



INTERIM REPORT OF THE FENNELLY COMMISSION

Commission of Investigation

(Certain Matters relative to An Garda Síochána and other persons)

The Hon. Mr. Justice Nial Fennelly

Sole Member

Terms of Reference (n) and (o)

Delivered to the Taoiseach as the specified Minister and in accordance with the provisions of
Section 32 of the Commissions of Investigation Act 2004

on the 31st day of August 2015

A handwritten signature in blue ink, appearing to read 'Nial Fennelly'.

Nial Fennelly
Sole Member of the Commission

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1. Introduction

- 1.1 The Government, by Order dated 30th April 2014 (S.I. No. 192 of 2014), made pursuant to the provisions of the Commissions of Investigation Act 2004, appointed Mr Justice Nial Fennelly as the Sole Member of the Commission of Investigation into certain matters relative to An Garda Síochána and other persons.

The Terms of Reference of the Commission, which are set out at Appendix 1 hereto, outline the scope of the investigations. Paragraph 1 states:-

“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....”

The Terms of Reference then set out a list of 17 matters to be considered in the context of Garda Síochána telephone recording systems.

- 1.2 By letter dated 31st July 2014, the Commission wrote to the Taoiseach, Mr Enda Kenny, indicating that it believed it would be possible to report on sub-paragraphs 1(n) and (o) in advance of, and separately from, the other matters set out in the Terms of Reference. In a letter of 7th 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 sub-paragraphs 1(n) and (o) – “...if you believe that it is feasible and appropriate.” This Interim Report is submitted in response to that request.

For an account of the procedures and work methods adopted by the Commission, the reader is referred to the first Interim Report of the Commission, submitted in November 2014 and published by the Department of the Taoiseach on 16th January 2015. A copy of that report is at:-

[http://www.taoiseach.gov.ie/eng/Publications/Publications_2015/Fennelly Commission Interim Report.pdf](http://www.taoiseach.gov.ie/eng/Publications/Publications_2015/Fennelly_Commission_Interim_Report.pdf)

1.3 Sub-paragraph 1(n) of the Terms of Reference requires the Commission:-

“to investigate and report on the furnishing to the Minister [for Justice and Equality]¹ 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.”

Sub-paragraph 1(o) of the Terms of Reference requires the Commission:-

“to investigate and report on the sequence of events leading up to the retirement of the former Garda Commissioner, Mr Martin Callinan, on 25th March 2014.”

1.4 Each of these two matters will receive detailed consideration in this report. A brief summary is sufficient at this point.

1.5 The letter referred to in sub-paragraph 1(n) of the Terms of Reference was addressed by the Commissioner of An Garda Síochána, Mr Martin Callinan, to the Secretary General of the Department of Justice, Mr Brian Purcell. It was headed “Recording of Telephone Conversations Made and Retained in Garda Stations. Data Protection Acts – Retention of Data”. The Commissioner informed the Secretary General that he wished to bring the matters mentioned in the letter “to the Minister’s attention in accordance with Section 41(d) of the Garda Síochána Act 2005.” As it transpired, the Minister remained unaware of the existence of the letter until a copy was handed to him during a Cabinet meeting on 25th March 2014, some 15 days after it had been delivered by hand to the office of the Secretary General, Mr Purcell, on 10th March 2014.

1.6 In the view of the Commission, to report solely on the physical process by which the letter was furnished to the Minister would be to ignore the substantive matters of significant public concern which underlie this aspect of the Terms of Reference. Full

¹ During the relevant period, the Department of Justice and Equality has had a number of changes in title – the Department of Justice (1923 – 1997), the Department of Justice, Equality and Law Reform (1997 – 2010), the Department of Justice and Law Reform (2010 – 2011) and the Department of Justice and Equality (2011 – to present). This Report will refer to “the Department of Justice” or “the Department” when referring to the present Department of Justice and Equality.

Similarly, the Minister for Justice and Equality will be referred throughout as “the Minister for Justice” or “the Minister”.

completion of the task required under this heading includes reporting on (i) why the Minister did not receive a copy of the letter at an earlier date, (ii) whether he should have done so and (iii) whether he was informed of the matters contained in the letter (as the Garda Commissioner had requested) at any stage prior to receiving it on 25th March 2014. These matters go to the heart of the reporting relationship between An Garda Síochána and the Government of the State. They require detailed consideration of the existing legal framework, the reporting practices in place at the time and the contents and significance of the letter itself.

- 1.7 Sub-paragraph 1(o) of the Terms of Reference concerns the fact that the sender of that letter, Mr Martin Callinan, announced his retirement from his position as Commissioner of An Garda Síochána on 25th March 2014. The Commission is required to investigate the sequence of events leading up to that announcement. This requirement must be interpreted in light of the Commission's overall remit to investigate "the operation of Garda Síochána telephone recording systems." In effect, the Commission is being asked to investigate and report on the extent to which the sequence of events leading up to the retirement of the Garda Commissioner related to issues around the recording of telephone calls to and from Garda stations.
- 1.8 It became clear to the Commission at an early stage of its investigations that there was a close temporal and factual relationship between the events referred to in sub-paragraphs 1(n) and (o) of the Terms of Reference. Both are inextricably linked with the emergence in or around October/ November 2013 of concerns regarding the systematic recording of non-999 telephone calls by An Garda Síochána and with the circumstances in which the Government came to be informed of those concerns. For that reason, the Commission decided that it was appropriate to investigate and report on sub-paragraphs 1(n) and (o) as part of a single module.
- 1.9 In addition to seeking documentation from An Garda Síochána, the Department of Justice and other relevant bodies and individuals, the Commission heard evidence on oath from a total of 26 witnesses. In order to comply with the requirements of fair procedures and, in particular to observe the provisions of section 12 of the Commissions of Investigation Act 2004, the Commission recalled a number of witnesses, some on more than one occasion.

- 1.10 Once all necessary evidence was obtained and considered, a draft report was completed. As required by section 34 of the Commissions of Investigation Act 2004, the draft, or portions thereof, were sent to some 60 persons who were identified or identifiable in the draft, in order that they would have an opportunity to make submissions to the Commission or to apply to the High Court as envisaged by section 35 of the Act. A total of 20 submissions were received as a result of this process. The Commission gave careful consideration to all submissions received and accordingly, a number of amendments were made to the draft and incorporated in the final version of the report, before it was submitted to the Taoiseach as the specified Minister under the Act.
- 1.11 The Report is divided into two sections. Part One deals principally with sub-paragraph 1(n). It considers the reporting relationship between the Garda Commissioner and the Minister for Justice, investigates the background circumstances that resulted in the sending of the letter of 10th March 2014, reports on the delivery of the letter to the Department of Justice and examines other relevant events up to and including 19th March 2014.
- 1.12 Part Two of this Report deals mainly with sub-paragraph 1(o) – that is, the sequence of events leading up to the retirement of the Garda Commissioner – although it also contains material of relevance to sub-paragraph 1(n). It examines legal issues in relation to the appointment, removal, resignation and retirement of the Garda Commissioner and summarises other contemporary events which, though not included in the Terms of Reference, form an important part of the background to the events being investigated by the Commission. There then follows a detailed account of the events which, in the view of the Commission, are essential to an understanding of Mr Callinan’s decision to retire. These events took place over 20th – 25th March 2014.
- 1.13 This Interim Report concerns only the subject matter of sub-paragraphs 1(n) and (o) of the Terms of Reference. The Commission is careful in this report to refrain from expressing any views on the general issue of “the operation of Garda Síochána telephone recording systems...” (Paragraph 1 of the Terms of Reference) or any of the particular matters listed at sub-paragraphs 1(a) to (m) of the Terms of Reference.

Sub-paragraph 1 (g) of the Terms of Reference requires the Commission to establish whether the installation, operation and use of the telephone recording systems were “authorised by law.” The Commission gives an account in this report of the views expressed by a number of key persons on the lawfulness of the recording systems. It does not, in this report, express any view on the larger issue of the legality of recording telephone calls to Garda Stations. This is a complex matter requiring consideration of legislation affecting a number of areas and is part of the continuing work of the Commission.

PART ONE

Term of Reference 1(n)

2. The Letter of 10th March 2014

- 2.1 The letter, which is the subject matter of sub-paragraph 1(n) of the Terms of Reference, was signed by the then Garda Commissioner, Mr Martin Callinan, and addressed to the then Secretary General of the Department of Justice and Equality, Mr Brian Purcell. It was delivered to the Secretary General's office at 94 St Stephen's Green, Dublin 2 on the morning of 10th March 2014.
- 2.2 The content of the letter, and the circumstances in which the Minister for Justice, Mr Alan Shatter, was made aware of it, are important also in considering the sequence of events leading up to the Commissioner's retirement, as required by sub-paragraph 1(o). In order to report fully on both these aspects of the Terms of Reference, it is necessary to examine, in some detail, the background events which resulted in the Garda Commissioner's decision to send the letter.
- 2.3 From a reading of the letter itself, it is clear that the appropriate starting point for such consideration is the emergence, in the context of civil proceedings taken by Mr Ian Bailey and Ms Catherine Jules Thomas, of concerns within An Garda Síochána relating to the recording of telephone calls.
- 2.4 The letter is reproduced in full hereunder:-

The Fennelly Commission Interim Report (n) and (o)
Chapter 2 – The Letter of 10th March

Oifig an Choimisinéara
An Garda Síochána
Páirc an Fhionnuisce
Baile Átha Cliath 8
Éire

Tel/Teileafón: (01) 666 2015 / 2026
Fax/Facs: (01) 666 2013

*Luaigh an uimhir tharagtha seo a leanas le do
thoil:*

Please quote the following ref. number:

An Garda Síochána



Office of the Commissioner
Garda Headquarters
Phoenix Park
Dublin 8
Ireland

Láithreán Gréasáin / Web site:
www.garda.ie

Ríomhphost / E-mail:
commissioner@garda.ie

CMR_22-37161/12

CONFIDENTIAL

Secretary General
Department of Justice and Equality
94, St. Stephen's Green
Dublin 2

**RE: Recording of Telephone Conversations made and retained in Garda Stations.
Data Protection Acts – Retention of Data.**

Dear *Secretary General,*

I wish to bring the following to the Minister's attention in accordance with Section 41 (d) of the Garda Síochána Act 2005.

During the discovery process in the current civil proceedings being taken by Mr. Ian Bailey and his partner, Ms Catherine Jules Thomas, for wrongful arrest and under other headings, further material has come to light that is relevant to discovery in those proceedings. This material relates to tapes of telephone conversations which took place on various dates during 1997 between members of An Garda Síochána at Bandon Garda Station and other serving members of An Garda Síochána and also with Ms Marie Farrell and in other cases with journalists who were contacting An Garda Síochána seeking information. These tapes are currently being reviewed as part of the Discovery process and will be listed in an Affidavit of Discovery which must be sworn by An Garda Síochána before the 25th March 2014.

As you are aware, An Garda Síochána and your Department are currently dealing with an order for Discovery which was made by Mr. Justice Hedigan on 17 May 2013. In respect of three earlier recordings between members of An Garda Síochána and between a member of An Garda Síochána and Ms. Marie Farrell, I have received advices from Senior Counsel that these recordings are captured by that Discovery Order and are relevant to the proceedings. A copy of these transcripts has previously been forwarded to the Chief State Solicitor's Office for review by Senior Counsel and I understand, following receipt of advices from Counsel a copy of those transcripts has also been forwarded to the Attorney General's Office and to your Department.

The analysis of remaining recordings is continuing at present which includes inter alia recordings of telephone calls between members of An Garda Síochána at Bandon Garda Station and journalists contacting An Garda Síochána and telephone calls between members of An Garda Síochána and a Mr. Martin Graham who is ostensibly providing information to An Garda Síochána.

It has since transpired following enquiries that systems would appear to have been installed during the 1980's, in Garda Stations to allow for the recording of incoming and outgoing telephone calls from designated extensions. The rationale behind this was the recording of Garda radio traffic to and from control rooms, 999 calls and the gathering of evidence around calls made to Garda stations regarding bomb threats and other code word messages. This practice has continued in some stations over the years with the relevant recordings being retained within the station itself. The original recorders were replaced with Dictaphone recorders during the 1990's and further replaced by NICE recorders which were installed in 2008.

I have since directed that the routine recording of non 999 Emergency calls to Garda stations cease and confirm that all recordings save those made on dedicated 999 lines were fully stopped nationally on 27 November 2013.

The only calls currently being recorded are 999 calls to the ECAS service where, since the legislation underpinning it in 2007 was enacted, a member of the public gives up their right to privacy when they ring the 999 service. BT ECAS record these calls from start to finish and An Garda Síochána record them from the point where they are handed over to it.

I await written confirmation from each Divisional Officer that all audio recordings that were stored at each of the Divisional HQ's outside of the Dublin Metropolitan Region are collected and are now stored securely in Garda Headquarters pending finalisation of legal advice. The total amount of tapes collected to date is 2,485.

The issue now is what action I as Data Controller should take in relation to the tapes which have been collected. I am very conscious in my role as Data Controller under section 2(1) (c) the Data Protection Act 1988 and 2003 and of my responsibilities which are as follows:

- 2(1) *A data controller shall, as respects personal data kept by him or her, comply with the following provisions:*
- (c) *the data –*
- (i) shall have been obtained only for one or more specified, explicit and legitimate purposes,*
 - (ii) shall not be further processed in a manner incompatible with that purpose or those purposes,*
 - (iii) shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are collected or are further processed, and*
 - (iv) shall not be kept for longer than is necessary for that purpose or those purposes.*

I consulted with the Attorney General's Office on this issue on 11 November 2013 and also established a Working Group who will be in a position to report to me once they have further liaised with the Attorney General's Office in respect of all recordings which have been collated to date. It is the case I expect that consultation with the Office of the Data Protection Commissioner will be necessary which I will consider following further advices from the Attorney General.

The Fennelly Commission Interim Report (n) and (o)
Chapter 2 – The Letter of 10th March

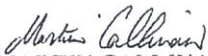
The Attorney General's Office advises at this time that all the outstanding recordings should be brought together and some inventory made of them, identifying them by station, date of recording and if they are in a condition which can be played or not. The recordings are being stored carefully and under secure conditions. An inventory of those recordings collated to date has now been compiled and has been furnished to the Attorney General's Office.

From a cursory examination of some of the tapes there is evidence of mould which would indicate decay of the magnetic tapes which may render the tapes unplayable. It is also the case that the only machines which are capable to playing these tapes are also quite fragile and dated.

I have no doubt that when the Discovery process is completed and if copies of the tape recordings are disclosed to the plaintiff in the Ian Bailey civil proceedings that this issue will very much come into the public domain and I am anxious to resolve any data protection issues as quickly as possible. You will note however that as soon as this issue came to my attention I took immediate steps to regularise the position and continue to do so.

A meeting has been arranged for Monday 10 March 2014 between Counsel, Attorney Generals Office and An Garda Síochána, which I understand Assistant Commissioner Michael Flahive will attend, where this matter and other pertinent issues will be discussed.

Yours sincerely


MARTIN CALLINAN
COMMISSIONER OF
AN GARDA SÍOCHÁNA

10th March 2014

2.5 There are a number of important aspects to the content of this letter, which can be summarised as follows:-

2.5.1 The subject matter of the letter is described in the heading as “Recording of Telephone Conversations made and retained in Garda Stations. Data Protection Acts – Retention of Data”.

2.5.2 The letter is addressed to the Secretary General, Mr Purcell, but the clear and explicit purpose of the letter is to set out certain matters that, in the opinion of the Commissioner, should be brought to the attention of the Minister for Justice, Mr Shatter.

2.5.3 The letter specifically invokes section 41(d) of the Garda Síochána Act 2005. This section forms part of the statutory reporting responsibilities imposed on the Garda Commissioner by the Act of 2005, which will be considered in detail below.²

2.5.4 The letter begins by reporting the emergence of certain “tapes of telephone conversations” during the discovery process in civil proceedings taken by Mr Ian Bailey and his partner, Ms Catherine Jules Thomas. A brief account of the background to the Bailey and Thomas cases is set out below.³

2.5.5 In perhaps the most significant paragraph, the letter goes on to state:

“It has since transpired following enquiries that systems would appear to have been installed during the 1980s in Garda Stations to allow for the recording of incoming and outgoing telephone calls from designated extensions. The rationale behind this was the recording of Garda radio traffic to and from control rooms, 999 calls and the gathering of evidence around calls made to Garda stations regarding bomb threats and other code word messages.”

² See Para 3.17 *et seq.*

³ See Para 5.1 *et seq.*

It adds that the practice of recording and retaining such calls “has continued in some stations over the years”, and that the original recording equipment was replaced during the 1990s and again in 2008.

- 2.5.6 The letter does not express a view on the legality of the recording systems as described. However, the Commissioner does say that he directed “that the routine recording of non-999 Emergency calls to Garda stations cease” and that this was done on 27th November 2013.
- 2.5.7 The letter indicates that, as at 10th March 2014, the Commissioner was still awaiting written confirmation that all audio recordings stored outside the Dublin Metropolitan region had now been collected in Garda Headquarters.
- 2.5.8 Mr Callinan identifies “the issue” – by implication, the only current issue – as being “what action I as Data Controller should take in relation to the tapes which have been collected”. This is also reflected in the letter heading, which refers to the retention of data under the Data Protection Acts.
- 2.5.9 The letter states that the Attorney General’s Office had been consulted “on this issue” – that is, the data retention issue – on 11th November 2013, some four months before this letter was written to the Secretary General, Mr Purcell. It also indicates that the legal advice sought by An Garda Síochána had yet to be finalised and that consultation with the Data Protection Commissioner might be necessary.
- 2.5.10 Having indicated, earlier in the letter, that the tape recordings deemed relevant to the Bailey case would be listed in an affidavit to be sworn before 25th March 2014, the Commissioner goes on to say that he “has no doubt” that disclosure of the tape recordings to the plaintiff in that case would result in “this issue” coming into the public domain. In light of this, he states that he is “anxious to resolve any data protection issues as quickly as possible”.

It is worth emphasising, at this point, that the question of whether issues relating to Garda telephone recording could become public on or after 25th March 2014 is a key aspect, not only of the furnishing of the letter of 10th March 2014 to the Minister on 25th March 2014, but also of the sequence of events leading up to the Commissioner's retirement.

- 2.5.11 Finally, the Garda Commissioner's letter refers to a meeting, to take place on the same day as the letter was sent, at which counsel would attend, along with representatives from the Attorney General's Office, An Garda Síochána and the Department of Justice and Equality.⁴ The letter indicated that "this matter and other pertinent issues" would be discussed at the meeting.

⁴ The reference in the letter of 10 March to "Assistant Commissioner Michael Flahive" is a typographical error. Mr Flahive was in fact an Assistant Secretary at the Department of Justice and Equality.

3. The Garda Commissioner: Reporting and Accountability

Early legislation

3.1 The first statutory reference to the position of Commissioner of An Garda Síochána was in the Garda Síochána (Temporary Provisions) Act 1923 (“the Act of 1923”), which was passed pending the enactment of a law for the establishment and regulation of a Police Force in Saorstát Eireann. Section 3 of that Act contained a basic provision whose essence has been repeated in all subsequent legislation, vesting the “general direction and control of the Garda Síochána” in the Commissioner.

3.2 The Garda Síochána Act 1924 (“the Act of 1924”) replaced and repealed the Act of 1923. Section 1 of the Act of 1924, making permanent what had been provided temporarily in 1923, provided that it should be “lawful for the Executive Council of Saorstát Eireann to continue to raise, train, equip, pay and maintain in Saorstát Eireann the force of police called the Garda Síochána”. Section 2 of the Act of 1924 provided for the office of Commissioner in the following terms:-

“The general direction and control of the Garda Síochána shall, subject to regulations made by the Minister under this Act, be vested in the Commissioner of the Garda Síochána, who shall from time to time be appointed, and may at any time be removed, by the Executive Council.”

Following the enactment of the Police Forces Amalgamation Act 1925, the Garda Síochána and the Dublin Metropolitan Police were amalgamated into one force under the name of the former.

3.3 Parts of the Act of 1924 continued in force and applied to the amalgamated force. However, the legislation of 1924 and 1925 did not cast any further light on the relationship between An Garda Síochána or its Commissioner and the Government of the day or the Minister for Justice. That relationship fell to be deduced from the general scheme of the legislation. From the outset, the underlying principle was that

the force would be “centrally controlled, and responsible to the Executive Government.”⁵

- 3.4 The basic structure of the Act of 1924, concerning An Garda Síochána, and the Act of 1925, which created the amalgamated force, remained in force until 2005. The Oireachtas charged the Commissioner with the task described as the “general direction and control” of the force, subject only to such statutory regulations as might be made from time to time. The Government (formerly the Executive Council) had the power of appointment of officers of all ranks (see ss. 6, 7 and 10 of the Act of 1925). Otherwise, neither the Government nor the Minister for Justice was given any explicit power to direct the Commissioner, either in particular cases or in respect of general policy, in relation to the exercise of his duties. On the other hand, the legislation did not provide that the Commissioner was independent in the performance of his duties, save what can be deduced from the provision vesting in him the “general direction and control” of the force. Over time, Ministers came to recognise, in practice, what was called the “operational independence” of the Garda Commissioner.
- 3.5 Several writers have pointed out that the central feature of the new force was that it would be under the direction and control of a Garda Commissioner who was directly accountable to the government. There was, however, no intervening official or board.
- 3.6 Similarly, the legislation was silent with regard to the position of the Garda Commissioner as the holder of that office. Section 6(2) of the Act of 1925 provided simply that the Garda Commissioner might “at any time be removed by the Executive Council.” Until the decision in *Garvey v. Ireland* [1981] 1 I.R. 75, mentioned later, it was generally accepted that officers, such as civil servants, which would include the Garda Commissioner, held their positions at the pleasure of the Government, which could remove them without giving reasons and without notice.

⁵ See Kevin O’Higgins, Minister for Justice on Second stage of the Bill for the Act of 1923, Dáil Debates 31st July 1923.

- 3.7 In Part 1 of this Interim Report, the Commission will draw attention to subsequent legislative, judicial and other developments concerning the reporting responsibility of the Garda Commissioner. Part 2 of this Report considers the tenure of the Garda Commissioner.

Garda Síochána Act 2005

- 3.8 The Garda Síochána Act 2005 (the “Act of 2005”) was enacted following publication of the Reports of the Tribunal of Inquiry into certain Gardaí in the Donegal Division, (“The Morris Tribunal”), which was established by resolution of Dáil and Seanad Éireann, passed on 28th March 2002. The Morris Tribunal investigated events that occurred in Donegal in the 1990s and early 2000s, producing a series of reports between July 2004 and October 2008.
- 3.9 One of the issues examined by the Morris Tribunal, though peripheral to its main terms of reference, was the reporting structure that existed at that time between An Garda Síochána and the Department of Justice. In its first report of July 2004, the Tribunal noted the shortfalls in the relationship between the Donegal Division and Garda Headquarters. The report also noted the need “to ensure that the Department of Justice Equality and Law Reform is kept properly informed as to the proper functioning of the national police force.”⁶
- 3.10 Mr John O’Donoghue was Minister for Justice from June 1997 until June 2002. He gave evidence to the Morris Tribunal of the reporting practices of Garda Commissioners during his tenure. He said:

“If there were very serious matters which had occurred, the normal procedure was that the Garda Síochána would transmit that information to the private secretary who would in turn transmit it to me”⁷.

At the same time, he laid great emphasis on the importance of the Minister not interfering with the Garda Commissioner’s operational role.⁸

⁶ Report of the Tribunal of Inquiry into certain Gardaí in the Donegal Division, Module 1, p453, para 13.03.

⁷ Morris Tribunal transcripts Module 1, Day 109, p5, lines 9–13.

⁸ Morris Tribunal transcripts Module 1, Day109, p7, lines 16–24.

Mr O'Donoghue gave evidence to the Morris Tribunal of his frustration that concerns relating to Donegal were coming to his attention through the media, through parliamentary colleagues and through parliamentary questions, while he had no role or function to intervene.⁹ He said that there were occasions when he was not informed of events and he would communicate his annoyance through the Secretary General. These events and concerns ultimately led to the establishment of the Morris Tribunal.

3.11 In Chapter 13 of his report, Mr Justice Morris stated:

“The Department of Justice, Equality and Law Reform is now utterly isolated from Garda Headquarters..... The Minister expects that his or her officials should be briefed on developments of importance so that he or she will be able to answer for them before Dáil Éireann, and, in respect of developments which attract publicity, make an informed comment, if that course is chosen, to elements of the national media. There is nothing to suggest that the trust reposed by the Department of Justice, Equality and Law Reform in Garda Headquarters is misplaced. That is not to say however, that the management structures are adequate¹⁰.”

3.12 The report was also highly critical of what it called “structural defects and deficiencies” in the quality of reporting upwards within An Garda Síochána.

3.13 Following informal consultation between the Department of Justice and the Tribunal, the Garda Síochána Bill 2004 was published. In its second report, the Tribunal noted that, whilst it reiterated its finding from its first report that the Department of Justice was “far too isolated from Garda Headquarters”, the draft legislation was designed to ameliorate this, in the context of what it described as “scandalous situations.....that need to be addressed....[and]...deficiencies in management and accountability.”¹¹

⁹ Ibid p8, lines 18–21.

¹⁰ Report of the Tribunal of Inquiry into Certain Gardaí in the Donegal Division, Module 1, para 13.07.

¹¹ Morris Tribunal, Report on Term of Reference (a) and (b), para. 9.6.

- 3.14 The reports of the Morris Tribunal expressed deep concern about reporting mechanisms both within An Garda Síochána and between the Garda Commissioner and the Department of Justice. As anticipated by the second Morris Report, the Bill of 2004 was passed into law as the Garda Síochána Act 2005. It addressed many of these concerns. It is a long and detailed piece of legislation that deals with many aspects of policing in the State – the first attempt at comprehensive legislative reform since the passing of the Police Forces Amalgamation Act 1925.
- 3.15 The Act of 2005 laid down, in explicit and elaborate detail, provisions for ensuring that the Commissioner of An Garda Síochána is accountable to the Minister for Justice in the performance of his duties.
- 3.16 Mr Michael McDowell, Senior Counsel, who, as Minister for Justice, introduced the Act of 2005, was quite clear that, in a functioning democracy, the police force of the State had to be accountable to the Government of the day. This did not mean, he said, that the Government or individual Ministers could interfere with the investigation of crime, but members of An Garda Síochána had to operate in accordance with the policies of the Government.
- 3.17 Part 2, Chapter 3 of the Act of 2005 deals with the roles of the Minister for Justice and the Garda Commissioner and seeks to distinguish the policy role of the Minister from the day-to-day management role of the Garda Commissioner.
- 3.18 Section 26(1) of the Act of 2005 firstly prescribes the functions of the Garda Commissioner as follows:-
- 1) Subject to this Act and the regulations, the Garda Commissioner has the following functions:
 - (a) to direct and control the Garda Síochána;
 - (b) to carry on and manage and control generally the administration and business of the Garda Síochána, including by arranging for the recruitment, training and appointment of its members and civilian staff;
 - (c) to advise the Minister on policing and security matters;

(d) to perform any other functions that are assigned to him or her by this Act or that may, by regulation, be assigned to him or her.¹²

- 3.19 More generally, s. 26(3) of the Act of 2005 prescribes the relationship between the Garda Commissioner and the Minister for Justice in a manner which did not appear in the earlier legislation. It is as follows:-

“The Garda Commissioner is accountable to the Minister for the performance of the Commissioner’s functions and those of the Garda Síochána.”

- 3.20 Section 40(1) of the Act of 2005 also deals with the relationship between the Garda Commissioner and the Minister and the Department of Justice:-

“The Garda Commissioner shall account fully to the Government and the Minister through the Secretary General of the Department of Justice, Equality and Law Reform for any aspect of his or her functions.”

- 3.21 Although this sub-section requires the Garda Commissioner to account to the Government, he or she is to do so through the Secretary General of the Department of Justice, whom, as shown below, the Garda Commissioner is required, by s. 41(1) of the Act of 2005 to keep fully informed. In addition, s. 40(2) confers power on the Secretary General of the Department of Justice to require the Garda Commissioner to provide him or her with “any document in the power or control of the Garda Síochána, including material in the form of Garda records, statements made by members of the Garda Síochána and by other persons and reports.”

- 3.22 Section 25 of the Act of 2005 confers power on the Minister for Justice, with the approval of the Government, to “issue to the Garda Commissioner written directives concerning any matter relating to the Garda Síochána.” This power is qualified by s. 25(4) which provides:-

¹² Section 26 of the Act of 2005 adds that the Garda Commissioner is to have regard to the following matters:

a) the objective of promoting effectiveness, efficiency and economy in the Garda Síochána;
(b) the priorities and performance targets in operation under section 20 at the relevant time;
(c) any relevant policies of the Minister or the Government;
(d) the strategy statement in operation under section 21 at that time;
(e) the annual policing plan prepared under section 22 ; and (f) any directive issued under section 25 .

“The Minister’s power under subsection (1) may not be exercised to limit the independence of a member of the Garda Síochána in performing functions relating to the investigation of a specific offence or the prosecution of an offence as authorised by section 8.”

- 3.23 The accountability of the Garda Commissioner to the Minister for Justice is prescribed in its most specific form by s. 41 of the Act of 2005, pursuant to which the Commissioner, Mr Callinan wrote the letter of 10th March 2014. The key point is the obligation of the Garda Commissioner to keep the Minister for Justice “fully informed”, on an ongoing basis, of significant developments. Section 41 provides:-

“(1) The Garda Commissioner shall keep the Minister and the Secretary General of the Department of Justice, Equality and Law Reform fully informed of the following:

(a) matters relating to significant developments concerning—

(i) the preservation of peace and public order in the State,

(ii) the protection of life and property in the State, and

(iii) the protection of the security of the State;

(b) significant developments that might reasonably be expected to affect adversely public confidence in the Garda Síochána;

(c) matters relevant to the accountability of the Government to the Houses of the Oireachtas;

(d) any other matters that, in the Commissioner’s opinion, should be brought to the Minister’s attention.”

Section 41(2) requires the Commissioner to submit a report to the Minister when required.

- 3.24 In its totality, the Act of 2005 makes it clear that the Commissioner of An Garda Síochána is accountable to the Minister for Justice in respect of the performance of

his functions and those of the force. The Garda Commissioner is obliged to keep the Minister and the Secretary General of the Department of Justice fully informed on an ongoing basis in respect of any “significant developments” concerning the preservation of peace and order, the protection of life and liberty, the security of the State or matters which might reasonably be expected to adversely affect the confidence of the public in the force.

- 3.25 The reporting responsibility to the Minister for Justice is placed squarely on the shoulders of the Garda Commissioner. The Garda Commissioner is obliged under s. 40 of the Act of 2005 to account fully to the Government and the Minister for Justice through the Secretary General of the Department of Justice for “any aspect of his or her functions.”

The Act of 2005 does not provide, at least not expressly, for the operational independence of An Garda Síochána, save that the Minister for Justice may not use the power to issue directives to the Garda Commissioner under s. 25 so as to limit the independence of a member of the force in “performing functions relating to the investigation of a specific offence or the prosecution of an offence...”

4. Reporting Pursuant to s. 41, Garda Síochána Act 2005 – Practice and Procedures

- 4.1 The Commission asked Mr Sean Aylward, Secretary General of the Department of Justice from July 2004 until July 2011, to describe how communication worked in practice between the Department and An Garda Síochána. He said:-

“On a daily basis, there could be dozens of phone calls and text messages flowing from....., the Commissioner of the day to me, and then in turn from me to the minister.”

- 4.2 Mr Aylward said that *“an astonishing amount”* of communication was through text messages and that would be *“through the night, often all hours of the day and night continuous.....it was absolutely continuous.”* He stated that almost all of his communication was with the Garda Commissioner himself. He said that the formal channel of contact between the Garda Commissioner and the Minister was through the Secretary General of the Department of Justice and that had been the position throughout the history of the Department.

- 4.3 Mr Aylward said that the enactment of the Act of 2005 and the coming into operation of ss. 40 and 41 of the Act did not have a significant impact on practices that had been *in situ* before the Act:-

“It was a continuum with what happened before the Act really..... throughout the period from the late '20s to today, there was a communications conduit between the Secretary of the Department of Justice, the Guards and the Minister of the day.”

- 4.4 Mr Brian Purcell, who succeeded Mr Sean Aylward as Secretary General of the Department of Justice in August 2011, confirmed what had been stated by Mr Aylward, that there was no protocol for dealing with “Section 41 communications” as such. All communications from the Garda Commissioner were assumed to be in fulfilment of his reporting obligations under s. 41 of the 2005 Act, even if the

section itself was not specifically mentioned. Mr Purcell said these communications could take the form of letters, emails, texts and telephone calls.

- 4.5 Mr Purcell informed the Commission that he had some recollection of previous communications coming into the Department which referred to s. 41 of the Act of 2005 but that he could not recall the specifics of these.
- 4.6 The Commission asked the Department of Justice to furnish any letters received by the Department which cited s. 41 of the Act of 2005 explicitly (“Section 41 Reports”). A total of five such letters were delivered to the Commission. All of them were written by Commissioner Callinan – one whilst he was still Deputy Commissioner. Two of these letters were received by Mr Sean Aylward and three were received by Mr Brian Purcell. Mr Aylward told the Commission he had no recollection of receiving any letters specifically citing s. 41, but, given the volume of correspondence dealt with by Mr Aylward during his time as Secretary General, this is not surprising. Mr Purcell, for his part, made it clear that he did not attach any particular importance to the fact that the letter of March 10th 2014 had specifically cited s. 41. His view was that all communications from the Garda Commissioner came within that section, whether or not it was expressly invoked.
- 4.7 Commissioner Callinan had sought the advice of the Attorney General in May 2013, on how s. 41 of the Act of 2005 should be complied with. In particular, he had asked whether all reports under this section had to be in writing. The Attorney General’s Office advised that s. 41 could be complied with by both oral and written reports and that the Act did not specify the format.
- 4.8 The Commission has seen the day-to-day communication that flowed from The Commissioner to the Secretary General, Mr Purcell, from October 2013 to March 2014. This was almost exclusively made up of texts and telephone calls. Mr Purcell said that he would receive texts from the Commissioner or from a senior member of An Garda Síochána to keep him abreast of particular Garda operations *“and they in turn would be passed on to the Minister as well for information...”* During the period from October 2013 until March 2014, Commissioner Callinan sent between 30 and 40 texts per month from his phone to the Secretary General of the Department of

Justice, Mr Purcell. The Assistant Secretary in charge of Crime and Security in the Department of Justice, Mr Ken O’Leary, was almost always sent the texts as well. These texts referred, typically, to breaking crime stories as they happened, such as drug seizures, robberies, assaults, shootings, knife attacks, murders, road traffic accidents and arrests. Some related to individual members of An Garda Síochána who had appeared before the courts.

- 4.9 Although statutory responsibility for passing on this information rested on the Secretary General of the Department of Justice, it appears that this function was, in fact, performed by the Assistant Secretary, Mr O’Leary.
- 4.10 While these texts are important in demonstrating the continuous flow of information from the Garda Commissioner to the Department of Justice, it is worthy of note that there was no mention of any of the developments that were occurring in the Bailey case (discussed in detail below) or in the general recording issue throughout that period. Events of more general importance would not appear to have normally been the subject of text messages.
- 4.11 Considering the overall purpose of s. 41 of the Act of 2005, it is clear that the subject-matter of a matter to be communicated must be something which the Garda Commissioner judges to be “significant,” before the obligation under the section is triggered. Routine day-to-day communications do not necessarily take place in fulfilment of the statutory obligation. The formal invocation of the section by the Garda Commissioner, identifying a specific sub-section, coupled with an express request that the Minister be informed takes the matter out of the ordinary communications by telephone or text message.

5. The Bailey / Thomas Cases

- 5.1 Madame Sophie Toscan du Plantier was murdered in West Cork in December 1996. Members of An Garda Síochána investigating the murder regarded Mr Ian Bailey, a UK citizen who was living in the area, as a suspect in the murder, from some time in 1996. Mr Bailey was arrested on two separate occasions: on 10th February 1997, pursuant to the provisions of the Criminal Justice Act 1984, and on 27th January 1998, under Section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997. Members of An Garda Síochána also arrested Mr Bailey's partner, Catherine Jules Thomas, on 10th February 1997, under Section 4(a) of the Criminal Justice Act 1984. Neither Mr Bailey nor Ms Thomas was ever charged with the murder.
- 5.2 Mr Bailey instituted proceedings in 2007 against the Commissioner of An Garda Síochána, the Minister for Justice, Equality and Law Reform, Ireland and the Attorney General (Record Number 2007/3424P). His partner, Ms Catherine Jules Thomas, instituted similar proceedings (Record Number 2007/3796P). The claims were for damages for unlawful arrest, false imprisonment, assault, battery and trespass to the person, intentional infliction of emotional and psychological harm, harassment, intimidation and terrorising and oppressive behaviour. Mr Bailey was unsuccessful in this action on 30th March 2015, following a lengthy hearing before a judge and jury.
- 5.3 In the course of those two proceedings, which, for ease of reference, are here together called the Bailey proceedings, the High Court (Hedigan J.) made extensive orders for discovery against the defendants. The defendants were due to swear their affidavits of discovery on or before 18th October 2013. Given the nature of the allegations made in the proceedings, the principal burden of compliance with the discovery orders fell on An Garda Síochána. While the defendants generally were represented by the Chief State Solicitor, the Head of Legal Affairs in An Garda Síochána, Mr Kenneth Ruane, solicitor, was responsible within the force for handling the litigation. Chief Superintendent Hayes, Cork West Garda Division (Bandon Garda station) was responsible for coordinating compliance with the orders of discovery and was due to swear the affidavits on behalf of all the defendants.

6. October/November 2013 – Emergence of Recording Issue

- 6.1 As previously stated, a full account of “the level of knowledge of the existence, operation and use of the said telephone recording systems within An Garda Síochána” – as required by sub-paragraph 1(e) of the Terms of Reference – is beyond the scope of this Interim Report. A report on sub-paragraphs 1(n) and (o) of the Terms of Reference necessarily involves a consideration of the information available to the former Commissioner, Mr Callinan and other key persons, which resulted in the Commissioner sending the letter of 10th March 2014.
- 6.2 Garda concerns around the systematic recording of telephone calls emerged originally from a narrower concern regarding the content of specific phone conversations recorded at Bandon Garda station and their potential impact on the State’s defence of the Bailey case.
- 6.3 It is common case that the issues that became the subject matter of the letter of 10th March 2014 – that is to say, the existence and content of non-999 recordings from Bandon Garda station, and the possible existence of a general system of recording non-999 calls – were first brought to the attention of senior management at Garda Headquarters on or about 17 to 18th October 2013. The following key persons were involved in this process:-

Deputy Commissioner Nóirín O’Sullivan

During the period with which this report is concerned, the retirement of one Deputy Commissioner in An Garda Síochána meant that Deputy Commissioner O’Sullivan occupied a dual role, as Deputy Commissioner for Operations and as acting Deputy Commissioner for Strategy and Change Management. She reported directly to the Commissioner and had oversight of the operational activities of An Garda Síochána. She also had oversight of the Legal Affairs section, amongst other duties.

Cyril Dunne – Chief Administrative Officer

The Chief Administrative Officer (CAO) is a civilian appointee who is considered to be of equivalent rank to Deputy Commissioner. The CAO reports directly to the Commissioner. His responsibility includes information and communications technology (ICT).

Liam Kidd – Executive Director, Information and Communications Technology (ICT)

The Executive Director ICT is also a civilian appointment, considered to be of equivalent rank to Assistant Commissioner. Mr Kidd reports to the Chief Administrative Officer.

Superintendent Michael Flynn – ICT (Telecommunications Operations)

Superintendent Flynn has been attached to the Telecommunications Section since 1991. In 2008 he was appointed Superintendent, Telecommunications Operations. He reports to the Executive Director ICT.

Kenneth Ruane – Head of Legal Affairs for An Garda Síochána

Mr Ruane is a solicitor. He was appointed to the position of Head of Legal Affairs for An Garda Síochána in December 2011. Amongst other matters, he has oversight of the management of litigation in which An Garda Síochána are involved. He reports to the Deputy Commissioner Strategy and Change Management, who during the relevant period was Deputy Commissioner Nóirín O’Sullivan.

Chief Superintendent Thomas Hayes

Chief Superintendent Hayes is attached to Cork West Division. He was responsible for co-ordinating compliance with the order for discovery made in the Bailey case and was due to swear the relevant affidavit on behalf of all the defendants on 18th October 2013.

Informing of Deputy Commissioner, Chief Administrative Officer and ICT section.

- 6.4 In the course of the discovery process in the Bailey case, it emerged that there were a number of tapes in Bandon Garda station containing recordings of telephone conversations into and out of that Station in the year 1997 and that these could contain material relevant to the case. In October 2013, it was reported to Chief Superintendent Hayes by members of the Gardaí who had been assigned the task of listening to the tapes, that three conversations in particular, two between members of An Garda Síochána, and one between a Garda and a civilian, Ms Marie Farrell,

contained material which could be unhelpful insofar as the defence of the Bailey case was concerned and damaging to An Garda Síochána. No transcripts were yet available.

Although the content of the recordings is a matter for the Commission's principal report, it may be observed that, even at that early stage, it appeared that the system at Bandon had recorded telephone calls on a line which Chief Superintendent Hayes, at any rate, did not consider to be normal.

6.5 On 17th October 2013, Chief Superintendent Hayes telephoned Deputy Commissioner O'Sullivan. He brought to her attention that certain audio recordings of relevant telephone conversations, three, in particular, from Bandon Garda station, which were being examined, appeared to be relevant to the discovery order in the Bailey case. There were two conversations between members of An Garda Síochána and one was between a single member of An Garda Síochána and Ms. Marie Farrell, who was a potential witness in the investigation of the murder of Madame Sophie Toscan du Plantier. It was now not going to be possible to swear the affidavit of discovery on 18th October 2013, as had been envisaged.

6.6 Deputy Commissioner O'Sullivan made contact with the Chief Administrative Officer, Mr Cyril Dunne, and the Executive Director of the Information and Communications Technology (ICT) section, Mr Liam Kidd. She wished to establish first, how the particular phone calls referred to by Chief Superintendent Hayes came to be recorded and secondly, whether recording of this kind – that is to say, of calls which did not appear to be 999-emergency calls – could have occurred in stations other than Bandon. It was this initiative by the then Deputy Commissioner, arising from the Bandon information, which led to the revelation of the existence of general systems of recording in Garda stations other than Bandon.

Mr Kidd contacted Superintendent Michael Flynn, ICT, and asked him to obtain further information about the systems for recording telephone calls.

Superintendent Flynn in turn sought the assistance of other colleagues in the ICT section, including a retired member of An Garda Síochána.

6.7 On Friday, 18th October 2013, at 10.13 a.m., Superintendent Flynn sent a brief report by email to Deputy Commissioner O’Sullivan, copying it to Mr Kidd and Mr Dunne. This report was not accurate in a number of respects but it is important because it was the first report that was made in general terms on the recording issue. Superintendent Flynn was not aware of the content of the tapes that had arisen in Bandon and, specifically, that they contained recordings from non-999 lines.

6.8 The report was, in its principal parts, as follows:-

“The original installation of voice recording at Divisional HQs predates many currently serving in Telecommunications but it is my understanding that they were installed during the 1980s and the rationale behind this was the recording of 999 calls and the gathering of evidence around calls made to Garda stations regarding bomb threats and other code word messages.

The original recorders were replaced with Dictaphone recorders during the 1990s and further replaced by Nice recorders approximately five years ago. The Nice recorders allow for central recording and management of recordings... Therefore today we have telephone recording systems installed in Command and Control and all Divisional HQs outside the DMR [Dublin Metropolitan Region].

In Divisions there is no national policy regarding what extensions were recorded but primarily the Public Office, Communications Room and Incident Rooms are included as decided by the Divisional Officer. Initially the recorder recorded all calls to or from the designated extension and the radio traffic to or from the communications room. Post the NDRS [National Digital Radio Service] deployment the radio traffic is now recorded centrally.”

6.9 Superintendent Flynn’s reference to the recording of bomb threats and other code-word messages suggested at least an arguable justification for the recording systems. Unfortunately, it was largely ignored in subsequent communications. The email went on to discuss related matters including the period for which recordings were to be retained, the reasons for such retention and whether any recordings still extant should now be destroyed. Superintendent Flynn concluded by stating:-

“I would also recommend that we as an organisation define a national policy as to whether we can still continue to record these extensions and if it is decided that we can, then we must also clearly define what extensions can be recorded...

The only calls I am sure we can record are 999 calls to the ECAS¹³ service where since the legislation underpinning it in 2007¹⁴ was enacted a member of the public gives up their right to privacy when the[y] ring the 999 service. BT ECAS record these calls from start to finish and an Garda Síochána record them from the point where they were handed over to us.”

6.10 Deputy Commissioner O’Sullivan, the Chief Administrative Officer, Mr Dunne, and the Executive Director of ICT, Mr Kidd, have all given evidence that, prior to receiving this email from Superintendent Flynn on 18th October 2013, they were not aware of the existence of a general system for recording phone calls in Divisional Headquarters as described by Superintendent Flynn. Deputy Commissioner O’Sullivan and Mr Kidd were aware of the recording of emergency or 999 calls. Mr Dunne was unaware of the existence of any system for recording phone calls of any kind.

6.11 Deputy Commissioner O’Sullivan met with Mr Dunne and Mr Kidd in the evening of 18th October 2013. It was agreed that more information was needed as to the nature and extent of any recording that had taken place or was still taking place.

Informing of Garda Legal Affairs Section

6.12 On Friday, 18th October 2013, Chief Superintendent Hayes was due to meet with counsel at the Four Courts, in relation to the Bailey case. On 16th October 2013, he phoned the Head of Legal Affairs for An Garda Síochána, Mr Kenneth Ruane, and requested a meeting, to take place on 18th October 2013. Mr Ruane assumed that it related to the discovery process in the Bailey case.

¹³ Emergency Call Answering Service

¹⁴ The Commission has been unable to identify any legislation authorising the recording of 999 or ECAS calls.

- 6.13 On the morning of 18th October 2013, Assistant Commissioner John O'Mahony, Crime and Security, met Chief Superintendent Hayes, who outlined the discovery process and the emergence of tape recordings, giving general information about the three particular tapes.
- 6.14 At the meeting with counsel, Chief Superintendent Hayes said that an issue had arisen in relation to the discovery which might impact on the time for delivery of the affidavit. He was reluctant to give any explanation at that time but would discuss what had arisen with Mr Ruane after the meeting. It was decided that a letter should be drafted to be sent to Mr Bailey's solicitor requesting more time for delivery of the affidavit of discovery.
- 6.15 Chief Superintendent Hayes met Mr Ruane in the afternoon of 18th October 2013. He said that An Garda Síochána in Bandon were in possession of tapes containing approximately 4,200 hours of audio recordings of telephone calls, all made during the time period to which the discovery order related and that it would take a considerable length of time to review them, in order to identify calls relevant to the discovery order. He said that three conversations, in particular, had been identified which were "not helpful" in terms of defending the Bailey case. The figure of 4,200 hours is in fact completely unscientific both in terms of quantum and content but this will be dealt with in the next Report of the Commission which will deal with Garda recording.
- 6.16 Mr Ruane understood that these recordings arose from a practice of recording phone calls on particular lines in Bandon Garda station rather than lawfully authorised interceptions. Understandably, his primary concern at this point was to identify the implications of the recordings and their content for the Bailey case. He requested that transcripts be obtained of the three particular calls so that they could be provided to counsel for their advice.
- 6.17 Mr Ruane told Deputy Commissioner O'Sullivan on the 18th October 2013 that an extension of time would be needed in order to complete the necessary discovery in the Bailey case. He also informed her of the decision to get transcripts for counsel.

Mr Ruane noted “that the Deputy Commissioner is in agreement and that she wishes to advise the Commissioner.”

- 6.18 Mr Ruane was aware at this stage only of the recordings at Bandon and not of the history and extent of telephone recording systems in An Garda Síochána generally.
- 6.19 Ms Frederique Duchene who was the solicitor handling the Bailey cases in the Chief State Solicitor’s Office, was then phoned by Garda Stephen Nolan and Mr Ruane from Garda Legal Affairs and instructed not to send the letter requesting an extension of time for delivery of the affidavit of discovery. She was told that further instructions would follow on Monday morning, 21st of October 2014.

Informing of Garda Commissioner

- 6.20 The Commission has not been able to confirm the precise date on which the Garda Commissioner, Mr Callinan, was first informed that an issue had emerged from the discovery process in the Bailey case, which involved the recording of non-999 telephone calls. Neither Mr Callinan nor Commissioner O’Sullivan has a specific recollection of Deputy Commissioner O’Sullivan briefing the Commissioner, Mr Callinan, on or around 18th October 2013, in relation to the Bandon recordings. However, Mr Callinan stated in evidence:-

“Well, I certainly knew in around that time that those inquiries were being made in Cork.”

This accords with the evidence of Commissioner O’Sullivan, who told the Commission:-

“... the issues that were discovered in Bandon had arisen in the context of the ongoing discovery in the Bailey case... I would certainly have briefed [the Commissioner] in terms that issues had arisen and that I was having enquiries made with ICT....”

- 6.21 Mr Callinan has no recollection of seeing the email of 18th October 2013 from Superintendent Flynn, ICT, to Deputy Commissioner O’Sullivan, reporting on telephone recording systems generally. In fact, he appeared to remain unaware of its

existence until shown a copy by the Commission whilst giving evidence on 9th December 2014.

- 6.22 Although Mr Callinan is unsure of the date on which he became aware of the Bandon recordings, he has given consistent evidence to the effect that the first time he was made aware of the existence of general systems of recording calls, other than 999 calls, was in a conversation with the Head of Legal Affairs of An Garda Síochána, Mr Ruane, on 8th November 2013.

Further inquiries – An Garda Síochána, ICT

- 6.23 On 22nd October 2013, Superintendent Flynn emailed the Executive Director of ICT, Mr Kidd, with a list of all the telephone lines being recorded in Garda stations at that time, both in the Dublin Metropolitan Region and at Divisional Headquarters around the country. He pointed out that “...there is no uniformity across the country with some divisions only recording six channels and others a lot more.” Superintendent Flynn also enclosed some newly uncovered documents from the year 1996, “...which indicate the planned channels (both radio and telephony) to be recorded.” He observed:-

“The reality on the ground seems different and I would be concerned that in the likes of Bandon the extension in the Doctor’s room is being recorded which as discussed at the meeting yesterday could lead to privileged conversations being recorded.”

His email concluded:

“We urgently need advice as to whether we are entitled to record these lines and a clear national policy as to what can and cannot be recorded.”

This plea seems to have been largely ignored.

- 6.24 On 25th October 2013, Superintendent Flynn submitted a further report to Mr Kidd. He again enclosed the documents from 1996, which he described as “a partial file”, and commented:-

“The partial file at ‘A’ described what should be recorded but having received a list of all extensions which are being recorded nationally... it is clear that this has expanded way beyond what was initially intended. In addition some of the extensions being recorded could be considered to be of concern.”

6.25 In short, on 22nd and 25th October 2013, Superintendent Flynn sent to Mr Kidd further details of the lines being recorded with some documentary history going back to 1996. None of this was sent on to the CAO, Mr Dunne, Deputy Commissioner O’Sullivan or Commissioner Callinan.

6.26 Mr Kidd discussed the issue with Mr Dunne in a meeting “*at the end of October*” and advocated advising the Commissioner that recording of all non-999 lines be suspended “*until we know what we can and what we can’t record.*”

Further inquiries – An Garda Síochána, Legal Affairs

6.27 On the morning of Monday, 21st October 2013, Garda Stephen Nolan, Legal Affairs, emailed Ms Frederique Duchene at the Chief State Solicitor’s Office. He referred to “a significant amount of data files” which had just come to light and which should be reviewed before discovery could be completed. Ms Duchene rang Garda Nolan seeking clarification, and was told that the “data files” consisted of recordings of telephone calls “which were put on electronic discs.” In a subsequent note of the conversation Ms Duchene wrote:-

“The recorded calls are those that were received through the emergency 999 line and to a station’s main number.

The Gardaí do not want the details of this newly surfacing material to be disclosed. They do not know at this point in time whether anything on those discs are relevant.”

Both Garda Nolan and Ms Duchene have confirmed to the Commission that in referring to disclosure, Garda Nolan was merely indicating that the recordings were not to be disclosed to the solicitors for Mr Bailey until it was determined whether their content was relevant to the discovery order in that case. He was not articulating

any general reluctance on the part of An Garda Síochána to disclose the existence of the recordings.

