

Ruling on Applications for Legal Representation (No. 2)

On the 19th November, 2002 last, I sat to hear applications for legal representation in respect of interested parties. Having heard a number of applications for representation I am now delivering a decision in relation to each application in the order in which they were made.

1. Mr. Thomas Murphy of Hughes Murphy Walsh & Company, Solicitors, made application on behalf of the Garda Representative Association on behalf of a number of named Gardaí. Firstly, he made application on behalf of Garda Noel McMahon in respect of issues that are likely to arise in respect of Garda Noel McMahon under Term of Reference (e). Secondly, he made application in respect of retired Garda John Nicholson in respect of matters likely to affect him and arising under Terms of Reference (b), (c) and (d). He also made application on behalf of Garda John O'Dowd in respect of matters likely to affect him which may arise under Terms of Reference (a), (b), (c) and (f). Lastly, he made application in respect of Garda Pauric Mulligan in respect of matters likely to concern him arising under Terms of Reference (b). Having considered the initial submissions made by letter dated 19th November, 2002 and the further submissions made by Mr. Murphy at the oral hearing on the 19th November, and having regard to the opening statement made by counsel on behalf of the Tribunal, I am satisfied that legal representation should be granted to the four named individuals respectively in respect of the matters arising under the Terms of Reference referred to by Mr. Murphy. I have decided to grant the four individuals legal representation because the issues which arise in respect of these Terms of Reference may result in an attack on their good name and their behaviour as members of An Garda Síochána. It is appropriate that representation granted to the four named individuals should be exercised by the same solicitor.

Mr. Murphy also renewed an application for general representation on behalf of the Garda Representative Association which had already been made on the 15th July, 2002, but which had been deferred until the delivery of the preliminary opening statement by counsel on behalf of the Tribunal. Mr. Murphy submitted that, having regard to the many issues of a general nature concerning policy, procedures, management, discipline and investigative techniques that may come under scrutiny in the course of the Tribunal's hearings, it was appropriate that the Garda Representative Association should be represented throughout the hearings. It could then formulate and make submissions to the Tribunal at the appropriate time from the perspective of serving members of An Garda Síochána. I am satisfied that the conclusions and recommendations of this Tribunal may affect serving members of An Garda Síochána in the execution of their duties and the investigation of crime and that it is appropriate that the Tribunal should be assisted in relation to these issues by those having practical experience in the day-to-day operations of An Garda Síochána.

Therefore, I also grant representation to the Association on the general basis sought. This representation is granted on the understanding that submissions in relation to these issues are likely to be received by the Tribunal towards the end of its business and that the Tribunal does not consider it necessary for a full legal team to be present at all times during the course of the Tribunal's hearings for this purpose. Other considerations, of course, apply at the time of the making of these submissions and when the right to legal representation afforded to the named individuals is being exercised on their behalf.

2. Mr. Conleth Bradley, barrister-at-law, instructed by Damian Tansey & Associates appeared on behalf of Garda Tina Fowley. Notice of this application was furnished by letter dated 12th November, 2002, in which it was indicated that an application would be made to the Tribunal for representation on behalf of Garda Fowley but without citing any Term of Reference. Mr Bradley, at the oral hearing of the Tribunal on the 19th November, 2002, expanded on this application by reference to Terms of Reference (b) and (c). Having considered this application and the submissions of Mr. Bradley in this regard and the opening statement of counsel on behalf of the Tribunal, I am satisfied that it is appropriate to grant Garda Tina Fowley representation by way of Solicitor, one Senior and one Junior counsel in respect of the issues which may arise concerning Garda Fowley under Terms of Reference (b) and (c) in the course of the Tribunal's hearings. I have decided that such representation in respect of Term of Reference (b) should be limited to that part of the Tribunal's business that is concerned with aspects of the arrest and detention of suspects in the course of the investigation of the death of Richard Barron. In the course of his submissions Mr. Bradley also brought to the attention of the Tribunal a letter which had been sent to the Chief Superintendent, Letterkenny, by Assistant Commissioner M. F. Murphy dated 30th October, 2002, informing him that the Garda Commissioner would not be applying for legal representation in respect of Garda Fowley before the Tribunal, and requesting that confirmation of this notification be given to Garda Fowley. In this context, Mr. Bradley submitted that his client was without funding in respect of her representation before the Tribunal and that this would cause her considerable hardship. He submitted to the Tribunal that there were a number of options open by means of which the Tribunal might afford some relief to Garda Fowley. Firstly, it was suggested that the Tribunal should direct the Attorney General or the State or representatives of the State to fund Garda Fowley's representation. Secondly, if the Tribunal considered that it did not have the power to make such a direction, it was submitted that the Tribunal should seek such power from Dáil Éireann in terms of an amendment of the Terms of Reference. Thirdly, it was submitted that the Tribunal should recommend to the Attorney General that the Attorney General's scheme should apply to Garda Fowley's representation. I have considered this application and decided that I do not have the necessary jurisdiction to make the directions and or orders sought by Mr. Bradley on behalf of his client. I have already addressed the issue

of costs and the legal principles applicable thereto in my rulings on the 22nd July, 2002, and opening remarks which I made on the 15th July, 2002, to which I will refer at the conclusion of this ruling.

