



## **RULING OF THE TRIBUNAL IN RESPECT OF AN INTENDED ORDER FOR DISCOVERY AS AGAINST THE MINISTER FOR DEFENCE**

### **Background**

1. Section 1(1)(b) of the Tribunals of Inquiry (Evidence) Acts 1921 to 2011 confers upon the Tribunal all such powers, rights, and privileges as are vested in the High Court in respect of the production of documents. Section 4 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979 provides that a tribunal may make such orders as it considers necessary for the purposes of its functions, and it shall have, in relation to their making, all such powers, rights and privileges as are vested in the High Court or a judge of that Court in respect of the making of orders.

2. The Tribunal is bound by the requirement to observe fair procedures in making any order for discovery. While the Tribunal has a broad power to make discovery, fair procedures require that those affected by an Intended Order for Discovery must be given notice of its terms and afforded the opportunity to make submissions, by reference to the Terms of Reference, in relation to the relevance, necessity and proportionality of the intended discovery order, as well as any other matters which may be relevant, including, confidentiality (*Haughey v Moriarty* [1999] 3 IR 107).

3. In compliance with its obligation to observe fair procedures, the Tribunal, on the 28<sup>th</sup> day of November 2024, issued a Notice of its intention to make an Order for Discovery as against the Minister for Defence ('the Notice'). The Notice together with the Intended Order for Discovery were published in four national newspapers and on the Tribunal's website ([www.toidf.ie](http://www.toidf.ie)). The Tribunal published the said Notice so as to afford all persons who believed that they may be affected by the terms of the Intended Order for Discovery an opportunity to make submissions, in writing, to the Tribunal by close of business on the 13<sup>th</sup> day of January 2025.

4. A written submission on behalf of the Minister for Defence ('the Minister') on the Intended Order for Discovery was received by the Tribunal on the 13<sup>th</sup> day of January 2025. The Tribunal has had regard to this submission in the making of the Order requiring the Minister to make discovery. No other written submission in relation to the intended Order in respect of the Minister was received by the Tribunal.

5. The legal principles applicable to discovery have developed through case law and are well settled; these are relevance, necessity and proportionality (*Compagnie Financière du Pacifique v Peruvian Guano Co.* (1882) 11 Q.B.D. 55; *Ryanair p.l.c. v Aer Rianta c.p.t.* [2003] 4 I.R. 264; and *Tobin v The Minister for Defence, Ireland and the Attorney General* [2020] 1 IR 211).

**The Ruling of the Tribunal, delivered on the 27<sup>th</sup> day of January 2025, is as follows:**

6. The Intended Order for Discovery contained seven (7) categories.

## Category 1

7. The first intended category of documents read as follows:

*“all complaint files relating to complaints of abuse, as defined in the Terms of Reference, made to the Minister for Defence pursuant to section 114 of the Defence Act 1954 (Redress of Wrongs) for the period from 1 January 1983 to 20 June 2024, to include but not limited to, all statements, notes, records of investigations and interviews, reports, determinations, recordings, memoranda and records of written and electronic correspondence and communications of any kind”.*

8. The Minister, in his submission, summarises the evolution of the complaints processes in the Defence Forces and the Tribunal accepts this summary. The Minister notes that Category 1 is drafted to include *‘all statements, notes, records of investigations and interviews, reports, determinations, recordings, memoranda and records of written and electronic correspondence and communications of any kind’*.

9. The Minister, in his interpretation of this category, submits that the institution of civil litigation by a member or a former member of the Defence Forces in court proceedings is not a complaint to the Minister within the meaning of the Terms of Reference nor is it, in his view, considered that the institution of litigation is a *‘complaints process’* within the meaning of the Terms of Reference or to which the Terms of Reference apply.

