

**An Coimisiún Imscrúdúcháin**  
(Nithe Áirithe i dtaobh an Gharda  
Síochána agus daoine eile)



**Commission of Investigation**  
(Certain Matters relative to An Garda  
Síochána and other persons)

**The Hon. Mr. Justice Nial Fennelly**  
**Sole Member**

## **Interim Report**

**November 2014**

**A request for the revision of the timeframe for submitting a final report under  
Section 6 (6) of the Commissions of Investigation Act 2004.**

## 1. Introduction

1.1 On March 25<sup>th</sup> 2014 the Taoiseach announced to the Dáil that the Government had agreed to set up a Commission of Investigation under the Commissions of Investigation Act 2004 (hereinafter referred to as 'the Act'). The Commission was charged with investigating a number of matters of significant public concern that had recently been brought to the attention of the Government:

- the practice of recording of non-999 telephone calls in certain Garda Stations over a 30 year period,
- the apprehension that telephone recordings to and from Bandon Garda Station might indicate unlawful and improper conduct by Gardai involved in the investigation into the death of Sophie Toscan Du Plantier in 1996,
- to investigate and report on the furnishing to the Minister for Justice of a letter dated 10<sup>th</sup> March 2013 sent by the former Garda Commissioner, Mr Martin Callinan, to the Secretary General of the Department of Justice and Equality.
- to investigate and report on the sequence of events leading up to the retirement of the former Garda Commissioner, Mr Martin Callinan, on the 24<sup>th</sup> March 2014

1.2 The Order of the Government establishing the Commission is set out in S.I. No. 192 of 2014, The Commission of Investigation (Certain Matters relative to An Garda Síochána and other persons) Order 2014. This S.I. is contained in the Rules and Procedures document which is at Appendix 1 of this Report and it sets out in full the Terms of Reference of the Commission of Investigation.

1.3 This Interim Report is submitted to the Taoiseach pursuant to Section 33(3) of the Act, which states:

*If a commission requests that the time frame for submitting its final report be revised under section 6(6), the commission shall submit an interim report to the specified Minister with the request.*

1.4 Section 6 (6) of the Act states:

*Even though a commission's terms of reference are not amended, the specified Minister may, at the commission's request, revise the time frame for the submission of its final report to the extent consistent with the objective of having the investigation conducted and the report submitted as expeditiously as a proper consideration of the matter referred to the commission permits.*

- 1.5 Under the Order of the Government which established the Commission, the Taoiseach was appointed as the specified Minister pursuant to section 3(3)(b) of the Act.

- 1.6 Although the Commission had an initial deadline of December 31<sup>st</sup> 2014 for completion of its task, it was always the view of the Commission that the scale of the investigation required by the terms of reference would require an extension of time under Section 6 (6). This view was reflected in the Memorandum for Government that established the Commission which stated:

*In relation to the time frame for a final report, the Commission's draft Terms of Reference which were approved by Government on 8 April 2014, envisage a final report to the Government no later than 31<sup>st</sup> December 2014, subject to section 6(6) of the Commission of Investigation Act, 2004.*

*It should be recognised, and has already been observed by the sole member, that the timeframe is extremely tight given the scope of the Terms of Reference. Under section 6(6) of the Act, the Commission may request the specified Minister to revise the timeframe for submission of its final report. The Commission can also be requested to prepare interim reports, including where it seeks to revise the timeframe for its final report.*

- 1.7 The purpose of this Interim Report is to set out what has been achieved by the Commission since its establishment, to outline the work that remains to be done with a view to identifying as accurately as possible the time required to complete the task, and to seek an extension of time under Section 6(6) of the Act.

## 2. Preliminary

- 2.1 On 30<sup>th</sup> day of April, 2014, the Government appointed the Honourable Mr Justice Nial Fennelly, then of the Supreme Court as Sole Member of the Commission – hereinafter referred to as ‘The Fennelly Commission’, or ‘the Commission’. Mr Justice Fennelly retired from the Supreme Court on May 2<sup>nd</sup> 2014.
- 2.2 Following his appointment, Mr Justice Fennelly was provided with assistance by the Department of the Taoiseach in establishing the infrastructure of the Commission. Suitable premises were identified on Floor One, St Stephen’s Green House, Dublin 2. These premises had a hearing room and office accommodation for administrative and legal staff.
- 2.3 I.T. infrastructure was identified as a priority and during May 2014, telephone and internet facilities were put in place. A Solicitor was engaged from May 12<sup>th</sup> 2014 and a Head of Administration was appointed by the Department of the Taoiseach on 26<sup>th</sup> May 2014.
- 2.4 The Commission’s first task was to analyse and interpret the Terms of Reference that had been adopted by the Government and to identify a methodology whereby these Terms of Reference could be addressed in the most thorough and efficient way possible within the parameters of the Act. The Commission also had to assess its personnel requirements, both administrative and legal.
- 2.5 The Commission divided its task into three distinct though inter-related bodies of work with a possible fourth task at 1(p) of its Terms of Reference: “In the event that any matter arises from the Report of the Inspector of Prisons Judge Michael Reilly pursuant to Section 31 of the Prisons Act 2007 into all the circumstances surrounding the recording of telephone conversations between prisoners and their solicitors, which appears to require further investigation in the public interest the Commission may investigate and report on same.”
- 2.6 The three tranches of work are:

- (1) To investigate and report on the operation of Garda Síochána telephone recording systems as outlined in Terms of Reference 1(a) to (l).
- (2) To identify and review all recordings in the possession of An Garda Síochána emanating from the Garda recording system at Bandon Garda Station or otherwise which relate to the Garda investigation into the death of Sophie Toscan du Plantier and to establish whether those recorded phone calls, and any other acts or events in the course of the said Garda investigation, disclose any evidence of unlawful or improper conduct by members of An Garda Síochána in connection with that investigation - Term of Reference 1 (m).
- (3) To investigate and report on the furnishing to the Minister of a letter dated 10<sup>th</sup> March 2014 sent by the former Garda Commissioner, Mr Martin Callinan, to the Secretary General of the Department of Justice and Equality – Term of Reference 1 (n)

and

To investigate and report on the sequence of events leading up to the retirement of the former Garda Commissioner Mr. Martin Callinan on the 25<sup>th</sup> March 2014 - Term of Reference 1 (o).

- 2.7 Having identified the three strands of work that would operate concurrently, the Commission recruited three Junior Counsel and two document juniors to assist it in its work. It established that all three strands would require documentary and oral evidence and Mr Justice Fennelly worked with his legal team to establish the legal and administrative framework necessary to acquire and analyse documentation and to conduct oral hearings in an efficient and appropriate manner.

### **3. Data Base**

- 3.1 The Commission was aware from the outset that its investigations would involve extensive discovery from numerous state agencies. It realised that proper document management and a well organised data base was crucial to the efficient completion of its work. More importantly, the sensitive and confidential nature of much of the material that it required to enable it to conduct its investigation, made it essential that a secure and properly monitored and controlled document storage system be put in place as a priority.

- 3.2 Before receiving delivery of any substantial quantity of documentary evidence, it embarked on a public procurement process to identify the most cost-efficient and effective data base provider. The data-base was installed and operational by the end of June 2014. Once this had been completed, the Commission was in a position to commence taking in the significant quantity of documentary evidence that is relevant to its terms of reference. At Oct 20 2014, almost 6000 individual documents comprising multiple thousands of pages of data have been loaded on to the data -base and annotated. All of these have been, or are in the process of being, analysed by the Commission.
- 3.3 A Confidentiality Protocol was adopted by the Commission and it is brought to the attention of all employees before they commence work with the Commission. It asserts the right of all witnesses to communicate with the Commission in confidence and it requires the strictest standards of confidentiality from all staff.

#### **4. Liaison Persons**

- 4.1 The Commission identified a number of key organisations from whom it would require extensive documentation and co-operation. During June 2014, it wrote to each of these bodies and asked that a liaison person be appointed to deal directly with the Commission in order to ensure that documentation and information could be made available to the Commission in a timely and consistent manner. The bodies written to and asked to provide liaison persons were:

An Garda Síochána

The Dept of Justice

The Chief State Solicitor's office

The Office of the Attorney General

The Director of Public Prosecutions

The Law Society

- 4.2 In the case of An Garda Síochána, The Department of Justice and the Office of the Attorney General, the Commission suggested that a liaison person be appointed over each of the two principal areas of work – the garda recording and the calls

recorded at Bandon Garda Station in the course of the investigation into the death of Sophie Toscan du Plantier, to ensure that work could proceed concurrently.

- 4.3 The Commission has requested extensive documentation from An Garda Síochána in a series of letters dated from June 11<sup>th</sup> 2014 to the present. At the time of writing, the Gardaí have received a total of 12 letters of requests for information from the Commission. In most cases, multiple requests were included in a single letter. The Commission acknowledges that responding to some of the requests from the Commission will require considerable time and resources within An Garda Síochána.
- 4.4 Other State and non-State agencies contacted by the Commission have also co-operated, or are in the process of co-operating, with the Commission's requests for documentation and that task is continuing.

