

# **DEFENCE FORCES TRIBUNAL**

## **Procedures of the Tribunal**

### **1. General**

1.1 The legislation under which this Tribunal operates (The Tribunals of Inquiry (Evidence) Acts 1921 to 2011) does not provide detailed procedures to be adopted by a Tribunal in carrying out its particular functions. It is, therefore, appropriate for this Tribunal to set out how it intends to carry out its functions under its Terms of Reference.

1.2 The essence of a Tribunal of Inquiry was encapsulated by the then Chief Justice, Mr. Justice Hamilton in *Haughey v. Moriarty* [1999] 3 I.R. 1 at p.54, as follows:

*“... the principal function of such tribunals has been to restore public confidence in the democratic institutions of the State by having the most vigorous possible enquiry consistent with the rights of its citizens into the circumstances which gave rise to the public disquiet.”*

1.3 There are several stages to the work of any Tribunal of Inquiry. These were described by Hamilton CJ as follows:

*“1. a preliminary investigation of the evidence available;*

*2. the determination by the tribunal of what it considers to be evidence relevant to the matters into which it is obliged to enquire;*

*3. the service of such evidence on persons likely to be affected thereby;*

*4. the public hearing of witnesses in regard to such evidence, and the cross-examination of such witnesses by or on behalf of persons affected thereby;*

*5. the preparation of a report and the making of recommendations based upon facts established at such public hearing.”*

## **2. Fair Procedures**

2.1 The Tribunal respects the right to fair procedures of any person in relation to its preliminary investigation, its public sittings and, its private sittings (if any).

## **3. Representation**

3.1 Applications for legal representation on behalf of persons who believe that they are entitled to same, whether on a full or a limited basis or for only one part or one issue within paragraphs (i) to (vii) of the Terms of Reference, should be made, in writing, to the solicitor for the Tribunal. The application should identify the name of the party concerned, the interest of the party concerned, the basis upon which representation is sought and the extent and duration of the representation requested.

3.2 Insofar as possible, the Tribunal will deal with applications for legal representation by way of correspondence. At its discretion, the Tribunal may hear submissions on any application in public or in private session. Having regard to the progress of its inquiries, and the information available to the Tribunal at a given point in time and any other relevant consideration, the Tribunal may decide to postpone its decision on an application for representation until such later date as it deems appropriate.

#### **4. Preliminary Investigation**

4.1 The Tribunal will, insofar as practicable, consistent with its duties under the Tribunals of Inquiry (Evidence) Acts 1921 to 2011, conduct its investigation by seeking and facilitating the voluntary cooperation of any person who is or may be in possession of relevant information, knowledge or material relating to the Terms of Reference.

4.2 The Tribunal will, therefore, seek to ascertain from interested parties who have been given representation, or anyone else who may be able to assist the Tribunal with its Inquiry, all information that is relevant or potentially relevant to the business of the Tribunal. It will also seek to ascertain the names of potential witnesses who may have documentation or other information in their possession that is relevant to the subject matter of the inquiry.

4.3 The Tribunal may invite persons who may be in a position to assist the Tribunal to do all or any of the following:

(a) to furnish a statement of proposed evidence;

(b) to answer questions in writing;

(c) to attend a private meeting with legal representatives of the Tribunal where deemed appropriate.

Without prejudice to the provisions of paragraph 5 below, a person requested to do any of the above shall be under no obligation to comply with the request. A person requested to attend the meeting with legal representatives of the Tribunal shall be entitled to have his or her legal representatives present if he or she so wishes.

4.4 Where necessary during the course of its preliminary investigations the Tribunal may sit, in public or if necessary in private (in accordance with the Tribunals of Inquiry (Evidence) Acts 1921 to 2011), to determine any matter relevant to its functions or to make such orders as it considers necessary for the purpose of its functions.

