Minister for Justice and Equality,
Department of Justice and Equality,
51, St. Stephen’s Green,
Dublin 2.

Your Ref: Minister.
Commission Ref: KCOH/PK/DJOH

25th April, 2016.

Re: Commission of Investigation (Certain Matters relative to the Cavan / Monaghan Division of An Garda Síochána). Final Report.

Dear Minister,

Please find enclosed the final report of the commission established by Order of the Government and S.I. No. 38 of 2015 entitled “Commission of Investigation (Certain Matters Relative to the Cavan/Monaghan Division of the Garda Síochána).

Yours sincerely,

KEVIN C. O’HIGGINS,
Retired Judge of the High Court.
COMMISSION OF INVESTIGATION

(CERTAIN MATTERS RELATIVE TO THE CAVAN/MONAGHAN DIVISION OF
THE GARDA SÍOCHÁNA)

AN COIMISIÚN IMSCRÚDÚCHÁIN

(NITHE ÁIRITHE I DTAOBH RANNÁN AN CHABHÁIN / MHUINEACHCÁIN
DEN GHRARDA SIOCHÁNA)

Mr. Justice Kevin C. O’Higgins
Sole Member

REPORT
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Preface and acknowledgements

i. On 3rd of February 2015, this commission was established by Government Order (Certain Matters Relative to the Cavan / Monaghan Division of the Garda Síochána) Order 2015) S.I. No. 38 of 2015. Notice of the making of the Government Order (Statutory Instrument No.192 of 2014) was published in Iris Oifigiúil on 6th of February 2014. The draft terms of reference were approval by resolution by each House of the Oireachtas. Mr. Kevin C. O’Higgins, retired High Court judge, was appointed by the government to act as the sole member of the commission.

ii. The Order is contained in Appendix 3 to this report.

iii. The commission was directed to investigate, in accordance with the provisions of section 32 of the Commissions of Investigation Act 2004, and to report to the Minister for Justice and Equality on certain matters of significant public concern.

iv. The matters to be investigated and reported on by the commission were set out in the terms of reference of the commission:

   a. The investigation by An Garda Síochána of a public order incident and possible sexual assault on a bus at Kingscourt, Co Cavan on 25 February 2007;

   b. The investigation by An Garda Síochána of an assault at the Lakeside Manor Hotel, Virginia, Co Cavan on 14 April 2007;

   c. The investigation by An Garda Síochána of two incidents in 2007 involving Jerry McGrath, i.e. the assault on Mary Lynch near Virginia, Co Cavan on 30 April 2007 and the abduction of a child during the burglary of a house in Tipperary on 9 October 2007, and the management and coordination by An Garda Síochána of those investigations, in particular in relation to the question of bail;
d. The investigation by An Garda Síochána of a public order incident in Cafolla’s restaurant, Bailieboro, Co Cavan on 5 August 2007;

e. The investigation by An Garda Síochána of an incident of assault and false imprisonment of a girl in Cootehill, Co Cavan on 2 September 2007;

f. The investigation by An Garda Síochána of a dangerous driving incident at the Lakeside Manor Hotel, Virginia, Co Cavan on 27 December 2007;

g. The investigation by An Garda Síochána of an assault in Crossan’s public house in Bailieboro, Co Cavan on 23 May 2007;

h. The investigation by An Garda Síochána of sexual offences and child pornography offences in respect of which Michael Molloy was convicted in 2009, having particular regard to the loss of a computer seized during the course of that investigation;

i. The investigation by An Garda Síochána of the allegations made by Sergeant Maurice McCabe of malpractice and corruption in relation to PULSE records seized from him on 11 October 2010 at the Hillgrove Hotel, Monaghan;

j. The investigation by An Garda Síochána and the Minister for Justice and Equality and Department of Justice and Equality of complaints made by Sergeant Maurice McCabe in relation to matters at (a) to (i);

k. The investigation by An Garda Síochána and the Garda Síochána Ombudsman Commission of Garda disciplinary issues arising out of the above matters;

l. The general conduct of policing at Bailieboro Garda District in 2007/2008 with reference to the management and operational structure and resource allocation for Bailieboro Garda District, at the relevant times, including:

• The number of probationary Gardaí assigned to Bailieboro Garda District;
• The number and experience of Sergeants available to supervise and monitor on a daily basis the work of those probationary Gardaí;

• The significance, if any, of the absence of an Inspector permanently allocated to Bailieboro Garda Station;

• The stability, continuity, and experience available at District Officer level in Bailieboro District;

• The arrangements in operation for the supervision and monitoring of probationary Gardaí in relation to their operational and, specifically, investigative duties, and

• The standard of accommodation at Bailieboro Garda station and its possible impact on the performance of the policing function.

v. The terms of reference included the following direction, “[t]he [c]ommission should 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.”

vi. The structure of this report follows the terms of reference set out above, and after the preliminary chapters, each of the incidents and complaints in paragraph 1(a) to paragraph (l) of the Order are dealt with in separate chapters which follow.

vii. The commission acknowledges with thanks the assistance of:

• Its documentary counsel: barristers-at-law Lalita Morgan Pillay, Alice Walsh, Michael McCormack, Peter McKenna and Nick Reilly for their expertise and willingness to help at short notice.
• Its secretarial team of Brenda Byrne, Natalie Twomey and Marian Sweetman, for their skill and commitment.

• The staff of the Dublin Dispute Resolution Centre, Distillery Building, Church Street Dublin for their efficiency and courtesy.

• Sergeant Gavin Scott, Garda Tom Dwyer and Mr. Brian Savage of Garda Headquarters for the assistance that they afforded to the inquiry, in particular in enabling it to better understand the PULSE system.

• Gwen Malone Stenography Services Limited for their excellent service over the course of the long sitting days and hearings.

• The witnesses at the commission for their cooperation with the investigation, and especially those witnesses who, by the very nature of the inquiry, were under much pressure.

• The legal teams for the parties involved in this inquiry for their valuable assistance, both at the hearings (which were long and at times stressful), and in their submissions.

viii. A special tribute is owed to the legal team of the commission - Sean Gillane S.C.; barristers-at-law David Dodd, Elizabeth Davey and Aoife McNickle; David J. O’Hagan, solicitor, and to the registrar to the commission, Peter Kavanagh. Their unstinting dedication and expertise, their constant good humour and hard work, their unflappability under pressure and attention to detail were all factors that made it a rewarding, happy - and humbling - experience to work with them.

ix. The commission is pleased to acknowledge the cooperation it received from all persons. However, the compliance with the obligation of making discovery by the gardaí was unsatisfactory. A large volume of documents were not provided in a timely fashion, and as late as 12th October 2015, the commission was informed that many documents had not been discovered. In circumstances where these documents were
readily available in Bailieboro garda station - the epicentre of this investigation - the failure to disclose them at the outset was disappointing and difficult to understand. Some of the documents concerned matters with which the commission had already dealt. The late discovery of these documents by the gardaí was unhelpful and frustrating. It caused delay and extra work for the commission. The commission accepted the apology of the Commissioner of An Garda Síochána for this, and it is satisfied that the failures were not due to a deliberate lack of cooperation. However, the manner in which such cooperation manifested itself was, on occasion, quite inadequate – the commission expected better from An Garda Síochána.
Chapter 1 Introduction

Background

1.1. On 19th February 2014 a dossier was furnished to An Taoiseach, Mr. Enda Kenny by Mr. Micheál Martin T.D., leader of the opposition. It contained a note by Sergeant Maurice McCabe on a large number of different matters about which he had concerns. Each of those notes was contained within volume one of three volumes of material furnished to the Department of Justice and Equality by letter of 4th September 2012 by Sergeant McCabe’s solicitors, Seán Costello & Company. A number of these incidents has been investigated by the commission pursuant to its terms of reference and they are reported on in separate chapters of this report.

1.2. The furnishing of the documents to Mr. Martin T.D. followed a series of complaints by Sergeant McCabe about policing performance, mainly in the Bailieboro Garda District in Co. Cavan. These included complaints which had been made to his direct superiors in the gardaí, human resource management, to the confidential recipient appointed under the Garda Síochána (Confidential Reporting of Corruption or Malpractice) Regulations 2007, to the Minister for Justice and Equality, Mr. Alan Shatter T.D., and to certain other members of Dáil Éireann.

1.3. Sergeant McCabe became a member of An Garda Síochána in August 1985. He first served in Bailieboro garda station in July 1989, and he remained there until his promotion to the rank of sergeant in January 2000, when he moved to Clones garda station. In October 2004 he was appointed to sergeant in charge, Bailieboro garda station, and served as such until, further to his letter dated 4th March 2008, he vacated that position on 20th March. In July of 2008 he moved on temporary transfer to Mullingar garda station where he still serves.

1.4. In late 2007 and into 2008, Sergeant McCabe became concerned about the way in which a number of investigations of suspected criminal offences were handled by members of An Garda Síochána. His concerns were primarily about policing practice, and standards relating to the quality of investigations in the Bailieboro district. In addition, he expressed concern about compliance with proper internal garda procedures in specific garda investigations. He was also concerned about the
manner in which his complaints were treated. These concerns eventually led to the note furnished to Mr. Micheál Martin, and through him to An Taoiseach, Mr. Kenny.

1.5. Sergeant McCabe became widely known to the general public and the media as a “garda whistleblower.” The subject of his complaints and the manner in which they were dealt with became a matter of public debate and controversy. They were also the subject matter of much speculation and rumour.

1.6. On 27th February 2014 the government announced a decision to hold a review of allegations made by Sergeant McCabe. Seán Guerin S.C. was appointed to prepare a report for An Taoiseach, in accordance with the terms of reference agreed by the government on the advice of the Attorney General.

1.7. On 6th May 2014 Mr. Guerin furnished his report and recommended as follows:

   In my opinion, having regard to the number, range and importance of the issues arising, it is desirable in the public interest that a comprehensive Commission of Investigation be established pursuant to the Commissions of Investigation Act 2004 to investigate the issues that remain unresolved arising out of the complaints made by Sergeant Maurice McCabe and examined in this report. Such a Commission is, in my opinion, desirable in the public interest to ensure continuing confidence in the institution of An Garda Síochána and the criminal justice system.

1.8. The recommendations contained in the report of Mr. Guerin as to the establishment of a commission of investigation, and as to the contents of such an investigation, were accepted in their entirety by the government. Subsequently this commission of investigation was established.

The task of the commission

1.9. The matters arising under (a) to (h) in the terms of reference of the commission relate to specific investigations by the gardaí into alleged offences. The investigations into the incidents and complaints with which this commission is concerned are of significant public interest. Although they concern incidents not
necessarily of the highest gravity, and largely, although not exclusively, confined to one particular area, they concern matters which are fundamental to the relationship between the citizen and the gardaí. They relate to the expectation of competence and professionalism from the gardaí to which the public is entitled, and also to the trust accorded to the force by the public. To put the matters under investigation in a proper context, it is only necessary to quote from the evidence of one of the witnesses to this commission. A passage in that evidence sets out, in a striking fashion, the legitimate expectations of citizens, and by implication, the obligations of the gardaí to a community. It reads:

... we were raised in Bailieboro, it’s a small town, so if you have trouble or you’re concerned or anything, your first stop is the Garda Station. They are who you trust, they’re who you go to ....

For a healthy relationship between the people and the gardaí, such trust is essential.

1.10. This commission of investigation examines the particular investigations set out in the terms of reference, and reports on its findings. In each investigation defects were found which are set out in this report. The commission identifies the causes of the individual failings, and makes some observations which are directed at the improvement in the quality of policing in the Bailieboro district.

1.11. In addition to the quality of the investigations carried out by An Garda Síochána, the commission was directed under paragraphs (j) and (k) of its terms of reference, to investigate and report on the manner in which the complaints of Sergeant McCabe were dealt with by An Garda Síochána, the Minister for Justice and Equality, the Department of Justice and Equality, and the Garda Síochána Ombudsman Commission. This involved an examination of the Byrne / McGinn report. Some matters considered in it were outside the scope of this inquiry, but all matters which could be relevant to the terms of reference of the commission were considered in great detail.

1.12. PULSE (Police Using Leading Systems Effectively) is a computer system used by An Garda Síochána. It contains a considerable amount of data on crimes, investigations and on individuals. Sergeant McCabe made allegations of malpractice and corruption in relation to PULSE records seized from him on 11th October 2010
at the Hillgrove Hotel, Monaghan, which caused public concern. These allegations are the subject of paragraph (i) in the terms of reference of the commission. Chapter 12 of this report sets out how these complaints were dealt with and provides the results of its examination.

1.13. The final task of the commission is set out in paragraph (l) of its terms of reference. Although required to examine the general conduct of policing at Bailieboro Garda District in 2007/2008, the examination with which the commission is tasked in that regard is circumscribed by very specific limitations, and is subject to most important qualifications. The examination of the general conduct of policing was only by reference to the management and operational structure and resource allocation. Our task was not to examine and report on the quality of policing at large in the Bailieboro district. Such a task would involve the examination of a vast number of investigations, and not only those set out in the terms of reference of the commission and would probably take many years. The limited nature of the commission’s examination is underlined by the fact that matters to be included are specifically set out in the terms of reference.

Observations on whistleblowers

1.14. In March 2006, the Morris Tribunal recommended that it should be possible for any serving member of An Garda Síochána to speak in confidence with a designated officer in garda headquarters should they have concerns about misconduct.

1.15. Following the Morris report, the passing of the Garda Síochána Confidential Reporting of Corruption or Malpractice Regulations 2007 was an important development in relation to police accountability in the state. The regulations allowed gardaí or civilian employees of An Garda Síochána to report corruption or malpractice in confidence and without fear of adverse consequences. Those regulations were revoked by section 19(2) of the Protected Disclosures Act 2014.

1.16. The purpose of the Protected Disclosures Act 2014 is to ensure that those making complaints about “relevant wrongdoings” should be able to do so without fear of
adverse repercussions. The gardaí are afforded protection under that Act. This is clearly in the interest of the general public, and indeed of the gardaí themselves.

