

The Honourable Mr Justice Frederick J. Morris
15/July/2002 2:00PM
Court 6
Four Courts
Dublin 7

This is the first sitting of the Tribunal of Inquiry created by Resolution passed by Dáil and Seanad Éireann on the 28th March, 2002 and by Instrument entitled Tribunals of Inquiry (Evidence) Act, 1921 (Establishment of Tribunal) Instrument, 2002 made by the Minister for Justice, Equality and Law Reform on the 24th April, 2002.

At this sitting the Tribunal has three functions. The first is to read and define the Terms of Reference, the second is to identify certain procedures which will be followed by the Tribunal, which should be mentioned at this stage. The third function, then, is to hear applications from parties seeking authorisation for representation before the Tribunal.

Before referring to the Terms of Reference I wish to express my thanks to the President of the High Court for his permission to sit in the Four Courts on this occasion. This became necessary because the normal hearing room of the Tribunal, which is situated at its premises at Belfield Office Park, Beaver Row, Clonskeagh, Dublin 4 is being renovated. It will be ready when the Tribunal is at a stage when it will hold its first public sittings later in the year. Consideration is also being given to the possibility of holding some public sittings in County Donegal to facilitate a situation which may arise where there are a multitude of local witnesses in respect of a limited and defined aspect of the work of the Tribunal.

Dealing now with the Terms of Reference which are contained in the Instrument of the 24th April, 2002, they are as follows:-

(Reading of the [Terms of Reference](#)).

It is appropriate having stated the Terms of Reference of the Tribunal to explain the Terms of Reference where necessary and, moreover, to give an insight into the approach which the Tribunal will adopt in addressing the Terms of Reference and in carrying out its role in accordance with law. This definition of the Terms of Reference and the approach being adopted by the Tribunal to them may require to be re-addressed as the work of the Tribunal progresses and as issues are clarified. Appropriate notice will be given of any such changes which will, of course, be made public.

The Tribunal has received a considerable volume of correspondence. This correspondence can be broadly divided into two categories. First of all, it has received many letters from members of the public who believe that they have information, which would be of help to the Tribunal and for the purpose of making this information available, they have sought representation before the Tribunal. I think that I should make the position about the right to representation before the Tribunal clear.

The right to representation is available in the main only to those persons who might be prejudiced by the evidence given at the Tribunal or, by a finding made by the Tribunal in the report, which it prepares. They are entitled to representation so that they may be in a position to refute any criticism which might be made of them, to cross-examine the person making the criticism and to give evidence in opposition. One does not get representation before the Tribunal solely for the purpose of contributing to the evidence of the Tribunal or joining in the work of the Tribunal simply because one is interested in it.

The Tribunal has already replied to this correspondence and has indicated, that representation is not available to these people. However, the Tribunal is extremely concerned that it should consider all the information offered to it, and, accordingly, it would ask that if there is any evidence which is relevant to the Tribunal's Terms of Reference which any member of the public wishes the Tribunal to consider, that evidence should be set out in the form of a statement to be prepared either by a Solicitor or by the person themselves. It should be forwarded to the Tribunal and it will be fully considered and if relevant, it will be used. If that person is not in a position to prepare his or her own statement, an officer of the Tribunal will be made available if requested to assist in the preparation of the statement.

There is one further aspect to the question of representation before the Tribunal that should be considered. The fact that any person has been given the right to representation before the Tribunal does not automatically mean that that person is entitled to recover the costs of representation. In this

regard, I can do no better than to quote what Mr. Justice Costello said when dealing with this matter in his report of the Tribunal of Inquiry into the Whiddy Island Disaster. He said "Tribunals of Inquiry are essentially carrying out investigatory functions and need not require that any person be represented by Solicitor or Counsel before them. Persons may apply to appear before the Tribunal by Solicitor and Counsel, and applications are granted when the applicant may be prejudicially affected by the evidence or by the Tribunal's findings. It certainly does not follow that when persons incur legal expenses in defending their own interests prima facie those expenses should be paid out of public funds".

The Chief Justice in his report on the Stardust Tribunal adopted that statement and added "the extent of the participation by a party in the hearings of the Tribunal, whether by attendance at them or the conduct of examination of witnesses on his behalf by Counsel, is entirely a matter for the person himself, subject, of course, to his obligation to give evidence on oath as to the matters being enquired into, if the Tribunal so requires".

In my view, these are correct statements of the law and I believe that it is appropriate that the parties should know this when they are applying for representation. However parties to whom representation has been granted and who have been of assistance to the Tribunal and cooperated with it in its work could make a strong argument for being awarded their costs. On the other hand Section 6.1 of the 1979 Act refers to circumstances in which costs may be awarded against another person.