10. The Minister further submits that, insofar as it may be relevant, should the Tribunal consider that litigation files *per se* (as a class) are relevant, in whole or in part, the following considerations should inform the Tribunal's view in respect of the reasonableness, necessity or proportionality of such a finding. The Minister submits that: (a) there are no electronic records of litigation files prior to 2006, such files being archived in hard copy; (b) that the records relating to the archiving of litigation between 1983 and 2006 do not disclose on their face what the files relate to or what the contested issues were in a set of proceedings; (c) that there are approximately 20,000 hard copy litigation files prior to 2006 and while it is believed that a very significant proportion of these files relate to army deafness cases, the manner of archiving and naming these files does not make it possible to identify or eliminate these files and / or identify files which are or could relate to matters in the Terms of Reference; (d) that the only possible way of adequately searching these 20,000 files would be a manual retrieval and search of the boxes, of which there are several thousand stored at an external storage facility; and (e) that any such retrieval and examination process would take an unknown time, likely to be a number of years, and require resources which would be entirely disproportionate to the possibility of discovery of files that are actually relevant to the Terms of Reference.

11. The Tribunal accepts the Minister's submission that litigation files are not '*complaints of abuse*' to the Minister within the meaning of the Terms of Reference. However, it considers that some litigation files are likely to contain material relevant to complaints of abuse and the complaints processes within the Defence Forces. The Tribunal acknowledges that the Minister may assert a claim of legal professional privilege over several documents contained on relevant litigation files. It is further acknowledged that privilege may provide a legitimate basis for refusing to disclose documents even if

those documents prove necessary to the proper administration of justice (as per Clarke C.J. in *Tobin v Minister for Defence* at paragraph 44). However, a claim of privilege, if asserted, would not extend to the pleadings contained on such litigation files. Pleadings, in litigation, are likely to articulate, clearly and specifically, issues that are relevant to complaints of abuse and the responses thereto and, therefore, would be of evidential value to the Tribunal in investigating the processes for dealing with complaints of abuse.

12. Bearing in mind the principle of proportionality and the Minister's submission as to the time consuming and labour intensive process that would be involved in retrieving hard-copy files from external storage, the Tribunal accepts Category 1 of the Intended Order, as drafted, would be disproportionate. Consequently, it does not consider it necessary, at this time, for the Minister to discover relevant litigation files that pre-date 2006.

13. However, the Tribunal finds that legal pleadings, to include replies to particulars, in relation to litigation files that post-date 2006 are both relevant and necessary at this time. In due course, the Tribunal may require the Minister to make further submissions in relation to the necessity of making an order for discovery in respect of relevant litigation files that pre-date 2006.

14. The terms of Category 1, as drafted in the Intended Order for Discovery as against the Minister, should be interpreted to include pleadings, including replies to particulars, contained on relevant litigation files from the 1<sup>st</sup> day of January 2006 to the 20<sup>th</sup> day of June 2024 in relation to complaints of abuse, as defined in the Terms of Reference.

15. Accordingly, the Tribunal orders that the Minister makes discovery of Category 1 documents in the following terms:

*“all complaint files relating to complaints of abuse, as defined in the Terms of Reference, made to the Minister for Defence pursuant to section 114 of the Defence Act 1954 (Redress of Wrongs) for the period from 1 January 1983 to 20 June 2024, to include but not limited to, all statements, notes, records of investigations and interviews, reports, determinations, recordings, memoranda and records of written and electronic correspondence and communications of any kind and pleadings, including replies to particulars, contained on relevant litigation files which said litigation files are limited to the period 1 January 2006 to 20 June 2024 relating to complaints of abuse, as defined in the Terms of Reference”.*

## **Category 2**

16. The second intended category of documents read as follows:

*“all documents relating to notifications to the Minister for Defence about complaints of abuse, as defined in the Terms of Reference, made pursuant to section 114 of the Defence Act 1954, and all amending Acts, or otherwise, for the period 1 January 1983 to 20 June 2024, to include, but not limited to, all statements, notifications, notes, records of investigations and interviews, reports, determinations, recordings, memoranda and records of written and electronic correspondence and communications of any kind”.*

17. The Minister submits that the reference to ‘*or otherwise*’ in Category 2 of the Intended Order for Discovery is unclear and/or too broad and/or disproportionate and requests clarification in respect of this. In addition, the Minister repeated his submission in relation to the relevance of litigation files as set outlined in relation to Category 1 (above) and applied the same rationale to Category 2.