## **5. Rules and Procedures**

- 5.1 The Rules and Procedures of the Commission were developed during May and June 2014 and formally adopted by Mr Justice Fennelly on 13<sup>th</sup> June 2014 pursuant to Section 15 of the Act. They are attached to this report at Appendix 1. Under the provisions of the Act, the substantive work of the Commission could only be commenced once these Rules and Procedures were in place.
- 5.2 A further requirement, under Section 23 of the Act, was the creation of guidelines concerning the payment to witnesses of legal costs necessarily incurred by them in connection with the investigation. This was done by the Department of the Taoiseach in consultation with the Commission and the Department of Finance.
- 5.3 The Rules and Procedures were adopted in order to ensure fair procedures and to ensure that the statutory provisions of the Act are appropriately applied. They establish that the Commission will, in the first instance seek the voluntary co-operation of all witnesses from whom evidence is required. In the event that such voluntary co-operation is not forthcoming, the Commission will consider whether to use any of its powers under the Act to compel production of the required evidence.

- 5.4 The Commission may receive evidence and information in any form that it considers appropriate, including orally before the Commission, by affidavit, statements, submissions, electronic and paper documents, live video links, video and sound recordings and any other mode of transmission. Evidence, as defined by Section 2 of the Act, includes *“any expression, orally, in writing or otherwise, of an opinion, belief or intention.”*
- 5.5 Before giving evidence to the Commission, a witness is provided with a Witness Notice setting out the Commission’s powers under the relevant sections of the Act. The Commission also gives to any person before he or she gives evidence to the Commission a copy of the guidelines concerning recovery of legal costs. Both the Witness Notice and the Guidelines on Legal Costs are included in the Rules and Procedures at Appendix 1.
- 5.6 One of the most important provisions of the Act is Section 12, which requires the Commission to disclose to any person who attends (voluntarily or otherwise) as a witness before it or to any person about whom evidence is given to the Commission, the substance of any evidence in its possession that, in its opinion, the person should be aware of for the purposes of the evidence which that person has given or may give to the Commission. Any person to whom the substance of such evidence is disclosed will be given an opportunity to comment in evidence or by written or oral submissions on the evidence, in such manner as the Commission shall decide in accordance with its discretion.
- 5.7 The Rules and Procedures cover areas such as privilege, confidentiality, legal representation and the payment of costs and expenses. Under the Rules there is no requirement that a witness retain a legal representative although he or she may be accompanied by a legal representative while giving evidence.
- 5.8 Under Section 11 (b) of the Act, legal representatives of persons other than the witness may be present and the witness may be cross-examined by or on behalf of any person, only if the Commission so directs. However, the Commission may be required in specific circumstances to permit cross-examination in accordance with



the principles laid down by the Supreme Court in the case of *In re Haughey* [1971] 1 I.R. 217.

## **6. Commissions of Investigation Act 2004: Interpretation**

- 6.1 The Commission has sought the opinion of Senior Counsel on certain provisions of the Commissions of Investigation Act 2004. These related to the Commission's power to make decisions on conflicting facts presented to it. The Commission is under an obligation pursuant to s. 32 of the Commissions of Investigation Act 2004 to make a report, based on the evidence it has received, setting out the facts it has established. Performance of this duty obliges the Commission to seek to resolve conflicts of fact where they arise.
- 6.2 In cases of conflicting evidence, the Commission is satisfied that full observation of fair procedures as enunciated in the case of *In re Haughey*, obliges it to permit certain witnesses to cross-examine other witnesses if they so request. In the event that any such requests are made, this will add to the time the Commission needs to complete its work and to the overall costs of the Commission.
- 6.3 The Commission is obliged to observe fair procedures in the questioning of all witnesses. In particular, the Commission has endeavoured to the greatest extent possible to comply with the obligations imposed on it by s.12 of the Act. Thus, it has disclosed to all witnesses the substance of any evidence in its possession that it believed any witness should be aware of for the purposes of evidence they themselves have given or might give. To that end, it has provided witnesses with copies of statements or extracts from the transcripts of the evidence of other witnesses. The Commission will continue to follow this practice.
- 6.4 Where a conflict of fact has been identified by the Commission, witnesses are asked pursuant to Section 11 of the Act, whether they wish to avail of the opportunity to attend - either on their own or accompanied by a legal representative of their choice - for the purpose of cross-examining any of the other witnesses mentioned in respect of the conflicts of evidence specified.

- 6.5 The Commission will of course ensure, whether or not the opportunity to cross-examine is availed of, that the rules of natural justice and fair procedures are scrupulously observed when determining the outcome of any conflict of evidence. Witnesses are accordingly invited to make any submissions to the Commission, orally or in writing, which seem to be appropriate, bearing in mind that the Commission may feel obliged to make any such submissions available to any other witnesses who may be affected.
- 6.6 It is the intention of the Commission to keep the investigation as non-confrontational as possible and it will, to the greatest extent possible consistent with its duties under the Act, conduct its investigation by seeking and facilitating the voluntary co-operation of any person from whom evidence may be required. It will seek to identify and inform witnesses of any areas of conflict as clearly as possible in advance of any hearings. This will, it is hoped, reduce the necessity for extensive cross-examination.

## **7. The Work of the Commission**

- 7.1 Even before the Commission commenced its investigation, the scope and scale of the tasks required was already evident from the Terms of Reference. To take just one aspect of the matter: sub-paragraphs 1 (a) to (l) require the Commission to investigate the installation, authorisation, legality, operation, maintenance, repair, removal and replacement of telephone systems at an unspecified number of Garda stations over a period of more than 30 years. The Commission must also investigate the use, reporting, retention and destruction of telephone recordings and information obtained from telephone recordings; as well as reporting on the level of knowledge of the existence, operation and use of the said telephone recording systems within the Office of the Minister for Justice and Equality, the Department of Justice and Equality, the Office of the Attorney General, the Chief State Solicitor's Office, the Office of the Director of Public Prosecutions, the Office of the Data Protection Commissioner and the Garda Síochána Ombudsman Commission.
- 7.2 As previously stated, the Commission began by dividing the tasks set out in the Terms of Reference into three principal strands of work. The Commission then

developed and adopted a work programme in relation to each of these strands, to enable it to complete its investigation. The task of identifying and obtaining relevant documentation has proceeded in relation to all three strands, but in terms of hearing witnesses, it was decided to focus initially on Terms of Reference 1 (n) and (o) –

(n) to investigate and report on the furnishing to the Minister of a letter dated 10<sup>th</sup> March 2013 sent by the former Garda Commissioner, Mr Martin Callinan, to the Secretary General of the Department of Justice and Equality.

(o) to investigate and report on the sequence of events leading up to the retirement of the former Garda Commissioner Mr Martin Callinan on the 24<sup>th</sup> March 2014

7.3 It was hoped to be able to conclude the work on this strand in a relatively short period of time, leaving the Commission then free to concentrate on the other strands of its investigation.

7.4 What follows is an outline of the work done to date on each of the main strands of the Commission's work, together with an attempt in so far as practicable to identify what will be required to bring each of them to a conclusion.

## **8. Terms of Reference 1 (n) and (o)**

8.1 It was possible to commence work on Terms of Reference 1(n) and (o) once the basic infrastructure of the Commission had been put in place. These investigations did not require a significant quantity of documentary evidence and therefore could be proceeded with before the data base had been established. Accordingly, the work on this tranche of the Commission's investigation commenced in early June 2014.

8.2 From 21<sup>st</sup> May 2014 the Commission wrote to over 20 witnesses that it had identified as having information that might be of relevance to either Term of

Reference 1(n) or (o) or both. Each potential witness was asked to submit a Statement to the Commission outlining any information he or she had together with any relevant documentation. All requests for such statements were delivered, albeit not always within the timeframe suggested by the Commission.