3. Mr. Donal McGuinness, barrister-at-law, instructed by Oliver Roche & Company, appeared on behalf of Mr Paul Gallagher. Initially, the Tribunal was given notice of an intention to make an application for representation on behalf of Mr. Gallagher by letter dated the 14th November, 2002, following the opening statement of counsel for the Tribunal. Mr. McGuinness, in a clear and concise submission to me on the 19th November, elaborated upon the grounds for this application, and sought representation for his client in respect of issues which will arise in the course of the Tribunal's hearings under Term of Reference (b). Mr. Gallagher has allegedly made statements in the course of the investigation into the death of Mr. Richard Barron which appear to have been considered relevant to the course which that investigation took from time to time, and, having regard to the fact that his good name may be called into question in the course of the Tribunal's hearings, I have decided that he should be granted representation. This representation is limited to a solicitor and one junior counsel and confined to that part of the Tribunal's hearings in the course of which Mr. Gallagher may be required to give evidence, or evidence may be given by others which may reflect upon his good name.
4. An application was made on behalf of Sean Crossan by Mr Alan Toal, barrister-at-law, instructed by Binchy's Solicitors, seeking an extension of the representation granted to him on the 22nd July, 2002. This representation was limited to paragraph (b) of the Terms of Reference. Notice of this application for an extension of representation to cover paragraph (j) of the Terms of Reference was given by letter dated 14th November, 2002. The reason for this application is that the Garda Síochána Complaints Board was said, in the preliminary opening statement by counsel for the Tribunal, to have deemed a complaint made by Mr. Crossan to the Garda Complaints Board vexatious and to have deemed Mr. Crossan not to be a credible witness in respect of the matters raised in his complaint. Mr. Toal elaborated upon this application by reference to the text of the preliminary opening statement in respect of his client's complaint to the Garda Complaints Board. It is useful to refer to the text of Term of Reference (j) under which I am required to inquire into

the effectiveness of the Garda Síochána Complaints Inquiry process vis-a-vis complaints made by Frank McBrearty Snr. and his family between 1997 and 2001.

It is the task of the Tribunal to consider the effectiveness of the entire procedure of Garda complaints having regard to the various complaints made by Mr. Frank McBrearty, Snr. and his family to the Garda Síochána Complaints Board. I have already indicated on the

15th July, 2002, what this involves. The Tribunal will in respect of this Term of Reference

- (1) Establish what complaints were actually made by Mr. McBrearty and his family between the relevant dates.**
- (2) Establish the manner in which these complaints were dealt with by the appropriate parties and identify where any of these complaints may not have been dealt with in a satisfactory manner, if that be the case.**
- (3) Consider the procedures which exist for dealing with complaints under the Garda Síochána (Complaints) Act, 1986, as amended, and the rules made thereunder.**

Enquire into the effectiveness of these procedures and advise, if it be the case, how these procedures could be improved.

It is not my intention to examine, under this Term of Reference, the truthfulness or otherwise of the complaint made. The inquiry is focussed on the effectiveness of procedures. The substance of Mr. Crossan's allegation will be dealt with under Term of Reference (b). Accordingly, I do not propose to grant legal representation to Mr. Crossan under this Terms of Reference as matters presently stand.

5. A similar application was made on behalf of Mrs. Katriona Brolly, who was also represented by Mr. Alan Toal, barrister-at-law, instructed by Binchy's Solicitors. A similar notice of an intention to apply for extended representation on behalf of Mrs. Brolly in relation to paragraph (j) of the Terms of Reference was given by letter dated 14th November, 2002. Mr. Toal also elaborated upon the reasons for which this extension of representation was sought on behalf of Mrs. Brolly which were broadly the same reasons as those furnished in respect of Mr. Crossan. Mrs. Brolly's complaint to the Garda Complaints Board dated 26th November, 1997, concerned her grievance in relation to alleged enquiries made of the Royal Ulster Constabulary and her employers in Strabane concerning her and her movements on the 14th October, 1996. It was indicated in the letter and by counsel at the oral hearing on the 19th November, 2002, that the Garda Complaints Board apparently ruled on the complaint and deemed it to be vexatious, and that Mrs. Brolly was deemed not to be a credible witness by the Board. On this basis, it was submitted, that representation should be afforded to her in relation to Term of Reference (j). Counsel on behalf of the Tribunal, in the preliminary opening statement, indicated that the complaint was held not to be admissible by the chief executive of the Garda Complaints Board because "it did not constitute an offence or breach of discipline against a member complained of". Therefore, it would appear that the complaint was found to be inadmissible on the basis of Section 4, subsection 3 of the Garda Síochána (Complaints) Act, 1986, and not

on the basis that it was vexatious under Section 4, subsection 6 of the said Act, or because Mrs. Brolly was deemed not to be a credible witness. For these reasons and for the same reasons given in respect of Mr. Crossan's application for extended legal representation in respect of Term of Reference (j), I decline to extend representation as requested for Mrs. Brolly as matters presently stand.

6. An application was made on behalf of Ms. Karen McGlinchey by Mr. Paul Murray, barrister-at-law, instructed by Gallagher Shatter, Solicitors. Notice of this application was given by letter dated 18th November, 2002, from Gallagher Shatter to the Tribunal's solicitor. In this letter, reference is made to the opening statement by counsel to the Tribunal in the course of which it was indicated that on 24th October, 1999, Karen McGlinchey claimed that her home at Brookside House, Letterkenny, was the subject of a burglary. The Tribunal was also informed that an Eleanor McDermott had told Gardaí that this report of a burglary at Karen McGlinchey's house was a false report and that Adrienne McGlinchey (Karen McGlinchey's sister) had told her this. This, of course, is contrary to the complaint made by Karen McGlinchey that her house had indeed been burgled. It was submitted that there is a suggestion that Karen McGlinchey may have made a false report which impinges upon her reputation. It is clear from the letter received and from counsel's submissions that this has been and is emphatically denied by Karen McGlinchey. Accordingly, it was submitted, that in respect of this issue, Ms. McGlinchey should be entitled to legal representation in the course of the Tribunal's hearings. This representation is sought in respect of Term of Reference (b)(iii) in respect of informants and (e). I have decided to grant legal representation limited to a solicitor and junior counsel to Ms. Karen McGlinchey limited to her appearance as a witness in the course of the Tribunal's hearings and to the other testimony or evidence produced in the course of the Tribunal's hearings in respect of the Terms of Reference mentioned which may reflect upon her reputation.
7. An application was made by Mr. Marcus Dowling, barrister-at-law, jointly instructed by Smyth O'Brien Hegarty, Solicitors, and Sean Costello & Company, Solicitors, on behalf of the Association of Garda Sergeants and Inspectors for legal representation. Initially, an application was made to the Tribunal on 15th July, 2002 at which time it was indicated that a further application would be made for legal representation in respect of individual members of the AGSI by the two firms of Solicitors already named and that this application would be made following the opening statement of counsel on behalf of the Tribunal. By letter dated the 18th November, 2002, Messrs. Smyth O'Brien Hegarty, Solicitors wrote to the Tribunal indicating that they, together with Sean Costello & Company, Solicitors, would seek legal representation on behalf of members of the association named on an attached list. At the hearing of the Tribunal on the 19th November, 2002, an application was made for legal representation and clarification