18. The Tribunal considers that the inclusion of the reference ‘*or otherwise*’ in the text of Category 2 is appropriate and clarifies that the term is to be interpreted as meaning “*or other complaints processes*” (as defined in the Terms of Reference) that may be applicable.

19. In respect of any relevant litigation files that may fall within the scope of Category 2, the Tribunal makes the same finding as set out above in respect of Category 1 and litigation files.

20. The text of Category 2 of the Order for Discovery as against the Minister will include explicit reference to pleadings, including replies to particulars, contained on litigation files in relation to such documents falling within this category for the period 1<sup>st</sup> day of January 2006 to the 20<sup>th</sup> day of June 2024.

21. Accordingly, the Tribunal orders that the Minister makes discovery of Category 2 documents in the following terms:

*“all documents relating to notifications to the Minister for Defence about complaints of abuse, as defined in the Terms of Reference, made pursuant to section 114 of the Defence Act 1954, and all amending Acts, or otherwise, for the period 1 January 1983*

*to 20 June 2024, to include, but not limited to, all statements, notifications, notes, records of investigations and interviews, reports, determinations, recordings, memoranda and records of written and electronic correspondence and communications of any kind and pleadings, including replies to particulars, contained on relevant litigation files which said litigation files are limited to the period 1 January 2006 to 20 June 2024 relating to complaints of abuse, as defined in the Terms of Reference”.*

### **Category 3**

22. The third intended category of documents read as follows:

*“all documents relating to protected disclosures made to the Minister for Defence under the Protected Disclosures Act 2014, and where applicable the Protected Disclosures (Amendment) Act 2022, relating to any of the Terms of Reference (i) to (vii) of the Tribunal covering the period from 15 July 2014 to 20 June 2024, to include, but not limited to, all files, statements, notes, records of investigations, reports, recordings, determinations, memoranda and records of written and electronic correspondence and communications of any kind”.*

23. The Minister, in accordance with his obligations under the Protected Disclosures Act 2014 (‘the 2014 Act’) and Protected Disclosures (Amendment) Act 2022, has proposed that documents falling within this category should be subject to a separate redaction approach which is designed to protect the confidentiality of the protected disclosure process, and in particular, the identity of the discloser.



24. The Tribunal accepts that the Minister has onerous obligations and duties under the 2014 Act and, as set out in section 16 thereof, the Minister could be subject to penalisation should he fail to comply with his obligations under the Act.

25. The Tribunal is satisfied, based on the Minister's obligations and the confidentiality afforded to disclosers under the 2014 Act, that the relevant documents to be discovered under Category 3 should be subject to the more extensive redaction protocol as proposed by the Minister. To that end, the fourth recital in the actual Order for Discovery references that discovery of Category 3 is subject to a separate redaction protocol that will be appended to Schedule Two of the Order for Discovery.

#### **Category 4**

26. The fourth intended category of documents read as follows:

*“all documents relating to notifications and reports to the Minister for Defence of complaints of hazardous chemicals, as defined within the Terms of Reference, and the response thereto, for the period 1 January 1983 to 20 June 2024, to include, but not limited to, complaints files, statements, records of investigations and interviews, recordings, reports, determinations, notes, memoranda and records of written and electronic correspondence and communications of any kind”.*

27. The Minister, in respect of Category 4 of the Intended Order for Discovery, submits that the documents falling within this category include all '*notifications and reports*' to the Minister of complaints in respect of the use of hazardous chemicals within Air Corps' headquarters at Casement Aerodrome, Baldonnell. The Minister accepts that this category encompasses '*complaints files, statements, records of investigations and interviews,*

*recordings, reports, determinations, notes, memoranda and records of written and electronic correspondence and communications of any kind*' in the context of the complaints process. However, the Minister repeats his submission in relation to the relevance of litigation files as outlined in relation to Category 1 (above) and applies the same rationale to Category 4.