1.17. Many organisations and institutions have an instinctive hostility to whistleblowers. This may be explained by cultural or historical reasons. The hostility may be as a result of a particular understanding of what constitutes loyalty. Under that understanding, any criticism from within is regarded as suspect, disloyal, or even treacherous. This notion of loyalty can be all the more ingrained in organisations, such as An Garda Síochána, with a strong tradition of internal solidarity. However, there is a growing realisation that the activities of whistleblowers, so far from being disloyal, may be motivated by a genuine concern for, and dedication to, an organisation. In that context, an open minded consideration of genuine complaints from within is important in any organisation. A fair consideration of the merits of such complaints (rather than a focus on the complainant) may be of considerable benefit to an organisation. It can enable it to learn from mistakes, to address problems and thereby to improve its performance and efficiency. In the case of An Garda Síochána, such an approach can enhance the quality of the service provided to the people of Ireland. The ability of an organisation to learn from past errors is essential for the improvement of its future performance.

1.18. The purpose of this inquiry is to examine the matters raised in its terms of reference in an objective and impartial manner. In so doing, criticism has been made of certain individuals, not in a gratuitous manner, but because such criticism arose naturally from the findings of the commission. Such criticism does not take into account the good work which may well be the norm for those persons criticised.

1.19. The matters examined by this commission generated a considerable amount of controversy and animated debate. It is hoped that the findings of this commission will bring clarity to at least some of the issues involved.
Chapter 2  Approach to the Inquiry.

Preliminary steps and methodology.

2.1 Although this commission was established following the recommendations of the report to An Taoiseach by Seán Guerin S.C., it must be stressed that the commission was not in any way influenced by that report in its findings. In order to underline its independence the commission decided to have no communication with Mr. Guerin.

2.2 Having received notice of its establishment, the commission was provided with offices in the Old Distillers Building in Smithfield, which were adequate for its purposes. Unfortunately, the late provision of access to computers and printers delayed the progress of the commission by many weeks. The building provided had no facilities for oral hearings, all but one of which were held in the nearby Dublin Dispute Resolution Centre in Church Street, Dublin. In one instance, the commission heard evidence at its own offices.

2.3 The commission adopted formal rules and procedures, copies of which were provided to persons furnishing documents and giving evidence to the commission. The rules and procedures governed a wide range of matters concerning the conduct of the investigation.

2.4 The commission obtained relevant documentation by way of request or direction. Letters were sent to many individuals and institutions, including the Office of the Director of Public Prosecutions, the Commissioner of An Garda Síochána, Sergeant Maurice McCabe, the Garda Síochána Ombudsman Commission, and the Minister for Justice and Equality seeking documents pursuant to section 16(f) of the Commissions of Investigation Act, 2004 (“the Act”) in relation to the subject matter of the commission.

2.5 People with direct knowledge of the incidents giving rise to the matters under examination were called as witnesses. The commission drew up a provisional list of witnesses, but was open to suggestions by other parties about who should be included as witnesses.
2.6 This report is based on the evidence received by the commission between 14th May 2015 and 17th December 2015.

2.7 Section 10 (1) of the Commissions of Investigation Act 2004 provides that, “[a] commission may, subject to this Act and the commission’s rules and procedures, conduct its investigation in the manner that it considers appropriate in the circumstances of the case.” The commission was concerned that this report be delivered as speedily as possible, and within the budget allocated to it. However, its primary concern was that it be fair to all parties. With this in mind, it adopted procedures which it considered most suitable for its purposes.

2.8 Having carefully considered other possible approaches, in particular those employed in other commissions of investigation, the commission decided that the most effective and fairest course to follow was to have private hearings, at which any person who could be adversely affected by the evidence of another witness, was allowed to be present for that evidence, and to question that witness if permitted to do so. The decision was taken having regard to the fact that there were a large number of witnesses, and much of the evidence was likely to be disputed, not only in general terms, but in detail. The commission considered that some of the other possible approaches would be unwieldy and would also considerably lengthen the time expended on this inquiry.

2.9 The commission divided its work into seven modules as follows:

- Module 1 - considered term of reference 1 (a) and 1 (k);
- Module 2 - Part 1 considered term of reference 1 (b);
- Module 2 - Part 2 considered term of reference 1 (c) and 1 (k);
- Module 2 - Part 3 considered term of reference 1 (d);
- Module 2 - Part 4 considered term of reference 1 (e) and 1 (k);
- Module 3 - Part 1 considered term of reference 1 (f);
- Module 3 - Part 2 considered term of reference 1 (g);
- Module 4 - considered term of reference 1 (h);
- Module 5 - considered term of reference I (j);
- Module 6 - considered term of reference I (i);
- Module 7 - considered term of reference I (l).

2.10 Parties whose interests the commission considered might be affected were granted representation, and, where appropriate, were permitted to cross-examine witnesses in accordance with the provisions of section 11 (2) (c) of the Commissions of Investigation Act 2004. Persons were required to apply to the commission for legal representation, and they were only allowed to be present at a hearing if they could justify their presence. Where an application for permission to be present was refused, witnesses were excluded from the hearing, except when giving their own evidence.

2.11 Prior to the commencement of each module, the commission communicated through the appropriate channels with witnesses. A copy of the rules and procedures of the commission (including its terms of reference), a sample affidavit verifying evidence, a sample affidavit of documents, general guidelines on the payment of costs and Statutory Instrument No. 38 of 2015, which established the commission, were provided to each witness at an early stage.

2.12 In each module, other than those on the PULSE system and on management issues, the commission furnished a statement of facts which it considered to be uncontested, and asked parties to indicate if they disagreed with any of the matters contained in it. Where observations were made, they were considered by the commission, and where appropriate, amendments were made to the statement of facts. This saved time and enabled the pertinent issues to be more clearly defined.

2.13 The commission decided that, in general, it was not necessary to interview witnesses in advance of the hearings. Firstly, a large number of statements had already been furnished to the Byrne / McGinn investigation, and were available to the commission. Where relevant, they were included in the core booklets in each module. The commission also had regard to the fact that at least some of the issues involved in the commission had been made known, albeit in an entirely different context, in the Guerin report. This made it likely that people would be aware of the issues. However, the commission ensured that no person felt ambushed or disadvantaged by being taken by surprise by evidence for which they had not time to
prepare. Where there was any risk of this happening, the commission readily granted
time to anybody who requested it, so that the relevant material could be considered.
In a few instances potential witnesses were contacted by telephone in order to
ascertain whether it would be necessary or desirable that they should be asked to
give evidence to the commission.

2.14 In advance of the hearing of each module the commission circulated a core booklet
to all parties involved in that module. This comprised all documents the commission
considered relevant to the module. Prior to furnishing the core booklet, the
commission required each party to sign an undertaking not to disclose the documents
contained therein to a third party, other than with the written authorisation of the sole
member of the commission, or as directed by a court or tribunal in accordance with
section 45 of the Act, or otherwise as required by law.

2.15 The commission held all its hearings in private pursuant to section 11 of the Act, no
application having been made to it to have evidence taken in public pursuant to
section 11 (1) (a) of the Act.

2.16 The commission heard evidence on a total of thirty four days. The normal hours of
hearings were from 10 am until 6 pm. The sitting day was long, but it enabled more
evidence to be heard on each day, thereby saving time and expense. The commission
appreciates the cooperation of all the legal teams and witnesses in this arrangement.

2.17 Evidence was given by ninety seven witnesses. Thirty witnesses gave evidence at
two or more modules of the hearings. The names and representatives for those
parties are set out in Appendix 1 to the report.

2.18 Garda witnesses are referred to in the report in accordance with their rank at the time
of each individual investigation. However, where members gave evidence to the
commission and that evidence is referred to in the report they are referred to by their
rank at that time.

2.19 The parties giving evidence in each module were invited to make submissions on the
evidence within two weeks of the conclusion of the module in question. Every
submission made has been carefully considered by the commission.
2.20 At the outset, and very frequently throughout the hearings, the commission stressed the fact that the hearings were inquisitorial and not adversarial. It was considered that this was particularly important in circumstances where other interested persons were permitted to be present at hearings, and allowed to ask questions with the permission of the commission. This non-adversarial method was generally followed by all legal teams, although there were a few isolated aberrations from this approach.

2.21 The evidence was adduced by counsel to the commission, and with the permission of the commission questions were allowed by other persons where that was deemed appropriate.

2.22 The commission conducted its proceedings with particular regard to its duty of compliance with the requirements of constitutional and natural justice.

2.23 All witnesses were examined under oath or affirmation. One witness was examined via video-link to India.

2.24 In accordance with the provisions of the Commissions of Investigation Act 2004, the commission took all necessary steps to ensure the confidentiality of its proceedings.
Chapter 3 Remarks on Context

Sergeant McCabe, the Byrne / McGinn report, findings on investigations and findings on individual gardaí.

Sergeant McCabe

3.1 Sergeant McCabe is the central figure in this commission of investigation. He is a dedicated and committed member of An Garda Síochána. He has brought to public attention certain investigations where the public was not well served. He has also highlighted certain legitimate concerns about procedures and practices in place at Bailieboro garda station. The events leading up to and including this commission of investigation have been extremely stressful for him and for his family over a long period of time. In particular, he considered that he was being wrongly blamed for certain errors in the investigation of the Fr. Michael Molloy case, and he was subjected to disciplinary proceedings for the first time in a long career. This was especially upsetting for him because he had no part in that investigation. He also had reason to believe that he was being “set up” and wrongly implicated in relation to important aspects of the Jerry McGrath investigation. His understandable beliefs in that regard remain unproven. Sergeant McCabe felt that his complaints were not being addressed properly, and this report examines how those complaints were dealt with. In addition, Sergeant McCabe felt that he was subjected to ridicule and odium by certain persons within the force. He felt very isolated as a result of his complaints.

3.2 Sergeant McCabe impressed the commission as being never less than truthful in his evidence, even if prone to exaggeration at times. In common with many other witnesses, his recollection of some events is diminished because of the passage of time.

3.3 Some of the complaints have been upheld in this report, especially in respect of the quality of the investigations examined by this commission. Other complaints made by him have proven to be overstated or exaggerated. Some were unfounded, and some have been withdrawn.
Some people, wrongly and unfairly, cast aspersions on Sergeant McCabe’s motives; others were ambivalent about them. Sergeant McCabe acted out of genuine and legitimate concerns, and the commission unreservedly accepts his *bona fides*. Sergeant McCabe has shown courage, and performed a genuine public service at considerable personal cost. For this he is due the gratitude, not only of the general public, but also of An Garda Síochána. While some of his complaints have not been upheld by this commission, Sergeant McCabe is a man of integrity, whom the public can trust in the exercise of his duties. Assistant Commissioner Byrne told the commission that, “*Sergeant McCabe is regarded as a highly efficient sergeant, competent*”. This assessment is shared by the commission.

Sergeant McCabe made complaints of corruption under the Garda Síochána (Confidential Reporting of Corruption or Malpractice) Regulations 2007, against the then Garda Commissioner Martin Callinan. The charter established under those regulations does not define corruption or malpractice, but it includes not only matters which constitute criminal behaviour, but also other conduct such as breaches of discipline, abuse of authority and a range of other matters. It was submitted on behalf of Sergeant McCabe that he had not intended to make allegations of criminal conduct against the commissioner, but rather of an abuse of power only. The allegation was understood by the commissioner to be one of criminal conduct. The hurtful allegation was based on the belief, unsupported by any evidence, that the commissioner had put Superintendent Clancy on a promotion list. The complaint was, in part, a device to ensure that the complaint came before the Minister for Justice and Equality. At that time a complaint against the commissioner had to be referred to the minister. The matter is dealt with in Chapter 13 of this report, where the former commissioner is vindicated.

Complaints of corruption in the context of the charter were also made against Assistant Commissioner Byrne, Chief Superintendent Rooney and Superintendent Clancy. In each case the commission has found those hurtful complaints unfounded and those against whom such complaints were made had to live for many years under the strain of those allegations. No direct allegation of corruption was levelled against Superintendent Cunningham, but, so far as any may be implied, they also are unfounded.
3.7 The only subsisting complaint against Assistant Commissioner Byrne, within the terms of reference of this commission, relates to the methodology and findings of the Byrne / McGinn report and is dealt with in this report.

3.8 There is an outstanding matter concerning allegations made by Sergeant McCabe against former Chief Superintendent Rooney which is the subject matter of ongoing litigation by Sergeant McCabe. It is outside the terms of reference of this commission and it would be inappropriate to comment on it.

3.9 There were a large number of complaints against Chief Superintendent Clancy examined in detail in this report. He is exonerated of any wrongdoing and is the subject of only occasional and very mild criticism.

3.10 The involvement of Superintendent Cunningham in investigations is discussed in the relevant chapters.

The Byrne / McGinn report

3.11 On 2nd May 2008 a written complaint in the form of a statement dated 28th April 2008 was received at the office of the Assistant Commissioner, Human Resource Management, from Sergeant McCabe, who was then attached to Bailieboro garda station. In his complaint, Sergeant McCabe alleged that he had been victimised in his role as sergeant in charge, Bailieboro garda station, and he highlighted alleged neglect of duties by gardaí at Bailieboro garda station, failures by garda members to investigate complaints, poor work practices and lack of supervision within the Bailieboro Garda District. The Assistant Commissioner, Human Resource Management referred the complaint to Assistant Commissioner, Northern Region for investigation on 9th May 2008 and stated that:

While Sergeant McCabe has made his complaint under the Bullying and Harassment Policy, I believe his allegations are so wide ranging that an investigation under the said policy would be too narrow and inappropriate. Accordingly, please nominate a Chief Superintendent other than the local Divisional Officer to carry out an investigation into all of the allegations made.
Chief Superintendent Terry McGinn, Donegal Division, was appointed to investigate the allegations by Assistant Commissioner, Northern Region, on 13th May 2008.

3.12 In October 2008 a report was received by the confidential recipient under the Garda Síochána (Confidential Reporting of Corruption or Malpractice) Regulations 2007. In accordance with his statutory duty under regulation 7(1) the confidential recipient transmitted the matter to the Garda Commissioner, who in turn passed the matter on to Assistant Commissioner Derek Byrne to investigate the complaints. Chief Superintendent McGinn was reporting to the Assistant Commissioner, Human Resource Management and Assistant Commissioner Byrne was reporting to the Garda Commissioner on foot of the complaint conveyed to him by the confidential recipient.