The Tribunal has also received a number of letters from Solicitors acting for members of An Garda Síochána and others enquiring in effect how their clients will know if they should seek representation before the Tribunal and enquiring how they will know if their clients are involved in the matters with which the Tribunal is concerned. I will now address this query.

First of all, the Tribunal's Terms of Reference have been published and advertised in the Press and are now available on website. I believe that anyone reading these Terms of Reference would recognise whether he or she was involved in the events referred to in the Terms of Reference. However, there are two further safeguards which will ensure that all interested parties will know the extent, if any, of their possible involvement. First of all, when the first substantive public sitting of the Inquiry takes place, probably in the Autumn, Counsel for the Tribunal will make a comprehensive statement in which he will set out the events which will be considered and enquired into by the Tribunal and he will identify the persons who are or have been involved in these matters. Having heard this opening, parties will be left in no doubt as to his or her involvement in the matter. The Tribunal will not be bound by that statement. It will be given as a guide to the issues and the parties involved.

Secondly, you will hear in a moment the procedures envisaged by the Tribunal whereby every person who may be prejudiced by evidence adduced before the Tribunal will be furnished with a file showing that person's alleged involvement affording them an opportunity of responding to same and will, of course, be given an opportunity to seek representation before the Tribunal, cross-examine a witness or witnesses and give evidence on his or her own behalf.

Accordingly, this is by no means the only opportunity upon which it will be open to parties to make application for representation before the Tribunal. Such an application might be made now or may be postponed until after the opening statement in the Autumn or postponed until after the service of documents.

Before dealing with each of the Terms of Reference in the order in which they are set out in the Instrument establishing this Tribunal it should be emphasised that this is a Tribunal of Inquiry and accordingly, in respect of each of the Terms of Reference, the Tribunal will enquire into and establish, in so far as it is possible, the facts relevant to each of the Terms of Reference.

I will now deal with each of the Terms of Reference in turn.

With regard to the first paragraph of the Terms of Reference the Tribunal will enquire into

(A) "The making of extortion and hoax telephone calls to the home of Michael and Charlotte Peoples on the 9th November, 1996 and the subsequent Garda investigation into that complaint".

Michael and Charlotte Peoples complain that they received a number of anonymous extortion or hoax telephone calls to their home on the 9th November, 1996. In these calls, they complain, that the caller demanded a money payment and made certain threats if such payment were not to be forthcoming. The Tribunal in the course of its inquiry will

- (i) Enquire into and in so far as is possible, establish the basic facts relating to these alleged phone calls;
- (ii) Attempt to establish the origin of such telephone calls;
- (iii) Enquire into the identity of the person or persons making the alleged calls and to the telephone lines used in that regard;
- (iv) Attempt to establish the motive for the making of such calls;
- (v) Enquire into the manner in which the complaint made by Mr. and Mrs. Peoples about these calls was dealt with by An Garda Síochána;
- (vi) Enquire into an application made on the 18th December, 1996 under Section 13(2)(2a), and (2b) of the Interception of Postal Packets and Telecommunications (Regulations) Act, 1993, seeking information as to such calls and the handling of same within An Garda Síochána and in Eircom Plc (or Telecom Eireann Plc as it then was);
- (vii) Enquire into the part which may have been played by any informer in the making, or arranging for the making, of these telephone calls;
- (viii) Enquire into the connection, which there may be between the making of these calls and any other matter referred to in the Terms of Reference.

(B) "Investigations in relation to the death of Mr. Richie Barron of Raphoe, Co. Donegal on the 14th October, 1996 with particular reference to the arrest and treatment of persons in custody in connection with that investigation, the progress, management and effectiveness of the Garda investigation with particular reference to the management of informants".

Mr. Richard Barron died on the 14th October, 1996. The circumstances in which he died have not been established. One thing which is beyond doubt is that the Barron family suffered a bereavement by reason of Mr. Barron's untimely death. Before going any further, I wish to express my condolences to them, both on my own behalf and on behalf of the entire Tribunal team.

The Tribunal wishes to stress that it is no part of the Tribunal's function to establish who may have been responsible for Mr. Barron's death. However, the details surrounding his death are of relevance in so far as they relate to the investigations by An Garda Síochána in relation to his death and the matters set out at (B) above.