## **5. Tribunal Investigators**

5.1 The Tribunal may, pursuant to section 6 of the Tribunals of Inquiry (Evidence) (Amendment) Act 2002, appoint investigators who, subject to its direction and control, may assist it in the performance of its functions. Where investigators have been so appointed, the Tribunal may, pursuant to section 6(3) request one or more of its investigators to carry out a preliminary investigation of any matter material to its inquiry. An investigator appointed by the Tribunal has the following powers under the Act:

*"Section 6 -*

*(4) An investigator may, for the purposes of a preliminary investigation under subsection (3), require a person to—*

*(a) give to him or her such information in the possession, power or control of the person as he or she may reasonably request,*

*(b) send to him or her any documents or things in the possession, power or control of the person that he or she may reasonably request, or*

*(c) attend before him or her and answer such questions as he or she may reasonably put to the person and produce any documents or things in the possession, power or control of the person that he or she may reasonably request,*

*and the person shall comply with the requirement.*

*(5) An investigator may examine a person mentioned in subsection (4) in relation to any information, documents or things mentioned in that subsection and may reduce the answers of the person to writing and require the person to sign the document containing them.*

*(6) Where a person mentioned in subsection (4) fails or refuses to comply with a requirement made to the person by an investigator under that subsection, the Court may, on application to it in a summary manner in that behalf made by the investigator with the consent of the tribunal concerned, order the person to comply with the requirement and make such other (if any) order as it considers necessary and just to enable the requirement to have full effect.*

*(7) A person to whom a requirement under subsection (4) is made shall be entitled*

*to the same immunities and privileges as if he or she were a witness before the Court.*

*(8) An investigator shall not, without the consent of the tribunal by which he or she was appointed, disclose other than to that tribunal any information, documents or things obtained by him or her in the performance of his or her functions under this section.*

*(9) An investigator shall be furnished with a warrant of appointment and when performing a function under this section shall, if so requested by a person affected, produce the warrant or a copy of it to the person.*

5.2 The following provisions also relate to investigators appointed by the Tribunal:

*Section 7 -*

*(1) A person who, without reasonable cause, by act or omission obstructs or hinders an investigator in the performance of his or her functions under section 6, or fails or refuses to comply with a requirement made to the person under subsection (4) of that section, shall be guilty of an offence.*

*(2) A prosecution for an offence under this section may be brought only by or with the consent of the Director of Public Prosecutions.*

*(3) A person guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding €3,000 or imprisonment for a term not exceeding 12 months or both.*

*Section 8 -*

*A statement or admission made by a person before an investigator shall not be admissible as evidence against the person in any criminal proceedings.”*

**6. Powers of the Tribunal**

6.1 The Tribunal has all the powers of the High Court to make such orders as are necessary for the performance of its functions.

6.2 In this regard the Tribunal is empowered, *inter alia*, to make orders in respect of the enforcement of the attendance of witnesses and in respect of their examination on oath, affirmation or otherwise.

6.3 The Tribunal may, *inter alia*, make orders for the preservation and/or production and/or inspection and/or examination and/or discovery of documents as it considers necessary for the purpose of its inquiry.

6.4 The Tribunal may accept any item, document or testimony in evidence which will assist it in its inquiries.

**7. Discovery**

7.1 Where it is proposed to make an Order for Discovery, the Tribunal will, insofar as it is practicable, put any party affected thereby on notice of any proposed order and

provide that any party to whom it is directed, or who may be affected, may apply to the Tribunal to make submissions regarding the scope or period of time covered by the proposed order or to raise any issue connected therewith. The Tribunal may, alternatively, where practicable, request that discovery be made on a voluntary basis.

7.2 The Tribunal will fix the time for compliance with an Order for Discovery allowing such period as appears appropriate in the circumstances. Any application for an extension of time may be made in writing to the Tribunal setting out the basis for the request.

7.3 Discovery should be in the form required of an Affidavit of Discovery under the Rules of the Superior Courts 1986, as amended. The Affidavit of Discovery should list, individually, the documents discovered with a brief description of each item. Where privilege is claimed, the category of documentation, a brief description of its nature and the type of and reason for the privilege so claimed should be stated.