3.13 On 15th October 2008 Sergeant McCabe made a further statement to Chief Superintendent McGinn containing allegations against Chief Superintendent Rooney. Garda policy provides that members of An Garda Síochána cannot investigate complaints against members of equal rank, and it became necessary for an assistant commissioner to be appointed to investigate the complaints against Chief Superintendent Rooney. As a result it was decided that Assistant Commissioner Byrne, who had already been charged by the commissioner to furnish him with a report on the complaints which had been transmitted by the confidential recipient, would now oversee Chief Superintendent McGinn’s investigation of complaints which had been made against Chief Superintendent Rooney.

3.14 The complaints of Sergeant McCabe had originally been made under the bullying and harassment policy of An Garda Síochána. The relevant procedures in place under that policy were subject to particular time limits, which could only be extended with the consent of the parties concerned. Such consent was not forthcoming on the third occasion it was asked for, and as a result the bullying and harassment policy was no longer a mechanism which was available to deal with complaints which would otherwise be dealt with under that policy.

3.15 Neither Assistant Commissioner Byrne nor Chief Superintendent McGinn objects to their report being termed, for the sake of convenience “the Byrne / McGinn report”.

3.16 The commission is critical of aspects of the Byrne / McGinn findings, and, in particular for failing to address certain specific complaints of Sergeant McCabe
regarding the incidents the subject matter of this inquiry, and / or for dealing with them in vague or general terms. Sergeant McCabe made many complaints against Superintendent Clancy, which have been rejected by this commission. However, on several occasions detailed in this report, those complaints were not addressed at all, and, at other times, only superficially dealt with in the Byrne / McGinn report. This matter is discussed in Chapter 13.

3.17 In the circumstances outlined above the commission considers that there was a corporate closing of ranks. The commission does not consider that this was done consciously or deliberately. There was no question of bad faith.

3.18 The fact that Sergeant McCabe was only furnished with a five page summary of the report, at a meeting to discuss the outcome of the Byrne / McGinn investigation did nothing to instil confidence in him that his concerns had been properly addressed.

3.19 However, any criticism of the Byrne / McGinn report must be taken in context. In that regard, it is important that the following matters be noted.

- It would be quite wrong and unfair to suggest that Sergeant McCabe’s complaints were not taken seriously, or that they were brushed aside.

- The complaints of Sergeant McCabe were extensive, and went far beyond matters that could be dealt with under the bullying and harassment policy of the gardaí. The Byrne / McGinn investigation had a very broad remit. It attempted to identify and categorise issues, to refer those matters to the appropriate authority for full enquiry or investigation with a view to that authority making a final determination on a case by case basis.

- The investigation was concerned with a multiplicity of complaints, some specific, and some generalised. This inquiry is not concerned with the majority of the issues dealt with in that report.

- Some of the matters investigated by the Byrne / McGinn team were very difficult and extremely sensitive.

- The investigation involved a great deal of hard work. It took nearly two years to complete, partially due to the large volume of matters dealt with, but also
because new allegations were introduced during the course of the investigation. The completed file consisted of eight modules comprising a report and appendices.

- There were more than twenty interviews with Sergeant McCabe during the course of the investigation and he furnished eleven statements. Sergeant McCabe was on sick leave for a period during the Byrne / McGinn investigation. Furthermore, as was his right, he required meetings with his legal representatives before agreeing to meet with the investigation team to assist in their work or to make relevant disclosures. It is not a criticism of Sergeant McCabe to state, given the stressful circumstances, that he was not always the easiest person to deal with.

- The commission is aware that Chief Superintendent McGinn, in particular, showed experience, kindness, and sensitivity in her dealings with Sergeant McCabe.

- Very considerable resources were put into the investigation. An incident room was established at Ballyshannon garda station under the direction of Assistant Commissioner Byrne and Chief Superintendent McGinn. Resources from both Sligo / Leitrim Division and Donegal Division were utilised to conduct enquiries, take statements from witnesses and to operate the incident room.

- The summary of the Byrne McGinn report handed to Sergeant McCabe indicated that eleven of his complaints were upheld.

- It was not to be anticipated by the authors, that the report would be subjected to such detailed scrutiny as was applied by this commission.

- Assistant Commissioner Byrne gave evidence to the commission in a forthright, honest and helpful manner. He is a man of integrity and a highly competent member of An Garda Síochána, clearly committed to the good of the force. The commission is absolutely satisfied that the public can repose trust in him in the exercise of his duties.
Findings on investigations

3.20 This commission was concerned only with a number of specific garda investigations which are set out in its terms of reference. It would be quite wrong to regard the investigations examined and criticised by the commission as being indicative of the general quality of investigations in the Bailieboro district. To do so would be most unfair to the gardaí in that district, who have worked under the shadow of allegations for many years. The commission has heard evidence of, and accepts that there was, much good work performed “unhonored and unsung” by the gardaí in Bailieboro district. However this is not within the terms of reference of the commission.

3.21 As has already been pointed out, the remit of the commission in any general consideration of policing in the Bailieboro district was very limited indeed. Consequently, it is outside the remit of this commission to pronounce on the quality of policing in the Bailieboro district beyond those limited matters. Suffice it to say that, following the Byrne / McGinn investigation, the Bailieboro district was subject to audit, the results of which were generally favourable. However, it must be added that the results of that audit were themselves, subject to criticism by the Garda Inspectorate.

Findings on individuals

3.22 Although this report is critical of individual gardaí in specific investigations, it would be unfair to regard those criticisms as applicable to the quality of their work in general, or to consider the actions criticised as typical of their performance.

3.23 The commission considered whether in the exercise of its discretion under S.32(3) of the Commissions of Investigation Act 2004 it should omit the names of certain members of An Garda Síochána who gave evidence to the commission. Having carefully considered the matter, and having regard, inter alia, to the fact that members of An Garda Síochána are individually and collectively accountable to the public, the commission decided that to do so would be contrary to the interests of the investigation.
Chapter 4 Kingscourt Bus Incident

The investigation by An Garda Síochána of a public order incident and possible sexual assault on a bus at Kingscourt, Co. Cavan on 25th February 2007

The facts

4.1 At 4:30 am on 25th February 2007, Ms. Lorraine Browne contacted Bailieboro garda station to complain of the behaviour of a number of individuals on a minibus which she was driving, and to request the assistance of gardaí.

4.2 Garda Fearghal McCarthy, a probationer garda, observer in the official patrol car, and Garda Sinéad Delaney, the driver, arrived at the scene at about 4:50 am and spoke to Ms. Browne.

4.3 Ms. Browne made a statement about the matter on 26th February 2007.

4.4 On 30th May 2007 Ms. Browne signed a statement withdrawing her complaint. There was no prosecution.

The garda investigation

4.5 When the gardaí arrived at the scene in Kingscourt on 25th February 2007 Ms. Browne gave a brief account of the incident to Garda McCarthy. Ms. Browne’s statement is set out at paragraph 4.9. The incident involved a number of men causing trouble on a minibus which she was driving. Ms. Browne also indicated that she might be able to ascertain the name of a girl who had been on the bus, and whom she alleged had been assaulted. Although Garda McCarthy noted Ms. Browne’s name, address, contact number, date of birth and the registration of her minibus, he did not make any notes relating to the incident itself.

4.6 On the arrival of the gardaí, Ms. Browne was at the scene together with two men. Ms. Browne told the commission that these men had been her passengers earlier that night and that she had arranged to pick them up again in Bailieboro at 4:00 am in order to bring them home. Ms. Browne had not arrived to bring them home and they became
worried at this. They telephoned her around the time of the incident. She was hiding in a garden behind a hedge at that time. She outlined her predicament to these men, and they came to her assistance. Garda McCarthy denies that the two men were present, but the commission accepts the evidence of Ms. Browne. She had no reason to invent the presence of these men, and she mentioned their presence in her statement to Garda McCarthy made the very next day. Ms. Browne impressed the commission, not only as a capable and courageous woman, but as a fair-minded and truthful witness.

4.7 Garda McCarthy caused the incident to be entered onto the PULSE system. It read as follows: “three males caused disturbance on mini bus on Main Street, Kingscourt. To proceed by summons.”

4.8 Garda McCarthy, rather optimistically, checked out local premises to ascertain whether there was CCTV footage of the incident, but none was available. He has no record of what premises he checked, or of when he checked them.

4.9 On 26th February 2007 Ms. Browne made the following statement about the incident to Garda McCarthy:

My name is Lorraine Browne of Lough an Lea, Kingscourt, Co. Cavan. On 25/2/07 I was picking up regulars who travel with me in the minibus, from Carrickmacross. At 3.30 am I went to Carrickmacross to pick them up at the Roma chipper at the top of the town. In total I picked up ten to twelve people. Four lads got on the bus that I didn’t know. I told everyone on the bus that I was going to Kingscourt and when the four lads were getting on told them that I was going there. They said they were going there too. The minute I pulled off the verbal abuse from the biggest lads started. He started verbally abusing the lady passengers that I had on board. Putting women down saying filthy talk and talking about their privates. He was trying to start a row with their partners by saying stuff to them. His mates one of them the smallest lad kept laughing and egging him on. The bald lad was asleep in the bus and the last lad was sitting behind me telling them to stop. About half way to Kingscourt I stopped to let a fella and his girlfriend off and when the girl was getting off, the biggest lad grabbed her arse. Her boyfriend turned around and said “how dare you mate”. The big lad laughed in his
face. The couple then left. I then carried on to Kingscourt the whole way to Kingscourt the lad kept shouting abuse at the other passengers. The bald lad, slept the whole way to Kingscourt. When I got to Kingscourt I told the four lads they would have to get off it was the last stop. I still had about six locals on the bus who I was going to drop home because I would always leave them home. The four lads refused to get off when asked. The biggest lad kept saying to ring the Guards that he wasn’t moving he wanted to be taken to Ardee. He refused to get off for about half an hour and the other people just got impatient as they wanted to get home so they got off. One girl was still on the bus she didn’t get off. When the passengers were getting off the biggest lad groped another girl when she was getting off. The four lads were still on the bus at this stage. I then agreed to take them to Ardee and the lad sitting behind me said out loud to the other lads that “we’ll pay her well if she does it”. The biggest lad then started shouting “she’s getting nothing off me I’ll just take the bus and take myself fucking home”. At this stage I was terrified so I told them I wasn’t taking them anywhere but I’d ring them another taxi. I then got off the bus and walked to the middle of the road so they couldn’t hear me and rang Bailieboro Garda Station. The minute I got off the phone I heard the girl on the bus screaming. I ran around to the side door and saw the big lad had a grip of the girl holding her by her clothes at the front. She then broke free of him and ran up the town screaming. The quiet lad that was sitting behind me went running after her to see if she was ok. I then ran up after him and told him to go back and mind the bus. The girl kept running away I didn’t manage to catch up with her. I then turned and went back towards the bus. They were all on the bus still shouting very loud. I then saw the big rowdy fella step off the bus shouting “where the fuck was she gone”. At this stage I turned and ran towards Kingscourt Garda Station and hid at the corner of the road so that I could still see them. They all got off the bus and walked up towards where I was so I ran further up towards the Garda Station. I could still hear them shouting where has she gone. I then heard the voices were getting faded so I walked back down towards the corner and saw that they were going back towards the bus still looking for me. When they got back to the bus they walked across the road to the opposite side of the street and stood around
the Europa chipper. A fair [sic] that I was to pick up in Bailieboro started ringing me at this stage and knew I was in trouble in a distresses stage [sic]. They then got another taxi and when they got to Kingscourt rang me to see where I was and picked me up. They then brought me down to the bus and the Gardai landed at the same time. Everybody that was on the bus was very nervous of the lads. I was working with C.I.E as a bus driver working on route 77 which is the worst one in Dublin which is the Tallaght one for 5 years. Previous to this I was taxi driver around Dublin for 4/5 years. This was the worst I have ever encountered in all of my years driving. This statement has been read over to me and is correct. I have been invited to make any additions or alterations. I do not wish to make any.

4.10 The statement was signed by Ms. Browne and witnessed by Garda McCarthy.

4.11 At the time she made the statement, Ms. Browne again indicated that she would try to ascertain the name of the girl who had been assaulted on the bus.

4.12 Some weeks later Garda McCarthy contacted Ms. Browne by telephone. Her account of the conversation was that:

...he basically said to me, well in a nice way you haven’t got much of a case...
He went on to say that I would have to find the witnesses that was on the bus, find names, go to court, face these guys in court and he said then that they might just get off with a caution. So basically it was like he was saying you’re wasting your time, you know.

She later said:

...basically he made me feel, in a very polite manner, I have to say, that there was not much point going ahead with the case because he told me what was going to be involved, that statements would have to be taken, witnesses would have to be found, he told me I’d probably have to go to court and face them in a court of law. He told me all them things in a very polite manner, and basically said to me, like you know it’s up to yourself, after telling me all that. So, you know, what you take from that, is you have no case really, have you.
Ms. Browne told the commission that some time after that conversation Garda McCarthy again contacted her by telephone. He told her that one of the suspects had offered an apology and a meal voucher. She thought about the matter and she unequivocally rejected the offer. She then telephoned Garda McCarthy and she was told that, even if she did not accept the meal voucher, she would be compensated for her loss of earnings. Garda McCarthy asked her to calculate her loss of earnings. She calculated her loss as being €150 as she had allowed all passengers to leave the bus without paying because she was so shocked. Garda McCarthy told her that if she accepted the meal voucher or compensation she would have to withdraw her statement of complaint. Ms. Browne decided to accept the compensation, and notified Garda McCarthy of that fact. Garda McCarthy asked her to come to the garda station.

On 30th May 2007 Ms. Browne attended at Bailieboro garda station where she met Garda McCarthy. She told the commission that Garda McCarthy brought her into a room and handed her a brown envelope. He asked her to check that it contained €150. Ms. Browne told the commission she checked the envelope and it contained the money and a note of apology written on some paper which had been torn out of a copy book. Ms. Browne stated that she was told that, if she accepted the contents of the envelope she would have to withdraw her statement. Ms. Browne signed a statement withdrawing her complaint. It contains the following sentence “I wish to withdraw the statement of complaint as I have settled with the person that was causing the trouble...”.

