge is this witness is then -- are you saying I am not entitled to pursue the line and ask him questions about what conversation he had with Sergeant McCabe or he is to be recalled at a later stage or how is the Commission to proceed in relation to this witness?*

*MR JUSTICE O'HIGGINS: Well, there are two or three possibilities. One is that you might be permitted to cross-examine in the terms that were suggested, that you suggest that Sergeant McCabe acted as he did as a result of his disappointment with the decision made by the Chief Superintendent Rooney, full stop. Without the necessity of canvassing matters that are alien to this or any other module of the enquiry.*

*MR SMYTH: I am not going to necessarily go into the graphic detail of what the investigation was but I am entitled to. This witness is going to suggest, as I understand it, that it was demanded of him to put pressure on another superintendent to write to the DPP and to have the DPP write a letter in certain terms in respect of Sergeant McCabe. So that has to be put if I am allowed to do it. He was about to, everybody jumps up and raises an objection, that is the tenor of what he was saying --*

*MR JUSTICE O'HIGGINS: Well, it might have been too late to raise the objection if the evidence was already given as you will appreciate, there are certain delicate matters that it is, if necessary, they will have to be canvassed but at the moment it doesn't appear that they need be canvassed in any detail but rather than suggesting that the motive for doing X, Y and Z is because he was dissatisfied with some decision by Chief Superintendent Rooney to do this or not to do that. And I don't think that would inhibit -- I don't at this stage see any necessity that the matter be probed in detail other than that.*

*MR SMYTH: Judge, if are you asking am I going to probe for the sake of being gratuitously offensive to Sergeant McCabe about some investigation that was conducted that he was a subject of, that doesn't really concern me. I am more concerned with his demand that he made of this witness to contact another superintendent, a superintendent to have that superintendent do something*

*MR McDOWELL: Now he is putting the material before the -- my client has the good name to protect in this matter. That is the first thing. Secondly, Judge, Mr. Smyth, as I understand it, has been directed by the Commission to put in writing what line it is that he wants to deal with, the material he wants to deal with, and to give me notice of it. He is now trying to circumvent it before the Commission. It is very simple, if he has some material he wants to put to this witness concerning and let us be clear what he said -- he said that he is impugning my client's integrity, motivation and credibility.*

*MR JUSTICE O'HIGGINS: Yes.*

*MR McDOWELL: If that is what he is doing, if he wants to do in my respectful submission, I am entitled to advance knowledge of the line of cross-examination that he is going to take in relation to this matter in relation to this witness. There is no point in debating this any longer in my respectful submission let him do it, let him write this letter. We will be writing to the Commissioner in all probability tomorrow as well. But before we get to that point we want to know what it is that Mr. Smyth wants to illicit from this witness about my client's behaviour.*

*MR SMYTH: Not only this witness, Judge, but the other witnesses.*

*MR McDOWELL: And any other witnesses.*

*MR JUSTICE O'HIGGINS: I think that is not unreasonable and you have you no problem with that.*

*MR SMYTH: No difficulty.*

*MR JUSTICE O'HIGGINS: Well, we have reached that anyway. I think that in the circumstances it might be good idea to adjourn now and if you could furnish -- they don't have to be exhaustive but they do have to contain the substance of the matter so that it can be dealt with. I think we will leave it there. Unfortunately Chief Superintendent Rooney, you will have to come back. Thanks very much indeed.*

There were further phone calls later that night. At 19:28 hours Commissioner O'Sullivan telephoned Chief Superintendent Healy and they spoke for five minutes. At 21:05 hours, Commissioner O'Sullivan telephoned Ken O'Leary, deputy secretary in the Department of Justice and Equality and they spoke for seven and a half minutes.

### **Finding as to the Garda Commissioner's approach**

What had Commissioner O'Sullivan instructed counsel as to her approach?

First of all, it is necessary to look at the progression in the transcript extracts whereby the truism of one word borrowing another assumes validity. Colm Smyth SC had mentioned that questions might be asked in terms of Maurice McCabe's "motivation for certain facts or for certain matters or, indeed, credibility in relation to the certain matters." Michael McDowell SC, who was representing Maurice McCabe, then asserted that this was bringing into question "his character".

Colm Smyth SC had never said anything about character. Michael McDowell SC then claimed that this was “launching an attack on my client.” Emotion was high but Colm Smyth SC had never suggested that. Mr Justice O’Higgins calmed matters by ruling that the question of the credibility of a witness would be probed “in the normal fashion in relation to clearly the accuracy of somebody’s memory”. He stated that if Commissioner O’Sullivan wished to impugn “the motivation and the integrity of Sergeant McCabe” that Colm Smyth SC should “say so in so many words”. The reference to integrity clearly followed from the reference to character and to attack; but this escalation came from counsel for Maurice McCabe.

Mr Justice O’Higgins sought instructions from counsel for the Garda Commissioner as to whether, in making the complaints about bad policing and corruption “his motivation was dishonest or wrong ... that he made these allegations not in good faith but because he was motivated by malice or some such motive and that impinges on his integrity.” Colm Smyth SC then incorrectly confirmed these to be his instructions; that he was “attacking his motivation and ... his integrity ... right the way through ... full stop.” He had made a mistake in the rushed circumstances and in the absence of a consultation with the Garda Commissioner. A further escalation of the heightened mood occurred when Michael McDowell SC suggested that the Garda Commissioner, who was not within the terms of reference, save in relation to her former and very peripheral role as head of human resources, should give evidence and be cross-examined by him. He commented that she would “not enjoy the experience”.<sup>323</sup> That was very much more than unfortunate. Barristers should never threaten a witness. This was yet a further escalation of emotion. It was completely unnecessary.

So, this was a full-scale row; but one which might have become much worse had Mr Justice O’Higgins not acted with the calm and skill displayed in the transcript. It is easy for a judge to become sidetracked by this kind of thing. Clearly, under him, that was not going to happen.

The tribunal is not intent on examining how a row happened. Its focus is on considering the instructions to counsel of Commissioner O’Sullivan. On this, the tribunal accepts the following uncontradicted evidence from Colm Smyth SC:

*This is what I want to deal with. Because firstly, my former client, the Commissioner, Commissioner O’Sullivan, who I consider to be a very good and decent person, I have to put that on the record. She is a lady who gave me straightforward instructions, she has never wavered. I do not want and never wanted this man’s character to be attacked and nor would I, because I didn’t see any reason for it. But as a lawyer looking at this, and Commissioner O’Sullivan is not a lawyer, if I challenge, which is the better word, somebody’s credibility on the facts and if there is no evidence to support it - What was your motivation for making these allegations in the first place? - it necessarily seems to me, as a lawyer, that there are issues of integrity surrounding those allegations. Not the character, but issues of integrity surrounding the allegations. And I know I am going to be asked questions of this probably all day long about my, what I said or what I didn’t say to the Commission, but that’s as I understand the position. But Commissioner O’Sullivan never used the word integrity ... and when I said at the Commission on day 29 that that was an error on my part, I meant an error because she never said to me the word integrity. ... And where I fell into the trap in all of this is that I was trying to interpret what the judge’s interpretation was of integrity. And my*

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<sup>323</sup> O’Higgins Commission transcript day 3 page 16

*interpretation of integrity is what I have just given to you. . . . And it's as simple as that...*<sup>324</sup>

The tribunal also accepts the following evidence from Commissioner O'Sullivan:

*I would have given directions to Chief Superintendent Healy, a general instruction that what we were trying to do here was to assist the Commission in getting to the truth of the matter by establishing all of the relevant facts... I was faced with dealing with very, very serious issues that had dogged the organisation for a number of years. These and other issues had led to a public and a political narrative that suggested that An Garda Síochána was corrupt ... and indeed, as was proven, that there were shortcomings in investigations right throughout ... that victims had not been appropriately dealt with, and I wanted to know exactly the nature and extent of what we were dealing with here and make sure that we get to the crux of the matter ... but also, where or what parts of each of those individual investigations led Sergeant McCabe to conclude that there was corruption and malpractice and also testing the evidence that was there to support that understanding or that belief... I was also aware that Sergeant McCabe's legal team had sought a commission as well because the matters were of such a serious nature that they had to be examined by a commission of investigation. So going into the Commission, I was of the view, yes, that we were dealing with Module 1, but -- what I wasn't clear at that time on, what elements of Module 1 fed into the overall charges of ... the overall allegations of corruption and malpractice.*<sup>325</sup>

Commissioner O'Sullivan was not of the view that Maurice McCabe had become embittered, rather, that peoples' "attitudes can change for a number of reasons."<sup>326</sup> It was on this that she sought counsel's advices, unfortunately through proxy, and these were read out to her at 15:41 hours on the telephone during her seven-minute conversation with Chief Superintendent Healy.<sup>327</sup> Officially, as it were, the advices of counsel in writing was forwarded by email from Annmarie Ryan to Chief Superintendent Healy at 16:33 hours on that same Friday, forwarding on an email from counsel already sent to him at 15:29; a circumstance explained by the Internet access problem. This advice by counsel to the Garda Commissioner should be quoted:

As counsel appointed to represent the interests of An Garda Síochána before the O'Higgins Commission, it is our view that it is appropriate and necessary that the conduct of any member of the force be challenged by way of cross-examination if and to the extent necessary.

It is likely that in the course of the process, which is a private hearing, it will be become necessary to put to Sgt. Maurice McCabe certain background issues which touch upon and concern the history of his dealings with members of Garda management. In particular, we consider it necessary and in the interests of a fair and balanced examination of the subject matter of the investigation, that specific issues be put to Sgt. McCabe regarding his conduct and interactions with senior management following the completion of a formal Garda investigation into a complaint against Sgt. McCabe which resulted in a direction by the DPP that no further action was to be taken against Sgt. McCabe.

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<sup>324</sup> Transcript day 48 from page 63

<sup>325</sup> Transcript day 45 from page 106

<sup>326</sup> Transcript day 45 page 131

<sup>327</sup> Transcript day 45 page 129

The purpose of such a line of enquiry is to open to the Commission of Investigation the full factual background surrounding the complaints made by Sgt. McCabe so that all the circumstances are clearly put before the Commission for consideration.<sup>328</sup>

The row was unfortunate. It added to the up-and-down nature of the responses to the complaints of Maurice McCabe and was inconsistent with public declarations made by Commissioner O'Sullivan supporting him. No one, however, had instructed counsel that Commissioner O'Sullivan had publicly made declarations of support for Maurice McCabe. That was, yet again, a problem that could have been solved at a consultation. With the escalation of emotion, with the rush to catch up and with various pieces of paper adding to the legal broth that was brewing, the kind of mistakes that happen in long cases occurred in this one.

The balance of the evidence is to the effect that Commissioner O'Sullivan was urgently requested to engage with counsel over the weekend following the row but that for whatever unexplained reason, she was not prepared to do so. The tribunal cannot accept her evidence in that regard.

In terms of an objective distillation of the instructions of Commissioner O'Sullivan, her evidence was that her task was to consider the interests of all the gardaí before the O'Higgins Commission and that it was her responsibility to have the evidence of Maurice McCabe scrutinised. That was not an improper position. The tribunal accepts that evidence.

What is necessary here is to focus on what the term of reference requires the tribunal to inquire into: "false allegations of sexual abuse". These were never deployed in private against Maurice McCabe before the O'Higgins Commission. Commissioner O'Sullivan never gave such an instruction. She would not have been at all interested in engaging in any such nasty and discreditable conduct. That does not fit with her character. Instead, her approach was to find out whether there was any evidence to back up the allegations of corruption made by Maurice McCabe. That is a normal process in respect of any trial where any person alleges improper conduct against another. Where an allegation of a serious kind is made without evidence, it is also completely proper to ask the person making it as to why it had been made without evidence in the first place.

### **Government involved**

Commissioner O'Sullivan told the tribunal that she made a number of phone calls on 15 May 2015 to the Department of Justice and Equality. The first, at 15:26 hours and lasting fourteen minutes, was to the Secretary General, Noel Waters. This was not noted by him. The impression made on the tribunal by Noel Waters was that he was a person intent on doing business and moving on. The tribunal finds it hard to conclude, however, that a person of his considerable talents could now have absolutely no memory of this long phone call. His evidence was improbable. Commissioner O'Sullivan claimed that she could have been talking to him about a number of issues that were arising that day, including an important visitor from the nearby kingdom, a gangland operation and other matters. That is not accepted. Given the coincidence with what was happening before the commission, it is likely that the subject of Maurice McCabe was discussed as well. It is also likely, given that Commissioner O'Sullivan phoned Ken O'Leary in the Department at 16:16 hours and spoke for three and a half minutes, that the subject of Maurice McCabe was very much on her mind. Later on that evening, at 21:05 hours, she again telephoned Ken O'Leary and spoke for seven and a half minutes.

The Garda Commissioner did not speak directly to the Minister and the tribunal is satisfied that if this had happened, it would have been noted by the Minister's private secretary Christopher Quattrociochi, whose evidence the tribunal accepts. The lack of note taking on the departmental

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<sup>328</sup> Tribunal documents page 689

side is noteworthy, with no notes being taken by anyone. In contrast, when Annmarie Ryan telephoned Michael Dreelan of the Office of the Attorney General at 16:32 hours, on the same subject of the dispute that had arisen before the commission, this was noted in some form down the line until it returned again to the Department.

Fortunately, Ken O'Leary had a close to total recall of his conversations with the Garda Commissioner. He exhibited high levels of common sense and the kind of keen intelligence that cuts through to the core of any issue by being capable of suggesting appropriate solutions that accord with honesty. The Department has been fortunate to have the services of such a talented man over several decades. The tribunal accepts his evidence. During the first telephone call at 16:16 hours, Commissioner O'Sullivan mentioned the dispute that had arisen before the O'Higgins Commission and a very strong objection that had been raised by counsel from Maurice McCabe. From what she was saying he could only get a limited understanding, which was that it was in some way related to matters following on the Ms D case. The Garda Commissioner explained to him that she was worried about what she regarded as a serious row and how it might get before the public and so she asked him what she should be mindful of.

His impression was that the Garda Commissioner was using him as a sounding board. That was in no way improper: he is a highly intelligent person of clear judgement. He told her that the Department of Justice and Equality could not become involved in any way in her approach to the commission as that was a statutory inquiry. He mentioned to her that certain issues were alive, including the need to be sensitive to the position of Maurice McCabe and the need to protect him, the necessity for probing the veracity of whatever was alleged by him against other people, that facts should be established and that she should cooperate with the O'Higgins Commission. Finally, he told her that if anyone was to do anything insensitive, the judge in charge of the commission would most likely take a clear view. His impression was that she was engaged in ongoing discussions with her lawyers. For him, this was just a colleague-to-colleague chat. There was no discussion about motivation or credibility: he had no knowledge of any of that, or the particular words used during the row, at that time.

Ken O'Leary recalled a second phone call from the Garda Commissioner shortly after that. Insofar as there has been an issue about this, the tribunal accepts his evidence. It is more than possible that Commissioner O'Sullivan was using the mobile phone of one of her staff. Shortly after that, Michael Flahive, the Assistant Secretary General in charge of garda matters in the Department of Justice and Equality, telephoned Ken O'Leary in relation to the stream of information that came through the solicitor acting for the gardaí at the commission, Annmarie Ryan, to officials in the Office of the Attorney General. Ken O'Leary suggested that Michael Flahive write an email for the benefit of the Minister. Had that not been done, he was considering writing an email himself. His view may be taken as indicative of the kind of approach of officials who were tasked with advising the Minister. Effectively, the Minister was put at a distance from all of this. A clear view was taken by him and by everyone else that she should not intervene:

*I had virtually no information whatsoever, but the reality was, and I was clear in my mind about this, that the Minister could not establish a commission of investigation and then become involved in the case anyone was making at that Commission of Investigation. ... Even [in] an informal way. ... I mean, there's two points I would make about that. I mean, of course there were political sensitivities about this, but expediency doesn't make what is wrong right because it's politically expedient. And if you look at the practical terms, if you accept that it just wasn't proper for the Minister to try and interfere with the commission she had established herself, like how would that conversation go in practical terms? She'd say to the Commissioner, look, I am worried about this, the Commissioner would say I have*

*legal advice. ...Is that the Minister then meant to say, well, get other legal advice? You couldn't overlook the fact, too, that everyone at the Commission of Investigation had the same rights. The Minister couldn't be in the business of deciding the balance of that. And it all boiled down -- like, we wouldn't have had any knowledge, nor would the Minister, of whether there was evidence, of what the evidence was, whether there was evidence that would act, for example, to exonerate people. I mean, just if you look at it as a matter of political expediency, we can't, as a department, as I say, advise that suddenly becomes something -- that's wrong, suddenly becomes right. But any of this would involve, if it was to be meaningful, the Minister making judgements in relation to, say, for example, the quality of evidence that was to be presented at the O'Higgins Commission, involve herself in -- this was the Commissioner's statutory responsibility, not the Minister's, not the Department's.*<sup>329</sup>

Clearly, there may have been circumstances where Ken O'Leary might have contacted the Minister. As far as he was concerned, on what he had been told and on what the Attorney General had been told, circumstances had not arisen where the Minister could do anything meaningful. Clearly, also, the matter was on Commissioner O'Sullivan's mind, given the record of another telephone call to Ken O'Leary later that evening. It was not sufficient for her to tell the tribunal that these telephone calls could have been about other matters. No doubt, other matters may have been mentioned but it is clear from the evidence that she was keenly worried about what had happened at the commission and, rightly, regarded Ken O'Leary as a rock of sense.

Meanwhile, Annmarie Ryan had established another line of communication. In so doing, she was acting with the intelligence and efficiency which was apparent from her evidence to the tribunal. When she had a chance, it seems at 16:32 hours on that Friday, she telephoned Michael Dreelan of the Office of the Attorney General. In any of this, a fair-minded observer might ask themselves the following question: how much of the essence of the documents which have been quoted in this report and the throughput of adjectives and issues that the transcript from the O'Higgins Commission evidences, could be conveyed over the telephone? Extremely little, is the only answer. Annmarie Ryan's job was, and as in everything she did it impeccably, to keep the Office of the Attorney General informed of any issue which might become contentious or of public moment. Such subtle issues as have taken considerable time before this tribunal to be sorted out would most likely become far less nuanced along the way.

And so it proved. Annmarie Ryan spoke to Michael Dreelan, in turn he spoke to Richard Barrett, and in turn the matter came back to the Department of Justice and Equality from him to Michael Flahive.

### **Decision of the Minister**

Within the public service, to use the phrase "for information", and cognate expressions, notifies the recipient of any email or memorandum that no action is either needed or expected. So it was that Christopher Quattrociocchi, as private secretary to the Minister, received the following email from Michael Flahive at 16:57 hours on Friday, 15 May 2015:

Could you pass this on to the Minister for information please.

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<sup>329</sup> Transcript day 50 page 46-48

I took a call this afternoon from Richard Barrett in relation to the O'Higgins Commission of Investigation (which is investigating the matters identified by the Guerin report).

The O'Higgins Commission has started hearings, and the Garda Síochána are represented by counsel, as is Sergeant McCabe (in his case, Michael MacDowell SC).

Richard wanted to let me know that counsel for the Garda Síochána has raised an issue in the hearings an allegation made against Sergeant McCabe which was one of the cases examined by the [Independent Review Mechanism]. The allegation had been that a serious criminal complaint against Sergeant McCabe (which he has always denied) had not been properly investigated by the Garda Síochána. The IRM found that an investigation file on the case had in fact been submitted to the DPP, who had directed no prosecution, and the IRM, which because of the seriousness of the allegation had been considering whether to recommend its inclusion in the O'Higgins terms of reference, in the end recommended no further action by the Minister.

Presumably the Garda Síochána are raising the matter on the basis, they could argue (and Sergeant McCabe would deny), that it is potentially relevant to motivation. Richard advised me that counsel for Sergeant McCabe objected to this issue being raised, and asked whether the Garda Commissioner had authorised this approach. Richard also told me that the Garda Commissioner's authorisation had been confirmed (although I understand separately that this may be subject to any further legal advice).

Richard and I agreed that this is a matter for the Garda Commissioner, who is being legally advised, and that neither the Attorney nor the Minister has a function relating to the evidence a party to a Commission of Investigation may adduce.<sup>330</sup>

It is probable that the Minister read this email at some stage on the Friday, using her mobile device. It was some days later, on 25 May 2015, that the matter came back noted as having been read by her.<sup>331</sup> Her decision was not to interfere. She told the tribunal:

*I mean, the way I would have responded to the email was that, first of all, it was about something that was happening at the O'Higgins Commission. Now, I would have regarded the O'Higgins Commission as really quasi-judicial under the Commission of Investigation Act, it was private, it was independent and I did not see any role for myself in relation to the O'Higgins Commission. I think obviously if I had interfered in any way with the O'Higgins Commission, I would be answering different questions now. It would have been completely inappropriate for me, as Minister, to interfere, to have any political interference. The day of political interference in something like that was well gone, as far as I was concerned. And I was being told about something that had happened at the O'Higgins Commission and I was being informed ... in relation to it, but I had appointed -- the Government had appointed a very eminent judge to deal with the ... O'Higgins Commission. ... And I would be very satisfied that whatever arose would be dealt with by the Judge. So I saw it as information, yes, coming from the people you have described, and, of course, the important point as well, that there was no role for me as Minister or indeed no role for the Attorney General, and that was emphasised. Now, having said that, I would, of course, have considered it myself and my own judgment, you know, I would have used my own judgment,*

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<sup>330</sup> Tribunal documents page 745

<sup>331</sup> Tribunal documents page 749

*having read the email as well, but I noted that part of the email. I would have noted that part of the email. When you asked me to consider that email, that would have been my -- that would have been my approach to it.*<sup>332</sup>

Was this wrong? The tribunal accepts this evidence is an honest appraisal of the situation. It was not a lazy dodging of the issues but rather a considered response to the information. The tribunal is satisfied that the Minister and the Garda Commissioner did not speak about the matter. The Garda Commissioner had already used Ken O’Leary as a sounding board and, as might be expected from that source, received unimpeachable advice. In any attempt at a balanced approach to this issue, it should be borne in mind that the terms of reference of the O’Higgins Commission required it to investigate the Department of Justice and Equality. The other party being investigated was Garda Headquarters. All of this centred on the individual cases of incompetence and malpractice and on allegations of malpractice and corruption in the PULSE system raised in the public interest by Maurice McCabe.

There is a fundamental point here. The Garda Commissioner and the Department of Justice and Equality were both under investigation by the O’Higgins Commission. Any hint of working things out between them had, as a matter of ethics, to be avoided. It would have been wrong to think that any row that had broken out could not have been dealt with by Mr Justice O’Higgins. As expected, he dealt with it. More importantly, unless something had arisen which transcended the legal requirement for parties under investigation not to be directing each other as to their approach to the O’Higgins Commission, the only appropriate action for one investigated party was not to interfere with the approach of the other investigated party.

And then it might be asked, was there anything which could have changed this?

### **The transcendent factor**

In the history of how the common law developed, a major reaction to the rigidity of legal rules was the availability of resort to courts of chancery to mitigate the harshness of rules formed to deal with the generality of cases. This was a reaction against fairness and equity being bypassed and legal decisions being based on strict law, the application of which could be divorced from what was fair. Hence, since the 14<sup>th</sup> century, resort could be had to the equitable jurisdiction which was based upon a set of legal maxims, the purpose of which was to uphold honourable conduct and to ensure the application of a system of fairness that would do substantive justice between contending legal parties. Sometimes just applying the law to a case may not be enough. The fundamental rights provisions of our Constitution have more or less taken over that ameliorating function in the modern era.

There are some considerations which go beyond what the strictures of the law indicate as the parameters of correct conduct. The Department of Justice and Equality, the Minister for Justice and Equality and the Office of the Attorney General rightly did not attempt to direct the Garda Commissioner as to how she should approach the O’Higgins Commission. Correctly, also, while they reasoned that if any dispute had broken out, Mr Justice O’Higgins could be trusted to sort the matter out, that might, in some extreme circumstances, not have been a sufficient response.

A transcendent situation could have arisen which would have required the Minister or the Attorney General to intervene. It did not, however. That situation was identified by Ken O’Leary as being the very situation which this term of reference was thought to be about by whoever framed it,

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<sup>332</sup> Transcript day 52 from page 153

namely “false allegations of sexual abuse” being deployed in order to unfairly traduce Maurice McCabe. This was the exchange which Ken O’Leary had with the chairman:

***Question: What if the Garda Commissioner had rung you up and said: what we are proposing to do is we are proposing to challenge Maurice McCabe on the basis that he sexually abused a child, knowing that the matter had been investigated thoroughly, knowing that the DPP had ruled on the matter, knowing there was no prosecution, knowing that the DPP had said even if there was no issues as to credibility, what had happened wasn’t a sexual assault and wasn’t even an assault at all, would you have brought that to the attention of the Minister and said, look, Minister, something alarming is going to happen here and we need to do something about it?***

***Answer: I think so, in the sense that, like, that would have transcended -- it would have been such a very egregious thing to do. I mean, if I had got a phone call from the Garda Commissioner saying, look, we are going to use the Ms. D allegation to undermine Maurice McCabe, as I say that would have transcended any issues in relation to the Commission. I mean, that would be alerting us that we had a problem with the Garda Commissioner. Now, I have to say in relation to the Garda Commissioner O’Sullivan in any discussions she ever had with me in relation to Sergeant McCabe, there wasn’t the slightest doubt in my mind that she was trying her best to resolve the issues that had arisen.***<sup>333</sup>

The tribunal accepts that evidence. It demonstrates the fundamental fair-mindedness of Ken O’Leary. It also demonstrates that any situation requiring intervention by the Minister did not in fact occur before the O’Higgins Commission. Fundamentally, Maurice McCabe was never accused of abusing any child at those hearings at the behest of the Garda Commissioner or anyone else. In fact, nothing occurred which Mr Justice O’Higgins could not deal with.

## **Media queries**

Much time was also spent before the tribunal as to the means of knowledge of the Minister, and her recollection in relation to whether there was anything to hint to her that anything improper at the level of seriousness identified by Ken O’Leary was happening before the commission. The tribunal’s view is that there was not. Before May 2016, when selected portions of the transcript of the O’Higgins Commission were leaked to the media, other leaks had occurred. One of these was a press query to the gardaí from John Burke of Raidió Teilifís Éireann on 4 July 2015, of which the Minister was made informed. This is evidenced in an email of that date to the Garda Press Office.<sup>334</sup> In part, that read:

RTE’s This Week understands that at a recent session of the Justice Kevin O’Higgins Inquiry, counsel for the Garda Commissioner raised questions over the motivation of Sgt McCabe for bringing certain matters regarding alleged garda misconduct to attention.

Does this amount to the view of the Garda Commissioner in terms of her view as to why Sgt McCabe raised these issues in the first instance?

I would appreciate your response at the earliest opportunity.

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<sup>333</sup> Transcript day 50 page 79-80

<sup>334</sup> Tribunal documents page 2016

The Garda Press Office responded in anodyne terms:

An Garda Síochána do not comment on named individuals or on the deployment of Garda resources internally/externally for operational reasons. As this Inquiry is ongoing it would be inappropriate for An Garda Síochána to comment.

Please note An Garda Síochána's understanding is that the O'Higgins Inquiry may have imposed reporting restrictions on its workings.

A copy of this email has been forwarded to Chief Superintendent Ward, Professional Standards, Mr. John Barrett, Executive Director Human Resource Management and Mr Kenneth Ruane, Legal Affairs for their information.<sup>335</sup>

As it happened, the Minister was due to appear on a radio programme the following morning. Consequently, a short note was sent to her in which her officials unfortunately translated the query from being one about motivation into whether the "Garda Commissioner ... had instructed counsel to adopt an aggressive stance towards Sgt McCabe at the O'Higgins commission."<sup>336</sup> It may have been from this that the myth of some kind of aggressive conduct towards Maurice McCabe before the O'Higgins Commission began to grow. There was no particular reason for the Minister to remember this. That would especially meet with the mindset that disposes of issues in a busy life and puts them behind as no longer requiring to be remembered or attended to. The tribunal accepts the Minister's evidence.

### **Public relations as a substitute for actual fact**

One other matter is worthy of comment. A close reading of the chronology will indicate the extent to which a public controversy began to grow in florid form following on the deception of the media by the persons who leaked selected extracts from the O'Higgins Commission transcript. This led to a flurry of emails, memoranda, communications at high level, drafts, counter drafts and final drafts about the Garda Commissioner's approach to those who point out irregularities within our police force.

The tribunal is far from impressed by any of this. It seems that our public life is now to be dominated by spin and that plain speaking is elided in favour of meaningless public relations speak. This is a hideous development in Irish public life.

We have been brought to a situation where those who genuinely know their job are expected to put things in a form which no longer garners respect and which is far from the requirement of plain speaking. It is frankly bizarre that when the Garda Commissioner is asked about her approach to a matter of serious public importance, she is not left alone to answer from her own mind but instead that comments and suggestions amounting to drafts of letters of several thousand words are whizzed over in her direction so that she can send the same thing back again. The public are then expected to digest this as being her utterance.

The tribunal found this practice unworthy of our public service. It adds to the sense of public distrust in the key institutions of the State. Public service is not about public relations. Plain speaking by those who know what they are talking about is the only acceptable way to address the Irish people.

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<sup>335</sup> Tribunal documents page 2016

<sup>336</sup> Tribunal documents page 3484

## The letter of 18 May 2015

Mr Justice O'Higgins had ruled on 15 May 2015 that any cross-examination of Maurice McCabe that went beyond any dispute as to facts in any way had to be justified in advance. Procedures laid down by him required that parties be open in their dealings with one another. This involved advance notice of any evidence beyond that which the commission had circulated. This procedure was also designed to put him on notice of the underlying issues and to notify Maurice McCabe in respect of any issue tangential to the facts in issue before the commission. Hence, counsel for the Garda Commissioner had to notify the O'Higgins Commission by letter regarding precisely what aspect of the background facts as to the attitude of Maurice McCabe they were calling into question.

That letter was drafted by counsel in haste, following on hurried consultations over that weekend. It was delivered to the commission by Annmarie Ryan on Monday, 18 May 2015 but, as circumstances would have it, she was delayed that morning. In the result, the document was handed in to the O'Higgins Commission together with the report by Superintendent Noel Cunningham of Maurice McCabe's meeting with him on 25 August 2008. The probability is that Annmarie Ryan handed this letter around and that it also got to the lawyers acting for Maurice McCabe on that day; though not in any form that pointed out that it was significant. What is important here is that the report of Superintendent Cunningham was accurate and truthful.

Annmarie Ryan's notes of 18 May 2015 record as follows in relation to the circulation of the letter and relevant documents to the commission and Maurice McCabe's legal team:

Noel Cunningham's documents referred to in our letter 18 May 2015.

3 documents – handed to Judge

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~~handed copy documents to McDowell~~

Judge / David O'Hagan directed me to give McCabe's legal team our letter of 18/5/15 + docs referred to in same to them.

- gave them 3 copies<sup>337</sup>

In her evidence, Annmarie Ryan said the following:

*...that letter was prepared for the Commission and on direction by Judge O'Higgins it was only given to Sergeant McCabe's legal team. And I understand my notes reflect that I gave three copies together with the documents to Sergeant McCabe's legal team that morning on the 18th May 2015.*<sup>338</sup>

*...The 18th May 2015, I recall Mr. O'Hagan wanted the letter immediately and, as I said, I was late for other reasons getting over there, out of my control, and I gave the letter over, I was then copying the documentation, there was three documents and they followed within a couple of minutes, and the hearings commenced and I do recall a part -- and then a copy of it I was directed to give it to Maurice McCabe's*

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<sup>337</sup> Tribunal documents page 781

<sup>338</sup> Transcript day 42 page 62

***legal team. My notes show I gave over three copies and with the letter, with the documentation and no other party received that letter or documentation.***<sup>339</sup>

Annmarie Ryan is an intelligent and honest person. She is also admirably diligent. She would not say that she had done something had she not done it. The tribunal unequivocally accepts her evidence.

The letter of 18 May 2015 handed in to the O'Higgins Commission setting out what approach was to be taken to any issue as to the background and motivation of Maurice McCabe was accurate up to a point. Then it went off the rails. This was not the fault of Annmarie Ryan or of counsel. Rather, inattention and perhaps emotional overlay by some of those instructing the legal team sent the letter astray. Here is the accurate part of the letter:

1. In summer 2004, both Sergeant McCabe and a colleague applied for the vacant position of Sergeant in Charge of Bailieboro Garda Station. Sergeant McCabe was successful and took up the duties of Sergeant in Charge in October 2004.
2. In January 2006, Sergeant McCabe made a complaint against this colleague which resulted in a disciplinary sanction being imposed on the colleague.
3. The colleague applied for a transfer to another Garda Station in December 2006 which request was refused for operational reasons due to the supervisory needs of Bailieboro station.
4. In December 2006, the colleague and his wife, on behalf of their daughter, made a complaint against Sergeant McCabe. Chief Superintendent Colm Rooney duly appointed Inspector (now Superintendent) Noel Cunningham to carry out a formal Garda investigation into the complaint
5. Inspector Cunningham completed his investigation and forwarded the Garda Investigation File to the office of the Director of Public Prosecutions on or about the 19<sup>th</sup> of February 2007. Inspector Cunningham stated in his report to the Director of Public Prosecutions "taking all matters into consideration, including the question of whether the event if it happened, constituted a breach of the criminal law, it is felt that there is no ground for a criminal prosecution
6. The Director of Public Prosecutions communicated the decision not to initiate any form of action against Sergeant McCabe and the observation was made that it was doubtful that the allegation could constitute a crime at all. The said directions were issued by way of letter dated 5<sup>th</sup> of April 2007 to the Cavan State Solicitor. Inspector Cunningham had requested that the directions from the D.P.P. were to be forwarded for his attention rather than addressed in the usual way to the Station and he received the directions, as he had requested, marked for his attention.
7. Upon receipt of the said directions, Inspector Cunningham undertook the task of informing the parties to the complaint of the outcome of the investigation and the directions of the D.P.P. He advised the colleague and his wife on the 24<sup>th</sup> of April 2007.
8. On the same day (the 24<sup>th</sup> of April 2007) Inspector Cunningham sought to make an appointment with Sergeant McCabe to similarly advise him of the outcome of the

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<sup>339</sup> Transcript day 43 page 58-59

investigation and the response from the D.P.P. However Sergeant McCabe was on sick leave from the 24<sup>th</sup> of April 2007 to the 21<sup>st</sup> of May 2007. Inspector Cunningham called Sergeant McCabe to arrange to meet, but Sergeant McCabe initially refused but subsequently agreed to meet on the 8<sup>th</sup> of May 2007.

9. On the 8<sup>th</sup> of May 2007, Inspector Cunningham met with Sergeant McCabe by appointment at the Bailie Hotel. Inspector Cunningham was alone but Sergeant McCabe was accompanied by Sergeant Regina McArdle who was present initially as A.G.S.I. Representative and then Welfare Officer. Inspector Cunningham duly informed Sergeant McCabe of the outcome of the investigation and the response/directions of the D.P.P.
10. On 15<sup>th</sup> and 17<sup>th</sup> October 2007, there were two incidents in which Sergeant McCabe had an encounter with the wife and daughter, respectively, of the aforementioned colleague. Following these incidents, Sergeant McCabe raised with Superintendent Clancy the issue of dissemination of the DPP's directions which were given at the conclusion of an investigation into an allegation assault against Sergeant McCabe. Sergeant McCabe stated that he was of the view that the colleague's family were unaware of the DPP's directions. He stated that he was aware that Inspector Cunningham had met the colleague's family concerning the outcome of the DPP's directions. As a consequence, on the 22<sup>nd</sup> October 2007, Superintendent Clancy sent a minute to Inspector Cunningham in Monaghan seeking his observations on the issue.
11. Superintendent Clancy recalls having a meeting with Sergeant McCabe at the beginning of February 2008. At that meeting, Superintendent Clancy ascertained from Sergeant McCabe that he had no desire to have the colleague's family prosecuted for the incidents he complained about. Superintendent Clancy asked Sergeant McCabe to convey his attitude in this matter by way of written report as the Superintendent wished to have his views recorded on the file. Sergeant McCabe stated that he would forward a report indicating that he did not wish to have the colleague's family prosecuted. At the same meeting, Superintendent Clancy informed Sergeant McCabe that he had been in contact with Inspector Cunningham on the issue of dissemination of the DPP's directions. Superintendent Clancy informed Sergeant McCabe that Inspector Cunningham had communicated the DPP's directions to the colleague's family on 24<sup>th</sup> April 2007. Sergeant McCabe then stated that he wished to view the actual written direction given by the DPP. Sergeant McCabe stated that he felt he should be 'exonerated' by the DPP. Sergeant McCabe stated that he would make a written application to the Superintendent to have the DPP's written directions shown to him. On 7<sup>th</sup> February 2008, Superintendent Clancy sent a minute to Sergeant McCabe giving the outcome of his enquiries with Inspector Cunningham on the issue of dissemination of the DPP's directions.<sup>340</sup>

There one might stop at paragraph 11. There is a dispute as to what Maurice McCabe said at the various meetings. In particular, Superintendent Noel Cunningham told the tribunal that it was difficult to completely understand at times what Maurice McCabe was saying at the Mullingar meeting of 25 August 2008. This is understandable because the entire matter must have been an enormous strain for him. Given that Superintendent Cunningham had been told to investigate certain complaints in the 25 February letter from Maurice McCabe, he was floundering around in the dark when it came to Maurice McCabe's request for circulation of that letter to the D family

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<sup>340</sup> Tribunal documents from page 771

and the McCabe family, and the “business case” proposed by Chief Superintendent Rooney in that regard. The letter continues:

12. On Tuesday, 26<sup>th</sup> February 2008, Superintendent Clancy received an envelope marked ‘personal’ containing a report dated 25<sup>th</sup> February 2008 from Sergeant McCabe. In this report, Sergeant McCabe made a number of allegations of incidents which allegedly occurred as far back as 2004 against the colleague and other unnamed members of Bailieboro Garda Station. Sergeant McCabe acknowledged that he had received Superintendent Clancy’s minute of 7<sup>th</sup> February 2008. Sergeant McCabe asked for full disclosure of the DPP’s directions. *“I urge you, if you can, to asked [sic] the Director of Public Prosecutions to allow the full D.P.P. Directions to be conveyed to me and the other party, in particular [the colleague’s wife], in this particular case due to the fact that all parties work in close proximity and I would really appreciate it. That is all I am asking”.*
13. Superintendent Clancy immediately forwarded this report to the Divisional Officer, Chief Superintendent Colm Rooney, recommending that the allegations made by Sergeant McCabe be investigated. In the meantime, Superintendent Clancy sought sight of the written directions as given by the DPP. Having carefully viewed the content of the DPP’s directions, the Superintendent decided that he would adhere to the DPP’s Guidelines and that he would not request release of the contents of the document. On 11<sup>th</sup> March 2008, Superintendent Clancy met Sergeant McCabe and gave him the outcome of his decision.
14. Sergeant McCabe was unhappy with the outcome of the decision of the Director of Public Prosecutions, as he believed that the decision ought to have completely exonerated him rather than recording that there was not sufficient evidence to proceed against him.

At paragraph 14 one might again stop. That is wrong. Insofar as any decision of the Director of Public Prosecutions could possibly exonerate anybody, this had already happened. It is incorrect to suggest that Maurice McCabe was seeking that from anyone or that he may have needed to.

15. In or around the same time, Sergeant McCabe presented Superintendent Clancy with a series of operational issues for his attention, which were of a type which would normally have been dealt with by the Sergeant in Charge of the station.
16. Sergeant McCabe sought an appointment to see Chief Superintendent Colm Rooney and this was facilitated in June/July 2007. At the meeting Sergeant McCabe expressed anger and annoyance towards the Director of Public Prosecutions. He demanded that Chief Superintendent Rooney communicate with the Director of Public Prosecutions to seek a declaration of his innocence from the Director of Public Prosecutions in relation to the allegation. Chief Superintendent Rooney advised Sergeant McCabe of the policy of the Director of Public Prosecutions in dealing with such issues, a policy which Sergeant McCabe was himself professionally aware of. Chief Superintendent Rooney told Sergeant McCabe that he could not seek such a declaration on Sergeant McCabe’s behalf from the Director of Public Prosecutions. Chief Superintendent Rooney pointed out to Sergeant McCabe that from his own experience of dealing with criminal files to the Director of Public Prosecutions he was aware of the Director of Public Prosecutions role to determine if sufficient evidence was available on a file to direct a prosecution. Chief Superintendent Rooney advised Sergeant McCabe that it was not the Garda Commissioner’s policy that An Garda Síochána challenge the Director of Public Prosecutions on his decisions. Chief Superintendent Rooney further pointed out to Sergeant McCabe that, as a private citizen, it was open to him to write

to the Director of Public Prosecution if he so wished to seek the declaration he required.

At paragraph 16, it is appropriate to comment on another inaccuracy. While it may have been difficult to understand what a man under strain was saying, it was abundantly clear that Maurice McCabe was never annoyed with the Director of Public Prosecutions. On the contrary, it is clear that the letter from that source of 5 April 2007, as read to him by the local state solicitor, came as a considerable relief.

17. In March 2008 Sergeant McCabe applied to be redeployed from his position as Sergeant in Charge of Bailieboro Garda Station and his request was granted.
18. Pursuant to the complaint made by Sergeant McCabe on the 26<sup>th</sup> February 2008 to Superintendent Clancy, Chief Superintendent Colm Rooney appointed Inspector Noel Cunningham to carry out an investigation.

Here it should be noted that the references are about a complaint to Superintendent Clancy. This is not stated in the letter as a complaint against Superintendent Clancy. The following paragraph flatly contradicts what had immediately gone before:

19. Having been appointed to investigate Sergeant McCabe's complaint against Superintendent Clancy, now Superintendent Noel Cunningham, having attempted on a number of occasions to meet with Sergeant McCabe, eventually met with Sergeant McCabe by appointment on the 25<sup>th</sup> August 2008 in Mullingar Garda Station, to receive details of his formal complaint. Superintendent Cunningham was accompanied to this meeting by Sergeant ... Notes were taken at the meeting and countersigned by Sergeant ... and a detailed report of the meeting was prepared by Superintendent Cunningham, and its contents agreed with Sergeant ... and forwarded to Chief Superintendent Rooney. In the course of this meeting Sergeant McCabe advised Superintendent Cunningham that the only reason he made the complaint against Superintendent Clancy was to force him to allow Sergeant McCabe to have the full DPP directions conveyed to him.

This is a strange paragraph. For a start, the first sentence does not make grammatical sense. Secondly, and more importantly, what investigation is being talked about and into what? Furthermore, how can a superintendent investigate another superintendent? That does not happen in our police force. At a minimum, it requires a rank above. This is a mistake which should have been noticed but, unfortunately, was not. The mistake is compounded by an allegation that somehow, and at some stage, Maurice McCabe had made a complaint against Superintendent Clancy out of an improper motive. That never happened. Certainly, later on, there were complaints about Superintendent Clancy but not in the context of apparently pressuring him in order to have the written directions of the Director of Public Prosecutions released to Maurice McCabe and the D family.

While there was a huge emphasis at the hearings on the letter of 18 May 2015, its rights and wrongs, the only question which the tribunal has jurisdiction to answer is whether any of this had anything to do with Commissioner Nóirín O'Sullivan.

### **Conclusion on the letter of 18 May 2015**

The Garda Commissioner had no notice of this letter. She never read it. She did not know about it. The mistakes in the letter are apparent to anyone who reads it carefully. What is not apparent from the text alone is that it was distributed over a weekend and was expected to be corrected within that timescale. Of those involved, counsel and the solicitor for the gardaí at the O'Higgins

Commission and two clients have given evidence: Chief Superintendent Rooney and Superintendent Cunningham. Of the available evidence, Chief Superintendent Rooney and Superintendent Cunningham have both claimed privilege to a greater or lesser extent. That is their entitlement. As to counsel, their necessarily limited evidence in this context, that of privilege being asserted by their clients, is that no mistake was made by them.

Superintendent Cunningham instructed counsel that up to 2008 a complaint had never been made against him, but that thereafter there was a multitude. He also said that he got on well with Maurice McCabe and regarded him as an excellent officer, in fact going to him and asking him to depart from his plan to go to Mullingar and to stay in Bailieboro. He thought they would make a good team together, and asked him to rescind his request to leave Bailieboro, to “crease the half-sheet”. Apparently, this is a garda expression meaning to make a written report.<sup>341</sup> Maurice McCabe had decided to leave that station in March 2008.<sup>342</sup>

In testimony, Superintendent Cunningham never appeared as someone who was embittered but rather someone who was a natural and excellent investigator, who had been put into the position of being required by orders to investigate a complaint against someone he respected: the Ms D allegation against Maurice McCabe on one occasion and on another occasion, a complaint made by Maurice McCabe. His attitude and demeanour was of someone who was dragged into a whirlpool of controversy and who found it difficult, in consequence, to operate within circumstances which he found draining. The letter in question came to him over the weekend of an inquiry which he regarded as, effectively but incorrectly, being about him and his investigations. He read it through on a mobile device and stated in evidence that he did not notice the mistakes. At the start of the hearing on the Monday, he did not read through the letter in hard copy. In his evidence, and in that of Chief Superintendent Rooney, it should be remembered that there was a concentration not on any issue as to accuracy or inaccuracy in this letter but on a sequence of events which had begun with Maurice McCabe’s letter of 28 January 2008 to Superintendent Clancy on the issue of standards.<sup>343</sup> In meeting Maurice McCabe in Mullingar on 25 August 2008, Superintendent Cunningham had been left in a state of confusion in that he did not know that Chief Superintendent Rooney had asked Maurice McCabe to make out a case for releasing the letter of the Director of Public Prosecutions. Nor did he really know anything except that complaints in relation to bad conduct within the police had, justifiably to his mind in some cases, been made. The situation was further confused by the letter of 25 February 2008 complaining of incidents on 15 and 17 October 2007, confrontations of Maurice McCabe by members of the D family, and of a great deal more besides. Some of the wide-ranging narrative in that letter was excised for privacy reasons before being distributed by the tribunal.

The tribunal is satisfied that there was no deliberate attempt to write a series of quite silly mistakes by way of a submission undermining Maurice McCabe to the O’Higgins Commission. It is beyond belief that Chief Superintendent Rooney would stand over a letter which referred to him requiring a superintendent to investigate a superintendent or that he and Superintendent Cunningham would make two completely inconsistent cases about complaints to Superintendent Clancy and against Superintendent Clancy.<sup>344</sup> Furthermore, if one digs down into the notes made by Annmarie Ryan during her consultation with Superintendent Cunningham on 12 May 2015, which are available to the tribunal, they support the case Superintendent Cunningham made:

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<sup>341</sup> Transcript day 13 page 43

<sup>342</sup> Transcript day 55 page 215

<sup>343</sup> Tribunal documents from page 5019

<sup>344</sup> Tribunal documents pages 4136 and 5020

Up to 2008 Noel never had one single complaint against him by anyone. Since then there has been numerous complaints from public about him. Question over whether McCabe behind those. Allegations that Noel didn't carry out proper investigations. No adverse finding to-date but some still on-going. Noel met with McCabe in Mullingar with Yvonne Martin in 2008 about complaint to Mike Clancy. McCabe wanted his DPP file. Noel made report of this meeting the next day (he has copy of this). Sent this report to Monaghan. This was his reason for making complaint to Mick Clancy. Gardaí to send me report by Noel as counsel want this.<sup>345</sup>

Counsel were of course correct to seek this report of the Mullingar meeting. Sergeant Yvonne Martin signed her name to a set of notes taken by Superintendent Cunningham at the time of the meeting in August 2008. These fully accord with a tape recording made by Maurice McCabe of the meeting. Superintendent Cunningham never gave evidence to the contrary of this either at the O'Higgins Commission or at this tribunal. When asked about the meeting at the O'Higgins Commission by Mr Justice O'Higgins, he told the truth. Sergeant Yvonne Martin was never called to give evidence. There was no controversy in live testimony for her to speak to.

The probability is that, for reasons of confusion between complaints to Superintendent Clancy and against Superintendent Clancy, counsel for the Garda Commissioner at the O'Higgins Commission asked Maurice McCabe in evidence about whether he had made complaints against Superintendent Clancy with a view to the circulation of the ruling of the Director of Public Prosecutions to himself and the D family. The tribunal has listened to the audio recording of this. It takes all of 20 seconds. Then the matter is dropped. Superintendent Cunningham has no recollection of hearing this or paying any particular attention to it, supposing he was even in the room over a very long day, and it would seem that Chief Superintendent Rooney is in a similar position. Mr Justice O'Higgins had, in any event, ruled that the only entitlement in pursuing any collateral issue was to establish "that Sergeant McCabe had a grievance real or perceived in arising out of a conversation with ... Chief Superintendent Rooney ... His motivation... is only peripheral, very peripheral."<sup>346</sup>

There is not any evidence that Commissioner O'Sullivan ever knew about this issue or about the letter or that she had any input into drafting it or that she was aware of any error in its contents. She was not. She was called to give evidence to the O'Higgins Commission months after this letter and was then extensively briefed. Essentially this was for two reasons: firstly her prior job in human resources; and secondly because of the disturbing and wrong reference by counsel for Maurice McCabe to her being required to expect "an experience she would not enjoy". There was an expectation that there would be questions from counsel for Maurice McCabe as to any instructions that she might have given regarding any challenge to his motivation. As it happened, that opportunity had been allowed to pass. It was revived years later before this tribunal. There were notes of her consultations with counsel. Privilege was waived on these. Again, much has been made of the notes in relation to that briefing. The tribunal is satisfied to accept the evidence of Colm Smyth SC as to the instructions which he had from Commissioner O'Sullivan. There is no contrary indication.

Commissioner O'Sullivan gave evidence on 4 November 2015, day 29 of the O'Higgins Commission hearings. The ruling of Mr Justice O'Higgins had been designed to focus minds on the terms of reference. It was successful. On sitting that day, the judge mentioned the discussion that had taken place on Friday, 15 May 2015 and sought clarification. Colm Smyth SC clarified that he had made an error and that the credibility of Maurice McCabe and his motivation in making

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<sup>345</sup> Tribunal documents page 4292

<sup>346</sup> O'Higgins Commission transcript day 3 page 19

allegations was being challenged, but that any reference that he had made to his integrity “was an error ... on my part”.<sup>347</sup>

Previously, on 24 June 2015, day 5 of the O’Higgins Commission, Mr Justice O’Higgins had again raised a point at the commencement of the sitting. He read out paragraph 19 of the letter of 18 May 2015 and pointed out that this was inconsistent with the report made by Superintendent Cunningham as to the Mullingar meeting with Maurice McCabe on 25 August 2008. Both documents had already been handed to the commission and had been distributed with the letter of 18 May 2015, including to counsel for Maurice McCabe. Of itself, even without the evidence of Annmarie Ryan, this proves that fact. Superintendent Cunningham was asked about this in evidence and as to whether there were allegations against Superintendent Clancy or complaints made to Superintendent Clancy. He clarified that they were complaints about Mr D, made to Superintendent Clancy. This accords with the written record of the time.

While the tribunal is effectively invited, not by the terms of reference but by counsel for Maurice McCabe, to make a ruling on this issue, experience indicates that even in court cases with the ultimate available in terms of preparation and personnel, mistakes occur. This incident about which much has been made took place in rushed circumstances. Whatever the confusion relating to the background, the O’Higgins Commission was determined to focus minds. This it did. In consequence any errors were cleared up. None of these amounted to “false allegations of sexual abuse” or reliance on any unjustified grounds. The character of Maurice McCabe was not attempted to be undermined.

On particular facts, there were issues of contention between him and other serving gardaí in the Cavan/Monaghan division. One would be the computer seized from a cleric which contained images of child pornography. It also held parish records so the relevant superior of the cleric asked for it back. It had by then just disappeared. Keeping custody of such exhibits was the responsibility of the exhibits officer. However it was claimed by the exhibits officer, another garda, that Maurice McCabe had taken custody of the computer. In relation to the release of a suspected assailant of a teenager, it was claimed that Maurice McCabe had ordered his release after a matter of minutes, but that decision had in fact been made by another officer. These are examples.

But, the focus is not to rerun the O’Higgins Commission and the tribunal has not been mandated in that regard. What is hard to know in all of this is how the Garda Commissioner was supposed to interest herself in the minute details of what any individual garda might say that might contradict Maurice McCabe on a matter of fact. What would be appalling, if it happened, and it did not, would be for her to direct every garda officer that no matter what evidence Maurice McCabe gave, each of them was to agree with him.

What is abundantly clear is that any error that occurred and any conflict in the evidence did not commence with Commissioner O’Sullivan and nor was it authorised by her or later affirmed by her.

### **Conduct of the proceedings**

In one particular quote in relation to the proceedings before the O’Higgins Commission, Maurice McCabe claimed, in his statement to the tribunal dated 15 March 2017, that he had asked Colm Smyth SC not to shout at him on a number of occasions. This is what he said:

It was immediately apparent that regardless of the parameters set by the Judge that the senior members of An Garda Síochána had their own agenda. The hearings were highly

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<sup>347</sup> O’Higgins Commission transcript day 29 page 9-10

adversarial and I broke down on a number of occasions due to the ferocity of the attack by Counsel for the Commissioner. I had to seek medical attention. Her Counsel did not cross-examine anybody but me in a similar fashion. I had no issue with the vigorous cross-examination I was subject to by the other legal teams representing Byrne, McGinn, AGSI and the GRA. They were doing their job to protect their clients and were thoroughly professional but took grave exception to the pejorative and hostile tone adopted by Colm Smith S.C., so much so that on a number of occasions I had to say “*Mr. Smith please stop shouting*”.<sup>348</sup>

The tribunal was extremely concerned with that allegation. It impacted not only on the barrister in question, but also on the judge. The former was accused in explicit terms of professional misconduct and the latter, in being tacitly described as tolerating it, was depicted as having lost control of the proceedings. That did not happen.

In late February 2018, a year after that statement, the tribunal isolated all of the portions of the audio recordings of the O’Higgins Commission where Maurice McCabe was giving evidence. This was put onto USB flash drives and sent to all the parties. On 5 March 2018, there followed a letter from the solicitors for Maurice McCabe. That read:

As indicated in recent contact with the Tribunal, there is one issue that I wish to clarify in advance of our client giving evidence to the Tribunal.

In the written statement made by our client, at page 12, he stated that he told counsel for the Commissioner to stop shouting at him during cross examination at the O’Higgins Commission. This statement was included due to an error on the part of a person in my office during the preparation of the statement. We sincerely regret this error.

The transcript and audio recording accurately discloses the tone and manner in which our client was cross examined. In any event the most important issue should be what happened at the Commission rather than the tone or volume of the cross examination of any witness including our client.

The latter part of that letter makes little sense; in fact none at all. The tribunal is mystified as to how some kind of mistake could ever explain making an allegation of this kind. It is impossible in the context of that express allegation having been made already in a statement to the tribunal.

An examination of the transcripts and of the audio recordings of the commission hearings indicated that the only time that the words “shout” or “shouting” were used was where counsel apologised for having to keep his voice up by reason of the acoustics and sound system and hoped that no one would construe it as shouting. Everyone had been asked by counsel for the commission to keep their voices up. That happens in virtually every court hearing. On one occasion, Maurice McCabe asked Colm Smyth SC to “ease your voice slightly, please.”<sup>349</sup> There was, however, neither there nor anywhere else in the audio recording any shouting by anyone and nor was there any reference to a request by anyone to stop shouting. People were speaking noticeably moderately. As might be expected, no kind of rudeness or misconduct by counsel would ever have been allowed by Mr Justice O’Higgins. There was nothing in the nature of bullying conduct either attempted or permitted.

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<sup>348</sup> Tribunal documents page 2949

<sup>349</sup> O’Higgins Commission day 31 page 67

## “Going after Maurice”

On 27 April 2017, John Barrett, who is Executive Director of Human Resources and People Development in Garda Headquarters, made a lengthy statement to the tribunal about his dealings with Maurice McCabe. In the course of that statement he said the following:

prior to the commencement of the O’Higgins Commission Hearings, at the conclusion of a meeting in the office of The Chief Administrative Officer, Cyril Dunne, Mr. Dunne asked me to remain in his office after the other attendees had left and with reference to Sergeant Maurice McCabe, said, “we are going after him in the Commission”. My role as interlocutor/principal point of contact with Sergeant McCabe was well established at this stage and I indicated my shock and dismay that such an approach would be taken in the O’Higgins Commission.<sup>350</sup>

John Barrett described this encounter in terms which did not bring it alive as anything other than a bare allegation. There followed several more communications from John Barrett all of which, in contrast to that bare allegation, were characterised by their detail. In a letter dated 17 January 2018 to the tribunal from his solicitors, he helpfully outlined a chronology of events over ten numbered paragraphs as to his interactions with Maurice McCabe.<sup>351</sup> The date of this alleged encounter with Cyril Dunne was not mentioned in the original statement or in that letter.

By the time John Barrett came to give evidence, the dates surrounding the row before the O’Higgins Commission of Friday, 15 May 2015 and the interactions between the Garda Commissioner, the Office of the Attorney General and the Department of Justice and Equality had begun to assume a particular importance. Giving evidence on day 53 of this tribunal, he claimed without prior written warning that this alleged encounter had occurred on Wednesday, 13 May 2015.<sup>352</sup> As it happens, the Garda Commissioner was in London on that date and could not physically have been back in Garda Headquarters, on any realistic basis, before about 20:00 hours. There was also no pressing reason for her to go there at that time and not to return home to rest. While Cyril Dunne may well have worked late on occasion, it seems beyond belief that there could, as the original statement alleges, have been a high-level meeting which started sometime after 20:00 hours, went on for whatever time it is supposed to have gone on for, and that then the remark was made late at night.

When these inconvenient facts were pointed out during tribunal hearings to John Barrett, the startling importance of the alleged date he had suddenly come up with in reference to other events and the unlikelihood of it occurring on that day, his prior certainty began to slip. According to his complaint when confronted with this, too much focus was being put on the date and not enough on his testimony; ignoring the fact that it was he who had nominated the date. Insofar as reference has been made to emails sent late at night from computer systems used in Garda Headquarters, the tribunal is familiar with electronic systems where work emails can be accessed remotely. None of these emails, however, make any reference to this alleged meeting or to this alleged comment. Furthermore, John Barrett regarded the task of supporting Maurice McCabe as being a special responsibility. Although he affirmed in testimony that he trusted the Garda Commissioner and although his immediate boss had apparently completely undermined her strategy of support, he did not think to mention it to her, to anyone else or to Maurice McCabe with whom he had a

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<sup>350</sup> Tribunal documents page 2969

<sup>351</sup> Tribunal documents page 4355

<sup>352</sup> Transcript day 53 page 200

number of meetings. It was over a year and a half later before this allegation was passed to Maurice McCabe.<sup>353</sup>

John Barrett described Cyril Dunne as being a powerful individual. It is difficult, however, to imagine that he could overrule the Garda Commissioner. Furthermore, on the face of the transcript before the O’Higgins Commission, no one was “going after Maurice McCabe”. Much of the evidence of John Barrett had an imaginative element to it, describing Maurice McCabe as having a “cornucopia of issues”, his own evidence as “the ugly truth”, and Cyril Dunne as sitting “with three others at the apex of the organisation.”<sup>354</sup> Yet, despite this, very little of John Barrett’s evidence came across as a reliving of events. As to the meeting itself, it had no context, the comment came from nowhere and was unsupported by either a contemporaneous note or any action consistent with what John Barrett claimed was a “visceral” reaction by him to what would have been an appalling revelation. Hearing this was to be left wondering, what the meeting was about, who was there, what was discussed, how the comment ascribed to Cyril Dunne could have arisen and what were the lead points that prompted this startling revelation? None of this was apparent.

Two other matters were important. Firstly, Cyril Dunne came across as a sober individual who had a sense of honour. In circumstances where he was being let into some kind of unpleasant secret, higher considerations would have prevailed on his conduct. Certainly, from his evidence he would have been aware of a general strategy of support of Maurice McCabe. Any general conversation in which he participated may have included Nóirín O’Sullivan, with whom he had worked on a peer-to-peer basis prior to her becoming Garda Commissioner. It is possible that he may have heard something about the importance of finding the truth out before the O’Higgins Commission and the necessity to test evidence. That, however, is not the same thing as being party to a nasty strategy. It is also very far from any mindset that would apparently countenance announcing it randomly to a subordinate.

In circumstances such as this, the natural inclination is to wonder whether a conversation has become distorted. But, John Barrett ruled this out categorically. Despite this, there was no context put forward in his evidence that could have explained this sudden alleged revelation. There was nothing to indicate, furthermore, why he suddenly nominated an improbable but significant date in testimony without notifying the tribunal beforehand.

The second aspect was that John Barrett claimed for the first time that he had quickly mentioned this matter to his subordinate Chief Superintendent Anthony McLoughlin, who also works in human resources, apparently within weeks of the alleged comment.<sup>355</sup> He was nominated by John Barrett as backing him up. As to where, when, and in what terms? John Barrett’s evidence again became fluid. Chief Superintendent McLoughlin gave evidence that there was no such conversation and that he would remember it had it ever taken place. It would be the kind of conversation he would have remembered.<sup>356</sup> Instead, the conversation which he recalled was one of John Barrett going to him prior to Christmas 2017, in preparation for testifying to this tribunal, and asking him whether he remembered him recounting this remark. He did not. Another approach was made to Chief Superintendent McLoughlin in early 2018, but again he told John Barrett that he did not recall him ever saying such a thing to him. In evidence to the tribunal, prior to Chief Superintendent McLoughlin giving evidence, John Barrett had, however, claimed that he had confirmed with him “recently that I’d made that remark”. After Chief Superintendent

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<sup>353</sup> Tribunal documents page 2949

<sup>354</sup> For instance, transcript day 54 page 52

<sup>355</sup> Transcript day 53 page 202

<sup>356</sup> Transcript day 57 from page 97

McLoughlin gave evidence denying that he had ever told him of this remark at any time in 2015, John Barrett was content to say that this was correct. Both situations cannot be right.

It was incorrect of John Barrett to attempt through instructions to his counsel to undermine the credit of Cyril Dunne in relation to his business career. In any event this fell flat on its face. There was nothing to suggest that Cyril Dunne had ever acted anything other than honestly by taking up the tasks which life had given to him. It was a preposterous example of cross-examination as to credit. That is not to criticise counsel. He was properly following instructions.

The tribunal is not satisfied that this conversation ever took place either at all or in any manner as alleged.

### **Comment**

This term of reference set up an expectation that in the privacy of a commission of investigation, held under the 2004 Act, Maurice McCabe was traduced by “false allegations of sexual abuse”. The central query in the term of reference is whether this was done by Commissioner O’Sullivan to discredit him. Nothing like that ever happened.

In fact, some mistakes were made, but these had nothing whatsoever to do with sexual abuse. Anyone familiar with the give and take of any long hearing would realise that claims and counter-claims are made and that decisions are made that may not be properly thought through due to pressure of time and the necessity to deal with multiple facts and voluminous documentation. Nobody who was a party to the O’Higgins Commission was ever intending to claim that the allegation of Ms D went against the credit of this fine police officer Maurice McCabe. That simply never happened. Insofar as mistakes occurred, or were left uncorrected and subsequently should have been corrected in later submissions, these had nothing to do with Commissioner O’Sullivan.

Insofar as selected leaked transcripts created a truly unfortunate impression and a rush to judgement in the public mind, the tribunal has not been asked to investigate their source and passes no comment. It follows that the tribunal could not and does not blame anyone for this.

If there was any question as to what happened where a full transcript was available of the event, and a full audio recording, resort should not ever be had to the expenditure of public money on a tribunal without fully considering it beforehand. A reading of the transcript shows that nothing of the kind alleged against Commissioner O’Sullivan ever happened.

During the tribunal hearings, there was considerable focus on how Maurice McCabe was, on several occasions, blamed by his colleagues for matters in respect of which the O’Higgins Commission vindicated him totally. An example would be as to who had taken possession of the computer in the clerical child abuse and pornography case. Another would be who ordered the release from garda custody of the prisoner who was suspected of attempting to drag an unfortunate teenage girl into an isolated place. There are others. What this term of reference is about is the directions of Níorín O’Sullivan as Garda Commissioner. She could not summon any witness who might contradict Maurice McCabe and direct them to agree with his account. To do that would be perversion of the course of justice. She, rightly, left the matter alone. In all court cases, lots of witnesses contradict each other or even say unpleasant things about each other.

It was for a judge of real experience to sort out the good sense of this. This Mr Justice O’Higgins did.

## **Part 3: Report on the allegation of character assassination**

### **A note on structure**

It is best to regard what follows as separate reports with a separate chronology and other appendices following. While logically this is the third and last of three joined reports, it has been necessary to repeat certain matters that occurred in earlier reports. In reading this report, it is important to also have read the entirety of all of the reports in order to not lose the sense of the overall findings. Any recommendations are set out in part 4 and arise out of the consideration of all of the issues, evidence and documents throughout the entirety of the tribunal. Thus, this is part 3 of a 4-part volume. Other comments made in part 1 are applicable here as well.

### **Allegations of Superintendent David Taylor**

The focus of this report is the claim by Superintendent David Taylor that, when he was in charge of the Garda Press Office from 1 July 2012 to 31 May 2014, he was requested by Garda Commissioner Martin Callinan to traduce the character of Sergeant Maurice McCabe. This was to be effected, according to his account of that instruction, in any dealings which he had concerning Maurice McCabe with the media. In this, Deputy Commissioner Nóirín O’Sullivan was alleged, on the various accounts of Superintendent David Taylor, to be variously acquiescing in, or merely knowing about and doing nothing to protest, that alleged plan. While the tribunal terms of reference relevant to this report follow, condensing these into concise form, it is clear that the task entrusted by the Oireachtas to the tribunal has been to investigate whether Superintendent David Taylor:

was ... directed ... to contact the media to brief them negatively against Sergeant Maurice McCabe and ... to brief the media that [he] was motivated by malice and revenge [and] to encourage [them] to write negatively about [him] ... that his complaints had no substance ... and that he was driven by agendas ... the root cause [of which was] revenge ... concerning [an] allegation of criminal misconduct made against [him].

That overall allegation by Superintendent David Taylor as expressed in the terms of reference also encompassed the necessity for this tribunal to inquire into:

the creation, distribution and use by TUSLA of a file containing false allegations of sexual abuse against Sergeant Maurice McCabe ... and whether these false allegations ... were knowingly used by senior members of An Garda Síochána to discredit [him].

Two immediate points should be made. Firstly, the report on the TUSLA matter precedes this one, part 1 of this 4-part volume, and any evidence of use by any member of the gardaí of the astonishing errors by that organisation is considered in the body of that report. All findings on that are in part 1.

Secondly, as a matter of fact, it is important to immediately note that no newspaper or media outlet ever traduced the character of Maurice McCabe in consequence of any communication from Superintendent Taylor, or indeed at all. No one in print or on radio or on television or on Internet sites ever said either that Maurice McCabe had abused a child or that he was a bitter man with hidden agendas in consequence of being investigated by his colleagues due to an allegation made against him in December 2006 of what was then claimed to be historic abuse. Rumours were, however, as this report details in part, flying around about him; particularly from 2013 and in January 2014 when issues about fixed charge penalty notices and an Oireachtas hearing by the Public Accounts Committee put the issue of the proper collection of motoring fines sharply into

public focus. It is in this context, mainly, that crucial parts of the evidence to this report are directed.

Because of the form of the protected disclosures made by Superintendent David Taylor on 30 September 2016 and that of Sergeant Maurice McCabe on 26 September 2016 and a speech in Dáil Éireann on 26 May 2016 by John McGuinness TD, reporting on what he says was said to him by Commissioner Callinan in a car park meeting, the Oireachtas has required that the inquiry of the tribunal is to encompass:

[m]edia and broadcasting personnel, ... Government, TUSLA, [and] any other State entities ... [and] all records relating to the telecommunications interactions used by Superintendent Taylor, former Commissioner Callinan and Commissioner O'Sullivan [during that period] ... and all electronic and paper files, relating to Sergeant Maurice McCabe held [in Garda Headquarters] and whether Commissioner O'Sullivan, using briefing material prepared in Garda Headquarters, influenced or attempted to influence broadcasts on RTÉ on the 9<sup>th</sup> of May, 2016, ... [and] whether a meeting took place... between former Commissioner Callinan and Deputy John McGuinness on the 24<sup>th</sup> of January, 2014 in the carpark of Bewley's Hotel ... and ... matters discussed at such meeting ... [and] such knowledge which Commissioner O'Sullivan had of the meeting.

In this volume, overall, the tribunal firstly reported on matters involving TUSLA and the Health Service Executive, part 1, and, secondly, on the prior investigation by Mr Justice Kevin O'Higgins, not of complaints against Maurice McCabe, but of complaints by him as to garda investigations and evidence of incompetence or lack of application to duty shown on PULSE records, part 2. A prior report dealing with the Garda Keith Harrison affair was also sent to the Clerk of Dáil Éireann on 30 November 2017.

Thus, this report, as part 3, concentrates on the allegation that there were attempts by senior garda officers to calumniate Sergeant Maurice McCabe.

### **The relevant terms of reference**

The terms of reference with which the tribunal had originally been tasked are now set out:

[a] To investigate the allegation made in a Protected Disclosure under the Protected Disclosures Act 2014, on the 30<sup>th</sup> of September, 2016, by Superintendent David Taylor, wherein he alleges that he was instructed or directed by former Commissioner Martin Callinan and/or Deputy Commissioner Nóirín O'Sullivan, to contact the media to brief them negatively against Sergeant Maurice McCabe and in particular to brief the media that Sergeant McCabe was motivated by malice and revenge, that he was to encourage the media to write negatively about Sergeant McCabe, to the effect that his complaints had no substance, that the Gardaí had fully investigated his complaints and found no substance to his allegations and that he was driven by agendas.

[b] To investigate the allegation of Superintendent Taylor in his Protected Disclosure, that he was directed to draw journalists' attention to an allegation of criminal misconduct made against Sergeant McCabe and that this was the root cause of his agenda, namely revenge against the Gardaí.

[c] To investigate what knowledge former Commissioner Callinan and/or Commissioner O'Sullivan and/or other senior members of the Garda Síochána had concerning this allegation of criminal misconduct made against Sergeant McCabe and whether they acted upon same in a manner intended to discredit Sergeant McCabe.

[d] To investigate the creation, distribution and use by TUSLA of a file containing false allegations of sexual abuse against Sergeant Maurice McCabe that was allegedly sent to Gardaí in 2013, and whether these false allegations and/or the file were knowingly used by senior members of An Garda Síochána to discredit Sergeant McCabe.

[e] To investigate whether the false allegations of sexual abuse or any other unjustified grounds were inappropriately relied upon by Commissioner O'Sullivan to discredit Sergeant Maurice McCabe at the Commission of Investigation into Certain Matters in the Cavan/Monaghan district under the Chairmanship of Mr. Justice Kevin O'Higgins.

[f] To investigate whether senior members of An Garda Síochána attempted to entrap or falsely accuse Sergeant McCabe of criminal misconduct.

[g] To investigate such knowledge which former Commissioner Callinan and Commissioner O'Sullivan had concerning the matters set out in [a], [b], [c], [d], [e] and [f] above.

[h] To investigate contacts between members of An Garda Síochána and:

- Media and broadcasting personnel,
- members of the Government,
- TUSLA,
- Health Service Executive,
- any other State entities,
- or any relevant person as the Sole Member may deem necessary to carry out his work relevant to the matters set out in [a], [b], [c], [d], [e] and [f] above.

[i] To examine all records relating to the telecommunications interactions used by Superintendent Taylor, former Commissioner Callinan and Commissioner O'Sullivan, in the period from the 1<sup>st</sup> of July, 2012, to the 31<sup>st</sup> of May, 2014, to ascertain whether there are any records of text messages or other telecommunication interactions relating to the matters set out at [a], [b], [c], [d], [e] and [f] above and to examine and consider the content of any such text messages or other telecommunication interactions.

[j] To examine all electronic and paper files, relating to Sergeant Maurice McCabe held by An Garda Síochána and to consider any material therein relevant to [a], [b], [c], [d], [e] and [f] above.

[k] To investigate whether Commissioner O'Sullivan, using briefing material prepared in Garda Headquarters, influenced or attempted to influence broadcasts on RTE on the 9<sup>th</sup> of May, 2016, purporting to be a leaked account of the unpublished O'Higgins Commission Report, in which Sergeant McCabe was branded a liar and irresponsible.

[l] To investigate whether a meeting took place between former Commissioner Callinan and Deputy John McGuinness on the 24<sup>th</sup> of January, 2014 in the carpark of Bewley's Hotel, Newlands Cross, Co. Dublin and to examine and consider the circumstances which led to any such meeting, the purpose of such meeting and matters discussed at such meeting.

[m] To investigate such knowledge which Commissioner O’Sullivan had of the meeting referred to in [l] above.

[n] To investigate contacts between members of An Garda Síochána and TUSLA in relation to Garda Keith Harrison.

[o] To investigate any pattern of the creation, distribution and use by TUSLA of files containing allegations of criminal misconduct against members of An Garda Síochána who had made allegations of wrongdoing within An Garda Síochána and of the use knowingly by senior members of the Garda Síochána of these files to discredit members who had made such allegation.

[p] To consider any other complaints by a member of the Garda Síochána who has made a protected disclosure prior to 16<sup>th</sup> 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.

This chairman of the tribunal was never tasked with investigating term of reference [p] and that will be done by another judge. An explanation of the terms of reference appears on the tribunal website at [www.disclosuretribunal.ie](http://www.disclosuretribunal.ie) as of 12 May 2017.

### **Quotes, background, ranks and chronology**

In what follows, mistakes in grammar, punctuation and the use of capital letters and misspellings of proper names in documents quoted are neither corrected, nor are left uncorrected and followed by “(sic)”. The tribunal is not responsible for any illiteracy in quoted documents. It is the document itself which is important and is thus quoted as it was.

A basic chronology is set out in appendix 3 to this report. The chronology, like the ones relating to parts 1 and 2, is no more than a ready-reckoner, in this instance on dates and events related primarily to the Superintendent Taylor allegations. It does not form part of the report. None of the chronologies relating to any of the reports are in any way findings of fact by the tribunal. Further, such chronologies are based on the documents distributed by the tribunal prior to hearings, or in some cases during testimony. In contrast, this report is based on the hearings and the chronology of documented events is merely indicative and has not influenced the report. The other comments as to structure and approach in part 1 are also applicable here, as they are to the entirety of this four part volume.

It should also be noted that footnotes to this report reference the transcript as of the day of the hearing and not any particular section of the tribunal’s work; while references to documents by page number are to those particular to this section, unless otherwise marked.

Within the gardaí, people have ranks. The rank held at the time of an event is what is given here. If the rank has changed by the time an officer gives evidence, the rank at the time of testimony is given; thus Sergeant Saoirse O’Neill may become Superintendent Saoirse O’Neill on giving evidence. Where a person has retired, they are referred to in giving evidence by the last rank which they held.

Sergeant Maurice McCabe is referred to multiple times in this report. For simplicity’s sake, he is referenced by his name. He has specifically agreed to this.

## **Facts and tribunal jurisdiction and functions**

What has been written in prior reports, particularly part 1, as to the task of the tribunal in finding facts and what has been stated as to jurisdiction and the law governing tribunal functions does not require to be repeated here. Ideally, the reader should again read the entirety of the introduction to the HSE/TUSLA report, part 1. References in all of the reports are to the particular page numbers and transcripts for that section.

### **The Raidió Teilifís Éireann broadcasts of 9 May 2016**

Term of reference (k) requires the tribunal to:

investigate whether Commissioner O’Sullivan, using briefing material prepared in Garda Headquarters, influenced or attempted to influence broadcasts on RTÉ on the 9th of May, 2016, purporting to be a leaked account of the unpublished O’Higgins Commission Report, in which Sergeant McCabe was branded a liar and irresponsible.

The official report of the O’Higgins Commission was delivered to the Minister for Justice and Equality on 25 April 2016. While the report was not officially published until 11 May 2016, a series of broadcasts on the leaked report aired on RTÉ television and radio on 9 May 2016.

While not coming within the tribunal’s terms of reference, there was also discussion during the tribunal hearings about an article by Raidió Teilifís Éireann’s crime correspondent Paul Reynolds over two years prior to the O’Higgins report broadcasts. What was this? On 24 February 2014, an article appeared on the RTÉ website in relation to Maurice McCabe and the issue of cooperation with the investigation conducted by Assistant Commissioner John O’Mahoney into his complaints about the fixed charge penalty notice system:

The Garda Commissioner wrote to the whistleblower Sergeant Maurice McCabe fourteen months ago and told him to co-operate with the investigation into allegations that penalty points had been cancelled.

Martin Callinan issued a direction to the sergeant on the 14 December 2012 to co-operate with the investigation being carried out by the assistant commissioner John O’Mahony and directing him to bring any information or concerns he had to the inquiry team.

The Garda Síochána is a disciplined force and members are required to comply with directions issued by the Commissioner.

It’s understood that Sgt McCabe may have been on sick leave for a number of months from December 2012 and did not contact the assistant commissioner until April of 2013, by which time the investigation had been completed.<sup>357</sup>

Paul Reynolds told the tribunal that he had sight of the direction of 14 December 2012 and that it was on this basis that he wrote the above article, as his interpretation of the wording was that it constituted a direction from the Commissioner to Maurice McCabe to engage with the O’Mahoney investigation. Prior to its publication, he sought comment from Garda Headquarters and Maurice McCabe. He received comment from the gardaí but not from Maurice McCabe, who gave a response to ‘Prime Time’ ahead of that programme being broadcast that evening. Paul Reynolds then amended his article to incorporate Maurice McCabe’s response to ‘Prime Time’. His clearly stated position was that he had never been directed by the Commissioner to cooperate

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<sup>357</sup> Tribunal documents page 7381

with the O'Mahoney investigation, nor had he been contacted by the investigation team.<sup>358</sup>

Term of reference (k), however, requires the tribunal to consider broadcasts from two years later, again by journalist and broadcaster Paul Reynolds. On 9 May 2016, he appeared on both radio and television broadcasts on RTÉ. He appeared on radio broadcasts of Morning Ireland, the Morning Ireland 8am news bulletin and on RTÉ radio News at One. He appeared on television broadcasts on the RTÉ News at One, the Six One and the Nine O'clock News. The tribunal, having listened to all of these broadcasts, also played the relevant radio and television pieces on days 91 and 92 of the hearings. As to the specific wording of the terms of reference, it should be noted that the word 'lie' is said by Paul Reynolds in two of the broadcasts in relation to Maurice McCabe. The word 'irresponsible' is not used in any of the broadcasts.

The tribunal first turns to look at the central allegation in term of reference (k); that is of an improper influence of Commissioner O'Sullivan on the 9 May 2016 broadcasts on RTÉ radio and television. In Maurice McCabe's protected disclosure of 26 September 2016, he stated:

I am currently on work- related stress leave, due (i) to Garda Commissioner Noreen O'Sullivan's treatment of me, and (ii) false evidence produced at the O'Higgins Commission in an attempt to set me up, and (iii) to a disgraceful series of broadcasts on RTE on 9<sup>th</sup> May 2016 purporting to leak an account of the unpublished O'Higgins Commission Report in which I was branded as a liar and irresponsible.

I am now satisfied, on impeccable authority that those RTE broadcasts were planned and orchestrated by the Commissioner, Nóirín O'Sullivan, personally using briefing material prepared at Garda headquarters.<sup>359</sup>

In relation to this allegation, Maurice McCabe told the tribunal:

***Q. ... there was a broadcast on the 9th May 2016 by Paul Reynolds in relation to the Commission findings. ... what were your feelings when you heard that being broadcast?***

***A. I didn't like the broadcast. I thought it was one way. I thought it wasn't balanced. He was the only one that did an article of that description.***<sup>360</sup>

In relation to the "impeccable authority" referred to in his protected disclosure, Maurice McCabe identified John Barrett, Executive Director of Human Resources and People Development in An Garda Síochána, as the person who had told him that Commissioner O'Sullivan had influenced the RTÉ broadcasts of 9 May 2016. Maurice McCabe gave the following evidence:

***Q. You advised our investigators during the course of an interview ... you made an assertion that you believe that Nóirín O'Sullivan was behind the RTÉ broadcast on the 9th May concerning the O'Higgins Commission report. You claim that John Barrett told you that it would have come from block 1 at the front, Nóirín O'Sullivan's office?***

***A. Yes, that's correct. ...***

***Q. When did John Barrett say that to you?***

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<sup>358</sup> Transcript day 91 page 155-156

<sup>359</sup> Tribunal documents page 244

<sup>360</sup> Transcript day 59 page 149

*A. He told us that in our house, me and Lorraine were there when he told us. I would have the date in a diary, but it was -- well, it was obviously after this, after the broadcast. But he said, it would have come from block 1. ... I mean, after the broadcast, it affected us, we thought it was all one-sided, but, I mean, we didn't know anything of who suggested it and we only said in my statement, I only said in my statement exactly how I came to know about it.*<sup>361</sup>

John Barrett denied that he had said this, or any such thing, to Maurice McCabe. He met Maurice and Lorraine McCabe on 31 May 2016, just over three weeks after the broadcasts. They also met in August and October of 2016. Maurice McCabe identified the date of the meeting that he believed John Barrett had made this comment to him as being 23 August 2016.<sup>362</sup> There is no reference to such a comment by John Barrett in the minutes of any of these meetings.<sup>363</sup>

Here is what John Barrett said when questioned by Diarmaid McGuinness SC for the tribunal:

*Q: ... Now, can I just ask you to address the substance of this. Have you any information that the RTÉ broadcasts which the Tribunal has heard were planned and orchestrated by the Commissioner?*

*A. No, I don't. I don't have any such information.*

*Q. It is suggested that she did it personally, you have no knowledge of that?*

*A. No knowledge of that.*<sup>364</sup>

While John Barrett decided in his evidence to disavow the remark, the tribunal is satisfied that a comment to the effect that the 9 May 2016 broadcasts were influenced by “block 1” was made by John Barrett to Maurice and Lorraine McCabe at their meeting. Possibly John Barrett does not fully remember making the remark or how serious it was likely to sound in the febrile atmosphere of the time. Perhaps he was speaking casually, but if so, it was loose speech in the wrong context.

The tribunal now considers the broadcasts of 9 May 2016 and the evidence of Paul Reynolds. The reference to Maurice McCabe telling a “lie” in an official report occurred in the reports by Paul Reynolds on the Morning Ireland radio programme and on the one o'clock television news. This related to a passage in the O'Higgins Commission report which said that Maurice McCabe had told an “untruth” in a report to a superior officer:

In a report of 3<sup>rd</sup> March 2008, Sergeant McCabe informed Superintendent Clancy of the complaints which had been made to him by Mr. and Mrs. R. He reported that a complaint had been made to GSOC although he was aware that this was not the case. He told the commission that the reason for this untruth was that he felt Mr. and Mrs. R had been badly treated and that he knew that the reference to GSOC would ensure that the matter would receive attention. While his concern was genuine and commendable it is unacceptable to furnish false information in a report.<sup>365</sup>

On Morning Ireland, Paul Reynolds discussed the eight criminal investigations examined by the O'Higgins Commission. The allegations of Maurice McCabe in respect of some of the

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<sup>361</sup> Transcript day 59 pages 150-151

<sup>362</sup> Transcript day 93 page 213

<sup>363</sup> Transcript day 93 page 207

<sup>364</sup> Transcript day 93 page 205

<sup>365</sup> O'Higgins Commission report paragraph 10.86

investigations were set out and questions were posed as to the findings of the O'Higgins Commission in respect of Maurice McCabe's complaints. Paul Reynolds said as follows:

Also, while on the one hand the commission says Sergeant McCabe was quote "never less than truthful in his evidence" that he gave to the commission, it also says that he lied during this case, or as the commission puts it quote "told this untruth" in a report to a senior officer. On the 3rd of March 2008 the commission report says, the sergeant reported that "a complaint had been made to GSOC", end quote when he knew, the commission says, he was quote "aware" that this was not the case. He told the commission that the reason for the untruth was that he felt the victim and his wife had been badly treated and that he knew the reference to GSOC would ensure the matter would receive attention. Quote "while his concern was genuine and commendable", the commission said, it was unacceptable to furnish false information in a report.

Ultimately, in this broadcast, when asked about the conclusions of the report in relation to policing in Bailieboro, Paul Reynolds said:

Well this is the real issue. The report identifies probationer gardaí as being the lead investigators in seven out of eight of the poorly conducted garda investigations and stresses that probationer gardaí because they're at the early stages of their careers are in need of constant supervision and management. I mean in some garda units at the time in Bailieboro, there were as many as five probationers on one unit alone. Now the report says, quote "it would be wrong to regard the investigations examined and criticised by the commission as indicative of the general quality of investigations in Bailieboro. To do so would be unfair to the gardaí in that district who have worked under the shadow of these allegations for many years."

It also says that although this report is critical of individual gardaí in specific investigations it would be unfair to regard these criticisms as applicable to the quality of their work in general or to consider their actions criticised as typical of their performance and that includes Sergeant Maurice McCabe.