- 8.3 The Commission identified those witnesses it wished to invite to attend for an oral hearing and a schedule of hearings was put in place. These hearings took place between 24<sup>th</sup> June 2014 and 22<sup>nd</sup> July 2014 and 15 witnesses were called to give evidence. The Commission engaged a Senior Counsel to conduct hearings on its behalf and evidence was recorded by a stenography company which had been engaged by the Commission following a procurement process.
- 8.4 All witnesses were furnished with a copy of the Rules and Procedures that had been adopted by the Commission. They were also furnished with Statements or extracts of Statements from other witnesses that the Commission believed they should be informed about. As hearings occurred, transcripts of the evidence of other witnesses were also provided to witnesses in advance of their attendance at the Commission in accordance with Section 12 of the Act.
- 8.5 Three witnesses were recalled in early September 2014 for a second hearing during which evidence that had been submitted by other witnesses could be put to them. This process is not complete. Further hearings in this module are anticipated over the coming weeks.
- 8.6 The Commission has identified outstanding areas of conflict and is seeking resolution of any contradictory or disputed evidence.
- 8.7 Section 33(2) of the Act provides that the specified Minister (in this instance, the Taoiseach) may request an interim report *“on the general progress of a commission’s investigation or on a particular aspect of the investigation.”* By letter dated 31<sup>st</sup> July 2014, the Commission wrote to the Taoiseach indicating that it believed it would be possible to report on sub-paragraphs (n) and (o) in advance of, and separately from, the other matters set out in the Terms of Reference. In a letter of 7<sup>th</sup> October 2014, the Taoiseach expressed the view that it would be welcome if

such an interim report could be produced at an earlier date, and concluded by formally requesting the Commission to submit an interim report in respect of paragraphs 1(n) and (o) – “...if you believe that it is feasible and appropriate.” The Commission intends to comply with this request and to submit an interim report on (n) and (o) as soon as practicable. There follows an outline of the work to be done in this regard, together with a proposed timeline for delivery of the report to the Taoiseach.

- 8.8 The work that remains to be done in this module is to identify witnesses for further hearings, and to conduct those hearings. A limited amount of outstanding information has also been sought in correspondence, responses to some of which are awaited at the time of writing. Once all the necessary evidence has been taken, the Commission will finalise a draft interim report, submit the draft report (or portions thereof) to all persons entitled to receive it under Section 34 of the Act, allow a period in which to receive submissions from those persons in respect of the draft report and, if it is deemed appropriate, amend the draft report accordingly. Any persons affected by such amendments will then receive notification of same before the Interim Report is submitted to the Taoiseach.
- 8.9 If cross-examination is not availed of by any of the witnesses, it is anticipated that all hearings in this module will be completed by the middle of December 2014. The draft report will be finalised by the end of January 2015. It will then, in accordance with Section 34 of the Act, be sent to “any person who is identified in or identifiable from the draft report”. Submissions will be received, considered and any necessary amendments to the draft report will be made by the end of February 2015. The Interim Report on Terms of Reference 1(n) and (o) will be submitted to the specified Minister, the Taoiseach by the end of March 2015. As stated above however, this timeline could be affected by the requirement of cross-examination if requested by any witness or by an application to the High Court in accordance with Section 35(b) of the Act.

## **9. Garda Recording of Non-999 Telephone Calls**

- 9.1 This is the major part of the Commission's work and it is covered by Terms of Reference 1(a) to (l).
- 9.2 The period in relation to which the Commission is required to investigate the recording of non-999 telephone calls by An Garda Síochána runs from 1<sup>st</sup> January 1980 to 27<sup>th</sup> November 2013. However, although it is known that machines capable of recording telephone calls were installed in some Garda stations during the 1980s and possibly earlier, inquiries carried out to date by An Garda Síochána have not located any extant recordings for the period 1980-1994. The recordings that have been located to date fall into two periods (i) 1995 – 2008 and (ii) 2008 – 2013.
- 9.3 The quantity of recordings still extant will impact on the way the Commission delivers on its Terms of Reference. The surviving recorded conversations from the 1995 to 2008 period are on over 3,000 DAT cassettes, each of which can record on up to 8 channels simultaneously, giving a potential maximum of 320 hours of recorded material per cassette. Although these tapes have been collated by An Garda Síochána, they have not been listened to and therefore it is unclear how many hours of recorded conversation are on each tape. However, based on the above information alone it is reasonable to assume that it would take years, if not decades, to listen to all of the recorded material from the period 1995-2008. A further problem is that the DAT recordings were made on machines using security encoding which was unique to An Garda Síochána. At the time of writing, there are only four machines in existence which are capable of playing these recordings.
- 9.4 Apart from the DAT recordings, there is also audio material on a hard disk system from calls that were recorded between 2008 and November 2013. This was known as the NICE system. Although the Commission does not yet have definitive information on the volume of recorded material from the 2008-2013 period, it is likely that it will also run to many years in duration.
- 9.5 Clearly, it would not be feasible in any reasonable timeframe to examine all of the recorded material. The Commission has consulted with experts in statistical analysis as to whether an examination of a sample of recordings might be a useful

way to proceed. Examination of a sample of recordings is explicitly foreseen under Paragraph 2 in the Commission's Terms of Reference.

- 9.6 It will be necessary for the Commission to identify pertinent facts about the recordings that are in existence such as the number of calls, the duration of such calls, the location and date from which the calls were made, the extent to which access to recordings was requested, and the basis on which access requests were allowed or denied. It is the Commission's view that this work can be done without the requirement to listen to the substantive content of the conversations involved. The issue for the Commission at this stage is whether this work can be done through a properly constructed sampling formula and that is the exercise it is presently engaged with. At this time, the Commission is still engaged in the preliminary process of gathering the information which is needed before it is possible to identify a statistically meaningful sample size. The size of that sample, once identified with the help of expert advice, will determine the length of time and the resources necessary to complete this aspect of the Commission's investigation.
- 9.7 The Commission has received considerable documentation from An Garda Síochána in relation to the issue of recording calls other than 999 calls, in Garda Stations. On a preliminary examination of this it is clear that it will be necessary to take oral evidence from a substantial number of current and former members of An Garda Síochána and other witnesses.
- 9.8 In order to complete its task as thoroughly as possible, the Commission has placed advertisements in National Daily Newspapers and the Garda Review Magazine inviting the public and in particular past and present members and employees of An Garda Síochána to contact it if they have any evidence or knowledge of recording of telephone calls other than 999 calls.
- 9.9 The Terms of Reference that deal with Garda recording of telephone calls are quite extensive and require considerable investigation on the part of the Commission. They include identifying all Garda Stations in which telephone recording systems to record calls other than 999 calls were installed and/or operated between 1<sup>st</sup> January 1980 and 27<sup>th</sup> November 2013 and to report on the installation, the duration and



the termination of such systems. The Commission is required to establish the immediate circumstances surrounding the installation of these systems including authorisation, funding, installation, maintenance, upgrading and public procurement procedures. This covers the installation of analogue recording systems in the 1980s, as well as the installation of DAT recorders in the 1990s and their ultimate replacement with the hard disk system in 2008.

- 9.10 Part of the Commission's remit is to examine the operation, management and use of these telephone systems including storage, access and the use made of any information collated by the systems. The Commission is also required to look at the level of knowledge of the existence, operation and use of these systems within An Garda Síochána and within certain named State Agencies.
- 9.11 As a context for all of these investigations, the Commission must look at the law relating to the installation, operation and use of these telephone recording systems and it must establish whether they were authorised by law.
- 9.12 The Commission has analysed a considerable quantity of data on this module of its Terms of Reference and it has identified persons it requires to attend for an oral hearing. As the Commission has prioritised completion of witness hearings and an interim report in relation to Terms of Reference 1 (n) and (o), it is likely that oral hearings in relation to the general Garda recording issue will not be able to commence until January 2015.
- 9.13 The Commission has identified a number of Gardaí and lay employees who worked in the IT section of An Garda Síochána over the relevant period. A Questionnaire has been prepared and sent out to each of these Gardaí and lay persons and it is anticipated that the majority of them will be invited to attend to give oral evidence to the Commission.
- 9.14 The anticipated timeline for this module of the Commission's work is:
- It is estimated that a minimum of 150 Gardaí, retired Gardaí and lay persons will be called for interview for this module of the Commission's work.



- Oral Hearings will commence in January 2015 and continue at least until the middle of April 2015.

## **10. Calls to and from Solicitors**

- 10.1 As part of the strand of work relating to the systematic recording of non-999 calls, Term of Reference 1 (h) and (i) require the Commission to establish whether any telephone conversations between solicitors and their clients were recorded by the said telephone recording systems and whether any information from these recordings was used for any purpose whatsoever.
- 10.2 The Commission is in discussion with the Law Society to identify a method for establishing whether calls to and from solicitors were recorded on to these tapes and whether these calls were ever accessed.

## **11. Calls to and from Solicitors - Pilot Project**

- 11.1 As a pilot project to assess the validity of using custody records to identify whether telephone conversations between solicitors and their clients were recorded and /or accessed, the Commission took delivery of all the custody records from a specified Garda Station for the years 2008 and 2009. This amounted to 3959 individual custody records. Some Continuation Books were not included in the original delivery and they are now being located and should be furnished to the Commission in due course. With respect to the 2008 period, the Commission examined the 1,910 custody records for that period and noted any calls made by persons in detention and particularly identified all calls made to solicitors by persons in detention. The date, time and telephone numbers of these calls were all extracted from the custody files. These calls can now be checked against the existing DAT recordings and the NICE system in Garda Headquarters which will show whether they had been recorded and in the case of recordings on the NICE system, will show whether they had been accessed. Access to recordings in the 1995 – 2008 period was not automatically recorded and it would appear that the extent to which requests and decisions regarding access were documented is not uniform across the relevant stations.