The Tribunal proposes to advance its inquiry in respect of paragraph (B) by addressing it in 3 parts:-

1st Part The Tribunal proposes to enquire into the investigations made by members of An Garda Síochána into the death of the late Mr. Barron. The Tribunal therefore will

- (i) Enquire into and in so far as is possible, establish what were the basic facts in this regard;
- (ii) Enquire into the steps taken by An Garda Síochána in carrying out the investigation;
- (iii) Enquire into and establish the normal approved practices and procedures which are prescribed or followed when investigating crimes in the apparent circumstances in which Mr. Barron died;
- (iv) Enquire into whether the normal approved practices and procedures which are prescribed or followed in such circumstances were carried out or followed in the course of the investigation into the death of Mr. Barron;
- (v) Enquire into the adequacy of the Garda practices and/or procedures;
- (vi) Enquire into the efforts made by An Garda Síochána to obtain expert evidence and the use made of such evidence by them in the course of the investigation;
- (vii) Enquire generally into the progress, management and effectiveness of the entire investigation into the death of Mr. Richard Barron;
- (viii) Enquire into the course of the investigation into the death of Mr. Barron and the decisions which may have been taken in the course of the progress and management of the investigation, and enquire as to whether the investigation was in any way influenced by any external or improper factor and whether there is any connection between any of these matters and any other matter referred to in the Terms of Reference.

2nd Part The Tribunal will enquire into the arrest and treatment of persons in custody in connection with Mr. Barron's death. In this regard the Tribunal will:-

- (i) Enquire as to whether it was determined that on a planned and pre-arranged basis members of An Garda Síochána should arrest particular individuals with a view to having them detained pursuant to Section 4 of the Criminal Justice Act, 1984 and/or questioned in relation to the death of Richard Barron and if so enquire into the circumstances in which and the reasons for which such a determination was made;

- (ii) Enquire as to whether there exist within the Garda Síochána any standards, practices or procedures applicable to the making of a determination in the course of an investigation to arrest and detain by pre-arrangement persons suspected in relation to a matter under investigation and, if so, whether there exist any or any adequate safeguards against any potential errors in the decision-making process or misuse of power whether accidental or deliberate;
- (iii) Enquire into and establish the identity of persons arrested in respect of the investigation into the death of Richard Barron, the reason for such arrests and whether such reasons were based on correct legal grounds and as to how the arrests were effected;
- (iv) Consider whether members of An Garda Síochána when making the arrests acted in good faith and/or reasonably;
- (v) Enquire into whether particular persons became the focus of unfounded or unreasonable suspicion and, if so, how and why this occurred;
- (vi) Enquire whether in directing and/or making arrests members of An Garda Síochána proceeded with the arrests only when satisfied that in respect of each arrested person their suspicions were reasonable and/or that they exercised all appropriate care, caution and diligence in deciding to make an arrest with due regard to the presumption of innocence attaching to such persons and their right to fairness of procedures;
- (vii) Enquire into all aspects of the arrests and detentions including extensions of custody carried out in the course of the investigation and the treatment of persons whilst in custody;
- (viii) Enquire into and establish the standard Garda procedure and practice in relation to the treatment of persons in custody and whether such procedures and practice were observed in the course of the arrests and detentions and treatment of those in custody in connection with the investigation and further, the adequacy and fairness of such procedures and practice having regard to the facts which may be established in evidence at the Tribunal;
- (ix) Enquire into any aspect of this Term of Reference in so far as it may be connected to any other Term of Reference.

3rd Part The Tribunal will enquire into the management of informants and will

- (i) Enquire into the basis upon which a person may be classified by the Garda Síochána as an informant and whether procedures and practices exist which apply to the classification and management of informants and whether these are adequate and appropriate and/or whether recommendations may be made for improvements in this regard;
- (ii) Enquire as to whether the procedures and practices for the classification and management of informants were applied in this investigation adequately, appropriately or at all;
- (iii) Enquire as to the procedure and practice (if any) by which the information gleaned from informants is marshalled, analysed, processed and/or verified by the Garda Síochána and if and how that was done in this investigation and whether recommendations may be made for improvements in this regard;
- (iv) Enquire into whether there was a misuse and/or over-reliance upon informants arising either as a result of the actions of the informants themselves or those dealing with informants or in the handling of the information supplied by members of An Garda Síochána;
- (v) Enquire into any aspect of this Term of Reference in so far as it may be connected to any other Term of Reference.

In this regard if it emerges in the course of establishing the facts in relation to the other Terms of Reference that informants were used by members of An Garda Síochána in the course of the events relevant to those Terms of Reference, the Tribunal will enquire into and consider in respect of all evidence which emerges before the Tribunal concerning informants, the adequacy and appropriateness of the procedures and practice in relation to the classification and management of informants and such information alleged to have been supplied by them in like manner to that set out above.

(C) "Allegations of harassment of the McBrearty family of Raphoe, County Donegal and of relatives, associates and agents of that family by members of An Garda Síochána subsequent to the death of Mr. Barron including the issue and prosecution of summonses relating to offences alleged to have occurred between the 28th October, 1996 and the 28th September, 1998."

Under this heading it would appear that members of the McBrearty family of Raphoe, County Donegal have complained that certain Gardai in the Donegal area have singled them and their business out for special attention by conduct which could broadly be described as over-zealous performance of their duties, including the issue of numerous summonses alleging breaches of the licensing law in a licensed premises and surveillance of the premises in what is alleged to have been an oppressive manner.