But it also points out that a business case had been made in September of 2006 for a garda inspector to be appointed to Bailieboro but this was not done until two years later, by which time, all these crimes and deficient investigations had occurred. The commission concludes that all these problems quote "would not have occurred or would have been rectified if an inspector had been appointed to Bailieboro." It's very probable, it says, that these matters would have been rectified. Now the report in relation to Sergeant McCabe says that he acted out of genuine and legitimate concern, he was a dedicated and committed member of the gardaí, prone to exaggeration, and while some of his complaints were upheld, others were proven to be overstated, exaggerated, unfounded and ultimately they were withdrawn.

In the 8am radio news bulletin, Paul Reynolds said:

A commission was established by the Government after serious allegations by Sergeant Maurice McCabe of garda corruption and malpractice were raised in the Dáil by Micheál Martin and others. The report by Mr Justice Kevin O'Higgins, a copy of which has been seen by RTÉ news, has found there were problems with garda management and resources at many levels but no evidence of garda corruption. It identified serious failings in eight criminal investigations including assaults, dangerous driving, child abuse and in the case of Jerry McGrath, who subsequently committed murder while out on bail. These investigations were led by junior, inexperienced or probationer gardaí and the commission

said the failures were at a human level, caused by poor individual performance and in many cases by poor supervision. The investigations were characterised by errors and delays and the report found that victims of crime were not well served by garda or GSOC investigations.

It also concluded that much of what happened could have been avoided or resolved if a garda inspector had been appointed to Bailieboro garda station. The commission found that Sergeant McCabe acted out of genuine and legitimate concerns. It upheld some of his complaints, but found others were, quote, “inaccurate, incorrect, overstated and unfounded.” The commission’s report was delivered to the Justice Minister Frances Fitzgerald two weeks ago. She says it’s being studied by the Attorney General, but the delay in publishing it has been strongly criticised by the former Minister, Alan Shatter.

On the radio news at one, Paul Reynolds said:

[Maurice McCabe] acted out of genuine and legitimate concerns, that he also showed courage and performed a public service at considerable personal cost, and the commission believes he’s due the gratitude of the general public and also An Garda Síochána. And it does say he was a dedicated and committed member of the gardaí but prone to exaggeration. And while some of his complaints were upheld, and we did outline those complaints which, where he was upheld and where his work was praised on Morning Ireland, there were also other cases that were proven to be overstated, exaggerated, unfounded and that were ultimately withdrawn at the commission. ... the commission says that Sergeant McCabe accused the former garda Commissioner of corruption.

The report also says it is submitted on behalf of Sergeant McCabe that he didn’t intend to make allegations of corruption. Sergeant McCabe told the commission he was quote, “guarded in his complaints against the commissioner” but the report says quote, “this does not alter the fact that a complaint of corruption existed.” It also says quote, “he did not withdraw the allegation against the commissioner, despite being invited to do so.” But it says that the former commissioner quote, is “vindicated.”

This broadcast also discussed allegations made by Maurice McCabe against other senior officers and the findings of the O’Higgins report in relation to Alan Shatter. Flaws in criminal investigations detailed in the O’Higgins report were also briefly discussed.

On television, Paul Reynolds appeared on three RTÉ news programmes on 9 May 2016 to discuss the findings of the O’Higgins report. On the News at One, the broadcast began as follows:

John Finnerty: A report has found serious flaws and failures in criminal investigations in the Cavan/Monaghan Garda Division in 2007 and 2008 but the report has found no evidence of garda corruption. The commission was established following complaints made by the garda whistleblower Maurice McCabe. It found Sergeant McCabe acted out of genuine and legitimate concerns but it found some complaints were inaccurate and overstated.

Paul Reynolds: It was the allegations of Sergeant Maurice McCabe, of corruption and malpractice in the Garda Síochána, that threatened public confidence in the police service. These led to the establishment of the O’Higgins commission.

Its report, seen by RTE news, has found there were problems with garda management and resources at many levels but no evidence of garda criminality or corruption. It identified serious failings in eight criminal investigations from Bailieboro garda station. These included assaults, dangerous driving and child abuse. The most serious began with what

the report called “a savage attack” on taxi driver Mary Lynch by Jerry McGrath, who was only charged with a minor assault. This was strongly criticised by the report. While on bail for that, McGrath first abducted a five-year-old child but was given bail again and then went on to murder Sylvia Roche Kelly. The commission found the investigations were led by junior, inexperienced or probationer gardaí, and the commission said the failures were at a human level, caused by poor individual performance and in many cases by poor supervision. The investigations were characterised by errors and delays and the report found that victims of crime were not well served by garda or GSOC investigations.

On Sergeant Maurice McCabe, the commission says, he acted out of genuine and legitimate concerns and is a dedicated and committed member of the gardaí. It also said he was prone to exaggeration and while some of his complaints were upheld, others were found to be overstated, exaggerated, unfound[ed], and were withdrawn.

On the former garda commissioner, the report says “it must be stated, clearly and [un]ambiguously there is not a scintilla of evidence to support an allegation of any type of corruption against the former commissioner” and that Martin Callinan was entitled to have his reputation vindicated. The commission also found the former Minister for Justice Alan Shatter’s actions were entirely reasonable and appropriate, and that he took the allegations of garda whistleblowers very seriously.

The report also concluded that much of what happened could have been avoided or resolved if a garda inspector had been appointed to Bailieboro garda station.

This piece was also used in the Six One and Nine O’clock News packages. Further, on the one o’clock news, Paul Reynolds was in studio and said:

Sergeant Maurice McCabe is described in this report as the central figure in this investigation and it says that he acted out of genuine and legitimate concerns, he showed courage, he performed a public service at considerable personal cost and that he is due the gratitude of the general public and the Garda Síochána. It does also say that while some of his complaints were upheld, others were found to be exaggerated, overstated and were withdrawn. And it also said while the sergeant was never less than truthful in his evidence to the commission, it did highlight a number of incidents, including cases where he wrongly claimed that a minor assault was a rape, he alleged there had been an attempt to poison a father and son when there was no evidence to support this, the commission found, and also the commission says that he lied in a report to a senior officer.

Paul Reynolds appeared on the Nine O’Clock News with Eileen Dunne to discuss the report:

Eileen Dunne: And our crime correspondent Paul Reynolds joins us now in studio. Paul, what are we to make of it all? Yes, there were failures, yes there were flaws, but no corruption.

Paul Reynolds: Well, I mean if you look at the report there’s over 350 pages in it, everybody’s a winner and everybody’s a loser, and everybody will take from the report what they will. The reality is, however, that the former Garda Commissioner Martin Callinan, the former Minister for Justice Alan Shatter and the former garda confidential recipient Oliver Connolly all lost their jobs. However, they have been vindicated and their reputations have been restored. In the case of Maurice McCabe, he...his actions have also been vindicated, in that his courage has been applauded, and he has done the public some service, according to the commission’s report. And while he has been criticised in that report, and sometimes severely criticised in the report, the commission describes him as a

dedicated and committed garda, and he is still serving in the Garda Síochána today. And although much of what he highlighted had already been identified in the Byrne/McGinn report which was carried out by Assistant Commissioner Derek Byrne and Chief Superintendent Terry McGinn, files had been sent to the DPP as a result of that report. No criminality was identified, no prosecutions took place, but the gardaí involved in those flawed and failed investigations were disciplined. However, that was a garda, an internal garda report. It wasn't published, the public weren't privy to what was in it and it's the actions of Maurice McCabe that has led to this information coming out today. And if he hadn't taken the approach and done what he had done we wouldn't know what we do know today about the failings in Bailieboro.

In giving evidence before the tribunal, Paul Reynolds said that all of the information in the broadcasts came from the leaked O'Higgins report itself.<sup>366</sup> He said that he also "spoke to a number of people as well and I got various information, but the only information that I put in the public domain and the only information I published was based specifically and directly on the contents of the O'Higgins Commission report."<sup>367</sup> Paul Reynolds explained his approach as follows:

*[T]he reports were put through the full rigours of the RTÉ editorial process, and they went right up to the top, to the acting Director General at the time, Kevin Bakhurst, so they went right up to the top and went back down and as you can see there was a developmental process where they started at one stage and then other information was put in and they were -- whatever was published was published on the basis of it being newsworthy. And I took an approach to it when I got the report that specifically, for example, what are we looking at here? So for example, in relation to the eight criminal investigations which were identified to have serious flaws and serious failings, I said well what actually happened here? That was the first -- and look at those and say well, what happened? And then we had the second -- my second point on that was, well okay, we'll tell people what circumstances were of each of those investigations. Then we'll have to tell people what the Commission found. And then Sergeant Maurice McCabe was identified in the report as the central figure, so his role or any comment or criticism or compliment that the Commission had paid to him in relation to each of those investigations also had to be examined. They were the factors that I felt were very important. And nobody before had looked at the failings and the flaws in the criminal investigations. I also thought the issue of Garda corruption was a huge issue, there was an allegation made against the highest ranking officer in the State, that the Garda Commissioner was corrupt, not only was the Garda Commissioner corrupt but there was four other senior officers who were also corrupt. And we had to look at this and see what this true; did we have a corrupt police force? And that is what the Commission was set up to investigate. I identified those factors and I felt they were also newsworthy as well. A number of people had lost their jobs, the former Garda Commissioner, the Minister for Justice, the confidential recipient, there was dossiers that had been supplied to the Fianna Fáil leader Micheál Martin which included claims that murders hadn't been properly investigated and there was a dossier supplied to the Taoiseach, and these were very, very serious matters and we had to look and see what Mr. Justice Kevin O'Higgins had found in relation to*

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<sup>366</sup> Transcript day 92 pages 8-9

<sup>367</sup> Transcript day 92 page 11

*these. So all these factors, I thought that these were all hugely important issues in the public interest, that we had to explain to people, and publish.*<sup>368</sup>

Paul Reynolds denied that there had been any influence from Garda Headquarters or Commissioner O'Sullivan over the broadcasts. He said:

*Well, first of all, I don't think Garda Headquarters knew what I was doing. I think the first they heard of it was when they heard it on the news that morning. And I have heard evidence given to this Tribunal that Garda Headquarters, and particularly Commissioner O'Sullivan, was very unhappy with the report, that she didn't like the reports. So the fact is that Garda Headquarters had absolutely no influence over me. And I wasn't -- I wasn't working alone; whatever I was preparing was being seen by my news editor, by the programme editors who were responsible for the broadcasts for each individual programme. So, there was a different editor for Morning Ireland who looked at the material there, there was a different editor for the radio News at One who looked at that material, there was a different editor online who looked at the material before it was put online, there is a different programme editor for the one o'clock television news, the six o'clock television news and the nine o'clock television news. There is a chief news editor who I was corresponding with all week and all weekend in relation to this, and as I said, there was the managing editor of news above him and then there was the acting director general. So all of the material that I was putting in was being scrutinised and was coming back to me, so it wasn't my viewpoint; it was the O'Higgins Commission report's findings.*<sup>369</sup>

Commissioner Nóirín O'Sullivan also told the tribunal that she “never sought to influence RTÉ in relation to their coverage of anything at all, but specifically in relation to the O'Higgins Report, not at all, and I have no idea how anybody would come to that conclusion.”<sup>370</sup>

Paul Reynolds told the tribunal that as the serious allegations made by Maurice McCabe against senior officers had not been upheld by the O'Higgins Commission, while those in relation to individual criminal investigations had been upheld, he and his editors were “were conscious of being seen to be biased, where we had to be balanced, we had to be fair, we had to get the tone right, we had to make sure that everything we put on air had to be straight from the Commission's report.”<sup>371</sup>

In relation to the use of the word “lie” in two of the broadcasts, Paul Reynolds said in evidence:

*Well, I mean, we noticed that, we -- I saw that in the report. Chapter 10.86, I knew it would be controversial because it's a big step to accuse somebody of telling a lie. I hadn't accused Sergeant McCabe of telling a lie; Mr. Justice Kevin O'Higgins said that he'd told a lie. I read that a number of times. I read it that Sergeant McCabe had told an untruth -- the report said that Sergeant McCabe had told an untruth, that he was aware it was an untruth, that he had told it for a specific reason and that the report found -- Mr. Justice Kevin O'Higgins found that this was unacceptable. And the word used in the report was "untruth". But because of those four factors I said that is a lie, and I said it to Ray Burke and he agreed it*

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<sup>368</sup> Transcript day 92 from page 13

<sup>369</sup> Transcript day 92 pages 15-16

<sup>370</sup> Transcript day 81 page 93

<sup>371</sup> Transcript day 92 page 34

*was a lie and it went up the RTÉ editorial chain. I have an old Collins dictionary on my desk at home, I took it out and looked up the word "untruth" and the first word that came up was "lie". I thought back to my catechism when I was in first class when it said no lie is either lawful or innocent and I thought, if we have any responsibility, we have to tell people what is in the report. And I know this is unpalatable, but, as I said, I talked to Ray Burke about it and it went right up to Kevin Bakhurst and right through the editorial chain and it was decided that yes, we had to say that this was -- this was a lie and that a lie was told. I made very sure that we put it in the context that we also reported the finding that Mr. Justice Kevin O'Higgins said that Sergeant McCabe was nothing less than truthful in his evidence to the Commission, and I stressed that as well, but in this particular case he had told an untruth for a specific reason, it was found to be unacceptable and that was a lie. And I felt we had a responsibility to say that and we said it.*<sup>372</sup>

Much of the questioning of Paul Reynolds at the tribunal related to the reference to Maurice McCabe being directed to cooperate with the O'Mahoney inquiry, and while an inference was floated by implication that this and the tone of the broadcasts of 9 May 2016 showed a continual influence on RTÉ by Garda Headquarters, the tribunal does not accept that. This is a matter of opinion only, not something from which a negative inference could be taken. With the same material, perhaps another broadcaster would have concentrated more on how bad policing investigations were in Cavan/Monaghan, perhaps not. Perhaps the story might have been more about the issues and not about the personality of Maurice McCabe, perhaps not. That is not the point. On which would be better or not, the tribunal does not comment.

The tribunal accepts the evidence of Paul Reynolds that no one in Garda Headquarters was influencing his broadcasts. He gave honest evidence to the tribunal and he was entitled to his view on the O'Higgins Commission upon his examination of a leaked copy of the report.

### **Superintendent David Taylor**

According to the various documents in the possession of the tribunal, David Taylor was born in 1962 and joined the gardaí at the age of 19 in 1982. He was promoted to sergeant in 1997. From 2002 he served with the Special Detective Unit, moving two years later as an inspector to internal affairs, and then in 2008 as a detective inspector to Garda Headquarters where he dealt with liaison and protection. He was promoted to the rank of superintendent in 2012 and allocated to the Garda Press Office.

In December 2010, Martin Callinan was appointed Garda Commissioner. He had first joined the gardaí in 1973. Nóirín O'Sullivan, who succeeded him as Garda Commissioner, having served under him as Deputy Commissioner, joined the gardaí in 1981. Martin Callinan retired from his role as Garda Commissioner on 24 March 2014. Nóirín O'Sullivan was then appointed as acting interim commissioner, and then as Commissioner on 25 November 2014, resigning from that post on 10 September 2017 amid the whirl of controversy surrounding mainly these issues.

It is an utter mystery as to why Commissioner Martin Callinan could have decided to choose Superintendent David Taylor as his press officer. Both of them have given explanations for this decision: that David Taylor was talented, experienced, articulate and so on.<sup>373</sup> He is not. All of this is just plain untrue.

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<sup>372</sup> Transcript day 92 from page 44

<sup>373</sup> Transcript day 78 pages 28-29

Under Commissioner Callinan, Superintendent David Taylor served as Garda Press Officer from 1 July 2012 to 31 May 2014, but actually leaving the office on 10 June 2014. Almost immediately after Nóirín O'Sullivan's appointment as acting interim commissioner, Superintendent Taylor was moved to become superintendent in the traffic corps, based in Dublin Castle. He was not promoted to chief superintendent. He was not at all happy. Having been a constant sidekick of the Garda Commissioner and constantly in and out of his office, under Commissioner Nóirín O'Sullivan he, maybe, visited that office perfunctorily once.

Disturbingly, he remained in touch with the Garda Press Office after his departure, asking to be put on the list of persons entitled to the daily reports of serious incidents. The new head of the press office eventually put a stop to this. He was absolutely right.

### **Garda leaks and Superintendent Taylor**

Shortly after he left the Garda Press Office, a suspicion of a criminal offence arose against Superintendent David Taylor. This resulted from an investigation conducted as to leaks to the media at a time when he held the media liaison job and when he had moved to the traffic corps. Through 2014, the gardaí were concerned as to the source of information which was appearing in the media concerning ongoing investigations into highly sensitive criminal matters. A garda criminal investigation commenced in August 2014, following a special inquiry conducted by Emily Logan, the Ombudsman for Children, under section 42 of the Garda Síochána Act 2005. The Logan report had examined a highly publicised case involving a Roma child in Dublin. Details of the taking of that child and the name of the child's parents had somehow been leaked to the media.

Assistant Commissioner John Twomey, rightly, in consequence of the clearest possible breach of standards, assigned Chief Superintendent Francis Clerkin to conduct an investigation of potential criminal offences or any breaches of discipline arising from Emily Logan's report. The investigation team included Detective Superintendent James McGowan. As it happens, he is married to Commissioner Nóirín O'Sullivan. The investigation team under Chief Superintendent Clerkin conducted an investigation that, in thoroughness, in intelligence and in determination to get to the bottom of a series of damaging leaks from garda sources, was first class. There was very strong reason to suspect Superintendent David Taylor for the leaks in relation to the Roma case. Further, and during the course of the investigation, focus having been directed to inappropriate material appearing in newspapers with a clear origin in those few who knew about garda investigations, attention was rightly directed at him. There were many such cases. Superintendent Taylor attests to having no insight that he was doing anything wrong. He saw no reason why private matters should not be made public. He also demonstrated no appreciation that certain police investigations need to keep certain facts from becoming public. There are very good reasons for this: to protect the integrity of investigations; not to forewarn perpetrators as to methods or progress; and to ensure the reliability of confession statements.

In the course of the Clerkin investigation, on 18 December 2014, Superintendent Taylor voluntarily handed his mobile phone to Detective Superintendent McGowan. A search warrant was in the possession of Chief Superintendent Clerkin but this was not executed as a result of Superintendent Taylor surrendering his mobile phone on request. A very thorough analysis of this mobile phone was carried out by Sergeant Niall Duffy. A scrutiny of Superintendent Taylor's official garda email was also carried out for the relevant time period. Both analyses clearly and unambiguously identified contacts with journalists in relation to criminal investigations that might interest the media but which Superintendent Taylor had no legitimate reason to interest himself in.

On 23 January 2015, Inspector David Gallagher obtained and executed a warrant which gave him access to Superintendent Taylor's personal email account. Only a small number of emails remained: there was a pattern of immediate deletion. Those emails that remained were of no value to the particular investigation. There was also a pattern of Superintendent Taylor deleting text messages on his phone on a systematic basis. On 16 February 2015, Chief Superintendent PV Murphy was appointed as investigating officer under the Garda Síochána (Discipline) Regulations 2007 to investigate alleged breaches of discipline against Superintendent Taylor.

On 18 February 2015, Chief Superintendent Clerkin obtained a search warrant to search the office of Superintendent Taylor for his official garda mobile phone and laptop computer. On 19 February 2015, Chief Superintendent Clerkin executed this search warrant and seized Superintendent Taylor's mobile phone and laptop computer. An examination of the mobile phone was carried out by Sergeant Duffy. It was asserted on both reasonable and very strong grounds in the later garda report that this examination found contact between Superintendent Taylor and a number of journalists at a time, consistent with a pattern which raised strong suspicions against him in relation to the leaking of sensitive information about ongoing garda investigations, or which heedlessly put what ought normally to be private information about crime victims into the public domain. On 21 June 2015, Detective Sergeant John Finan carried out an examination of Superintendent Taylor's official garda laptop computer.

In consequence of information relating to the leaks, Superintendent Taylor was arrested on 28 May 2015 by Chief Superintendent Clerkin for offences contrary to section 62 of the Garda Síochána Act 2005 and suspended from duty on that day. He was more than bitter over this.

Section 62 of the 2005 Act reads:

- (1) A person who is or was a member of the Garda Síochána or of its civilian staff or who is or was engaged under contract or other arrangement to work with or for the Garda Síochána shall not disclose, in or outside the State, any information obtained in the course of carrying out duties of that person's office, employment, contract or other arrangement if the person knows the disclosure of that information is likely to have a harmful effect.
- (2) For the purpose of this section, the disclosure of information referred to in subsection (1) does not have a harmful effect unless it—
  - (a) facilitates the commission of an offence,
  - (b) prejudices the safekeeping of a person in legal custody,
  - (c) impedes the prevention, detection or investigation of an offence,
  - (d) impedes the apprehension or prosecution of a suspected offender,
  - (e) prejudices the security of any system of communication of the Garda Síochána,
  - (f) results in the identification of a person—
    - (i) who is a witness in a criminal proceeding or who has given information in confidence to a member of the Garda Síochána, and
    - (ii) whose identity is not at the time of the disclosure a matter of public knowledge,
  - (g) results in the publication of information that—
    - (i) relates to a person who is a witness to or a victim of an offence, and
    - (ii) is of such a nature that its publication would be likely to discourage the person to whom the information relates or any other person from giving evidence or reporting an offence,
  - (h) results in the publication of personal information and constitutes an unwarranted and

serious infringement of a person's right to privacy,

- (i) reveals information provided in confidence by another state, an international organisation, another police service or an intelligence service, or
- (j) affects adversely the international relations or interests abroad of the State, including those with Northern Ireland.

(3) For the purpose of this section, a person is presumed, unless the contrary is proved, to know that disclosure of information referred to in subsection (1) is likely to have a harmful effect if a reasonable person would, in all the circumstances, be aware that its disclosure could have that effect.

(4) Subsection (1) does not prohibit a person from disclosing information referred to in that subsection if the disclosure [is made to specified State bodies]

(5) A person who contravenes subsection (1) is guilty of an offence and is liable—

- (a) on summary conviction, to a fine not exceeding €3,000 or imprisonment for a term not exceeding 12 months or both, or
- (b) on conviction on indictment, to a fine not exceeding €50,000 or imprisonment for a term not exceeding 5 years or both.

(6) A person who contravenes subsection (1) and who receives any gift, consideration or advantage as an inducement to disclose the information to which the contravention relates or as a reward for, or otherwise on account of, the disclosure of that information is guilty of an offence and is liable—

- (a) on summary conviction, to a fine not exceeding €3,000 or imprisonment for a term not exceeding 12 months or both, or
- (b) on conviction on indictment, to a fine not exceeding €75,000 or imprisonment for a term not exceeding 7 years or both.

(7) The provisions of this section are in addition to, and not in substitution for, the provisions of the Official Secrets Act 1963.

(8) In this section “personal information” has the meaning given to it by section 2(1) of the Freedom of Information Act 1997 and includes personal information relating to a deceased individual.

On 4 August 2015, a file on the investigation into Superintendent Taylor on suspicion of the commission of offences arising out of the foregoing section was submitted to the Director of Public Prosecutions. In it, Chief Superintendent Clerkin recommended prosecution for section 62 offences on the stated basis of the “serious potential prejudice and harm” that could be caused by the release of information by Superintendent Taylor to the media, “not to underestimate the harm to an investigation caused by deterring potential witnesses from coming forward as a result of information published in articles.”<sup>374</sup>

This summary of the section 62 investigation is provided in order to set out the bald facts. There was also another investigation, but no mention needs to be made of same.

On 17 February 2016, the Director of Public Prosecutions ruled that there should be no prosecution on the basis that even in cases where there may be a potentially provable “electronic

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<sup>374</sup> Tribunal documents pages 2324-2325

trail” of information being disclosed, “it is impossible to establish the “harm” requirement of section 62”. The Director of Public Prosecutions concluded, “[w]hile highly suspicious, I do not think that it is possible to prove beyond reasonable doubt that the suspect disclosed confidential information.”<sup>375</sup>

In February 2016, Superintendent David Taylor took a judicial review of disciplinary proceedings commenced against him in respect of this matter. In it, he swore an affidavit that was almost entirely made up of nothing but lies. The matter did not reach a full hearing in the High Court as the application for judicial review was not heard. In reality, Superintendent Taylor did not pursue it because, through it and through his other manoeuvres, he had got what he wanted. On 14 February 2017, Superintendent Taylor resumed his duties in Dublin Castle. The criminal charges had been dropped. Disciplinary proceedings against Superintendent Taylor were discontinued for some unexplained reason by Garda Headquarters in February 2018.<sup>376</sup> As to the terms on which the High Court proceedings were discontinued and as to the reason why the disciplinary proceedings were dropped, the tribunal specifically asked for information. That was not forthcoming.

The only point which the tribunal considers it necessary to make on this is that this inescapably demonstrates what Mr Justice Frederick Morris said in the reports of the Morris Tribunal: the system of garda discipline is not fit for purpose. Turning an internal matter of who should or should not continue to be a policeman or policewoman into a complex series of steps, susceptible at every stage to judicial review and attendant delay, that ends in what is in effect a full criminal trial conducted internally with An Garda Síochána has been a disaster for the country.

Notwithstanding having admitted leaking information wholesale in breach of garda discipline, with the exception of the Roma child case which he contests,<sup>377</sup> and notwithstanding that he presented a false affidavit to the High Court, Superintendent David Taylor continues as of writing this to be superintendent in the traffic division for Dublin.

The report in relation to Garda Keith Harrison might also be read as it might similarly illuminate a point or two.

### **The allegations are made**

During the time when he was under investigation and during his suspension from duty, Superintendent David Taylor made a protected disclosure alleging that while he was Garda Press Officer, he had been tasked by Commissioner Callinan, with the express acquiescence of Deputy Commissioner O’Sullivan, with traducing the character of Maurice McCabe through spreading allegations against him of child sexual abuse to the media in order to further the idea that he was not to be trusted and was driven by bitterness against An Garda Síochána.

That revelation was first made in a private meeting with Maurice McCabe at Superintendent Taylor’s residence on 20 September 2016. The meeting is said to have lasted between three hours<sup>378</sup> and four and a half hours.<sup>379</sup> There was a second brief meeting on 21 September 2016. This is a very important meeting because of a particular confirmation made to Maurice McCabe at it. In consequence, ahead of Superintendent Taylor’s protected disclosure, in his own protected disclosure of 26 September 2016, Maurice McCabe reported what he remembered of that meeting.

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<sup>375</sup> Tribunal documents page 2577

<sup>376</sup> Transcript day 70 page 104

<sup>377</sup> Transcript day 77 from page 92

<sup>378</sup> Tribunal documents page 245

<sup>379</sup> Michael Clifford, *A Force For Justice*, page 323

A protected disclosure, differing in one particularly important respect, was then made by Superintendent Taylor on 30 September 2016.

### **Events leading up to the David Taylor allegations**

As will be appreciated, and here the various chronologies refer, although the O'Higgins Commission was sitting up to 17 December 2015, the astonishing letter from TUSLA of 29 December 2015, claiming that Maurice McCabe had committed a rape offence, had not been received by him until early in 2016. This reignited everything to do with false accusations of sexual abuse in the mind of Maurice McCabe. He was aware that rumours about him in that context were swirling around. The full extent of this he was, however, oblivious to. Here was an allegation from TUSLA, which no one had ever made, now being laid literally on his doorstep.

Events that year proceeded. The O'Higgins Commission report was published on 11 May 2016. It vindicated the stance taken by Maurice McCabe on several criminal investigations in the Cavan/Monaghan Division and on the PULSE controversy relating to the proper completion of entries on that system. But, since social services had not then explained how a word processing error, and astonishing subsequent incompetence, failure to read files and sheer indolence, had led to the letter, the entire issue as to false allegations of sexual abuse remained to be investigated. The TUSLA issue, since it only came to light publicly in February 2017, was never one of the terms of reference of the O'Higgins Commission.

### **Revelation in Dáil Éireann**

On 26 May 2016, John McGuinness TD made a contribution to a debate in Dáil Éireann. This speech concerned events surrounding a crucial fulcrum of the tribunal's inquiries: the Public Accounts Committee hearings in January of 2014 into the misuse of fixed charge penalty notices in consequence of revelations by Maurice McCabe and another concerned garda. Since loss of revenue to the State was involved, that particular branch of the Oireachtas had jurisdiction. The hearings were scheduled for January 2014 and the committee intended to hear from Maurice McCabe. However, Maurice McCabe was a sergeant and thus under command of the Garda Commissioner, who was more than unhappy with the notion of any serving garda giving evidence to that committee. That, nonetheless, was the committee's plan. Commissioner Callinan was disquieted.

Deputy McGuinness told Dáil Éireann that he had met Commissioner Callinan in the carpark of Bewley's Hotel in west Dublin around the time of the Public Accounts Committee inquiry into this issue in January 2014, and that unpleasant allegations had there been made to him by the commissioner against Maurice McCabe. Here is part of what he said:

Every effort was made by those within the Garda Síochána at senior level to discredit [Sergeant] McCabe, including the outgoing Garda Commissioner who confided to me in a car park on the Naas Road that he was not to be trusted and there were serious issues in relation to [Sergeant] McCabe. The vile stories that circulated about [Sergeant] McCabe, which were promoted by senior officers in the Garda, were absolutely appalling. Because they attempted to discredit him, he had to bring forward various pieces of strong, firm evidence to protect his integrity. During the course of that time, we have to recognise that the political establishment was of absolutely no help to him. Every effort was made to ensure he would not appear before the Committee of Public Accounts. Every effort was made to dampen down the strong evidence he put into the public domain, which he had

to do to protect himself, but also to inform us about what was going on with penalty points and other issues.<sup>380</sup>

### **Maurice McCabe makes inquiries**

In late May 2016, Deputy McGuinness, in his role as a public representative, met Maurice McCabe and told him of the encounter.<sup>381</sup> In consequence of that, Maurice McCabe made further inquiries in relation to the possible undermining of his character within the gardaí. Maurice McCabe described to the tribunal how he first heard in the summer of 2016 that Superintendent David Taylor might know something of a campaign of vilification against him. Examined by Patrick Marrinan SC for the tribunal, here is his testimony:

***Q. And how did you first come into contact with [Superintendent Taylor] and think that he had -- maybe had something to say in relation to your position? ...***

***A. I made contact with Mrs. [Michelle] Taylor. What happened was, there was an article in the Irish Examiner, so Mick Clifford had done an article and he had mentioned something in relation to Superintendent Taylor, and he rang me after the article to say that Mr. Taylor – or Superintendent Taylor had been on to him. So I asked him if I could get his phone number, and he said, yeah, that's no problem and –***

***Q. Why were you looking for his phone number or why were you anxious to make contact with him?***

***A. Well, he was the press secretary, and I was going to go all out to find out what was happening to me. I wanted to know everything and I thought that he would know something ... I rang Superintendent Taylor and he answered the phone and I told him who I was, and he says I can't talk to you at the moment, I'll talk to you in the morning ... This was in July or August [2016]. ... So I didn't get a phone call off him in the morning time, so I let it lie. I knew he wasn't going to ring me. But I got a phone call in the afternoon in relation to Mrs. Taylor ... And, Mr. Chairman, I asked her if she wanted to meet and she agreed to meet me. ... I wanted to find out if they knew or if Superintendent Taylor knew of what was going around about me and all these rumours. ... And I was going all out to find out who is starting these rumours. I owed it to myself, I owed it to my family. ... She rang me ... and I met her in the Skylon Hotel, probably a week later. We had a coffee, we chatted about children, various things in relation to my job and her job. But I did ask her had she heard any rumours in relation to me. ... and she said no, she hadn't.<sup>382</sup>***

Maurice McCabe then recounted to Patrick Marrinan SC a second meeting with Michelle Taylor, which he said took place about a week after the first meeting:

***Q. And who made contact with who on this occasion?***

***A. I think I made contact with her.***

***Q. Why?***

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<sup>380</sup> Tribunal documents pages 1416-1417

<sup>381</sup> Transcript day 59 from page 156 and day 62 from page 85

<sup>382</sup> Transcript day 59 from page 163

*A. Just because I'd seen her before and I said I'd have another go and another go and another go.*

*Q. And did you think that she might have some information to give you?*

*A. I knew there was something there, but she completely said no, she completely said no. I knew there was something there.*

*Q. And yet even though she told you on the previous occasion that she had nothing to offer, she hadn't heard anything in relation to you at all, she agreed to meet you a second time?*

*A. Yeah, she did, yeah.*

*Q. Did you not find that a little bit odd?*

*A. No, I didn't.*

*Q. Okay. So you went and met her. Did you meet her in the same hotel?*

*A. I did, I met her in the same hotel, only for about ten minutes.*

*Q. And what did she say to you on that occasion?*

*A. Nothing. It was just ordinary chat, but about family and Dave [Taylor] is still off and he's still under investigation, but there was nothing else at all.<sup>383</sup>*

Michelle Taylor gave the following evidence to the tribunal about the first two meetings with Maurice McCabe:

*Sergeant McCabe had contacted, had rang Dave [Taylor around April or May 2016] and we had visitors in the house and Dave [Taylor] came out when they had gone and he said Maurice McCabe is after ringing me. And I went, wow. It was kind of a bit of a shock. And I said, what did you say? And he said, I told him that I'd call him back. I said, okay, are you going to call him back? He said, I don't know. So the next day I said, are you going to call Maurice McCabe back? And he said, I don't think so. And I said, I think it would be kind of rude if you didn't. I said, I believe he's out sick and you're suspended, I said, he obviously wants to ring you, I said, so maybe you should return the call. And he said no, I do not want to. And I said look, I'll return the call. So I rang him back. ... Well, I rang him back and he said he'd love to meet Dave [Taylor] or to meet up and I said I don't know if Dave is in that space at the moment, he's not in a very good place, and I said, but I'd be happy to meet you for a coffee if you're in Dublin. And he said yeah, that'd be fine.<sup>384</sup>*

In relation to the first meeting with Maurice McCabe at the Skylon Hotel, Michelle Taylor said:

*Q. ...[W]ere any matters in relation to the campaign discussed at that?*

*A. Nothing at all. It was just, it was very polite, he was asking me how Dave [Taylor] was and I was telling him, I said I'm very, very worried about him and he asked him how he was and I asked him how his wife and his children were and I*

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<sup>383</sup> Transcript day 59 from page 167

<sup>384</sup> Transcript day 76 from page 171

*said, it's an awful time for everybody. He was very pleasant, he was very nice. He had to take a phone call then and then he came back and he had to head off to a meeting.*<sup>385</sup>

In relation to the second meeting, Michelle Taylor said the following:

*Q. ... And did you encourage Superintendent Taylor –*

*A. I said to Dave [Taylor] I think he really wants to meet you, would you be willing to meet him and Dave said no.*

*Q. All right. And the second meeting with Sergeant McCabe was in the nature of a chat as well?*

*A. Yes, it was much briefer.*

*Q. All right.*

*A. Because I suppose I couldn't give any more that Dave would meet him.*<sup>386</sup>

Eventually, a face-to-face meeting was arranged between Maurice McCabe and Superintendent David Taylor. That meeting also included Michelle Taylor. This happened on 20 September 2016, which is probably one to two months after Maurice McCabe had first made overtures to attempt to gain information from Superintendent Taylor. It was at this meeting that allegations were first made by Superintendent Taylor that his superiors had instructed him to initiate a campaign of deceit against Maurice McCabe. As to why Maurice McCabe was inspired to try to chase down Superintendent David Taylor, that came about through a public-spirited journalist:

*I'll tell you exactly how that came about. I was out in the garden and I got a phone call off Mick Clifford again in the Irish Examiner, and he said he had been speaking to Dave Taylor, I'm not sure if it was on the phone or at his house, but he said to me he is not suspended in relation to the Roma children, he's suspended [on] what he knows about you. And I said, what? He says, on what he knows about you. I said, well, I said, tell me what. No, that's all, he says.*<sup>387</sup>

This meeting was organised through Michelle Taylor. Maurice McCabe did not speak to Superintendent Taylor on the phone prior to this meeting.

Superintendent Taylor's evidence broadly agreed with this account of how the meeting came about and is not worth repeating here. Michelle Taylor's evidence to the tribunal about the meeting of 20 September 2016 was as follows:

*Maurice arrived to the house that day. I had to change the time. And he came to the house. I was apprehensive and Dave was apprehensive. Dave had decided he would meet him. And he came to the house and I answered the door and brought him in and shook his hand and said you're very welcome. And then Dave came and shook his hand and we sat down and they started to chat. And Dave said to him -- I knew Maurice at that stage. You know, the two of them were there together, it was the elephant in the room. And Dave said to him look, Maurice, I have to be*

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<sup>385</sup> Transcript day 76 page 173

<sup>386</sup> Transcript day 76 page 174

<sup>387</sup> Transcript day 59 from page 168

*honest with you, there was a campaign against you and I was part of it. ... [The meeting lasted r]oughly maybe two and a half, three hours ...*

*Maurice understandably was curious to know what had happened or what went on. Dave was very emotional, because I think the fact that he'd been away from the job for so long, maybe he had clarity in his head and he had even said it to me at that stage, when he was suspended, he said I can't believe, you know, there was a campaign and I was part of it. And he said I can't believe it. And then I said -- because I believed initially it wasn't a campaign as such, that they were trying to do whatever, that I felt for him, I felt, you know, this is awful.<sup>388</sup>*

Michael Clifford agreed with the evidence of Maurice McCabe about him giving assistance in identifying Superintendent Taylor. He told the tribunal that he had a conversation with Superintendent Taylor in late August/September 2016 and that in consequence of that, he became aware that there was a story to be told that might be of interest to Maurice McCabe.<sup>389</sup>

### **The Public Accounts Committee as catalyst**

John McGuinness TD was elected chairman of the Public Accounts Committee in 2011. He first came into contact with Maurice McCabe in that year, in relation to his allegations about the operation of the fixed charge notice system. There was a lead-up to his eventual appearance before the Public Accounts Committee in January 2014. This needs to be explained.

In July 2012, Maurice McCabe made contact with the Office of the Comptroller and Auditor General, seeking a meeting to discuss his concerns about the operation of the fixed charge penalty notice system. Revenue was being lost to the State in consequence of fixed charge penalty notices being cancelled. On 7 August 2012, Maurice McCabe met with Mary Henry, Deputy Director of Audit with the Comptroller and Auditor General, and provided her with a file of information relating to his concerns about the system. That file was basically print-outs from the PULSE system. It highlighted how some charges levied on motorists were not collected or had been cancelled at a higher level within the gardaí.

In October 2012, Maurice McCabe communicated with the Department of Transport, Tourism and Sport in relation to this matter. In late October 2012, Séamus McCarthy, the Comptroller and Auditor General, received a file from Noel Brett, then head of the Road Safety Authority. This, he told the tribunal, was similar to that presented by Maurice McCabe to Mary Henry. Noel Brett had received the file from a member of An Garda Síochána. The assumption of the tribunal that it had come from Maurice McCabe was unchallenged when stated at the hearings. The file related to cases from the PULSE system and apparently improper cancellation of fixed charge notices. This file encompassed allegations that in certain cases, fixed charge notices to motorists who had committed road traffic violations had been wrongly cancelled by senior gardaí. As to whether this encompassed possible evidence of illegality or of corruption was a potential question that a reasonable and concerned citizen might be entitled to ask. Had that occurred, and here the tribunal can express no view, there would have been a loss of revenue to the State. Consequently, the Comptroller and Auditor General decided to incorporate an examination of this file into his audit of the 2012 garda appropriation account.<sup>390</sup>

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<sup>388</sup> Transcript day 76 from page 175

<sup>389</sup> Transcript day 85 pages 22-23

<sup>390</sup> Transcript day 65 pages 7-8

An internal garda investigation was carried out into the allegations relating to the operation of the fixed charge notice system by Assistant Commissioner John O'Mahoney. This was published on 15 May 2013. That report found "no evidence to suggest any act of criminality, corruption, deception or falsification as alleged."<sup>391</sup> He found, however, that there were irregularities. As to the scale of these, that report differed somewhat from the later report of the Garda Inspectorate. The O'Mahoney investigation was carried out in good faith and the tribunal makes no comment on that matter. Following the O'Mahoney analysis, a report by the Garda Inspectorate also investigated the concerns raised by Maurice McCabe about abuse of the penalty points system. It issued a report in February 2014, making a number of recommendations for reform of the fixed charge notice system.<sup>392</sup>

Maurice McCabe had also brought evidence of apparent non-compliance with the fixed charge penalty notice scheme to John McGuinness TD from around 2011. At that stage Deputy McGuinness was chairman of the Public Accounts Committee. The Comptroller and Auditor General is, in effect, a permanent expert witness at the meetings of that committee, examining as his office does value for expenditure and revenue matters. The role of the Comptroller and Auditor General is defined under Article 33 of Bunreacht na hÉireann as being to "control on behalf of the State all disbursements and to audit all accounts of monies administered by or under the authority of the Oireachtas." He is required by the Constitution to "report to Dáil Éireann at stated periods". Dáil Éireann has exclusive competence for taxation and money bills. The Comptroller and Auditor General was in contact with John McGuinness TD, who presented the information to the Public Accounts Committee. Deputy McGuinness was concerned that the information demonstrated that serious abuse of the fixed charge notice system was taking place and that this involved "loss to the taxpayer".<sup>393</sup> He told the tribunal that following the redaction of sensitive data, the other members of the committee were given sight of the materials.<sup>394</sup>

Here, a word on redactions is necessary. The original PULSE printouts, as handed over by Maurice McCabe, are part of the ordinary recording of every offence from minor road traffic matters to the most serious criminal cases. PULSE records thus state the name of a victim, address details, the nature of the offence, the date of report or detection and the names and other details of suspects. All of this is, under European law, sensitive information for the purpose of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Hence, while the fact that something happened or was detected during a particular month and that a fine was levied but later cancelled was what was important to the Public Accounts Committee, the names and other sensitive data needed to be excised in order to comply with the Directive.

In late 2013 and early 2014, there was correspondence between Commissioner Callinan and John McGuinness TD on the issue of fixed charge penalty notice enforcement and the documentation that had been given to the Public Accounts Committee by Maurice McCabe. Commissioner Callinan was of the view that he was the controller of the data which had been handed over by Maurice McCabe. As such, he considered that the data held by the Public Accounts Committee in relation to this matter should be returned to him. This would mean that the Oireachtas committee would never get to analyse that raw material.

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<sup>391</sup> Report on Allegations of Irregularities in the Operation of the Fixed Charge Processing System, page 7  
[www.justice.ie/en/JELR/Pages/PB13000190](http://www.justice.ie/en/JELR/Pages/PB13000190)

<sup>392</sup> The Fixed Charge Processing System - A 21<sup>st</sup> Century Strategy,  
[www.gsinsp.ie/en/GSINSP/Pages/published\\_reports](http://www.gsinsp.ie/en/GSINSP/Pages/published_reports)

<sup>393</sup> Transcript day 62 page 9

<sup>394</sup> Transcript day 62 page 9

John McGuinness TD took an entirely different view. He responded to the letter from Commissioner Callinan asserting this. He stated that all sensitive material had been redacted and that the Public Accounts Committee was lawfully in possession of the information.<sup>395</sup> The tribunal takes no view on this other than presuming that these views on both sides were held in good faith and on, it seems, contradicting legal advice on a complex area given in good faith. In the result, the Public Accounts Committee was not swayed by the view expressed in the Commissioner's letter and decided to proceed with a detailed examination of the revenue issues concerning apparent non-compliance by the gardaí with their duties under the fixed charge penalty notice scheme. Normally, any such examination takes place in public and the hearings of the committee are broadcast either as they happen or are available for inclusion in television or radio news, Oireachtas TV or Internet sites.

The Commissioner attended to give evidence before the Public Accounts Committee in relation to this matter on 23 January 2014. Ahead of the Commissioner's appearance, a number of meetings were held within Garda Headquarters. These gatherings of senior garda management took place on 6 January, 9 January, 14 January, 16 January, 21 January and 22 January 2014.<sup>396</sup> Commissioner Callinan attended all of these meetings, and Deputy Commissioner O'Sullivan attended all of them with the exception of the meeting of 6 January, while a number of these were also attended by Assistant Commissioner O'Mahoney, Ken Ruane, Head of Legal Affairs, Andrew McLindon, Director of Communications, Detective Chief Superintendent Patrick Clavin, Deputy Commissioner John Twomey and Chief Superintendent Fergus Healy.

#### **Public Accounts Committee hearing of 23 January 2014**

On 23 January, the hearings of the Public Accounts Committee were long-drawn-out. There was also contentious debate, with the Garda Commissioner giving evidence over several hours and questions challenging his point of view being posed.

The issues under discussion moved at one point in a very definite way from revenue collection and law enforcement to whether the source of the information before the committee had performed a public service. This raised the question of the role of what members of the committee were calling "whistleblowers". Questions on that particular issue persisted. During the committee hearing, Commissioner Callinan said:

Clearly here, ... we have two people [Maurice McCabe and Garda John Wilson], out of a force of over 13,000, who are making extraordinary and serious allegations. There is not a whisper anywhere else or from any other member of the Garda Síochána, however, about this corruption, malpractice and other charges levelled against their fellow officers. Frankly, on a personal level I think it is quite disgusting.<sup>397</sup>

This caused a storm of public controversy. It also led, the tribunal is satisfied, to yet more energetic circulation of the rumours already in currency that identified Maurice McCabe with sexual abuse.

That aside, serious legal issues remained, however, as raised by Commissioner Callinan in correspondence with the committee prior to his appearance. One related to a sergeant giving evidence before the committee and how it was the person responsible for the budget of the gardaí,

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<sup>395</sup> Tribunal documents from page 128, for terms of reference (l) and (m)

<sup>396</sup> Transcript day 65 page 64

<sup>397</sup> Tribunal documents page 1108

namely the commissioner, who ought instead and solely to give public account of expenditure and the collection of revenue through fines. Thus, the argument went, as expressed in the letter from Commissioner Callinan to the committee, within a disciplined force, the most senior officer should be the one to command a subordinate to appear or not to appear at any event. This argument did not find favour with the committee. Secondly, concerns were expressed by Commissioner Callinan about the possibility of confidential matters being disclosed in public if Maurice McCabe gave evidence. This argument found some favour with some members of the committee, while others had a different view. While it is unclear, it may be that the initiative came from Maurice McCabe in relation to him giving evidence in private. However that happened, this suggestion was circulated later that week to the committee members and it was decided by them that Maurice McCabe would give evidence in private on 30 January 2014. As it turned out, this private session did not see the revelation of any names or any confidential details of apparent breaches of the fixed charge penalty system by Maurice McCabe.

The tribunal has found it necessary to go into the events leading to the Public Accounts Committee as these explain to some extent the pressures that arose on various key witnesses; particularly Commissioner Martin Callinan and John McGuinness TD. The nature of what was discussed at that Oireachtas committee was what was, ostensibly, a serious abuse of police power. The necessity to discuss it arose because Maurice McCabe had put it into the public arena and had done so persistently and not only through ordinary police channels. This added to the ordinary strains of those in Garda Headquarters and put particular pressure on Commissioner Callinan. According to the evidence before the tribunal, it was that matrix which is the context of various utterances by Commissioner Callinan to Philip Boucher-Hayes in Raidió Teilifís Éireann in December 2013, to John Deasy TD and to Séamus McCarthy as Comptroller and Auditor General before the Public Accounts Committee meeting in Dáil Éireann on 23 January 2014, to Deputy John McGuinness in its immediate aftermath or wind-down, and again to Deputy McGuinness TD in a carpark meeting inside the deputy's car on the following day.

### **Comment on the context**

If these accounts are to be believed, they are capable of supporting the evidence of Superintendent David Taylor that there was a campaign of calumny led by Commissioner Callinan against Maurice McCabe. In themselves, the various witnesses just mentioned may in addition supply independent information that could support the central terms of reference concerning whether such a campaign was waged by the Garda Commissioner.

Any analysis of that question should start with a consideration of what Superintendent Taylor alleged. He made a protected disclosure on 30 September 2016. The tribunal also had correspondence with him through his solicitors. The tribunal investigators, kindly seconded through the good offices of Ms Justice Mary Ellen Ring of the Garda Síochána Ombudsman Commission, also spoke to him in the context of three different formal interviews. The purpose was to try to ascribe detail to his central allegation that he had contacted journalists at the behest of the Garda Commissioner in order to calumniate Maurice McCabe. This was like getting blood out of a stone.

Given that the central plank of the defence put forward by counsel for all of the represented gardaí affected by the allegations of Superintendent David Taylor was that his allegations were beyond belief, as to the manner of their expression, the lack of supporting detail, his demeanour in the tribunal witness-box, his character as demonstrated in his reaction to him being investigated for serial leaking of sensitive information and his inconsistency, it is appropriate to analyse all of his allegations. That is now done in the form of listing what he had to say about various issues and

people and contrasting it, in cascade form, to what was later said or testified to. It is to that task that the tribunal now turns.

### **Superintendent David Taylor allegations: a cascade**

It is thus useful, before turning to the actual testimony given by Superintendent Taylor to the tribunal, to first of all consider his original protected disclosure and then his three interviews with the investigators by way of a cascade. Thus moving from the original protected disclosure of 30 September 2016 onwards chronologically to the relevant evidence to the tribunal, it becomes a potentially illuminating exercise to set out what he said in each on particular topics and to contrast that with any alternative or supporting statement or evidence; principally from Maurice McCabe, John McGuinness TD, Michelle Taylor, Clare Daly TD, Michael Wallace TD and Michael Clifford of the Irish Examiner newspaper.

These are set out below under sub-headings on subjects pertinent to this inquiry, namely: the intensity of the instructions from Commissioner Martin Callinan; the use of electronic communications in the campaign; to whom among the community of journalists were such alleged calumnies passed on; and, finally, the alleged role of Deputy Commissioner Nóirín O’Sullivan.

#### As to the intensity of the campaign

According to Superintendent Taylor’s protected disclosure dated 30 September 2016:

[T]here was a campaign at the highest level in An Garda Síochána involving the then Commissioner, Martin Callinan, and the then Deputy Commissioner, now Commissioner, Nóirín O’Sullivan, to discredit Maurice McCabe. ...

I recall being instructed or directed to contact the media to brief them on the particular line the Commissioner had instructed, namely to brief negatively against Sgt. McCabe. In particular I recall that I was to brief the media that Sgt. McCabe was motivated by maliciousness and revenge. I was also to encourage media to write negatively about Sgt. McCabe, that his complaints had no substance and that the Garda had fully investigated his complaints and found no substance to his allegations. In essence I was to brief that Sgt. McCabe was driven by agendas.

I was also directed to draw journalists attention to the complaint of sexual assault made against Sgt. McCabe, and that this was the root cause of his agenda – revenge against the Gardai.<sup>398</sup>

According to Maurice McCabe’s protected disclosure dated 26 September 2016, he states that at the meeting of 20 September 2016, Superintendent Taylor:

spoke at great length of how, when he was the Garda Press Officer, he had in a sustained campaign destroyed my character and reputation by disseminating false, scurrilous and damaging allegations about me to persons of influence and persons in the media, acting on orders and instructions from Garda management.

He stated that he was now being targeted because he “knew too much”.<sup>399</sup>

In his evidence to the tribunal, Maurice McCabe said the following:

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<sup>398</sup> Tribunal documents pages 4-5

<sup>399</sup> Tribunal documents page 245

***[Superintendent Taylor] said Martin Callinan was the main person. He said Martin Callinan would encourage Dave Taylor to spread the rumours about me, the fact that I had been investigated for a sexual assault, and he was told to down me all the time. He said that -- I didn't ask him in relation to the journalists' name because I didn't want to know who they were, but he did say to me that he would ring them up, and if there was good story about me in the paper, he would always put it bad. He also said that in relation to -- Commissioner Callinan's version was to always run me down, bring up the alleged assault and always run me down.***<sup>400</sup>

According to Michelle Taylor, giving evidence to the tribunal, describing the meeting she was also present at on 20 September 2016, Superintendent Taylor told Maurice McCabe:

***Dave [Taylor] said basically if I was speaking to any media at a crime scene or if I had any contact with media I was to brief them negatively about you and tell them that there was a backstory to you, that basically because of the Ms. D allegation, investigation, that you were motivated by revenge. And I could see he was probably a bit upset and Dave was upset. It wasn't pleasant.***<sup>401</sup>

Clare Daly TD told tribunal investigators on 20 April 2018 about a meeting she and fellow TD Michael Wallace had with Superintendent Taylor on 3 October 2016. They also had a meeting with Maurice McCabe earlier that day:

Sergeant McCabe would have said that the Commissioners were fully aware and actually even directed a lot of the bad mouthing or smearing against Sergeant McCabe with the media and that they were fully complicit in that. ... Sergeant McCabe also said that text messages were sent out by Superintendent Taylor and that Nóirín O'Sullivan, in one instance, replied "Perfect" in response. ... Superintendent Taylor did not tell us anything new about Sergeant McCabe, other than confirm what Sergeant McCabe had already told us.<sup>402</sup>

Her evidence to the tribunal did not differ from that account in any way of substance.<sup>403</sup>

#### As to the use of electronic communications

Maurice McCabe's protected disclosure states that Superintendent Taylor told him at the meeting on 20 September 2016 that he was involved in:

sending hundreds of texts messages about me, to the then Deputy Commissioner O'Sullivan, and other senior officers and members of the media. He stated that Commissioner Martin Callinan usually provided the text of the vile messages about me and my family and sent them to Superintendent Taylor's mobile.<sup>404</sup>

In his evidence to the tribunal, Maurice McCabe said the following:

***[Superintendent Taylor] said that he orchestrated, he said that there was an orchestrated campaign to attack me and he said it was in the form of whispering, of phone calls, of texts, of text messages. He said he was ordered to do this on the authority of ex-Commissioner Martin Callinan. He told me that -- he said to me, I***

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<sup>400</sup> Transcript day 59 pages 173-174

<sup>401</sup> Transcript day 76 page 177

<sup>402</sup> Tribunal documents from page 6328

<sup>403</sup> Transcript day 94 from page 99

<sup>404</sup> Tribunal documents page 246

*never wrote the text messages, he says, all the text -- Martin Callinan, he says, always wrote the text messages, and he says, I was asked just to send them on. And then he told me then that he would always send one to ex-Commissioner Nóirín O'Sullivan, and that she would always reply, I think the word "perfect".*<sup>405</sup>

Maurice McCabe also gave evidence of a second meeting with Superintendent Taylor and Michelle Taylor at their family home on 21 September 2016. He left the first meeting and then went to consult with his solicitor. Then, since the matter was specifically on his mind as to whether text messages had been used to denigrate his character, he sought another meeting. This took place at Maurice McCabe's request, according to him for the purpose of clarifying the use of text messages in the alleged campaign against him:

*Q. ... So, in any event, having reflected on it, did you return to see him the following day?*

*A. I went home that night and I discussed it at home and it was pretty late, and I couldn't get my head around the hundreds of text messages, and I wanted to clear that up in my head, was I listening to this? And I went back to him solely for that purpose the following morning, for about, I'd say, five minutes, and I told him I wanted just to check was it hundreds of text messages that he had sent, and he said to me it could have been thousands.*

*Q. It could have been thousands?*

*A. Mm-hmm. That is exactly what he said to me.*

*Q. At that meeting on the 21st September, how long did that meeting last?*

*A. That meeting lasted five minutes or ten minutes.*

*Q. I think that was in his home, was it?*

*A. I pretended -- yeah. I pretended I was in a hurry, yeah.*

*Q. And that only concerned the volume of messages that were sent, is that right?*

*A. Yeah.*<sup>406</sup>

Superintendent Taylor disputed this in his evidence to the tribunal, saying that Maurice McCabe only called to his home on 21 September 2016 to inform him and his wife Michelle Taylor that he was making a protected disclosure and that the matters discussed on the previous day were not mentioned, nor was any clarification sought by Maurice McCabe.<sup>407</sup> That would be a pointless errand. The tribunal does not accept that evidence. Such a message could have been delivered by telephone or by text. There was absolutely no reason for him to return out of any sense of some kind of solidarity or even social obligation. This, after all, was a meeting about the instrument, according to himself, of the destruction of his character. Clearly, Maurice McCabe was in emotional turmoil after the first encounter. He returned to the Taylor home reluctantly in order to be certain as to what Superintendent David Taylor was alleging about electronic communications. The conversation as described by Maurice McCabe then happened.

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<sup>405</sup> Transcript day 59 page 172

<sup>406</sup> Transcript day 59 pages 183-184

<sup>407</sup> Transcript day 75 pages 30-31

In any event, it is foolish to look at a piece of evidence in isolation: especially where one witness flatly contradicts another. As will emerge, there is plenty of other evidence as to what story Superintendent Taylor was intent on spinning and why he set about doing what he did.

In his protected disclosure, Superintendent Taylor stated:

I spoke to various journalists on foot of the instructions as given to me by the Commissioner to encourage them to write negatively about Sgt. McCabe and to brief against him. ...

Throughout 2013/2014 any information or update I received from the media or any source was passed on by me to both the Commissioner and Deputy Commissioner O'Sullivan for their attention. This included a significant number of updates or information regarding Sgt. McCabe. On many occasions they would acknowledge receipt of these text messages. The Commissioner often replied by saying "thanks Davy" or "Thanks D". Deputy Commissioner O'Sullivan often acknowledged receipt of text messages by the use of the word "thanks" or "perfect". I cannot specify any particular instances.

Some of these text message updates might be as mundane as informing them both that a radio interview was taking place and to turn on the radio. Such was the focus on Sgt. McCabe, I had to notify them both of anything and everything that came across my radar.

I can confirm that a huge number of interactions took place between myself, the Commissioner and Deputy Commissioner O'Sullivan by way of text message. My telephones have been seized and taken from me and are in the custody of An Garda Síochána. I understand from the course of my interviews under caution that the phone has been forensically examined and so these text messages should be available on my devices. I did not delete any text messages sent by me or received by me which involved the Commissioner and Deputy Commissioner O'Sullivan.<sup>408</sup>

In his statement to tribunal investigators dated 22 September 2017, Superintendent Taylor said that "[the negative briefing] was never by email and I doubt it if I ever sent it by text to journalists... it was mainly face-to-face meetings and by phone."<sup>409</sup> He stated that the Commissioner always provided him with "verbal instructions only".<sup>410</sup> The plain reality, however, is that Superintendent David Taylor engages in thought-through deceptions. To refer in his protected disclosure to "some ... text message updates might be as mundane" is to float the idea that there were many others, not just some, that were damning and revelatory of the alleged campaign by Commissioner Callinan and the assent by his deputy.

In his statement to tribunal investigators dated 8 March 2018, Superintendent Taylor said that while there were text messages sent concerning Maurice McCabe, these were general in nature and not related to any negative press briefing:

In relation to "hundreds of text messages" I would have sent these in the context of updates on Sergeant Maurice McCabe to the former Commissioner Callinan and then Deputy Commissioner O'Sullivan. These would have been updates in respect to matters in relation to Sergeant McCabe as they appeared in the media, in the public domain, comments in the Dáil etc. These texts were updates ... Commissioner Callinan never composed texts about Maurice McCabe ... that he sent to me with instructions to send on

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<sup>408</sup> Tribunal documents pages 5-8

<sup>409</sup> Tribunal documents page 216

<sup>410</sup> Tribunal documents page 209

to anyone. I never said this to Maurice McCabe. ... It is correct that former Commissioner O'Sullivan would normally reply to my text messages with "perfect". This would be the standard response to a multiplicity of policing matters I would be updating her on. Once again to confirm, she never replied "perfect" in respect to texts allegedly compiled by Commissioner Callinan in respect to Sergeant McCabe which were sent to me to be further disseminated because that never happened.<sup>411</sup>

That is a lie. It is deceitful in the sense that he had previously said the opposite and, that lie having achieved its purpose of making him appear the innocent victim of a campaign from Garda Headquarters, public sympathy having restored him to his job, Superintendent David Taylor could throw away his prior allegations as if he had never made them. Several people got the same impression from him: that Commissioner Callinan was drafting calumny for electronic dissemination. All of these people, who talked to him around the same time, are not wrong. In addition to Clare Daly TD and Michael Wallace TD, Michael Clifford told the tribunal about a meeting he had with Superintendent Taylor in late summer 2016:

*In terms of the campaign against Maurice McCabe, the only things – [Superintendent Taylor] spoke in a general way about it, but the general gist of it was that Martin Callinan would send him a text or a message and that -- which would be derogatory towards Sergeant McCabe in one form or another, and he passed this on, I believe he said to other senior officers and to the media. I cannot tell you 100 percent that he said he texted the media or spoke to them verbally. I understand that he said he told me he only spoke verbally, I have no recollection of that. But I can't be 100 percent of that. But what I am absolutely sure of, in terms of that conversation, is the centrality of these text messages<sup>412</sup> ...*

*the impression I got was that these text messages were sent, as I understood it, to senior officers or senior management rather than one individual. I wasn't 100 percent sure on that. Neither was I 100 percent sure that they were sent to journalists. But the emphasis that was put on them was that these text messages contain effectively statements, language, whatever, that shows that this campaign he was claiming was run was being run and, therefore, people who would have been informed had knowledge of it. That was the general gist of where I interpreted him as coming from with the whole issue around text messages. As I say, I can't say definitively that he said he sent texts to journalists but he most definitely said that he sent texts of this nature to Nóirín O'Sullivan and, my recollection, to senior management in the Garda.<sup>413</sup>*

Michael Clifford also met Superintendent Taylor on a second occasion in October 2016, in order to clarify a number of matters with him which they had discussed in their first meeting:

*I said [that there was] just a couple of things I wanted to check. One, were the text messages part of this campaign? He said, yes. Had an intelligence file been created on Maurice McCabe in HQ? He said, yes. And had somebody been appointed to monitor Maurice McCabe's activity on Pulse? And he confirmed that as well.<sup>414</sup>*

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<sup>411</sup> Tribunal documents page 3267-3268

<sup>412</sup> Transcript day 85 page 22

<sup>413</sup> Transcript day 85 pages 25-26

<sup>414</sup> Transcript day 85 page 24

Michael Clifford's book *A Force for Justice* describes how "[t]here were a number of strands to the campaign ... The most basic was the conveyance of hundreds if not thousands of text messages to media and Garda personnel casting McCabe in a bad light."<sup>415</sup> Michael Clifford told the tribunal:

*what I am absolutely sure of, in terms of that conversation, is the centrality of these text messages, because his thesis, if you want to call it that, was that the whole investigation, suspension of him from his job was associated with the fact that then Commissioner O'Sullivan wanted to get her hands on his phone because that was what you might call the smoking gun in terms of anything to link her to the type of attitudes there was to Maurice McCabe back in '13 and '14, and he effectively blamed his demise as such on that issue, and he put forward the case that it was all linked to the Commissioner, through her husband, who was on the investigation team, he described it at the time as heading it up, getting her hands on that phone to effectively destroy any evidence linking her to this campaign that he says was going on.*<sup>416</sup>

In his evidence to the tribunal, Michael Clifford came across as a serious-minded and careful journalist. He had taken a particular interest in the entire saga surrounding Maurice McCabe and had decided that a book-length study was warranted. While, like anyone else, he might make a mistake, it is clear that in his professional work he took every reasonable precaution to obviate error. On 25 May 2017, some months prior to the book's publication, Michael Clifford emailed Superintendent Taylor an extract from his book, asking him to "see what you think, particularly in terms of factual accuracy."<sup>417</sup> Michael Clifford told the tribunal that Superintendent Taylor contacted him by phone to make one alteration to the draft text. This correction related to the Roma child investigation. The reference to Superintendent Taylor sending "hundreds if not thousands" of negative text messages about Maurice McCabe was part of the short extract. It was not corrected, nor were any concerns raised in relation to this passage, by Superintendent Taylor. Michael Clifford said the following in evidence to the tribunal:

*Q. And all of that, with the exception of one portion, made its way into your book, isn't that right?*

*A. That's correct. When I passed it to Superintendent Taylor, I asked him to have a look at it, when he came back to me he said there was just one issue and that was that in relation to the investigation into leaking of the names of the children, that he was not interviewed by the Children's Ombudsman. I went and checked that out as best I could and I was able to confirm that that was the case, so I had no problem inserting that in terms of the only change that he requested me to make.*

*Q. So that was the only correction and it was done at his behest in relation to the draft ... is that right?*

*A. Correct.*

*Q. Did he ever, even after publication of the book, ever at any time contact you with a view to correcting the text of the book?*

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<sup>415</sup> Michael Clifford, *A Force for Justice*, page 323

<sup>416</sup> Transcript day 85 pages 22-23

<sup>417</sup> Tribunal documents page 6617

**A. No, absolutely not.**<sup>418</sup>

Superintendent Taylor was questioned about this by Diarmaid McGuinness SC for the tribunal:

**Q. Now, you didn't correct that?**

**A. Well, I didn't proofread it in the sense of go through it line-by-line.**

**Q. Yeah, but did you not read what was being said about you?**

**A. I gave it a very perusal look through it.**

**Q. Well, I mean, one of the other things that I'd like your evidence on is did you pick that up as something that was being said about you?**

**A. As pick it up as something that's being said about me?**

**Q. Yeah. Did you notice it?**

**A. No, I didn't notice it.**<sup>419</sup>

Giving evidence to the tribunal, Superintendent Taylor contradicted the evidence of Michael Clifford, stating that he told him that his negative briefing of journalists was “always done verbally”. In an interview with tribunal investigators, and giving evidence before the tribunal, Superintendent Taylor denied being the source for the reference in Michael Clifford’s book to “hundreds if not thousands of text messages”.<sup>420</sup> He told the tribunal:

***I've always said, and I have consistently said, that I sent numerous, lots of texts to Commissioner Callinan and Commissioner O'Sullivan in relation -- as a way of background information, as a way of updates, as a way of notifications in relation to the McCabe affair as it was playing out in the various forums.***<sup>421</sup>

The tribunal does not accept that transparently deceitful testimony.

In his evidence to the tribunal, John McGuinness TD detailed a meeting with Superintendent Taylor and Michelle Taylor which took place in January 2017 about the alleged smear campaign against Maurice McCabe:

***[Superintendent Taylor] mentioned, you know, what he had -- his involvement in the Sergeant Maurice McCabe matter and that his role in it was as Press Officer and that he acted at all times with the permission of the commissioner and assistant commissioner. ...***

**Q. And what did you take that to mean when he said that he briefed [the media] in a negative way?**

**A. That the intent was to smear Maurice McCabe and that it was the desire of the commissioner and assistant commissioner to get those type of messages out and that he facilitated those. It was a very short conversation, actually, in relation to that aspect of the meeting.**

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<sup>418</sup> Transcript day 85 page 35

<sup>419</sup> Transcript day 75 pages 29-30

<sup>420</sup> Tribunal documents page 3278, transcript day 75 page 28, Michael Clifford, *A Force for Justice*, page 323

<sup>421</sup> Transcript day 74 pages 53-54

*Q. And when you say "get those type of messages out", what do you mean by that?*

*A. Well, I presume that he meant text messages.*

*Q. Well, now, do you say you presume that he meant text messages or –*

*A. No, no, he -- well, he indicated to me that he been involved in the sending of text messages and that these had been approved by his superiors.*

*Q. And to whom is he sending these text messages?*

*A. I didn't ask, and we didn't go into that kind of detail.<sup>422</sup>*

Michelle Taylor described the meeting of 20 September 2016 with Maurice McCabe in relation to the nature of the negative briefings as described by Superintendent Taylor:

*Dave [Taylor] said that any time there was anything negative or anything about [Maurice McCabe] on the TV or the radio or Prime Time, that [he] would text the Garda Commissioners and inform them there was something negative or there was a programme on tonight featuring Maurice McCabe and the penalty points debacle again. So he said ["I would inform them everything that was going on in the media in relation to you"]. ... He never texted journalists negatively about him.<sup>423</sup> ... Basically Dave told Sergeant McCabe that he would send text messages to the commissioners if there was anything related to him in the media. If there was a programme, as I said earlier, he would inform them. And that Commissioner Callinan would text back "thanks Dave" or "Davy", because he always used to laugh, he'd say Davy, and Commissioner O'Sullivan always replied back "perfect".<sup>424</sup>*

The tribunal rejects that evidence.

Clare Daly TD told tribunal investigators about her meetings with Superintendent Taylor and Maurice McCabe:

We definitely discussed phone messages and phones. [Superintendent Taylor] broadly verified what Sergeant McCabe said earlier to us that day. ... We did discuss Nóirín replying "perfect" to the texts he sent and also the negative briefing by text ... Both of them referred to text messages being used in a campaign to negatively brief journalists against Sergeant McCabe by Superintendent David Taylor. ... I remember at the meeting with Superintendent Taylor the context of phones being destroyed, SIM cards being destroyed and being bleached, the phones would be destroyed because this is what the Gardaí do ... was in relation to negative briefings about Sergeant Maurice McCabe.<sup>425</sup>

In common with Clare Daly TD, Michael Wallace TD came across as intent on telling the tribunal the truth and eschewing any form of exaggeration. Neither had spoken about this matter publicly

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<sup>422</sup> Transcript day 62 from page 91

<sup>423</sup> Transcript day 76 page 177

<sup>424</sup> Transcript day 76 page 185

<sup>425</sup> Tribunal documents pages 6333-6335

without first of all doing basic checking. In the meeting with Superintendent David Taylor, in the company of Deputy Daly, Deputy Wallace had got the same impression, that messages against Maurice McCabe were distributed through the head of the Garda Press Office by electronic means:

*He told us that there was -- that it was orchestrated, there was a campaign to discredit Maurice, that he understood at the time himself that Maurice was motivated out of badness because he said that he felt -- the idea that he got was that Maurice had not been well treated over the allegations that had been made about him and that this was his effort to get back at them, and that there was -- that he was in contact with Commissioner Callinan at the time and that he would check -- when he would -- he would have a derogatory text or information, he used to run it by Nóirín to check to see what did she think and he told us that a regular reply, not always, but a regular reply of hers would have been, just a single word "perfect".*

*.... now, obviously I did get the impression then that this text was being sent around, because he did tell us that he was feeding the media derogatory information about Maurice. So I presumed that this was going out in text form. But obviously as I said, when I rang him, when I heard him say that in here at the Tribunal, that he actually wasn't sending it out in text form, I actually rang him and said did you not tell us that this was going out in text form? And he said no. I said, well, what texts were you talking about? And he said, well, I would be -- I was keeping the Commissioner informed and Assistant Commissioner O'Sullivan about derogatory things that were being said in the media and whatever, and I was running them by him. So obviously this, as I have said, seemed like a change of position from my perspective. ... That was the impression I had. But as I said, could I say 100 percent that Superintendent Taylor told me, no, I was sending these out to the media then in text form, no, he didn't specifically say that but it was the impression I got.<sup>426</sup>*

According to Superintendent Taylor, he told Clare Daly TD and Michael Wallace TD:

*That I sent hundreds of texts to the Garda Commissioner and Deputy Garda Commissioner as a way of background, updates, in relation to the Maurice McCabe issue, as it was playing out in media and various forums. That has always been what I have said.<sup>427</sup>*

What has to be remembered here is that Superintendent David Taylor had an agenda. The evidence for his disgraceful behaviour in leaking police investigation details to selected 'friends' of his in the media was electronic. He was in danger of being charged with a criminal offence. He was also facing disciplinary proceedings. To undermine all the dangers he had put himself into, his strategy was to garner public sympathy by creating a fuss specifically directed at what he deceitfully was claiming was the unreliability of evidence against him. He therefore claimed that his phones were manipulated by garda conspiracy. The best evidence of that would be that Garda Headquarters at the highest level had a compelling motivation for planting evidence on his phones and computers. This was rubbish. In his entirely deceitful affidavit laid before the High Court in his judicial review proceedings designed to stop the investigation into his leaking activities, sworn on 29 February 2016, he had claimed that the telephones and computers seized from him had been "tampered

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<sup>426</sup> Transcript day 94 pages 60-61

<sup>427</sup> Transcript day 74 page 56

with or interfered with.” He also claimed that a phone seized from him and kept in Garda Headquarters was electronically manipulated. He said:

On a date unknown (but possibly on or about 14<sup>th</sup> November 2015) the device(s) and in particular the Sim card, became live. The number ... attempted to enter “private chat” on the Viber platform. Viber is a mobile application which allows users to make phone calls, and to send text messages to other Viber users using Wi-Fi or 4G. The Viber app provides and supports conversation galleries that permit or facilitate public and private chat.

The Plaintiff has now been informed that the Garda mobile telephone number ... tied to the Sim card(s) seized in the course of this investigation became live and attempted to enter and/or communicate with a private chat group, of which one of the applicant’s neighbour’s was a member. This is a closed group. In the circumstances evidence has been interfered with or has been tampered with or has otherwise become insecure, it has been accessed by third parties, and it has been used as aforementioned.<sup>428</sup>

This was a lie. The affidavit also states that Michelle Taylor had submitted a complaint to the Garda Síochána Ombudsman Commission on this. There was no interference with the phone. Of course, what this does show is not only a casual attitude to the truth, but a propensity to spread self-serving and malicious allegations against professional colleagues. Having heard Chief Superintendent Francis Clerkin, it is clear to the tribunal that not only would he not countenance anything of the kind of vicious chicanery alleged against him by Superintendent David Taylor but that his equanimity in the face of calumny was truly admirable. Yet, Superintendent Taylor felt able to swear before the High Court that Chief Superintendent Clerkin’s investigation had “been tainted beyond redemption”, that he and his team had been guilty of “a significant breach of trust and confidence”, that the “investigation is lacking credibility”, and that as regards the investigation team, the “actions and activities as they have been so far conducted amount to an interference with the administration of justice”, were “manifestly irregular” and “failed to respect and uphold the rule of law.” Of course, in evidence to the tribunal, Superintendent Taylor sought to explain this deception through further lies about phones, about his upset, his personal responsibilities and that none of this meant what it said.<sup>429</sup>

What might be regarded as upsetting in all of this is the extent to which Superintendent Taylor was able to dress up lies in a legal syrup that cloyingly garnered public sympathy. He apparently succeeded in garnering public sympathy through the manipulation of the media and he also managed to hold on to his career through deceit.

#### As to the journalists to whom any such calumny was passed on

Maurice McCabe told the tribunal that, during his two meetings in September 2016, he did not ask Superintendent Taylor about the journalists he had negatively briefed, nor did Superintendent Taylor identify any such journalists in either of their meetings.<sup>430</sup> Superintendent Taylor’s protected disclosure does not specifically name the journalists to whom negative briefings about Maurice McCabe were allegedly given. On 13 April 2017, Superintendent Taylor’s solicitor wrote to the tribunal identifying the following nine journalists allegedly negatively briefed by him:

- Paul Williams [INM];

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<sup>428</sup> Tribunal documents pages 29-41

<sup>429</sup> Transcript day 74 and see in particular from page 58

<sup>430</sup> Transcript day 59 pages 173-174

- Paul Reynolds [RTÉ];
- Conor Lally [The Irish Times];
- John Mooney [The Sunday Times];
- Michael O'Toole [Irish Daily Star];
- Cormac O'Keeffe [Irish Examiner];
- John Burke [RTÉ];
- Daniel McConnell [Irish Examiner];
- Juno McEnroe [Irish Examiner].<sup>431</sup>

The letter however stated that “[w]ithout access to ... records ... [Superintendent Taylor] cannot confirm this list definitively.” That kind of excuse is deceptive. What are these records? The explanation, so called, clashes with his testimony to the tribunal of casual verbal contacts and dropping calumny into conversations. He produced no records of that apart from his own assertions in the witness box.

On 2 May 2017, solicitors for Superintendent Taylor forwarded a signed waiver dated 28 April 2017 to the tribunal which read as follows:

I wish to confirm that I do not claim and have not claimed any privilege over my identification as the source of any information, briefing, allegation or belief communicated to journalists in the print, broadcasting or other media directly or indirectly relating to Sergeant Maurice McCabe.

For the avoidance of any doubt I also confirm hereby that, in so far as may be necessary, I waive and abandon any such right to claim privilege, or have it asserted on my behalf or in relation to me, in so far as it relates to my identity as the source of same.

I understand I am giving this confirmation

- (a) for the purposes of the Tribunal’s preliminary inquiries into the matters included within the Tribunal’s Terms of Reference, which are attached hereto.
- (b) for all other purposes of the Tribunal, including the taking of evidence from myself or any other person, whether in public or private sittings.<sup>432</sup>

In an interview with tribunal investigators on 22 September 2017, Superintendent Taylor added Eavan Murray (The Irish Sun) and Debbie McCann (Irish Mail on Sunday) to the list of journalists who were negatively briefed by him about Maurice McCabe.<sup>433</sup> He only ever added those two names because the tribunal’s investigators had found out through other means that those two journalists had visited the home of Ms D with a view to getting an interview, during late February or early March 2014. Bizarrely, Superintendent Taylor’s phone records showed him having a great deal of contact with both during the relevant period. Phone traffic to Eavan Murray was extraordinarily heavy.<sup>434</sup> He did not forget these two journalists. He deliberately left them out.

In relation to the initially named nine journalists, Superintendent David Taylor claimed that he believed that he “would have briefed them all negatively about Sergeant McCabe. I cannot provide

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<sup>431</sup> Tribunal documents page 158

<sup>432</sup> Tribunal documents page 167

<sup>433</sup> Tribunal documents page 223

<sup>434</sup> Tribunal documents from page 3325

any further details. It was generic and it was as and when the matters presented themselves.”<sup>435</sup> Superintendent Taylor was questioned before the tribunal as to the omission of the later named two journalists from his initial identification of journalists he allegedly negatively briefed:

*Q. Well, you didn't add names. You didn't add names. When did you ever add a name to the list?*

*A. Well, with Debbie McCann and Eavan Murray.*

*Q. Well, let's come to that in a moment. But the person you had most contact with, journalist, at this point in time was Ms. Eavan Murray, isn't that right?*

*A. That's right, yes.*

*Q. Now, how is it that in neither your first statement to the Tribunal, in your first interview or in your solicitor's list you omitted Ms. Murray's name completely?*

*A. Well, I added it in, I added it in a subsequent statement.*

*Q. Well, that's not the question I asked you. Why did you omit it? Because you must've omitted it deliberately.*

*A. No.*

*Q. Well, how could you forget to include it, that's what I'm just –*

*A. But it wasn't a case of forgetting –*

*Q. -- puzzling towards?*

*A. It wasn't a case of forgetting, Mr. McGuinness. I always put all the information, as it came available to me, before the Tribunal.*

*Q. Ah, well sure, as it became available to you? I mean, this is something you knew from 2014.*

*A. Mm-hmm.*

*Q. Isn't that right?*

*A. Well, I put all this information before the –*

*Q. This wasn't new information becoming available to you in September 2017, isn't that right?*

*A. But I put all this information before the Tribunal.*

*Q. Well, you didn't.*

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<sup>435</sup> Tribunal documents page 223

**A. But, I did.**

**Q. And of concern on one interpretation is that the Tribunal had heard the evidence from the D family last summer, before you were interviewed, when Mr. D, Mrs. D and Ms. D gave evidence and the evidence emerged about the visit of these two ladies.**

**A. Mm-hmm.**

**Q. Isn't that right?**

**A. That's right.**<sup>436</sup>

That evidence of Superintendent David Taylor is rejected. It is clear that keeping the tribunal away from any knowledge of any interaction with Eavan Murray and Debbie McCann was part of his overall strategy of minimisation of his own role in this scandal.

Another extraordinary event unfolded during the tribunal hearings. As a result of investigations, the tribunal found it necessary to call in evidence the journalist Cathal McMahon, who worked at the time for the Irish Daily Mirror. Sometime around January or February 2014, he had heard a rumour that "Sergeant McCabe had been investigated for alleged sexual abuse of a child in the Cavan area and that the allegation was historic in nature."<sup>437</sup> Responsibly, and in keeping with high professional standards, he decided to check that out:

***I then contacted Superintendent Dave Taylor, who was at the time the Press Officer, and he confirmed the story as I had given it to him, and the only addition was that he suggested that maybe I should go to Cavan and find further details there. ... I outlined the details [to my editor] as I knew them at the time and I asked if he felt it was a story worth pursuing. He said he didn't feel it was a story that warranted much extra work -- or, sorry, excuse me, he said he didn't feel that it was a story worth pursuing and, you know, I was satisfied with that response. I was working on a number of other stories at the time. Had, as I mentioned earlier, serious concerns about the veracity and truthfulness of that particular story and was happy to move on.***<sup>438</sup>

What matters about this is that never having been mentioned by Superintendent David Taylor as a journalist briefed by him with calumny as to Maurice McCabe, on his appearance before the tribunal, Cathal McMahon was suddenly nominated as the recipient of his malicious gossip. Superintendent Taylor denied confirming any details as to the investigation and specifically claimed that any encouragement to go to Cavan to find further details of the story was wrong. That denial by Superintendent Taylor is a lie.

The account given by Cathal McMahon is strikingly similar to that testified to by Paul Williams. As will be recalled from part 1, that journalist had been contacted through an intermediary by the D family and Paul Williams had recorded a videoed interview with Ms D which would later become the subject of four articles published from 12 April 2014. He, too, had rung Superintendent David

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<sup>436</sup> Transcript day 75 pages 38-39

<sup>437</sup> Transcript day 94 page 133

<sup>438</sup> Transcript day 94 pages 135-136

Taylor as Garda Press Officer in order to check out details as to whether there had been an allegation against Maurice McCabe. He, too, was nominated by Superintendent Taylor as a journalist briefed at the request of Commissioner Callinan. Similarly, Superintendent Taylor had denied giving any information to Paul Williams about the D case. Both of these journalists are telling the truth and Superintendent Taylor is not.

#### The allegations as to Nóirín O'Sullivan

In Superintendent Taylor's protected disclosure, he states that the campaign to discredit Maurice McCabe involved both the Commissioner and Deputy Commissioner O'Sullivan, and that the Commissioner was "quite open in his instructions to me and never directed me to withhold any information from Deputy Commissioner O'Sullivan."<sup>439</sup> He also later claimed to have involved Andrew McLindon, who was the garda Head of Communications, and put him in the know about this strategy of calumny. But, Superintendent David Taylor can say anything. Towards the end of his evidence to the tribunal, the following exchange occurred with the chairman:

*Q. There was just two other matters then, superintendent. The first is in relation to Andrew McLinden. Now I have been told that the two of you didn't get on and look*

*--*

*A. That's not true.*

*Q. I know, but if it be the case I think in any close relationship people sometimes don't get on, people get on well and then there are people who are particular friends of yours.*

*A. Yes.*

*Q. Now let's suppose you weren't a particular friend. But in fact did you -- he thinks you were bypassing him and going direct to the Commissioner and leaving him [out of] the loop and he said to me that he was playing the long game, which was that eventually there was going to be change and he would be able to get in, maybe his ideas might be accepted in Headquarters? Nothing illegitimate about that, by the way.*

*A. When Andrew came in I fully respected Andrew's position, I fully kept him briefed, and I actually brought him down to court on the first day to show him how the court systems work, because he'd never worked in the criminal justice system before. So I was always -- you know, it was the first time I ever worked with a civilian boss. So, as I said, I welcomed Andrew with open arms.*

*Q. Did you find him likeable enough?*

*A. He's a very likeable individual, yeah.*

*Q. I was just wondering then why you described him in a text as a rodent?*

*A. You send texts and regret them pretty quickly afterwards. I suppose in the sense I was moved and he had gone on holidays and I thought he would have told me you're going to be moved. He would have known that before I was -- because he was my direct boss.<sup>440</sup>*

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<sup>439</sup> Tribunal documents page 5

<sup>440</sup> Transcript day 77 pages 114-115

No comment needs to be made on the looseness with truth that this exchange evidences. It is pretty much typical. The tribunal does not accept any allegation against Andrew McLindon.

According to Maurice McCabe's protected disclosure, Superintendent David Taylor told him "that "Commissioner Noreen O'Sullivan knew everything"; he said she was "the pusher" in the campaign to discredit me, not Martin Callinan."<sup>441</sup> What should be recalled in relation to any allegation against Nóirín O'Sullivan is that Superintendent Taylor was suffused in bitterness against her in consequence of being moved from the Garda Press Office, added to her decision not to nominate him for a post as a chief superintendent. His viciousness towards her was compounded by the trouble that he was in, investigated as he was for a series of criminal offences and facing the labyrinthine garda disciplinary process over the same matters. He was perfectly happy to make any claim against her that would assist in his strategy of cloaking himself in rectitude through lying against other people.