- 6.28 At a consultation that day, counsel for the State were informed of the developments in relation to the Bailey case. They were told of the three phone calls with potentially damaging content and that transcripts would be forwarded once received.
- 6.29 On 22nd October 2013, a letter was sent to the solicitors for Mr Bailey asking for their consent to extend the time for discovery. The letter indicated that delays had arisen in relation to “certain other media held in electronic format”. Elsewhere it referred to “electronic files” and “electronic media discovery”.
- 6.30 The first transcripts of Bandon recordings requested by the Head of Legal Affairs of An Garda Síochána, Mr Ruane, were received by him on 23rd October 2013. On 24th October 2013, Mr Ruane sent them to Deputy Commissioner O’Sullivan. He explained that he was seeking “to ascertain if they are relevant and therefore discoverable under the Discovery Order”. Mr Ruane informed the Deputy Commissioner:-
- “You will be aware that a number of potentially relevant and unhelpful recordings have already been identified... It is no doubt the case that the persons identified on the calls did not appreciate that they were being recorded and this might cause difficulties when the matter comes to trial”
- 6.31 Mr Ruane went on to note that “there [might] be policy issues to be reviewed for the organisation” in light of the contents of the recordings, but stated that, for the moment, he was confining his advice to the case in hand.
- 6.32 Mr Bailey’s solicitors declined to consent to an extension of time for discovery. Papers were then drafted for the defendants to bring a motion before the High Court seeking the extension of time. That motion was heard on 25th November 2013 and an extension of time in which to make discovery was granted to 25th March 2014. The affidavit grounding the application did not refer to telephone or audio recordings, but stated:-

“The Gardaí have a number of old electronic files in their possession which will take a period of time to review... The technology being used to view the files is old, obsolete and fragile.”

- 6.33 On the morning of Friday, 25th October 2013, Mr Ruane emailed copies of the transcripts of the Bandon recordings to junior counsel dealing with discovery in the Bailey Case for his views as to the relevance of the transcripts to the discovery process. The email was copied to Ms Frederique Duchene in the Chief State Solicitor’s Office. Mr Ruane concluded with the following request, which was highlighted in red in his email:-

“Please exercise great care in relation to the attached given the sensitive nature of the material.”

Ms Duchene has said that the emphasis on the sensitivity and confidentiality of the material was such that she did not open the attachments to the email sent by Mr Ruane.

- 6.34 On that same day, Deputy Commissioner O’Sullivan sent copies of Mr Ruane’s letter/briefing note of 24th October 2013, together with the enclosed three transcripts to the Commissioner, for his information. The file was returned to her office five days later, with a handwritten note from Commissioner Callinan (dated 29th October 2013) asking whether the advices of senior counsel were yet available.

From this, it is clear that the Commissioner was aware of issues relating to telephone recordings in Bandon Garda station by 29th October 2013.

- 6.35 On 29th October 2013, Mr Ruane rang Deputy Commissioner O’Sullivan to discuss another, unrelated matter. She referred to the Bandon recordings issue and said that she had received correspondence from, ICT, which made it clear that recordings were not just confined to Bandon, but that there was a wider issue.

According to Mr Ruane, this was the first occasion on which he was told that there was evidence of the recording of non-999 phone calls outside of those recorded at

Bandon Garda station. However, he remained unaware of any of the details, save that ICT had apparently uncovered evidence of “a wider issue”. Following this conversation, Mr Ruane sent a text message to Deputy Commissioner O’Sullivan in which he offered to have his “data protection team” review the correspondence she had received from ICT. Deputy Commissioner O’Sullivan did not respond to this offer.

- 6.36 On 6th November 2013, on his own initiative, Mr. Ruane sent Deputy Commissioner O’Sullivan a three-page document headed “Data Protection Acts – Retention of Personal Data – General Advice”, containing general advice on the rights and obligations of An Garda Síochána under Data Protection legislation, but made no specific reference to the legality or otherwise of making and retaining telephone recordings.

In fact, Mr Ruane did not receive copies of any of the relevant documents, emails and reports produced by ICT, in relation to the general recording issue, until 29th January 2014, some three months later.

- 6.37 Mr Ruane told the Commission that he was prompted to prepare and send the document by Deputy Commissioner O’Sullivan’s reference on 29th October 2013 to a “wider issue” of telephone recording. Because he had no other information as to what the factual situation was, he confined himself to general principles of law. Without knowing what was being recorded and why, Mr Ruane was not in a position to form any definitive conclusions as to legality. However, he told the Commission:-

“On my own understanding of the situation certainly there was a data protection issue. In other words... you shouldn’t be recording people unless you have a sound, clear and legitimate purpose for so doing.”

It would seem that Mr Ruane’s memo on data protection was not brought to the attention of Commissioner Callinan at this time.

- 6.38 On 7th November 2013, senior counsel in the Bailey case, Paul O’Higgins S.C., advised that at least two of the three transcripts that had emerged from Bandon Garda station were relevant and discoverable.
- 6.39 Ms Duchene, of the Chief State Solicitor’s Office emailed a copy of the advices of Mr O’Higgins S.C. to the Department of Justice, but without the three transcripts to which the advice referred. From the evidence of Ms Duchene and of a number of Department of Justice officials, the Commission understands that it would be normal practice to copy the Department with the advices of counsel, but not necessarily with copies of the documentation seen by counsel in preparing their advice – in this instance, the transcripts themselves. Mr O’Higgins’ advices, whilst referring to transcripts of telephone calls gave no indication that these calls were not recorded in the normal course of the investigation and therefore would not have raised any concerns in the Department at that time.

7. Briefing of Garda Commissioner, October–November 2013

- 7.1 As previously stated, Mr Callinan’s evidence is that he was made aware of issues relating to phone recordings in the Bailey case within a week or so of 18th October 2013, but that he remained unaware of the existence of a general recording issue until a meeting with the Head of Legal Affairs of An Garda Síochána, Mr Ruane on 8th November 2013. This being so, the question arises as to why he was not briefed earlier on the general issue and, in particular, on the first report of Superintendent Flynn of 18th October 2013 and his subsequent reports of 22nd and 25th October, 2013.

The two most senior officers under Commissioner Callinan were Deputy Commissioner O’Sullivan and the Chief Administrative Officer, Mr Cyril Dunne. Mr Dunne and the Deputy Commissioner were considered of equal rank. Each reported directly to the Commissioner with regard to his or her area of responsibility.

In this instance, it appears that each was of the view that responsibility for briefing the Commissioner on the recordings issue as it developed lay with the other.

- 7.2 Both Mr Dunne and Deputy Commissioner O’Sullivan received Superintendent Flynn’s initial report on 18th October 2013, which set out what was known regarding telephone recording systems at that time and drew attention to potential issues – including questions as to the legality of recording and retaining non-999 calls. Importantly, there is no evidence that this report was shown to the Commissioner.

From the evidence already outlined,¹⁵ it seems neither Mr Dunne nor Deputy Commissioner O’Sullivan were made aware of the additional documentation provided by Superintendent Flynn after 18th October 2013, especially the documents from 1996 which were included in Superintendent Flynn’s reports of October 22nd 2013 and October 25th 2013, which indicated what lines were to be recorded.

Meeting with Garda Commissioner, 8th November 2013

- 7.3 At around 3 p.m. on 8th November 2013, the Commissioner met Deputy Commissioner O’Sullivan and the Head of Legal Affairs, Mr Ruane, to discuss

¹⁵ See above para. 6.23 to 6.26.

unrelated matters. The Commissioner raised the issue of the recordings towards the end of the meeting, which was at about 5:15 p.m., and it was decided to set up a meeting with the Attorney General's Office. Mr Ruane's impression was that the Commissioner was already aware of the general recording issue.

7.4 Mr Callinan accepted that he had raised the issue of recordings with Mr Ruane, but said that he had raised it in the context of the Bandon recordings and that there was discussion about the tapes and transcripts as well as the advice of senior counsel. Deputy Commissioner O'Sullivan remembers attending the meeting on 8th November 2013, but does not remember any discussion of matters relating to telephone recordings.

7.5 It is important to note that, at this time, Mr Ruane had not seen any of the relevant documentation from ICT, that is, the emails of the 18th, 23rd and 25th October 2013. He knew only what he had been told informally by Deputy Commissioner O'Sullivan – that she had received correspondence from ICT which indicated that there was "*a wider issue*". He was not in a position to give the Commissioner any other information.

It was Mr Ruane's usual practice to take brief handwritten notes, where significant matters were discussed at meetings he attended. In this instance, however, it seems that no note was taken.

7.6 In a written statement provided to the Commission on 2nd June 2014, Mr Callinan indicated that, when he became aware "in early November" of the recording of non-999 telephone calls, he took the following four steps:-

- He directed that the recording of all calls, other than 999 emergency calls, "should cease immediately."
- He issued an instruction that all tapes of telephone recordings should be collated by "a small group of people regionally" working under Superintendent Flynn, "so that they could be properly indexed and examined as to their contents."

- He asked the Head of Legal Affairs of An Garda Síochána, Mr Ruane, to arrange a meeting with the Attorney General’s Office “to seek legal advice as to how to proceed”.
- He contacted Mr Brian Purcell, Secretary General of the Department of Justice “on learning of the situation in Cork with the recordings” to inform him and indicated that he would report further “when I had a clearer picture of the position in West Cork and nationally.” This contact is disputed by Mr Purcell.

These four steps will now be considered in turn.

Decision to stop non-999 recording

7.7 There is no written record of the instruction given by the Commissioner to have all recording of non-999 telephone calls stopped. The evidence suggests that it was given verbally, but it is by no means clear to whom the instruction was given, or when. The Commissioner did not seek legal advice either from the Head of Legal Affairs, Mr Ruane, or from the Attorney General’s Office, prior to issuing this instruction. In short he did not consult anyone. He has told the Commission that he believed the recording was unlawful because those speaking were unaware they were being recorded, and for that reason issued an instruction that it should be stopped. The evidence which the Commission has heard from Mr Callinan, Commissioner O’Sullivan and the Chief Administrative Officer of An Garda Síochána, Mr Dunne, does not lead to any clear conclusion on this point. It is sufficient to record that:-

- i. Mr Dunne stated that, following a meeting with the Commissioner, he instructed Mr Kidd, the Executive Director of ICT, to implement the decision to stop recording all non-999 lines. Mr Kidd is unsure of the date, but accepts that he received this instruction in “*very early November*”.
- ii. Mr Kidd passed the instruction on to Superintendent Flynn, who states that he received this instruction on 11th November 2013 and that he passed it on to other subordinate officers for implementation.

- iii. The first written evidence of an instruction to stop non-999 recording is an internal ICT email, sent on 11th November 2013 at 11.29 a.m., in which the recipient is asked to arrange for all recording of telephone lines, except 999 / 112 lines, “to be stopped immediately.”
- iv. At the meeting with the Attorney General’s Office later that day, 11th November 2013, the Commissioner is recorded as saying that a direction had been given to stop recording all non-999 calls.

7.8 Full implementation of the instruction to cease recording non-999 lines throughout the State was delayed for a number of reasons which need not be outlined in this report. However, documentation from ICT section indicates that by 27/11/13, the task had been completed and that the only lines now recording were those associated with 999 or ECAS¹⁶ calls. The Commission will report more fully on this point in its final report.

Decision to collate recordings

- 7.9 In his report to the Executive Director ICT, Mr Kidd, dated 25th October 2013, Superintendent Flynn had recommended that all tapes not required for ongoing investigations should be transported to Garda Headquarters, in order that they might be destroyed under the supervision of An Garda Síochána.
- 7.10 At a meeting in the Attorney General’s Office on 11th November 2013¹⁷, Ms Ruth Fitz Gerald, who was Advisory Counsel in the Office of the Attorney General at the time, recommended that all outstanding recordings should be brought together for safe storage and an inventory compiled, in order to assist the Attorney General’s Office in providing final advices as to what should be done with the recordings.
- 7.11 Further to this advice, it was decided, with the Commissioner’s approval, to set up an internal working group to progress the matter. The working group consisted of the Chief Administrative Officer, Mr Cyril Dunne, the Executive Director ICT, Mr Liam

¹⁶ Emergency Call Answering Service

¹⁷ See below para.8.1 *et seq.*

Kidd, the Head of Legal Affairs of An Garda Síochána, Mr Ken Ruane and the Assistant Commissioner Crime and Security, Mr John O'Mahony.

Although the working group was not set up until 27th November 2013, the process of collecting and collating tape recordings had begun before that. Mr Callinan says he asked for this to be done when he became aware of the general recording issue and Superintendent Flynn recalls getting an instruction from Mr Kidd on the 11th November 2013 to ensure that all existing tapes were collected for secure storage in Garda Headquarters.

- 7.12 This process had begun by 13th November 2013, although it was not completed to the satisfaction of ICT until the end of January 2014. Even then, the process was subsequently found to be incomplete, as more tapes came to light in searches which followed the retirement of the Garda Commissioner on 25th March 2014.

8. Informing of Attorney General's Office

- 8.1 On 8th November 2013, Mr Ruane, the Head of Legal Affairs for An Garda Síochána, texted Ms Fitz Gerald, Advisory Counsel in the Office of the Attorney General, to say that the Commissioner had requested a meeting with herself and the Director General of the Attorney General's Office, Mr Liam O'Daly, on Monday, 11th of November 2013. The reason for the meeting was described as follows:-

“An issue has arisen in respect of Data Protection for An Garda Síochána regarding recording of telephone calls both in and out of certain Garda stations.”

The meeting took place at 3.40 p.m. on Monday, November 11th 2013 with the Commissioner, Deputy Commissioner O'Sullivan, Mr Ruane and Ms Fitz Gerald in attendance. Mr O'Daly was unavailable.

- 8.2 The Commissioner briefed the meeting. In a subsequent memo to the Attorney General, seeking the nomination of counsel to advise on the matter, Ms Fitz Gerald summarised what she was told as follows:-

“It appears that systems were put in place in Garda stations – possibly in the 1970s – to allow for the recording of incoming and outgoing telephone calls. The reasons for the installation of the system are not known at this remove. However, in many stations the system has continued in place and recordings of telephone conversations have been made and stored. Some of the recordings are on tapes... which are effectively obsolete.”

She stated that the issue had come to light as a result of the discovery process in the Bailey case and then continued:-

“As regards 999 telephone calls, these are recorded and that is both permissible and necessary. What is at issue here is calls other than 999 calls.”

Ms Fitz Gerald stated:-

“...the Garda Commissioner himself is simply not in a position to say what the purpose may have been or [to] find any documentation relevant to this recording...”

8.3 A handwritten note made by Mr Ruane at the meeting notes: “systems installed 1970s / 80s to allow recording incoming & outgoing calls from garda stations / Comm believes he can justify 999 calls & direction given to stop recording all non 999 calls.” No mention is made of any possible reason for the installation of the systems.

8.4 At the conclusion of his note, Mr Ruane recorded Ms Fitz Gerald as saying that the Commissioner should inform the Minister – meaning the Minister for Justice. This was the first of a number of occasions on which the Attorney General’s Office and Ms Fitz Gerald in particular, expressed the view that the Minister should be informed.

8.5 From the accounts given by Mr Ruane and Ms Fitz Gerald of the meeting on 11th November 2013, it seems clear that, when the Commissioner briefed the meeting, he was unaware of several important pieces of information that had been reported in writing by Superintendent Flynn between 18th and 25th October 2013:-

- The Commissioner was not aware that recording equipment had been installed in a limited number of stations – that is, at Command and Control (Harcourt Square) and at Divisional Headquarters outside the Dublin Metropolitan Region. There are 23 Divisional Headquarters outside of Dublin and Cork.
- He was not aware that, according to Superintendent Flynn’s report there was a rationale behind the installation of the systems, which included “the gathering of evidence around calls made to Garda stations regarding bomb threats and other code word messages.”
- He was not aware that documents had been found from 1996 which seemed to suggest a policy of recording only certain specific non-999

lines, as opposed to the indiscriminate recording of all phone lines into Garda stations.¹⁸

8.6 Whether or not the Commissioner was aware of these pieces of information, it is clear that they were not conveyed to the Attorney General’s Office at this time. This was a significant information deficit, so far as the Office of the Attorney General was concerned. Ms Fitz Gerald, in a memo to the Attorney General and in a letter to Mr Ken Ruane, Head of Legal Affairs, both dated 14th November 2013, referred to “this recording of routine telephone conversations” which took place “in Garda stations”, with no further detail as to what lines in what Garda stations were being recorded and why.

8.7 In her memo to the Attorney General, headed ‘Nomination of Counsel – Discovery of Garda station recordings of telephone conversations’, Ms Fitz Gerald wrote:-

“As it is not possible at this remove to say what the purpose for the recording was... it would appear that the recording of telephone conversations since the introduction of the Data Protection Act is unlawful insofar as there was no purpose for the recording or the retention of the recording (Section 2(1)(c)).

The Garda Commissioner indicated at our meeting that he does not think there is any reason for retaining the recordings and he does not wish to do so. His concern was whether there is anything which would stop him directing the destruction of the recordings.

It seems to me that this is a difficult issue upon which to advise. At one level, the recordings are illegal and illegally obtained evidence should not be used in support of a prosecution or proceedings. Yet it may be that a party who communicated with a Garda station may have some reason to wish to obtain the recording e.g. may claim it contains exculpatory evidence.”

¹⁸ The implementation or otherwise of this 1996 policy is a matter for the Final Report of the Commission. For now it is sufficient to note that the apparent existence of such a policy was not made known to the Commissioner or to the Attorney General’s Office.

Ms Fitz Gerald concluded her memo by asking the Attorney General to nominate counsel to advise on the issue. The Attorney responded by nominating counsel but did not otherwise comment.

- 8.8 Ms Fitz Gerald emailed a letter to Mr Ken Ruane, also on November 14th 2013, in which she set out the facts and issues in similar terms to those employed in her memo to the Attorney General. Having noted again that “This is a difficult issue on which to advise”, she continued:-

“The recordings are illegal and illegally obtained evidence could not be used in support of a prosecution or proceedings. Yet it may be that a party who has communicated with the Garda station may have some reason to obtain the recording. I am not saying that they would be entitled to do so but, rather, that once it becomes known that there are such recordings, that the issue would become a live one. Further, if the recordings are to be discovered in the Bailey proceedings, then it may be necessary to see whether there are any recordings relevant to other cases in which discovery is outstanding... or indeed, cases in which discovery has already been made but the case not yet heard.

The issues are complex. Further, because the issue will be a controversial one once the information comes to light in the Bailey case that the recordings were made I think it is important to ensure that we can demonstrate that the question of what to do about these recordings was considered carefully and thoroughly. As part of that process I am seeking the advice of Counsel.”

Ms Fitz Gerald went on to advise that any outstanding recordings should be collected, placed in secure storage “and some inventory made of them, perhaps identifying the station and dates to which the recordings relate, so far as this is possible.”

- 8.9 It is clear from Ms Fitz Gerald’s communications with the Attorney General and Mr Ruane, the Head of Legal Affairs of An Garda Síochána, and from her recommendation on 11th November 2013 that the Minister for Justice be informed,

that she was conscious, from the outset, of the seriousness and complexity of the issues raised and of the care required in dealing with them.

- 8.10 Ms Fitz Gerald sent a further email to Mr Ruane later on the 14th November 2013, in which she indicated that she had changed her mind on the advisability of getting advice from Counsel, stating that more information was needed about what recordings there were and of what value they could be. Matters remained effectively in abeyance until An Garda Síochána provided further information in February 2014.
- 8.11 Ms Fitz Gerald’s original letter to Mr Ruane of 14th November 2013 was forwarded to Deputy Commissioner O’Sullivan on 20th November 2013. She in turn sent it to the Commissioner on 27th November 2013, with a covering letter that also confirmed the establishment of an internal Garda working group to progress the collation of outstanding tape recordings.

Response of Attorney General’s Office

- 8.12 As will be detailed later in this report, the Taoiseach first became aware of issues around Garda telephone recording systems on 23rd March 2014, when he was briefed on the matter by the Attorney General, Ms Máire Whelan. This briefing resulted in the meeting of 24th March 2014 at which it was decided that Mr Brian Purcell, Secretary General of the Department of Justice, should visit the Garda Commissioner, Mr Callinan, in his home.
- 8.13 It is important to establish the extent of the Attorney General’s knowledge of matters relating to Garda telephone recordings, from the time her office was first informed in November 2013 until her briefing of the Taoiseach on 23rd and 24th March 2014.
- 8.14 As we have seen, the Attorney General was first informed of the issue by Ms Fitz Gerald, Advisory Counsel, in a memo of 14th November 2013 seeking the nomination of counsel to advise on the matter. It is important to note that the Attorney’s own opinion on the matter was not being sought at that stage. As she told the Commission, she merely received a routine document seeking nomination of

counsel. She noted that it was a data protection matter and signed off on the basis that counsel would advise.

8.15 The Attorney did not see Ms Fitz Gerald’s letter to Mr Ruane of 14th November 2013 and she did not discuss the matter with Ms Fitz Gerald at that time. Ms Fitz Gerald told the Attorney of her decision not to proceed to engage counsel.

8.16 In her evidence to the Commission, the Attorney said that her initial impression on reading the Nomination of Counsel memo was that the state of knowledge at that point was “*entirely tentative.*” She continued:-

“The only information forthcoming seemed to be of an historical situation ... It wasn’t at all clear to what extent it extended beyond Bandon Garda station.”

Elsewhere in her evidence, the Attorney General referred to the fact that the issue had emerged from the Bailey case – a matter which Ms Fitz Gerald had indicated would be the subject of separate advices – and commented:-

“It was not possible for me to know or to evaluate [how] this all happened – did it have a nexus, the activity, with Sophie Toscan du Plantier and her murder? ... and so was this a West Cork problem? I didn’t know. There was nothing to suggest it went beyond the borders of West Cork.”

8.17 There were aspects of the Nomination of Counsel document which implied that the matter was not merely historical. The Commissioner’s direction that the recording be stopped implied that it had continued up to that point. It was also stated that “some” (but by inference, not all) of the recordings were on obsolete tapes. Nonetheless, the Attorney General’s predominant impression was of “*something that certainly projects as substantially historic*”. It is of course clear, that neither the Attorney General nor her office were made aware of Superintendent Flynn’s reports, to the effect that the purpose of the recording was to record bomb threats and code word messages and that there was relevant documentation going back to 1996.

8.18 On 19th November 2013, Ms Fitz Gerald, Advisory Counsel, presented a brief written report on the general recording issue to the Director General of the Attorney

General’s Office, Mr Liam O’Daly, as part of the regular weekly meeting between Mr O’Daly and his senior officials. The report stated:-

“The Garda Commissioner sought advice as to what to do with tapes of recordings of telephone conversations to and from Garda stations which he and senior management in the Gardaí did not know were held and for which they do not know the purpose – it has been in place for some time. I have asked the Gardaí to collect what recordings there are and inventory them... In the meantime we will consider what to do about the recordings. The Commissioner has issued a direction that there are to be no further recordings of certain conversations except the 999 calls.”

8.19 There followed a brief discussion of possible legal justifications for recording telephone calls. In light of what Mr O’Daly described as the “*very rudimentary information*” available to the Office of the Attorney General at that time, this discussion was necessarily speculative. Mr O’Daly considered it important that the practice of recording non-999 calls had now been stopped by the Commissioner. Like Ms Fitz Gerald, he was concerned that the Department of Justice should be notified about the telephone recording issue. His direction to that effect is recorded as a comment attached to Ms Fitz Gerald’s report.

8.20 On the following day, 20th of November 2013, Ms Fitz Gerald’s report, together with Mr O’Daly’s comment, was considered during a Legal Management Advisory Committee (‘Legal MAC’) meeting at the Office of the Attorney General. These meetings are held three times a year, and their main purpose is to consider the Report to Government on Sensitive Cases, which forms part of the process by which the Cabinet is briefed on the status, progress and potential implications of sensitive litigation in which the State is involved. This meeting was attended by the Attorney herself, as well as Mr O’Daly, Ms Fitz Gerald and representatives from the Chief State Solicitor’s Office. A minute of the meeting simply reported:-

“The issue of recordings of telephone conversations to and from Garda stations was noted and may be the result of the use of an automatic recording phone system in certain Garda stations.”

- 8.21 In her evidence to the Commission, the Attorney General confirmed that she had seen that report and the recommendation of Mr O’Daly.

9. Informing of Department of Justice

- 9.1 Mr Callinan has given evidence that, when he was the Garda Commissioner, he contacted the Secretary General of the Department of Justice, Mr Brian Purcell, and briefed him verbally on the issue of the Garda telephone recordings. Mr. Callinan's evidence in this regard is strongly disputed by Mr Purcell.
- 9.2 The general reporting obligations on the Garda Commissioner as set out in the Garda Síochána Act 2005 are discussed elsewhere in this Report.¹⁹ In this instance, Mr. Callinan's evidence is that he chose to report the matter verbally at this time rather than in writing, although he always intended that a written report would eventually go to Mr Purcell, when he had all the salient facts at his disposal.
- 9.3 The Commission now addresses the evidence regarding the reporting to the Department of Justice of (i) specific telephone recordings relating to the Bailey case and (ii) the existence of general systems for recording non-999 calls. The question of when and to what extent the Minister for Justice should have been made aware of issues in relation to Garda telephone recordings is a key aspect of the matters to be dealt with under sub-paragraphs 1(n) and (o) of the Commission's Terms of Reference.
- 9.4 This report has already summarised the extent of Commissioner Callinan's knowledge of these two issues. He had been informed at some time in late October 2013 of the emergence of telephone recordings from Bandon Garda station which were of potential relevance to the Bailey action. He was aware that these recordings were unhelpful and would cause difficulties in the context of the Bailey trial and that the persons heard speaking had not known that they were being recorded. The Commissioner was also aware and had reported to the Attorney General's Office that there were systems of recording telephone conversations at a number of Garda stations that had been in existence for some time.
- 9.5 The Commissioner regarded these matters as important. That was the reason he gave for seeking the advice of the Attorney General's Office rather than relying on An

¹⁹ See above para. 3.23 to 4.11.

Garda Síochána's own legal resources. He had already concluded, of his own motion, that the system of telephone recording that was in place in Divisional Headquarters was unlawful because neither party would have known that they were being recorded. As soon as the Commissioner became aware of the recording issue, he gave an immediate instruction, even before visiting the Attorney General's Office, that the recording of all calls, except 999 calls, was to be stopped.

- 9.6 The Bailey case involved serious and important issues. It was on the list of sensitive cases for quarterly consideration by the Cabinet. Its background was the tragic murder of a French citizen living in Cork. Mr Bailey had been the subject of a European Arrest Warrant issued by the French authorities. This application had been heard and the determination of the Supreme Court was to "refuse to order the surrender of Bailey to the French authorities".²⁰
- 9.7 The recordings in the Bailey case and the general system of recording, were matters of which the Garda Commissioner was indisputably obliged to inform the Department of Justice, whether the Minister or the Secretary General, pursuant to s. 41 of the Garda Síochána Act 2005, a proposition which, it is fair to record, the former Commissioner at no stage contested in the course of his evidence to the Commission. Indeed, he was at pains to emphasise that he had intended, "*from the outset*" to report on them, in writing, to Mr Purcell, Secretary General of the Department of Justice, though he qualified this by adding that he "*needed to have all the facts at [his] disposal or as many as were available at the time.*"
- 9.8 The case brought by Mr Ian Bailey that concerns this Commission was against An Garda Síochána, the Minister for Justice, Ireland and the Attorney General. As between the defendants, it was understood that the defence of the case rested, in the main, with An Garda Síochána.
- 9.9 Although the Bailey case was identified from the outset as having potentially significant implications for the State, the conduct of the case was left to An Garda Síochána, subject to the advice of the Attorney General's Office. As a general rule,

²⁰ *Minister for Justice v Bailey* [2012] 4 I.R.1

communications between An Garda Síochána and the Department of Justice in relation to the case went through the Chief State Solicitor's Office.

Even in important cases, the Department of Justice would not expect to be included in every aspect of a case. Thus, for example, it was not normal practice for the Department to receive copies of material produced by An Garda Síochána in response to discovery requests.

- 9.10 However, it must be remembered that, aside from the need to keep the Department of Justice sufficiently informed as a co-defendant, issues in the case could also give rise to a reporting obligation under s. 41 of the Garda Síochána Act 2005. In the view of the Commission, the possible emergence into the public domain of telephone recordings containing evidence of apparent misconduct by individual members of An Garda Síochána, clearly came under the heading of “significant developments that might reasonably be expected to affect adversely public confidence in the Garda Síochána”, as set out in s. 41(1)(b) of the Act of 2005.
- 9.11 Similarly, as far as the general recording issue is concerned, the Commission considers that this was a serious matter of which the Secretary General of the Department of Justice should have been informed under s. 41 of the Act of 2005. The question of how, when and to what extent this was done is examined further below.

10. Informing of Department of Justice: Office of the Attorney General

- 10.1 In considering the Garda Commissioner's obligation to report to the Department of Justice, it is relevant to note that on two occasions in November 2013, he was made aware that the Attorney General's Office were of the view that the Department should be informed of the general recording issue.
- 10.2 As previously indicated, when Ms Fitz Gerald was first briefed on the issue by the Commissioner on 11th November 2013, she advised that the Commissioner should inform the Minister for Justice. When the Director General of the Attorney General's Office, Mr Liam O'Daly, was briefed about the general recording issue by Ms Fitz Gerald on 19th November 2013, he gave a direction to the effect that the Department of Justice should be informed.
- 10.3 Ms Fitz Gerald had assumed that this would have been done by An Garda Síochána, following her advice on 11th November 2013, but, in response to Mr O'Daly's concern, she emailed Mr Ruane, the Head of Legal Affairs of An Garda Síochána, on 21st November 2013 seeking confirmation that the Department of Justice had been notified about the issue. Mr Ruane replied, "No Ruth, not to my knowledge". Ms Fitz Gerald then responded:-

"I think it will have to be done. Happy to do so unless the Gardai would prefer to do it themselves. Perhaps you could let me know later in the day."

Mr Ruane replied, saying:-

"I think it is more appropriate for the Commissioner to inform the Department and I will discuss with him at the earliest opportunity."

There was also a contemporaneous exchange of text messages between Ms Fitz Gerald and Mr Ruane to the same effect.

Mr Ruane mentioned this exchange to the Commissioner at a meeting on November 22nd 2013 (which is dealt with in greater detail at paragraph 11.16 below) and the Commissioner stated that he had no difficulty informing the Department of Justice.

- 10.4 These events show the importance attached by the Attorney General and her office to the Department of Justice being informed of the general recording issue – even on the basis of the information then available which would make any legal assessment of the situation tentative at best.
- 10.5 It is clear that Ms Fitz Gerald expected the task of informing the Department of Justice to be taken on by An Garda Síochána. This is not to say that there was any legal barrier to the Attorney General’s Office performing that task, but that Ms Fitz Gerald’s understanding of what was both customary and appropriate in this specific instance was that the Garda Commissioner should do it. Her view in this was supported by Mr O’Daly and by the Attorney General herself, who told the Commission:-

“My impression was... that the Garda Síochána were very proprietorial of their relationship with the Department of Justice and... my impression certainly would be that it would be not very well received if there was any intervention directly by my office.”

It should be said that the Attorney’s impression of a ‘proprietorial’ relationship was disputed by Mr Callinan, who told the Commission he had always assumed that the Attorney General’s Office would copy the Department of Justice with any advice given to An Garda Síochána. He also said that he would have “*absolutely no difficulty*” with the Attorney General’s Office informing the Department of Justice of anything that was happening between the Office of the Attorney General and An Garda Síochána.

- 10.6 Commissioner’s Callinan’s view to that effect in no way affected his own obligation to keep the Department and the Minister of Justice fully informed under s. 41 of the 2005 Act.
- 10.7 The Commission has received conflicting evidence from relevant witnesses as to whether a practice existed of the Attorney General’s Office copying advice to the Department of Justice. In this instance, however, it is not necessary to resolve the

question, as Mr Ruane clearly indicated on 21st November 2013 that he would undertake to have the Commissioner inform the Department of the issue.

11. Informing of Department of Justice: An Garda Síochána

Records and Documentary Evidence in An Garda Síochána

- 11.1 The Commission has investigated, in detail, the extent of information that was known within An Garda Síochána and the extent to which that information was made known to the Commissioner, Mr Callinan, and, in turn, to the Department of Justice. It has been striking how little documentary evidence is available. Important decisions were not formally recorded and were communicated orally. Such work practices make it very difficult to identify what decisions were made, by whom and for what reasons.
- 11.2 The Commission requested from An Garda Síochána all relevant documents, correspondence and reports relating to the matters the subject matter of this report and, in particular, sought diaries and personal notebooks belonging to the former Garda Commissioner, Mr Martin Callinan. Mr Callinan informed the Commission that he had cleared out all personal papers after he announced his retirement on March 25th 2014 and that he did not have any written notes to support his evidence, particularly in relation to informing Mr Brian Purcell, Secretary General of the Department of Justice about the issue of the telephone recordings. Mr Callinan was however, able to produce his diary for the year 2014.
- 11.3 The Commission received the following reply to its request for diaries and personal notebooks belonging to the former Commissioner, from Assistant Commissioner Jack Nolan, who was the liaison person appointed to assist the Commission in its investigations:

“I am advised that the then Commissioner, at some point in the late afternoon [March 25th 2014] went to a filing unit in the Conference Room where he kept personal papers. He asked Superintendent Walsh to get some black refuse sacks as he wished to sort through his files. Later still he asked Superintendent Walsh to dispose of several bags of personal papers. There were possibly 8 – 10 bags, filled to a few inches if (sic) paper in each bag and knotted on the top. Superintendent Walsh advises that he did not see [n]or was he aware of what was

contained in the bags other than then Commissioner Callinan informing him that they were personal papers gathered over the years.”

- 11.4 Assistant Commissioner Nolan went on to say that the black sacks were brought from the Conference Room to the shredding bins, which remained locked until the papers were shredded on April 4th 2014.
- 11.5 The Commission also asked about the former Commissioner’s mobile phone. Given the evidence that had been received, that almost all communication with the Department of Justice was through texts, the information contained on the mobile phone of Mr Callinan was extremely relevant.
- 11.6 The Commission asked Mr Callinan about his mobile phone. He confirmed that the phone he used as Commissioner was an official phone. He said he did not know where it was.
- 11.7 Following this evidence, the Commission made enquiries of An Garda Síochána regarding the former Commissioner’s mobile phone. Assistant Commissioner Nolan said that the phone had been returned to An Garda Síochána by Mr Callinan, that the SIM card had been removed and the phone then returned to Mr Callinan. He went on to state that he believed that the SIM card was subsequently destroyed. Following this information, the Commission again wrote to Mr Callinan and asked him to search for the phone. He found it and furnished it to the Commission but it had no SIM card in it and no information stored on it. The Commission wrote to Assistant Commissioner Nolan requesting details of how the SIM card had come to be destroyed and who had authorised this, as well as details of the policy of An Garda Síochána in relation to mobile phones once members have left office. Assistant Commissioner Nolan was originally of the view that the SIM card had been destroyed in Garda Headquarters but subsequently stated that the SIM card had not been returned by the former Commissioner and it had been cancelled remotely on 30th May 2014, as it had not been used since 16th April 2014.
- 11.8 The Commission issued a Discovery Order, pursuant to s. 16 of the Commission of Investigation Act 2004, to the service providers for Mr Callinan’s phone. As a result

of this Order, a certain amount of meta-data was made available to the Commission but the contents of text messages were not retrievable.

- 11.9 The Commission wrote to the Department of Justice and was furnished with a copy of all texts sent by Commissioner Callinan to Mr Brian Purcell, Secretary General of the Department of Justice, during the relevant period. These are discussed generally at paragraph 4.8 above and in the section below dealing with informing the Department.
- 11.10 The Commission can only speculate as to whether any information of value to its investigation was lost because of these actions. What limited information it has been able to glean from Mr Callinan's 2014 diary has been of value.

Contact with Secretary General, Department of Justice

- 11.11 As set out elsewhere in this Report, the Garda Commissioner has a statutory duty under s. 41 of the Garda Síochána Act 2005 to keep the Minister and the Secretary General of the Department of Justice fully informed of various matters, including, at subs. 41(b): "significant developments that might reasonably be expected to affect adversely public confidence in the Garda Síochána" and at subs.41(d): "any other matters that, in the Commissioner's opinion, should be brought to the Minister's attention."
- 11.12 In his evidence to the Commission, Mr. Callinan accepted that the emergence of the general recording issue in October/November 2013 was something of which the Department of Justice should have been informed. Thus, there is no question but that the matter was one which fell within the scope of the Commissioner's statutory obligation to keep the Secretary General and the Minister "fully informed". Mr Callinan says that he did, in fact, report the matter around that time, in one or more conversations with the Secretary General of the Department, Mr. Brian Purcell. His evidence in that regard is disputed by Mr Purcell, who has no recollection of being briefed on the telephone recordings issue at any time prior to 10th March 2014. Mr Purcell goes further and says that he is certain that no such conversations took place.

- 11.13 Mr Callinan has not given any exact date or dates on which he says he spoke with Mr Purcell regarding the general recording issue. The former Commissioner has unavoidably laboured under the very substantial handicap of having no access to documents to assist him in his recollection. Against that, it is fair to note that he did not retain his personal documents, a matter on which the Commission has already commented.
- 11.14 Mr Callinan was able to produce to the Commission his personal diary for 2014, but could not locate his diary for 2013 and searches carried out by An Garda Síochána have also failed to produce it. If the former Commissioner, on retirement, was in a position to take his diary for 2014 with him, one would have thought that he would also have the diary that related to 2013. However, Mr Callinan has been unable to find it, in spite of several requests from the Commission. If, on the contrary, the former Commissioner's 2013 diary remained at Garda Headquarters, it might have been expected that it would be carefully preserved in circumstances where the Government announced the establishment of a Commission of Investigation on the very day of the Commissioner's retirement. It must be presumed that the diary for 2013 was included in the bags of "personal papers" that were shredded following Mr Callinan's departure.
- 11.15 The difficulty with the mobile phone used by the former Commissioner has been outlined above and, as indicated, a discovery order was issued to the relevant service provider, which allowed the Commission to obtain and examine records of telephone calls made between the Commissioner and Mr Purcell, as well as calls between their respective offices; but, in circumstances where Mr Callinan has not been able to specify with certainty the dates on which he believes he spoke with Mr Purcell about the recording issue, these records are of limited assistance.

In addition to the telephone records, the Commission has considered other relevant evidence, including notes by Mr Ruane, the Head of Legal Affairs of An Garda Síochána, from internal Garda meetings, at which the issue of informing the Department of Justice was raised with the Commissioner.

The importance of this matter requires that it be examined in some detail. With that in mind, the evidence before the Commission is set out below.

Evidence of Mr Martin Callinan

11.16 In his initial statement to the Commission, Mr Callinan wrote:-

“On learning of the situation in Cork with the recordings I informed the Secretary General of the Department and I indicated that I would report further when I had a clearer picture of the position in West Cork and nationally.”

When asked about this during his first appearance before the Commission he explained:-

“When I learned about the situation in Cork first I mentioned it to Mr Purcell and I told him what I was doing. I told him that I had issued a direction to stop the recording of non-999 telephone calls nationally, that I had a working group, a small group in place to gather up all of the materials so that they could be stored centrally and that we would seek further advices as to what should happen with those tape recordings.”

He described the conversation with Mr Purcell as being relatively short:-

“Well other than I was taking action, that we had discovered this situation in Cork, that I didn’t know what was happening nationally and that when I had a clearer picture I would revert back. That was pretty much the extent of the conversation... It wasn’t a lengthy conversation... about who did what and when because all of that was very unclear at the time.”

11.17 Arising from his references to “*the situation in Cork*”, Mr Callinan was asked by the Commission if the context of his conversation with Mr Purcell was the Bailey case or the more general recording issue. He replied that it was both, although he did not say whether and to what extent he informed Mr Purcell of the content of the Bailey-related recordings at that time.

- 11.18 Mr Callinan said he was “pretty sure” that this conversation was on the telephone, rather than face-to-face. He confirmed that he did not write to the Secretary General, Mr Purcell, at that time on the issue. He told the Commission that he thought their conversation would have taken place within a day of his being informed of the existence of a general recording issue – that is to say, on either 8th or 9th November 2013.
- 11.19 Mr Callinan’s attention was drawn to the internal Garda meeting of 22nd November 2013, at which the Head of Legal Affairs of An Garda Síochána, Mr Ruane, had raised the question of whether the Department of Justice had been informed about the general recording issue following texts and emails from Ms Fitz Gerald from the Office of the Attorney General and had noted the Commissioner as saying in response that he had no difficulty with that and that he would inform the Secretary General, Mr Purcell. When asked if he had any further communications with Mr Purcell after this meeting, Mr Callinan replied:-

“We would have spoken occasionally about what was happening and I was... indicating that the process of gathering all of the tape recordings was taking place... All of that work was going on and he was aware that that work was going on. So that was really the extent of the updates they were getting. But these were discussions we would have in the context of a number of other [issues].”

- 11.20 Mr Callinan appeared again before the Commission in September 2014, having been given the opportunity to consider the evidence given by Mr Purcell and other relevant witnesses. On this occasion, he was asked if his initial conversation with Mr Purcell had taken place before or after his meeting with the Attorney General’s Office on 11th November 2013 – the meeting at which Ms Fitz Gerald had first advised that the Minister should be informed. He stated at first that he was not sure, but, on being shown Mr Ruane’s note of that meeting, said he thought he probably contacted Mr Purcell afterwards rather than before.

He said that he had a “clear recollection” of speaking with the Secretary General, Mr Purcell, on two occasions about the general recordings issue – once around the time of his meeting with Ms Fitz Gerald on 11th November 2013 and again at some

point following the meeting of 22nd November 2013 when Mr Ruane raised the issue. He was not certain of the exact dates, but said that the two conversations had certainly taken place within a fortnight of each other.

- 11.21 When asked about the denial of the Secretary General, Mr Purcell, that any such conversations had taken place, Mr Callinan said he was “*very surprised*” that Mr Purcell did not remember the phone calls. He insisted that he had informed Mr Purcell in specific terms of the emergence of the non-999 recording issue, his view that such recording was illegal and the fact that he had stopped it. He said that he did not explicitly refer to the matter as being serious, but would have expected Mr Purcell to understand that these were serious matters. Similarly, he did not ask Mr Purcell to tell the Minister for Justice, but assumed that he would do so:-

“I think it is implicit... in all of our conversations when we are dealing with serious matters that the Secretary General would speak to the Minister.”

When asked what Mr Purcell’s reaction was to his first phone call – now placed as having taken place on or after 11th November 2013 – Mr Callinan said:-

“Well, I think he was probably satisfied that I had taken action, that I had stopped what was going on for many, many years and that I had begun the process of gathering up the tape recordings themselves and also that I was seeking advice from the Attorney General’s Office.”

As to the second phone call, made after 22nd November 2013, Mr Callinan indicated that “*there wasn’t really anything new*” in what he said on that occasion.

- 11.22 Mr Callinan was recalled for a third hearing before the Commission in December 2014. He was asked to consider his previous evidence in light of telephone and text message records obtained by the Commission. At the Commission’s request, he brought with him his personal diary for 2014. Subsequent to the hearing, the Commission discovered entries in the diary that were potentially relevant to the question of whether or not he had informed Mr Purcell about the general recording issue in 2013. Mr Callinan appeared to be unaware of these entries and their

significance and was surprised when they were drawn to his attention by the Commission. The content and import of these diary entries will be considered below in the context of relevant documentary evidence.

11.23 Having considered the telephone records, Mr Callinan identified 13th and 26th November 2013 as being the most likely dates on which he had spoken to the Secretary General, Mr Purcell, regarding the general recording issue. Although still not certain from his own recollection as to when, precisely, the two telephone conversations had occurred, he had “*absolutely no doubt*” that he had spoken of the matter with Mr Purcell on at least two occasions.

11.24 Over the course of three hearings before the Commission, Mr Callinan was insistent on the truth of his evidence in this matter and passionate in his defence of his reputation. He said he had never been found wanting in reporting matters to the Department of Justice. He would not, in any circumstances, prevent anything from going to the Department that needed to. He pointed out that he had gone to the Attorney General’s Office immediately on learning of the wider recording of non-999 telephone calls. There was no logic in suggesting that he would conceal the matter from the Department when there was every possibility of the Attorney General mentioning it to the Minister for Justice, the Tánaiste or the Taoiseach. He said that, having informed Mr Purcell and Ms Fitz Gerald in November 2013, it was his belief that both the Minister for Justice, Mr Alan Shatter, and the Attorney General, Ms Máire Whelan, would have been aware of the general recording issue from that time on.

Evidence of Mr Brian Purcell

11.25 As with Mr Callinan, Mr Purcell provided the Commission with a written statement in relation to sub-paragraphs 1(n) and (o) of the Commission’s Terms of Reference and gave further evidence at three separate hearings before the Commission.

When asked by the Commission to comment on Mr Callinan’s evidence that he first informed him about the general recording issue in early November 2013, Mr Purcell responded:-

“I can say straight off and I have no problem saying it, I have no recollection of that conversation. No recollection whatsoever.”

When questioned further about it, he explained that, in saying he had no recollection, he did not wish to imply that he had any doubt about the matter:-

“As far as I’m concerned, that conversation didn’t take place.”

The one conversation he accepted he had with Commissioner Callinan was about recordings in the specific context of the Bailey case and that was, he said, in late February or early March 2014.

- 11.26 In a subsequent appearance before the Commission, Mr Purcell’s attention was drawn to the former Garda Commissioner’s evidence that he had spoken with him about the recording issue on two separate occasions in November 2013. Mr Purcell responded by stating simply: *“He didn’t”*.

Mr Purcell went on to say that, if Mr Callinan had said something to him about the issue, he would have then discussed it with Michael Flahive, the Assistant Secretary in charge of the Garda Division in the Department of Justice, as it would have been another issue to add to the several controversies involving An Garda Síochána at that time:-

“...if I had been told that by the Commissioner, I most certainly would have said to Michael Flahive, ‘Michael, you’ll never – you won’t believe what’s coming down the tracks now’...”

He concluded:-

“I didn’t need any confirmation in my own mind that I wasn’t told about that because I knew it – but if I had have been told, I most certainly would have said it to Michael Flahive.”

Mr Flahive, the Assistant Secretary in charge of the Garda Division in the Department of Justice, gave evidence to the Commission that he was unaware of the general recording issue until 10th March 2014.

Evidence of Mr Alan Shatter

- 11.27 The former Minister for Justice, Mr Alan Shatter, gave evidence to the Commission of a number of official events attended by him in the company of the Commissioner, Mr Callinan from December 2013 to February 2014. These, he said, were occasions when the former Commissioner had an opportunity to bring the recording issue to his attention. They included ceremonies at Templemore Garda College and a meeting with important visitors from Northern Ireland. He said that it had been the practice at such occasions to have brief, informal discussions about Garda issues of concern and issues of the day. Mr Shatter said that he would have expected to have been informed of something of the seriousness of the telephone recording issue. None of these, it may be noted, were meetings for the transaction of business specifically arranged with the Commissioner. The Commission has not received any evidence of any formal meetings between the Minister and Commissioner Callinan, notwithstanding the series of controversies that had arisen involving An Garda Síochána and the Department of Justice during the period in question of October 2013 to March 2014.
- 11.28 Mr Callinan had no recollection of discussing the matter of telephone recording with the Minister in person at any stage. He said that, although the media were wont to report that there was a very close relationship between him and the Minister, in fact his interactions with the Department of Justice were through Mr Purcell, the Secretary General. His conversations with the Minister would be very few. His evidence was that his normal conduit for bringing matters to the attention of the Minister was *via* the Secretary General, Mr Purcell. In this instance, he said he had informed Mr Purcell about the recording issue and assumed that the Secretary General would inform the Minister.

Telephone and text message records

- 11.29 As discussed earlier in this report, following a request from the Commission, the Department of Justice provided copies of text messages sent between Mr Callinan, as Commissioner, and Mr Purcell, the Secretary General of the Department of Justice from October 2013 to March 2014. These messages were retrieved from the Secretary General's official mobile phone. The general recording issue is not

mentioned in any of the text messages. Mr Callinan told the Commission that this was not an issue which he would have communicated to Mr Purcell by text.

- 11.30 The Commission also sought all available records of telephone calls for the period 1st October 2013 to 25th March 2014 between Mr Callinan and Mr Purcell– including both mobile phone records and telephone calls to and from their respective offices. Copies of such records were provided by the Department of Justice and also by An Garda Síochána. Although the records from both organisations are largely identical, at least one significant discrepancy has been noted, which casts some doubt on their reliability.

Both sets of telephone records disclosed to the Commission indicate that, from the time Mr Callinan says he learned from Mr Ruane, Head of Legal Affairs of An Garda Síochána, about the general recording issue (approximately 5.15 p.m. on 8th November 2013), there were no phone calls between Mr Callinan and Mr Purcell or between their respective offices until the morning of 13th November 2013. There were, however, eight unsuccessful attempts by Commissioner Callinan’s Office to contact Mr Purcell, the Secretary General, on the morning of 11th November 2013, prior to the Commissioner’s afternoon meeting with Ms Fitz Gerald at the Attorney General’s Office – a fact to which Mr Callinan drew attention in his oral evidence to the Commission.

Mr Callinan also referred to a telephone call made at 12.17 p.m. on 13th November 2013, from the Department of Justice to the Commissioner’s Office. The call is listed in the records received from the Department of Justice, but is not mentioned in the records received from An Garda Síochána. According to the Department’s records, it was 7 minutes and 25 seconds long. Mr Callinan thought it probable that this was the call during which he first informed Mr Purcell of the general recording issue.

- 11.31 As previously stated, Mr Callinan gave evidence to the Commission that he had mentioned the matter to Mr Purcell in another phone conversation which took place on or after Friday, 22nd November 2013, following an internal meeting of An Garda Síochána on that date, at which Mr Ruane raised the matter. The telephone records disclosed to the Commission show no evidence of calls from after the meeting on

22nd November until the morning of 25th November 2013, when there was one call from the Commissioner's Office, lasting just 25 seconds. However, on 26th November 2013 there was a call from the Secretary General's Office to the Garda Commissioner's office which lasted 17 minutes and 28 seconds. Although he had no specific recollection of the date and time of the call, Mr Callinan told the Commission he believed this was the second occasion on which he spoke to Mr Purcell about the general recording issue. This date coincided with the Court application in which the time for delivering discovery in the Bailey case was extended to 25 March 2014.

No note or other written record of the content of these telephone conversations has been found.

Attendance notes – An Garda Síochána

11.32 As previously stated,²¹ in correspondence with Ms Fitz Gerald, Advisory Counsel in the Attorney Generals' Office, on 21st November 2013, the Head of Legal Affairs of An Garda Síochána, Mr Ruane, undertook to raise the issue of informing the Department of Justice with the Commissioner. He told the Commission in evidence:-

"... my understanding was from the meeting [of 11th November 2013] that, you know, he would have informed the Minister, but I certainly didn't have anything to indicate that that had occurred."

11.33 On 22nd November 2013 at 5 p.m., Mr Ruane attended an internal meeting of An Garda Síochána with the Commissioner, Deputy Commissioner O'Sullivan and others to discuss matters relating to the Bailey case. Towards the end of the meeting, Mr Ruane drew attention to the fact that Ms Fitz Gerald was asking if the Department of Justice had been informed about the general recording issue. In his handwritten minute of the meeting, he recorded the Commissioner's response as follows:

"Comm has no difficulty with that & will inform Sec General."

²¹ See above para 10.3.

In evidence to the Commission, Mr Ruane was in no doubt that the Commissioner said he would “inform” rather than “update” the Secretary General. Mr Ruane was also clear that the Commissioner did not say that he had already reported the matter to Mr Purcell, the Secretary General, – something which Mr Ruane would have expected him to mention at that point, if it had been done.

- 11.34 For his part, Mr Callinan told the Commission that the conversation was “*very brief*”, with no discussion of the matter. He did not tell Mr Ruane that he had already informed the Secretary General and Mr Ruane did not ask him if he had done so. He did not dispute Mr Ruane’s note of what he said, but told the Commission that what he meant was that he had no difficulty in updating the Secretary General.

In this context, Mr Callinan also gave evidence as to a telephone query that he recalled getting from Mr Ruane around lunchtime on the previous day, 21st November 2013, in which he said Mr Ruane had told him of Ms Fitz Gerald’s question as to whether he had informed the Department. He said that when the call came through he was in the midst of a meeting on an unrelated matter:-

“... we were dealing with some other issue anyway when Mr Ruane was put through and I had said, yes, of course, and probably appropriate that I would update him, being the Secretary General.”

- 11.35 Mr Ruane told the Commission he had neither any recollection nor any note of making such a call and observed that, if the call had taken place as described, there would have been no requirement for him to raise the matter again at the meeting on the following day. Telephone records provided by Mr Ruane indicate that no call was made from Mr Ruane’s office number or from his mobile phone to the Garda Commissioner’s office on 21st November 2013. The Commission also notes that, in his emailed response to Ms Fitz Gerald, sent at 1.52 p.m. on that day, Mr Ruane said:-

“I think it is more appropriate for the Commissioner to inform the Department and I will discuss with him at the earliest opportunity.”