- 11.2 Based on this pilot project, it is estimated by the Commission's legal team that the processing of one year's custody records in one Garda Station in order to identify calls involving solicitors and clients would take approximately 170 hours or over 4 weeks. Given that there is a period of 13 years in question (from 1995 – 2008) and given that there are at least 23 Garda Stations where it is believed recordings took place, the scale of the task becomes apparent. By a simple calculation of multiplying the number of stations by the number of years and multiplying that figure by four, it is possible to come to an approximate figure of 1200 weeks for this work, or 24 years.
- 11.3 It will be necessary to conduct oral hearings into this module of the Commission's work, which it is hoped will take place during April/May 2015.
- 11.4 The Commission is not in a position to commit to a definite timeline for this module for the reasons outlined above but would hope to bring this module to a conclusion by September 2015.

## **12. Access, Use, Storage and Destruction of Recordings**

- 12.1 In addition to establishing the extent of phone recording that occurred during the relevant period, the Commission must also look at the use, if any, of information obtained from these recordings. In particular, the Commission must identify whether the Gardaí accessed or analysed information stored on these tapes, the purpose for such access, how access requests were recorded, processed and overseen, as well as where the recordings were stored and whether any of the recordings were destroyed. The Commission must also identify whether the Director of Public Prosecutions made use of the data and information produced by the said recording systems in the conduct of prosecutions.
- 12.2 Although this task is large enough to constitute a separate and distinct body of work, it is anticipated that it will be possible to carry out this investigation concurrently with the investigations outlined above into the recording systems generally, provided sufficient personnel resources are made available to the Commission.

**13. Investigation of matters relating to the Garda investigation into the death of Sophie Toscan du Plantier.**

13.1 Term of Reference (m) requires the Commission *“to identify and review all recordings in the possession of An Garda Síochána emanating from the Garda telephone recording system at Bandon Garda Station or otherwise, which relate to the Garda investigation into the death of Sophie Toscan du Plantier and to establish whether those recorded phone calls, and any other acts or events in the course of the said Garda investigation, disclose any evidence of unlawful or improper conduct by members of An Garda Síochána in connection with that investigation.”*

13.2 For a number of reasons the Commission is not in a position to embark on oral hearings on this module at this time.

13.3 The Commission is in the process of obtaining all necessary evidence for the identification and review outlined at 1(m) above. It has also received and continues to receive substantial documentary evidence.

13.4 It is anticipated that some oral hearings will be required in relation to this module of the Commission’s work. The Commission would hope to conduct these hearings during June/July 2015. It should be possible to complete all work on this aspect of the Terms of Reference by the end of November 2015.

**14. Research Projects**

14.1 The Commission has engaged in a number of research projects that are necessary to the completion of its Terms of Reference. These include Data Protection and Retention Legislation and Law, Telecommunications Legislation and Law, the Constitutional right to privacy, The Garda Síochána Act 2005 and the principles applied in neighbouring jurisdictions in relation to telephone recordings. This programme of research is continuing and will continue at some level, throughout the life of the Commission.

## **15. Personnel Requirements**

- 15.1 The Commission has engaged three Junior Counsel and two document juniors to assist in its work. It has not engaged a full time Senior Counsel but has briefed a Senior Counsel as required to conduct Hearings on behalf of the Commission.
- 15.2 It is clear from the preceding paragraphs that the work assigned to the Commission is time consuming and labour intensive. The Commission is mindful of the necessity to keep costs to a minimum and it continuously balances the need for comprehensiveness against the need for cost effectiveness and timeliness. The Commission anticipates that it will need a minimum of four additional junior counsel to enable it to keep to its schedule and in particular to allow it to conduct its work on different strands of the Terms of Reference concurrently. It is not in a position to rule out further requests for assistance as its work progresses in all three strands of its Terms of Reference.
- 15.3 A significant number of witnesses may require expenses and it is anticipated that additional administrative staff would be needed to support the Head of Administration.

## **16. Possible Delays**

- 16.1 It is important to note that issues may arise outside the control of the Commission that may make it impossible for it to adhere to the timelines outlined in this report.
- 16.2 Section 11(2)(c) of the 2004 Act permits cross-examination of witnesses *“as the commission so directs”*. If the Commission identifies a conflict of evidence that needs to be resolved, the Commission will be obliged by the requirements of fair procedures to permit the cross-examination of a witness by the legal representative of the other person or persons involved in the conflict.
- 16.3 It should also be noted that under Section 35 of the Act, any person who receives a draft report or part of a draft report from the Commission and who believes that the Commission has not observed fair procedures may request the Commission to

review the draft or may apply to the Court for an order directing that the draft be amended before its submission to the specified Minister. Such an application could delay publication to the Taoiseach by at least a year. This applies to interim reports as well as the final report of the Commission.

16.4 In addition, the Commission is at all times subject to the possibility of an application for a Judicial Review.

16.5 Both of the provisions outlined above and a Judicial Review application, have the potential for increasing both the cost and the timeline of the Commission.

## 17. Projected Costs

17.1 It is not possible to estimate the full cost of the Commission for the coming year. There are additional resources that are required and they are itemised below:

## 18. Additional Staff

- |  |                |
|--|----------------|
| ▪ Additional legal staff: 4 additional Junior Counsel: | <b>416,000</b> |
| ▪ Senior Counsel as required                           | <b>N/A</b>     |
| ▪ 1 clerical officer for administrative support        | <b>35,000</b>  |

## 19. Witnesses Vouched Expenses

19.1 A very preliminary estimate of this element of expenditure may be indicated thus:  
150 witnesses @ approximately €330 per day - **50,000**

## 20. Cost of Hearings

- **Contested Hearings:**  
A week of contested hearings would cost the Commission **€40,000** approximately.<sup>1</sup>

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<sup>1</sup> 3SC@€1000 per day plus one reading day = €6000 per day  
Stenography services @ €2000 per day. This is €8000 per day's hearing or €40,000 per week.

- **Non-Contested Hearings:**  
A week of non-contested hearings would cost the Commission between **€10,000** and **€20,000** depending on whether Senior Counsel is retained for the hearings.<sup>2</sup>

## **21. Additional Expenses**

21.1 The Commission may incur additional expenses in area such as:

- Expert assistance relating to any matter within its terms of reference
- Temporary additional staff to deal with discovery documentation
- Printing and publication expenses
- Legal costs associated with a legal application.

## **22. Final report of the Commission and Extension Sought.**

22.1 Subject to the caveats outlined above, the Commission proposes a delivery date for its final report of **December 31<sup>st</sup> 2015** and formally requests that the Taoiseach as specified Minister revise the time frame for the Commission's investigation to reflect this.



Mr Justice Nial Fennelly

Sole Member

November 14 2014

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<sup>2</sup> Stenography services @€2000 per day. 1 SC @ €1000 per day plus preparation days €10,000 per week.

## **Appendix 1**

### **Rules and Procedures of the Fennelly Commission**



**An Coimisiún Imscrúdúcháin  
(Nithe Áirithe i dtaobh  
an Gharda Síochána  
agus daoine eile)**

**Commission of Investigation  
(certain matters relative to  
An Garda Síochána  
and other persons)**

**The Honourable Mr Justice Nial Fennelly  
Sole Member**

## **Rules and Procedures**

**1<sup>st</sup> Floor, St Stephen's Green House, Earlsfort Terrace, Dublin 2.**

**Tel. No. 01 662 9151**

**e-mail: [info@fennellycommission.ie](mailto:info@fennellycommission.ie)**



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## **2. Introduction**

The Commission of Investigation into certain matters relative to An Garda Síochána and other persons ("the Commission") was established pursuant to section 3 of the Commissions of Investigation Act 2004 ("the Act") by order of the Government dated 30 April 2014. See <http://www.irishstatutebook.ie/pdf/2004/en.act.2004.0023.pdf>

Notice of the making of the Government Order (Statutory Instrument No.192 of 2014) was published in Iris Oifigiúil on 6 May 2014.

The Government appointed the Honourable Mr Justice Nial Fennelly, then of the Supreme Court (since retired), to act as the Sole Member of the Commission.

These Rules and Procedures are adopted by the Commission pursuant to section 15 of the Act. They do not constitute an exhaustive statement of the powers and duties of the Commission.

## **3. Terms of reference**

The Commission is directed to investigate and make a report to the Taoiseach in accordance with the provisions of the Act on certain matters of significant public concern.

These matters are set out in the Terms of Reference of the Commission, which can be found in Appendix 1 of these Rules and Procedures.

The Commission is directed to report to the Government no later than 31 December 2014, subject to section 6(6) of the Act.

The Rules and Procedures set out below have been adopted by the Commission in relation to evidence and submissions and, in accordance with section 15 of the Act, will be published to those persons involved in the work of the Commission.

The Rules and Procedures are definitive as from the date hereof. They are to be read in conjunction with the Act.