The Tribunal will interpret the word "harassment" as meaning a persistent or repeated improper use of power calculated to cause trouble, embarrassment, harm, torment, or distress which may be effected and/or continued by acts or omissions on the part of an appropriate person to act when he should have acted.

With regard to this paragraph, the Tribunal will interpret the term "the McBrearty family of Raphoe, County Donegal" in such a manner as to encompass persons who are members of the extended McBrearty family who consider that they have been subjected to harassment by members of An Garda Síochána because they have been identified as members of that family.

The Tribunal will interpret the words "associates and agents" in the broader sense and will include in this group persons or bodies who appear to have been identified by members of An Garda Síochána as being associates or friends or agents of the family.

In relation to this paragraph, the Tribunal will

- (i) Establish the nature of the complaints of harassment made by the McBrearty family and the persons referred to in the Terms of Reference;
- (ii) Attempt to establish the basic facts in respect of each complaint;
- (iii) Establish the number and nature of the summonses relating to offences alleged to have occurred between the 28th October, 1996 and the 28th September, 1998 issued by members of An Garda Síochána or other prosecuting authorities;
- (iv) Ascertain what is the standard Garda practice and procedure with regard to the issuing and management of summons cases;
- (v) Ascertain whether there was a departure from Garda practice and procedure in the making of the complaints leading to the issue of the summonses;
- (vi) Enquire into the alleged basis (evidential or otherwise) upon which a member(s) of An Garda Síochána applied for the issuing of a summons(es) or recommended a prosecution or pursued a prosecution in respect of the offence(s) alleged in such summons(es);
- (vii) Enquire into the course of the investigation made by members of An Garda Síochána in respect of each summons issued or applied for and enquire into the origin and basis of the members' suspicions and/or conclusions as to whether an offence or offences had been committed;
- (viii) Attempt to identify the members of An Garda Síochána, if any, implicated in the complaint of harassment;
- (ix) Enquire into and determine whether the alleged harassment, the subject matter of this Term of Reference by members of An Garda Síochána took place;
- (x) If harassment did take place as alleged identify (if possible) the reasons or motives for such conduct on the part of the person or persons responsible and why such conduct continued;
- (xi) Enquire as to the extent and/or level of knowledge within An Garda Síochána in respect of the facts relevant to the allegations of harassment and the steps (if any) taken in the light of such knowledge;
- (xii) Enquire into the role (if any) of the Director of Public Prosecutions in relation to the prosecution of the summonses or any other fact relevant to this Term of Reference;
- (xiii) Enquire into the connection, if any, between this Term of Reference and any other Term of Reference;
- (xiv) Consider the use of informants in relation to the conduct of which complaint is made. In that regard the same approach outlined at Term of Reference (B)(3) will be applied;
- (xv) Consider whether standard Garda practice and procedure with regard to the initiation and management of prosecutions by summons contain adequate safeguards.

With regard to Paragraph D

"The circumstances surrounding the arrest and detention of Mark McConnell on 1st October, 1998 and Michael Peoples on the 6th May, 1999."

The information which is available to the Tribunal suggests that there was an arrest and detention of the persons named on the date set out in the Terms of Reference. An arrest is a deprivation of a citizen's liberty. An arrest is justified where there is a suspicion on good faith, against the person proposed to be arrested, that he committed an offence which carries with it, in law, a power of arrest. Following the exercise of a power of arrest the detention of the person arrested may be sought under the provisions of Section 4 of the Criminal Justice Act, 1984, for the proper investigation of the offence in respect of which the person has been arrested. These principles apply where an arrest is considered in the context of

any of the Terms of Reference, with necessary modifications. The Tribunal understands that the complaint here is that the arrests and detentions should not have been made and occurred for reasons other than those permitted by law.

The Tribunal will:

- (i) Establish in so far as possible the facts surrounding these arrests and detentions and the treatment of the two men whilst in custody;
- (ii) Ascertain, in so far as possible, the material available to the Garda Síochána when the arrests and detentions were made;
- (iii) Enquire into and establish the reason for such arrests and detentions and whether such reasons were based on correct legal grounds;
- (iv) Enquire into and establish whether members of An Garda Síochána when making the arrests and detentions acted reasonably or in good faith or on any or any sufficient, reasonable suspicion;
- (v) Enquire into whether the two individuals had become the focus of unfounded or unreasonable suspicion and, if so, how and why this occurred;
- (vi) Enquire into whether there was any or any legal justification for seeking to extend or extending the period of detention of either of the parties;
- (vii) Enquire into whether in making these two arrests members of An Garda Síochána proceeded with the arrests only when satisfied that in respect of each arrested persons their suspicions were reasonable and/or that they exercised all appropriate care, caution, and diligence in deciding to make an arrest with due regard to the presumption of innocence attaching to these two persons and their rights to fairness of procedures;
- (viii) Enquire into the motive for any conduct which may be disclosed;
- (ix) Consider the circumstances in which the Garda Síochána came into possession of the material available to them at the time when the arrests were effected and in this regard consider the use of informants, if relevant, using the same approach as set out in relation to Term of Reference (B)(3);
- (x) Enquire into and consider the relationship, if any, between the material arising in this Term of Reference and any other Term of Reference.