If Mr Ruane had spoken to the Commissioner about this matter shortly beforehand, his email to Ms Fitz Gerald would surely have reflected this. In light of all this, the Commission concludes that Mr Callinan must be mistaken in his recollection of discussing the matter with Mr Ruane on 21st November 2013.

11.36 On the evidence available to the Commission, the next occasion involving the Commissioner, at which the Department of Justice’s knowledge of the general recording issue was raised, was on 4th March 2014. The Commissioner met with Deputy Commissioner O’Sullivan and Mr Ruane to discuss the Bailey case, but there was also some discussion around a draft letter prepared by Mr Ruane as a report to the Minister under s. 41 of the Garda Síochána Act 2005. According to Mr Ruane, no discussion took place about whether and to what extent the Commissioner had already briefed the Secretary General on the general recording issue.

Mr Callinan’s diary, 2014

11.37 In response to a request from the Commission, Mr Callinan produced a copy of his personal diary for 2014, which he had taken with him on his retirement from office in March 2014. He has, as already stated, been unable to locate his diary for 2013 and searches of Garda Headquarters have also failed to locate it.

In 2013 and 2014, Commissioner Callinan’s appointments were kept on an electronic diary, managed by staff in the Commissioner’s Office. Mr Callinan used his own diary as an informal notepad for his own purposes.

There are two entries in his 2014 diary which are of significance in this context:-

- On 7th January 2014, Mr Callinan wrote: “Meeting Sec. Gen here on Thursday c10am – update him on Murders, phone recordings, Bailey etc.”
- On 10th March 2014, Mr Callinan wrote: “Letter to Sec Gen by hand – Update on phone recordings @ Stations.”

The Commission is satisfied that both entries were made by Mr Callinan on or about the respective dates indicated. Despite their apparent relevance to the question of whether or not the Secretary General was briefed by the Commissioner prior to 10th

March 2014, Mr Callinan did not draw these entries to the attention of the Commission and appeared unaware of their existence until the Commission asked him to comment on them.

11.38 The first entry refers to a proposed meeting with Mr Purcell, Secretary General of the Department of Justice, at 10 a.m. on Thursday, 9th January 2014. Neither Mr Callinan nor Mr Purcell have any recollection of the meeting taking place, although it seems likely that it did. The meeting was entered in Mr Purcell's electronic diary for 10 a.m. Between 8.56 and 8.58 a.m. on that day, the following exchange of text messages took place between Mr Purcell and Mr Callinan:-

- [From Mr Purcell]: "Martin, would it be ok to put the meeting back to 11? Brian."
- [From Mr Callinan]: "Perfect Brian"
- [From Mr Purcell]: "Thanks see u then."

Commissioner Callinan's electronic diary records a meeting with the Secretary General being scheduled for the Commissioner's office at 11 a.m. The colour of the entry indicates that the appointment was 'accepted' by the Commissioner. There is also an email disclosed to the Commission by Mr Purcell's Private Secretary, which was received at 11.32 a.m., the contents of which imply that Mr Purcell was out of his office at that time.

11.39 Formally scheduled meetings of this kind between the Garda Commissioner and the Secretary General were not a frequent occurrence. The Commissioner's electronic diary for 2013 contains only 5 such meetings for the year, taking place in January, May, July and October 2013. If the meeting of 9th January 2014 did take place, it is very surprising that neither party would remember it.

11.40 If one accepts that the meeting did take place as arranged, the content of what was discussed is still unknown. No minute of the meeting has been disclosed to the Commission and neither Mr Purcell nor Mr Callinan has any recollection of the meeting.

However, the use of the word “update” in Mr Callinan’s own diary entries of January and March 2014 possibly suggests that, at the time they were written, Mr Callinan himself believed that he had already informed the Secretary General of the phone recording issue.

12. Informing of Department of Justice: Analysis of Evidence

- 12.1 The Commission considers that it must seek to resolve the question of whether the Secretary General of the Department of Justice, Mr Purcell, was informed in November 2013 about issues relating to Garda telephone recordings, as part of its report on sub-paragraph 1(n) of the Terms of Reference, which concerns the “furnishing to the Minister” of the letter of 10th March 2014 from the former Garda Commissioner.

In reporting on the furnishing to the Minister of the 10th March 2014 letter, the Commission must necessarily investigate the circumstances by which the Minister came to be informed of the issues contained in the letter and report on whether he should have been made aware of those issues at an earlier date. The question of whether the former Garda Commissioner informed the Secretary General, Mr Brian Purcell, in November 2013 is highly relevant. The date of the furnishing of the letter to the Minister would be much less significant if the Minister or the Secretary General was already aware of the issues raised in it.

- 12.2 The question of what the Minister ought to have been told and when is also relevant to sub-paragraph 1(o) of the Terms of Reference, which concerns the sequence of events leading to the former Commissioner’s retirement. As is made clear elsewhere in this Report, the evidence of the former Minister, Mr Alan Shatter, is that he remained unaware of the general recording issue until Monday, 24th March 2014. Mr Shatter, the Taoiseach, Mr. Enda Kenny, and the Attorney General, Ms Máire Whelan, have all expressed the view in evidence that if he, Mr Shatter, had been aware of the issue at an earlier stage, the events which led to the retirement of the Garda Commissioner would not have unfolded in the manner in which they did.

- 12.3 It has been accepted by all of the key witnesses interviewed by the Commission, including Mr Callinan himself, that the information given to him in or around November 2013 concerning Garda telephone recording systems was important and serious enough to give rise to an obligation under s.41 of the Garda Síochána Act 2005 to keep the Minister for Justice and the Secretary General of the Department fully informed.

The former Garda Commissioner has given evidence that his normal route for conveying information to the Minister was *via* the Secretary General and this has not been disputed. The key question, therefore, is whether and to what extent the Commissioner reported the matter to the Secretary General when it was first drawn to his attention in or around November 2013.

It is an established fact that no written report was made to either the Secretary General of the Department of Justice or the Minister until 10th March 2014, some four months after the Garda Commissioner became aware of the issue. There remains the question of whether an oral report was made. The Commission faces the difficulty that the former Commissioner, Mr Callinan, and the former Secretary General of the Department, Mr Purcell, have given directly contrary evidence of the facts.

- 12.4 The Commission accepts the honesty of the testimony of both Mr Callinan and Mr Purcell. Mr Callinan positively states that he has a clear memory of reporting to Mr Purcell on two occasions. Mr Purcell is equally clear that those conversations did not take place.
- 12.5 The Commission has sought and reviewed all available documentation and telephone records that could help to shed light on this issue, but the evidence obtained from this process has not proved conclusive. In part, this is due to gaps in the written record – such as the absence of Mr Callinan’s 2013 diary, or the fact that no note or record exists to confirm the substance of matters discussed by the two men in their telephone conversations during November 2013, or at their meeting on 9th January 2014.

In the view of the Commission, Mr Ruane’s note of 22nd November 2013 saying that the Commissioner “will inform” the Secretary General, strongly suggests that Mr Callinan had not, in fact, informed the Secretary General up to that point. It does not shed any light on whether Mr Callinan contacted the Secretary General after 22nd November 2013 – although his statement to Mr Ruane, Head of Legal Affairs of An Garda Síochána, that he “had no problem” with informing Mr Purcell certainly suggests that the Commissioner intended to report on the issue after that date. In this regard, Mr Callinan’s diary entry of 7th January 2014, with its reference to

“updating” the Secretary General, provides some, if slight, support for his contention that he had informed Mr Purcell of the issue at some point before the end of 2013. The meeting was scheduled to discuss “Murders, phone recordings, Bailey etc” and it is possible that the term “update” referred to matters other than recordings and Bailey.

- 12.6 Mr Callinan strongly rejected any suggestion that he might have wished to keep the general recording issue or matters relating to the Bailey recordings from the Department of Justice. He said that he had “*no reason whatsoever*” to exclude the Department from this. He pointed to other occasions on which he had informed the Secretary General of “*matters that certainly wouldn’t have shown An Garda Síochána in a good light*”, including instances of improper and illegal behaviour by members of An Garda Síochána. He also referred to the fact that he had consulted the Attorney General’s Office as further evidence that he was not engaged in an attempt to withhold information from the Department:-

“I mean, the Attorney General sits at Cabinet, she sits with the Taoiseach and the Tánaiste and the Minister and she has interplay with all of those at various times. If I’m going to the Attorney General’s Office the minute I hear about this wider recording of non-999 telephone calls, if I’m going for advice there... why in the name of God would I seek to hide that from the Department, knowing well that there’s every possibility that the Attorney General would mention this either to my Minister or to the Tánaiste or Taoiseach or any other Minister. It just wouldn’t make sense to me...”

- 12.7 It may be observed here that nobody suggested that the Commissioner had deliberately withheld information from the Department of Justice. Equally, it is not sufficient for Commissioner Callinan, in performance of his own duty, to rely on his assumption that the Attorney General’s Office would inform the Department. The fact is that the Attorney General’s Office offered to inform the Department of Justice, but Mr Ruane, on behalf of Commissioner Callinan, declined the offer.
- 12.8 For his part, Mr Purcell has been equally adamant. He was very clear in saying, not merely that he did not recall a conversation in which the Commissioner informed

him of the recording issue, but that, so far as he was concerned, no such conversation took place. Mr Purcell added that, had the matter been brought to his attention in November 2013, he would, at a minimum, have mentioned it to the Assistant Secretary in the Department of Justice, Michael Flahive, with whom he was in daily contact on matters related to An Garda Síochána. The Commission accepts Mr Flahive's evidence that he was not made aware of the issue, by Mr Purcell or anyone else, in November 2013.

- 12.9 On the evidence before it, the Commission is satisfied that Mr Callinan accepted the importance of informing the Secretary General about the general recording issue in November 2013 and that he intended to do so by making a written report, which he ultimately did. On the first occasion on which he gave evidence to the Commission, Mr Callinan explained that he would need to have all the salient facts, before he could prepare a written report for the Secretary General. When recalled and further questioned on this point, Mr Callinan accepted that he could have made a written report which would have described the position as it was and pending the establishment of all the facts. The Commission is satisfied that it would have been perfectly possible to make a written report to either the Secretary General or the Minister based on such information as was available in November 2013. The statutory obligation is to keep the Minister "fully informed". In the view of the Commission, keeping the Minister fully informed would have required the Department of Justice to be informed of the matters emerging regarding telephone recording both as regards the specific instance of Bandon Garda station and its connection with the Bailey case and the general systems of recording insofar as An Garda Síochána were then aware of them.

- 12.10 A full account of the history and operation of Garda telephone recording systems must await the Final Report of the Commission.

Nonetheless, that information and its possible implications were recognised by the Attorney General's Office in November 2013 as being sufficiently important to warrant the Minister for Justice being informed of the issue. It is clear that this did not take place. The issue was not brought to the Minister's attention until March

2014. Responsibility for this must lie with either the Garda Commissioner, Mr Callinan, the Secretary General of the Department, Mr Purcell, or both.

- 12.11 In the absence of any report in writing to the Department, the Commission must address the question whether the Commissioner, Mr Callinan, made a verbal report to the Secretary General as he alleges. The obligation of the Commission under s. 32(1) of the Commissions of Investigation Act 2004 is to make a report “based on the evidence received by it, setting out the facts established in relation to the matters referred to it for investigation.” Section 32(2) provides:-

“If for any reason (including insufficient, conflicting or inconsistent evidence) a commission considers that the facts relating to a particular issue have not been established, the commission in its report—

(a) shall identify the issue, and

(b) may indicate its opinion as to the quality and weight of any evidence relating to the issue.”

- 12.12 Essentially, therefore, the Commission must seek to establish the facts. Clearly, it should apply the standard of balance of probabilities.
- 12.13 The Commission finds that the Commissioner, Mr Callinan did not report the general recording issue to the Secretary General prior to 22nd November 2013. In coming to this conclusion, the Commission places particular reliance on the evidence of Mr Ruane’s note of that date – which states that the Commissioner “will inform” the Secretary General and makes no reference to his having already done so.
- 12.14 The remaining question then is whether Mr Callinan informed Mr Purcell at some point after Friday, 22nd November 2013, as he had indicated to Mr Ken Ruane he would. The telephone records show evidence of a phone conversation between the respective offices of the Commissioner and the Secretary General on Tuesday, 26th November 2013, which lasted approximately 17 minutes. Given the proximity of this conversation to Mr Callinan’s undertaking on 22nd November 2013 to inform Mr Purcell and the fact that it was the day after the Bailey discovery application had

been heard in the High Court,²² this is the most likely occasion on which the Commissioner would have informed Mr Purcell.

- 12.15 The Commission faces a direct conflict of evidence between two witnesses, each of whom is equally certain, one of the fact that the conversation took place and the other that it did not.
- 12.16 It would not be reasonable to place any burden on Mr Purcell to produce any evidence that the conversation did not take place, to prove a negative. It is much more natural to expect Mr Callinan, who was the Garda Commissioner, to produce something in the way of a contemporaneous note or record or even some conversation with other persons to support his version. He has been passionate and ultimately, so far as the Commission is concerned, convincing in saying that he reported the matter to Mr Purcell. It is inherently more probable that Mr Callinan's positive memory of the phone call is more correct than that of Mr Purcell's denial, which is capable of being explained by a failure of memory. The Commission has unearthed only one small and single piece of independent evidence on either side. It is the entry in Mr Callinan's diary for 7th January 2014, which reads: "Meeting Sec. Gen here on Thursday c10am – update him on Murders, phone recordings, Bailey etc." Strangely, Mr Callinan himself did not draw the attention of the Commission to this entry. Nor did he (or Mr Purcell for that matter) remember at all the meeting of 9th January 2014 to which this entry related, a meeting which very probably took place. The diary entry refers both to "phone recordings" and "Bailey." The obvious meaning of "update" is that the Commissioner had already informed Mr Purcell of these matters.
- 12.17 However, the Commission, while finding that the Commissioner informed Mr Purcell of the matter of the telephone recordings, probably referring to the Bailey case and the general recording systems, is not convinced that the Commissioner explained the implications of the emergence of the recordings, in either the Bailey case or more generally, and did not attach any real urgency or importance to it. Otherwise, Mr Purcell would have been more likely to remember it. In conclusion, the Commission accepts that some verbal report of a general kind was made, but it

²² See below para. 13.1 -13.5.

was not of such significance as to make any real impact on Mr Purcell. It is significant that Mr Callinan agrees that he did not ask Mr Purcell to inform the Minister.

- 12.18 Such a verbal report did not comply with the Commissioner's obligation to keep the Secretary General and the Minister "fully informed" as required by s. 41 of the Garda Síochána Act 2005. This obligation was not complied with until the letter of 10th March 2014 was delivered to the Department of Justice.

13. Further Developments, November 2013 – February 2014

Developments in Bailey case, November 2013

13.1 As already stated, on Friday, 22nd November 2013, an internal meeting was held at Garda Headquarters to discuss the Bailey case, which was due for mention in the High Court on the following Monday. The Garda Commissioner, Mr Callinan, Deputy Commissioner O’Sullivan and Head of Legal Affairs of An Garda Síochána, Mr Ruane, attended the meeting, along with Chief Superintendent Hayes and other officers of An Garda Síochána involved in the Bailey discovery process.

13.2 Mr Ruane conveyed the preliminary views of counsel – firstly, that digital audio tape recordings could come within the definition of “documents” discoverable under the Rules of the Superior Courts, and secondly, that at least two and possibly all three of the recordings, of which transcripts were obtained in October 2013, would come within the terms of the discovery order.

Following discussion, it was agreed that an extension of time for filing the affidavit of discovery would be sought when the matter next came before the court. Mr Ruane noted:-

“Counsel will refer in court that we are examining ‘phone traffic’ in & out Bandon GS [Garda station] & time required to allow us to finalise Discovery process.”

13.3 Mr Ruane attended in the High Court on 25th November 2013, when the extension of time was sought. His note of what was said at the hearing includes a reference to “New material discovered – ‘phone traffic’.” Elsewhere he noted counsel referring to “Data in electronic form. Fresh & unexpected / Difficult to unscramble”.

13.4 An attendance note of the hearing produced on behalf of the Chief State Solicitor’s Office makes no mention of recordings or “phone traffic” but states that counsel explained the difficulties in dealing with “the large amount of electronic material” that had to be gone through. This note was copied to the Department of Justice and the Attorney General’s Office.

- 13.5 Having heard the application, the Court granted the extension. The defendants were given until 25th March 2014 to make discovery of the new material.

Contact between the Department of Justice and An Garda Síochána, December 2013

- 13.6 The Department of Justice continued to have limited involvement in matters concerning the defence of the Bailey Case in the period from November 2013 to the end of February 2014.
- 13.7 In December 2013, the Taoiseach's Department sought material to answer possible Leader's Questions concerning the case, arising out of some press publicity. The material was prepared by An Garda Síochána and transmitted through the Department of Justice. Mr Ruane, who handled the matter for An Garda Síochána, took a cautious approach. He explained in evidence that, while he had had no intention of withholding information, he did not wish to compromise advice that was still being given by putting matters in the public domain. The briefing note did not refer to the recording of telephone calls, either at Bandon Garda station or elsewhere, but rather to the emergence of "a number of old electronic files" which would have to be reviewed to ensure full compliance with the discovery order.
- 13.8 On 19th December 2013, a consultation was held in the Bailey case. It was attended by the Commissioner, Mr Callinan, Deputy Commissioner O'Sullivan, Mr Ruane, other members of An Garda Síochána, Ms Duchene from the Chief State Solicitor's Office, Mr Matt Feely from the Attorney General's Office, Mr Paul O'Higgins, Senior Counsel, and Mr Luán Ó Braonáin, Senior Counsel. The Department of Justice was not represented. Mr Ruane was of the view that their attendance was not necessary.
- 13.9 Following the meeting, Mr Feely asked for a copy of the transcripts of the telephone recordings in the Bailey case on behalf of the Attorney General's Office. Mr Ruane said he would prefer to wait until he had received the advice of senior counsel regarding their effect on liability in the case. Mr Feely agreed with this.

Further developments, November 2013 – January 2014

- 13.10 As previously indicated, the process of collecting all extant tape recordings from Garda stations around the country began on or around 11th November 2013, in response to a verbal instruction which was understood to have originated with the Commissioner, Mr Callinan.²³ This process was supervised by Superintendent Michael Flynn, ICT.
- 13.11 At the suggestion of Mr Ruane, it was decided, on or around 21st November 2013, to establish a high-level working group to oversee this process. The group consisted of Mr Ruane; the CAO, Mr Dunne; the Executive Director ICT, Mr Kidd; and the Assistant Commissioner Crime & Security, Mr O'Mahony. As it transpired, the work of collecting the tapes was carried out by ICT section without any significant input from the working group until mid-January 2014. Superintendent Flynn does not recall being asked for progress reports by anyone from ICT or from senior management of An Garda Síochána during this period.
- 13.12 The task of reviewing the tapes found at Bandon Garda station to determine whether or not they contained any more calls relevant to the Bailey proceedings, began on the 14th January 2014. A team of six members of An Garda Síochána was increased to ten in February 2014 and thereafter the process continued with assistance from junior counsel. Approximately 3080 hours of Garda time resulted in almost 40,000 calls being listened to. Transcripts of calls identified by counsel as relevant to the discovery order in the Bailey case were then prepared and forwarded to the Chief State Solicitor's Office.
- 13.13 In relation to the general recording issue, the process of gathering tapes from stations around the country continued during December 2013 and January 2014. Searches were conducted by Divisional Telecommunications Technicians and any tapes found were collected and then brought to Garda Headquarters for secure storage.
- 13.14 On 17th January 2014, Mr Ruane wrote to the CAO, Mr Dunne, concerning the general recording issue. The letter was copied to Mr Kidd and Deputy Commissioner

²³ See para. 7.7 above.

O’Sullivan. Mr Ruane referred to an earlier letter from the Deputy Commissioner of 27th November 2013 and repeated the request therein for an inventory of recordings, as required by the Attorney General’s Office. The letter went on to request that a meeting be convened “at the earliest opportunity” to discuss a number of related matters, including “the duty of the Commissioner to inform the Minister for Justice and Equality in relation to this issue under section 41 of the Garda Síochána Act 2005.” Mr Ruane added: “My view is it is now appropriate for the Commissioner to duly inform the Minister”.

- 13.15 In evidence to the Commission, Mr Ruane confirmed that, in citing the duty to inform the Minister under s. 41, he was thinking in terms of a written report. His assumption at that time was that a written report had not been made.

Mr Ruane told the Commission he made no assumption as to whether or not the Minister or the Secretary General had already been briefed verbally by the Commissioner. In Mr Ruane’s view, the recording issue was one of such importance and complexity that a written report was necessary, irrespective of whether an oral briefing had taken place:-

“I felt the issue was of such primary importance that a written report should go down, perhaps it wasn’t my place to do it but I felt in the context of the general issue and the issue in the Bailey discovery becoming live in March that certainly I would have been suggesting or advising the Commissioner that a written report should go down...”

Mr Ruane concluded his letter of January 17th 2014 by suggesting that An Garda Síochána “should now move quickly” to:-

- (i) finalise the outstanding legal advice from the Attorney General’s Office (for which the inventory of recordings was required); and
- (ii) prepare an “action plan to deal with fallout when the matter enters the public domain” (which refers to an earlier comment that “the issue of the recordings will become live and public” in the context of the Bailey litigation).

- 13.16 The Chief Administrative Officer, Mr Dunne, told the Commission that Mr Ruane's letter acted as "*a reminder we need to be really pushing this thing on*". He said that, prior to receiving the letter, he was not conscious of any sense of urgency in the matter. He responded by calling a meeting of the working group – its first – which took place on 29th January 2014.
- 13.17 At the meeting, the Executive Director of ICT, Mr Kidd, produced an interim report on the tape collection process from Superintendent Flynn. The report stated:-
- “...the audio recordings that were stored at each of the Divisional HQs outside of the Dublin Metropolitan Region have all been collected and are stored securely in Garda Headquarters. As previously stated these recordings were made on obsolete Dictaphone recorders locally in each Divisional HQ.”
- Superintendent Flynn's report also indicated that it would take “a number of weeks” to prepare an inventory of what had been recovered.
- 13.18 Mr Ruane stated that he needed the inventory of recordings to further brief the Attorney General's Office. He also said that he was not aware if the Commissioner had sent a written report to the Minister for Justice under s. 41 of the Garda Síochána Act 2005 and repeated his view that he should do so. The working group agreed to meet again in two weeks.
- 13.19 On the evidence before the Commission, it appears that no one briefed the Commissioner on the matters discussed at the working group meeting of 29th January 2014. He was not made aware that the process of collecting tapes in Garda Headquarters had been completed. Nor was he aware, at this time, of Mr Ruane's concern that a report should be made in writing to the Minister on the issue. Nor does he appear to have made any enquiries on these matters.
- 13.20 The next meeting of the working group is considered from paragraph 15.4 below, which deals with the preparation of a written report to the Minister for Justice under s. 41 of the Act of 2005.

14. Further developments, February 2014

14.1 On 17th February 2014, Mr Ruane spoke with Ms Frederique Duchene, Chief State Solicitor's Office, regarding the Bailey case. He reiterated the urgency of getting an opinion from counsel as to the effect of the transcribed recordings on liability in the case. He also raised the question of whether the Attorney General's Office should now be provided with copies of the transcripts, but said that it was a matter for the Chief State Solicitor's Office to decide. Ms Duchene reminded him of his previous decision not to provide the Attorney General's Office with transcripts until written advice on liability had been obtained from senior counsel in the case.

14.2 In the meantime, a team of members of An Garda Síochána had been engaged in the process of identifying audio recordings from Bandon Garda station of potential relevance to the Bailey proceedings. On 25th February 2014, the first batch of recordings from this process was delivered to documentary counsel for review.

14.3 On 27th February 2014, Mr Ruane emailed Ms Duchene to indicate that, following a discussion with Mr Matt Feely from the Attorney General's Office, it was agreed that copies of the first three Bailey-related transcripts (provided to counsel in October 2013) should now be sent to the Attorney General's Office. He went on to state that the Attorney General's Office were of the view that the Department of Justice, as a co-defendant in the Bailey case, should also be copied with the transcripts, adding:-

“I understand that advice from Senior Counsel will be furnished by tomorrow and in this regard I will be guided by the Attorney General's Office as to whether we should wait for this advice before forwarding same to the Department.”

14.4 In the event, advice on quantum and liability was sent by senior counsel to the Chief State Solicitor's Office on the same day, February 27th 2014. On 28th February 2014, the Attorney General, Ms Whelan, read the advice and formally sanctioned its release to the Department of Justice. She added a comment to the transcripts:-

“Careful reflection on the assessment of the position is urgently warranted now.”

This observation was sent to the Department of Justice on Monday 3rd March 2014.

- 14.5 Upon receipt of senior counsel’s advices, Ms Duchene of the Chief State Solicitor’s Office sent an email to Ms Bernadette Keaveney at the Department of Justice on the 28th February, attaching the transcripts and the opinion of counsel. In a phone call earlier that morning, Ms Keaveney had been alerted by Mr Ruane to the fact that these documents would be coming. She had pointed out to him that it was not usual for the Department of Justice to be copied with discovery documentation from An Garda Síochána, but Mr Ruane indicated that, in this instance, given the sensitivity of the case and the content of the transcripts, he felt it necessary that the Department should be made aware of them.
- 14.6 These events call for the following observations. The Commissioner had been aware since October of the existence of these transcripts and, indeed, of the wider practice of recording telephone conversations. He was aware of the recorded telephone calls and, therefore, that the transcripts contained material which was regarded as embarrassing to the force and potentially prejudicial to the defence of the Bailey case. The Department of Justice had not been informed of these matters, save to the extent that the former Commissioner has stated in evidence, and the Commission has found, that he had a limited telephone conversation with the Secretary General, Mr Purcell. Mr Purcell disputes this. Certainly, the Department of Justice had not been informed in writing. The Minister had not been informed in any form.
- 14.7 It has already been noted that Mr Ruane told Ms Keaveney, in a telephone call on 9th December 2013, of the existence of phone recordings in and out of Bandon Garda station and had referred to transcripts of phone calls. He also said that the transcripts had been forwarded to the Chief State Solicitor’s Office and that that office could send on details to the Department of Justice. Between then and the end of February 2014, no other steps were taken by An Garda Síochána to see that the Department was provided with the transcripts.

- 14.8 When the opinion of counsel and the transcripts arrived at the Department of Justice on the afternoon of Friday, 28th February 2014, they were forwarded by email to the Assistant Secretary in charge of the Garda Division, Mr Michael Flahive. According to Mr Flahive, that was the first time he became aware of an issue relating to Garda telephone recordings. He had seen references to “electronic files,” in earlier documentation but, understandably, had not appreciated that this involved audio recordings.

Mr Flahive told the Commission in evidence that it was not the existence of recordings *per se* but their content that impacted upon him at this point – and the potential effect of that content on the outcome of the Bailey case. Questions around the legality of the recordings, or the extent to which An Garda Síochána were recording telephone calls outside of Bandon Garda station did not occur to him at this stage.

- 14.9 Mr Flahive, in turn, sent the email and attachments to Mr Denis Griffin, Private Secretary to the Secretary General. In his email, he asked Mr Griffin to show this to Mr Purcell immediately. Mr Griffin told the Commission in evidence that he did this. He recalled that Mr Purcell then spoke to Mr Flahive “*within a few minutes*” of receiving the documents.

- 14.10 Mr Purcell confirmed in evidence that the transcripts and counsel’s opinion were brought to his attention in or around the end of February 2014, though he could not be precise as to when. He does not remember speaking to the Minister for Justice, Mr Shatter, about the matter and the evidence of Mr Shatter is that he was not told about it at this time. Mr Purcell told the Commission:-

“I would have spoken to Michael Flahive about this... I was aware that there were going to be further consultations with counsel. So it would have been the case that I was going to wait and see what the outcome of those consultations would be. In hindsight, it probably would have been better if I had said to the Minister, listen, we’ve got some stuff in on the Bailey case, we will be having further consultations with the AG and we’ll keep you posted as it moves on.”

- 14.11 Similarly, Mr Flahive had no specific recollection of discussing the matter with Mr Purcell but believes he would have done so.

He continued:-

“... we needed the advice of the Attorney or the Attorney’s Office, we needed to hear across the table what Luán Ó Braonáin and Paul O’Higgins thought and after that consultation we could assess what needed to be done, which could include informing the Minister if that needed to be done but no decision was needed from the Minister. This was not going public, there was no point of crisis being reached.”

- 14.12 On the same day that the transcripts and opinion of counsel were sent to the Department of Justice, February 28th 2014, the Head of Legal Affairs of An Garda Síochána, Mr Ruane, rang the Commissioner to inform him that this had been done and to brief him on where matters now stood in relation to the Bailey case. The Commissioner instructed Mr Ruane to organise a consultation with all the relevant stakeholders, including the Chief State Solicitor’s Office, the Attorney General’s Office and the Department of Justice, to discuss how to proceed in light of the approaching deadline for discovery.

15. Preparing the Section 41 Report

Communication - ICT and Legal Affairs

15.1 On the 29th January 2014 – following the first meeting of the Garda working group established to oversee collation of the existing tape recordings –Mr Ruane asked for material from the Executive Director ICT, Mr Kidd, to enable him to prepare a draft written report for the Commissioner to send to the Secretary General for the Department of Justice under s. 41 of the Garda Síochána Act 2005 (the “Section 41 Report”). Mr Ruane was provided with copies of the following:-

- Superintendent Flynn’s initial email report of 18th October 2013 regarding Garda telephone recording systems;
- Superintendent Flynn’s report of 25th October 2013 with enclosures including:
 - documents described by Superintendent Flynn as “a partial file” from 1996 describing “what should be recorded”; and
 - a list of stations where recording was taking place, and the telephone extensions that were being recorded as at 22nd October 2013.

This was the first occasion on which Mr Ruane had sight of the information compiled by ICT in relation to the general recording issue.

15.2 Up to this point, Mr Ruane had not discussed the sending of a written report under s. 41 of the Act of 2005 with the Commissioner and he had received no instruction to prepare such a report. He admitted that it was unusual for him to commence drafting a report in such circumstances, but indicated that his advice to Commissioner Callinan would ultimately have been that a written report should go down, and, in light of the impending deadline of 25th March 2014 for discovery in the Bailey case, he took it upon himself to begin the process of drafting a report.

- 15.3 For his part, Mr Callinan stated several times in evidence that, from the time he first learned of the general recording issue, it had always been his intention to submit a report in writing under s. 41 of the Act of 2005. Although he did not recall mentioning this to Mr Ruane at any stage, he referred to the fact that he had made written reports on other issues in the past and stated:-

“...it would be no surprise that I was going to report when I had a clearer picture and we had gathered all the materials.”

Working Group meeting

- 15.4 The second and final meeting of the working group took place on 18th February 2014 in the office of the Chief Administrative Officer, Mr Dunne. Assistant Commissioner O’Mahony, who was a member of the working group, was not present.
- 15.5 The day before the meeting, Mr Ruane wrote to Mr Dunne and the other working group members enclosing two documents “to be forwarded to the Commissioner for his attention after review by the Working Group”. The documents were:-
- (i) a draft version of the proposed report to the Secretary General of the Department Justice under s. 41 of the Act of 2005, and
 - (ii) a draft certificate to be signed by Divisional Chief Superintendents, confirming that all outstanding tapes in their area had been collected.

Mr Ruane told the Commission that he circulated the draft Section 41 Report in order to get “*the ICT perspective*” on it, and to ensure that his account of the history of Garda telephone recording systems was factually accurate.

- 15.6 At the working group meeting, Mr Kidd said that the inventory of tapes, which had been requested by the Attorney General’s Office at the meeting of November 11th 2013, was being finalised and would be available shortly. He said that 2,485 tapes had been collected to date. Mr Ruane said that the Section 41 Report for the Minister could be finalised when the inventory had been furnished and it was agreed that this should be done.

Inventory of recordings

15.7 On 19th February 2014, Superintendent Flynn, ICT, sent a written report on the recordings of telephone conversations made and retained in Garda Stations to Mr Kidd, Executive Director ICT. There were two appendices to that report. Appendix I was entitled “The Inventory of Dictaphone Tapes Returned.” It listed numbers of tapes retained in fourteen Divisional Garda Stations in respect of different years from 1995 to 2008. The total number of tapes was 2,485. Appendix II was an “Inventory of Dictaphone Solid State Recordings.” This covered the period 2008 to 2013, listing the lines that had been connected for recording during that time on a station-by-station basis. Mr Kidd transmitted Superintendent Flynn’s report on the following day to Mr Ruane, the Head of Legal Affairs of An Garda Síochána. Mr Ruane forwarded the report and appendices to Ms Fitz Gerald at the Attorney General’s Office on 28th February 2014.

Completion of draft s.41 report

15.8 On 24th February 2014, Mr Ruane wrote to Deputy Commissioner O’Sullivan. He enclosed copies of the following documents:-

- (i) the proposed draft report to the Secretary General of the Department of Justice under section 41 of the Act of 2005;
- (ii) the draft certificate to be completed by Chief Superintendents in order to ensure that all outstanding recordings were collated;
- (iii) a copy of Superintendent Flynn’s report and inventory of 19th February 2014; and
- (iv) a copy of the three transcripts from the Bailey case (first obtained by An Garda Síochána in October 2013) and a schedule of other recordings relating to the Bailey discovery process, dated 20th February 2014.

He advised that, in light of the fact that the Minister was a co-defendant in the Bailey case, and also considering the obligations imposed on the Commissioner under s. 41 of the Garda Síochána Act 2005, the Minister “should be informed of the existence

of the current recordings and transcripts which will be discovered in the Ian Bailey civil proceedings together with the general issue of recordings in all other stations...”

- 15.9 Deputy Commissioner O’Sullivan forwarded the letter and the attached documents to the Commissioner, Mr Callinan, for his attention, on 27th February 2014. In a covering letter, she repeated Mr Ruane’s recommendation that the Minister should be informed of both the Bailey-related recordings and the general recording issue. The Commissioner expressly referred to these transcripts in his section 41 Report of March 10th.
- 15.10 The issue of the Bailey-related recordings was brought to the attention of the Department of Justice on 28th February 2014, when the Department was provided with transcripts and the opinion of counsel. This left the question of whether and in what form it was necessary to inform the Department and the Minister of the state of affairs in relation to the general recording issue. Up to this time, apart from a verbal report of a general kind made by the Commissioner to the Secretary General (which is disputed by Mr Purcell), nobody in the Department of Justice had any knowledge of the general recording issue.

Consideration of draft s.41 report by Garda Commissioner

- 15.11 On 4th March 2014, Mr Ruane responded to a query from the Garda Commissioner’s office seeking clarification as to whether a paragraph in his draft Section 41 Report, summarising the history of telephone recording at Garda stations was correct. Later on the same day, Mr Ruane met with the Commissioner, Mr Callinan and Deputy Commissioner O’Sullivan to discuss the Bailey case. Towards the end of the meeting, the Deputy Commissioner raised the question of sending a briefing report to the Minister for Justice under s. 41 of the Act of 2005. Mr Ruane noted the Commissioner as saying:-

“Do I have to send Report, can I give briefing verbally to Secretary General?”

Mr Ruane, supported by Deputy Commissioner O’Sullivan, expressed the view that the issue was of such importance that a written report should go.

- 15.12 Following the meeting, the Garda Commissioner discussed the text of the draft Section 41 Report with Mr Ruane and some minor changes were made. A revised draft was sent to the Commissioner's office by Mr Ruane on 5th March 2014. Some further amendments were made to this draft by the Commissioner, the most significant of which was the mention of a meeting arranged for 10th March 2014 with counsel, the Attorney General's Office and Mr Flahive from the Department of Justice, at which "this matter and other pertinent issues will be discussed". That meeting had, in fact, been arranged to discuss the Bailey case, although the letter implied that the general recording issue would also be considered.
- 15.13 The s.41 Report, in its final version, was signed by the Commissioner and hand-delivered to the Department of Justice on the morning of 10th March 2014. This letter is replicated in full at paragraph 2.4 above.

Delivery of the Section 41 Report to the Department.

- 15.14 Mr Denis Griffin is the Private Secretary to the Secretary General of the Department of Justice. The normal practice is to open each letter received in the office of the Secretary General and date-stamp it. Mr Griffin would then read it to determine the senior official responsible for its subject-matter and he would write that name on the top right corner of the letter. The letter would be scanned and emailed to that official. In this case, Mr Griffin wrote the name of Mr Michael Flahive, the Assistant Secretary responsible for the Garda Division, on the letter which had been received from the Garda Commissioner. While Mr Griffin had no recollection of handling the letter of 10th March 2014, he had no doubt that he gave Mr Purcell the copy, probably within a few minutes. He would have no authority to decide that a letter should go to the Minister. He could do that only under the direction of the Secretary General or, in his absence, an Assistant Secretary.
- 15.15 Mr Brian Purcell, the Secretary General of the Department of Justice, had no specific recollection of receiving the letter. He had received no advance telephone warning from the Commissioner that such a letter was coming. He said that he would have had a quick look at the letter and would have seen that the letter had gone to the

relevant section, in this case to Mr Michael Flahive, the Assistant Secretary responsible for the Garda Division.

15.16 Thus, the action taken on 10th March 2014 was to forward the letter to Mr Flahive for him to deal with. Mr Purcell did not inform the Minister either of the receipt of the letter or of its contents, nor did he provide him with a copy, notwithstanding the opening sentence which stated: “I wish to bring the following to the Minister’s attention in accordance with Section 41(d) of the Garda Síochána Act 2005”. Mr Purcell explained that Mr Flahive would have been aware of the background to the Bailey case and would have had people in his area who were dealing with it. Mr Purcell gave Mr Flahive no instructions about what was to be done in respect of the letter.

15.17 Mr Purcell’s assessment of the situation was that, insofar as the systemic issue of telephone recording was concerned, this had been stopped by the Commissioner the previous November and that no immediate or urgent decisions were required. In short, the problem was not continuing, because the recording had been stopped. Furthermore, the tapes had then been gathered and securely stored. In Mr Purcell’s view that would have dealt with any of the Data Protection Act issues raised in the letter. Mr Purcell was asked whether it had struck him that there might be wider issues than Data Protection in terms of people’s rights and rights of privacy. He acknowledged that there could be such issues. Again, his view was that, whatever had happened, it had now been stopped.

15.18 Fuller reference will be made later to the evidence of Mr Alan Shatter, the former Minister for Justice. At this point, it is sufficient to note that Mr Shatter said in evidence that he would have assumed that a letter on an issue of such importance and going to the Secretary General would have been brought instantly to his attention. Mr Shatter also said that, bearing in mind all the other controversies around An Garda Síochána at that time, he would have expected that Mr Purcell would have regarded the letter as sufficiently important to bring it to his attention. It was an absolute and complete mystery to him, he said, that he would not have been given the letter. He made the same comment concerning Mr Flahive.

- 15.19 Mr Purcell accepted, in his evidence to the Commission, that it certainly would have been better if the letter had immediately been sent to the Minister when it came in. He qualified this statement by saying that it was made with the benefit of hindsight.
- 15.20 Mr Michael Flahive has been Assistant Secretary in the Department of Justice responsible for the Garda Division since 2002. He first became aware of the general issue of telephone recordings at Garda Stations on 10th March 2014, the day the Commissioner sent his letter.

Mr Flahive read the letter on receiving it and his assessment was very similar to Mr Purcell's. He noted the information about the Bailey case. He noted that the Commissioner described a more general issue, of which the Commissioner had become aware some time in 2013, that the Commissioner had stopped the practice of recording non-999 calls and that the office of the Attorney General had been informed. Mr Flahive had the impression that the matter was serious and very important, but that there appeared to be a level of acceptance by the Attorney General's office that the matter was being managed appropriately. He drew comfort from the fact that the Attorney General's office had been involved and had not sought to involve the Department of Justice. He thought that the Department would clearly have to follow up and get to the bottom of what had happened. He was, of course, unaware that the Attorney General's Office had, on more than one occasion, asked that the Department of Justice be informed of the general recording issue.

- 15.21 Mr Flahive was asked, in particular, whether the letter might require to be brought to the attention of the Minister for Justice. He said that he was absolutely clear that his understanding was that the letter would have been brought to the attention of the Minister. He noted that the Garda Commissioner, in this case, had invoked s. 41(1)(d) of the Garda Síochána Act 2005. It seemed to him that, irrespective of "our" (the Department of Justice's) assessment of the seriousness of the letter, the letter would have to be passed on to the Minister. Mr Flahive was questioned closely on this point. It was, he said, "slightly awkward" for him. He did not wish to be pointing fingers or deflecting responsibility, but it was his understanding that the letter would have been passed to the Minister. Putting it in another way, he said that he did not understand that the letter was being referred to him to make a judgment as

to whether the Minister should be informed. In short, Mr Flahive was of the view that the Minister should have received the letter because of its importance but he assumed that Mr Purcell had done so. Mr Flahive was sure that the matter was mentioned in conversation with Mr Purcell but does not recall any specific conversation. Mr Purcell did not recall discussing the letter with Mr Flahive at all. He said that the overarching issue which was dominating the time of the Minister and the Secretary General was in relation to allegations of misconduct within An Garda Síochána. Thus, this issue was part of a bigger picture.

15.22 Mr Flahive himself, on the morning of 10th March 2014, forwarded the email enclosing the letter to Mr Kevin Clarke, Principal Officer in the Garda Division, in accordance with what Mr Flahive said was normal practice. His email, timed at 10:55 a.m., said: “Kevin for information.” There were, he said, important matters that needed to be followed up. The Commissioner had said that he had engaged with the Attorney General’s office and with the Data Protection Commissioner, Mr Billy Hawkes, and there were specific indications for the Bailey proceedings. Mr Clarke was the central figure in the Garda Division dealing with a number of controversies and serious allegations of one sort or another, which were then current, concerning An Garda Síochána. It was important that he be made aware of the letter. Thus it would be a team who would be dealing with the matter. Mr Flahive expected that he would be having discussions with Mr Clarke. He did not give Mr Clarke any instructions.

15.23 The fact is that the letter of 10th March 2014 was not given, in any form, to the Minister at any time from its delivery on 10th March 2014 up to 25th March 2014. Mr Purcell has accepted that it was his responsibility (as Secretary General of the Department of Justice), to bring the letter and its contents to the attention of the Minister. He said that this wouldn’t necessarily have to be done immediately once the letter arrived, but that it should have been done “*reasonably quickly*” – in this instance, by the end of that week, or early the following week. This was not done. Mr Purcell did not seek to pass the blame on to anyone else. Specifically, he said that he had not passed the letter on to Mr Flahive for him to decide whether it should be shown to the Minister. It is important to interpolate at this point that Mr Purcell’s mother was terminally ill at that time. She died on 15th March 2014 and Mr Purcell

was absent on leave for the following week. He said in his evidence: *“on that particular occasion,[his] personal life impinged on [his] work performance [though]...on many occasions in the past, it was the exact opposite.”*

16. Further Developments, March 2014

Consultation on 10th March 2014

- 16.1 On 10th March 2014, a consultation took place at Garda Headquarters concerning the Bailey case. This meeting had been requested by the Commissioner as early as 28th February 2014,²⁴ but, for various logistical reasons, it was not found possible to arrange it prior to 10th March 2014.

The meeting had been arranged to discuss the defence of the Bailey proceedings, with particular reference to the impending disclosure of telephone recordings and their effect on liability in the case.

- 16.2 At around 3.15 p.m. the Head of Legal Affairs of An Garda Síochána, Mr Ruane, emailed a document to the Commissioner and Deputy Commissioner O’Sullivan, which he described as “a further synopsis of further unhelpful issues which have been identified in further recordings which have been furnished by Chief Superintendent Hayes” The document contained brief summaries of other, potentially significant, conversations identified after the original three calls provided to counsel in October 2013.

- 16.3 The consultation commenced at 5 p.m. in the afternoon. It was attended by the Commissioner, Mr Callinan, Deputy Commissioner O’Sullivan, Mr Ruane and other relevant members of An Garda Síochána, as well as senior and junior counsel for the State, Mr Flahive and Ms Keaveney from the Department of Justice, Ms Duchene from the Chief State Solicitor’s Office and Ms Fitz Gerald from the Office of the Attorney General. The meeting continued until 7.15 p.m. Ms Duchene, Ms Fitz Gerald, Ms Keaveney and Mr Ruane made detailed notes of the issues discussed.

At the outset, Mr Ruane indicated that the purpose of the meeting was to discuss the defence of the Bailey case. He made particular reference to the ongoing discovery process and the fact that more recorded conversations had been found which would have to be disclosed and were “unhelpful” to the defence of the case.

²⁴ See above para. 14.12.

- 16.4 The Commissioner, in his letter to the Secretary General earlier that day, had stated an intention to discuss the general recording issue at the meeting of 10th March 2014, alongside the Bailey case. It would appear that it was not, in fact, discussed to any significant extent.
- 16.5 Ms Duchene noted that counsel at one point queried why An Garda Síochána were recording telephone conversations. No explanation was offered in response, but it was noted that there was a data protection issue in relation to recordings, on which advices were being sought from the Attorney General. It is noteworthy that Counsel who were advising the State on the defence of the Bailey case were not informed, at any time, that a broader issue had emerged of general recording of non-999 calls in Garda stations around the country.
- 16.6 The fact that the Commissioner had written to the Secretary General on the general recording issue earlier that day was not mentioned at the meeting. Legal counsel and the representatives of the Chief State Solicitor's Office and Attorney General's Office were unaware of the letter of 10th March 2014 and had been told that the sole purpose of the meeting was to discuss the Bailey case. Mr Flahive from the Department of Justice had seen the letter but did not refer to it at the meeting and the Commissioner himself made no reference to it.
- 16.7 Although the general recording issue was not the focus of the meeting, it did come up informally in conversations which took place before and after the meeting itself. Whilst waiting to go into the room, Mr Flahive mentioned to Ms Fitz Gerald that the recording issue was bigger than the Bailey case. Ms Fitz Gerald said in evidence that this was the first conversation she had with anyone from the Department of Justice in relation to the general recording issue. She told Mr Flahive that she was preparing advices on the issue.
- 16.8 As the meeting broke up, Mr Flahive had a conversation with the Commissioner, who referred to the general recording issue. He told Mr Flahive that when he had discovered the matter the previous November, it had come as a complete surprise to him. He had never known of its existence. The Commissioner said he had caused inquiries to be made of retired Commissioners and they had told him that they had

never known of it. Neither Mr Callinan nor Mr Flahive could recall whether the letter of 10th March 2014 was referred to explicitly in the course of this brief conversation, but Mr Flahive said that the conversation took place on the understanding that he was aware of the letter and its contents.

- 16.9 The Commissioner said to Mr Flahive from the Department of Justice that he would like to brief the Secretary General personally on the implications of the recordings in the Bailey case and the advices of counsel as to how to proceed in the case. Mr Flahive immediately phoned Mr Purcell on his mobile and arranged a meeting for the next morning, 11th March 2014.
- 16.10 In a separate conversation that took place after the meeting had broken up, the Head of Legal Affairs of An Garda Síochána, Mr Ruane, raised the general recording issue with Ms Fitz Gerald, who told him that she was still working on general advices on the issue and that the views of the Data Protection Commissioner might have to be sought. It could not be ruled out, she said, that her advice may be to destroy the tapes.
- 16.11 Later that evening, Mr Ruane texted Ms Fitz Gerald saying that he would not be able to attend the meeting that had been arranged in the Department of Justice. The purpose of this meeting was to fully brief the Department on the Bailey case and on the consultation that had occurred that day. Ms Fitz Gerald had been due to be on leave the following day but she said she would attend the meeting. She said that she was more concerned about the advice to be given on the general recording issue. Mr Ruane replied: *“I expect Ruth in any event we will need to consult Data protection Commissioner. If issue is to become public we are better to preserve them rather than the optics of destroying the data at this point”*
- 16.12 Following this exchange with Ms Fitz Gerald, Mr Ruane sent a lengthy email to the Garda Commissioner and Deputy Commissioner O’Sullivan, outlining the issues that had been clarified at the consultation that evening.

Meeting of March 11th 2014

16.13 On the morning of 11th March 2014, the meeting took place at the Department of Justice, concerning the Bailey proceedings, as arranged. Among those attending were the Garda Commissioner, Mr Purcell, Mr Flahive, Ms Fitz Gerald, and Ms Duchene from the Chief State Solicitor's Office.

The Garda Commissioner outlined the views expressed by counsel at the consultation on the previous day regarding the discovery process in the Bailey proceedings and the likely effect on the case.

16.14 Mr Purcell and Mr Flahive both gave evidence that the focus of this meeting was more or less entirely on the Bailey proceedings and that the more general issue of telephone recording was raised, but only in passing. In his statement to the Commission, Mr Purcell stated:

"During the course of the consultation on 10th March and the meeting of 11th March the emphasis was firmly concentrated on the Bailey case, in particular on the content of the transcripts of the telephone conversations between members of An Garda Síochána at Bandon Garda Station, between members of An Garda Síochána and journalists and between members of An Garda Síochána and a third party, who was ostensibly providing information to the Gardaí. Even though the Commissioner's letter of 10th March had referred to this systemic issue there was little discussion of that particular issue, and certainly not in any Red Flag manner".

16.15 However, in Ms Duchene's note of the meeting of March 11th, she does refer to the Garda Commissioner explaining that when the Bailey tapes emerged, members of An Garda Síochána discovered a number of similar recordings around the country. She noted the Garda Commissioner as saying that "There is no material to explain the why of those recordings apart from the 999 which are recorded as normal." She noted that this raised data protection issues.

- 16.16 Ms Fitz Gerald also noted a discussion on the general recording issue in which it was stated that the production of the tapes in Bandon Garda station was the first that senior management of An Garda Síochána knew of the mechanism of taping conversations. They had done a trawl of all Garda stations and now had an inventory of tapes of telephone conversations to Garda stations. Advice had been sought on how to deal with those tapes. One of the points which Ms Fitz Gerald said she made to the Commissioner at the meeting was “that the optimum would be if whatever solutions my advice may throw up have been executed before the discovery is made of the transcripts.”
- 16.17 Although Mr Purcell stated that he had a copy of the letter of March 10th 2014 with him at the meeting, he, Mr Callinan and Mr Flahive agreed in their evidence that the letter of 10th March 2014 was not mentioned during the meeting of 11th March 2014. More specifically, Mr Callinan never enquired, either on 10th or 11th March 2014 whether Mr Purcell had passed the letter on to the Minister or whether the Minister had expressed any views on its contents.
- 16.18 Between 28th February 2014 (when the opinion of counsel and accompanying transcripts from Bandon were sent to the Department of Justice) and 10th March 2014, the Minister was not briefed by Mr Purcell or Mr Flahive concerning developments in the Bailey case.
- 16.19 Mr Flahive in evidence referred to the publication on 12th March 2014 of a report by the Garda Inspectorate into the fixed charge processing system, which he said dominated their attention on that day – and also in days leading up to it, as the Department were engaged in preparation for its release. He said he imagined that, in that context, he might have discussed the Bailey case and / or the general recording issue with Mr Purcell around this time, *“but really, I have to say, our attention was focused more on a whole series of things that were happening. It was a time of absolute intense pressure.”*
- 16.20 Two very high-powered meetings had thus occurred, one day after the other, involving the Garda Commissioner, Mr Callinan, Deputy Commissioner O’Sullivan, senior counsel, Advisory Counsel from the Attorney General’s Office, Ms Fitz

Gerald, and a State Solicitor, Ms Duchene. The Assistant Secretary from the Department, Mr Flahive, attended the first of these meetings and the Secretary General, Mr Purcell, attended the second. The Minister with direct statutory responsibility for An Garda Síochána was not informed about the subject matter of these meetings nor was he informed about the letter of the 10th March 2014 and remained unaware of it until the letter was handed to him on the morning of March 25th 2014.

- 16.21 While the Department of Justice was preoccupied with many other important and controversial matters concerning An Garda Síochána, both the Minister and the Secretary General were present and available, at least until Friday, 14th March 2014. The Minister was out of Dublin on 10th March 2014, visiting Garda stations and Army barracks. He was in the Department of Justice on the morning of Tuesday 11th March, but had engagements in the afternoon, including a lunch at the Mexican Embassy, in view of his impending visit to Mexico for St Patrick's Day. He spent Wednesday 12th March primarily in and around the Dáil. He was working in the Department of Defence all day on Friday, 14th March 2014. He had a number of other engagements during the week. However, he said in evidence that he was always contactable. He would always have had with him either his Department of Justice private secretary or his Department of Defence private secretary. There would have been no difficulty in Mr Purcell coming to meet him in the Dáil and of course, the letter could have been emailed to him at any time.
- 16.22 On Saturday, 15th March 2014, the Minister left for Mexico, accompanied by his Department of Justice private secretary. The Minister was not in the Department of Justice again until 21st March 2014. The Minister and his private secretary confirmed to the Commission that he would have been in regular contact with the Department of Justice during this working trip and could have been contacted at any time during this period.
- 16.23 Mr Purcell's mother died on 15th March 2014. He decided to take annual leave for the following week. Monday was St Patrick's Day, 17th March. Mr Purcell was not in the Department again until Monday 24th March 2014.