was sought by the Tribunal as to the basis upon which representation was sought in respect of the named individuals. Clarification was furnished to the Tribunal by letter of the same date, which is deemed by me to be part of the submissions made in support of this application. In relation to the members named in the submission furnished by Messrs. Smyth O'Brien Hegarty, Solicitors, I propose to deal with this application in the order in which the applicants have been set out in the submission. However, in relation to some events it has been convenient to consider a number of the applicants for representation together:

- (1)–(3) An application was made for legal representation on behalf of D/Sergeant John Melody, Inspector Edward O'Grady and D/Sergeant Gerard McGrath who, in 1996, were attached to the National Bureau of Criminal Investigation at Harcourt Square, Dublin. All three are said to have been involved in various ways in the arrest, detention, and interviewing of Frank McBrearty, Jnr. on 4th December, 1996. Serious allegations have been made against these members by Frank McBrearty, Jnr. which, if true, would tend to reflect badly upon D/Sergeant Melody, Inspector O'Grady and D/Sergeant McGrath in their conduct as members of An Garda Síochána and on their reputations. It is appropriate, therefore, that they be granted legal representation before the Tribunal in respect of Term of Reference (b). Since their involvement in the case seems to be confined to the arrest, detention and interviewing of Frank McBrearty, Jnr. and in the case of D/Sergeant Melody, Frank McBrearty, Snr., it appears appropriate that representation be limited to Term of Reference (b).
- (4) An application was made on behalf of Sergeant Sarah Hargadon of Lifford Garda Station, County Donegal. It is suggested that Sergeant Hargadon is the subject of an allegation by Bernard Conlon and that she assisted in the identification of Michael Peoples which led ultimately to his arrest on foot of a false allegation in respect of the silver bullet affair. Application is, therefore, made for representation in respect of Term of Reference (d). It would appear that Sergeant Hargadon denied any involvement in this matter. However, it is appropriate, having regard to the statement made by Bernard Conlon in respect of Sergeant Hargadon, that she be represented when giving evidence before the Tribunal. Accordingly, representation is granted to Sergeant Hargadon limited to the period during which she is required to give evidence to the Tribunal and the period during which any other person may give evidence which tends to reflect upon her character in respect of Term of Reference (d).

- (5) D/Inspector Michael Keane of Letterkenny Garda Station seeks legal representation because he was involved in the arrest of Michael Peoples. Insofar as there may be criticisms of his role in the arrest of Michael Peoples he seeks representation in respect of Term of Reference (d) i.e. the arrest of Mr. Peoples on 6th May, 1999. It should be noted that D/Inspector Keane was not the arresting officer in respect of Mr. Peoples on that date. He was arrested by Detective Sergeant Gerry Connolly along with his colleague D/Garda Michael Reynolds in the company of D/Garda E. McHale. I take it that the reference to Term of Reference (d) is a mistake and that in fact representation is sought by D/Inspector Keane in respect of the arrest of Michael Peoples which occurred on the 4th December, 1996. In relation to those events D/Inspector Keane was the arresting Garda and there may well be issues raised in relation to this arrest and detention which reflect on his decisions and actions in the course of his dealings with Mr. Peoples. Consequently, in that regard, it is appropriate to grant legal representation to D/Inspector Keane in respect of Term of Reference (b).
- (6) Application was made on behalf of Sergeant Sylvie Henry of Letterkenny Garda Station in respect of Terms of Reference (a), (b), (d), and (j). It is clear that allegations have been made by Mr. Sean Crossan in relation to Sergeant Henry's behaviour in the course of arresting, detaining and interviewing Mr. Crossan. Sergeant Henry was also involved in the arrest and detention of Mrs. Charlotte Peoples, the legality of which is to be considered by the Tribunal under Term of Reference (b) - not (d) as suggested in the submission. It is also suggested that Garda John O'Dowd has alleged that Sergeant Henry, together with Inspector John McGinley, was trying to frame him in relation to the alleged extortion phone calls to the Peoples' home which is the subject of Term of Reference (a). Lastly, a complaint is made that Sergeant Henry may not have properly investigated the significance of a phone call allegedly made by Mark McConnell to Frankies' Tudor Bar on the night of the 23rd October, 1996, in respect of which a complaint was apparently made to the Garda Complaints Board. Consequently, representation is sought in respect of Term of Reference (j). It seems to me that it is appropriate that Sergeant Henry should have legal representation in respect of Terms of Reference (a) and (b) as findings could be made which reflect upon his character.

Insofar as representation is sought in respect of Term of Reference (j), I decline to grant representation in respect of this paragraph. Sergeant Henry's grievance appears to

relate to the fact that it has been alleged that he did not properly investigate the significance of a phone call allegedly made by Mark McConnell to Frankies' Tudor Bar on the night of the 23rd October, 1996. In fact this reference appears to be mistaken and the relevant phone call is one made at 11 p.m. on 13th October, 1996 from the Town & Country Bar to Frankies' Tudor Bar. This was the subject of complaint number 971126 by Mr. Frank McBrearty, Snr. to the Garda Complaints Board complaining that it had not been investigated properly. There appears to be a suggestion that Sergeant Henry was engaged in this investigation and that, if the matter had not been investigated properly, it would perhaps reflect badly upon him. In that context it seems to me that Sergeant Henry would be entitled to legal representation in respect of this issue should it arise in the course of the Tribunal's hearings in respect of the investigation of the death of Mr. Barron – Term of Reference (b) and, as previously indicated, I am disposed to grant legal representation to Sergeant Henry in relation to Term of Reference (b).