## **4. Guiding principles**

### Independence

The Commission is independent in the performance of its functions.<sup>1</sup> The Commission will conduct its investigation in the manner that it considers appropriate having regard to the provisions of the Act, the terms of reference of the Commission and in accordance with these Rules and Procedures.<sup>2</sup>

### Confidentiality

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<sup>1</sup> Commissions of Investigations Act 2004, s. 9

<sup>2</sup> Ibid., s.10.

The Commission will respect the confidence of all documents and evidence communicated to it, save to the extent that it is required by any of the provisions of the Act to disclose or report any such matter.

#### Voluntary co-operation

The Commission will, to the greatest extent possible consistent with its duties under the Act, conduct its investigation by seeking and facilitating the voluntary co-operation of any person from whom evidence may be required.<sup>3</sup>

#### Fair procedures

The Commission will at all times, respect the right to fair procedures of any person who gives evidence to the Commission, or is affected by the conduct of its investigation.

#### Expedition

The Commission will conduct its investigation as expeditiously as a proper consideration of the matters referred to it permit.<sup>4</sup>

### **5. Conduct of investigation**

The Commission will conduct its investigation in private, save where it decides to grant the request of a witness that his or her evidence be heard in public, or where the Commission is satisfied that it is desirable in the interests both of the investigation and of fair procedures to hear all or part of the evidence of a witness in public.<sup>5</sup>

Where the evidence of a witness is to be heard in private, the Commission may give directions as to the persons who may be present while the evidence is being heard.<sup>6</sup>

The disclosure by any person of evidence heard or documentation produced to the Commission in private is not permitted (save in certain limited circumstances set out in sections 11 and 12 of the Act) and may constitute a criminal offence.<sup>7</sup>

### **6. Preservation of information**

Section 31(1) of the Act imposes a specific statutory duty on any person who has in his or her possession or power a document, or information in any form, relating to any matter within the Commission's Terms of Reference to preserve that document or information for the duration of the Commission, or the completion of a subsequent tribunal of inquiry.

A person who commits a breach of this statutory duty to preserve a document or information may be guilty of a criminal offence under section 31(2) of the Act.

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<sup>3</sup> Ibid s.11

<sup>4</sup> Ibid., s. 10(4)

<sup>5</sup> Ibid s.11(1).

<sup>6</sup> Ibid s.11(2).

<sup>7</sup> Ibid s.11(3).

The decision as to whether a document is relevant to this investigation is a matter for the Commission and not for the person from whom the document is sought.

## **7. Evidence**

The powers of the Commission relating to the obtaining of evidence are set out in the Act, in particular sections 16, 17 and 28.

The Commission will in the first instance and to the extent permitted by the Act, seek the voluntary co-operation of all witnesses from whom evidence is required.

In the event that such voluntary co-operation is not forthcoming, the Commission will consider whether to use any of its powers under the Act to compel production of the required evidence.

Before a person gives evidence to the Commission, he or she will be provided with a Witness Notice setting out the Commission's powers under the relevant sections of the Act and indicating that, if voluntary co-operation is not given or is withdrawn, the Commission will exercise such of those powers as it considers necessary.<sup>8</sup> The Commission will also give to any person before he or she gives evidence to the Commission a copy of the guidelines concerning recovery of legal costs prepared by the Taoiseach.<sup>9</sup> [See Appendix 3].

The Commission may receive evidence and information in any form that it considers appropriate, including orally before the Commission, by affidavit, statements, submissions, electronic and paper documents, live video links, video and sound recordings or any other mode of transmission.<sup>10</sup> Evidence includes any expression, orally, in writing or otherwise, of an opinion, belief or intention.<sup>11</sup>

Where a person gives evidence to the Commission otherwise than by attending in person or by means of a live video link, that person must provide, within a period specified by the Commission, a sworn affidavit acknowledging that the evidence concerned was given by him or her; that the evidence was given voluntarily; and that to the best of his or her knowledge and belief the content of that evidence is true and accurate. A suggested draft affidavit for this purpose can be found in Appendix 2 of these Rules and Procedures.

A witness who attends before the Commission to give evidence may be required to give the evidence on oath or affirmation. If no legal representative is present to advise the witness, the Commission shall advise the witness of his or her legal rights and obligations while giving such evidence.<sup>12</sup>

It is a criminal offence for any person giving evidence to the Commission to make a statement material to the investigation that he or she knows to be false or does not believe to be true. This applies whether or not the statement is made under oath or affirmation.

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<sup>8</sup> Ibid s.13(1).

<sup>9</sup> Ibid. S. 23(4).

<sup>10</sup> Ibid s.14, 15.

<sup>11</sup> Ibid. S. 2.

<sup>12</sup> Ibid s.13(2), 14(2).

A person who gives evidence to the Commission, or who produces or sends documents to the Commission on being directed to do so, has the same immunities and privileges, and is subject to the same liabilities, as a witness in the High Court.<sup>13</sup>

## **8. Disclosure of evidence to witnesses**

The Commission will disclose to any person who is either directed to attend or attends voluntarily as a witness before it or to any person about whom evidence is given to the Commission the substance of any evidence in its possession that, in its opinion, the person should be aware of for the purposes of the evidence which that person has given or may give to the Commission.<sup>14</sup>

The Commission is not obliged to disclose the source of the evidence given or document produced by a witness while giving evidence in private, unless the interests of fair procedures require it.<sup>15</sup>

Any person to whom the substance of such evidence is disclosed will be given an opportunity to comment in evidence or by written or oral submissions on the evidence, in such manner as the Commission shall decide in accordance with its discretion

## **9. Privilege and confidentiality**

A person who has been requested, directed or ordered to provide documents, evidence or information to the Commission may request the Commission to consider a claim of privilege or duty of confidentiality in relation to the contents of same.

Anyone wishing to assert a claim of privilege or duty of confidentiality must write to the Commission at the earliest opportunity, indicating:

- the specific documents, evidence or information in respect of which a claim of privilege or duty of confidentiality is being asserted,
- the precise privilege or duty of confidentiality asserted,
- particulars of any facts or circumstances relevant to the privilege or duty of confidentiality asserted, and
- any legal submissions in support of the claim of privilege or duty of confidentiality.

Under section 21(2) of the Act, it is for the Commission to determine whether the claimed privilege or duty of confidentiality applies. For that reason, the Act requires that the person asserting such claim provide the documents concerned to the Commission in advance of a ruling by the Commission on the claim of privilege or confidentiality.

Where the commission determines that the privilege or the duty of confidentiality relied on as grounds for refusing to produce a document does not apply to any of the information in the document, the document is considered for the purposes of this Act to have been

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<sup>13</sup> Ibid s.20.

<sup>14</sup> Section 12 of the Act.

<sup>15</sup> Ibid s.12(2).



received as evidence by the commission unless the determination is modified or overturned under section 22.<sup>16</sup>

A person whose refusal to disclose information or to produce a document is the subject of a determination by the Commission under section 21(2) may appeal to the High Court against that determination.<sup>17</sup>

## **10. Legal representation**

There is no requirement that a witness retain a legal representative.

The fact that a witness has retained a legal representative does not relieve that person of his or her personal duties to the Commission.

A witness may be accompanied by his or her legal representative while giving evidence.

The legal representative of any person other than the witness may be present only if the Commission is satisfied that the presence of such a representative would be in keeping with the purpose of the investigation and in the interests of fair procedures and directs that he or she be allowed to be present. Such a legal representative may cross-examine the witness only if the Commission is satisfied that such cross-examination is necessary in the interests of fair procedures. Such **cross-examination** shall be limited to matters the Commission considers relevant to the investigation.

A person who retains a legal representative for the purposes of dealing with the Commission does not, save as provided by sections 23 and 24 of the Act, thereby acquire any right to the legal costs of that representative.

## **11. Submissions**

The Commission may, in its discretion, request statements or submissions from any person who may have information of relevance to its investigation.<sup>18</sup>

Such statements or submissions should be communicated in writing to the Commission, in such form as may be decided by it, within a time which it will specify. The time frame for a statement or submission may be extended by the Commission where appropriate.

## **12. Guidelines on legal costs**

As required by section 23(1) of the Act, the Government, following consultation with the Commission, has prepared general guidelines concerning payment by the Taoiseach (as specified Minister) of legal costs **necessarily** incurred by witnesses in connection with this investigation.

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<sup>16</sup> Ibid., s. 21(11).

<sup>17</sup> Ibid s.22.

<sup>18</sup> Ibid. S. 15.

Section 23(4) requires the Commission to supply a copy of these guidelines to every witness before he or she gives evidence to the Commission. To that end, the guidelines are set out in Appendix 3 of these Rules and Procedures.

### **13. Payment of witnesses' expenses or legal costs**

Any person who attends, whether voluntarily or otherwise, as a witness before the Commission is entitled to be paid by the Taoiseach, (as specified Minister in relation to this Commission) such amount in respect of the expenses of his or her attendance as is determined in accordance with the guidelines set out in Appendix 3..