17. Communication with Attorney General's Office

17.1 Ms Ruth Fitz Gerald of the Attorney General's Office is the co-ordinator of the group within the office that deals with criminal matters. She was also, in her capacity as Advisory Counsel, responsible within the group for advice on the general Garda recording issue. Mr Matt Feely was responsible, within the group, for advice on the Bailey case.

17.2 When first informed of the general recording issue in November 2013, Ms Fitz Gerald had asked An Garda Síochána to produce an inventory of all telephone recordings, identifying them by station and date where possible.

The report and inventory of tapes produced by Superintendent Flynn on 19th February 2014 was forwarded to Ms Fitz Gerald by Mr Ruane, the Head of Legal Affairs of An Garda Síochána, on Friday, 28th February 2014. Mr Ruane indicated that the report was being provided in response to her request of November 2013 and sought directions on how to proceed in the context of the Data Protection Acts.

17.3 As previously stated, Ms Fitz Gerald attended meetings on the 10th and 11th of March 2014 at which the Bailey case and, to some extent, the general issue were discussed.

17.4 Ms Fitz Gerald tried to see the Attorney General, Ms Máire Whelan, on the morning of 11th and again on 12th March 2014, in order to discuss developments in the Bailey case and the finalisation of advice on the general recording issue, but the Attorney was unavailable on both days. On the evening of 12th March 2014, the Attorney left for a visit to America returning on the morning of 17th March. She was in her office all day Tuesday 18th March 2014.

17.5 On the evening of 11th March 2014, Ms Fitz Gerald emailed a number of queries to Mr Ruane concerning the general recording issue. She asked for confirmation that outgoing calls were recorded as well as incoming calls, pointing out that this raised the question of whether calls between solicitors and their clients might have been

recorded. She also asked if it was correct to say that the recordings were never used in any form.

- 17.6 Mr Ruane sought clarification on these and other matters from the Information and Communications Technology section (ICT) of An Garda Síochána and a response was emailed to Ms. Fitz Gerald in the Attorney General's Office on March 12th 2014.
- 17.7 On 13th March 2014, Ms Fitz Gerald emailed Mr Ruane with what she referred to as "*preliminary advice*" on the general recording issue. She suggested that An Garda Síochána make contact with the Data Protection Commissioner in order to get his views, so that they could be taken into account in the final advice which would issue from the Attorney General's Office. She also referred to the inventory of tapes and asked if they could be listed by month rather than year. Ms Fitz Gerald went on to offer some preliminary views on the legality of retaining the recordings made.
- 17.8 Ms Fitz Gerald's advice, which she emphasised was provisional, was not seen by the Attorney General herself, as she was out of the country. The Attorney had not, in fact, seen any documentation or participated in any discussion of the general recording issue since a Legal Management Advisory Committee (MAC) meeting of 20th November 2013 and she remained unaware of developments in relation to it until 20th March 2014, when the issue was again discussed at a Legal MAC meeting in her office.
- 17.9 On 14th March 2014, Ms Fitz Gerald emailed Mr Ruane to say that she thought it would be best if the Department of Justice "were kept informed of the advice as it progresses" and asked him to forward her advice of the previous day to the Department of Justice. Mr Ruane agreed, but decided to wait until he had contacted the Data Protection Commissioner, so that any advice received from him could be forwarded together with that of Ms Fitz Gerald.

18. Communication with Data Protection Commissioner

18.1 On 18th March 2014, Mr Ruane completed a draft letter to go from the Garda Commissioner to the Data Protection Commissioner. The letter was approved and sent on 19th March 2014. The factual content was substantially the same as that in the letter of 10th March 2014 to the Secretary General of the Department of Justice, Mr Purcell. It referred to the emergence of recordings in the Bailey case and the fact that some were captured by a discovery order and would have to be disclosed. It gave the same account of the background and extent of Garda telephone recording systems, mentioned that recording of non-999 calls had been stopped in November 2013 and identified the issue now as being what action the Garda Commissioner (as Data Controller) should take with regard to the existing recordings.

The views expressed in the letter of the Garda Commissioner to the Data Protection Commissioner were as follows:-

- That the tapes were likely to contain personal data for the purposes of the Data Protection Acts;
- That the Commissioner did not appear to have any lawful basis to retain the recordings;
- That s. 2 of the Data Protection Acts may not have been complied with, in that the purpose for the recordings “at least in recent years, has not been explicit” and thus their retention may have been excessive; and
- That there was an issue as to whether s. 2A of the Data Protection Acts, which allows processing of data in certain circumstances, could apply if there had been a breach of s. 2 of the Act in the first place.

The letter concluded by saying that the Commissioner would welcome an opportunity to meet the Data Protection Commissioner to ascertain his views, as discovery in the Bailey proceedings would be finalised in the following week. He suggested that the Data Protection Commissioner could be briefed by Mr Ruane and a representative from ICT section.

- 18.2 In the event, no such meeting took place. The Data Protection Commissioner, Mr Billy Hawkes, received the letter by email on 19th March 2014. He understood from it that there was an urgency in relation to compliance with the discovery order and so telephoned Mr Ruane, the person indicated in the letter as being the relevant contact. They discussed the matter and Mr Hawkes gave his opinion on the issues raised, as they had been presented to him in the letter.

In relation to the Bailey recordings, Mr Hawkes said that the tapes must be disclosed in accordance with the discovery order and that there was no basis under the Data Protection Acts to redact the names of individuals.

Mr Hawkes also said that if a data protection request was received it would have to be complied with fully, in respect of all data held by An Garda Síochána, regardless of whether that data was obtained or retained lawfully.

As regards recordings which were unconnected with the Bailey case, Mr Hawkes expressed the view that An Garda Síochána would not appear to have lawful grounds for retaining them. It is important to note that Mr Hawkes drew this conclusion from the statements made by the Garda Commissioner in his letter that there was no explicit purpose for the recordings and that he did not think he had any lawful basis on which to retain them.

Finally, Mr Hawkes advised that, in the event that it was decided to destroy the recordings, consent would have to be obtained from the Director of the National Archives, in order to ensure consideration of any obligations under the National Archives Act 1986.

- 18.3 In his evidence to the Commission, Mr Hawkes emphasised that he had given his advice in the context of the information provided to him by An Garda Síochána and, in particular, the view of the Garda Commissioner that there was no lawful basis for retaining the recordings. He said he was not made aware that the recordings could contain information relevant to the innocence or guilt of persons in other cases, which could affect the validity of court judgments. He accepted that there could potentially be a lawful basis for retaining recordings if there was a reasonable

assumption that they contained such material. But that was not something that was brought to his attention at the time. He had no information about it.

- 18.4 Following his conversation with the Data Protection Commissioner, Mr Ruane telephoned the Garda Commissioner and informed him of Mr Hawkes' views. The Garda Commissioner instructed Mr Ruane to relay the content of his conversation with Mr Hawkes to the Attorney General's Office and to seek a direction on whether An Garda Síochána should now look for the consent of the National Archives Office in relation to a decision to destroy recordings unrelated to the Bailey case.

Mr Callinan explained in evidence, and the Commission accepts, that this did not mean he was planning to dispose of the tapes without receiving final advices from the Attorney General's Office. He said that, from the time he became aware of the matter in November 2013, he never, at any stage, intended to destroy the recordings without the express consent of the Attorney General.

- 18.5 As the Commissioner had requested, Mr Ruane emailed Ms Fitz Gerald in the Attorney General's Office shortly afterward with a summary of Mr Hawkes' advice. He concluded the email by asking:

"I would be obliged for your confirmation and direction that it is in order now to seek the relevant consent from the National Archives Office for the destruction of the remaining data (i.e., that which is not connected to the Ian Bailey and Catherine Thomas litigation)."

Mr Ruane sent a copy of the email to Mr Flahive and Ms Keaveney at the Department of Justice, together with a copy of the preliminary advice provided by Ms Fitzgerald on 13th March 2014, in relation to the general recording issue.

- 18.6 The narrative of events thus far relates more particularly to the furnishing of the letter of March 10th 2014 to the Minister for Justice although, as stated at the outset, both the furnishing of the letter and the events leading to the retirement of the former Garda Commissioner, Mr Martin Callinan are closely interconnected.

- 18.7 Part Two of this Report takes up the events that led directly to the retirement of Mr Callinan whilst, at the same time, continuing the account of the letter and its eventual delivery to the Minister on the morning of March 25th 2014, after Mr Callinan had announced his retirement. The conclusions of the Commission in relation to terms of reference (n) and (o) are set out in Part Three.

PART TWO

Term of Reference 1(o)

The Garda Commissioner, Mr Martin Callinan, announced his decision to retire on March 25th 2014. This followed a visit to his home by the Secretary General of the Department of Justice, Mr Brian Purcell, at approximately 11 p.m. on Monday, 24th March 2014. Mr Purcell's visit arose following a meeting in the Office of the Taoiseach, also on 24th March 2014, which was attended by: the Taoiseach, Mr Enda Kenny; the Attorney General, Ms Máire Whelan and the Secretary General to the Department of the Taoiseach, Mr Martin Fraser. The meeting was subsequently joined by Mr Alan Shatter, Minister for Justice, and Mr Brian Purcell, Secretary General of the Department of Justice.

This report now examines the sequence of events that led to Mr Callinan's decision to retire and to the factors that influenced that decision. It also continues the discussion around the letter of March 10th 2014, which constituted a report under s. 41 of the Garda Síochána Act 2005, and was the principal focus of Part One of this report.

Before resuming the chronological investigation, which commenced in Part One with the discovery of tape recordings in the Bailey case in mid-October 2013 and which will continue until the end of March 2014, this Report must first consider two important matters. The first is the role, function and tenure of the Garda Commissioner under the law. The second is a brief summary of other contemporaneous events that, whilst not forming any part of the Terms of Reference of this Commission, nevertheless are an important backdrop to the events as they unfolded.¹

¹ See Appendix 1 for full Terms of Reference

19. Position of the Garda Commissioner – Legal Considerations.

19.1 Following the enactment of the Police Forces Amalgamation Act 1925 (“the Act of 1925”), An Garda Síochána and the Dublin Metropolitan Police were amalgamated into one force, under the name of the former. The Act of 1925 provided both for the appointment and the removal from office of the Commissioner of the amalgamated force as follows:-

“6.— (1) The person who at the commencement of this Act holds the office of Commissioner of the Garda Síochána shall upon the commencement of this Act become and be the Commissioner of the amalgamated force.

(2) Subject to the provisions of the foregoing sub-section, the Commissioner of the amalgamated force shall from time to time be appointed by the Executive Council, and every Commissioner of the amalgamated force, whether holding that office by virtue of an appointment under this sub-section or by virtue of the foregoing sub-section, may at any time be removed by the Executive Council.”

19.2 Section 6(2) of the Act of 1925 provided simply that the Commissioner might “at any time be removed by the Executive Council”. Until the decision in *Garvey v. Ireland* [1981] I.R. 75² mentioned later, it was generally accepted that officers such as civil servants, which would include the Garda Commissioner, held their positions at the pleasure of the Government, which could remove them without giving reasons and without notice.

19.3 The power to remove a Commissioner from office was exercised twice in the years between 1925 and 2005. In February 1933, the Executive Council, in exercise of the power conferred by s. 6(2) of the Act of 1925, removed General Eoin O’Duffy from the position of Commissioner. The President of the Executive Council, Mr Éamon de Valera, informed the Dáil on 1st March 1933 that no charge had been made against the Commissioner. He limited himself to saying:-

See para. 19.4 below

“He was removed from office because, in the opinion of the Executive Council, a change of Commissioner was desirable in the public interest.”

He said that he did not propose to state the reasons, explaining only that it was not desirable in all cases to give reasons, but added:-

“If a definite charge were made against General O'Duffy, then that charge would be brought forward and the reasons given.”

There was no legal challenge to the decision of the Executive Council.

19.4 The Government next exercised the power to remove a Commissioner in 1978. On 19th January 1978, Commissioner Edmund P. Garvey was called upon by the Government to resign from the post of Garda Commissioner. When he declined to do so, he received a notice of the Government's intention to remove him from office forthwith, pursuant to s. 6 (2) of the Act of 1925. Mr Garvey instituted proceedings in the High Court against Ireland, various members of the Government and the Attorney General. The High Court directed that certain points of law be tried as preliminary issues. The question was whether the Act of 1925 empowered the Government to terminate the office of the Commissioner of An Garda Síochána:-

- (a) Without prior notice;
- (b) Without giving reasons; and
- (c) Without giving the holder of the office an opportunity of making representations in relation thereto?

19.5 The High Court (Mc William J.) held that the Government was obliged to apply the concept of justice, whether it was called constitutional or natural justice and that reasonable notice should have been given to the Commissioner. The Government appealed to the Supreme Court.

19.6 The Government submitted, on appeal, that the office of Commissioner of An Garda Síochána was held at the pleasure of the Government and that the rules of natural justice did not apply to his removal. It submitted, at p. 83, that “because the government of the day must have full confidence in the Commissioner.... it would be

impossible to carry on satisfactorily if that confidence were lost and there were no power of instant dismissal.” The Government was not obliged, it argued, to give prior notice of or reasons for removal of the Commissioner from office.

- 19.7 The Supreme Court, by a majority of four to one, dismissed the appeal. O’Higgins C.J., with whom Parke J. agreed, held that the office of Commissioner was not held at the pleasure of the Government and that the rules of natural justice applied when it was proposed to remove the holder of the office. There was no question about the Government’s power to remove the Commissioner. It had the widest possible discretion as to the reasons or grounds upon which it might act. However, the Court found, at p. 97, that the Government was “bound to act fairly and must tell the Commissioner of the reason or reasons for the proposed action and give him an opportunity of being heard.” The Chief Justice emphasised that “the decision to remove must necessarily be one taken collectively by the members of the Government...”
- 19.8 The result of the Garvey case was twofold. Firstly, the Commissioner of An Garda Síochána held an office from which he could be removed at the discretion of the Government on a very broad range of grounds, including the fact, if it were the case, that the Government had lost confidence in the Commissioner. Secondly, whatever the reasons, the Commissioner was entitled to the benefit of the rules of natural justice. The Government would, accordingly, be obliged before exercising its power to remove a Garda Commissioner from office, to inform him or her of the reasons for the proposal and to permit him or her an opportunity to make representations in response.
- 19.9 The Garda Síochána Act 2005 (“the Act of 2005”) repealed s. 6 of the Act of 1925 and replaced it with new provisions governing the removal of a Commissioner. Section 11 of the Act of 2005 provides:-

“11.— (1) Subject to section 12, a person who holds the office of Garda Commissioner, Deputy Garda Commissioner or Assistant Garda Commissioner may be removed from office by the Government but only for stated reasons, including because—

(a) the person has failed to perform the functions of the office with due diligence and effectiveness or, in the case of the Garda Commissioner, has failed to have regard to any of the matters specified in section 26 (2),

(b) the person has engaged in conduct that brings discredit on the office or that may prejudice the proper performance of the functions of the office, or

(c) the person's removal from office would, in the Government's opinion, be in the best interests of the Garda Síochána."

19.10 Section 12 of the Act of 2005, in effect, gives statutory recognition to the Supreme Court judgment in the Garvey case by obliging the Government to give notice of any proposal to remove the Commissioner. It also makes detailed provision, exercisable at the discretion of the Government, for the holding of an inquiry into the "stated reasons". Section 12(1) provides:-

"12.— (1) Before considering a person's removal from office under section 11 , the Government, shall—

(a) notify the person that the Government intends to consider the matter and include in the notice a statement of their reasons for doing so, and

(b) give the person an opportunity to make representations as to why he or she ought not to be removed from office."

19.11 The Commission must bear these statutory provisions in mind when considering subparagraph 1(o) of its Terms of Reference.

20. Context: Other Contemporaneous Events

- 20.1 A number of other events occurred in the period preceding the Commissioner's retirement, which embroiled An Garda Síochána in public controversy. It is important to record these events, insofar as they form the background to the events leading up to the Commissioner's retirement. Several witnesses, including An Taoiseach, the Attorney General and the Secretary General to the Government, Mr Fraser, regarded these events as establishing an essential context to the events of the 24th and 25th of March 2014 and thus to the decision of the Garda Commissioner to retire. However, these earlier events do not fall within the Terms of Reference of the Commission. The primary subject matter of the Terms of Reference is, as set out in paragraph 1, "the operation of Garda Síochána telephone recording systems..." Those are the matters which were "considered by the Government to be of significant public concern..."³
- 20.2 The Commission has not investigated these other matters of controversy. It has no power to do so. However, their main elements are outlined briefly below, in order to set the wider context within which the issue of Garda telephone recordings was being considered at the time.
- 20.3 In September 2012, allegations of abuses and corruption in the fixed-charge processing system (FCPS) operated by An Garda Síochána were brought to the attention of the Minister for Justice, who referred them to the Garda Commissioner for investigation. A report by Assistant Commissioner John O'Mahony was published in May 2013. Arising from this, the Minister asked the Garda Síochána Inspectorate to carry out a review of the FCPS process.
- 20.4 The FCPS was also examined by the Comptroller and Auditor General, following the confidential disclosure of information extracted from a Garda Síochána database by an unnamed Garda member in July 2012. A report published on 30th September 2013 found significant weaknesses in the operation of the FCPS and made several recommendations, which were accepted by the Garda Commissioner.

³ S.I. No. 192/2014 30 April 2014 – Commission of Investigation (Certain matters relative to An Garda Síochána and other persons) Order 2014.

- 20.5 On 23rd January 2014, the Garda Commissioner, Mr Callinan, appeared before the Oireachtas Committee of Public Accounts (PAC). In the context of the allegations made by two members of An Garda Síochána concerning the FCPS, the Commissioner made the following remark:-

“I do respect the notion that Gardaí in certain circumstances should not be investigating one another. That is why we have the Ombudsman Commission to deal with those cases. Quite clearly here, we have two people out of a force of over 13,000 who are making extraordinarily serious allegations. There isn’t a whisper anywhere else, from any other member of the Garda Síochána, however, about this corruption, this malpractice and all of these things that are levelled against their fellow officers. Frankly, I think it’s quite disgusting, on a personal level, I think it is quite disgusting. These are members of An Garda Síochána so they have a responsibility to act responsibly.”

- 20.6 The allegations of the Garda whistleblowers continued to be a source of controversy throughout January and February 2014. On 27th January 2014, the Minister for Justice announced that he was referring the whistleblower allegations to the Garda Síochána Ombudsman Commission (GSOC) for investigation. On 20th February 2014, the Garda Confidential Recipient, Mr Oliver Connolly, was relieved of his duties by the Minister for Justice, following discussion in Dáil Eireann and media reports of a conversation, said by Mr Connolly to be confidential, between Mr Connolly and one of the whistleblowers. On 27th February 2014, it was announced that Mr Sean Guerin S.C. had been appointed to investigate a number of specific allegations of Garda misbehaviour made by one of the Garda whistleblowers. During a subsequent Dáil debate on the whistleblower allegations, the Garda Commissioner was strongly criticised for his use of the word ‘disgusting’ at the PAC.

- 20.7 An additional source of concern for An Garda Síochána arose in February 2014 from media reports of alleged unlawful surveillance of the Garda Síochána Ombudsman Commission. A statement issued by GSOC on 10th February spoke of “technical and electronic anomalies” which “could not be conclusively explained” and which had raised concerns as to the integrity of GSOC’s security systems. The statement went

on to say that “There was no evidence of Garda misconduct.”⁴ However, this suggested that the possibility of Garda involvement had been considered by GSOC.

- 20.8 On 14th February the Garda Commissioner stated publicly that An Garda Síochána had not engaged in any surveillance of the GSOC offices or of its members. On 19th February 2014 the Government appointed Mr Justice John Cooke, retired High Court Judge, to conduct an independent Inquiry into the matter.
- 20.9 On 12th March 2014, the Minister for Justice published the report of the Garda Inspectorate into the operation of the Fixed Charge Processing System. The report was critical of how the FCPS had been managed, finding “consistent and widespread breaches of policy” in its administration. On the same day, the Garda Commissioner sought to clarify the “disgusting” remark that he had made at the PAC by stating that he was not referring to the character of the two members of An Garda Síochána but to the manner in which sensitive material had appeared in public.
- 20.10 On 13th March 2014, in response to what the Secretary General to the Government, Mr Martin Fraser, described in evidence as “*aggressive questioning*” from journalists at an event in Washington D.C., the Taoiseach said that he retained confidence in the Garda Commissioner, Mr Callinan.
- 20.11 However, the controversy concerning the “disgusting” remark gained renewed impetus on 20th March 2014, when the Minister for Transport, Mr Leo Varadkar, speaking at a Road Safety Authority Conference, stated that he believed that the Commissioner should withdraw the remark and described the actions of the whistleblowers as “distinguished”. These comments were supported publicly by, among others, Ms Joan Burton, Minister for Social Protection; Mr Eamon Gilmore, Tánaiste; Mr Pat Rabbitte, Minister for Communications; and Mr Ruairí Quinn, Minister for Education.
- 20.12 Following the views expressed by Mr Varadkar, the Minister for Transport, and other members of the Government, the Taoiseach was again questioned by

⁴ GSOC, ‘Security at and surveillance of Garda Síochána Ombudsman Commissioner’, press release, 10th February 2014.

journalists on the matter, while in Brussels for a European Council meeting on 21st March 2014. He reiterated, in unequivocal terms, that he continued to have confidence in the Garda Commissioner. He was quoted as saying:-

“The relationship between the Taoiseach of the day and the Garda Commissioner of the day has to be completely professional... And the Garda Commissioner, in whom I have confidence, has responsibility for the day-to-day running of the Garda”.⁵

20.13 The Commission has heard evidence from both the Taoiseach, Mr Kenny, and the Tánaiste, Mr Gilmore, that, following the latter’s public comment that it would be “helpful” if Commissioner Callinan withdrew the “disgusting” remark, the Taoiseach telephoned Mr Gilmore from Brussels on 21st March 2014, to discuss the situation. The Taoiseach told the Tánaiste that he, the Taoiseach, would not be in a position to make the kind of comment which the Tánaiste had made, because that would be indicative of a lack of confidence in the Commissioner and that he would continue to express confidence in the Commissioner. The Tánaiste agreed with the Taoiseach that they would both continue to maintain confidence in the Commissioner. A spokesperson for Mr Gilmore subsequently confirmed to the media that he still had confidence in Mr Callinan and that his recent remarks had not changed that position.⁶

20.14 Nonetheless, the controversy surrounding the whistleblower allegations and the Garda Commissioner’s response to them remained a live issue, approaching the weekend of 22nd and 23rd March 2014.

20.15 The next meeting of the Cabinet was due to take place on Tuesday, 25th March 2014. The Minister for Justice, Mr Shatter, who had been in Mexico on official business, had not responded publicly to Mr Varadkar’s comments, except to say that any issues arising would be addressed in the Dáil on Thursday, 27th March 2014, when the House was due to discuss the Garda Inspectorate report. Nonetheless, there was a

⁵ “Taoiseach defends Callinan and criticises ministers” Irish Times, 21st March 2014.

⁶ ‘Kenny refuses to call for Garda chief retraction’, Irish Times, 22nd March 2014.

widespread media perception that Mr Shatter and Mr Varadkar were in conflict on this issue.⁷

20.16 There were also calls in the media for Mr Shatter to clarify or withdraw certain comments that he had made in the Dáil, in relation to the whistleblowers. On 24th March 2014, the Tánaiste, Mr Gilmore, in response to public questioning, said he thought it would be helpful if the comments of the Minister for Justice, Mr Shatter, as well as those of the Garda Commissioner, Mr Callinan, were withdrawn.

20.17 The Secretary General to the Government, Mr Martin Fraser, in his statement to the Commission, cited all of the above issues as being “prominent on the agenda of the Government” during this time. He referred to the existence of “a range of views within the Government as to how the oversight and accountability framework for policing should be reformed”. He described this policy debate as “growing in importance and urgency as the series of controversies unfolded.” He concluded:-

“There was no question but that these issues would all be raised again in the Dáil and the media during the following week.

It was therefore clear that the Government would have to attempt to reach a collective agreed position on all of these matters at its meeting on March 25th.”

⁷ ‘FG Ministers barely speaking after row over penalty points’, Irish Independent, 21st March 2014.

21. Sequence of Events leading up to the Retirement of the Former Garda Commissioner.

21.1 This report now turns to the period from March 20th to March 25th 2014. The principal focus is the retirement of the former Garda Commissioner, Mr Callinan, but it must be noted that the s. 41 letter of March 10th 2014 was not furnished to the Minister for Justice, Mr Shatter, throughout this period. The fact that the existence of this letter was unknown to the Taoiseach, Mr Kenny, the Minister for Justice, Mr Shatter, or the Attorney General, Ms Whelan, was highly significant in the sequence of events which culminated in the retirement of the Garda Commissioner.

22. Meeting of 20th March 2014 in the Office of the Attorney General.

22.1 On the morning of 20th March 2014, a meeting took place in the Office of the Attorney General of the Legal Management Advisory Committee (known as Legal MAC). It was attended by senior management staff of the Attorney General's Office, including Mr Liam O'Daly, the Director General, and Ms Ruth Fitz Gerald, Advisory Counsel. Also in attendance were Ms Eileen Creedon, the Chief State Solicitor, and some Assistant Solicitors from the Chief State Solicitor's Office. The Attorney General presided.

The Commission considers this meeting to be a key moment in “the sequence of events leading up to the retirement of the former Garda Commissioner, Mr Martin Callinan.”⁸

22.2 The meeting gave extensive consideration both to what was described as the “Discovery of (sic) Garda Stations of Recordings of Telephone Conversations” and the list of sensitive cases which is placed before the Cabinet, usually on a quarterly basis. The Bailey case was on that list.

22.3 On the issue of the general recording of telephone calls in Garda stations, the minutes of the meeting said:

“Submission was being prepared on the issue. I noted that the records date back to 1996 and the recordings to 2008 are magnetic but some are mouldy. The recordings were made to the public office of the Garda stations and the incident rooms. AG [Attorney General] noted that guidance was sought from Data Commissioner.

RF [Ruth Fitz Gerald] noted that the Guards are to go through files and see if there is Discovery. It was noted it will have to go to the DPP. DG [Director General] noted that the Commissioner wasn't aware of it. Donegal case related to another recording. AG noted it will be sensational.”

⁸ Term of Reference, sup-paragraph 1(o)

22.4 At a later point in the meeting, the cases of Ian Bailey and Jules Thomas were discussed. The minutes state:-

“It was noted that once the issue of the tapes becomes public it was going to become an issue.... DG referred to the timeline involved and stated that the Garda and the Department of Justice were prepared for massive outcry. RF agreed. DG stated that there will be political fallout. RF outlined that there was a meeting with Brian Purcell and Michael Flahive, and Brian Purcell is concerned. DG noted that it could get completely out of hand.

AG queried that the Minister did not seem to have anything to do with the issue. RF said yes and noted that the issue dates back to the mid 1980s

.....AG stated that she was troubled at the suggestion of destruction. RF stated that it was material which the Garda should not have – either in a criminal prosecution or civil matter... AG and DG referred to the principle of innocence at stake and the possibility that there could be exculpatory evidence on the tapes...

AG stated that the views of the DPP were to be sought and if legislation is needed let there be legislation.

...

AG asked is it the suggestion that November 2013 was the first time it was uncovered? RF outlined that the first they knew of it was when a Garda arrived in with a box of tapes from the station in Bandon. RF said that the Commissioner did not know about it....AG stated it is unbelievable.

AG stated the tapes were not to be destroyed.....DG queried whether the recordings would come within the administration of justice exception under the Data Protection Directive.”

22.5 Ms Fitz Gerald expressed her concern about the advice that had been given to An Garda Síochána by the Data Protection Commissioner. It was, Ms Fitz Gerald

thought, necessary to have the view of the Data Protection Commissioner, but the advice that had been received from him was, in her view, “*quite startling.*” She was already in the course of preparing a written submission to the Attorney. Ms Fitz Gerald was considering proposing legislation to deal with the tapes that had been retained. The Attorney, while not agreeing that legislation could deal with the issue, indicated that her view was provisional pending Ms Fitz Gerald’s submission. The Attorney made it quite clear that she did not agree that the tapes should be destroyed.

- 22.6 A particular concern, as explained by Mr O’Daly, the Director General of the Attorney General’s Office, in his evidence, was that recordings or, at any rate, some of them might be destroyed as a result of advice conveyed orally by the Data Protection Commissioner. It was this possibility which added urgency and immediacy to the issue.
- 22.7 The Attorney General, in her written statement to the Commission, has said that her assessment was that data protection considerations were being given undue weight by An Garda Síochána and that a balancing exercise was required between data protection concerns on the one hand and competing public interest and constitutional rights of any citizens as might be affected on the other. This meant that preservation of the recordings was more prudent until the full implications of destruction were carefully assessed.
- 22.8 The Attorney, in her evidence to the Commission, has said that the advice given by the Data Protection Commissioner was, in her view, a “*one-dimensional solution to a problem*”. The possible destruction of all recordings unrelated to the Bailey case was of particular concern. However, once she had given her advice, she was satisfied that the tapes were not going to be destroyed. Thereafter, the focus was not on destruction, but, as she put it, on “*the state of affairs.*”
- 22.9 On 20th March 2014, following this Legal MAC meeting, and on the instructions of the Attorney, Ms Fitz Gerald replied to the email of the Head of Legal Affairs for An Garda Síochána, Mr Ruane, of the afternoon of 19th March 2014, in which he had conveyed the substance of the Data Protection Commissioner’s advice. She conveyed the advice of the Attorney General that the tapes were not to be destroyed.

- 22.10 On 21st March, Mr Ruane forwarded the advice received from the Attorney General's Office to Deputy Commissioner O'Sullivan for the attention of the Commissioner.
- 22.11 The Attorney General, following the meeting, began to review the files on both the Bailey case and the general recording issue. She read, in particular, the report of Superintendent Flynn, ICT, of February 19th 2014 and the attached inventory of telephone recordings.
- 22.12 The Attorney explained to the Commission her concern that there was at least the possibility that material contained in the recordings might be of relevance to an accused person whose innocence was at stake or might be of evidential value where a miscarriage of justice was alleged to have occurred. She also believed that the public interest might warrant establishing whether such widespread recordings extended to the interception by An Garda Síochána of conversations between solicitors and clients, which would cause huge public anxiety.
- 22.13 In short, the Attorney believed that she had been going in to a "*routine enough meeting*" on the morning of 20th March 2014. She was then told that An Garda Síochána and the Department of Justice were prepared for a massive outcry in relation to the disclosure of the recordings in the Bailey case, and that there would be political fallout. In relation to the wider issue of Garda recording systems, she herself believed that public disclosure of this information would be sensational. The Commission is satisfied that the Attorney's assessment of the gravity of the general recording issue, combined with developments in the Bailey case, had a significant impact on the events of subsequent days.
- 22.14 Mr O'Daly, the Director General of the Attorney General's Office, said in evidence that he told the Attorney that he was going to telephone the Department of Justice. He explained the reason for this call, namely that, in view of the fact that the Bailey case and also the more general recording issue could be raised at Cabinet, it was important to be sure that the Department of Justice and the Minister were fully informed. The Attorney had not expressed the intention of bringing the matter before

the Cabinet, but it was understood that the issue could potentially arise if the Bailey case was discussed at the Cabinet meeting.

- 22.15 On 21st March 2014, Ms Fitz Gerald continued to work on the preparation of her submission to the Attorney. During that day, she also answered a number of questions from the Attorney related to the Bailey case. She completed the submission late that evening. As the Attorney had left the office by that time, Ms Fitz Gerald left the submission in the Attorney's office at about 8 p.m.

23. Events of the Weekend of 21st to 23rd March 2014

- 23.1 Early on the morning of Friday, 21st March 2014, the Minister for Justice, Mr Alan Shatter, returned to Ireland, having travelled overnight, from his trip to Mexico. He came home two days early, having heard of the public statement of the Minister for Transport, Mr Varadkar, in relation to the whistleblowers and the Garda Commissioner. He spent some hours in his office in the Department of Justice from about lunchtime on Friday, 21st of March 2014. He was still unaware of the Garda Commissioner's letter of 10th March 2014 or of its contents. The Assistant Secretary of the Department of Justice, Michael Flahive, who was in charge of this issue in the absence of the Secretary General, Mr Purcell, continued to believe that the Minister had, in fact, been informed of the letter. Mr Flahive attended a meeting which went on for about one and a half hours with the Minister during Friday lunchtime. The issue of the recordings was not raised. Mr Shatter, in his evidence to the Commission, made pointed comment on Mr Flahive's failure to mention the letter of 10th March 2014 at a meeting which largely concerned An Garda Síochána. Mr Flahive, in his evidence, reiterated that he was working under the assumption that the Minister was aware of it, because he thought that Mr Purcell would have informed him.
- 23.2 On the 21st of March 2014, the Data Protection Commissioner issued his report on his audit of data protection in An Garda Síochána. He appeared on radio and television on the lunchtime news. This news was watched during the Friday lunchtime meeting in the Department of Justice, which ended at about 1:45p.m.
- 23.3 Mr Flahive worked at 51 St Stephen's Green, which is on a different side of the Green from the Minister's Office at 94 St Stephen's Green. When Mr Flahive returned to his office, he received a voicemail from Mr Liam O'Daly, Director General of the Office of the Attorney General, asking him to ring. Mr O'Daly had telephoned the Department to speak to the Secretary General, Mr Purcell. He wished to apprise Mr Purcell of the likelihood that the Bailey case and the more general recording issue could be raised at Cabinet. On learning that Mr Purcell was not available, he asked for his call to be put through to Mr Flahive. The question of what

the Department of Justice or the Minister knew had been raised in discussions with the Attorney after the Legal MAC meeting. As already stated, Mr O'Daly, had informed the Attorney, in advance, of his intention to make the call, because he needed to know, in the event that the matter was going to be raised at Cabinet, whether the Department, specifically, the Minister, was fully informed. Mr O'Daly wanted to be satisfied that the Department was, as he put it in evidence, *"on top of these things."* Mr O'Daly said that the Attorney General was personally extremely concerned about the fact that there had been a general system in place for the recording of telephone calls to and from certain Garda stations over a number of years and, such was the concern felt by the Attorney General, that he thought it likely that the general recording issue could be raised at Cabinet.

- 23.4 The entire purpose of Mr O'Daly's call was to reassure himself that the Minister for Justice was fully aware of all the issues surrounding the recording of telephone conversations by An Garda Síochána. His thinking was that, while one could presume that the Minister was fully briefed, such presumptions were unsafe. The Attorney is not responsible for An Garda Síochána in operational matters, whereas the Minister for Justice is. Mr O'Daly explained in evidence:-

"It isn't necessarily just a matter solely for the Attorney, the Attorney is not responsible for the Garda Síochána, in the sense of operational matters and policy and so on, the Minister for Justice is, and any issue on, for instance, widespread recordings, of course the Attorney needed to do what she did but there is a very important role for the Department of Justice and the Minister. In fact, you would regard them as, possibly, having to take a lead on the matter. They shouldn't be passive bystanders on the issue and I wanted to reassure myself that they were not passive bystanders, that they were fully up to date with the information and that they, obviously, had satisfied themselves that, you know, they were on top of these things. The Attorney doing things herself is one thing, but there are other, others have responsibilities."

- 23.5 Mr Flahive was taken by surprise by Mr O'Daly's call. Up to that point, while he recognised the seriousness of the issues involved in the Garda recording, Mr Flahive understood that the matter was being appropriately managed by An Garda Síochána

under the directions of the Attorney General's Office. It was apparent to him, from the Garda Commissioners' letter of 10th March 2014, that the Office of the Attorney General had been aware of the general recording issue since November 2013, but had not raised it with the Department of Justice. Mr Flahive was not, of course, aware that the Attorney General's Office had been insistent, in November 2013, on the need for An Garda Síochána to inform the Department of Justice even to the extent of making an offer to do so, which had been declined. Mr Flahive believed that the fact that the Attorney General was now greatly concerned about the matter represented "a significant escalation in the legal risk assessment of the general Garda recording issue."

- 23.6 Mr O'Daly asked Mr Flahive whether the Minister for Justice had been fully briefed, both in relation to the Bailey situation and the more general recording issue. According to Mr O'Daly, Mr Flahive assured him that the Minister was fully briefed up. Mr Flahive agreed that he had conveyed to Mr O'Daly that the Minister was aware of both the Bailey and the general recording issues. Mr Flahive gave these assurances based solely on his mistaken belief, perhaps more accurately, his assumption that the Secretary General of the Department, Mr Purcell, had given the Garda Commissioner's letter of 10th March to the Minister for Justice.
- 23.7 Mr O'Daly also said that it was important that he should meet both Mr Purcell, and Mr Flahive on the following Monday, 24th March 2014, to discuss the matter of the general recording issue. He wanted a full discussion of all the issues to make sure there were not any gaps in the knowledge of the Department. Mr Flahive agreed.
- 23.8 In this way, the Attorney General, through her Director General, obtained reassurance that the Minister for Justice was fully briefed on the general recording issue. At that point, she was under the mistaken impression that the Minister was still abroad. She did not, in any event, seek to make contact with him personally.
- 23.9 Mr Flahive regarded it as essential that the Minister would know that the Attorney General was taking a very grave view of the general recording situation. However, he believed that the Minister already had the letter of 10th March 2014 and that, to that extent, he was already aware of the recording issue. The new element was that

the Attorney General was expressing serious concern about it, and that as a consequence it was likely to be raised at Cabinet. Mr Flahive did not know if the Minister was aware of the Attorney's concerns. He knew that the Minister had regular conversations with the Attorney but, in his view, this was very important and he could not take a chance on the Minister knowing about the Attorney's concerns. He told the Commission that he had a distinct memory of sitting at his desk for maybe 30 seconds or so, thinking whether he would ring the Minister. He decided that he would.

- 23.10 This telephone call has presented the Commission with one of its most difficult and challenging issues. Two persons of distinction have given directly contradictory versions of the facts. Since the credibility of each of these persons is in issue, the Commission has treated it with great care.
- 23.11 At first, the Minister for Justice's private secretary could not put Mr Flahive through, as the Minister was on another call, but he soon called back and put the call through. Firstly, Mr Flahive asked the Minister if he was aware of the issue of the general system of recording calls from certain Garda Stations. The Minister said that he was not. Mr Flahive was surprised, given his belief that the Minister had received the letter of 10th March 2014. Mr Flahive said that he *"straight away realised that the Minister didn't know anything about this."* He said that he explained the matter as succinctly as he could, but does not think he mentioned the letter itself. In fact, he did not have the letter in front of him. Mr Flahive gave the following account in his written statement to the Commission:-

"I then advised the Minister of the essence of the letter from the Garda Commissioner, namely of the discovery, in the context of the Ian Bailey case, of a general system of recording of phone calls to and from certain Garda stations, that the practice had been stopped by the Garda Commissioner in November 2013, that the Commissioner was consulting the Office of the Attorney General and the Office of the Data Protection Commissioner on how best to deal with the recordings which had been retained, that the Attorney General was personally greatly concerned at the emergence of the practice, that the Attorney General was likely to raise this matter at Cabinet, and that Mr O'Daly intended to meet the

Secretary General and me on Monday to discuss the matter. I indicated to the Minister that he would be updated on the outcome of that meeting.”

23.12 Mr Flahive has told the Commission that he was absolutely categorical that he “*explained the entirety of the substance of the letter from the Commissioner*”. As stated however, he did not have the letter with him. Nor did he tell the Minister about it.

23.13 Mr Flahive said that he told the Minister for Justice of the meeting arranged for the following Monday with Mr O’Daly and Mr Purcell and said that he would update him after that. Mr Flahive said that the Minister made a few normal conversational interjections but did not react in an alarmed way. He was “*more in listening mode*”. Mr Flahive described the Minister as “*a details man*” but, on this occasion, he did not engage with the details. Mr Flahive said that he conveyed to the Minister that the practice of recording had been stopped, that the Attorney General’s Office had been informed the previous November and that the Data Protection Commissioner was involved.

23.14 It is significant that, while Mr Flahive now understood from Mr. O’Daly that the Attorney General was greatly concerned about the recording issue, the evidence before the Commission suggests that the specific nature of her concerns had not been outlined to him. Mr Flahive believed, however, that the proposed meeting with Mr O’Daly on the Monday would provide sufficient opportunity for Mr Purcell and himself to hear and discuss those concerns, whatever they might be, and to try and resolve any issues before the Cabinet met on Tuesday. He told the Commission:

“In other words, we – Brian and myself – would have a better chance to report back to the Minister and if necessary, he would have had the opportunity to speak to the Attorney on Monday afternoon or Monday evening, as he frequently did...”

So we felt, certainly I felt the meeting on Monday provided time before the Cabinet meeting on Tuesday. Of course, I wasn’t to know that events were to take place over the weekend.”

- 23.15 It is also important to note that Mr Flahive himself did not view the matters outlined in the letter of 10th March with the same level of concern as that now attributed to the Attorney. In his evidence to the Commission, he described the letter of 10th March as:

“...a letter explaining in reasonable terms that correct action was being taken to manage a potentially serious situation... it was a letter that did not speak of a crisis, to my mind, but of a serious matter that was being addressed.”

This was the interpretation of events that he says he conveyed to the Minister during their telephone conversation.

- 23.16 The former Minister for Justice, Mr Shatter, gave evidence to the Commission. He said that he was in the Department of Justice until about 6:30 p.m. on 21st March 2014. He said that it was possible that he had a brief telephone conversation with Mr Flahive that day. He could not recall precisely. However, he said, categorically, that he was not told about the letter. In that respect, his evidence is not in conflict with that of Mr Flahive. If the letter had been mentioned, he said that he certainly would have asked for a copy. It would, in any event, have been a simple matter for Mr Flahive to have sent him a copy. However, Mr Shatter was equally categorical in his evidence that Mr Flahive did not brief him about the existence of the tapes or the Attorney General’s concerns. Mr Shatter was in no doubt that, if he had known about the Attorney General’s concerns, he would have had a conversation with the Attorney.

- 23.17 In a written submission to the Commission dated 3rd February 2015, Mr Shatter stated:

“I can with 100% certainty state that Michael Flahive did not inform me on 21st March of the contents of the Garda Commissioner’s Section 41 Report. If a conversation did take place I can categorically state that Michael Flahive did not raise any issue that caused alarm bells to ring with me – which a full account of the contents of the Garda Commissioner’s letter and the Attorney General’s level of concern as expressed by Liam O’Daly would certainly have done.

Had Michael Flahive detailed the comprehensive information contained in the letter of 10th March about the broader taping issue and in particular the existence of almost 2,500 tapes of uncertain legality and unknown content or fully briefed me on the level of the Attorney General's concerns relating to both the Bailey case, the broader taping issue and the possibility of tapes being destroyed on the instructions of the National Archive, this is a conversation I would not have forgotten. I had just prematurely returned from Mexico because of a Garda related controversy and was particularly sensitive to and concerned about Garda matters. Receiving information of such an explosive nature would have resulted in my asking him a range of questions (as I did on the evening of 24th March) and not merely terminating the phone call."

- 23.18 Mr Shatter commented, in particular, upon the failure of Mr Flahive to provide him with a copy of the letter. Of course, Mr Flahive had, up to the moment of the telephone conversation, been labouring under the misconception that the Minister already had the letter. However, he now learned, to his surprise, that the Minister was unaware of it. In those circumstances, it is, in the opinion of the Commission, fair to observe that Mr Flahive should have informed him of it, particularly as he was of the view from the moment he had first seen the letter that the Minister should have been informed. Mr Flahive must also have realised that the assurance he had given to Mr O'Daly had not been correct. It did not occur to Mr Flahive to cure the omission by immediately sending a copy of the letter to the Minister.
- 23.19 Confronted with what is clearly a total and direct disagreement with Mr Shatter about whether this telephone conversation took place, Mr Flahive reiterated in his evidence that he was one hundred per cent sure of it, that he had not the slightest doubt about it, the conversation took place exactly in the way he had described it. Mr Shatter was equally categorical that he was not briefed by Mr Flahive in the manner described by him.
- 23.20 On 26th March 2014, Mr Flahive became aware that the Minister for Justice was due to make a statement to the Dáil on the whole matter, in which he was going to say that the first he learned of the general system of recording in Garda stations was on 24th March 2014 and that he, the Minister was not going to mention that Mr Flahive

had phoned him on Friday, 21st March 2014. Mr Flahive was concerned about what seemed to be an omission from a full factual account of what had happened. He spoke to the Secretary General of the Department, Mr Purcell, to express his concern. He said that he also had a political concern for the Minister that, if he did not mention the Friday telephone call, and if details of it subsequently emerged, that would involve further political trouble for him, Mr Shatter. Mr Flahive prepared an aide-mémoire which was handwritten on an A4 sheet of paper. It stated:-

“Spoke to Sec Gen this morning about sentence in Minister’s Dáil statement for today to the effect that the first he heard of the existence of a general system of recordings of phone calls to and from Garda stations was on Monday of this week (24 March) and that he did not get a copy of the Commissioner’s letter of 10 March until Tuesday (25 March).

I reminded Sec Gen that, after speaking to Liam O’Daly, who impressed upon me the importance of the Minister being briefed on this, I had rung the Minister on Friday afternoon (21 March) at around 4.30, and advised him of the discovery of the general system, having first checked with him whether he knew about it (which he didn’t). Sec Gen said that he had this morning raised this with Minister, but the Minister said that he had no recollection of the phone call.”

- 23.21 The last sentence in the aide-mémoire refers to a conversation that the Secretary General of the Department of Justice, Mr Purcell, told the Commission he had with the Minister during the week following Sunday, 23rd March 2014, probably Wednesday or Thursday. Mr Purcell said he told the Minister that Mr Flahive said that he had phoned him on Friday 21st March. According to Mr Purcell, the Minister said that he had no recollection of Mr Flahive’s call. Mr Purcell also said that the Minister had explained that he had travelled through the night and that, by the time of the telephone call from Mr Flahive he was “*totally whacked*”. Mr Purcell accepted that this was perfectly reasonable and that, so far as the Minister was concerned, the first time he had been briefed was at the meeting on the evening of Monday, 24th March 2014. Mr Shatter, however, in his evidence to the Commission said that the background and the issue itself were of such a nature that no tiredness

would have mattered. He said that he had continued to work in the Department on Friday, 21st March 2014, until close to 6:30 p.m.

- 23.22 Mr Flahive has also told the Commission that he informed four colleagues in the Department of Justice of his telephone call to the Minister on Friday, 21st March 2014. Each of these persons has confirmed this in writing to the Commission. They are, respectively, Mr Ken O’Leary, Assistant Secretary, Mr Kevin Clarke, Principal Officer, Mr Eugene Banks, Principal Officer and Mr Fergus O’Callaghan, Principal Officer. Mr O’Callaghan has confirmed in writing to the Commission that, in the course of informal meetings which took place in the Department on 24th and 25th March 2014, Mr Flahive had informed him, Mr Clarke and Mr Banks that, on the previous Friday evening, he had brought the contents of Mr Callinan’s letter to the attention of the Minister. He recalled Mr Flahive saying that one of his reasons for doing so was that he had been uncertain as to whether the Secretary General would be available to do so, owing to his absence following the death of his mother. Mr Clarke and Mr Banks confirmed having been told by Mr Flahive that he had informed the Minister of the discovery of the Garda systems of telephone recording. Mr Clarke similarly confirmed that Mr Flahive had mentioned his telephone call to the Minister to advise him of the issue. None were able to confirm whether these conversations had occurred before or after the announcement of the Garda Commissioner’s retirement.
- 23.23 The Commission accepts that Mr Flahive telephoned the Minister in the afternoon of Friday, 21st March 2014, and that he informed him to some extent, but to an extent that it is impossible for the Commission to determine, of the telephone recording issue. It is clear, however, both from his own evidence and that of Mr Shatter, that he did not inform Mr Shatter of the existence of the Commissioner’s letter of 10th March 2014. Mr Flahive does not claim to have given more than a “*succinct*” summary of the contents of that letter to the Minister. The Commission notes that his aide-mémoire, prepared on 26th March 2014 in the knowledge of the Minister’s impending Dáil statement, is nothing like as comprehensive as the summary Mr Flahive says in evidence that he gave the Minister. The aide-mémoire merely says that Mr Flahive had “advised him of the discovery of the general system...”

23.24 The Commission also accepts that Mr Flahive's original purpose in making the telephone call was to apprise the Minister of the fact that the Attorney General had concerns about the issue. With that in mind, the Commission considers it likely that Mr Flahive did make some mention of the fact that the Attorney General had concerns about the recording issue. However, given the fact that (a) Mr Flahive's own view was that this was not a crisis but a serious matter that was being managed appropriately; (b) he had no specific information as to the particular nature of the Attorney's concerns; and (c) he believed that there would still be time after the proposed meeting with Mr O'Daly on Monday to ensure the Minister was fully briefed ahead of the Cabinet meeting on Tuesday, it seems likely that Mr Flahive did not convey any sense of urgency about the matter in his telephone conversation with the Minister. However, the Commission is satisfied that Mr Flahive was truthful in his evidence and that he did inform the Minister in some, but probably, very general terms of the telephone recording issue.

23.25 For whatever reason, Mr Flahive's phone call made no impact on the Minister. The most persuasive piece of evidence in this regard, is the subsequent behaviour of the Minister:

- He made no attempt to contact the Attorney General between 21st and 24th March;
- Early on the morning of Sunday, 23rd March, the Minister for Justice sent a text message to the Garda Commissioner, inviting him to telephone him back. In evidence to the Commission, Mr Shatter explained that he was concerned about the level of media attention being directed at the Garda Commissioner around that time, and had contacted him in order to express support for him as Commissioner. Mr Callinan has confirmed that he did telephone the Minister in response to the text, and that a conversation took place along the lines indicated by Mr Shatter in his evidence. As Mr Shatter stated in evidence, had he been aware of the recording issue, there would have been no question but he would have discussed it with the Garda Commissioner on the telephone that morning.
- The Minister also sent a text message to the Taoiseach on the morning of 23rd March which contained no mention of the telephone recording issue although

it does refer to other matters concerning An Garda Síochána;⁹ and at the briefings on the evening of 24th March – first with his own officials, and then with the Taoiseach at Government Buildings – he behaved with genuine surprise, as if he was learning about the issue for the first time.

23.26 The Commission is completely satisfied that the Minister acted genuinely as having no awareness of the general recording issue until the evening of Monday, 24th of March 2014.

23.27 The question remains as to why the phone conversation with Mr Flahive had no impact on the Minister. In the view of the Commission, the reason is likely to have been a combination of the following factors:

- the precise nature of the information conveyed by Mr Flahive;
- the manner in which that information was conveyed; and
- the circumstances in which the Minister received the call – notably the fact that the conversation took place at the end of a working day, following his return from Mexico on an overnight flight.

23.28 The Commission concludes that, whatever terms Mr Flahive used in the telephone conversation of Friday, 21st March 2014, they were not clear enough or explicit enough to convey to the Minister the fact that it had come to the notice of the Attorney General that An Garda Síochána had been engaged in widespread recording of telephone calls to and from Garda stations for many years, that the Commissioner had regarded it as so important that he had, on 10th March 2014, reported on it in writing to the Secretary General, Mr Purcell, pursuant to s. 41 of the Garda Síochána Act 2005 requesting that the Minister be informed of the issues raised, that the Attorney General regarded them as serious and that they were likely to be raised at Cabinet.

23.29 The Commission accepts that Mr Flahive had a conversation with the Minister for Justice in which he informed him of the telephone recording issue. For whatever

⁹ See para. 25.2 below.

reason, this made no impact on the Minister. It has to also be significant that the Minister had returned overnight on a long flight from Mexico and had worked a full day in the office. According to the Secretary General, Mr Purcell, the Minister told him during the week that he had no recollection of the telephone conversation, but explained that he had travelled through the night, that he had been up for many hours and that by evening of Friday he was “*totally whacked*”. The Minister did not dispute Mr Purcell’s version of this conversation, but insisted that no tiredness would have prevented him from taking in a conversation in which Mr Flahive told him of the general recording issue. The most likely explanation is that Mr Flahive did tell the Minister of the telephone recording issue but not in any urgent manner and that it did not register with the Minister due to tiredness at the end of a day following an overnight flight.