- (7) D/Sergeant Hugh Smith, Letterkenny Garda Station seeks legal representation in respect of Terms of Reference (b), (c), (e) and (f). In relation to Term of Reference (b) it is submitted that Sergeant Smith was involved in a number of aspects of the investigation and in dealings with Noel McBride on a number of occasions. In respect of Term of Reference (c) it is submitted that Sergeant Smith may have to deal with an allegation that he did not act correctly in suggesting that the absence of the original of a leaflet was an impediment to Garda investigations. In respect of Term of Reference (f) allegations are made in respect of Sergeant Smith and, in particular, his interview with Frank McBrearty, Jnr. It has also been suggested in the submission that there "may also be a conflict between his evidence and that of Sergeant White" in relation to this interview. In respect of Term of Reference (e) D/Sergeant Smith was a member of the Detective unit that first came into contact with Ms. Adrienne McGlinchey and accordingly, may be the subject of criticism in failing to follow procedures and exercise proper supervision of her as an informant. It seems to me appropriate that D/Sergeant Smith should have representation in respect of Terms of Reference (b), (c), (e) and (f). This should be limited to those occasions upon which he is giving evidence or evidence is given which reflects upon his character or reputation in relation to matters arising in respect of these Terms of Reference. I am satisfied that the submissions made and the materials available to the Tribunal justify the granting of representation on this basis.

- (8) Sergeant Sean McKenna, Ardara Garda Station, Donegal seeks legal representation in respect of Term of Reference (g) as it is claimed that he is concerned in virtually all aspects of that module including the alleged planting of poitín at Mr. Hugh Diver's home. I note from the opening statement made by counsel on behalf of the Tribunal that it is stated in respect of Sergeant McKenna's attendance as a scene of crime examiner at Ardara that "there is nothing to suggest that the performance of his duties on this day was anything less than professional" in respect of his attendance at the scene at Ardara mast on 19th November, 1996. However, there are other issues which arise in the course of the investigation in respect of the Ardara matters. The arrest and detentions which occurred thereafter, together with the allegations concerning the planting of poitín by Gardaí in Mr. Hugh Diver's home, are matters which may reflect upon the reputation of Sergeant McKenna and consequently, I think it appropriate, having regard to the materials available to the Tribunal, that he be afforded legal representation in respect of Term of Reference (g).
- (9) Application is made on behalf of Sergeant Niall Coady, Burnfoot Garda Station, Co Donegal for legal representation in respect of Terms of Reference (b) and (i). In respect of Term of Reference (b) it is submitted that Sergeant Coady was one of the first persons on the scene of Mr. Barron's death and was allegedly directed to preserve the scene. Although the submission indicates that it is anticipated that there will be criticism of Sergeant Coady's action in "picking up the skin fragment", this reference is not entirely understood by the Tribunal. However, leaving aside the stated basis upon which representation is sought, it seems to me in regard to the materials available to the Tribunal and the opening statement of counsel, that there is potential for criticism of Sergeant Coady in the carrying out of his duties in respect of the scene of Mr. Barron's death.

Representation is also sought in respect of Term of Reference (i). In relation to the events relating to this Term of Reference, Sergeant Coady was involved in the search at Burnfoot and allegedly found the firearm. It is submitted that the circumstances in which this discovery was made is the subject of serious controversy, the resolution of which could potentially impinge upon the reputation of Sergeant Coady. Therefore, it is appropriate that in respect of Terms of Reference (b) and (i), Sergeant Coady be granted legal representation.

- (10)–(11) D/Sergeant Thomas Burke, Buncrana Garda Station and Sergeant Philip Gillespie both seek representation in respect of Term of Reference (i). D/Sergeant Thomas Burke appears to have been one of the members to whom a search warrant in respect of the lands at Burnfoot was issued. Sergeant Gillespie does not appear to have been issued with such a warrant though it is suggested in the submission that he may have been. Both state that they are the subject of civil proceedings by John Casey and Bernard Power, respectively, in relation to their arrest and detention subsequent to the alleged finding of the firearm made at Burnfoot. Insofar as allegations are apparently to be made against them it would be appropriate that they have legal representation in respect of same. This should be limited to their attendance as witnesses before the Tribunal and the giving of evidence by any other party which reflects or has the potential to reflect adversely upon their character.
- (12) Application is also made for legal representation on behalf of retired D/Sergeant James Leheny, formerly of Buncrana Garda Station, County Donegal. This application refers to Terms of Reference (b), (e) and (i). In relation to Term of Reference (b) the submission is made that allegations have been made by Mark McConnell that Mr. Leheny wrongfully took items of property belonging to Mr. McConnell at the time of his arrest, and that Mr. McConnell was mistreated by Sergeant Leheny in the course of his detention. No allegations appear to have been made in respect of Term of Reference (e) and it is submitted that Mr. Leheny would appear before the Tribunal perhaps only as a witness but the submission seeks to reserve the position in relation to legal representation in respect of Term of Reference (e). In respect of Terms of Reference (i) it is submitted that Sergeant Leheny is involved in the events surrounding the finding of the firearm and the subsequent arrest and detention of persons at the scene at Burnfoot. In this regard, it is said that Timothy Collins has issued proceedings in which Mr. Leheny is named as a defendant and in which damages are claimed for false arrest, false imprisonment, assault and battery. Civil proceedings are not a matter of direct concern to this Tribunal but it is anticipated by Mr. Leheny that allegations will be made by those arrested as a result of the finding of the firearm at Burnfoot concerning his conduct as a member of An Garda Síochána on that occasion. Therefore, I have decided that legal representation should be afforded to Mr. Leheny in respect of Terms of Reference (b) and (i). This representation is limited to his giving evidence or the giving of evidence by others in the course of which his character is attacked.