In relation to this matter, Maurice McCabe gave the following evidence to the tribunal:

***Q. Well, just to make it very clear in relation to this because these are matters that have been -- that are in your protected disclosure and also in Superintendent Taylor's protected disclosure in a different form, substantially different form, and which former Commissioner Martin Callinan absolutely denies and in circumstances where former Commissioner Nóirín O'Sullivan denies any knowledge of?***

***A. Yes.***

***Q. Right. Did he say that she had any role in relation to this?***

***A. Em, he said that she was the pusher, that's what he called her.***

***Q. The pusher?***

***A. The pusher.***

***Q. And what did you think that that meant?***

***A. Well, then he just -- all he said was, you know, she was the pusher and she knew everything, everything that was going on.***<sup>442</sup>

The words "She knew everything - the pusher" also appear on Maurice McCabe's handwritten notes of the meeting of 20 September 2016.<sup>443</sup> In his statement dated 5 May 2017, Superintendent Taylor told the tribunal investigators that "Deputy Commissioner O'Sullivan never instructed me to brief the media...however, as far as I am concerned she was aware of the instruction by Commissioner Callinan."<sup>444</sup> In his statement dated 22 September 2017, Superintendent Taylor again stated that Nóirín O'Sullivan "never gave me any instructions...But she was aware of the negative briefing instructions given to me by the former Commissioner Callinan against Sergeant Maurice McCabe. I used to text her and to speak to her about it."<sup>445</sup>

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<sup>441</sup> Tribunal documents page 246

<sup>442</sup> Transcript day 59 pages 176-177

<sup>443</sup> Tribunal documents page 417

<sup>444</sup> Tribunal documents page 127

<sup>445</sup> Tribunal documents page 212

In his third statement to tribunal investigators on 8 March 2018, Superintendent Taylor disputed Maurice McCabe's account of the meeting of 20 September 2016 in relation to Nóirín O'Sullivan's role in an alleged campaign against him: "I never used the word *"pusher"*... I did state that she appeared to be heavily involved in the Garda investigation into me ... I never said she was the *"pusher"* in the campaign to discredit Sergeant McCabe."<sup>446</sup>

Superintendent Taylor rejected Maurice McCabe's account in giving evidence to the tribunal:

***Q. [Extract from statement read out] "He continued by stating that Commissioner Nóirín O'Sullivan knew everything. He said that she was the pusher in the campaign to discredit me, not Martin Callinan".***

***A. No, I never said that.***

***Q. You're certain you never said that?***

***A. Certain.***

***Q. Because Sergeant McCabe's note, I think from memory, has the word "the pusher" recorded in it.***

***A. It's a word I'd never use.***<sup>447</sup>

Michelle Taylor gave evidence of the meeting of 20 September, similarly rejecting Maurice McCabe's account:

***[W]e didn't use the word pusher. ... But I do recall that Dave said that Commissioner O'Sullivan would have been aware of what was going on, because herself and Commissioner Callinan worked closely together.***

***Q. All right. And was there any significance in relation to the pusher comment in relation to Nóirín O'Sullivan's role in your husband's criminal investigation?***

***A. Well, the word pusher wasn't used.***

***Q. Yes.***

***A. But I believe that it was a case that we felt that Commissioner O'Sullivan was anxious to get a charge against Dave, so we would have said that to Sergeant McCabe; that we felt she was very anxious to get a charge against him.***<sup>448</sup>

Clare Daly TD told tribunal investigators about a meeting in which Maurice McCabe said that he had been told by Superintendent Taylor that "when the media were pursuing negative commentary about him, former Commissioner Nóirín O'Sullivan was aware of that and that she was in fact involved in it."<sup>449</sup>

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<sup>446</sup> Tribunal documents page 3270

<sup>447</sup> Transcript day 75 pages 110-111

<sup>448</sup> Transcript day 76 from page 183

<sup>449</sup> Tribunal documents page 6328

The tribunal regards it as important to see the allegations from the Taylors in a proper context. In his High Court proceedings, Superintendent David Taylor had attempted to destroy the legitimate investigation into his leaking activities. This included the allegations against the entire investigation team that have been quoted above. Part of that investigation team was Detective Superintendent James McGowan. It so happens that he is married to Nóirín O’Sullivan. Michelle Taylor told the tribunal that she and her husband were worried that since the Commissioner’s husband had been inserted into the investigation, it was more likely that, it seems out of some sense of misplaced prestige, the investigation team would lack objectivity.<sup>450</sup> It was also alleged between the Taylors that this detective was somehow leading the investigation and had been inserted into the investigation at the behest of the Commissioner. In fact, Chief Superintendent Francis Clerkin had chosen him. It had nothing to do with the Commissioner.

That further hurtful allegation was invented for the purpose of distracting from the clear facts demonstrating continual leaking to the press by Superintendent David Taylor of confidential information that was potentially detrimental to investigations and undermined the rights of privacy of citizens. This strategy of obfuscation and diversion was both shared and pursued by Michelle and David Taylor. A necessary part of this campaign of deceit was to attack the character of Nóirín O’Sullivan.

### **Electronic communications**

As forensic consultants, the tribunal was fortunate to secure the services of Forensic Science Northern Ireland. The tribunal visited their headquarters on a number of occasions and, in addition, interacted with, principally, Elaine Strachan and Mark McConnell on numerous occasions in Dublin. These scientists spent a significant amount of time in Garda Headquarters interrogating computer systems. The gardaí were unstinting in their assistance in the interrogation of their systems. There was no attempt at any form of delay or concealment. In addition, the tribunal personally visited Garda Headquarters and interrogated the systems which were available for inspection only by a member of the judiciary.

It is appropriate to thank Forensic Science Northern Ireland for their assistance. They were objective, hard-working, analytical, knowledgeable, inventive. The forensic scientists spared no effort in pursuit of the objective of attempting to find out whether any allegation made by Superintendent David Taylor as to evidence being available on electronic systems of the campaign of calumny against Maurice McCabe was true or could be corroborated in any way.

Those allegations need be now returned to. There was, firstly, an allegation by Superintendent Taylor that there was a practice in Garda Headquarters of inappropriately recording details on a computer system called Oisín of those who apparently made trouble. That is not so. There is a computer system of that name, but it is linked to crime and security. It has nothing to do with Maurice McCabe. Interrogating files on that system, his name comes up from time to time, but in the context of him pursuing his duty as a policeman in a border area. In giving evidence to the tribunal, this allegation by Superintendent David Taylor about a secret computer system was modified so that any sinister connotation was removed. The allegation, in whatever form, is not borne out. It is yet another example of Superintendent Taylor making trouble to get himself out of trouble.

In his protected disclosure of 30 September 2016, Superintendent Taylor said the following:

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<sup>450</sup> Transcript day 76 from page 229

I am aware that Crime & Security have a separate stand-alone computer system, isolated from PULSE and not accessible to any other part of An Garda Síochána except Crime & Security. This computer system is called “Oisín”. This holds national intelligence including phone taps, phone records and material on subversive organisations. I am aware there are also files kept in Crime & Security on members under investigation. These files are colloquially known as “the corruption file”. I would be certain there are files in there on me and also on Sgt. McCabe.<sup>451</sup>

Maurice McCabe claimed that he was informed by Superintendent Taylor that “there were a number of intelligence files on me in Garda Headquarters and I should look for them under disclosure.”<sup>452</sup> Superintendent Taylor said he told Maurice McCabe that “there could be files in Garda Headquarters in Crime and Security ... I'd never seen, but I know if members have been investigated or there's issues, there may be files there contained.”<sup>453</sup> The following was put to him on behalf of Maurice McCabe:

***Q. Superintendent Taylor, are you saying that separate from, say, a discipline file or an investigation file or a personnel, a human resources file that it was your understanding that it was likely that there was a Crime and Security file on Sergeant McCabe because of his activities in relation to making trouble for the guards, is that what you're suggesting?***

***A. It's a possibility. ... I never said there was such a file, because I wouldn't have that knowledge. I said there's a possibility there could be a file.***<sup>454</sup>

The tribunal must now recap. The tribunal is satisfied that Superintendent David Taylor alleged in the clearest possible terms to Maurice McCabe in their meetings on 20 and 21 September 2016 that Commissioner Martin Callinan had composed the text of communications that were to be relayed, at his request, to journalists and other prominent individuals holding an overseeing role in our society. He having made this dramatic allegation, the tribunal had to spend time and money investigating it. That obligation continued even though Superintendent Taylor later withdrew the allegation in an interview with the tribunal investigators. He claimed that he never said any such thing. His wife, Michelle Taylor, also said that. The tribunal does not accept the evidence of either. In reality, that claim was in fact made made by Superintendent Taylor to Maurice McCabe, in order to add credibility and dramatic quality to his narrative. His motive was to ensure that the claim that Superintendent Taylor was then making, that his phones had been unlawfully interfered with, could have credibility. If there was an issue about interference with his phones by Garda Headquarters, then the investigation into his leaking confidential information about serious investigations to journalists would be undermined. His strategy was to falsely claim interference with his phones so that any evidence of leaking information would be called into question and potentially seen as infirm. By having Commissioner Callinan in the improbable position of drafting calumny in an electronic form and passing it on through text messages or other electronic communications, there would be a motive for those in Garda Headquarters to erase data and by doing so interfere with his own data on his own electronic devices. That would make his own activities explicable on the basis of some kind of a fit up. He denies this now. But, the reality remains that he made that allegation and he had the same motive for doing so as with the other allegations he made: his own self-interest.

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<sup>451</sup> Tribunal documents page 3379

<sup>452</sup> Tribunal documents page 246

<sup>453</sup> Transcript day 75 pages 116-117

<sup>454</sup> Transcript day 75 pages 118-119

It would have been an example of public irresponsibility not to investigate, to the fullest extent possible, any trace evidence of electronic communication that might bear out his claim that Commissioner Callinan was composing texts or ordering that Superintendent Taylor circulate texts denigrating Maurice McCabe to the media and the further allegation that these were shared with Deputy Commissioner Nóirín O'Sullivan who was alleged to have been aware of and consenting to the strategy.

The tribunal was in possession of phone billing records for Martin Callinan, Nóirín O'Sullivan and Superintendent Taylor for the relevant time period of 1 July 2012 to 31 May 2014.<sup>455</sup> In total, there were six phones and a single laptop computer used by Martin Callinan for the relevant period 1 July 2012 to 31 May 2014. The tribunal received two of these phones.

### **The electronic devices**

There were six phones used by Commissioner Nóirín O'Sullivan during the relevant period, and the tribunal received one of these phones.

The two phones used by Superintendent Taylor during the relevant period were not received by the tribunal. One of these was issued in or around November 2012 and another issued on 8 November 2013. Neither of these phones were recovered from Superintendent Taylor. Instead, one of these two phones had been retained by him and the whereabouts of the other phone is unknown; at least to the tribunal. The tribunal is satisfied that the one retained by him is at his home. Despite this, the tribunal never got the phone. He claims that it was used by a family member. The tribunal is sceptical. Whatever was happening to the phone, the plain reality is that Superintendent Taylor had it and did not surrender it to the tribunal. In relation to this phone, which would have been used during a crucial period under inquiry, Superintendent Taylor was questioned in the following way before the tribunal:

**CHAIRMAN:** ... *Is it or is it not the case that you actually had the phone that we don't have, that you never gave to Garda Headquarters from October 2013, in your household or with you or a member of your family during the relevant period when you were Garda Press Officer?*

**A.** *That's correct.*

**CHAIRMAN:** *You retained that?*

**A.** *Yes, that's correct.*

**CHAIRMAN:** *All right. And what has happened to it?*

**A.** *It's gone. I don't know where it's gone. Like, I mean, I gave it to my daughter and she used it for a short while. It was broken. Because I changed it at the time because it was not functioning perfectly.*<sup>456</sup>

The tribunal does not accept that excuse. There were other phones that had been used by Superintendent Taylor that the tribunal did recover. The tribunal recovered these from Garda Headquarters. However, those three phones were used by Superintendent Taylor outside of the relevant time period. These phones were ones seized by or on behalf of Chief Superintendent Francis Clerkin in the course of the criminal investigation he was conducting into Superintendent David Taylor. He also seized a Dell laptop computer. This, again, was for a period when

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<sup>455</sup> Tribunal documents from page 4509

<sup>456</sup> Transcript day 74 page 64

Superintendent Taylor was no longer press officer for Garda Headquarters. It is therefore not relevant to the time period of the terms of reference. The Dell laptop and the three phones, all recovered from Garda Headquarters and all examined already in the context of the Clerkin investigation, were analysed by Forensic Science Northern Ireland. There was a clear pattern on those phones of text messages being regularly deleted. This was, according to the evidence of Superintendent Taylor, merely for the purpose of good housekeeping, so that his phone was not clogged up with messages. The tribunal does not accept that. There was also a pattern of official garda documents which were sent in the ordinary course of business on his garda email, @garda.ie, being emailed on from there by him to his personal David Taylor email. Again, he had an excuse for that. The tribunal sees not the slightest honest reason why that happened. According to the evidence, gardaí could read garda emails securely on their laptops away from their office.<sup>457</sup>

The tribunal will now set out the analysis conducted in relation to all other mobile phones and computer devices.

SM1 was a Nokia mobile phone that had been surrendered by Commissioner Martin Callinan to the Fennelly Commission and later given to the tribunal.<sup>458</sup> It had been used by Martin Callinan from 16 December 2013 to 16 April 2014. This is a crucial period as it encompasses the lead up to, and aftermath of, the Public Accounts Committee meetings in January 2014. Elaine Strachan carried out an examination of this phone. She found that 277 of 278 text messages on the phone had been deleted. These, furthermore, were all after 17 January 2014. These were recovered but full details were missing: the direction of the message, the sender and receiver of the message.<sup>459</sup> The report on this device is now quoted:

No evidence was recovered from item SM1 to support a claim made by Superintendent Taylor, that he was instructed by the former Commissioner Martin Callinan to brief the media against Sergeant Maurice McCabe, or the allegation made by Superintendent David Taylor that the former Commissioner of An Garda Síochána, Noírin O'Sullivan, was aware of said instruction. It should be noted that all of the information obtained from item SM1 was within the time period covering the 17th of January 2014 to the 16th of April 2014. This is within the time period of relevance.<sup>460</sup>

SM2 was a Nokia mobile phone issued to Superintendent Taylor on 18 December 2014 and surrendered by him as part of the Clerkin investigation on 19 February 2015.<sup>461</sup> As can be appreciated, the period of use was well outside the relevant time period of the terms of reference. Superintendent Taylor had ceased to be press officer from 10 June 2014. Nonetheless, the phone was analysed. There were in excess of 950 contacts on the phone, and a number of texts were found as well as 600 emails. It was found that there was no evidence to support the claims made by Superintendent Taylor of any involvement by Commissioner Martin Callinan or assent by Deputy Commissioner Noírin O'Sullivan in denigrating Maurice McCabe.

SM3 was a Nokia mobile phone issued to Superintendent Taylor on 5 September 2014 and surrendered as part of the Clerkin investigation on 18 December 2014.<sup>462</sup> Again, this is well outside the time when he was press officer under Commissioner Callinan. No evidence was found on this phone to support the claims made by Superintendent Taylor.

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<sup>457</sup> Transcript day 56 pages 71-72

<sup>458</sup> Tribunal documents page 4610

<sup>459</sup> Transcript day 72 page 10

<sup>460</sup> Tribunal documents page 4624

<sup>461</sup> Tribunal documents page 4726

<sup>462</sup> Tribunal documents page 4527

SM4 was a mobile phone issued to Superintendent Taylor in February 2015 and in use until 29 May 2015, having been seized by Chief Superintendent Clerkin on that date.<sup>463</sup> This is even further outside the relevant time period. No evidence was found on this phone to support the claims made by Superintendent Taylor.

SM5 was a Dell laptop surrendered by Superintendent Taylor as part of the Clerkin investigation on 19 February 2015.<sup>464</sup> SM10 involved the examination of the forensic copy of this laptop.<sup>465</sup> This image was prepared by the gardaí, under Chief Superintendent Clerkin, as part of their investigation into Superintendent Taylor. No evidence was found on the laptop to support the claims made by Superintendent Taylor.

SM6 was a Nokia Lumia mobile phone issued to Martin Callinan on 26 July 2013.<sup>466</sup> This was later reissued to Detective Superintendent Anthony Howard after being repaired on 3 December 2013, and was operational between August 2014 and July 2015.<sup>467</sup> No information relating to Martin Callinan was on the phone as there was a factory reset, as part of ordinary garda protocols, prior to Detective Superintendent Howard being issued with the phone following the repair.<sup>468</sup> Thus, no evidence was found on the phone to support the claims made by Superintendent Taylor.

SM7 was an Apple iPhone 4 intermittently used by Commissioner Nóirín O'Sullivan until October 2013.<sup>469</sup> Her son used this particular phone on a basis personal to him and therefore no evidence was found to support the claims made by Superintendent Taylor.

SM8 was an Apple iPad issued to Commissioner Nóirín O'Sullivan.<sup>470</sup> The iPad was passcode locked when received by Forensic Science Northern Ireland and there were three attempts left to enter the passcode, seven incorrect entries having previously been made prior to the iPad being received by the FSNI. She had forgotten the passcode. Three more unsuccessful attempts would result in the iPad being wiped.<sup>471</sup> Three possible passcodes had been provided by An Garda Síochána; however, erring on the side of caution as none of these possible passcodes were certain to be correct, it was ultimately sent to an external company to be unlocked.<sup>472</sup> The data recovered related to use by Commissioner Nóirín O'Sullivan of the iPad between around 14 May 2014 and 21 November 2016.<sup>473</sup> No evidence was found on the iPad to support the claims made by Superintendent Taylor. Some evidence as to draft statements that related to the ongoing crisis within the gardaí was uncovered but none of this was in any way relevant to Maurice McCabe or the claims made by Superintendent David Taylor.

Forensic Science Northern Ireland also conducted an examination of files held in Garda Headquarters on Maurice McCabe. This was specifically required by the tribunal's terms of reference.<sup>474</sup> Forensic Science Northern Ireland attended at Garda Headquarters from 19 to 22 September 2017 examining various garda systems. The following fourteen systems are used or are in place in Garda Headquarters: AGS Portal, Correspondence Register, File Share, Mail Meter, PULSE, RECORD, CCIU (Computer Crime Investigation Unit), Cohort Medical Access, Fixed

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<sup>463</sup> Tribunal documents page 4735

<sup>464</sup> Tribunal documents page 4520

<sup>465</sup> Tribunal documents page 4502

<sup>466</sup> Tribunal documents page 4626

<sup>467</sup> Transcript day 72 page 22

<sup>468</sup> Transcript day 72 pages 22-23

<sup>469</sup> Tribunal documents page 4498

<sup>470</sup> Tribunal documents page 4749

<sup>471</sup> Transcript day 72 page 23

<sup>472</sup> Transcript day 72 pages 23-24

<sup>473</sup> Transcript day 72 page 25

<sup>474</sup> Tribunal documents page 4595

Charge Processing System (FCPS), GEMS (Garda Employee Management System), GRIPS (Garda Regional Integrated Personnel System), ICT Online Services, NCBI (National Bureau of Criminal Investigation) and PostLog. Of these systems, seven were never accessed by Commissioner Martin Callinan or Deputy Commissioner Nóirín O’Sullivan. Therefore AGS Portal, the Correspondence Register, File Share, Mail Meter, PULSE, RECORD and ICT Online Services were forensically examined.<sup>475</sup> Systems were searched using keywords such as Maurice McCabe, Whistleblower, Ms D [using her actual name], and ‘McCabe and child abuse’. From searches of these IT systems at Garda Headquarters, no evidence was recovered to support the claims of Superintendent Taylor.<sup>476</sup> There was no dispute as to the search words used by the tribunal, which were revealed in open hearing. No one suggested that any of the examinations conducted was anything less than fully thorough. Random but very time consuming searches were also conducted as a further safeguard.

SM12 was a mobile phone issued to Commissioner Nóirín O’Sullivan in January 2016.<sup>477</sup> This was provided to the tribunal and was in use from 26 April 2017 to 20 July 2017. This was well outside the period from July 2012 to June 2014 when Superintendent David Taylor was press officer in An Garda Síochána. No evidence was found to support the claims of Superintendent Taylor.

SM13 was a Samsung Galaxy S7 mobile phone issued to Commissioner Nóirín O’Sullivan and in use between 29 May 2016 and 12 October 2016.<sup>478</sup> Again, the period of use is outside the crucial period. No evidence was found to support the claims of Superintendent Taylor.

SM21 involved an examination of the Spotlight system in the Garda Press Office, and an examination of certain records on that system in accordance with particular keywords.<sup>479</sup> It was searched with keywords including: ‘McCabe’s’, ‘McCabe’, ‘Cabe’, ‘Whistleblower’ and Ms D’s surname, ‘Oisín’, ‘child abuse’, ‘kiddie fiddler’ and ‘rat’. A number of relevant hits were found for the relevant time period. However, Mark McConnell told the tribunal that no relevant evidence of any campaign against Maurice McCabe was found.<sup>480</sup>

SM23 was a laptop issued to Martin Callinan during his time as Garda Commissioner.<sup>481</sup> The time period thus renders it relevant, particularly for the years of 2013 and 2014. This laptop was examined at Garda Headquarters. Data from Martin Callinan’s time as Commissioner was no longer available and was non-recoverable.<sup>482</sup> This was due to the fact that in accordance with garda protocol, Commissioner Callinan arranged to buy this laptop when he retired. In consequence, in accordance with normal police protocols, the computer was cleaned of all material at that time.<sup>483</sup> As a result, a new personal user account for Martin Callinan became active on 4 April 2014, ten days after his resignation.

### **Conclusion on electronic devices and evidence**

The allegations made by Superintendent David Taylor as to the use by Commissioner Martin Callinan of electronic communications to suggest means of calumny against Maurice McCabe are false. Similarly, the allegations made by Superintendent David Taylor against Deputy Commissioner Nóirín O’Sullivan of assent to this strategy through attaching to such a

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<sup>475</sup> Tribunal documents page 4608

<sup>476</sup> Tribunal documents page 4609

<sup>477</sup> Tribunal documents page 4631

<sup>478</sup> Tribunal documents page 4671

<sup>479</sup> Tribunal documents page 4506

<sup>480</sup> Transcript day 72 page 41-42

<sup>481</sup> Tribunal documents page 4518

<sup>482</sup> Tribunal documents page 4519

<sup>483</sup> Transcript day 72 page 44

communication the words “perfect” or “thanks” are false. The purpose of the allegations was to undermine confidence in any electronic evidence that there was against himself in relation to leaking details of criminal investigations to the media at a time when he was no longer employed in the Garda Press Office.

Peter Kirwan was detective chief superintendent in charge of Security and Intelligence in Garda Headquarters. He gave evidence in relation to a claim made by Superintendent Taylor to Maurice McCabe that there were intelligence files on him at Garda Headquarters:

***Q. And you found that there was no file in existence at Security and Intelligence in respect of Sergeant Maurice McCabe, is that right?***

***A. That is correct.***

***Q. And I think that you can confirm that there is no file or document held whatsoever which presents Sergeant Maurice McCabe as a target of An Garda Síochána or as a suspect or in a derogatory light, is that right?***

***A. That is the situation, Chair.***

***Q. Now, I think that you point out an extensive database will have reference to many members of An Garda Síochána, both currently serving and retired. In that context, you found traces relative to one or potentially one or more persons called Maurice McCabe and an Operation Oisín, is that right?***

***A. That is correct, Chair.***

...

***Q. Now, I think you then point out that, in answer to the question to confirm whether there are files kept in Crime and Security on members under investigation, which are colloquially known as the corruption file, and whether there are any such files kept in relation to either Sergeant Maurice McCabe or Superintendent David Taylor. Now, I think that the National Criminal Intelligence Unit conducted a search of both electronic and paper records and found no reference to Maurice McCabe or to David Taylor in the context of an operation, is that right?***

***A. That is correct, Chairman.***<sup>484</sup>

Maurice McCabe’s protected disclosure claims that he was told by Superintendent Taylor that someone called Kieran was monitoring his activity on PULSE; however Superintendent Taylor denied saying this.<sup>485</sup> The name “Kieran” also appears in Maurice McCabe’s notes of his meeting with Superintendent Taylor on 20 September 2016.<sup>486</sup> Here is what Superintendent Taylor said while being cross-examined by counsel for Maurice McCabe:

***Q. Did you inform him that there was a person called Kieran in Garda Headquarters who monitored all Sergeant McCabe’s activities on Pulse?***

***A. No. I was.***

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<sup>484</sup> Transcript day 73 from page 10

<sup>485</sup> Tribunal documents page 248

<sup>486</sup> Tribunal documents page 417

*Q. You didn't tell him that?*

*A. I spoke to him in relation to Pulse and your Pulse activity would be monitored, that peoples' Pulse activity –*

*Q. Did you suggest that somebody called Kieran –*

*A. No.*

*Q. -- was in charge of monitoring?*

*A. I don't know anybody, Kieran.*

*Q. So that is an invention by Sergeant McCabe is it?*

*A. I don't know a person Kieran that looks after -- I know there's lots of people up there who looks after Pulse.<sup>487</sup>*

The tribunal rejects that evidence of Superintendent David Taylor. The allegation was made by him to Maurice McCabe.

There is a plain reality to this. Superintendent David Taylor spun a deceit that his boss, Commissioner Martin Callinan, with whom he was on the best of terms for all his time in the press office of Garda Headquarters, and Nóirín O'Sullivan, who he decided for his own bitter reasons he didn't like and was not up to the job, were on the one hand composing, and on the other approving, derogatory messages about Maurice McCabe. Hence, in his false reasoning, phones were important. Hence, in his false reasoning phones went missing, Hence, in his false reasoning, phones behaved mysteriously. Why? Because these phones had evidence implicating the highest levels of the national police force in a vicious campaign against a defenceless sergeant who wanted to see no more than an improvement in police standards.

And the reality? This tale was spun about missing phones, telecommunications interference by Garda Headquarters, texts to politicians and journalists and a trail of evidence that never existed in order, specifically and deliberately, to destroy the investigation by Chief Superintendent Clerkin into the behaviour of Superintendent David Taylor. At risk through a perfectly legitimate and honest investigation by a police officer of high intelligence and of truly distinguished record, Superintendent Taylor chose to present a public lie to the people of Ireland. It was enthusiastically taken up. Furthermore, it cast a pall of pretended deceit over the entire police force.

Then no one knew better. Now, they do.

## **Questions**

As of this point, it is appropriate to question whether the evidence of Superintendent David Taylor could constitute a probable evidential basis for any finding supporting his allegations against Commissioner Martin Callinan. The answer to that is that this might occur only in the context of attempting to see whether there is any evidence that might firmly establish that there was a campaign of calumny against Maurice McCabe and, further, that this involved Commissioner Callinan. It would always be a mistake for any judge or tribunal to throw hands in the air and say:

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<sup>487</sup> Transcript day 75 page 127

this man is unreliable and that is the end of the matter. A witness such as Superintendent David Taylor may hang by a thread in terms of his credibility, or may fall entirely from the realm of being ever believed, and yet be firmly supported by other evidence. That support may be to the extent of separate proof that could stand up without his evidence, or it may strongly indicate that some portion of what he said turns out to be true.

Consequently, it is important to look for that supporting evidence and to analyse it with shrewdness and common sense. It was the tribunal's duty to carry on. For the record, the tribunal did give itself an accomplice warning. The tribunal bore in mind at every stage of the evidence the potential unreliability of Superintendent David Taylor and his conduct and his strong motivation for ensnaring other people. Despite all of that, the truth has to be looked for: but vary warily.

Insofar as several people are saying, independently of Superintendent David Taylor, that they were personally approached with calumny about Maurice McCabe, that evidence must be scrutinised individually, and also collectively, with a view to sounding out its probable relationship to the truth.

What should not be done is to engage in an exercise derived from that state of unreality called law-world whereby snippets of evidence are isolated and dismissed as if there were not a bigger picture. This is not an exercise in the admission of evidence by a judge for the consideration of a jury on the basis of similar fact rules. In criminal trials, factual evidence of past misconduct by the accused can be admitted at trial for the purpose of inferring that the accused committed the misconduct at issue, but only if the evidence is strong enough to establish through a pattern that establishes relevance and overcomes potential prejudice. Whereas some earlier authorities require striking similarities before a jury can be told, contrary to the usual rules, about the accused's past misconduct, a better view is that since evidence that an accused has committed crimes in the past may prejudice a jury unfairly, only evidence sufficiently strong in cogency to overcome that prejudice may be admitted. This rule, then, is no more than the ordinary principle that prejudicial evidence cannot be admitted unless its probative value outweighs any such potential prejudicial effect. That rule does not apply in civil cases. Nor, as the tribunal stated in part 1, is the tribunal bound by the rules of evidence.

What would be completely wrong in such an exercise would be for the tribunal to be tempted into an exercise of piecemeal analysis and possible rejection or possible acceptance of snippets. Yes, evidence has to be cogent in itself, but its cogency can be increased in the light of other evidence. This is saying no more than that evidence should not be accepted or rejected in isolation of its background, but should be also considered in the light of other evidence, provided that evidence is in itself capable of belief. It is the overall state of the evidence that matters with a view to deciding whether a probability has been established. Writing on this issue, in an academic article on sexual violence, Charleton and Byrne in the *Irish Journal of Legal Studies*, volume 1 from 2010, offered the following warning:

Evan Whitton refers to the scandal of eight separate trials in Australia against a religious brother (institutional abuse has often transpired to produce these kinds of situations); [1998] EWCA Crim 1486, see also N. Wallace, 'We saw it coming, say ex-students, as brother acquitted' *The Sydney Morning Herald* (2 July 2004). Eight boys had complained of sexual abuse by this individual. In consequence of pre-trial rulings, all of the complaints went to court individually before separate juries. He secured separate trials in respect of each complainant. A separate jury was thus sworn in each case so that the word of the alleged victims stood alone against the contradiction of the brother in religion. Each of the trials resulted in acquittal. It can be argued that ordering separate trials may amount to a serious error in many cases. All too often, arguments are put that if a jury is to hear from

two or more complainants of sexual abuse that the accused's character is being taken into account. This is arguably not the case. Witness A says that he was abused by the accused. Witness B says he was abused by the accused and so does witness C. Let us remember, this is not character evidence. None of this is proved and there is a presumption of innocence in respect of each charge in favour of the accused. It is a different issue if the jury accept witness A, then they have to be told the rules for using that evidence in favour of B or C. But only if the evidence given by A is capable in law of bolstering the case made on behalf of the prosecution against B or C because the normal rule is that separate trials of each count are held at the same time. They can also be told that if they accept witness A that on no account should they use the bad behaviour now proven to jump to the supposition that the accused is also guilty on the allegations of B and C. Instead, they only use that evidence which they accept from A if it is logically probative in support of the evidence of B or/and C. It is also wise to tell the jury that they must rule out collusion first.

We should be wary of any notion that our system is beyond analysis. It is also worthwhile to remember that every country in Europe is now part of a general framework under the European Convention on Human Rights, which guarantees fairness of trial procedure. A trial procedure is never fair if it becomes ideologically based, so that the idea of what may be fair is severed from practical reality. The Scots have a separate legal system from ours, and a very fine one too. On independence, we developed the potential to construct our own rules to deal with our own problems. In the field of criminal law, the Scots have had this for centuries. Consider, in contrast to the case mentioned by Whitton, the decision in *Moorov v. H.M. Advocate*; [1930] J.C. 68. Scottish criminal law requires corroboration of the offence. It does not matter what the offence is; theft, murder, rape – all require more than one witness. The accused, Mr Moorov, was indecently assaulting a number of his employees. The employees were not left to give evidence alone in a series of isolated cases. The Full Bench of the High Court of Justiciary ruled that the evidence from one girl could corroborate the evidence of another. This is a radically different approach to the Whitton example.<sup>488</sup>

Fundamentally, the tribunal intends to bear in mind that its job is to be sensible and to be shrewd.

### **Direct and indirect calumny**

According to a sermon, a penitent once went to a priest for confession. The sin was gossip. The priest suggested a penance: that the person go to the top of the church tower and tear apart a feather pillow, releasing its contents to the wind. The penitent was to return to confession the following week. Smugly, the fulfilment of the penance was then announced. The priest said: that's not all - now go and pick up each feather.

Much of the tribunal's time has been taken up with testimony about rumours heard by politicians and journalists. Generally, this was to the effect that Maurice McCabe was once investigated for a historic allegation of abuse against a child. Since journalists are constricted by defamation laws, the publication of an allegation tantamount to essentially the worst that could be said about anyone meant that how the allegation might stand up in court had to be considered. To defend defamation, the burden of proving the truth of any allegation is on the publisher. Further, journalists have standards. Some news organs insist on verification by two sources; the standards of other media

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<sup>488</sup> Peter Charleton and Stephen Byrne, *Sexual Violence: Witnesses and Suspects A Debating Document*, (2010) Volume 1(1) Irish Journal of Legal Studies from page 42

sources may not be so exacting. Hence, journalists were obligated to check out the rumour. Since a file had gone to the Director of Public Prosecutions and no proceedings were authorised, that would be the end of the matter. Effectively, nothing could be published. Several journalists, and some public representatives, checked the matter through. For public representatives, who do not cultivate sources, getting to the bottom of the allegation was harder. For both politicians and journalists, the rumour mill functioned anonymously. Typically, people could not remember when the matter was first mentioned and details as to what, precisely, was said were vague. Typically, as well, rumours could not be specified as to the time of their first emergence; but late 2013 and through 2014 were characteristic. It is best to divide the evidence into that received, firstly, from politicians and then, later, from journalists.

Evidence of rumour was given to the tribunal by Micheál Martin TD, leader of Fianna Fáil: the Republican Party, Pat Rabbitte TD, then Minister for Communications, Energy and Natural Resources, and Eoghan Murphy TD as to what they had heard about Maurice McCabe. None of what they heard was complimentary to him.

### **Rumours in political circles**

Micheál Martin TD told the tribunal he was aware of “general comment” in relation to Maurice McCabe after Deputy Martin had raised the penalty points allegations in the Dáil in February 2014:

*I was aware of general comment. I think it became more -- it became more pronounced, I suppose, in the aftermath of I raising it in the Dáil. There was a lot of rumour about the place, but also, you know, people close to me or the Press Officer would have received queries as to whether your leader, in raising this issue, can he stand over the credibility of this person, is he satisfied, that type of thing.*<sup>489</sup>

This public representative, as leader of the opposition in Dáil Éireann, had met Maurice McCabe in February 2014 in order to discuss pressing policing issues. These talks were about efficiency in the national police force and fixed charge penalty notice enforcement. In consequence of that first meeting, Micheál Martin TD regarded Maurice McCabe as an ostensibly reliable person and one concerned with the public good.<sup>490</sup>

On 19 February 2014, Deputy Martin raised concerns in Dáil Éireann arising from the dossier of evidence given to him by Maurice McCabe. Then the nature of the rumours crystallised markedly. Shortly after, he told the tribunal, John McGuinness TD called into his office and told him about a conversation he had had with Garda Commissioner Martin Callinan:

*And he came in to say, thanking me and saying well done in terms of raising this issue. He had expressed an opinion that politicians or mainstream politicians should be representing and supporting people like Maurice McCabe in the situations that they find themselves in, they feel marginalised, they feel people don't support them enough and towards the end of the meeting, at the very end of the meeting, he then said to me that he had met the then Garda Commissioner, Martin Callinan, in a car park and that he had said to him that Maurice McCabe was not to be trusted and that he was a child abuser.*<sup>491</sup>

Micheál Martin TD also told the tribunal about general rumours circulating at that time:

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<sup>489</sup> Transcript day 66 pages 9-10

<sup>490</sup> Transcript day 66 page 13

<sup>491</sup> Transcript day 66 pages 14-15

*I had heard rumour about child abuse but nothing specific, couldn't pin it down in a window, that kind of thing, be careful, be careful how you are proceeding on this issue, but that would have been, you know, coming from a Garda Commissioner saying it to a TD, that was the -- you know, that was different.*<sup>492</sup>

Micheál Martin TD told the tribunal that he informed his chef de cabinet and press officer of his conversation with John McGuinness TD.<sup>493</sup> Micheál Martin TD decided not to pursue the matter or take any steps following this, telling the tribunal that “to accuse anyone of child abuse is probably the worst accusation you can make against any individual.” His thinking against taking any further steps was that “to subsequently rearticulate that is, whether one likes it or not, going to be very damaging to that individual.”<sup>494</sup> This approach displayed both thoughtfulness and sensitivity.

Pat Rabbitte had initially come into contact with Maurice McCabe around 2007 when he was first raising concerns about policing standards in Bailieboro. He was concerned with what Maurice McCabe had to tell him. He had been supportive; not out of any sense that any emotional propping up was needed but in the sense that an issue of public moment had been raised that needed to be followed through on. That support had become known publicly. In 2014, he appeared on an RTÉ radio programme and discussed his previous dealings with Maurice McCabe, speaking positively about him.

On 14 February 2017, Pat Rabbitte discussed a conversation he had with a retired garda on the RTÉ television programme ‘Prime Time’:

DAVE MCCULLAGH: Well seeing as you mention that, you were sitting in a cabinet for some of the period when all this was going on, did you hear rumours about Maurice McCabe? The smears about Maurice McCabe?

PAT RABBITTE: I did, yes. Maurice McCabe approached me at the end of 2006 or maybe early 2007 about policing difficulties and malfeasance and he had a major thorough file and I helped him or advised him on the confidential basis he sought, as best I could. But when the incident blew up in 2013/14, probably early 2014, I was asked on a programme like this, that same question and I explained that I did indeed know Maurice McCabe as an upstanding and, in my view, an honest, conscientious policeman. And I was approached that night by a friend of mine, who is a retired garda, to say that he didn't know that I had any knowledge of Maurice McCabe and that I better be careful because did I not know what was going round? And he graphically told me what was going round.

DAVE MCCULLAGH: And did you tell anybody about that?

PAT RABBITTE: No, nobody. I thought it was foul gossip. I didn't believe there was anything to it and I didn't think it should be given legs. But I did express my view, publicly and privately, about the probity and integrity of Maurice McCabe.<sup>495</sup>

At the time of the conversation there referred to, Pat Rabbitte was Teachta Dála and was Minister for Communications, Energy and Natural Resources. That was from 2011 to 2014. He came forward and provided a statement to the tribunal. At the hearings, he described the nature and context of the conversation to which he had publicly referred. He identified the garda to whom

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<sup>492</sup> Transcript day 66 page 16

<sup>493</sup> Transcript day 66 page 42

<sup>494</sup> Transcript day 66 page 17

<sup>495</sup> Tribunal documents page 1468

he spoke as his ministerial driver John Kennedy, a man who had served with distinction in the detective branch. It is important to record that the nature of the conversation was not presented to the tribunal as involving in any way the deliberate spreading of rumours. Rather, his driver simply informed him as to what was being said about Maurice McCabe within police circles without in any way endorsing it. The context, as it emerged, was of one person who worked very closely with the other filling his employer in on a trap into which he might walk unawares. This is how Pat Rabbitte put the matter to the tribunal:

*Q. You had a conversation with him in relation to your radio interview, is that right?*

*A. Not quite. He raised it with me, he said he hadn't known that I knew Maurice McCabe, and he wanted to warn me in my own best interests about wading into a controversy when the rumours on the grapevine suggested that he might not be a man of the character that I said he was.*

*Q. And did he say why he may not be the man of the character that you had stated that he was?*

*A. Well, he did. He said that he couldn't be trusted, that his own colleagues believed that he couldn't be trusted with children. The conversation wasn't very prolonged after that, but the meaning was clear.*

*Q. How did you react to what was being said to you?*

*A. Silently, I think. On the one hand, I had to accept that Mr. Kennedy was drawing it to my attention in my own best interests, to alert me to steer clear of a controversy that might not be what it seemed, but on the other hand, I had to appreciate the import of it, there scarcely being an allegation more grave than that you can level against a man's character.*

*Q. And your impression, Mr. Rabbitte, at that time was that he was merely saying this to you because he regarded you as a friend and somebody who ought to be advised of this as opposed to merely spreading gossip about Sergeant McCabe?*

*A. No, no, in my opinion, he certainly wasn't in the business of propagating the rumour; he was merely alerting me to knowledge that he had and that I didn't have and that I should perhaps be careful about testifying to Maurice McCabe's good character in public, given what was being said on the Garda network.<sup>496</sup>*

John Kennedy denied ever having any conversation with Pat Rabbitte about Maurice McCabe. He told the tribunal that he knew nothing about rumours of sexual assault allegations against Maurice McCabe:

*I never discussed Sergeant McCabe with Mr. Rabbitte at all. Never. Secondly, the perception out there is that, oh, Kennedy said to Mr. Rabbitte that Mr. McCabe was involved with sexual abuse, which is completely wrong, I didn't say it, never said it, nor never would say it. Now, if somebody came to me, and we're not talking about Sergeant McCabe here, we're just talking about just in your neighbourhood or whatever, I'd be very slow to say to anybody, and I would go to the property authorities, meaning the Health Board, the Garda Síochána, or whoever, the people, and that's where I would go. I certainly wouldn't -- it's too sensitive, it's*

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<sup>496</sup> Transcript day 66 pages 68-69

*too horrible to suggest that anybody, with no -- with absolutely no proof. And I know what you're saying, that you're led that I didn't specifically say it but I heard it from someone else. No, I never heard it from anyone else. I didn't hear it doing the rounds and I certainly didn't say it.*<sup>497</sup>

The tribunal does not accept that evidence. At the same time, while that conversation happened as described by Pat Rabbitte, there was nothing in the presentation or character of John Kennedy which displayed either malice or delight in spreading damaging news about others. Rather, it seems he would have blamed himself for not speaking had the Minister's support turned out to be for a hero with feet of clay. The incident points up the dangerous nature of gossip: ever changing, usually for the worse, rarely accurate and liable to repetition even by people of goodwill, that relaying often capable of being justified to keep others away from apparent treachery.

Eoghan Murphy TD, current Minister for Housing, Planning and Local Government, also told the tribunal about rumours relating to Maurice McCabe. He had been a member of the Public Accounts Committee from 2011 to 2014. Thus he had been intimately involved in the controversies that had been aired in correspondence as to the use of data and the appearance of Maurice McCabe before that committee. Minister Murphy provided a statement to the tribunal in December 2017.<sup>498</sup> He told the tribunal of general rumours circulating around Leinster House about Maurice McCabe and Garda John Wilson around January 2014:

*So, you know, in the months preceding his appearance in front of the Public Accounts Committee in a private session but also the appearance of the Commissioner, insofar as we were investigating the different aspects of that vote, there had been statements in the Dáil, and I think, from memory, certainly John Wilson had been in the vicinity of Leinster House, or indeed in Leinster House, maybe even in the visitors' gallery on some occasion, and so I can't say any more than to say that people were saying that they were odd, that these were two odd individuals making claims and, as I say in my correspondence, that would not be unusual in Leinster House. I mean, it is, as I say, the quintessential rumour mill, where you have politicians, you have civil servants, you have people working in the media, you have people or the public coming in for whatever reason, and rumours can spread quite quickly, and it sometimes can be difficult to remember where you first heard that rumour and what the source of it was. But it certainly was a view that had, I think, spread around Leinster House, that these two people who were going up against the system were odd. And again, I didn't see that as being abnormal in the fact of what they were trying to claim or what they were trying to do. The system in itself would resist that, you know, including individuals.*<sup>499</sup>

Minister Murphy told the tribunal that he did not hear any rumours specific to Maurice McCabe, nor did he hear any rumour about allegations of sexual assault against him.<sup>500</sup> These are a sample of witnesses' testimony. Other evidence was provided by journalists. Insofar as it is essential to the tribunal's conclusion, it is considered later.

What has been detailed above, of course, are merely rumours. Part of the case put forward on behalf of Commissioner Martin Callinan was that he neither engaged in calumny nor traded in gossip. His case was that he was not the originator of that gossip and that if Superintendent David

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<sup>497</sup> Transcript day 66 page 117

<sup>498</sup> Tribunal documents pages 1452-1453

<sup>499</sup> Transcript day 66 page 98

<sup>500</sup> Transcript day 66 page 99

Taylor, his press officer, was, then that had nothing to do with him. On one occasion, the Minister to whom Commissioner Callinan answered had occasion to ask him about Maurice McCabe, and his answer to that query is claimed by him to show that his attitude was responsible. That incident is important also as it provides a link to testimony from people who were prepared to come forward in order to testify to the tribunal about what they say Commissioner Callinan had said to them about Maurice McCabe.

Alan Shatter was Minister for Justice and Equality from 2011 to 2014. This coincided with the Public Accounts Committee's hearings in January 2014. Several pieces of correspondence in relation to Maurice McCabe would have come across his desk during his term in office. Out of a proper sense of ministerial responsibility, since the entire issue of penalty points cancellations and policing in Cavan/Monaghan came within his portfolio, he, rightly, took the trouble to ask Commissioner Martin Callinan about Maurice McCabe. His interest was, therefore, appropriate. To do his job properly, he needed to know what might be behind the litany of complaints from Maurice McCabe that extended even to an allegation that Commissioner Callinan was himself corrupt. He explained the background to the tribunal and what transpired between himself, as Minister, and Commissioner Callinan. That happened, probably, around the time of the publication of the report by Assistant Commissioner John O'Mahoney into the fixed charge penalty notice cancellation controversy. Thus, he is referring to sometime in May 2013 or shortly after:

*The background to the query was the difficulties being experienced in dealing with issues raised by Sergeant McCabe, what I perceived to be the erratic nature of his engagement. I'm very conscious that this Tribunal doesn't want to re-visit issues from the O'Higgins Commission, but in the background, truthfully, were a number of issues. One was a series of letters sent to Sergeant McCabe's solicitors trying to seek agreement that documentation provided to the department in confidence, directed for my eyes only, for the addressee only, that we could release that to the Garda Commissioner to get observations, to ascertain, having got them, whether there was a need for a public inquiry or commission of investigation. That was one issue.*

*There was, Sergeant McCabe adamantly insisting that every allegation made by him on the ticket charge issue stood up, even though some patently didn't. There was the complaint that he hadn't been interviewed in circumstances in which he'd sought anonymity. And there was this very strange arrangement that he described the Taoiseach of being invited to meet a member of the O'Mahony team and regarding it as being alarming. There was continuing public controversy. I was being publicly pilloried. The fact that I had truthfully and genuinely wanted to resolve the issues and ensure we had the best possible and transparent system administering the fixed charge ticket issue was partially being ridiculed, and the Garda Commissioner was being demonised. And there was a particular problem.*

*So, my recollection of this is that no, when I first wrote to the Commission I said I think it occurred after the O'Mahony report was published; I'm pretty certain that this was a conversation that did occur now after the O'Mahony report was published, because I think it was a consequence also of the reaction to the O'Mahony report. There was a phone conversation between myself and the Commissioner on a number of different issues, I think I was in the Department of Justice and I simply said to him look, along the lines that there's continuing difficulties dealing with issues raised by Maurice McCabe. The Commissioner knew nothing about the letters that weren't being responded to, because that*

*wasn't an issue we'd written to him about because of the confidentiality issue. And I said to him, is there something in the background here that I should know? Is there some other issue of concern? And his reaction was to say that the only issue that occurred to him was that some years ago, and I can't recall did he then or did I subsequently, in the context of all the later publicity that has since arisen, did he say it was 2006 or was it just some years ago, I'm not 100% certain of that, that an allegation was made of a sexual nature in relation to Sergeant McCabe, that it had been fully investigated and the DPP had directed there was no basis for a prosecution. And I asked him were there any similar further allegations made and he said no. And he then speculated that perhaps Sergeant McCabe was upset at the manner in which the matter was dealt with. Now, I took that to mean that this impacted in some personal way on Sergeant McCabe and that this was impacting just on his perception of how he could or should engage with the Gardaí.*

*Looking back on it now, the conversation on that issue was very brief. I took the view, and maybe it's my legal training, that it was - I didn't ask what the charge of a sexual nature or the allegation of a sexual nature was, I didn't know that it related to - allegedly to a child until I subsequently met the young woman, which I reference in my submission, or in my statement to the Commission, and I didn't query it any further. And my only perception of it was, contrary to the way Martin Callinan has been portrayed, was he didn't make a big deal out of it. My perception was that whatever the allegation was wasn't a major issue.*

*Now, as someone practising in the area of family law who has dealt for over 30 years with family cases, I've had far too many instances of false allegations of sexual abuse being made by one parent against another in the context of fights over the custody of children. And of course I have had allegations in cases I've dealt with that have been true. But in the vast majority of cases, they're part of unfortunately the tool of battle that a parent seriously at war with the other parent often uses to try and curtail access.*

*So perhaps I didn't treat this as being something horrendous to be explored, I just took it that the DPP had decided there was no basis for the allegation and that was the end of it.*

*It was something that Martin Callinan and myself never again discussed.*<sup>501</sup>

The tribunal fully accepts this evidence. Also accepted is Alan Shatter's testimony that he, unlike many other politicians, had never heard any rumour around Leinster House or elsewhere about this topic. As he said, it was perhaps his position as Minister and the barriers surrounding direct contact which explains that.

Alan Shatter's testimony as to Commissioner Martin Callinan, while clearly true, contrasts markedly with other evidence as to the attitude of Commissioner Callinan. A date helps to explain this. As noted, this conversation occurred possibly in late spring of 2013. Other conversations, now to be detailed, occurred in the lead-up to Christmas 2013 and in January 2014: a time when issues as to whether documents garnered from the PULSE system ought to be debated publicly before the Public Accounts Committee and as to the appropriateness of a serving garda sergeant being a witness contrary to the wishes of his ultimate commanding officer were generating debate.

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<sup>501</sup> Transcript day 77 pages 142-146

## Direct condemnation

It is appropriate, therefore, to now detail evidence given to the tribunal by other persons who assert that they were directly approached by Commissioner Martin Callinan with unpleasant allegations about Maurice McCabe. They claim that this did not happen through any intermediary, such as Superintendent David Taylor, but that the Garda Commissioner himself attacked the character of Maurice McCabe.

These were: firstly, John McGuinness TD, former chairman of the Public Accounts Committee; secondly, Séamus McCarthy, the Comptroller and Auditor General; thirdly, John Deasy TD, a public representative; and, fourthly, Philip Boucher-Hayes, a journalist working for Raidió Teilifís Éireann. While that evidence differed in detail, there were features common to much of the testimony: that Commissioner Callinan had a very low opinion of Maurice McCabe, that he was prepared to specify why, and that his view was that he, as his ultimate commanding officer, was the victim of an utterly unreliable individual.

What must be borne in mind is the core allegation of Superintendent David Taylor: that he was the mouthpiece for Commissioner Callinan's low opinions of Maurice McCabe. As regards any evidence proving any involvement by Superintendent David Taylor in that repellent task, it is the evidence of Philip Boucher-Hayes that, if accepted, is most telling.

### John McGuinness TD and Commissioner Callinan

To recap: John McGuinness TD was chairman of the Public Accounts Committee from 2011 to 2016. He had met Maurice McCabe on a number of occasions since 2011 in relation to the penalty points issue and other concerns which he was raising.<sup>502</sup> He told the tribunal that he was one of the public representatives who had heard rumours about Maurice McCabe. Those rumours intensified in the lead-up to Maurice McCabe's appearance before the Public Accounts Committee in January 2014:

*[D]uring the lead-up to that decision being taken it was obvious that Sergeant McCabe and others were highlighting this issue and a number of members of the Oireachtas were raising questions in relation to this matter. And then to complete, I suppose, what was happening, alongside that effort being made by Sergeant McCabe and others, there was a further effort being made to spread gossip and rumour in relation to the character of Sergeant Maurice McCabe and to insist that he was not a credible individual to be listening to. ... I don't know the source of these rumours because I ignored them. I like to deal with facts as presented, and the facts as presented by Sergeant McCabe seemed at that time to be credible. That was before looking at the evidence that he gave in terms of the paperwork. So I ignored what was being said, but it was rumour that, I suppose it was being circulated throughout Leinster House and I decided not to take part in, you know, examining that, because my purpose was to examine the fixed penalty point issue.*

...

*I can't identify the people who will have spread this rumour. I don't know the source of it, but I do know at the time there was considerable pressure to ensure that the lobbying being carried out by Sergeant Maurice McCabe and others was stopped, and the method used to stop that rumour -- to stop that process, was to*

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<sup>502</sup> Transcript day 62 from page 7

*spread these malicious rumours about Sergeant McCabe, which I ignored and took no part in. ... [It was said t]hat he was involved in issues around sexual abuse and that he was a paedophile. ... And because of that, I felt it was deliberate in the effort being made to prevent the examination of the issue any further and I had to keep my sight clearly on what was the work of the Public Accounts Committee, the Comptroller and Auditor General and what was about to be debated or to be examined at the Public Accounts Committee meeting.*<sup>503</sup>

John McGuinness TD told the tribunal that he had spoken to Maurice McCabe about these rumours in one of their meetings at some point prior to Maurice McCabe coming before the Public Accounts Committee in January 2014. It must have been very upsetting for Maurice McCabe to be asked about that issue. Nonetheless, asking that question was part of the duty which chairmanship of the Public Accounts Committee cast on John McGuinness TD. He was assured by Maurice McCabe that any rumours were “not true” and so he “accepted that, and I pursued it no further.”<sup>504</sup>

Then came the few days in January 2014 when, after intensive correspondence about the issue between Deputy McGuinness and Commissioner Callinan, the Public Accounts Committee were moving towards a compromise whereby, contrary to the wishes of his ultimate commanding officer, a serving sergeant was to appear to testify on matters gleaned from PULSE, a system of information reserved to gardaí, but was to do so in private. Up to the time of the making of that decision, a few days before Maurice McCabe gave evidence on 30 January 2014, there was tension within the committee as to whether he should be called at all and, if called, whether his evidence should be exceptionally taken in private. As of the date when Commissioner Callinan was to give evidence, 23 January 2014, no decision had been made beyond the Public Accounts Committee making it clear in correspondence that data protection legislation was not going to stop them hearing from Maurice McCabe.

This, therefore, was the setting within which Commissioner Martin Callinan testified over about five hours to the committee on 23 January 2014. The tribunal has seen the video recording of that committee sitting. It was within that context that the comment by Commissioner Callinan about those with issues not pursuing garda channels being “disgusting” was made. The tribunal understands well how an inappropriate word, that in this instance was deeply hurtful, can be dropped inappropriately. The tribunal is not influenced by that or by the somewhat inadequate public relations speak so-called clarification that later followed on 12 March 2014 where Commissioner Callinan said:

I want to clarify that my use of that term was not in reference to the character of either Sgt McCabe or former Garda Wilson, but the manner in which personal and sensitive data was inappropriately appearing in the public domain without regard to due process and fair procedures.

I stated at the PAC and re-iterate now my absolute support and commitment to any member of An Garda Síochána who reports wrongdoing of any kind.<sup>505</sup>

John McGuinness TD gave evidence about a comment he alleges Commissioner Callinan made on 23 January 2014, when the afternoon’s evidence had finished in the Public Accounts Committee and as the meeting was formally ended and people were going their separate ways:

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<sup>503</sup> Transcript day 62 from page 10

<sup>504</sup> Transcript day 62 from page 12

<sup>505</sup> Tribunal documents page 3004

*Well, after the meeting we would go and pass some pleasantries [with witnesses], thank them for attending the meeting, for their evidence and so on. On that particular day, as I have stated, as I approached the Garda Commissioner, he immediately went into a story, or telling me about an incident involving John Wilson, where there was a difficulty in Grafton Street I think it was, the police were called to that, John Wilson was one of the individual Gardaí that attended at that incident, and in the Commissioner's words, he pulled the k..... off the horse, because it involved horses and individuals, he got on the horse himself, rode it back to the barracks and tied it to the railings of the barracks; and the other fella fiddles with kids; they're the kind of f..... headbangers I am dealing with.*<sup>506</sup>

According to John McGuinness TD, Deputy Commissioner O'Sullivan and Superintendent Taylor were present when these remarks were made. In terms of what was happening in the room, the meeting having just concluded, and the general noise of committee members, witnesses, and attendees from the public and the press talking to each other, the tribunal cannot be sure that this remark would necessarily be overheard. In his initial statement to the tribunal, John McGuinness TD said that:

Mr Callinan was with Ms. Norin O'Sullivan and David Taylor and he said to me, "this man fiddles with Children, this is outrageous". I took the reference to "this man" to refer to Mr. McCabe.<sup>507</sup>

According to Superintendent David Taylor in his evidence to the tribunal:

*After -- it was a very long day and at the end of the day, Deputy McGuinness came down from the podium, which he would normally do, and he was shaking hands and engaging with Commissioner Callinan. To his left was Commissioner O'Sullivan, Commissioner O'Mahony, Andrew McLindon and myself. I was standing behind Commissioner Callinan. My usual protocol would be, when the meeting was open I'd pick up the Commissioner's hat and his satchel and hand it to him as a courtesy. I was aware that Deputy McGuinness was talking to Commissioner Callinan in the conversation, I didn't hear the beginning of the conversation but when I looked around I could hear Commissioner Callinan say that Sergeant McCabe was a kiddie fiddler.*<sup>508</sup>

Commissioner Martin Callinan did not at all agree with the account of Deputy McGuinness. He testified:

*Mr. McGuinness is correct when he said that he'd normally - he normally comes down to thank the witnesses who have given evidence, at least that has been my experience, and this occasion was no different; he did approach me to thank me for coming down and he said it was a long day and you will be glad you are finished, and I asked the question would Garda John Wilson be called to give evidence, former Garda John Wilson be called to give evidence and he replied "you must be joking, sure he's an f-ing header". That is what I said in my statement, and that is the correct version of events, and no other version, and certainly not the version of events that has just been read out to me.*

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<sup>506</sup> Transcript day 62 pages 35-36

<sup>507</sup> Tribunal documents page 1419

<sup>508</sup> Transcript day 74 from page 44

*... [As to making a reference to kiddie fiddler] I never heard the expression before.*

*... [As to John Wilson's nickname] ... you know, it was a point of humour, I suppose, and I do agree with you that there is no semblance in the appearance of both individuals, but, you know, the reality is, there was a world champion, John Jockey Wilson, and, you know, I had associated his name, his nickname, with that person. You know, Garda John Wilson was in Pearse Street at a period when I was serving there is a sergeant, a relatively short period of time, but the reality is, we didn't have that much contact, you know, he was on a different unit, etcetera, and there was, I don't know, maybe 130 or 140 Gardaí there, you know, so I can't help with how he was christened it but I was certainly aware that that was the nickname, Jockey Wilson. ... that was an assumption on my part ... the world champion [darts player].*

*... [As to the horse story] In Garda circles ... there are many, many stories about many, many individuals. If this was one of them I accept that that is the case, of course I do. But I don't accept that I heard it, that's all I can tell the Tribunal.*

*... [As to ascribing an allegation of child sexual abuse to Maurice McCabe] There are a couple of different versions, Chairman. Superintendent Taylor was the person that introduced the words "kiddie fiddler". What Mr. McGuinness initially introduced was the fact that I had indicated "this man fiddles with children, this is outrageous", a reference he took to be Sergeant McCabe. And then I think prior to me making my statement and indicating that I had asked the question of him, he responded to the investigators by introducing John Wilson in a completely different capacity, that hadn't been mentioned previously, apart from the question and the answer that I had got. That was the sequence of events, as far as I'm aware.<sup>509</sup>*

While it is correct that there are issues as to the form in which the conversation was first described in a written statement to the tribunal and with the reference to Garda John Wilson by Deputy McGuinness, the inherent details and vocabulary are telling. The tribunal has seen both witnesses. There was a marked sense in the demeanour of John McGuinness TD of someone who was engaging in genuine recall. People, generally, do not necessarily come up with an utterly accurate account of important conversations. Certainly not at the first attempt, as this usually is a process of teasing things out and then putting order on a narrative. Lawyers are trained to put structure on the give and take of human conversations. Experience also demonstrates that an encounter that suddenly takes a startling turn may create a jumbled impression. With that in mind, one turns to what John McGuinness TD also had to say about what happened in the aftermath of this encounter, specifically the next day. By that stage, everyone would have had a chance to sleep on matters and perhaps reconsider any prior attitudes.

On 24 January 2014, there was a meeting in the car park of Bewley's Hotel between John McGuinness TD and Commissioner Callinan. Phone records demonstrate contact between them prior to this meeting, on both 23 and 24 January 2014. John McGuinness TD told the tribunal that these phone calls were to arrange the meeting.<sup>510</sup> Normally, any such encounter would involve both parties going into the hotel lobby and perhaps ordering the usual teas and coffees. It would seem that heavy rain could operate as a reasonable explanation as to why that did not happen and why the commissioner instead opened the passenger door and sat into the deputy's car. The weather, however, seems to have had little to do with it as the weather report only indicates very

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<sup>509</sup> Transcript day 79 from page 36

<sup>510</sup> Tribunal documents page 2202, transcript day 62 pages 58-59

light and occasional showers on that day. The tribunal is satisfied that the Garda Commissioner just stepped into the passenger seat and that what then happened between them was short and to the point, as if the time for niceties had passed. This is John McGuinness' account of the meeting:

*I arrived in the car park, as arranged, and I presumed that we were going to meet in the hotel, so when I saw the Commissioner approach, I was in the process of getting out of the car, but he in turn went around quickly to the passenger side of my car and sat in. And then he immediately got into the conversation to do with the Maurice McCabe and the issues. I suggested to him at the beginning of this conversation, as I did the day before, that like any other employer that perhaps the best way out of this was for him to talk directly to Sergeant Maurice McCabe and to determine what exactly the issues were and resolve it that way, without it having to, you know, go into the public realm and him dealing -- trying to deal with it that way. And it was at that stage that he said to me that no, it had gone beyond all of that and that there was issues to do with Maurice McCabe and his behaviour and he suggested that there was -- he had sexually abused his family and an individual, that he was not to be trusted, that I had made a grave error in relation to the Public Accounts Committee and the hearings because of this and that I would find myself in serious trouble. ...*

*I said that they were -- some rumours that I had already heard and I said we all know what goes on in relation to these matters and that they were just in fact rumours. And he said to me, no, that there was a file there and that action would be taken against Sergeant Maurice McCabe. He gave me the impression that that would be the case and that I had, as I have said, made a grave error and that, you know, because of all of this he was not reliable and therefore the Public Accounts Committee would find itself and me in serious trouble.<sup>511</sup>*

John McGuinness TD told the tribunal that Commissioner Callinan led him to believe that there was an ongoing investigation into sexual allegations against Maurice McCabe:

*[Commissioner Callinan] gave me to believe that there was an investigation ongoing in relation to the allegations and that they were at an advanced stage and I immediately presumed from that that Sergeant Maurice McCabe would be charged with something or other. ... I believe that he said that there was a file, I presumed that this was a file that was going to whatever prosecutor would be involved in the case.<sup>512</sup>*

John McGuinness TD described how what had been said had shocked and worried him. His principle concern, as expressed to the tribunal, was that the committee which he chaired might have embarked on a course of reliance on the evidence of someone who might fit into the category of unreliable and who might shortly be exposed through the bringing of perhaps a number of serious sexual violence charges against him. Those concerns plagued him on his journey home. So much so, he told the tribunal, that he stopped in a lay-by for lorries just off the motorway to Kilkenny and took out his notebook in which he had a habit of recording both constituency and personal matters for later attention. This entry appears close to names of constituents and a note as to a good source of dog food for the German Shepherds which, as a major life-interest, he keeps and breeds. The note appears as a quick jotting at the end of a page. The notes are as follows:

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<sup>511</sup> Transcript day 62 pages 60-61

<sup>512</sup> Transcript day 62 page 61

Callinan  
McCabe  
Sexual abuse!  
Individual + family  
Don't trust him  
Story not credible  
Investigations on going  
He's not credible  
Trouble for PAC and me?<sup>513</sup>

Commissioner Martin Callinan had a radically different view of the car park meeting and rejected the account given by Deputy McGuinness:

*I had suggested we'd meet at the car park, simply to expedite his journey home, Chairman, because he had indicated to me that he was under time pressure and he said -- I had suggested maybe we'd meet at some suitable location on the outskirts of Dublin to facilitate his journey home and he had asked me well, where do you suggest? So I had, for convenience, mentioned the then Bewley's Hotel at Newlands Cross and I would see him in the car park there so as not to delay him. There was nothing more sinister or unusual apart from that. ... As I approached Mr. McGuinness's car, Chairman, he had some papers on the front passenger seat which he moved into the back seat and I took that to be an indication to sit in to the car and that is what I did. ...*

*[John McGuinness's account of the conversation is put to him] That is absolutely false, Chairman. I never, under any circumstances, said anything of that nature. ... [John McGuinness] did indicate that he had heard rumours about Sergeant McCabe in the sense that he seemed to be aware of the investigation underlying the allegation. He told me that. He brought it to my attention, in the course of the conversation, that he was aware that Sergeant McCabe had been investigated over matters of a sexual nature. [John McGuinness' account of being told by Martin Callinan that Maurice McCabe was under investigation] Totally untrue, Chairman, and would be contrary to any facts that I had within my knowledge at the time. Absolutely untrue. I wasn't aware of any investigation or any inquiries at all in relation to Sergeant Maurice McCabe. ... what Mr. McGuinness said to me was that he was aware that Sergeant McCabe had been the subject of a criminal allegation of a sexual nature, he was already aware of that prior to our meeting, and he went on to ask me about why Sergeant McCabe was making all of these complaints. Was it because of the file that went to the DPP? So it's quite clear to me, prior to our meeting, that Mr. McGuinness was quite aware that Sergeant McCabe had been investigated - not a shadow of a doubt about that in my mind - and all he was speaking about was an allegation. There was no reference to allegations in any way, shape or form.<sup>514</sup>*

Martin Callinan described the conversation in the following way to the tribunal:

*I sat into the car on the basis that Mr. McGuinness had moved papers from the passenger seat. I sat in there, and we began to engage in the conversation. He knew*

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<sup>513</sup> Tribunal documents page 108, for terms of reference (l) and (m)

<sup>514</sup> Transcript day 79 from page 57

*I had been in Dundalk. He inquired about the particular family, he inquired about the Garda family, he inquired about the community, he inquired about cooperation we were getting in the context of that particular investigation. And so, he was aware of all that. And then he asked the question, why was it that Sergeant McCabe was raising all of these issues? Was it because of the file that went to the Director of Public Prosecutions? The DPP, I think was the term he used. And I looked at him with some surprise and he indicated to me that he knew all about the criminal investigation underlying the allegation. And as I said in my statement, that was not something that was prompted by me or something that was raised in response to a question that I had raised. I simply replied by saying to Mr. McGuinness that if he was aware of the file that went to the DPP he must be aware of the directions and he indicated that he knew all about the investigation. And that was pretty much the extent of the conversation in relation to that matter.*

*I didn't at any point in the conversation try to undermine the working of the Public Accounts Committee or speak in derogatory terms of Sergeant McCabe, nor would I. And I then put my proposals to him, what I had intended to do. I write to himself, as the Chairman, and also to the sergeant, and outlining the steps, what I was proposing within the draft letter that had been read out earlier, and to see would that be acceptable. And he had said, we are definitely calling Sergeant McCabe next week, there was no question about that. So that made the letter in that regard redundant, and I did impress upon him in the context of the conversation that I could not see how these matters could be dealt with without members of the public being raised and their particular details, and that is what partly -- partly what I was complaining about in relation to Sergeant McCabe's appearance before the Public Accounts Committee. I didn't believe it was the correct forum, Chairman. It wasn't the case that I had any objection to Sergeant McCabe raising any complaints he wanted to make around -- about wrongdoing. That wasn't the issue, that wasn't on my mind at all. My issue was that they should be raised at the appropriate forum. And I believe I have been entirely consistent from the moment I heard about the materials that were given to the Public Accounts Committee, through the exchange of correspondence, through my evidence at the Public [Accounts] Committee and indeed with my meeting with John McGuinness at the car park, I was entirely consistent at all times. And none of that conversation and none of that correspondence at any point in time spoke to Sergeant McCabe in derogatory terms.<sup>515</sup>*

Nothing in the evidence, the documents before the tribunal, or the background of both parties, indicates even a hint of any animus by John McGuinness TD towards Commissioner Martin Callinan. While it was presented as inconceivable that the Garda Commissioner would speak in this way about a serving officer, it is difficult to imagine why Deputy McGuinness would be so malicious as to pervert the details of their conversation from the expression of legitimate concern into a series of threats and in-the-know warnings.

The tribunal's view is that by the time the Public Accounts Committee had met on the previous day, Commissioner Callinan had considered all legal and legitimate avenues. This meeting was even more private than the brief encounter described by John McGuinness TD in the aftermath of the hearings. In the view of the tribunal, Commissioner Callinan felt able to express himself

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<sup>515</sup> Transcript day 79 from page 64

unguardedly to someone who he thought of as being manipulated by someone for whom he had little respect. As far as Commissioner Callinan's state of emotion left him, it was only by a frontal attack that he might head off what he saw as the undermining of standards of duty and loyalty to which he had devoted his career. That involved, regrettably, a pretence that Maurice McCabe was not only unreliable, but that reliance on him would be a trap, the springing of which, through him being charged with one or multiple sexual abuse allegations, would leave Deputy McGuinness looking more than foolish.

The conversations as described by John McGuinness TD took place.

Deputy Commissioner O'Sullivan's awareness or otherwise must also be considered under the tribunal's terms of reference. In her evidence to the tribunal, Nóirín O'Sullivan denied any knowledge of the car park meeting and said that her first awareness of the meeting was when Deputy McGuinness made a contribution in the Dáil about this on 26 May 2016.<sup>516</sup> There is nothing to show otherwise. As for phone contact, clearly the tribunal does not have any recording of anyone's conversation and the reality of the matter is that Commissioner Callinan and Deputy Commissioner O'Sullivan were telephoning each other all of the time given their respective roles.

### **Séamus McCarthy and Commissioner Callinan**

Séamus McCarthy has been in the role of Comptroller and Auditor General since May 2012. Prompted, in part at least, by material received from Maurice McCabe, he carried out an examination of the operation of the fixed charge notice system. This report was presented to the Dáil on 30 September 2013.<sup>517</sup> One of the concerns which must justifiably have been uppermost in his mind during that process would have been the reliability of the source of any information which he was receiving. However, he told the tribunal that what mattered to him was the data, and that from the PULSE records and other sources of analysis, a loss of revenue to the State through the gardaí not consistently enforcing the fixed charge penalty notice system was a serious concern. Thus the raw data mattered much more than the source of the information. That approach was correct.

Séamus McCarthy stated that he had not heard any specific rumours about Maurice McCabe at that time, but that he had heard something about the missing computer in the Fr Molloy sexual abuse case, which was subsequently examined by the O'Higgins Commission.<sup>518</sup> That examination, by the way, exonerated Maurice McCabe.

In March 2017, directly in response to the tribunal's public appeal in late February the same year for people with information to come forward, Séamus McCarthy provided a statement to the tribunal. In consequence, he was called to give evidence. The tribunal had known nothing about his being in any way a potential witness and could not, furthermore, have learned anything that might have made him relevant from any document furnished by any party. He testified to the tribunal about a conversation he had with Commissioner Callinan on 23 January 2014, prior to the Public Accounts Committee hearing on that day. He stated that he met Commissioner Callinan in the lobby, located at the level below the coffee dock near the Committee room in Leinster House. He recounted the conversation in his evidence to the tribunal as follows:

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<sup>516</sup> Transcript day 81 pages 38-39

<sup>517</sup> Comptroller and Auditor General, Report on the Accounts of the Public Services 2012. Chapter 7 of the report deals with the management of the fixed charge notice system.

<http://static.rasset.ie/documents/news/publicaccounts-report.pdf>, tribunal documents from page 1508

<sup>518</sup> Transcript day 65 page 15

*[M]y recollection is that we were apart from both groups, so my colleagues were not party to the conversation and the colleagues with Commissioner Callinan were not party to the conversation. We began just with sort of normal greetings and -- but very quickly the Commissioner raised Sergeant McCabe's name in the conversation, along the lines that Sergeant McCabe is not to be trusted, that he had questions to answer and that there were sexual offence allegations against him. ... I was surprised, certainly. My immediate concern was Sergeant McCabe's name being raised in the conversation, because, as far as I was concerned, that was not a name that we had shared with the Garda Síochána at any stage during the examination and I had already, on occasions, in Public Accounts, resisted revealing who the whistleblower was.<sup>519</sup>*

Séamus McCarthy told the tribunal that Commissioner Callinan referred to sexual offence allegations in the plural against Maurice McCabe, and that these were allegations under current investigation, as opposed to allegations which had been the subject of a previous investigation.<sup>520</sup> The resonance of this evidence with that concerning the car park meeting is apparent.

Commissioner Martin Callinan had a radically different view of the conversation. He told the tribunal:

*It is correct to say that I did speak about Sergeant McCabe. That was in the context of what [Séamus McCarthy] had spoken to me about, i.e. the audit that he had just carried out, and he had indicated how he had got a file from a whistleblower that prompted that audit and in fairness, I was the person that indicated that some of the allegations made by Sergeant McCabe turned out to be questionable in that some of them proved to be incorrect. I did say that, I have no difficulty at all in saying that, but it was as a result of the remark that he had made that it was the file that he had got from the whistleblower that prompted his audit, the audit that we were down to answer to. ... I have never had occasion to cross swords with the Comptroller & Auditor General, he is a very fine person and we get on very well together, at least I believed we did, and, you know, indicating that the man [Sergeant McCabe] had questions to answer and he couldn't be trusted, could possibly have been an interpretation he took from me indicating that not everything he had said was correct, that he had questions to answer. I don't know. That is the only explanation I can proffer for that particular portion of the sentence. And the balance of the sentence, that there were allegations of sexual offences against him, well certainly I was not aware of any new, fresh allegations in relation to Sergeant Maurice McCabe. My understanding was the only allegation that was made against Sergeant McCabe was the allegation in 2006, that it had been investigated and the DPP had adjudicated on it and that was the end of the matter. ... I was the one that raised Sergeant McCabe's name and I was of the clear understanding that we were both aware that the brief that he had got from the whistleblower was the brief from Sergeant McCabe. ...*

*[Séamus McCarthy] had said he had indicated that he had heard a rumour or a story that Sergeant McCabe was being investigated over an allegation of a sexual nature and I corrected the record as I thought, Chairman, by indicating that that was several years ago and that a file had been sent to the DPP, who directed no prosecution. I thought that was the correct course of action to take because, to be*

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<sup>519</sup> Transcript day 65 from page 18

<sup>520</sup> Transcript day 65 page 19

*fair to Sergeant McCabe, he was going to appear before that committee in a couple of days' time.*<sup>521</sup>

The tribunal accepts the evidence of Séamus McCarthy. He showed real public spiritedness in coming forward. As a constitutional officer, he has nothing to gain and nothing to lose. His evidence was coherent and convincing. Everything about how he gave his evidence indicated a sense of duty. There is not the slightest hint of any ill-motivation. While the cross-examination on behalf of Commissioner Martin Callinan was skilled, the truthfulness of Séamus McCarthy as a witness remained untouched.

The tribunal concludes that the conversation with Commissioner Martin Callinan as described by Séamus McCarthy is accurate.

### **John Deasy TD and Commissioner Callinan**

John Deasy TD was a member of the Public Accounts Committee between 2011 and 2016. On 14 February 2017, John Deasy TD appeared on RTÉ's 'Prime Time' and said the following:

Before the [Public Accounts Committee] meeting [on 23 January 2014] I was approached by a very senior guard and he proceeded to make some very derogatory comments about Maurice McCabe, the nature of which were, you know, Maurice McCabe couldn't be believed and couldn't be trusted on anything. They were very, very derogatory. It was, you know, a serious attack and very strongly worded. Maurice McCabe was in the Public Accounts Committee the following Thursday and I thought that he was credible and I made that judgment.<sup>522</sup>

Deputy Deasy subsequently provided a statement to the tribunal in March 2017. This happened, as in the case of Séamus McCarthy, in answer to the tribunal's direct public appeal for relevant information. In that statement Commissioner Callinan was identified as the "very senior guard" referred to in this interview. John Deasy TD gave the following evidence to the tribunal about a conversation he had at the coffee dock in Leinster House with Commissioner Callinan on 23 January 2014 prior to his appearance before the Committee:

*[It was a] very public place, very noisy, people milling about. It wasn't a place where -- it wasn't a car park or a corridor. It was a public area. A very short conversation. He turned to me and we spoke. ... The only part that I do remember is him saying that Maurice McCabe was not to be believed or trusted with anything. And the reason I think I remember that is because it surprised me, I have to say.*<sup>523</sup>

According to John Deasy TD, Commissioner Callinan did not refer to sexual abuse allegations in this conversation:

**Q. Okay. You've no recollection, therefore, of referring to files or sexual abuse allegations?**

**A. No.**

**Q. And how long did you perhaps spend? I know it's a brief period.**

**A. I'd say less than a minute.**

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<sup>521</sup> Transcript day 79 from page 22

<sup>522</sup> Tribunal documents page 1470

<sup>523</sup> Transcript day 63 page 206

*Q. Less than a minute, all right. But is the height of it then, as you have stated in your statement and to the investigators, was that he simply referred to him as someone who couldn't be believed or trusted?*

*A. Yes.*

*Q. But did you understand that that related to the penalty points issue?*

*A. Em –*

*Q. Or did it go further in your mind?*

*A. In my mind, it went further. And I suppose maybe I'm putting this together after the fact.*

*Q. Yes.*

*A. You know, I might be. I think at that point it was to do with the penalty points issue.*

*Q. Okay. Did you think he was trying to influence you adversely in relation to Sergeant McCabe's evidence on the penalty points issue?*

*A. Yes.*<sup>524</sup>

Commissioner Callinan's view of this conversation differed and his evidence to the tribunal was as follows:

*I spoke to him very briefly. It wasn't a lengthy conversation, Chairman, and he indicated to me the areas that he was going to question me on. He spoke about the service of summonses, he spoke about the registration of company cars, and he spoke about the interaction between the Courts Services, An Garda Síochána and other particular departments in the context of providing a more efficient way of collecting fines, and he also asked me whether -- what my views were in relation to whistleblowers appearing before the Public Accounts Committee. So I thanked him for the information and I indicated to him that you have my views in relation to the whistleblowers, the last point he had mentioned, in that I had written on two separate occasions pointing out my views in relation to that particular topic. And I also mentioned, of course, that it is the case that not all of the allegations of Sergeant McCabe turned out to be correct and cautioned about the inaccuracies of some of the information and that the Committee, I was aware, had Mr. O'Mahony's report in front of them to assist them in that capacity. ...*

*It was -- there is a coffee dock just on the right before you go down the stairs. I think, Chairman, you visited the area; it's literally before you go down to the steps to the lobby in front of the Committee rooms. It is a very -- relatively short distance, possibly from here to the end of the room. That type of distance, I think, maybe less. ... Well, there were a number of colleagues in the vicinity. Whether or not they overhead the conversation, I'm not entirely sure.*<sup>525</sup> ...

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<sup>524</sup> Transcript day 63 pages 211-212

<sup>525</sup> Transcript day 79 from page 11

*the words [Deputy Deasy] is using in relation to my comments about not being trusted or that he couldn't be trusted on anything, they are not words that I used, nor are they words that I would use about any member of An Garda Síochána. If that was the situation, Chairman, I would have been obliged to act. I mean, this is a member of An Garda Síochána who would be giving evidence in court, who would be dealing with the public and would be expected to be a person who could be trusted. So, I mean, that is the broad naked reality here. And in addition to the commentary of Mr. Deasy, where he expressed the opinion and indicating that his grandfather was a member of the Garda Síochána and he would have been very, very saddened by a Commissioner of the day using that kind of -- I can assure you I would be in the exact same position if I said those things, but I certainly did not say them, nor would I ever say those things about a member of An Garda Síochána.*<sup>526</sup>

The tribunal considers that the evidence of John Deasy TD is correct. In terms of the consideration of any supposed collusion between these three witnesses, a suggestion not made on behalf of Commissioner Callinan, but one that nonetheless needs to be seriously considered by any tribunal in the face of very similar evidence being given by three witnesses, there is no hint of this. John Deasy TD, if in any sense tailoring his evidence to meld with that of John McGuinness TD and Séamus McCarthy, leaves out any suggestion of a direct allegation of sexual abuse against Maurice McCabe made by Commissioner Callinan. The evidence of John Deasy TD gave no hint of being motivated by sensationalism or by attention-seeking. Instead, the tribunal is of the view that his evidence was given out of a sense of duty.

### **Philip Boucher-Hayes, Commissioner Callinan and Superintendent Taylor**

The final piece of evidence against Commissioner Martin Callinan outside any allegation made by Superintendent David Taylor occurred in a context different to the Public Accounts Committee hearings. What this evidence has in common, however, is the build up of pressure as to policing issues which led into the Public Accounts Committee hearing on 23 January 2014.

Raidió Teilifís Éireann produce a programme called 'Crimecall' on television. This is a crime analysis programme which also enables gardaí to make direct appeals to the public for help and which can use reconstructions in an attempt to jog peoples' memories. Throughout the year, the programme is widely watched and it can be of great assistance to victims. A tradition has grown up that once a year, usually proximate to Christmas, the Garda Commissioner appears on the programme and is interviewed.

On 17 December 2013, a disagreement arose at a production meeting at RTÉ for the 'Crimecall' programme on which Commissioner Callinan was due to appear. While, prior to 2013, many such interviews might have been focused on such matters as statistics and criminal justice trends, all very important in themselves, this appearance coincided with top news stories about fixed charge penalty notices and the recent appearance of the Smithwick report into the murder of Chief Superintendent Harry Breen and Superintendent Robert Buchanan of the Royal Ulster Constabulary. From a journalistic point of view, and from a public viewpoint as well, it might reasonably look more than odd for the Garda Commissioner to be interviewed and closely questioned about such matters as police rostering or overtime allowances. Throughout the day, there were meetings and conversations about the Commissioner's appearance. The garda side were

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<sup>526</sup> Transcript day 79 from page 17

advocating for the traditional type of interview, while on behalf of the programme a more robust interview was suggested, with those currently controversial topics in particular in the frame.

It seems that it was conveyed to Commissioner Callinan that an agreement in relation to discussion topics had been reached prior to his arrival at RTÉ, when in fact the matter had not been fully resolved. Philip Boucher-Hayes, again a person who came forward and answered the tribunal's public call for information of relevance, was co-presenter on the programme and a well-known broadcaster. He was not content to have the programme assume the bewilderingly bland cast sought by the police side. It appears that he wanted to try again and in particular wanted to ensure that questions about Maurice McCabe's allegations in relation to penalty points were asked of the Commissioner. Probably, as well, there was a definite irritation on the police side that when the Garda Commissioner arrived in Montrose for the interview, this topic was raised again despite his impression that the issue had been resolved.

By way of background, while the entire question of some kind of allegation of child sexual abuse and Maurice McCabe had been widely discussed among journalists, Philip Boucher-Hayes told the tribunal that he had never heard any negative rumours about Maurice McCabe. What he wanted to happen, in any event, had nothing to do with that, but instead he was pressing for the programme to have real and currently relevant content. Thus, there was an encounter in a corridor between Philip Boucher-Hayes and the Garda Commissioner. There is no sense of voices being raised but there is a mood of frustration apparent on both sides. Somewhat away from the handful of other people, they discussed matters privately. The tribunal is also satisfied that as press officer, Superintendent Taylor was in close attendance and is very likely to have been trying to overhear every word spoken. Superintendent Taylor, it will be noted, has claimed to overhear other conversations; but not this one. Commissioner Callinan began by requesting that he and the journalist "speak off the record". Greatly to his credit, Philip Boucher-Hayes said nothing. He took the view that conversations were conversations and that he had to specifically agree to Commissioner Callinan being a confidential source before he would be bound by the ethic of journalistic privilege. That was the right thing to do. Especially so, as what happened was an attempt to undermine the character of a serving sergeant, Maurice McCabe, in a way that, because of its deceit, could never be in the public interest to conceal.