- 23.30 The Commission cannot refrain from observing that the most effective way of drawing the issue to the Minister’s attention would have been to provide him with a copy of the letter of 10th March 2014. The result of the conclusion of the Commission on this issue is that the Minister at no time, prior to 6 p.m. on Monday 24th March, had any effective knowledge of either the telephone recording matter or the developments in the Bailey case arising from the discovery of recorded telephone conversations in Bandon Garda station.

24. Actions of the Attorney General.

- 24.1 The Commission now returns to an account of the Attorney General's actions following the Legal MAC meeting of Thursday, 20th March 2014. She reviewed the files over the 20th to 22nd of March. She regarded the revelation of the long-established practice in An Garda Síochána of recording non-999 telephone conversations to and from Garda stations as one of great seriousness and treated it as such from that time on.
- 24.2 The Attorney General had been informed, on 14th November 2013, of the fact that a system of recording of telephone calls had been in place in many Garda stations up to that month, when the Commissioner had directed the practice to cease. The Attorney had been informed that some of the recordings were on tapes which were effectively obsolete and that the Commissioner was to be advised that he should take steps to gather all outstanding recordings and seek to identify the dates to which they related, storing them carefully under secure conditions. In the Attorney's view, the information she had in November 2013 bore no relation to the situation which was now revealed.
- 24.3 The issue, as the Attorney saw it, was that the state of affairs as disclosed in March 2014 was "*wholly and materially different in every respect*" from what she had been made aware of in November 2013. She had not been informed in November 2013 that the system had been updated in 1996 and 2008. The Attorney had read the three transcripts of recordings at Bandon Garda station at the end of February 2014 and had now learned of the fact of recording at Garda stations more widely. She concluded that there had, for decades, been wholesale extensive recording of telephone calls the length and breadth of the country in Garda stations, without any apparent authorisation under any of the legislation. This had, she considered, amounted to wholesale violation of the law by An Garda Síochána. She queried why the law had not been complied with. She considered that it was a most serious matter. She had grave concerns about it.

- 24.4 On Saturday, March 22nd 2014, the Attorney received and read the submission of Ms Fitz Gerald, which had been delivered to the Attorney's office on the evening of Friday 21st March. The submission ran to fifteen pages. The Commission does not, in this interim report, reach any conclusions on the question of the legality of the Garda recording systems. It will need to examine that issue, in all its aspects, in its principal report on the Garda recording systems. For that reason, it will note, only briefly, that Ms Fitz Gerald dealt with: "Legality of Recordings". So far as the Data Protection Acts were concerned, Ms Fitz Gerald said that it seemed that the recordings had been taken to facilitate the prevention or investigation of crime. That, she said was clearly a legitimate purpose. However, the retention of the recordings for such a length of time could not be justified. Ms Fitz Gerald also referred very briefly to s. 98 of the Postal and Telecommunications Services Act 1983, as amended, and said that it is an offence to make a recording in the absence of authorisation and that there did not seem to have been a general authorisation. She was referring to the offence of interception, created by that section, in cases of listening to or recording telecommunications messages in the course of transmission. Ms Fitz Gerald did not reach any final conclusion on the legality of the recording systems.
- 24.5 Included with Ms Fitz Gerald's submission were a number of important documents including: counsel's opinion and transcripts of tape recordings in the Bailey case; the letter from Superintendent Michael Flynn, ICT section, dated 19th February 2014, with the inventory of the tapes that had been collated; the letter of March 19th written by Commissioner Callinan to the Data Protection Commissioner, Mr Billy Hawkes, and the email from Mr Ken Ruane, Head of Legal Affairs in An Garda Síochána, outlining the oral advice given to him by Mr Hawkes.
- 24.6 The letter of March 19th is important. It is similar in content to the March 10th letter addressed to the Secretary General, Mr Purcell, and significantly, it outlines the background to the discovery of the tapes. It states:-

"It has since transpired following inquiries that systems would appear to have been installed during the 1980's, in Garda Stations to allow for the recording of incoming and outgoing telephone calls from designated extensions. The rationale behind this was the recording of Garda radio traffic to and from control rooms,

999 calls and the gathering of evidence around calls made to Garda stations regarding bomb threats and other code word messages. It would now appear that this practice has continued in some stations over the years with the relevant recordings being retained within the station itself.”

The Attorney General has confirmed in evidence to the Commission that she saw the letter of March 19th 2014 before the evening of March 23rd, when she first briefed the Taoiseach.

The Commission does not address in this Interim Report the question of whether the rationale behind the installation of the recording systems was as set out in the letter of 19th March. That issue will form part of the Commission’s Final Report. For now, it is sufficient to note that the Attorney General’s Office had not seen any other documentary evidence to support this proposition. In light of this, the Attorney took the view that the suggested rationale was, at best, hypothetical.

- 24.7 The Attorney has told the Commission that she did not endorse the submission as her advice. It is important to note the reason the Attorney gave. She told the Commission in a written statement that:-

“I felt that the background history and full factual matrix to the existence of the recordings was not yet entirely clear. I was not satisfied that the somewhat minimalist documentation and information forthcoming was complete. The instructions received were not sufficiently comprehensive to enable us to advise on the real legal questions in issue and I was further satisfied that all material facts in relation to the entire background to the matter had not been provided by An Garda Síochána.”

- 24.8 The Commission has read the foregoing statement with great care. It was communicated in writing by the Attorney on 5th May 2015. It seems to the Commission to mean very clearly that the Attorney did not believe that her office was in possession of sufficient facts about the systems of Garda telephone recording as of the time when she read Ms Fitz Gerald’s submission on 22nd March. In that situation, it seems necessarily to follow that the Attorney would need to seek further

information before taking any stand on the matter. However, as will appear from subsequent events, she did not do so.

- 24.9 In the view of the Commission, there can be no doubt that the Attorney General's assessment of the issue in March 2014, notably her view that An Garda Síochána had apparently been engaged in wholesale violation of the law, injected a new element of seriousness and urgency into consideration of the telephone recording issue, combined with the emergence of some recordings in the course of the investigation into the murder of Madame Toscan du Plantier. The Commission is satisfied that it contributed decisively to the subsequent very serious light in which the Garda telephone recording issue was viewed. In Mr Flahive's vivid expression, it represented an escalation of the assessment of the legal risk. The Attorney was, of course, completely unaware of the fact that the Commissioner had formally reported on the matter to the Secretary General of the Department, Mr Brian Purcell, on 10th March 2014.

25. Informing the Taoiseach

25.1 On Saturday, 22nd March 2014, the Attorney General spoke to the Taoiseach by telephone about routine Government business. He was in Castlebar. She said that there was another matter she would like to discuss with him, but that she did not wish to do so on the telephone. She agreed to meet him on his return to Dublin on Sunday evening, 23rd March 2014.

25.2 On the morning of Sunday, 23rd March 2014, at 9:50 a.m., the Minister for Justice sent a text message to the Taoiseach which read as follows:-

“Good morning. Think we should discuss ticket charge issue, where matters now stand and a possible statement I might issue today to reframe some of the discussion. Dont think it tenable or helpful that I say nothing before cabinet meeting. Also imp that we do not sucumb [sic] to the mob or pour oil on troubled waters. The current level of media hysteria and misinformation (some of which is fuelled by colleagues) is damaging to the gardai, unfair to Cmsnr and politically damaging, at least in the short term.”

25.3 The Taoiseach confirmed in evidence that he had received this text message. He said that he receives hundreds of text messages. This text message shows the preoccupation on the Minister’s part with the impending Cabinet meeting. It mentions the penalty-points controversy under the name of the “ticket charge issue”. The current media interest in that issue centred on the statements of the Minister for Transport, Mr Leo Varadkar, and other ministers about the Commissioner’s use of the term “disgusting” at the Public Account Committee. Significantly, however, the Minister’s text message exhibits no indication of any knowledge of the new matter of the telephone recording systems.

25.4 The former Minister for Justice, Mr Shatter, gave evidence that he had received no reply to his text message. He said that *“it was quite extraordinary that he [the Taoiseach] didn’t make contact with me. I was the Minister for Justice.”* He said: *“He should have known I was trying to make contact with him from the text I sent*

him.” The Taoiseach agreed that he had not replied to the text. However, he said that he had checked his mobile phone records and found that he had telephoned Mr Shatter’s mobile number at 12:32p.m. on that day. The call lasted 18 seconds. He also pointed out that there was attached to the Minister’s statement sent to the Taoiseach’s secretary by email later that day, a note from Mr Shatter’s secretary, saying:-

"Minister Shatter would greatly appreciate if you would bring the below statement to the attention of the Taoiseach this evening following on from his telephone conversation with the Minister earlier today".

In his evidence, the Taoiseach said that Mr Shatter’s statement that he had not contacted him, while he agreed that it was given to the best of Mr Shatter’s recollection, was not accurate. The Taoiseach did not claim to be able to recall the telephone call or its contents. He was not sure whether he was leaving a message to say that he had got that [the text message], but that he would be in touch. The Taoiseach was not, of course, at this time, yet aware of the Garda telephone recording issue.

- 25.5 In the afternoon of Sunday, 23rd March 2014, the Taoiseach telephoned the Attorney General to say that he was in Government Buildings. The Attorney General called by his office. She outlined briefly that she had matters she wished to discuss with him and that they included recent developments in the Bailey case and that she wanted to raise another allied matter in relation to the recording of telephone calls historically in Garda Stations. The Taoiseach was about to leave the office to attend a function and said that he would be back to his office later that evening.
- 25.6 At about 6 p.m. on the evening of 23rd March, the Attorney General met the Taoiseach in his office with Mr Martin Fraser, who was Secretary General to the Department of the Taoiseach and Secretary General to the Government. It was a long meeting. It was also an important meeting, because it was the occasion when the Taoiseach first learned of the developments in the Bailey case and the practice of recording of telephone calls to and from Garda Stations. It was the occasion when

the Taoiseach, upon the advice of the Attorney General, accepted that it was a matter of great seriousness.

25.7 The Commission pauses at this point. As will shortly appear, the Attorney General was about, at this moment on the Sunday afternoon, to present the Taoiseach with an account of extremely serious misconduct in An Garda Síochána. She had known of the matter since at least the previous Thursday and had read a number of documents about it over the weekend. She has told the Commission that, to paraphrase her letter of 5th May 2015, her office was not in possession of sufficient facts to be able to advise. As she said, the *“people in possession of all the information about the circumstances were An Garda Síochána”*. In these circumstances, it is surprising that the Attorney took no steps to have contact made with the Garda Commissioner, in order to seek further information on the origin, extent and use of Garda telephone recording systems. After all, it was An Garda Síochána that was seeking advice from the Attorney General’s Office. It is difficult to see how the office would have any difficulty in seeking further information from the body which was effectively in the position of a client. The Attorney did ask her own staff to obtain background information on the recordings which related to the Bailey case.¹⁰ However, as far as the general recording issue was concerned, she gave no instructions to seek further information from An Garda Síochána. Nor did she make contact with the Minister for Justice, who was the primary conduit of information between An Garda Síochána and the Government.

25.8 The Attorney General, at the meeting on Sunday evening 23rd March 2014, outlined the current position in regard to the Bailey case to the Taoiseach and to the Secretary General to the Government, Mr Fraser,. She also gave an account of the three telephone transcripts from Bandon Garda station and the views of counsel about them. She informed the Taoiseach that compliance with the High Court discovery order was due on the following Tuesday, 25th March 2014. There was also a brief discussion of the international dimension to the Bailey case.

¹⁰ See below para. 26.2-26.5.

- 25.9 In her written statement to the Commission, the Attorney General gave the following account of the report she made to the Taoiseach and Mr Fraser at the meeting on 23rd March.

“I then informed him of the widespread Garda practice of recording of telephone calls from Garda Stations since the 1980's to November 2013 with no apparent lawful authorisation. The Garda Commissioner was reported to have been unaware of the widespread practice until 2013 and it was halted by him in November 2013. I outlined the potentially very serious implications legally and constitutional, civil and criminal law issues that could arise from the breaches of the Constitution and the law and infringement of citizen's rights including the right to privacy.”

- 25.10 The Attorney said, in her oral evidence to the Commission, that she told the Taoiseach that An Garda Síochána, a central body in the State, had engaged in an extensive practice for decades:-

“of recording telephone calls in and out of Garda Stations in complete violation of the law, with total disregard for the requirements predating the 1983 Act [the Postal and Telecommunications Act 1983] of ministerial authorisation, in the light of the Kennedy and Arnold decision and the clear articulation of rights of citizens under the Constitution...”

So far as she was concerned, *“this was criminal activity being engaged in by An Garda Síochána”*. There was no lawful basis that she could find for such behaviour. She did not know what use the material was being put to. She *“had real concerns about the rights of individual accused persons, detainees and telephone calls with solicitors”*. If that were seen to have occurred it would be *“a most grievous matter”*.

- 25.11 Such a message from the Attorney General to the Taoiseach concerning the national police force of the State was inevitably going to raise alarm and concern. The Attorney did not advert to the letter of March 19th 2014, written by the Garda Commissioner to the Data Protection Commissioner, which outlined a possible justification for the activity, nor did she advert to Ms Fitz Gerald's view, that the

Gardaí may not have committed a criminal offence in recording the telephone conversations in question.

25.12 Mr Fraser recollected the Attorney as having reported that there had been widespread taping of telephone calls in Garda Stations all over the country for many years. In his statement to the Commission he said:-

“The AG stated that, arising from documents being prepared for discovery in the Bailey case, it appeared that:

- there had been widespread taping of telephone calls in Garda stations all over the country for many years
- that in the specific case of Mr Bailey, the transcripts to be discovered suggested very serious Garda misconduct
- that it was therefore likely that the State would lose that specific case, and thereby be exposed to considerable damages”.

25.13 According to Mr Fraser, the Attorney General advised that the documents would be made available to Mr Bailey's legal team on Tuesday, 25th March 2014, and that it was likely that the matter would then become public knowledge and give rise to very significant public concern and controversy, given the high profile of that specific case.

25.14 Mr Fraser went on to say that the Attorney had indicated at the meeting that:-

“Quite apart from the specific case, the potential implications for the criminal justice system of this information were profound.

The AG also advised that she had concerns that the destruction of tapes was being considered by the Gardaí, who had sought the views of the Data Protection Commissioner on the matter. She had therefore given instructions that no tapes were to be destroyed, in case they had evidential value or, indeed,

could prove someone's innocence.

It was clear that the implications of this new development were potentially very serious and wide-ranging.”

- 25.15 The Taoiseach’s account was similar to that of Mr Fraser’s. He mentioned recordings at an unknown number of Garda stations all over the country. He said that he was shocked at the extent of it. He went on to say that, as discovery was due in the Bailey case on 25th March, it was accepted that these matters would be in the public domain shortly after the Cabinet meeting.
- 25.16 The content of the message conveyed by the Attorney to the Taoiseach on Sunday evening, 23rd March 2014, is of central importance in the sequence of events leading to the retirement of the Garda Commissioner. The Attorney believed that the matter of Garda telephone recording was of such seriousness that it warranted her bringing it to the attention of the Taoiseach. It was, in her view *“a whole of government issue.”* This intervention by her started the chain of events which culminated in the retirement of the Garda Commissioner. It is to be expected that participants in such a meeting will vary in their recollection of the language used.
- 25.17 The Commission has been presented with a significant new problem in its assessment of this evidence. On 22nd May 2015, the Attorney made a written submission to the Commission, with the effect of substantially modifying her earlier evidence of what she had said at the meeting. She now says that, contrary to the evidence given by her at her first hearing by the Commission, she did not convey an unequivocal view to the Taoiseach “as to whether any individual or body had been guilty of criminal activity.”
- 25.18 This late intervention, in fairness to all those involved, especially the Attorney General, calls for careful consideration by the Commission.
- 25.19 Firstly, it is relevant to note that the Attorney had, in accordance with normal practice, been duly provided with transcripts of evidence of each of her hearings by the Commission. On 5th February 2015, she wrote to the Commission pointing out a

number of points of detail with a view to making corrections or clearing up misunderstandings. None of the points then raised questioned the accuracy of her evidence concerning the meeting with the Taoiseach and Mr Fraser on the evening of Sunday 23rd March 2014.

- 25.20 In essence, the Attorney now says that, at the meetings on 23rd and 24th March 2014, she had not given an unequivocal view as to whether any individual or body had been guilty of criminal activity. She apologises for having given a contrary impression in her evidence to the Commission and regrets that her “at times trenchant language” had undoubtedly left the Commission with what she calls an erroneous impression that she had used such language at the meetings and, in particular, that she had used language alluding to criminal activity at the meeting with the Taoiseach and Mr Fraser on the 23rd of March 2014.
- 25.21 The Attorney has invited the Commission to consider the evidence of the other witnesses, namely the Taoiseach and Mr Fraser, pointing out, quite correctly, that neither of them, in their statements or when giving evidence, used words or phrases suggesting that she had alluded to criminal activity. She insists that she did not, at either the meeting on 23rd or 24th March 2014, suggest “that any particular individual or body might be guilty of an offence” under the relevant legislation.
- 25.22 The Attorney draws attention to s. 98 of the Interception of Postal Packets and Telecommunications (Regulation) Act 1983 as amended by s. 13(2) of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993. That is the legislation which created the offence of intercepting telecommunications messages (and other related offences). It is essentially the foundation for the Attorney’s view that the Garda recording was unlawful. In that context, she observes in her written submission that “it is appropriate to use the language of criminality...”
- 25.23 The Attorney, in her submission of 22nd May 2015, made a particular point of the absence, when she was dealing with the matter in March 2014, of any evidence that authorisations existed, which permitted interception of telephone messages by An Garda Síochána. On this point, the Attorney General is undoubtedly correct.

Although she did not have access to any significant body of factual evidence when giving evidence, the Commission is satisfied from its investigations to date that no question ever arose of An Garda Síochána obtaining statutory authorisation for the recording of telephone calls to Garda stations. The possible need for authorisation for the telephone recording systems at Garda stations did not occur to anyone in An Garda Síochána. Authorisation for listening to or downloading particular recordings is a different matter. The Commission is in the course of investigating the procedures followed in that respect and will report on it as part of its report on the general recording issue.

- 25.24 This Interim Report does not, as already stated, purport to report on whether the recording systems were “authorised by law.” (Sub-paragraph 1(g) of the Terms of Reference). The task of the Commission, in that respect, will be to consider not only the criminal law but broader issues of potential infringement of fundamental rights, in particular the right to privacy and the right to protection of personal data. Having regard to the specific concerns of the Attorney General about section 98 of the Postal and Telecommunications Act 1983 (as amended), the Commission will need to consider whether the definition of the term “interception” in that legislation, particularly after its amendment in 1993, includes the recording of a telephone call by the person receiving the call. From 1993, recording does not amount to the offence of interception, unless it occurs “in the course of transmission” and where either party to the call consents to the recording. The Commission will also examine the legislation concerning data protection, the Criminal Justice (Surveillance) Act 2009 and the legal consequences of recording or permitting access to recorded telephone calls between solicitors and their clients.
- 25.25 The Attorney, in her submission of 22nd May 2015, states, at several points, that the issue she raised at the meeting on 23rd of March 2014, was one of “potential illegality.” She points out that, in her written statement to the Commission, she had referred to the “potentially very serious implications of the recordings.” This is true, but that expression followed her reference, in her statement of 12th June 2014, to what she described as “the widespread Garda practice of recording of telephone calls in Garda Stations since the 1980's to November 2013 with no apparent lawful authorisation.”

- 25.26 In short, the Attorney is at pains to emphasise the use of the word “potential”. Insofar as she referred to illegality or criminality, she says that she had qualified it by the word, “potential”. She also emphasised, at several points, that she did not consider that she had enough information on 23rd March 2014 to give an unequivocal view that any offences had been committed.
- 25.27 The Commission has to assess the overall effect of the meeting of 23rd March 2014. The exact words used will be less important than their impact in their context. The Attorney denies using the language of criminality, at least in the sense that she did not say that any particular person or body had committed an offence. It is nonetheless striking that the Attorney General, on the first occasion on which she gave evidence to the Commission, clearly said that she had conveyed to the Taoiseach that An Garda Síochána had, for decades, been involved in a criminal enterprise. That would have been extreme language, if she spoke in those terms. The Commission respects the fact that the Attorney, in a careful and considered written submission, has now modified her evidence and has expressed regret for any contrary impression created. It accepts her qualification of her evidence, as far as it goes. However, it also notes that the Attorney’s initial evidence on this point was given in response to a direct question from the Commission as to what she said to the Taoiseach regarding her concerns on 23rd March.
- 25.28 Taking all of the above into account, the Commission is satisfied that the Attorney spoke in strong terms at the meeting on 23rd March 2014 of apparently unlawful behaviour over many years by An Garda Síochána. The way in which the Attorney expressed herself in giving evidence on oath to the Commission lends support to this view. The expression “potential illegality”, though not as forceful as the language used by the Attorney in her first appearance before the Commission, is in itself quite powerful, particularly when applied in a general sense to An Garda Síochána. The seriousness of the impact created by the Attorney’s presentation may, perhaps, be gauged from the evidence of Mr Fraser. He saw a picture of “*verdicts being overturned or criminals to be released or jails to be emptied,*” even though he acknowledged that might be an extreme view.

- 25.29 It is inescapable that the Attorney General presented an alarming picture to the meeting, to such an extent that the Taoiseach was, as he says himself, shocked.
- 25.30 Again, it is clear that the Attorney General was the Taoiseach's only source of information on the facts and the law. The information communicated by the Attorney did not convey any suggestion that the Garda Commissioner had any responsibility for what had occurred. In giving evidence to the Commission, the Attorney General explained that the extensive practice of recording telephone calls in and out of Garda stations, in complete violation of the law and with total disregard for the need for proper authorisation, seemed, she said, to extend to every county except two. This, she said, was criminal activity being engaged in by An Garda Síochána. She found herself simply in the dark as to how it had all happened. The Attorney General emphasised, however, that there was no reference whatever to any particular individual or to blame being ascribed to anyone.
- 25.31 The Attorney saw this matter as emerging against a background of a broad range of issues which had arisen at or around that time concerning An Garda Síochána. These have been mentioned above at paragraphs 20.01 to 20.17. The Attorney considered it to be a very sensitive time. It was very demoralising for An Garda Síochána. Public trust was at a very low ebb.
- 25.32 The Taoiseach was extremely concerned following the Attorney's report. Mr Fraser could see that he was taken aback. He was concerned that members of the public who had made contact with Garda stations over very many years had had their messages recorded illegally. The matter would give rise to great public controversy and to a perception of a lack of integrity and credibility in the force that would cause public outrage. The Taoiseach remarked that there were, as he was then aware, over 2,600 recordings from all over the country from, insofar as he then knew, an unknown list of Garda Stations.
- 25.33 During her first appearance before the Commission, when asked to give a sense of what she had said to the Taoiseach regarding her concerns about Garda telephone recording, the Attorney General stated, without expressing any doubt or qualification, that An Garda Síochána had been engaging in wholesale and criminal

violation of the law for many years. It is fair to note that the Attorney, in her written statement of 22nd May 2015, has now substantially withdrawn from what she calls this “trenchant language.” She says, rather, that she spoke of “potential” illegality when briefing the Taoiseach on the matter. The Attorney did not tell the Taoiseach that another view had, whether rightly or wrongly, been expressed by a lawyer in her office. Nor did she say that there was a need to gather further facts.

25.34 The Taoiseach and Mr Fraser in their statements to the Commission said that the Taoiseach asked the Attorney General to get legal advice (described by the Taoiseach as “*written*” and by Mr Fraser as “*definitive*”) on the issues involved. According to the Attorney, she said that she intended to instruct senior counsel to carry out a review of the material that she had been considering. It was agreed that they would meet on the following (Monday, 24th March 2014) evening. The Attorney would report back. The Taoiseach expected that the position would then be much clearer.

25.35 In the course of her evidence to the Commission, the Attorney stated that on Sunday night, 23 March 2014, the focus of the meeting was on the facts: “*It was the facts and then I needed to verify facts.*” Later in her evidence she stated:-

“But really at the meeting of the 23rd, I mean at that the Taoiseach was very cautious, he wanted to make sure everything was correct, the facts to be as correct as possible, you know, he wanted clarity about -- he was worried about the Bailey case..... And then he wanted, the legal team in the Bailey case, he wanted their up to date advice...”

25.36 In his evidence to the Commission, the Taoiseach also spoke repeatedly of asking the Attorney to get the facts “*checked and double checked*”. Their evidence to the Commission would suggest that neither the Attorney nor Mr Fraser understood that to be part of her task.

25.37 Notwithstanding her remark quoted above, that she needed to verify facts, the thrust of the Attorney’s evidence was that she did not believe the Taoiseach was asking her to check or verify the facts. Fact gathering would not normally have been her

function. As the Taoiseach himself emphasised, she was the legal adviser to the Government. If anyone was to obtain the facts, it might have been expected that it would be the Minister for Justice with whom An Garda Síochána had a direct statutory relationship, under the Garda Síochána Act 2005. In fact, Mr Shatter, in his evidence, said that, if he had been invited to the Sunday meeting, *“literally on the way out [he would have] phoned the Garda Commissioner.”* He also said that he *“could have got facts and looked for information any time on the Monday and [he] was never asked to do so.”*

25.38 The Commission pauses to observe, at this point, that it is striking that the Minister for Justice was not informed of these developments, either by the Attorney General or the Taoiseach. Mr O’Daly, the Director General of the Attorney General’s Office, had gone to considerable lengths on Friday, 21st March 2014, to satisfy himself that the Minister for Justice was *“fully briefed”* and so informed the Attorney. He telephoned Mr Flahive, Assistant Secretary of the Department of Justice, in the absence of the Secretary General, Mr Purcell. Not satisfied with that, he had arranged a meeting for Monday, 24th March 2014, with both Mr Flahive and Mr Purcell. Mr O’Daly’s efforts to ensure the Department and the Minister for Justice were fully aware of the issues stands in contrast to the fact that the Minister was not informed of or invited to the meeting of 23rd March 2014 in Government Buildings. When that meeting ended, no arrangement was made for the attendance of the Minister for Justice at the meeting that had been arranged between the participants for the following evening. Mr O’Daly, for his part was unaware that the Attorney had contacted the Taoiseach over the weekend and did not know of the meetings on 23rd and 24th March 2014 until after the Garda Commissioner had retired.

25.39 On the evening of Sunday, 23rd March 2014, Mr Flahive telephoned Mr Purcell at his home. The call was *“quite brief.”* He told Mr Purcell of his conversation with Mr O’Daly on Friday, 21st March 2014, that the Attorney was personally very concerned about the issue of the recordings, that she was likely to raise it at Cabinet on Tuesday, that he, Mr Flahive, had felt obliged to ring the Minister straightaway and he stated in evidence:-

“I certainly told Brian that I had phoned the Minister. I didn't get into – I didn't go on and say to Brian that I was surprised that the Minister was surprised. I didn't, I didn't raise that, but I certainly told him that I had phoned the Minister because of the concern that Liam O'Daly told me the Attorney felt.”

25.40 Mr Flahive also told Mr Purcell that Mr O'Daly had asked for a meeting with both Mr Purcell and Mr Flahive on Monday, 24th March 2014. Mr Purcell thought that Mr Flahive was seeking to confirm that he would be coming in to work on Monday. Mr Flahive said that Mr O'Daly wanted to meet on Monday to discuss the issues both in relation to the Bailey case and the general recording issue, as the Attorney had become increasingly concerned. Mr Purcell said that Mr Flahive did not speak to him *“in any sort of alarming manner”*.

25.41 Also on the evening of Sunday, 23rd March 2014, the Attorney General emailed her Director General, Mr O'Daly, Ms Fitz Gerald, Advisory Counsel, and Mr Feely, Advisory Counsel, who was handling the Bailey litigation on behalf of the office of the Attorney General. The email was headed “Ian Bailey” and was marked as of high importance. It requested a consultation and “a full briefing on this matter and the issue of Discovery in particular asap tomorrow...”

26. The morning of 24th March 2014

- 26.1 On Monday morning, 24th March 2014, at 9:50a.m., the Assistant Secretary in the Department of Justice, Mr Flahive, telephoned the Head of Legal Affairs for An Garda Síochána, Mr Ruane. Mr Flahive was looking for material to brief the Minister for Justice on the general recording issue. He raised a number of queries regarding the tapes and also raised the question of taping in Dundalk that might have consequences for the Smithwick Tribunal. Mr Ruane undertook to look into the questions raised and emailed Mr Flahive a copy of the 10th March 2014 letter, which the Commissioner had sent to the Minister for Justice.
- 26.2 During the course of the morning, the Attorney General emailed her advisors with a number of specific questions relating to the recordings in the Bailey case. Arising from this, Mr Feely contacted Ms Duchene of the Chief State Solicitor's Office to ask if she could answer these questions. He also asked her if junior counsel in the Bailey case could come to the office in order to give the Attorney some background information in relation to the tapes from Bandon Garda station. Ms Duchene texted counsel with the request and also contacted Garda Stephen Nolan from the Legal Affairs Section of An Garda Síochána. Garda Nolan said he would see if Mr Ruane, the Head of Legal Affairs, was available to brief the Attorney. Ms Duchene informed Mr Feely and Ms Fitz Gerald of her actions by email sent at 1:47 p.m. This email also contained information provided by Garda Nolan in response to the specific questions raised by the Attorney earlier that day. Mr Feely copied the email to the Attorney's private office at 1:52p.m.
- 26.3 At 1:46 p.m. on 24th March 2014, Mr Ruane sent a text message to Ms Fitz Gerald, stating:-

“Ruth, can you please confirm if the Attorney General wants to be briefed personally on the Ian Bailey recording / tapes issue. If so I will inform the Commissioner and suggest who should attend such a briefing.”

- 26.4 Mr Ruane did not receive a response to this text. At 2p.m., the meeting which the Attorney had requested with her own staff - Mr O'Daly, Ms Fitz Gerald and Mr Feely - commenced.
- 26.5 The Attorney General told the Commission that, at that meeting: *"I did ask, you know, what is the background here, could somebody get me the information, what is the background?"* She said that she was trying to get as much information as possible *"Because [she] didn't have the facts."* The Attorney told the Commission that she was looking for more information *"from the people in my office."* She said she did not know about Mr Ruane's offer to arrange a briefing with the Garda Commissioner on the issue of the Bailey tapes, and said that *"it would have been good if I could have spoken to him"*.
- 26.6 Following this meeting, the Attorney General consulted verbally with Mr Shane Murphy, Senior Counsel, on Monday, 24th March 2014, in order to obtain what she variously described as an "outside view" or a "second opinion". She explained, in her evidence:-

"I wanted an overview from him with regard to, you know, my evaluation and he is somebody whose view I would greatly value and I wanted a sense of if he saw things differently, if he thought that perhaps there was no problem with recording, there was no problem, that they were somehow immune from authorisation in regard to the general issue, what was his sense of it, and also then with regard to the litigation, you know".

She said that she had to

"leave an open mind to the possibility that there might have been some legal justification for the recording."

- 26.7 Following some confusion regarding the extent of consultation, if any, with Mr Murphy, the Commission invited both the Attorney and Mr Murphy to attend hearings. The Attorney attended on 7th May 2015 and stated that she had not consulted Mr Murphy in relation to the general recording issue, at all.

26.8 In a written submission to the Commission, dated 22nd May 2015, the Attorney stated that:-

“I had a general wide-ranging discussion with Shane Murphy SC on the Bailey case and the potential implications of Garda recording for that case and for the State more generally.”

She outlined the parameters of her discussion with Mr Murphy and stated that:

“In the presence of Martin Fraser, Shane Murphy S.C. and I discussed the options and alternatives that were available.....to establish all the facts in the general recording issue and the background to the Bandon tapes. The clear preference ultimately was to recommend a Commission of Investigation.”

Mr Murphy with the consent of the Attorney General gave evidence to the Commission and confirmed that he had been consulted by the Attorney in the afternoon of Monday, 24th March 2014. The meeting lasted about one and a half hours. He said that, at the beginning of the meeting, he had been handed a lever arch file of documents divided into two sections. Part 1 contained material relating to the general recording issue and Part 2 referred to the Bailey case and included the three transcripts of telephone calls from Bandon Garda station.

26.9 Mr Murphy confirmed that, whilst he had been asked to advise very generally on the areas of law that were relevant to the general recording issue, he was not asked to advise on it specifically. He stated that he would not have been in a position to do so without a full consideration of the legal issues. He said that he did advise that the matter probably merited a Commission of Investigation.

26.10 Following her meeting with Mr Murphy, and at his suggestion, the Attorney requested a meeting with the counsel involved in the Bailey case, in order to obtain their up-to-date advice. They had been in court and could only come to the office after court had risen, which was at approximately 5p.m. They were not aware of the general recording issue and the consultation was confined to the Bailey case. The

Attorney General was called away from her meeting with them to attend the meeting at the Taoiseach's office.

27. The afternoon of 24th March 2014

27.1 In the afternoon of Monday, 24th March 2014, the meeting which had been sought by the Director General of the Attorney General's Office, Mr O'Daly, whilst on the phone to the Assistant Secretary in the Department of Justice, Mr Flahive, the previous Friday took place in the Attorney General's Office. It was attended by Mr O'Daly as well as Ms Fitz Gerald and Mr Feely from that office and by Mr Purcell and Mr Flahive from the Department. Mr O'Daly emphasised that the Attorney was deeply concerned at the emergence of the practice of recording calls from Garda stations. He "pointedly" asked for and received confirmation from both Mr Purcell and Mr Flahive that the Minister had been fully briefed. The meeting was largely concerned with the Bailey case, which included discussion of the discovery of the tape recordings. However, it also concerned the more general recording issue. Mr O'Daly asked if the Department of Justice officials were aware of the outcome of the Data Protection Commissioner's advice. He reiterated the Attorney General's advice that no recordings could be destroyed. Mr O'Daly referred to the "*high probability*" that the matter would come before cabinet on Tuesday morning.

Mr O'Daly commented in his evidence on the failure of Mr Purcell to mention at the meeting that he had received a letter from the Garda Commissioner, pursuant to s. 41 of the Garda Síochána Act 2005.

27.2 In his evidence to the Commission, Mr Flahive did not dispute the evidence of Mr O'Daly. He said that the issue of the telephone recordings was the pressing issue and that Mr O'Daly was very anxious that the Minister be aware of this, that he had assured Mr O'Daly at the meeting on the afternoon of 24th March 2014 that the Minister was fully briefed. Mr Flahive said that he explained to Mr O'Daly that, after their conversation on the afternoon of Friday, 21st March 2014, he had phoned the Minister for Justice and briefed him "*on what Liam [O'Daly] told [him]. He presumed that [was] the basis for the sense that the Minister had been briefed.*" It is also the case that Mr Purcell had not briefed the Minister on the matter at that time. Thus, Mr O'Daly can only have been relying on Mr Flahive's account of briefing the Minister by phone on Friday afternoon to ground his belief that the Minister had

been fully briefed. Again, neither Mr Purcell nor Mr Flahive made any reference to the letter of 10th March 2014 at the meeting.

- 27.3 At no time during 24th March did either Mr Purcell or Mr Flahive provide the Minister for Justice with a copy of the letter of 10th March 2014. The Commission asked both Mr Flahive and Mr Purcell if they had discussed the letter between themselves and neither could recall doing so.

Mr Purcell knew, by this time, that the Attorney regarded the matter as serious and was likely to raise it at Cabinet. Mr Flahive had believed all along that the Minister should have received the letter. However, he knew from Friday afternoon that the Minister did not know about it. It is regrettable that the Minister was not, even at that stage, given a copy of the letter.

- 27.4 Later in the afternoon of Monday, 24th March 2014, Mr Purcell telephoned the Commissioner with a number of inquiries, including whether it was possible that there were tape recordings of calls into Dundalk Garda Station during the period of the murders of the two RUC Officers which was the subject of the Smithwick Tribunal. Following inquiries by the Commissioner, it was confirmed that Dundalk Garda Station was not included in the recording. Mr Purcell asked the Commissioner whether all of the recordings had been collated and he also said that a two week extension for discovery would be sought in the Bailey case.

- 27.5 Following the meeting between Mr Purcell, Mr Flahive and the officials from the Attorney General's Office, Mr Purcell asked the Minister for Justice's Private Secretary if there was a slot where they could meet the Minister later on. The purpose of the meeting requested was to brief the Minister on the issues raised by Mr O'Daly regarding the Attorney's concern.

- 27.6 At about 6.00 p.m. on 24th March, both Mr Purcell and Mr Flahive met the Minister to brief him on the telephone recording issue. Mr Shatter has told the Commission that he was not informed in advance of the purpose of the meeting. Mr Purcell has told the Commission that he had a copy of the letter of 10th March 2014 with him. Mr Purcell informed the Minister of the existence of the system of telephone

recording and of the fact that it had ceased. He informed him of how the existence of tapes of recorded conversations had come to light in Bandon, that their contents had to be discovered to the plaintiffs in the Bailey case and that, as a result of further searches, it was then found that there were other tapes in other Garda stations. The Minister was told that this had been discovered in or about October 2013 and that the Garda Commissioner had put a stop to it in November 2013. He was informed that it was all very serious. The former Minister, Mr Shatter, said in his evidence to the Commission:-

“I started raising a whole series of questions; what did we know about the tapes? Did we know how many Garda stations were affected? Did we know what was being taped? Was there any possibility that conversations between individuals held in custody and members of the legal profession were recorded? Had any consideration been given to the implications of this for proceedings already determined?”

The briefing had not concluded when it was interrupted by a telephone call from the Taoiseach to the Minister calling him to a meeting in his (the Taoiseach’s) office. The Minister left at once. While it is not clear to what extent the issues concerning the telephone recording system had been discussed before the Minister left, it is clear that, once more, the letter of 10th March 2014 had not been mentioned by either by Mr Purcell or Mr Flahive before the meeting was interrupted.

27.7 The Taoiseach did not have any further contact with the Attorney General or any other Minister concerning this issue between the evening of Sunday 23rd March and the evening of 24th March. He met Mr Leo Varadkar, Minister for Transport, on Monday morning, 24th March and discussed with him how difficulties with the Minister for Justice might be resolved. These difficulties concerned remarks about the Garda Commissioner’s use of the word “disgusting” in reference to the Garda whistleblowers, which had been made by Mr Varadkar, mentioned earlier in this report.¹¹

¹¹ See para 20.11 above.

27.8 The Minister for Justice had not been at the meeting on the evening of Sunday 23rd March, and was not informed, either by the Taoiseach or the Attorney General, about the issue of telephone recording from Garda stations or the serious view that was being taken of it. The Attorney General has informed the Commission that she was of the view that the Minister for Justice was already fully informed about the matter. She knew that the Department had been supplied with the transcripts from Bandon Garda station on 28th February 2014. In addition, Mr O'Daly had informed her of the mistaken assurances he had received from the Department that the Minister was fully briefed in the matter.

In a later written submission, the Attorney also drew attention to the fact that the presentation of the list of Sensitive Cases for consideration by the Cabinet was a function of the Taoiseach, not the Minister for Justice. As the Bailey case was on that list, and as it was possible that the general recording issue would arise when that case was discussed, the Attorney considered it her duty to brief the Taoiseach on these matters in advance of the Cabinet meeting.

27.9 The Commission is satisfied that the Minister was not informed of the very serious view now being taken of the matter by the Attorney. In his evidence to the Commission, the former Minister for Justice, Mr Shatter, fully accepted that it was reasonable for the Attorney to believe that he had been fully briefed by his own officials. However, because of the extent to which they had worked together and collaborated on dealing with issues of difficulty across a broad range of matters, he found it difficult to understand why he was not contacted at the same time or before she briefed the Taoiseach. He did not understand why she did not lift the phone because they talked to each other frequently.

27.10 The Attorney, in response to this point, said that the Minister was, as she put it, "*part of the narrative*". She said, in her evidence:-

"But there was also another reason [for not contacting the Minister], and that is, part of the issue involved the Minister himself. So, in addition to being the Minister seised with functions under the legislation regarding the Gardaí, he was also part of the narrative and there were issues, allegations touching and

concerning the Minister himself personally....So, he was very much directly involved but as a participator rather than as the line Minister”.

Given the gravity of the matter from the Attorney General’s perspective, she believed it warranted being raised and managed by the Taoiseach, in light of the tensions that existed between the Minister for Justice and Mr Varadkar. She stated:-

“But my first concern was, this was a whole of Government issue and that this warranted, given that it - the nature of what was concerning me, you know, that there had been a whole series of ----, given all the matters, the Garda Inspectorate Report, the O'Mahony Report, the myriad of matters, the Commissioner -- and also the narrative in the media that the Commissioner and the Minister were unduly close and so on, I believe that, you know, it warranted raising this matter with the Taoiseach,...”

27.11 Mr Shatter emphasised in evidence that he and the Attorney General had worked very well and very closely together over three years. There were no allegations relating to him concerning the tapes, which created any barrier to his being briefed over the weekend by the Attorney General.

27.12 Mr Shatter was, of course, completely unaware of the Garda telephone recording issue, which was of such concern to both the Attorney and the Taoiseach, save to the extent that Mr Flahive had informed him of it by telephone on Friday afternoon, 21st March 2014.

27.13 Mr Shatter, in his evidence to the Commission, has expressed surprise that he was not contacted by the Attorney General or the Taoiseach, that he was not invited to the meeting on Sunday evening, 23rd March, and that the meeting on the evening of 24th March commenced in his absence and without his knowledge. He found it “quite extraordinary” that the Taoiseach had not made contact with him. As he pointed out, he “*was the Minister for Justice.*” Indeed the Attorney General made the point in her evidence quoted above, that he “*was the Minister seised under the Act with all the functions about the Commissioner.*”

27.14 The Attorney's failure to contact Mr Shatter is all the more puzzling, in circumstances where she had been informed that the Minister for Justice was "fully briefed" on the matter. Given that her instructions from the Taoiseach on Sunday night had been to "*check and double check the facts*", it is somewhat perplexing that she did not contact the one person who, as she believed, was in a position to enlighten her. In addition, Mr Shatter, as Minister for Justice, was uniquely placed to contact the Garda Commissioner for explanations and clarifications. The Commission accepts that the Attorney was not under any duty to contact the Minister in these circumstances, but considers that it would have been both reasonable and prudent for her to have done so.

27.15 In his evidence to the Commission, the Taoiseach responded to Mr Shatter's concerns about not having been contacted or invited to attend the meeting on Sunday evening, 23rd March 2014. He denied that he was under any requirement at all to have the Minister for Justice attend at any meeting. He was the Taoiseach. He gave the following evidence:-

"I wasn't under any requirement at all to have the Minister attend at any meeting here. The Attorney generally apprised me of certain facts. I asked her, as was my responsibility, to have those facts checked and double-checked and from my point of view to get a written analysis of those facts so that I would be clear about what I was dealing with. So there wasn't any requirement to have anybody else there while I asked the Attorney General to check what she was telling me and have it verified".

27.16 The Taoiseach insisted that he had had no intention of excluding the Minister for Justice. He said that he:-

"would have assumed that the Department of Justice and the Minister for Justice would have been dealing with these matters in any event... every minister in every department has responsibilities and you would expect that they would be up-to-date and up to speed in respect of the developments that take place relevant to those departments."

He said that he was obviously going to be engaged with the Minister for Justice in relation to the issue but he needed to get his facts right first.

27.17 It is difficult to avoid the conclusion that a decision was made not to include the Minister for Justice in discussions of the matter on Sunday, 23rd March, and for most of Monday, 24th March. The Taoiseach maintained that he was entitled not to do so, but the information he was receiving from the Attorney General could not have been more alarming and it does raise the question as to whether it was the most appropriate decision. It is impossible to know what would have happened if the Minister had been taken into the confidence of the Taoiseach and the Attorney General. Mr Shatter has said that he would himself have contacted the Commissioner. It is true that the Commissioner was not contacted, either by the Taoiseach or the Attorney General, following the meeting on Sunday evening, 23rd March 2014. It is very likely that, if the Minister had been kept informed of the issue, it would have made a significant difference to the events as they unfolded.

27.18 Nobody made contact with the Garda Commissioner about the matter of the telephone recording at any time on Monday, 24th March. Mr Purcell, as stated above, telephoned him to make an inquiry about Dundalk Garda Station. The Taoiseach said that no thought had been given to contacting the Commissioner on Sunday evening, 23rd March. The Attorney agreed. The Taoiseach repeated that he had wanted an understanding of what was involved and said that: *“the follow through from that would be engagement with the Department and the Minister of Justice, whose Secretary General under law is the person who makes contact with a Garda Commissioner.”* However, neither the Taoiseach nor the Attorney General made any contact with the Department of Justice on Monday, 24th March. The Taoiseach has told the Commission that he was clear that it would not have been appropriate for him to contact the Commissioner.

28. Meeting at Government Buildings, 24th March 2014

28.1 This brings us to the crucial and decisive meeting of the early evening of Monday, 24th March. It is impossible to overstate its importance. It was the meeting from which the Secretary General of the Department of Justice, Mr Purcell, was sent on a mission to visit the Garda Commissioner, Mr Callinan, in his home. The meeting lasted several hours. The Taoiseach said that the meeting was *“called to follow through on the instruction [he] had given to the Attorney General, what is involved here, what are the facts, what do we need to do arising from this.”* He said that *“the purpose of the meeting was to have the Minister for Justice present, the Secretary General of the Department of the Taoiseach, the Attorney General, and myself, to have a discussion about what was now emerging.”* The meeting commenced at about 6 p.m., at which time it was attended by the Taoiseach, the Attorney General and the Secretary General to the Government, Mr Fraser. The Minister for Justice had received no advance notice of this meeting but was in his Department when the call came from the Taoiseach to join the meeting and could therefore do so without delay.

28.2 So far as the general recording issue was concerned there were no more facts before the meeting of the evening of 24th March 2014 than there had been on Sunday evening, 23rd March. Nor was there any definitive legal opinion about it, in writing or otherwise, although it does appear that a Commission of Investigation into the matter had been discussed as an option earlier that day by the Attorney General, Mr Fraser and Mr Shane Murphy S.C.

28.3 At about 6:20p.m., the Taoiseach telephoned the Minister for Justice and asked him to join the meeting, which he did shortly thereafter. The Secretary General of the Department of Justice, Mr Purcell, joined the meeting at about 9 p.m., at the request of Mr Fraser. The meeting ended after 10 p.m., after a period of some four hours, at which point Mr Purcell left to visit the Garda Commissioner.

28.4 All five participants at the meeting have cooperated fully and without hesitation with the work of the Commission. Firstly, each of them voluntarily provided written

statements, at the request of the Commission and several provided relevant documents. Secondly, all five have given evidence in private to the Commission. Each has done so on more than one occasion, some have done so several times.

- 28.5 The Commission faces, nonetheless, a dual dilemma. Firstly, the participants differ significantly, on some points sharply, in their recollection of what was said, on some of the most crucial points. Secondly, nobody attending the meeting took any note or record whatever of its proceedings. There is significant divergence in the evidence of the participants concerning the absolutely central question as to the content of the message that Mr Purcell was asked to convey to the Garda Commissioner.
- 28.6 The Commission asked Mr Fraser, as Secretary General to the Government, why there was no record of this important meeting and he told the Commission that the way the Government operates is that the minutes of Government meetings are limited to recording the decisions made. No minutes are kept of who said what at a meeting. Thus, as he explained, there is no documentary evidence, other than the decisions subsequently made. In this case, Mr Fraser said the decisions find expression in the Government decisions of 25th March. Hence, there is no separate record of the proceedings at the meeting of 24th March.
- 28.7 The Commission has had the benefit of the evidence of Mr Sean Aylward, who held the post of Secretary General of the Department of Justice from 31st July 2004 to 31st July 2011. Mr Aylward agreed that, when decisions were taken, they were minuted and recorded, but that the process leading to a decision was never the subject of record-keeping. He referred to the grave risk of something coming out in an untimely way.
- 28.8 From the evidence heard by the Commission, it is clear that it has been a matter of public policy, for many years, that minutes are no longer kept of discussions at Government meetings. An account of the proceedings at a meeting can be discovered, if at all, from a reading of the terms of any decision made. In the present case, although a decision was, in fact, made at the meeting of 24th March 2014, no record at all was made of what was decided. It is no part of the function of this Commission to pass judgment on the merits or otherwise of this policy. Attention is

drawn to it, insofar as it inhibits the Commission in performing the task assigned to it by the Government of investigating and reporting on what occurred at an important meeting. That applies, with particular force, to the terms of the mandate or instructions given to the Secretary General of the Department of Justice, Mr Purcell, concerning his exceptional visit to the home of the Commissioner of An Garda Síochána. It is agreed by everybody who attended the meeting that a decision was made to ask Mr Brian Purcell, in his capacity as Secretary General of the Department of Justice, to visit and speak to the Garda Commissioner at his home, on behalf of the Taoiseach. No note or record, of any kind, was made of what Mr Purcell was asked to say to the Commissioner. Regrettably, there is sharp disagreement between the participants at the meeting regarding that precise question. It seems to the Commission to be beyond argument that good administration would require that a proper record be kept of such an important decision. From the evidence given by Mr Fraser, it appears that the Commission must rely on the record of the Cabinet decisions of 25th March 2014 to ascertain what decision was made at the meeting in respect of the Garda Commissioner. That record shows that the Commissioner had announced his retirement. It discloses neither the fact that Mr Purcell was required to attend at the Commissioner's house nor the instructions given to him. Of these important matters, there is no record of any kind.

28.9 Based on the documentary evidence it has received and the oral evidence it has heard, the Commission is of the view that the proceedings of the meeting of 24th March 2014 can usefully be analysed under the following six headings.

- I. The prevailing political background or context against which the meeting was held, especially insofar as it concerned the position of the Garda Commissioner;
- II. The seriousness or gravity attached by the participants, especially the Taoiseach, to the emergence of the fact of Garda telephone recording;
- III. The extent to which the Garda Commissioner was considered to be responsible for the practice of recording telephone calls;

- IV. Whether there was any discussion of the Garda Commissioner's continued retention of his position in office;
- V. The nature of the discussion at the meeting of expressions of confidence, past and future, by the Taoiseach in the Garda Commissioner;
- VI. The content of the message which the Secretary General of the Department of Justice, Mr Purcell, was to convey to the Garda Commissioner Mr Callinan.

- 28.10 These six headings provide a useful framework for analysis of the events at the meeting and its outcome. The Commission is satisfied that there is broad agreement on the first four matters. Witnesses have, however, disagreed significantly with regard to the final two matters, namely the extent of discussion of future expression of confidence in the Commissioner and the terms of the message which Mr Purcell was required to convey to the Commissioner.
- 28.11 The immediate reason for the calling of the meeting was, of course, the revelations regarding the Garda telephone recording issue, both in the Bailey case and more generally. It had been decided, on Sunday evening, 23rd March 2014, by the Taoiseach that there would be a further meeting on Monday, 24th March, to discuss these issues. The Garda Commissioner had, of course, reported formally on these issues in his letter addressed to the Secretary General of the Department, Mr Purcell, pursuant to s. 41 of the Garda Síochána Act 2005, on 10th March 2014.
- 28.12 It is particularly unfortunate that nobody attending the meeting, except for Mr Brian Purcell, knew that the Commissioner had, fourteen days earlier, written formally to him as Secretary General of the Department of Justice, outlining the basic facts of the very issues which were the subject of the meeting. Unfortunately, Mr Purcell failed to mention this letter at any stage. Thus, a meeting which concerned essentially the Garda telephone recording issue, regarded by all as a serious new issue, so important that the Secretary General of the Department of Justice was to be sent to speak to the Commissioner late at night in his home, took place in entire

ignorance of the fact that the Commissioner himself had already taken the step of officially notifying the relevant Government Department about it.

29. Meeting of 24th March 2014 Commences

29.1 The Taoiseach provided the Commission with a written statement, in advance of giving evidence. It contains a summary of the events of the meeting from his point of view. In that statement he said:-

“On Monday evening 24th March 2014, I met with the Attorney General, the Secretary General to the Department of the Taoiseach and the Minister for Justice in my office. The AG confirmed the seriousness and the implications of the case concerned. As I was now formally apprised of this serious matter, I understood that I would have to inform the Cabinet on Tuesday morning and that statements would be required in the Dáil subsequently. The meeting recommended that the matter warranted that a Commission of Investigation be appointed and that I would recommend this to the Government...In the light of the revelations presented by the AG, I felt it my duty that my concerns should be communicated to the Garda Commissioner for his views. I felt I could not attend at Cabinet having the information referred to and not having informed the Commissioner of my concerns.”

29.2 The Taoiseach went on to say that the Secretary General of the Department of Justice, Mr Purcell, had been called to the meeting. His statement summarised the task undertaken by Mr Purcell as follows:-

“The Secretary General of the Department of Justice undertook to contact the Garda Commissioner and to inform him of my views on the serious nature of the case concerned and the meeting then concluded.”

It may be noted that the Taoiseach did not, in this carefully written statement, suggest that Mr Purcell was to put any questions to the Commissioner.