Garda McCarthy’s account is different. He said that, sometime after the statement of Ms. Browne was taken, he contacted the suspect, Mr. A, to explore the possibility of obtaining a cautioned statement from him about the incident. Mr. A informed him that he wanted to apologise to Ms. Browne, “sort her out for her loss of earnings and wanted to give her a meal voucher.” He told Garda McCarthy that he wanted to meet Ms. Browne and asked for her telephone number. Garda McCarthy refused to provide this. He did not pursue the matter of taking a statement from the suspect, and no statement was ever taken from him. It did not occur to Garda McCarthy that the apology and offer of compensation might be evidence of guilt of some wrongdoing. Neither did it occur to him, at any time, to contact the other two men who had been with Mr. A and may have been guilty of criminal offences, or at least be potential witnesses. Garda McCarthy said that he informed Ms. Browne that the suspect wished
to give her a meal voucher and to compensate her for her losses on the night. She told him that she would think about the matter. He stated that she reverted to him stating that she was prepared to let the matter go if she received her loss of earnings.

4.16 The incident under investigation took place in 2007, and it is understandable that because of the lapse of time, the recollection of witnesses may be impaired, and the sequence of events may be inaccurate or confused. However, the commission accepts the evidence of Ms. Browne that the question of compensation did not emanate from her.

4.17 The procedural requirements of pursuing the case, such as the necessity of getting witnesses, and the fact that she would have to attend court, were pointed out to Ms. Browne. She was told that the offenders might be merely cautioned. She was led to believe that it might not be worth her while pursuing the matter, and that in those circumstances, it might be as well for her not to proceed further. However, Sergeant McCabe was inaccurate in asserting that she was told that “she had no case”. Indeed, the very fact that she was told that the culprits might get off lightly indicates, not that she had “no case”, but rather that it might not be worth her while to pursue it. As she stated in evidence “I basically believed that garda himself, Ferghal, thought it was the best idea to take the apology and to withdraw your statement.”

4.18 Garda McCarthy demonstrated little enthusiasm in pursuing the matter, and he discouraged Ms. Browne from proceeding, by pointing out the practicalities of going to court and the possibility that the offenders might be merely cautioned. However, she was aware that she could proceed and was not pressurised into withdrawing the complaint. The statement of withdrawal was in the handwriting of Garda McCarthy and composed by him but signed by Ms. Browne. Ms. Browne was not happy with the outcome but accepted it on a pragmatic basis.

4.19 On the same day as the complaint was withdrawn Garda McCarthy updated the PULSE entry as follows “Statement of Complaint withdrawn. Parties resolved issue amongst themselves. Updated by Garda ...”.

35
Findings on investigation

4.20 The investigation of the incident was very poor. The following are some of the obvious defects:

- Garda McCarthy failed to take a statement from the two witnesses who were at the scene shortly after the event, and who were helping Ms. Browne in her distress. They might have had some useful information to impart.

- At the scene Garda McCarthy spoke to the suspects and took their names, addresses and contact details. Other than that he failed to take any note of what transpired and he does not know whether he cautioned them or not. Even more surprisingly, he does not know whether some or all of them made admissions. This is not an acceptable standard of investigation.

- It is apparent from Ms. Browne’s statement that on the night in question she picked up regular customers in her minibus. She told the commission that these people normally telephoned her to book the minibus to bring them to Carrickmacross and to bring them home. Garda McCarthy failed to follow up this lead, and made no effort to contact those persons.

- Garda McCarthy made no attempt to interview the suspects whose names he had noted on the night, with the exception of Mr. A. Even if those other suspects were not to be charged, they may well have been witnesses as they were on the bus at all relevant times. However, one of them was unlikely to have been a useful witness as he appears to have been asleep for at least part of the time.

- Garda McCarthy contacted the suspect Mr. A with a view to taking a statement from him, but, in the event, failed to pursue that course of action.

- Garda McCarthy failed to obtain a statement from Garda Delaney, who was in the garda car with him, and was present when Ms. Browne was at the scene. It is strange that he did not discuss the incident with her nor did she discuss the matter with him.

- Garda McCarthy failed to establish whether or not any of the suspects had criminal records. This information was readily obtainable from the PULSE system.
and could have been an important factor in deciding how the case should be pursued.

- Garda McCarthy asked Ms. Browne to try to locate the lady who was allegedly subjected to a sexual assault. This was a reasonable and sensible request, as that lady had been a passenger of Ms. Browne on previous occasions. Ms. Browne knew which road she lived on but not her address on that road which was several miles long. However, the fact that Ms. Browne was asked to try and ascertain the name of the passenger did not exonerate the gardaí, and Garda McCarthy in particular, from making enquiries of their own. No such enquiries were made. Assistant Commissioner Byrne stated that “there is no doubt we could have gotten the lady if we looked”.

- The precise circumstances of the transfer of the money and its relationship with the withdrawal of the case were matters central to the handling of the incident; yet Garda McCarthy failed to take any written note of them. He cannot say whether the envelope containing the note of apology and the €150 was given to him in person, or if it was placed in his locker. There is no receipt or record of the transaction and neither is the method of resolution of the matter recorded on the PULSE system.

- Even though it was his first public order incident, Garda McCarthy failed to discuss it with his supervisory sergeant, Sergeant David Burke, or to seek any guidance on the matter. The incident was discussed at Garda McCarthy’s phase IV assessment on the day after the incident occurred. That discussion was in the context of his reasons for not arresting the suspects at the scene. At this time Ms. Browne had not given her statement to Garda McCarthy, so the details contained therein were not available to discuss at the assessment. It is possible that he discussed it with Chief Superintendent Rooney on 27th February 2007. On that date Chief Superintendent Rooney reviewed and signed Garda McCarthy’s notebook but, not surprisingly, he cannot recall whether any such discussion took place. On 28th February 2007 Chief Superintendent Rooney wrote to the superintendent, Bailieboro, referencing his meeting with Garda McCarthy and noting that he had “no arrests for Drink Driving, Public Order or similar offences for five months”. Chief Superintendent Rooney asked for an examination as to
why this was so, and requested that “all necessary supports” be put in place to assist Garda McCarthy’s development. This correspondence was sent to Sergeant David Burke. On 26\(^{th}\) March 2007 he reported that he had “spoken to Garda McCarthy about the matters raised by the Divisional Officer” and that Garda McCarthy stated “he is dealing with a Public Order incident by summons (file to be forwarded in due course)”. Sergeant Burke told the commission he was not aware that this was Garda McCarthy’s first public order incident, and from their conversation he thought “it was an ordinary public order incident that happens most weekends”. Garda McCarthy failed to seek any guidance on the investigation.

- Garda McCarthy commenced writing a report on the incident on 14\(^{th}\) March 2007. This report was addressed to sergeant in charge, unit A, Bailieboro, but was never completed, or submitted. Garda McCarthy cannot explain why the report was abandoned and he accepts that it was an error on his part.

- There was a lamentable lack of note taking demonstrated in this investigation. The conversations with the suspects were not recorded and they may even have made some incriminating admissions. The circumstances leading up to and including the withdrawal of the complaint, and the handing over of money were not noted by Garda McCarthy.

4.21 Garda McCarthy, probably due to inexperience, failed to appreciate the relative gravity of the incident, even after Ms. Browne made her statement. He showed very little enthusiasm for this investigation. Ms. Browne, a lady who does not scare easily, was subjected to a nasty and frightening experience which left her terrified and upset. She was entitled to have her case investigated fully and professionally. Unfortunately this did not happen.

4.22 It would appear that Garda McCarthy learned from his mistakes and from his further training. Superintendent Noel Cunningham, in a letter dated 26\(^{th}\) January 2009 recommending that Garda McCarthy’s appointment be confirmed, spoke of him in positive terms.
The involvement of GSOC

4.23 In May 2008 Ms. Browne was contacted by Sergeant Regina Mc Ardle and, as a result of talking to her, Ms. Browne felt that she should complain to the Garda Síochána Ombudsman Commission (GSOC) about how the case had been handled. Sergeant McCabe also contacted her and he, too, felt she had been let down and that the case had been wrongly dealt with. Both sergeants encouraged her to complain to GSOC.

4.24 On 25th May 2008, at Carrickmacross garda station, Ms. Browne made a statement of complaint to GSOC. Although that statement is essentially the same as that given to Garda McCarthy, it portrays the incident in a somewhat more serious light. However, it must be remembered that the investigation by gardaí in Bailieboro was based on the statement given by Ms. Browne to Garda McCarthy, and he cannot be criticised for the statement that he took. Indeed, Ms. Browne agreed that the statement reflects what happened on the night.

4.25 As a result of her complaint, Ms. Browne was contacted by Mr. Kevin Duffy, a case officer with GSOC, on 3rd June 2008. In his note of the interview dated 4th June 2008 he records her as indicating that she “didn't think the Gardaí did anything wrong, but just didn't help her”. She went on to describe the incident and how it developed. In the course of that description she indicated that two patrol cars and four members of An Garda Síochána had attended. The commission is satisfied that, although another patrol car may have passed near the scene of the incident, there were only two gardaí, namely Garda McCarthy and Garda Delaney, involved at the scene. Indeed Ms. Browne did not insist that there were two patrol cars at the scene and suggests that the second patrol car was going somewhere else.

4.26 Ms. Browne also indicated to GSOC that she made a statement to a member of An Garda Síochána called Cathal or Cahill, and that this member arranged the letter of apology and payment of compensation. She was, in fact, referring to Garda Fearghal McCarthy. She stated that the member discouraged her from taking her complaint any further by indicating a number of matters, including the fact that she would have to go to court and appear as a witness, after which the men would get off lightly. She also gave an account of receiving €150 in compensation and a letter of apology, both of
which she collected in an envelope at Bailieboro garda station. She indicated that she
was upset at the outcome of the situation at the time, but had gradually come to terms
with it and forgotten about it. It is clear from her evidence that Ms. Browne had not
forgotten about the matter in the sense of erasing it from her mind, but rather that she
had successfully managed not to dwell on it, and to get on with her life.

4.27 Mr. George O’Doherty, a senior case officer with GSOC, contacted Ms. Browne by
telephone on 22nd July 2008 at the request of Mr. Conor Brady, a commissioner in
GSOC. He took details of her account of the incident. She indicated that she made
contact with the gardaí on her mobile telephone and that two patrol cars with four
gardaí in them had arrived quite quickly. She also indicated that Garda McCarthy had
taken a statement from her. She said “[r]ight from the beginning, however, Garda
McCarthy discouraged her from pursuing her complaint and that he kept telling her
she would need to go to [c]ourt and testify against the men but that they would get off
lightly anyway.” She told Mr. O’Doherty that Garda McCarthy also told her that “it
would all be a waste of time”. She said that approximately four weeks later Garda
McCarthy had contacted her again to tell her that the three men would not be charged.
She then gave him an account of Garda McCarthy telling her that one of the men had
expressed regret. She estimated that she had lost €150 on the night as most of her
passengers, including the three men, had not paid their fare. It was on the basis of this
figure that the compensation was agreed. She also indicated that she was initially
quite angry that the gardaí had neither arrested the men on the night nor pressed
charges. She said that “she believed Garda McCarthy when he told her that there was
no point in going ahead with the case.” The matter of the complaint to GSOC being
out of time, and of it’s consideration of whether it would extend time and admit the
complaint, was also discussed with her. In relation to the time delay in making the
complaint, Ms. Browne indicated that at the time of the incident she was unaware
there was “anyone other than the [g]ardaí to whom she could complain”.

4.28 The late Mr. Justice Kevin Haugh, Chairman of GSOC, made a detailed memorandum
on the matter. Mr. Conor Brady discussed the matter with his fellow commissioners.
Serious consideration was given to the possibility of exercising the statutory powers
of GSOC to admit the complaint, although it was clearly out of time, but a decision
was taken not to admit the complaint.
4.29 By letter dated 11th August 2008, GSOC informed Ms. Browne that her complaint was inadmissible, as it was out of time.

4.30 The matter was carefully and competently dealt with by GSOC. There was a detailed report from Mr. O’Doherty, an interview by Mr. Duffy with Ms. Browne, an opinion from the late Mr. Justice Haugh, and a discussion amongst the commissioners before arriving at their legitimate conclusion.

**The disciplinary inquiry**

4.31 On 22nd May 2008 Garda McCarthy had a meeting with his training sergeants, Sergeant Pat O’Connell and Sergeant Regina McArdle, to discuss the incident at Kingscourt on 25th February 2007, along with other incidents. At this meeting, Garda McCarthy told the training sergeants that he had submitted an investigation file recommending that the suspects be charged with public order offences. Garda McCarthy was then afforded an opportunity to produce the investigation file, or a copy of it, to the training sergeants by 26th May 2008. He failed to do so. On 26th May 2008 Garda McCarthy met with Sergeant O’Connell and Sergeant Thomas Miller and was asked for a full report addressing a number of matters, including why the injured party withdrew her complaint and why no investigation file was submitted. Garda McCarthy was afforded the remainder of his tour of duty that day to submit the report. He duly did so.

4.32 On 29th May 2008 Sergeant O’Connell completed a report in which he recommended that the matter be fully investigated in accordance with the Garda Síochána (Discipline) Regulations 2007 to establish if any breaches of discipline should be preferred against Garda McCarthy. That ended his involvement with the matter. It was addressed to the superintendent, Bailieboro (who at that time was Superintendent Cunningham) and was forwarded on his behalf by Inspector P.J. McMorrow to the Chief Superintendent Cavan / Monaghan. Superintendent Michael Clancy for the Chief Superintendent forwarded it to Assistant Commissioner Catherine Clancy, Human Resource Management, whose consent was required to commence disciplinary action in respect of probationary gardaí.

4.33 Both the Garda Síochána Code and HQ Directive 37/99 provide that:
Under no circumstances shall a disciplinary investigation be commenced concerning a Probationer Garda without the prior consent of Assistant Commissioner, Human Resource Management who shall consider the matter in light of the Garda Síochána (Admissions and Appointments) Regulations, 1988 before proceeding with any disciplinary action.

4.34 On 23rd July 2008 consent was given to initiate disciplinary proceedings in relation to Garda McCarthy’s handling of the incident at Kingscourt on 25th February 2007. The letter was signed by Chief Superintendent Grogan over the name Catherine Clancy, Assistant Commissioner, and on her behalf. The letter gave consent for disciplinary proceedings for “the alleged neglect of duty”.