This is Philip Boucher-Hayes' account of the conversation prior to the recording of the interview which he had with Commissioner Callinan on 17 December 2013:

*I said if the interview and indeed the Commissioner was to have any credibility then these were issues that really needed to be addressed and that the proposed talking points were of absolutely no interest and would do neither him nor the programme nor RTE any service. He, his response was to immediately suggest that we were off record, which I neither assented to nor disagreed with. And in spite of the fact that I had not mentioned the names John Wilson or Maurice McCabe, that was his starting point in responding to these issues.*

*He said -- he didn't say very much about John Wilson, I can't remember his exact words but he more or less dismissed John Wilson with kind of a shake of the hand and then concentrated on Maurice McCabe and said 'this man has issues, he has some well known grievances, well known within An Garda Síochána and there's all kinds of issues there, Philip, that I can't talk to you about; there are psychological, psychiatric issues with this man and there's more that I could tell you, but I won't, there's an awful lot worse that I could tell you, the worst possible kind of things, but we'll just leave it there'. ... As far as I remember it was actually the most horrific kind of things, which I didn't believe. I did not believe what I was being told right*

*from the very start. ... my imagination went to where I presumed it was being directed to an allegation of child sexual abuse or rape perhaps.*<sup>527</sup>

In relation to Superintendent Taylor, he stated:

*[Commissioner Callinan] said as a parting shot: 'If there's anything else you want to know about this or any of the other stuff we've been talking about, you can talk to David Taylor over there', who was standing a few feet away in the corridor. ... Everybody was moving behind the Commissioner down towards studio four where the pre-recorded interview was to be conducted. I didn't really have that much interest in watching it, I was going in the other direction. And as I passed him, David Taylor didn't physically button-hole me, but stopped me and said 'Now do you understand the issues related to Maurice McCabe and the penalty points' -- sorry, 'Do you understand the issue with Maurice McCabe and the penalty points?' ... To be clear, it did not mean, in my mind, that he knew the content of myself and the then Commissioner's conversation, only that he knew that the penalty points was the issue that I had been pressing him, David Taylor, the hardest on during the course of our earlier conversations. So -- and he had been telling me that there was no way that Martin Callinan was going to answer questions about penalty points. So insofar as -- the explanation perhaps for what he said lies in that myself and David Taylor had been talking about penalty points, not about Maurice McCabe beforehand.*<sup>528</sup>

It is important to deal sequentially with the denials that this generated. Firstly, Superintendent David Taylor was intent on distancing himself from this. This testimony, the tribunal is satisfied, is of a part with his constant desire to present himself as some kind of victim through, firstly, claiming that he was under orders from Commissioner Callinan as to what he did and, secondly, by playing down his part almost to nothing. In one of his interviews with the tribunal investigators, Superintendent Taylor said:

I don't remember mentioning the name Sergeant Maurice McCabe to Philip Boucher-Hayes. The issue on the day, as I have already said, was to do with the penalty points. The issue of penalty points and Sergeant McCabe are interwoven. Any discussion I had with Philip Boucher-Hayes on that date was to do with the penalty points and in that context Sergeant McCabe may have been mentioned. However, I did not make reference to any sexual abuse allegations or any negative briefing against Sergeant McCabe to Philip Boucher-Hayes.<sup>529</sup>

This is what he said in his evidence to the tribunal:

[Statement of Philip Boucher-Hayes is put to him] That's fairly accurate, yeah. As I said, I remember that evening distinctly. Mr. Hayes wanted to bring up and question Commissioner Callinan on air in relation to the penalty point controversy and Commissioner Callinan was having none of it. And I think at one stage the broadcast may not have gone forward. [As to whether he was present for that conversation] No, I was aware, spatially I was aware that they were speaking, but I was not within earshot.<sup>530</sup>

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<sup>527</sup> Transcript day 84 pages 188-190

<sup>528</sup> Transcript day 84 pages 191-192

<sup>529</sup> Tribunal documents page 3262

<sup>530</sup> Transcript day 74 from page 151

Superintendent Taylor was then asked about his answer to the tribunal investigators in relation to the quotation attributed to him by Philip Boucher-Hayes:

*Q. ... this quotation attributed to you [by Philip Boucher-Hayes]; "Now do you understand what the position is with Maurice McCabe?" You see, yesterday you appeared to agree that you said that and you don't appear to have a recollection of it in your statement?*

*A. You couldn't mention the word penalty points without an obvious connection to Sergeant McCabe.*

*Q. But in any event –*

*A. Penalty points and Sergeant McCabe were intricately interwoven.*

*Q. All right. But whatever you said to Mr. Boucher-Hayes it wasn't in reference to or with knowledge of what Commissioner Callinan had said to him?*

*A. You have to understand that day when Commissioner Callinan went out to RTÉ, Mr. Hayes wanted to raise the penalty points issues and that was a red rag to Mr. Callinan.*

*Q. But whatever was attributed to you by Mr. Boucher-Hayes was not said by you with the knowledge of anything that Commissioner Callinan had said to him, Mr. Boucher-Hayes?*

*A. I didn't hear the conversation between the two.<sup>531</sup>*

The tribunal regards this denial as improbable. Commissioner Callinan had a different view of the conversation which, it is common case, he indeed had with Philip Boucher-Hayes in a corridor in the Montrose studios. He told the tribunal:

*I met with [Philip Boucher-Hayes] on the corridor leading down to the studio. He had been talking to a young lady and that conversation broke up and then we engaged in conversation. ... [His demeanour was] I thought pretty relaxed. He did mention to me that he was disappointed and probably a little bit angry, truth to tell, in relation to the fact that I wouldn't engage on the topics, that he had hoped I would, and he made reference to the fact that, you know, in his view as an experienced journalist I should engage with those topics. ...*

*Q. I think in particular he asked you whether you'd be willing to answer questions about the penalty points issue and the two whistleblowers, Sergeant McCabe and John Wilson, is that right?*

*A. That's correct, Chairman.*

*Q. Did he actually name the two whistleblowers?*

*A. He did, Chairman, yes.*

*Q. You say he was the first to introduce it into the conversation, is that right?*

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<sup>531</sup> Transcript day 75 from page 82

*A. I had no intention of getting involved in that subject at all, Chairman.*

*Q. And you say in your statement that you imparted some information in relation to John Wilson. Do you recall that?*

*A. Yes, Chairman.*

*Q. What was that?*

*A. I had indicated that Garda John Wilson had made a complaint under the Antifraud Policy in September of '12, it was shortly after a HQ circular we had distributed to the force in relation to fraud issues, and he made a complaint against an inspector who had allegedly wrongfully cancelled, I think, 20, if I'm not mistaken, fixed charge notices. That matter was -- because there were criminal allegations, that matter was investigated by a chief superintendent who completed a file and submitted it to the Director of Public Prosecutions, who subsequently indicated there was no prosecutions arising in the case.*

*Q. And you indicated that to Mr. Boucher-Hayes, is that right?*

*A. Yes, I did, yes.*

*Q. Did you mention Sergeant McCabe then?*

*A. I just mentioned in terms of Sergeant McCabe as everybody was aware, a number of allegations had been made and they were being examined by assistant -- they had been examined by Assistant Commissioner John O'Mahony, as everyone was aware. And that report was published.*

*Q. This conversation was taking place in a corridor in RTÉ, is that right?*

*A. That's correct, Chairman, yes.*

*Q. Against a background where your understanding was that you were going to Crimercall to give the Commissioner's Christmas address, is that right?*

*A. That's correct, Chairman, yes.*

*Q. That you weren't going to be asked any questions and you weren't going to be interviewed about the Smithwick or the fixed charge penalty notice issue, is that right?*

*A. That was my expressed wish, Chairman.*

*Q. Well, how is it that you end up talking to Mr. Boucher-Hayes about these issues then in the corridor at all?*

*A. Simply because he introduced the subject and rather than blank him completely, I gave a very brief résumé of the complaints from Garda John Wilson. And I think everybody was aware of Sergeant McCabe's complaints at that stage.*

*Q. How long did the conversation last?*

*A. I would think a couple of minutes, certainly no more.*

*Q. And how did it conclude?*

*A. Oh, it wasn't -- we parted on good company, we shook hands and wished one another a happy Christmas. I suppose it was a result of sorts. ...*

*Q. Did you say anything about Sergeant McCabe having a lot of psychological issues and psychiatric issues?*

*A. No, I certainly did not. No, Chairman, no.*

*Q. Well, do you think you might have said something that might have been taken up wrong by Mr. Boucher-Hayes in that regard?*

*A. Chairman, I wouldn't get involved in that level of discussion with a journalist, not a hope. Nor would I with anybody else for that matter. ... I wouldn't talk about any member of the Garda Síochána like that, certainly not. ...*

*Q. I mean, potentially [the mention in Philip Boucher-Hayes' statement to "horrific things, the worst kind of things"] could be a reference, if it were true, to the sexual assault in 2006.*

*A. I accept that, Chairman, yes. But, you know, my observation on this, for what it's worth, Chairman, is this man is an experienced journalist with RTÉ, I don't think that he would have left it go at that if I had come out with something to the effect there's other things I can tell you about, horrific things, the worst kind of thing, without him coming back with a supplementary to say, what the hell are you talking about, Commissioner? It just wouldn't make sense to me. And that's what I made reference to this morning, talking about this opaque comment.<sup>532</sup>*

As to the various accounts of this encounter in Montrose on 17 December 2013, the tribunal finds as a fact that Philip Boucher-Hayes is telling the truth and that Commissioner Martin Callinan and Superintendent David Taylor are not. Philip Boucher-Hayes came forward unasked and early in answer to the tribunal's plea for assistance in February 2017. That's not necessarily or at all a mark of truthfulness and the tribunal does not regard it as such in relation to anyone's evidence. Everything about his evidence suggests that he did so out of a sense of public duty and his demeanour in the witness box demonstrates the continuation of his public spirit. Certainly, he had a disagreement with Commissioner Callinan and his team as to what ought to be discussed in his interview on the television. Philip Boucher-Hayes struck the tribunal as a big enough character, and as a person used to the sometimes bruising experience of day-to-day broadcasting, to get over that. His attitude to a request from Commissioner Callinan for a conversation "off the record" was one of "wait and see". He was not prepared to be used.

It happened that Commissioner Martin Callinan said to Philip Boucher-Hayes: "If there's anything else you want to know about this or any of the other stuff we've been talking about, you can talk to David Taylor over there". The tribunal accepts that Superintendent David Taylor was standing only a few feet away in the corridor and had reason to take a close interest in the conversation. The tribunal finds that Superintendent David Taylor addressed Philip Boucher-Hayes in the aftermath of the conversation and said: "Do you understand the issue with Maurice McCabe and the penalty points?" The tribunal notes the denial of Superintendent David Taylor. The tribunal regards that denial as an obvious deceit. The tribunal finds this testimony confirmation in a material respect of the existence of a plan of campaign between these two gardaí, the Garda Commissioner and the head of the Garda Press Office. Even if Superintendent David Taylor did not hear all or any of what was said between Commissioner Callinan and Philip Boucher-Hayes, there is in this

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<sup>532</sup> Transcript day 78 from page 97

exchange evidence of coordination of effort between the two gardaí. In reality, Commissioner Callinan uttered negative comments about Maurice McCabe and his press officer weighed in immediately after that exchange ended with a statement that confirms that he was aware of the strategy of his boss.

In the context of all of the evidence which the tribunal has heard, the tribunal is of the view that Superintendent David Taylor knew the general tenor of the conversation that the Garda Commissioner was likely to initiate with Philip Boucher-Hayes, if challenged as to interview topics, and that, in any event, he made it his business to be on hand to support what had then become a mutual strategy between them. In rejecting the denial of Superintendent David Taylor, the tribunal is not simply taking the opposite of his deceitful denial. On the contrary, the evidence establishes that there was a meeting of minds between the two police officers as to how Maurice McCabe was to be viewed. On an overall view of the evidence, this confirms that Commissioner Martin Callinan was not alone in his attempts to denigrate the character of Maurice McCabe. They were acting together.

### **Gerald Kean's broadcast**

The tribunal now turns to a witness who, the tribunal is satisfied, heard or knew about the tribunal's public appeal for information that was broadcast in February 2017. It was only through the diligence of tribunal counsel, sorting through tens of thousands of items of discovered documents, that the quite astonishing evidence that follows was uncovered. The tribunal regards the evidence as strongly speaking to a strong animus by Commissioner Martin Callinan against Maurice McCabe.

On 26 January 2014, solicitor Gerald Kean appeared on the Marian Finucane radio programme on RTÉ. This is a Sunday morning programme and is very widely listened to. He discussed a number of topics including the penalty points controversy. Here is part of what he told anyone who had their radios tuned in:

I know there's this question about [the 'disgusting' remark], you know, when you put that in context, what [Commissioner Callinan] is saying is that he has always stated and ... I only met the man personally once so he is not somebody that I know that well but I know at one function he advocated in no uncertain terms the importance of whistle blowers and the importance of protecting them ... when whistle blowers first of all do not cooperate in any way shape or form with the investigation, the investigative committee under Inspector John O'Mahony who is a very respectful man, they didn't cooperate with that at all. They go in, they breach the Data Protection Act, that's clear, I mean I think that he is clear and from the information that I have, it looks as if they have breached the Act, which is a criminal offence and then what they do is they spoon feed this information to certain independents in ... Dail Eireann .... I don't believe for one minute that ... the Commissioner and Deputy Commissioners and Assistant Commissioners are going to condone for one moment any illegality that takes place within An Garda Síochána --<sup>533</sup>

What is important is what happened both before this broadcast and what happened after. Prior to and following his appearance on the programme, there was telephone contact between Gerald Kean, Commissioner Callinan and Chief Superintendent Diarmuid O'Sullivan.<sup>534</sup> It is best to start two days before the programme.

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<sup>533</sup> Tribunal documents pages 1706-1707

<sup>534</sup> Tribunal documents page 1789

On Friday 24 January 2014, Gerald Kean had a telephone conversation with Chief Superintendent O'Sullivan, at 18:03 hours for five minutes. Incidentally, that is the same day as the car park meeting between John McGuinness TD and Commissioner Martin Callinan. He contacted Chief Superintendent O'Sullivan for a random reason; it was just that he wanted to speak to the Garda Commissioner and this officer was, in a perfectly legitimate way, a contact because of a burglary at his house and other social matters. As to this Friday conversation, Gerald Kean told the tribunal:

***I don't recollect ringing Diarmuid and saying can you tell me what the story is on Sergeant McCabe, because I am not sure he might have known, but I have a feeling I might have said to him, Diarmuid, can you point me in the right direction or who should I go to. ... I was delighted when there was a suggestion that the Commissioner would be the man that would clarify matters for me. And you know, I know I was very pleased at that.***<sup>535</sup>

On the afternoon of Saturday 25 January, there was a further phone call between Chief Superintendent Diarmuid O'Sullivan and Gerald Kean lasting over thirteen minutes. An hour later, Commissioner Callinan phoned Gerald Kean. This was the first direct contact between Gerald Kean and Commissioner Callinan. That call lasted for almost seventeen minutes. Following this, the Garda Commissioner sent Gerald Kean a text message. Such calls, in the context of what was discussed and the efforts made by Gerald Kean to brief himself for an upcoming national radio appearance, are just not forgettable. What was to happen later was even more memorable.

Later that same Saturday, Gerald Kean phoned Chief Superintendent O'Sullivan and spoke to him for almost ten minutes. Gerald Kean then phoned Commissioner Callinan again and this call lasted over a minute. A text was then sent from Commissioner Callinan to Gerald Kean. That text was not recoverable by the tribunal. At 16:50 hours, Commissioner Callinan had a further phone conversation with Gerald Kean lasting almost 28 minutes.

On the Sunday morning of Gerald Kean's appearance on the Marian Finucane programme, 26 January 2014, Commissioner Callinan phoned Gerald Kean and spoke to him for over five minutes and also sent him a text message following the phone call. None of these text messages proved recoverable. That afternoon, after the broadcast, Gerald Kean spoke to Commissioner Callinan on the phone for almost eight minutes. Later that day, Chief Superintendent O'Sullivan phoned Gerald Kean and they spoke for almost three minutes. Immediately following this, late afternoon and about a minute later, Chief Superintendent O'Sullivan phoned Commissioner Callinan and they spoke for over fifteen minutes. It is immediately to be wondered: what possible interest in each other could the solicitor and the chief of police have?

Maurice McCabe was listening to the Marian Finucane Show. He was not at all pleased by Gerald Kean's contribution to the national debate. He wrote to him complaining and threatening a defamation action. That letter is dated 3 February 2014. That letter from Maurice McCabe said:

You publically stated over the airwaves that I had committed criminal offences, in other words I was a criminal. You stated and adamantly affirmed three times that I had not cooperated with the O'Mahony enquiry. You also stated, twice, that I had breached the Data Protection Act. You also stated you had information on this. You stated that I spoon fed TD's and did not go through proper practice procedures. All your statements are false and have done me great harm. Each of your accusation on me will be denied ...

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<sup>535</sup> Transcript day 64 pages 36-37

I am giving you an opportunity to try to make amends for some of the damage done to me as a result of your public statements on the RTE programme. I think it is the least you can do and even if that is done I don't believe that it can undo all the harm caused by those defamatory/slanderous statements and remarks. I have also written to RTE regarding their airing of the statements in question.<sup>536</sup>

Gerald Kean then had a serious problem. Defamation actions can garner high damages and are very expensive indeed to be involved in. He turned to Commissioner Martin Callinan to help solve it for him.

On 6 February 2014, Gerald Kean sent a letter to Commissioner Callinan attaching the letter he received from Maurice McCabe, saying he would be grateful if he could look at the letter and a proposed draft response he had written. He concluded the letter by stating that "any assistance would certainly be appreciated."<sup>537</sup> The Garda Commissioner responded by sitting down and taking out pen and paper to draft what he thought of as a suitable riposte to the letter from one of his subordinate policemen complaining about what he claimed were defamatory comments broadcast on the national airwaves by a solicitor.

On the morning of 12 February 2014, Superintendent Frank Walsh, who was private secretary to Commissioner Callinan, met Gerald Kean in his office. This was to convey a message and the draft text from the Garda Commissioner. He told the tribunal that he had been unaware of the Commissioner's previous conversations with Gerald Kean before his appearance on the Marian Finucane programme. Superintendent Walsh told the tribunal about a conversation he had with Commissioner Callinan following receipt of Gerald Kean's letter seeking assistance:

***The Commissioner expressed his view that this matter was inappropriate for him to address back to Mr. Kean. I was in agreement with that, for the reasons I have stated, given that Maurice McCabe was a member of the force, etcetera, etcetera. The Commissioner was still anxious to do something for Mr. Kean, and I do recollect him saying, because he was a great supporter of the guards and he was anxious to assist him in some way. Now, that is the conversation that we had around this. Most likely what happened after that was, because I don't remember exactly, but the Commissioner said he'd take some time to consider it and the next thing that he came up with was his handwritten notes on this.***<sup>538</sup>

Superintendent Walsh typed up the Commissioner's handwritten note and brought this to his meeting with Gerald Kean at his offices.<sup>539</sup> The following are handwritten notes written by Commissioner Callinan in the first person to assist Gerald Kean:

1. Can I first of all say that I am invited on several radio an TV programmes to discuss many topical issues where I voice my opinion, as I am entitled to do, and I hope I have always acted fairly to everyone.
2. The subject of FCPS on the show that day as part of the programme was well aired in the public domain previously and so I was aware that you and your colleague were advised to contact Assistant Commissioner O'Mahoney and his team if you had any complaints to

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<sup>536</sup> Tribunal documents pages 1775-1776

<sup>537</sup> Tribunal documents from page 1773

<sup>538</sup> Transcript day 67 page 31

<sup>539</sup> Transcript day 67 page 37

make without prejudice to the Confidential Reporting system. That was the point I was making about cooperation with the investigation.

3. It is also the case of course that the Data Protection Commissioner's views are well known in the context of personal sensitive data being aired in public. I fully agree with his view in this regard.
4. I have no doubt that the GSOC investigation will fully examine all of these matters and address any wrongdoing.<sup>540</sup>

These points subsequently appeared in Gerald Kean's reply to Maurice McCabe's letter; effectively word for word.<sup>541</sup>

So, the Garda Commissioner, by profession a criminal law enforcement officer, was drafting a letter for a solicitor on a legal problem, defamation, which the solicitor had. No comment is needed on this. Maurice McCabe subsequently took a defamation action against RTÉ and Gerald Kean. The case against Gerald Kean was not ultimately pursued, while a settlement was reached between Maurice McCabe and RTÉ.

### **Compilation of all negative reporting or comment**

The tribunal now proposes to set out in chronological format, insofar as that is possible, all negative statements which were given in evidence about Maurice McCabe. In doing so, the tribunal ascribes a source and an indicative date, if appropriate.

In 2006, Ms D accused Maurice McCabe of child sexual abuse, a matter that was supposed to have occurred in or around 1998. In recounting, again, what she reported, the tribunal is in no way taking a view as to the truth or otherwise of what she said or what her family said. The tribunal is not entitled to, and does not, offer any view as to whether what she said was accurate or not. What she said was:

I went and hid in the sitting room. What I can remember of this room was that there was a couch. It was a long seated chair. I have drawn a picture of what I remember of the room. I was the only one there. I remember hearing him coming for fear he would find me. This fear was from the game nothing else. The next thing I remember I am bent over the arm of the couch, my feet on the ground and my face down. I remember his, Maurice McCabe's arms around my waist tickling me. I did not see his face. He was behind me. I can remember him pressing against me. I could not get up, the pressure was too strong. He was pressing himself against me. Humping. I can't remember how long it lasted. I remember somebody running down the hall. He stopped. He said nothing to me. I can't remember anything else about it. I knew Maurice McCabe before that as he was often in my house with Daddy. I remember when we went back to the kitchen he was talking at the table. Maurice was asking what I was going to get for Christmas. He, Maurice, said I should get a puppy for Christmas as I was a good girl. I did get a puppy not at Christmas though. I can remember also a puppy at their house.<sup>542</sup>

This statement was known to several gardaí who were tasked with investigating it in the Cavan/Monaghan area. It was also known to social workers. It is likely that both groups kept very quiet. Certainly, an indication of this is that Inspector Cunningham kept the file in a safe in his office and the matter was, correctly, not put up on the PULSE system by Detective Sergeant

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<sup>540</sup> Tribunal documents page 1782

<sup>541</sup> Tribunal documents from page 1779

<sup>542</sup> Tribunal documents pages 36-37, for term of reference (d)

Fraher. With the incidents reported by Maurice McCabe in October 2007, in a courthouse and in the street, knowledge is likely to have spread further.

Within the D household in 2007, there was talk, according to Mr D, from an officer who had retired that another accusation had been made against Maurice McCabe by a different girl. This was to in some way relate to another town in Monaghan. There was not the slightest evidence of this. There was also some notion within the D family that Maurice McCabe had an unhealthy interest in patrolling near a particular girls' secondary school. That is not likely to have travelled. Part 1 of this volume refers.

In 2007, Maurice McCabe made several complaints as to standards of policing in Bailieboro. On 11 March 2009, The Anglo-Celt newspaper published comments attributed to Chief Superintendent Rooney where he stated that he had "total confidence in the guards in Bailieboro". He further stated, "I recently read reports in the national and local media in relation to policing in Bailieboro and it was absolute rubbish what was in those reports, it was factually incorrect". Part 2 of this volume refers.

On 4 July 2011, Chief Superintendent Rooney circulated a letter to the Assistant Commissioner and to all district officers in Cavan/Monaghan entitled "RE: Allegations made by Sergeant Maurice McCabe, Bailieboro Garda Station". Chief Superintendent Rooney had met with Assistant Commissioner Byrne on 24 June 2011 regarding the findings of the Byrne/McGinn report into allegations made by Maurice McCabe of inadequacies in investigations in the division. It stated that "no systemic failures ... in the management and administration of Bailieboro Garda District" had been identified by that investigation, although there were a "number of minor procedural issues". It stated that "[t]he findings of the Assistant Commissioner vindicate the high standards and professionalism" at Bailieboro. Chief Superintendent Rooney also congratulated all serving members at Bailieboro and hoped that they could now "put this difficult period behind them", thanking the sergeant in Bailieboro in particular for "steering the station party through the crisis that had occurred".<sup>543</sup> Part 2 of this volume refers.

While it was in July 2012 that Superintendent David Taylor had been made press officer for the gardaí by Commissioner Martin Callinan, holding the position up to 10 June 2014, it would appear to be sometime in 2013 when he was instructed to drop in to conversations with journalists that Maurice McCabe had been investigated for a sexual assault against a minor and that although the Director of Public Prosecutions had ruled there should be no case taken, he was embittered and was only making complaints to get revenge on the gardaí. This was to be done on the basis that "there is no smoke without fire." The dissemination of this, according to Superintendent David Taylor, was to twelve journalists.

The account of the alleged couch encounter was repeated by Ms D, more or less, to Laura Brophy of Rian counselling service in July 2013. Again, Maurice McCabe was named, but only in the second counselling session. Naturally, that had to be referred on to social services. It was then referred by social services to the gardaí because there was no clarity on the fact that the gardaí had actually referred it on to social services at the time of the investigation in 2006/2007. When the confusion occurred between the allegation by Ms Y and Ms D, which made this into a rape offence, Ms D wondered if this was a new person making a new allegation against Maurice McCabe. It was not. In January 2016, a letter was received in the Maurice McCabe household accusing him of this rape offence, one involving digital penetration of the anus and vagina of Ms D. This was an allegation she had never made against him. Notwithstanding the correction of the error, the matter was reported to the Assistant Commissioner for the Northern Region and notwithstanding the

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<sup>543</sup> Tribunal documents page 4943, for term of reference (e)

correction of the error, that allegation was reported on to Garda Headquarters in May 2014. Thus, there was wide dissemination of an allegation which no one had ever made against Maurice McCabe. Part 1 of this volume refers.

In 2013 and 2014, several politicians and many journalists heard that there had been a historic allegation of child sexual abuse, or some kind of sexual offence, against Maurice McCabe. Some were in a position to check the matter out and discovered that the Director of Public Prosecutions had directed that there was no case to answer, or some such explanation. Part 3 of this volume refers. This was widespread. It must be remembered that talk of this reached a crescendo towards the end part of 2013 and through 2014. This gossip about Maurice McCabe is the backdrop to all other specific instances of denigratory talk about Maurice McCabe.

On 17 December 2013, Philip Boucher-Hayes was told by Commissioner Martin Callinan that Maurice McCabe is a “man [who] has issues, he has some well known grievances, well known within An Garda Síochána and there's all kinds of issues there, Philip, that I can't talk to you about; there are psychological, psychiatric issues with this man and there's more that I could tell you, but I won't, there's an awful lot worse that I could tell you, the worst possible kind of things, but we'll just leave it there”. Superintendent David Taylor chimed in at the end of that conversation with a comment about Maurice McCabe and the penalty points issue. The matter is unlikely to have been much discussed outside RTÉ and family. Part 3 of this volume refers.

On 23 January 2014, giving evidence to the Public Accounts Committee, Commissioner Martin Callinan referred to the process of gardaí who make a protected disclosure rather than going through official channels as “disgusting”.

On 23 January 2014, in conversation with John Deasy TD, Commissioner Martin Callinan referred to Maurice McCabe as someone that could not be “believed or trusted.” The matter is unlikely to have been much discussed. Part 3 of this volume refers.

On 23 January 2014, in conversation with Séamus McCarthy, the Comptroller and Auditor General, Commissioner Martin Callinan said of Maurice McCabe that “Sergeant McCabe is not to be trusted, that he had questions to answer and that there were sexual offence allegations against him.” The matter is unlikely to have been much discussed. Part 3 of this volume refers.

On 23 January 2014, in conversation with John McGuinness, Commissioner Martin Callinan is recounted as: “telling me about an incident involving John Wilson, where there was a difficulty in Grafton Street I think it was, the police were called to that, John Wilson was one of the individual Gardaí that attended at that incident, and in the Commissioner's words, he pulled the k..... off the horse, because it involved horses and individuals, he got on the horse himself, rode it back to the barracks and tied it to the railings of the barracks; and the other fella fiddles with kids; they're the kind of f..... headbangers I am dealing with”. This incident was not much discussed until later revealed. Part 3 of this volume refers.

On 24 January 2014, in a car park, Commissioner Martin Callinan told John McGuinness TD “there was issues to do with Maurice McCabe and his behaviour and he suggested that there was -- he had sexually abused his family and an individual, that he was not to be trusted, that I had made a grave error in relation to the Public Accounts Committee and the hearings because of this and that I would find myself in serious trouble.”

On 26 January 2014, having spoken to Commissioner Martin Callinan, Gerald Kean, a solicitor, speaking on the Marian Finucane radio Sunday morning show said:

I know there's this question about [the 'disgusting' remark], you know, when you put that in context, what [Commissioner Callinan] is saying is that he has always stated and ... I

only met the man personally once so he is not somebody that I know that well but I know at one function he advocated in no uncertain terms the importance of whistle blowers and the importance of protecting them ... when whistle blowers first of all do not cooperate in any way shape or form with the investigation, the investigative committee under Inspector John O'Mahony who is a very respectful man, they didn't cooperate with that at all. They go in, they breach the Data Protection Act, that's clear, I mean I think that he is clear and from the information that I have, it looks as if they have breached the Act, which is a criminal offence and then what they do is they spoon feed this information to certain independents in ... Dail Eireann .... I don't believe for one minute that ... the Commissioner and Deputy Commissioners and Assistant Commissioners are going to condone for one moment any illegality that takes place within An Garda Síochána --<sup>544</sup>

At a time which is probably January or February 2014, Cathal McMahan, a journalist with the Irish Daily Mirror, heard of rumours about Maurice McCabe and a sexual assault allegation. With a view to obtaining some information he rang the Garda Press Office. At the other end of the line, Superintendent David Taylor confirmed that there had been an investigation. He suggested to the journalist that "maybe [he] should go to Cavan and find further details there." His editor, John Kierans, said that the story of Maurice McCabe as a child abuser was proposed by Superintendent David Taylor to two other newspaper editorial rooms. This is likely to have led to a lot of conversation among journalists. Part 3 of this volume refers.

In mid-February 2014, Minister Pat Rabbitte had a conversation with a garda officer who said to him about Maurice McCabe "that he couldn't be trusted, that his own colleagues believed that he couldn't be trusted with children." Part 3 of this volume refers.

In late February or early March 2014, Debbie McCann and Eavan Murray, each on separate occasions, called on the D household in order to seek an interview with the woman making the allegation against Maurice McCabe. This interview was refused. There was a view taken by Debbie McCann that the allegation was correct. Part 1 of this volume refers.

In late February 2014, Mr D, a serving garda, discussed the allegation of his daughter with Detective Superintendent John O'Reilly. Because he is a family friend, Superintendent O'Reilly had already known of the allegation for some time but this came as a reminder and he assisted Mr D in making contact with journalist Paul Williams. Part 1 of his volume refers.

In March 2014, Ms D was interviewed by Paul Williams. He published a series of four articles about an anonymous woman being dissatisfied with the investigation into her allegation that she had been sexually assaulted by a garda. The series of articles also detailed attempts to raise the issue politically. Any person already knowing about the accusation would have been aware that the person accused was Maurice McCabe. Part 1 of this volume refers.

In April 2014, Ms D complained to the Garda Síochána Ombudsman Commission that her original complaint in 2006 had not been properly investigated and that it was wrong not to have put her allegation on the PULSE computer system. This was not likely to have disseminated beyond those offices. Part 1 of this volume refers.

On 18 September 2014, an article entitled "We were 'hung out to dry'" appeared on the front page of The Anglo-Celt newspaper. It detailed the response of a number of gardaí in Bailieboro following the publication of the Guerin report in May 2014. The article said that these gardaí felt that the allegations made by Maurice McCabe "undermine public confidence in the gardaí at the

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<sup>544</sup> Tribunal documents pages 1706-1707

station because they have never had their side of the story heard”, with one unnamed garda member stating that Maurice McCabe was “the main man [in Bailieboro] ... it was his job to make sure [that] files were good and that investigations were carried out right and that files were submitted on time.”<sup>545</sup> This piece was based on an article which had been published in the *Garda Review*, a publication of the Garda Representative Association, on 16 September 2014 entitled “Abandoned outpost: Has everyone turned their backs on Bailieboro?”. This contained comments attributed to a number of unnamed gardaí about the Guerin report and its recommendation to establish a commission of investigation into Maurice McCabe’s complaints. The article concluded:

If the allegations made to the Guerin Report were true, why are the gardaí named in those allegations so anxious to tell their side of the story? Why are they so insistent they want to be put before an independent Commission of Inquiry? They deserve the inquiry now.

An editorial in the *Garda Review* appeared in November 2014 on this issue, entitled “Is the truth inconvenient?”, calling for a commission of investigation to be established as quickly as possible. The editorial goes on:

[a]llegations are not enough as a base for reform; yet those who should know better are using them as if they were established fact. When our political elite believes otherwise, it can come as no real surprise that a local newspaper believes allegations can vindicate the alleger.

In January 2016, a letter arrived into the family home of Maurice McCabe from TUSLA alleging a rape offence against a young girl, supposedly Ms D. This was an allegation that she had never made. Part 1 of this volume refers.

This exercise is conducted with a view to analysing the role of Superintendent David Taylor and with a view to considering his claim that, acting on “orders” from the Garda Commissioner, he briefed journalists negatively. What truth, or otherwise, there may be in the claim that he actually carried out this plan is considered in the context of evidence from journalists. His claim as to knowledge and assent by Deputy Commissioner Nóirín O’Sullivan must also be considered.

## **Journalists and Superintendent David Taylor**

Superintendent Taylor told the tribunal that he negatively briefed twelve journalists about Maurice McCabe. Evidence of rumours in journalistic circles about Maurice McCabe and the negative briefings of such journalists alleged by Superintendent Taylor are now set out, together with the response of journalists to these claims. It should be remembered that initially nine names were nominated by him in a letter to the tribunal of 13 April 2017; that when the tribunal investigators found out through their own inquiries that two journalists had visited the home of Ms D in February or very early March, and confronted him with that, he then nominated those two; that when during the closing days of the tribunal hearings a journalist claimed that he had verified the fact of the investigation into the allegation of Ms D against Maurice McCabe, Superintendent Taylor denied that he had added that that journalist should travel to Cavan to “learn more” but nominated that journalist in addition as having been negatively briefed by him. That makes twelve.

### **Rumours in media circles**

Many of the journalists who gave evidence to the tribunal said that they had heard various rumours about Maurice McCabe. These are now set out in chronological order where that is possible, because sometimes that order is only indicative. All of the journalists nominated by Superintendent

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<sup>545</sup> Tribunal documents page 384

Taylor, with the exception of John Burke,<sup>546</sup> told the tribunal that they had heard rumours at various times about Maurice McCabe, and most generally in early 2014. None of the journalists ascribed the source of these rumours to Superintendent David Taylor. Three journalists, all from the Irish Examiner newspaper, refused to answer any questions relevant to Superintendent David Taylor, notwithstanding that he had waived any claim he had to journalistic privilege. Another journalist, Debbie McCann, took a similar attitude.

John Mooney of The Sunday Times told the tribunal that he was aware of the Ms D allegation when he wrote a November 2010 article about Maurice McCabe. He said:

*I always kind of need to know what I don't need to know. I had examined Sergeant McCabe's complaints or became aware of them at that time and written a number of stories about it. Sergeant McCabe had made a number of very valid allegations about issues in policing in the Cavan-Monaghan area. Subsequent to that, I would have been contacted by lots of different people. I was working in the border area quite a lot at that time; dissident republican factions, I suppose, were becoming very active in late 2008, 2009. So meeting people up there wouldn't have been a major issue to me. There was, someone made a very fleeting reference to an allegation against Sergeant McCabe. I subsequently made an inquiry about that and was told categorically that there was nothing in it. I didn't pursue it any further for the simple reason that these matters are confidential by the health services, the guards and the other statutory agencies involved and I don't think it's appropriate for journalists to get involved in examining them or trying to second-guess any sort of proper investigation that has been taken -- that is being undertaken. So, I left it at that. As far as I was concerned, I would be very aware of internal Garda procedures; if there was an allegation that was of any substance against a member of the force they would be at the minimum suspended. So the fact that Sergeant McCabe was still a sergeant would have clarified that for me. I didn't get into looking at it in any great detail. As far as I was concerned I treat such matters as gossip and noise and that was it.*<sup>547</sup>

John Mooney did not look any further into the matter as he said the Ms D story wouldn't have met the threshold for publication in The Sunday Times.<sup>548</sup>

Conor Lally of The Irish Times told the tribunal that he heard about the Ms D allegation in "about 2011 and possibly even in 2010". He said:

*It is so long ago now and Sergeant McCabe wasn't the well-known person then that he is now. I mean, I hadn't begun really writing about the cancellation of penalty points, or anything, at that stage. So I actually genuinely can't recall who told me about this, but I do recall from the first time that I heard about it, it was put to me that there was an allegation made against him, that it was investigated by the guards, that the guards recommended to the DPP that there be no prosecution, and that there was no prosecution. And I think the person who first told me used a phrase like, you know, the case was, quote-unquote, completely thrown out by the DPP. So even from the outset it was very, very clear to me that this had gone absolutely nowhere. And from my recollection, even the person who told me, it was kind of in the context of, you know, Sergeant McCabe fell out with An Garda*

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<sup>546</sup> Transcript day 85 pages 157-158

<sup>547</sup> Transcript day 89 from page 17

<sup>548</sup> Transcript day 89 pages 21-22

*Síochána and this appears to have been the start of it all. But there was nobody trying to drive home a point that he was a bad guy or you had to be wary of him, or anything like that. From my recollection, the kind of telling of this particular story was an explainer for how he fell out with Garda management, basically.*<sup>549</sup>

He said that he thought he would have looked into the rumour at that time but that he had no particular memory of doing so, as:

*the way it was told to me, it kind of had a start, a middle and an end, and there was nothing you could do with the information or that you would want to do with the information. An allegation had been made, he had been exonerated, there wasn't a huge amount to be done.*<sup>550</sup>

However, Conor Lally said that the rumour “resurfaced” and began “doing the rounds in journalism circles” in 2013 and 2014:

*Q. I mean, was it doing the rounds on the basis of -- the factual basis on which you are saying; namely, look, there was an investigation, if anybody hears about this be alert to the fact that it was looked at by the DPP and they directed no prosecution, in circumstances where the facts didn't disclose, even at its height, a criminal offence.*

*A. Well, I mean, you know, I suppose I can only speak from my own experience really, but certainly my own experience was that nobody ever came to me to try and convince me that this was true or that Sergeant McCabe had, you know, done anything wrong or broken any laws, or anything like that. When I say it was doing the rounds, I just am aware that some other people were aware of the same information I was.*<sup>551</sup>

Michael O'Toole of the Irish Daily Star told the tribunal that before Superintendent Taylor had become Garda Press Officer, in 2011 or 2012:

*I had heard rumours about Sergeant McCabe. They had come from journalistic sources, non-crime reporters, ordinary journalists shall we say. Because of the nature of my job, ordinary journalists tend to come to crime reporters when they want stuff checked out, they think we hold all the secrets. And to a certain extent, we know more than most crime reporters. And I know that a very experienced journalist with significant access to the political world first raised this with me. Now, as I say, it was well before the terms of reference here, it was probably 2011/2012. He raised it with me and I said 'I don't think there's anything to this'.*

*Subsequent to that, I checked with a contact I have. It's important to say that this contact would not have been in Garda Headquarters or in the Garda Press Office. I always take the view that the Garda Press Office really is His Master's Voice; you ring the Garda Press Office, they are there, they don't work for journalists, they work for the Commissioner. So obviously if I rang someone in the Garda Headquarters, they would give probably a not independent view of what was going on.*

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<sup>549</sup> Transcript day 87 pages 126-127

<sup>550</sup> Transcript day 87 page 129

<sup>551</sup> Transcript day 87 pages 128-129

*So I was lucky enough to have a contact who knows Sergeant McCabe - I can't say who it is, but he spoke very highly of him, he called him Maurice, he said he had worked with him, said he was a very competent Sergeant, he had done files with him and he explained the background of the investigation and the outcome of the DPP's file. So once I heard that, the matter was dead for me, because there was absolutely no story for me in this. I don't think any journalist in their right mind, once they hear that the DPP has not only directed no charges, but said it's - whatever the phrase is - it was very unlikely that any offence was disclosed, I don't think any journalist in their right mind would consider writing anything about this. The issue was dead for me.<sup>552</sup>*

Paul Reynolds, crime correspondent on RTÉ television, told the tribunal that he first heard about the D allegation sometime in 2013:

*I think I first heard that there had been an allegation some time around 2013, but I heard it all together, if you know what I mean, I heard there had been an allegation but that there was nothing to do it, and then I heard four facts in relation to it: I heard the fact that there was an allegation, I heard the fact that there was an investigation, I heard the fact that a file had been sent to the DPP and I heard the fact that there was no prosecution. And that's it. ... once I heard that the DPP had decided there was no prosecution, it was -- as far as I was concerned, it was nothing to do with me as a reporter.<sup>553</sup>*

He knew that this was an allegation of child sexual abuse and that rumours he heard were “always in the context that there was nothing in it, that everybody seemed to know there was nothing in it.”<sup>554</sup> He did not check the information any further as he had been told the Director of Public Prosecutions had directed no prosecution.<sup>555</sup>

Daniel McConnell of the Irish Examiner gave evidence that he was aware of the Ms D allegation in early 2014. He said:

*I had heard, particularly in the run-up to the PAC meeting, I had certainly heard, I think I describe it in my statement as journalistic chatter. There was certainly a lot of chat around. And there was a conflation of issues because there was a lot of criticism of the PAC at the time for essentially going beyond its remit; you know, that it shouldn't really be bringing Maurice McCabe in before it, but there was vague, and I'm talking very low level sort of suggestions, you know, attacking the integrity of Maurice McCabe, nothing that I could ever really put my finger on, nothing that I could ever be specific about, but certainly there were -- as I say, it was journalistic chatter. ... I'm very much in the sort of political realm, but again, it was very low level, inconsequential, in my view, and certainly something that I never either investigated, looked at, because it wasn't within my remit to do so. ... it was so vague at that stage, I had no idea, really, as to what it was.<sup>556</sup>*

He said that he did not take any steps to look into this matter as he took the view that it was:

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<sup>552</sup> Transcript day 86 pages 192-193

<sup>553</sup> Transcript day 91 page 139

<sup>554</sup> Transcript day 91 pages 140-141

<sup>555</sup> Transcript day 91 page 142

<sup>556</sup> Transcript day 90 pages 143-144

*inconsequential, and also, as well, the questions being asked politically was, was he a credible witness for the PAC in terms of the penalty points issue. ... It was as to his bona fides, as to, you know, were the issues that he was raising credible, and that is what I was interested in. Like, the other stuff I just didn't really pay any attention to at all.*<sup>557</sup>

Juno McEnroe of the Irish Examiner told the tribunal that he was aware of certain “question marks” around Maurice McCabe in January 2014:

*I know that other journalists in the Tribunal have been asked this question in terms of when they became aware of, you know, a complaint or an allegation, and I have tried to think about this. I do specifically remember the day or I think it was an evening that Sergeant McCabe came to Leinster House, it was an unprecedented moment for the sergeant to go to that committee. And there was a lot of attention around his appearance, and I remember saying his face for the first time, from the photographs. I wasn't actually covering that period of committee hearings. I would have been very active around the Public Accounts Committee, I would have been very active around everything in Leinster House as we always are, in the political team, but I do remember at that period and that juncture, and this was more gossip, prattle, that somebody raised a question-mark or a doubt around Sergeant McCabe ... I then endeavoured to look into that and I was satisfied as things went forward that he was a credible person. ...*

*you know, as a journalist, specifically as a political journalist you will hear a lot of gossip and claims, sometimes, it depends on what you are doing, though, and what you are covering, and I've tried to recall, and I don't remember specifics that might have been suggested to me or were put to me. I just remember there was a question-mark raised, you know, whether -- is he a trustworthy person, or something along those lines, and I cannot be specific. I didn't take those suggestions very seriously because they weren't coming to me in a briefing sense, they were coming, as I say, from gossip or from tittle-tattle or something that was just put out there or a side comment. But I did actually go and speak to people who would have met Sergeant McCabe and also people who knew Sergeant McCabe, and I satisfied myself that there didn't seem to be something to be concerned about.*<sup>558</sup>

Cathal McMahon, who worked in the Irish Daily Mirror at the relevant time, told the tribunal that he became aware of the Ms D allegation in January or February 2014. He said that he “learned from a source, I'm not willing to name, that Sergeant McCabe had been investigated for alleged sexual abuse of a child in the Cavan area and that the allegation was historic in nature.”<sup>559</sup> He told the tribunal that the source was not a member of the gardaí.

Eavan Murray of The Irish Sun told the tribunal that she first heard of the Ms D allegation in early 2014, either January or February:

**Q. In what context?**

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<sup>557</sup> Transcript day 90 page 145

<sup>558</sup> Transcript day 90 from page 41

<sup>559</sup> Transcript day 94 page 133

*A. Em, the person actually, they didn't go into a huge amount of detail about it, he just said that there was an allegation in the past about Maurice McCabe, there had been an allegation of sexual assault. But it didn't go anywhere, was –*

*Q. Okay. And are you excluding a garda as being the source of this?*

*A. Yes, yeah.*

*Q. But was there any detail given to you?*

*A. No. That was it, that was it. It was very -- it was just a very, very small –*

*Q. Pardon?*

*A. It was a very small interaction. ... my understanding was that this allegation was never proceeded with. I never really thought about it again, to be honest. And then when I heard that the Irish Independent had this rather massive exclusive, I thought that maybe there was something else to it. I thought that maybe there was another branch to it or maybe it had been reinvestigated or maybe it was a different allegation. I just didn't know.<sup>560</sup>*

Debbie McCann of the Irish Mail on Sunday told the tribunal that around February 2014:

*I'm not sure how -- for how long, but I certainly -- there were murmurings going around that there was something in relation to Sergeant McCabe, in his past. I didn't know the specifics at that point. I didn't know very much about it at all, really, and I didn't pay too much heed to it at that point. ... I can't remember exactly [what the murmurings specifically were], but it was something -- I think it was that I -- there was an allegation there. I didn't know what had happened with the allegation, what the allegation was about, I didn't know any of the details in relation to the allegation, but just that there had been an allegation in the past.<sup>561</sup>*

She told the tribunal that she made further inquiries to establish exactly what the allegation was.<sup>562</sup>

Cormac O'Keeffe of the Irish Examiner told the tribunal that he first heard rumours around Maurice McCabe towards the end of February 2014, but possibly it could have been in 2013. He said:

*It's very hard to be certain what I heard or trying to remember what I heard because I don't remember clearly what I heard. I do remember an allegation of sexual abuse being mentioned, I think when I initially heard that there was no reference to a child, the first reference I think was in relation to a sexual allegation generally ... I think I heard it more than once ... from other journalists.<sup>563</sup>*

Paul Williams of the Irish Independent told the tribunal that prior to his interview with Ms D in March 2014, he had heard:

*vague rumours going around that -- various rumours that Maurice McCabe, the reason he was involved in the dispute with the Gardaí and exposing the penalty*

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<sup>560</sup> Transcript day 89 from page 78

<sup>561</sup> Transcript day 88 page 77

<sup>562</sup> Transcript day 88 page 81

<sup>563</sup> Transcript day 90 pages 82-83

*points and other issues was that, and malpractice issues, was because of a grievance that began several years beforehand during an investigation ...*<sup>564</sup>

Paul Williams could not specify from whom he had first heard the rumour because it was “out there. It was a vague rumour that there was a grievance, that this was not just out of the blue, that there was a history to [Maurice McCabe’s complaints].”<sup>565</sup>

### **Tribunal interaction with journalists**

On 15 March 2017, the tribunal wrote individual letters to 25 journalists. Each of these 25 journalists had been identified as having been in contact with Superintendent Taylor during the relevant period. Each journalist was asked whether they had information relevant to the terms of reference of the tribunal and, if so, to submit a statement containing such information. On 21 March 2017, the tribunal also wrote to another journalist, Conor Lally, seeking a statement.

On 21 April 2017, the tribunal again wrote to each of the 25 journalists who were initially contacted, and also then wrote to journalists Cormac O’Keeffe and Daniel McConnell. On 24 April 2017, the tribunal wrote to Conor Lally. In these letters to 28 journalists, the tribunal requested answers to a list of questions relevant to its terms of reference. With one exception, no answer was given to the complete set of questions at that time.<sup>566</sup>

In the months following April 2017, the tribunal’s focus was on those journalists who had been nominated by Superintendent Taylor as having been negatively briefed by him. Some journalists began to engage with the tribunal: reference has already been made to Paul Williams’ interaction with the tribunal; Alison O’Reilly’s interaction with the tribunal is dealt with later in this report, while RTÉ journalists provided statements in September 2017, and Michael O’Toole provided information to the tribunal investigators in April 2018. Others, however, waited until just before giving evidence to the tribunal before they provided any meaningful assistance to the tribunal.

The tribunal, while grateful to those journalists who eventually cooperated with it, regards the delay in providing that cooperation as regrettable and as a frustration of the public will, as expressed by the terms of reference set by the Oireachtas, that a tribunal of enquiry should do its work quickly. Ultimately three journalists from the Irish Examiner, Cormac O’Keeffe, Juno McEnroe and Daniel McConnell, refused to give evidence to the tribunal about the content of their dealings with Superintendent Taylor. This, obviously, and without justification, frustrated the work of the tribunal. The following section of the report deals with the evidence given to the tribunal by those journalists who Superintendent David Taylor negatively briefed.

### **Tribunal interaction with senior officers**

The tribunal did everything it possibly could to gather relevant evidence from senior officers in An Garda Síochána, given that they are specifically mentioned in the terms of reference. In October and November 2017, the tribunal wrote to over 430 different individuals at assistant commissioner, chief superintendent and superintendent ranks, including retired senior officers.<sup>567</sup> None of these individuals replied with any relevant information, apart from two officers. No

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<sup>564</sup> Transcript day 11 page 14

<sup>565</sup> Transcript day 11 page 26

<sup>566</sup> Email from Frank Greaney dated 3 May 2017, tribunal documents page 4134

<sup>567</sup> Tribunal documents from page 7306

inference can be drawn as to whether these other senior officers had any relevant information which they chose not to share.

In this report, the tribunal makes findings in relation to four individuals, who are not gardaí, and who had interactions with Martin Callinan about Maurice McCabe. These four individuals were total strangers to him. The tribunal does not find it probable that interactions of a similar nature were not had with at least some of those who were close to Martin Callinan in An Garda Síochána. No such evidence was volunteered to the tribunal or otherwise given in evidence by any serving or former officer. The tribunal is not able to make any finding of fact in this regard against any particular person.

### **Negative briefing**

As has already been set out, in a letter of 13 April 2017, Superintendent Taylor nominated the following nine journalists as having been negatively briefed against Maurice McCabe by him: Paul Williams, Paul Reynolds, Conor Lally, John Mooney, Michael O’Toole, Cormac O’Keeffe, John Burke, Daniel McConnell and Juno McEnroe. Subsequently, in answer to a question posed by the tribunal’s investigators on 22 September 2017, journalists Eavan Murray and Debbie McCann were added. On day 94, just as the tribunal was finishing its hearings in June 2018, Superintendent Taylor also nominated Cathal McMahan as having been negatively briefed by him about Maurice McCabe.

All of the journalists nominated by Superintendent Taylor gave evidence to the tribunal. The evidence of Eavan Murray and Debbie McCann concerning their visits to the D home will be dealt with separately, while the visit and subsequent interview of Ms D by Paul Williams has already been detailed, as has the evidence of Cathal McMahan.

To recap, Paul Williams was contacted by Detective Superintendent John O’Reilly and asked to interview Ms D at the request of her family. This he did on 8 March 2014. A few days later, he rang Superintendent Taylor to confirm certain details. Superintendent Taylor confirmed that there had been an investigation, that a file had gone to the Director of Public Prosecutions and that no prosecution was taken. Superintendent Taylor denies this and claimed, outrageously, that Paul Williams had rung him from the D household saying “guess where I am?” and told him that he was going to run a damaging story on Maurice McCabe. The tribunal rejects Superintendent Taylor’s evidence on this matter and accepts that of Paul Williams. While Superintendent Taylor claims, in typically laconic form used in relation to any evidence that might have supported his claims, that he briefed Paul Williams negatively against Maurice McCabe, no details of this, as usual, were supplied and the tribunal does not believe him.

Cathal McMahan, having heard a rumour about a historic sex abuse allegation, rang Superintendent Taylor who confirmed the same details as the ones he denied confirming to Paul Williams. He also suggested that if Cathal McMahan wanted to know more, he should “go to Cavan”. While Superintendent Taylor claims to have negatively briefed Cathal McMahan, he denies any suggestion that he directed the journalist to Cavan in this conversation. He claimed through counsel that he “never referred or directed any journalist to travel to Cavan and that that is incorrect that [he] directed you to Cavan”.<sup>568</sup> However, Superintendent Taylor’s instructions were also that he did negatively brief Cathal McMahan, but that this took place when he met him at crime scenes and that they had telephone conversations in relation to Maurice McCabe.<sup>569</sup> Cathal McMahan told the tribunal that he did not believe he was negatively briefed by Superintendent

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<sup>568</sup> Transcript day 94 page 197

<sup>569</sup> Transcript day 94 page 197

Taylor or that the conversation about the Ms D allegation as per his evidence constituted negative briefing.<sup>570</sup> The tribunal rejects Superintendent Taylor's evidence.

The other journalists must now be considered one by one.

Superintendent David Taylor told the tribunal that he negatively briefed Paul Reynolds sometime after he had received his initial instruction from Commissioner Callinan in mid-2013. In a typically vague way, he said:

*I cannot give a definitive date when I spoke, it would always be an opportunist time that it presented itself. ... I'd meet him at -- as I said, I attended a vast majority of scenes of murders, of various outrages and press conferences and media briefings and Commissioner's briefings and Commissioner's conference, and I'd meet him, yes, face-to-face. ... As I've said previously, it was opportunist where the situation would present it; it would be at scenes, at press conferences, Commissioner conferences, where we'd have conversations on the margins and the matter would come up. I cannot identify specific dates, but it was opportunist ... the conversation sometimes would come up, sometimes it wouldn't come up. And we would talk about Sergeant McCabe and that's when I would give the briefing in relation to the motivation of Sergeant McCabe in bringing these matters forward.<sup>571</sup>*

Superintendent Taylor said he spoke in a negative way to Paul Reynolds on "a number of occasions" about Maurice McCabe, by linking his motivation for making complaints with revenge on the gardaí for having carried out an investigation into Ms D's allegation.<sup>572</sup>

Paul Reynolds told the tribunal that he had never been briefed negatively about Maurice McCabe by Superintendent Taylor in this manner or in any other manner:

*Well, that didn't happen. And anybody who knows how reporters work in the field, knows that that, you know, couldn't happen the way it is explained there. If I can give you an example, Chairman. For example, I go to a lot of murder scenes. They're busy places. I arrive with a camera crew or a satellite van. I get at the scene. I have to find out what is going on, what happened, what are the details. I'm moving around, I'm trying to identify if there are any eyewitnesses. I'm trying to -- we're trying to, you know, for everything, to try and find parking for the satellite van and trying to find location for a live view. You're trying to find out what happened, who the victim is, what the situation is, what the circumstances are. You're waiting for the guards to arrive, you're waiting for, is there going to be a press briefing, there may be a press briefing and whether it's at the scene or whether it's at the Garda station, and the senior officer will arrive and that is usually when the press officer will arrive. So the press officer will be in the company of the senior investigating officer. But when Dave Taylor was the Press Officer, more often than not he would do it himself. I would be just one of a number of journalists there.*

*There's a thing called the huddle, where the microphones are set up, we're in a group, and in many cases I tend to be asking all the questions because I have responsibility both to television and radio, so we tend to try and put an elongated interview on the radio, and you're asking questions about the murder and the*

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<sup>570</sup> Transcript day 94 page 139

<sup>571</sup> Transcript day 74 from page 124

<sup>572</sup> Transcript day 74 page 130

*circumstances, you're getting as much information as you can so you can broadcast it. Once you have that information, you're gone to the satellite van, you're trying to get the stuff together. The idea that someone would come in, or, you know, that a press officer would sidle over to you and -- in the middle of a particular story and try and talk to you about something completely innocuous, completely different, you know, it doesn't make sense, really, and it's not -- it wouldn't happen. And how was I separated, you know, the goat, how was I separated from the sheep within the huddle, that we're all there, we're all trying to work on this story, so how was I separated for this particular negative briefing, how were journalists separated, how were other journalists not separated? It just doesn't make sense to me. I can't see how it is possible.*<sup>573</sup>

The tribunal accepts this evidence.

Superintendent Taylor told the tribunal that he negatively briefed Conor Lally and when asked whether any of the nominated journalists had reacted when they were negatively briefed, said the following:

*The only person that ever pushed back on anything I reported was in relation to the Sergeant McCabe not cooperating with the John O'Mahoney report, Mr. Conor Lally pushed back and basically said he didn't believe it. ... that was another part of the briefing in relation to the O'Mahoney report and the engagement of Sergeant McCabe with it.*<sup>574</sup>

However, this was not a “push back” in relation to any briefing in relation to the Ms D matter.

Conor Lally denied being negatively briefed by Superintendent Taylor and that such a conversation ever took place:

*I think I'd recall that conversation. ... I would remember that -- I would remember that conversation because, as far as I'm concerned, if that conversation took place, that would be an effort to negatively brief me about Sergeant McCabe, and I would remember that. We are now into territory here where Sergeant McCabe is a very well known person, this is really heating up now, this is what, 2013, 2014, this is a serious business now, so this is not like the conversation that I had several years earlier. This is a conversation that I would recall, right? The nature of my contact with Garda Headquarters just is not as it is outlined here. It's just that simple. If this took place I would recall. This never took place.*<sup>575</sup>

The tribunal accepts Conor Lally's evidence.

Superintendent Taylor told the tribunal that he negatively briefed Juno McEnroe by telling him that “Sergeant McCabe had been investigated back in 2006 in relation to a sexual matter, that it had gone to the DPP, directed no prosecution and this was the motivation of his revenge in bringing all these matters to the public arena.”<sup>576</sup> He said this was done by phone around the time of Commissioner Callinan's appearance before a Dáil Committee.<sup>577</sup>

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<sup>573</sup> Transcript day 91 from page 144

<sup>574</sup> Transcript day 74 page 140

<sup>575</sup> Transcript day 88 pages 41-42

<sup>576</sup> Transcript day 74 page 144

<sup>577</sup> Transcript day 74 from page 145

While Juno McEnroe told the tribunal that he did not become aware of the Ms D allegation until sometime after July 2014, following Superintendent Taylor's time as Garda Press Officer,<sup>578</sup> he would not "discuss any conversations [he] might have had with a source or sources."<sup>579</sup> The plain reality is that his answer excludes any possibility of having been negatively briefed by Superintendent Taylor while he was press officer. The tribunal accepts Juno McEnroe's evidence.

According to Superintendent Taylor, he probably would also have briefed Cormac O'Keeffe against Maurice McCabe:

***at scenes, he would be at scenes and it would be over the phone. I would meet him at Garda conferences, on the various association conferences, I would meet him at Commissioner's conferences, I would meet him at press conferences, I would meet him at -- he turned up regularly at all these events. ... [I briefed him a] number of times [when] we'd have discussion in relation to Sergeant McCabe and how the Sergeant McCabe thing was playing out in the media.***<sup>580</sup>

As usual, there is no detail in that capable of being tested or which might attest to actual recall. Cormac O'Keeffe, "for reasons of journalistic privilege" would not answer as to whether or not Superintendent Taylor had briefed him negatively about Maurice McCabe and drawn his attention to the Ms D allegation as motivation for his complaints.<sup>581</sup> The tribunal does not accept that any issue of journalistic privilege arose on his evidence. The tribunal considers that the privilege had been waived by Superintendent Taylor and that this evidence was given for reasons best known to Cormac O'Keeffe. The tribunal regards it as unlikely that he is the source of any crucial evidence. The bizarre aspect of this claim of privilege is that the journalist, having refused to give evidence to the tribunal, is quite free to write whatever he likes about any alleged encounter he may believe he had "with a garda source". It is hard to see that as serving the public interest.

While the tribunal found records of only five contacts during the relevant period with Daniel McConnell, Superintendent Taylor claims that he briefed him negatively about Maurice McCabe when he contacted him on his landline.<sup>582</sup> He said he did this "around the PAC and in relation to the penalty points and how they were coming before the PAC and Dáil committees" and that there were a "couple of engagements" where he negatively briefed him by phone.<sup>583</sup>

Daniel McConnell would "neither confirm nor deny" that any such negative briefing occurred "for reasons of journalistic privilege."<sup>584</sup> The tribunal does not accept that any issue of journalistic privilege arose on his evidence. The tribunal considers that the privilege had been waived and that this evidence was given for reasons best known to himself. The tribunal regards it as unlikely that he is the source of any crucial evidence. The bizarre aspect of this claim of privilege is that the journalist, having refused to give evidence to the tribunal, is quite free to write whatever he likes about any alleged encounter he may believe he had "with a garda source". Again, how that might serve the public interest is hard to fathom.

Superintendent Taylor told the tribunal that he briefed Michael O'Toole at crime scenes, and while there also "could have been briefings over the phone", crime scene briefings were more likely

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<sup>578</sup> Transcript day 90 pages 30-31

<sup>579</sup> Transcript day 90 page 31

<sup>580</sup> Transcript day 74 page 160

<sup>581</sup> Transcript day 90 page 89

<sup>582</sup> Transcript day 74 page 163

<sup>583</sup> Transcript day 74 page 163

<sup>584</sup> Transcript day 90 page 133

given Michael O'Toole's role as a crime reporter.<sup>585</sup> Superintendent Taylor said that Michael O'Toole did not react to the briefings and that he "did not get any reaction back to say you're telling me something that I have not heard before."<sup>586</sup>

Michael O'Toole denied being negatively briefed by Superintendent Taylor and told the tribunal that "no guard briefed me about Sergeant McCabe or mentioned or spoke or maligned him or spoke anything about or said anything about the sexual, the indecent assault allegation, anything."<sup>587</sup> The tribunal has no reason to doubt Michael O'Toole's evidence.

Superintendent Taylor told the tribunal that while there were relatively few phone contacts between him and John Burke, he spoke to him on his mobile phone and landline but could not pinpoint the exact date of any negative briefing:

*Mr. Burke is a very respected journalist and I respect him. He was covering the penalty points issue quite extensively at that time and there was a number of programmes, segments of programmes on the News at One. ... I think [conversations were] in relation to coming up to PAC and coming up to various reports that were coming out at the time. ... as I said, these were opportunist; you took the opportunity when the opportunity presented itself.*<sup>588</sup>

John Burke denied being negatively briefed by Superintendent Taylor:

*It's not even a question of whether I remember anything. I am absolutely certain he didn't. It's not something that would have passed me by. Had he said anything like that, had somebody like the head of the Garda Press Office made that point to me, I think one of the first things I would have done was attempted to check it out and I'd probably check it out with Maurice McCabe or representatives thereof. The fact I didn't, I think actually speaks for itself. But absolutely, it didn't happen, and I am mystified as to why my name is included on that list. I would have had very little contact, as an individual, with David Taylor at that time, over that period, other than the very sort of brief and almost formulaic means that I said earlier.*<sup>589</sup>

John Burke convinced the tribunal that his evidence was sound.

Superintendent Taylor told the tribunal that John Mooney did not regularly attend crime scenes, but that he briefed him negatively sometime in 2013. He said:

*I do not think he approached me. He has extensive contacts, Mr. Mooney; a very experienced, well-established journalist. My specific role always was to brief in relation -- because he'd bring up or that he was writing stories on Sergeant McCabe and I would brief him the negative briefing that I was instructed to do. ... [as to whether he got any reaction from John Mooney] No. In the sense of you pass on information to journalists, how they process it and how they deal with it is a matter for themselves. They may ignore it and put it aside or they may go off and seek further source material in order to confirm it or dispute it.*<sup>590</sup>

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<sup>585</sup> Transcript day 74 page 148

<sup>586</sup> Transcript day 74 pages 148-149

<sup>587</sup> Transcript day 86 page 195

<sup>588</sup> Transcript day 74 from page 137

<sup>589</sup> Transcript day 85 pages 158-159

<sup>590</sup> Transcript day 74 from page 155

John Mooney told the tribunal that he “wasn't negatively briefed by Dave Taylor or any member of An Garda Síochána who attempted possibly to suggest that Sergeant McCabe was involved in child abuse or something like that. That didn't happen with me.”<sup>591</sup> Again, the tribunal has no reason to doubt the evidence of John Mooney.

### **Conflict between journalists**

The tribunal heard evidence on a number of conflicts in the evidence of several journalists. The tribunal respects all journalists who came to the tribunal to give evidence and provided assistance to it in its inquiries.

These conflicts were those between: Anne Harris and Fionnán Sheahan; Colum Kenny and Paul Reynolds; Colum Kenny and Tom Brady; Gemma O'Doherty and Ian Mallon; Gemma O'Doherty and Stephen Rae; Alison O'Reilly and Robert Cox.

However, it is not appropriate to set out the detail of these conflicts, and even less would it be appropriate to attempt to resolve them as they do not come within the tribunal's jurisdiction, with the exception of those conflicts between Alison O'Reilly and Debbie McCann, and Eavan Murray and Fergus O'Shea, which are dealt with below.

### **February and March 2014**

Two other journalists were among those eventually nominated by Superintendent David Taylor as being the recipients of his calumny against Maurice McCabe: Eavan Murray of The Irish Sun newspaper and Debbie McCann of the Irish Mail on Sunday. That happened because the tribunal had first discovered that they had interacted with the D family and directly confronted Superintendent David Taylor. He then admitted them to his list. He did not forget: they had been deliberately left off. These were the journalists who had visited the home of Ms D in the hope of getting an interview with the woman who had claimed that she had been sexually abused by Maurice McCabe as a child. These visits happened in February 2014 or very early March of the same year. That this coincides with the aftermath of the Public Accounts Committee hearings is noted.

Eavan Murray claimed that she had heard that a major story was in the offing about Ms D. In consequence, in an attempt to pre-empt a scoop by Paul Williams of the Irish Independent, she went to her editor and obtained permission to travel to Cavan. She claims to have obtained the address of the D family from her own sources. Superintendent David Taylor denied influencing in any way any trip by either Eavan Murray or Debbie McCann to Cavan to search out a story about Ms D. Nonetheless, he claimed that they both informed him about the trip before they went up to Cavan. He added that he did not say anything about it either way: “I did not discourage them.”<sup>592</sup> This evidence from Superintendent David Taylor about two journalists reporting to him about their activities without him having the slightest thing to do with their quest is improbable and is also plainly deceitful.

Eavan Murray claims to have travelled to Cavan on 14 March 2014; that is six days after the tribunal has established that Paul Williams had done an interview on video with Ms D on Saturday 8 March 2014. She claimed she knew the visit took place on that date because of personal matters. She claimed that she spoke to Mrs D and Mr D, in their home, about the visit of Paul Williams. That, however, is not the account given by Mr D or by Mrs D and is inconsistent with the narrative recounted by Ms D as to why she wished to give an interview to Paul Williams. Basically, that was

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<sup>591</sup> Transcript day 89 page 13

<sup>592</sup> Transcript day 75 from page 36

because journalists, the two in question, had started calling to her home and in consequence, Ms D wished to give an interview to someone she trusted. Nor did any member of the D family recount the friendly chat that Eavan Murray said that they all had.

Eavan Murray testified as follows:

*I was actually the third journalist to go to Cavan and attempt to interview Ms. D. ... I understand -- I don't know exactly in what sequence, but I think Debbie McCann would have gone initially, then Paul Williams. And how I came to know about this is we heard that Paul Williams had some huge exclusive that they intended to run over a number of days in the Irish Independent in a couple of days' time. ... So that word was in the newsroom, and I was tasked with going up there and seeing if we could -- I don't want to use the word 'spoiler' as such. ... That wouldn't even be correct. It was just in case something was published by the Irish Independent, that we wouldn't be entirely [without a story] ...*

*It would have only been a couple of days after Mr. Williams went up there. ... Because they told me, the family told me that -- well, one of the things that we discussed was, they were quite anxious about the fact that she had done an interview to camera. ... And they were -- I was there -- it was unusual in the sense that I was there in the capacity as a journalist, Chairman, but it turned into really a conversation just between three people. As soon as I got to the house, I felt quite guilty, to be honest, because they seemed very weary. I wouldn't go so -- like, they were very, very, very nice, but they just seemed exhausted, and I can remember just feeling quite sorry for them. ... It turned into a conversation just between three individuals and they asked me about my experience as reporting on people that tend to go public with accusations -- and, again, I would just like to say that I do not in any way mean that as anything against Maurice McCabe -- and I gave them a fairly honest answer about that, as much as I could in my experience. ... People that go public about these things, it can seem like a good decision when you're very young, in your early 20s, but in ten years' time it may not be such a good decision; like, if you are married and you have children of your own.<sup>593</sup>*

Her editor at the time was Fergus O'Shea. He thought it unlikely that news from the Irish Independent story on Ms D would filter into his newsroom or be widely discussed.<sup>594</sup> He had never heard that there was an allegation by Ms D claiming that she had been sexually assaulted as a child by Maurice McCabe. His testimony, contrary to that of Eavan Murray, was that there was no "word ... in the newsroom" about a big exclusive. Further, Eavan Murray claims that she was "tasked with going up there". But, the recollection of Fergus O'Shea was not that. Instead his evidence was that she came to him.<sup>595</sup>

Another factor which is significant is the extraordinarily voluminous telephone traffic between Superintendent David Taylor and Eavan Murray. From 12 February 2014 to 27 June 2014, this amounts to 40 print out pages of him contacting her.<sup>596</sup> Eavan Murray refused to confirm her phone number to the tribunal investigators when interviewed in October 2017. Journalistic privilege was claimed. The tribunal had no difficulty, however, working out her phone number through its inquiries since the level of contact between Superintendent David Taylor and her is

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<sup>593</sup> Transcript day 89 from page 73

<sup>594</sup> Transcript day 95 page 25

<sup>595</sup> Transcript day 95 page 21 and tribunal documents page 7627

<sup>596</sup> Tribunal documents pages 3325 to 3365

amply proven. In giving evidence, Eavan Murray accepted that these records demonstrated contact between her and Superintendent Taylor. While Eavan Murray may well have been helping him gain a higher degree qualification in communications, the reality is that this cannot of itself be a sufficient explanation. While she denied ever being negatively briefed by Superintendent Taylor about Maurice McCabe, and maintained that she heard rumours about the sergeant from somewhere else, not from a garda, the tribunal cannot accept that. There is no explanation for her being in Cavan that is credible, apart from assistance from Superintendent Taylor. He denies knowing more than a surname and claimed not to know the address of the D family. But this came across as yet another false denial.<sup>597</sup> He claims to have texted Commissioner Callinan to inform him of the fact that Eavan Murray and Debbie McCann were going to visit the D home, but there is no evidence of this.<sup>598</sup> He was, of course, systematically deleting texts. That, the tribunal is convinced, had nothing to do with keeping a tidy phone.

Eavan Murray denies ever telling Superintendent Taylor that she was planning on going to Cavan ahead of her visit and puts the first conversation about anything to do with Ms D and Cavan as being in late March 2014.<sup>599</sup> Eavan Murray also claims that “he didn’t seem at all put out that” when she told him that she could not publish any story about Ms D. This is not the reaction of the Superintendent Taylor that the tribunal saw testify.

Superintendent Taylor merely claims to have confirmed details about the investigation, including that there was no prosecution, to both Eavan Murray and Debbie McCann when the two journalists contacted him.<sup>600</sup> That scenario is more than unlikely. It should be noted that he denied confirming those details to Paul Williams but accepts confirming them to Cathal McMahan. In this context, it should be remembered that the tribunal accepts Cathal McMahan’s testimony that Superintendent Taylor suggested that he should travel to Cavan. There was, of course, only one reason in his mind for sending someone to Cavan.

Debbie McCann claimed in evidence never to have been negatively briefed by any person in the police force against Maurice McCabe.<sup>601</sup> She was questioned closely on this, and what emerged was that she was adopting her own definition of what a negative briefing was and applying that definition to any answer that she proposed to give in order not to answer any questions about Superintendent David Taylor. In addition to that, she claimed journalistic privilege any time any detail was sought in relation to the press officer for Garda Headquarters.

Debbie McCann claims that any information in relation to Maurice McCabe and a claim of child sex abuse came to her, effectively, out of the ether:

***Yeah, I’m not sure how -- for how long, but I certainly -- there were murmurings going around that there was something in relation to Sergeant McCabe, in his past. I didn’t know the specifics at that point. I didn’t know very much about it at all, really, and I didn’t pay too much heed to it at that point. ... I can’t remember exactly, but it was something -- I think it was that I -- there was an allegation there. I didn’t know what had happened with the allegation, what the allegation was about, I didn’t know any of the details in relation to the allegation, but just that there had been an allegation in the past.***<sup>602</sup>

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<sup>597</sup> Transcript day 75 from page 41

<sup>598</sup> Transcript day 75 pages 43-44

<sup>599</sup> Transcript day 89 from page 81

<sup>600</sup> Transcript day 75 from page 44

<sup>601</sup> Transcript day 88 page 71

<sup>602</sup> Transcript day 88 page 77

She was asked if she contacted Superintendent Taylor about this allegation in order to find out what it was and she answered:

*I don't feel I can answer that question for source protection reasons, but I did state that, again, no member of An Garda Síochána has ever maligned Sergeant McCabe to me ... In relation to a matter like that, you wouldn't really expect the Garda Press Officer to confirm details like that. I would have my own sources that I would go to.<sup>603</sup> ... I guess we are coming up to around February 2014 when I would have been looking into the allegations a little bit more and I would have contacted my own sources in relation to that. ... It was, yeah, at that point, around about that point that I would have made further -- I would have made inquiries myself to establish what the allegation was ... And whether or not there was any substance to it. ... I understood, going up there, I understood that there had been an allegation, it was historic in nature, I understood that it had been an allegation of inappropriate touching and I understood that the matter had been referred to the DPP and the DPP had ruled not to prosecute. ... I had the names and I inquired myself then as to the address, you know, I got it myself as opposed to from sources. ... I'm pretty sure I did know ... at that point [that it concerned a daughter of a colleague of Sergeant McCabe].<sup>604</sup>*

Debbie McCann was asked by Patrick Marrinan SC for the tribunal about the claim by Superintendent David Taylor that she had informed him of her intention to go to Cavan to try and get an interview with Ms D:

*Q. And what you are looking for is something that might be factual and might -- there might be a legitimate inquiry of the Garda Press Officer or indeed the Garda Press Office, did you ever think of contacting the Garda Press Office directly?*

*A. No, not in relation to that allegation. I wouldn't have looked --*

*Q. Did you think of contacting Superintendent Taylor about it?*

*A. I don't know if I can answer that question, in the sense that if I had contacted anybody in relation to this matter, it would have been purely on an off-the-record basis.*

*Q. You are familiar with the waiver that Superintendent Taylor has signed ... in this regard, and it's extremely broad in its content, and the Tribunal investigators drew your attention to it, and it's in the papers. You are also familiar with the waiver of former Commissioner Callinan ... in relation to these matters, and also ... former Commissioner Nóirín O'Sullivan? ... I mean was there some -- was there in any sense any sort of prompting by Superintendent Taylor in relation to this story? Were the murmurings heard from him at that time?*

*A. Again, I don't feel I can answer that question for source protection reasons. ... In relation to the murmurings I would have been hearing, I'm not even sure who I would have been hearing them from.<sup>605</sup>*

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<sup>603</sup> Transcript day 88 page 77

<sup>604</sup> Transcript day 88 from page 81

<sup>605</sup> Transcript day 88 from page 78

According to Superintendent David Taylor, he gave at least some assistance in relation to this trip to the D household in Cavan. He claims that Debbie McCann had rung him and that she was looking for information about the D allegation in the aftermath of the “disgusting” remark by the Garda Commissioner at the Public Accounts Committee on 23 January 2014:

*Well, I confirmed there had been an allegation against Sergeant McCabe, it had been investigated in 2006, it had gone to the DPP, he'd been cleared and that the victim had been the daughter of another member. ... That's it. ... A sexual allegation. ... I didn't know the intimate details of the whole allegation ... but it was known, do you know, it was known that it was the child of another member. ... I was carrying out the instructions of the Commissioner. ... The instructions I got from the Commissioner was to draw the media attention to the fact about the motivation of Sergeant McCabe in bringing these issues about the penalty points to the public forum and that it was driven by revenge based upon the allegation and the investigation into him. I never got into the minute detail of the allegation.*<sup>606</sup>

Alison O'Reilly was a journalist who worked in the Irish Daily Mail with Debbie McCann, who worked for the Irish Mail on Sunday. They were friends but, unfortunately, have since fallen out.

A great deal of discussion on the hearsay rule has not assisted in the tribunal's deliberations because there is a fundamental mistake being made by the parties addressing it. The hearsay rule, firstly, does not apply to rule out a tribunal relying on evidence other than that stated by a witness who is experienced at relaying that in testimony. The hearsay rule has a fundamental exception, which is that admissions made by a party to proceedings are admissible against that party. Alison O'Reilly, in recounting conversations which she had with Debbie McCann in and around the time of the trip to Cavan, is recounting a conversation which, if accepted by the tribunal, is evidence of an admission.

Prior to speaking to Debbie McCann, Alison O'Reilly was not privy to rumours about an alleged sexual assault on Ms D by Maurice McCabe sometime in the distant past. She recounts conversations which she had with Debbie McCann. These were in the way of rolling discussions about various items that might be in the news while both were around the newsroom or partaking of refreshments or, on other occasions, walking back to where their cars were parked. Into May 2014, when Debbie McCann was on leave, there were also conversations over the phone and some exchanges of text messages.

Here is a relevant part of the testimony of Alison O'Reilly in relation to the first important conversation she had with Debbie McCann:

*Yeah. I suppose, Chairman, there was a lot happening at the time in relation to whistleblowers, so it was flaring up in the media and going away and coming back and going away, so Debbie and I probably had loads and loads of conversations about it, well over a year-and-a-half. So I can only really recall conversations around times that stories happened or -- because I obviously don't have any dates or times of things, but I remember at this point we had discussed it a few times and the names of people who had their penalty points being quashed had been in the papers a few times, I think, but on this particular occasion we were in the kitchen in the Mail having a cup of tea, which we did regularly - I'm not office-based, so I would be in and out quite a bit - but I remember we were in the kitchen, and you can't really talk when you are there, but we were making a cup of tea, which we did*

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<sup>606</sup> Transcript day 75 pages 48-49

*loads of times, and I said to her, I think -- I am not sure, I think there was a senator or somebody was in the paper about having their penalty points quashed, and there was a reference possibly to the volume of penalty points that are being quashed or something like that, and she said to me, 'I have had my penalty points quashed and I'm concerned that my name is going to end up in the paper', and her father was a guard and she didn't like that, I think it had been referenced in another paper before about something else, not her penalty points being quashed but the fact that her father is a guard and she didn't like that, obviously. ...*

*I suppose you can see her point of view; her father is a guard and she has had her penalty points quashed, and nobody would like that. But I had then mentioned the whistleblowers, you know, and she said, well, you mightn't mind Maurice McCabe, he is a child abuser. I said, what do you mean he is a child abuser? And she said, he abused a child that is now an adult and everybody knows, all the guards know. ... She said that he had a falling-out with his superiors, and that all of this, lifting the lid on the penalty points and raising alleged Garda malpractice, was just to get back at his employers, when really he had this thing in his past. ... I was suspicious of it myself anyway [and I spoke to a colleague who put my mind at rest]. I didn't really need anybody to -- like, the colleague I spoke to would just be somebody I trust, but it was really just to bounce the idea off, that this is what I had heard, and he had said, I had heard a bit of something about that or -- I know I kind of explained what I had heard and who I had heard it from, and I had already felt that it was suspicious because I thought, why would you put yourself out there with all these allegations about penalty points if you had gotten away with something like that? So I bounced it off somebody, but I don't need anyone to tell me how I feel.<sup>607</sup>*

Alison O'Reilly told the tribunal that she had further conversations with Debbie McCann after she had obtained information about Ms D:

*But I remember sort of around early 2014, Debbie had told me she had gotten the name and address of this girl that had made the allegation, and I'd asked where she was getting it from and she said the Gardaí. ... No, she had said the Gardaí. I mean this is a conversation we had for a long, long time, you know, and it was quite tetchy and heated between the two of us, a bit like the yes and no campaign, two colleagues, two friends, there is always something they dispute about. So she said the Gardaí, she said someone high up in the Gardaí, she said her dad confirmed this story, she said she heard it from Dave Taylor, she said she heard it from Nóirín O'Sullivan. It just went on and on. We had numerous conversations about it. ... She never -- she never said much about Dave Taylor, other than I remember she had said that he told her she was in a -- this girl was in a bad way and that it was -- you know, it was going all the way up to government at some stage. I remember the conversation I had [with] her [about] Dave Taylor, I was at home in the evening from work and it was around the time of the Roma children story [in October 2013], and I'm not sure what specific day it was, but at that point I think the children had just been returned home at some point around that time and we were talking about it on the phone, and I said to her, you know, you see you were wrong there about the Roma children and you were wrong about the family, and she said some derogatory things about the family and I said to her that it was totally unfair and she was to leave it go, and it got very heated, the exchange on the phone, and I said*

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<sup>607</sup> Transcript day 83 pages 69-72

*to her you are probably wrong about the Maurice McCabe stuff as well, and she said, no, no, no, Dave Taylor told me she is in a bad way. That was the first time I'd heard [Superintendent Taylor's name mentioned in relation to this matter].<sup>608</sup>*

Alison O'Reilly gave the tribunal an account of a subsequent conversation she had with Debbie McCann in late January 2014 in relation to her pursuing the Ms D story:

*I think it was around the time of the Public Accounts Committee meeting. We sat in the office ... I would have expected that conversation to have happened on a Tuesday because we were discussing what we were working on. And she and I would -- we'd say to each other, what did you have this week or have you got anything decent? And she said she had the details of this girl. ... I just remember that they [Robert Cox, an editor, and Debbie McCann] were standing at the back of the office having a conversation and I kind of just joined in and said, are you sure? You know, I had asked that question a few times. But they were discussing going up there because, with a story like that, like it would be -- it would be considered ... a sensitive story, a very sensitive story because it involved ... somebody who had made the allegation. So there would have been a considerable amount of planning put into that story in the sense that Debbie has heard it somewhere, she brings it to the table, she discusses it with her line manager, then he discusses it with the editor. They may have a conversation together with Debbie, the three of them.<sup>609</sup>*

Alison O'Reilly took the trouble to travel to Ulster and to meet Maurice McCabe, doing this to set her mind at rest as to what kind of a person he was. This was in or around the same time, coincidentally, as the attempt by Debbie McCann to speak to Ms D in Cavan.

After that, Alison O'Reilly told the tribunal, she had another conversation with Debbie McCann. She said:

*She told me she spent about an hour [with Ms D] and that she really believed the girl. She said that she was in the living room with her, that she was sitting on one end of the sofa and a girl was sitting on the other end of the sofa and that she was kind of gripped, gripping herself like this, that she was in an awful state, like, she was visibly shaking recalling the story, and then she outlined the allegation to me. ... I was obviously quite interested because I suppose Debbie and I both write crime stories, not everyone would have been interested in it, but both -- I'm not a crime correspondent, but I would be interested in crime so I have written so many stories about child sex survivors, child abuse survivors and rape survivors, so I was kind of gripped by what she was telling me. And she said that she had spent about an hour with this girl, she had called up to the house, that she was in an awful state, she said that she had been, what, I don't know, five, six or seven at the time, that her father was a guard and that he knew Maurice McCabe and that they were at some gathering, I thought she said in her house, when she was small, and he went in behind the sofa and pushed up against her using his groin and that she had forgotten about it for years and then it all came flooding back and it was now in the media and upsetting her and she was very damaged by the whole thing. ...*

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<sup>608</sup> Transcript day 83 pages 72-73

<sup>609</sup> Transcript day 83 from page 74

*Debbie said ... that they had fallen out at some stage. ... And she said something like, I think that happens to abuse victims quite a bit, that they can forget things and it can all come flooding back, and this is what happened to this girl, she said. ... You see, it seemed very believable to me. Like, I can only tell you what Debbie told me. I wasn't there. Again, I had only the word of Maurice McCabe, who I felt was quite credible, and John Wilson as well, but I didn't meet this girl, I didn't talk to her, I didn't know anything, and given Debbie's expertise and, you know, -- in this area, and her experience as a journalist, I mean, why would she be telling me something else? And I kind of was thinking maybe I have this wrong, maybe this did happen, I don't know, because she seemed to have all this information, and it's - and it always seemed like the story was building and building, and I thought at some point maybe Maurice McCabe is going to be arrested here and I have got this totally wrong, I don't know.<sup>610</sup>*

The next incident that was important was an occasion when Alison O'Reilly and Debbie McCann were walking to their cars after them both being in the office. There, the conversation between them took a further twist. In between, there had been a conversation about the Ms D story and how Debbie McCann had failed to get any story published. This, in any event was what Debbie McCann told her, even though she had in fact never managed to get in the door of the D household. On the way to the car:

*I think it was a conversation we were having -- we walked to our cars all the time together if we finished early, so I think we were talking about it on our way back to the car one day where she just -- I said, what happened with that story? Because it kind of went off the radar again. And she said that she had -- she had talked to Conor [O'Donnell, an editor] and Robert [Cox], or whoever, and it wasn't going in and that it was Sebastian Hamilton, the editor-in-chief, who had put a stop to it. ... That's what she said, yeah, I think she said it a second time as well. Sometimes you would try and get a story in and it wouldn't go in and then you would push for it to go again and push for it, and then eventually you just know, look, it's not going in. ...*

*Again, I think it was a Tuesday conference because we were leaving early and we didn't seem to be rushed. When it was Saturday we would be rushed to get home, because you could end up working until all hours. But we were walking back to our cars, as we always did, and we were standing at the black gates of Herbert Park and the cars were across the road, the other side of the road, and we were just talking about it again, and she was saying, you know, the story is true, and I was like, maybe there is something wrong with it, just the usual sort of tetchy debate that we had about it, and all I remember is that she was ... and I just asked her a bit more about it and she said, oh, this woman was going to go and meet Micheál Martin and the Taoiseach Enda Kenny and I just kept thinking the story was getting bigger and bigger and, you know, something was going to happen to Maurice McCabe again, and I said I - I can only tell you what she was telling me, and I said, you know, like, where is it coming from, like? Your pal Nóirín? And she said yes. That was it. I kind of thought to myself then, maybe you have got this wrong completely yourself, and maybe, you know, he is going to end up in jail. I don't know.<sup>611</sup>*

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<sup>610</sup> Transcript day 83 from page 85

<sup>611</sup> Transcript day 83 from page 92

Debbie McCann denied these conversations. The fact that her attitude was one of scepticism towards Maurice McCabe is neither here nor there. She was entitled to take that view and she was entitled to discuss the basis for her view with a friend. All of the relevant people in the newspaper gave evidence that no story was pitched by Debbie McCann in relation to Ms D and that, in any event, that kind of story could not have existed seeing as she had not got inside the front door of her house. This was used as a basis for a vehement denial that any conversation such as that described by Alison O'Reilly could ever have taken place. Debbie McCann told the tribunal:

***It wasn't that I didn't approve of what he was doing; it was that I had heard an allegation in relation to him. But it's a bit of a leap to go from hearing an allegation and to calling him a child abuser. ... Well, you know, there would have been discussions, obviously, you know, that this was causing a huge amount of controversy. You know, whether I would have said that they are bringing a lot of trouble. ... In that sense, I was possibly a little bit more skeptical at the time in the sense that I had heard this allegation but it was no more or less than that.***<sup>612</sup>

There had also been a mention in the conversations of some disquiet that the matter had not been investigated properly on Ms D making the allegation, something translated into a reference to a "cover-up"; that somehow the gardaí did not want to "expose one of their own".<sup>613</sup> Debbie McCann denied making any such reference. At the time, however, Ms D had taken a complaint before the Garda Síochána Ombudsman Commission alleging, on 29 April 2014 at the least, a poor investigation. Where had this information come from?