29.3 As has been related earlier in this Report, the Minister for Justice was telephoned by the Taoiseach while Mr Purcell and Mr Flahive were in the process of briefing him on both the developments in the Bailey case and the telephone recording issue. The

Taoiseach told the Minister that a serious issue had come up and that he was with the Attorney General. He asked the Minister to come over to Government Buildings.

29.4 The meeting had commenced at about 6 p.m. The Taoiseach and Mr Fraser were joined by the Attorney General. The Attorney General briefed the meeting. She said that she had discovered that there had been widespread taping of telephone calls all over the country, over many years, going back to the 1980s. This, she explained, had come to light in connection with the Bailey case. She outlined the matter in some detail. She gave an account of the content of the three relevant tapes that were to be discovered to the plaintiffs in the Bailey case on March 25th 2014 and their effect on the strength of the State's defence of that action. She confirmed her concerns as to the seriousness of the matter. The Taoiseach was shocked at the extent of it. Mr Fraser, in his evidence, emphasised the unknown scale of the problem but thought the potential implications were profound. It was agreed, at an early stage, that the matter was so serious that it merited the establishment of a Commission of Investigation. The Taoiseach, in his evidence, said that this was suggested by Mr Fraser. The Taoiseach was not sure whether it was agreed before the Minister for Justice joined the meeting. If so, the suggestion was certainly repeated after he joined. Mr Fraser described the Commission of Investigation as the "*gold standard of investigation.*" And it was agreed that the Taoiseach would recommend the establishment of a Commission to the Cabinet.

29.5 The Taoiseach stated in his written statement to the Commission that he "was shocked at the information presented by the Attorney General which included taping of telephone calls to Garda Stations all over the country for many years and also evidence from a number of recordings that suggested serious Garda misconduct...". He was here referring to the three taped conversations from Bandon Garda station which had come to light in October 2013. He was concerned, as he said in evidence, that "*members of the public, who had been making contact with...an unknown list of Garda Stations over very many years, were in a position where their messages or calls were recorded illegally.*" He thought that all this would give rise to great public controversy and cast doubt on the integrity and credibility of the force. It would, he said, cause "*public outrage.*" The Taoiseach agreed with the Attorney General that the matter would have to be explained to the Cabinet, in the context of the quarterly

review of sensitive cases, which included the Bailey case, and which was on the Cabinet agenda for the following day. He also said that he would have to brief the Tánaiste, as well as the opposition leaders, regarding the seriousness of the situation. He regarded it *“as being a serious matter and that it should be brought to his [i.e., the Commissioner’s] attention”*. Mr Fraser said in his statement:-

“The Taoiseach was clear that the Government would have to be informed about this development at its meeting on the following morning, March 25th.

He was also clear that the Dáil would also have to be informed on the same day. It was agreed that the matter was of sufficient gravity as to merit the establishment of a Commission of Investigation, and that the Taoiseach would recommend this to the Government. The outcome of the scheduled discussion at Government on March 25th of all of these issues was very uncertain.”

29.6 When the Minister for Justice, Mr Shatter, joined the meeting, he said that he had been in the middle of a briefing and that he was just learning of the telephone recording issue. The Attorney noted that he seemed really surprised and everything about his demeanour conveyed that he was hearing about all this for the first time. This was entirely contrary to what she had expected. She had assumed the Minister was fully aware of these issues.

29.7 Mr Fraser and Mr Shatter agreed in evidence that there was extensive discussion of the legal issues and implications, both for the Bailey case and for other cases, some of them already determined, as well as for future cases. There were clearly implications for An Garda Síochána. Reference was also made to the position of the Data Protection Commissioner and the possibility that the tapes would be destroyed. The Attorney General and the Minister agreed that there could be no question of any tape being destroyed or disposed of and steps should be taken to ensure that there would be no miscarriage of justice. Mr Fraser, on the basis of the Attorney’s briefing, went so far as to say that he understood there was even a possibility of legal decisions being overturned and prisoners being released. In different terms, all were agreed that matters of considerable gravity had been brought to light.

29.8 Up to the point when Mr Purcell joined the meeting, there does not appear to have been any debate or discussion of the question of the personal responsibility of the Commissioner, if any, for the recording of non-999 telephone calls.

29.9 Mr Alan Shatter has told the Commission in evidence that he was concerned at the level of alarm that all of this seemed to have generated between the Taoiseach and the Attorney. He said that he had pointed out, before Mr Purcell came over, that there were two things of relevance, namely that whatever was going on had been stopped and that it had been going on for many years. He added that he had indicated to the meeting:-

“...this had been going on for many years and that, yes, this was grave and serious and there were a whole range of questions to be asked but that perhaps we should just pause for a moment to reflect on all of this and nothing precipitative should be done”.

29.10 Mr Shatter said that nobody made any positive suggestion that the Commissioner had been at fault in any way. Nonetheless, the subject under discussion was a new matter of great seriousness involving An Garda Síochána. The Attorney General observed that the Commissioner was understood not to have been aware of the telephone recording until recently and had directed that it cease in November 2013. At the same time, she noted that there was discussion at the meeting of a series of other current or recent controversies concerning An Garda Síochána and the cumulative impact of them on Garda morale and public trust in the force. In short, prior to the arrival of Mr Purcell, the four participants in the meeting agreed that the revelation of the practice of recording of non-999 telephone calls by An Garda Síochána was a matter of grave importance, highlighted to some extent by the existence of other controversies concerning the force. Other than some remarks of the Minister for Justice, Mr Shatter, there does not appear to have been any discussion at all, either positive or negative, about the extent of the Commissioner's responsibility, prior to Mr Purcell joining the meeting, save that it was accepted he had not known about it and had stopped it once it came to his notice.

- 29.11 In the course of this discussion, it was proposed that the Garda Commissioner should be made aware of the seriousness of the issues which had been raised by the Attorney General. The Taoiseach, at some point, suggested that the Secretary General to the Government, Mr Fraser, was the appropriate person to contact the Commissioner. Mr Fraser advised that the long established procedure was that the contact point between the Garda Commissioner and the Government was, in fact, the Secretary General of the Department of Justice.

30. Mr Purcell is Called to the Meeting

- 30.1 Shortly after the Minister for Justice had left to attend the meeting with the Taoiseach, Mr Fraser telephoned Mr Purcell to ask if he was still in the office. Mr Fraser said that Mr Purcell might have to come over to Government Buildings later. The Taoiseach said that he *“had expected from Mr Fraser having spoken to him that he [Mr Purcell] would be called over later.”* He said that *“it is...very normal to have appropriate civil servants on hand if they are required”*. All this suggests that Mr Fraser, and possibly the Taoiseach, already had it in mind that Mr Purcell would be required to join the meeting at some point. According to Mr Fraser, it is “a standard procedure” to request the presence of the Secretary General of a Department at a meeting in Government Buildings where important issues relating to that Department are being discussed.
- 30.2 At approximately 9 p.m., Mr Fraser telephoned Mr Purcell again and asked him to come over. Mr Purcell drove over from the Department of Justice to Government Buildings. Arrangements had to be made to allow him to bring his car through the gate. He went to the Taoiseach’s private office. The Taoiseach’s private secretary called Mr Fraser out of the meeting. He and Mr Purcell had a short conversation. Mr Fraser told him that the Taoiseach, the Minister for Justice, the Attorney General and he had been meeting regarding the Garda tapes and that there was a major problem. The Taoiseach had grave concerns. Mr Fraser informed Mr Purcell of the proposal that the Garda Commissioner be informed of the matter and that he would be asked to convey this to him. Mr Purcell was shocked and puzzled as to why the taping, which had been going on for so long and which the Commissioner had dealt with by stopping it in November 2013, would be a problem. It was not, of course, the case that any actual decision had been made at that point. Mr Fraser was giving Mr Purcell a general indication of what had been discussed at the meeting to date.
- 30.3 Mr Purcell asked Mr Fraser if this was simply about the tapes or whether it was about a combination of that and the whistleblower situation. There are slightly different versions of Mr Fraser’s response. Mr Purcell said in evidence that Mr Fraser said that, if it was only about the whistleblowers, it could be dealt with but

that now it was the tapes issue which was a matter of grave concern. From the conversation, it was clear to Mr Purcell that it was the issue of the tapes that was now the principal concern. Mr Fraser, in evidence, accepted that Mr Purcell was shocked and puzzled. Mr Fraser's version was as follows:-

“ I attempted to explain to him [Mr Purcell] that we now had an accumulation of issues which were bringing us further away from a political resolution to all the issues I have outlined. In other words, the situation had got worse. This had made the situation much worse rather than better. I mean, if it was only the whistleblowers, it could be dealt with. I think that maybe shortens the situation. As I say, we went into the weekend looking at a Government meeting where the matter of the Commissioner's comments on the whistleblowers was clearly going to have to be dealt with. We had many senior Ministers from both parties, including if I recall the Tanaiste, on the record as calling for the Commissioner to do something about the whistleblowers. That's what I thought we were going to be talking about. We hadn't heard from the Commissioner on that.....

So I think that sentence may be, if it means, if a resolution to the whistleblowers issue had been found and that was the only issue we had, then we wouldn't have a problem. But now that we had the whistleblowers issue unresolved and what the Taoiseach regarded as a much bigger issue, this made things more difficult for everybody.”

30.4 Mr Fraser laid emphasis on the broader context. He said in evidence that:-

“It must have been abundantly clear to everybody that the major issue unresolved was the comments at the PAC and the political storm surrounding it and that for the purpose of the conversation, the taping allegations had greatly complicated the issue rather than resolving it”.

30.5 Mr Purcell told Mr Fraser that he had a significant problem with what had been said. He expressed a wish to speak to the Taoiseach. Mr Fraser agreed. He thought it appropriate. Mr Purcell would have to do so if he was to receive instructions directly

from the Taoiseach to visit the Commissioner. Mr Purcell and Mr Fraser then joined the meeting with the Taoiseach, the Minister and the Attorney General.

- 30.6 It was already clear, however, from what Mr Fraser had said, that Mr Purcell was going to be asked to contact the Commissioner about the recording of telephone calls. In that respect, the scene had already been set. The precise terms of Mr Purcell's mission were not elaborated by Mr Fraser.
- 30.7 After Mr Purcell had joined the meeting, the Taoiseach explained that the Attorney General had informed him about the facts concerning the Garda telephone recording. He explained his concerns for public confidence in An Garda Síochána. He was concerned that unauthorised recording of telephone conversations had been going on and that this could have implications for the criminal justice system, extending possibly to cases which had already been heard. The matter was so serious that it would obviously have to be discussed in Cabinet the next day.
- 30.8 Mr Purcell was shocked at the turn of events. He pointed out that the practice had been going on for some thirty years, that Mr Callinan had been Commissioner for a relatively short period of time and that any Garda Commissioner, in the intervening period, could have found himself in the same position. Moreover, the fact of the matter was that the Commissioner had stopped the process as soon as he had become aware of it. Mr Fraser described Mr Purcell as having been "*very forceful*" about the extent of the Commissioner's personal involvement. However, the other attendees at the meeting did not mention Mr Purcell's reaction in their written statements to the Commission.
- 30.9 Mr Purcell's presentation does not appear to have provoked any response. Nobody expressed any doubts or contradicted him. Mr Fraser said that there was no impression that Mr Callinan, the Commissioner, had "*done this personally*," though he could not recall "*specifically*" whether anyone had responded to Mr Purcell's remarks. The Taoiseach accepted that Mr Callinan had not been responsible in any way for the process, though it is not clear if he said so at the meeting. Mr Fraser also accepted that Mr Shatter, as he has sworn, might have made the same points as Mr Purcell. The Attorney General similarly stated:

“....there was no suggestion or allegation of wrongdoing of any kind against the Commissioner. Everybody in the room was aware and conscious that he had done nothing wrong”.

30.10 It is beyond doubt, therefore, that nobody at the meeting laid any blame at the door of the Commissioner for the fact that recording of telephone calls had been going on at a number of Garda stations for many years.

30.11 However, the fact remained that a Cabinet meeting was going to take place the next day, at which other members of the Government, who had already criticised the Commissioner’s handling of the whistleblower issue, might question the Taoiseach’s decision to maintain confidence in him, in light of these new developments. In this context, it was unfortunate that it did not occur to Mr Purcell to tell the meeting about the letter of 10th March 2014 from the Garda Commissioner, an omission which the Taoiseach described, in his evidence, as *“inexplicable”*. It is unwise to speculate, but knowledge that the Commissioner had formally reported on the existence of the telephone recording system can only have worked in his favour. When viewing the Commissioner’s responsibility in its totality, it must have been a material fact in a situation where a matter concerning An Garda Síochána constantly described as either grave or serious was under discussion that the Commissioner had already made a formal report on the matter through the channel laid down by law.

30.12 When questioned on this by the Commission, Mr Purcell pointed out that the key elements covered in the letter were known to everyone at the meeting. But, as both the Taoiseach and the Attorney General said in their evidence, the importance of the letter in this context was that it could be presented to the Cabinet as a formal statement by the Commissioner, showing that he had treated the matter seriously, had taken action on it and had reported it to the Government *via* the Department of Justice.

31. Discussion of Confidence in the Commissioner

31.1 The Commission has already drawn attention to the Taoiseach's consistent public expressions of confidence in the Garda Commissioner in the period immediately preceding the weekend of 22nd and 23rd March 2014. It is common case that these statements were referred to at the meeting of Monday, 24th March. It is a matter of some controversy but it is of great importance to determine whether the Taoiseach said in the course of the meeting that, on the following or in ensuing days, he might not continue to be in a position to express that confidence.

31.2 This question is crucial to the Commission's consideration of the sequence of events leading up to the retirement of the Commissioner. The Taoiseach was at pains, quite correctly, to emphasise that:-

"It is a very important connection between the Taoiseach of the day and the Garda Commissioner of the day and a fundamentally important part of our democracy. Were a Taoiseach to express publicly that they did not have confidence in the Garda Commissioner, the implications of that would be very serious."

31.3 Consequently, the Taoiseach was of the view that there could be no equivocation about the Taoiseach of the day expressing confidence in the Commissioner of An Garda Síochána.

31.4 This was not a merely theoretical matter. The issue of the Taoiseach's continued confidence in the Commissioner was a matter of lively public interest and debate. The Taoiseach had, in very recent days, been insistently pressed by the media to state his position. This had taken place most recently in Brussels, following a European Council meeting, on 21st March 2014. In a text message to the Taoiseach sent on Sunday morning, 23rd March 2014, the Minister for Justice had referred to the undoubtedly extraordinary and concentrated level of media commentary on the issue as "hysteria". In his evidence to the Commission he described it as a "frenzy". This was perhaps an exaggeration, but it represented a heightened level of public and media interest in the position of the Commissioner.

31.5 The fact that the Taoiseach had suggested publicly that ministers raise matters of concern at Cabinet rather than in public had brought the Cabinet meeting of Tuesday, 25th March 2014, into sharp focus. Mr Fraser said, in his written statement to the Commission, that the Taoiseach was clear that the Government would have to be informed about the discovery of the telephone recording problem at that meeting. The Taoiseach, in his evidence to the Commission recognised that:-

“this matter would be the subject of comment at the Cabinet the following day.... and, inevitably, given that this was going to be a matter of public concern, the question of confidence was one that would arise.”

31.6 The Taoiseach, in his evidence, referred to a serious, publicly stated, difference of opinion between cabinet ministers. He said that there were five *“ministers who had publicly stated their views about this sensitive matter”*. *“Clearly”*, he said, *“having that range of views expressed publicly by ministers was an issue that would be inevitably discussed at the Cabinet because the week's business would be discussed at the Cabinet.”* He expected a *“really charged, intense meeting”*. On the evidence before the Commission, everyone at the meeting of March 24th 2014 was conscious that the Bailey recording issue and the general recording issue would be raised and discussed at the Cabinet meeting the following day.

31.7 In his statement, the Taoiseach expressed the view:-

“As I was now formally appraised of this serious matter I understood that I would have to inform the Cabinet on Tuesday morning and that statements would be required in the Dáil subsequently.”

31.8 Mr Fraser, in his statement, said that the outcome of the expected discussion of these issues at Government was very uncertain, that it was very unclear if, and to what extent, this new and very serious development would harden the views of ministers who had already been publicly critical of the Garda Commissioner, in particular in relation to his use of the word “disgusting” at the Public Accounts Committee. It all

cast doubt on whether the Government, or the Taoiseach, would be able to express continued confidence in the Commissioner, in the light of this new development.

31.9 The Commission has heard the evidence of the Taoiseach, the Attorney General, Mr Alan Shatter, Mr Martin Fraser and Mr Brian Purcell and has questioned each of them closely about the extent and nature of any discussion of the issue of the Taoiseach's continuing confidence in the Commissioner. It has heard from all of these witnesses at least twice and from some of them three or more times. The evidence ranges from those, principally Mr Purcell and Mr Shatter and, to some extent, Mr Fraser, who said that the Taoiseach had expressed the view that he might not be able to express continuing confidence in the Commissioner, on the one side, to the Attorney General, who denied that any such discussion had taken place. The Taoiseach himself did not recall specifically using the language attributed to him. There follows an attempt to summarise these views.

Evidence of Mr Purcell

31.10 Mr Purcell, in his evidence to the Commission, recalled the Taoiseach saying that the matter of the telephone recording would have to be discussed at Cabinet, because of the gravity with which he viewed it. The Taoiseach's view was that when that occurred, which would be on the following day, the he was likely to find himself in the position, that, following discussion, he might not be able to express confidence in the Garda Commissioner going forward.

31.11 At some points in his evidence, Mr Purcell seemed to say that the Taoiseach was saying that he "*would not*" as distinct from "*might not*," in the situation envisaged, be able to express confidence in the Commissioner. After close questioning, Mr Purcell accepted that "*might*" was the correct formulation.

31.12 The Commission is satisfied that this is so. It would have been extraordinary for the Taoiseach to have said positively that he "*would not*" be able to express that confidence. This proposition can be tested simply by transforming the sentence from indirect to direct speech and asking whether the Taoiseach actually said: "I will not be able to express confidence in the Commissioner." That would have amounted to a

clear ultimatum to the Commissioner. If it had been said, it would have been very likely to have been remembered by those present. Although the power to remove a Commissioner from office lies with the government and is not exercisable by the Taoiseach alone, the Attorney General, in particular, would have immediately been alerted to the legal implications. At another point, Mr Purcell said that the Taoiseach had suggested that he would have, perhaps, difficulty in expressing confidence in the Commissioner. It is quite likely that, in the course of a discussion over a period of more than an hour (so far as Mr Purcell was concerned), more than one form of words was used.

Evidence of Mr Fraser

- 31.13 Mr Fraser, in his evidence, drew attention to the Taoiseach's unequivocal expressions of confidence in the Commissioner, given both in Washington and Brussels, in response to what he described as aggressive media questioning. He thought that, in order for that position to be maintained, the Government would need to make a collective decision on all the matters in controversy. Following the Taoiseach's expressions of confidence, he had seen the Commissioner's position challenged, in some way, by several members of the Cabinet. The Taoiseach was going to have to resolve the Government's view and attempt to get a collective Government view on all the issues, principally the "disgusting" comment.
- 31.14 Mr Fraser was very clear that the question of whether the Taoiseach could continue to express confidence in the Commissioner was one of the issues discussed. He might be invited to express confidence in Cabinet, in Dáil Eireann or otherwise in public. Thus, the *"question of the Taoiseach's ability to continue to express confidence in the Commissioner was obviously part of [the existing] set of circumstances"*.
- 31.15 Mr Fraser's recollection was that the Taoiseach was very concerned that, were he to tell the Cabinet about the recording issues, that would aggravate an already difficult position for the Commissioner and the Government. He continued:-

"And the question of whether he [the Taoiseach] could express confidence in the

Commissioner in that situation (which was at that point hypothetical, but likely) was on his mind. He was also, and he said this several times, ...very concerned that if he at any point failed to express confidence in the Commissioner, that the Commissioner would presumably feel compelled to resign, That was supposition on his part, and he was very anxious about that respect.”

31.16 Mr Fraser added: *“there was a possibility that the Taoiseach would not be able to express confidence in the Commissioner.”*

Evidence of Mr Shatter

31.17 The evidence of Mr Alan Shatter was very similar, on this point, to that of Mr Fraser. He said that the Taoiseach considered that the matter of the revelations of the tapes, meaning the telephone recording, was very grave, that there was likely to be adverse political reaction by members of Cabinet, or that there would be a difficulty in Cabinet, and that he, the Taoiseach, would have difficulty in expressing confidence in the Garda Commissioner, if he were asked. The Taoiseach had expressed confidence in the Commissioner on Friday in Brussels, but, if asked again, he now had a problem and that problem could be compounded by what might be said by people at Cabinet.

31.18 As Mr Shatter saw it, the confidence issue was part of the brief that Mr Purcell was to convey to the Commissioner. He said in his evidence:-

“Well my recollection of what he was being asked to do was convey to the Garda Commissioner the views of the Taoiseach, that this was a very serious matter, that the Minister for Justice agreed it was a very serious matter, but also to convey to the Garda Commissioner, the Taoiseach's view that if asked he wouldn't be able to express confidence in the Commissioner.”

Mr Shatter later accepted and the Commission has found that the word “*wouldn't*” was not used by the Taoiseach in this context.

31.19 Mr Shatter did not recall the Taoiseach saying, as Mr Fraser had said he did, that *“he was very concerned that if he at any point failed to express confidence in the Commissioner, that the Commissioner would presumably feel compelled to resign.”* However, Mr Shatter added that he was *“sure that the Taoiseach was very aware of the fact that if at any time he failed to express confidence in the Commissioner the Commissioner would be compelled to resign.”*

Evidence of the Attorney General

31.20 The Attorney General, in her evidence to the Commission, agreed that the Taoiseach’s previous expressions of confidence in the Commissioner were discussed at the meeting. However, on the question of whether the Taoiseach’s position regarding future confidence in the Commissioner was discussed, her evidence differed significantly from that of Mr Purcell, Mr Fraser and Mr Shatter.

31.21 The Attorney drew a distinction between mention of the fact that the Taoiseach had, on a number of recent occasions, expressed confidence in the Commissioner and contemplation that the Taoiseach might not be able to express continued confidence on the following day. The first had happened. The second, she said, emphatically, did not:-

“There was talk about confidence in terms of he said; ‘I have expressed confidence in him’. You know, he used that. He talked about the past incidents, that did come up. So the phrase ‘confidence’ did arise, just in that. But in the past. There was no articulation of a change of circumstance”.

31.22 The Attorney was keenly aware that the meeting of the evening of the 24th March 2014 was taking place in the shadow of the forthcoming Cabinet meeting on 25th March. She recalled the general political background and said that *“there were worries about what would transpire in Cabinet and the stance particularly of the Tánaiste and the Labour Ministers”*. She expected the Cabinet meeting to be very stormy. It was going to be *“a very intense meeting with a lot of people with very strong views...”* She spoke of the Taoiseach’s need to *“manage”* the situation. She said that:-

“[H]e was concerned about the Cabinet and he needed to have the Garda Commissioner's point of view and he needed to be in a position to articulate the situation from the Garda Commissioner's perspective to the members of the Cabinet ...”

- 31.23 In response to questions from the Commission about the evidence given by Mr Fraser in particular, the Attorney accepted that the Taoiseach was “preoccupied” by what would happen when these new developments were brought before the Cabinet. She stated:-

“The Taoiseach did say that he had repeatedly expressed confidence in the Commissioner, he did say that, yes... And the question of whether he could express confidence in the Commissioner in that situation was on his mind. He was very troubled...He was deeply troubled. I mean, he had indicated, without hesitation, given the gravity of the matter, that this warranted a Commission of Investigation...”

- 31.24 However, the Attorney maintained in her evidence that, whatever concerns the Taoiseach may have had, in his own mind, regarding his ability to continue expressing confidence in the Commissioner, he did not voice them at the meeting:-

“You know, I could see that he was visualising the Cabinet meeting, visualising certain ministers and how they would behave and react... But he didn't say any set of words that could lead me to reasonably believe that he anticipated that he wouldn't or couldn't, or would be in a position where he contemplated that he wouldn't or couldn't express confidence in Commissioner Callinan, as Commissioner of the Garda Síochána, the following day.”

- 31.25 The Attorney agreed that there was some uncertainty as to how the Cabinet would react to this new information regarding Garda telephone recordings and recalled the Taoiseach asking the meeting “What am I going to say tomorrow?” She said her sense was that the Cabinet members would want to know what the Garda

Commissioner's response was to this new issue. She was then asked by the Commission:-

“Depending on the Commissioner's response, was there an issue about whether the Taoiseach might be able to express continued confidence in him?”

31.26 She responded:

“That was never articulated at the meeting.”

31.27 The Attorney made a strong link between the fact that the Commissioner was not considered to be at fault, in any way, and the consequent impossibility, as she saw it, of there having been any question of telling him that the Taoiseach might have difficulty expressing confidence in him. No blame was being attached to the Commissioner, so the issue of confidence in him could not arise. As she put it:-

“And so the idea that Mr. Purcell would go to convey (a) part of the Taoiseach's concern about the issue, but (b) that he would have a remit to convey to the Commissioner that the Taoiseach on the following day would not be expressing confidence. How would that possibly happen, unless there was some wrongdoing?”

Evidence of the Taoiseach

31.28 The Taoiseach in his evidence referred, on a number of occasions, to the fact that he had previously and unequivocally expressed confidence in the Commissioner. When asked to comment on the evidence of Mr Shatter that, when the revelation of the tapes was under discussion, the Taoiseach said that the matter was very grave and that he would have difficulty in expressing confidence in the Garda Commissioner, he did not expressly deny having used those words, although he could not recall using them.

At a later point, having been pressed at length on the issue, the Taoiseach said that he could not *“recall using that kind of phraseology.”*

- 31.29 The Taoiseach was asked to consider the modified version of Mr Purcell’s evidence, namely that *“he was likely to find himself in a position where he might not be able to express confidence in the Garda Commissioner going forward.”* Asked whether that accorded with his recollection of what was said, the Taoiseach did not expressly agree or disagree with it. However, he emphasised, quite rightly, that there was a difference between “would” and “might”. He did not, however, say whether the latter formula had been used. When asked expressly whether he had discussed, in any form, whether he *“would or might”* be able to express confidence in the Garda Commissioner, the Taoiseach gave the following answer:-

“.... what I have tried to say was that the information and the evidence given by the Attorney General arising from the sensitive case report coming before the Cabinet was one obviously of grave concern....And that I felt that the Garda Commissioner should be apprised of my concerns about that, because I needed to be in a position to explain to Cabinet Members and Cabinet colleagues what was happening here. At that stage, obviously, I couldn't speak for any member of the Cabinet as to what view they might take, based on the information that I was about to present to them. So at the meeting, I had one side of a story.”

- 31.30 The Taoiseach’s meeting with the Tánaiste, Mr Eamon Gilmore, T.D. at 9 a.m. on the morning of Tuesday, 25th March 2014, casts some light on his statements at the meeting. The Taoiseach sent a request to the Tánaiste to meet him privately, prior to the normal parallel pre-Cabinet meetings of the Fine Gael and Labour Party ministers. Mr Gilmore thus met the Taoiseach, who told him of the information he had received from the Attorney General which he, the Taoiseach, described as *“very alarming”*, in relation to the Bailey case and the general recording issue.
- 31.31 The Taoiseach, according to Mr Gilmore, went on to say that, if he were asked in the House if he had confidence in the Garda Commissioner, he would not be able to say that he had. He added that, if he said that he had confidence in the Garda

Commissioner on the Tuesday, and information relating to these tapes emerged on the Wednesday, he would then be in a very difficult position.

31.32 The evidence of Mr Gilmore, although it relates to what the Taoiseach said the following day, provides significant corroboration for the proposition that the Taoiseach did express doubts about whether he could continue to express confidence in the Commissioner. Although this conversation occurred after the Commissioner had retired, it is significant that, in an entirely different setting, the Taoiseach was speaking to Mr Gilmore of the issue very much in the same terms as are attributed to him by Mr Fraser, Mr Shatter and Mr Purcell on the evening before.

31.33 The Taoiseach appeared, at first, to take issue with Mr Gilmore's account of this meeting. When asked to comment on Mr Gilmore's evidence, he said that he did not agree. However, he added that he could not "*recall the accuracy of what he said*" and, later, that he could not verify whether they (the words attributed to him by Mr Gilmore) were the actual words that he used. He then returned to the theme of the necessity for him of being able to "*defend and support my confidence in the Commissioner.*"

31.34 The Commission has given careful and very detailed consideration to the question of whether, at the meeting of 24th March 2014 in the Taoiseach's office, there was discussion, whatever words were used, of whether the Taoiseach would, on the following day at Cabinet, in the Dáil later in the week or in public, be in a position where he might not be able to express confidence in the Garda Commissioner. This is a crucially important question, because of its obvious implications for the position of the Commissioner. In reality, this amounts to enquiring whether the Taoiseach made such a statement. The Commission finds it impossible to resist the conclusion that, in some form, the Taoiseach did, indeed say that, putting at its lowest, he might, in light of an impending difficult Cabinet meeting, have difficulty in expressing confidence in the Commissioner. He did so in the knowledge that any equivocation in his expression of confidence was problematic for the Commissioner.

31.35 The Commission notes that Mr Fraser, Mr Purcell and Mr Shatter all gave evidence to the effect that some statement was made about the continued ability of the

Taoiseach to express confidence. There was some debate as to whether the Taoiseach said that he “would” or that he “might” not be able to express such confidence. Firstly, the Commission is satisfied that “might,” or some equivalent, is far more likely to have been the word used. Secondly, the Commission does not believe that it makes any real difference whether the word “would” or “might” was used. A message conveyed to the Commissioner that the Taoiseach may not, even as a matter of possibility, be able to express confidence in him, if asked, would have very serious implications, which will be discussed later. There is no reason to doubt the evidence of Mr Fraser, Mr Shatter and Mr Purcell that it was said that the Taoiseach might not be able to continue to express confidence in the Commissioner. The Commission finds their evidence to be plausible and credible.

31.36 The Commission has carefully examined the evidence of the Taoiseach on this issue. It is true that, at no time, did he expressly agree that he had said that he might not be able to express confidence in the Commissioner. Nevertheless, he accepted that the issue of his confidence in the Commissioner was one which would arise at Cabinet. In response to insistent questioning, he did not directly dispute this proposition when put to him.

31.37 The Attorney General accepted that there had been reference to the Taoiseach’s previous declarations of confidence in the Commissioner. She accepted that the Taoiseach was troubled and concerned about the outcome of the Cabinet and, at one point, that the question of confidence was on his, the Taoiseach’s mind. On the other hand, she consistently denied that the matter of whether the Taoiseach would or even might be in a position to express continued confidence in the Commissioner in the future was ever discussed at the meeting. The Attorney made two points to support the logic of her position. Firstly, since no fault was being assigned to the Commissioner in respect of the Garda telephone recording matter, the issue of confidence could not, she argued, logically arise. Secondly, if there had been an issue of confidence in the Commissioner, the matter would have been entirely different in character and she would necessarily have had to advise on the legal implications. In particular, she would have had to advise on the effect of the provisions of the Garda Síochána Act 2005, with regard to the position of the Garda Commissioner. The first of these points is logical from a purely legal point of view,

but not conclusive when viewed in a political context. There was great existing controversy concerning the Commissioner, especially concerning his remarks at the Public Accounts Committee.

31.38 From the point of view of those attending the meeting on 24th March 2014, the question of confidence in the Commissioner was not necessarily considered only, or, indeed, at all, from a legal standpoint. The use by the Commissioner of the word “disgusting” at the Public Accounts Committee had attracted widespread comment and criticism. It was at the forefront of political controversy over that weekend. As to whether the Attorney should herself have considered and advised on the legal implications, it is important to note that those attending the meeting were unanimously of the view that no question ever arose about the dismissal of the Commissioner from office. Admittedly, the matter is not necessarily a simple one. A public Government declaration of lack of confidence in the Commissioner would certainly have serious legal implications. Some of the judgments of the majority in *Garvey v Ireland* [1981] I.R. 75 discuss the issue of confidence in a Garda Commissioner. It is quite clear nobody attending the meeting, including two lawyers, adverted to that fact. However, it is equally clear that Mr Purcell and Mr Shatter, at least, and possibly Mr Fraser believed that the position of the Commissioner was in peril.

31.39 When considered in its totality and in context, the Commission is satisfied that it was an important theme of the meeting of 24th March 2014 that, following the revelation of the Garda telephone recording systems, the Taoiseach might find himself in a position where he would not be able to express confidence in the Garda Commissioner, either at the Cabinet meeting on the next day, in the Dáil or, if questioned, in the media. The mere fact that it was acknowledged that confidence in the Garda Commissioner would be discussed in Cabinet the next day was of great significance.

32. Discussion of Mr Purcell's Task

- 32.1 The next difficult matter which the Commission has to determine is what precise task was entrusted to Mr Purcell, the Secretary General of the Department of Justice. It was agreed by all who attended the meeting that he was asked by the Taoiseach to go to see the Commissioner at his home and to speak to him about the Garda telephone recording matter. It had been the view of the Taoiseach from the evening of Sunday, 23rd March 2014, that the telephone recording was a serious matter and, on Monday, 24th March 2014, that it should be brought to the attention of the Commissioner. The Taoiseach asked who was to contact the Garda Commissioner and the Secretary General of the Government, Mr Martin Fraser, said that the protocol and the line of contact was through the Secretary General of the Department of Justice.
- 32.2 Regrettably, there is sharp controversy as to the substance of the message which Mr Purcell was instructed to impart to the Commissioner. In brief summary, Mr Purcell says that he was asked to convey to Mr Callinan the gravity with which the Taoiseach viewed the matter of the Garda telephone recording systems and to ask him to consider the situation. This view is largely supported by Mr Shatter and, effectively, by Mr Fraser. The Attorney General and the Taoiseach, on the other hand, say that Mr Purcell, while conveying the gravity of the Taoiseach's concerns, was also asked to obtain the views of the Commissioner.
- 32.3 It is on this crucial point that it is most unfortunate and, indeed, extraordinary that there is no note or record, of any sort, to resolve the matter. The Taoiseach, the head of the Government, instructed the Secretary General of the Department of Justice to deliver a message about a matter considered to be of the utmost national gravity to the head of the national police force, the Commissioner of An Garda Síochána. Yet there is not available to the Government, in any of its aspects, to this Commission or to the public any written record to verify the nature of that mission. This Commission is, of course, powerless in the matter. It is left in the position of having to reconcile conflicting sworn evidence from responsible ministers and officials at the highest level in the State. It can only register its astonishment at a system of

administration which apparently quite deliberately adopts a practice of not keeping any record of a meeting where an important decision is made.

32.4 In the absence of any contemporaneous record from Government sources, it seems appropriate to commence the analysis by looking at the written statements submitted, in advance of giving evidence, by each of the participants in the meeting of 24th March 2014. All the evidence suggests that those statements were carefully prepared and that they contained the considered account of those making them. They were prepared relatively shortly after the events they record. In each case, the maker of the statement verified it on oath when he or she was called to give evidence.

32.5 The following is the summary, extracted from the statements, of what each of the participants in the meeting of 24th March said with regard to the mission given, on that occasion, to Mr Brian Purcell:-

a. Mr Brian Purcell’s written statement:-

- i. “In the circumstances, the Taoiseach felt the Commissioner should immediately be informed of his view of the gravity of the situation in order that the Commissioner would have the opportunity to consider this as fully as possible in advance of the Cabinet meeting the next day.”
- ii. “I was then asked to convey the gravity of the situation to the Commissioner without delay in order to give him the maximum amount of time for consideration of the matter.”

b. Mr Martin Fraser’s written statement:-

- i. “It was agreed that the gravity with which the Taoiseach, and the Minister, viewed these matters should be conveyed to the Garda Commissioner by the Secretary General of the Department of Justice & Equality.”

- ii. “Following some discussion, it was decided this should be done immediately.”
- c. The Attorney General’s written statement:-
 - i. “It was considered by the Taoiseach and the Minister important and appropriate that the Garda Commissioner be apprised of the concerns arising from these various developments.”
 - ii. “The Secretary General to the Department of Justice, Mr Brian Purcell, subsequently joined the meeting. It was agreed that..... it was important that the grave concerns of the Taoiseach and the Minister be communicated to the Garda Commissioner.”
- d. Mr Alan Shatter’s written statement:-
 - i. “The Taoiseach asked Brian Purcell to make contact with the Garda Commissioner that evening and to visit with him to explain to him how the Taoiseach perceived matters.”
 - ii. “Brian Purcell was essentially asked to visit with him and to detail the Taoiseach's concerns to him.”
- e. An Taoiseach’s written statement:-
 - i. “In the light of the revelations presented by the AG I felt it my duty that my concerns should be communicated to the Garda Commissioner for his views.”
 - ii. “I felt I could not attend at Cabinet having the information referred to and not have informed the Commissioner of my concerns.”

- iii. “The Secretary General of the Department of Justice joined the meeting and was appraised of the situation by me in the presence of the Minister for Justice, the Secretary General of the Department of the Taoiseach and the AG.”
- iv. “The Secretary General of the Department of Justice undertook to contact the Garda Commissioner and to inform him of my views on the serious nature of the case concerned. The meeting then concluded.”

32.6 In summary, each of those statements says that Mr Purcell was to convey to the Garda Commissioner the gravity with which the Taoiseach viewed the matter or, as it was expressed in some cases, the Taoiseach’s concerns. In that, the five statements are entirely consistent. Mr Fraser, Mr Purcell and the Attorney General speak of “gravity” or “grave concerns.”

32.7 The five statements are also consistent in omitting to state that Mr Purcell was required to obtain any response or information from the Commissioner. The Taoiseach, it is true, says that he felt it to be his “duty that [his] concerns should be communicated to the Garda Commissioner for his views.” He does not expressly say that he asked Mr Purcell to obtain such views, though it may be reasonable to imply that into his statement. In any event, nothing more precise is suggested. If an important component of Mr Purcell’s instructions was that he was to obtain any response, whether in the form of information or views, it is most surprising that none of these five, carefully prepared, written statements says so. It would be extraordinary if an essential component of Mr Purcell’s instructions was omitted by all five such able and experienced politicians and civil servants. This cannot have been accidental.

32.8 None of the five statements give a precise list of what the concerns to be conveyed by Mr Purcell were. The nature of those concerns falls to be derived from their accounts of what was discussed at the meeting. The following concerns are reflected in the accounts given by all parties:-

- The fact that An Garda Síochána had been recording telephone calls in an unknown number of Garda stations throughout the country, over a period of many years, apparently without lawful authorisation;
- The fact that recordings to be disclosed in the Bailey case contained evidence suggesting serious misconduct by individual members of An Garda Síochána;
- The likelihood that both of these issues would emerge into the public domain on or after 25th March 2014;
- The impact of these revelations on the administration of justice in the State and, in particular, on public confidence and trust in An Garda Síochána, bearing in mind other recent matters of controversy in which the organisation had been involved;
- The fact that the Taoiseach would have to bring all of this to the attention of the Cabinet on 25th March 2014, with consequences that were uncertain.

32.9 As previously indicated, the most significant question – and the one on which the evidence diverges most – is whether the concerns to be conveyed by Mr Purcell to the Garda Commissioner included a concern that the Taoiseach might have difficulty in maintaining confidence in the Commissioner, once these matters were disclosed to the Cabinet, the Dáil and the public. This concern is recorded explicitly by Mr Purcell, Mr Shatter and Mr Fraser in their statements, but is not mentioned by the Taoiseach or the Attorney General.

32.10 In addition to their written statements, each of the five persons mentioned attended at the offices of the Commission and gave evidence on oath. It is appropriate to commence consideration of the evidence by examining that of Mr Purcell, for the obvious reason that the message which Mr Purcell conveyed to the Commissioner was the one which he believed was given to him at the meeting. It is important also

to recall that, prior to his joining that meeting, Mr Purcell had already been briefed on the essence of his intended assignment by Mr Fraser outside the meeting room.

Evidence of Mr Purcell

32.11 Mr Purcell, in evidence, confirmed the contents of his written statement and said that he was asked to arrange a meeting with the Commissioner and to convey to him the gravity of the situation, as viewed by the Taoiseach. He was to explain that the gravity of the matter was such that it was going to have to be brought to Cabinet the following day and that, once the matter was discussed at Cabinet, the Taoiseach would have, perhaps, difficulty expressing confidence in the Garda Commissioner.

32.12 Mr Purcell was very clear in saying that he was not asked to obtain any explanation or to seek the views of the Commissioner about the matter. He cited his state of shock at his mission as evidence contradicting the notion that he had been asked to obtain the Commissioner’s views: *“would I have been shocked or would I have said it was wrong,”* he asked, *“if I had been asked to get the views of the Commissioner?”* He emphasised this point several times. He also said that if the purpose of his engagement in the process had been to get more information or the views of the Commissioner, that could easily have been done on the telephone. Alternatively, the Commissioner could have been invited in.

Evidence of Mr Shatter

32.13 Mr Alan Shatter fully supported Mr Purcell’s view that he was not asked to obtain any further information or views from the Commissioner. Like Mr Purcell, he said that it would have been a simple matter to invite the Commissioner to come and meet that evening with the Taoiseach, the Attorney and himself and ask him any additional questions that needed to be asked. There was not, he said, any question at the meeting of asking the Commissioner additional questions.

32.14 Mr Shatter, when recalled as a witness, was even more emphatic. He could not recall the word “views” being used. It was not language he recognised. He observed that no one could spell out any single piece of information which Mr Purcell was asked to

obtain. He thought that the notion that Mr Purcell had been “*asked to go and seek information was fantasy*”.

32.15 In sum, Mr Shatter said that what Mr Purcell was asked to convey to the Garda Commissioner was that the Taoiseach took all of this very seriously and the Taoiseach would have a difficulty in expressing confidence in him if asked.

32.16 In his statement Mr Shatter said that in his opinion, the Taoiseach was clearly of the view, though he did not say so, that the Garda Commissioner should resign or retire.

Evidence of Mr Fraser

32.17 Mr Fraser was asked to comment on the proposition that Mr Purcell was to ask for the Commissioner’s views. At no point in his evidence did Mr Fraser confirm that any such request had been made. He said that there was no “*prejudgement of what the Commissioner’s response would be*” and that “*there was no prohibition on him offering views or indeed seeking a meeting*”. He continued:-

“But there was no sense in which if he had any views he wished to convey or if he wished to have a meeting with anybody ... in which that was prohibited. I mean it would seem to me again implicit in the conversation that if the Commissioner had views that he would certainly be at liberty to convey them through Mr. Purcell or in person. I would have expected in person in the circumstances. He decided to retire which sort of, you know, eliminated all other possibilities.”

Mr Fraser explained that, by “*in person,*” he meant that he thought that the Commissioner would seek a meeting to discuss the matter either with the Minister or the Taoiseach.

32.18 Mr Fraser was pressed at some length and asked repeatedly to say whether Mr Purcell was asked to elicit any particular response from the Commissioner. At no point did he identify any request that was to be made of the Commissioner. He reiterated, on a number of occasions, that a range of potential responses was available and the Commissioner was not prohibited or banned from speaking or from

making any response. The furthest he went was to say that the Commissioner’s views “*were implicitly being sought.*”

Evidence of the Attorney General

32.19 The Attorney General, as already noted, said that it was agreed at the meeting that it was important that the grave concerns of the Taoiseach be communicated to the Commissioner. Mr Purcell was to convey the “*gravity of the matter*” to the Commissioner. Mr Purcell “*should talk to him to convey the Taoiseach’s perspective on it.....that this was a serious matter.*”

32.20 The Attorney used a number of different terms to describe what she believed Mr Purcell was to obtain from the Commissioner. Generally, she said that the Taoiseach wanted or needed one of those things. Her evidence referred both to the entitlement of the Commissioner to have his point of view or perspective presented to Cabinet and of the Taoiseach’s need to have his views or his perspective for that purpose. She used variously the words “*response,*” “*narrative,*” “*vantage points,*” “*views,*” “*explanation,*” “*stance,*” “*voice,*” and “*perspective.*” When pressed for more specific evidence on what, precisely, Mr Purcell was to ask the Commissioner, the Attorney replied that there was not “*a precise list of any questions,*” adding, by way of explanation, that: “*It was to convey the gravity.*” She also said that it was important that the Commissioner knew the matter was in Cabinet the following day.

32.21 Responding to the point that the Commissioner had not been requested to attend the meeting or give an explanation, the Attorney General mentioned the “*deference one had to have for the Commissioner*”. She said: “*He’s a very independent person and you have to keep that very noble distance with the Commissioner, given his position*”.

She said it was an option that would be open and said that what she thought would happen was that the Commissioner “*would come in the morning and that he would have a chat and he would say: ‘I welcome the Commission of Investigation,’ and confirming he put a halt to the activity.*”

32.22 The Attorney, in response to Mr Purcell’s evidence that he had not been asked to seek views from the Commissioner, said that he appeared to have misunderstood his remit, that he was mistaken. Mr Purcell strongly disagreed.

Evidence of the Taoiseach

32.23 The Taoiseach, in evidence, described the brief for Mr Purcell succinctly as follows:-

“The brief was to apprise the Commissioner of the concerns of the Taoiseach and to ascertain his views.”

32.24 The Taoiseach did not agree with the evidence of Mr Shatter that the brief was to convey to the Commissioner that it was a very serious matter and that *“if asked, he would not be able to express confidence in the Commissioner.”* He said that:-

“The brief for Brian Purcell was twofold:

(1) inform the Commissioner of the gravity of the situation that had been brought to the Taoiseach’s attention.

(2) to get his views on that.”

32.25 The Taoiseach, on several occasions, said that he wanted to have the “view” of the Commissioner. He *“needed to know what the view of the Commissioner was, both about the concern that I was expressing about this and what was being done about it.”* At times, he emphasised the need to have facts. For example:-

“I needed to be in possession of accurate information from the Garda Commissioner about first of all the gravity of the situation but how it was being dealt with.”

32.26 The Taoiseach referred to *“the wider implication of widespread Garda recording of conversations with members of the public to Garda stations all over the country,”* and said that *“This was a matter that we needed to get facts about in order that the*

case would be referred to the Cabinet on the Tuesday, [to] be properly informed of that information”.

32.27 Nonetheless, in answer to questions about whether any particular questions were to be asked or whether anything more precise was formulated than to ascertain the views of the Commissioner, he said, like the Attorney, that he had not given Mr Purcell *“a list of questions to ask the Commissioner.”*

32.28 In the course of Leader’s Questions in the Dáil on Wednesday, March 26th 2014, Deputy Micheál Martin asked the Taoiseach whether a civil servant had gone to the house of the Garda Commissioner the night before his retirement. The Taoiseach said:-

“The answer to that question is ‘Yes’. The reason is I thought it appropriate, given the nature of the information made available to me, that the Commissioner should be made aware of its gravity and how I felt about it and the implications.”

32.29 The evidence with regard to the nature of the brief of Mr Purcell can now be summarised. Firstly, it was agreed by all witnesses that Mr Purcell was to convey to the Commissioner the fact that the Taoiseach regarded the legal and political implications of what he had learned, concerning the recording of telephone calls by An Garda Síochána, as a matter of seriousness or gravity. The Taoiseach expressly confirmed this in his answers in the Dáil on 26th March 2014. Gravity is a very strong word. The nature of that gravity was not spelled out, but the evidence suggests that it related to the apparent illegality of Garda telephone recording carried on, over many years, and, as the Taoiseach said in evidence, *“what that might entail for the integrity of the system, for public credibility and trust in... the administration of justice...”*. It is important to note that it was not indicated that Mr Purcell was to inform the Commissioner that it was believed by anyone at the meeting that he was personally responsible.

32.30 There is disagreement as to whether Mr Purcell was required to obtain the “views” of the Commissioner. The Taoiseach said in his evidence that he had required Mr Purcell to obtain the views of the Commissioner. Nonetheless, when pressed

particularly on this point, the Taoiseach was unable to mention any particular question that was to be put to the Commissioner. Insofar as information might have been sought, as suggested by the Attorney General in particular, no information of any particular type was formulated. For example, questions might well have been asked about how many Garda stations were involved in recording, what regions of the country were involved, how long it had been going on, what lines were involved, what legal advice had been sought, whether legal authorisations had been sought, whether there were any justifications for the calls, either legal or factual. Neither these questions nor any others were formulated. In fact there seems to have been no discussion at the meeting about the substance of the issue that had arisen around Garda recording of non-999 calls.

32.31 Whether or not the word “views” was used is, in the view of the Commission, scarcely material. It must be remembered that the first part of the message was, by common agreement of all witnesses, that the Commissioner was to be told that the matter was considered by the Taoiseach to be grave. In that context, the use of the word “views” is either meaningless or takes on a different and more serious meaning. It suggests that what the Commissioner is to comment on is the gravity of the matter. That accords with the evidence of the Attorney General that what was required was the Commissioner’s perspective, explanation or stance. Viewed in that light, the message to the Commissioner was, in effect, that the Taoiseach wished him to know that he considered the matter of the telephone recordings to be very grave and to let him have his, the Commissioner’s, views on that grave matter.

33. Whether the Commissioner’s Position was at Issue

- 33.1 Mr Fraser said in his written statement that the possibility of the dismissal or removal of the Garda Commissioner from his post was not discussed. That evidence was not contested by anyone. Sections 11 and 12 of the Garda Síochána Act 2005 provide that the Commissioner of An Garda Síochána may be removed from office by the Government only for stated reasons and following observance of procedures designed to ensure reasonable notice and provide an adequate opportunity to make representations. Nobody at the meeting mentioned or, it appears, even had these provisions in mind.
- 33.2 The Attorney General was emphatic that there was no question of the departure of the Commissioner. It was not in contemplation that he would retire. If it had been, she would have had to advise on the matter. She said that, if she had had any sense that the Taoiseach had formed an intention to say that he might not have confidence in the Commissioner, she would immediately have called him to one side and pointed out that this was a statutory matter. She would have had to refer to the Act, meaning the Garda Síochána Act 2005.
- 33.3 The Taoiseach said that, if he had wished to put pressure on the Garda Commissioner or have him removed or be required to resign, there was a legal process that had to be followed. It would involve getting advice from the Attorney General and bringing any such proposition to the Cabinet, for their decision. He insisted that he had no reason, nor had he any intention, direct or indirect, of pressurising the Garda Commissioner to be removed from his position. He said that he was “*publicly and on more than one occasion the strongest defender of the Garda Commissioner.*”
- 33.4 Mr Shatter, in his written statement to the Commission, said that the Taoiseach was clearly of the view that the Garda Commissioner should resign or retire. He was asked, in evidence, to say whether he believed Mr Purcell was being sent out on a mission where there was an intention to put pressure on the Commissioner to consider his position. Mr Shatter regretted having to be involved, in view of the fact

that the Taoiseach, the Attorney General and himself had worked so closely for three years until recent matters. Nonetheless, he answered that he could only interpret the Taoiseach’s approach and the manner in which Mr Purcell had been asked to go to the Garda Commissioner’s house as having *“the intent of a message going to the Commissioner that indicated very clearly to him that his position was in great difficulty or that he should consider his position.”* He added:

“...whether you're a Minister or a Garda Commissioner or a senior official confronted by the possibility, and I'm using the neutral phrase, but the possibility that the Taoiseach of the country might, even just using the word "might", not even the word "would", might have a difficulty... in expressing confidence in you the following day completely undermines your position if that's said in public..., [and] it would lead you to certain conclusions unless you were going to resort to law.”

33.5 In response to Mr Shatter’s comments, the Taoiseach said that it *“was perfectly open to the Minister to say: ‘hold on a minute; I am going out to ring the Garda Commissioner now. I am not in possession of this information.’”* Mr Shatter, he said, had regular contact with the Commissioner. Mr Shatter was not *“a docile pacifist who sits there because he is in the presence of the Taoiseach.”* He would never let himself be discouraged from speaking merely because the Taoiseach was in charge of the meeting. The Taoiseach added that the Minister *“was part of the decision of Brian Purcell going out there...”*

33.6 The Commission is quite satisfied that there was no mention, of any sort, at the meeting on Sunday, 24th March 2014, of the removal or dismissal of the Commissioner from office. Such a proposal would have had direct and serious legal implications. The statutory procedure would have had to be followed.

33.7 That conclusion does not affect the findings which the Commission has made that there was considerable discussion of the question of whether the Taoiseach would be able to continue to express confidence in the Garda Commissioner. It is common case that there had been repeated mention of the Taoiseach’s recent declarations of confidence in him. Furthermore, the Taoiseach did not dispute that, if he were ever

to state publicly that he did not have such confidence, the Commissioner would presumably feel compelled to resign. The Taoiseach was greatly concerned about the likely outcome of discussions of the position of the Commissioner at the Cabinet on the following day. In that context, he contemplated the possibility that he might not be able to continue to express confidence in the Commissioner.