4.35 The original request for authorisation was in respect of two possible breaches of discipline, the first being that Garda McCarthy “failed to conduct a proper investigation into the alleged offences thereby neglecting his duty as a Professional member of An Garda Síochána” and the second being to establish “if he acted in a corrupt and improper manner in approaching the injured party with an offer of compensation on behalf of one of the suspects on the condition that she would withdraw her complaint.” However, the authorisation for an inquiry into the latter was accidentally omitted from the letter of consent.

4.36 On 1st September 2008 Chief Superintendent Rooney appointed Superintendent Karl Heller, Carrickmacross, as deciding officer in the disciplinary proceedings involving Garda McCarthy.

4.37 The inquiry concerned possible breaches of discipline by Garda McCarthy as follows:

(1) The member concerned, failed to fully and expeditiously complete an investigation into a series of alleged incidents which occurred on the 30th May 2007 [sic] at Kingscourt, Co. Cavan arising from a statement of complaint made to you by Ms Lorraine Brown,[sic] Lough An Lea, Kingscourt, Co. Cavan and which were recorded on Pulse Incident 3831541.

The circumstances outlined above may amount to the Breach of Discipline “Neglect of Duty’s” [sic] provided for at Article 4 of the Schedule of Regulations.
(2) You, the member concerned acted in a corrupt or improper manner in approaching the injured party with an offer of compensation on behalf of one of the suspects on the condition that she would withdraw her complaint.

The circumstances outlined above may amount to the breach of Discipline “Discreditable Conduct” as provided for at Article 1 of the Schedule to the Regulations.

4.38 The matters above could arguably amount to one, two, three or four breaches of discipline: (1) neglect of duty, (2) acting in a corrupt manner, (3) acting in an improper manner, or (4) discreditable conduct.

4.39 The disciplinary inquiry as set out above was seriously flawed.

4.40 Firstly, there was no authority to conduct a disciplinary inquiry other than into a possible neglect of duty. Both HQ Directive 37/99 and provision 10.28 (2) of An Garda Síochána Code expressly require the prior consent of the Assistant Commissioner, Human Resource Management, to any disciplinary proceedings against a probationer garda and state that under no circumstances should proceedings commence in the absence of that consent. The Assistant Commissioner, Human Resource Management, is required to consider the decision to allow disciplinary proceedings under the Garda Síochána (Admissions and Appointments) Regulations 1988. Such proceedings could have serious ramifications for a probationer, and must be considered in light of the regulations. Sergeant O’Connell was aware of that and quoted from HQ Directive 37/99 in his report recommending an investigation as to whether disciplinary proceedings should be commenced.

4.41 The consent granted and signed by Chief Superintendent Grogan on behalf of Assistant Commissioner Clancy, Human Resource Management, states that “[p]ermission is hereby granted to initiate disciplinary proceedings in respect of Probationer Garda Fearghal McCarthy for the alleged neglect of duty”. That was the only matter for which disciplinary proceedings were authorised.

4.42 Article 4 of the schedule to the 2007 regulations defines neglect of duty as follows:

\[\text{neglect of duty, that is to say, without good and sufficient cause –}

\[\text{failing or neglecting –}\]
(i) properly to account for any money or property received by him or her in his or her capacity as a member, or

(ii) promptly to carry out any lawful order or to do any other thing which it is his or her duty to do, or

(b) doing anything mentioned in subparagraph (a)(ii) in a negligent manner.

4.43 Chief Superintendent Grogan accepted that an authorisation for an inquiry into an allegation of corruption or improper conduct was not included in the consent letter. He stated that this was an accidental omission.

4.44 Chief Superintendent Rooney maintained that it is “completely wrong” and “not correct at all” to interpret the authorisation as being restricted to an inquiry into an alleged neglect of duty and that it should be interpreted as the authorisation for disciplinary proceedings without limit in that sense. He said “[t]hat is my experience and my knowledge of the commissioner’s policy.” Chief Superintendent Rooney was asked the following: “the permission, as you understood it in that sense, was to get to the bottom of it, whatever it was?” His response was: “[a]bsolutely. All issues connected with or touching on that incident on the night in Kingscourt or what later transpired in Bailieboro to be dealt with.”

4.45 The commission cannot accept the contention that the authorisation issued by Assistant Commissioner Clancy should be interpreted as permitting an investigation into matters other than neglect of duty. To so interpret the letter would require the commission to disregard the clear and unambiguous wording of the authorisation itself, and to interpret it instead on the basis of Chief Superintendent Rooney’s understanding of the commissioner’s policy. The letter of authorisation alone, and not the commissioner’s policy, or Chief Superintendent Rooney’s understanding of it, provided authority for the disciplinary inquiry. It has been submitted that neither Chief Superintendent Grogan nor the Assistant Commissioner had “the power to circumscribe the statutory power of the divisional officer under the 2007 Regulations”. It is unnecessary to consider this other that to state that there was no authorisation to proceed with the inquiry actually embarked on and it would be incorrect to interpret the authorisation as an authorisation at large to cover it. Indeed,
the implication in the letter of authorisation is that any other charges were not authorised.

4.46 Consequently, in the absence of the authorisation that was a prerequisite for the holding of such an inquiry, Superintendent Heller had no authority to conduct an investigation into the allegations of acting in a corrupt or improper manner or into an allegation of discreditable conduct.

4.47 The second criticism also concerns the allegation that Garda McCarthy acted in a “corrupt or improper manner in approaching the injured party with an offer of compensation on behalf of one of the suspects on the condition that she would withdraw her complaint” that “may amount to a breach of discipline “Discreditable Conduct” as provided for at Article 1 of the Schedule”.

4.48 “Corrupt practice” and “improper practice” are separate breaches of discipline provided for at article 7 of the schedule to the 1989 regulations, and at article 8 of the schedule to the 2007 regulations, which is phrased in identical terms.

4.49 Both of the breaches are listed together as ‘corrupt or improper conduct’.

4.50 The 2005 version of An Garda Síochána Code deals specifically with this issue in relation to the 1989 regulations. At paragraph 10.10 (3) the following is stated:

When entering particulars of breaches of discipline alleged against a member on the Discipline Form B30 in accordance with Regulation 10(2)(b) the Appointing Officer should not put breaches in the alternative. Cases where this arises are “Corrupt or Improper Practice” and “Falsehood and Prevarication”. The Appointing Officer should decide exactly what the breach is, i.e., whether it is “Corrupt” or is it “Improper Practice” that should be preferred against the member concerned and word the breach accordingly, e.g. “Improper Practice, that is to say”, etc. The same applies to “Falsehood or Prevarication” – both words should not be used in the same breach as this leads to ambiguity and vagueness and is contrary to the term “precise nature” which is required by the Regulations and Code instructions. Apart from the name of the breach, there are also alternatives contained in the description of the name of the breaches in the schedule to the Regulations. For example “Discreditable Conduct” is described as “conducting oneself in a manner

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which the member knows or ought to know would be prejudicial to discipline or reasonably likely to bring discredit on An Garda Síochána”. The Appointing Officer should decide which of the alternatives described in the description refer most suitably.

4.51 HQ Directive 159/08 deals with disciplinary procedures under the 2007 regulations in a similar fashion. Paragraph 1.10 (3) states:

A number of breaches of discipline contain alternatives, such as ‘Corrupt or Improper Practice’ and ‘Falsehood or Prevarication’. It should be decided exactly what the breach of discipline is i.e. whether it is ‘Corrupt’ or ‘Improper Practice’ that should be preferred against the member concerned and the breach should be worded accordingly, e.g. ‘Improper practice, that is to say, etc’. The same applies to ‘Falsehood or Prevarication’ – both words should not be used in the same breach as this leads to ambiguity and vagueness and is contrary to the term ‘precise nature’ which is required by the Regulations.

4.52 At the time the Form I.A.(L.) 11 in respect of this disciplinary investigation was drafted, there were no directly applicable guidelines in place governing the correct formula for an allegation of corrupt or improper practice. HQ Directive 159/08, Notes on Disciplinary Procedures under the Garda Síochána (Discipline) Regulations 2007, is dated 3rd September 2008, two days after Chief Superintendent Rooney issued the Form I.A.(L.) 11 in respect of Garda McCarthy. Neither were the previously applicable provisions in force when the form was signed, because the 1989 regulations had been repealed. However, in circumstances where the breaches of discipline were identical in both the 1989 and 2007 regulations, and although neither set of guidelines were operative on that particular day, it would have been the prudent, sensible and logical approach to follow paragraph 10.10 (3) of the Garda Code, if there was a concern as to the form the alleged breach should take. Had the divisional officer been aware of the provisions contained in paragraph 10.10 (3) of the Garda Code 2005 (even though they were no longer operative) Garda McCarthy would not have had to face a disciplinary inquiry in relation to alleged corruption, but only one for improper conduct. It is clear that these are separate breaches of discipline and
should not be alleged together. Chief Superintendent Rooney accepted responsibility for the form of the breaches.

4.53 Unfortunately, Chief Superintendent Rooney, the most senior member of the gardaí in the division, was not aware of the contents of those guidelines. He believed joining ‘corrupt’ or ‘improper’ was “the format the breach had to take” even though he was of the view that “[w]ithout any shadow of doubt the question of corruption did not come into [his] thought process either appointing Superintendent Heller [to conduct his inquiry] or subsequent to the decision Superintendent Heller made.”

4.54 Sergeant O’Connell recommended an investigation as to whether disciplinary proceedings should be commenced for alleged neglect of duty, but, in addition he stated that “[i]t also needs to be established if he acted in a corrupt or improper manner in approaching the injured party with an offer of compensation on behalf of one of the suspects on the condition that she would withdraw her complaint.” At the time he did not consider that there was any prima facie evidence of corruption. He thought that, at most, there was the possibility of improper conduct. He, too, was of the erroneous view that corrupt and improper conduct were inextricably linked in the regulations. Sergeant O’Connell did not recommend a disciplinary investigation into the possibility of an alleged breach of article 1, namely “discreditable conduct”.

4.55 All parties involved with the disciplinary proceedings believed that the second alleged breach was one of “acting in a corrupt or improper manner”. The commission heard no evidence that “discreditable conduct” was considered at any time.

4.56 A passage in the report of Garda McCarthy to Superintendent Heller dated 19th September 2008, in the disciplinary inquiry, reads as follows:

I totally deny any allegation of corruption. I merely passed on a message from one party to another. In my estimation the charge of corruption is possibly the most serious charge that could be levelled against a [g]arda. I am deeply disappointed that my character has been called in question like this. I absolutely deny that I in any way acted in a corrupt manner, nor would I ever do.

4.57 It is wrong that Garda McCarthy should have faced such an inquiry into an allegation of corruption. Neither Sergeant O’Connell, who merely recommended that the matter
should be investigated, nor Chief Superintendent Rooney, who was responsible for the form of the alleged breaches, considered that Garda McCarthy had a case to answer on that allegation. It is also wrong that he faced such proceedings on the basis of a misconception of the appropriate formulation of the allegation.

4.58 A third criticism of the disciplinary inquiry is that the allegation of corruption and the allegation of improper conduct, which are separate breaches of discipline under article 8 of the relevant regulations, were wrongly taken together. The commission notes that the actual wording was “*acting in a corrupt or improper manner*”. In addition they were alleged to amount to a possible breach of discipline “*discreditable conduct*” as provided for at article 1 of the schedule to the regulations. There was, however, no authorisation for an inquiry into “*discreditable conduct*”. The commission heard no evidence whatsoever of an inquiry into “*discreditable conduct*”.

4.59 It is unclear whether, in addition to an allegation of neglect of duty, Garda McCarthy had to answer the following allegations: (a) an allegation of corruption, (b) an allegation of improper conduct, or (c) an allegation of discreditable conduct, arising from proof of the allegations (a) and / or (b). The Form I.A.(L.) 11 in this case may be characterised as a mish-mash of allegations of corruption, improper conduct and discreditable conduct. The commission cannot see any justification for so framing the alleged breach / breaches, especially when what was intended was that he answer firstly for neglect of duty and secondly for improper conduct.

4.60 An Garda Síochána Code gives specific guidance on drafting an alleged breach of discipline of “*Discreditable Conduct*”, see paragraph 4.50 above. HQ Directive No. 159/08 provides similar guidance at paragraph 1.10 (4).

4.61 Apart from the errors set out above the legality of initiating any disciplinary proceedings against Garda McCarthy is very doubtful.

4.62 The Garda Síochána (Discipline) Regulations 2007 commenced on 1st June 2007 and replaced the 1989 regulations. HQ Directive 159/08 deals with disciplinary procedures under the 2007 regulations. Regulation 13 of the 2007 regulations is a transitional provision and provides that “*any proceedings in relation to a member under the Garda Síochána (Discipline) Regulations 1989 (S.I. No. 94 of 1989) which
were commenced but not concluded before the commencement of these regulations may be continued as if these regulations had not been made.”

4.63 Garda McCarthy’s disciplinary investigation was conducted under the 2007 regulations as the investigation into his actions did not commence until September 2008.

4.64 The transitional provision contained in the 2007 regulations provides that only disciplinary proceedings that were already in existence at the time of the introduction of the 2007 regulations would continue under the 1989 regulations. However, the proceedings in respect of Garda McCarthy were not in being at the commencement of the 2007 regulations. The transitional provisions contained in those regulations only provided for the continuance of proceedings that had already been commenced under the 1989 regulations. Therefore they were not applicable in this case. Accordingly, it seems that there was no legal basis upon which the disciplinary proceedings could have commenced, see McGowan v. Commissioner of An Garda Síochána1.

4.65 Garda McCarthy could not properly be the subject of proceedings under the 1989 regulations, which had been repealed. Neither should he have faced a disciplinary inquiry under the 2007 regulations, as those regulations were not in existence at the time of the alleged breaches of discipline, see McGrath v. Commissioner of An Garda Síochána.2 This has been remedied in the Garda Síochána (Discipline) (Amendment) Regulations 2011 (SI No 620 of 2011).