- (13) Application is made on behalf of Sergeant Joseph Hannigan of Letterkenny Garda Station. It is submitted that Sergeant Hannigan appears to have an involvement in a number of matters and representation is sought in respect of Terms of Reference (b), (c), (i) and (j). It is submitted that Sergeant Hannigan was the Sergeant-in-charge in Raphoe Garda Station in October, 1996 and may, perhaps, be the subject of criticism in relation to the investigation into the death of Mr. Barron. Sergeant Hannigan is also concerned with events which occurred in respect of the arrest and detention and ultimate interviewing of a number of persons arising out of the investigation into the death of Mr. Barron. In respect of Term of Reference (c) it is claimed that during the period of the allegations of harassment made under this Term of Reference, Sergeant Hannigan was the Sergeant-in-charge of Raphoe Station during some of this period and that there was a specific allegation that he made inappropriate contact with the Royal Ulster Constabulary with a view to having inquiries made at Katriona Brolly's place of work. In respect of Term of Reference (i) it is submitted that Sergeant Hannigan is a person who is, in some way, involved in overhearing an account given by Gardaí McConigley and Moran in respect of their involvement in the search of the field at Burnfoot. The context in which representation is sought in this regard is not entirely clear to the Tribunal and for the moment I have decided not to grant legal representation in respect of Term of Reference (i) but this application may be renewed if it is thought appropriate in the future. In relation to Term of Reference (j) the fact that Sergeant Hannigan may have been the subject of a complaint to the Garda Complaints Board does not entitle him to legal representation on that basis having regard to the provisions of Terms of Reference (j), which requires me to investigate the effectiveness of the enquiry process rather than the substance of the complaint. Therefore, I refuse representation to Sergeant Hannigan in respect of Term of Reference (j). However, having regard to the material available and the submissions made in relation to Terms of Reference (b) and (c) I allow representation to Sergeant Hannigan in respect of those paragraphs. This representation is limited to those occasions upon which he may give evidence or is likely to be the subject of evidence which may impinge upon his character.
- (14) Sergeant Martin Moylan of Letterkenny Garda Station, County Donegal seeks representation in relation to Term of Reference (b). Sergeant Moylan was involved, apparently, in the investigation into Mr. Barron's death and, in particular, in interviewing Mr. Noel McBride. It is submitted that since the

basis upon which Frank McBrearty, Jnr. became a suspect appears to be in issue and since Sergeant Moylan was alleged to have been involved in the taking of Noel McBride's statement and to have treated it at face value, he may be the subject of adverse comment in respect of the manner in which he carried out his investigative function. It is also submitted that there is a conflict between the statements of Garda O'Dowd and those of Sergeant Moylan in relation to this issue. I propose to grant representation to Sergeant Moylan in relation to Term of Reference (b) confined to the giving of his evidence and the furnishing of evidence by others which may adversely impinge upon his reputation as a member of An Garda Síochána.

- (15) Representation is sought on behalf of Inspector Gerard Connolly, Sligo Garda Station, Co. Sligo in relation to Term of Reference (d). It is submitted that because he was involved in the arrest of Michael Peoples and because he was also involved in interviewing Bernard Conlon, he may come under adverse criticism having regard to his dealings with Mr. Peoples and in respect of the treatment of informants generally. It is the Tribunal's understanding at this stage that the suggestion made by Bernard Conlon that he was asked to make a false statement against Mark McConnell and Michael Peoples does not encompass any suggestion that Inspector Connolly was a party to procuring such a false statement in any respect. However, complaints have been made by Mr. McConnell in respect of Inspector Connolly which may tend to impinge upon his character and consequently, I have decided to grant to Inspector Connolly the right to legal representation in respect of Term of Reference (d).
- (16) Sergeant Mick Murray of Buncrana Garda Station seeks legal representation in respect of Term of Reference (e). It is contended that he was the scene of crime examiner who examined the McGlinchey flat and that the adequacy of that examination may be the source of criticism in the course of the inquiry. The submission relates to potential criticism arising out of the examination of Adrienne McGlinchey's flat in March, 1994. He may also have been involved in the alleged find of fertilizer material at Bridgend in January, 1994. Similarly, Sergeant Murray may be open to criticism in relation to his handling and examination of that material. Consequently, I have decided to allow Sergeant Murray legal representation in respect of Term of Reference (e) limited to the occasion upon which he may attend to give evidence or evidence is adduced which may adversely affect his reputation.

- (17) A further application has been made in respect of a retired Sergeant John Costello who served in Letterkenny Garda Station, County Donegal. Representation is sought on his behalf in relation to Term of Reference (f) on the grounds that it is submitted that he supplied the video camera that recorded interviews (presumably of Mr. Frank McBrearty, Jnr.) during the course of his detention and an issue arises as to whether it was a proper course of action in the circumstances. This submission contains new and interesting information and it is appropriate, therefore, to grant Mr. Costello legal representation in respect of Term of Reference (f) limited to his attendance as a witness or the giving of evidence which may adversely impinge upon his reputation.
- (18) Sergeant John O'Keeffe of Buncrana Garda Station, County Donegal applied for representation on the basis that Garda Noel McMahon is alleged to have approached him in a bar in June or July, 1996 and, in the course of a drunken conversation, informed him that he, Noel McMahon, had driven a bomb into Strabane in order to assist two females. This is said to have occurred at a time when Garda O'Keeffe was involved with Noel McMahon in relation to his duties as a Detective Garda. It is submitted that the extent or otherwise to which he should have taken action in relation to this incident may be the subject of criticism and representation is sought for him on that basis. Not every witness appearing before the Tribunal is entitled to representation but I am prepared to grant Sergeant John O'Keeffe representation, limited to the giving of his testimony before this Tribunal, and in respect of any evidence which may be adduced during the course of the Tribunal which may adversely affect his character.
- (19) Retired D/Sergeant Thomas D. (Des) Walsh, formerly of Buncrana Garda Station, County Donegal seeks legal representation in relation to Term of Reference (e). Sergeant Walsh apparently worked with Garda McMahon and was involved in a search of Ms. McGlinchey's flat during which fertilizer was found and apparently, obtained the warrant for that search. It is also alleged that he had certain conversations with Sheenagh McMahon in which he indicated a certain level of knowledge of Garda McMahon's and Inspector Lennon's alleged activities. At the moment it is not clear to me how his reputation may be put in issue before the Tribunal. For the moment, I am not disposed to grant legal representation to Mr. Walsh but this application may be renewed at a later date at which stage further information or statements may have been obtained from Mr. Walsh or other sources in relation to this aspect of the Tribunal's inquiry.