With regard to Paragraph E of the Terms of Reference

"Complaints that some Gardai in County Donegal may have been involved in hoax explosives and bomb-making equipment finds (in particular discoveries on 11th September, 1993, 19th November, 1993, 11th January, 1994, 14th March, 1994, 4th June, 1994, 13th June, 1994 and 18th July, 1994) and a review of the management and investigation of these issues."

The information which is available to the Tribunal contains allegations made by a number of persons that some members of An Garda Síochána "planted" subversive paraphernalia and later purported to discover it or have it discovered by third parties.

The Tribunal proposes to

- (i) Enquire into and establish the facts in relation to these events;
- (ii) Enquire into and establish what "finds" were actually made, if any;
- (iii) Identify the nature of the materials said to have been found on these occasions;
- (iv) Enquire into and establish the events and circumstances which led to the making of these "finds";
- (v) Enquire into and establish the identity of such members of An Garda Síochána, if any, who acted with regard to these finds and attempt to discover whether their actions were proper or improper;
- (vi) Enquire into the normal Garda procedure and/or practice (if any) relating to the making of such "finds" including practice and procedures relating to preservation of materials found, forensic analysis of same, the preservation and examination of the apparent crime scene, and any other follow-up procedures or practices applicable to such a find and consider whether such procedures and practices were followed in relation to these "finds";
- (vii) Consider the adequacy of the procedures and practices applicable to the making of such "finds" having regard to the facts which may be established in evidence at the Tribunal;
- (viii) Enquire into the course and management of the investigations relating to these incidents;
- (ix) Consider the use and role of informants in this matter: in that regard the approach already set out in relation to Term (B)(3) of the Terms of Reference will be applied;

- (x) Enquire into and establish the manner in which the complaints made in relation to these events were dealt with by members of An Garda Síochána including complaints made to the Garda Síochána Complaints Board;
- (xi) Enquire into and consider the relationship, if any, between the events the subject matter of this Term of Reference and any other Term of Reference.

With regard to Paragraph G

"Allegations relating to the Garda investigation of an arson attack on property situated on the site of the telecommunications mast at Ardara, County Donegal in October/November 1996;"

This is largely self-explanatory and will be approached in the same way as enunciated in relation to Paragraph E.

With regard to Paragraph F

"The circumstances surrounding the arrest and detention of Frank McBrearty Jnr. on 4th February, 1997 and his subsequent prosecution in the Circuit Criminal Court in relation to an alleged assault in December, 1996 on Edward Moss with particular reference to the Garda investigation and the management of both the investigation and the role of the Gardai in the subsequent prosecution."

The information available to the Tribunal at present indicates that Mr. Frank McBrearty Jnr. was arrested and subsequently detained on the 4th February, 1997, at a time when he was attending at a Garda Station, apparently for the purpose of making a report or a complaint. He was apparently arrested in relation to an alleged assault in December, 1996 on an Edward Moss in respect of which he was subsequently prosecuted and acquitted. Allegations have been made that while he was in custody Mr. McBrearty Jnr was assaulted, videotaped and otherwise improperly treated.

The Tribunal proposes to:

- (i) Enquire into and establish the facts in relation to this event;
- (ii) Enquire into and examine the material which was then available to members of An Garda Síochána (if any) and consider whether such material had afforded members of An Garda Síochána grounds for reasonable suspicion for the arrest of Mr. McBrearty Jnr on the 4th February, 1997;
- (iii) Enquire into whether the member of An Garda Síochána alleged to have arrested Mr. McBrearty Jnr on the 4th February, 1996 proceeded with the arrest only when satisfied that in respect of Mr. McBrearty Jnr his suspicions were reasonable and/or that he had exercised all appropriate care, caution and diligence in deciding to make an arrest with due regard to the presumption of innocence attaching to Mr. McBrearty Jnr and his right to fairness of procedures;
- (iv) Enquire into all aspects of the arrest and detention of Mr. McBrearty Jnr and his treatment whilst in custody;
- (v) Consider whether the member of An Garda Síochána who allegedly made the arrest acted reasonably and in good faith;
- (vi) Enquire into and examine the material which was available at the time as to whether the said material tended to implicate Mr. McBrearty Jnr or justify his prosecution for the offence for which he was arrested;
- (vii) Ascertain whether any material available to members of An Garda Síochána in the course of their investigation came into their possession in accordance with lawful or unlawful practices or means;
- (viii) Enquire into:

- a) The investigation into an alleged assault on Edward Moss by Frank McBrearty Jnr;
- b) Any report and/or material submitted to the Office of the Director of Public Prosecutions in relation to this investigation;
- c) The reasons for the decision and the decision to prosecute Frank McBrearty Jnr. in relation to the alleged assault on Edward Moss;
- d) The prosecution and, in so far as it may be relevant, the trial of Frank McBrearty Jnr in relation to the alleged assault on Edward Moss.