28. In respect of any relevant litigation files that may fall within the scope of Category 4, the Tribunal accepts that litigation files are not "*notifications and reports*" to the Minister of complaints of hazardous chemicals within the meaning of the Terms of Reference. However, litigation files are likely to contain material relevant to such complaints. The Tribunal acknowledges that the Minister may assert a claim of legal professional privilege over several documents contained on relevant litigation files. It is acknowledged that privilege may provide a legitimate basis for refusing to disclose documents (as per Clarke C.J. in *Tobin v Minister for Defence* at paragraph 44) even if those documents prove necessary to the proper administration of justice. However, a claim of privilege would not extend to the pleadings on such litigation files. Pleadings, in litigation, are likely to articulate, clearly and specifically, issues relevant to and surrounding complaints of hazardous chemicals and, therefore, would be of evidential value to the Tribunal in investigating the processes for dealing with complaints of hazardous chemicals. Bearing in mind the principle of proportionality, and the time consuming and labour intensive process that would be involved in retrieving hard-copy files from external storage, the Tribunal accepts the Minister's submission as to the proportionality of an Order as currently drafted within the terms of the Intended Order. Consequently, it does not consider it necessary, at this time, for the Minister to discover relevant litigation files that pre-date 2006. Accordingly, only legal pleadings, to include replies to

particulars, that post-date 2006 are deemed necessary at this time. In due course, the Tribunal may require the Minister to make further submissions in relation to the necessity of making an order for discovery in respect of relevant litigation files that pre-date 2006.

29. The text of Category 4 in the Order for Discovery as against the Minister will include explicit reference to pleadings, including replies to particulars, contained on litigation files in relation to such documents falling within this category for the period 1<sup>st</sup> day of January 2006 to the 20<sup>th</sup> day of June 2024.

30. Accordingly, the Tribunal orders that the Minister makes discovery of Category 4 on the following terms:

*“all documents relating to notifications and reports to the Minister for Defence of complaints of hazardous chemicals, as defined within the Terms of Reference, and the response thereto, for the period 1 January 1983 to 20 June 2024, to include, but not limited to, complaints files, statements, records of investigations and interviews, recordings, reports, determinations, notes, memoranda and records of written and electronic correspondence and communications of any kind and pleadings, including replies to particulars, contained on relevant litigation files which said litigation files are limited to the period 1 January 2006 to 20 June 2024 relating to complaints of abuse, as defined in the Terms of Reference”.*

### **Category 5, Category 6 and Category 7**

31. The submission received from the Minister did not contain any observations on the text of Category 5, Category 6 and Category 7 of the Intended Order for Discovery. The Tribunal is satisfied that it is relevant, necessary and proportionate to order the Minister to make discovery of the documents referred to in these categories as drafted in the Intended Order for Discovery, without the need for amendment.

### **Timeframe**

32. The Minister, in his submission, outlines that it is anticipated that his Department will make discovery of the documents falling within categories (3); (4); (5); (6) and (7) within the fifteen (15) week period provided for in the Intended Order for Discovery, the period to commence from the date of the making of the Order.

33. However, in respect of the documents falling within Category 1 and Category 2, the Minister states that while he will make all efforts to comply with a timeframe of fifteen (15) weeks, in consideration of the scale of the redaction process, the Minister has requested that the period for making discovery in respect of these categories be extended to twenty (20) weeks from the date of the Order. The Minister states that it is intended to furnish discovery to the Tribunal on a rolling basis as expeditiously as possible.

34. In consideration of the Minister's request for an extension of the timeframe for delivery of discovery to twenty (20) weeks on the basis of the scale of redaction required to be undertaken on the relevant documents falling within Category 1 and Category 2, and noting that discovery will be furnished on a rolling basis upon the making of the Order, the Tribunal is satisfied that it is appropriate to grant the Minister's request and

to extend the timeframe for the delivery of discovery in respect of Category 1 and Category 2 to twenty (20) weeks.

35. To avoid the relevant Deponent having to swear two (2) affidavits of discovery based on differing timeframes for compliance with the Order, the timeframe of twenty (20) weeks will also apply to the discovery of documents falling within the scope of Category 3; Category 4; Category 5; Category 6 and Category 7.

Dated the 27<sup>th</sup> day of January 2025.