7.4 A person making discovery shall make available to the Tribunal all documents other than those in respect of which a claim for privilege is asserted and accepted by the Tribunal.

## **8. Documents**

8.1 Where documents are to be made available to the Tribunal, either pursuant to an Order for Discovery or voluntarily, the person doing so shall retain the original and



make a photocopy available to the Tribunal. The original should be kept available for inspection, should this be necessary.

8.2 Subject to what is set out below, documents received by the Tribunal shall be treated in a confidential manner.

8.3 All documents received by the Tribunal are liable, potentially, to be put in evidence in the course of the public hearing of evidence before the Tribunal or may be disclosed to a third party as required by law or fair procedures. Any claim of privilege or protection from disclosure asserted shall be adjudicated upon by the Tribunal.

8.4 The Tribunal shall make any appropriate redaction to documents where there is material therein which, in the Tribunal's view, is neither relevant nor necessary for its work. Documents may be redacted in any other case where the Tribunal considers that the justice of the case so requires.

8.5 The Tribunal may make copies in pdf format of documents received by it available to such persons as it considers necessary for the purposes of the Tribunal. Where documents are circulated by the Tribunal to such persons this shall be, strictly, on the basis that they will be used solely for the purpose of the Tribunal and that neither the documents nor any material contained therein will be disclosed to any third party without the express permission of the Tribunal. This requirement will no longer apply in respect of any particular document, or part thereof, if and when that document, or part thereof, is accepted into evidence in the course of a public hearing.

Where material is redacted as outlined above, any interested party may seek clarification in writing from the Tribunal in respect of this redaction.

- 8.6 All material which is evidence received by, or a document created by or for the Tribunal (including any document which is incomplete or in draft form only), is subject to the National Archives Act 1986 and Part 15 of the Civil Law (Miscellaneous Provisions) Act 2011, as amended, and will, save for limited exceptions, become part of the National Archives upon completion of the Tribunal's inquiry.

## **9. Public Hearings**

- 9.1 The Tribunal will hold public oral hearings as necessary to carry out its work. The Tribunal intends to make public statements in relation to which aspects of the inquiry will be pursued in oral hearings. Hearings shall be in public save as may otherwise be decided by the Tribunal in accordance with law. Counsel will make an opening statement on behalf of the Tribunal in advance of public hearings.
- 9.2 The Tribunal shall decide, as it considers appropriate, which of the Terms of Reference or which issues within its Terms of Reference shall be the subject of any public hearing having regard to its investigations and inquiries, and having regard to the material and witnesses available to it at any particular time.

## **10. Service of Evidence**

- 10.1 The Tribunal will determine what it considers to be evidence relevant to the matters

into which it is obliged to enquire having regard to documents which it has received, statements furnished to it and any other relevant information.

10.2 The Tribunal will serve copies of all relevant evidence on parties with representation, including limited representation, and on other persons likely to be affected thereby. In preparation for each public sitting the Tribunal will identify persons likely to be affected by the evidence available to the Tribunal and will contact all such persons who are legally represented or, if not legally represented, will make reasonable efforts to contact them personally. It is therefore envisaged that all persons likely to be affected by evidence will, insofar as practicable, be furnished in advance with all of the relevant evidence in the Tribunal's possession relative to that sitting.

10.3 A party or a proposed witness who believes that a relevant document or documents has or have been omitted from the material provided should bring this to the attention of counsel for the Tribunal at the earliest opportunity. If counsel for the Tribunal does not agree to include any such document or documents in the material provided, an application may be made to the Tribunal for a direction that the document or documents should be included. Such an application should ordinarily be made before the witness in question begins giving evidence.

10.4 If giving evidence to the Tribunal, a witness may not refer, or be referred to a document which is not included in the documents provided save with the express permission of the Tribunal. If the Tribunal decides to grant such permission, it may, at its discretion, direct that arrangements are made for the witness and relevant

parties to have an opportunity to examine and consider the document before it is referred to in evidence.