33.8 Before moving on to the events which occurred following the meeting, it may be appropriate to return once more to the content of the message Mr Purcell was being instructed to convey to the Commissioner. It is not disputed that the first point Mr Purcell was to convey to the Commissioner was that the Taoiseach regarded the Garda systems of telephone recording as a grave matter. It is, however, disputed whether Mr Purcell was asked to obtain any views or information from the Commissioner. Mr Purcell is certain that he was not asked and that it was no part of his brief to obtain any views from the Commissioner. Consequently, he did not do so. Neither the Taoiseach, the Attorney nor Mr Fraser identified any specific issue about which Mr Purcell was instructed or asked to obtain views or what type of information he was to get.

33.9 The issue of the Taoiseach’s possible failure to be able to express confidence in the Garda Commissioner is in a slightly different category. The Taoiseach and the Attorney General gave evidence that it was not one of the concerns to be conveyed by Mr Purcell. Mr Purcell, Mr Fraser and Mr Shatter on the other hand, were in no doubt that it was part of the message to be conveyed to the Garda Commissioner. Mr Purcell strongly disputed that he had misunderstood his remit, as suggested by the Attorney. He stated:-

“I did not misunderstand my remit. It was clear to everyone in the room, in my view, what I was being asked to do and that was to go to the Commissioner’s home and to convey to him the fact that the Taoiseach was very concerned by this development in relation to taping... he was viewing this with extreme seriousness or extreme gravity and... that there was going to be a Commission of Investigation and it was a matter that would be discussed at Cabinet the next day. One of the Taoiseach’s concerns was that, once it was discussed at Cabinet the next day, he might subsequently find himself in a position where he might not be

able to express confidence in the Commissioner, and that was said at the meeting.”

- 33.10 Mr Fraser confirmed that the question of whether the Taoiseach could continue to express confidence in the Commissioner was one of the issues discussed at the meeting. He referred to the Bailey case and the taping issue as having “*supplemented, very significantly*” the range of issues which could lead to the Taoiseach being questioned again on the confidence issue, whether at Cabinet, in the Dáil or otherwise on the public record. He concluded:-

“... and so the gravity of that set of circumstances is what the Secretary General was asked to convey to the Commissioner... The question of the Taoiseach’s ability to continue to express confidence in the Commissioner was obviously part of that set of circumstances.”

- 33.11 As indicated earlier in this Report, the Commission is satisfied that this concern of the Taoiseach’s was an important theme of the meeting on 24th March 2014. Indeed, it was probably the most important matter discussed at the meeting. It would, in the view of the Commission, have been unthinkable for Mr Purcell to fail to inform the Commissioner of a matter with such serious implications for him, whether or not it was expressly included in his brief.
- 33.12 The strong view of the Taoiseach, supported by Mr Fraser, was that Mr Purcell must speak to the Commissioner about the matter on that evening. It was decided at the meeting that, for reasons that are not clear to the Commission, simply telephoning the Garda Commissioner was not sufficient but that the message should be conveyed by Mr Purcell in person. The Commission received no satisfactory explanation as to why the option of telephoning the Commissioner was rejected. Indeed, Mr Purcell’s initial contact with the Commissioner that evening was to telephone him but he did not give him any indication as to why he needed to meet with him, or why a face to face meeting was required.
- 33.13 Mr Purcell was thus instructed by the Taoiseach to visit the Garda Commissioner. He was to visit his home, something which neither he nor, so far as he was aware,

any of his predecessors had ever done before. Mr Purcell did not leave Government Buildings until after 10:15 p.m. He was to tell the Commissioner that the Taoiseach regarded the matter of the Garda telephone recording as very grave and, accepting the Taoiseach’s version, he was to ask the Commissioner “*for his views.*” In context, the views he was to seek can only have related to the gravity of the issue of telephone recording. On any version of the evidence, Mr Purcell was not required to obtain the views of the Commissioner on any particular aspect of the matter or to obtain any identifiable information or facts.

Mr Purcell was also, as the Commission finds, to inform the Commissioner that the matter was to be discussed at Cabinet on the following day and that the Taoiseach, if asked, might not be able to express confidence in the Commissioner.

- 33.14 The message so summarised was, at best vague and, at worst, stark. A statement to the Commissioner that the head of the Government regards a matter as grave, seeks unspecified views and may not be able to express confidence in the Commissioner carries with it a necessary implication that the position of the Commissioner is at risk.
- 33.15 Mr Purcell was extremely unhappy about what he was being asked to do and said at the meeting that he thought it was wrong. However, he accepted his instructions that he must speak to the Commissioner. He expressed the view that he could do so in the morning, that he could have a meeting very early with the Commissioner in the Department of Justice, Government Buildings or Garda Headquarters. This proposal was rejected. It was the view of the Taoiseach that this would not be fair to Mr Callinan. It would not give him adequate time to consider the situation, particularly in view of the timing of the Cabinet meeting that was to take place at 10.30 a.m. the following morning.
- 33.16 Both Mr Purcell and Mr Shatter expressed the view that, if all Mr Purcell was being asked to do was to ascertain the views of the Commissioner, then, to quote Mr Purcell:-

“....it would have been very simple to make a phone call to the Commissioner to say, look, everything that has happened in relation to the tape recording issue, the Taoiseach would just like your take on this, your views on it.

So, look, do you even want to consider it overnight and we can meet early in the morning. If that had been the purpose, there would have been no need for me to make a late night visit to the Commissioner's house, if the purpose was to get more information.”

Mr Shatter expressed a similar view:-

“And if he thought he was going out just looking for information, he would not have been stressed. No one would have been stressed saying look, we have a big problem, go and have a chat about it.”

33.17 Mr Purcell was equally clear in saying that the task of conveying the Taoiseach’s concern regarding the gravity of the situation did not, in his view, require a late-night visit to the Commissioner’s home:-

“If the message being given was, ‘I view this very gravely’... that’s a message that could have been given easily over the telephone, you know, that obviously this is very serious.”

33.18 From a strictly legal point of view, the meeting was not concerned with the continued tenure of the Garda Commissioner in his office. Although the matter was at no point adverted to, all those present would have been aware, if it had been adverted to, that only the Government, as a whole, had the power to remove a Garda Commissioner from office and then only following observance of strict procedures designed to guarantee fairness. There can be no question, therefore, of the meeting reaching a decision to remove the Commissioner from his post.

33.19 The Taoiseach has assured the Commission in evidence that he had no intention of putting any kind of pressure, direct or indirect on the Commissioner and that he was genuinely very surprised when he learned that the Commissioner had decided to

retire. The Commission accepts the Taoiseach’s assurances that he did not, by sending Mr Purcell to visit the Commissioner, intend to put pressure on the Commissioner to retire. Seen objectively however, Mr Purcell’s message that the matter of the telephone recording was grave and that the Taoiseach might not, at Cabinet the next day, be able to express confidence in the Commissioner, delivered without previous notice, in person by the Secretary General of the Department of Justice, on behalf of the Taoiseach, at the Commissioner’s home, late at night, was likely to be interpreted as doing just that.

- 33.20 The Commission has already found that there was no mention, of any sort, at the meeting on Sunday, 24th March 2014, of the removal or dismissal of the Commissioner from office. If any such proposal were under consideration, the Attorney would have had to advise and the procedure under ss. 11 and 12 of the Garda Síochána Act 2005 would have had to be followed. Only the Government has the power to remove a Garda Commissioner from office. Where the Government proposes to exercise that power, it is obliged to give the Commissioner the notice required by s. 12 of the Act of 2005, containing a statement of the reasons for the proposal. The Government must also allow the Commissioner an opportunity to make representations as to why he or she ought not to be removed from office. Thus, it is only the Government which may initiate that procedure. In the present case, the stage was at no time reached where the Government contemplated following that procedure. The Act of 2005 was not engaged. At the most, the Taoiseach gave an indication that he, personally, might not be in a position to express confidence in the Commissioner. That did not preclude the Government moving the matter to the statutory plane. That stage was never reached.

34. Mr Purcell Visits the Commissioner

34.1 Once it was decided that Mr Purcell was going to have to meet the Commissioner, the question arose as to how the conversation was to take place. The meeting reviewed the different options. The Department of Justice was excluded as it was already closed for the night and reopening it would have required calling the Service Officer. Government Buildings were excluded, principally because of the danger of media interest. Similarly, there was a perceived danger of the Commissioner being seen coming into Garda Headquarters at that time of night, with the Secretary General of the Department arriving soon afterwards.

34.2 Mr Purcell agreed with the conclusion that, although it was certainly not something he wanted to do, it would be best to phone the Commissioner and arrange to call to see him at his home. Mr Purcell described this as “*the least worst option*”. He was extremely uncomfortable about having to go to the home of the Commissioner, somebody he knew very well, very late at night, to convey the particular message entrusted to him. He had never had to do this before and did not believe that any other Secretary General had done so. A visit by him to the home of the Garda Commissioner was an unprecedented event.

34.3 The Taoiseach regarded the visit to the Commissioner’s home as necessary in the circumstances. He said:-

“if you hadn't contacted the Garda Commissioner it would have been very unfair, it would have been absolutely unfair to say, there is a Cabinet meeting going on and it's all about this new information that has come out. So the decision or the agreement, including from Mr. Purcell, was, well, tell him this evening that there is an issue here that I need to know about..... I felt it would be grossly unfair to him to say, like, wait until the morning, a half an hour before a Cabinet meeting fixed for 10:30, what are you going to do. So it's just a matter of, if you like, normal courtesy.”

34.4 Mr Purcell said in his evidence that, as he was about to leave the meeting to go out to the Commissioner, the Minister for Justice did ask if he would like him to accompany him, but that he had answered: *“No,...I think this is something that’s better if I do it myself.”* Mr Purcell made the point that the Minister would not have been offering to accompany him if they were really just trying to get additional information from the Commissioner. He saw the Minister’s offer as a *“genuine attempt...to share the burden.”*

34.5 Mr Purcell then left the meeting. He went to his car to phone the Commissioner. The Commission has established that this telephone call was placed at 10:15 p.m. Mr Purcell told the Commissioner that he wished to speak to him about a subject which could not be discussed on the telephone. He realised that the Commissioner had no inkling of the nature of the conversation that was going to take place. Mr Callinan has said that he had *“absolutely no idea”* what the proposed visit was about. The Commissioner asked if Mr Purcell wished him to call to the Department or to meet at Garda Headquarters, but Mr Purcell indicated that he would call to the Commissioner’s home. It took him about twenty five minutes to drive there. Thus, the time must have been approaching 11 p.m. when he arrived.

35. Discussion at Commissioner’s Home

35.1 Before moving to consider the discussion which took place between Mr Purcell and Mr Callinan, it is worth recalling the Commissioner’s own state of knowledge at this time concerning the issues with which he was about to be confronted. In brief:-

- He had informed the Attorney General’s Office of the general recording issue at a meeting in November 2013 and had received preliminary advice;
- He believed he had informed Mr Purcell of the issue by telephone in November 2013;
- He had written formally to Mr Purcell on 10th March 2014, informing him on developments and asking him to bring the matter to the attention of the Minister for Justice;
- He was aware that transcripts of recordings and the opinion of counsel in the Bailey case had gone to the Attorney General’s Office and the Department of Justice on 28th February 2014, and that, on the same day, the Attorney General’s Office had also been provided with the inventory of recordings compiled by Superintendent Flynn;
- He had attended meetings on 10th and 11th March 2014, at which the Bailey case and, to a lesser extent, the general recording issue had been discussed with officials from the Attorney General’s Office and the Department of Justice;
- He had seen preliminary advices from Ms Fitz Gerald, dated 13th March 2014, as well as her response of 20th March 2014 to the advice given by the Data Protection Commissioner and was expecting final advices to issue shortly from the Attorney General in relation to the general recording issue;

- He had returned a call to the Minister on the morning of Sunday 23rd March in which the Minister had assured him of his support in the face of the “*media frenzy*” that was occurring at the time. No mention was made of the general recording issue in the course of this telephone call.
- He was made aware, on the afternoon of Monday, 24th March 2014, that the Attorney General’s Office were proposing to seek a two-week extension of time for discovery in the Bailey case, which, if successful, would delay any public disclosure of the recording issue, and give more time for the Attorney to finalise her advice on it;
- He had taken a phone call from Mr Purcell at 5 p.m. on the evening of Monday, 24th March 2014, in which certain specific queries were made concerning phone recordings, but no indication was given of any broader or more urgent concern.

35.2 In other words, the Commissioner, from his perspective, had good reason to presume that from as early as November 2013, and certainly by 10th / 11th March 2014, both the Attorney General and the Minister for Justice would have been made aware of the key facts in relation to the general recording issue and the Bailey case. Neither party had made direct contact with him on these issues and the communications from their respective offices – including a phone call from Mr Purcell a mere six hours previously – had given him no sense that this was being treated as a matter of great gravity.

35.3 The meeting between Mr Purcell and the Commissioner lasted from sometime before 11 p.m. to sometime after midnight. There were lengthy discussions, punctuated by long silences. To Mr Purcell it “*seemed like an eternity*”. There are some differences in recollection between the participants. None of them are significant. Mr Callinan recorded his own version of the events, in handwriting, in his diary on the following day.

- 35.4 Mr Callinan said in evidence that Mr Purcell told him that he had been sent by the Taoiseach, to indicate to him that he had been briefed by the Attorney General, in relation to the taping of telephone calls to and from Garda stations and that the Taoiseach was treating the matter very seriously or, as expressed at another point, that the Taoiseach had “grave concerns.” These concerns related to the recording of telephone calls in and out of Garda stations and the issue of the tapes discovered in Bandon Garda station. Mr Purcell informed him that the matter had been discussed at a meeting attended by the Taoiseach, the Attorney General, the Minister and, Commissioner Callinan thought, Mr Martin Fraser; that the Taoiseach was placing the matter on the Cabinet agenda the following morning and that he intended to propose the appointment of a Commission of Investigation into the matter. He said that the Taoiseach was unsure about how the matter would be received in Cabinet, but that he wanted the Commissioner to be aware of the situation.
- 35.5 Mr Callinan said that he inquired if it was perceived that he had done something wrong and that Mr Purcell assured him that this was not the case. According to Mr Callinan, it was in this respect that there was much discussion and “a lot of silences.” He was seeking an explanation as to why Mr Purcell was there, at his house, when, as he put it, “I was aware of how serious the matter was, as were the others, you know. It should not have been a surprise...” He added: “the awareness was out there, I couldn’t understand it....” He also inquired whether the Taoiseach believed that he, Mr Callinan, had had something to do with setting up the system of recording non-999 calls to and from Garda stations and said that Mr Purcell shook his head, indicating that it was not mentioned. Mr Callinan was, of course, conscious that the matter of telephone recording had been reported to the Attorney General’s Office the previous November and that he had written to the Secretary General of the Department of Justice about it on 10th March 2014. He could not understand how it now seemed to be regarded as something new or surprising. Above all, he could not understand why Mr Purcell was visiting him at his home, an unprecedented event, so late at night.
- 35.6 Mr Callinan said that he asked if it was the case that the Government did not have confidence in him as Commissioner and that Mr Purcell said that there was to be a discussion of the matter at an early morning meeting in advance of the Cabinet

meeting.

35.7 Mr Callinan gave evidence that Mr Purcell: *“mentioned that there were other issues coming down the line”* and that he mentioned *“problems in or around the justice system”*.

35.8 Mr Callinan said that Mr Purcell did not ask him for his views on any aspect of the matter, which is entirely consistent with Mr Purcell’s own evidence. Mr Purcell was absolutely clear in his evidence that he had not been asked to obtain any views from the Commissioner. Mr Callinan stated:-

“Here I am in charge of the Garda Siochana and, basically, Mr. Purcell was coming out and I knew that I had to consider my position, that that was the import of what was going on. But nobody gave me specific pointers as to why, for instance, I needed to consider my position. Of course it was a serious matter and of course it was a cause of concern, there is no doubt, but I wasn't asked in any detail about the state of knowledge that I had, and matters that you would expect that I would have been asked about.”

He would, he said, *“have been delighted to give [his] views.”* As he put it, he would have been very happy to jump into his car and go straight to the Taoiseach right then, through the night or at any time up to the time of the Cabinet meeting.

35.9 Questioned as to the fact that he had not sought to meet either the Taoiseach or the Minister for Justice, Mr Callinan said that, if he had thought this was an option open to him, he would have done so. He had met the Taoiseach numerous times on various issues. It did not arise, on this occasion, because he was not given the opportunity. If he had known that the Taoiseach’s concern was to get accurate facts, he would have been more than glad to present himself, wherever he was needed, to provide those facts. He would have loved to have had the opportunity, but it was never presented to him. It is true, of course, that Mr Purcell did not ask the Commissioner for any information. But Mr Callinan responded to the suggestion that he could have contacted the Taoiseach without being invited, by saying that, from his perspective, it was never an option.

35.10 The fact was that Mr Purcell was visiting the Commissioner’s home, to deliver a message at the Taoiseach’s initiative. The Taoiseach would be the person expected to issue any invitation for a meeting with the Commissioner if one was contemplated.

35.11 On all the evidence, this encounter was an extremely difficult one for both men. The Commissioner was surprised and shocked. He had had no inkling that anything of the sort was to take place. He had a very strong professional and personal relationship with the Secretary General and could see that Mr Purcell was extremely uncomfortable. Mr Callinan could not understand the reason for this late-night visit relating to a matter about which all concerned should have been well aware. He also said that he felt *“Mr. Purcell had a certain degree of difficulty in imparting whatever he had to impart to me as well.”* Mr Callinan was not aware, unfortunately, of the fact that nobody at the meeting that had taken place earlier that evening had known about the Section 41 letter of March 10th 2014, except for Mr Purcell. Surprisingly, there was no particular discussion of the letter of March 10th in the conversation between Mr Purcell and Mr Callinan.

35.12 Mr Purcell’s version of his visit to Mr Callinan differs in detail but not in substance. He told Mr Callinan that the outcome of that evening’s meeting in the Taoiseach’s office was that the matter of the Garda telephone recording was going to be in the public domain, that it would be discussed in Cabinet and that the Taoiseach’s grave concern was that, following discussion at Cabinet, he might not be in a position where he would be able to express confidence in the Commissioner. Mr Purcell had no hesitation in describing it as one of the worst days of his career. It *“was a terrible moment, a terrible thing for [him] to have to deal with”*.

35.13 Mr Callinan made a note of his recollection of the meeting in his handwritten diary on the following day. The part of that entry which relates to the meeting with Mr Purcell is headed: *“Note of Meeting with Sec. Gen. @ house (made 25/3/14).”* The diary entry reads:-

“BP rang – said he wanted to see me. Sent by Taoiseach, briefed by AG taped telephone calls to Stations etc. – treating the matter very seriously. Putting on Cabinet Agenda next morning will announce Commission of Investigation. Taoiseach unsure how cabinet would receive news. Wanted me aware. I asked – was it perceived I had done something wrong and was assured that was not the case (BP’s conversation with MF). Failed to understand the need for visit!!

I asked did the Taoiseach believe I had something to do with setting up recording on non 999 telephone calls – shook his head and said that was not mentioned to him. I asked was it the case that the Govt. did not have confidence in me as Cr. – Sec Gen said there was to be a meeting early the next morning in advance of Cabinet meeting where matter would be discussed – not told who was attending the meeting. Took it visit from Sec Gen meant I was to consider my position, that being the case, I wanted some time to announce my retirement – said I would ring him in the morning. I rang Sec Gen shortly after leaving my house– expressed a desire to retire on 23/5/14 having served 41 years in AGS.”

- 35.14 The Commissioner took it from the fact of the visit of the Secretary General, in the circumstances, to his home, late at night, indicating that the Taoiseach was very concerned, that he was expected to consider his position. He was being informed that the Taoiseach did not know how the matter would be received in Cabinet and that he might find himself in a position where he might not be able to express confidence in the Commissioner. Using an expression he employed several times, he said that he knew “*from his experience*” that he was expected to consider his position.
- 35.15 The expression, “consider one’s position,” has come to mean that a person holding a particular position should consider resigning or actually resign. Mr Purcell did not use that expression. The furthest Mr Purcell went was to say that he was to communicate to the Commissioner the gravity of the matter and that he was to consider the situation. Mr Callinan concluded that he was expected to consider his position from his assessment of the circumstances surrounding Mr Purcell’s visit. It was most unusual, indeed it was unprecedented, for the Secretary General of the Department of Justice to visit the Garda Commissioner at his home and this visit was taking place late at night. He was informed that the Taoiseach considered that the

matter of the telephone recording was very grave and that the Taoiseach wished him to be aware of that fact. Most importantly, he was informed that, when the matter was discussed at Cabinet the next day, the Taoiseach was unsure of the outcome of the discussions and might find himself in a position where he could not continue to express confidence in the Commissioner.

35.16 At a certain stage, the Commissioner said he had always been loyal and that, regardless of the circumstances, he was going to retire. He said that he would like some time to consider his retirement. He asked for a period of three months which he regarded as a sort of standard period.

35.17 Mr Callinan has told the Commission that he had not considered retirement from his position up to 24th March 2014, even though he was naturally aware of the various current issues concerning An Garda Síochána and, indeed his own position. He denied that those issues had influenced his decision to retire.

35.18 Mr Callinan interpreted the situation he was placed in by the visit of Mr Purcell as leaving him absolutely no option and that he was expected to retire:-

“I want to be very clear, there was absolutely no options put on the table to me.”

Later in his evidence he said:-

“I was left in no doubt what I had to do then that evening. I was left in absolutely no doubt.”

35.19 Mr Callinan was reminded by the Commission that he did have options. He could have decided not to retire, saying that he had done nothing wrong. In answer to the direct question as to whether it was his decision to retire, he answered: “Yes.”. He acknowledged that “it was down to [him] to make that decision.” Mr Callinan said that he had met many issues of confrontation, had faced down armed criminals. He said that he had the “steel to face up to issues and face them down.”

35.20 Nonetheless, he insisted that he had no option. If there was the possibility that the Taoiseach was going to express a lack of confidence in him, he clearly could not continue in office.

35.21 Pressed on this issue and, in particular, on the fact that he could have faced up to the matter and insisted that he had done nothing wrong, Mr Callinan’s answer was:-

“.....why would I want to get into conflict with a Government that I have the greatest respect for? And why would I want to put myself through civil litigation. The fact that I was being told that that I had done nothing wrong or there was nothing being leveled against me was sufficient for me but clearly there was a problem and there was a political problem for the Government..... Once I am happy nobody is blaming me, I was prepared, in those circumstances, to walk off the pitch.”

35.22 When the Commissioner had communicated his decision to retire but wished to be allowed a period of three months to do so, it was necessary for Mr Purcell to telephone Mr Fraser so that he could speak, in turn, to the Taoiseach about it. He went to his car to get his mobile phone, because he understood that the Commissioner wished him to make that call in his presence. Mr Purcell thought that the Commissioner’s proposal was reasonable but said that he would have to phone Mr Fraser who, in turn, would have to consult with the Taoiseach. He phoned Mr Fraser and had to wait for some time in the Commissioner’s home for a reply. Mr Fraser said that he had spoken to the Taoiseach who expressed some concern about the suggested approach, *i.e.*, the three month notice period. The Taoiseach agreed with it, in principle, but wanted to consider it further overnight. Mr Fraser said that he would revert in the morning with confirmation. Mr Purcell then left Mr Callinan’s house.

36. The Commissioner’s Proposal to Retire

36.1 The Taoiseach said that he was very surprised when, a short time after he had left the meeting in his office, the Secretary General of the Department of the Taoiseach contacted him with the message from the Secretary General of the Department of Justice that the Garda Commissioner had decided to retire but that he wished to postpone his retirement for a three month period. This was amended, in fact, some minutes later, to two months by Mr Callinan.

36.2 When Mr Purcell returned to his car, he noted that there was a text message on his mobile phone from the Minister for Justice. This message was timed at five minutes past midnight, on 25th March 2014. It read:-

“This is horrendous. Phone me when you can at any time. A.”

It should be noted that the Minister sent the text before he knew of the Commissioner’s decision to retire. Mr Purcell telephoned the Minister from his car. They had a brief conversation. Mr Purcell explained that he was not in the mood for any lengthy conversations about the issue. The Minister said: “this is awful,” or words to that effect. Mr Purcell informed the Minister that the Commissioner had decided to retire in three months.

36.3 The Taoiseach reflected on the matter overnight. He said, in evidence, that the *“decision to retire was the Garda Commissioner’s”*. He said that he had *“been asked to give a view on whether he could remain on for a further three months”*. In fact, the request from the Commissioner had, at that point, unknown to the Taoiseach, been adjusted to two months. The Taoiseach said that he had not slept a wink. He made his decision. He did not consult the Attorney General or the Minister for Justice. He communicated his decision by text message to Mr Fraser, the Secretary General of the Government, in the morning. That text message read:-

“Have considered this all night. Once decision on early ret is made it simply has to be immediate. Otherwise Cabinet accepts reason for stepping down but

allows it to continue. This would simply not be feasible in any circumstance. His therefore to be with immediate effect.”

- 36.4 Mr Fraser transmitted to Mr Purcell the message that, if the Commissioner was going to retire, he should do so with immediate effect. Mr Purcell expressed himself as being very unhappy with it. He thought it was wrong. He thought that Mr Callinan should be allowed to retire in the way he wanted. He asked to see the Taoiseach. Mr Purcell saw the Taoiseach in the presence of Mr Fraser and the Minister for Justice. He said that he believed the decision was wrong. He also said that there was a possibility that Mr Callinan might decide not to retire, if not allowed to go on his own terms, and that he might seek legal advice. In evidence, the Taoiseach said:-

“... it was absolutely crystal clear in my mind here that the decision to retire came as a surprise to me and was a decision specifically and individually for the Garda Commissioner. The request made to me was, will I reflect on the question of a further three months. I gave my view on that and that was my view on that element of a decision which was entirely his.”

The Taoiseach noted what Mr Purcell said to him but expressed his view that a delayed departure would mean that both the Commissioner and the Government would be in impossible positions.

- 36.5 Mr Purcell telephoned the Commissioner, who was at his office at Garda Headquarters, and communicated the Taoiseach’s view to him. He was disappointed. He referred to the possibility of seeking legal advice, but, according to both himself and Mr Purcell, it was a fleeting or momentary reference and he confirmed that he was going to retire for personal and family reasons and that he would do so with immediate effect. Mr Callinan has told the Commission that he thought about it and that he decided:-

“I’m certainly not going to bring my family through the trauma of challenging the State in relation to my departure from An Garda Síochána and, in those circumstances, I was going to put in my notification to retire immediately.”

37. The Commissioner Retires

37.1 The Commissioner submitted his letter of retirement addressed to the Secretary General of the Department of Justice on 25th March 2014. It was delivered by hand.

It read:-

“I hereby give notice of my intention to retire from An Garda Síochána with immediate effect. I am retiring for family reasons.

I wish to place on record my sincerest thanks to you and the Minister for Justice, Equality and Defence and the Government for the honour of serving as Garda Commissioner.”

37.2 A press statement issued by the Garda Press Office on the same day recorded Mr Callinan as saying:-

“In the best interests of An Garda Síochána and my family, I have decided to retire. I felt that recent developments were proving to be a distraction from the important work that is carried out by An Garda Síochána on a daily basis for the citizens of the State in an independent and impartial manner”.

37.3 The letter and the press release were prepared in Garda Headquarters. Mr Callinan, in evidence, explained the reference to “family reasons” in the letter as meaning that he did not *“want to invite the trauma of having to get into a legal wrangle with Government.”* He had done it *“purely on a humanitarian level”*. He added, however:-

“....it was also the case that I was conscious of what was going on in the public domain around An Garda Síochána and I felt from the organisation’s perspective, as well as the public that we are serving, and the family and that is what I put into my statement. It was a combination of those things.”

37.4 On the morning of 25th March 2014 at about 9 a.m., the Taoiseach informed the Tánaiste, Mr Gilmore, of the Commissioner’s retirement and briefed him on the

issues. This report has already dealt with the issue of confidence as it was discussed between the two men. Mr Gilmore was told about the discussions on 23rd and 24th March 2014 and that the Garda Commissioner had been visited by the Secretary General of the Department of Justice and had decided to retire.

- 37.5 On the afternoon of Tuesday, 25th March 2014, the Taoiseach asked Mr Micheál Martin, T.D., the leader of Fianna Fáil and Mr Gerry Adams, T.D., the leader of Sinn Féin, to meet him in his office. He informed the party leaders that the Attorney General had briefed him the previous Sunday in relation to a system of recording telephone conversations to and from Garda Stations.

PART THREE

Summary and Conclusions

SUMMARY AND CONCLUSIONS

Term of Reference 1(n)

Paragraph 1(n) of the Commission's terms of reference requires it 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."*

The Garda Commissioner wrote the letter of 10th March 2014 to comply with his obligation to keep the Secretary General of the Department of Justice and the Minister fully informed of significant matters concerning An Garda Síochána. What he in fact wanted to tell the Minister about was the recording of telephone calls into and out of Garda Stations, both in Bandon Garda Station as a result of the Bailey case and more generally in other Garda Stations. These were matters which had come to his attention in late October or early November 2013. How this happened is first explained.

1. Discovery of recorded telephone conversations in Bandon Garda Station

- 1.1 On 23rd December 1996, Mme Sophie Toscan du Plantier, a French citizen, was brutally murdered outside her holiday home at Toormore, Schull, Co Cork. The Garda investigation of her murder was based at Bantry, Co Cork. For some time in 1997, some of the investigation team used a room in Bandon Garda Station.
- 1.2 Mr Ian Bailey, a UK citizen, living in the area where the murder had taken place, came under Garda suspicion for the murder. The Gardaí arrested him pursuant to statutory powers on two occasions: on 10th February 1997 and 27th January 1998.

- 1.3 Mr Bailey has claimed that his arrests and other Garda actions focussed on him were unlawful. In 2007, Mr Bailey and his partner instituted High Court proceedings against the State claiming damages for alleged commission of a number of torts, including unlawful arrest, false imprisonment, assault, battery and trespass to the person. This action was unsuccessful and a verdict was returned on March 30th 2015.
- 1.4 The High Court (Hedigan J) made extensive orders in Mr Bailey's action requiring the defendants to make discovery of documents relevant to the plaintiff's claim. The principal burden of compliance with the discovery orders fell on An Garda Síochána, against whose members the allegations were being made. Chief Superintendent Thomas Hayes, who was in charge of the Cork West Region and based in Bandon, was responsible for collating the relevant documents. He was due to swear the defendants' affidavit of discovery on or about 18th October 2013.
- 1.5 In the course of the discovery process in the Bailey case, it emerged that there were a number of tapes in Bandon Garda Station containing recordings of telephone conversations into and out of that station in the year 1997 and that these could contain material relevant to the case. In October 2013, it was reported to Chief Superintendent Hayes by members of the Gardaí who had been assigned the task of listening to the tapes, that three conversations in particular - two between members of An Garda Síochána, and one between a Garda and a civilian, Ms Marie Farrell - contained material which could be unhelpful insofar as the defence of the Bailey case was concerned and damaging to An Garda Síochána. No transcripts were yet available.
- 1.6 Although the content of the recordings is a matter for the Commission's principal report, it may be observed that, even at that early stage, it appeared that the system at Bandon had recorded telephone calls on a line which Chief Superintendent Hayes, at any rate, did not consider to be normal.

2. Garda Headquarters learns of Garda recording systems

- 2.1 Chief Superintendent Hayes decided to notify Garda Headquarters of this. On 16th October he telephoned Mr Ken Ruane, the Head of Legal Affairs for An Garda Síochána, and arranged to meet him on Friday 18th. On 17th October he telephoned Deputy Commissioner O'Sullivan. He told her about the three problematic taped telephone conversations that had been identified in Bandon and their possible relevance to the Bailey case. It was not now going to be possible to swear the affidavit of discovery on 18th October as had been envisaged.
- 2.2 The Deputy Commissioner was concerned to establish, firstly, how the particular phone calls had come to be recorded in Bandon, and secondly, whether recording of this kind – that is to say, of calls which did not appear to be '999' emergency calls - could have occurred in stations other than Bandon.
- 2.3 She immediately made contact with Mr Cyril Dunne, the Chief Administrative Officer, and Mr Liam Kidd, Head of Information and Communications Technology (ICT). Superintendent Michael Flynn, ICT, was asked to make inquiries as to what systems for recording telephone conversations existed within An Garda Síochána.
- 2.4 It was this initiative of the then Deputy Commissioner, arising from the Bandon information, which led to the revelation of the existence of general systems of recording in Garda Stations other than Bandon.
- 2.5 On Friday 18th October at 10.13 a.m. Superintendent Flynn reported by email to Deputy Commissioner O'Sullivan that recording systems had been installed in Garda Stations as far back as the 1980's. They had been replaced by Dictaphone recorders in the 1990's and again by a NICE recording system in or around 2008. At that time, there were telephone recording systems installed in Command and Control, in Dublin, and all Divisional HQs outside the Dublin Metropolitan Region. Although Superintendent Flynn's email did not say so, it would have been clear to anyone having knowledge of the force that

a maximum of 23 Garda Stations was involved. Superintendent Flynn reported that the rationale behind this was the recording of 999 calls and the gathering of evidence around calls made to Garda stations regarding bomb threats and other code word messages.

- 2.6 He said that the only calls he was sure that An Garda Síochána could record were 999 calls. He urged that the force establish a national policy defining what calls could be recorded. While the belief of Superintendent Flynn as to the legitimacy of recording 999 calls was widely shared, the Commission has been unable as yet to identify any statutory authority for the recording of 999 calls.

3. Meetings on 18th October

- 3.1 Chief Superintendent Hayes came to Dublin on 18th October. He met and briefed Mr Ken Ruane, who as Head of Legal Affairs in An Garda Síochána was responsible for the conduct of the Bailey litigation. Mr Ruane requested that transcripts be obtained of the three calls which had been identified as problematic, in order to provide them to counsel for their advice.
- 3.2 The Commission is satisfied that Garda Headquarters up to the level of Deputy Commissioner O'Sullivan was from 18th October 2013 aware at a general level, if not in full detail that:
- Telephone calls between members of An Garda Síochána and between a member and a civilian had been recorded in the course of the du Plantier murder investigation at Bandon Garda Station on lines not usually recorded, that the tapes of these calls were in the possession of the Gardaí at Bandon, that the content of the calls was potentially unhelpful in the defence of the Bailey case and that there were other tapes which had yet to be listened to and transcribed; and

- Systems for recording telephone calls had been installed in Divisional Garda Stations generally in the 1980's and replaced in the 1990's and about 2008.

3.3 The significance and sensitivity of the matters involved was apparent. Chief Superintendent Hayes had telephoned the Deputy Commissioner in advance of his visit to Dublin. She, in turn, had initiated the inquiry by Superintendent Flynn as to whether recording was limited to Bandon. Mr Ruane was rightly extremely cautious in his handling of the information. He urged that great care be exercised in relation to the transcripts which he described as very sensitive. Counsel's opinion had yet to be obtained.

4. Garda Commissioner learns of telephone recording

4.1 The Commission has investigated in detail how and when the Garda Commissioner was made aware of these matters. The former Commissioner, Mr Martin Callinan, has given evidence on three occasions.

4.2 Mr Callinan fully accepted that he was aware of the recording of calls into and out of Bandon Garda station from late October. He believed that the ICT section was making inquiries of control rooms all round the country. In fact, the Commissioner had received a minute dated 24th October 2013 from Mr Ruane to Deputy Commissioner O'Sullivan, who had forwarded that document to the Commissioner. It stated that:

- There was in excess of 4000 hours of recordings from Bandon Garda Station;
- There might be policy issues for the organisation;
- A number of potentially relevant and unhelpful recordings had already been identified, transcripts of which were included;
- Advice was being sought from counsel;

- These calls made for difficult reading in the context of the integrity of one named retired Garda;
 - The persons identified did not know that they were being recorded.
- 4.3 The figure of 4000 hours was in fact an extremely rough and unscientific estimate.
- 4.4 The file containing this minute was returned from the Commissioner's to the Deputy Commissioner's office after five days with a handwritten note from the Commissioner enquiring about counsel's opinion.
- 4.5 Thus, by 29th October 2013 the Commissioner was fully aware of the serious problem which had arisen in Bandon, at least to the extent to which it was then known.
- 4.6 The Garda Commissioner was first alerted to the existence of a general recording issue on 8th November 2013, in a conversation with his Head of Legal Affairs, Mr Ken Ruane. Mr Ruane had been told by the Deputy Commissioner that there was "a wider issue" than the Bandon recordings, but was unaware of any of the details.
- 4.7 Commissioner Callinan obtained some further information on the general recording issue between 8th and 11th November 2013, most likely in the form of a verbal briefing from Mr Cyril Dunne, who as Chief Administrative Officer had oversight of the Information and Communications Technology Section (ICT) of An Garda Síochána.
- 4.8 Between 18th and 25th October 2013 Superintendent Flynn, ICT produced three reports with accompanying documentation, which set out what was known about the general recording systems at that time. None of these reports were shown to the Garda Commissioner. The reports contained important information of which the Commissioner remained unaware until March 2014, notably:

- That there was evidence of a rationale behind the original installation of the recording systems – which included “the gathering of evidence around calls made to Garda stations regarding bomb threats and other code word messages.”
- That recording took place only in Command and Control (Harcourt Square) and in Divisional Headquarters outside the Dublin Metropolitan Region – a maximum of 23 stations.
- That, when the original systems were replaced with Digital Audio Tape (DAT) recorders in the mid-1990s, there was documentary evidence of a policy being put in place which limited recording to certain kinds of lines, although it appeared that in subsequent years these limits were not observed in some stations, including Bandon.

5. Action by Commissioner

- 5.1 The most notable action taken by the Commissioner is that, immediately he became aware of the existence of general recording systems, entirely of his own motion, he decided to issue an instruction that all recording of telephone calls other than 999/112 calls should immediately cease. There is no written record of this instruction and the Commission has been unable to establish to whom the instruction was given. The Commission has, however, been able to establish that the instruction was conveyed from ICT Section at Garda Headquarters to Divisional Sergeants and Technicians in an email timed at 11:29 on 11th November.
- 5.2 The Commissioner did not seek legal advice either from the Head of Legal Affairs or from the Attorney General’s Office, prior to issuing his instruction that recording of non-999 calls should be stopped. In short, he did not consult anyone. He has told the Commission that he believed the recording was

unlawful because those speaking were unaware that they were being recorded, and for that reason issued an instruction that it should be stopped.

- 5.3 The Commissioner also immediately decided to seek advice from the Attorney General's Office, where he attended personally in the company of the Deputy Commissioner and the Head of Legal Affairs on 11th November. He there met Ms Ruth Fitz Gerald, Advisory Counsel. He gave a verbal account of what he knew concerning the telephone recording systems and sought advice on the data protection implications of what had been discovered.
- 5.4 The Commissioner informed Ms Fitz Gerald that it appeared that the recording systems had been put in place, possibly in the 1970's to allow for the recording of incoming and outgoing calls, but that the reason for the installation was not known at that remove in time. He believed that he could justify recording 999 calls. He also said that no documentation had been found relevant to the recording. He said that he did not think there was any reason to retain the recordings and that he did not wish to do so. His concern was to ascertain whether there was anything which would stop him directing the destruction of the recordings.
- 5.5 The Commissioner had not, of course, seen Superintendent Flynn's email of 18th October. He was not, therefore, aware of the rationale there mentioned for the recording systems, namely *"the gathering of evidence around calls made to Garda stations regarding bomb threats and other code word messages."* Nor was he aware that Superintendent Flynn reported that the recording systems were in Command and Control and Divisional Garda Stations. Similarly, he was not aware that Superintendent Flynn had reported on 22nd October that he had discovered some documents from the year 1996 indicating which channels were to be recorded.
- 5.6 The Commissioner's apparent lack of knowledge of the possible justification for recording at least non-999 telephone calls conveying bomb threats and other code-word messages had the consequence that the initial advice from the

Attorney General's Office was provided on the assumption that there was no possible justification for the recording of non-999 calls.

5.7 It is significant that Ms Fitz Gerald, unprompted, expressed the view towards the end of the meeting that the Minister for Justice should be informed.

5.8 Ms Fitz Gerald's written advice of 14th November was cautious. She described the issues as difficult and complex. She expressed the view that as it was not possible, according to her instructions, to say what the purpose of the recordings was, they were unlawful, by reference to the Data Protection Acts. Nonetheless, she pointed out some difficulties. It might be that a party would have reason for obtaining a recording. Apart from the Bailey case, there might be outstanding discovery in other cases. She advised that all outstanding recordings be brought together and an inventory made of them. They should be stored securely. Once this was done, she believed she would be able to advise relatively quickly on the action to be taken.

5.9 About this time an instruction was given that all tapes of recorded telephone calls should be collated and brought to Garda Headquarters. This had been the advice of Ms Fitz Gerald, though Superintendent Flynn had also suggested it and the task was assigned to him. A working group was established to oversee the task with the approval of the Commissioner. The process of collation took several months and no inventory was available until late February 2014.

6. Attorney General's Office says Department should be notified

6.1 The Commission has summarised elsewhere the evidence of concern in the Attorney General's Office that the Minister or the Department of Justice should be informed about the telephone recording systems. Ms Fitz Gerald had told the Commissioner that it should be done on 11th November. The Director General of the Office, Mr Liam O'Daly, expressed similar concern on 19th November. Ms Fitz Gerald enquired of Mr Ruane by text and by email on 21st November as to whether the Department had been informed. She thought it

would have to be done and offered to do so herself. Mr Ruane declined on the basis that it was more appropriate for “the Commissioner to inform the Department.” Mr Ruane, on 22nd November, drew the Commissioner’s attention to Ms Fitz Gerald’s intervention. The Commissioner replied that he had no difficulty with that and that he would inform the Secretary General.

7. Commissioner informs Secretary General

- 7.1 The Commission has, in the body of this report, analysed the evidence of the Commissioner regarding his informing of the Secretary General in great detail. It has taken full note of Mr Purcell’s denial that he had any conversation with the Commissioner in which he was informed of the recording either in the context of the Bailey case or generally.
- 7.2 The Commission has come to the conclusion that, as a matter of probability, the Commissioner did not report the matter to Mr Purcell prior to 22nd November 2013, as he claimed.
- 7.3 On the other hand, the Commission has found as a matter of probability that the Commissioner informed Mr Purcell of the matter of the telephone recordings on the telephone after 22nd November, probably referring to the Bailey case and the general recording systems. It is not, however, convinced that the Commissioner conveyed to Mr Purcell any real sense of the importance of the matter, as Mr Purcell would have been very likely to remember it if he had. Mr Purcell has absolutely no memory of such a conversation.

8. Commissioner’s duty to inform Department of Justice

- 8.1 The Commission is satisfied that, as from mid-November, the Commissioner was in possession of information concerning the existence of tapes of recordings at Bandon Garda Station which contained unhelpful material in the

context of the Bailey action and that there was still a large number of tapes to be listened to. He had also been informed that systems for the recording of telephone calls other than 999 calls had existed in Garda Stations since the 1970's or 1980's. He was not aware of any reason, justification or policy in relation to the installation and operation of these systems.

- 8.2 It is very significant that Commissioner Callinan himself was of the view from the outset that these matters were important and that he should make a written report about them to the Secretary General of the Department. His assessment was clearly correct. It is a striking fact that the Attorney General's Office expressed the view from the first meeting on 11th November that the Department should be informed and repeated this on 21st November, even to the extent of offering to inform the Department on behalf of An Garda Síochána. The Commissioner was aware of both of these interventions.
- 8.3 The obligation imposed by section 41(1) of the Act of 2005 to keep the Secretary General and the Minister "fully informed" necessarily implies that this be done in a timely fashion. The Commissioner insisted that he intended from the outset to make a report in writing to the Secretary General but said that he needed to have all the facts at his disposal. He accepted, however, when questioned, that he could have reported in writing in November 2013, describing the position as it was pending the establishment of all the facts. The Commission is satisfied that it would have been perfectly possible for the Commissioner to make a written report to either the Secretary General or the Minister based on such admittedly limited information as was available in November.
- 8.4 In the event, the Commissioner decided instead to report the matter verbally to the Secretary General on the telephone. Unfortunately, there is no record or corroboration of this call. Although Mr Purcell disputes it, the Commission finds as a fact that it took place, but at a level of generality which was not sufficient to make any impact on Mr Purcell. The result, of course was that the Minister was not informed at all.

8.5 Under s. 41(1), the Garda Commissioner is obliged to ensure that not only the Secretary General, but also the Minister is kept “fully informed.” The former Minister, Mr Alan Shatter instanced, in his evidence, a number of official events attended by him in the company of the Commissioner from December 2013 to February 2014, when the Commissioner had an opportunity to bring the recording issue to his attention. He said that he would have expected to have been informed of something of the seriousness of the telephone recording issue. Mr Callinan did not claim to have informed the Minister personally. He correctly emphasised that the normal conduit for informing the Minister was the Secretary General and that he assumed that the Secretary General would in turn inform the Minister.

8.6 The wording of section 41(1) of the Act presents a problem of interpretation. On its face, it obliges the Commissioner to keep both the Secretary General and the Minister fully informed. Section 40(1), on the other hand, requires the Garda Commissioner to “*account fully to the Government and the Minister through the Secretary General.*” It would be unreal to expect the Garda Commissioner to operate duplicate lines of communication to the Secretary General and the Minister. If the Commissioner keeps the Secretary General fully and effectively informed, he cannot be expected constantly to inform the Minister directly of the same matters.

8.7 The Commission has given careful consideration to the significance of the information which was in the Commissioner’s possession from mid-November 2013 having regard to his obligation to keep the Secretary General and the Minister “fully informed” as required by section 41(1) of the Garda Síochána Act 2005, which provides:

“The Garda Commissioner shall keep the Minister and the Secretary General of the Department of Justice, Equality and Law Reform fully informed of the following:

(a) matters relating to significant developments concerning—

- (i) the preservation of peace and public order in the State,
 - (ii) the protection of life and property in the State, and
 - (iii) the protection of the security of the State;
- (b) significant developments that might reasonably be expected to affect adversely public confidence in the Garda Síochána;
- (c) matters relevant to the accountability of the Government to the Houses of the Oireachtas;
- (d) any other matters that, in the Commissioner's opinion, should be brought to the Minister's attention."

8.8 As already mentioned, the Commissioner's obligation is to keep both the Minister and the Secretary General fully informed. In the view of the Commission, there was little doubt that the two related matters of which the Commissioner had learned concerning the recording of non-999 telephone calls at Bandon Garda station and the existence of similar recording systems in other stations around the country fell under one or more of these headings. Most obviously, any question of unlawful activity by An Garda Síochána would be liable to affect public confidence in An Garda Síochána. (sub-paragraph 41(1)(b)). The most general provision is in sub-paragraph 41(1)(d) which requires the Commissioner to report on any matters that, *"in his opinion, should be brought to the Minister's attention."* Any significant matter related to the Bailey action would naturally be of interest to the Minister. Firstly, the Minister was a named defendant in the Bailey action. Secondly, that action was on the list of sensitive cases reported regularly to Cabinet. Thirdly, it was a matter of public interest and controversy: Mr Bailey had been the subject of a European Arrest Warrant issued by a French judicial authority and had been the subject of a Supreme Court decision. Fourthly, the murder victim's French citizenship had caused her case to be a matter of interest in France and was relevant to the State's relations with that country. Finally, though this did not occur until the following month, the case was important enough to cause the Office of the Taoiseach to seek briefing material for

Leader's Questions from An Garda Síochána, material which was supplied via the Department of Justice and Equality.

8.9 Similarly, any concern that An Garda Síochána had been engaged, without lawful justification, in the widespread recording of non-999 telephone calls was clearly a matter about which the Secretary General or the Minister should have been informed. While it is, perhaps, not strictly necessary for the Commission to form a view on this matter. Mr Callinan has consistently stated in his evidence that, from the outset, it had been his intention to make a report in writing to the Secretary General¹. This was subject to the proviso that he would have all the salient facts. The Commission does not, in this report, pronounce on the substantive question of the justification or lawfulness of the recording of telephone calls. That will require consideration of the purpose of the recording and the applicability of relevant legislation in the fields of data protection, telecommunications and surveillance. It is sufficient to note that the Commissioner himself believed that there was a significant legal issue and that he found it advisable to consult the Office of the Attorney General.

8.10 The fact that the Commissioner was under a duty to report the telephone recording issue to the Secretary General and the Minister did not necessarily mean that it had to be done in writing. However, the Commissioner made a judgment in the present instance that a written report was required. The Commission agrees with that judgment. The inter-related issues of recording at Bandon Garda Station, its connection with the du Plantier investigation, the problems presented by the three transcribed telephone conversations and their potentially unhelpful impact on the Bailey case together with the revelation that such recording had been practised on a more widespread basis warranted a careful, though not necessarily very detailed, written report.

9. Garda Commissioner makes a written report

- 9.1 In the event, the Commissioner failed to report in writing to the Secretary General or the Department in or about November 2013. The uncertainty surrounding his telephone call to Mr Purcell meant that, either because of lack of clarity of the message conveyed or because of Mr Purcell's failure of memory, no effective report was received. The delivery of a written report was postponed for a number of months and the Minister was not informed at all.
- 9.2 It should also be stated that the Garda Commissioner cannot effectively perform his obligation to report to the Secretary General and the Minister pursuant to section 41 of the Garda Síochána Act 2005, unless he is himself adequately informed by his colleagues. The Commission has noted several failures of internal communication in An Garda Síochána, most notably that the Commissioner was unaware of any of Superintendent Flynn's reports of 18th, 22nd and 25th October 2013, when he attended at the Office of the Attorney General on November 11th 2013.
- 9.3 The first steps towards the preparation of a written report for submission to the Secretary General were taken by Mr Ruane in January 2014. He obtained briefing materials, drafted a report and circulated it to members of the working group to check its accuracy.
- 9.4 In February, Superintendent Flynn produced an inventory of the collated recordings, which had been awaited since November 2013. A draft letter to the Secretary General of the Department of Justice, prepared by Mr Ruane and invoking section 41 of the Garda Síochána Act 2005, was submitted to the Commissioner and amendments were agreed.
- 9.5 On 28th February 2014, an updated opinion of counsel in the Bailey case, together with three transcripts of recordings relevant to that case, were forwarded to the Department of Justice on the instructions of Mr Ruane, with the knowledge and consent of the Garda Commissioner. In his letter of 10th March, the Commissioner expressly drew the attention of the Secretary

General to this fact. Following a further round of amendments, the final version of the letter of 10th March was hand delivered to Mr Denis Griffin, the private secretary to the Secretary General, on that day. Commissioner Callinan began the letter by asking that its contents be brought to the attention of the Minister. In this way the Garda Commissioner unquestionably, though belatedly, complied with his obligation to ensure that the Secretary General and the Minister were fully informed.

- 9.6 It remains to consider the fact that the letter was not furnished to the Minister until 25th March 2014.

10. Handling of letter of 10th March in Department of Justice

- 10.1 Mr Griffin, who received the letter on behalf of the Secretary General's Office on 10th March, read through it. He noted that it concerned the Garda Division of the Department, of which Mr Michael Flahive, Assistant Secretary, was the head. He wrote Mr Flahive's name on it, scanned it and emailed it to him. He gave a copy to the Secretary General. Mr Purcell has told the Commission that he has no specific recollection of receiving the letter but says he would have seen that it had gone to the relevant section. Thus, the letter had been forwarded to Mr Flahive for him to deal with. Mr Purcell did not provide a copy to the Minister; nor did he inform him of the receipt of the letter, or of its contents.
- 10.2 Mr Purcell did not believe that there was any continuing problem about the recording of non-999 telephone calls, as the Commissioner had stopped it. His assessment of the situation was that no immediate or urgent decisions were required. However, the former Minister, Mr Alan Shatter, has given evidence that he would have assumed that a letter of such importance would have been brought to his attention, especially having regard to other controversies concerning the Garda Síochána at that time. It is only fair and humane to interpolate that Mr Purcell's mother was at that stage in the last stages of her life. Mr Purcell was naturally very concerned about her. However, this

personal crisis did not directly impact on the decision not to tell the Minister about the letter of 10th March. The decision to allow matters to proceed on the basis that the letter had been transmitted to Mr Flahive was taken on its own merits.

10.3 Mr Purcell accepted in evidence that, with the benefit of hindsight, it would certainly have been better if the letter had been sent to the Minister.

10.4 Mr Flahive has informed the Commission that he was absolutely clear that he believed that the letter would have been brought to the attention of the Minister by Mr Purcell. The Minister should, he thought, have received the letter because of its importance.

10.5 Mr Purcell honourably made no attempt in evidence to evade his responsibility for the decision. He was at pains, in particular, to emphasise that it was not Mr Flahive's task to inform the Minister. Mr Flahive, in turn, did not believe he had any such decision to consider as he was perfectly, if mistakenly, satisfied that Mr Purcell had brought the letter to the attention of the Minister.