Section 24 of the Act empowers the Commission - at the request of a witness - to direct that all or part of the legal costs necessarily incurred by that witness in connection with its investigation be paid by the Taoiseach.

Under section 24(2), the Commission may not issue a direction for the payment of legal costs of a witness unless satisfied that:

- (a) the costs were necessarily incurred, and
- (b) the level and amount of those costs are reasonable.

In considering a request to direct payment of legal costs, the Commission will have regard to all relevant factors, including the specific criteria set out in section 24(3) of the Act, before making any decision in that regard.

### **14. Procedure for seeking legal costs**

Requests for the Commission to direct the payment of legal costs incurred by a witness must be made in writing to the Commission and should include the following:

- the name of the witness making the request,
- contact details for the witness making the request,
- the factual basis upon which it is claimed that legal costs were necessarily incurred,
- the factual basis upon which it is claimed that the level and amount of costs for which payment is sought are reasonable,
- a bill of costs, and
- the amount of Value Added Tax on those legal costs.

### **15. Procedure for seeking certain other expenses**

A witness who has incurred heavy expenses (other than legal costs) arising from his or her involvement with the Commission, may request the Commission to direct that all or part, of those expenses be paid by the Taoiseach. These expenses may relate to:



- (a) The nature, volume or location of documents produced by the witness,
- (b) Where relevant, the location outside the State from which the witness travelled to attend before the Commission,
- (c) Any other factor not within the control of the witness.<sup>19</sup>

A request for a direction in relation to such expenses must be made in writing to the Commission and should include the following:

- the name of the witness making the request,
- contact details for the witness making the request,
- the factual basis upon which the expenses are claimed, including all original vouchers and receipts in respect of such expenses,
- the total amount of expenses claimed, and
- the amount of Value Added Tax on those expenses, if any.

The Commission, if satisfied that the expenses incurred were necessary in the circumstances, will direct payment of such amount of expenses as it considers reasonable.

## **16. Cut-off date for costs and expenses**

Prior to submitting its final report to the Taoiseach, the Commission will schedule a cut-off date, beyond which any requests in relation to costs or expenses will not be considered.

## **17. Interim reports**

The Commission may submit an interim report to the Taoiseach in the following circumstances:

- At the request of the Taoiseach, or
- Where the Commission considers it necessary to request that the time frame for its investigation be revised under section 6(6) of the Act.

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<sup>19</sup> Ibid s.24(5).

## 18. Disclosure of draft reports

Before an interim or final report is submitted to the Taoiseach, the Commission will send the draft report, or relevant sections thereof, to any person who is identified in, or identifiable from the draft report.<sup>20</sup>

A person is considered identifiable if the draft report contains information that could reasonably be expected to lead to his or her identification.<sup>21</sup>

The Commission will specify a period within which any person who receives a draft report or part thereof and who believes that the Commission has not observed fair procedures in relation to him or her, may do either of the following:


- (a) Submit a written statement to the Commission setting out the reasons for the belief and requesting the Commission to review the draft in light of the statement, or
- (b) Apply to the Court for an order directing that the draft be amended before the submission of the report to the Taoiseach.<sup>22</sup>

## 19. Final report and dissolution of the Commission

On the conclusion of its investigation, the Commission will prepare and submit to the Taoiseach a final report, based on the evidence received by it, concerning the matters set out in the Commission's terms of reference.<sup>23</sup>

Prior to submitting the final report, the Commission will deposit with the Taoiseach all evidence received by and documents created by or for the Commission.<sup>24</sup>

The Commission shall be dissolved on the submission of its Final Report to the Taoiseach, unless a tribunal is established to inquire into a matter which is wholly within the Commission's terms of reference. In that event, the Government shall, by order notified in *Iris Oifigiúil*, appoint the day on which the Commission is to be dissolved.

  
Nial Fennelly  
Sole Member

13<sup>5</sup> June 2014

<sup>20</sup> Ibid s.34(1).

<sup>21</sup> Ibid s.34(3).

<sup>22</sup> Ibid s.35(1).

<sup>23</sup> Ibid s.32(1).

<sup>24</sup> Ibid s.43(2).

# **APPENDIX 1**

## **TERMS OF REFERENCE**

**Terms of Reference for Commission of Investigation  
regarding certain matters relative to An Garda Síochána  
and other persons**

1. The Commission is directed to investigate and to make a report to the Taoiseach in accordance with the provisions of Section 32 of the Commissions of Investigation Act, 2004 (No. 23 of 2004) on the operation of Garda Síochána telephone recording systems and on the following matters in particular:

- (a) To identify all Garda Stations in which telephone recording systems, to record calls other than 999 calls to the Emergency Call Answering Service, were installed and/or operated by An Garda Síochána between 1st January 1980 and 27th November 2013 and to establish an inventory of those Garda Stations so identified to include:
  - (i) the date of initial installation, where such installation occurred at a date between 1st January 1980 and 27th November 2013;
  - (ii) to report whether any such installations were already in existence on the 1st January 1980;
  - (iii) the duration for which telephone recording systems continued in operation in each such Garda Station;
  - (iv) the date on which telephone recording systems were terminated or removed from each such Garda Station.
- (b) To establish the immediate circumstances surrounding the installation of telephone recording systems operated by An Garda Síochána at the said Garda Stations referred to at (a) above and to establish what authorisation was sought or obtained by An Garda Síochána for such installation and, including the funding, installation, maintenance and / or upgrading of those telephone recording systems, to include the public procurement procedure followed in 1996 and further in relation to the installation of the NICE recorder system in 2008.
- (c) To establish how the said telephone recording systems operated by An Garda Síochána were managed and to establish what use (if any), was made by An Garda Síochána of any information collated by the said telephone recording systems.
- (d) To identify the organisation and structures in place for the installation, operation and management of the said telephone recording systems and in the storage, access, analysis and use of any information obtained from them.

- (e) To investigate and report on the level of knowledge of the existence, operation and use of the said telephone recording systems within An Garda Síochána.
- (f) To investigate and report on the level of knowledge of the existence, operation and use of the said telephone recording systems within the Office of the Minister for Justice and Equality, the Department of Justice and Equality, the Office of the Attorney General, the Chief State Solicitor's Office, the Office of the Director of Public Prosecutions, the Office of the Data Protection Commissioner and the Garda Síochána Ombudsman Commission.
- (g) To establish whether the installation, operation and use of the said telephone recording systems was authorised by law.
- (h) To establish whether any telephone conversations between solicitors and their clients were recorded by the said telephone recording systems.
- (i) To establish whether any information obtained from the said telephone recording systems by An Garda Síochána was used by it either improperly or unlawfully and, in particular, whether any recordings as may have been made by An Garda Síochána of Solicitor / Client telephone conversations were used for any purpose whatsoever.
- (j) To establish where the recorded information obtained from the telephone recording systems operated by An Garda Síochána was stored since the creation of same and to establish how such information was accessed and analysed by An Garda Síochána.
- (k) To establish whether any of the recorded information has been destroyed.
- (l) To establish any instances during the relevant period where the Office of the Director of Public Prosecutions made use of the data and information produced by the said telephone recording systems for any purpose.
- (m) In particular, to identify and review all recordings in the possession of An Garda Síochána emanating from the Garda telephone recording system at Bandon Garda Station or otherwise, which relate to the Garda investigation into the death of Sophie Toscan du Plantier and to establish whether those recorded phone calls, and any other acts or events in the course of the said Garda investigation, disclose any evidence of unlawful or improper conduct by members of An Garda Síochána in connection with that investigation.
- (n) To investigate and report on the furnishing to the Minister of a letter dated 10th March 2014 sent by the former Garda

Commissioner, Mr. Martin Callinan, to the Secretary General of the Department of Justice and Equality.

(o) To investigate and report on the sequence of events leading up to the retirement of the former Garda Commissioner Mr. Martin Callinan on the 25th March 2014.#

(p) In the event that any matter arises from the Report of the Inspector of Prisons Judge Michael Reilly pursuant to section 31 of the Prisons Act 2007 into all the circumstances surrounding the recording of telephone conversations between prisoners and their solicitors, which appears to require further investigation in the public interest the Commission may investigate and report on same.

(q) To report on any other matters of concern arising from its investigation of recordings to and from Garda Stations and to make any further recommendations as it sees fit.

2.The Commission shall exercise discretion in relation to the scope and intensity of the investigation it considers necessary and appropriate, having regard to the general objective of the investigation. In particular, the Commission shall have the discretion to decide to limit its investigation to samples of recordings in the light of what is disclosed as the investigation progresses.

3.The Government has appointed the Honourable Mr. Justice Nial Fennelly, Judge of the Supreme Court. to act as the Sole Member of the Commission of Investigation.

4.The Commission of Investigation is directed to conduct the task assigned to it under these Terms of Reference and to report to the Government no later than the 31st December 2014, subject to section 6(6) of the Commissions of Investigation Act, 2004.