It should be noted that these matters will be investigated only in so far as they are relevant to the Terms of Reference of the Tribunal and it is no part of the Tribunal's function to question in any way the order of the Circuit Criminal Court in this regard;

(ix) Consider whether there was in all the circumstances any or any reasonable or probable cause upon which to initiate a prosecution against Mr. McBrearty in relation to the alleged assault on Edward Moss;

(x) Enquire into and establish the standard Garda procedure and practice in relation to the treatment of persons in custody and whether such procedures and practice were observed in the course of the arrest and detention and treatment of Frank McBrearty Jnr following his arrest and detention on the 4th February, 1997, and further, the adequacy and fairness of such procedures and practice having regard to the facts which may be established in evidence at the Tribunal;

(xi) Enquire into the allegations made by Frank McBrearty Jnr in relation to his treatment during the course of his arrest and detention;

(xii) Consider whether there was any use of informants and if there was the approach set out in relation to Term (B)(3) above will then apply;

(xiii) Consider whether there is any connection between the events covered by this Term of Reference and any other of the Terms of Reference.

With regard to Paragraph H

[Enquire into]

"Allegations contained in documents received by Deputy Jim Higgins on 25th June, 2000 and information received by Deputy Brendan Howlin on 25th June, 2000 that two senior members of An Garda Síochána may have acted with impropriety."

The information available to the Tribunal indicates that Deputy Jim Higgins (as he then was) and Deputy Brendan Howlin at or about the time indicated brought to the attention of the then Minister for Justice, Equality and Law Reform a fax, which had apparently been received by Deputy Higgins on the 25th June, 2000.

The main allegations relevant to this module are that:

(i) An investigation being carried out into conduct alleged against a member of An Garda Síochána was not being conducted in accordance with the Garda Commissioner's instructions due to the fact that the member under investigation had worked with two high ranking members of An Garda Síochána one of whom had charge of the investigation in respect of the alleged misconduct;

(ii) When working with these two high ranking members of An Garda Síochána he was alleged to have been given the job of producing evidence by unlawful means to prove a case beyond reasonable doubt whenever such evidence "had to be got";

(iii) In this regard a large number of convictions were achieved by planting evidence and it is alleged that both of the high ranking Gardaí were aware that the member under investigation was the source of trumped up evidence used in this manner;

(iv) The member under investigation gained from his actions of producing trumped up evidence which secured convictions in that he had paid to him extra expenses in the form of unworked overtime/travelling and subsistence allowances which continued up to 1998 and that he was given blanket permission to claim such expenses;

(v) The member under investigation was involved in planting stolen property on suspects and as a result had a huge amount of stolen property at his disposal which he had in the Donegal area and that this was known to members of An Garda Síochána at a number of levels;

(vi) The member under investigation was in regular contact with a high ranking Garda officer and had an eighteen page document concerning his and others activities while stationed in Dublin which document would enable him to escape the rigours of the law and was his way of frustrating the ongoing Garda investigation into his alleged misconduct.

The Tribunal proposes to:

- (a) Enquire into this matter generally, and in so far as it is possible, ascertain the basic facts;
- (b) Fully investigate each of the allegations contained in the document to ascertain whether there is any foundation for same;
- (c) Consider the investigations carried out to date in relation to this matter and generally consider whether these allegations were scrutinised with the seriousness which they merit;
- (d) Ascertain if there is any connection between this incident and any other incident referred to in the Terms of Reference;
- (e) Attempt to ascertain if the author of the fax has any information which would justify the allegations contained therein: in that regard it would be necessary to ascertain the identity of this person and to seek his/her assistance for the work of the Tribunal;
- (f) Attempt to ascertain whether the use of informants has anything to do with this matter and, if that is so, the same approach as set out in relation to Term of Reference B(3) will then apply;
- (g) Attempt to ascertain the motive for sending this fax, if this is relevant.

With regard to Paragraph I

"The circumstances surrounding the arrest and detention of seven persons at Burnfoot, County Donegal on 23rd May, 1998 and the investigation relating thereto"

The information available to the Tribunal indicates that at 08.00 a.m. on Saturday, 23rd May, 1998, a search of property namely a Traveller's encampment was carried out by members of An Garda Síochána on foot of search warrants. This search, or the searches, was or were carried out on the apparent basis that there were reasonable grounds for the Gardai to believe that the persons occupying the relevant place were in possession of a firearm. The grounds for the belief were said to have been based on "confidential information". A firearm and ammunition were apparently found in a shed on the property searched. Seven persons were subsequently arrested and detained.