- (20) Retired Detective Sergeant Tom Sreenan, formerly of Buncrana Garda Station, County Donegal seeks representation in relation to Term of Reference (e). Mr. Sreenan, it is submitted, was Garda McMahon's supervisor during much of the period covered by this Term of Reference and raised some concerns (it is alleged) about Garda Noel McMahon's behaviour with his supervisors. It is anticipated that his supervision of Garda Noel McMahon may be the subject of adverse comment or criticism in the future. Whilst I acknowledge that Mr. Sreenan appears in the materials in relation to the findings of explosives, I do not at this point propose to grant legal representation to him on the basis of the submission made. It may be that in the future further statements or materials may become available from Mr. Sreenan or others to add substance to his concerns and accordingly this application may be renewed if this is thought appropriate at some future date.

The AGSI also seeks general representation in that it has a desire to be permanently represented during the Tribunal's hearings for the purpose of preparing submissions on behalf of the association in relation to any findings and recommendations which the Tribunal may make. It seems to me that it would be most useful to have the submissions of the AGSI in respect of matters of policy and procedure. The stage for making submissions of this kind will probably arise towards the end of the Tribunal's hearings of oral evidence. It does not appear to me to be appropriate in relation to the Association of Garda Sergeants and Inspectors or the Garda Representative Association that both be represented by full legal teams during the entire Tribunal proceedings for the purpose of making these submissions towards the end of the Tribunal's business. It is, however, appropriate that this representation be granted to the Association of Garda Sergeants and Inspectors for the purpose of making submissions on these general issues at the conclusion of the oral hearings. Therefore, I propose to grant representation on this general basis to the association on the same basis as that granted to the Garda Representative Association.

8. An application was made on behalf of Mr. John Bovaird by Mr. Sean O'Siochain, barrister-at-law, instructed by Michael O'Shea, Solicitor. Documents were furnished to the Tribunal including a statement of Mr. John Bovaird dated 13th November, 2002 which accompanied written submissions which had been forwarded by O'Donovan & Company, Solicitors dated 18th November, 2002. The application is based on allegations made by Mr. Bovaird arising out of the building of a house for a serving member of An Garda Síochána in 1972. Mr. Bovaird had difficulty, he alleges, in securing the balance of monies due to him in respect of the contract for the building of this house. He alleges that between 1973 and 1995, he and his family were subjected to a campaign of abuse, harassment, watching and

besetting by members of An Garda Síochána, the unwarranted issuing of a large number of summonses (he claims 500 in all) and the setting up of checkpoints with great frequency outside his house. He claims that he sought to resolve these difficulties by making representations to Garda Headquarters in Dublin, senior Gardaí, local Teachtaí Dála and the Ombudsman. He was, however, unaware of the Garda Complaints Board, its functions or powers and became somewhat despondent over his situation. A submission is made that Mr. Bovaird's experience with members of An Garda Síochána, as outlined in his statement, and the submissions furnished, would assist the Tribunal in relation to somewhat similar issues arising out of allegations of the harassment of others and legal representation is sought on behalf of Mr. John Bovaird under Term of Reference (c) and (j). These terms cover allegations of harassment of the McBrearty family and the effectiveness of the Garda complaints inquiry process.

It has to some degree been acknowledged by counsel on behalf of Mr. Bovaird that the issues raised by his client do not come within the Terms of Reference cited in support of the submission. I am of the view that the complaints raised by Mr. Bovaird do not fall within the Terms of Reference of this Tribunal and accordingly, I must refuse this application for legal representation made on his behalf.

9. Mr. Kieran Waldron made a personal application to the Tribunal at its sitting on the 19th November, 2002 for legal representation. Mr. Waldron made a statement to Sergeant James Leheny on 15th May, 2000 which has been furnished to the Tribunal and gave notice of his intention to make application to the Tribunal for legal representation by letter dated 7th November, 2002. His statement to D/Sergeant Leheny was made after Mr. Waldron made contact with Assistant Commissioner Kevin Carty on 26th March, 2000 apparently, and contained serious allegations against a named member of An Garda Síochána. In particular, he alleges that he was threatened by this member of An Garda Síochána with his firearm. It appears to me that the investigation, in the course of which this event is alleged to have occurred, is not one which falls to be considered within the Terms of Reference as they are presently constituted. Accordingly, I have invited Mr. Waldron to furnish such further details to the Tribunal through the Tribunal's solicitor or its investigators as may be of assistance to me in the conduct of this inquiry. However, for the moment, I must decline this application for representation.
10. It was indicated that an application would be made by or on behalf of Mrs. Rosalind White at the oral hearing on 19th November, 2002. However, when Mrs. White's name was called there was no appearance by her or on her behalf. Accordingly, I cannot make any order in relation to representation in respect of Mrs. White and her application may be renewed at some convenient date in the future, if that is her wish.