Debbie McCann agreed that there were conversations on the subject of Maurice McCabe, and as to whether it was worthwhile for him to pursue his allegations of garda malpractice:

***We very much discussed the allegation. But that's, for one, not language that I would use, and secondly, in terms of discussing an allegation, it is a very big jump to go from me -- discussing an allegation, and we discuss allegations all the time, we hear allegations all the time, some of them are legitimate, some of them are not, we discuss it, I certainly don't go around calling people that I'm hearing allegations about paedophiles and child abusers and --***<sup>614</sup>

Debbie McCann was asked about a statement by Alison O'Reilly where she described her and the news editor Robert Cox standing at the back of the office and telling those present that Debbie McCann had details for the woman who was allegedly abused by Maurice McCabe and that she was going to get her to talk, and how Robert Cox said he would check with the editor Conor O'Donnell about arranging for a photographer to go with her. This would involve, apparently, silhouette photographs. Debbie McCann said:

***I don't know how she would have been aware of that, in the sense that that conversation took place over the phone, it took place a couple of times, I think, that week over the phone, and on the final occasion that I spoke to Robert I would have told him that I had the details, and it was the following morning that we went up. ... That is very much a process that we would take in our newsroom. It is pretty much the process we would take with every single story that we cover. ... I can't say what her thinking is, but I'm just telling you what happened that week. ... Well, she is saying that she heard it in the office and she was standing in the back of the***

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<sup>612</sup> Transcript day 88 from page 89

<sup>613</sup> Transcript day 83 page 82

<sup>614</sup> Transcript day 88 page 100

*office. That, to my mind, did not happen. ... I don't know if she would have specifically known [that I was in fairly regular contact with Superintendent David Taylor] but I'm sure she would have hazarded a guess. I was a crime correspondent, I still am, and he was the Press Office within the Gardaí.*<sup>615</sup>

Debbie McCann had a strong attitude in relation to Maurice McCabe at that time. She was no more than incorrect. She could not be seen to be a purveyor of gossip and as between her and a friend she was entitled to speak frankly, if at times seriously exaggeratedly, about an issue that was of interest to fellow journalists. On 9 May 2014, when Debbie McCann was on leave, Alison O'Reilly was in contact with her by phone or by text with a view to keeping up-to-date on news. On 6 May 2014, Seán Guerin SC had furnished his report on the allegations by Maurice McCabe as to the Cavan/Monaghan police district to the Government and it was then published three days later. On 9 May 2014, Alison O'Reilly texted Debbie McCann:

'A highly respected officer held high in high regard' is how judge guerin describes McCabe.....

Alison O'Reilly then followed that up shortly afterwards with this text comment:

'Paul Williams and the indo have agenda against McCabe', says Michael Martin to pals.

Debbie McCann replied:

I am fully aware. And to be honest I think it's gross. There is a very messed up girl at the heart of it and no one gives a f....<sup>616</sup>

Alison O'Reilly was actively discouraged by her employer newspaper company from giving evidence to the tribunal. Her testimony was that she had been told, in colourful language, that anyone who went to a tribunal with information out of a sense of duty might end up at the receiving end of criticism themselves: "You know, nobody comes out of a Tribunal looking okay, even if they're trying to be the good guy."<sup>617</sup> While this could be seen as mere chat, the reality is that Alison O'Reilly felt far from encouraged. This was not an appropriate way to deal with an employee who wished to cooperate with a public enquiry. In fact, it is appalling. Worse was to follow. She wrote to the tribunal on 7 June 2017, in response to the plea for public assistance made on 27 February 2017 and because Brendan Howlin TD had made a statement to the Dáil on 8 February 2017, and had helpfully provided a statement to the tribunal on 15 March 2017. Alison O'Reilly's employers had been asked specifically for any information they had in March 2017. Journalistic privilege was claimed in a letter of 13 March 2017, and further correspondence followed, with Debbie McCann and Alison O'Reilly being interviewed by the tribunal's investigators. On 13 April 2018, it was claimed in a letter that Alison O'Reilly was an embittered person. As between her and Debbie McCann, they attacked her testimony, without any basis other than that Debbie McCann had had no story about Ms D to pitch to her editors.

The tribunal accepts the evidence of Alison O'Reilly. The tribunal is of the view that while a great deal of the conversation that went between these two journalists can be seen as braggadocio, or simply loose talk, the core of this is factually correct. Someone had strongly biased the mind of Debbie McCann against Maurice McCabe. That person, the tribunal is convinced, was neither her father, retired Detective Superintendent John McCann, who was a responsible and hard-working officer, nor Commissioner Nóirín O'Sullivan, who had hardly ever met her and had not the

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<sup>615</sup> Transcript day 88 pages 101-102

<sup>616</sup> Transcript day 88 from page 118, tribunal documents page 6368

<sup>617</sup> Transcript day 83 page 147

slightest reason to interact with her, save in a social context, but the press officer for An Garda Síochána, with whom she was in regular contact, namely Superintendent David Taylor. It was he who, like his conversation with Cathal McMahon, had directed both Debbie McCann and Eavan Murray to Cavan. There was no truth to his senseless evidence that they were somehow merely reporting to him on activities in that area, especially as he also denied that those activities had anything to do with him. Why would they report to a superintendent sitting up in Garda Headquarters?

The account given by Debbie McCann to Alison O'Reilly as to Ms D being in a bad way and sitting on a couch and hugging herself certainly did not come from Paul Williams. In addition, Debbie McCann had details which appeared in the garda file sent to the Director of Public Prosecutions. There is the reference to them being at "a party or gathering" and there is a description of the alleged encounter. She told the tribunal that it was "an allegation of inappropriate touching", and she said that she may have known at the time that "there may have been tickling involved". That last, evocative, word appears in the garda file. These are details that she admits to knowing, but she claims to have obtained this information about the tickling from what she describes as a source.<sup>618</sup>

This was a case of Debbie McCann making a mistake and being sucked into the orbit of Superintendent David Taylor and listening to the kind of detail which the tribunal is satisfied he had at his disposal and which he was content to deploy, to a major extent with the detail provided by him to Debbie McCann, and to a lesser extent by way of supplying details which were easily at his disposal to both her and to Eavan Murray. They were taken in by him.

### **Extent of role of Superintendent David Taylor**

In the result, the tribunal has been convinced that there was a campaign of calumny against Maurice McCabe by Commissioner Martin Callinan and that in it he was actively aided by his press officer Superintendent David Taylor. It is now necessary to consider the extent to which Superintendent Taylor has downplayed his role in events.

The tribunal is of the view that Superintendent David Taylor has seriously understated his role in this affair. In giving evidence to the tribunal on day 74, and having been previously interviewed on three occasions by the investigators acting for the tribunal, he claimed for the first time a kind of Nuremberg defence: that he was acting under orders. The tribunal does not accept this evidence:

*Well, I was given specific instructions by Commissioner Callinan to take every opportunity I had with the media to drop it into conversations that when they'd bring up Sergeant McCabe in -- you know, because the issues would come to light frequently/infrequently, they may be raised in the Dáil, they may be raised in social media, they may have been raised by commentators, and if I was to be meeting any of those journalists, to say 'Well, there's a back story here'. ... Now, was anybody else instructed by Commissioner Callinan? I don't know. I can just tell you the instructions I got. ... Well, An Garda Síochána is a disciplined force and insubordination is one of the actions within -- if a Garda Commissioner gives you a direction, order, you act on it. It's not for me to question the Garda Commissioner.<sup>619</sup>*

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<sup>618</sup> Transcript day 88 pages 112 and 206-207

<sup>619</sup> Transcript day 74 page 31

This is daft evidence. The intended reference, dropped out by Superintendent Taylor because, no doubt, even he saw how silly it might sound, is to the Garda Code. This set of rules for the police does not oblige anyone to engage in calumny on orders.

The tribunal is convinced that Superintendent David Taylor did more than merely inform some journalists that in the past there had been an investigation into Maurice McCabe and that the Director of Public Prosecutions had decided that there should be no prosecution and that he was consequently embittered. That is all he claims to have done. That is untrue. In reality, he directed Cathal McMahon towards Cavan to interview Ms D. That could only have one purpose: to cause as much trouble for Maurice McCabe as possible.

Superintendent David Taylor conveniently provided a list of nine journalists by letter to the tribunal dated 13 April 2017. This was convenient because, as it seems to the tribunal, despite the claim of journalistic privilege by three of these, and a strong hint by one that he could never have been briefed in this way, these journalists were chosen because they were probably never encouraged to think in any negative way by Superintendent David Taylor against Maurice McCabe. Conveniently, as well, he left out the names of Eavan Murray, Debbie McCann and Cathal McMahon. These were people who were encouraged to go up to Cavan to speak to Ms D. Had he the opportunity, he would have filled their minds in a non-positive way about Maurice McCabe. It was the misfortune of Eavan Murray and Debbie McCann that they came too close to his orbit. They were journalists looking, understandably, for a story and for whatever reason best known to himself, he decided to use them.

Coming slightly closer to the truth was a statement made by Superintendent David Taylor to the tribunal's investigators on 5 May 2017. This statement was markedly stronger than his attitude taken before the tribunal, which in effect was merely one of following orders and relaying information. Superintendent Taylor said:

As we rolled into 2013 the penalty point issue was building, there was a lot of media and political commentary. To understand senior Garda management, they are hyper sensitive to negative political commentary, perceived or real. In that context the Commissioner and senior Garda management were deeply frustrated the credibility that Maurice McCabe was gaining within the political and media community. There was hardly a week or a day that there was not commentary on it. Senior Garda management were deeply frustrated that Maurice McCabe was getting a clear run in the media without being challenged. The Commissioner and senior Garda management were shackled by their positions and what they could say about Maurice McCabe. The stock answers had to be given in public, but behind the scenes they wanted the boot put into him. This was like a pressure cooker in terms of the frustration building, Commissioner Callinan would have said to me we need to hit back so that when I was talking to the media in whatever environment it presented itself, I would take advantage and I was to say that Maurice McCabe was driven by agendas, he is motivated by revenge, and that revenge is driven by the allegation, the sexual allegation, made against him by another members daughter a number of years ago, I would say that I did always clarify to the journalists that a file had gone to the DPP and that there was no prosecution, however, this was the narrative. It was put in such a way that there was no smoke without fire, I would drop that in when talking to the journalists.<sup>620</sup>

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<sup>620</sup> Tribunal documents pages 127-128

In his evidence, Superintendent Taylor sought to explain this reference to “no smoke without fire” as being something other than a nudge-nudge wink-wink about Maurice McCabe and the sexual abuse of a minor:

*Q. When we finished up yesterday I was asking you some questions about the methodology or the approach you took to what you've given evidence about, namely a smear campaign and the command that was given to you by Martin Callinan you say. Can I ask you, in relation to the sexual abuse allegation that you say you were to whisper about or leave or mention to journalists, that included an idea that -- well, was the purpose of that not to give the journalists to believe that in fact there was something to the allegation?*

*A. No, it was to draw their attention to a motivation.*

*Q. Well, you see, you might help us with that. Because I had thought part of the smear campaign purpose was to turn whomever you were briefing off Sergeant McCabe, and to that end, part of the scheme involved you giving them to understand that there was something in it, by which I mean in the sexual abuse allegation.*

*A. No. It was to draw their attention to his motivation as to why he was bringing these matters to the public arena.*

*Q. But did you not say in one of your statements that in fact part of the rationale or methodology of the smear was that there was no smoke without fire?*

*A. That's in relation to his motivation as to what brought him forward, that this investigation was the motivation for bringing these matters forward to the public arena.*

*Q. But you see, no smoke without fire -- well, first of all, is it your position that you were to impart the message 'There is no smoke without fire' --*

*A. No.*

*Q. -- in relation to the sexual abuse allegation?*

*A. No, I merely imparted the information as directed by the Commissioner, to say that Sergeant McCabe was driven by revenge, emanating from the investigation.*

*Q. And is it your position that you were never instructed and you never did indicate to a journalist 'There's no smoke without fire' in relation to the sexual abuse allegation --*

*A. No.*

*Q. Is that your --*

*A. That's correct.*

*Q. That's your position on that?*

*A. Mm-hmm. ...*

*Q. This is what you told the Tribunal investigators:*

*"I was to say that Maurice McCabe was driven by agendas, he's motivated by revenge and that revenge is driven by the allegation, the sexual allegation made against him by another member's daughter a number of years ago. I would say that I did always clarify to the journalist that a file had gone to the DPP and that there was no prosecution. However, this was the narrative."*

*And then you say:*

*"It was put in such a way that there was no smoke without fire. I would drop that in when talking to the journalists."*

*So, did you say that to the Tribunal investigator?*

*A. I did.*

*Q. And did you not say a few moments ago that in fact you didn't indicate to the journalists whom you were briefing that there was no smoke without fire?*

*A. Well, I said that, what I've always said to the journalists, that Sergeant McCabe bringing these matters into the public arena was driven by revenge and this revenge emanated from the investigation into him.*

*CHAIRMAN: No, if you just go back, if you wouldn't mind, Superintendent –*

*A. Yeah.*

*CHAIRMAN: -- to the question you were asked. Counsel asked you: "But you see, no smoke without fire -- well, first of all, is it your position that you were to impart the message "There is no smoke out fire"?" The answer was "No". "In relation to the sexual abuse allegation?" "No, I merely imparted the information as directed by the Commissioner to say that Sergeant McCabe was driven by revenge emanating from the investigation." That's, I think, what counsel is referring to.*

*A. Yes.*

*Q. MR. MÍCHEÁL O'HIGGINS: So what did you mean in telling the Tribunal investigator the methodology involved indicating or imparting "No smoke without fire"; what smoke and what fire?*

*A. Bringing these matters of the penalty points to the public arena was driven by, motivated by revenge.*

*Q. Why did you use the expression, in purporting to describe the methodology of the smear campaign, "I would indicate no smoke without fire"?*

*A. Because that showed his motivation in bringing these matters to the public arena.*

*Q. I suggest to you "No smoke without fire" means there's something in the allegation, the allegation is likely to be true. That's what that expression means.*

*A. I don't accept that.<sup>621</sup>*

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<sup>621</sup> Transcript day 76 from page 6

The tribunal does not accept his explanation. The statement of 5 May 2017 speaks for itself and is, in itself, a considerable understatement of his role.

Why then did Commissioner Martin Callinan feel the need to get involved, as he did in relation to at least four people who have told this tribunal the truth, in December 2013 and January 2014? Superintendent David Taylor was a person who would promise much and deliver little. While the tribunal is convinced that he gave a list of journalists who were never briefed in order to mislead the tribunal, and while the tribunal cannot but regard it as probable that there are other journalists who have decided not to come forward and assist the public inquiry that the tribunal represents, despite having been briefed negatively by him, his attitude to his superior was likely to have been one of bluster and spoof which was eventually seen through.

In the context of what Commissioner Callinan saw as the crucial events surrounding the Public Accounts Committee breach of his rights, as he saw them, both as data controller of garda information and as commander of his subordinates, he decided to step in and try and do a more effective job than his incompetent subordinate had already engaged in. That is why Superintendent David Taylor jumped in enthusiastically at the end of Commissioner Callinan's conversation with Philip Boucher-Hayes in the Montrose corridor on 17 December 2013. He did not need to hear, whether he heard or not, because he knew what was likely to be said.

#### **Former Commissioner Nóirín O'Sullivan**

There is no credible evidence that Deputy Commissioner Nóirín O'Sullivan played any hand act or part in any campaign conducted by Commissioner Martin Callinan and by Superintendent David Taylor.

All of the evidence is to the contrary in fact. When Commissioner Nóirín O'Sullivan came into office, practically the first thing she did was to get rid of Superintendent David Taylor, the incumbent press officer. She did this because she neither trusted him nor liked him. She reached out to Maurice McCabe and attempted to solve the workplace-related issues which surrounded him. These efforts were successful at first, but were undermined by what she felt was the necessity to test where he was coming from in the very serious allegations of corruption that he was making before the O'Higgins Commission. Her decision in that regard involved talking at length to officials in the Department of Justice and Equality. She is likely to have remembered that, contrary to her evidence, because she realised what was at stake. It is also improbable that she did not have an inkling at the very least about Commissioner Callinan's views. At the very least, it was more than improbable that nothing emerged in the car journey with him back to Garda Headquarters from the meeting of the Public Accounts Committee on 23 January 2014. It was disappointing to hear her evidence on this.

One thing, however, of which the tribunal is satisfied is this: that Superintendent David Taylor had every reason to lie about Commissioner O'Sullivan. He was bitter about not being promoted, bitter about no longer being the press officer for Garda Headquarters, bitter about no longer traipsing in and out of the Garda Commissioner's office, bitter about the crimes for which he was being rightly investigated, bitter about being arrested, bitter about having telephones and computers seized from him in the course of a criminal investigation, bitter about having to go to the High Court and recite untruths in an affidavit, bitter about having to decamp from Garda Headquarters to the less power-charged surroundings of Dublin Castle, and determined to get revenge on the person whom he saw was responsible. Instead of telling the truth to himself, or to the tribunal, he set out to destroy people by associating himself with Maurice McCabe and

undermining the wife, Nóirín O'Sullivan, of one of the detectives leading the investigation against him.

## **Conclusions**

Maurice McCabe is a genuine person who at all times has had the interests of the people of Ireland uppermost in his mind. Those interests he regarded as superior to any loyalty which he had to the police force of the State. Neither interest should ever be in conflict.

As was powerfully disclosed by the report by Mr Justice O'Higgins, an extremely serious state of lack of application to duty and failure to follow basic and fundamental procedures was at the heart of the legitimate concerns of Maurice McCabe. Within an honest setting, those responsible for such dereliction of duty would admit the matter readily, but instead several mistakes and failures to carry out duties were actually blamed on Maurice McCabe himself at the O'Higgins Commission. This was in no way inspired by Commissioner Nóirín O'Sullivan and she had no authority, in any event, to tell any garda under her command to take notes and to give evidence in any particular way.

Maurice McCabe has done the State considerable service by bringing these matters to the attention of the wider public and he has done so not out of a desire to inflate his public profile, but out of a legitimate drive to ensure that the national police force serves the people through hard work and diligence. He is an exemplar of that kind of attitude. Notwithstanding everything that happened to him, he remains an officer of exemplary character and has shown himself in giving evidence to the tribunal as being a person of admirable fortitude.

The broadcasts of 9 May 2016 on Raidió Teilifís Éireann reporting on the O'Higgins Commission laid a great deal of emphasis on the character of Maurice McCabe and little emphasis on the incompetence and indolence which the report of Mr Justice O'Higgins had laid out line by line. The messenger, in relation to this matter, was much less important than the message which was delivered: that our police force was to wake up and actually start doing its job properly. While there was a reference to an untruth told by Maurice McCabe to the O'Higgins Commission, there can be no criticism for reporting that. Furthermore a reference in the relevant term of reference, (k), to Maurice McCabe being branded as irresponsible is inaccurate.

What Paul Reynolds did was honest. He was not under the directions of Garda Headquarters and he went about his job as an intelligent and independent reporter. In no sense was he a tool of the higher echelons of Garda Headquarters.

Those reading this report will no doubt be horrified when they come to the section which, in concise form, summarises all of the negative things said directly about Maurice McCabe and all of the rumours which floated around, and were no doubt magnified, from a period which probably began in early 2007 and continued over the best part of the subsequent decade. The central question with which this tribunal has been tasked is as to where that calumny and gossip came from.

The tribunal is convinced that by a natural process, following the investigation conducted in consequence of the allegation of Ms D, about which the tribunal makes no comment and can make no finding one way or another, it was inevitable that local gardaí should hear about the matter and that talk should begin. That was compounded by whatever events occurred in October 2007 where Maurice McCabe was confronted by members of the D family. It is a shame that the ruling of the Director of Public Prosecutions of 5 April 2007 could not have been circulated to Maurice McCabe and the D family, but the tribunal ascribes no malice to the scrupulous following of regulations by the officers involved. As Maurice McCabe rightly drew attention to failings in garda files, to indolence in investigations, and began to see obvious problems, which should have been spotted

by garda management independently of him, with the fixed charge penalty notice system on the PULSE system and the failure to properly operate that system and to properly complete investigations into other offences as evidenced by that system, talk against him began to grow. He came to be seen by a substantial minority of his fellow officers as a pariah and someone who was heedlessly causing trouble. Consequently, rumours grew out from the garda community and reached political and journalistic circles.

Many, hearing these rumours, behaved responsibly and asked themselves such questions as: why would a guilty person draw attention to themselves; or what possible basis can there be if the Director of Public Prosecutions refuses to take a case? But, unfortunately, closed and self-loyal organisations are ones in which an attitude can take hold and can be very hard to displace.

With the revelation of one of the most bizarre coincidences in the ascribing of a rape offence against a completely different individual to Maurice McCabe through a transcription error by a counsellor, and with TUSLA then compounding this error, and its subsequent failure to face up to and admit its considerable failings and stupidities, public disquiet at the way Maurice McCabe was treated legitimately reached a peak of considerable concern.

Central to the allegations examined by this tribunal has been the claim by the press officer for Garda Headquarters, Superintendent David Taylor, that he was tasked by the then Garda Commissioner, Martin Callinan, to destroy the character of Maurice McCabe through briefings to journalists. While this tribunal has no option but to find that Superintendent David Taylor is a witness whose credibility was completely undermined by his own bitterness and by the untruthful nature of his affidavit in the judicial review proceedings that he intended to commence before the High Court, and while his motivation in bringing forward this allegation was to stop or undermine a criminal investigation rightly being taken against him, the tribunal nonetheless had to examine whether there was any independent evidence proving something of the case which he was making.

The truth is that Superintendent David Taylor completely understated his own involvement in a campaign of calumny against Maurice McCabe. He claimed, for the first time, while giving evidence to the tribunal that he was acting under orders. That was not the case. The tribunal is convinced that he pursued a scheme that somehow evolved out of his cheek-by-jowl working relationship with Commissioner Callinan. Their plan was that there was to be much nodding and winking and references to a historic claim of sexual abuse while, at the same time, saying that the Director of Public Prosecutions had ruled that even if the central allegation did not have credibility issues, what was described did not amount to an offence of sexual assault or even an assault.

Superintendent David Taylor supplied a list of nine journalists to the tribunal whom he claimed were negatively briefed by him against Maurice McCabe. The tribunal is not convinced that any of those journalists were ever egged on in publishing negative stories about Maurice McCabe or even in thinking less of him. The two journalists not named among those nine, Debbie McCann and Eavan Murray, were, however, like Cathal McMahan, another journalist nominated by Superintendent David Taylor in the dying days of evidence before the tribunal, encouraged to seek out Ms D and to publish a negative story about Maurice McCabe in relation to her allegation. Cathal McMahan, innocently making an inquiry having heard a rumour, was told by the press officer for An Garda Síochána that he might find out more by going to Cavan. Debbie McCann and Eavan Murray, committed journalists who were looking for news, were very unfortunate to have come within the orbit of Superintendent David Taylor.

As the Public Accounts Committee hearings came towards a climax on 23 January 2014, in terms of the emotional disquiet that they were causing Commissioner Martin Callinan, he personally felt the need to supplement the efforts of his press officer, a man who promised much but delivered little, by speaking to two Teachtaí Dála, Deputy John McGuinness and Deputy John Deasy, and

to the Comptroller and Auditor General, Séamus McCarthy, in the most derogatory way about Maurice McCabe.

Thus, there was independent evidence apart from the testimony of Superintendent David Taylor which proved this campaign. As regards any issue about whether the Garda Commissioner and his press officer were working together, an encounter in Montrose on 17 December 2013, in the context of a dispute as to whether the Garda Commissioner was to be asked bland public relations type questions or whether issues such as the penalty points controversy should be discussed, this caused Commissioner Callinan to seek an off-the-record conversation which was rightly not agreed to by a responsible journalist, Philip Boucher-Hayes. That occasion was used to further denigrate the character of Maurice McCabe and this was done in the near presence, if not the actual hearing, of the press officer for Garda Headquarters. Nonetheless, in the immediate aftermath of the conversation and from a few feet away Superintendent Taylor weighed in, in accordance with the scheme which both of them were pursuing, with a comment to the effect that the journalist should now know what the problem was with Maurice McCabe's allegations about fixed penalty charge notices and their cancellation.

The tribunal had the greatest difficulty in getting any information from journalists. From March 2017, the tribunal was writing to journalists and specifically targeted journalists who were noted as contacts on Superintendent David Taylor's mobile devices. He waived privilege. Journalistic privilege has two parts, the entitlement to assert it and the right of society to override it in the interests of a pressing national concern. It took over a year of work to come to the point where journalists could be called to, in the end, testify that they had never been negatively briefed by Superintendent David Taylor or to claim that they alone possessed the privilege of not answering questions. What did Superintendent Taylor do? That was the question which the people of Ireland entrusted this tribunal to find out.

The tribunal sat for 102 days. In terms of documents considered by the tribunal, these amounted to tens of thousands and, typically, in each of the four sections of the tribunal's work, there were in or around 8000 pages distributed to the parties by electronic means together with video and audio recordings of relevant materials. This has been a huge task.

Whereas many are cynical and claim that tribunals are a political means of sidelining important issues and covering matters within the power of government with a lachrymose sauce about the need for fair procedures, a tribunal, having completed its work, might hope that thereby some improvement could occur. A tribunal should speak freely and a tribunal should in no way be trapped by the temptation of cynicism that nothing may change.

The improvement that is most needed in our police force is adherence to honesty and adherence to the duty to do a full and hard day of work in the service of the people of Ireland. This grim exercise was widely reported. Thinking of all of the hard-working gardaí in the Donegal Division, who did their job in an exemplary fashion despite the problems Garda Keith Harrison threw up, remembering the brilliance of the investigation into Superintendent David Taylor by Chief Superintendent Clerkin, recalling how objective and thorough the investigation into the original Ms D investigation was by Superintendent Noel Cunningham, and realising that out there, in every division and district, there are so many police officers intent on doing their work properly, what this inquiry has shown must be deeply dispiriting to them.

The tribunal turns to its recommendations in part 4.

#### **Part 4: Conclusions from parts 1, 2 and 3 and the Garda Keith Harrison report**

Before moving on to recommendations, it is proposed to contextualise this final part. Thus the conclusions which the tribunal has reached on all of the reports which it has issued are repeated. There are, in effect, three in this volume, and it is also important to recall what conclusions were reached in relation to the Garda Keith Harrison affair.

This report is part 4 of 4 in this volume. Recommendations then follow.

#### **Garda Keith Harrison: conclusions repeated**

Very serious allegations were made by Garda Keith Harrison and by Marisa Simms. While they presented themselves as being the victims of others, the reality that should not be forgotten is that to be wrongly accused is a deeply upsetting experience. Essentially, they accused the gardaí in Donegal of interfering in their home and family life. This was due, they claimed, to malice against him. So similar, it was asserted, was this alleged interference to what had happened to Sergeant Maurice McCabe, that they claimed that it was inspired not just at local level but by Garda Headquarters. The wrongs against Garda Keith Harrison and Marisa Simms were claimed by them to involve the cunning use of trickery to bring her in to Letterkenny garda station, pursuant to an alleged design to obtain evidence against him.

While in the station, Marisa Simms made a statement against Garda Keith Harrison. This came about, they asserted, through coercion. When that statement by her alleged various wrongs by Garda Keith Harrison against her, some amounting to criminal offences if proved, this was claimed by her to be due to pressure or to misrepresentation by the interviewing gardaí. That statement, on analysis, however, is a repeat of several of the most serious allegations made by Marisa Simms in text messages to Garda Keith Harrison during the course of their relationship. These were sent by her before she had any contact with the gardaí as to the serious complaints that she proposed to make against him. These text messages were later voluntarily downloaded from the mobile phone of Marisa Simms. The gardaí could have had nothing to do with these text messages.

It was claimed by Garda Keith Harrison and Marisa Simms that there was nothing in that statement to gardaí of Marisa Simms which required the intervention of social services. The terms of the *Children First* guidelines, however, required the gardaí to involve the Health Service Executive, later called TUSLA when fulfilling the relevant function. The relevant fundamental obligation was to protect children. At that time, generally where a domestic violence statement revealed a possible cause for criminal prosecution, the gardaí were worried about pre-arresting a potential accused with a narrative of what was alleged against him. This would allow him to tailor his story if arrested or interviewed by the gardaí. In fact, TUSLA asserted during the hearings, and the tribunal accepts, that while the statement was not passed to them by the gardaí, had it been or had the full nature of the allegations made by Marisa Simms been explained to them, their response would have been considerably quicker, more vigorous and much more intrusive than it in fact was. This is borne out by the substance of Marisa Simms' statement, which is quoted in part earlier in this report. The procedures since that time have changed. Where there is now, in 2017, a parallel criminal and social work overlap, full statements taken by gardaí, or a detailed précis, are generally available to social services. The point wrongly asserted by Garda Keith Harrison and Marisa Simms was of a malicious referral of their life together by the gardaí to social services. Were that so, exaggeration might be expected. But here, social services testified that the allegations were not passed to them in their full seriousness. Nothing in the evidence suggests that TUSLA were drawn in to any over-reaction. There was, in fact, no over-reaction and there was nothing passed by gardaí to inspire that. An under-reaction in consequence of information passed by the gardaí is what happened. That occurred because of the then system of liaison between gardaí and social services. That

resulted in a considerably milder intervention by TUSLA with the home life [of] Garda Keith Harrison and Marisa Simms than the text of her statement warranted.

TUSLA is an independent statutory agency. It is not under the control of gardaí in Donegal and nor is it influenced by them or by Garda Headquarters. Nonetheless, Garda Keith Harrison and Marisa Simms asserted that there would have been no social work visit to their house had not the gardaí imposed pressure on particular social workers within TUSLA. For a social worker to invade someone's house on a pretext, or to have carried out an unnecessary duty with children due to pressure from an outside agency, would have been shocking. The social workers accused by them of abuse of office were entitled to feel deeply upset at being targeted with such allegations. Their integrity was incorrectly undermined by these widely-publicised allegations. Yet, during the hearings, these very serious allegations by Garda Keith Harrison and Marisa Simms simply collapsed.

Allegations need to be considered on the basis of whatever merit, if any, which they may hold. This is only possible after analysis. It is to be noted that in the aftermath of the matters which have been considered by this tribunal, Garda Keith Harrison made a report to the relevant recipient of confidential complaints of misconduct within the gardaí; in other words, he became a "whistleblower". While the accuracy or otherwise of whatever was alleged by him is outside the terms of reference, and therefore not capable of being considered by the tribunal, one thing should be noted. In Donegal town garda station, at the time he was moving into this confidential complaint process, Garda Keith Harrison met Sergeant David Durkin and told him that he was not complaining about his conduct. Nonetheless, in a statement to this tribunal, Garda Keith Harrison has done just that. These allegations were put to Sergeant Durkin by the tribunal because Garda Keith Harrison refused to put them. It was clear how upsetting those allegations were to Sergeant Durkin and his dignity and truthfulness in answering them was transparent. The allegations against Sergeant Durkin are also rejected.

This is only one example of how upsetting accusations against responsible people were found to have no foundation. This process, by the tribunal, has been one of serious and damaging allegations of professional misconduct being discovered through enquiry and through public hearings to have been completely unfounded. In this report, why there was no basis for making the allegations, the changes of mind and of emphasis, and the contradicting evidence, are set out in full. That is what an enquiry by tribunal is about. Had the accusations made been true, an extremely serious state of affairs would have been uncovered. In respect of this matter, it was not. That does not mean, however, that the process was not called for. This process of enquiry by public tribunal was started in good faith by the Oireachtas. It is only in consequence of the tribunal hearings and this report that there has been a full appraisal of the facts.

All of the allegations of Garda Keith Harrison and Marisa Simms examined by the tribunal are entirely without any validity. They have claimed to have been the victims of a malicious procession of events. That is not so. They claimed to have been the victims of others. There is another side to this. The allegations which they made must have taken a considerable emotional toll on several of the multiple persons accused by them of very serious misconduct. It is appropriate here to exonerate everyone in social services and in policing accused by them of discreditable conduct. That is the only possible conclusion to the tribunal's enquiry. It is also amply corroborated by the supporting evidence analysed in this report.

While there is indeed public disquiet arising from other matters, and the treatment of Sergeant Maurice McCabe is the urgent focus of this tribunal, it must be commented, as to the functioning of our police force and the response of social services, that this series of issues raised by Garda Keith Harrison and Marisa Simms has been enquired into in detail and a positive picture has

emerged. There have been many committed public servants who gave evidence in this matter and the impression given has been one of devotion to duty and determination to do the right thing. Thus, in any public discussion of this matter, it should also be remembered that in policing and in social services in Ireland there are plenty of people who diligently turn up for their jobs and do a real day of work with humanity and with skill. Those serving in the gardaí in Donegal demonstrated seriousness and genuine concern in the context of domestic violence allegations. There was no breakdown in the garda command structure. Instead, allegations were treated seriously, properly reported up the line and diligently pursued.

In this section of the tribunal's work, it became apparent that there was no shortage of police officers well capable of leadership and the application of intelligence to their task.

In carrying out the often fraught and difficult duties of social work, the witnesses from TUSLA stood out as paying proper regard to independence, professional standards and pride.

### **TUSLA and the HSE: conclusions repeated**

A complaint had been made by Ms D and her family against Maurice McCabe to the gardaí in Cavan in December 2006. Ms D had already been undergoing counselling. The complaint was of a single, brief, alleged clothed incident back when she was six or seven, in perhaps 1998. In December 2006, the gardaí had reported this complaint of an alleged encounter to the Health Service Executive, predecessor in this respect of TUSLA. The criminal investigation into the Ms D complaint ended when the Director of Public Prosecutions decided in April 2007 that no offence had been disclosed; even taking the complaint at face value. Social services thereafter decided to take no further action. That should have been the end of any allegation that Maurice McCabe had ever sexually assaulted a child.

Ms D returned to counselling because of the stresses of life in 2013. Within the counselling organisation, Rian in Cavan, a mistake was made in transcribing an account of Ms D by mixing that up with the account of a Ms Y. In the result, the complaint of Ms D about an alleged and brief fully clothed encounter became a complaint of vaginal and digital anal penetration: a rape offence.

Maurice McCabe by 2013 had become, or was increasingly becoming, a public figure. He was seen as a serving sergeant complaining about poor police investigations and failure to properly enforce fixed charge penalty notices for driving offences. He was, consequently, much disliked by some gardaí. Yet, the transcription error turning the fully clothed alleged encounter, which the Director of Public Prosecutions had described as not disclosing an offence, became a rape allegation through a mistake. While many gardaí had a serious problem with Maurice McCabe and his complaints, a rape allegation was conjured out of nowhere. This must be one of the most unlikely coincidences ever to be accepted by any judicial tribunal. Yet, coincidence it was. All of the witnesses were honest. The computer analysis checks out absolutely correctly. So do the paper files. When the mistake was discovered nearly a year later in 2014 when Maurice McCabe was even better known, the person who made it did all she could to rectify it. It was given continued life, notwithstanding her efforts, because of startling inefficiency and indolence within social services. In consequence, serious upset was caused to Maurice McCabe and his wife and family because the rape allegation took on a life of its own and resulted in a letter from TUSLA being delivered to his household accusing him of a rape offence that no one had ever laid against him.

Rian had been obliged to pass on any sexual offence allegation against identified individuals to the Health Service Executive. The allegation of a rape offence was thus passed up the line on 9 August 2013. This did not happen under any influence from anyone in the national police force.

The Ms D allegation had been investigated from December 2006 in a highly competent and objective fashion by the gardaí. The file against Maurice McCabe was locked away. The allegation was never put on the PULSE computer system whereby gardaí are informed of allegations of alleged criminality. Because in 2006, the gardaí had reported the correctly described Ms D allegation to the Health Service Executive, in 2013/2014 there was therefore no need for Rian or for the Health Service Executive to further report this matter to the police.

At the start of 2014, TUSLA, or the Child and Family Agency, took over the functions of the Health Service Executive in respect of child protection. It was nothing to do with the changeover, which largely maintained the same personnel and the continuity of the same files, which inspired TUSLA to report to the gardaí for a second time what was described as the alleged encounter between Maurice McCabe and Ms D. Procedures were so chaotic that the first report from the gardaí to TUSLA's predecessor, from the time of the 2006/07 garda investigation, was unknown. Nor was there any great effort to uncover the accurate situation. Communication to the gardaí seeking information in good faith went unanswered. Consequently, a mistaken report was made to the gardaí by TUSLA on 2 May 2014 alleging that Maurice McCabe had been accused by Ms D of a rape offence and that this had been reported to Rian by Ms D. No such thing had ever been reported by anyone against Maurice McCabe.

The gardaí reacted by passing the rape offence allegation up the line to the assistant commissioner for the Northern Region. In doing so, however, it had already been realised within the gardaí that the report was incorrect and that a rape offence allegation had been improperly ascribed to Maurice McCabe by Rian and later TUSLA. Nonetheless, a report was made to the assistant commissioner for the Northern Region from Cavan/Monaghan. This was passed on to Garda Headquarters. At a time when there was considerable public interest in Maurice McCabe as a person who had disclosed inefficiencies and bad practices within the gardaí, an incorrect report, accusing him of a rape offence, was maintained in Garda Headquarters. When the Northern Region learned of the inaccuracy of that report, the assistant commissioner did not correct it to Garda Headquarters.

The false report had an afterlife within TUSLA. This was not due to any action by gardaí, but was because of the astounding inefficiency of that organisation and the inertia of its management in Cavan/Monaghan. In due course, and very probably because of the media attention surrounding Maurice McCabe, in April 2014 the file was taken from the filing cabinet in which it was stored. The mistake was discovered almost immediately but that was because Ms D, when she came to know of the rape offence allegation against Maurice McCabe, protested that she had never claimed any such thing. That should have resulted in an immediate and definitive correction within TUSLA: but it did not.

Nothing much happened over the following year but the file was later actioned for attention in May 2015. The correct thing to have done then, in 2015, was to seek a meeting with Ms D in order to engage in a credibility assessment. Contact was made. But it did not result in any such meeting with social workers. No such exercise had been undertaken back in 2006/07, when Ms D had originally made the allegation concerning a fully clothed encounter on a couch during an alleged game of hide and seek. This failure to meet Ms D to conduct a credibility assessment was a clear breach of procedures. Counselling had been given to Ms D in 2007. In 2015, Ms D was contacted by social workers and she was asked to meet them. In any event, Ms D, then a student, was too busy to take up the 2015 request by TUSLA of a meeting.

Another essential procedure was not undertaken back in 2006/07. This was to offer a meeting to the person against whom the allegation was made, Maurice McCabe, in order to take his account of events and to explore whether he might constitute any kind of risk to children.

When TUSLA re-engaged with the file in May 2015, no one read the papers properly; and this despite there being only about 36 pages. Above all, this was a failure in senior management. The counsellor in Rian who made the mistake in 2013 in ascribing, in a word processing error through her use of a template from the different file of Ms Y, a rape offence to Maurice McCabe was not contacted. Thus, the mistake was left on the file to be later treated as reality through 2015. When two inconsistent realities showed up on the file, clashing with each other, senior management exhibited complete inertia. What should have happened was that Maurice McCabe was not contacted until a credibility assessment had been conducted with Ms D. She was offered a meeting but was engaged in exams and the matter was not followed up. Had she been met, the nature of the error left negligently on the file would have immediately shown up and in clear enough terms for even management in TUSLA in Cavan/Monaghan to take notice. That did not happen. Maurice McCabe was then sent a letter that he received in January 2016 accusing him of a rape offence. This letter was opened by his wife.

From 2016, no one within TUSLA considered owning up to the serious mistakes that had been made. The solicitors' letter of complaint on Maurice McCabe's behalf, sent in response to the letter from TUSLA received in January 2016, was an invitation to give a proper explanation of what had happened. Had that happened, had TUSLA senior management sat down and read the file and then forthrightly replied setting out fully the mistakes that they had made, this tribunal of inquiry would most probably have been avoided. Instead, the matter was passed to an outside team, the Sexual Abuse Regional Team, when it should and could have been dealt with locally in Cavan.

In addition, in passing on the file to Dublin, certain documents were taken off by some unidentifiable person in Cavan/Monaghan, so that a review of the file in the head offices of TUSLA did not highlight the incorrect notification to the gardaí that had been made of a rape offence in respect of Maurice McCabe in May 2014. The tribunal received, in due course, the reconstructed file with nothing taken off it. The tribunal realised, however, that the file had been earlier filleted so that the full extent of the inefficiencies in Cavan/Monaghan TUSLA would not be made known to the Sexual Abuse Regional Team based in Dublin who had been transferred the file in 2016.

While certain gardaí knew of this mixing up of the Ms D allegation and the Ms Y allegation to make a false allegation of a rape offence against Maurice McCabe, there was nonetheless an expectation, on a legitimate basis, that TUSLA ought to be competent enough not to follow through on an obvious error.

An inaccurate report of a rape offence was sent to the assistant commissioner of the Northern Region. That report was later corrected. Garda Headquarters was immediately informed of the false report as if it had been true. When the report to the Northern Region was explicitly corrected and the error explained, the incorrect report to Garda Headquarters was never uncorrected.

While others were informed, and incorrectly informed, Maurice McCabe was never contacted and told that these mistakes had been made.

### **The O'Higgins Commission: comment repeated**

This term of reference set up an expectation that in the privacy of a commission of investigation, held under the 2004 Act, Maurice McCabe was traduced by "false allegations of sexual abuse". The central query in the term of reference is whether this was done by Commissioner O'Sullivan to discredit him. Nothing like that ever happened.

In fact, some mistakes were made, but these had nothing whatsoever to do with sexual abuse. Anyone familiar with the give and take of any long hearing would realise that claims and counter-claims are made and that decisions are made that may not be properly thought through due to

pressure of time and the necessity to deal with multiple facts and voluminous documentation. Nobody who was a party to the O'Higgins Commission was ever intending to claim that the allegation of Ms D went against the credit of this fine police officer Maurice McCabe. That simply never happened. Insofar as mistakes occurred, or were left uncorrected and subsequently should have been corrected in later submissions, these had nothing to do with Commissioner O'Sullivan.

Insofar as selected leaked transcripts created a truly unfortunate impression and a rush to judgement in the public mind, the tribunal has not been asked to investigate their source and passes no comment. It follows that the tribunal could not and does not blame anyone for this.

If there was any question as to what happened where a full transcript was available of the event, and a full audio recording, resort should not ever be had to the expenditure of public money on a tribunal without fully considering it beforehand. A reading of the transcript shows that nothing of the kind alleged against Commissioner O'Sullivan ever happened.

During the tribunal hearings, there was considerable focus on how Maurice McCabe was, on several occasions, blamed by his colleagues for matters in respect of which the O'Higgins Commission vindicated him totally. An example would be as to who had taken possession of the computer in the clerical child abuse and pornography case. Another would be who ordered the release from garda custody of the prisoner who was suspected of attempting to drag an unfortunate teenage girl into an isolated place. There are others. What this term of reference is about is the directions of Nóirín O'Sullivan as Garda Commissioner. She could not summon any witness who might contradict Maurice McCabe and direct them to agree with his account. To do that would be perversion of the course of justice. She, rightly, left the matter alone. In all court cases, lots of witnesses contradict each other or even say unpleasant things about each other.

It was for a judge of real experience to sort out the good sense of this. This Mr Justice O'Higgins did.

### **Attack on the character of Maurice McCabe: conclusions repeated**

Maurice McCabe is a genuine person who at all times has had the interests of the people of Ireland uppermost in his mind. Those interests he regarded as superior to any loyalty which he had to the police force of the State. Neither interest should ever be in conflict.

As was powerfully disclosed by the report by Mr Justice O'Higgins, an extremely serious state of lack of application to duty and failure to follow basic and fundamental procedures was at the heart of the legitimate concerns of Maurice McCabe. Within an honest setting, those responsible for such dereliction of duty would admit the matter readily, but instead several mistakes and failures to carry out duties were actually blamed on Maurice McCabe himself at the O'Higgins Commission. This was in no way inspired by Commissioner Nóirín O'Sullivan and she had no authority, in any event, to tell any garda under her command to take notes and to give evidence in any particular way.

Maurice McCabe has done the State considerable service by bringing these matters to the attention of the wider public and he has done so not out of a desire to inflate his public profile, but out of a legitimate drive to ensure that the national police force serves the people through hard work and diligence. He is an exemplar of that kind of attitude. Notwithstanding everything that happened to him, he remains an officer of exemplary character and has shown himself in giving evidence to the tribunal as being a person of admirable fortitude.

The broadcasts of 9 May 2016 on Raidió Teilifís Éireann reporting on the O'Higgins Commission laid a great deal of emphasis on the character of Maurice McCabe and little emphasis on the incompetence and indolence which the report of Mr Justice O'Higgins had laid out line by line.

The messenger, in relation to this matter, was much less important than the message which was delivered: that our police force was to wake up and actually start doing its job properly. While there was a reference to an untruth told by Maurice McCabe to the O'Higgins Commission, there can be no criticism for reporting that. Furthermore a reference in the relevant term of reference, (k), to Maurice McCabe being branded as irresponsible is inaccurate.

What Paul Reynolds did was honest. He was not under the directions of Garda Headquarters and he went about his job as an intelligent and independent reporter. In no sense was he a tool of the higher echelons of Garda Headquarters.

Those reading this report will no doubt be horrified when they come to the section which, in concise form, summarises all of the negative things said directly about Maurice McCabe and all of the rumours which floated around, and were no doubt magnified, from a period which probably began in early 2007 and continued over the best part of the subsequent decade. The central question with which this tribunal has been tasked is as to where that calumny and gossip came from.

The tribunal is convinced that by a natural process, following the investigation conducted in consequence of the allegation of Ms D, about which the tribunal makes no comment and can make no finding one way or another, it was inevitable that local gardaí should hear about the matter and that talk should begin. That was compounded by whatever events occurred in October 2007 where Maurice McCabe was confronted by members of the D family. It is a shame that the ruling of the Director of Public Prosecutions of 5 April 2007 could not have been circulated to Maurice McCabe and the D family, but the tribunal ascribes no malice to the scrupulous following of regulations by the officers involved. As Maurice McCabe rightly drew attention to failings in garda files, to indolence in investigations, and began to see obvious problems, which should have been spotted by garda management independently of him, with the fixed charge penalty notice system on the PULSE system and the failure to properly operate that system and to properly complete investigations into other offences as evidenced by that system, talk against him began to grow. He came to be seen by a substantial minority of his fellow officers as a pariah and someone who was heedlessly causing trouble. Consequently, rumours grew out from the garda community and reached political and journalistic circles.

Many, hearing these rumours, behaved responsibly and asked themselves such questions as: why would a guilty person draw attention to themselves; or what possible basis can there be if the Director of Public Prosecutions refuses to take a case? But, unfortunately, closed and self-loyal organisations are ones in which an attitude can take hold and can be very hard to displace.

With the revelation of one of the most bizarre coincidences in the ascribing of a rape offence against a completely different individual to Maurice McCabe through a transcription error by a counsellor, and with TUSLA then compounding this error, and its subsequent failure to face up to and admit its considerable failings and stupidities, public disquiet at the way Maurice McCabe was treated legitimately reached a peak of considerable concern.

Central to the allegations examined by this tribunal has been the claim by the press officer for Garda Headquarters, Superintendent David Taylor, that he was tasked by the then Garda Commissioner, Martin Callinan, to destroy the character of Maurice McCabe through briefings to journalists. While this tribunal has no option but to find that Superintendent David Taylor is a witness whose credibility was completely undermined by his own bitterness and by the untruthful nature of his affidavit in the judicial review proceedings that he intended to commence before the High Court, and while his motivation in bringing forward this allegation was to stop or undermine a criminal investigation rightly being taken against him, the tribunal nonetheless had to examine whether there was any independent evidence proving something of the case which he was making.

The truth is that Superintendent David Taylor completely understated his own involvement in a campaign of calumny against Maurice McCabe. He claimed, for the first time, while giving evidence to the tribunal that he was acting under orders. That was not the case. The tribunal is convinced that he pursued a scheme that somehow evolved out of his cheek-by-jowl working relationship with Commissioner Callinan. Their plan was that there was to be much nodding and winking and references to a historic claim of sexual abuse while, at the same time, saying that the Director of Public Prosecutions had ruled that even if the central allegation did not have credibility issues, what was described did not amount to an offence of sexual assault or even an assault.

Superintendent David Taylor supplied a list of nine journalists to the tribunal whom he claimed were negatively briefed by him against Maurice McCabe. The tribunal is not convinced that any of those journalists were ever egged on in publishing negative stories about Maurice McCabe or even in thinking less of him. The two journalists not named among those nine, Debbie McCann and Eavan Murray, were, however, like Cathal McMahon, another journalist nominated by Superintendent David Taylor in the dying days of evidence before the tribunal, encouraged to seek out Ms D and to publish a negative story about Maurice McCabe in relation to her allegation. Cathal McMahon, innocently making an inquiry having heard a rumour, was told by the press officer for An Garda Síochána that he might find out more by going to Cavan. Debbie McCann and Eavan Murray, committed journalists who were looking for news, were very unfortunate to have come within the orbit of Superintendent David Taylor.

As the Public Accounts Committee hearings came towards a climax on 23 January 2014, in terms of the emotional disquiet that they were causing Commissioner Martin Callinan, he personally felt the need to supplement the efforts of his press officer, a man who promised much but delivered little, by speaking to two Teachtaí Dála, Deputy John McGuinness and Deputy John Deasy, and to the Comptroller and Auditor General, Séamus McCarthy, in the most derogatory way about Maurice McCabe.

Thus, there was independent evidence apart from the testimony of Superintendent David Taylor which proved this campaign. As regards any issue about whether the Garda Commissioner and his press officer were working together, an encounter in Montrose on 17 December 2013, in the context of a dispute as to whether the Garda Commissioner was to be asked bland public relations type questions or whether issues such as the penalty points controversy should be discussed, this caused Commissioner Callinan to seek an off-the-record conversation which was rightly not agreed to by a responsible journalist, Philip Boucher-Hayes. That occasion was used to further denigrate the character of Maurice McCabe and this was done in the near presence, if not the actual hearing, of the press officer for Garda Headquarters. Nonetheless, in the immediate aftermath of the conversation and from a few feet away Superintendent Taylor weighed in, in accordance with the scheme which both of them were pursuing, with a comment to the effect that the journalist should now know what the problem was with Maurice McCabe's allegations about fixed penalty charge notices and their cancellation.

The tribunal had the greatest difficulty in getting any information from journalists. From March 2017, the tribunal was writing to journalists and specifically targeted journalists who were noted as contacts on Superintendent David Taylor's mobile devices. He waived privilege. Journalistic privilege has two parts, the entitlement to assert it and the right of society to override it in the interests of a pressing national concern. It took over a year of work to come to the point where journalists could be called to, in the end, testify that they had never been negatively briefed by Superintendent David Taylor or to claim that they alone possessed the privilege of not answering questions. What did Superintendent Taylor do? That was the question which the people of Ireland entrusted this tribunal to find out.

The tribunal sat for 102 days. In terms of documents considered by the tribunal, these amounted to tens of thousands and, typically, in each of the four sections of the tribunal's work, there were in or around 8000 pages distributed to the parties by electronic means together with video and audio recordings of relevant materials. This has been a huge task.

Whereas many are cynical and claim that tribunals are a political means of sidelining important issues and covering matters within the power of government with a lachrymose sauce about the need for fair procedures, a tribunal, having completed its work, might hope that thereby some improvement could occur. A tribunal should speak freely and a tribunal should in no way be trapped by the temptation of cynicism that nothing may change.

The improvement that is most needed in our police force is adherence to honesty and adherence to the duty to do a full and hard day of work in the service of the people of Ireland. This grim exercise was widely reported. Thinking of all of the hard-working gardaí in the Donegal Division, who did their job in an exemplary fashion despite the problems which Garda Keith Harrison threw up, remembering the brilliance of the investigation into Superintendent David Taylor by Chief Superintendent Clerkin, recalling how objective and thorough the investigation into the original Ms D investigation was by Superintendent Noel Cunningham, and realising that out there, in every division and district, there are so many police officers intent on doing their work properly, what this inquiry has shown must be deeply dispiriting to them.

## Recommendations

It may be questioned as to whether a tribunal lasting for a year and a half and at great public expense is worthwhile. There is, however, an underlying reality to this exercise.

### Calling to account

A police force is an aspect of the entitlement of a sovereign nation to control its citizens through the rule of law. It exercises primary law enforcement. It is entitled to use force and may be armed. Where respect for the truth fades within such an organisation, where structures of command and accountability break down, and where the police do not offer a complete day of work in exchange for being remunerated by the taxpayer, an essential component of a modern country ceases to function properly. Police action may become fitful, inefficient or even dishonest. This helps no one.

This tribunal has been about calling that police force to account. The Morris Tribunal was about the same thing. The commission of investigation conducted by Mr Justice Kevin O'Higgins, which reported to the Minister for Justice and Equality on 25 April 2016, was about the same thing. Central to these inquiries has been the truth.

At the end of the day, the question may be asked as to what Maurice McCabe was concerned about? Some people who come to public notice are anxious to push their career, some are intent on mischief, and some are genuine. As an officer of the law, sworn to uphold the structure of justice within the country, Maurice McCabe was concerned to maintain standards. His focus was on the need of a police force to respond efficiently to victims and on the duty of everyone working in the public service to question themselves as to what, in any day's work, they had done for the taxpayer on that day. This is laudable. It is also no more than is expected of any public servant.

Maurice McCabe is also, it has always to be remembered, an ordinary human being who can make mistakes and who at times is prone to grasp the wrong end of an issue. Because he is so intent on his task, and feels matters so deeply, at times he is not a completely reliable historian. As Mr Justice O'Higgins put it, he is "prone to exaggeration at times." His evidence, like that of any other witness, cannot just be accepted at face value but requires to be tested. It was tested before this tribunal, and in the most important respect, as regards disagreements between Maurice McCabe and Superintendent David Taylor about what happened at their meetings in September 2016, there is a clear preference for Maurice McCabe's evidence.

### Reaction to justified criticism

The worth of any organisation is to be judged by the work it does. The soundness of any organisation may usefully be judged by the reaction it has to the mistakes it makes. Both the reaction of TUSLA and the reaction of An Garda Síochána to mistakes both made are disheartening. Central to dealing with inefficiencies and with mistakes, as an inevitable part of human life, is the need to face up to them, to report honestly on them and to address them by improvement. An instance may here be taken. Airline travel remains safe beyond other means of transport because of what may be termed the black box mentality.<sup>622</sup> If something goes wrong, there is an all-out effort to discover why and to learn from error. Regrettably, neither TUSLA nor the garda organisation currently displays that mentality.

The response from within TUSLA, at least, has been for senior officials to appear before the tribunal and to offer withering criticisms of structures, personnel and conduct within the

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<sup>622</sup> Matthew Syed - *Black Box Thinking* (John Murray Publishers Ltd, London, 2015)

organisation. TUSLA has also changed several procedures. So has Rian. It is not for the tribunal to advise on administrative matters; beyond saying that it is clear that management need to wake up and actually do a day of work. Whatever changes need to be made can be identified from this report and through the exercise of common sense.

The gardaí offered no criticism of themselves. They need a complete turn-around in their attitude. This has to be led from senior management. Fundamental to that is to acknowledge what the mentality of the organisation lacks. That also involves acknowledging the strengths which our national police force has.

#### Worthwhile police work

While this tribunal has been about garda misconduct, it has also been about good police work. The tribunal does not forget that when the domestic chaos and obvious deceit of Garda Keith Harrison confronted Chief Superintendent Terry McGinn in the Donegal Division, that section of our police force responded correctly. Evidence was also given to this tribunal by individual gardaí from Donegal truthfully and with a real sense of the worth of police work to the victims of crime, including those who may have suffered domestic violence.

When this tribunal was faced with key evidence that might demonstrate the worth of individual officers, this came when the gardaí were tasked with investigating their own. In response to the allegation of Ms D, about the accuracy of which the tribunal makes no finding, there was a thorough investigation even though the allegation was made against a serving sergeant. When it was suspected that police investigations were being compromised through wholesale leaking of the confidential details of investigations to selected members of the press, attention was rightly focused on Superintendent David Taylor, formerly the press officer for Garda Headquarters. He was given no special favours. The investigation into him was as rigorous as if it had been into any other criminal suspect.

Every day people choose policing as a career and for so many it turns into a vocation. They are the people who have to attend traffic accidents and crime scenes and break dreadful news to people. They do that task with humanity.

Our police force is a resource of brilliant men and women. While it is a single-level entry service, it regularly produces people of extraordinary devotion to duty and intelligence at the highest level. It is that police force that needs to be supported and fostered.

How dispiriting it must be for them that all of what is detailed in this report happened. They are crying out for leadership.

#### The Morris Tribunal 2002 to 2008 and change

Since the devoted public service of Mr Justice Frederick Morris over six years, marked by the Morris Tribunal reports, there have been several changes to the garda organisation largely inspired by his work. There are structures for complaints from within the ranks: now the Protected Disclosures Act 2014. There is now a policing authority. The police are subject to oversight in the event of a complaint by the public, or automatically where death or serious injury is caused by garda action: the Garda Síochána Act 2005. Many of these were recommended by the Morris Tribunal. Some recommendations, such as markedly augmenting the number of ethnic minorities in An Garda Síochána, require much more effort. It is obvious that while structures have been superimposed on the police force, there is still trouble. It is the same kind of trouble that was identified a dozen and more years ago by Mr Justice Morris. Therefore, more structures are not the answer to these problems. Structures can readily be put in place. A change of culture is markedly more difficult.

On his examination of corruption and deceit in An Garda Síochána from 2002 to 2008, discipline and its disappearance from the garda force is a central concern of the reports issued by Mr Justice Morris. Rightly, as his focus was much wider, he did not limit what he said merely to Donegal. He was speaking generally when he said:

Regrettably, the Tribunal has sat through a year of evidence and read thousands of documents and, as a result, has come to the conclusion that An Garda Síochána is losing its character as a disciplined force. This is detrimental to the morale of members who wish to serve within the context of a police force that has a proud record. It is undermining respect for authority both within the force, and in relation to those who have to interact with it, on whatever basis.

Ultimately, the gradual erosion of discipline within An Garda Síochána is a developing situation that will, sooner or later, lead to disaster.<sup>623</sup>

This tribunal remains deeply concerned in the same way. A country with an undisciplined police force is at risk from that police force. The risk runs two ways. Breaches of the law and of regulations may be tolerated generally, giving rise to those promoted lacking the authority of their status as commanders due to being seen to be not necessarily fit for command. Further, slackness and a lack of application to work may result in a deceptive account of supposed work which everyone else, including commanding officers, is expected to uphold, or at least tolerate.

That was surely the entire point of the O'Higgins Commission report; which for any professional in the criminal justice system, and for anyone concerned about the rights of victims, makes shocking reading. Maurice McCabe did a serious public service in bringing these and other matters to public attention. How his own organisation treated him is detailed in this report. That was not, of course, every person in the organisation. Yet, it was the leader of the police and the head of the press office; and all through his ordeal, nasty gossip about him was rampant.

#### Continuation of problems

Furthermore, it would be foolish to imagine that the problems were isolated to the Cavan/Monaghan Division. It would have been foolish in 2008 to suppose that problems were isolated to the Donegal Division. It may be asked: how many divisions does it take before the problem is caught on to and dealt with? Since then, Maurice McCabe's concerns over the PULSE system and fixed charge penalty notices and completion of investigations; and unrelated concerns over the invention of hundreds of thousands of drink detection tests have dragged the national police force into negativity.

These problems continue. During the time when Maurice McCabe was seeking a better level of policing standards, there were plenty of people who said nothing was wrong. There is ample evidence that we have these problems. Part of the answer is in restoring accountability and, most importantly, in restoring the structure of command. Failure to address these by the immediate re-imposition of a strong command structure and appropriate structures of discipline will do Ireland no service.

Central to those issues is a mentality problem. Where a problem occurs, strongly self-identifying organisations can have a self-protective tendency. That, regrettably, also describes An Garda Síochána. It is beyond a pity that it took independent inquiries to identify obvious problems with what Maurice McCabe was reporting. To ask the right question, as Anton Pavlovich Chekhov said, is to go far in answering it. Why did it require Seán Guerin SC, the Independent Review

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<sup>623</sup> Mr Justice Frederick Morris, "Report on Explosives 'Finds' in Donegal" page 490

Mechanism, and then over a year of work by Mr Justice O'Higgins for the plain facts as to the misuse shown on PULSE generally and the justified disappointments of crime victims in Cavan/Monaghan to be identified?

Central to any reform of An Garda Síochána is not any new structure, but that the organisation should be able to look at itself honestly and to identify its own faults. The police should interrogate their own mistakes objectively. Unconsciously, an internal police inquiry may fail to come to an entirely appropriate conclusion. This may be because of unconscious protection of each other by those under investigation. They should not stand up for each other. The attitude of our police force, of all of our public service, has to be that of duty to the public, to victims of crime, and to the taxpayer. Duty to Ireland is above group loyalty. That lesson badly needs to be learned by our police force.

Those in the police should be accountable to senior officers and senior officers should be tasked with ensuring that those under their command should do a day of honest work on behalf of the taxpayer on every working day.

#### Choosing senior officers

The tribunal has had to comment on the evidence of several senior officers and the way in which evidence was presented by them to the tribunal was untenable. A cultural shift requiring respect for the truth is needed. The system of promotions within An Garda Síochána is also thereby thrown into sharp, and not always complimentary, focus.

On that topic, the tribunal was much taken with the sergeants and inspectors from the Donegal Division who gave evidence. They showed intelligence, diligence and serious-mindedness. The promotion system which operates within our national police force must be such as to seek out such men and women and to ensure that they take up responsibility as a national duty. As for some now holding, or who have held, senior rank, this report speaks for itself. There is an inescapable conclusion from this and a lesson to be learnt.

The police should acknowledge, through proper promotion, the talent of those among them. The tribunal does not have to spell it out beyond a requirement that the promotions system should be freed from whatever ties it to not always promoting excellence. It is for others to implement concrete reforms and not for the tribunal to identify what is needed outside of the essential demand for that reform.

#### Open-ended obligations

In the field of criminal justice, it is perhaps understandable that resort may be had to rules that derive from court practice. In reality, these are of limited value in a workplace context. What rules can do, as Saint Paul says, is to lay down rules in the place of simply following what is right; I Timothy 1:9. The world of law becomes self-serving when a myriad of rules assume a life divorced from the purpose for which rules are enacted. Then, the purpose and spirit behind the law becomes lost in the fog of a horrible legal formalism.

What does this mean? Well, the European Union is a law-based pooling of sovereignty by 28 nations which upholds the rule of law and which places legal certainty as a central pillar of its own proper functioning. The EU has detailed rules, through directives, regulations and decisions, on, for example, consumer protection, workers rights, food safety and product standards. Still and all, the EU has not made the mistake which the garda regulations make, and which in the Garda Discipline Regulations has proved not to be of service to our community. European law contains open-ended obligations. An example would be that while there are pernickety but necessary regulations as to the examination of the carcasses of animals slaughtered for human food, involving

for instance the palpation of certain organs and the scrutiny of others, the open-ended obligation that European law lays down is that meat be safe for human consumption. Just that; and it works. That obligation overrides any resort by lawyers to a defence based on the text of the regulation. The law has a defined spirit and it requires adherence. It excludes the pernicky attitude of lawyers.

Another example, at the level of international cooperation, is that a duty of sincere or loyal cooperation is laid down in Article 4(3) of the Treaty on European Union. That duty, variously expressed in the case law as “the duty of genuine cooperation”, “the obligation to cooperate in good faith” and “the principle of the duty to cooperate in good faith”, is the legal spirit whereby all the Member States are called to account because of, and through, an overriding principle. Of course, in the field of Irish constitutional law, there are cases which say that to make a citizen liable for a crime which is vague in definition is to violate fundamental norms of justice. That is all very well in the context of criminal justice, but a nation running a police force, the central instrument of control by a State over its citizens, has to be certain of its diligence and honesty. In terms of avoiding harm, the resort to open-ended obligations has been recognised by Professor Temple Grandin in her book *Animals in Translation* as central to ensuring that fundamental standards are adhered to.

### Obligations of gardaí

Hence, the tribunal suggests the following open-ended obligations as the duty of police personnel:

The first obligation of gardaí is to take pride in their work and in their uniform. An Garda Síochána has served Ireland courageously, with the loss of 88 lives to 2018 and many more injuries. Many of those who gave evidence to the tribunal stood out by their keen intelligence and application to duty. Those within the gardaí, and there are not a few, should be held up as examples for those who have the privilege of entering the force and serving their country as police officers. That should extend to basic training and police education. Those people matter and lectures and education matter too.

The second obligation of gardaí is to always be honest. By abiding by the truth, those who are promoted within a single entry-level organisation will rise to a higher rank with the respect of those whom they command. Grotius quotes the sages of the Greek era to the effect that “that which is good is better than the truth” and that “sometimes the common good requires that even falsehoods should be upheld.” But that is not the purpose of a justice system. A justice system always seeks to find the truth. Without the truth, without honest striving after the truth, a justice system is nothing. It is in resort to the common good that democratic societies set up a court system and with that comes responsibility: no judicial exercise makes any sense unless its object is to seek out the truth. A court should be the one public space where all in society, no matter what their motivation, despite any wrong they may have suffered, and no matter what grudge they hold, are under an absolute duty of veracity. There the duty binds the judge as much as the witness, as much as the advocate, for, as Kant states:

A principle recognised as true ... must never be abandoned, however obviously danger seems to be involved in it.” But one must only understand the danger not as a danger of accidentally doing a harm but only as a danger of doing a wrong. This would happen if I made the duty of being truthful, which is unconditional and the supreme juridical condition in testimony, into a conditional duty subordinate to other considerations.<sup>624</sup>

The third obligation of gardaí is to be visible. In contrast to other major cities, such as Rome and London and Athens, where police are visible at intersections, at junctions and in public plazas and

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<sup>624</sup> Immanuel Kant, “On a Supposed Right to Lie From Altruistic Motives”

squares, the extraordinary aspect of our police force is that they keep themselves isolated in police stations and then transport themselves around in squad cars. It is extraordinarily rare that gardaí are seen in uniform on the streets. In undertaking hundreds of journeys between the Four Courts and Dublin Castle during the currency of the tribunal, on only one occasion was there a policeman to stop a taxi or car breaking through a pedestrian light. While this may be belittled as a small example, the effect of police challenge was immediate and salutary. People behave well, generally, in the presence of uniformed officers of the law. Other examples include the extent to which cycle lanes, there to protect those cycling for economic, health and environmental motives, who are extraordinarily vulnerable, are simply ignored. Cars block cycle lanes, intrude on them and endanger cyclists. That happens repeatedly within a minute's walk of garda stations. So, where are the gardaí? Again, this may be dismissed as a small example, but the consequences of serious injury, for even one person, is a tragedy. In countries where there is a terrorist threat, police presence is manifest as a matter of necessity. Ireland, while not having any immediate terrorist threat, but with a serious organised crime problem, has a real problem due to the invisibility of our police force. That is not a small matter. If it is said that the gardaí are too busy to be out on foot or on bicycles, the tribunal begs to doubt that. Everyone serving in the police should give a portion of the day to foot and bicycle patrols.

The fourth obligation of those who serve the public in our public service, especially the gardaí, is to be polite. The tribunal has had the duty of reading many files on complaints about the gardaí. It suffices to say that there are certain words which should never pass the lips of those who serve their country in uniform. That obligation applies when a police officer is speaking to another police officer and, most especially, is demanded where a police officer is dealing with a member of the public.

The fifth obligation of gardaí is to serve the people of Ireland. Thus, every police officer should ask himself or herself what he or she has done on any particular day for the taxpayer. Diligence and application to duty are expected of all: not moaning. While some, perhaps pessimistic, models in human resources management say that command structures battle against the rule of thirds – that one third work hard no matter what and one third can be encouraged to work while one third will shirk work deliberately – restoring discipline within our national police force can overturn such gloomy expectations.

The sixth obligation of gardaí is cast on the organisation as a whole. The organisation must treat their obligation to the public as superior to any false sense that individual policemen and policewomen should stick up for each other. An Garda Síochána must become a place where incompetence is not covered up, where laziness is called to account and where people respect their senior officers. There is always a temptation in organisations which operate on the basis of a shared uniform and identity to treat the public as other, and consequently not to be seen as being entitled to honesty when one of their number is called to account. That attitude has to change. The ultimate danger as to potential consequences of its continuing are shown in a most florid form in the 2014 documentary by Tiller Russell, 'Precinct Seven Five'. We have not approached the scale of those problems. Yet, we have very serious problems of our own. Surely the object of our country, as an independent nation dedicated to the ideals of the Proclamation of 1916, is to do things better than if we were still under foreign control.

The seventh obligation of gardaí is self-analysis. It should not be necessary to have a Morris Tribunal sitting for six years, nor to have an O'Higgins Commission for a year and a half, nor a Disclosures Tribunal, now reporting after over a year and a half since being set up. If necessary, what was known as B Branch, enforcing discipline within the gardaí, now known as human resources management, should be tasked with the job of preliminary and thorough analysis of issues that arise and of making forthright recommendations which should include dispensing with

the services of the senior officer under whose command serious problems have arisen. If the buck stops, there has to be consequences. Ultimately senior officers have the responsibility. As Mr Justice Morris said, what happens within a division is the responsibility of the person in charge. The buck has to stop somewhere. What has been missing in the past is the command structure of An Garda Síochána calling itself to account. That calling to account by the public happened, certainly, in consequence of the Morris Tribunal; but it should not take a tribunal of inquiry and massive expenditure of public money to reach that point. Just as air traffic accident investigators scour crash sites and the flight recorder data for evidence as to how a tragedy occurred, it should be for our police force internally to reflect on itself with a view to learning lessons for the future. Calling the organisation to account, as opposed to issuing comfortingly saccharine pseudo-analyses of public crises, is the job most called for from senior garda officers. The efforts to date are insufficient.

### Discipline and dismissal

From all that, it follows that the obligation of gardaí is to be a disciplined force. In that regard, it is necessary to repeat what the tribunal has already stated in its report on the Garda Keith Harrison matter and which Mr Justice Morris, after spending six years looking at our national police force, considered as essential to the gardaí moving forward. To be clear, the duty that the police force owes to Ireland requires that those serving within it are under command and are not in a position to create difficulty when directed to do their work honestly and properly. Mr Justice Morris was deeply concerned about discipline as the framework for proper service. In addition, as Mr Justice Morris commented, it is far too difficult to dispense with the services of those who are unsuited to police work or who are just not prepared to work. That remains a concern of this tribunal. He said:

Members of the Gardaí against whom any wrong is alleged have the dubious, and often exploited, benefit of procedures that compare with those in a murder trial. Garda discipline should be about accounting for how one has served the people of Ireland and about the truth. The criminal trial model is not the only model available for the disposal of employment matters. In ordinary employment, the criminal trial model is almost never available. Instead, people are given the right to be notified of allegations and the right to respond to them before a decision is made. Then that decision is made subject to a statutory remedy as to whether a reasonable employer would have opted for dismissal in such circumstances. This all has the advantage of being swift and fair. If it were adopted within the Gardaí, matters should improve. There would be no right to claim damages for unfair dismissal as Garda service is outside the statutory framework. A simple appeal process from a decision to dismiss could replace the absence of a statutory remedy for unfair dismissal.<sup>625</sup>

This concern should not remain more than a dozen years after those prescient words were written. The system requires reform along the lines suggested by Mr Justice Morris. Those gardaí accused of ill-discipline should be subject to correction by senior officers without the need to resort to the elaborate structures which constitute what is in effect a private trial using procedures akin to our criminal courts. A simplified structure is called for. Private industry uses a system of simply taking a statement of what is wrong, passing it to the employee and considering any response offered. As Mr Justice Morris recommended, that could be used together with an appeal system within police structures.

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<sup>625</sup> Mr Justice Frederick Morris, “Report on the Arrest and Detention of Seven Persons at Burnfoot, County Donegal on the 23<sup>rd</sup> of May 1998 and the investigation relating to same” at page 265

The discipline process as it currently exists is far too technical. Garda discipline rules should be supplemented with open-ended obligations and breach of these should invoke a simplified disciplinary code. Currently, it is far too easily impeded by court applications. The evidence is in this report. It is obvious. Citizens have a right to access the courts and gardaí are no different. They are different, however, in the elaborate nature of the disciplinary code and in the consequent invitation that it poses to resort to legal challenges in what should primarily be a disciplinary structure. Such challenges are far too easily commenced under our system. Once commenced, years of delay result. As to judicial reviews to challenge garda discipline, these should be subject to the same strictures as planning reviews. The *G* test,<sup>626</sup> which allows a judicial review to be taken simply on the presentation of a barely arguable case, should be replaced by a test which requires substantial grounds to be shown before any notice of motion seeking judicial review can be issued.<sup>627</sup>

### Public relations

The Garda Press Office and Garda Headquarters now feel themselves free to make confidential communications on matters of public moment to journalists. This obliges the media to assert privilege. Why is this happening? Surely, the police force should be transparent: speaking accountably when necessary, acting transparently; save where there is a need for the proper completion of an investigation, and holding to silence where the overriding aim of duty to the victims of crime require.

Public relations speak as a substitute for plain speaking is an affront to the duty of our police force to be accountable. The correct approach for an organisation is to enable those who are expert on a subject to speak on its behalf.

It is also extraordinary that at the relevant time, the press officer for Garda Headquarters was Superintendent David Taylor, a person with no relevant experience in media matters. He was chosen by Commissioner Martin Callinan. He was succeeded by a man of integrity and dynamism; an example of the kind of officers our police force can produce. He was chosen by Commissioner Nóirín O'Sullivan. Since the post is key, it should no longer be seen as within the domain of choice of the head of our police force. Certainly, the Garda Commissioner should not be expected to work in a highly pressurised job with someone who they do not respect or do not trust. At a minimum, the garda press officer should be someone who undertakes relevant training. Experience of working in the press office should be regarded as useful for the job of directing it. Even more than that, an honest person is required.

### Protected disclosures

An issue arises in respect of the use of protected disclosures. The issue, as the tribunal sees it, is for the Oireachtas to consider whether there is a lacuna in the Protected Disclosures Act, 2014.

This provides for a necessary, but elaborate, procedure in relation to the mechanism for making a protected disclosure, including the issue of the proper designated person or authority to whom it should be made. It also thereby protects the discloser by provisions relating to anonymity. However, as happened with two of the protected disclosures with which the tribunal is concerned, these, despite having been made in the proper manner, were promptly disclosed, inter alia, to public representatives and journalists working in the media. This constituted not merely the ignition switch, but the accelerant used to inflame public opinion in relation to the matters

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<sup>626</sup> *G v Director of Public Prosecutions* [1994] 1 IR 374

<sup>627</sup> Section 50(4)(b) of the Planning and Development Act 2000 requires “substantial grounds” for leave to appeal a decision of An Bord Pleanála, for instance.

concerned. It may be noted, of course, that these revelations necessarily led to, to say the least, deep public concern as to the nature of the alleged wrongdoing being revealed, the identity of the whistleblowers and other relevant details, at a time when it must be certain that the persons accused of the relevant wrongdoing and the proper authority had little or no opportunity to consider the impact of these disclosures and how they might be appropriately addressed.

The Oireachtas might therefore wish to consider whether any further regulation of the use of protected disclosures might be properly put in place to deal with this type of issue. In short, did the Oireachtas intend that the provisions of the 2014 Act should be used in this way or not?

### **Uncovering the truth**

In relation to the matters at issue in these reports, it has been a dreadful struggle to attempt to uncover what may have gone on behind closed doors. That should not happen. A court, or a tribunal or other investigative body appointed on behalf of the people of Ireland, is the place where public servants are obligated to the truth and not to any group adhesion. Our judiciary is independent. People are obligated by patriotic duty to cooperate with judicial processes, whether in the police or public service or not.

No judicial exercise makes any sense unless its object is to seek out the truth. A court should be the one public space where all in society, no matter what their motivation, despite any wrong they may have suffered and no matter what grudge they hold, are under an absolute duty of veracity. There the duty binds the judge as much as the witness, as much as the advocate.

## Afterword

This tribunal was set up by the National Parliament in February 2017. The previous year was when our republic celebrated 100 years since its proclamation in 1916. While the events detailed in this report constitute an unwelcome reflection on aspects of our national life, we must be reassured at least by the thought that we have both the right of both free speech and the legal structures whereby the truth may be searched for. Putting matters to rights is, however, harder. While less prominent in 2016, in 1966, a time when many of the heroic men and women who led the national movement half a century earlier might still have been alive, there was debate as to the leadership they might have given had they survived and not been executed. In a way, that debate was futile. The reality was that the answers were there among us. Leslie Price, for instance, had shown amazing courage and independence of thought on the battlefield in Dublin, rising from volunteer to officer through her work as a messenger, and later in life showed unwavering support for and advocacy on behalf of the oppressed, under her married name of Leslie de Barra, through the Irish Red Cross.

What mattered in our country was that people tried their best and worked hard. What should not be doubted is that the life of a nation is best founded on all of its citizens doing what they can; and always trying to do the best that they can. While easily to be denigrated in comparison to more overt public gestures or pompous rhetoric, there is nothing more important than all of us fulfilling our duty as citizens through diligent work. As it happens, during this year, 2018, the Czech and Slovak nations celebrate the centenary of the founding of Czechoslovakia. The philosopher-nationalist and first president of that republic, Tomáš Garrigue Masaryk, advocated that by small actions in everyday life, an independent and proud country could be established. In his 1898 book *The Social Issue*, he stated:

Small work is really practical, for it is the genuine lifetime mission of so-called great deeds. Heroic deeds as well as the heroism of revolution are greater in the imagination than in reality. Utopianism can be overcome by humble work, and through small work revolutionism is overcome as well. ... The truly modern man is the man of work. The working man.

“Do not fear and do not steal”: this was Masaryk’s motto.

What has been unnerving about more than 100 days of hearings in this tribunal is that a person who stood up for better standards in our national police force, Sergeant Maurice McCabe, and who exemplified hard work in his own calling, was repulsively denigrated for being no more than a good citizen and police officer. In investigating the calumny against him, other aspects of our national life have been laid bare. Within the pages of this report are detailed those women and men who have done their work well and who try every day, as police officers, social workers and administrators, to do their best. But not all. Not every person seeks either to uphold the highest standards or to strive for them through daily work.

The question has to be asked as to why what is best, what demands hard work, is not the calling of every single person who takes on the job of service to Ireland. Worse still is the question of how it is that decent people, of whom Maurice McCabe emerges as a paradigm, are so shamefully treated when rightly they demand that we do better.

## **Appendix 1: A chronology of events relating to the HSE/TUSLA matter as it emerged from the papers distributed by the tribunal prior to or during the oral hearings**

1960s: Sergeant McCabe, Lorraine McCabe, Mr D and Mrs D born.

1983: Mr D became a member of An Garda Síochána.

August 1985: Sergeant McCabe became a member of An Garda Síochána.

July 1989: Sergeant McCabe began to serve in Bailieboro garda station.

1990s: Ms D born.

1993: Sergeant McCabe and Lorraine McCabe married.

December 1998: Alleged incident involving Ms D at the McCabe's home around Christmastime.

January 2000: Sergeant McCabe promoted to the rank of sergeant, moved to Clones garda station.

27 February 2004: First record of Sergeant McCabe attending Child Protection Conferences with Health Service Executive staff who later were involved in Ms D file when this case was referred to social services. Relevant meetings include attendance or being placed on a core team with Gerry Lowry, Orla Curran, Emer O'Neill, Mary Tiernan, Carmel McCauley, Eileen Argue and Pamela Armitage on a number of occasions up to 8 July 2009.

21 October 2004: Sergeant McCabe appointed sergeant in charge at Bailieboro garda station.

2005: Ms D attending counselling.

19 September 2005: Social work file opened on Ms D by Emer O'Neill, psychologist and Orla Curran, social worker.

Late November 2005: Ms D went to stay with family in Kilkenny. Ms D told her father's first cousin, N that she had been sexually assaulted at the age of six. N informed Mr D of the allegation but did not name the man. Ms D's parents decided to not "push" Ms D on this matter and they did not ask her about the allegation when she came home.

11 January 2006: According to Mr D, following the funeral of a local man, he and three other gardaí went to a pub when they were off duty. While at the pub they got word of the suicide of a young man from the area, who was the son of a friend of one of the gardaí. This garda wanted to go to the home of the family and another garda drove him in an unmarked garda car. Mr D was driven in another car and stated that he spoke to the family and they were pleased to see them. He further stated that he spoke to Sergeant McCabe who was on duty at the scene. Mr D stated that the next day, Sergeant McCabe approached him and said that another garda had complained to him that another garda had driven an unmarked garda car while off duty and intoxicated and asked "what [he was] going to do about it". Mr D stated that Sergeant McCabe reported this to Chief Superintendent Rooney who disbanded the crime unit and put all the gardaí involved back on regular duties. [Mr D's 2014 statement to GSOC]

Superintendent Cunningham's account of this incident stated that Mr D and the other gardaí were highly emotional and intoxicated and that an "embarrassing situation developed when all three had to be removed from the scene" by Sergeant McCabe who then reported the matter. [Ms D investigation file sent to DPP by Inspector Noel Cunningham, 19 February 2007]

March/April 2006: A friend of Ms D informed by her of Ms D's allegation.

14 April 2006: A friend of Ms D went to Bailieboro garda station with Ms D and they saw Sergeant McCabe. Ms D told her friend that he was the person who sexually assaulted her.

4 December 2006: Ms D told her parents for the first time about the allegations, naming Sergeant McCabe as perpetrator with a friend of hers present. Parents of Ms D made contact with Detective Sergeant James Fraher at Cavan garda station.

5 December 2006: Ms D interviewed and made statement. She said the following regarding her memory of the incident: “[w]hen I was in Primary School people were talking about humping. It was then I realised what he, McCabe had done to me was that. I could have been in 3<sup>rd</sup> Class. [That’s] when I had thoughts about what occurred. It would have been when I was in Sixth class that I realised it was not right what he had done to me. I have kept this bottled up inside me until I told my friend.”

6 December 2006: The gardaí notified the Health Service Executive about Ms D’s allegation.

8 December 2006: Rhona Murphy, social worker, informed by Mrs D about Ms D’s allegation against Sergeant McCabe.

Chief Superintendent Rooney informed the Chief Superintendent’s office in Monaghan of the allegation against Sergeant McCabe, noting that Superintendent Cunningham had been appointed to carry out the investigation and sent a copy of the statement made by Ms D.

12 December 2006: Strategic child protection risk management meeting took place re Ms D, decision made to refer Ms D to Child Sexual Abuse team in HSE. Home visit with Ms D’s parents by Ms Murphy. Ms Murphy sought information on the alleged perpetrator and Mr D told her it was Sergeant McCabe.

14 December 2006: Superintendent Cunningham made phone call to Rhona Murphy and asked for her professional opinion on Ms D case; she made no comment as she had referred Ms D to Child Sexual Abuse team.

16 December 2006: N, Ms D’s cousin, made statement re Ms D’s allegation.

19 December 2006: Mr and Mrs D separately interviewed at home re Ms D’s allegation against Sergeant McCabe. According to Superintendent Cunningham, “[b]oth acknowledged that they had identified Maurice McCabe as the alleged perpetrator in November 2005”. [file to DPP, 19 February 2007]

20 December 2006: Friend of Ms D made a statement.

21 December 2006: Second statement made by Ms D to clarify matters and provide further detail as sought by Superintendent Cunningham. Ms D did not want Garda Campion present at the interview and instead was interviewed by Superintendent Cunningham with a family friend present. Regarding her memory of the incident, Ms D said: “I didn’t know there was anything wrong with what he had done, he hadn’t hurt me like in the way I was crying. As I got older you’d be talking about sex like flicking through the television you’d see it then it was at this time that it flicked into my head that it wasn’t a game, it’s not just a normal thing that you do or happens every day. I was about ten or eleven when I realised this.”

22 December 2006: Sergeant McCabe made statement re Ms D’s allegation.

23 December 2006: Lorraine McCabe made statement re Ms D’s allegation.

2 January 2007: The Health Service Executive received notification of suspected child abuse from gardaí following Ms D's complaint to gardaí.

4 January 2007: Assessment of Ms D by Orla Curran and Emer O'Neill of the Child Sexual Abuse team took place with the purpose of assessing the need for further treatment services. The notes record that Ms D appeared to be in "good form" since she made her statement in December 2006 to gardaí, stated that she was much happier since then and her behaviour had settled. However, her parents were anxious not to initiate conversation re allegations because they didn't wish to upset her. Ms D also met Ms Curran and Ms O'Neill on 24 January, and 7 and 21 February. Ms D's parents also met with the team on this date and on 21 March.