The Tribunal will, in the first instance, seek to establish the facts in this case and consider the accuracy of the matters set out above. The Tribunal will

- (i) Enquire into and ascertain the facts in relation to the above matters;
- (ii) Enquire into and establish the identities of those said to have been arrested and detained at Burnfoot on the 23rd May, 1998;
- (iii) Enquire into and establish the circumstances in which it was found appropriate or necessary to search the area of Burnfoot, Co. Donegal on or about the 23rd May, 1998;
- (iv) Enquire into and establish the grounds and/or material relied upon as the basis for an application made for the issuing of a search warrant or warrants for the purposes of searching an area of Burnfoot, Co. Donegal in or about May, 1998;
- (v) Enquire into and establish whether the search and/or searches alleged to have occurred at Burnfoot, Co. Donegal in May, 1998 were related to some other investigation;
- (vi) Enquire into and establish the extent to which the search and/or searches at Burnfoot, Co. Donegal were planned in advance;
- (vii) Enquire as to whether any conference of members of An Garda Síochána was held prior to the said search or searches at Burnfoot, Co. Donegal;

- (viii) Enquire into whether it was determined that on a planned and pre-arranged basis members of An Garda Síochána should arrest and detain certain individuals with a view to having them questioned in relation to the finding of any material or any other matter and if so enquire into the circumstances in which and the reasons for which such a determination was made;
- (ix) Enquire as to whether there exist within the Garda Síochána any standards, practices or procedures applicable to the making of a determination in the course of an investigation to arrest and detain by pre-arrangement persons suspected in relation to a matter under investigation whether in the course of a search or otherwise and, if so, whether there exist any or any adequate safeguards against any potential errors in the decision-making process or misuse of power whether accidental or deliberate;
- (x) Consider whether members of An Garda Síochána when making the arrests acted reasonably and in good faith;
- (xi) Enquire into whether particular persons became the focus of unfounded or unreasonable suspicion and, if so, how and why this occurred;
- (xii) Enquire whether in directing and/or making arrests members of An Garda Síochána proceeded with the arrests only when satisfied that in respect of each arrested person their suspicions were reasonable and/or that they exercised all appropriate care, caution and diligence in deciding to make an arrest with due regard to the presumption of innocence attaching to such persons and their right to fairness of procedures;
- (xiii) Enquire into all aspects of the arrests and detentions including the extensions of custody carried out in the course of the investigation;
- (xiv) Enquire into the information available and the circumstances which led to the search;
- (xv) Enquire into the circumstances in which the firearm allegedly came to be on the property;
- (xvi) Enquire into the role of the members of An Garda Síochána who searched the property and their relationship (if any) to the firearms apparently found on the property;
- (xvii) Enquire into the treatment of the persons arrested;
- (xviii) Enquire into the connection (if any) between arrests relating to this Term of Reference and any other of the Terms of Reference;
- (xix) Enquire into the handling of informants and the information received (if any) in relation to the events the subject matter of this Term of Reference and in that regard the procedure and approach set out. Paragraph (B)(3) of the Terms of Reference will be applied.

(J) "The effectiveness of the Garda Síochána Complaints Enquiry Process vis-à-vis the complaints made by Frank McBrearty Snr. And his family between 1997 and 2001."

The information available to the Tribunal suggests that complaints were made by Frank McBrearty Snr and his family to the Garda Síochána Complaints Board. This may or may not be an effective way of dealing with serious complaints made by citizens against members of An Garda Síochána. It is the task of the Tribunal to consider the effectiveness of this entire procedure.

The Tribunal will:

- (i) Establish what complaints were actually made by Mr. McBrearty and his family between the relevant dates;
- (ii) 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;
- (iii) Consider the procedures, which exist for dealing with complaints under the Garda Síochána (Complaints) Act, 1986 as amended and the rules made thereunder.
- (iv) Enquire into the effectiveness of these procedures and advise, if it be the case, how these procedures should be improved.

It has been drawn to my attention, ladies and gentlemen, that Paragraph G in this copy I am reading from has been omitted. My clear recollection is that Paragraph G is self explanatory and I do not believe that I need to go into it in the same detail.