Superintendent Heller’s inquiry

4.66 On 12th September 2008 Superintendent Heller spoke with Ms. Browne, but he did not take a formal statement from her. There is a note appended to his report of the disciplinary investigation dated 12th September 2008 which records what are described as “comments of Ms. Brennan”. The commission accepts that this name was used in error and that the comments were those of Ms. Browne. Those comments are listed as five bullet points as follows:

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2 McGrath v. Commissioner of An Garda Síochána (Unreported, Supreme Court, Finlay C.J., 26th January 1993)
- Garda McCarthy was polite and courteous
- Took statements early
- Disappointed no arrest was made on the night
- He was good with follow up, spoke to me after three weeks
- I got no real sense of completion

4.67 In a covering letter dated 26th February 2009 to Chief Superintendent Terry McGinn, Superintendent Heller asks her to note an amendment on the final page of the file which contains the comments of Ms. Browne. In that copy the word “completion” has been amended by hand to read “corruption” and the amendment is initialled. The comment as amended reads: “I got no sense of corruption”. The commission has no doubt that “corruption” was the word intended, indeed it is contained in the original note provided to the commission.

4.68 In a report dated 19th September 2008 to Superintendent Heller, Garda McCarthy outlined his involvement in the incident at Kingscourt on 25th February 2007. Garda McCarthy was interviewed by Superintendent Heller at Carrickmacross garda station on 19th September 2008. There is a signed record of that interview. In it Garda McCarthy said that “if an arrest was feasible I would arrest. I would also complete a full file with the parties identified, statements for direction from Sergeant”. He went on to say “this was an error on my part - I have learned from this experience. I have learned the need to keep on top of all my files and complete investigations. I have started to submit a preliminary report”.

4.69 Sergeant Miller was not Garda McCarthy’s unit sergeant at the time of the incident, but became so in July 2007. He provided a report dated 19th September 2008 in which he indicated that Garda McCarthy had dealt with the incident in the most practical manner possible at the time because an arrest was not feasible in the circumstances. He stated that Garda McCarthy may have erred in failing to follow up properly with the preparation of the file. He pointed out that Garda McCarthy was a very junior member of the gardaí at the time of the incident. Sergeant Miller considered that there was no attempt by Garda McCarthy to pervert the course of justice or to act in any way improperly. He thought that Garda McCarthy was very hard working and
sometimes had the highest returns in the station. Moreover “[h]e followed up all the incidents diligently and any requests that were made of him were completed as efficiently as possible”. Sergeant Miller reported that he would not associate Garda McCarthy with “any inappropriate behaviour or intent towards the public” as a garda, and he considered “any issue in relation to this incident is as a result of inexperience and not any impropriety”.

4.70 Sergeant Kevin Gavigan also furnished a report to Superintendent Heller dated 19th September 2008. He wrote:

I wish to state that I find Garda McCarthy to be a diligent and hardworking Garda. His quality of work and his work return since his return off sick leave, is very good for a member of his service.

In the course of his duties he is handling monies for Firearms Fees, Warrants etc. He deals with all these matters in a proper and professional manner. There was never any suggestion of him misappropriating monies coming into his possession in the course of his duty.

I do not believe there was corrupt, or inappropriate intent in his dealings with this case. I have spoken to him on issues raised and I know that he has learned a huge lesson from this incident and that there will not be a reoccurrence of this practice.

4.71 Superintendent Heller’s findings in his report dated 26th September 2008 were as follows:

I have determined that no breach of discipline is disclosed by this probationer. While the probationer Garda erred, I believe it was not with any malice in the case of alleged breach of No 2 and in the case of alleged breach No 1 it was as a consequence of poor assessment of his duties at an early stage of his career, that is while on Phase 4, the aptly termed ‘deep experimental [sic] learning phase’.

4.72 Superintendent Heller explained his decision that Garda McCarthy’s failure to complete the report was a consequence of “poor assessment of his duties” rather than neglect of duty, as follows:
...my attention was drawn to an expression within the schedule, within the discipline regulations in that breach where it sets out the words ‘without good and sufficient cause’. Bearing that in mind, judge, I weighted the probationer Garda’s inexperience and his junior service as being a good and sufficient cause in my mind to find him not culpable.

4.73 That finding in relation to “neglect of duty” was charitable, especially in view of Garda McCarthy’s admission that he had not completed a full file in relation to the incident, although he had thought he had done so. However, it was within Superintendent Heller’s remit to make such a determination.

4.74 In relation to the second alleged breach Superintendent Heller stated:

    I did consider in the second breach very strongly the views of the victim and I also considered the reports made to me by the probationer garda and by the two Sergeants. With all that in mind, judge, I could find no evidence to support an allegation of corruption and accordingly in that breach I also found no breach. I couldn’t find him culpable, judge, in that breach either.

4.75 This determination was entirely correct. There was not a scintilla of evidence of corruption, and any determination other than the one actually made, would have been perverse. It is clear from his evidence, and indeed from the finding itself, that Superintendent Heller actively considered the allegation of corruption. However, it is less clear that he considered fully the alleged “improper conduct”.

4.76 The investigation of Superintendent Heller was not particularly thorough. There is no evidence that the circumstances of the transfer of money were explored in any depth by him. In addition he made his findings without sight of the statement of Ms. Browne, but any criticism on that basis has to be considered in light of the fact that he knew that Ms. Browne felt “no sense of corruption”.

4.77 Superintendent Heller did not explore with Garda McCarthy the level of guidance or assistance sought, or received, from his unit sergeant in relation to the investigation. That might have been a useful exercise in determining the outcome of the inquiry. However, that omission is explained by Superintendent Heller’s understanding of his terms of reference. Those terms, however, did not preclude such an inquiry.
On 6th October 2008 Chief Superintendent Rooney sent two copies of Superintendent Heller’s file to the Assistant Commissioner, Human Resource Management. That letter contains the following paragraphs:

On examining the file of Superintendent Heller, I find it difficult to understand the conclusions arrived at by the Deciding Officer in relation to the alleged breach bearing in mind the evidence of the member concerned.

I intend to address the unacceptable practise [sic] of facilitating the Civil resolution of a Criminal issue by members of an Garda Síochána as is evidenced in the investigation.

I am issuing a directive on the matter to the Divisional Force.

Chief Superintendent Rooney explained in evidence that he intended in the letter to refer to both the neglect of duty and the corrupt or improper conduct. This is curious in view of the fact that the very next paragraph in the letter refers to “the Civil resolution of a Criminal issue”, which could only refer to alleged breach number two, namely corrupt or improper conduct.

A few days later, Chief Superintendent Rooney issued a timely, clear and strongly worded directive to the district officers in the Cavan / Monaghan Division. It read as follows:

I have become aware of a number of disturbing instances recently in this Division where members of An Garda Síochána appear to have facilitated a Civil Resolution of a Criminal issues [sic]. As a result of this the injured parties have withdrawn their complaint, a criminal investigation did not proceed or criminal proceedings were not instituted.

This is contrary to good policing practice and will be discontinued forthwith.

In future, when a member of the [p]ublic makes a complaint alleging the commission of a crime, a statement of complaint should be taken in the first instance. If time or circumstances do not permit this to happen, a memo of this complaint should be recorded. The matter should be immediately recorded on Pulse if the commission of an alleged crime is determined in all circumstances.
Such a crime should then be fully investigated. An early statement should be taken, if not already recorded from the injured party and any witnesses. Where an injured party subsequently declines to make a statement or withdraws a statement of complaint, consideration should be given to the issue of waste of police time.

During the course of investigation into crime, members of An Garda Síochána should not engage in any negotiation between injured parties and suspects on the payment of compensation. The issue of compensation is an issue entirely for any alleged culprit in his approach to addressing his wrongdoing and should in no circumstances be conditional on any actions as to likely proceedings arising except in the explicit circumstances set down in relation to the Juveniles [sic] Diversion Programme.

4.81 Chief Superintendent Rooney directed district officers and supervisors to take every opportunity to address members on this issue on an ongoing basis.

4.82 In the directive Chief Superintendent Rooney, although he rightly characterised the facilitating of civil resolution of criminal issues as “contrary to good policing practice”, did not characterise it as “improper conduct”, still less corrupt conduct. However, he told the commission that, as far as he is concerned, improper conduct and actions “contrary to good policing practice” are one and the same thing. Although it is clear that improper conduct would be contrary to good policing practice, not every act contrary to good policing practice would amount to improper conduct.

4.83 The conduct of Garda McCarthy, a junior, inexperienced probationer garda, in his first public order investigation, was imprudent, ill-advised and very naive. However, although clearly contrary to good policing practice, it was certainly not corrupt.

The Byrne / McGinn report

4.84 On 2nd May 2008, a written complaint by Sergeant McCabe was received at the office of the Assistant Commissioner, Human Resource Management, of An Garda Síochána. On foot of that complaint, on 13th May 2008, Chief Superintendent Terry McGinn was appointed to investigate all matters contained in that complaint.
4.85 The complaint about the incident under examination in this chapter was not among the allegations in that document. It was first made to the confidential recipient on 14th October 2008. It was also contained in the document, “Brief Proven Facts Pertaining to my Complaint” received by Chief Superintendent McGinn and Assistant Commissioner Byrne on the 14th January 2009. The relevant complaint is that there was a failure to investigate the incident involving Ms. Browne and the manner in which the investigation was terminated by the complaint being withdrawn.

4.86 Chief Superintendent McGinn wrote on three occasions to Cavan / Monaghan Division requesting the investigation file relating to Ms. Browne’s case. Superintendent Cunningham replied to the effect that there was no file. Chief Superintendent McGinn obtained Superintendent Heller’s file, which contained, amongst other items, the incomplete report that Garda McCarthy had furnished to the Heller disciplinary investigation, and the reports to that investigation by Sergeant Miller and Sergeant Gavigan. She was also in possession of the notes made by Superintendent Heller, and had spoken to him.

4.87 Chief Superintendent McGinn was aware that a statement of complaint had been taken from Ms. Browne. However, because of her unsuccessful attempts to obtain the investigation file, she mistakenly considered that it was no longer available to her. She now realises that, in fact, it was available. The following exchange occurred:

Q. If you felt the need to see it, it would have been possible for you to get it?

A. At that stage, yes.

Q. And it would have been very easy to get it by dint of phone call or request?

A. If I felt I needed it, yes, I could make a phone call again to try and follow up.

4.88 Assistant Commissioner Derek Byrne candidly discussed the failure to obtain the statement of Ms. Browne. His evidence to the commission was as follows:

Q. It must have occurred to somebody of that rank, Superintendent, Chief Superintendent or your rank, Assistant Commissioner, to simply ask the question: Where is or did this lady make a statement?
A. If I am asked now, honestly, judge, I am really disappointed that I didn't ask for that statement myself, I have no difficulty, I am really disappointed I didn't ask for that statement, I have no issue with that at all. It probably seems basic now. I accepted the evidence that was presented to me, I never challenged it, I never questioned it, the Superintendent had interviewed Ms. Browne, he had asked her a number of questions, she gave a number of answers, which I think are captured in five salient points, he asked the Garda what he would do about it and nowhere in that file does it mention false imprisonment or hijacking or sexual assault. The mistake I made, I accepted everything that was done, and really for me personally I am disappointed I didn't look for the statement.

Q. With your own actions in relation to it, is it?

A. I am disappointed that I didn't look for the statement.

4.89 Both Assistant Commissioner Byrne and Chief Superintendent McGinn stated that their view of the matter would not have changed, even if they had seen the statement of Ms. Browne.

4.90 The findings of the Byrne / McGinn report in relation to this incident are contained under the heading “Observations/Action Required”, and read as follows:

A copy of the investigation file in relation to the investigation carried out into the incident on the bus was sought from Superintendent, Bailieboro, but no file appears to have been compiled in this matter. A statement of complaint was taken from Ms. Browne by Garda McCarthy but this was not submitted by way of an investigation file to the [s]uperintendent, Bailieboro.

A copy of the file in relation to the internal investigation carried out into the complaint made by Ms. Browne has been obtained from Superintendent Karl Heller, Carrickmacross. This file has been examined and is filed in the Incident Room. Superintendent Heller determined that no breach of discipline was disclosed in this matter. There is no new evidence which would justify another disciplinary investigation.
H.Q. Directive 6/06 (Appendix 11), clearly states that Gardaí have not got the authority to organise compensation in respect of victims of crime. This incident is recorded on PULSE (I.D. 3831541) as a Public Order incident and shows that the statement of complaint has been withdrawn by the injured party.

Sergeant McCabe’s assertion that the incident involved false imprisonment and sexual assault is a gross exaggeration of the facts and bears little resemblance to the available evidence.

While the investigation was shabby and the investigating member took a short cut in accepting the compensation route, this aspect has already been investigated by Superintendent Heller and a determination made in which circumstances no further disciplinary proceedings are appropriate or warranted.

4.91 The assessment in the Byrne / McGinn report of the incident under review in this chapter was unfortunately made without sight of Ms. Browne’s statement, which could be regarded as a core document. It was available to the authors of the report, had the matter been pursued further. It was not followed up because of a mistaken, though genuinely held, belief that it was no longer available. In circumstances where that document was not examined the assessment was unlikely to inspire confidence in the quality of the examination of the complaint of Sergeant McCabe.

4.92 The Byrne / McGinn report was incorrect insofar as it stated that the disciplinary proceedings against Garda McCarthy were initiated on foot of a complaint to GSOC. Chief Superintendent McGinn mistakenly thought that a complaint had gone to GSOC and that GSOC had sent the matter back to the commissioner who thought the matter should be the subject of an unsupervised investigation under the provisions of section 94 of the Garda Síochána Act 2005. However, the disciplinary proceedings were actually as a result of an authorisation issued by the Assistant Commissioner, Human Resource Management. This error is inconsequential.

4.93 The Byrne / McGinn report stated that the question of compensating Ms. Browne arose while Garda McCarthy was interviewing Mr. A. The impression is mistakenly conveyed that a greater level of investigation was carried out by Garda McCarthy than
was actually the case. The Byrne / McGinn report did, however, describe Garda McCarthy’s investigation as “shabby”. The suspect in this case was not questioned about the offence. At a time when Garda McCarthy intended to take a cautioned statement from one of the suspects the issue of compensation came up. Even though it was apparent that the suspect was accepting responsibility for some of his actions no cautioned statement was taken from him. This might have caused problems if Ms. Browne had not agreed to accept an apology and compensation.