GIVEN under the Official Seal of the  
Government, 30 April 2014.

ENDA KENNY,  
Taoiseach.

## **APPENDIX 2**

### **AFFIDAVIT OF DOCUMENTS**



**An Coimisiún Imscrúdúcháin  
(Nithe Áirithe i dtaobh  
relative to  
an Garda Síochána  
agus daoine eile)**

**Commission of Investigation  
(certain matters**

**An Garda Síochána  
and other persons)**

**The Honourable Mr Justice Nial Fennelly  
Sole Member**

**Affidavit Verifying Evidence**

I, \_\_\_\_\_ [name], of \_\_\_\_\_ [address],  
\_\_\_\_\_ [description/occupation] aged 18 years and upwards

**MAKE OATH** and say as follows:

1. I am \_\_\_\_\_ [name], of \_\_\_\_\_ [address] and am \_\_\_\_\_ [description].
2. I make this affidavit from facts within my own knowledge and from data, documentation and information within my possession, power or procurement save where otherwise appears and where so otherwise appearing I believe the same to be true.
3. I have read the terms of reference of the Commission of Investigation (certain matters relative to An Garda Síochána and other persons).
4. I have read the Rules and Procedures document published by the Commission of Investigation (certain matters relative to An Garda Síochána and other persons).



5. I have read the \_\_\_\_\_ [request/direction/order] of the Commission of Investigation (certain matters relative to An Garda Síochána and other persons) directed to \_\_\_\_\_ [name person] dated the \_\_ day of \_\_\_\_\_, 2014.
6. I am aware of, and understand, the requirements of sections 10, 14, 16, 17, 28 and 31 of the Commissions of Investigation Act 2004.
7. I am a person who has given evidence to the Commission otherwise than by attending before the Commission (or, if appropriate, by means of a video link) pursuant to Section 14(4) of the Commissions of Investigation Act 2004.
8. I refer to a text copy of my evidence given on the \_\_ day of \_\_\_\_\_, 2014 at \_\_\_\_\_ [address] upon which and marked with the letter "A" I have signed my name prior to swearing this affidavit.
9. I have read the text copy of my evidence given on the \_\_ day of \_\_\_\_\_, 2014 at \_\_\_\_\_ [address] and I confirm that:
  - (a) this evidence was given by me, \_\_\_\_\_ [name], on the \_\_ day of \_\_\_\_\_, 2014 at \_\_\_\_\_ [address],
  - (b) this evidence was given voluntarily, and
  - (c) that to the best of my knowledge this evidence is true and accurate.

SWORN this \_\_ day of \_\_\_\_\_, 2014  
 At \_\_\_\_\_ [address] by \_\_\_\_\_ [name]  
 Before me \_\_\_\_\_ [name]  
 a Commissioner for Oaths/Practising Solicitor  
 and I know the deponent.

## **APPENDIX 3**

### **GUIDELINES ON LEGAL COSTS**



An Coimisiún Imscrúdúcháin  
(Nithe Áirithe i dtaobh  
relative to  
an Garda Síochána  
agus daoine eile)

Commission of Investigation  
(certain matters

An Garda Síochána  
and other persons)

The Honourable Mr Justice Nial Fennelly  
Sole Member

**General Guidelines on Payment of Legal Costs and  
Other Expenses to Persons Who Become Involved with  
the Commission of Investigation**

**Purpose of General Guidelines**

1. These General Guidelines have been agreed by an Taoiseach, as the specified Minister, following consultation with the Commission and with the consent of the Minister for Public Expenditure and Reform, as required by the Commissions of Investigation Act 2004 (the Act) and the Finance (Transfer of Departmental Administrative and Ministerial Functions) Order 2011 [S.I. No. 418/2011].
2. These guidelines should be read in conjunction with that Act<sup>1</sup>.
3. The Commission operates in accordance with these guidelines on costs but is independent in the performance of its functions as set out in the Act.

**What Expenses (Other than Legal Costs) Can a Person Expect to Recover?**

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<sup>1</sup> In the event of any dispute, the terms of the Act shall prevail

4. A person who attends as a witness before the Commission is entitled to payment of the expenses incurred by reason of that attendance<sup>2</sup>.
5. The expenses to be covered are travel and transport costs, accommodation, meals and any other expenses that are necessarily incurred as a direct result of attendance before the Commission.

Expenses related to loss of earnings will not be paid unless the person concerned can show to the satisfaction of the Commission that he or she has suffered undue hardship by reason of his/her attendance.

Expenses will not be paid to any serving public servant whose expenses have been met by his/her employer.

Payment in respect of accommodation and meals will be made on the basis of vouched expenses, subject to the following upper limits:

- A maximum of € 108.99 in respect of an overnight stay;
- A maximum of € 33.61 in respect of a period of 10 hours or more;
- A maximum of € 13.71 in respect of a period of 5 hours or more.

Where possible, public transport (bus or rail) should be used. Taxis should only be used where another reasonable alternative does not exist. In the event that use of a private car is necessary, expenses will be met at the rate of € 0.38 per mile / €0.24 per kilometre.

6. A person may also request the Commission of Investigation to pay 'heavy expenses'<sup>3</sup> (other than legal costs) incurred because of:
  - The nature, volume or location of the documents produced by the witness;
  - The location outside the State from which the witness travelled to attend before the Commission;
  - Any other factor not within the control of the witness.

It is a matter for the Commission to decide what constitutes 'heavy expenses' on a case by case basis. The Commission may, on being satisfied that they were necessary in the circumstances, direct that such amount of those expenses as it considers reasonable be paid to the witness.

#### **What Legal Costs Can a Person Expect to Recover?**

7. A witness may request recovery of legal costs necessarily incurred<sup>4</sup>.

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<sup>2</sup> Section 16 (3).

<sup>3</sup> Section 24 (5)

8. Legal costs shall not be paid except where
- a) The good name or conduct of the witness are called into question by any evidence received by the Commission, or
  - b) Other personal or property rights of the witness are at risk of being jeopardised as a result of any evidence received by the Commission.

‘Legal Costs’ means fees, disbursements, charges and expenses included in a bill of costs in respect of a barrister or solicitor.

9. Discovery costs may be included as legal costs for a party who has been granted legal representation before the Commission, in which case payment of costs of discovery will be decided in the context of payment of overall legal costs.
10. The amount of legal costs to be paid by an Taoiseach, as the specified Minister, shall be assessed by the Commission in the light of the relevant provisions of the Act<sup>5</sup>

These Guidelines do not place any restriction on the number or type of legal representatives that may be engaged by a party who has been granted legal representation by the Commission.

The Commission may, in its discretion, limit the amount of legal costs recoverable in respect of such representation (including the number of those representatives).

These Guidelines specify a maximum daily rate for Senior Counsel, Junior Counsel and Solicitor in respect of their appearance before the Commission (see paragraph 12 below)

11. The Commission is to be satisfied that any legal costs to be paid were necessarily incurred and that the level and amount of these costs are reasonable.
12. The amounts payable in respect of appearance by a legal representative before the Commission are:

Senior Counsel	€788.27 <i>per diem</i> (excluding VAT)
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<sup>4</sup> Sections 23 and 24

<sup>5</sup> Sections 23 and 24

Junior Counsel	€394.14 <i>per diem</i> (excluding VAT)
Solicitor	€624.00 <i>per diem</i> (excluding VAT)

13. The amounts payable in respect of the following affidavits that may be furnished to the Commission are:

An affidavit of documents	A maximum of €780.00, subject to the exemption set out below
An affidavit verifying evidence	A maximum of €390.00 per affidavit (to cover payment to all legal representatives )
An affidavit	A maximum of €390.00 per affidavit (to cover payment to all legal representatives)

These maximum limits may only be exceeded in respect of an affidavit of documents that requires discovery costs in excess of that limit and where, in the Commission's view:

- The volume of documents discovered is substantial;
- The documents disclosed were relevant;
- The legal normalities in relation to the swearing of the affidavit of documents was properly and promptly complied with; and
- These costs were necessarily incurred.

14. To the extent possible, legal representation shall be granted on a joint basis to parties with similar interests, and in any event, the costs incurred by such parties shall be assessed by reference to the potential reduction in legal costs that could have been secured through such joint representation irrespective of whether such joint representation occurred, with the distribution of allowable costs to be determined by the Commission by reference to the criteria in the Act.<sup>6</sup>

15. These Guidelines are definitive as to all legal costs or expenses (including heavy expenses) that may be recoverable by a person who seeks to recover such costs or expenses from the Commission. No payment shall be made in respect of brief fees, instruction fees or any other legal costs or expenses, other than those legal costs and expenses expressly specified in these Guidelines.