11. Counsel on behalf of the Garda Commissioner, Mr Eamon Leahy S.C., attended at the oral hearing on the 19th November, 2002 and indicated that it was his intention to make application for legal representation on behalf of a number of named Gardaí. By letter dated 18th November, 2002, the Tribunal was informed by the solicitor acting on behalf of the Commissioner (and this was restated by senior counsel at the oral hearing of the Tribunal) that it was their intention to set out in writing in respect of each member of An Garda Síochána, in respect of whom they have instructions to apply for legal representation, the basis upon which each named Garda sought legal representation, by reference to material set out in counsel's preliminary opening statement to the Tribunal and the relevant Term of Reference. It was indicated to me that further time was required in order to make this application in the manner intended, having regard to the detailed nature of the preliminary opening statement. I was happy to indicate that this application for legal representation could be made at any convenient time following the delivery to the Tribunal of this submission in the form referred to by counsel. Accordingly, this application is adjourned until a convenient date following receipt of this document.
12. Mr. Frank McBrearty, Snr. attended at the oral hearing of the Tribunal on 19th November, 2002. Frank McBrearty, Snr. informed the Tribunal that in 1997 he had approached various members of the Oireachtas in relation to the difficulties which he had experienced and continued to experience with members of An Garda Síochána in the Donegal division. Mr. McBrearty, Snr. made it clear to me that he was dissatisfied with the Terms of Reference of the Tribunal as established by a resolution passed by Dáil Éireann and Seanad Éireann on 28th March, 2002. In particular, he complains that the Terms of Reference are deficient insofar as they do not encompass grievances which he has against the Commissioner of An Garda Síochána, the Director of Public Prosecutions, the Attorney General, the Minister for Justice, Equality & Law Reform, and the Donegal State Solicitor. He also complains that he is not in a financial position to pay for legal representation which he has already been granted by the Tribunal for the duration of the Tribunal's hearings which may continue for a considerable time. I indicated that I had some sympathy for him in this regard and that I understood that it would be a very onerous financial undertaking to fund a legal team for the duration of the Tribunal. Mr. McBrearty indicated that because of the limited nature of the Terms of Reference of this Tribunal of Inquiry and his inability to fund a legal team for the duration of the Inquiry that he and his family and the Diver family did not intend to participate in or assist this Inquiry, whether as witnesses or otherwise.

As already noted, this Inquiry has been established by a resolution of the Dáil and Seanad which determined its Terms of Reference. Since its inception the Tribunal and its legal team have carried out extensive preliminary research into the issues raised by these Terms of Reference. It has appointed two investigators to assist it in its enquiries. Upon completion of this preliminary investigative stage, counsel to the Tribunal delivered an extensive preliminary opening statement in respect of the complicated issues and facts relevant to the Terms of Reference. This work is conducted pursuant to the Tribunals of Inquiry (Evidence) Act, 1921, as amended. As is clear from the preliminary opening statement, the McBrearty family and their dealings with An Garda Síochána and various other parties are central to many of the Tribunal's Terms of Reference. The evidence of members of the McBrearty family and their friends and associates will be important to the workings of the Tribunal, as will the testimony of many other persons. This Tribunal is entitled, as a matter of law, to expect the co-operation and testimony of all witnesses called to give evidence before it. The Tribunal is mandated to discover the truth. Any witness called before the Tribunal will be afforded all appropriate facilities, rights and procedures to which they are entitled by law. It should be recalled that this Tribunal is established to enquire urgently into matters of public importance and thus to carry out a public, not a private, function. The Tribunal is determined to carry out its function and to exercise appropriately all the legal powers vested in it in order that it may effectively establish the truth and conclude its proceedings by making its report to the Minister for Justice, Equality & Law Reform as expeditiously as possible. It is the duty of all citizens who may be called before the Tribunal to give evidence, to do so. The Tribunal has the right to expect of each witness called before it that he or she will give their untrammelled evidence directly and truthfully, in accordance with the oath or affirmation made, and without regard to any other external issue or grievance which they may harbour in respect of the establishment of this Tribunal. Each witness called before the Tribunal has a moral, civic and legal duty to give his or her evidence unconditionally, and the Tribunal expects each witness to discharge his or her duty fully in this regard. Consequently, it should not be thought by anybody attending before this Tribunal that they may give evidence as and when they see fit or at such time as they see fit. Further, it should not be thought by anybody attending before this Tribunal that threats of non co-operation will coerce me as sole member of the Tribunal to exercise any of the powers vested in me pursuant to the Tribunals of Inquiry (Evidence) Act, 1921, as amended, whether in respect of seeking an extension of the Terms of Reference or otherwise. Such decisions as I make as sole member will be made in accordance with law and the procedures to be followed in the course of the Tribunal's business.

I now turn to the submissions made by Mr. Frank McBrearty, Snr. in respect of his application for an extension of the Terms of Reference of this Tribunal to include the Garda Commissioner, the Attorney General, the Director of Public Prosecutions, the State Solicitor for County Donegal and the Minister for Justice, Equality & Law Reform. I have already addressed this issue in the course of the statement which I made at the opening of this Tribunal on the 15th July, 2002, when a somewhat similar application was made by Mr. Martin Giblin, Senior Counsel, on behalf of the extended McBrearty family. On that occasion I stated:

It is contended that the Terms of Reference which delimit the work of the Tribunal are too narrow. The argument is made that the role of the State should be investigated and the hope was expressed that the Minister for Justice Equality & Law Reform would support an application to extend the Terms of Reference. This argument has already been advanced to Dáil Éireann. The Tribunal does not have its mind closed to this argument. It could not possibly at this stage adjudicate on such an application, because no material has been advanced as to why an extension of the Terms of Reference should be sought. The Tribunal is mindful of the fact that Section 1(a) of the Tribunal of Inquiry (Evidence) Act, 1921, as inserted by Section 1 of the Tribunal of Inquiry (Amendment) Act, 1998 and as amended by Section 1 of the Tribunal of Inquiry (Amendment No. 2) Act, 1998 provides as to its material part;

- 1. An instrument to which this section applies (whether made before or after the passing of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1998 shall be amended pursuant to a Resolution of both Houses of the Oireachtas, by a Minister of the Government where**
 - (a) The Tribunal has consented to the proposed amendment following consultation between the Tribunal and the Attorney General on behalf of the Minister, or**
 - (b) The Tribunal has requested the amendment and is satisfied that such an amendment would not prejudice the legal rights of any person who has co-operated with, or provided information to the Tribunal under its Terms of Reference.**
- 2. Without prejudice to the generality of subsection (1), the Tribunal should not consent to or request an amendment to an Instrument to which this section applies where it is satisfied that such amendment would**

prejudice the legal rights of any person who has co-operated with or provided information to the Tribunal under its Terms of Reference.