8 January 2007: N, cousin of Ms D made second statement, correcting her initial statement to clarify that Ms D did not name the alleged perpetrator when she spoke to her in November 2005, and that all she had said was that the person was a friend of her father and worked with him. Mr D's brother also made a statement confirming that N told him about Ms D's allegations in November 2005 and did not name the alleged perpetrator, but instead said he worked with her father and was a friend of his.

19 February 2007: Superintendent Noel Cunningham completed investigation file in Ms D case and stated that "[t]aking all matters into consideration including the question of whether the event, if it happened, constituted a breach of the criminal law, it is felt there is no ground for a criminal prosecution". He also sent this to Chief Superintendent Rooney in Monaghan.

25 February 2007: Kingscourt Bus Incident – rowdy conduct by male passengers on a minibus, female passenger groped. Complaints made by driver. A garda handed the driver €150 in an envelope for loss of earnings and apology note from suspect and she withdrew her complaint. O'Higgins described the investigation as "very poor" due to the failure to take witness statements. The behaviour of the garda involved was described as "imprudent, ill-advised and very naïve". Byrne/McGinn described the investigation as "shabby", but stated that "no further disciplinary proceedings" were appropriate or warranted after a superintendent had examined the file and determined there was no breach of discipline in this case. Byrne/McGinn criticised Sergeant McCabe's description of the incident as involving false imprisonment and sexual assault, finding that this was a "gross exaggeration of the facts".

27 February 2007: On examining the investigation file, Chief Superintendent Rooney stated that he did not propose initiating a disciplinary investigation against Sergeant McCabe, and sent a copy of the investigation file to the assistant commissioner, HRM and the assistant commissioner, Northern Region.

1 March 2007: Rory Hayden, state solicitor for Cavan, sent garda investigation file re Ms D to the DPP's office, stating that he did not think any case arose for prosecution, due to a number of inconsistencies in the file and the strained credibility of Ms D, with the allegation itself "unclear", and stated that even on Ms D's account, the incident amounted to "horse play and no more".

2 March 2007: The assistant commissioner, Northern Region acknowledged receipt of the investigation file and asked that Chief Superintendent Rooney report developments.

7 March 2007: Chief Superintendent Rooney wrote to Superintendent Cunningham asking that he be forwarded the DPP directions once they became available.

2 April 2007: Ms D was discharged from the Child Sexual Abuse team. Further therapeutic sessions were recommended; however Ms D did not wish to engage.

5 April 2007: Letter from DPP stated that there was no basis for prosecution of Sergeant McCabe re Ms D allegations. The letter stated that the evidence in the case did not warrant a prosecution, as there were no admissions and the incident described by Ms D is “vague. It appears that it was only when she was eleven/twelve that she decided that whatever occurred was sexual in nature. Even if there wasn’t a doubt over her credibility, the incident that she describes does not constitute a sexual assault or indeed an assault”. Sergeant McCabe was informally told of the DPP’s direction on or about this date by Rory Hayden, state solicitor. Sergeant McCabe wanted the content of the DPP’s direction to be communicated to Ms D’s family: “Did you believe that because you had to work with that person?” “Yeah, close by, yeah.” “And in the circumstance[s] the air had to be cleared?” “Yeah.” [Day 3, 18 May 2015, O’Higgins Commission]

14 April 2007: Lakeside Manor Assault – man assaulted and suffered facial injuries, man charged with a section 3 assault but the prosecution was unsuccessful. O’Higgins found that there were defects in the investigation such as the delay in investigating, delay in interviewing witnesses, failure to obtain CCTV footage, and a lack of supervision of a probationer garda. O’Higgins described the investigation as one “characterised by delay and error”, with Sergeant McCabe salvaging the prosecution by identifying the deficiencies in the investigation and taking steps to rectify them. Byrne/McGinn found that the investigation was “not carried out in a timely and professional manner”.

24 April 2007: Superintendent Cunningham informed the Ds that the DPP had directed no prosecution of Sergeant McCabe, and contacted Sergeant McCabe in this regard, who he says refused to meet with him on that date. According to evidence given at O’Higgins on 18 May 2015, the reason for this was that Sergeant McCabe was unhappy that Superintendent Cunningham had been aware of the DPP’s direction in early April and had not spoken with him immediately on this matter. However, Superintendent Cunningham states that he did not receive the DPP letter until 24 April when he returned to Monaghan garda station as he had been temporarily working in Bailieboro station from the beginning of April.

Ms D’s mother contacted Emer O’Neill to inform her of the DPP’s direction; Ms D had not yet been informed.

HSE child protection team referral meeting took place. A decision was made to contact Sergeant McCabe in order to inform him that the HSE were aware of Ms D’s allegation and conduct a risk assessment. No file had been opened on Sergeant McCabe at this stage by the HSE. However as many of the social workers knew Sergeant McCabe professionally in Cavan/Monaghan, the decision was made by Mary O’Reilly to “contact Catherine Sweeney, principal social worker in Meath, to ask her to nominate a member of the team to deal with Mr. McCabe”. According to social worker Mary Tiernan, at some stage after this meeting Mary O’Reilly informed her that she discussed this with Ms Sweeney in Meath who would not agree to making contact with Sergeant McCabe. Sergeant McCabe was not contacted as a result, and according to Ms Tiernan, she believes that both she and Ms O’Reilly “considered it was unlikely that considered analysis of the case would be likely to conclude that a threshold had been reached to support substantial further involvement after informing Mr McCabe of the report.” [Mary Tiernan, statement to tribunal, 30 June 2017]

30 April 2007: Vicious assault on Mary Lynch by Jerry McGrath, charged with section 2 instead of section 3 assault. McGrath was then granted bail and later murdered Sylvia Roche Kelly while on bail for offences committed in Cavan and Tipperary. O’Higgins criticised investigation as one “characterised by delay and lack of effective supervision of the investigating member”, and the misclassification of the original assault on Ms Lynch as a section 2. The investigation was criticised for this reason, failure to keep Ms Lynch informed of developments in the case, failure to ensure

that Ms Lynch was in court when the case was disposed of, delay in furnishing file to the DPP, lack of supervision, lack of proper note taking etc. Ms Lynch later made complaints to Byrne/McGinn investigation, who identified a number of concerns in the investigation file. These complaints were forwarded to GSOC in December 2010.

8 May 2007: Superintendent Cunningham met Sergeant McCabe to inform him of the DPP's direction. Sergeant McCabe was accompanied by welfare officer, Sergeant Regina McArdle. According to Sergeant McCabe, Superintendent Cunningham informed him that the DPP determined that "there was no offence disclosed whatsoever and that [he] was exonerated". He also states that Superintendent Cunningham told him that he could not inform the D family of the detail of the DPP letter, but instead of the basic fact that there would be no prosecution due to "insufficient evidence".

23 May 2007: Assault at Crossan's Pub on Mr R, who suffered minor injuries to his head and face. Mr R later withdrew his complaint when a garda called to his home with a pre-prepared statement of withdrawal, telling him that there was insufficient evidence to proceed with the case. O'Higgins found that the garda investigation was poor in this case, due to the wrongly obtained statement of withdrawal from Mr R, the delay in compiling the file, communication issues regarding CCTV footage and unnecessary search warrant, undated and unsigned witness statements, delay in interviewing potential witnesses, and lack of supervision of the garda investigating the case. Byrne/McGinn stated that the investigation carried out by the investigating garda was "not carried out in a timely and professional manner and [fell] below the minimum expected standard".

5 August 2007: Cafolla's Restaurant public order incident occurred where three men entered the premises and one of them replaced contents of a vinegar bottle with urine and left the premises. The owner Ms Cafolla made a complaint to gardaí. The three men later pleaded guilty to a public order offence. O'Higgins found a number of defects in the investigation, including the handling of Ms Cafolla's complaint, the failure to keep relevant CCTV footage in a safe place, the "unwarranted delay" in completing the file, the "lamentable lack of note taking", and telling Ms Cafolla that a file had gone to the DPP when in fact it had not. Byrne/McGinn found that the investigating gardaí "did not act professionally or appropriately" with regard to Ms Cafolla's complaint and that gardaí had misled Ms Cafolla in relation to the file being sent to the DPP. It also found that the investigation "fell well short of the required standard and the injured party was not truthfully kept informed of the progress of the investigation".

9 August 2007: Superintendent Cunningham forwarded the DPP's direction of no prosecution against Sergeant McCabe to Chief Superintendent Rooney and informed him that all relevant parties had been notified.

23 August 2007: Chief Superintendent Rooney's office informed the assistant commissioner, HRM, of the DPP's directions.

2 September 2007: Assault and false imprisonment of a seventeen-year-old girl walking home in Cootehill. Girl made a written statement in presence of a garda and her parents. Investigation criticised by O'Higgins for the failure to conduct a formal ID parade, inadequate interviewing of suspect, delay in obtaining CCTV footage, and lack of follow-up on reported sightings of suspect. Byrne/McGinn stated that the investigation was ongoing at the time of the report and that the shortcomings in the investigation had been addressed by Superintendent Cunningham. However, no prosecution ever occurred in this case.

2 or 3 September 2007: Cootehill assault: Sergeant McCabe notified Superintendent Clancy of the incident and Superintendent Clancy directed a formal investigation.

11 September 2007: Man made complaint at Bailieboro garda station that his son was sexually abused by Fr Michael Molloy between July 2006 and September 2007. O'Higgins found that the investigation had "serious shortcomings" despite starting out well, including defective search warrants, the failure to have the computer forensically examined, and the ultimate loss of the computer, which was never found. Deputy Commissioner Rice's review of Byrne/McGinn described the investigation in this case as having been carried out "efficiently and speedily" as Fr Molloy was later convicted and sentenced.

10 October 2007: Rhona Murphy informed Mary O'Reilly that she was closing the Ms D file. In her letter she stated that Sergeant McCabe had not been contacted by or met with by the social work department as per HSE procedures where there were allegations of sexual abuse, and that she would be grateful if this was dealt with as soon as possible. Her case review form recommended closure of the case, concluding that the allegations made by Ms D were "inconclusive".

15 October 2007: Sergeant McCabe at Bailieboro court house, and Mrs D is there also.

17 October 2007: Ms D stated that once she found out that there was no prosecution re her allegations against Sergeant McCabe, her mother asked her what she wanted to do next and she stated that she wanted to confront him. Her mother drove her to Bailieboro garda station and when she saw Sergeant McCabe, she jumped out of the car and ran towards him and shouted at him, saying that he had ruined her life. He ran away from her into the garda station and locked himself into an office. Another garda had seen Ms D follow Sergeant McCabe and tried to calm the situation, and brought her back to her mother. [Ms D 2014 statement to GSOC] In evidence Sergeant McCabe gave a different version.

Following the above two incidents, an investigation was carried out at Bailieboro by the Superintendent. Mrs D and Ms D were cautioned, and there were no further incidents. [Chief Superintendent McGinn report, 26 November 2008]

13 November 2007: Lakeside Manor assault: Sergeant McCabe unhappy with investigation, submitted report outlining his issues with the investigation file.

15 November 2007: Lakeside Manor assault: Sergeant McCabe wrote to Superintendent Clancy indicating that there were "defects" in the investigation file, which could be explained by neglect of duty, or inexperience on the part of the investigating garda.

21 November 2007: Crossan's assault: Sergeant McCabe notified Superintendent Clancy of delay in furnishing investigation file and sent on subsequent reminders.

27 November 2007: Lakeside Manor assault: Superintendent Clancy replied to Sergeant McCabe, agreeing that the investigation was unsatisfactory, and requested a meeting with Sergeant McCabe.

28 November 2007: Lakeside Manor assault: a meeting between Superintendent Clancy and Sergeant McCabe took place, at which the relevant garda gave an account of his handling of the investigation. Superintendent Clancy made a number of directions for the progress of the investigation.

29 November 2007: Lakeside Manor assault: conference between Superintendent Clancy, Sergeant McCabe and a garda, at which this garda was reprimanded by Superintendent Clancy for defects in the investigation.

December 2007: Cafolla's incident: Ms Cafolla spoke to a sergeant in relation to this matter, who contacted Sergeant McCabe. The next day, Sergeant McCabe spoke to Ms Cafolla, and apologised on behalf of the gardaí. He told her that no file had been sent to the DPP, and that she could make a complaint about the matter. She said she would make a complaint at a later stage, but never did.

8 December 2007: Sylvia Roche-Kelly was murdered by Jerry McGrath in Limerick.

27 December 2007: Dangerous driving incident at Lakeside Manor Hotel occurred. Security staff ejected three men and one woman from the hotel. These individuals got into a BMW car parked near the hotel, which moved slowly at first but then speedily reversed towards the hotel entrance. Three people were hit by the speeding car and suffered minor injuries. The DPP later directed no prosecution as the case was statute barred. O'Higgins criticised the significant delays in investigating this case, describing it as "seriously flawed", as well as the confusion as to who was the investigating officer in this case as a "fundamental failure" from which the investigation never recovered. Byrne/McGinn stated that there was "no proper management of this investigation" in the beginning but that once this matter was highlighted, it "received the necessary attention that it required". That report did not explicitly uphold or dismiss Sergeant McCabe's complaints.

21 January 2008: Cafolla's incident: Sergeant McCabe furnished a formal report to Superintendent Clancy outlining the facts of the case and referring to the excellent quality of the CCTV footage. The file was forwarded to the DPP for directions on or about this date.

Cootehill assault: A suspect, Mr G, was arrested for section 3 assault, detained for questioning and released without charge, denying any involvement in the incident. Conflict as to decision to release suspect. A garda stated that Sergeant McCabe told her to release suspect, which he denied. O'Higgins accepted the evidence of Sergeant McCabe.

28 January 2008: Sergeant McCabe wrote a letter to Superintendent Clancy raising a number of concerns about garda standards at Bailieboro garda station which he wished to be addressed. A meeting took place between Sergeant McCabe and Superintendent Clancy. Sergeant McCabe complained of a number of issues such as poor investigation files, investigation files not being done, lack of supervision, PULSE records not being created for reported incidents, calls not being attended to, and inadequate investigation of reported incidents. Sergeant McCabe later informed O'Higgins that these were general complaints, but that he also had a number of specific cases in mind, such as Crossan's assault, when he made these complaints.

Crossan's assault: Discussion of the handling of this investigation at meeting between Sergeant McCabe and Superintendent Clancy.

The superintendent asked Sergeant McCabe to make "a business case" for releasing the text of the DPP directions of 5 April 2007 on the Ms D allegation to the D family and to him.

31 January 2008: Cafolla's incident: DPP directed that the suspects be prosecuted contrary to section 6 of the Criminal Justice (Public Order) Act 1994.

1 February 2008: Cafolla's incident: Sergeant McCabe directed a garda to apply for a summons for an offence contrary to section 6 for each of the three suspects.

12 February 2008: Cootehill assault: Sergeant McCabe wrote to Superintendent Clancy complaining about the investigation in this case, such as the "poor use" of detention of the suspect Mr G, non-availability of CCTV, lack of informal identification of suspect, and short interview during Mr G's detention.

25 February 2008: Crossan's assault: Sergeant McCabe visited Mr and Mrs R and complaints were made about the investigation.

Sergeant McCabe submitted a complaint to Superintendent Clancy, outlining issues in relation to himself and Mr D, as well as the incidents of October 2007 involving confrontations by Ms D and her mother. Sergeant McCabe also outlined a number of workplace issues involving Mr D. Sergeant McCabe stated that he did not want prosecutions to take place for the October 2007 incidents but wanted the DPP directions in full to be conveyed to him and the D family "due to the fact that all parties work in close proximity". Superintendent Cunningham was appointed to carry out the investigation into this complaint by Chief Superintendent Rooney.

3 March 2008: Crossan's assault: Sergeant McCabe reported to Superintendent Clancy that Mr and Mrs R had made a complaint to GSOC although he was aware that this was not the case. Sergeant McCabe told O'Higgins that "the reason for this untruth was that he felt Mr and Mrs R had been badly treated and that he knew that the reference to GSOC would ensure that the matter would receive attention". O'Higgins found that "[w]hile his concern was genuine and commendable it is unacceptable to furnish false information in a report".

4 March 2008: Letter from Sergeant McCabe setting out his intention to leave his role as sergeant in charge at Bailieboro.

6 March 2008: Crossan's assault: Superintendent Clancy responded to the report of Sergeant McCabe providing directions regarding the investigation. Sergeant McCabe never saw this report as he was on rest days from this date.

11 March 2008: Superintendent Clancy informed Sergeant McCabe that he would not be releasing the DPP document in the Ms D case to Sergeant McCabe. Sergeant McCabe recorded this meeting and gave it over to the Byrne/McGinn inquiry. Superintendent Clancy suggested that Sergeant McCabe "do a document, [and] simply ask for the DPP's direction to each party". [Discussed further on 18 May 2015, day 3 of O'Higgins]

13 March 2008: Superintendent Clancy refused full disclosure of the DPP directions as requested by Sergeant McCabe in his complaint re dealings with the D family of 25 February 2008.

18 March 2008: Superintendent Clancy left Bailieboro, with responsibility passed on to Superintendent Cunningham.

20 March 2008: Sergeant McCabe vacated his position as sergeant in charge at Bailieboro. According to Superintendent Cunningham, this was on Sergeant McCabe's own application and he asked him to reconsider this but Sergeant McCabe did not.

28 April 2008: Sergeant McCabe made a formal complaint to human resource management in An Garda Síochána, which included allegations of harassment, bullying, discrimination and victimisation against Superintendent Clancy contrary to the garda bullying and harassment policy. He also provided examples of what he considered to be evidence of low standards in Bailieboro, including inadequacies in the investigations into the Lakeside Manor assault, the Cafolla's incident, and the dangerous driving incident at the Lakeside Manor hotel.

2 May 2008: Sergeant McCabe's complaint received by HR. Assistant Commissioner Catherine Clancy requested a "firm recommendation" from Chief Superintendent John Grogan as to how the matter should be dealt with.

9 May 2008: Chief Superintendent Grogan advised that given the serious nature of the allegations made by Sergeant McCabe, an investigation under the bullying policy was not appropriate. Chief Superintendent Grogan instead requested that an external chief superintendent be nominated to investigate the allegations.

13 May 2008: Assistant Commissioner Byrne appointed Chief Superintendent Terry McGinn to conduct the investigation into Sergeant McCabe's allegations.

30 May 2008: Sergeant McCabe provided a document to the Chief Superintendent McGinn investigation detailing his issues with a number of investigations including the Cootehill assault.

23 July 2008: Sergeant McCabe moved from Bailieboro to Mullingar garda station.

25 August 2008: Superintendent Cunningham met with Sergeant McCabe at Mullingar garda station. Sergeant Yvonne Martin was also in attendance, witnessing and signing notes taken by Superintendent Cunningham. This meeting was organised in order to discuss Sergeant McCabe's complaints relating to Mr D and the D family. A report on the meeting by Superintendent Cunningham of 12 September 2008 provides that Sergeant McCabe stated at that meeting that his report containing complaints about Mr D was "a bid by him to have the full D.P.P. directions conveyed to him and the Ds". At the O'Higgins Commission, this meeting was discussed. Sergeant McCabe also produced an audio recording and transcript of the meeting.

15 September 2008: Sergeant McCabe's complaint under the bullying and harassment policy was out of time. Superintendent Clancy did not consent to a third extension of time for the investigation, given the 28 day time limit for investigation of such complaints. Sergeant McCabe decided to pursue his complaints through the Office of the Confidential Recipient.

26 September 2008: Kingscourt bus incident: Superintendent Heller report found no breach of discipline by the relevant garda.

14 October 2008: The confidential recipient received a report from Sergeant McCabe under the Garda Síochána (Confidential Reporting of Corruption or Malpractice) Regulations 2007. The report contained complaints about the investigations in the Kingscourt bus incident and the Lakeside Manor assault.

Brian McCarthy, the Garda Síochána Confidential Recipient, wrote to the then Commissioner Fachtina Murphy and enclosed the confidential report of Sergeant McCabe in relation to practices at Bailieboro garda station.

15 October 2008: Sergeant McCabe made complaints against Chief Superintendent Rooney, responsible for the Cavan/Monaghan Division of the gardaí at the time. As gardaí cannot investigate complaints against a member of equal rank, an assistant commissioner had to be appointed to take over the McGinn investigation. Assistant Commissioner Derek Byrne was appointed. Sergeant McCabe met Chief Superintendent McGinn and Superintendent Eugene McGovern at his solicitors and made a further statement regarding Chief Superintendent Rooney. He also referred to the inadequate investigation in the Lakeside Manor assault and the Crossan's Pub assault.

28 October 2008: A case conference was held at the Human Resource Management Division about the complaints made by Sergeant McCabe. The confidential report made by Sergeant McCabe on 14 October 2008 was sent by Commissioner Murphy to Assistant Commissioner Byrne for "urgent investigation and report".

29 October 2008: The then Assistant Commissioner Nóirín O’Sullivan was appointed to human resource management.

6 November 2008: Assistant Commissioner Byrne was appointed by Commissioner O’Sullivan to oversee the completion of Chief Superintendent McGinn’s investigation. Sergeant McCabe’s solicitors were informed of this appointment the following day.

14 January 2009: Assistant Commissioner Byrne and Chief Superintendent McGinn received a document from Sergeant McCabe entitled “Brief Proven Facts Pertaining to my Complaint”. He complained about a “lack of standards, accountability, duty to public and management support”, and that garda management “allowed disturbing practices and crime investigations”. The document also contained specific complaints about garda investigations into the Kingscourt bus incident, the Lakeside Manor assault, and the Crossan’s Pub assault.

23 March 2009: Sergeant McCabe emailed the then Minister for Justice, Equality and Law Reform, Dermot Ahern TD, seeking an independent person to oversee an investigation into his complaints of “malpractice and corruption” in Bailieboro. Sergeant McCabe complained about comments attributed to Chief Superintendent Rooney in the Anglo Celt newspaper on 11 March 2009 where he stated that he had “total confidence in the guards in Bailieboro”. He further stated, “I recently read reports in the national and local media in relation to policing in Bailieboro and it was absolute rubbish what was in those reports, it was factually incorrect”. Sergeant McCabe considered that the Byrne/McGinn investigation had been undermined by such comments.

30 March 2009: Dangerous driving incident at Lakeside Manor hotel: Chief Superintendent McGinn recommended that there should not be disciplinary proceedings on foot of complaints about this investigation.

11 May 2009: Minister Ahern’s private secretary wrote to Sergeant McCabe stating that the investigation was a matter for the Garda Commissioner and that the Minister did not have a role in such matters.

30 June 2009: Jerry McGrath case: Lorcan Roche-Kelly, husband of Sylvia Roche-Kelly who was murdered by McGrath while he was on bail, made a complaint to GSOC.

25 August 2009: Brian McCarthy, confidential recipient, informed Commissioner Murphy that he had received another allegation of harassment and victimisation in a further report from Sergeant McCabe arising from his previous report. This report was forwarded to Assistant Commissioner Byrne.

23 November 2009: Molloy case: Fr Molloy sentenced to five years’ imprisonment after pleading guilty on 22 July 2009 at Cavan Circuit Court to a number of child sex offences.

26 November 2009: Sergeant McCabe made a further complaint to the confidential recipient in relation to images which appeared on social media depicting a large rat named “Maurice”, described in the O’Higgins Commission report as “vile and offensive”. According to Garda Sinéad Killian, her husband had seen the images on Facebook and she had informed Sergeant McCabe of this.

2 December 2009: The complaint about the rat image which appeared on social media was referred to Assistant Commissioner Byrne and a file sent to the DPP, who directed no prosecution in this matter.

26 May 2010: Dangerous driving incident at Lakeside Manor: Chief Superintendent McGinn recommended disciplinary investigation due to delays in investigating this case, but no further action was taken.

21 June 2010: Cafolla's incident: Superintendent Noel Carolan appointed as deciding officer for the disciplinary investigation of two gardaí involved in investigating the incident.

Cootehill assault: disciplinary proceedings commenced against a garda.

8 July 2010: Cootehill assault: meeting between Superintendent McFadden, deciding officer, and Sergeant McCabe, in which Sergeant McCabe made a statement regarding the investigation.

9 September 2010: Cafolla's incident: statement taken from Sergeant McCabe in relation to the ongoing disciplinary proceedings.

21 September 2010: Molloy case: request by a bishop for return of computer seized in investigation on 14 September 2007.

6 October 2010: Molloy case: following a search, Fr Molloy's computer could not be located at Bailieboro garda station.

11 October 2010: Sergeant McCabe met Assistant Commissioner Byrne and Chief Superintendent McGinn at the Hillgrove Hotel, Co. Monaghan. This meeting was organised to inform Sergeant McCabe of the outcomes of the Byrne/McGinn investigation in relation to the 42 allegations made by him and to explain the findings for each complaint. Eleven of his complaints were upheld. At the meeting, Sergeant McCabe informed Assistant Commissioner Byrne and Chief Superintendent McGinn that he had evidence of further wrongdoing. He briefly left the hotel and returned with two boxes of documents containing printouts from PULSE system records from Cavan/Monaghan. He stated that the documents showed evidence of misuse of PULSE by members of the gardaí. Assistant Commissioner Byrne took these boxes to his office in Dublin. Sergeant McCabe lodged a report with the confidential recipient about this meeting, requesting that a full and detailed inquiry be undertaken again into his original complaints as he was not satisfied with the Byrne/McGinn investigation due to delay and a failure to comprehensively set out the reasons for its findings in relation to each complaint.

12 October 2010: Assistant Commissioner Byrne requested a written report from Sergeant McCabe as to how he came to be in possession of these documents given the confidential nature of PULSE records.

18 October 2010: Cootehill assault: disciplinary investigation against a garda officially discontinued.

30 October 2010: Cafolla's incident: Superintendent Carolan determined that the relevant garda was in breach of discipline (neglect of duty) and the disciplinary action to be taken was "advice".

2 November 2010: Deputy Commissioner Rice was appointed to investigate Sergeant McCabe's complaints to the confidential recipient, PULSE records, and to review the Byrne/McGinn investigation.

14 November 2010: First mention of the name of Sergeant Maurice McCabe in print occurs in The Sunday Times in an article by John Mooney entitled 'Internal inquiry clears gardaí' about the Byrne/McGinn investigation. It also mentions another ongoing inquiry in relation to what had emerged from PULSE records.

15 November 2010: Sergeant McCabe's solicitor wrote to the private secretary to the Commissioner setting out Sergeant McCabe's concerns with the Byrne/McGinn investigation.

19 November 2010: Assistant Commissioner Byrne gave the PULSE records provided by Sergeant McCabe to Deputy Commissioner Rice. As stated in the O'Higgins report, there were 1,153 individual PULSE documents relating to incidents in Bailieboro and neighbouring districts and these were divided into two broad categories. 624 of the incidents were referred back to Chief Superintendent Rooney, to "advise on the final outcome of the incidents referred to" and the remaining 529 incidents were separately identified and grouped together as it was "unclear" what issues arose in relation to those incidents.

26 November 2010: A meeting took place between Deputy Commissioner Rice and Sergeant McCabe.

8 March 2011: Deputy Commissioner Rice issued a report to the Commissioner which did not find any fault with the Byrne/McGinn investigation. The O'Higgins Commission disagreed with many of the findings in Byrne/McGinn, viewing some as overly generous or lenient.

25 March 2011: Chief Superintendent Rooney directed to set out final outcome on 624 PULSE incidents. A meeting was planned with Sergeant McCabe in relation to the remaining 529 incidents, but he did not attend as it was his view that all records should have been independently examined and not sent back to the Cavan/Monaghan Division.

6 April 2011: Lorraine McCabe sent an email to the then Minister for Justice and Equality, Alan Shatter TD, in relation to her husband's complaints about garda inefficiencies in Cavan/Monaghan.

7 April 2011: Sergeant McCabe was informed that the review of the Byrne/McGinn investigation carried out by Deputy Commissioner Rice found that investigation to be professional and impartial.

14 April 2011: The Minister's private secretary replied to Lorraine McCabe providing details on making a complaint to GSOC.

28 April 2011: Deputy Commissioner Rice sought an interview with Sergeant McCabe about PULSE records he brought to Byrne/McGinn meeting. This interview did not take place.

6 May 2011: The Minister's private secretary stated that the matter would be brought to the Minister's attention following further emails from Lorraine McCabe.

9 June 2011: In a report, Chief Superintendent Rooney provided the final outcome of 624 PULSE incidents that he was asked to examine. O'Higgins found that while the decision to return the incidents to Cavan/Monaghan for examination was taken in good faith and was not corrupt as was Sergeant McCabe's contention, it found that it "would have been better to separately require an individual report from each investigating garda explaining the rationale behind each PULSE update in order to properly understand why a particular PULSE entry did not accurately reflect the true position in respect of any given incident".

16 June 2011: Sergeant McCabe wrote to the Minister for Justice and Equality requesting the establishment of a commission of investigation under the Commissions of Investigation Act 2004, expressing dissatisfaction with investigations that had taken place to date, including Deputy Commissioner Rice's review of the Byrne/McGinn report. Sergeant McCabe sought an "independent, fair and transparent investigation". The letter included a 22-page statement made by Sergeant McCabe on 15 October 2008 detailing his concerns about Superintendent Clancy and

Chief Superintendent Rooney, as well as a statement made to Deputy Commissioner Rice at a meeting on 26 November 2010.

4 July 2011: Chief Superintendent Rooney circulated a letter to the Assistant Commissioner entitled “RE: Allegations made by Sergeant Maurice McCabe, Bailieboro Garda Station”. Chief Superintendent Rooney had met with Assistant Commissioner Byrne on 24 June 2011 regarding the Byrne/McGinn report. It stated that “no systemic failures ... in the management and administration of Bailieboro Garda District” had been identified by the Byrne/McGinn investigation, while a “number of minor procedural issues were identified”. It stated that “[t]he findings of the Assistant Commissioner vindicate the high standards and professionalism” at Bailieboro. Chief Superintendent Rooney also congratulated all serving members at Bailieboro and hoped that they could now “put this difficult period behind them”, thanking Sergeant Gavigan in particular for “steering the station party through the crisis that had occurred”.

9 August 2011: Sergeant McCabe’s solicitors wrote again to the Minister for Justice and Equality referring Chief Superintendent Rooney’s circular of 4 July 2011. The Minister’s private secretary replied to Sergeant McCabe’s solicitors the following day, stating that the matter was receiving attention from the Minister.

29 August 2011: The Minister’s private secretary replied to the request for the establishment of a commission of investigation, stating that it was inappropriate for the Minister to intervene where the complaints were already being investigated.

1 September 2011: McGrath case: Sergeant McCabe interviewed by GSOC in relation to the handling of the investigation into the assault on Mary Lynch.

12 January 2012: Sergeant McCabe made allegations of corruption against Commissioner Martin Callinan under the Garda Síochána (Confidential Reporting of Corruption Or Malpractice) Regulations 2007 due to the placing of Superintendent Clancy on the promotion list for the rank of Chief Superintendent. The document also contained a complaint about Superintendent Clancy’s handling of the Lakeside Manor hotel assault and the Michael Molloy case. Sergeant McCabe stated that a false allegation had been made against him for the loss of a computer in the Molloy case and complained of a number of serious deficiencies in the investigation.

23 January 2012: The complaints against Commissioner Callinan were sent to the Minister by the confidential recipient, Oliver Connolly, as required under regulation 7(2) of the 2007 Regulations. Sergeant McCabe also made complaints about the investigation into the Cafolla’s incident, alleging that “Superintendent Clancy refused to send a file to the DPP on an endangerment involving the attempted poisoning of a young boy and his father”.

24 January 2012: Sergeant McCabe’s complaint against Commissioner Callinan was forwarded by the Secretary General of the Department of Justice and Equality, Brian Purcell, to Commissioner Callinan asking for his comments.

27 January 2012: The Commissioner responded to Mr Purcell stating that there was no evidence of wrongdoing on the part of Superintendent Clancy, or Assistant Commissioner Byrne, having regard also to Deputy Commissioner Rice’s review of the Byrne/McGinn report.

3 February 2012: The Minister for Justice wrote to the confidential recipient, Mr Connolly, stating that there was no evidence to support further action being taken in respect of Sergeant McCabe’s confidential report of 12 January 2012.

9 February 2012: Mr Connolly met Sergeant McCabe to discuss the Minister’s response to the January 2012 confidential report.

10 February 2012: Molloy case: Disciplinary proceedings were commenced against Sergeant McCabe for failing to exercise proper custodial care over the missing computer.

7 March 2012: Jerry McGrath case: Sergeant McCabe made a statement to GSOC regarding the complaint of Lorcan Roche-Kelly, alleging that Superintendent Clancy did “nothing at all” with his information regarding McGrath and the issue of bail.

9 May 2012: Sergeant McCabe made a further complaint to the confidential recipient in relation to the manner in which the Minister for Justice dealt with his January 2012 complaint. He criticised the Minister for seeking a report from the Commissioner against whom the complaint had been made. He requested that the Minister or his officials examine the relevant investigation files to understand the context of his complaints about garda investigations in Cavan/Monaghan.

17 July 2012: Superintendent David Taylor became Garda Press Officer.

13 August 2012: McGrath case: GSOC recommended that disciplinary proceedings be initiated in accordance with regulation 45 of the Garda Síochána (Discipline) Regulations 2007 against Garda McEvoy and Detective Sergeant Long.

4 September 2012: Sergeant McCabe’s solicitors wrote to the Minister for Justice and asked that he exercise his statutory powers under section 42 of the Criminal Justice Act 2007 to hold a special inquiry relating to An Garda Síochána, and also provided notes on a number of incidents which were later investigated by the O’Higgins Commission.

October 2012: Sergeant McCabe communicated with the Department of Transport alleging wrongdoing by members of the gardaí in relation to the annulment of road traffic offences, known as the “ticket fixing” controversy. He had previously made complaints to the confidential recipient on this issue.

18 October 2012: The Minister’s private secretary replied to Sergeant McCabe’s solicitors’ letter of the 4 September 2012 noting that the correspondence received was marked “STRICTLY PRIVATE & CONFIDENTIAL” and “ADDRESSEE ONLY”, and requested confirmation that there was no objection to the correspondence and enclosures being forwarded to the Commissioner for his views. No response to this letter was ever received from Sergeant McCabe’s solicitors who said they had not received it following numerous subsequent reminders.

8 November 2012: McGrath case: Superintendent Wall reported that he found no breach of discipline on the part of either of the two garda members involved.

December 2012: Sergeant McCabe’s access to PULSE was restricted.

20 December 2012: Mr Purcell wrote to Commissioner Callinan seeking additional details of the outcome of the investigations mentioned in his report of 27 January 2012.

9 January 2013: McGrath case: Lorcan Roche-Kelly made a second complaint to GSOC.

26 February 2013: The Commissioner replied to the request of 20 December 2012 with a report. The Minister stated that he made inquiries about this throughout 2013, but only received this report on 26 February 2013 from Mr Purcell prior to a Dáil speech.

15 May 2013: An inquiry was carried out into the ticket fixing controversy and the report issued by Assistant Commissioner John O’Mahoney found “no evidence ... to suggest any act of criminality, corruption, deception or falsification as alleged by the anonymous author [Sergeant McCabe].” The O’Higgins Commission later analysed 182 PULSE incidents and found that “the

vast majority of complaints made by Sergeant McCabe in this regard are borne out, at least in part.” Concerning motoring offences (58% of those examined), it found that there was “a clear pattern of members of the public being stopped for having no insurance or some other deficit in their documentation in relation to tax and / or driving licence. In a number of those incidents the member of the public is recorded as having admitted the offence. However, the examined printouts reveal a failure to prosecute in many instances.” In respect of a number of drug incidents (25% of records examined) where there were admissions, “Sergeant McCabe’s complaint that there was no subsequent prosecution is correct”. From the material examined by the Commission, it found that there was “a sufficient basis ... to conclude that issues of concern arise in relation to aspects of the operation of PULSE”.

5 June 2013: According to Rian counsellor Laura Brophy, on this date she completed a retrospective report form in relation to Ms Y, another client, and this is where the error in the description of abuse section in the subsequent Ms D referral form originated. [Laura Brophy statement, 28 April 2017]

21 June 2013: Molloy case: formal disciplinary interview took place with Sergeant McCabe regarding the missing computer. Sergeant McCabe made submissions in his defence and provided a written submission at interview.

18 July 2013: Ms D referral to Rian counselling service, a free counselling service in the HSE for victims of childhood abuse under the category: “survivor of past abuse – other”. There are records of Ms D attending two appointments with Laura Brophy on 24 July and 7 August 2013.

24 July 2013: Molloy case: Sergeant McCabe notified by Detective Superintendent Maguire that he was not in breach of discipline for missing computer.

Ms D’s initial assessment took place at Rian with Laura Brophy. Ms D signed confidentiality in counselling form, which stated that the National Counselling Service was required under Children First to pass on any disclosures of identifiable information relating to current or past child abuse to the HSE’s Children and Family Services. Ms D completed client initial assessment form at Rian counselling, stated that she went to family therapy with her mother after teenage difficulties. She said she was closer to her father during her teenage years but was equally close to both parents now. Ms D was also dealing with depression and anxiety issues at this time. The assessment further detailed an allegation of sexual abuse made by Ms D. Ms D did not name Sergeant McCabe at the initial assessment but stated that the alleged perpetrator was a garda and was moved from the garda station or was “forced out” of Bailieboro when the allegation was made. The assessment noted that Ms D felt no one would believe her because he was a garda. Ms Brophy had “concerns that the alleged is still working in the community as a Garda and may be a potential risk”. Ms Brophy noted that the abuse “didn’t come back to client until she was 12 or 13” and that Ms D “remembers getting really uncomfortable in primary school”.

26 July 2013: Ms Brophy recorded in client notes that she phoned the HSE re reporting disclosure of abuse by Ms D but that the duty social worker was unavailable.

29 July 2013: Fiona Ward, Director of Counselling met with Laura Brophy to discuss Ms D, who informed her of Ms D’s allegations and 2006 complaint and that she would be contacting HSE social work department for information about whether a referral was required in this case. It was also agreed that Ms Brophy would meet the client again to explain child protection procedures under Children First re obligations to make referral which she could not do unless she was given the name of the alleged perpetrator.

30 July 2013: Ms Brophy phoned the social work department and explained the case, and got more information on procedure for referral.

6 August 2013: Molloy case: Disciplinary proceedings against Sergeant McCabe were officially terminated by a report which found it would be “unsafe” to find Sergeant McCabe in breach of discipline for a missing computer due to inconsistencies in Garda Killian’s evidence. The O’Higgins Commission later described the issuing of disciplinary proceedings against Sergeant McCabe as “difficult to understand”.

7 August 2013: According to Ms Brophy, she had a second appointment with Ms D on this date in order for Ms Brophy to “relay ... information” that she had received from social work and also for Ms D to decide whether to disclose the name of the alleged perpetrator of the sexual abuse. According to Ms Brophy, it was at this appointment that Ms D named Sergeant McCabe to her for the first time and Ms Brophy subsequently updated the initial assessment form of 24 July 2013 to record this information and did not make any separate notes of this appointment.

9 August 2013: Ms Brophy spoke with Briege Tinnelly, duty social worker, and made a verbal referral as recorded in Ms Brophy’s client notes: “informed about alleged and concern about report having been passed to [social work] ten years ago. Ms Tinnelly took contact details of client and alleged and I agreed to follow this with a report”. In the verbal referral, Ms Brophy described the alleged incident with the correct details that had been reported by Ms D in 2006 and these were recorded as such on the intake record completed by Ms Tinnelly. Keara McGlone, social work team leader, signed off on the intake record on this date and added a note that there was a duty to notify gardaí. A file on Sergeant McCabe was subsequently opened as she became aware that he had not been met with to discuss the allegations in 2006/7 by the social work department. The case was placed on the Measuring the Pressure system (list of cases on a database which are awaiting allocation to a social worker).

Ms Brophy completed a written retrospective report form on this date. According to Ms Brophy, as Ms Tinnelly did not find a file on either Sergeant McCabe or Ms D when they discussed the case during their phone call, a written referral was necessary. [Laura Brophy statement, 28 April 2017] According to Ms Brophy, she would not have made a referral had a file on Ms D or Sergeant McCabe been located by the social work department. In the written referral, under the heading “Description of abuse”, the report stated: “[redacted] informed me that she suffered sexual abuse in childhood. The abuse involved digital penetration both vaginal and anal. The alleged would also threaten [redacted] father if she said anything”. The redacted name is that of Ms Y, another client of Ms Brophy.

12 August 2013: Fiona Ward met Ms Brophy for a standard supervision meeting for update on Ms D. Ms Brophy reported that she contacted the social work department who said a referral should be made and that “the client was agreeable that the report be submitted to the Social Work Department”. [Fiona Ward statements, 18 & 19 April 2017]

A referrals meeting in the social work department took place on this date where details of the Ms D referral were discussed and noted. Ms McGlone located the HSE file on Ms D from 2006/2007 and became aware that the “verbal allegation received from Rian ... was consistent with the allegation made” by Ms D in 2006.

Ms McGlone states that she did not see the written referral from Rian which arrived in the social work department on 12 August. According to Ms McGlone, she handwrote a letter to Superintendent Cunningham on the same day, asking him to meet “to discuss the case prior to making any contact with the alleged perpetrator”. She also noted that Sergeant McCabe had not been met with by the HSE at the time of the criminal investigation in 2006/2007. Ms McGlone

did not receive a response from Superintendent Cunningham. This letter was typed up by admin staff and sent on the 15 August. Superintendent Cunningham states that he was on leave from 17 July until 16 September and would have opened the letter on his return. However he did not respond to the letter and did not view it as urgent but more of a “housekeeping letter”, and placed it in a locked cabinet in his office with the original investigation file which he kept separately from other files given the parties involved. Superintendent Cunningham was then on leave again in October 2013 and according to him, he forgot about the matter but had always intended to respond.

13 August 2013: Following attendance at initial assessment, Ms D was placed on waiting list for counselling at Rian.

15 August 2013: Laura Brophy received a letter to inform her that the Ms D case would be followed up by the HSE’s Children and Family Services.

December 2013: Sergeant Tony Byrne, liaison officer for the Bailieboro district, attended a garda liaison meeting in which Keara McGlone, social work team leader was present. He later wrote to team leaders Carmel McCauley (on 2 July 2014) and Kay McLoughlin (on 1 November 2014) to organise further meetings.

Late December 2013: Philip Boucher-Hayes of RTÉ stated that there was a disagreement with gardaí during a Crimecall production meeting as then Commissioner Martin Callinan was speaking on the programme and Mr Boucher-Hayes argued that the penalty points allegations made by Sergeant McCabe should be addressed by Commissioner Callinan. However, representatives from the Commissioner’s office and Garda Press Office said that there were “no circumstances under which he would address the topic”. When Commissioner Callinan arrived at RTÉ, Mr Boucher-Hayes asked to speak to him alone to resolve the row, and they spoke privately in a public corridor. According to Mr Boucher-Hayes, Commissioner Callinan made “negative but cursory” comments about Garda John Wilson, while he spoke “at some length on Maurice McCabe’s character”, even though Mr Boucher-Hayes had not asked any questions about this. The statement provides as follows: “he told me that McCabe was a troubled individual and that he had a “lot of psychological issues and psychiatric issues”. He claimed that McCabe was motivated by a set of grievances against Garda management and that he was famous within An Garda Síochána for this. He warned me that McCabe was not to be trusted and went on to add that there were other things he could tell me about him “horrific things, the worst kind of thing” but that he did not elaborate further.” Commissioner Callinan then told him that if there was anything else he wanted to know about Sergeant McCabe and penalty points, then he should ask Superintendent Taylor (Garda Press Officer at the time), who immediately “buttonholed him” after this conversation and asked “[n]ow do you understand what the problem with Maurice McCabe and the penalty points is?” [Philip Boucher-Hayes, statement to tribunal, 13 March 2017] This has been fully denied by Martin Callinan.

23 January 2014: Former Commissioner Martin Callinan testified before the Public Accounts Committee and said the following: “[q]uite clearly here, we have two people [Sergeant McCabe and Garda John Wilson] out of a force of over 13,000 who are making extraordinary [and] serious allegations and there isn’t a whisper anywhere else from any other member of the Garda Síochána about this corruption, this malpractice, and all of those things that are levelled against their fellow officers. Frankly, I think it’s quite disgusting. On a personal level, I think it’s quite disgusting.”

According to Deputy John McGuinness, chairman of PAC, at the conclusion of the hearing, he approached then Commissioner Callinan to thank him for attending: “Mr Callinan was with Ms. Noirin O’Sullivan and David Taylor and he said to me, “this man fiddles with Children, this is

outrageous”. I took the reference to “this man” to refer to Mr. McCabe.” [Deputy John McGuinness, statement to tribunal, 28 March 2017] Martin Callinan denies this.

Séamus McCarthy, Comptroller and Auditor General, also stated that he had a conversation with Martin Callinan on this date and he referred to Sergeant McCabe by name “made statements to the effect that Sergeant McCabe was not to be trusted, that he had questions to answer, and that there were allegations of sexual offences against him.” [Statement to tribunal, 13 March 2017] Martin Callinan denies this.

It appears that on this date, Sergeant McCabe was publicly identified in the media for the first time although his penalty points claims had been known to the public and reported on since late 2012. According to Ms D, she was upset and angered at the portrayal of Sergeant McCabe as a hero and this was why she sought to have the 2006/07 investigation into her allegation re-examined.

24 January 2014: A meeting took place between former Commissioner Callinan and Deputy John McGuinness in the carpark of Bewley’s Hotel, Newlands Cross, Dublin.

According to Deputy McGuinness, he received a call from former Commissioner Callinan to arrange an urgent meeting. The statement provides as follows: “Mr Callinan suggested that I and my fellow Committee Members might not be aware of Mr McCabe’s personal background. I suggested that it would be normal in business where there was an issue or a problem with an employee that the Boss would take the time to sit down and discuss the matter with the employee. Mr Callinan stated that this was not an option in the case of Mr McCabe because of what he knew about Mr McCabe. Mr Callinan asked if I was aware of issues surrounding Mr McCabe’s personal life. I stated that I had heard vague rumours and gossip that Mr McCabe had sexually abused someone and that he was a paedophile but that I had been assured by Mr McCabe that these rumours were all lies, that he had heard them before and that they were malicious falsehoods. Mr Callinan stated to me that the rumours were true, that Mr McCabe had sexually abused someone and that he was not a credible person. Mr Callinan stated that an investigation into Mr McCabe’s activities was underway. Mr Callinan then asked me was I aware that Mr McCabe had sexually abused family members. I was shocked and extremely troubled by what Mr Callinan was telling me because the allegations being made were extreme and the person relaying them to me, as well as the fact that an investigation had commenced, was the Commissioner of An Garda Síochána. When he left my car, Mr Callinan put his hand on my arm and stated that Mr McCabe was not reliable and could not be trusted and suggested I had gotten myself and the Public Accounts Committee into a lot of trouble by pursuing the penalty points issue. I kept a handwritten note of this meeting.” [Deputy John McGuinness, statement to tribunal, 28 March 2017]

According to former Commissioner Callinan’s statement, Deputy McGuinness raised the issue of allegations against Sergeant McCabe: “During the course of this meeting [he] asked why was Sergeant McCabe raising these issues. He asked if it was because of the file that went to the DPP. It was clear he was already aware prior to our meeting that Sgt McCabe had been the subject of a criminal investigation. His query in this regard was not in response to nor was it prompted by anything I had said. I responded by telling him that if he knew about the file that went to the DPP he knew what the DPP had decided. He indicated to me that he knew all about the allegation underlying the investigation. I did not at any point, as alleged, seek to discredit Sergeant McCabe”. Former Commissioner Callinan did not inform Commissioner O’Sullivan of the meeting as it was arranged on short notice, and there was no “deliberate attempt to conceal the fact of the meeting”. [Former Commissioner Callinan, statement to tribunal, 13 March 2017]

30 January 2014: Sergeant McCabe gave evidence to the PAC in private.

February 2014: According to Ms D, the journalists Debbie McCann (Irish Mail on Sunday) and Eavan Murray (Irish Sun) separately attended at her parent's house in Cavan given the media attention on Sergeant McCabe around that time and she "assumed it related to [the] 2006 complaint and investigation". A journalist also attempted to contact Ms D on Facebook at around this time. [Ms D statement, 13 April 2017] Mr D said he viewed his daughter's allegation against Sergeant McCabe as an "open secret within An Garda Síochána and among journalists and politicians". [Mr D statement to investigators, 7 June 2017]

According to Debbie McCann, she called to the D family home on either 14 or 21 February. She said that she heard "murmurings of an allegation" against Sergeant McCabe at around this time and approached a number of undisclosed sources to find out more information about this. A decision was then made to approach the D family. Mrs D answered the door and, according to Ms McCann, was somewhat upset as the one o'clock news had just been on and there had been a mention of Sergeant McCabe. Ms McCann gave Mrs D her contact details but she did not hear anything back from her and had no further contact with the D family.

Late February 2014: After this, Mr D states that he met a friend of his, Detective Superintendent John O'Reilly, and informed him that "...we had been approached by journalists but I was cautious of them. John said to me would she talk to a journalist that was prominent in the media such as Paul Williams. I said I wasn't sure but it was [my daughter's] decision, so I said I would talk to her. I ran it by [her], she said she knew who Paul Williams was from the media and she said again she did not want publicity but just to give her story. [She] did not want her private life in print she just wanted to show that there was another side to Maurice McCabe. We made contact with Paul Williams and he came down to the house and interviewed [her] on her own".

According to Detective Superintendent O'Reilly, when he asked Mr D how his daughter was during a conversation, he said that the media coverage of Sergeant McCabe was causing her distress and "went to outline how they were being persecuted at their home by the press." He said that Mr D said their family didn't trust journalists but that he "felt [Ms D] wanted to talk to somebody. He believed that Ms D did not want her account to be made public. He said to me, we were thinking about Paul Williams." Detective Superintendent O'Reilly then states that Mr D asked him if he knew Paul Williams, he responded by saying that he knew him and had dealt with him before and found him to be okay. Detective Superintendent O'Reilly believes he then gave Paul Williams' phone number to Mr D and that Mr D said he would speak with his daughter to see if she wished to speak to Paul Williams. Mr D then asked Detective Superintendent O'Reilly a few days after that to contact Paul Williams in order to see if he would speak with Ms D, as Ms D had told her father she would speak to him.

19 February 2014: Taoiseach Enda Kenny was furnished with Sergeant McCabe's dossier by Micheál Martin TD. The dossier included complaints about specific investigations including the Cafolla's incident and the Jerry McGrath case, misuse of PULSE, etc. Regarding the Cafolla's incident, Sergeant McCabe complained that gardaí had laughed at the injured party, and that nothing was done in relation to the incident until the injured party had made several calls and Sergeant McCabe personally intervened in the investigation.

27 February 2014: The Government announced its decision to hold a review of the allegations made by Sergeant McCabe, appointing Seán Guerin SC to prepare a report for An Taoiseach.

5 March 2014: Paul Williams went to Ms D's home and met with her parents and had a discussion. According to Paul Williams, Mr D had contacted him sometime before this.

8 March 2014: Paul Williams met and interviewed Ms D in her home. The interview was also recorded by a videographer and Mr Williams was in contact with the family numerous times

thereafter. According to Superintendent Taylor, Mr Williams rang him from Ms D's home on that date and told him that he was there to interview her. He states that Mr Williams said that he was going to write an article on her allegations against Sergeant McCabe which would be "damaging to McCabe". Superintendent Taylor states that he then sent a text message to then Commissioner Callinan and then Deputy Commissioner O'Sullivan to this effect. However, Mr Williams states that he in fact rang Superintendent Taylor a few days or a week after this and sought confirmation as to the detail of the 2006/07 investigation and the DPP's direction, and that he spoke to him more than once.

11 March 2014: Chief Superintendent Sheridan handed over the investigation file that was available in Monaghan garda station to Seán Guerin SC. He was unaware that Superintendent Cunningham had a separate file in his personal office. According to Assistant Commissioner Kenny, his office assisted in making discovery for the Guerin report and he read the file around this time and was aware it was being disclosed. Ms D was unaware of this.

24 March 2014: Former Commissioner Callinan resigned.

25 March 2014: The Fennelly Commission was set up under the Commissions of Investigation Act 2004 to investigate a number of matters, including the resignation of former Commissioner Callinan.

Nóirín O'Sullivan was appointed interim acting Garda Commissioner.

12 April 2014: Article by Paul Williams entitled "Girl wants new probe into alleged sex assault by garda" appeared in the Irish Independent containing comments by Ms D concerning her sexual assault allegation against Sergeant McCabe and her dissatisfaction with the 2006 garda investigation.

15 April 2014: Another article in the Irish Independent by Paul Williams, "Alleged garda sex victim wants to meet Martin", stating that Ms D wanted to meet with Micheál Martin TD, who had received dossier from Sergeant McCabe.

16 April 2014: Article by Paul Williams entitled "FF leader to meet woman at centre of claims she was abused by garda" appeared in the Irish Independent. This article stated that Micheál Martin was to meet Ms D the following week in relation to her allegations. The article described the allegation of Ms D as made in 2006 and the impact she said the alleged incident had on her life thereafter, as well as her dissatisfaction with the way in which the 2006/07 investigation was carried out and the fact that it was not recorded on PULSE.

19 April 2014: Ms D emailed Seán Guerin SC seeking to have her case included in the dossier of cases to be considered by Mr Guerin SC.

29 April 2014: Ms D made complaint to GSOC, stating that the complaint she made against Sergeant McCabe in December 2006 was "not properly investigated" for two reasons: the appointment of Superintendent Cunningham to investigate the allegations when he personally knew both Mr D and Sergeant McCabe, and the failure to record the allegations on PULSE.

30 April 2014: Laura Connolly, then duty social worker in Cavan town, reviewed Ms D's case and noticed that no intake records had been completed regarding Sergeant McCabe's children in 2006/7 or 2013. She stated that it was "practice at the time that Intake Records were opened in respect of children of alleged perpetrators of sexual abuse, [and were] categorised as child welfare concerns, noting that the children are in contact with the alleged perpetrator of child sexual abuse". Following a case direction of Ms Argue, from whom she had sought advice on this matter, files were opened on four of Sergeant McCabe's children, although it was noted that two were most

likely over 18 years of age at the time. The intake records under 'Details of Report' stated that, "[Ms D] is attending counselling with Rian, during the course of counselling she alleged that she experienced sexual abuse in childhood, that this abuse involved digital penetration both vaginal and anal. This abuse is alleged to have occurred on one occasion in 1998-1999. [Ms D] reports being aged 6/7 years old at the time of this alleged abuse."

She also completed the garda notification which was sent to gardaí on 2 May 2014. According to Ms Connolly, "the content of this Notification was based on the Standard Referral Form forwarded by Rian to Tusla. Notifying An Garda Síochána of allegations of child sexual abuse was standard procedure". [Laura Connolly's statement to tribunal, 20 March 2017]. She then emailed the garda notification to Linda Dewhirst, social work administrator, to be signed off and sent to gardaí. Ms Connolly states that she based the content of the intake records and garda notification on the written referral from Rian as opposed to the intake record completed by Briege Tinnelly on 9 August 2013 and did not notice Ms Y's name on the Rian referral when completing these forms.

Ms D met Micheál Martin TD in relation to her GSOC complaint, who said he would endeavour to have this included in the examination of cases being carried out by Seán Guerin SC. Paul Williams initially put Ms D in contact with Micheál Martin's office to arrange the meeting.

1 May 2014: Ms D was informed that following her initial counselling assessment a counselling place was available on 13 May 2014 at Rian; however she was attending college in another part of the country at that time.

2 May 2014: TUSLA referred on Ms D allegations to the Superintendent in charge at Bailieboro garda station, Superintendent Leo McGinn, which contained a more serious allegation against Sergeant McCabe. It stated the following: "Laura Brophy, Counsellor with RIAN Counselling Service reported the following information to the Child and Family Agency in August 2013. [Ms D] is attending counselling with Rian, during the course of counselling she alleged that she experienced sexual abuse in childhood, that this abuse involved digital penetration both vaginal and anal. This abuse is alleged to have occurred on one occasion in 1998-1999. [Ms D] reports being aged 6/7 years old at the time of this alleged abuse. [Ms D] alleges that the alleged perpetrator of this abuse threatened her father if she said anything. [Ms D] alleges that this incident of alleged abuse occurred whilst she and her parents were visiting the home of the alleged perpetrator, [Ms D] alleges that her parents and the alleged perpetrator's wife were in another part of the house, that she was playing hide and seek and the alleged perpetrator and his two daughters who were then aged approx 3 years and 5 years of age", signed on that date by Séamus Deeney, Principal Social Worker and Designated Officer.

Ms D transferred to the National Counselling Service waiting list in the south east.

3 May 2014: Article by Paul Williams appeared in the Irish Independent entitled "Kenny to set up probe into garda sex abuse claims", which stated that the then Taoiseach was "expected to order an investigation into allegations that a young woman was sexually abused by a serving garda". According to Mr Williams, he received confirmation from Mr Martin's office that Ms D's case had been referred to the Taoiseach. Neither Ms D nor Sergeant McCabe are identified in any of the four articles by Mr Williams and according to him, he did not contact Sergeant McCabe for a response as he had preserved the anonymity of both parties.

6 May 2014: Seán Guerin SC provided a report which recommended establishment of a commission of investigation under the Commissions of Investigation Act 2014 to inquire into Sergeant McCabe's complaints. The report was critical of previous investigations carried out in light of Sergeant McCabe's complaints.

7 May 2014: Superintendent Leo McGinn states that he received the garda notification re Ms D from TUSLA at Bailieboro garda station. He said he deduced from the notification that it referred to an allegation against Superintendent McCabe and was aware of the 2006/7 investigation and subsequent DPP direction. [Superintendent Leo McGinn, statement to tribunal, 30 March 2017]

Alan Shatter TD resigned as Minister for Justice.

8 May 2014: Superintendent McGinn forwarded the garda notification to the Chief Superintendent in Cavan/Monaghan, James Sheridan. A copy of the investigation file from 2006/07 was not held in Bailieboro at the time. Superintendent McGinn stated that he felt it was “appropriate to have the investigation reviewed” outside of the Cavan/Monaghan Division, either by someone at officer level in the gardaí or through referral to the Cold Case Unit. He wrote this letter on 7 May but sent it the following day due to a typographical error which needed to be amended. According to Chief Superintendent Sheridan, he had a phone conversation with Superintendent McGinn about the garda notification prior to receiving his letter of 8 May.

8/9 May 2014: Superintendent McGinn states that he brought the garda notification to Mr D’s attention. Mr D read the report and said that it “did not seem correct and that he would check with his family as to its accuracy”. He subsequently informed Superintendent McGinn that the information contained on the 2 May garda notification was incorrect, which may have been on a date around the 12 to 14 May as it was on 14 May that a call was made to Laura Brophy notifying her of the error on her report of 9 August 2013.

9 May 2014: Ms D discharged from Rian counselling service in Cavan.

The Guerin report was published.

Sergeant McCabe’s access to PULSE was fully restored. [Commissioner O’Sullivan’s statement to tribunal, 13 March 2017]

10 May 2014: Assistant Commissioner Kieran Kenny met with Sergeant McCabe to inform him that his access to PULSE had been restored.

12 May 2014: Possibly on this date according to Chief Superintendent Sheridan, Superintendent McGinn informed him by phone that the information contained on the garda notification was incorrect.

13 May 2014: The Government set up a body of barristers to review over 300 cases where people were making allegations of garda incompetence. This was called the Independent Review Mechanism. It looked at several of the cases from Cavan/Monaghan Division, including the allegation by Ms D that her case was not competently investigated, and there were also cases from outside the division.

14 May 2014: Chief Superintendent Sheridan attached the correspondence from Superintendent McGinn of 8 May and wrote to Assistant Commissioner Kenny, noting that the allegations in the referral were the subject of an investigation in 2006/07, and also noting that Ms D had made a complaint to GSOC and Micheál Martin TD, who had also referred the matter to then Taoiseach Enda Kenny. It recommended that gardaí “await further communication from [those parties] prior to commencing a review of this investigation”, noting that a full copy of the garda investigation file was available in Monaghan garda station.

According to Laura Brophy’s client notes, Ms D telephoned the Rian counselling service and left a message with Pauline Johnston, office administrator, for Ms Brophy, saying that it was “urgent”, seeking a call back. She then spoke to Ms Brophy and told her that there was a mistake in the

referral made to the HSE on 9 August 2013. Ms D states that she received a phone call from her father: “My father said to me “What the f... did you say to the counsellor?” and I would have said “what are you talking about?” or “what counsellor?””. Her father then told her that he would speak with Superintendent McGinn to clarify that an error had been made as Ms D told her father that she had never made an allegation of digital penetration against Sergeant McCabe. [Ms D statement, 13 April 2017]

According to Ms Brophy, she spoke to Ms D on the phone who said “you said I was raped” and Ms Brophy replied, “I know you weren’t”. She then checked the referral of 9 August 2013 and noticed the error for the first time. [Laura Brophy statement, 28 April 2017]

Ms Brophy first contacted Pamela Armitage to inform her that there was an error in the initial report and it contained “a line from another referral on another adult that has been pasted in error”. Ms Brophy then sent an amended referral form to Eileen Argue, Social Work Team Leader. The amended report under the heading “Description of abuse” stated: “[Ms D] informed me that there was a single incident of sexual abuse. At the time of the incident both [Ms D] and the alleged were fully clothed and the incident involved inappropriate contact as the alleged rubbed himself up and down [Ms D] in a sexual manner.”

Eileen Argue sent an email to Gerry Lowry, area manager, to Séamus Deeney and Louise Carolan, principal social workers, stating that the garda notification had been forwarded on the basis of wrong information, and stating that “information provided ... did not relate to Ms D and was in relation to another person against another man and not the man MMcC”, therefore the “notification needs to be amended as soon as possible and the relevant superintendent needs to be updated with regard to same”.

Ms Brophy also sent a letter to Eileen Argue on this date and clarified the error: “on page one of the original report I sent on behalf of [Ms D], under the title **‘Description of abuse’** the sentence which begins with “[Ms D] ... informed me...” and ends with “.....she said anything” is incorrect information and should be disregarded.” Therefore she requested that “the original report containing the error and any copies made or distributed be retracted and replaced with the correct version of the report enclosed”.

An incident report by Ms Brophy on this date stated that Ms D contacted her in relation to the error. According to Ms Brophy, Ms D contacted her again later that day “to clarify the mistake in the report as she wondered if the erroneous allegation in the report was from another client but intended for the same alleged perpetrator. I informed [Ms D] that the error was entirely my own and from a completely different report unrelated to hers. [Ms D] then asked me if I would contact the [Superintendent] in the Garda Station that had a copy of the report to inform them of the error.”

15 May 2014: Ms Brophy stated that she had made the error by pasting an extract from a template report relating to another client and another alleged perpetrator into the report relating to Ms D. In light of this, an incident report on a possible data breach was completed by Fiona Ward, HSE Director of Counselling. The report stated that Ms D had told Ms Brophy that the error in the report had “come to [her] attention as a result of a recent contact with the Gardaí that a written report ... contained inaccurate information regarding the nature of the abuse” reported by her.

Ms Ward’s incident report stated: “[o]n review of the report submitted to the Social Work Service it has been determined that as a result of an administrative error, the information which was recorded in the section of the report entitled: “Description of Abuse” was incorrect. The information in this section of the report pertained to another client of the service. The information on the report referred to this client by surname only. No other identifying details were contained

and this client is not identifiable from the information in the report. The remainder of the report is accurate.” The report stated that Ms Brophy informed TUSLA of the error and provided a corrected version of the report as soon as the error came to light, and asked that the incorrect report be shredded with the new report placed on the client file. The case did not have an allocated social worker at this time.

An email from Ms Brophy to Fiona Ward stated that Eileen Argue had been in contact with the Chief Superintendent, who informed her that they were just beginning to look into the Ms D matter on 14 May 2014. The email states that he was then informed of the error in the original report, but Ms Argue could not “guarantee” that he would return the original report, as “he mentioned something about keeping the original along with the updated report”. A later email states that the Chief Superintendent in question was Chief Superintendent Sheridan. Superintendent McGinn’s statement refers to a phone conversation he had with a staff member at TUSLA informing them of the error on the garda notification once he had spoken with Mr D. [Statement of 11 May 2017]

16 May 2014: According to Ms Brophy’s client notes, Ms D contacted Ms Brophy to tell her that Superintendent Leo McGinn had not been informed of the error in the garda notification and to request that she contact him.

Ms Brophy then contacted him. She said that Superintendent McGinn said that he had not been told about the error so she explained it to him. According to her email to Fiona Ward on this date, he stated that the matter had been “given over to the Commissioner and a separate team to investigate the case outside the region”. Ms Brophy wrote to Superintendent McGinn by registered post attaching the amended Rian referral. Ms Brophy was under the impression that her report of 9 August 2013 had been forwarded to the gardaí by TUSLA.

Superintendent McGinn states that he informed Ms Brophy that he could not return the referral to Rian as he had forwarded it to the divisional officer in Monaghan.

Ms Brophy then wrote a letter to Ms D, apologising for the error and informing her of the steps she had taken to inform Superintendent Leo McGinn. According to Ms D, she did not have sight of this document until her meeting with tribunal investigators. [Ms D statement, 13 April 2017]

Rosalie Smith Lynch, HSE Data Controller, wrote to Fiona Ward and stated that the error in the initial report of 9 August 2013 which mentioned the surname of another client, Ms Y, did not constitute a data protection breach, as “the surname of the person concerned is the only identifier which was released in error”. Ms Smith Lynch therefore did not recommend writing to that particular client, Ms Y, to inform her of the incident.

Sergeant Karen Duffy, from the office of Assistant Commissioner Kenny, emailed the erroneous garda notification for the attention of Commissioner O’Sullivan. Assistant Commissioner Kenny wrote to Commissioner O’Sullivan attaching Chief Superintendent Sheridan’s correspondence of 14 May stating that he was “considering this matter at the present time” and would keep the Commissioner informed of developments.

Detective Superintendent Frank Walsh, Private Secretary to the Commissioner states that he showed the Commissioner this correspondence on this date.

20 May 2014: Fiona Ward wrote to TUSLA seeking the return of all copies of the incorrect report re Ms D to the National Counselling Service. As did Ms Brophy, Ms Ward gave evidence that she was under the impression that the Rian referral had been forwarded to the gardaí by TUSLA.

Superintendent Frank Walsh replied to Assistant Commissioner Kenny stating that the content of his correspondence of 16 May was noted by the Garda Commissioner and that the Commissioner would be kept up to date in terms of developments.

On this date, Superintendent McGinn forwarded the amended Rian referral to Chief Superintendent Sheridan along with the letter from Ms Brophy explaining the error in the initial report.

22 May 2014: Chief Superintendent Sheridan forwarded the letter of Superintendent McGinn of 20 May to Assistant Commissioner Kenny, stating that the previous referral “contained incorrect information and should therefore be withdrawn and replaced with the attached” as the referral related to an incident which had already been investigated by gardaí in 2006/2007. Chief Superintendent Sheridan wrote that the attached referral “does not disclose any new information/evidence in regard to these matters and therefore at this time does not require any further action by An Garda Síochána”.

Fiona Ward wrote to Chief Superintendent Sheridan seeking the return of all copies of the incorrect report that had been sent to the gardaí.

28 May 2014: Ms Brophy sent an amended version of her report to the counselling service in the south east where Ms D had been transferred for counselling.

29 May 2014: An email was sent from Chief Superintendent Sheridan to Superintendent McGinn and Sergeant Duffy in the office of Assistant Commissioner Kenny regarding the incorrect report and asking them to confirm that all copies of the incorrect report had been retracted and destroyed and asking for the original copy to be forwarded to him so that he could return this to Ms Ward in the HSE. Superintendent McGinn states that he did not destroy the copy held in Bailieboro. This email written by Sergeant Patricia Maguire includes a typographical error and refers to a report of 13 August 2013.

7 June 2014: Eileen Argue sent amended garda notification form to Linda Dewhirst, TUSLA administration, to be signed off by her before sending to gardaí. The amended report was incorrectly dated 2 May 2014.

9 June 2014: Chief Superintendent Sheridan sought clarification from Ms Ward re the error, asking whether the referral related to the allegation which had been investigated by gardaí in 2006/07 or whether it related to a new disclosure requiring investigation by gardaí. He also sought clarification on how the error occurred and subsequently came to light.

10 June 2014: Superintendent Taylor, no longer Garda Press Officer, transferred to the Regional Traffic Unit. According to former Commissioner Callinan, Superintendent Taylor visited him at his home following the transfer and “expressed anger and disappointment” at this event.

The amended garda notification was processed by Linda Dewhirst, the date was corrected to the 10 June 2014 and left with Séamus Deeney to sign off before it could be sent to gardaí.

Assistant Commissioner Kenny wrote to Chief Superintendent Sheridan in relation to his email of 29 May, “concerned that a confidential matter such as this is dealt with by way of email”, stating that “[u]nder no circumstances should any material in Garda custody be retracted or destroyed regarding this matter” and that no materials would be returned to the HSE without permission from his office in Sligo. He then asked that Chief Superintendent Sheridan and Superintendent McGinn attend a meeting on 16 June regarding the matter, but this did not take place until the following month.

12 June 2014: Ms D's GSOC complaint designated for investigation in accordance with section 98 of the Garda Síochána Act 2005. No file forwarded to DPP.

17 June 2014: Ms D met Alan Shatter TD at the Merrion Hotel regarding her complaints about the 2006 investigation into her allegation against Sergeant McCabe. Paul Williams made contact with Mr Shatter's office to arrange this.

18 June 2014: Fiona Ward replied to Chief Superintendent Sheridan's letter of 9 June stating that Ms D had brought the error to the attention of Ms Brophy. She stated that the information in the initial report was reported in error and related to a different client and a different alleged perpetrator, and repeated her request for the return of the original report.

19 June 2014: Following his meeting with Ms D, Alan Shatter TD made a speech in the Dáil in relation to her case, seeking to have it included within the terms of reference for the Commission of Investigation which had been recommended by the Guerin report:

If the statutory inquiry is to be comprehensive it should include all cases dealt with in Bailieborough Garda Station which have given rise to complaint. There is a matter which has been the subject of articles in the *Irish Independent*, which included a report of Deputy Micheál Martin meeting an individual who alleges she was the victim of a sexual assault and her complaint was not recorded on the PULSE system and did not result in a prosecution. I understand from the newspaper report that Deputy Martin was to provide information on this matter to the Taoiseach and I presume he has done so. This case should clearly form part of any statutory inquiry.

20 June 2014: The amended garda notification form was signed off by Séamus Deeney and sent to the Superintendent at Bailieboro. The more serious allegation had been removed and therefore stated: "[Laura Brophy] stated that during the course of counselling [Ms D] alleged that she experienced sexual abuse in childhood. This abuse is alleged to have occurred on one occasion in 1998-1999. Ms D reports being aged 6/7 years old at the time of this alleged abuse. [Ms D] alleges that the alleged perpetrator of this abuse threatened her father if she said anything...". [Ms Brophy in letter to Eileen Argue of 14 May 2014 stated that the reference to threats should be removed and that she had not included this in her own amended report of 14 May 2014]

24 June 2014: Fiona Ward received a phone call from Inspector Pat O'Connell, Monaghan, regarding the error. Inspector O'Connell stated that the 2 May report had been "sent the Commissioner in Sligo and that they needed to clarify the nature of the error before any report could be destroyed or returned given the nature of the report". The reference to the Commissioner appears to in fact refer to Assistant Commissioner Kenny, who was in correspondence with Chief Superintendent Sheridan on the matter. Inspector O'Connell also sought clarification as to whether the 2013 report related to the 2006 allegations made by Ms D to gardaí. Inspector O'Connell said he would pass on the information to Chief Superintendent Sheridan and revert back to Ms Ward if any further clarification was needed. Inspector O'Connell however has recorded this phone call as taking place on 30 June.

Superintendent McGinn in Bailieboro received the amended garda notification from TUSLA and forwarded this to Chief Superintendent Sheridan.

1 July 2014: Fiona Ward wrote again to Chief Superintendent Sheridan, stating that the administrative error in the report occurred "as a result of a typographical mistake made by the Counsellor/Therapist who compiled the report. This error occurred when information from a report template was cut and pasted into another template." The return of the inaccurate original report was again sought. Ms Ward has informed the tribunal that the original report was never

returned by gardaí; however she was seeking the Rian report of 9 August 2013 which had never been sent to gardaí in the first place. [Fiona Ward statements, 18 & 19 April 2017]

3 July 2014: Ms D made a statement to GSOC in relation to her complaint about the 2006/7 garda investigation of her allegation against Sergeant McCabe. In this statement she said the following: “I didn’t remember the assault until I was about 12 or 13; I think I subconsciously blocked it out of my memory. Once I remembered the assault it had a huge effect on my life”.

Chief Superintendent Sheridan set out the Ms D case history in a letter to Assistant Commissioner Kenny, noting that from the referral from Tusla as well as from his communication with Ms Ward, it was “clear that the [r]eferral [i.e. amended report by Ms Brophy] ... refers to the allegations of Ms D investigated by the Gardai in 2006/2007. The referral does not contain any new allegations.” It stated that the 2 May 2014 notification was issued in error and was not relevant to Ms D’s allegation. The letter however states that at the time of the garda investigation the matter was not referred by gardaí to the HSE, which is incorrect as the HSE received a notification from the gardaí of suspected child abuse in January 2007 from Detective Sergeant Fraher. Assistant Commissioner Kenny did not forward this correspondence to the Commissioner

4 July 2014: Ms D attended an initial assessment appointment at NCS in the south east with counsellor Evelyn Waters. Ms D wanted to address anxiety and relationship issues in counselling. The report stated that she had short flashbacks to the incident with Sergeant McCabe, and was “being triggered by media coverage”. She attended for subsequent appointments on 26 September, 3 October 2014 and 17 October 2014. Her file was closed on 13 January 2015 as she did not make any further contact with the service.

10 July 2014: Assistant Commissioner Kenny replied to Chief Superintendent Sheridan’s letter of 3 July, noting his correspondence.

16 July 2014: A meeting took place in Mullingar garda station regarding the TUSLA referral relating to Ms D. Assistant Commissioner Kenny, Chief Superintendent Sheridan, Superintendent McGinn and Sergeant Duffy were in attendance. The meeting lasted 40 minutes. Sergeant Duffy recorded the minutes of this meeting. The minutes of the meeting record that Assistant Commissioner Kenny found it “unbelievable” that the HSE completed the referral via copy and paste and didn’t accept that the referral had passed through three different people in the HSE without being noticed, and said that no correspondence would be destroyed and nothing would be retracted, but that he “accepts that the H.S.E. made a mistake and they have amended it”. The minutes state that the incident was not recorded on PULSE in 2006/07 (correct) and that the matter was not referred to the HSE at the time (incorrect – this was done in January 2007). Assistant Commissioner Kenny outlined that he had concerns as he was of the view that “this referral should be dealt with as a new referral ... we can’t just take it as the same incident”. Chief Superintendent Sheridan however pointed out that the referral outlined that the matter had been investigated by gardaí, but that Sergeant McCabe would need to be informed given that he has children if the gardaí liaised with the HSE in relation to this matter.

Superintendent McGinn raised an issue in relation to Sergeant McCabe having access to children in his employment and whether there was a risk. Assistant Commissioner Kenny agreed with this and stated that the matter “needed to be dealt with properly”. Superintendent McGinn then outlined that the garda investigation had been completed. Assistant Commissioner Kenny outlined that he was of the view that “legal opinion and advice would be necessary” and said this would be sought from Ken Ruane, Head of Legal Affairs – his concern was that he incorrectly assumed that no notification had been made to the HSE by the gardaí in 2006/07 and that GSOC might request that the matter be reinvestigated. Assistant Commissioner Kenny also raised the possibility of

liaising with Ms D to establish if the referral made by TUSLA was the same as her complaint to gardaí in 2006.

Assistant Commissioner Kenny and Chief Superintendent Sheridan agreed that a meeting should be arranged with Mr Ruane. Chief Superintendent Sheridan was to contact TUSLA to establish their intentions/strategy and Chief Superintendent Sheridan requested Inspector O'Connell to do this on 20 July.

17 July 2014: Mr D made a statement relating to his daughter's complaint to GSOC.

Superintendent Walsh, directed by the Commissioner, inquired on the current status of the Ms D referral from Assistant Commissioner Kenny.

Superintendent Taylor began his role in the Regional Traffic Unit.

According to Inspector O'Connell, Chief Superintendent Sheridan asked him to get in touch with TUSLA to establish intentions/strategy re the Sergeant McCabe matter.

21 July 2014: Inspector O'Connell spoke again with Fiona Ward, and sought an update on follow up done by TUSLA regarding the Ms D referral. She told him that she would obtain the details of the relevant social worker in the case and revert back to him, as subsequent actions in the case were not within the remit of Rian counselling service but were a matter for TUSLA. Inspector O'Connell also asked if "there was any subsequent action by the HSE such as strategy meetings with the Gardaí". According to Inspector O'Connell, he was at a farewell lunch in the Hillgrove Hotel which Chief Superintendent Sheridan was also attending when he received a phone call from Ms Ward, and he conveyed this information to the chief superintendent almost immediately.

28 July 2014: Assistant Commissioner Kenny responded to Superintendent Walsh stating that he had had a meeting in relation to the matter on 16 July and would be consulting with Mr Ruane and that Chief Superintendent Sheridan would be liaising with TUSLA.

Fiona Ward emailed Inspector O'Connell with contact details for Eileen Argue as requested by him. According to Inspector O'Connell, he was unable to find any record of this on his email account, and he either never received it or deleted it in error.

31 July 2014: Superintendent Walsh replied to Assistant Commissioner Kenny asking him to report following consultations with Mr Ruane and TUSLA. According to Assistant Commissioner Kenny, he decided not to seek legal advice once he was satisfied that the amended garda notification referred to the same allegation that Ms D had made in 2006 and as such no further action by gardaí was required.

5 August 2014: Detective Sergeant Fraher made a statement to GSOC re Ms D's complaint

10 November 2014: Superintendent Cunningham made a statement to GSOC in relation to Ms D's complaint. He states that when he was appointed to carry out the investigation he raised concerns with Sergeant Eamon White, divisional clerk to Chief Superintendent Rooney, to the effect that he knew both parties and felt it would not be appropriate for him to investigate the matter, asking him to bring this to Chief Superintendent Rooney's attention.

After examining the garda file on the Ms D investigation of 2006/7, a barrister with the Independent Review Mechanism reported that the case would be unsuitable for inclusion in a commission of investigation that was proposed under the chairmanship of Mr Justice Kevin O'Higgins.

25 November 2014: Nóirín O'Sullivan was appointed Garda Commissioner.

4 December 2014: Decision made at GSOC to conduct a further investigation into Ms D's complaint in accordance with section 95 of the 2005 Act.

19 December 2014: Government lays the draft terms of the O'Higgins Commission before the Houses of the Oireachtas.

22 December 2014: GSOC served notice on Superintendent Cunningham and Detective Sergeant Fraher regarding the GSOC investigation under section 95 into the Ms D allegation.

3 February 2015: The Commission of Investigation (Certain matters relative to the Cavan/Monaghan Division of the Garda Síochána) [the O'Higgins Commission] was established by Government order (Certain Matters Relative to the Cavan/Monaghan Division of the Garda Síochána Order 2015) SI No 38 of 2015, with Mr Justice Kevin O'Higgins, retired judge of the High Court, appointed as its sole member.

31 March 2015: Chief Superintendent Rooney gave a statement to GSOC in relation to Ms D's complaint. He states that while he was aware that Superintendent Cunningham knew the parties involved, he was not concerned as he felt that Superintendent Cunningham was "a person of integrity, of high standard[s] both personal and professional with an independent mind".

1 April 2015: Gardaí to be represented at the O'Higgins Commission seek the nomination of counsel, but the response to this is delayed.

16 April 2015: Declan Farrell, Designated Officer at GSOC, issued a section 97 report on Ms D's complaint. He found that there should be no proceedings taken against Superintendent Cunningham or Detective Sergeant Fraher for the investigation into her allegations against Sergeant McCabe.

7 May 2015: A review of the Ms D file took place at TUSLA, as the case had remained unallocated and on a waiting list following the referral in August 2013. According to Kay McLoughlin, Social Work Team Leader, she undertook a review of unallocated files in order to progress these although the resources were not available to allocate the case to a social worker on her team. She undertook this task with Gail Penders and Séamus Deeney. A decision was made to respond to the Rian referral and write to Sergeant McCabe about the allegations made by Ms D.

Séamus Deeney completed a Waiting List Review Form on this date with a management decision to: "Contact [Ms D] re checking the reliability and accuracy of allegations made. Review information. Letter prepared for Maurice McCabe – to contact – establish current address". Ms McLoughlin drafted the Barr letter to be sent to Sergeant McCabe. The draft was sent to Gerry Lowry, Area Manager, and Séamus Deeney, with Mr Lowry stating in reply that as the matter had been previously reported to gardaí, "we would need to coordinate with them before taking the steps outlined".

8 May 2015: Séamus Deeney sent an email to Ms McLoughlin outlining steps that should be taken in the Ms D case: contact Ms D as there were "discrepancies in the allegations forwarded to Tusla [in order to] allow the agency to check the reliability and accuracy of the allegations and determine whether there was foundation to the allegations", determine whether anyone of relevance would need to be interviewed, e.g. counsellor, Ms Brophy, inform Sergeant McCabe on review of the above steps, and make plan regarding informing third parties such as Sergeant McCabe's wife.

11 May 2015: Kay McLoughlin offered Ms D an appointment to attend with them on 2 June 2015, stating that "[a] matter has been brought to the attention of the Social Work Department which we would like to discuss with you" with no further details provided.

12 May 2015: Counsel representing the Garda Commissioner and the other senior garda officers meet together for the first time. The Garda Commissioner is absent and only attends a consultation in October and in November.

14 May 2015: The O’Higgins Commission sat for the first time.

15 May 2015: After Ms McLoughlin had offered Ms D an appointment, she received a phone call from Ms D’s mother giving her Ms D’s mobile phone number. When Ms McLoughlin spoke to Ms D, she said she could not attend an appointment offered for 2 June as she had college exams but that she would be in contact thereafter. Ms D also “wanted to know what had happened that led to us reopening the case. I explained the referral from her counsellor in 2013”. The error in the Rian report was not discussed. [Kay McLoughlin’s statement to tribunal, 20 March 2017] Ms D did not get in contact with Ms McLoughlin after this and they never met to discuss the allegations.

On the second day of sittings at O’Higgins, there were a number of exchanges between O’Higgins J and Colm Smyth SC regarding the instructions he had received from his clients in relation to Sergeant McCabe. Mr Smyth SC represented Commissioner O’Sullivan and other senior garda members at O’Higgins. He stated that his instructions from the Commissioner were to “challenge the integrity certainly of Sergeant McCabe and his motivation ... his motivation and his credibility in mounting these allegations of corruption and malpractice”. O’Higgins J sought to clarify the nature of these instructions and Mr Smyth SC said: “I mean this isn’t something that I am pulling out of the sky, Judge, and I mean I can only act on instructions”. O’Higgins J again sought to confirm these instructions and said “you are attacking his motivation and you are attacking his integrity”, Mr Smyth SC agreed and stated “Right the way through” “Full stop.” “Yes, full stop”. The Commission rose after this to allow Mr Smyth to seek clarification of his instructions. Mr Smyth returned and said that his instructions were reconfirmed. “Very good. Your instructions, as I understand them, are that Sergeant McCabe acted as he did for improper motives” “Yeah”; “Okay. And that his integrity is being challenge[d] in that respect”; “In that respect”. Michael MacDowell states that if the Garda Commissioner came to give evidence that it would be an “experience” she would not “enjoy”.

18 May 2015: During examination of Superintendent Cunningham at O’Higgins, Mr Smyth SC asked if he was “aware that Sergeant McCabe had a personal grievance with the guards”. No direct reference was made to the Ms D allegation, but this instead related to the refusal by garda management to agree to Sergeant McCabe’s request to have the DPP directions circulated to him and the D family. Superintendent Cunningham agreed that he was aware of this “personal grievance” in early 2007. Sergeant McCabe denied having any such personal grievance when this question was put to him by counsel for the Commissioner.

That morning a document as to the instructions of counsel for the Garda Commissioner was lodged with the O’Higgins Commission. Also lodged was the report by Superintendent Cunningham on the 25 August 2008 meeting with Sergeant McCabe.

20 May 2015: Sergeant McCabe was informed of the outcome of the GSOC investigation into Ms D’s complaints by Mr Farrell.

25 May 2015: GSOC memo re Ms D complaint by Jon Leeman stated that he considered whether a formal referral to TUSLA was necessary given that the complaint related to the investigation of child sexual abuse allegations. However, as gardaí had informed the HSE of the complaints in 2006, and the GSOC investigation “uncovered no other child protection concerns”, a formal referral to TUSLA was not considered to be necessary.

24 June 2015: Mr Justice O’Higgins clears up the contradictions between the two documents lodged on 18 May 2015 and Superintendent Cunningham gives evidence accordingly.

October 2015: Garda-TUSLA liaison meeting took place. Although the Ms D case was not on the agenda, Ms McLoughlin asked Sergeant Anthony Byrne about the status of the case, and was informed of the DPP’s direction of no prosecution of Sergeant McCabe in 2007. Ms McLoughlin stated that such meetings are held “in order to update each service in relation to cases which are open to both services”. [Kay McLoughlin’s statement to tribunal, 20 March 2017] Sergeant Anthony Byrne was garda liaison officer at this time and according to him, he was never made aware of the garda notifications relating to Ms D.