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<sup>6</sup> Sections 23 and 24

## APPENDIX 4

Witness Notice



**An Coimisiun Imscruduchain  
(Nithe Airithe i dtaobh  
an Gharda Síochána  
agus daoine eile)**

**Commission of  
Investigation (certain  
matters relative to An  
Garda Síochána and  
other persons)**

**The Honourable Mr Justice Nial Fennelly  
Sole Member**

**WITNESS NOTICE**

**Introduction**

The Commission of Investigation into certain matters relative to An Garda Síochána and other persons ("the Commission") was established pursuant to section 3 of the Commissions of Investigation Act 2004 ("the Act") by order of the Government dated 30 April 2014.

Before a person gives evidence to the Commission, section 13 of the Act requires that the Commission provide that person with a written statement setting out certain powers of the Commission and indicating the circumstances in which the Commission may decide to exercise those powers.

This is an important document. The Commission invites you to read it carefully before you give evidence to the Commission.

**Powers relating to witnesses and documents**

Section 16(1) of the Act provides that, for the purposes of its investigation, the Commission may do all or any of the following:

- Direct in writing any person to attend before the Commission on a date and at a place and time specified in the direction and there to give evidence and to produce



any document that is in the person's possession or power and is specified in the direction.

- Direct a witness to answer questions that it believes to be relevant to a matter under investigation.
- Examine a witness on oath or affirmation or by use of a statutory declaration or written interrogatories.
- Examine or cross-examine any witness to the extent the Commission thinks proper in order to elicit information relevant to a matter under investigation.
- Direct a witness to produce to the Commission any document that is in his or her possession or power and is specified in the direction.
- Direct in writing any person to-
  - (i) provide the Commission with a list, verified by affidavit, disclosing all documents in the person's possession or power relating to a matter under investigation, and
  - (ii) specify in the affidavit any of the listed documents that the person objects to producing to the Commission and the basis for the objection.

Please note that the rules of court relating to the discovery of documents in Court proceedings apply with any necessary modifications in relation to the disclosure of documents pursuant to a direction of this kind by the Commission.<sup>7</sup>

- Direct in writing any person to send to the Commission any document that is in the person's possession or power and is specified in the direction.
- Direct a person who made a statement or answered a question while being interviewed by a person appointed under section 8 of the Act to advise or assist the Commission to provide the Commission with a sworn statement, in a form acceptable to the Commission, confirming (if such is the case)-
  - (i) that the statement was made or the answer given by him or her voluntarily, and
  - (ii) that to the best of his or her knowledge the content is true and accurate.

Where such a statement or answer to a question is confirmed in this manner, it is considered to have been received as evidence by the Commission.<sup>8</sup>

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<sup>7</sup> Commissions of Investigation Act 2004. s.16(4).

<sup>8</sup> Ibid s.16(5).

- Give any other directions that appear to the Commission to be reasonable.

Where a person does not comply with a direction given by the Commission under section 16(1) of the Act, the Sole Member of the Commission may apply to the High Court for:

- (a) an order that the person comply with the direction, and
- (b) any other order the Court considers necessary and just to enable the direction to have full effect.<sup>9</sup>

Failure to comply with the direction specified in such an order may be dealt with by the Court as if it were a contempt of court.<sup>10</sup>

Any person who, without reasonable excuse, fails to comply with a direction of the Commission to attend before it for the purpose of giving evidence and / or producing documents is guilty of an offence under section 16(8) of the Act.

A failure to comply with a direction to attend before the Commission may be punished either as an offence or as a contempt of court.<sup>11</sup>

#### **Power to direct certain persons to pay costs**

Section 17 of the Act provides that where a person obstructs the Commission in the carrying out of its investigation and the Commission thereby incurs costs which it would not otherwise have incurred, the Commission may, in writing, direct that person to pay to the Minister for Finance those costs, including legal costs as taxed by a Taxing Master of the High Court and costs arising from any delay in completing the investigation.

Such obstruction may include failing, without reasonable excuse, to comply with one or more of the following:

- (i) a direction from the Commission under section 16 of the Act,
- (ii) ) a request for additional information in relation to evidence previously given by that person to the Commission<sup>12</sup>.or
- (iii) a request to submit a document to the Commission for the purposes of determining a claim of privilege or duty of confidentiality in relation to that document.<sup>13</sup>

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<sup>9</sup> Ibid s.16(6).

<sup>10</sup> Ibid s.16(7).

<sup>11</sup> Ibid s.16(9).

<sup>12</sup> Ibid s.14(5).

<sup>13</sup> Ibid s.17(1).

If the said obstruction adversely affects any other person who attends or gives evidence to the Commission, the Commission may – on its own initiative or at the request of the person so affected – direct that all or part of any costs (including legal costs) incurred by the affected person as a result of the obstruction, be paid by the person responsible for that obstruction.<sup>14</sup>

A direction by the Commission ordering payment of either its own costs or the costs of a witness in the circumstances outlined above does not take effect until it is confirmed by the High Court on the application of the Sole Member.<sup>15</sup> The Court may make an order confirming the direction with or without modification, or may refuse to make such an order.<sup>16</sup>

Any sum payable pursuant to a direction which has been confirmed by the Court may be recovered as a simple contract debt in any court of competent jurisdiction.<sup>17</sup>

A person may be directed to pay costs under section 17 of the Act even though the act or omission that resulted in the direction is punishable as a contempt of Court or as an offence under the Act. The issuing of a direction under this section of the Act does not prevent the person being punished for contempt or the bringing of proceedings in respect of the offence.<sup>18</sup>

#### **Powers of entry and inspection**

Section 28 of the Act sets out a number of powers which can be exercised by "authorised persons" at the direction of the Commission. In this context, an "authorised person" is defined as:

- (a) the Sole Member of the Commission, and
- (b) any person appointed under section 8 of the Act to assist and advise the Commission and who has been authorised in writing by the Commission to exercise the powers set out in section 28.<sup>19</sup>

Authorised persons may only exercise those powers where the Commission considers it reasonable and necessary for the purposes of its investigation, and so directs.<sup>20</sup>

Subject to those conditions, an authorised person may do any or all of the following:

- enter at any reasonable time any premises in which the authorised person has

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<sup>14</sup> Ibid s.17(2).

<sup>15</sup> Ibid s.17(3).

<sup>16</sup> Ibid s.17(4).

<sup>17</sup> Ibid s.17(5).

<sup>18</sup> Ibid s.17(6).

<sup>19</sup> Ibid s.26.

<sup>20</sup> Ibid s.27.

reasonable grounds to believe there are any documents, or there is information in any form, relating to any matter within the Commission's terms of reference;

- inspect any documents, or information in any form, on the premises;
- secure for later inspection any documents, any information in any form and any equipment in which those documents or that information may be held, if the authorised person has reason to believe that the documents or information may be relevant to the investigation;
- secure for later inspection the premises, or any part of the premises, but only if the authorised person considers it necessary to do so in order to preserve for inspection documents or information in any form that he or she has reason to believe may be kept there and may relate to the investigation;
- take copies of or extracts from any documents or any electronic information system on the premises, including in the case of information in a non-legible form, copies of or extracts from such information in a permanent legible form;
- remove for later examination or copying any documents, or information in any form, that the authorised person has reason to believe may relate to a matter under investigation and retain them for the period that he or she considers reasonable;
- direct any person on the premises to produce to the authorised person any documents, or information in any form, kept on the premises;
- direct any person on the premises having charge of, or otherwise concerned with the operation of, data equipment or any associated apparatus or material to provide the authorised person with all reasonable assistance in relation to the equipment, apparatus or material;
- direct any person on the premises to give to the authorised person any information that the authorised person may reasonably require with regard to a matter under investigation.

An authorised person may not enter a private dwelling or the part of any premises that is used as a private dwelling, except with the consent of the occupier, or under the authority of a warrant issued under section 29 of the Act by a judge of the District Court.<sup>21</sup>

When exercising powers under this section, an authorised person may be accompanied by a member of the Garda Síochána.<sup>22</sup>

The production of a document in compliance with a direction under section 28 of the Act does not prejudice a person's lien on the document.<sup>23</sup>

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<sup>21</sup> Ibid s.28(2).

<sup>22</sup> Ibid s.28(3).

### **Exercise of powers by the Commission**

The Commission will in the first instance and to the extent permitted by the Act, seek and facilitate the voluntary co-operation of all witnesses from whom evidence is required.<sup>24</sup>

In the event that such voluntary co-operation is not forthcoming or is withdrawn, the Commission will consider whether to use any of its powers under the Act to compel production of the required evidence.<sup>25</sup>

### **Legal representation before the Commission**

There is no requirement that a witness retain a legal representative. The fact that a witness has retained a legal representative does not relieve that person of his or her personal duties to the Commission.

A witness may be accompanied by his or her legal representative while giving evidence. If you have no legal representative present to advise you, the Commission will advise you of your legal rights and obligations while giving evidence.

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<sup>23</sup> Ibid s.28(4).

<sup>24</sup> Ibid s.10(2).

<sup>25</sup> Ibid s.13(1).