10.6 Faced with this evidence, the Commission can have no doubt but that the letter should have been brought to the attention of the Minister in a timely fashion. Most obviously, the letter, in its opening sentence, asked that its contents be brought to the Minister's attention.

10.7 The events of the ensuing two weeks have been analysed in detail elsewhere in this Report² and can now be mentioned briefly. Mr Flahive passed the letter on to another official in the Garda Division of the Department of Justice for his information. He noted that the Commissioner had engaged with the Attorney General's Office and the Data Protection Commissioner. He believes that he had discussions with Mr Purcell about the letter in the course of the week but has no specific recollection of them. There were two important consultations on 10th and 11th March 2014 concerning the Bailey case, both attended by the

² Events from 10th to 19th March 2014 are dealt with in Part One of this Interim Report. Events from 20th to 25th March form part of the matters considered in Part Two of the Interim Report.

Garda Commissioner. Mr Flahive attended the first of these; both he and Mr Purcell attended the second. The letter was not mentioned on either occasion, although the general recording issue was discussed to some extent.

- 10.8 Both the Minister and the Secretary General were available until Friday 14th March. On Saturday 15th March, the Minister left for Mexico. On the same day, Mr Purcell's mother died. Mr Purcell was on leave for the following week. He returned to work on Monday 24th March. The Minister returned on 21st March. He was in regular contact with his Department while away.
- 10.9 On Friday 21st March the Minister, having returned from Mexico that morning, attended meetings over lunchtime in his Department. Mr Purcell was still on leave. Mr Flahive was present, but did not mention the letter of 10th March. He was still under the mistaken impression that Mr Purcell had informed the Minister about it. During the afternoon, Mr Liam O'Daly, Director General of the Office of the Attorney General, telephoned Mr Flahive to inform him that the Attorney took a very serious view of the telephone recording issue – both in the context of the Bailey case and more generally - and that this matter was likely to be raised at the Cabinet meeting which was due to take place next Tuesday 25th March. Mr O'Daly sought and received assurances from Mr Flahive that the Minister was fully briefed on the matter. Again, this was based on Mr Flahive's belief that Mr Purcell had given the Minister the letter of 10th March.
- 10.10 Mr Flahive telephoned the Minister. Mr Shatter has no recollection of such a phone call. Mr Flahive asked the Minister if he was aware of the matter of telephone recording. The Minister said that he was not. Thus Mr Flahive learned for the first time that the Minister had not in fact received the letter of 10th March. Mr Flahive says he told him in what he called succinct terms of the essence of the letter, including the emergence of issues around telephone recording at Garda Stations, but he did not tell him of the letter itself. Mr Flahive says he also told the Minister of the Attorney General's concern. Mr Shatter categorically denies having received any of this information. This is a direct conflict.

10.11 The Commission accepts that Mr Flahive had a conversation with the Minister in which he informed him of the telephone recording issue. The content and effect of that telephone conversation are considered in detail elsewhere in this Report, in the context of sub-paragraph 1(o) of the Terms of Reference.³ For the present purpose, it is sufficient to note that, although the Commission is satisfied that Mr Flahive did inform the Minister of the recording issue, probably in very general terms, it is equally satisfied that this conversation had no impact on the Minister, who remained effectively unaware of the issue until the evening of 24th March 2014. The Commission considers the most likely explanation of this to be that Mr Flahive did not speak of the issue in any urgent manner and that it did not register with the Minister due to tiredness at the end of a day following an overnight flight. As for the letter of 10th March, Mr Flahive himself accepts he did not reveal the existence of the letter of 10th March to the Minister at that time.

10.12 At around 6 pm on Monday 24th March, Mr Purcell and Mr Flahive met with the Minister in order to brief him on matters relating to Garda telephone recordings. This briefing was interrupted when the Minister was called away to a meeting at the Taoiseach's office. Although the issues contained in the letter of 10th March had been discussed to some extent, neither Mr Purcell nor Mr Flahive had mentioned the existence of the letter before the meeting was interrupted.

11. Letter of 10th March given to Minister

11.1 On the morning of 25th March 2014, the Garda Commissioner announced his retirement. The sequence of events leading up to that decision is considered in Part Two of this Interim Report.

³ See above para. 23.01 to 23.30.

- 11.2 It struck Mr Purcell on the morning of 25th March, following the Commissioner's announcement of his retirement, that the Minister had not yet seen the letter of 10th March. He arranged for it to be delivered to him as a matter of urgency. The letter was placed before the Minister, in an envelope, during the Cabinet meeting at around 12:40 pm.
- 11.3 The sum total of all this was that the Minister was not effectively briefed on the contents of the letter of 10th March until 24th March, and the letter itself was not brought to the Minister's attention until 25th March, after the Commissioner had announced his retirement. Mr Purcell has openly accepted that this was a matter for which he had ultimate responsibility. As he put the matter in evidence, *"on that particular occasion, [his] personal life impinged on his work performance, [though]...on many occasions in the past, it was the exact opposite."*
- 11.4 The Commission regrets to have to find that Mr Purcell failed in his responsibility as Secretary General by not telling the Minister of the letter or its contents. Having said that, the Commission has noted the way in which Mr Purcell has met the matter. It is impossible not to sympathise with the personal pressures that Mr Purcell was under in that week.

TERM OF REFERENCE 1(N) – CONCLUSIONS

1. The Garda Commissioner was aware by 29th October 2013 of the existence of certain non-999 telephone recordings from Bandon Garda station, the content of which had potentially serious implications for the Bailey case and if made public, could have severe consequences for the reputation of An Garda Síochána;
2. The Commissioner had been informed by 11th November 2013 that systems for the recording of telephone calls other than 999 calls had existed in Garda stations since the 1970's or 1980's. He was not aware of any reason, justification or policy in relation to the recording of such calls.
3. The Commissioner was under an obligation from mid-November 2013 pursuant to section 41 of the Garda Síochána Act to ensure that the Secretary General and the Minister were fully informed of the matter brought to his attention concerning telephone recording at Bandon and elsewhere.
4. While he was not obliged to report in writing, a written report was appropriate in this case.
5. The Commission has come to the conclusion that, as a matter of probability, the Commissioner did not report the matter verbally to Mr Purcell prior to 22nd November 2013.
6. On the other hand, the Commission has found as a matter of probability that the Commissioner did inform Mr Purcell of the matter of the telephone recordings by telephone on a date after 22nd November, probably referring to the Bailey case and the general recording systems. It is not, however, convinced that the Commissioner conveyed to Mr Purcell any real sense of the importance of the matter. Mr Purcell has absolutely no memory of such a conversation.

7. In the view of the Commission, it was an error of judgment for the Garda Commissioner to postpone making a written report pending the gathering of facts concerning the number of tapes at Garda Stations; he could have made a partial or general report sufficient to alert the Secretary General and the Minister of the matter.
8. In sending the letter of 10th March 2014, the Commissioner unquestionably complied with his obligation to ensure that the Secretary General and the Minister were fully informed, though he was in delay.
9. Mr Purcell should have shown the letter of 10th March 2014 to the Minister shortly after it had been received: he should not have delayed for two weeks, although the Commission notes his personal circumstances.
10. The Minister remained unaware of the existence of the letter of 10th March 2014 until 25th March 2014, and had no effective knowledge of the issues raised in the letter until the evening of 24th March 2014..
11. The view of the Commission is that s. 41 of the Act of 2005 ought to have made a difference to the continuum of communication between the Garda Commissioner and the Secretary General and Minister. Considering the overall purpose of s. 41, it is clear that it was a method for alerting the Department to significant developments. The Department should have developed protocols for dealing with communications – whether oral or in writing – that expressly invoked this section.
12. The reporting relationship outlined in section 41 of the Garda Síochána Act 2005 is essential in order to ensure proper communication between the Department of Justice and An Garda Síochána. It did not work in this case because:
 - (i) the Commissioner was not adequately informed by his management team regarding the details of the telephone recording issue,
 - (ii) the Commissioner's verbal report to the Secretary General in November 2013 made no impact on the Secretary General, and

- (iii) the Commissioner did not submit a written report on the matter until 10th March 2014.

SUMMARY AND CONCLUSIONS

Term of Reference 1(o)

Paragraph 1(o) of its terms of reference requires the Commission 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.”*

Mr Callinan gave formal notice of his retirement from the post of Garda Commissioner with immediate effect on the morning of 25th March 2014. This followed a visit to his home by the Secretary General of the Department of Justice, Mr Brian Purcell, at approximately 11pm on Monday 24th March. Mr Purcell’s visit arose following a meeting in the office of the Taoiseach which was attended by: the Taoiseach, Mr Enda Kenny; the Attorney General, Ms Máire Whelan SC; and the Secretary General to the Taoiseach and the Government, Mr Martin Fraser. The meeting was subsequently joined by Mr Alan Shatter, Minister for Justice, and at a later stage by Mr Brian Purcell, Secretary General of the Department of Justice. The central purpose of Mr Purcell’s visit to the Commissioner’s home was to tell him of the seriousness with which the Taoiseach regarded the practice of recording telephone calls to Garda Stations.

The Commission has taken the view that the sequence of events leading up to the Commissioner’s retirement commenced on Thursday 20th March 2014 with a meeting at the Attorney General’s Office.

The principal persons involved in the events leading up to the Commissioner’s decision to retire were: The Taoiseach, the Attorney General, Mr Fraser, the Minister for Justice and Mr Purcell.

As the Commission has reported in Part I of this report, the Garda Commissioner had written formally to Mr Purcell as Secretary General on 10th March 2014, asking him to bring certain matters relating to Garda telephone recordings to the attention of the Minister. Mr Purcell had

not told the Minister about that letter. As a result, none of the principal participants in the events which unfolded from 20th to 25th March – except for Mr Purcell himself - were aware that the Garda Commissioner had written the letter, until after the Commissioner’s retirement.

1. Contemporaneous Events

- 1.1 The Commission has recalled a number of events and controversies affecting An Garda Síochána and the Commissioner at that time. There was intense media pressure. Responding to what Mr Fraser called very aggressive questioning from the media, the Taoiseach had repeatedly expressed his unqualified confidence in the Garda Commissioner. Nonetheless, a number of Ministers had, over the weekend preceding Tuesday 25th March, called on the Commissioner to withdraw or qualify remarks made by him at a hearing of the Oireachtas Committee of Public Accounts in January 2014, during which he had used the word “disgusting” in reference to the Garda whistleblowers. In this context, all those involved expected the Cabinet meeting to be held on 25th March to be difficult, some said “stormy.” The Commissioner’s position would be debated.

2. Meeting in Attorney General’s Office on 20th March

- 2.1 On 20th March, the Attorney General presided over a meeting of the Legal Management Advisory Committee, attended by her senior staff and representatives of the Chief State Solicitor’s Office.
- 2.2 The meeting fully considered both the Bailey case, which was on the list of sensitive cases due to be considered by the Cabinet, as well as the general issue of telephone recording at Garda Stations. It was noted that, according to information which An Garda Síochána were said to have described as “anecdotal”,¹ recording had started in the 1980’s as a result of bomb threats and that the Commissioner had not been aware of it but had stopped it once he had learned of it.

¹ See Part II, para. 24.6 above.

- 2.3 The meeting was also informed of advice given by the Data Protection Commissioner to An Garda Síochána on 19th March concerning the legality of retaining the existing telephone recordings. There were concerns that the advice of the Data Protection Commissioner could potentially lead to the destruction of the tapes and that such action could prejudice the rights of persons whose convictions might conceivably be set aside based on material revealed from the tapes, the principle of “innocence at stake.” Miscarriages of justice might have occurred. The Attorney General advised firmly that the tapes were not to be destroyed, pending full legal advice. She told the Commission in evidence that from that point on,, she was no longer concerned that there was any danger of destruction. She was satisfied that her advice would be followed. That aspect of the matter need not, therefore, be considered further.

3. Actions of the Attorney General

- 3.1 It is not so much the events at the meeting of 20th March as the Attorney’s assessment of the situation as being extremely grave which became important. Over 21st and 22nd March, she reviewed documentation available to her concerning the Bailey case and the more general issue of telephone conversations made and retained in Garda Stations.
- 3.2 On Saturday March 22nd, the Attorney received and read a fifteen-page submission prepared by Ms Fitz Gerald on the general recording issue. The Commission does not, in this Interim Report, reach any conclusions on the question of the legality of the Garda recording systems. It will need to examine that issue in all its aspects in its principal report on the Garda recording systems. For that reason, it will note only briefly, that Ms Fitz Gerald considered various aspects of the issue, but did not reach any final conclusion on the legality of the recording systems. The principal focus of her submission was on the question of what was to be done with the recordings that were currently in the possession of An Garda Síochána.

- 3.3 Included with Ms Fitz Gerald's submission were a number of important documents including the opinion of counsel and transcripts of tape recordings in the Bailey case; a report from Superintendent Michael Flynn dated 19th February 2014 with the inventory of recordings that had been collated; a letter of March 19th 2014 written by Commissioner Callinan to the Data Protection Commissioner, Mr Billy Hawkes, and an email from Mr Ruane, Head of Legal Affairs in An Garda Síochána, outlining the oral advice given to him by Mr Hawkes in response to that letter. The Attorney also obtained and read a report of the Garda Síochána Ombudsman Commission, issued in June 2013, concerning a trial at Waterford Circuit Criminal Court in which evidence obtained from recordings made on certain telephone lines at Waterford Garda station was ruled inadmissible for the purposes of the trial. These were the documents which formed the basis for the Attorney General's views of the matter and further action.
- 3.4 The Attorney General has explained forcefully in her evidence her view of matters as they then appeared to her. It seemed to her that there had, for decades, been *"wholesale extensive recording of telephone calls the length and breadth of the country in Garda stations without any apparent authorisation under any of the legislation..."* This had, she considered, amounted to *"wholesale violation of the law by the Garda Síochána."* She described this as "criminal activity" by An Garda Síochána. She considered this to be a state of affairs *"wholly and materially different in every respect from what had been projected in November."*
- 3.5 The Commission is satisfied that the Attorney General formed the view that a most alarming state of affairs had been disclosed in that, as she saw it, An Garda Síochána had been engaged for many years in widespread recording of telephone calls which was apparently unauthorised and unlawful. She took an extremely serious view about the whole matter.
- 3.6 The Commission repeats at this point that it does not, in this Interim Report, address the important substantive issue of whether and to what extent any actual recording was authorised by law – a matter that comes under sub-paragraph 1(g) of the terms of reference, and will form part of the Commission's Final Report. In

reporting on that aspect, the Commission will have to give careful consideration to a number of matters, including, but not limited to:

- The extent to which the recording was of 999 calls and the legal authority for doing so;
- The extent to which the recording of emergency calls to the main switch in a Garda Station, though not strictly on a 999 line is justifiable;
- The effect of the amendment of section 98 of the Postal and Telecommunications Act 1983 by section 13(2) of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act, 1993, s. 13(2);
- The Criminal Justice (Surveillance) Act 2009;
- The extent to which there was, in fact, any recording of telephone calls between solicitors and their clients.

All those matters must be reserved for the Commission's principal report.

3.7 While the Attorney read and considered Ms Fitz Gerald's submission on the general recording issue, she did not endorse the submission as representing her own advice on the matter. In a written statement to the Commission, she made it clear that she did not believe her Office was in possession of sufficient facts about the systems of Garda telephone recording as of 22nd March 2014. In that situation, it seems necessarily to follow that the Attorney would need to seek further information before taking any stand on the matter. However, as will appear from subsequent events, she did not do so.

3.8 The Attorney did not contact the Commissioner, nor did she ask anyone to contact him on her behalf to seek further information or explanations from An

Garda Síochána. She took the view that she could not intervene in the relationship between the Commissioner and the Department. The Garda Síochána were, as she described it, “*very proprietorial of their relationship with the Department of Justice.*” If she interposed and dealt with the Commissioner, she believed that she would be “*undermining the Minister,*” adding that “*the Garda Síochána are part of the Department of Justice and Equality.*” Nor, however, did the Attorney General make any attempt to contact the Minister, a matter on which the former Minister has commented strongly to the Commission.

- 3.9 The Attorney General explained that she did not need to contact the Minister on the issues, as her understanding was that he was already in possession of all the relevant material. She placed particular emphasis on the fact that her Director General, Mr O’Daly had telephoned the Department on 21st March to make sure that the Minister was fully briefed on both the Bailey and the general recording issues, and had been assured that he was. This assurance was repeated to Mr O’Daly by Department officials at a meeting in the afternoon of 24th March. On both occasions, Mr O’Daly passed these assurances on to the Attorney General. She was thus fully entitled to believe that the Minister was properly briefed on the issues.
- 3.10 The Attorney also pointed to the fact that the presentation of the list of Sensitive Cases for consideration by the Cabinet was a function of the Taoiseach, not the Minister for Justice. As the Bailey case was on that list, and as it was possible that the general recording issue would arise when that case was discussed, the Attorney considered it her duty to brief the Taoiseach on these matters in advance of the Cabinet meeting.
- 3.11 In the view of the Commission, it is notable that the Attorney did not contact the Minister on this matter, which she regarded as having significant implications for An Garda Síochána and the State, in circumstances where she believed the Minister to be fully briefed, and was also aware of deficits in the information then available to her own Office . The Attorney added however, significantly, that there was another reason for not contacting the Minister. She thought that part of the issue involved the Minister himself. She accepted that he was the Minister

“seised with functions under the legislation regarding the Gardaí.” However, he was, she believed *“part of the narrative...there were issues, allegations touching the Minister himself personally.”* Here she was referring to the recent controversy concerning remarks made by the Minister with regard to the Garda whistleblowers.

- 3.12 Mr Shatter has said that he was not involved in any way in the matter of the Garda telephone recording, which appears to be correct. Nobody has suggested that he was. He was not even aware of it.
- 3.13 The Attorney considered the matter to be a *“whole of government issue.”* She thought it warranted *“being raised and managed by the Taoiseach.”* In this context she referred to *“tensions between the Minister for Justice and Equality and another...minister.”* She was referring to the public statement of the Minister for Transport, Mr Leo Varadkar, in which he had referred to the Garda whistleblowers as “distinguished”. She mentioned *“the narrative in the media that the Commissioner and the Minister were unduly close...”*
- 3.14 Finally, the Attorney also believed that the Minister was away. She was not aware that he had returned from Mexico on Friday morning 21st March.
- 3.15 The result of all this was that, although the Attorney General considered that she had discovered a matter of the gravest possible public concern regarding An Garda Síochána, and, as we shall see, she believed it warranted being raised with the Taoiseach, no contact was made with nor inquiry made of either of the two people most obviously concerned and responsible. These were the Garda Commissioner, who was charged under the legislation with the direction and control of the force, and the Minister for Justice, to whom the Commissioner was legally accountable. This had the unfortunate result that the relevant actors all went into the events of 23rd and 24th March in almost complete ignorance of many relevant facts. The most outstanding of these facts, which was known only to Mr Purcell, was that the Garda Commissioner had, on 10th March, written an important formal letter under s. 41(1)(d) of the Garda Síochána Act of 2005, to the Secretary General of the Department of Justice, dealing with the very issue

which so gravely concerned the Attorney. If anyone had asked the Commissioner about the issue, he would surely have pointed out that he had already written a letter about it to the Secretary General of the Department in order to perform his duty to keep him and the Minister fully informed.

4. Contact with the Department of Justice

- 4.1 Although the Attorney General herself made no direct contact with the Minister for Justice, the Director General of the Attorney General's Office, Mr O'Daly, did contact the Department by telephone on Friday 21st March. In the absence on leave of Mr Purcell, he spoke to Mr Flahive and sought his assurance that the Minister was fully briefed on the issues around recordings in the Bailey case and more generally. The Minister was not, of course, briefed on these matters at all. He had not received the letter of 10th March or even been told of its existence. Neither had he been furnished with counsel's opinion on the Bailey case which, together with transcripts of three telephone calls was forwarded to the Department of Justice on February 28th 2014. Nonetheless, Mr Flahive innocently compounded the misfortune by assuring Mr O'Daly that the Minister was fully briefed. He did so under the mistaken impression that Mr Purcell had provided the Minister with the letter of 10th March. He had no other basis for giving the assurance.
- 4.2 Mr O'Daly told Mr Flahive that the Attorney General was personally greatly concerned about the fact that there had been a general system in place for the recording of telephone calls to and from certain Garda stations over a number of years and that he thought it likely the matter could be raised at the Cabinet meeting on Tuesday 25th March. With this in mind, Mr O'Daly asked to meet with Mr Purcell and Mr Flahive on Monday 24th, in order to have a full discussion of all the issues. Mr Flahive agreed.
- 4.3 Although Mr Flahive believed at this time that the Minister was aware of the general recording issue, he was not sure if the Minister knew of the Attorney General's personal concern about the issue. He decided to ring the Minister. He

began by asking the Minister if he knew about the issue of Garda telephone recording systems. When the Minister said that he did not, Mr Flahive realised that, contrary to his firm belief up to that moment, Mr Purcell had not in fact given the Minister the letter of 10th March. Thus, he knew that the Minister was not in fact fully briefed. However, he did not himself tell the Minister of the letter or provide him with a copy. Nor did he telephone Mr O'Daly to correct the information he had mistakenly given him.

4.4 The Attorney, in these circumstances went into the weekend of 22nd and 23rd March under the mistaken impression that the Minister was fully aware of the telephone recording issue. Mr Shatter, in his evidence to the Commission has accepted that it was reasonable for her to hold that belief.

4.5 Mr Flahive has stated categorically in evidence that, on learning that the Minister for Justice was unaware of the recording issue, he proceeded to describe in succinct terms the essence of the matters set out in the letter of 10th March, although he did not mention the letter itself. Mr Flahive also said he informed the Minister that the Attorney General was greatly concerned about the recording issue and that the matter was likely to be raised at Cabinet on the following Tuesday. He said he concluded by saying that he and Mr Purcell would update the Minister on Monday, once they had met with Mr O'Daly on the issue.

4.6 It is significant that, while Mr Flahive thought it important to tell the Minister that the Attorney General was greatly concerned about the recording issue, he does not seem to have been made aware of any particular reasons for the Attorney's current concern. It is also important to note that Mr Flahive himself did not view the matter with the same level of concern as that attributed to the Attorney. His own view was that this was not a crisis but a serious matter that was being managed appropriately. Finally, it is clear that Mr Flahive believed there would still be time after the proposed meeting with Mr O'Daly on Monday 24th March to ensure the Minister was fully briefed ahead of the Cabinet meeting on Tuesday.

This was Mr Flahive's state of mind when he spoke to the Minister on 21st March.

4.7 Mr Shatter accepted it was possible that he had a brief telephone conversation with Mr Flahive in the afternoon of 21st March, though he did not recall one. However, he was equally categorical in his evidence that Mr Flahive did not brief him about the tape recording issue or about the Attorney General's concerns. Mr Shatter was in no doubt that, if he had known about the Attorney General's concerns, he would have had a conversation with her.

4.8 This telephone call has presented the Commission with one of its most difficult and challenging issues. Two persons of distinction have given directly contradictory versions of the facts. Since the credibility of each of these persons is in issue, the Commission has treated it with great care.

4.9 Having heard detailed evidence on the issue from both participants, the Commission is satisfied that Mr Flahive did telephone the Minister on 21st March and that he did inform him in some, but probably very general, terms of the telephone recording issue. The Commission also considers it likely that Mr Flahive did make some mention of the fact that the Attorney General had concerns about the recording issue.

4.10 On the other hand, the Commission is equally satisfied that the information imparted by Mr Flahive in this telephone call made no impact on the Minister, and that as events unfolded over 21st to 24th March 2014 the Minister acted genuinely as having no awareness of the general recording issue.

4.11 The question remains as to why the phone conversation with Mr Flahive had no impact on the Minister. In the view of the Commission, the reason is likely to have been a combination of the following factors:

- the precise nature of the information conveyed by Mr Flahive;
- the manner in which that information was conveyed; and
- the circumstances in which the Minister received the call – notably the fact that the conversation took place at the end of a working day, following his return from Mexico on an overnight flight.

- 4.12 The Commission considers the most likely explanation to be that Mr Flahive did tell the Minister of the telephone recording issue but not in any urgent manner and that it did not register with the Minister due to tiredness at the end of a day following an overnight flight.

5. Events on 23rd March

- 5.1 Although he remained effectively unaware of the issues around Garda telephone recording, the Minister sent a strongly-worded text message to the Taoiseach on Sunday morning 23rd March relating to other Garda matters and urging the Taoiseach to discuss them with him.
- 5.2 The Taoiseach tried to phone the Minister at about mid-day, but did not reply to the text or otherwise contact the Minister.
- 5.3 On the afternoon of Sunday 23rd March, the Attorney General contacted the Taoiseach in Government Buildings. She said that she wished to discuss recent developments in the Bailey case and to raise another matter in relation to the recording of telephone calls historically in Garda Stations.
- 5.4 At about 6 pm, the Attorney General met the Taoiseach in his office with Mr Martin Fraser. This was when the Taoiseach first learned of the issues around recordings in the Bailey case, and of the general issue of Garda telephone recording systems.
- 5.5 The Attorney outlined to the Taoiseach and to Mr Fraser the current position in regard to the Bailey case. She also gave an account of the three telephone transcripts from Bandon Garda Station and the views of counsel about them. She informed the Taoiseach that compliance with the High Court discovery order was due on the following Tuesday. There was also a brief discussion of the

international dimension to the Bailey case. The Attorney then went on to brief the Taoiseach on the general recording issue.

5.6 When she first gave evidence to the Commission, the Attorney said she told the Taoiseach that the Garda Síochána had been engaged in an extensive practice for decades *“of recording telephone calls in and out of Garda Stations in complete violation of the law, with total disregard for the requirements of ministerial authorisation and of the rights of citizens under the Constitution...”* So far as she was concerned, *“this was criminal activity being engaged in by An Garda Síochána.”* She said she told him that she *“had real concerns about the rights of individual accused persons, detainees and telephone calls with solicitors...”* If that were seen to have occurred it would be *“a most grievous matter.”* The Attorney saw this issue as arising against a background of a broad range of issues which had arisen at or around that time concerning An Garda Síochána.

5.7 In a written submission of 22nd May 2015, the Attorney presented a substantially modified version of her evidence to the Commission. She regretted that her earlier use of what she described as “trenchant language” had left the Commission under an erroneous impression. She insisted that she had not expressed an unequivocal view that “any particular person or body might be guilty of an offence” under the relevant legislation, but that she had referred only to “potential” illegality. The Commission accepts the Attorney’s qualification of her earlier evidence but cannot entirely ignore the very strong terms in which she described the account she gave to the Taoiseach in her sworn evidence. The Commission has come to the conclusion that the Attorney, even if she spoke of “potential” illegality, made a very dramatic presentation of what she saw as a serious state of affairs. She presented a picture of widespread and longstanding unlawful behaviour in An Garda Síochána.

5.8 The Taoiseach was extremely concerned following the Attorney’s report. Mr Fraser could see that he was taken aback. He was concerned that members of the public who had made contact with Garda Stations over very many years had had their messages recorded illegally. The matter would give rise to great

public controversy, would give rise to a perception of lack of integrity and credibility in the force and would cause public outrage.

5.9 The meeting on the evening of 23rd March was a long one. At its conclusion, the Taoiseach and Mr Fraser say that the Taoiseach asked the Attorney General to get legal advice (described by the Taoiseach as “*written*” and by Mr Fraser as “*definitive*”) on the issues involved. According to the Attorney, she said that she intended to instruct Senior Counsel to carry out a review of the material that she had been considering. It was agreed that they would meet on the following (Monday) evening. The Attorney would report back. The Taoiseach expected that the position would then be much clearer.

5.10 In the course of her evidence to the Commission, the Attorney stated that on Sunday night the focus of the meeting was on the facts: “*It was the facts and then I needed to verify facts.*” In his evidence to the Commission, the Taoiseach also spoke repeatedly of asking the Attorney to get the facts “*checked and double checked*”.

5.11 However, notwithstanding her remark that she needed to verify facts, the thrust of the Attorney’s evidence was that she did not believe the Taoiseach was asking her to check or verify the facts. Fact gathering would not normally have been her function. As the Taoiseach himself emphasised, she was the legal adviser to the Government. If anyone was to obtain the facts, it might have been expected that it would be the Minister for Justice with whom An Garda Síochána had a direct statutory relationship under the Garda Síochána Act 2005. In fact, Mr Shatter, in his evidence, said that, if he had been invited to the Sunday meeting, “*literally on the way out [he would have] phoned the Garda Commissioner.*” He also said that he “*could have got facts and looked for information any time on the Monday and [he] was never asked to do so.*”

5.12 The Minister for Justice was not informed of these developments, either by the Attorney General or the Taoiseach. He was the Minister specifically charged under the Garda Síochána 2005 with responsibility for An Garda Síochána. The Garda Commissioner was accountable to him.

- 5.13 The participants at the meeting of Sunday the 23rd March had very little information about the matter of Garda telephone recording. Yet, no attempt was made to obtain further information in the most obvious way, namely by asking the Garda Commissioner, if necessary via the Minister.
- 5.14 What was decided was that the entire matter was to be considered at a meeting on the following evening Monday 24th March at which the Taoiseach, the Attorney General and Mr Fraser were to attend. No arrangements were made for the attendance of the Minister for Justice at that meeting. It will be recalled that the Minister had texted the Taoiseach on the Sunday morning pressing for a discussion of other matters relating to An Garda Síochána. The former Minister has said that he found it extraordinary that the Taoiseach did not contact him.
- 5.15 The Commission finds it difficult to avoid the conclusion that a decision was made not to include the Minister in discussions of the telephone recording matter on Sunday and for most of Monday. The Taoiseach, as he emphasised in evidence, was entitled not to include him. It does not follow that it was the appropriate decision.
- 5.16 The issue of telephone recording at Garda Stations was being considered on the assumption that it involved widespread, apparently unlawful behaviour for decades by An Garda Síochána. The Minister responsible for An Garda Síochána under the Garda Síochána Act 2005 was neither consulted nor informed. The Commission accepts that it is impossible to know what would have happened, if the Minister had been taken into the confidence of the Taoiseach and the Attorney General. However, it is very likely that if the Minister had been kept informed, it would have made a significant difference to the events as they unfolded.
- 5.17 It is also notable that nobody who had attended the meeting on 23rd March made contact with the Commissioner about the matter of the telephone recording at any time on Monday 24th March, just as no thought had been given to contacting him on the Sunday evening. Both the Taoiseach and the Attorney have explained that they did not consider it appropriate for them personally to

contact the Garda Commissioner. That being so, the obvious step would have been to ask the responsible Minister, the Minister for Justice and Equality to do so. This was not done. The result was that, for whatever reason, the Garda Commissioner, the person charged under law with the direction and control of An Garda Síochána, was not asked to supply any information or explanations in advance of a meeting specifically arranged to consider a matter profoundly affecting the force.

6. Events on 24th March

- 6.1 During the course of the morning, the Attorney General emailed her Director General, Mr O'Daly and the relevant Advisory Counsel with a number of specific questions relating to the recordings in the Bailey case. She then met them in the early afternoon to discuss matters further.
- 6.2 Following the meeting with her own staff, the Attorney met Mr Shane Murphy, Senior Counsel. Mr Martin Fraser attended for part of that meeting, as did Mr O'Daly. They had what the Attorney described as "a general, wide-ranging discussion... on the Bailey case and the potential implications of Garda recording for that case and for the State more generally." In relation to the general recording issue, Mr Murphy told the Commission that he was asked to advise very generally on the areas of law that were relevant to the issue, but gave no specific advice.
- 6.3 At about 5.30 pm, the Attorney General met with counsel involved in the Bailey case in order to obtain their up-to-date advice. She was called away from that meeting to attend the meeting at the Taoiseach's office, which began around 6 pm.
- 6.4 At around the time when the Attorney was meeting Mr Murphy, Mr O'Daly met with Mr Purcell and Mr Flahive from the Department in order to further discuss the Bailey case and the general recording issue, as had been arranged on the previous Friday. Mr O'Daly emphasised that the Attorney was deeply concerned at the emergence of the practice of recording calls from Garda Stations. He

“pointedly” asked for and received confirmation from both Mr Purcell and Mr Flahive that the Minister had been fully briefed. Mr O’Daly referred to the “*high probability*” that the matter would come before the Cabinet on Tuesday morning.

6.5 Following this meeting, Mr Purcell rang the Garda Commissioner with a number of inquiries relating to the general recording issue. He then contacted the Minister’s Private Secretary and arranged for himself and Mr Flahive to meet the Minister at 6 pm. At that meeting, they began to brief the Minister on the issues around Garda telephone recording. They were interrupted at around 6.20 pm, when the Taoiseach telephoned the Minister to ask him to join the meeting in his (the Taoiseach’s) office. The Minister left at once. Mr Fraser subsequently telephoned the Department and asked Mr Purcell to stay on, in case he was needed.

6.6 However, the most notable matters about 24th March are things that did not happen. Neither Mr Purcell nor Mr Flahive told the Minister about the letter of 10th March, although they both knew from Mr O’Daly’s telephone call on Friday that the subject of the letter was likely to be raised at Cabinet. Neither the Taoiseach nor the Attorney contacted the Commissioner, whom they each said they could not contact, nor the Minister, who was responsible for An Garda Síochána.

6.7 Mr Purcell and Mr Flahive arranged a meeting with the Minister for 6 pm to brief him on the telephone recording issue. This was effectively the first the Minister had heard of it. That meeting was interrupted by the Taoiseach’s call to the Minister to come to his Office for a meeting with the Attorney General and Mr Fraser. The Minister had no notice of this meeting.

Mr Fraser phoned Mr Purcell to ask him to remain in his office.

7. Meeting at Taoiseach's Office, 24th March

7.1 The meeting of 24th March in the Taoiseach's office is the central event in this report. It went on for four hours. The participants were the Taoiseach, the Attorney General, the Minister for Justice and the Secretary General of the Government and, at a later stage, the Secretary General of the Department of Justice. There is not a single note or record of any kind of that meeting or of its result. It resulted in the despatch of the Secretary General of the Department of Justice and Equality on a very important mission to visit the Garda Commissioner to inform him of what was considered to be a grave matter. The Commission has examined the events of this meeting and the evidence of all the participants in great detail. It will not here repeat that analysis. Its conclusions can be briefly stated:

- The Attorney General confirmed the concerns that she had expressed to the Taoiseach on the previous evening concerning both the Bailey case and the general recording issue.
- It was agreed that the matter of the existence of systems for the recording of telephone calls to Garda Stations was a grave and serious matter.
- Similarly, the fact that recordings to be disclosed in the Bailey case contained evidence which could be interpreted as suggesting misconduct by individual members of An Garda Síochána was a matter with potentially serious implications for that organisation and for the State.
- These matters warranted a proposal being made to the Government for the establishment of a Commission of Investigation.

- It was accepted that the Garda Commissioner, Mr Martin Callinan, bore no personal responsibility for the establishment and operation of the telephone recording systems.
- There was no question of any proposal that the Government consider the removal of the Commissioner from office.
- It was expected that the Cabinet meeting on the following day would be difficult and tense; the Taoiseach could not predict its outcome.
- The Taoiseach had repeatedly expressed his confidence in the Garda Commissioner but it was possible that the Taoiseach would not be able in the following days and in particular at the Cabinet to continue to express that confidence.
- It was important that the Commissioner be informed of the serious view being taken by the Taoiseach of these matters and that this be done in time for him to respond before the Cabinet meeting.
- Mr Purcell, as Secretary General of the Department of Justice and Equality, was considered the appropriate person to make the Commissioner aware of the concerns of the Taoiseach in this regard.
- Mr Purcell was contacted by telephone at around 9 pm and asked to come over to Government Buildings. At this stage, the meeting had been going on for approximately three hours.
- Mr Purcell was instructed by the Taoiseach to attend on the Garda Commissioner at his home on that evening and to inform him of the Taoiseach's concerns regarding the matters that had been discussed at the meeting.

- According to the Taoiseach, but not Mr Purcell, Mr Purcell was also to obtain the Commissioner's views; even on the Taoiseach's account Mr Purcell was not asked to put any particular question to the Commissioner.

7.2 The Commission has found that a visit to the Commissioner's house by the Secretary General was an event without precedent. It was taking place very late at night. The Commissioner had no prior notice other than Mr Purcell's telephone call after he had left the meeting at 10:15 pm.

7.3 The Taoiseach has assured the Commission that he had no intention whatever of putting pressure on the Commissioner to retire. The Attorney General was very clear that no question whatever arose about the Commissioner being removed from office. On the other hand it did not escape Mr Fraser that one of the possible outcomes of Mr Purcell's visit to the Commissioner was that the Commissioner might choose to retire. While Mr Fraser was surprised to be informed of it so soon, he was not surprised that a decision by the Commissioner to retire was the ultimate outcome. Mr Shatter was firmly of the view that the Commissioner was expected by the Taoiseach to consider his position. Mr Purcell put the matter more obliquely, saying that he was shocked and concerned at what he was being asked to do. He told the meeting on more than one occasion that it was wrong.

7.4 In the view of the Commission, when all the circumstances are viewed objectively, the mission on which Mr Purcell was being sent was liable to be interpreted as suggesting to the Commissioner that he should consider his position, though, it must be emphasised, any actual decision would be for the Commissioner himself to make.

8. Mr Purcell visits the Garda Commissioner

8.1 Mr Purcell telephoned the Commissioner at about 10:15 pm and arranged to visit him at his home. He said that he wished to speak to him about a subject that could not be discussed on the telephone. The Commissioner had no idea of the purpose

of the visit. He certainly did not know it was about the telephone recording issue on which he had written formally to the Secretary General for the information of the Minister two weeks previously. Mr Purcell arrived at the Commissioner's home approaching 11 pm.

- 8.2 While there are slight differences in recollection between the former Commissioner and Mr Purcell, there is no dispute that Mr Purcell said that he had been sent by the Taoiseach to indicate to the Commissioner that he had been briefed by the Attorney General in relation to the taping of telephone calls to and from Garda Stations and that the Taoiseach was treating the matter very seriously or that he had "grave concerns."
- 8.3 Mr Purcell did not ask for the Commissioner's views as he did not believe that to have been part of his brief. Mr Callinan told the Commission he would have been glad to present himself wherever he was needed to provide any information required, but in the circumstances, he did not consider that this option was open to him. It is, of course, true that Mr Purcell did not suggest to the Commissioner that he was being invited to meet anyone. He had not been instructed to.
- 8.4 Mr Purcell told the Commissioner that the matter was going to be in the public domain, that the Taoiseach was placing it on the Cabinet agenda the following morning and that he intended to announce the appointment of a Commission of Investigation into the matter. The Taoiseach, he said, was unsure about how the matter would be received in Cabinet, but that he wanted the Commissioner to be aware of the situation. The Taoiseach's grave concern, as explained by Mr Purcell was that, following discussion at Cabinet, he might not be in a position where he would be able to express confidence in the Commissioner.
- 8.5 Mr Callinan, not surprisingly, was shocked. He could not understand why Mr Purcell was attending at his house at all. He accepted the matter was serious. He had reported it to the Attorney General's Office the previous November. He had written about it to the Secretary General on 10th March.

8.6 He inquired if he was believed to have something to do with the systems. Mr Purcell indicated the negative by shaking his head. Mr Purcell mentioned other issues and “problems in or around the justice system,” or words to that effect.

8.7 Quite obviously, this was an extremely uncomfortable and stressful encounter for both men. Mr Purcell described it as one of the worst days of his life. The meeting went on until after midnight, though there were long pauses.

8.8 It is instructive to consider the first part of what Mr Callinan entered in his diary on the following day:

“BP rang – said he wanted to see me. Sent by Taoiseach, briefed by AG taped telephone calls to Stations etc. – treating the matter very seriously. Putting on Cabinet Agenda next morning will announce Commission of Investigation.

Taoiseach unsure how cabinet would receive news. Wanted me aware.”

8.9 The Commissioner thought that the import of what he was being told was that the Taoiseach might not be able to express confidence in him if asked. He believed that it was implicit that, if a public announcement was made to that effect, it would be difficult for him to retain his position.

8.10 The Commissioner took it from all the circumstances of the visit of the Secretary General’s visit to his home late at night and the message conveyed to him from the Taoiseach, that he was expected to consider his position, although it is agreed that Mr Purcell did not use that expression. He also said repeatedly that he believed that he had, in all the circumstances, no option but to retire. In spite of all these circumstances, Mr Callinan did not dispute that the decision to retire was his.

8.11 According to Mr Purcell, at a certain stage, the Commissioner said he had always been loyal and that, regardless of the circumstances, he was going to retire. He acknowledged: *“It was down to me to make the decision.”* He could have decided not to retire. He could have decided to tell Mr Purcell that he clearly had no responsibility for the telephone recording systems and pointed out that he had

reported on it to the Attorney General's Office in November and by formal letter on 10th March. He could, even though he had not been invited, have offered to meet the Minister, the Taoiseach or anyone else to explain the matter. However, he added: *"I was very clear in my own mind that I didn't have options."*

- 8.12 Mr Callinan explained in evidence that he did not wish to get into conflict with a Government for which he had great respect. Once satisfied that no blame was being attached to him, he was prepared *"to walk off the pitch"*. He did not wish to put his family through the trauma of litigation in challenging the State in relation to his departure from An Garda Síochána.
- 8.13 The Commission fully recognizes the difficult position in which the Commissioner was placed. He saw himself as being in conflict with the Government. Nonetheless, the decision was his to make and he made it.
- 8.14 The fact that the Commissioner made his own decision to retire, does not mean that the Commissioner was wrong to arrive at the conclusion that he was expected to consider his position. The Commission has already found that the message delivered by Mr Purcell, in all the attendant circumstances, in explicit contemplation of the risk that at the next day's Cabinet meeting the Taoiseach might possibly not be able to express confidence in him, carried with it the obvious implication that the Commissioner's own position was in question. Accepting the Taoiseach's assurances, given in good faith, that he did not intend to put pressure on the Commissioner to retire, nonetheless, viewed objectively, Mr Purcell's mission was likely to be interpreted as doing just that.
- 8.15 The true underlying reality of what was happening on that night is vividly illustrated by the description of the situation as "horrendous" in a text sent by the Minister to Mr Purcell at five minutes past midnight, before the Minister knew about the Commissioner's decision.
- 8.16 The Commission must add that the decision of the Garda Commissioner to retire cannot be seen in complete isolation from other contemporary events concerning An Garda Síochána and the Commissioner personally. The use by the

Commissioner of the expression “disgusting” at the Public Accounts Committee on 23rd January had generated a great deal of publicity, much of it critical of the Commissioner. The Minister for Transport had, as recently as 20th March, called on the Commissioner to withdraw the remark. Several other ministers had publicly supported him.

- 8.17 Mr Purcell, at the meeting in the Commissioner’s home had mentioned the issue of the whistleblowers. He also referred to “other issues coming down the line” and “problems in or around the criminal justice system.” In his retirement statement, the Commissioner said that he “felt that recent developments were proving to be a distraction from the important work that is carried out by An Garda Síochána....”
- 8.18 Nonetheless, notwithstanding his awareness of these other issues, Mr Callinan has stated unequivocally to the Commission that they were not the catalyst for his decision to retire, and that he did not consider them in arriving at that decision on the night of 24th March 2014. The immediate and direct cause of his decision to retire was the visit from Mr Purcell, and the message conveyed from the Taoiseach during that visit.
- 8.19 Having reached his decision, the Commissioner informed Mr Purcell that he wished to retire in three months’ time (later shortened to two). Mr Purcell reported this to Mr Fraser, who in turn informed the Taoiseach. The Taoiseach, having considered the matter overnight, replied on 25th March by saying that, once the decision to retire was made, it had to take place “with immediate effect.” This expression of opinion by the Taoiseach did not alter the fact, as he was careful to maintain, that the decision was that of the Commissioner. When the Taoiseach’s view was communicated to the Commissioner, he gave fleeting consideration to seeking legal advice but immediately decided that he was going to retire for personal and family reasons and that he would do so with immediate effect.
- 8.20 The Commission has already found that there was no mention of any sort at the meeting on Monday 24th March of the removal or dismissal of the Commissioner

from office. If any such proposal were under consideration, the Attorney would have had to advise and the procedure under sections 11 and 12 of An Garda Síochána Act 2005 would have had to be followed. Only the Government has the power to remove a Garda Commissioner from office. Where the Government proposes to exercise that power, it is obliged to give the Commissioner the notice required by s. 12 of the Act of 2005 containing a statement of the reasons for the proposal. The Government must also allow the Commissioner an opportunity to make representations as to why he or she ought not to be removed from office. Thus, it is only the Government which may initiate that procedure. In the present case, the stage was at no time reached where the Government contemplated following that procedure. The Act was not engaged. At the most, the Taoiseach gave an indication that he, personally, might not be in a position to express confidence in the Commissioner. That did not preclude the Government moving the matter to the statutory plane. That stage was never reached.

TERM OF REFERENCE 1(O) – CONCLUSIONS

1. The event which precipitated the Commissioner's decision to retire on 25th March 2014 was the visit of the Secretary General of the Department of Justice to his home late on the night of Monday 24th March, to inform him that the Taoiseach regarded matters involving Garda telephone recording as very grave.
2. The events leading up to the retirement of the Garda Commissioner were beset by serious information deficits and multiple failures of communication, as set out in the conclusions which follow.
3. The Commissioner had, in fact, written formally to the Secretary General of the Department of Justice two weeks previously, asking him to bring certain facts about the telephone recording issue to the Minister's attention, but the Minister had not been informed of this.
4. The Minister for Justice had no effective knowledge of the issues around Garda telephone recording until the evening of 24th March 2014. Had he been fully briefed on these issues at an earlier date, it is likely that he would have communicated with the Garda Commissioner and that the events of the evening of 24th March 2014 would not have unfolded in the way they did.
5. The concerns which the Taoiseach asked Mr Purcell to convey to the Garda Commissioner arose from briefings given to the Taoiseach by the Attorney General on 23rd and 24th March, in which she informed him that An Garda Síochána had for decades been engaged in apparent widespread violation of the law the length and breadth of the country, with potentially serious implications for An Garda Síochána and the State.
6. While briefing the Taoiseach in those terms, the Attorney believed that she had insufficient information about the matter to offer definitive advice on the real legal questions in issue. There were, in the view of the Commission, significant gaps in the information then in the possession of her Office on matters including the origin of the

recording systems; the number of stations involved and the types of lines recorded; the operation, management and use of recordings by An Garda Síochána; the extent to which the recording of calls between solicitors and their clients was contemplated and / or feasible; and the extent to which members of An Garda Síochána in relevant stations were aware of what telephone lines were being recorded. Insofar as it was available, any such information was likely to be in the possession of An Garda Síochána.

7. The primary conduit of information between An Garda Síochána and the Government is the Minister for Justice. The Attorney, based on assurances from Department of Justice officials which she had no reason to doubt, believed that the Minister was fully informed about the general matter of Garda recording systems and the specific issue of recordings in the Bailey case.
8. However, the Attorney did not contact the Minister, either to elicit his assistance in seeking further information from An Garda Síochána, or to discuss with him the serious view she had taken of the matter and the fact that it was likely to be discussed at Cabinet. Although the Attorney was not under any duty to contact the Minister in these circumstances, it would have been both reasonable and prudent for her to have done so.
9. The Taoiseach was first briefed on issues relating to Garda recording by the Attorney General on the evening of 23rd March. His response was to convene a further meeting on the evening of 24th March, at which these matters would again be discussed. The Minister for Justice was not invited to attend this meeting until after its commencement. Nor did the Taoiseach contact the Minister prior to this meeting to discuss these matters.
10. Both the Taoiseach and the Attorney General were of the view that it would have been inappropriate for them to contact the Garda Commissioner directly in relation to these issues. Under the reporting framework set out in the Garda Síochána Act 2005, the Minister for Justice was uniquely placed to obtain explanations and clarifications

from the Garda Commissioner if required. He was not asked to do this. In the result, nobody made contact with the Garda Commissioner prior to the meeting in Government Buildings on the evening of 24th March - whether to seek information from him or to forewarn him that the Taoiseach had been briefed on the issues relating to Garda telephone recording, that he was seriously concerned about their implications, and that these matters were likely to be discussed at Cabinet on the following day.

11. It is likely that the first piece of information the Commissioner would have provided, if contacted, would have been that he had reported the matter formally to the Department of Justice on 10th March, which would undoubtedly have made a significant difference to events as they unfolded.
12. Prior to the meeting in Government Buildings on 24th March, the Attorney General sought and obtained updated advices in relation to the Bailey case. In relation to the general recording issue, she consulted Senior Counsel on the afternoon of Monday 24th March as to the appropriate areas of law to be considered, and as to the appropriate form of any future inquiry to find and establish facts, but did not obtain from him any advice regarding the legality of the recording systems.
13. As far as the general recording issue was concerned, therefore, the meeting of 24th March did not have available to it any greater information either about the facts or the law than had been provided by the Attorney on the Sunday evening. The same picture was presented regarding apparent violation of the law, nationwide, by An Garda Síochána.
14. There was no question at the meeting on 24th March of any proposal being made that the Government consider the removal of the Commissioner from office.
15. The Commission accepts that the Taoiseach did not intend to put pressure on the Garda Commissioner to retire.
16. It was, however, the Taoiseach who made the decision to instruct the Secretary General of the Department of Justice to visit the Commissioner at his home, late at

night and to inform him that he considered the matters involving Garda telephone recording systems to be a matter of the utmost gravity.

17. The Commission finds that Mr Purcell received no clear instructions on the detail of the message that he was to convey to the Garda Commissioner.
18. The Commission finds that the Taoiseach did not instruct Mr Purcell to obtain the views of the Commissioner on any particular questions; nor did the Taoiseach invite the Commissioner to contact him.
19. The Commission does not believe that a request by Mr Purcell that the Commissioner express his views about the matter of the Garda telephone recording, would have added anything material to the tenor of the message that the Taoiseach regarded the matter as one of great gravity.
20. Mr Purcell was, at least implicitly, instructed to tell the Commissioner that the matter of the Garda telephone recording systems would be discussed at Cabinet on the following day, that the Taoiseach would be proposing the appointment of a Commission of Investigation and that there was a possibility that he, the Taoiseach, would be in a position where he might not be able to express continued confidence in the Commissioner.
21. The Garda Commissioner interpreted the message delivered to him by Mr Purcell on behalf of the Taoiseach, with all its attendant circumstances, as an indication that he should consider his position; in the view of the Commission, that was a reasonable conclusion for the Commissioner to reach.
22. The Commissioner decided to retire; he could have decided otherwise, but he did not wish to become embroiled in legal or other conflict with the Government.
23. Although the Commissioner was conscious of other recent events which had resulted in controversy for himself and for An Garda Síochána, the immediate catalyst for his decision to retire was the visit of the Secretary General of the Department of Justice to

his home, and the message that was conveyed to him from the Taoiseach during that visit.

Appendix 1

S.I. No. 192/2014 - Commission of Investigation (Certain Matters relative to An Garda Síochána and other persons) Order 2014.



STATUTORY INSTRUMENTS.

S.I. No. 192 of 2014

COMMISSION OF INVESTIGATION (CERTAIN MATTERS RELATIVE
TO AN GARDA SÍOCHÁNA AND OTHER PERSONS) ORDER 2014

COMMISSION OF INVESTIGATION (CERTAIN MATTERS RELATIVE
TO AN GARDA SÍOCHÁNA AND OTHER PERSONS) ORDER 2014

WHEREAS pursuant to section 3(1) of the Commissions of Investigation Act 2004 (No. 23 of 2004) the Taoiseach, with the approval of the Minister for Public Expenditure and Reform, made a proposal to the Government for the establishment of a commission to investigate the matters specified in Article 3 of the following Order and to make any reports required under that Act in relation to its investigation;

AND WHEREAS the Government by decision made on 15 April 2014 considered those matters to be of significant public concern;

AND WHEREAS a draft of the following Order has been laid before each House of the Oireachtas, together with a statement of the reasons for establishing the commission, and a resolution approving that draft has been passed by each such House;

NOW, the Government, in exercise of the powers conferred on them by section 3 of the Commissions of Investigation Act 2004 (No. 23 of 2004), hereby order as follows:

1. This Order may be cited as the Commission of Investigation (Certain Matters relative to An Garda Síochána and other persons) Order 2014.
2. In this Order “Act” means the Commissions of Investigation Act 2004 (No. 23 of 2004).
3. A commission is hereby established to—
 - (a) investigate the matters, which are considered by the Government to be of significant public concern, referred to in the terms of reference (the text of which is, for convenience of reference, set out in the Schedule) of the commission, and
 - (b) make any reports required under the Act in relation to its investigation.
4. The Taoiseach is specified as the Minister of the Government responsible for overseeing administrative matters relating to the establishment of the commission, for receiving its reports and for performing any other functions given to him under the Act.

*Notice of the making of this Statutory Instrument was published in
“Iris Oifigiúil” of 6th May, 2014.*

SCHEDULE

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.