4.94 Ms. Browne stated “and when the girl was getting off, the biggest lad grabbed her arse. Her boyfriend turned around and said ‘how dare you mate’”. This is prima facie evidence of a sexual assault. Chief Superintendent McGinn said “I don’t see evidence of a sexual assault in the absence of the person who suffered the sexual assault.” In the absence of identifying the victim and taking a statement from her, a successful prosecution was hardly possible. However, it is doubtful that the failure to investigate an assault on the sole basis that the victim was not yet located or had yet to make a complaint would be justified. Garda McCarthy told the commission that “[t]o even take it to an investigation I need a complainant... I can’t investigate something unless I have the complaint of it... I need the person to come forward with a complaint to me.”

4.95 Chief Superintendent McGinn rightly pointed out that the complaint to the confidential recipient referred to sexual harassment rather than sexual assault. That is true, but there is no doubt that the complaint made by Sergeant McCabe in the document “Brief Proven Facts Pertaining to my complaint” specifically refers to, amongst other things, sexual assault.

4.96 Assistant Commissioner Byrne agreed that there was evidence of a sexual assault, although he stood over the finding that “Sergeant McCabe’s assertion that the incident involved false imprisonment and sexual assault is a gross exaggeration of the facts and bears little resemblance to the available evidence.” Chief Superintendent McGinn agreed with Assistant Commissioner Byrne save for the use of the word “gross”. Sergeant McCabe’s assertion that the incident involved an alleged sexual assault was not exaggerated; it was quite correct.

4.97 Sergeant McCabe’s assertion that the incident involved “false imprisonment” was shared by Sergeant O’Connell in his report dated 29th May 2008 where he stated that
Ms. Browne, in her statement, alleged a number of offences including, “public order, sexual assault, false imprisonment and assault”. This report was not furnished to the Byrne / McGinn investigation. Assistant Commissioner Byrne and Chief Superintendent McGinn formed a different view than Sergeant McCabe as to false imprisonment and they were clearly entitled to do so. However, it is unduly harsh to say of Sergeant McCabe’s description of the incident that it was a “gross exaggeration of the facts and bears little resemblance to the available evidence.” The Byrne / McGinn investigation relied on the file provided by Superintendent Heller which did not contain a detailed account of the incident. In addition, Ms. Browne’s statement had not been seen. In those circumstances the finding referred to above is surprising.

Conclusion

4.98 Ms. Browne underwent a harrowing experience and was entitled to have the matter dealt with competently and professionally by the gardaí. Unfortunately, as is evident from the findings of the commission set out above her legitimate expectations in this regard were not met.
Chapter 5  Lakeside Manor Hotel Assault.

The investigation by An Garda Síochána of an assault at the Lakeside Manor Hotel, Virginia, Co. Cavan on 14th April 2007

The facts

5.1 On the night of 13th April 2007 Mr. Charles McMahon of Virginia, Co. Cavan attended a nightclub at the Lakeside Manor Hotel, Virginia, Co. Cavan. At about 2:15 am Mr. McMahon went outside the hotel. Shortly afterwards, he was assaulted and suffered facial injuries.

5.2 Following an investigation into the incident by gardaí in Bailieboro, on 11th July 2007 a man was charged with assault causing harm contrary to section 3 of the Non-Fatal Offences against the Person Act 1997.

5.3 On 17th January 2008 in Virginia District Court, the man was acquitted of the charges.

The garda investigation

5.4 On 14th April 2007 Garda Padhraig Naughton received a report of the incident and attended at the scene at 2:55 am accompanied by Garda Conor Rice. Garda Gary McDonnell was also present. Mr. McMahon was already in an ambulance which had been called to the scene. He informed Garda Naughton that he had been assaulted, but he could not identify his assailant.

5.5 Garda Naughton spoke to a number of people present who told him that one Mr. B had assaulted Mr. McMahon outside the nightclub. Garda Naughton and Garda Rice patrolled the area in an unsuccessful search for Mr. B. They then went to the house of Mr. B’s father and spoke to him. He told the gardaí that Mr. B was not home. Despite their efforts, the gardaí were still unable to locate the suspect.

5.6 On a date shortly after the assault, Garda Naughton viewed CCTV footage at the Lakeside Manor Hotel. He did not note the date in his garda notebook.
5.7 On 17\textsuperscript{th} April 2007 Mr. McMahon made a statement to Garda Naughton at Bailieboro garda station. Mr. McMahon stated that prior to the incident he:

...heard some shouting, something about a girlfriend. Then I felt a bang on the side of my head. I don’t remember anything after that. The next thing I remember talking to my sister who was going frantic.

He added that “I can’t say who hit me as I did not see who hit me”.

5.8 On 27\textsuperscript{th} April 2007 a district management meeting of the gardaí was held in Bailieboro, the purpose of which was, among other matters, to review outstanding investigation files. The relevant entry beside “Lakeside Manor Hotel, Burrenrea, Virginia” reads “Assault – suspect not known”.

5.9 No further steps were taken in the investigation by the gardaí until July 2007, and the matter first appeared on the Bailieboro correspondence register on 1\textsuperscript{st} August 2007.

5.10 On 11\textsuperscript{th} July 2007 Mr. B was arrested on suspicion of assault and brought to Bailieboro garda station, where he was detained by the member in charge. He was interviewed twice while in custody, and at 10:24 pm Mr. B was charged with assault causing harm contrary to section 3 of the Non-Fatal Offences against the Person Act 1997. On the same day the PULSE record of the incident was updated by adding Mr. B as the suspected offender. No other person was listed as a suspected offender.

5.11 After Mr. B was charged on 11\textsuperscript{th} July 2007, Garda Naughton wrote a short report addressed to the superintendent, Cavan district. He stated:

\textit{I wish for [Mr. B] to be remanded on his own cash bail to appear at Virginia district court on the 20/09/2007 to give amble [sic] time to prepare a full file. There are a number of other suspected offenders to be questioned in relation to this incident.}

5.12 On 12\textsuperscript{th} July 2007 the case was listed in Virginia District Court where it was adjourned to 20\textsuperscript{th} September 2007. The judge indicated that he would consider whether to accept jurisdiction in the case on the adjourned date, and sought a medical report in respect of the injuries sustained by the victim.
5.13 On 8th August 2007 the solicitor acting for Mr. B wrote to the superintendent for copies of the statements and available video evidence.

5.14 On 13th August 2007 Inspector J. O’Reilly, on behalf of the superintendent, forwarded Garda Naughton’s report of 11th July 2007 from the district office to the sergeant in charge, Bailieboro, for attachment to the investigation file. The letter is date-stamped as being received in the sergeant’s office on 16th August 2007. Sergeant McCabe added a note saying “Full file required. Please” and passed it to the sergeant in charge of Garda Naughton’s unit, Sergeant Pauric Jones. He, in turn, inserted a note to Garda Naughton: “Full investigation file to be forwarded in early course, please.” By mid-August 2007 Garda Naughton’s unit sergeant, the sergeant in charge of his station, and his district officer were all aware of the incident, and the fact that that the investigation was ongoing.

5.15 Mr. McMahon’s facial injuries were not insignificant. In a medical report dated 27th August 2007 from Cavan General Hospital it was stated that there was a possibility that Mr. McMahon had lost consciousness. A graze was noted on the right ear as was swelling and bruising of the right eye area. There were abrasions found on the left side of the face. Swelling of the right cheek and of the upper and lower lip was noted, as well as bruising and grazing of the left shoulder area.

5.16 On 19th September 2007 Garda Naughton arrested Mr. C, who had been present with Mr. B on the night of the assault, and had left the scene with him. He was brought to Bailieboro garda station, where he was detained. In the course of his detention he was interviewed twice. The memo of the first interview records the following:

"Q. Did you throw any punching [sic] or kick Charles Mahon at any stage?"

A. No.

The following exchange also took place between Garda Naughton and Mr. C:

"Q. There is CCTV footage which show’s you striking Charles – what do you say to that?"

A. I didn’t strike him."
The man was released without charge. He was subsequently the main prosecution witness at the trial.

5.17 By letter dated 19th September 2007 Garda Naughton brought Superintendent Clancy up to date with the investigation. He enclosed twelve documents, including a witness statement of Mr. McMahon, a statement of evidence of Garda Naughton himself, copies of two memos of interview in respect of both Mr. B and Mr. C, a copy of the medical report, and photographs of Mr. McMahon’s injuries. The report of Garda Naughton stated that Mr. C was arrested on 19th August 2007 in relation to this incident, and that while in custody, he had stated that he had seen Mr. B strike a “number of blow [sic] to the head” of Charles McMahon. Garda Naughton’s statement of evidence was attached to this report.

5.18 On 20th September 2007 the judge accepted jurisdiction in the case of Mr. B, and the matter was listed for hearing on 15th November 2007. The note of the proceedings of 20th September 2007 included the following remarks:

Investigation file should be completed without delay - statements of Garda Naughton and members involved in interviews should be attached to file... Afterwards to Defence Order of Judge.

5.19 On 21st September 2007 the solicitor for Mr. B wrote to the superintendent seeking copy statements and all evidence, including video evidence, prior to the hearing date, and he referred to the order of the judge in that regard.

5.20 On 7th November 2007 Garda Naughton furnished an updated investigation file addressed to the superintendent, Bailieboro. His own statement of evidence was included in the file. It contained a note regarding the non-retrieval of the CCTV footage:

Footage cannot be downloaded due to fault with CCTV system at lakeside manor. Footage observed by Garda Naughton shows Mr [B] go out of view with injured party. Footages [sic] shows only partial view of incident where a scuffle takes place but unable to make out what actually occurred.

5.21 Statements of gardaí involved in the detention and interview of Mr. B were also appended to the report. There were no statements of evidence from the civilian
witnesses, other than the memorandum of interview with Mr. C and the statement of the victim, attached to the report.

5.22 On 10th November 2007 the report, addressed to the superintendent, was forwarded by Sergeant Anthony Quinn, to the sergeant in charge, Bailieboro, Sergeant McCabe, with the covering note “All statements/memos included.”

5.23 On 13th November 2007 two days before the hearing, Sergeant McCabe submitted a report to the superintendent outlining ten matters to be addressed in the investigation file. These were:

1. Video footage: During questioning of the suspects the video footage was referred to. It must be produced and where is it?

2. [A person] should be interviewed as a witness and asked what evidence she can give.

3. [A person] should also be interviewed.

4. [A person] and [a person] must be interviewed in view of the fact that the suspect involved is alleging serious offences being carried out on both these women.

5. Have the two friends of Charles McMahon been identified and interviewed?

6. [A person] should also be interviewed.

7. [A person] should also be interviewed.

8. The bouncers referred to on file especially the one referred to as “[deleted]” must be interviewed as requested by the Suspect during interview.

9. Has [Mr. C]’s mother been interviewed in relation to the events after the disco?

10. Has it been verified that the defendant did in fact ring Bailieboro Garda Station on the morning in question as he states?

5.24 There is a handwritten note indicating that the matter was to be adjourned by agreement for two months. The matter was, in fact, adjourned to 3rd December 2007.
On 15\textsuperscript{th} November 2007 the same date as the matter was listed in court, Sergeant McCabe wrote to Superintendent Clancy stating that “\textit{defects were discovered}” in the file and “\textit{it is lucky that we were not embarrassed in court}”. He expressed the view that:

\begin{quote}
The lack of investigation carried out in the case can only be one of two things:

• Neglect of duty or

• Inexperienced.
\end{quote}

\textit{Forwarded for your views please}

A number of statements from other witnesses were then obtained and included in the investigation file. They are dated as follows: 20\textsuperscript{th} November 2007, 23\textsuperscript{rd} November 2007, 24\textsuperscript{th} November 2007, and 26\textsuperscript{th} November 2007.

On 27\textsuperscript{th} November 2007 Superintendent Clancy replied to Sergeant McCabe, agreeing that the investigation had not been satisfactorily completed. He noted that Sergeant McCabe had “\textit{addressed these deficiencies to the investigating member for urgent attention}”. He rightly stated that:

\begin{quote}
This was a very serious incident. It is listed for contested hearing peremptory against the State. I presume that all the enquiries have now been completed...
Please arrange a conference in my office attended by the investigating members and yourself. I want to ensure that all outstanding matters [sic] are tidied up before hearing date to avoid further embarrassment.
\end{quote}

That meeting took place at 5:30 pm on 28\textsuperscript{th} November 2007, and both Sergeant McCabe and Garda Naughton were present. Superintendent Clancy made a handwritten record at this meeting. It contains the note: “\textit{Saw the CCTV}” and later “[Mr. B] and Charles McMahon exchange of words. All moved around the corner. Could not see them on CCTV”. It is also recorded “\textit{CCTV saved on hard drive}”.

At this meeting, Garda Naughton gave an account of his handling of the investigation. Garda Naughton informed Superintendent Clancy that he had viewed CCTV footage at the Lakeside Manor Hotel, but that he was experiencing difficulties in obtaining it.
He was of the view that it was not technically possible to download it from the computer hard drive retained by the Lakeside Manor Hotel.

5.30 Superintendent Clancy directed that the CCTV evidence be obtained. He asked Sergeant McCabe to help Garda Naughton by arranging technical assistance from the communications office in Monaghan in order to download the CCTV footage. Superintendent Clancy also directed that five named potential witnesses be interviewed, and that a further statement be made by Garda Naughton. He directed Garda Naughton to complete the file without delay. He told Garda Naughton that it was totally unacceptable that the investigation at this stage would not have reached a stage of completion.

5.31 Three statements were taken on 28th November 2007. The following day a statement was taken from another witness and Garda Naughton made an additional statement. He contacted the communications office in Monaghan and “would have been told” that it was not possible to download the CCTV. However, he could not remember the name of the garda to whom he had spoken, or whether that garda had gone to the hotel to attempt to download the CCTV footage of the incident.