The question of extending the Terms of Reference of the Tribunal to cover Mr. Shortt was specifically debated in Dáil Éireann, inter alia, on the 28th March, 2002. Whether the matter was debated in Dáil Éireann or not, however, the Tribunal remains mindful of its own responsibility. If arguments or submissions are made, particularly those grounded upon evidence, the Tribunal will then consider its attitude bearing in mind its responsibilities under the relevant Acts.

I have also indicated that I am mindful that the present Terms of Reference of this Tribunal have been debated in the Houses of the Oireachtas which framed the Terms of Reference after due deliberation and debate, following which a Resolution establishing the Tribunal was passed by both Houses. I must have regard to that democratic decision in considering applications of this nature and that it is not appropriate to seek an amendment of the Terms of Reference unless good grounds exist.

It is equally clear to me that there may be circumstances in which a Tribunal may request an amendment of its Terms of Reference in accordance with the quoted provisions. If a submission were to be made to the Tribunal which the Tribunal accepted, or the Tribunal determined of its own motion that it could better or more effectively carry out its work by means of extending the Terms of Reference to include further issues or persons not presently captured within the Terms of Reference, it could seek an extension. If, by seeking an extension of the Terms of Reference, the Tribunal could thereby secure additional potential material, or evidence which would enable it to determine the truth relating to the issues and facts which have arisen before the Tribunal in the course of its work, then it may be appropriate to seek an extension in respect of such issues or persons; particularly, if this would help the Tribunal to address the issues which are of “serious public concern about allegations that members of the Garda Síochána in the Donegal Division engaged in unethical and criminal behaviour” and assist it in fulfilling the purpose for which it was established. A mere assertion or request for an extension of the Terms of Reference is not sufficient. As already stated, the Tribunal will entertain submissions and argument based on the material and evidence which will be canvassed before the Tribunal by any party appearing before it who wishes to make a submission seeking an extension of the Terms of Reference. In saying this I do not in any way preclude myself from exercising the statutory power vested in me to seek an extension of the Terms of Reference at any stage during the course of the Tribunal’s work, if I believe this to be necessary.

For the moment I do not think it appropriate to act on Mr. Frank McBrearty's assertion because I believe it to be far too general in its nature and scope and premature in its timing. Mr. Frank McBrearty, Snr. or anyone acting on his behalf may, at any stage, renew this application in accordance with the procedures which I have indicated.

It should also be noted that the Minister for Justice, Equality & Law Reform may also exercise his powers pursuant to the quoted provisions and may move, if he thinks fit, to amend the Terms of Reference and extend them in any manner which he thinks appropriate. He must, in that regard, consult with the Tribunal in respect of any such proposed extension. Although the Tribunal must consent to the proposed amendment before a Resolution amending the Terms of Reference may be passed by the Houses of the Oireachtas, the legislation specifically confers upon the Minister the power to initiate such an amendment. I draw attention to this aspect of the legislation because some comments and reports on this matter give the mistaken impression that the initiative lies solely with the Tribunal. I conclude my remarks in respect of the extension of the Terms of Reference by emphasising that the work of this Inquiry under its present Terms of Reference will proceed and that the Tribunal expects all those attending or giving evidence before the Tribunal to discharge their duty to the Tribunal.

I now turn to the issue of costs raised by Mr. Frank McBrearty, Snr. in his submission to me on the 19th November, 2002. I have already indicated on the 22nd July, 2002 that the Tribunal considers that it has powers to make provision for the payment of a viaticum to witnesses for the purpose of attendance. In respect of the wider issue of costs, this matter was fully addressed by me on the 22nd July, 2002. The power of the Tribunal in relation to costs is limited. The Tribunal is not empowered to grant legal aid under the civil or criminal legal aid scheme. The Tribunal is not empowered to make a recommendation under the Attorney General's Scheme whereby litigants in some forms of proceedings before the courts are indemnified from a fund administered by the Office of the Attorney General. The Tribunal only has a power to make an order for costs at the conclusion of the Tribunal's business. Additionally, the Tribunal has the power, having regard to the findings of the Tribunal, and all other relevant matters, to order that the whole or part of the costs of any person appearing before the Tribunal be paid by another person to that person, or to the Minister for Finance. As previously noted, it is not possible for the Tribunal to consider this aspect of costs until the Tribunal's business has concluded. Consequently, although I appreciate that the retention of lawyers by a private individual to appear before this Tribunal on a person's behalf inflicts a heavy financial burden upon him, the Tribunal is not vested with any power to relieve that burden. Mr. Frank McBrearty, Snr. has expressed, in forceful terms, the nature and extent of that burden for him and his family. A similar burden will also fall on many other persons who have already been granted legal

representation. Whilst I can sympathise with the financial situation faced by these parties, I have no power to remedy it. In those circumstances, Mr. Frank McBrearty, Snr. and his family and others are left with the option of representing themselves before this Tribunal if they are unable to procure legal representation.

In conclusion, I repeat that whatever grievances a witness may have, whether it be the suggested deficiencies in the Terms of Reference of the Tribunal or an inability to fund legal representation before the Tribunal, such issues do not diminish that person's legal duty to attend as a witness before the Tribunal, or give his or her evidence when called upon in accordance with law.