4 November 2015: At the O’Higgins Commission, the issue of the Commissioner’s instructions to her counsel Mr Smyth SC was again discussed. Mr Smyth SC stated: “I had instructions to challenge Sergeant McCabe in relation to motivation and credibility.” “And integrity.” “No, there was no mention of integrity.”... “And insofar as you said that my instructions are to challenge the integrity certainly of Sergeant McCabe that is an error.” “That is an error on my part.” ... “So his motivation and credibility are under attack but not his integrity.”

17 December 2015: Last day of sittings in the O’Higgins Commission.

29 December 2015: Kay McLoughlin wrote to Sergeant McCabe stating that TUSLA was “obliged to investigate allegations of abuse and to reach a determination as to whether there are sufficient grounds for believing you may potentially pose a risk to children”. Sergeant McCabe was informed of the more serious allegation of digital penetration for the first time, which had been included in the erroneous referral of 9 August 2013. The letter stated that Ms McLoughlin wished to meet with Sergeant McCabe to give him an opportunity to respond to the allegations on 21 January 2016 (he did not attend). It further stated that relevant third parties, such as his employer or family, would be informed if the TUSLA assessment determined that Sergeant McCabe posed a risk to children.

28 January 2016: Sergeant McCabe responded to the TUSLA letter via his solicitors, stating that the allegation was “wholly untrue”, noting that the claim of digital penetration had never been made before by Ms D. It stated that Sergeant McCabe was “astonished” by the contents of the 29 December letter.

2 February 2016: Ms McLoughlin sought a copy of Ms D’s statement to gardaí in 2006 as she was “assessing what risk if any Maurice McCabe poses to children”. Emer O’Neill furnished her with a copy the following day.

4 February 2016: Ms McLoughlin sent a draft apology letter to Sergeant McCabe’s solicitors to Gerry Lowry for approval after realising that the amended May 2014 referral by Ms Brophy had removed the digital penetration allegation. Ms McLoughlin had taken information for the Barr letter of 29 December from the 2 May 2014 garda notification, which had remained on Sergeant McCabe’s TUSLA file. She stated, “as soon as I realised I made an error in relation to the allegation of digital penetration, I wished to make an apology to Mr McCabe”. [Kay McLoughlin’s statement to tribunal, 20 March 2017]

8 February 2016: Mr Lowry instructed Ms McLoughlin to review the file on Ms D held by the CSA team from 2007, and also the garda file, and revert back re apology.

26 February 2016: Ms McLoughlin emailed Gerry Lowry with a reminder of the need to discuss a response to Sergeant McCabe’s solicitors’ letter of 28 January as a reply still had not been sent.

8 April 2016: Supervision meeting between Mr Lowry and Ms McLoughlin took place –TUSLA had not yet responded to Sergeant McCabe’s solicitors’ letter of 28 January.

25 April 2016: The final report of the O’Higgins Commission was sent to the Minister for Justice and Equality.

9 May 2016: RTÉ ran several TV and radio broadcasts including discussions of what was purported to be a leaked account of the unpublished O’Higgins report. These reports lay no emphasis on bad policing but concentrated on such matters as Garda numbers.

11 May 2016: Report of the O’Higgins Commission published by the Minister for Justice and Equality.

17 May 2016: Prime Time special aired on RTÉ containing discussions of leaked snippets of transcripts of the O’Higgins Commission, which included exchanges between Mr Colm Smyth SC and O’Higgins J regarding instructions given to him by Commissioner O’Sullivan to challenge the motivation, integrity and credibility of Sergeant McCabe. The full transcripts are not leaked and so the media is presented with a one-sided picture.

26 May 2016: In Dáil debate re O’Higgins report, Deputy McGuinness made a statement regarding the January 2014 meeting he had with former Commissioner Callinan for the first time: “Every effort was made by those within the Garda Síochána at senior level to discredit [Sergeant] McCabe. The Garda Commissioner confided in me in a car park on the Naas Road that [Sergeant] McCabe was not to be trusted and there were serious issues about him. The vile stories that circulated about [Sergeant] McCabe, which were promoted by senior officers in the Garda, were absolutely appalling. Because they attempted to discredit him, he had to bring forward various pieces of strong evidence to protect his integrity.”

20 June 2016: Ms McLoughlin replied to Sergeant McCabe’s letter of January 28 stating that there was a “mistake” in previous correspondence, and confirmed that “no allegation of *‘digital penetration’*” had been made against Sergeant McCabe by Ms D. The letter acknowledged that while Sergeant McCabe denied the allegations, and the gardaí investigated the complaints in 2006, TUSLA had an obligation under section 3 of the Child Care Act 1991 in particular to “assess the allegations and to come to a conclusion whether the protection of a minor is at issue”.

28 June 2016: Michael Cunningham, social work team leader on the duty intake team in Cavan/Monaghan, attended a meeting with Claire Tobin and Lisa O’Loghlen from the Sexual Abuse Regional Team (SART), a regional team set up initially by TUSLA to manage and respond to unallocated retrospective cases of child sexual abuse. According to Mr Cunningham, he brought along fifteen cases to this meeting which he had personally reviewed and felt appropriate for referral. Prior to this meeting, he states that he was directed by Kay McLoughlin to “take the Maurice McCabe file to the meeting and give it to SART for review”, and explained at the meeting that he was handing over this file to SART on her direction. [statement of Michael Cunningham, 18 July 2017] This seems to have been on some date before 24 June as Ms McLoughlin went on annual leave on this date. According to Ms McLoughlin, she was directed by Gerry Lowry to ensure the file was transferred to SART. [statement to tribunal, 23 July 2016]

5 July 2016: The Ms D case was officially referred to SART by Michael Cunningham.

20 July 2016: Sergeant McCabe’s solicitors replied to Ms McLoughlin’s letter of 20 June stating that they were “shocked and taken aback by the contents of [the] letter and its implications”, and queried why the HSE had not acted in 2006/2007 if they had concerns that Sergeant McCabe posed a risk to children, given that they were aware of Ms D’s allegations at that time. The solicitors sought an explanation for the inclusion of the more serious allegation in the 29 December letter.

Ms McLoughlin forwarded the letter of 20 July to Lisa O Loughlen, Regional Social Work Team Leader.

Gerry Lowry emailed Ms McLoughlin to ask whether the case had been passed on to SART and she informed him that it had been.

21 July 2016: A reply to the letter of 20 July was sent to Sergeant McCabe's solicitors outlining that a full reply would be received in due course.

29 July 2016: Further meeting with Ms D sought by TUSLA to see if she wished to engage with risk assessment of Sergeant McCabe. This had apparently been advised to Lisa O'Loughlen by Tara Downes of the legal office in TUSLA.

2 August 2016: Ms D case considered by SART to be of high priority given "complex legal issues" and Sergeant McCabe's "profession and high media profile". Case risk escalated by Lisa O'Loughlen. Report noted concerns regarding fair procedures given that Sergeant McCabe was not contacted re allegations in 2006 by HSE. Report queried how Rhona Murphy in 2007 had made finding that Ms D allegations of sexual abuse were inconclusive as there was no report as to how she had come to that conclusion. [TUSLA risk escalation form] The risk escalation form also contained an error in that the incorrect allegation in the Barr letter is described as being based upon Ms D's statement to gardaí on 5 December 2006.

Ms D file allocated to Claire Tobin, Regional Social Worker in SART. On review of the file, she noted that Sergeant McCabe had not been contacted in 2006/7 re allegations and noted that the standard report from August 2013 received allegations which had not been recorded in 2006. A credibility assessment regarding Ms D's allegations had also not been completed, which "should have been completed prior to any contact being made with Mr. McCabe in December 2015". [Claire Tobin statement to tribunal, 24 March 2017]

5 August 2016: Claire Tobin wrote to Ms D to inform her that the regional social work team had taken over her case, previously managed by Kay McLoughlin, and offered her an appointment to meet on 18 August to "discuss the content of [Ms Brophy's] referral and explain our role". Ms Tobin telephoned Ms D to confirm re appointment on 17 August but did not receive a call back and Ms D did not attend appointment.

22 August 2016: Ms Tobin wrote to Ms D asking whether she wished to pursue the matter further, and requested a call from her to confirm whether she wished to do so or to have the matter closed.

25 August 2016: Ms D contacted TUSLA, spoke to Julie Flood, administrator, and said she did not wish to pursue the matter any further. This message was passed on to Ms Tobin.

20 September 2016: A meeting took place between Superintendent David Taylor and Sergeant McCabe, which acted as the basis for Sergeant McCabe's protected disclosure.

Legal advice sought from TUSLA's legal department by social work team regarding response to Sergeant McCabe letter of 20 July.

22 September 2016: SART's review of Ms D file conducted, the purpose being "to assist legal in their response to Mr. McCabe's legal team and outline how the case has been managed since reopening". The report found that Sergeant McCabe was "not afforded Fair Procedures with regard to the allegation made by [Ms D] – initially in 2006 and [when the case was referred again to] the Social Work Department in 2013". SART asked Ms D to attend an appointment to discuss the allegation against Sergeant McCabe, the purpose of such meeting being to "corroborate the information received" in the corrected May 2014 report form, "gather further relevant information

and assess the credibility of the allegation made” and “establish her wish to proceed and engage in the process”. However, Ms D did not attend a scheduled appointment and contacted the social work department to state that she did not wish to pursue the matter any further. In light of this, a decision was made to close the file, although the report concluded by stating that if Ms D came forward in the future regarding the 2006 allegation, TUSLA “will be obliged to reopen the matter” in accordance with its policy on historic allegations of child sexual abuse.

TUSLA then replied to Sergeant McCabe’s solicitors’ letter of 20 July, highlighting TUSLA’s statutory obligation under section 3 of the 1991 Act. However, it stated that TUSLA would “not be proceeding with its assessment of the allegations” and informed him of the decision to close the file. It was further confirmed that there were “no outstanding allegations or findings” recorded against Sergeant McCabe.

26 September 2016: Sergeant McCabe made a protected disclosure to the Minister for Justice under the Protected Disclosures Act 2014.

30 September 2016: Superintendent David Taylor made a protected disclosure to the Minister for Justice alleging that he was instructed by former Commissioner Martin Callinan, and then Deputy Commissioner Nóirín O’Sullivan, to contact the media and to brief them negatively against Sergeant McCabe, to the effect that he was motivated by malice to make complaints about garda misconduct.

12 October 2016: Mr Justice Iarfhlaith Ó Néill was appointed to review the allegations of wrongdoing contained in the protected disclosures.

7 December 2016: Mr Justice Iarfhlaith Ó Néill issued his final report to the Minister for Justice, Frances Fitzgerald TD, recommending the establishment of a commission of investigation under the Commissions of Investigation Act 2004.

14 December 2016: Further queries from Sergeant McCabe’s solicitors were sent to TUSLA, seeking information and an explanation as to how the more serious allegation against Sergeant McCabe had been made in error, and again why the HSE had not acted at an earlier stage since 2006/2007 if they had concerns that Sergeant McCabe posed a risk to children.

19 December 2016: Sergeant McCabe made a section 4 data request seeking access to all documents and information relating to him held by TUSLA. TUSLA released files to him on 5 January 2017. A subsequent similar request to the HSE resulted in the release of files to Sergeant McCabe on 6 March 2017.

8 February 2017: According to Ms D, a letter addressed to Mr D was hand delivered to their home by a male, prior to the RTÉ Prime Time special the following night. The letter notified Mr D that the programme would be focused on Sergeant McCabe, that it would involve discussion of the suicide incident and the fact that Mr D was reprimanded by Sergeant McCabe (which is untrue according to Ms D and her father), and Ms D’s allegations against Sergeant McCabe following this incident. [Ms D statement, 13 April 2017] According to Mr D, the letter “said that [RTÉ] intended to report that I was disciplined by Sergeant McCabe and that subsequently I made a complaint on behalf of my daughter against Sergeant McCabe for sexually abusing her. The vibe I got from the letter, was that I was behind the allegation against Maurice McCabe in revenge for him disciplining me.” He then made contact with Paul Williams to seek a recommendation for a solicitor and said that the Prime Time programme that aired the following day was “toned down a lot from the untruths in the letter” following an email from Kieran Kelly, solicitor. [Mr D statement to investigators, 7 June 2017]

9 February 2017: RTÉ Prime Time programme aired, which detailed the error in the referral to TUSLA made by Ms Brophy.

17 February 2017: The Tribunal of Inquiry into protected disclosures made under the Protected Disclosures Act 2014 and certain other matters was established by the Minister for Justice and Equality by instrument under the Tribunals of Inquiry (Evidence) Act 1921 as amended.

10 September 2017: Nóirín O'Sullivan stepped down from her role as Garda Commissioner.

28 November 2017: The Tánaiste and former Minister for Justice and Equality Frances Fitzgerald, facing a storm of allegations of failing to step in when Sergeant McCabe was accused of false sexual assault allegations before the O'Higgins Commission, resigns. There were no such accusations, even on the basis of the small snippets of transcript illegally passed to the media.

## **Appendix 2: A chronology of events relating to the O’Higgins Commission as it emerged from the papers distributed by the tribunal prior to or during the oral hearings**

December 1998: Alleged incident involving Ms D at the McCabe’s home around Christmastime.

5 December 2006: Ms D interviewed and made statement regarding abuse allegation against Sergeant McCabe. She said the following regarding her memory of the incident: “[w]hen I was in Primary School people were talking about humping. It was then I realised what he, McCabe had done to me was that. I could have been in 3<sup>rd</sup> Class. [That’s] when I had thoughts about what occurred. It would have been when I was in Sixth class that I realised it was not right what he had done to me. I have kept this bottled up inside me until I told my friend.”

5 April 2007: Letter from DPP stated that there was no basis for prosecution of Sergeant McCabe re: Ms D allegations. The letter stated that the evidence in the case did not warrant a prosecution, as there were no admissions and the incident described by Ms D is “vague. It appears that it was only when she was eleven/twelve that she decided that whatever occurred was sexual in nature. Even if there wasn’t a doubt over her credibility, the incident that she describes does not constitute a sexual assault or indeed an assault”. Sergeant McCabe later asked for this letter to be circulated to himself and the D family. Garda management refused to circulate the letter following the request of Sergeant McCabe as this was not procedure.

25 August 2008: Sergeant McCabe attended a meeting in Mullingar garda station with Superintendent Noel Cunningham and Sergeant Yvonne Martin. Superintendent Cunningham took notes, which were witnessed by Sergeant Martin. Sergeant Martin took no notes. The meeting was recorded by Sergeant McCabe. Superintendent Cunningham typed the notes later. The report of the meeting read as follows:

... Superintendent Noel Cunningham and Sergeant Yvonne Martin met with Sergeant Maurice McCabe at 5:30pm on the 25<sup>th</sup> August 2008 at Mullingar Garda Station.

Superintendent Cunningham explained to Sergeant McCabe that his function on this date was to investigate the allegations made by him in his report of 25 February 2008 to Superintendent Clancy, and to obtain a statement from Sergeant McCabe supporting these allegations.

Sergeant McCabe stated that this report was composed by him to highlight matters that occurred in Bailieboro District while he was Sergeant in Charge in Bailieborough Garda Station. He stated that the report was a bid by him to have the full DPP directions conveyed to him and [the D family] in relation to the allegations made against him by [Ms D] and the subsequent investigation.

In her statement to the tribunal dated 13 April 2017, Sergeant Martin stated:

To the best of my recollection [Superintendent Cunningham] sat at a computer [in Bailieboro garda station] and began typing a report in relation to the meeting. My input into the report was minimal, other than possibly answering queries which he may have raised, however, I have no specific recollection of him raising any queries with me...I did not sign this report.

11 October 2010: Annmarie Ryan recorded in an attendance on 11 May 2015 that Sergeant McCabe reportedly told Assistant Commissioner Byrne, apparently at a meeting at the Hillgrove Hotel on this date, “I will bring this job to its knees.” Present at the consultation were Ken Ruane, Garda Wayne Butler, Chief Superintendent Seán Ward, Chief Superintendent Fergus Healy,

Inspector Michael McNamara, Colm Smyth SC, Michael MacNamee BL, Garret Byrne BL and others.

18 July 2013: Ms D referral to Rian counselling service, a free counselling service in the HSE for victims of childhood abuse under the category: “survivor of past abuse – other”. Ms D recorded as attending two appointments with counsellor Laura Brophy on 24 July and 7 August 2013.

9 August 2013: Laura Brophy referred Ms D allegation against Sergeant McCabe on to the HSE’s Children and Family Services (now TUSLA) in a written referral. Under the heading “Description of abuse”, the report stated: “[redacted] informed me that she suffered sexual abuse in childhood. The abuse involved digital penetration both vaginal and anal. The alleged would also threaten [redacted] father if she said anything”. This was a complete mix-up. That allegation had never been made by Ms D, nor had anyone else made it against Sergeant McCabe. This was a cut and paste error originating from the use of a template, from an allegation made by a Ms Y against a Mr Z. Laura Brophy, upon learning of her error, did her best to withdraw the incorrect allegation.

14 May 2014: Chief Superintendent James Sheridan sent the notification of suspected child abuse to Assistant Commissioner Kenny.

16 May 2014: Assistant Commissioner Kenny forwarded the notification of suspected child abuse to Garda Headquarters. The Commissioner’s private secretary, Superintendent Frank Walsh, in his evidence to the tribunal, stated that he showed it to Commissioner O’Sullivan. Commissioner O’Sullivan told the tribunal that she did not recall being shown this notification, but accepted that it was in her office.

22 May 2014: Assistant Commissioner Kenny received notification that the referral of 9 August 2013 was made in error. Assistant Commissioner Kenny did not forward this to Garda Headquarters.

19 December 2014: O’Higgins Commission terms of reference were agreed by Government.

3 February 2015: The O’Higgins Commission was established by statutory instrument.

12 February 2015: Sergeant McCabe met with Commissioner O’Sullivan, Assistant Commissioner Twomey, Assistant Commissioner Fanning, Chief Superintendent McLoughlin, Ken Ruane and Superintendent Frank Walsh in the Commissioner’s conference room to discuss workplace issues.

22 February 2015: Commissioner O’Sullivan, Ken Ruane and other senior members of An Garda Síochána met to discuss complaints made by Sergeant McCabe about the Garda Review newspaper, and about a potential section 41 report to the Minister for Justice and Equality regarding workplace issues Sergeant McCabe was experiencing in Mullingar.

6 March 2015: Superintendent Frank Walsh wrote to Assistant Commissioner Kieran Kenny, stating that the Commissioner had appointed him as the liaison person to the O’Higgins Commission, enclosing correspondence from the Commission dated 26 February 2015.

On the same date, the solicitor to the O’Higgins Commission wrote to the Garda Commissioner requesting that “consideration might be given...to nominating another officer to fulfil that role in circumstances where it is reasonably anticipated that Assistant Commissioner Kenny may be giving evidence in the course of the commission’s work.”

12 March 2015: Chief Superintendent Seán Ward was appointed as liaison officer to the O’Higgins Commission.

20 March 2015: Commissioner O’Sullivan wrote to the Secretary General of the Department of Justice and Equality, under section 41(1)(d) of the Garda Síochána Act 2005, setting out her contact with Sergeant McCabe and the appointment of Kieran Mulvey to examine Sergeant McCabe’s concerns.

27 March 2015: The solicitor to the O’Higgins Commission informed Chief Superintendent Seán Ward and Superintendent Elizabeth Devin of the Commission’s intention to begin holding its hearings in mid-May.

7 April 2015: Assistant Commissioner Kieran Kenny wrote to Superintendent Frank Walsh recommending that “Counsel should be retained by the Commissioner as there are reputational and corporate issues for the Organisation.”

15 April 2015: At 17:10, Ken Ruane emailed the Assistant Commissioner Strategy and Change Management, Assistant Commissioner Kenny, Matthew Maguire, Noreen Collins, Superintendent Frank Walsh, and the Commissioner:

I discussed the issue of legal representation for the Commissioner...on the 30<sup>th</sup> March 2015 and following same I submitted a document to the Commissioner seeking her instructions in relation to same. ... In the circumstance pending the appointment of a solicitor from the Chief State Solicitor’s Office and Counsel I am of the view that the directions of the Commission to furnish documentation should be adhered to.

20 April 2015: Ken Ruane wrote to the Chief State Solicitor’s Office requesting legal representation for An Garda Síochána at the O’Higgins Commission. The letter was received by the Chief State Solicitor’s Office on 22 April 2015. The solicitor to the O’Higgins Commission wrote to the Garda Commissioner informing her of hearings commencing on 14 May.

27 April 2015: Annmarie Ryan appointed by the Chief State Solicitor to act as solicitor for the Garda Commissioner’s team.

28 and 30 April 2015: Annmarie Ryan requested nominations of counsel from the Office of the Attorney General.

29 April 2015: Chief Superintendent Fergus Healy appointed as liaison officer to the O’Higgins Commission. Assistant Commissioner Kenny and Chief Superintendent Ward had previously been appointed to this role.

30 April 2015: Inspector Michael McNamara, Chief Superintendent Healy and Chief Superintendent Ward had a handover meeting.

1 May 2015: Colm Smyth SC, Michael MacNamee BL and Garret Byrne BL accepted instructions from An Garda Síochána.

5 May 2015: Chief Superintendent Healy wrote to Ken Ruane, updating him on preparations for the O’Higgins Commission.

6 May 2015: Annmarie Ryan received a witness list and core booklet for module one from the O’Higgins Commission. This also included complaints of corruption, cover-up and incompetence against senior officers by Sergeant McCabe.

11 May 2015: A meeting took place with Ken Ruane, Chief Superintendent Fergus Healy, Inspector Michael McNamara, Annmarie Ryan, Colm Smyth SC, Michael MacNamee BL, Garret Byrne BL and others in attendance. Chief Superintendent Healy recorded the meeting in his diary.

Inspector Michael McNamara recorded in his notes of that meeting:

Comm will represent all members including retired- if conflict arises at any stage will have to review

Annmarie Ryan recorded in her notes of the meeting:

McCabe's initial sexual assault incident re colleague's minor daughter: Noel Cunningham will give us full details of this ...

McCabe from outset was subject of an allegation

- File sent to DPP + DPP found no crime
- allegation of indecent assault made against him
- McCabe had issues at way this allegation was investigated. McCabe sought access to his file + was refused the file.

Annmarie Ryan further recorded:

During the consultation Michael McNamee B.L. + Garret [Byrne] B.L. left to speak to Counsel for the Commission to see if there is any possibility of the forthcoming hearing dates being adjourned. Counsel for Commission indicated that there is no intention on the part of the Commission to adjourn the forthcoming hearing dates.

12 May 2015: Consultations took place with legal team for the Garda Commissioner and senior members. Superintendent Noel Cunningham met Annmarie Ryan, Colm Smyth SC, Michael MacNamee BL, Garret Byrne BL, Chief Superintendent Fergus Healy and Inspector Michael McNamara in Garda Headquarters.

On 14 January 2018, Superintendent Cunningham waived privilege over this meeting. Annmarie Ryan's notes of the meeting read:

(over 26 yrs service)

Up to 2008 Noel never had one single complaint against him by anyone. Since then there has been numerous complaints from public about him.

Question over whether McCabe behind those.

Allegations that Noel didn't carry out proper investigations. No adverse finding to-date but some still on-going.

Noel met with McCabe in Mullingar with Yvonne Martin in 2008 about complaint to Mike Clancy.

McCabe wanted his DPP File.

- This was his reason for making complaint to Mick Clancy

Noel made report of this meeting the next day (he has copy of this)

Sent this report to Monaghan

Gardai to send me report by Noel as Counsel want this.

Retired Assistant Commissioner Catherine Clancy had a consultation on the same date.

13 May 2015: Chief Superintendent Karl Heller and Superintendent Maura Lernihan had a consultation with the legal team.

In his statement to the tribunal dated 22 December 2017, Inspector Michael McNamara describes the consultations of 12 and 13 May as “urgently arranged” and recalled that during the consultations, “[c]ounsel questioned as to what was the underlying trigger/motivation to all of Sergeant McCabe’s complaints.”

14 May 2015: Day 1 of hearings at the O’Higgins Commission. Lorraine Browne, Garda Ferghal McCarthy, Sergeant Sinead Delaney and Sergeant Regina McArdle gave evidence.

Chief Superintendent Healy recorded in his diary:

Permission/instructions to use Cunningham inve[stigation]

- Motivation
- Clancy [redacted]
- Rooney [redacted]
- Then Maurice changed
- McCarthy

15 May 2015: Day 2 of the O’Higgins Commission. Sergeant Regina McArdle, Sergeant Patrick O’Connell, Assistant Commissioner Catherine Clancy and Chief Superintendent Rooney gave evidence.

Annamarie Ryan recorded in her notes:

During the afternoon hearing the Judge rose for State to discuss a matter with client re introduction of evidence re McCabe’s DPP finding [the transcripts indicate the Judge rose at around 15:10]

Fergus Healy made contact (by phone) with the Commissioner. Fergus had spoken to Commissioner the evening before (14/5/15) re this matter.

Commissioner requested Counsel’s advices + Fergus relayed same to her.

Commissioner after consideration instructed to “in light of the objections being raised by McCabe’s SC + in order to consider the matter further, for us to, if possible, seek adjournment or if not possible to go ahead + pursue questions as advised by Counsel.

During this time I telephoned Michael Dreelan AGO + informed him of above.

Garret Byrne BL sent email with Counsel’s Advices to myself + Fergus Healy

I immediately had email advices sent to Michael Dreelan

I followed this up by further telephone call to Michael Dreelan

Annamarie Ryan further wrote:

Judge asked do we believe the question of motive is relevant in this Module

Colm Smith SC says yes as McCabe + McArdle went to [Lorraine Browne] + encouraged her to go to GSOC

Missed some as making calls

Went back to Colm Smyth + informed him of Commissioner's instructions as per Fergus Healy

Commission asked do we want 5 mins

We say Yes

Before rising Judge asked do(es) this have to be introduced in this Module

Fergus made numerous calls directly to Commissioner. Appears she consulted with others- perhaps Minister

I phoned Michael Dreehan AGO + informed him of this event

I also phoned Paul Fleming CSSO + informed him

In her statement to the tribunal dated 8 December 2017, Annmarie Ryan recalled:

During evidence on Friday afternoon, 15<sup>th</sup> May (Day 2), at the request of Counsel for Sergeant McCabe, reconfirmation of the Commissioner's instructions was sought. I asked Chief Superintendent Fergus Healy to see if the Commissioner was available for an immediate consultation. Chief Superintendent Fergus Healy made contact by phone with the Commissioner. I recall him having difficulty contacting the Commissioner. Chief Superintendent Fergus Healy informed me that the Commissioner was busy and that the Commissioner requested that we seek an adjournment. Chief Superintendent Fergus Healy used a consultation room when calling the Commissioner. I was present in this room for part of this time.

I spoke to Mr. Sean Gillane SC for the Commission about the possibility of an adjournment. Mr. Gillane SC informed that Mr Justice O'Higgins was not adjourning the matter and that Mr. Justice O'Higgins wanted the Commissioner's instructions that day.

Chief Superintendent Fergus Healy had further contact with the Commissioner, following which he informed me that the Commissioner may have consulted with others. The Commissioner reverted to Chief Superintendent Fergus Healy reconfirming her instructions. Chief Superintendent Fergus Healy informed myself and Counsel that the Commissioner was confident with her decision.

...I recall asking Mr. Sean Gillane SC a second time for an adjournment. Mr Gillane SC again informed me that no adjournment would be given. ... The hearing resumed. Mr Justice O'Higgins requested that the issues be put in writing.

On Friday 15<sup>th</sup> May after the Commissioner reconfirmed her instructions, I sought a consultation with the Commissioner over the weekend. Counsel confirmed that they would make themselves available on the Saturday or Sunday. Chief Superintendent Fergus Healy later that evening informed me that the Commissioner had prior engagements over the weekend and was not available for a consultation. Later that night I sought to arrange a consultation with the Commissioner for early Monday morning, 18<sup>th</sup> May, but as matters transpired a consultation with the Commissioner was not possible.

In his statement to the tribunal dated 1 December 2017, Richard Barrett of the Office of the Attorney General recalled:

On 15<sup>th</sup> May 2015 I was informed by my colleague Michael Dreelan that he had a telephone call from the solicitor from the CSSO representing the Garda Síochána at the Commission, informing him that there had earlier that day been a dispute at the Commission between lawyers for the Gardaí and lawyers for Sgt McCabe about the expressed intention of the Gardaí's lawyers to question the motivation of Garda McCabe. It was explained that the question of motivation would be linked to an earlier allegation of a criminal offence by Sgt McCabe. It was anticipated that the dispute could result in judicial review proceedings by the Gardaí or indeed by Sgt McCabe. Soon after this, I made a telephone call to Michael Flahive in the Department of Justice to inform him of the dispute and the possibility of judicial review proceedings which could have the effect of putting into the public domain the allegation of a sexual offence.

At 15:29 Garret Byrne BL sent an email to Chief Superintendent Fergus Healy, which was copied to Colm Smyth SC, Michael MacNamee BL and Annmarie Ryan. The email read:

As counsel appointed to represent the interests of An Garda Síochána before the O'Higgins Commission, it is our view that it is appropriate and necessary that the conduct of any member of the force be challenged by way of cross-examination if and to the extent necessary.

It is likely that in the course of the process, which is a private hearing, it will become necessary to put to Sgt. Maurice McCabe certain background issues which touch upon and concern the history of his dealings with members of Garda management. In particular, we consider it necessary and in the interests of a fair and balanced examination of the subject matter of the investigation, that specific issues be put to Sgt. McCabe regarding his conduct and interactions with senior management following the completion of a formal Garda investigation into a complaint against Sgt. McCabe which resulted in a direction by the DPP that no further action was to be taken against Sgt. McCabe.

The purpose of such a line of enquiry is to open to the Commission of Investigation the full factual background surrounding the complaints made by Sgt. McCabe so that all the circumstances are clearly put before the Commission for consideration.

In his statement to the tribunal dated 11 December 2017, Michael MacNamee BL stated that "it is not the case that Superintendent Healy or the Commissioner offered any factual instructions as to the conduct of the case other than those" contained in the email above.

At 15:29, a call was placed from the Garda Commissioner's office to Noel Waters in the Department of Justice and Equality. The call lasted over 14 minutes. At 15:37, according to his diary, Chief Superintendent Healy rang the Commissioner and "explained the current developments of Colm Rooney's evidence." In his statement to the tribunal, Michael MacNamee BL stated that Chief Superintendent Healy "reverted with verbal instructions to us from Commissioner O'Sullivan to proceed as suggested in the email."

At approximately 16:00, Colm Smyth SC told the O'Higgins Commission he was attacking Sergeant McCabe's "integrity and motivation" "right the way through."

At 16:33, Annmarie Ryan forwarded Garret Byrne BL's email to Chief Superintendent Healy and Michael Dreelan. At 16:37, Michael Dreelan forwarded Garret Byrne BL's email to Richard Barrett, with the comment:

You will see the below joint email from counsel.

CSSO informs me the Commissioner has given the go-ahead for the proposed course of action.

At 16:43, Richard Barrett replied to Michael Dreelan, copying Annmarie Ryan:

Very well.

It was prudent of Annmarie to bring this development to the attention of the Office.

It is not proposed to second guess the advices of counsel below or the decision of the Garda Commissioner.

At 16:57 Michael Flahive emailed Christopher Quattrociocchi, the Minister's private secretary, asking for the email to be passed on to the Minister for Justice and Equality, Frances Fitzgerald. Martin Power, the Secretary General's office and Ken O'Leary also received the email. The email read:

Chris

Could you pass this on to the Minister for information please.

I took a call this afternoon from Richard Barrett in relation to the O'Higgins Commission of Investigation (which is investigating the matters identified by the Guerin report).

The O'Higgins Commission has started hearings, and the Garda Síochána are represented by counsel, as is Sergeant McCabe (in his case, Michael McDowell SC).

Richard wanted to let me know that counsel for the Garda Síochána has raised as an issue in the hearings an allegation made against Sergeant McCabe which was one of the cases examined by the IRM. The allegation had been that a serious criminal complaint against Sergeant McCabe (which he has always denied) had not been properly investigated by the Garda Síochána. ...

Presumably the Garda Síochána are raising the matter on the basis, they could argue (and Sergeant McCabe would deny) that it is potentially relevant to motivation. Richard advised me that counsel for Sergeant McCabe objected to this issue being raised, and asked whether the Garda Commissioner had authorised this approach. Richard also told me that the Garda Commissioner's authorisation had been confirmed (although I understand separately that this may be subject to any further legal advice).

Richard and I agreed that this is a matter for the Garda Commissioner, who is being legally advised, and that neither the Attorney nor the Minister has a function relating to the evidence a party to a Commission of Investigation may adduce.

At 17:00, Ken O'Leary replied "That's grand, Michael, thanks." At 17:04, Christopher Quattrociocchi forwarded the email to advisors William Lavelle, Marion Mannion, and Minister Frances Fitzgerald. At 17:05, Christopher Quattrociocchi emailed Michael Flahive, saying "I'll flag this to the minister." Ken O'Leary and Martin Power also received the email.

Annmarie Ryan's handwritten notes indicated that she rang Michael Dreelan at 17:55 and "gave him full details of events." She also wrote:

I telephoned FH [Chief Superintendent Fergus Healy] + informed him AGO's comments  
-not directing

-Commissioner's decision

-Line of qu may have some validity

Political dynamite!!

He'll brief Commissioner

I'll circulate draft letter once I get it from Counsel

At 19:17, counsel's email was forwarded by Chief Superintendent Fergus Healy to Commissioner O'Sullivan. His email read:

Further to our telephone conversations of even date please see the attached letter from Counsel appointed to represent our interests and those members of the organisation at Superintendent rank and higher, serving and retired, that have sought and been granted representation at the Commission of Investigation. I trust this letter grants comfort for the decision that have now been taken.

Former Commissioner O'Sullivan's phone bills indicated that she called Ken O'Leary at 21:05:56. The call lasted over 7 minutes. In his statement to the tribunal dated 14 December 2017, Ken O'Leary recalled:

On the afternoon of 15 May, 2015 former Garda Commissioner O'Sullivan contacted me in relation to a matter which had arisen at the O'Higgins Commission that day. ... My understanding from what the then Commissioner said was that counsel for Sgt McCabe had reacted strongly to an issue which had arisen at the Commission that somehow related to a previous criminal complaint made against Sgt McCabe and that counsel for Sgt McCabe had asked whether this issue was being raised on the instructions of the Commissioner.

I had no prior knowledge of what evidence An Garda Síochána intended to, or were in a position to, present at the Commission or any case that they proposed making.

I can recall being acutely conscious during the conversation of the proper position of the Department in relation to the O'Higgins Commission and I specifically remember mentioning to the then Garda Commissioner at an early stage of our discussion that the Department could not become involved in, or attempt to influence in any way, the approach of An Garda Síochána to the Commission which was entirely a matter for her as Garda Commissioner, taking into account the legal advice available to her. The then Commissioner fully accepted this. It was against that background too that I did not seek any further clarification of what had arisen at the Commission (the conduct of which I was aware was confidential) or information as to what evidence it was intended to present to the Commission or the nature of any legal case to be made.

The focus of our conversation related to the question of evidence and I do not recall it touching on any overall legal strategy counsel for the Commissioner might indicate to the Tribunal ...

While clearly accepting that the Department could have no role in determining the Garda position in relation to the Commission, the Commissioner asked me if, based on my experience, anything occurred to me which she might need to be mindful of in addressing this particular issue with her legal advisers. ... matters mentioned were the need for sensitivity in relation to protecting the position of Sgt McCabe, the position of other people

at the Commission against whom serious allegations had been made, the likely adverse reaction of the Commission to the introduction of matters which it might consider inappropriate and the overall duty on the Garda Commissioner to assist the Commission in whatever way possible to establish the facts of what the Commission had been asked to investigate. The Commissioner was then going to discuss these matters with her legal advisers and I think I reiterated the view that she would have to be guided by the legal advice available to her. I also believe I suggested that, from her point of view, it might be helpful if it was possible to gain more time so she could consider the matter more fully with her legal advisers.

To the best of my recollection, I received a further call shortly afterwards from the then Garda Commissioner (I think that at least for some of that call she was also on the phone to the Garda HQ Legal Officer at the O'Higgins Commission). As I understood it the Commissioner was being advised that her legal representatives at the Commission had to respond more or less immediately to the issue which had arisen earlier and the view of her legal team was that in discharging her obligation to the Commission there was a legal duty on her to raise matters which had arisen. I believe that, in the circumstances, the Commissioner indicated to the effect that her legal team should maintain their position that afternoon but there would be further detailed consultation with her legal team subsequently about the matter. ...

I do not believe that at any stage I alerted the Minister to the discussion which I had with the Garda Commissioner. My recollection is that I took the view that the Minister should not have any involvement in any matters relating to the case to be made by one of the parties to a Commission which she had established and, in any event, I was satisfied that she would be informed of the fact that a dispute had arisen between counsel by Mr Flahive's email.

16 May 2015: At 21:45, Michael MacNamee BL emailed Annmarie Ryan, Chief Superintendent Fergus Healy, Garret Byrne BL and Colm Smyth SC:

I ATTACH for your immediate attention a draft wording to be incorporated into our letter to the Commission.

It is of the UTMOST importance that the content be as factually accurate as possible such that there are no misstatements and nothing that cannot be backed up by oral or documentary evidence (with the exception of the facts alleged, recited or admitted by McCabe himself).

You will note the various comments and insertions and notes in the text and please respond to these with any particular observations or changes or suggestions in the actual document. In certain situations I have left issues for Colm to decide. If Fergus has any view of any of those issues then such a view will bind us and does not require counsel's approval.

Fergus should obtain the required instructions and insert these into the text where indicated. Also if the sequencing or paragraphs need to be switched around then please do this in accordance with instructions to the extent possible. Once this is complete Fergus should rename the document and send it back to me so that I can draft the full letter for Annmarie.

Annmarie Ryan recorded on a printout of the email from Garret Byrne BL:

Spoke to Fergus Healy @ 9:30pm. I pointed out my 2 concerns. I asked him to speak with Michael Clancy + get his views before we send it to Noel + Colm. He will come back to me in the morning.

Ken Ruane phoned me at 23:05. I relayed to him brief overview of what happened yesterday. I asked him to speak with Fergus. I told him I needed McCabe's 2 statement of claims/PI summons. He will get those to me on Monday.

Ken Ruane made an attendance note of this phone call, recording it as taking place at 23:00:

Phonecall AM Ryan CCSO re O'Higgins

Contentious issue arisen + C/S FH can fill me in. Instructions taken from Comm

Counsel advised full background to issues necessary to explore.

File to DPP + directions issued.

MMcD- are those instructions of Comm? CS advises these are relevant matters.

Talk to C/S FH

KR- received transcripts + has copy sent to C/S FH?

Ken Ruane wrote an attendance note of a phone call with Chief Superintendent Healy at 23:15:

Instructions obtained Comm + counsel written advices

Counsel wanted to know "how did this begin + what started all of this?"

Allegation assault MMcC + file to DPP. No prosecution. Issue re DPP directions

Counsel advised in writing + Comm gave instructions

KR has transcript, AM Ryan CSSO also has transcript.

FH needs documentary counsel urgently to assist

Annmarie Ryan, in her statement to the tribunal stated that she circulated all drafts of the letter delivered to the Commission on 18 May to Chief Superintendent Fergus Healy, former Chief Superintendent Colm Rooney and Superintendent Cunningham. She also circulated their replies to counsel. Annmarie Ryan further stated that she had telephone conversations with former Chief Superintendent Rooney and Superintendent Cunningham over the course of the weekend.

Michael MacNamee BL, in his statement to the tribunal dated 11 December 2017, stated that the "letter was based on factual instructions received from Clients other than Commissioner O'Sullivan, and those Clients approved the content of the letter before it was delivered to the O'Higgins Commission."

Inspector Michael McNamara, in his statement to the tribunal, stated that he was not aware of the letter being drafted, and had no input into it. He stated that he later saw the document in May 2016 when asked by Chief Superintendent Healy to prepare a folder of relevant material in respect of the Commissioner's instructions at the O'Higgins Commission.

18 May 2015: Day 3 of hearings at the O'Higgins Commission. Sergeant McCabe was cross-examined by Colm Smyth SC. Evidence was given by Chief Superintendent Colm Rooney,

Superintendent Karl Heller, Sergeant Tom Miller, Sergeant Gavigan, Superintendent Noel Cunningham, Superintendent Maura Lernihan, Inspector McMahon, Sergeant David Burke, Chief Superintendent Grogan, Conor Brady, Kevin Duffy and George O'Doherty.

At 09:32 Annmarie Ryan emailed Chief Superintendent Fergus Healy, Michael MacNamee BL and Garret Byrne BL a copy of a letter to David O'Hagan, solicitor for the O'Higgins Commission. This was lodged with the O'Higgins Commission as a submission and read as follows:

As directed by the Judge in the course of the hearing on Friday, the 15<sup>th</sup> of May 2015 we hereby provide the factual issues to be put to Sergeant Maurice McCabe.

1. In summer 2004, both Sergeant McCabe and a colleague applied for the vacant position of Sergeant in Charge of Bailieboro Garda Station. Sergeant McCabe was successful and took up the duties of Sergeant in Charge in October 2004.
2. In January 2006, Sergeant McCabe made a complaint against this colleague which resulted in a disciplinary sanction being imposed on the colleague.
3. The colleague applied for a transfer to another Garda Station in December 2006 which request was refused for operational reasons due to the supervisory needs of Bailieboro station.
4. In December 2006, the colleague and his wife, on behalf of their daughter, made a complaint against Sergeant McCabe. Chief Superintendent Colm Rooney duly appointed Inspector (now Superintendent) Noel Cunningham to carry out a formal Garda investigation into the complaint.
5. Inspector Cunningham completed his investigation and forwarded the Garda Investigation File to the office of the Director of Public Prosecutions on or about the 19<sup>th</sup> of February 2007. Inspector Cunningham stated in his report to the Director of Public Prosecutions "taking all matters into consideration, including the question of whether the event if it happened, constituted a breach of the criminal law, it is felt that there is no ground for a criminal prosecution
6. The Director of Public Prosecutions communicated the decision not to initiate any form of action against Sergeant McCabe and the observation was made that it was doubtful that the allegations could constitute a crime at all. The said directions were issued by way of letter dated 5<sup>th</sup> of April 2007 to the Cavan State Solicitor. Inspector Cunningham had requested that the directions from the D.P.P. were to be forwarded for his attention rather than addressed in the usual way to the Station and he received the directions, as he had requested, marked for his attention.
7. Upon receipt of the said directions, Inspector Cunningham undertook the task of informing the parties to the complaint of the outcome of the investigation and the directions of the D.P.P. He advised the colleague and his wife on the 24<sup>th</sup> of April 2007.
8. On the same day (the 24<sup>th</sup> of April 2007) Inspector Cunningham sought to make an appointment with Sergeant McCabe to similarly advise him of the outcome of the investigation and the response from the D.P.P. However Sergeant McCabe was on sick leave from the 24<sup>th</sup> of April 2007 to the 21<sup>st</sup> of May 2007. Inspector Cunningham called Sergeant McCabe to arrange to meet, but Sergeant McCabe initially refused but subsequently agreed to meet on the 8<sup>th</sup> of May 2007.
9. On the 8<sup>th</sup> of May 2007, Inspector Cunningham met with Sergeant McCabe by appointment at the Bailie Hotel. Inspector Cunningham was alone but Sergeant McCabe was accompanied by Sergeant Regina McArdle who was present initially as A.G.S.I. representative and then Welfare Officer. Inspector Cunningham duly informed Sergeant McCabe of the outcome of the investigation and the response/directions of the D.P.P.

10. On 15<sup>th</sup> and 17<sup>th</sup> October 2007, there were two incidents in which Sergeant McCabe had an encounter with the wife and daughter, respectively, of the aforementioned colleague. Following those incidents, Sergeant McCabe raised with Superintendent Clancy the issue of dissemination of the DPP's directions which were given at the conclusion of an investigation into an allegation assault against Sergeant McCabe. Sergeant McCabe stated that he was of the view that the colleague's family were unaware of the DPP's directions. He stated that he was aware that Inspector Cunningham had met the colleague's family concerning the outcome of the DPP's directions. As a consequence, on the 22<sup>nd</sup> October 2007, Superintendent Clancy sent a minute to Inspector Cunningham in Monaghan seeking his observations on the issue.
11. Superintendent Clancy recalls having a meeting with Sergeant McCabe at the beginning of February 2008. At that meeting, Superintendent Clancy ascertained from Sergeant McCabe that he had no desire to have the colleague's family prosecuted for the incidents he complained about ... Sergeant McCabe stated that he would forward a report indicating that he did not wish to have the colleague's family prosecuted. At the same meeting, Superintendent Clancy informed Sergeant McCabe that he had been in contact with Inspector Cunningham on the issue of dissemination of the DPP's directions. Superintendent Clancy informed Sergeant McCabe that Inspector Cunningham had communicated the DPP's directions to the colleague's family on 24<sup>th</sup> April 2007. Sergeant McCabe then stated that he wished to view the actual written direction given by the DPP. Sergeant McCabe stated he felt that he should be 'exonerated' by the DPP. Sergeant McCabe stated that he would make written application to the Superintendent to have the DPP's written directions shown to him. On 7<sup>th</sup> February 2008, Superintendent Clancy sent a minute to Sergeant McCabe giving the outcome of his enquiries with Inspector Cunningham on the issue of dissemination of the DPP's directions.
12. On Tuesday, 26<sup>th</sup> February 2008, Superintendent Clancy received an envelope marked 'personal' containing a report dated 25<sup>th</sup> February 2008 from Sergeant McCabe. In this report, Sergeant McCabe made a number of allegations of incidents which allegedly occurred as far back as 2004 against the colleague and other unnamed members of Bailieboro Garda Station. Sergeant McCabe acknowledged that he received Superintendent Clancy's minute of 7<sup>th</sup> February 2008. Sergeant McCabe asked for full disclosure of the DPP's directions *"I urge you, if you can, to asked [sic] the Director of Public Prosecutions to allow the full D.P.P. Directions to be conveyed to me and the other party, in particular [the colleague's wife], in this particular case due to the fact that all parties work in close proximity and I would really appreciate it. That is all I am asking."*
13. Superintendent Clancy immediately forwarded this report to the Divisional Officer, Chief Superintendent Colm Rooney, recommending that the allegations made by Sergeant McCabe be investigated. In the meantime, Superintendent Clancy sought sight of the written directions as given by the DPP. Having carefully viewed the content of the DPP's directions, the Superintendent decided that he would adhere to the DPP's Guidelines and that he would not request release of the contents of the document. On 11<sup>th</sup> March 2008, Superintendent Clancy met Sergeant McCabe and gave him the outcome of his decision.
14. Sergeant McCabe was unhappy with the outcome of the decision of the Director of Public Prosecutions, as he believed that the decision ought to have completely exonerated him rather than recording that there was not sufficient evidence to proceed against him.
15. In or around the same time, Sergeant McCabe presented Superintendent Clancy with a series of operational issues for his attention, which were of a type which would normally have been dealt with by the Sergeant in Charge of the station.

16. Sergeant McCabe sought an appointment to see Chief Superintendent Colm Rooney and this was facilitated in June/July 2007. At the meeting Sergeant McCabe expressed anger and annoyance towards the Director of Public Prosecutions. He demanded that Chief Superintendent Rooney communicate with the Director of Public Prosecutions to seek a declaration of his innocence from the Director of Public Prosecutions in relation to the allegation. Chief Superintendent Rooney advised Sergeant McCabe of the policy of the Director of Public Prosecutions in dealing with such issues, a policy which Sergeant McCabe was himself professionally aware of. Chief Superintendent Rooney told Sergeant McCabe that he could not seek such a declaration on Sergeant McCabe's behalf from the Director of Public Prosecutions.  
Chief Superintendent Rooney pointed out to Sergeant McCabe that from his own experience of dealing with criminal files to the Director of Public Prosecutions he was aware of the Director of Public Prosecutions role to determine if sufficient evidence was available on a file to direct a prosecution. Chief Superintendent Rooney advised Sergeant McCabe that it was not the Garda Commissioner's policy that An Garda Síochána challenge the Director of Public Prosecutions on his decisions. Chief Superintendent Rooney further pointed out to Sergeant McCabe that, as a private citizen, it was open to him to write to the Director of Public Prosecution if he so wished to seek the declaration he required.
17. In March 2008 Sergeant McCabe applied to be redeployed from his position as Sergeant in Charge of Bailieboro Garda Station and this request was granted.
18. Pursuant to the complaint made by Sergeant McCabe on the 26<sup>th</sup> February 2008 to Superintendent Clancy, Chief Superintendent Colm Rooney appointed Inspector Noel Cunningham to carry out an investigation.
19. Having been appointed to investigate Sergeant McCabe's complaint against Superintendent Clancy, now Superintendent Noel Cunningham, having attempted on a number of occasions to meet with Sergeant McCabe, eventually met with Sergeant McCabe by appointment on the 25<sup>th</sup> August 2008 in Mullingar Garda Station, to receive details of his formal complaint. Superintendent Cunningham was accompanied to this meeting by Sergeant Yvonne Martin. Notes were taken at the meeting and countersigned by Sergeant Martin, and a detailed report of the meeting was prepared by Superintendent Cunningham, and its contents agreed with Sergeant Martin and forwarded to Chief Superintendent Rooney. In the course of this meeting Sergeant McCabe advised Superintendent Cunningham that the only reason he made the complaint against Superintendent Clancy was to force him to allow Sergeant McCabe to have the full DPP directions conveyed to him.
20. It is understood that Sergeant McCabe had further interactions with Assistant Commissioner Derek Byrne and Chief Superintendent Terry McGinn prior to the investigation carried out by them.

At 17:38, Denis Griffin emailed Michael Flahive saying that his email of 15 May 2015 had been "Noted by Acting SG".

19 May 2015: Day 4 of the O'Higgins Commission hearings. Chief Superintendent Rooney, Superintendent Noel Cunningham, Chief Superintendent Terry McGinn, Assistant Commissioner Derek Byrne and Garda Ferghal McCarthy gave evidence.

GSOC delivered a report to Garda Headquarters, pursuant to section 97 of the 2005 Act, informing the gardaí of the conclusion of their investigation into Ms D's complaint about the 2006/07 investigation into her allegation against Sergeant McCabe.

21 May 2015: In her statement to tribunal investigators, Commissioner O’Sullivan stated that her e-calendar had a record of a meeting between herself, Chief Superintendent Healy and Colm Smyth SC for that date.

On the same day, GSOC wrote to Martin Power:

On 19 May 2015, GSOC delivered a report to Garda Headquarters in accordance with section 97 of the Garda Síochána Act 2005, as amended. Ms D has also been informed of the conclusions reached by GSOC during its investigations.

GSOC understands that Mr Paul Williams, journalist, is aware of the allegations made by Ms D against Sergeant McCabe.

Given the specifics of the case, GSOC feels that the Minister should be informed of the progress of the investigation and you may wish to bring this correspondence to her attention.

At 15:37, Frank McDermott emailed Christopher Quattrociochi, copying Noel Waters, Ken O’Leary, Michael Flahive, Martin Power, Mark Dugdale and John English:

Re: Report from GSOC on conclusion of their investigation of the complaint by Ms D of an alleged cover up by Gardai of sexual assault allegations made against Sergeant Maurice McCabe

1. Ms D’s case is amongst those under consideration under the independent review mechanism. Deputy Michéal Martin made representations in relation to the case.

25 May 2015: At 12:21, Christopher Quattrociochi emailed Michael Flahive saying “The Minister has noted” the email of 15 May.

26 May 2015: Chief Superintendent Fergus Healy recorded some notes in his diary regarding the O’Higgins Commission hearing on 15 May 2015 and his phone conversations with the Commissioner:

Commissioner sought time to speak to DoJ

Then returned with instructions that we

1. In light of the developments on the front that Sergeant McCabe had issues with now working in Mulligan + his welfare could we seek a deferral until we seek advice

Commissioner then rang a second time and advised that on reflection that [if] it first came out in the course of questioning then Counsel should explore it, & it was her view that if he (Counsel) was advising that we explore the area of motive & that it was necessary then she was inclined to give instructions to him to explore this issue. It would be remiss of her not to instruct him to proceed. Therefore Commissioner instructed Counsel to pursue that specific line of questioning.

27 May 2015: Martin Power updated Michael Flahive on the outcome of the GSOC investigation into Ms D’s complaint. A printed version of this memo bore a handwritten note from Michael Flahive which read “Minister For Your Attention M Flahive 2/6/15”. It also appeared to have been initialled by Minister Fitzgerald.

11 June 2015: The Commissioner's legal team made written submissions to the O'Higgins Commission in relation to module one. The submissions were drafted by Garret Byrne BL, and included the following paragraphs:

63. A complaint was made against Sgt McCabe around December 2006 which involved a sensitive and serious matter.

64. An investigation was carried out by Supt Cunningham (at that time, an inspector based in Monaghan) commencing around the 8<sup>th</sup> December 2006 relating to Sgt McCabe. Supt Cunningham reported his recommendation to the Director of Public Prosecutions on the 19<sup>th</sup> February 2007. Supt Cunningham offered the view and the DPP determined that the complaint against Sgt McCabe did not disclose any criminal conduct.

65. It appears that the DPP's directions were communicated separately to Sgt McCabe. This ought not to have happened as Supt Cunningham ought to have been informed first. The directions were dated the 5<sup>th</sup> April 2007 and were sent to the State Solicitor's Office on the 11<sup>th</sup> April 2007 and subsequently sent to Supt Cunningham at his office in Monaghan. It is not clear when the directions were sent to Supt Cunningham, but as he was acting district officer in Bailieboro from the 12<sup>th</sup> April 2007, he did not receive the directions until he returned to Monaghan on the 24<sup>th</sup> April 2007. Supt Cunningham had requested that the State Solicitor communicate only with him as otherwise, the DPP's direction would have been opened by someone else in Monaghan station.

66. At this stage, unbeknownst to (then) Insp Cunningham, Sgt McCabe had been aware of the direction for almost three weeks. As Sgt McCabe was unaware that Insp Cunningham had not received the direction during this period, he appears to have inferred or surmised for whatever reason that this delay was calculated to prolong the distress of the investigation. Insp Cunningham (since promoted to Superintendent) will absolutely deny that he was guilty of any deliberate delay and he will say that the delay was as a result of the procedure he had put in place which was calculated, in the utmost of good faith, to spare Sgt McCabe any additional stress if the directions were to have been accessed by any member but Insp Cunningham. .

67. Insp Cunningham informed the complaining party first and then sought to meet Sgt McCabe to inform him. Sgt McCabe initially refused to meet him, but the meeting took place on the 8<sup>th</sup> May 2007, and Sgt McCabe was accompanied by Sgt McArdle. Supt Cunningham informed Sgt McCabe that the DPP's directions recorded the phrase "Nothing of a criminal nature in the complaint".

68. Sgt McCabe's next actions are not absolutely clear (as the witnesses' memories of their conversations with him differ slightly), but it appears that he wanted something additional from the DPP so as to establish his innocence to the complaining party. It is possible that these differences are because Sgt McCabe himself changed his approach slightly over time and with difference colleagues. It appears that he requested from Chief Supt Rooney that he contact the DPP to seek a declaration of his innocence. It is understood that, should he give evidence on this point, Superintendent Michael Clancy will say that Sgt McCabe also contacted him seeking the DPP's file in order to show it to the complaining party. Whatever the exact nature of the request, they each refused. Chief Supt Rooney's evidence is that Sgt McCabe was very angry at the refusal.

69. Sgt McCabe then made a series of complaints against other officers in Bailieboro station, including Supt Clancy, against whom he alleged a lack of support. Chief Supt Rooney appointed Supt Cunningham to investigate these complaints. Supt Cunningham

attempted to meet Sgt McCabe to discuss the complaints and finally did so on the 25<sup>th</sup> August 2008. On this occasion Supt Cunningham was accompanied by Sgt Yvonne Martin.

70. It is understood that Supt Cunningham and Sgt Martin will give evidence that Sgt McCabe said at that meeting that the complaint which he had made (alleging lack of support as referred to in the preceding paragraph) was a bid by him to have the full DPP direction conveyed to him and to the complaining party. This is recorded in a report of the meeting prepared jointly by Sergeant Martin and Superintendent Cunningham.

Annmarie Ryan stated that the submissions were approved by Chief Superintendent Fergus Healy, Assistant Commissioner Catherine Clancy, Chief Superintendent Colm Rooney, Chief Superintendent Karl Heller, Superintendent Noel Cunningham, and Superintendent Maura Lernihan.

19 June 2015: David O'Hagan, solicitor to the O'Higgins Commission emailed Annmarie Ryan and Chief Superintendent Healy a copy of the transcript of Sergeant McCabe's recording of the Mullingar meeting of 25 August 2008.

24 June 2015: Day 5 of the O'Higgins Commission hearings. Superintendent Noel Cunningham, Garda Naughton, Garda Rice, Detective Garda McDonnell, Sergeant Jones, Sergeant Quinn, Sergeant Maura Lernihan, Sergeant Maurice McCabe and others gave evidence. Judge O'Higgins said that paragraph 19 of the letter of 18 May 2015 appeared to be incorrect.

Chief Superintendent Healy took a note of the hearings:

(Commission of Investigation)

Para 19 of the submission to the Commission by the CSSO word 'against' instead of the word 'to'

Transcript verified by the Commission on Page 10

Reason for investigation was to investigate complaint against allegation made about [Mr D] and not Mick Clancy 'against' should [be] 'to'

25 June 2015: Day 6 of the O'Higgins Commission hearings. Sergeant Maurice McCabe, Superintendent Noel Cunningham, Chief Superintendent Michael Clancy and Superintendent Terry McGinn gave evidence.

26 June 2015: Day 7 of the O'Higgins Commission hearings. Chief Superintendent Terry McGinn, Assistant Commissioner Derek Byrne, Majella Cafolla, Garda Fearghal McCarthy, Garda Rudy Kelly, Superintendent Noel Carolan, Sergeant Thomas Murray and Chief Superintendent Michael Clancy gave evidence.

29 June 2015: Day 8 of the O'Higgins Commission hearings. Garda Laura Martyn, Garda Fearghal McCarthy, Garda Doyle, Superintendent John McFadden, Superintendent Michael Clancy, Sergeant Maurice McCabe, Assistant Commissioner Kieran Kenny and Chief Superintendent Terry McGinn gave evidence.

30 June 2015: Day 9 of the O'Higgins Commission hearings. Garda James Morrisroe, Garda Rudy Kelly, Sergeant Chris McCormack, Sergeant Tom Miller, Chief Superintendent Michael Clancy, Sergeant Fyfe and others gave evidence.

1 July 2015: Day 10 of the O'Higgins Commission hearings. Sergeant Maurice McCabe, Garda Laura Martyn, Superintendent Noel Cunningham, Assistant Commissioner Kieran Kenny, Chief

Superintendent Michael Clancy, Assistant Commissioner Derek Byrne, Mary Lynch, Garda Padraig McEvoy and Superintendent Maura Lernihan gave evidence.

2 July 2015: Day 11 of the O’Higgins Commission hearings. Garda Padraig McEvoy, Garda Thomasina Connolly, Garda Sean Daly, Garda Peter O’Sullivan, Superintendent John Courtney, Superintendent Noel Cunningham and others gave evidence.

3 July 2015: Day 12 of the O’Higgins Commission hearings. Superintendent Noel Cunningham and Sergeant Maurice McCabe gave evidence.

4 July 2015: At 20:05, Ken O’Leary emailed Minister Frances Fitzgerald, copying William Lavelle, Noel Waters, Dale Sunderland, Fiona O’Sullivan, Marion Mannion, Michael Flahive and Christopher Quattrociocchi. The email said that the Garda Commissioner had phoned him to tell him that the Garda Press Office had received queries about whether Sergeant McCabe “was looking to be taken out of the traffic unit in Mullingar” and whether the Garda Commissioner had “instructed counsel to adopt an aggressive stance towards Sergeant McCabe at the O’Higgins Commission.”

At 20:56, Commissioner Nóirín O’Sullivan forwarded a press office query which had come from John Burke of RTÉ regarding Sergeant McCabe to Ken O’Leary, along with the garda response.

At 21:30, Ken O’Leary emailed Frances Fitzgerald, copying a number of other officials in the Department. The email read in part:

The Garda response refers to reporting restrictions on the workings of the Commission. The governing legislation provides that a person shall not disclose or publish any evidence given by a witness in private. While there may be a technical argument to be made that Mr Burke’s reference to what counsel raised, rather than what a witness said in evidence may not be covered by that you will appreciate that it would be completely inappropriate for you to comment in any way on the working of the Commission. The conduct of the Garda case at the Commission is entirely a matter for the Garda Commissioner on the basis of the legal advice available to her.

22 July 2015: Day 13 of the O’Higgins Commission hearings. Detective Sergeant John Long, Inspector Thomas O’Brien, Superintendent Gerard Redmond, Sergeant Martin Conroy, Inspector McMorrough, Deputy Commissioner Nacie Rice, Chief Superintendent Michael Cloonan, Declan Farrell and Jon Leeman gave evidence.

23 July 2015: Day 14 of the O’Higgins Commission hearings. Chief Superintendent Michael Clancy, Superintendent Noel Cunningham, Chief Superintendent James Sheridan, Superintendent Thomas Maguire, Chief Superintendent Terry McGinn, Assistant Commissioner Fintan Fanning and Sergeant Thomas Murray gave evidence.

24 July 2015: Day 15 of the O’Higgins Commission hearings. Garda Caroline Brady, Garda Adrian O’Hanlon, Garda Jerome Crawford and Sergeant Martin Conroy gave evidence.

27 July 2015: Day 16 of the O’Higgins Commission hearings. Sergeant Richard Bolger, Inspector Kevin Gavigan, Sergeant Maurice McCabe, Garda O’Hanlon, Garda John Maher, Chief Superintendent Michael Clancy, Superintendent Noel Cunningham, Chief Superintendent Colm Rooney, Superintendent Gerry O’Brien, Chief Superintendent Terry McGinn and Assistant Commissioner Derek Byrne gave evidence.

28 July 2015: Day 17 of the O’Higgins Commission hearings. Aidan Connolly, Elizabeth Burmiston, Garda Sean Daly, Garda Lisa Stephens, Inspector Kevin Gavigan, Sergeant Maurice McCabe and Chief Superintendent James Sheridan gave evidence.

29 July 2015: Day 18 of the O’Higgins Commission hearings. Superintendent Maura Lernihan, Sergeant Maurice McCabe, Superintendent Michael Clancy, Garda Ronan Geraghy and Superintendent Maura Lernihan gave evidence.

15 September 2015: At 12:09, Annmarie Ryan emailed Colm Smyth SC, Michael MacNamee BL and Garret Byrne BL, attaching an article by John Mooney of the Sunday Times, dated 13 September 2015. The email said that the Commissioner had requested that this be raised with counsel in order to seek advices as to recommended action. The article was headlined “O’Sullivan asked to speak out on McCabe” and read as follows:

Garda Commissioner Nóirín O’Sullivan has been asked to clarify her position on whistleblower Maurice McCabe following a row at the O’Higgins commission which is investigating allegations of garda malpractice in the Cavan/Monaghan division.

The move follows a row over the approach taken to McCabe by lawyers representing the force, who have questioned the whistleblower’s motivation for making complaints about fellow colleagues. McCabe denies acting with malice.

It is understood that McCabe has been subjected to “strong questioning” by lawyers representing Garda Headquarters and others, who have queried why he made repeated allegations against his colleagues to garda management, the Garda Síochána Ombudsman Commission and the Department of Justice.

21 September 2015: Day 19 of the O’Higgins Commission hearings. Garda Peter O’Sullivan, Sergeant Tom Murray, Superintendent Noel Cunningham, Noel Crossan, Chief Superintendent Colm Rooney, Inspector Patrick McMorrow and Chief Superintendent Terry McGinn gave evidence.

22 September 2015: Day 20 of the O’Higgins Commission hearings. Chief Superintendent Terry McGinn, Assistant Commissioner Derek Byrne, Garda Peter O’Sullivan and Inspector Kevin Gavigan gave evidence.

23 September 2015: Day 21 of the O’Higgins Commission hearings. Inspector Kevin Gavigan, Sergeant Paul Carroll, Garda Paul O’Shannon, Garda Sinéad Killian, Sergeant Damian Martin and others gave evidence.

24 September 2015: Day 22 of the O’Higgins Commission hearings. Garda Sinéad Killian, Sergeant Annemarie Lardner, Chief Superintendent Michael Clancy and Garda Andrew Scannell gave evidence.

25 September 2015: Day 23 of the O’Higgins Commission hearings. Inspector Kevin Gavigan gave evidence.

19 October 2015: Day 24 of the O’Higgins Commission hearings. Garda Sinéad Killian, Sergeant Tom Murray, Sergeant Maurice McCabe, Superintendent John G O’Brien and Superintendent Noel Cunningham gave evidence.

20 October 2015: Day 25 of the O’Higgins Commission hearings. Superintendent Noel Cunningham, Sergeant Chris McCormack, Garda Marie Glennon, Superintendent Colm

Featherstone, Chief Superintendent Colm Rooney and Detective Superintendent Tom Maguire gave evidence.

The garda legal team had consultations with Commissioner O'Sullivan. Inspector Michael McNamara, in his statement to the tribunal, said the following:

My diary records notes of a conversation which referred to the issue of [the Commissioner's] instructions on the 2<sup>nd</sup> day of Commission hearings and the choices for dealing with this issue if it arose during her cross examination at the Commission. The options recorded were that either the Commissioner cannot be questioned on lawyer client privilege in that she sought advices and gave instructions, or the second option was if the Commission was to force an answer regarding her instructions the choice was to deal with it head-on, that is, the instructions were given on the basis that there is a duty to be fair to everybody. My diary records notes that 'want it met head on but in a separate module'. During the conversation the Commissioner referred to various public statements wherein she expressed support for whistleblowers.

Anmarie Ryan recorded in her notes of the consultation:

Discussed McCabe's motivation

Responsible for corporate body

Duties to all employees

Cannot be a one-sided Tribunal/show

Commissioner has a responsibility

Role in Module 5 is during her time as A/C in HRM

Colm Smyth SC can refuse/object to this line of questioning as no doubt McDowell will try this line of questioning.

So either deal with it had on or Colm object- legal/client privilege

Commissioner would not want to set a precedent if meeting it head on

21 October 2015: Day 26 of the O'Higgins Commission hearings. Detective Superintendent Tom Maguire gave evidence.

22 October 2015: Day 27 of the O'Higgins Commission hearings. Sergeant Maurice McCabe, Assistant Commissioner Catherine Clancy, Chief Superintendent John Grogan and Assistant Commissioner Derek Byrne gave evidence.

3 November 2015: Day 28 of the O'Higgins Commission hearings. Dermot Ahern, Brian McCarthy, Chief Superintendent Colm Rooney gave evidence.

Anmarie Ryan recorded an attendance of a consultation with Commissioner Nóirín O'Sullivan, Colm Smyth SC, Garret Byrne BL, Michael MacNamee BL, Chief Superintendent Fergus Healy and Inspector Michael McNamara:

Motivation - we questioned this no particular mala fides against McCabe - just his motivation

In his statement to the tribunal, Inspector McNamara said:

In my recollection, Counsel introduced the consultation by referring to the words motivation and bad faith that had previously been raised at the Commission, that mala fides was introduced by the Judge, that it was posed as a question by the Judge, that it was never a problem until the [Ms D] case, that initially the view was to question his motivation and not on the issue of mala fides and that these matters could arise as an issue for Commissioner O’Sullivan to address in her testimony the following day.

Inspector McNamara also took notes of the consultation:

Comm- we didn’t question his mala fides- we questioned his motivation

-It may well be mala fides but that is a matter for Commission

CS- challenged his credibility

To hold balance between establishing facts & good name of those involve, to assist commission

On the same day, Chief Superintendent Healy took the following notes of the Commission hearings:

Standing over allegation of motivation.

(Mal fides.) - Bad faith – would the Commissioner consider withdrawing

Whistleblowers may not always be right but we must listen to them

But the matter of mal fides is a matter for the Commission

4 November 2015: Day 29 of the O’Higgins Commissioner hearings. Commissioner O’Sullivan, former Commissioner Fachtna Murphy, Assistant Commissioner Fintan Fanning, Oliver Connolly, former Commissioner Martin Callinan and Michael Flahive gave evidence.

Mr Justice O’Higgins sought clarification from Colm Smyth SC “in relation to a question that has been dormant for some time, concerning the integrity of Sergeant McCabe and his mala fides or bona fides in making his complaints.” Colm Smyth SC said that any reference to Sergeant McCabe’s character and a challenge to his integrity was “my mistake”, and that only the credibility and motivation of Sergeant McCabe were in issue.

5 November 2015: Day 30 of the O’Higgins Commission hearings. Michael Flahive, Brian Purcell, Kevin Clarke, Alan Shatter and others gave evidence.

7 December 2015: Day 31 of the O’Higgins Commission hearings. Maurice McCabe, Garda James Morrisroe, Chief Superintendent Michael Clancy and others gave evidence.

8 December 2015: Day 32 of the O’Higgins Commission hearings. Superintendent Noel Cunningham, Chief Superintendent Colm Rooney and Assistant Commissioner Derek Byrne gave evidence.

9 December 2015: Day 33 of the O’Higgins Commission hearings. Superintendent Gerard Wall, Chief Superintendent Terry McGinn, Chief Superintendent James Sheridan, Sergeant Scott and Assistant Commissioner Jack Nolan gave evidence.

17 December 2015: Day 34 of the O’Higgins Commission hearings. Garda Laura Martyn gave evidence.

15 February 2016: O'Higgins Commission issues a first draft report to interested parties.

10 March 2016: Commissioner O'Sullivan had a consultation with her legal team.

25 March 2016: AGS legal team made submissions on the draft report of the O'Higgins Commission.

21 April 2016: Final report of the O'Higgins Commission circulated to the parties.

25 April 2016: Consultation between counsel for AGS and Superintendent John Ferris, Superintendent Frank Walsh, Chief Superintendent Fergus Healy and Inspector Michael McNamara.

9 May 2016: RTÉ broadcasts on radio and television based on a leaked copy of the O'Higgins Commission report.

11 May 2016: O'Higgins Commission report published.

13 May 2016: Consultation between counsel and Commissioner O'Sullivan, Andrew McLindon, Superintendent Fergus Healy, Ken Ruane, Deputy Commissioner John Twomey.

Michael Clifford of the Irish Examiner requested a comment from Commissioner O'Sullivan on issues arising from the leaked O'Higgins Commission transcript extracts.

16 May 2016: Consultation between counsel and Commissioner O'Sullivan, Deputy Commissioner John Twomey, Andrew McLindon, Superintendent Murphy, Chief Superintendent Fergus Healy and Ken Ruane.

A briefing note was prepared ahead of a meeting between the Minister for Justice and Equality and the Commissioner.

Commissioner O'Sullivan issued a public statement arising from controversies surrounding the O'Higgins Commission.

17 May 2016: Chief Superintendent Fergus Healy forwarded counsel's email of 15 May 2015 to Commissioner O'Sullivan.

18 May 2016: The Irish Examiner published leaked extracts from the O'Higgins transcripts.

At 09:14, Commissioner O'Sullivan forwarded Chief Superintendent Healy's email of the previous day to her personal (Gmail) account. At 09:42, she forwarded the email from her personal account to Minister Frances Fitzgerald. Commissioner O'Sullivan emailed the following to Frances Fitzgerald TD from her personal (Gmail) account:

Minister,

I understand that you may have to make a statement this morning, and I enclose a draft for your consideration.

Secondly, I enclose the advice given to me by the legal team on 15 May 2015. You may choose to put this on the record in the house. If you do, I would request you state that I volunteered this document to you in the public interest.

My directions at all times were to assist the Commission to establish the facts and the truth and I never at any stage changed those directions.

The draft statement was sent in another email at 09:40:56, and read:

I have now interrogated this matter in detail with the Commissioner of An Garda Síochána and I now present to the house the outcome.

First of all, at no point did the Commissioner instruct the legal team representing An Garda Síochána at the O'Higgins Commission to accuse Sergeant McCabe of malice. This is important, because it was asserted in a headline in The Irish Examiner last week and has become a widely accepted truth since. It is NOT the truth and the word malice was not authorised by Noírin O'Sullivan.

The Commissioner had an absolute duty to vindicate the rights of Gardai accused of corruption. Her legal advice was that the allegations of corruption made by Sergeant Maurice McCabe against senior members of An Garda Síochána must be tested by appropriate cross examination. As can be seen from the report, those allegations were either withdrawn under questioning or adjudged in the final report to be unfounded.

Two points must be strongly made in relation to this.

- a) At no stage did the Commissioner instruct the legal team to suggest any question of bad faith or that Sergeant McCabe's integrity was in question.
- b) The Commissioner would have no control over the conduct of legal argument within the Commission.

The report of the Commission was published and Sergeant McCabe judged to have had honourable intentions.

The illegal publication of evidence presented to the Commission re-opened issues the Commission had set to rest.

More importantly, it robbed the Commissioner of the right to defend her good name, precluded as she was from commenting on the evidence before the Commission under the provisions of section 11 of the Commissions of Investigation Act, 2004. She was further advised against sharing details of the confidential briefing of her legal team.

I wish to state, here and now, that I have full confidence in the Commissioner.

At 16:11 Minister Fitzgerald forwarded Commissioner O'Sullivan's email from counsel dated 15 May 2015 along with the draft speech to Noel Waters, with the comment "For Sec Gens attention". In his evidence to the tribunal, Noel Waters stated that the email address to which this email was sent, [nawaters@justice.ie](mailto:nawaters@justice.ie), was not his email address so this email wouldn't have reached him.

19 May 2016: Minister Fitzgerald, Noel Waters, Ken O'Leary, Mr O'Callaghan, Marion Mannion, Deputy Commissioner John Twomey and Commissioner O'Sullivan attended a meeting with the legal strategy of the Commissioner at the O'Higgins Commission on the agenda.

21 May 2016: Ken O'Leary emailed Noírin O'Sullivan at 14:30, attaching a draft letter from the Commissioner to be sent to the Department of Justice and Equality in relation to the leaking of information and the legal strategy of the Commissioner at the O'Higgins Commission.

24 May 2016: A number of drafts of the above-mentioned letter travelled between the Department of Justice and Equality and An Garda Síochána via email.

25 May 2016: The letter was sent from Commissioner O’Sullivan to the Secretary General in the Department of Justice and Equality.

10 September 2017: Nóirín O’Sullivan retired as Garda Commissioner.

28 November 2017: Frances Fitzgerald TD, former Minister for Justice and Equality, resigned as Minister for Business, Enterprise and Innovation and as Tánaiste.

### **Appendix 3: A chronology of events in relation to the allegation of character assassination of Maurice McCabe as it emerged from the papers distributed by the tribunal prior to or during the oral hearings**

19 June 1962: David Taylor is born.

31 March 1982: David Taylor joins An Garda Síochána and is allocated to Whitehall.

March 1986: David Taylor is appointed to the Security Force.

1997: David Taylor is promoted to Sergeant and allocated to Ballybricken (Waterford). Six months later, he is transferred to Mountjoy.

John McGuinness is elected to the Dáil to represent Carlow/Kilkenny.

2002: David Taylor returns to the Special Detective Unit as Detective Sergeant.

2004: David Taylor is promoted to Inspector, and allocated to Internal Affairs, Harcourt Square.

5 December 2006: Ms D is interviewed and makes a statement regarding abuse allegations against Sergeant McCabe. She says the following regarding her memory of the incident: “[w]hen I was in Primary School people were talking about humping. It was then I realised what he, McCabe had done to me was that. I could have been in 3<sup>rd</sup> Class. [That’s] when I had thoughts about what occurred. It would have been when I was in Sixth class that I realised it was not right what he had done to me. I have kept this bottled up inside me until I told my friend.”

5 April 2007: Letter from DPP states that there is no basis for prosecution of Sergeant McCabe re: Ms D allegations. The letter states that the evidence in the case does not warrant a prosecution, as there were no admissions and the incident described by Ms D is “vague. It appears that it was only when she was eleven/twelve that she decided that whatever occurred was sexual in nature. Even if there wasn’t a doubt over her credibility, the incident that she describes does not constitute a sexual assault or indeed an assault”. Sergeant McCabe later asks for this letter to be circulated as the allegation is widely known. Garda management refuse to circulate the letter as this is not standard procedure.

2008: David Taylor is transferred to Liaison and Protection in Garda Headquarters as Detective Inspector.

14 November 2010: John Mooney names Sergeant McCabe as a whistleblower in a Sunday Times article with the headline “Internal inquiry clears garda?”. According to Mick O’Toole, this was the first time Sergeant McCabe was named in the media. The article states:

AN INTERNAL garda investigation into allegations of malpractice and indiscipline in the Cavan/Monaghan division has upheld complaints over the failure of officers to follow procedures, but found no evidence of corruption.

The inquiry led by Derek Byrne, an assistant garda commissioner in charge of national support services, was established two years ago to investigate claims by Maurice McCabe, a sergeant in Mullingar, Co Westmeath.

McCabe had claimed there was a breakdown in management at a station where he previously worked, and alleged that serious crimes were not properly investigated.

The inquiry also examined claims that gardai in Cavan did not conduct proper investigations into serious incidents including physical and sexual assaults, and false imprisonment.

The accusations were made by McCabe in a report passed to Brian McCarthy, a former secretary-general to President Mary McAleese. McCarthy was appointed by the government to receive confidential information from gardai who wanted to report alleged corruption and wrongdoing.

Byrne's report was sent to Fachtina Murphy, the garda commissioner, last month. It is understood to have recommended sanctions against a number of officers, including McCabe.

A second internal investigation was launched last month after McCabe disclosed that he had downloaded and removed hundreds of files and reports from Pulse, the garda's computer system. McCabe produced two boxes of files at a meeting with Byrne and inquiry team members at the Hillgrove hotel in Co Monaghan on October 11. The meeting was called to inform McCabe of the outcome of Byrne's investigation.

McCabe lodged a complaint against Byrne alleging assault and false imprisonment after Byrne refused to let him leave the hotel with the files and attempted to call in the gardai. It is understood McCabe later agreed to surrender the files.

Nacie Rice, the deputy garda commissioner, is to investigate the allegations against Byrne. McCabe is now under investigation himself for alleged breaches of internal garda regulations. These forbid officers from downloading information and removing files from stations. The files are currently being examined at garda headquarters.

The Garda Síochána Ombudsman Commission has been "notified" of the inquiry.

2011: Deputy McGuinness is elected chairman of the Public Accounts Committee. Sergeant McCabe makes contact with Deputy McGuinness about the penalty points issue for the first time.

July 2012: Sergeant McCabe makes contact with the Office of the Comptroller and Auditor General, seeking a meeting to discuss his concerns about the operation of the fixed charge penalty system.

17 July 2012: David Taylor is promoted to Superintendent and allocated to the Garda Press Office.

Two or three months later, Superintendent Taylor unexpectedly moves deputy press officer Superintendent John Ferris out of their shared office.

7 August 2012: Sergeant McCabe meets Mary Henry, Deputy Director of Audit with the Comptroller and Auditor General, and provides her with a file of information relating to his concerns about the fixed charge penalty system.

Late October 2012: Comptroller and Auditor General, Séamus McCarthy, receives a file from Noel Brett, then CEO of the Road Safety Authority, "similar" to that presented by Sergeant McCabe to Mary Henry, which Noel Brett had received from a member of An Garda Síochána. The file related to:

4,000 cases extracted from An Garda Síochána's PULSE system, where it appeared that fixed charge notices issued had subsequently been cancelled, including multiple notices cancelled for some individuals. It was alleged in the file that in certain cases, the notices selected had been cancelled corruptly and illegally by senior Garda officers, and in a

number of cases that drivers whose notices had been cancelled inappropriately had subsequently committed other more serious driving offences. Seamus McCarthy decides to incorporate an examination of this file into his audit of the 2012 garda appropriation account.

14 December 2012: Commissioner Callinan directs Sergeant McCabe and Garda Wilson to stop accessing PULSE and disclosing information on penalty points to third parties. Garda Wilson and Sergeant McCabe are informed of the direction by superior officers on the same date.

2013: Noel Brett, then CEO of the Road Safety Authority, asks Assistant Commissioner John Twomey (DMR Traffic) whether his phone is being intercepted “in the context of [his] dealings with Sergeant McCabe in relation to the penalty points issue.” Noel Brett is told that this is “unlikely” and accepts this. Noel Brett’s concerns “were raised by Sergeant McCabe who would routinely ask [him] to ring him on different numbers because he felt his calls may be listened to.”

In evidence to the tribunal on day 66, 16 April 2018, Brian Purcell stated that at some point in 2013, former Commissioner Callinan informed him of the facts of the Ms D allegation, in a matter-of-fact way.

Early 2013: A meeting takes place in Garda Headquarters, between An Garda Síochána and the Road Safety Authority. The meeting is attended by a number of people including Noel Brett and former Commissioner Callinan.

In his statement dated 15 March 2017, Sergeant McCabe stated:

I am aware that former Commissioner Callinan interviewed Noel Brett, the former chairman of the Road Safety Authority and angrily denounced me to him. Noel Brett later on told me about the hostile behaviour he endured and how angry Martin Callinan was and that Senior Officers were sent to his home shortly after a family bereavement to interview him. Conor Faughnan of AA Roadwatch was questioned about his meeting with me and what documents were given to him. He was sufficiently concerned with the tone of the meeting with Senior Gardai that he had to take legal advice.

In his statement to the tribunal investigators dated 26 March 2018, Noel Brett states:

The meeting took place some months after I had formally referred, what is known as the Penalty Points dossier, to both GSOC and the Comptroller and Auditor General...The issue of Sergeant McCabe’s Penalty Points allegations was not discussed at the meeting. The focus was on roads policing and road safety performance. Commissioner Callinan became very angry with me during an item of discussion of enforcement and appeared to lose his temper. Following the outburst, we decided to leave. Later that night, after 10pm, former Commissioner Callinan phoned me to apologise...I should say I was in regular contact with Sergeant McCabe and I would have told him about this meeting. However, I am very clear that I never told him that he was referred to at the meeting.

28 March 2013: Assistant Commissioner John O’Mahoney completes his penalty points report and forwards it to Minister for Justice and Equality Alan Shatter.

Middle of 2013: Former Commissioner Callinan informs Superintendent Taylor of the allegation which had been made by Ms D against Sergeant McCabe. During the same conversation, Commissioner Callinan instructs Superintendent Taylor to brief journalists negatively about Sergeant McCabe.

According to Alison O'Reilly, she is told by Debbie McCann that Sergeant McCabe was a child abuser.

18 July 2013: Ms D referral to Rian counselling service, a free counselling service in the HSE for victims of childhood abuse under the category: "survivor of past abuse – other". There are records of Ms D attending two appointments with Laura Brophy, counsellor on 24 July and 7 August 2013.

9 August 2013: Laura Brophy refers Ms D allegations against Sergeant McCabe on to the HSE's Children and Family Services in a written referral. Under the heading "Description of abuse", the report states: "[redacted] informed me that she suffered sexual abuse in childhood. The abuse involved digital penetration both vaginal and anal. The alleged would also threaten [redacted] father if she said anything". This is a complete mix-up. That allegation had never been made by Ms D, nor had anyone else made it against Sergeant McCabe. This is a cut and paste in error, from an allegation made by a Ms Y against a Mr Z. Laura Brophy, upon learning of her error, does her best to withdraw the incorrect allegation.

September 2013: Andrew McLindon takes up his position as Director of Communications with An Garda Síochána.

Superintendent Taylor fully briefs Andrew McLindon about Sergeant McCabe within a week of him taking up his post within An Garda Síochána. Superintendent Taylor tells Andrew McLindon that Sergeant McCabe is motivated by revenge, driven by a grievance he has over the Ms D investigation.

30 September 2013: Séamus McCarthy, Comptroller and Auditor General, presents his report on the fixed charge penalty system to the Government. In his statement to the tribunal dated 13 March 2017, Séamus McCarthy stated:

Following publication of my own report, I became aware through media reports of a complicated story about an historic paedophile case in the Cavan Monaghan Garda District; the subsequent disappearance of a laptop computer linked to that paedophile case; and the alleged involvement in some way of a Garda whistleblower in the matter, arising from his responsibilities as station sergeant. I understood that this might refer to Sergeant McCabe, but concluded that, as reported, this matter had no direct implications for my report.

23 October 2013: A journalist publishes an exclusive report on the Roma child, which bears strong similarities to the internal garda patrol officer report. There had been no official garda press release.

15 November 2013: Commissioner Callinan writes to Deputy McGuinness, requesting the return of any data he had obtained from Sergeant McCabe relating to penalty points. On the same date, Commissioner Callinan also writes to the Data Protection Commissioner, raising the same data protection concerns.