10.5 Parties represented before the Tribunal may, through their legal representatives, offer to the Tribunal, in writing, the names of any witness or witnesses or suggest any other measure which that party thinks the Tribunal might consider taking.

## **11. Oral Evidence**

11.1 The Tribunal shall decide which witnesses should be called to give oral evidence to the Tribunal and the order in which witnesses are called. In this regard, the Tribunal will consider submissions which any party may wish to make. Parties may consult with counsel for the Tribunal, in advance of the calling of a witness, in respect of any matter or question which that party considers should be raised with any such witness.

11.2 Oral evidence will be given on oath or by affirmation.

11.3 All witnesses will first be examined by counsel for the Tribunal. The witness may then be cross-examined by the legal representatives of parties affected by such evidence. The right to question any witness or to question any witness on a particular matter shall be determined by the Tribunal having regard to all of the circumstances, including, *inter alia*, the nature of the evidence given, the extent to which such evidence affects any other person and the obligation to observe fair

procedures.

- 11.4 Counsel for the Tribunal may further examine the witness in regard to any new matter that may have arisen during questioning by other parties or otherwise as appears appropriate to the Tribunal.
- 11.5 Where appropriate, the Tribunal will consider, having regard to the nature of any evidence proposed to be given by a witness, permitting a witness to adopt his or her statement as part of his or her evidence, subject to any modification or clarification which the witness may wish to make. It shall be a matter for the Tribunal to decide whether any particular piece of evidence is relevant and/or admissible and/or subject to any legally recognised form of privilege.
- 11.6 The Tribunal may admit into evidence the written statement of a person where there is agreement between the relevant parties that it is not necessary to call such a witness *viva voce* or where the Tribunal considers such admission to be appropriate in all the circumstances.
- 11.7 The Tribunal may, at any stage, raise any issue at a public sitting with the legal representative of a party and may ask such questions of any witnesses as it thinks fit and proper.
- 11.8 The legal representative of any party granted representation before the Tribunal may make a closing submission to the Tribunal, and will be afforded an opportunity

to address any evidence affecting his or her client. The timing of this opportunity will be determined by the Tribunal and may occur either at the conclusion of all of the public sittings or at the conclusion of a particular sitting relevant to the evidence on a specific Term or Terms of Reference.

## **12. Report**

12.1 In accordance with the Terms of Reference, the Tribunal shall endeavour to complete its work as expeditiously and as efficiently as possible, consistent with the fair examination of the matters which are the subject of its inquiry. The Tribunal shall endeavour to furnish its Report (including its findings and recommendations) within the timeframe stipulated in the Terms of Reference.

## **13. Costs**

13.1 Any application for an Order for costs pursuant to section 6 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979, as amended, may be made following submission of the final Report of the Tribunal. The fact that the Tribunal has or has not granted representation to any person or body does not mean that a party is entitled to an Order for costs automatically. Any Order made by the Tribunal will, ordinarily, be on a party and party basis in the usual form. The Tribunal shall have regard to the provisions of the Tribunal of Inquiries (Evidence) Acts 1921 to 2004 and all relevant case law when considering applications for costs.

## **14. Nature of Procedures**

- 14.1 These procedures are not rules of law but are intended to guide the public, parties before the Tribunal, witnesses, or proposed witnesses, as to how the Tribunal intends to go about its work.
- 14.2 The Tribunal may add to, alter or amend these procedures in the course of its work should it be deemed necessary so to do.
- 14.3 Clarification in relation to these procedures may be sought from the Tribunal in writing.

## **15. Records**

- 15.1 Any records made, received or held in the course of the Tribunal of Inquiry shall be subject to the terms of the National Archives Act 1986 and Part 15 of the Civil Law (Miscellaneous Provisions) Act 2011, as amended.

Dated the 20<sup>th</sup> day of June 2024.