That concludes the explanation of the Terms of Reference. Many of the Terms of Reference are self-explanatory and in giving explanation I do not wish in any way to derogate from the plain language therein contained. In relation to each of the Terms of Reference, the Tribunal would wish to go about its business by ascertaining the basic facts, by looking at existing Garda procedures, by looking at any deviation therefrom and by asking whether, if there was such a deviation, same was accidental or deliberate. The Tribunal must also look generally at the checks and balances within the system of criminal investigation and their adequacy. This is not intended to be a negative process. When a

serious complaint is made against a State agency the facts must first be ascertained. If there is fault (whether by act or omission) then there is a potential for learning how that fault came about and how it might be avoided in the future. There is also potential for looking at the operation of the system within which that fault occurred and for making positive recommendations for better practice or procedure in the future.

I now wish to make some general remarks as to procedures.

Hamilton C. J. in delivering the Judgement in *Haughey - v - Moriarty* [1999] 3 I.R.1 defined the "proceedings of the Tribunal" as involving the following stages:

- (i) A preliminary investigation of the evidence available
- (ii) The determination by the Tribunal of what it considers to be the evidence relevant to the matters into which it is obliged to enquire.
- (iii) The service of such evidence on persons likely to be affected thereby.
- (iv) The public hearing of witnesses in regard to such evidence and the cross-examination of such witnesses by or on behalf of the persons affected thereby and
- (v) The preparation of a report and the making of recommendations based on the facts established at such public hearing.

For some weeks past, Counsel on behalf of the Tribunal, Peter Charleton, S.C., Paul McDermott, S.C. and Anthony Barr, B.L. have been engaged with me in making a preliminary investigation of the material which is available at the present time. They have been assisted by Bernadette Crombie, solicitor to the Tribunal, and by the entire Tribunal team. As a result of this preliminary investigation, it has been decided that the Tribunal will address each of paragraphs of the Terms of Reference either in its entirety and alone, or in conjunction with another or other paragraphs, or it may address part only of a paragraph.

This is an enquiry. The Tribunal is not proceeding on the basis that certain people are accused of particular wrongs. It is attempting to ascertain what happened, why it happened and what might be learned from it. As it addresses each module, the Tribunal will identify persons likely to be affected by the available evidence. The Tribunal will contact all such persons who are legally represented and, if not legally represented, will make every effort to contact them personally. It is hoped that all persons likely to be affected by material arising in a particular module will be furnished where appropriate with a CD-Rom of all the evidence which is in the possession of the Tribunal relating to that module or where it is thought necessary of all the evidence in the possession of the Tribunal. They will also be furnished with a hard copy of the evidence which the Tribunal considers to be relevant to that particular module from which they can learn the manner in which they might be affected by that evidence. They may then consider this evidence and they may, if they wish, respond to it by making a written submission or a witness statement. The advantages of making such a witness statement or such a written submission are obvious, in as much as it will enable Counsel for the Tribunal to present and consider that response.

When I have determined that there is evidence of matters into which I am obliged to enquire, all the relevant evidence, if not already served will be served on all persons likely to be affected by the hearing of that Module and then the public hearing will be held.

If at any stage during a hearing assertions are made or evidence is sought to be addressed which might damage the reputation or good name of any individual but of which the Tribunal had not notice then procedures will be put in place either by an adjournment of the hearing or otherwise to deal with this situation, so as to ensure that fair procedures are observed.

May I now deal with discovery of documents. It is the wish and the hope of the Tribunal that there will be full co-operation with the Tribunal in the carrying out of its work and this would include the making of voluntary discovery. It is hoped that the Tribunal will not find it necessary to use its powers to make an Order for Discovery of Documents. However, it draws attention to the fact that such a power is vested in the Tribunal. Moreover, this Tribunal has been given the additional power with the consent of the Minister for Justice, Equality and Law Reform and the approval of the Minister for Finance under Section 6 of the 2002 Act to appoint "such and so many persons to be Investigators to perform the functions conferred on Investigators" by the section. These powers include the power to require a person to give the Investigators such information as may reasonably be required and to send him any documents or things in his power or control and includes a requirement to answer the Investigators questions.

It is hoped that with co-operation it will not be found necessary to utilise these powers.

The Tribunal wishes to make it clear that prior to making any Orders for Discovery it will give the requisite notice identified by the Supreme Court in Haughey - v - Moriarty.

The Tribunal is charged under the instrument creating it to complete its work "in as economical manner as possible and at the earliest possible date consistent with a fair examination of the matters referred too". With a view to establishing a procedure which will make the work of the Tribunal both orderly and assist in the completion of the work at the "earliest possible date", the Tribunal would propose that where any party wishes to raise a matter of substance, either legal or factual, for the consideration of the Tribunal, it should in as far as possible, give notice to the Tribunal in advance, so that the attendance of witnesses can be dispensed with and the issue disposed of, either before the sitting of the Tribunal in the morning, or alternatively, later in the afternoon. The Tribunal does of course, recognise that this may not always be possible, but the Tribunal would appreciate co-operation in this regard.

What I have just said is now available on the website www.morristribunal.ie.

I will now take applications for representation.