17 December 2013: During a 'Crimecall' production meeting, a disagreement arises between RTÉ staff and gardaí, as Philip Boucher-Hayes wants to question then Commissioner Callinan on Sergeant McCabe's penalty points allegations. Mr Boucher-Hayes then has a private conversation with Commissioner Callinan, during which, according to Philip Boucher-Hayes, the Commissioner makes "negative but cursory" comments about Garda John Wilson, before speaking "at some length on Maurice McCabe's character". Mr Boucher-Hayes says he had not asked the Commissioner any questions about Sergeant McCabe, but was told that the Sergeant was troubled and that he had "a lot of psychological and psychiatric issues".

He claimed that McCabe was motivated by a set of grievances against Garda management and that he was famous within An Garda Síochána for this. He warned me that McCabe was not to be trusted and went on to add that there were other things he could tell me about him “horrific things, the worst kind of thing” but that he did not elaborate further.

Commissioner Callinan then told him that if there was anything else he wanted to know about Sergeant McCabe and penalty points, then he should ask Superintendent Taylor, who immediately “buttonholed” him after this conversation and asked “[n]ow do you understand what the problem with Maurice McCabe and the penalty points is?”

In his supplemental statement to the tribunal dated 14 June 2017, former Commissioner Callinan recalls

On the day of the programme I learned from the Press Officer, Superintendent David Taylor, that Phillip Boucher-Hayes wished to interview me about the recently published Smithwick Report and the penalty points issue. I indicated to the Press Officer and staff liaising with the *Crimecall* programme that I would on that occasion speak about the couple of points outline above [the death of Adrian Donohue, thanking the public for their assistance] and I sought the programme’s cooperation in framing questions around same.

I was unaware that there was any risk to the programme being aired on the night, as outlined by Mr Boucher-Hayes. I do recall that before the programme was aired that night that the Press Officer, Superintendent David Taylor, indicated to me that Mr Boucher-Hayes was very annoyed that I would not engage on the topics that he wished to raise with me.

I met with Philip Boucher-Hayes in a corridor at RTE on the night of my scheduled appearance on *Crimecall*. He appeared to me to be upset and disappointed that I would not engage on the two topics mentioned, but particular the Smithwick report. He stated that as an experienced journalist, he felt it was important that I address these issues in the interview. I replied that there would be ample opportunities when I was in public elsewhere to address these matters.

He asked me if I would be willing to answer questions about the penalty points issue and the two whistleblowers Sergeant McCabe and John Wilson. I indicated John Wilson had made a complaint against an Inspector who had allegedly wrongfully cancelled around twenty fixed charge penalty notices. This matter was investigated by a Chief Superintendent who in turn submitted a file to the Director of Public Prosecutions on his investigation. No prosecution arose in the matter. I further indicated that Sergeant McCabe had submitted a list of allegations around the wrongful cancellation of fixed charge notices against several officers and these allegations were investigated by Assistant Commissioner John O’Mahony as was commonly known.

I did not speak “at some length” on Sergeant McCabe’s character as indicated.

I did not state that Sergeant McCabe had “a lot of psychological issues and psychiatric issues” and was “motivated by a set of grievances against Garda management and that he was famous within An Garda Síochána for this.” I did not indicate to Philip Boucher-Hayes that Sergeant McCabe was not to be trusted, nor did I state that there were other things I could tell him about “horrific things, the worst kind of thing.” I do not know what Philip Boucher-Hayes is referring to.

I certainly did say to Philip Boucher-Hayes that if he had any questions on either of the topics raised, i.e. the Smithwick Report or the penalty points issue, that he could forward

them to the Garda Press Office or Superintendent David Taylor, whom I was aware he was in contact with prior to me speaking with him.

18 December 2013: The clerk of the Public Accounts Committee replies to Commissioner Callinan's letter of 15 November, stating that legal advice had been sought by the Public Accounts Committee to the effect that they were lawfully in possession of the data relating to penalty points, and that any and all sensitive data had been redacted from the documents.

24 December 2013: Commissioner Callinan replies to Deputy McGuinness's letter of 15 November, reiterating his desire to have the penalty points data returned to him, and his belief that the PAC was not entitled to access that data.

Late 2013: Superintendent Taylor asks Commissioner Callinan if he can see the Ms D file. Commissioner Callinan does not provide the DPP file as he doesn't have it.

Early 2014: Michael Clifford hears about an allegation of child sex abuse against Sergeant McCabe for the first time. His source is not a member of the gardaí.

Eavan Murray hears about the allegation for the first time. The source of the information is a member of the media, who does not go into great detail about the allegation.

6 January 2014: Pre-PAC meeting.

16 January 2014: Pre-PAC meeting.

17 January 2014: The clerk of the Public Accounts Committee replies to Commissioner Callinan's letter of 24 December, stating that the penalty points documentation was devoid of any identifying information, and assuring the Commissioner that the committee would not discuss any individual case.

21 January 2014: In evidence to the tribunal on 13 April 2018, Andrew McLindon states that it is around the time of a meeting held on this day to prepare for Public Accounts Committee hearings that he becomes aware of an allegation of sexual abuse against Sergeant McCabe.

23 January 2014: Commissioner Callinan testifies before the Public Accounts Committee.

Comptroller and Auditor General Séamus McCarthy is also present at the meeting. In his statement to the tribunal, dated 13 March 2017, he recalls a conversation with Commissioner Callinan which took place before the committee hearing:

In the lobby outside the Committee meeting room, I met Commissioner Callinan, and we spoke briefly. No one else was a party to the conversation, which lasted probably not more than about five minutes. I had previously had no direct personal communication or conversation with Commissioner Callinan about my report. I do not recall any conversation (beyond normal social greetings) on this day with other senior Garda personnel.

Early in his conversation with me, Commissioner Callinan referred to Sergeant McCabe by name and made statements to the effect that Sergeant McCabe was not to be trusted, that he had questions to answer, and that there were allegations of sexual offences against him.

I responded to the effect that my report was not an investigation of any of the whistleblower's allegations; that it was based on analysis of random samples of fixed charge notice cases extracted by my Office's examination team from Garda records; and that my

findings were not affected or influenced by the whistleblower's motives. I did not probe the nature of the alleged sexual offences to which he had referred, and he did not provide any further information in that regard. I did not acknowledge Sergeant McCabe as being the whistleblower who had contacted my office.

...During the subsequent Committee meeting, I thought about what Commissioner Callinan had said to me personally about Sergeant McCabe, and realised that the words he had used meant that Sergeant McCabe was accused of, and was being (or would be), investigated for alleged sexual offences. I concluded that his statement to me referred to the alleged involvement of Sergeant McCabe in the loss of a computer in a paedophile case in Cavan Monaghan, of which I was previously aware.

John Deasy TD gave a statement to the tribunal investigators dated 27 September 2017 recalling a conversation he had with former Commissioner Callinan before the PAC hearing.

I spoke to Martin Callinan in the coffee dock standing in an informal manner, and the former Commissioner made reference to Maurice McCabe as someone that could not be believed or trusted. It was a very quick conversation after saying hello, and that is my recollection, I did not reply to the comment, the reason being I was surprised at it. One element I have thought about since is was there anyone else in earshot and I can't say if there was anyone else in earshot of the former Commissioner.

Former Commissioner Callinan gave a statement to the tribunal in which he states:

I am aware that Deputy John Deasy in an interview with Prime Time RTE 1 on the 15 February 2017 made mention of a conversation he had with a senior Garda in January 2014 who told him that Sergeant McCabe was not to be trusted. I recall that prior to my appearance before the Public Accounts Committee on the 23 January 2014 I spoke with Deputy John Deasy who was a member of that Committee. He indicated the areas he intended to address with me at the meeting; service of summonses, registration of company cars, interactions with other Departments and the Courts Service in the context of a more effective way of collecting fines. He also asked me my views on whistleblowers appearing before the Committee. I indicated to him that you have my views on this subject as I had written to the Committee about it. I cautioned on the need to be aware of the correctness of the information being imparted bearing in mind the inaccuracies of some of the allegations as highlighted in Assistant Commissioner O'Mahoney's report that was at the time available to the Committee.

In his statement to tribunal investigators dated 22 October 2017, former Commissioner Callinan states:

[John Deasy] asked me about my views about whistleblowers appearing before the Committee and I had indicated that the Committee would need to be mindful of the fact that not all of the allegations that Sergeant McCabe was making were correct, as highlighted in the O'Mahoney investigation and that the Committee had a copy of that report to rely on. I also told Deputy Deasy that I had written to the Committee outlining my views in regard to whistleblowers appearing before the Committee...That is what I indicated to Deputy Deasy. I certainly did not say that Sergeant McCabe could not be believed or trusted but I did point out that there were some inaccuracies in the allegations being made by Sergeant McCabe. That is also consistent with what I said to Mr McGuinness and to Seamus McCarthy. If this is being interpreted by any of the parties as taken to be that Sergeant McCabe was not to be trusted, it is an incorrect interpretation of what I said. For

the avoidance of doubt, it was never my intention to convey to any of the parties, that Sergeant McCabe was not to be trusted.

During the committee hearing, Commissioner Callinan says:

Clearly here ... we have two people, out of a force of over 13,000, who are making extraordinary and serious allegations. There is not a whisper anywhere else or from any other member of the Garda Síochána, however, about this corruption, malpractice, and other charges levelled against their fellow officers. Frankly, on a personal level I think it is quite disgusting.

Deputy McGuinness, in his statement to the tribunal (28 March 2017) states:

Mr Callinan was with Ms. Norin O’Sullivan and David Taylor and he said to me, “this man fiddles with Children, this is outrageous”. I took the reference to “this man” to refer to Mr. McCabe.

In his statement to tribunal investigators on 28 March 2018, Deputy McGuinness explains why he took Commissioner Callinan’s reference to “this man” to mean Sergeant McCabe.

It is normal practice for the chairman and members to thank the witnesses for attending and what that means is that we meet with the witnesses to thank them for their attendance. In this particular case I did exactly as I would normally do and in the course of that I came down to where Commissioner Callinan was and he was in the flow of conversation about former Garda John Wilson. Commissioner Callinan was relating a story about how John Wilson was called with other Gardaí to a disturbance in Grafton Street involving horses. When John Wilson got to Grafton Street, Commissioner Callinan in his own words said he (John Wilson) “pulled the k.....s off the horse he confiscated the horse mounted the horse and rode it back to the barracks where he tied it to the railings. And the other fella fiddles with kids. And that is the type of f..... hand bangers I’m dealing with.” That was said in a very loose group of people, I recall Nóirín O’Sullivan was in that group and Dave Taylor was there as well...It’s in that context that my understanding of the “other fella” is that Commissioner Callinan was referring to Sergeant McCabe...I didn’t make a note [of what Commissioner Callinan said]...I didn’t go around making notes of such gossip.

After the meeting, Superintendent Taylor hears Commissioner Callinan refer to Sergeant McCabe as a “kiddie fiddler” in conversation with Deputy John McGuinness. In cross-examining Deputy McGuinness on 9 April 2018, counsel for Superintendent Taylor stated that Superintendent Taylor does not recollect former Commissioner Callinan relaying an anecdote about Garda John Wilson.

Former Assistant Commissioner John O’Mahoney, in a statement to the tribunal dated 18 December 2017, states that he attended the PAC meeting, but was not party to any such conversation.

In his statement to the tribunal dated 30 May 2017, former Commissioner Callinan states that it is “simply incorrect and untrue” to allege that he made a comment about Sergeant McCabe fiddling with children. He goes on to state:

I do recall that I inquired from Mr McGuinness as to whether former Garda John Wilson would be called to give evidence. Mr McGuinness replied, “You must be joking, sure he’s a f..... header.” This took me by surprise in the circumstances where Mr McGuinness had been scathing in his criticism of An Garda Síochána for the manner in which whistleblowers generally are treated.

At 16:17:07, Commissioner Callinan rings John McGuinness. The call lasts 27 seconds.

24 January 2014: At 14:37, John McGuinness calls Commissioner Callinan. The call lasts 02:59. Deputy McGuinness states that he was returning a missed call from Commissioner Callinan.

At 14:43:28, Commissioner Callinan rings John McGuinness. The call lasts 34 seconds.

At 14:48, John McGuinness calls Commissioner Callinan. The call lasts 01:30.

At 16:43:09, Commissioner Callinan rings John McGuinness. The call lasts 51 seconds.

In his statement to tribunal investigators dated 28 March 2018, John McGuinness states that these phone calls “were nothing more than arranging the meeting”.

Commissioner Callinan and Deputy John McGuinness meet in the car park of Bewley’s Hotel. They speak in Deputy McGuinness’s car.

Deputy McGuinness’s handwritten note of the meeting reads:

Callinan

McCabe

Sexual abuse!

Individual + family

Don’t trust him

Story not credible

Investigations on going

He’s not credible

Trouble for PAC and me??

In his statement to tribunal investigators dated 28 March 2018, Deputy McGuinness states:

I made the note after the meeting on the way home because I was upset and disturbed at what [Commissioner Callinan] had said and as there was so much going on in respect to the PAC and the penalty points issue...On my way home I stopped and I made that note...I detail here what Martin Callinan said. “Callinan McCabe” is reference to Martin Callinan talking about Maurice McCabe. I then note “sexual abuse” and this is what had disturbed me most about what Commissioner Callinan had said. “Individual + family” he had mentioned that he (Sergeant McCabe) had abused an individual and had also abused family members. In part of our conversation I said I had heard vague rumours about Sergeant McCabe and that prompted Commissioner Callinan to say “don’t trust him” and that McCabe’s “story not credible”. He told me about the investigation he said “investigations were ongoing” I underlined “ions” in my note in that regard. Again he said Sergeant McCabe is “not reliable” and he said “trouble for PAC and me”...I used the word paedophile in the context of rumours I was hearing about Sergeant McCabe in Leinster House. That was the rumour and gossip in Leinster House. Commissioner Callinan didn’t call him a paedophile at that meeting, he did say do not trust him (Sergeant McCabe) that was relation to Sergeant McCabe’s denial of the rumour to me. Commissioner Callinan did state that a file was being prepared in respect to the investigations that were underway



men', I mean there is nobody suggesting the Commissioner is at home or the Deputy Commissioners and the Assistant Commissioners sitting around the fire planning a coup d'état. I mean 'my force' denotes pride, it does and I did my usual yesterday, I contacted guards all over the [country], I spoke to 13/14 members of the force. Now they were mostly guards, one inspector and one sergeant and they basically are saying there is nothing wrong with that. It is his force, he is the leader, he is not suggesting for one moment, its, not eh eh a very important organisation eh that's there for the benefit and at the behest of the State, of course he's not. It is just a turn of phrase and then I know there's this question about it referring to 'disgusting', you know, when you put that in context, what he is saying is that he has always stated and I, I been a president -- I only met the man personally once so he is not somebody that I know that well but I know at one function he advocated in no uncertain terms the importance of whistle blowers and the importance of protecting them but—

MS FINUCANE: But yet, but yet there was fierce undermining—I'm sorry Noreen [Hegarty] you wanted to come in on that.

MR KEAN: Well, well, yeah, the undermining is the fact that when whistleblowers first of all do not cooperate in any way shape or form with the investigation, the investigative committee under Inspector John O'Mahony who is a very respectful man, they didn't cooperate with that at all. They go in, they breach the Data Protection Act, that's clear, I mean I think that he is clear and from the information that I have, it looks as if they have breached the Act, which is a criminal offence and then what they do is they spoon feed this information to certain independents in, in, in Dáil Éireann, its stated the proper practice and procedure. I don't believe for one minute that the Minister, or sorry that the emm the Commissioner and Deputy Commissioners and Assistant Commissioners are going to condone for one moment any illegality that takes place within An Garda Síochána—

MS FINUCANE: Gerald, do you remember Donegal?

MR KEAN: Yes I do. Yeah, I do but I'm not saying, sorry, I didn't say there is no wrong doings within An Garda Síochána—

MS FINUCANE: Yeah.

MR KEAN: I said I don't accept that the Minister, or sorry that the Commissioner, the Deputy Commissioners and the Assistant Commissioners are all sitting around saying 'let's bury this, let's bury this', I don't accept that.

...

MR KEAN: I think the, I think the important thing is that, eh we all agree on it and I think it's accepted that the vast majority members of An Garda Síochána here deserve our support and confidence but it annoys me when people are, are, are, are not getting the facts right and Noreen [Hegarty] is simply absolutely and totally incorrect when she says that the whistle blowers have done everything they can within An Garda Síochána of this matter investigated, it is just simply wrong. She is believing what she's reading in the papers. The fact of the matter is that Inspector John O'Mahony who we accept is a wonderful—I've never met the man but I've heard great things about him, was set up to investigate this—

MS FINUCANE: Yeah, but I've no doubt the other men are wonderful men too.

MR KEAN: I, I, I, I, I've no doubt about that as well, I am not denying that at all but what I'm saying is, they did not cooperate with that investigation and by the way just so that we are aware of these – as a result of John O'Mahony's investigation, three or four members of the force have been sent forth for disciplinary action. Secondly many new reforms have been put in place based on his—which were needed, we are not saying—nobody is suggesting, of course there were wrong doings but in addition to that which people don't know, is the any fraud mechanism which is in place as sent four relatively senior members of An Garda Síochána files to the DPP for criminal prosecution—

MS FINUCANE: But you sound like that's outrageous—

MR KEAN: But you know—I want that—

MS FINUCANE: --because that's the way it is supposed to be—

MR KEAN: --it should be that way, yes, but what I'm saying is and you are absolutely right and everyone of them who have done a wrongdoing should go but what I'm saying is that for some reason, it's as if there's a white wash here, nobody is aware that they are trying to do something and, and, and that's under the guise of the Commissioner and I think it reflects badly on the rank and file members if there is just one way criticism of An Garda Síochána. I believe the An Garda Síochána are well able to deal with it and if by the way at the end of that they don't get a say and if they don't—if the whistle blowers who have a very legitimate right to air their grievances, if they don't go through the proper channels to get that, well absolutely fire on ahead, fire on ahead--

At 12:43:13, Gerald Kean rings Commissioner Callinan. The call lasts 07:51 minutes.

At 15:54:36, Diarmuid O'Sullivan rings Gerald Kean. The call lasts 02:52 minutes.

At 15:58:01, Diarmuid O'Sullivan rings Commissioner Callinan. The call lasts 15:25 minutes.

27 and 28 January 2014: John McGuinness in contact with Martin Callinan, informing him of the PAC's plans to hear evidence from Sergeant McCabe.

29 January 2014: Former Commissioner Callinan releases a statement about whistleblowers and the PAC:

I am aware that the Public Accounts Committee has decided to invite a serving member of the Force before it tomorrow. While I continue to have reservations about this matter, I note that the meeting will be held in private. I note too that it appears to be the intention to confine the questioning of the person concerned and, in particular, that person will not be able to make allegations against his colleagues or members of the public.

30 January 2014: Sergeant McCabe gives evidence to the PAC. The hearing is held in private.

31 January 2014: Andrew McLindon emails Commissioner Callinan, copying Superintendent Taylor, recommending the Commissioner give an interview to Sean O'Rourke, and drafting a proposed clarification of Commissioner Callinan's "disgusting" comment.

February 2014: Debbie McCann (Irish Mail on Sunday) decides to look into the "murmurings" surrounding Sergeant McCabe and establishes that there had been an allegation made against him by Ms D in 2006.

3 February 2014: Sergeant McCabe writes to Gerald Kean about the Marian Finucane show on the 26 January 2014.

Dear Mr Keane.

I refer to the programme which aired on RTE on Sunday 26<sup>th</sup> January 2014. The programme was hosted by Marian Finucane. You were one of the people on the show. I am the Garda Sergeant at the centre of the penalty points investigation by the Public Accounts Committee.

I contacted RTE station moments after I heard defamatory statements you made about me which were aired by RTE. I was at work and was devastated when I heard what you said. Your horrendous statements accused me of having committed criminal and disciplinary offences. RTE producer of the programme, Ann, said that they did not know you were going to say what you said. I advised Ann that I would be taking the matter further.

Hereunder is what you stated and affirmed publicly [the letter contains the above extract in which Mr Kean states that whistleblowers didn't cooperate with the O'Mahony investigation].

You publically stated over the airwaves that I had committed criminal offences, in other words I was a criminal. You stated and adamantly affirmed three times that I had not cooperated with the O'Mahony enquiry. You also stated, twice, that I had breached the Data Protection Act. You also stated you had information on this. You stated that I spoon fed TD's and did not go through proper practice procedures. All your statements are false and have done me great harm. Each of your accusation on me will be denied

I am a member of An Garda Siochana of Sergeant Rank. I have never committed any criminal offence and I have 28 years unblemished service. I am not a criminal. I did not and never breached the Data Protection Act. I did not fail or refuse to cooperate with the O'Mahony investigation and I did not spoon feed evidence to any T.D. I deny all your accusations and will show proof of this at a later date. My character and reputation are very important to me and you have destroyed them both. See references below.

Your accusations publically aired by RTE have done me serious harm and damage. What the programme did was essentially destroyed my reputation. I enforce the law, I have never broken it. I am so upset, annoyed and furious at the false accusations aired by RTE against me. The Defamatory/slandorous statements were made at a time when the Government Public Accounts Committee were deliberating on evidence I had given to them. I am the person who had reported the penalty points matters. My family and close friends contacted me when they heard the statements made by you and they also were disgusted. Furthermore, RTE has put this airing out on the RTE player causing me further humiliation and accusations that I am a criminal

I am giving you an opportunity to try to make amends for some of the damage done to me as a result of your public statements on the RTE programme. I think it is the least you can do and even if that is done I don't believe that it can undo all the harm caused by those defamatory/slandorous statements and remarks. I have also written to RTE regarding their airing of the statements in question.

I await hearing from you as a matter of urgency.

6 February 2014: Gerald Kean, solicitor, writes to Commissioner Callinan, attaching the letter Gerald Kean had received from Sergeant McCabe. The letter is sent by courier, marked 'Strictly Private & Confidential' and was not entered into the correspondence log and was not filed on the

Sergeant McCabe file. Superintendent Walsh, then private secretary to the Commissioner, states that this was an administrative error, but that he does not maintain the correspondence file.

Dear Martin,

I enclose copy letter which I have received from Maurice McCabe.

I am also enclosing draft response.

I have not sent these letters to the other person

I would be grateful if you could look at the letter that I have received and my proposed draft response.

I need to be factually correct and any assistance would certainly be appreciated.

The draft response by Gerald Kean read:

Dear Mr. McCabe

I refer to your recent correspondence received.

At the very outset, I need to clarify a number of matters.

I have, on many occasions in the past, spoken about the importance of protecting and safe guarding the rights of “whistleblowers” for want of a better phrase.

I have already stated on a number of occasions admiration for the bravery of people such as yourself and others in trying to expose wrongdoings within, not only An Garda Siochana, but any other body or company.

I have been strong in my views, that all allegations of wrong doing, need to be investigated in full and the full riggers and process of the law enforced where necessary.

I have also stated, that I believe any wrongdoings within An Garda Siochana, should be investigated in the first instance, within that force and by the appropriate personnel appointed to so investigate.

I have also stated on a number of occasions that if there was any attempt to “whitewash” or “sweep under the carpet” serious concerns of any “whistleblower” then the matter needs to be referred to the appropriate authorities and bodies outside An Garda Siochana.

I have been advised that Inspector O’Mahony was appointed to investigate in full any complaints including those of your goodself.

I have also been advised that you failed to co operate with Inspector O’Mahony’s investigation.

I have been advised that in fact you were directed by the Commissioner to co operate and again you failed in that regard.

I have also been advised that that there was a potential breach of the Data Protection Act by you and/or others and this was an allegation ad obviously will no doubt be investigated in due course.

I also believe and state that anybody that drip feeds politician or newspapers in relation to allegations without following the proper procedures in place was, in my opinion, not helping their own cause.

I repeat that I have great respect for anybody exposing wrongdoings in any organisation such as yourself.

I also complimented the Commissioner and the force in disciplining some members of An Garda Siochana and referring other files to the DPP where wrongdoings had occurred.

I should say for the record that I never had points squashed nor was I ever approached by any member of An Garda Siochana to assist in relation to same.

I believe that the work you and others in your situation are doing is vital and important to uphold the honesty and integrity of our society.

The comments I made, and for which I apologise if they caused any offence, were:

1. It was my opinion that the matter should be dealt with within the An Garda Siochana in the first instance.
2. I believe that everybody involved should have co operated with Inspector O'Mahony's investigation.
3. I was advised there were potential breaches of the Data Protection Act that this obviously something that will be adjudicated upon in due course.

I have no problem in clarifying these issues again and certainly do not want to cause any personal offence to you or anybody else save for my views outlined and referred to above.

Between 6 and 12 February 2014: Former Commissioner Callinan drafts a handwritten note reflecting his position in relation to the topics raised in Gerald Kean's letter:

1. Can I first of all say that I am invited on several radio and TV programmes to discuss many topical issues where I voice my opinion, as I am entitled to do, and I hope I have always acted fairly to everyone.
2. The subject of FCPS on the show that day as part of the programme was well aired in the public domain previously and so I was aware that you and your colleague were advised to contact Assistant Commissioner O'Mahoney and his team if you had any complaints to make without prejudice to the Confidential Reporting system. That was the point I was making about cooperation with the investigation.
3. It is also the case of course that the Data Protection Commissioner's views are well known in the context of personal sensitive data being aired in public. I fully agree with his view in this regard.
4. I have no doubt that the GSOC investigation will fully examine all of these matters and address any wrongdoing.

Superintendent Walsh, in his statement to tribunal investigators, stated that he typed up the Commissioner's handwritten note "for clarity" and in order to be able to give Gerald Kean a copy (which he doesn't recall doing).

12 February 2014: At 07:51:20, Commissioner Callinan texts Gerald Kean.

At 07:57:17, Commissioner Callinan texts Gerald Kean.

At 08:19, Superintendent Frank Walsh rings Commissioner Callinan's office phone from his own office phone. The call lasts 05:00 minutes.

At 08:26, Superintendent Walsh rings Gerald Kean from his office phone. The call lasts 24:25 minutes.

At 08:57, Superintendent Frank Walsh rings Commissioner Callinan's office phone from his own office phone. The call lasts 04:26 minutes.

At 11:13:12, Superintendent Taylor texts Eavan Murray. This is the first contact between them revealed by the phone bills.

At 11:30, Superintendent Walsh meets Gerald Kean at his office.

Gerald Kean issues a response to Sergeant McCabe's letter of 4 February 2014:

Dear Mr. McCabe

I refer to your recent correspondence received.

At the very outset, I need to clarify a number of matters.

I would like to say that I am invited on several radio and tv programmes, to discuss many topical issues, where I voice my opinion, as I am entitled to do, and I hope I have always acted fairly to everyone.

I have, on many occasions in the past, spoken about the importance of protecting and safe guarding the rights of "whistleblowers" for want of a better phrase.

I have already stated on a number of occasions admiration for the bravery of people such as yourself and others in trying to expose wrongdoings with, not only An Garda Siochana, but any other body or company.

I have been strong in my views, that all allegations of wrong doing, need to be investigated in full and the full riggers and process of the law enforced where necessary.

I have also stated, that I believe any wrongdoings within An Garda Siochana, should be investigated in the first instance, within that force and by the appropriate personnel appointed to so investigate.

I have also stated on a number of occasions that if there was any attempts to "whitewash" or "sweep under the carpet" concerns of any "whistleblower", by An Garda Siochana, then the matter needs to be referred to the appropriate authorities and bodies outside An Garda Siochana.

The subject of the FCPS on the show that day as part of the programme was well aired in the public domain previously and so I was aware that you and your colleague were advised to contact the Assistant Commissioner O'Mahony and his team if you had any complaints to made without prejudice to the confidential reporting system. That was the point I was making about co operation with the investigation.

It was also the case of course, that the Data Protection Commissioner's views, are well known in the context of personal sensitive data being aired in public. I fully agree with his views in this regard and I made this point on the radio.

I have no doubt that the GSOC investigation will fully examine all of these matters and address any wrongdoing.

I repeat that I have great respect for anybody exposing wrongdoings in any organisation such as yourself.

I also complimented the Commissioner and the force in disciplining some members of An Garda Síochána and referring other files to the DPP where wrongdoings had occurred.

I should say for the record that I never had points squashed nor was I ever approached by any member of An Garda Síochána to assist in relation to same.

I believe that the work you and others in your situation are doing is vital and important to uphold the honesty and integrity of our society.

The comments I made, and for which I apologise if they caused any offence, were:

1. It was my opinion that the matter should be dealt with within the An Garda Síochána in the first instance.
2. I believe that everybody involved should have co operated with the O'Mahony's investigation.
3. I was also concerned that there were or are potential breaches of the Data Protection Act and I have no doubt this will obviously be adjudicated upon in due course.

I have no problem in clarifying these issues again and certainly do not want to cause any personal offence to you or anybody else save for my views outlined and referred to above.

19 February 2014: Micheál Martin TD passes on to the Taoiseach a dossier he had received from Sergeant McCabe.

Late February 2014: In a letter to the tribunal dated 22 December 2017, Deputy Micheál Martin states:

On a date sometime in late February 2014, Deputy John McGuinness, who then chaired the Dáil Public Accounts Committee (PAC), dropped in to my office. Sergeant McCabe had given evidence before PAC on 30 January. Deputy McGuinness thanked me for having raised the contents of the McCabe dossier in the Dáil on 19 February and for having brought the matter to public attention.

When he was leaving my office he mentioned that a short while previously he had met the then Garda Commissioner, Martin Callinan, in a hotel car park. I recall him mentioning that the Commissioner had told him that Sergeant McCabe was not to be trusted and that he was a child abuser. He gave no other details.

John McGuinness TD, in his statement to tribunal investigators dated 28 March 2018, confirms this account as accurate.

Late February/March 2014: Debbie McCann doorsteps Mrs D. She only speaks to Mrs D, who declines an interview. Superintendent Taylor, in his statement to the tribunal on 22 September 2017, states that he was aware that Eavan Murray and Debbie McCann would be visiting the D family, although he did not instruct them to do so. He states that he would have encouraged them to do it. He states that "there were two contacts made with me by Eavan Murray in this context before and after she went to Cavan to Ms D's home. I remember Debbie McCann contacting me before she went to Cavan to Ms D's home but I cannot remember her contacting me afterwards."

Ms McCann had initially stated that the doorstep occurred on either the 14<sup>th</sup> or 21<sup>st</sup> of February 2014. There is no contact with Debbie McCann in Superintendent Taylor's phone bills for 14 February 2014, and there is one call on 21 February, at 17:27:25, which lasts seven seconds.

On 13 April 2018, solicitors for Debbie McCann clarified that Debbie McCann was in Longford on 21 February 2014, working on an unrelated story and "could not, therefore, have been at Ms D's home on that day. Indeed on reflection, it is possible that she only did so in late February or March 2014." Debbie McCann went on leave on 22 March.

2 March 2014: Colum Kenny writes an article in the Sunday Independent, with the headline "Garda Enquiry Should Look At Sex Abuse Case" and the sub-heading "Whistleblower was cleared after "enormous distress" to his family". The article refers mostly to the missing computer case, which was investigated by the O'Higgins Commission, but at paragraph six reads:

It is understood that McCabe has also been subjected to a serious accusation by a senior garda that was subsequently referred by gardaí to the DPP, who found no basis on which to pursue the matter.

8 March 2014: Paul Williams interviews Ms D at her home, and according to Superintendent Taylor contacts Superintendent Taylor to inform him of the interview. Superintendent Taylor states that he did not have prior knowledge of the interview, and did not know where Ms D lived. The following phone contact with Paul Williams around that time is found within Superintendent Taylor's phone bills.

06/03/2014	Call	17:52:36	00:05:21
07/03/2014	Call	14:54:54	00:02:22
11/03/2014	Call	15:49:24	00:00:03
13/03/2014	Call	10:56:04	00:00:11
13/03/2014	Call	11:00:30	00:02:25
13/03/2014	Call	11:15:54	00:03:13
13/03/2014	Text	11:49:28	
13/03/2014	Text	16:13:32	
13/03/2014	Text	16:15:25	

Mr Williams's phone bills do not reveal a phone call from Mr Williams to Superintendent Taylor on 8 March.

12 March 2014: Commissioner Callinan, in a press release, clarifies his use of the word "disgusting" at the Public Accounts Committee hearing in January 2014:

There is one other matter that I would like to address and which has been in the public domain for some time and which refers to the use of the terms disgusting at my recent Public Accounts Committee appearance on the 23<sup>rd</sup> January 2014. I want to clarify that my use of that term was not in reference to the character of either Sergeant McCabe or former Garda Wilson, but the manner in which personal and sensitive data was inappropriately appearing in the public domain without regard to due process and fair procedures.

I stated at the PAC and re-iterate now my absolute support and commitment to any member of An Garda Síochána who reports wrongdoing of any kind.

14 March 2014: Stephen Rae, Dearbhail McDonald, Ian Mallon and Paul Williams meet to discuss the Ms D story. According to Dearbhail McDonald, the meeting lasted 30 minutes. They watched

the video of the Ms D interview. After the meeting, Dearbhail McDonald emailed a memorandum with her observations, concerns and advice after the meeting.

On the same day, Eavan Murray gave evidence that she travelled to Cavan to meet the D family.

20 March 2014: Leo Varadkar TD describes the whistleblowers as “distinguished, not disgusting”.

24 March 2014: Commissioner Callinan retires. Nóirín O’Sullivan becomes Acting Commissioner.

25 March 2014: The Fennelly Commission is established to investigate certain matters including the circumstances of Commissioner Callinan’s resignation.

12 April 2014: Paul Williams publishes an article online about Ms D’s allegation against Sergeant McCabe. The headline was ‘Girl wants new probe into alleged sex assault by garda’.

15 April 2014: Paul Williams publishes an article stating that Ms D wanted to meet Micheál Martin TD. The headline was ‘Alleged garda sex victim wants to meet Martin’.

16 April 2014: Paul Williams publishes an article stating that Micheál Martin TD was to meet Ms D the following week. The headline was ‘FF leader to meet woman at centre of claims she was abused by garda’.

April 2014: Ms D meets Deputy Micheál Martin in relation to her GSOC complaint and requests that this be included within the Guerin Report.

3 May 2014: Paul Williams writes an article in the Sunday Independent, stating that “Enda Kenny is expected to order an investigation into allegations that a young woman was sexually abused by a serving garda,” and that Micheál Martin TD had passed Ms D’s complaint to the Taoiseach. The headline was ‘Kenny to set up probe into garda sex abuse claims’.

9 May 2014: Seán Guerin SC’s report is published.

14 May 2014: Chief Superintendent James Sheridan sends the notification of suspected child abuse to Assistant Commissioner Kenny.

16 May 2014: Assistant Commissioner Kenny forwards the notification of suspected child abuse to Garda Headquarters. Nóirín O’Sullivan’s private secretary Superintendent Frank Walsh, in his evidence to the tribunal, states that he showed it to Commissioner O’Sullivan. Commissioner O’Sullivan, in a statement given to tribunal investigators, states that she doesn’t recall being shown this notification, but accepts it was in her office.

22 May 2014: Assistant Commissioner Kenny receives notification that the referral of 9 August 2013 was made in error. Assistant Commissioner Kenny does not forward this to Garda Headquarters.

1 June 2014: Superintendent Taylor is transferred to the traffic division, Dublin Castle. Shortly after his transfer, Superintendent Ferris removes Superintendent Taylor from the press clipping mailing list.

10 June 2014: Superintendent Paul Moran takes up the role of Garda Press Officer.

September 2014: Superintendent Taylor begins studying for a Masters in Political Communication from Dublin City University. The garda section 62 report indicates that emails between Superintendent Taylor and Eavan Murray (The Irish Sun) suggest she was assisting him in completing assignments. This is supported by the FSNI examination of the phones.

14 November 2014: Superintendent Taylor receives a call from Chief Superintendent Clerkin who seeks to make an appointment for Superintendent Taylor to make a witness statement in relation to the Tallaght Roma child incident. Shortly after that phone call there begins a series of communications between Superintendent Taylor and Mick McCaffrey.

21 November 2014: Superintendent Taylor provides a witness statement to Chief Superintendent Francis Clerkin and Inspector Dave Gallagher relating to media coverage of the Roma child incident in Tallaght.

25 November 2014: Nóirín O’Sullivan is appointed Commissioner on a permanent basis.

18 December 2014: Superintendent Taylor voluntarily surrenders his phone to Chief Superintendent Clerkin.

19 December 2014: O’Higgins terms of reference agreed by Government.

First half of 2015: Michael Clifford hears from “an individual, somebody who would be familiar with politics and to a certain extent senior personnel in the Garda” that “your man McCabe is supposed to be a kiddie fiddler.”

January 2015: Superintendent Taylor, now in Dublin Castle, requests a member of the Garda Press Office staff to provide him with the list of media contact details. Superintendent Ferris contacts Superintendent Taylor and informs him that he is not entitled to that information.

23 January 2015: Inspector David Gallagher executes a warrant to obtain the content of Superintendent Taylor’s personal email account. Only a small number of emails remain, with the rest having been permanently deleted. No emails of value to the section 62 investigation are retrieved, though the examination identifies the email addresses of Eavan Murray, John Mooney and Paul Williams as having been utilised by Superintendent Taylor’s account.

19 February 2015: Superintendent Taylor’s phone is seized by Chief Superintendent Clerkin. Superintendent Taylor had voluntarily surrendered his phone on past dates. On this date, Chief Superintendent Clerkin has to execute a warrant. Superintendent Taylor’s laptop is also seized.

14 May 2015: The O’Higgins Commission begins hearings.

28 May 2015: David Taylor is suspended and arrested for offences contrary to section 62 of the Garda Síochána Act 2005.

28 and 29 May 2015: David Taylor is interviewed under caution and exercises his right to silence.

On or about 14 November 2015: Superintendent Taylor alleges that a phone of his which was in the custody of An Garda Síochána “became live” and attempted to join a neighbour’s private Viber group chat. Superintendent Taylor’s wife Michelle Taylor later made a complaint about this to the Garda Síochána Ombudsman Commission.

On day 69 of tribunal hearings, having taken instructions from Superintendent Taylor, Mr Ferry clarified that Superintendent Taylor was not pursuing this allegation, but that Superintendent Taylor was concerned that “a WhatsApp invitation went live on a phone at a particular time” when it was in the possession of An Garda Síochána.

15 February 2016: O’Higgins Commission issues a first draft report to interested parties, including An Garda Síochána.

17 February 2016: The DPP directs no prosecution against Superintendent Taylor as:

The problems are twofold. In most cases it is not possible to prove that information was disclosed to the press by the suspect. Even in cases where there is an electronic trail of information being disclosed, it is impossible to establish the “harm” requirement of section 62 of the Garda Síochána Act 2005.

While highly suspicious, I do not think that it is possible to prove beyond reasonable doubt that the suspect disclosed confidential information.

Therefore I direct no prosecution.

29 February 2016: Superintendent Taylor seeks leave to bring judicial review proceedings against the Commissioner of An Garda Síochána.

21 April 2016: The final report of the O’Higgins Commission is circulated to the parties, including An Garda Síochána.

Summer 2016: Following a call from Sergeant McCabe to Superintendent Taylor, Michelle Taylor starts contacting Sergeant McCabe. The pair meet twice in the Skylon Hotel, Drumcondra.

9 May 2016: Paul Reynolds appears on RTÉ several times, reporting on a leaked copy of the O’Higgins report.

11 May 2016: The O’Higgins report is published.

17 May 2016: RTÉ Prime Time report on leaked extracts from the O’Higgins transcript.

18 May 2016: The Irish Examiner publishes leaked extracts from the O’Higgins transcript.

26 May 2016: In a Dáil debate about the O’Higgins report, Deputy McGuinness makes a statement regarding the meeting he had with former Commissioner Callinan for the first time:

Every effort was made by those within the Garda Síochána at senior level to discredit [Sergeant] McCabe. The Garda Commissioner confided in me in a car park on the Naas Road that [Sergeant] McCabe was not to be trusted and there were serious issues about him. The vile stories that circulated about [Sergeant] McCabe, which were promoted by senior officers in the Garda, were absolutely appalling. Because they attempted to discredit him, he had to bring forward various pieces of strong evidence to protect his integrity.

In his evidence to the tribunal on 9 April 2018, John McGuinness stated that he met Sergeant McCabe in the Merrion Hotel after making his statement in the Dáil about his car park meeting with Commissioner Callinan. In his statement to tribunal investigators dated 6 December 2017, Sergeant McCabe recalls:

[Deputy McGuinness] told me of what he said the former Commissioner Callinan said to him at the car park meeting on 24/01/2014. I think he used the word ‘raped’ when referring to what the former Commissioner Callinan alleged against me. From my recollection, he did not mention what was said to him by the former Commissioner Callinan at the PAC meeting.

In his statement to tribunal investigators dated 28 March 2018, John McGuinness states:

I didn’t use that word “raped” but I would have repeated what I said in my other statement [dated 28 March 2017] in terms of the description of what Martin Callinan said. In reference to what Sergeant McCabe said in direct evidence to the tribunal on 05 March 2018 and where he said I told him that Martin Callinan told me that Sergeant McCabe had

sexually abused “all my children and my nieces”, I can confirm I did not say “all”. I did repeat to Sergeant McCabe what had been said to me by Martin Callinan and that was he (Martin Callinan) said Maurice McCabe had abused family members, meaning children and nieces.

In evidence to the tribunal on 10 April 2018, Deputy McGuinness said that he informed Sergeant McCabe about the car park meeting sometime around the 26 May 2016, but cannot be sure if it was before or after the debate.

29 May 2016: John McGuinness is interviewed on RTÉ by Richard Crowley. When asked whether former Commissioner Callinan had provided any new information at the car park meeting on 24 January 2014, Deputy McGuinness replied “I had heard all of this before and I had satisfied myself to the extent that I had already asked Sergeant McCabe about these matters and he dealt with each of the issues that I spoke to him about in detail and I believed him.” When Deputy McGuinness was asked if he recorded the meeting, took notes, or wrote notes after the meeting, Deputy McGuinness replied “No, no I did not.” When asked if he told Sergeant McCabe about the car park meeting, Deputy McGuinness replied “No, I did not because what was related to me was so vile and disturbing that I did not want to relate it to the- to Sergeant McCabe and I had heard it before--”. When asked if he subsequently told anybody about the meeting, Deputy McGuinness replied “No”. When asked if he told Micheál Martin TD about the meeting, Deputy McGuinness replied “No. No, I don’t believe I did no...because firstly it was a matter between me and Maurice McCabe as to how he was bringing forward the evidence and what he was doing and secondly, you know, when you do something like this the political establishment is against you...”

Deputy McGuinness also appears on the Sunday Show on Newstalk, interviewed by Shane Coleman. John McGuinness stated that the allegations made by former Commissioner Callinan at the car park meeting were allegations he had heard before. He also stated that he didn’t inform any other members of the PAC about the meeting.

Late May/Early June 2016: Superintendent Taylor makes contact with Michael Clifford for the first time, following an article Michael Clifford had written which made reference to Superintendent Taylor. Michael Clifford “got the impression that he attributed his plight, in respect of his arrest and suspension to his knowledge of the campaign which he said was conducted through him against Sergeant McCabe and specifically the allegation that Nóirín O’Sullivan was at last aware of it.”

Summer 2016: Sergeant McCabe meets Michelle Taylor twice in the Skylon Hotel. According to Sergeant McCabe’s statement to tribunal investigators dated 6 December 2016

They were general conversations. She was talking about David having been arrested and I was talking about my issues. That was it.

23 August 2016: John Barrett travels to Sergeant McCabe’s home and meets with Sergeant McCabe and his wife.

John Barrett’s memo of the meeting is eight pages long, and records that he read his memo of his previous meeting with the McCabes on 31 May 2016, which they signed.

Late August/Early September 2016: Michael Clifford meets Superintendent Taylor at Superintendent Taylor’s home. Superintendent Taylor cannot recall who initiated the contact that led to that meeting.

Early September 2016: Superintendent Taylor seeks spiritual advice from the Garda chaplain in relation to his role in the alleged campaign against Sergeant McCabe. In her statement to tribunal investigators, Michelle Taylor states that this was at her suggestion.

20 September 2016: Sergeant McCabe and Superintendent David Taylor meet at the Superintendent's home. The meeting lasts between three hours and four and a half hours and forms the basis of Sergeant McCabe's protected disclosure the following week. The meeting largely takes place in the presence of Superintendent Taylor's wife, Michelle.

Sergeant McCabe, in his statement to tribunal investigators dated 6 December 2017, details how the meeting came about:

In September 2016, I got another call off Mick Clifford of the Irish Examiner. He stated he was after having an interview with David Taylor for an hour. He said to me that he (Superintendent David Taylor) isn't suspended in relation to the Roma Children, he is suspended for information he knows about you (meaning me). I think it was the following day I rang Michelle Taylor and asked if I could meet with her and David. We agreed a date, which was the 20/09/2016. I met them that evening in the sitting room at their home. It was the first time I met Superintendent David Taylor. I said nothing. He started to tell me things about what he had done to me. After three or four things he said, I needed to take notes and I asked him could I take notes and he agreed. He proceeded to tell me that he had destroyed me in relation to a number of things he had done. What he told me is set out in my protected disclosure...I believe the meeting lasted over three hours.

Sergeant McCabe took a handwritten note of the meeting, and supplied tribunal investigators with a typed version on 6 December 2017. It includes references to PULSE, "Kieran" and the "Oisin computer" and "She knew everything- the pusher".

21 September 2016: Sergeant McCabe meets Superintendent Taylor again. In his statement to tribunal investigators dated 6 December 2017, Sergeant McCabe recalls:

I needed to clarify something with him. At our first meeting on the previous day, he told me that he had sent hundreds of text messages in relation to me and my family but he also said that whilst he had sent the text messages, it was Martin Callinan that had compiled them. Later that night (after the meeting on 20/09/2016), while at home, I couldn't get my head around the fact that he had sent hundreds of text messages about me. I needed to clarify that with him. As a result on the following morning, having telephoned in advance I called to him at his house and asked him in relation to the hundreds of text messages he said he had sent. Both he and Michelle [Taylor] were there. He reaffirmed that he had sent hundreds of text messages but he also said it could have been thousands. That was it.

26 September 2016: Sergeant McCabe makes a protected disclosure to the Minister for Justice and Equality under the Protected Disclosures Act 2014. It alleges that:

- Superintendent Taylor described to Sergeant McCabe "how ... he had in a sustained campaign destroyed my character and reputation by disseminating false, scurrilous and damaging allegations about me to persons of influence and persons in the media, acting on orders and instructions from Garda management."
- Superintendent Taylor told Sergeant McCabe that former Commissioner Callinan met Deputy John McGuinness and "Deputy McGuinness was warned against believing any evidence that I would give at the PAC on the basis that I was a serial sex abuser who abused my own children and nieces."

- Former Commissioner O’Sullivan “would have known about the meeting because Commissioner Callinan always kept her informed of such matters. [Superintendent Taylor] stated that “anything he knew, she knew.”
- “Commissioner Noreen O’Sullivan knew everything”; [Superintendent Taylor] said she was “the pusher” in the campaign to discredit me, not Martin Callinan.”
- Superintendent Taylor said he “was involved in sending hundreds of texts messages about [Maurice McCabe] to the then Deputy Commissioner O’Sullivan, and other senior officers and members of the media...Commissioner Martin Callinan usually provided the text of the vile messages about [Maurice McCabe and his family] and sent them to Superintendent Taylor’s mobile. Commissioner Callinan’s orders and instructions were to forward on the messages to the above persons, which [Superintendent Taylor] always did. Commissioner O’Sullivan usually replied with the one word “perfect”.”
- “Commissioner O’Sullivan would “go to any level” to lie.”
- “[T]here were a number of intelligence files on [Maurice McCabe] in Garda Headquarters...There is one file with Crime and Security and another file is on a special computer at Garda HQ...this latter file is named “Oisín”.”
- “[T]here was a person by the name as Kieran in Garda Headquarters who monitors all [Sergeant McCabe’s] activity on Pulse.”
- Superintendent Taylor was informed by Deputy Commissioner John Twomey that if Taylor were to retire “his discipline charges would “go away” and that Deputy Commissioner Twomey could facilitate it.”

30 September 2016: Superintendent David Taylor makes a protected disclosure to the Minister for Justice and Equality alleging that:

- “There was a campaign at the highest level in An Garda Síochána involving the then Commissioner, Martin Callinan, and the then Deputy Commissioner, now Commissioner Nóirín O’Sullivan, to discredit Maurice McCabe.”
- “I recall being instructed or directed to contact the media to brief them on the particular line the Commissioner had instructed, namely to brief negatively against Sergeant McCabe...I was to brief the media that Sergeant McCabe was motivated by maliciousness and revenge. I was also to encourage media to write negatively about Sergeant McCabe, that his complaints had no substance and that the Garda had fully investigated his complaints and found no substance to his allegations. In essence I was to brief that Sergeant McCabe was driven by agendas.”
- “I was also directed to draw journalists attention to the complaint of sexual assault made against Sergeant McCabe, and that this was the root cause of his agenda- revenge against the Gardai.”
- “I recall a telephone call with a journalist, Paul Williams, where he informed me that he was in the house of the person who had made the complaint against Sergeant McCabe with a view to interviewing her. I informed both the Commissioner and Deputy Commissioner of this. No article was ever published.”
- “I spoke to various journalists on foot of the instructions as given to me by the Commissioner to encourage them to write negatively about Sergeant McCabe and to brief against him.”
- “After the Commissioner arrived, I briefed him in the Superintendent’s Office in Dundalk Garda Station. During that briefing I was informed by the Commissioner that he had a telephone conversation with John McGuinness, then Chairman of the PAC, who he informed me had agreed to meet with him. The location of the meeting was Bewleys hotel at Newlands Cross...I knew the Commissioner had been trying to reach out to Mr

McGuinness in his capacity as Chairman of the PAC concerning Sergeant McCabe. The Commissioner never discussed with me what he wanted to discuss with Mr McGuinness.”

3 October 2016: Clare Daly TD and Mick Wallace TD meet Sergeant McCabe for lunch. They discuss the contents of his protected disclosure, and Superintendent Taylor’s.

4 October 2016: Michael Clifford, in a front page article in the Irish Examiner, breaks the story of the two protected disclosures. The article does not name Sergeant McCabe or Superintendent Taylor.

7 October 2016: Possible that Superintendent Taylor is identified in a newspaper article as one of the two gardaí who had made a protected disclosure in September.

9 October 2016: Deputy McGuinness is interviewed by Richard Crowley on RTE’s ‘This Week’ programme.

MR MCGUINNESS: It’s a matter of weeks and I’m saying this because of knowledge of what is in the Protected Disclosures and I’m saying it out of the work that the Public Accounts Committee did in the last five years. It is not a complicated issue to understand. There’s evidence there. It is evidenced based and it points in a particular direction in relation to the management of the force and that essential is what we need to get at.

...

Mr CROWLEY: It was in May of this year you were on this programme having spoken in the Dáil about that secret meeting you had in Bewley’s car park on the Naas Road with the then Commissioner...

MR MCGUINNESS: No, as I said at the time, if I had spoken about it at that time it may very well have derailed the Public Accounts Committee hearings. It was a judgment call that I had to make whether or not I was going to believe Maurice McCabe...

...

MR MCGUINNESS: Both before and after because in Leinster House rumour was circulating. The gossip mill was in full flow and for anyone that wanted to listen, all of the stories were being put out against Maurice McCabe.

MR CROWLEY: And what did McCabe say to you? What was his response when you told him what Martin Callinan was saying about him?

MR MCGUINNESS: I have to say that he wasn’t shocked because he had heard it before and he simply confirmed to me that it was nothing but untruths. That there was no basis for the type- for the allegations that were made and I believed in him and I’m glad now that I did because what has come since the hearings of the Public Accounts Committee has given us the proof that is necessary to show that it is a dysfunctional force at management level and that is supported by the current whistleblowers allegations that are now being investigated.

End of October/start of November 2016: Sergeant McCabe asks Michelle Taylor to ask Superintendent Taylor to meet John McGuinness TD and said it was “very important” that they meet.

Sometime after 16 January 2017: Superintendent Taylor, Michelle Taylor and John McGuinness TD meet in the Skylon Hotel, Drumcondra. Superintendent Taylor informs John McGuinness TD

of his instructions from Commissioner Callinan to brief the media negatively about Sergeant McCabe.

In his statement to tribunal investigators, John McGuinness states:

I met Superintendent Taylor once in relation to these matters, that meeting was in the Skylon Hotel in January 2017. The purpose of the meeting was to discuss the impact of what was happening at that time with him. I was interested as to how whistleblowers were being treated. They outlined what happened to them and the impact it had on them and their family life. It was in respect to all of that. Dave Taylor explained how he was used in all of this to inform people about Maurice McCabe and not to trust him...I didn't make a note of this meeting...I think Michelle [Taylor] set up in the meeting. Dave Taylor and Michelle were reaching out to people at the time and I responded to that.

Deputy McGuinness states that he has noted Mrs Taylor's mobile number in his diary on 16 January 2017, but has no note of when the meeting occurred.

19 January 2017: Superintendent Taylor's judicial review proceedings against the Commissioner of An Garda Síochána are adjourned generally.

7 February 2017: John Barrett travels to the home of Sergeant McCabe. His memo of the meeting runs to ten pages, and records conversation with the McCabe family about the Ms D allegation.

8 February 2017: Speaking in the Dáil, Brendan Howlin TD states:

This morning I was contacted by a journalist. The journalist told me that they have direct knowledge of calls made by the Garda Commissioner to journalists during 2013 and 2014 in the course of which the Commissioner made very serious allegations of sexual crimes having been committed by [Sergeant] Maurice McCabe. The Commissioner, in 2015, oversaw the investigation which examined the call logs of a garda officer who was under suspicion of leaking material to the media. If it was a fact that the Garda Commissioner was in direct contact with the media making allegations against one of her own officers at around the same time, it would be quite extraordinary. I don't know ... whether the charges that have been made against the Garda Commissioner are true or not.

In a statement to the Tribunal dated 13 March 2017, Deputy Howlin identifies this journalist as Alison O'Reilly, of the Irish Daily Mail.

9 February 2017: RTÉ Prime Time details the error in the referral to TUSLA made by Laura Brophy.

14 February 2017: David Taylor resumes duties in Dublin Castle (traffic).

John Deasy TD appears on Prime Time, interviewed by Katie Hannon:

Before the [Public Accounts Committee] meeting [on 23 January 2014] I was approached by a very senior guard and he proceeded to make some very derogatory comments about Maurice McCabe, the nature of which were, you know, Maurice McCabe couldn't be believed and couldn't be trusted on anything. They were very, very derogatory. It was, you know, a serious attack and very strongly worded. Maurice McCabe was in the Public Accounts Committee the following Thursday and I thought that he was credible and I made that judgment.

13 February 2017: The DPP sends a final direction to Chief Superintendent Clerkin, enclosing the advices of senior counsel in relation to a prosecution of Superintendent Taylor for breaches of the Data Protection Act 1988, as amended.

13 March 2017: Superintendent Taylor sends a statement to the tribunal, repeating the content of his protected disclosure, with added detail about a Viber message allegedly sent from his phone to his neighbour's group chat while it was in garda custody.

13 April 2017: Superintendent Taylor's solicitor writes to the tribunal identifying the journalists briefed by him in relation to Sergeant McCabe:

- Paul Williams [INM];
- Paul Reynolds [RTÉ];
- Conor Lally [The Irish Times];
- John Mooney [The Sunday Times];
- Michael O'Toole [Irish Daily Star];
- Cormac O'Keeffe [Irish Examiner];
- John Burke [RTÉ];
- Daniel McConnell [Irish Examiner];
- Juno McEnroe [Irish Examiner].

2 May 2017: Superintendent Taylor forwards a signed waiver to the tribunal, which states:

I wish to confirm that I do not claim and have not claimed any privilege over my identification as the source of any information, briefing, allegation or belief communicated to journalists in the print, broadcasting or other media directly or indirectly relating to Sergeant Maurice McCabe.

For the avoidance of any doubt I also confirm hereby that, in so far as may be necessary I waive and abandon any such right to claim privilege, or have it asserted on my behalf or in relation to me, in so far as it relates to my identity as the source of same.

I understand I am giving this confirmation

- (c) For the purposes of the Tribunal's preliminary inquiries into the matters included within the Tribunal's Terms of Reference, which are attached hereto.
- (d) For all other purposes of the Tribunal, including the taking of evidence from myself or any other person, whether in public or private sittings.

5 May 2017: Superintendent Taylor meets with tribunal investigators. In his statement, he clarified that "Deputy Commissioner O'Sullivan never instructed me to brief the media...however, as far as I am concerned she was aware of the instruction by Commissioner Callinan." He confirmed nobody else was present when the instructions were given, although Andrew McLindon was aware of the instructions as they were discussed by the two men.

25 May 2017: Michael Clifford emails Superintendent Taylor an extract from his book, asking him to "see what you think, particularly in terms of factual accuracy."

In his statement to tribunal investigators dated 3 April 2018, Michael Clifford states that Superintendent Taylor made one alteration, by phone a number of days later, in relation to the Roma children investigation. Michael Clifford took this to mean that Superintendent Taylor had read the entire extract, which included a reference to Superintendent Taylor sending "hundreds if not thousands" of text messages about Sergeant McCabe. The extract was eight pages long.

In his statement to tribunal investigators dated 8 March 2018, Superintendent Taylor states that he told Michael Clifford his negative briefing of journalists was “always done verbally”. He also denies being the source for the section of Michael Clifford’s book which refers to “hundreds if not thousands of text messages”. He stated that he did not read the extract “forensically”.

18 June 2017: Deputy McGuinness appears on the Marian Finucane show, hosted by Brendan O’Connor. He says that he never told anyone about his meeting in the car park with Commissioner Callinan, and that he took no note of the meeting.

10 September 2017: Nóirín O’Sullivan retires as Commissioner.

15 September 2017: Michael Clifford’s book, *A Force for Justice: the Maurice McCabe Story* is published.

22 September 2017: Superintendent Taylor meets with tribunal investigators. He states that the instructions from former Commissioner Callinan were always verbal, and were mostly given in the former Commissioner’s office. He also states that he had not alleged that former Commissioner O’Sullivan instructed him to negatively brief the media about Sergeant McCabe but “she was aware of the negative briefing instructions given to me by the former Commissioner Callinan against Sergeant McCabe. I used to text her and to speak to her about it.” He stated that he briefed journalists as the opportunity arose, usually in face-to-face meetings; it was never by email and he doubts if he ever sent it by text. He stated it was possible Andrew McLindon was in his presence as he negatively briefed a journalist, but he could not recall dates. Superintendent Taylor also added Eavan Murray and Debbie McCann to his list of journalists who were negatively briefed by him. Superintendent Taylor also waived sacerdotal privilege on that day.

28 November 2017: Frances Fitzgerald resigns as Minister for Business, Enterprise and Innovation and as Tánaiste.

6 December 2017: Sergeant McCabe meets with tribunal investigators. He confirms that his protected disclosure was an accurate account of his conversation with Superintendent Taylor, and that he has no recordings of any conversations he had with Superintendent Taylor.

February 2018: An Garda Síochána drop disciplinary proceedings against Superintendent Taylor.

14/15 February 2018: Superintendent Taylor and Eavan Murray meet for coffee in Dublin.

#### **Appendix 4: Opening statement of the tribunal, 27 February 2017**

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

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

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

The Morris Tribunal completed 10 modules in 6 years. Here there are 2 modules and responsibility rests here for the completion of the first of these; terms of reference (a) to (o). The second, and catchall module, module (p), generally and non-specifically concerns whether gardaí who have made protected disclosures were mistreated. The first module concerns the response of Commissioner Nóirín O'Sullivan, ex-Commissioner Martin Callinan and others at the highest command level to disclosures made by Sergeant Maurice McCabe. In particular, this is focused on the manner in which the character of a person may possibly have been undermined by calumny or detraction. Both Sergeant Maurice McCabe and another officer, Garda Keith Harrison, may have had dealings with, or have been the subject of discussions at, the Child and Family Agency and some aspect of those discussions may also have involved the Health Service Executive. This needs to be explored.

All are aware that this tribunal was preceded by a commission of investigation under the Hon Mr Justice Kevin O'Higgins, former judge of the High Court and of the European General Court, a person for whom it is impossible not to feel the highest regard. His commission sat long hours for 34 days and produced a report of model clarity and characteristic restraint. Prior to that, in consequence of the uncovering of work that did not meet the standards that a modern police force would adhere to, and that a business would tolerate only in the sure knowledge of its early demise, there were internal enquiries, disciplinary proceedings and an investigation by Chief Superintendent McGinn and Commissioner Byrne. Those went on for years. The commission was

the final step, established on the 3rd of February 2015 and issuing its final report on the 25th of April 2016. One of the issues before this tribunal is how counsel for the commissioner treated Sergeant Maurice McCabe when he was testifying.

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

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

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

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

The rules of evidence do not apply. The rules of logic and good sense do. Documentary evidence is to be considered for what it is worth, even though it may be hearsay. Where someone relays

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

Any examination by counsel of what a witness says is subject to the rule that it should be based on instructions and directed towards what a represented party wishes to assert as an explanation as to what happened, or to present a contrary point of view. Where focus is kept, cross-examination of witnesses is concise. Any party examining a witness is expected to come to the point, with reasonable latitude, and to be polite, with no latitude. Examination should converge on what is important. While cross-examination is an instrument for finding the truth, it can also be used to obfuscate and to divert attention away from the central issues. It is expected that represented parties will provide their legal representative with clear instructions; that they will tell them what facts they will later testify to. Cross examination as to credit can be legitimate. That may, or may not, be in the discretion of counsel. It may depend on the client or it may be within counsel's hands. The credit of a witness may be important, apart from their opportunity of observation, sureness of memory or possible motive. Where is a witness coming from may be germane to some cases. If, for instance, a prisoner sharing a cell with an accused person on remand on a charge of murder claims that the accused confessed his motive to him for killing the victim, then the fact that the prisoner as a witness himself has a previous fraud convictions, is important. It would be less important if he had been unfaithful to his girlfriend, or perhaps had done something discreditable while under strain or while young. The law of evidence allows the control of cross examination as to the credit of a witness based on its usefulness to the determination of the facts at issue and its length. That is a rule of commonsense.

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

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

out whether the media was used as an instrument for the dissemination of lies. That, however, may not be the only avenue of investigation.

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

On privilege and kindred issues, lastly, certain safeguards are provided by legislation, and certain safeguards inure under the Constitution, to those who find it difficult or impossible to access the system of justice, by reason of the subject matter of what they may need to testify to. Restricted hearings may take place, in terms of attendance and reporting, under section 2 of the 1921 Act, as amended. Submissions may need also to be heard on this as it will have to be carefully considered as to if there may be such a situation here; see terms of reference (d), (h), (n) and (o). Before we reach that stage, preliminary work will need to be done. The tribunal will approach this task with appropriate circumspection.

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

The terms of reference make it crystal clear as to what is at issue. [These were then set out]

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

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

Is tréith úsáideach é den aigne dlí go bhfuil sé coinníollaithe chun fianaise a lorg, chun fianaise thacaíoctha a lorg, chun patrúin a léiríonn an fhírinne a lorg, agus gan léimeadh go dtí cinneadh,

agus gan dearbhú go bhfuil rud míchluíteach déanta ag duine gan chruthúnas leordhóthanach. Is é sin ar gcaighdeán agus beidh muid ag cloí go deimhin leis.

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

In embarking on this task, one can only be reminded of human frailty and can only hope: is mór í an fhírinne agus bufaidh sí, the truth is powerful and will be victorious. There are no pre-conceived notions in this tribunal as to who is a villain and who is a victim, if there are such. And it may be that what the tribunal finds will not be to everyone's taste: Bíonn an fhírinne searbh ach ní fhaigheann sí náire go deo, the truth is bitter though not shameful. One useful aspect of the legal mind is that it is conditioned to look for evidence, to seek supporting evidence, to look for patterns indicative of truth, to not leap to conclusions and to not declare that someone has done something discreditable without sufficient proof. That is our standard and we will abide by it.

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

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

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

Thereafter, once the volunteered statements that have now been clearly called for are read, and further documents are examined, and circulated counsel for the tribunal will make an opening

statement. There will then be a short pause, following which the tribunal will begin public hearings, subject to the need that may arise to hear some evidence in restricted circumstances.

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

## **Appendix 5: Tribunal personnel**

Peter Charleton, judge of the Supreme Court, tribunal chairman

Diarmaid McGuinness SC, counsel

Patrick Marrinan SC, counsel

Kathleen Leader barrister, counsel

Elizabeth Mullan, solicitor

Emma Toal BL, documentary counsel

Lalita Pillay BL, documentary counsel

Peter Kavanagh, registrar

Philip Barnes, office manager

Joanne O'Donohue, investigator

Carl Ryan, investigator

(Courtesy of the Garda Síochána Ombudsman Commission and Ms Justice Mary Ellen Ring)

Ciara Herlihy, legal researcher

Ciara Ní Ghabhann, legal researcher

Brenda Byrne, administration

Susan McCormack, administration

Forensic consultants to the tribunal: Forensic Science Northern Ireland

Mark McConnell

Elaine Strachan

Stenographers to the tribunal: Gwen Malone Stenography Services

Niamh Kelly

Aoife Downes

Charles Biggs

Proofreader to the tribunal

Pat Neville

## **Appendix 6: Disclosures Tribunal timeline**

16 February 2017: Resolutions passed by Dáil Éireann and Seanad Éireann.

17 February 2017: The tribunal was established by the Minister for Justice and Equality under the Tribunals of Inquiry (Evidence) Act 1921 by instrument.

20 February 2017: The tribunal made a number of preservation orders.

27 February 2017: Opening statement of the tribunal delivered by the chairman, Mr Justice Peter Charleton.

30 March 2017: The tribunal heard applications for representation.

3 April 2017: Ruling of the Chairman in respect of applications for representation was published.

12 May 2017: Interpretation of the terms of reference of the tribunal and the procedures of the tribunal were published on the tribunal's website.

17 May 2017: The first interim report of the tribunal was laid before both Houses of the Oireachtas.

31 May 2017: Private sitting of the tribunal in respect of Ms Y.

1 June 2017: Private sitting of the tribunal in respect of Ms D.

14 June 2017: Opening statement of counsel for the tribunal was delivered by counsel for the tribunal, Diarmaid McGuinness SC, Patrick Marrinan SC and Kathleen Leader, counsel to the tribunal.

4 July 2017: Day 1 of public hearings of the tribunal. The first section of hearings dealt with the Health Service Executive/TUSLA matter under term of reference (d). Rhona Murphy, Mary O'Reilly and Laura Brophy gave evidence.

5 July 2017: Day 2 of tribunal hearings. Laura Brophy and Fiona Ward gave evidence.

6 July 2017: Day 3 of tribunal hearings. Fiona Ward, Carmel McAuley and Keara McGlone gave evidence.

7 July 2017: Day 4 of tribunal hearings. Keara McGlone and Laura Connolly gave evidence.

10 July 2017: Day 5 of tribunal hearings. Laura Connolly and Gerry Lowry gave evidence.

11 July 2017: Day 6 of tribunal hearings. Gerry Lowry and Kay McLoughlin gave evidence.

12 July 2017: Day 7 of tribunal hearings. Kay McLoughlin gave evidence.

13 July 2017: Day 8 of tribunal hearings. Sergeant Anthony Byrne, Orla Curran, Dr Gerard O'Neill, Pamela Armitage, Anne Masterson, Briege Tinnelly and Claire Tobin gave evidence.

14 July 2017: Day 9 of tribunal hearings. Claire Tobin, Linda Creamer and Eileen Argue gave evidence.

17 July 2017: Day 10 of tribunal hearings. Ms D, Mr D and Mrs D gave evidence in a private sitting of the tribunal.

18 July 2017: Day 11 of tribunal hearings. Paul Williams, Detective Superintendent John O'Reilly and Denise Duignan gave evidence.

19 July 2017: Day 12 of tribunal hearings. Superintendent Noel Cunningham gave evidence.

20 July 2017: Day 13 of tribunal hearings. Superintendent Noel Cunningham and Superintendent Leo McGinn gave evidence.

21 July 2017: Day 14 of tribunal hearings. Chief Superintendent James Sheridan gave evidence.

24 July 2017: Day 15 of tribunal hearings. Inspector Patrick O'Connell, Jim Gibson and Evelyn Waters gave evidence.

25 July 2017: Day 16 of tribunal hearings. Mark McConnell, Assistant Commissioner Kieran Kenny (retired) and Detective Superintendent Frank Walsh gave evidence.

26 July 2017: Day 17 of tribunal hearings. Rosalie Smyth-Lynch, Inspector Karen Duffy, Dermot Monaghan, Gail Penders, Patricia Bannon and Cormac Quinlan gave evidence.

27 July 2017: Day 18 of tribunal hearings. Kay McLoughlin, Linda Dewhirst, Mary Tiernan, Louise Carolan, Michael Cunningham and Seamus Deeney gave evidence.

18 September 2017: Day 19 of tribunal hearings, and the first day of hearings into matters relating to Garda Keith Harrison, under term of reference (n). Chief Superintendent James Sheridan (retired), Sergeant Daniel Devlin (retired), Garda Peter Kearins, Garda Michael Shevlin and Sergeant Phillip Gillespie gave evidence.

19 September 2017: Day 20 of tribunal hearings. William Bogle, Kerry Bogle, Jim Quinn, Garda Eoin Waters, Garda Ian Oates and Sergeant Aidan Doherty gave evidence.

20 September 2017: Day 21 of tribunal hearings. Sergeant David Durkin, Garda Brendan Mahon, Sergeant James Collins and George O'Doherty gave evidence.

21 September 2017: Day 22 of tribunal hearings. George O'Doherty, Garda Tina Fowley and Rita McDermott gave evidence.

22 September 2017: Day 23 of tribunal hearings. Inspector Goretta Sheridan gave evidence.

25 September 2017: Day 24 of tribunal hearings. Inspector Goretta Sheridan gave evidence.

26 September 2017: Day 25 of tribunal hearings. Sergeant Brigid McGowan gave evidence.

27 September 2017: Day 26 of tribunal hearings. Marisa Simms gave evidence.

28 September 2017: Day 27 of tribunal hearings. Marisa Simms and Garda Keith Harrison gave evidence.

29 September 2017: Day 28 of tribunal hearings. Garda Keith Harrison and Mary O'Donnell gave evidence.

2 October 2017: Day 29 of tribunal hearings. Garda Keith Harrison, Marisa Simms, Úna Coll, Gerry Hone and Donna McTeague gave evidence.

3 October 2017: Day 30 of tribunal hearings. Donna McTeague, Naomi Wallace and Bridgeen Smith gave evidence.

4 October 2017: Day 31 of tribunal hearings. Superintendent Eugene McGovern gave evidence.

5 October 2017: Day 32 of tribunal hearings. Superintendent Eugene McGovern gave evidence.

6 October 2017: Day 33 of tribunal hearings. Chief Superintendent Terry McGinn gave evidence.

9 October 2017: Day 34 of tribunal hearings. Chief Superintendent Terry McGinn and Garda Carl Campbell gave evidence.

10 October 2017: Day 35 of tribunal hearings. Garda Carl Campbell, Superintendent Michael Finan, Johan Groenewald, Darren Wright, Sergeant Paul Wallace, Detective Inspector Patrick O'Donnell and Superintendent Mary Murray gave evidence.

11 October 2017: Day 36 of tribunal hearings. No witnesses were heard on this date.

23 October 2017: Day 37 of tribunal hearings. Chief Superintendent James Sheridan, Superintendent Eugene McGovern, Chief Superintendent Terry McGinn and Gerry Hone gave evidence. Final submissions in relation to term of reference (n) were heard.

25 October 2017: Day 38 of tribunal hearings. Lisa O'Loughlen gave evidence.

30 November 2017: The second interim report of the tribunal on terms of reference (n) and (o) dealing with matters relating to Garda Keith Harrison was delivered to the Clerk of the Dáil Éireann and published on the same day.

8 January 2018: Day 39 of tribunal hearings, and the first day of public hearings relating to the O'Higgins Commission under terms of reference (e) and (h), with opening statement of counsel delivered by Kathleen Leader, counsel for the tribunal. No witnesses were heard on this date.

12 January 2018: Day 40 of tribunal hearings. Noel Waters and Ken Ruane gave evidence.

15 January 2018: Day 41 of tribunal hearings. Ken Ruane and Annmarie Ryan gave evidence.

17 January 2018: Day 42 of tribunal hearings. Annmarie Ryan gave evidence.

18 January 2018: Day 43 of tribunal hearings. Annmarie Ryan and Chief Superintendent Fergus Healy gave evidence.

19 January 2018: Day 44 of tribunal hearings. Chief Superintendent Fergus Healy gave evidence.

22 January 2018: Day 45 of tribunal hearings. Chief Superintendent Fergus Healy and former Commissioner Nóirín O'Sullivan gave evidence.

23 January 2018: Day 46 of tribunal hearings. Former Commissioner Nóirín O’Sullivan gave evidence.

24 January 2018: Day 47 of tribunal hearings. Former Commissioner Nóirín O’Sullivan, Richard Barrett and Colm Smyth SC gave evidence.

25 January 2018: Day 48 of tribunal hearings. Colm Smyth SC and Fiona O’Sullivan gave evidence.

26 January 2018: Day 49 of tribunal hearings. Colm Smyth SC, Michael MacNamee BL and Garret Byrne BL gave evidence.

29 January 2018: Day 50 of tribunal hearings. Paula Monks, Ken O’Leary, Michael Dreelan and Michael Flahive gave evidence.

30 January 2018: Day 51 of tribunal hearings. Christopher Quattrociochi, Inspector Michael McNamara, Bernadette Phelan, Denis Griffin, William Lavelle and Dale Sunderland gave evidence.

31 January 2018: Day 52 of tribunal hearings. Martin Power and Frances Fitzgerald TD gave evidence.

1 February 2018: Day 53 of tribunal hearings. Frances Fitzgerald TD and John Barrett gave evidence.

2 February 2018: Day 54 of tribunal hearings. John Barrett and Chief Superintendent Colm Rooney gave evidence.

5 February 2018: Day 55 of tribunal hearings. John Barrett and Superintendent Noel Cunningham gave evidence.

7 February 2018: Day 56 of tribunal hearings. Marion Mannion and Cyril Dunne gave evidence.

8 February 2018: Day 57 of tribunal hearings. Cyril Dunne, Noel Waters, Ken O’Leary, Chief Superintendent Anthony McLoughlin and Deputy Commissioner John Twomey gave evidence.

13 February 2018: Day 58 of tribunal hearings. Submissions on term of reference (d), relating to the Health Service Executive/TUSLA matter, were heard by the tribunal. No witnesses were heard on this date.

5 March 2018: Day 59 of tribunal hearings. Maurice McCabe gave evidence.

6 March 2018: Day 60 of tribunal hearings. Maurice McCabe gave evidence.

8 March 2018: Day 61 of tribunal hearings. Submissions on term of reference (e), relating to the O’Higgins Commission, were heard by the tribunal. No witnesses were heard on this date.

9 April 2018: Day 62 of tribunal hearings and the first day of public hearings into the remaining terms of reference. John McGuinness TD gave evidence.

10 April 2018: Day 63 of tribunal hearings. John McGuinness TD, Garda Paul Hynes and John Deasy TD gave evidence.

12 April 2018: Day 64 of tribunal hearings. Gerald Kean, Noel Brett and Chief Superintendent Diarmuid O’Sullivan gave evidence.

13 April 2018: Day 65 of tribunal hearings. Séamus McCarthy and Andrew McLindon gave evidence.

16 April 2018: Day 66 of tribunal hearings. Micheál Martin TD, Pat Rabbitte, Eoghan Murphy TD, John Kennedy and Brian Purcell gave evidence.

17 April 2018: Day 67 of tribunal hearings. Detective Superintendent Frank Walsh gave evidence.

2 May 2018: Day 68 of tribunal hearings. Superintendent Paul Moran and Superintendent John Ferris gave evidence.

4 May 2018: Day 69 of tribunal hearings. Superintendent Michael Flynn and Inspector Liam Moroney gave evidence.

8 May 2018: Day 70 of tribunal hearings. Shane Lenehan, Gerard Kavanagh, Brenda O’Grady, Antoinette Phillips, Chrissie Fitzpatrick, Ciarán Wren, Sergeant Margaret Flanagan, Chief Superintendent Frank Clerkin, Detective Sergeant Brian Hanley and Detective Sergeant John Colgan (retired) gave evidence.

9 May 2018: Day 71 of tribunal hearings. Deirdre Mooney, Sergeant Alan Frawley, Sergeant Damian Hogan, Sergeant Anthony Connaughton, Sergeant James Molloy, Superintendent Patrick Ryan, Sergeant Declan Monaghan and Garda Darina O’Brien gave evidence.

10 May 2018: Day 72 of tribunal hearings. Elaine Strachan and Mark McConnell gave evidence.

11 May 2018: Day 73 of tribunal hearings. Detective Chief Superintendent Peter Kirwan (retired) and Detective Superintendent Brian Brunton gave evidence.

14 May 2018: Day 74 of tribunal hearings. Superintendent David Taylor gave evidence.

15 May 2018: Day 75 of tribunal hearings. Superintendent David Taylor gave evidence.

16 May 2018: Day 76 of tribunal hearings. Superintendent David Taylor and Michelle Taylor gave evidence.

17 May 2018: Day 77 of tribunal hearings. Superintendent David Taylor and Alan Shatter gave evidence.

18 May 2018: Day 78 of tribunal hearings. Former Commissioner Martin Callinan gave evidence.

21 May 2018: Day 79 of tribunal hearings. Former Commissioner Martin Callinan gave evidence.

22 May 2018: Day 80 of tribunal hearings. Former Commissioner Martin Callinan gave evidence.

29 May 2018: Day 81 of tribunal hearings. Former Commissioner Nóirín O’Sullivan gave evidence.

30 May 2018: Day 82 of tribunal hearings. Former Commissioner Nóirín O’Sullivan, Anne Harris and Gemma O’Doherty gave evidence.

31 May 2018: Day 83 of tribunal hearings. Gemma O’Doherty, Alison O’Reilly and Brendan Howlin TD gave evidence.

1 June 2018: Day 84 of tribunal hearings. Alison O’Reilly, Justine McCarthy, Colum Kenny and Philip Boucher-Hayes gave evidence.

5 June 2018: Day 85 of tribunal hearings. Michael Clifford, Tim Vaughan, Frank Greaney and John Burke gave evidence.

6 June 2018: Day 86 of tribunal hearings. Superintendent John Ferris, Assistant Commissioner John O’Mahoney (retired) and Michael O’Toole gave evidence.

7 June 2018: Day 87 of tribunal hearings. Conor O’Donnell, Sebastian Hamilton and Conor Lally gave evidence.

8 June 2018: Day 88 of tribunal hearings. Conor Lally and Debbie McCann gave evidence.

11 June 2018: Day 89 of tribunal hearings. John Mooney and Eavan Murray gave evidence.

12 June 2018: Day 90 of tribunal hearings. Juno McEnroe, Cormac O’Keeffe, Daniel McConnell, Dearbhail McDonald and Ian Mallon gave evidence.

13 June 2018: Day 91 of tribunal hearings. Ian Mallon, Paul Williams and Paul Reynolds gave evidence.

14 June 2018: Day 92 of tribunal hearings. Paul Reynolds and Stephen Rae gave evidence.

15 June 2018: Day 93 of tribunal hearings. Paul Reynolds, Claire Grady, Fionnán Sheahan, Conor O’Callaghan, Ray Burke and John Barrett gave evidence.

21 June 2018: Day 94 of tribunal hearings. John Barrett, Niamh O’Connor, Tom Donnelly, Michael Wallace TD, Clare Daly TD, Cathal McMahon, John Kierans and Detective Superintendent John McCann (retired) gave evidence.

22 June 2018: Day 95 of tribunal hearings. Tom Brady, Fergus O’Shea and Robert Cox gave evidence. Submissions were made to the tribunal in relation to journalistic privilege. The chairman ruled that the matter would not be referred to the High Court and set out a number of issues to be addressed where relevant by the parties in final submissions.

28 and 29 June 2018: Days 96 and 97 of tribunal hearings. Final submissions from the parties were heard by the tribunal.

11 October 2018: The third interim report of the tribunal on terms of reference (a) and (o) dealing with the conduct of the Health Service Executive, the Child and Family Agency (TUSLA), Raidió Teilifís Éireann, Garda Headquarters, and Garda officers concerning Sergeant Maurice McCabe was delivered to the Clerk of the Dáil Éireann.

## **Appendix 7: List of represented parties before the tribunal**

For the tribunal:

Diarmaid McGuinness SC  
Patrick Marrinan SC  
Kathleen Leader BL  
Elizabeth Mullan, solicitor

For the Commissioner of An Garda Síochána, other senior members of An Garda Síochána and members of the Garda Press Office:

Shane Murphy SC  
Mícheál P O’Higgins SC  
Conor Dignam SC  
Noel Whelan BL  
John D Fitzgerald BL  
Donal McGuinness BL  
Instructed by the Chief State Solicitor’s Office

For TUSLA:

Paul Anthony McDermott SC  
Sarah McKechnie BL  
Instructed by Arthur Cox Solicitors

For Maurice McCabe:

Michael McDowell SC  
Paul McGarry SC  
Breffni Gordon BL  
Instructed by Seán Costello & Co. Solicitors

For John McGuinness TD:

Darren Lehane BL  
Instructed by Lawlor Partners Solicitors

For Superintendent David Taylor:

Michael O’Higgins SC  
Tara Burns SC  
John Ferry BL  
Instructed by ME Hanahoe Solicitors

For Raidió Teilifís Éireann:

Seán Gillane SC

Ronan Kennedy BL  
Instructed by Patricia Harrington, solicitor RTÉ

For the Health Service Executive:

Michael Cush SC  
Instructed by ByrneWallace Solicitors

For Alison O'Reilly:

Declan Doyle SC  
Fíonán Ó Muircheartaigh BL  
Michael Wall BL  
Instructed by Augustus Cullen Law Solicitors

For the D family:

Thomas P Hogan SC  
Niall F Buckley BL  
Instructed by Fanning & Kelly Solicitors

For The Irish Times DAC, Irish Times Trust and Conor Lally:

Patrick Leonard SC  
Mark Dunne BL  
Instructed by Hayes Solicitors

For News Group Newspapers Limited (The Irish Sun) and Eavan Murray:

Eoin McCullough SC  
Instructed by Simon McAleese Solicitors

For Cathal McMahon:

David Fennelly BL  
Sheehan & Partners Solicitors

For the Irish Examiner, Daniel McConnell, Juno McEnroe, Michael Clifford, Tim Vaughan and Cormac O'Keeffe:

Oisín Quinn SC  
Shane English BL  
Instructed by Ronan Daly Jermyn Solicitors

For Independent News and Media, Paul Williams, Michael O'Toole, Ian Mallon, Dearbhail McDonald, Stephen Rea, Tom Brady and Fionnán Sheahan:

Rossa Fanning SC

John Freeman BL  
Instructed by Fanning & Kelly Solicitors

For Annmarie Ryan:

Colm Ó hOisín SC  
Peter Shanley BL  
Instructed by Chief State Solicitor's Office

For Ms Y:

Paul Gunning BL  
Instructed by John J Quinn & Co Solicitors

For Department of Justice and Equality:

Patrick McCann SC  
Gerard Meehan BL  
Instructed by Chief State Solicitor's Office

For Colm Smyth SC, Garret Byrne BL and Michael MacNamee BL:

Paul Sreenan SC  
Catherine Donnelly BL  
Ellen Gleeson BL  
Instructed by Gleeson McGrath Baldwin Solicitors

For Gemma O'Doherty:

Mark Harty SC  
John Berry BL  
Instructed by KRW Law

For John Barrett:

John Rogers SC  
Tony McGillicuddy BL  
Instructed by Noble Law Solicitors

For John Wilson:

Mark Harty SC  
Instructed by Peter Connolly solicitor

For Associated Newspapers Limited (Irish Daily Mail and The Irish Mail on Sunday), Debbie McCann, Conor O'Donnell, Sebastian Hamilton and Robert Cox:

Hugh Mohan SC  
Tom Murphy BL  
Instructed by Michael Kealey solicitor

For the MGN Limited (Irish Daily Mirror) and John Kierans:

McCann FitzGerald Solicitors

For Anne Harris:

Darren Lehane BL  
Instructed by Patrick F O'Reilly & Co Solicitors

For AGSI, Inspector Patrick O'Connell and John Kennedy:

Desmond Dockery SC  
George Kennedy BL  
Instructed by Reddy Charlton Solicitors

For Justine McCarthy:

Brian Kennedy BL  
Instructed by A & L Goodbody Solicitors

For the Independent Star Limited (Daily Star) and Michael O'Toole:

Anthony Thuillier BL  
Instructed by Fanning & Kelly Solicitors

For John Mooney:

Conleth Bradley SC  
David Fennelly BL  
Instructed by Sheehan & Partners Solicitors

For Michelle Taylor:

Felix McEnroy SC  
Instructed by O'Mara Geraghty McCourt Solicitors

For Alan Shatter:

Eileen Barrington SC  
Cathal Murphy BL  
Instructed by Gallagher Shatter Solicitors

For Times Newspapers Limited (The Sunday Times):

Simon McAleese Solicitors

For Noel Brett:

McCann FitzGerald Solicitors

For Gerald Kean:

David Boughton BL

Instructed by Kean Solicitors

For Micheál Martin TD:

Feichín McDonagh SC

Instructed by Mason Hayes & Curran Solicitors