5.32 On 29th November 2007 an employee of the alarm company which had installed the CCTV system at the hotel made a statement about the CCTV footage in which he said that it was no longer stored on the hard drive. On the same day a second conference was held which was attended by Superintendent Clancy, Garda Naughton, and Sergeant McCabe. In his report on the same date to Superintendent Clancy, Garda Naughton noted the position regarding CCTV:

Footage cannot be downloaded due to fault with cctv [sic] system at lakeside manor. Technical assistance was supplied by installers of CCTV but were unable to download Footage. Footage observed by Garda Naughton shows Mr [B] go out of view with injured party. Footages [sic] shows only partial view of incident where a scuffle takes place but unable to make out what actually occurred.

He also stated in his statement of 29th November 2011:

I enlist [sic] the help of radio workshop to try to enable me to download the incident but to no avail. I also contacted the installers of the CCTV system at
Superintendent Clancy reprimanded Garda Naughton for the delay in completing the investigation. Garda Naughton accepted that he had made mistakes and had learnt from the experience. Superintendent Clancy told the commission that he gave Garda Naughton “an old fashioned telling off”. He did not invoke garda disciplinary regulations but gave an informal warning as to his future conduct. He spoke to Garda Naughton about the importance of completing files on time and informed him that he was not going to report him for disciplinary investigation on this occasion. However, he warned him about his future performance.

By letter dated 29th November 2007 the statements of Mr. McMahon and the relevant gardaí, the memorandums of interview of Mr. B and Mr. C, as well as the medical report on Mr. Mc Mahon, were furnished to the solicitor for Mr. B. The custody record of Mr. B was also provided. On the following day nine further statements were sent to the solicitor.

By letter dated 30th November 2007 the solicitor acknowledged receipt of the documents and indicated that he would apply for an adjournment of the case because of the large number of statements which had been furnished to him. He sought consent to this adjournment. It is clear that the solicitor was aware of the absence of CCTV footage, and that he also knew that Garda Naughton had told Mr. C that he had been seen on the CCTV striking Mr. McMahon. The letter stated:

...there is a reference in memo one of the interview with [Mr. C], at page 7 thereof, of CCTV footage which shows [Mr. C] striking Charles McMahon.

We have not been furnished with such CCTV footage and therefore hereby request you to furnish same to us at this time. (Original emphasis.)

In such circumstances that such [sic] CCTV is not available we must inform the Judge of this fact and put you on notice that we shall be making a submission to the effect that this case cannot proceed on the basis that there is a real likelihood that our client [Mr. C] will not get a fair trial in the absence of such CCTV being made available.
5.36 There is a handwritten note on this letter: “17/1/07 [sic] for hearing. CCTV be furnished”.

5.37 When the matter was listed in court on 3rd December 2007, the matter of the CCTV footage was raised by the solicitor for Mr. B. A note by Inspector McMorrow records that:

*CCTV footage to be released to defence before next hearing. Issue of non-availability of CCTV raised by defence solicitor, particularly footage which revealed [Mr. C] striking Charles McMahon – does this exist.*

Under the printed heading “Following matters require attention” the words “CCTV footage” are noted. There is a note addressed to the unit sergeant, unit D at the bottom of the return: “Have Gda Naughton clarify the issue of the CCTV. Did he witness [Mr. C] strike Charles McMahon on CCTV.”

5.38 The senior members of An Garda Síochána were now aware that the assertion by Garda Naughton that Mr. C was seen striking Mr. McMahon on CCTV was likely to feature in the case and that the absence of that CCTV footage was also likely to be raised. By letter dated 4th December 2007, the solicitor for Mr. B wrote to the superintendent noting the matter had been adjourned peremptorily against the state until 17th January 2008. The solicitor asked that the CCTV footage be furnished within fourteen days as per the order of the District Court Judge.

5.39 The gardaí were unsure how to deal with the consistent pressure to produce the CCTV footage. On 8th January 2008 Sergeant Michael Sheridan wrote to the superintendent, Bailieboro: “Supt – See reply re CCTV footage. What reply do we send to Sols”.

5.40 By letter dated 14th January 2008, Superintendent Clancy wrote to the solicitor for Mr. B regarding the CCTV:

*The Gardai have been unable to download the CCTV footage due to technical difficulties. As a consequence, the prosecution will be unable to introduce CCTV evidence. In these circumstances, the prosecution is unable to release to the defence footage which it does not have.*
Garda Naughton, investigating member, was able to view the CCTV at the Lakeside Manor [Hotel] shortly after the incident while it was on the system. Unfortunately this footage is no longer available.

5.41 On 16th January 2008 Garda Naughton took a statement from the person who operated the CCTV system at the Lakeside Manor Hotel. In it he stated that:

I remember viewing footage of the incident of the 14th April 2007. I first viewed the footage with Garda McDonnell. I was unable to download the footage on this occasion. I also viewed the footage with Garda Naughton on a separate occasion again there was a problem with the system. I was unable to download the incident onto the CD. This is an ongoing problem.

His evidence to the commission was to like effect.

5.42 The case was heard on 17th January 2008. Superintendent Noel Cunningham who prosecuted the case made a note of what happened in court. The note records the determination of the judge as follows:

District Judge cannot relay [sic] on the evidence of [Mr. C]. I believe [Mr. C] did strike McMahon. Therefore I must come to conclusion that both enterprise of [Mr. B] and [Mr. C] to assault innocent party McMahon. The jury is out as to whether or not there was glass on the ground. The stewards are clear that no glass allowed out of premises. In the absence of their suspicion that glass was on the ground that contributed to his injuries, he may also have been kicked as injuries concur with this conclusion. The only evidence State can depend upon is [Mr. C] whom I am not happy with. The evidence is contrary to what he said after caution.

I am disappointed that CCTV was not retrieved and sent out message that in – public interest and interest of victims CCTV must be retained up to 6 months.

Court must invoke the law. But you have put clear case against [Mr. C], [Mr. B] and possibly Hotel.

If I had evidence other than co-accused evidence. I would give 12 months but evidence is lacking.
Comment Garda that he should answer questions more direct. CCTV did or did not state [sic] McMahon.

Therefore must dismiss the charge but in civil action he has a case against [Mr. C], [Mr. B] and Hotel were he was in [sic] legal invitee.

Findings on investigation

5.43 The investigation started well. On the night of the assault Garda Naughton spoke to the injured party and witnesses. He identified the names of Mr. B and Mr. C as potential assailants, and ascertained that they had left the scene. He made significant efforts to locate them. He showed considerable determination and energy in discharging these duties. Garda Naughton acknowledged that “the investigation was poorly put together on my behalf... I didn’t do a good job on it and I accept that.”

5.44 The following are some of the defects in the investigation:

- From 27\textsuperscript{th} April 2007 to 11\textsuperscript{th} July 2007, no material steps were taken in the investigation;

- Relevant notes pertaining to the investigation were not adequately recorded, in Garda Naughton’s notebook or elsewhere;

- A number of witnesses were not interviewed until November 2007;

- The video footage from the Lakeside Manor Hotel, and the hard drive which contained it, were not secured. Garda Naughton observed the CCTV shortly after the date of the assault but he was unable to download the footage at that time. However, he could have taken possession of the hard drive, which action would have prevented the footage being deleted. He could have sought the assistance of the communications officer in Monaghan at the time to help with the retrieval the CCTV footage;

- In the course of an interview with Mr. C, Garda Naughton told him that he had been seen on CCTV footage striking the injured party. This was untrue. It was a ruse in order to advance the investigation. Established investigation
standards applied within An Garda Síochána, provide that tactics aimed at obtaining a confession by use of a false pretence or trick should be avoided by members investigating crimes. Even without such guidance, it should have been clear this course of action was wrong. Garda Naughton is now aware that it was inappropriate. He told the commission that:

“In hindsight and with experience now I realise I should never have asked him that question. The reason I asked him that question was because I wanted to know if he had been involved in assaulting him”.

The inappropriate assertion of Garda Naughton made in the course of the interview with Mr. C was damaging to the prosecution. It affected the credibility of Mr. C, who was the main garda witness. It also resulted in Garda Naughton being unable to satisfactorily answer questions about what he had seen on the CCTV footage. He was the subject of criticism by the judge who commented on his failure to answer questions directly.

Sergeant McCabe’s complaints

5.45 On 13th November 2007 Sergeant McCabe had identified no less than ten matters in the investigation that still had to be dealt with.

5.46 Two days later, on 15th November 2007, Sergeant McCabe wrote to the superintendent, Bailieboro, stating that “defects were discovered” in the file and “it is lucky that we were not embarrassed in court”. He expressed the view that:

The lack of investigation carried out in the case can only be one of two things:

- Neglect of duty or

- Inexperienced.

Forwarded for your views please

5.47 Sergeant McCabe made a complaint to the confidential recipient, Mr. Brian McCarthy. On 14th October 2008, he passed it to Commissioner Fachtna Murphy. The complaint included a reference to the investigation of the assault at the Lakeside Manor Hotel:
An assault case involving a Mr Charles McMahon was dismissed by the District Court in Virginia on 2nd December 2007 allegedly because of inadequate investigation by the investigating Garda.

(Sergeant McCabe is mistaken as to the date; in fact the case was dismissed on 17th January 2008.) On 28th October 2008 Assistant Commissioner Byrne was asked to investigate the complaint received from the confidential recipient.

5.48 On 15th October 2008 Sergeant McCabe provided a statement to Chief Superintendent McGinn who had been appointed to investigate Sergeant McCabe’s complaints under the bullying and harassment procedure. With regard to the case under review in the present chapter, he stated that “[t]he injured party in this case was never contacted by the Gardai for us to explain our behaviour and the manner of the non investigation of his complaint”. He referred to the lack of investigation of the complaint and stated that the “disturbing manner of interviewing was appalling”.

5.49 Complaints relating to this investigation also featured in a document entitled “Brief Proven Facts Pertaining to my Complaint” given to Chief Superintendent McGinn by Sergeant McCabe in January 2009. There he complained, amongst other things, of “[a]llowing certain members to go unaccountable and unsupervised”. He complained of the “lack of standards, accountability, duty to public and management support”. He made a specific complaint that garda management “allowed disturbing practices and crime investigations”.

5.50 In a further letter to the confidential recipient dated 23rd January 2012 Sergeant McCabe said:

A Serious matter were [sic] reported to Superintendent Clancy in writing involving a case of assault causing harm with serious injuries where potential witnesses were never interviewed, criminal conduct by Gardai in the investigation and no evidence against the person charged with the assault. He ignored what was reported to him and praised the Garda in question. When the case came to trial [the district judge] devoured the Garda in question in the witness box, and told the injured party that he had to dismiss the case due to the behaviour of the Garda. Superintendent Clancy took no sanctions against the Garda.
5.51 The commission is satisfied that there was no evidence of crime by Garda Naughton, and the allegation of criminality was withdrawn.

5.52 In his statement of 28th April 2008 given to the Byrne / McGinn investigation, Sergeant McCabe furnished examples of what he considered to be evidence of low standards in Bailieboro. Regarding the assault at the Lakeside Manor Hotel, his complaint contained the following specific allegations:

- Superintendent Clancy failed or refused to assist Sergeant McCabe in the issues and problems in Bailieboro;
- No investigation was carried out at all in the assault of Mr. McMahon;
- Eight witnesses were not interviewed or no witnesses were interviewed;
- A disturbing procedure was carried out. (This complaint is unfortunately couched in vague terms which had the consequences referred to in paragraph 5.64 -5.65 below);
- Superintendent Clancy informed Garda Naughton that he would not be disciplined;
- No sanction was handed to Garda Naughton for “total neglect” of duty that left an injured party with no satisfactory outcome.

5.53 The commission’s findings in respect of the complaints made by Sergeant McCabe on the 28th April 2008 are as follows:

- It is incorrect to state that Superintendent Clancy failed or refused to assist Sergeant McCabe in the issues and problems in the investigation under review. Superintendent Clancy provided appropriate guidance in the investigation to Garda Naughton, and together with Sergeant McCabe, made significant efforts to try and salvage the case. He directed Garda Naughton to deal with matters that had been identified by Sergeant McCabe as the deficiencies in the investigation. He identified the weakness caused by the absence of CCTV footage of the incident, and tried to have that matter addressed in advance of the trial. Superintendent Clancy acted professionally in dealing with the concerns of Sergeant McCabe about this case.
• It was inaccurate of Sergeant McCabe to assert that “no investigation whatsoever” was carried out into the assault. In fact an investigation had commenced on the night of the offence and further steps were also taken, details of some of which have been set out in paragraphs 5.4 to 5.8 above.

• There was indeed a failure by Garda Naughton to interview eight relevant witnesses. Presumably that is what Sergeant McCabe intended to convey in his complaint. However, prior to the hearing of the case and following the intervention of Sergeant McCabe and Superintendent Clancy, statements were taken from these persons. When interviewed, it was clear that the witnesses did not see the actual assault.

• It is quite incorrect to say that no witnesses were interviewed at all. In fact a large number of witness statements were taken, albeit not in a timely manner.

• It is true that Superintendent Clancy did not invoke any formal disciplinary process in respect of Garda Naughton. He considered that Garda Naughton fully appreciated his shortcomings in the investigation. Superintendent Clancy reprimanded him severely and warned him that if there was a repeat of his conduct a formal disciplinary inquiry would be invoked. In his own words, Superintendent Clancy stated that “I gave an old fashioned telling off, I was the manager and he was the guy that was meant to do the work.” The approach adopted by Superintendent Clancy in this case was not only open to him, but it was also quite appropriate, based on his knowledge at the time. It is not correct to say that Superintendent Clancy “ignored what was reported to him.”

• The assertion that there were “[n]o sanctions for non investigation of assault case” is only correct in the sense that there were no formal sanctions imposed on Garda Naughton. As has already been stated, he was reprimanded, and warned informally. Moreover, in circumstances where Sergeant McCabe himself was of the view that the deficiencies in the investigation by Garda Naughton could be attributable to the fact that he was “[i]nexperienced”, rather than in “neglect of duty”, he cannot, really, fault Superintendent Clancy for acting as he did. Sergeant McCabe’s complaints in that regard are not justified.
- Sergeant McCabe’s complaints about “the disturbing procedure” used by Garda Naughton are justified. The approach adopted by Garda Naughton at the interview of Mr. C was inappropriate, as has been set out in paragraph 5.44 above. However, it was not mentioned at the meeting of 27th or 28th November 2007. At the time when Superintendent Clancy informally reprimanded Garda Naughton he was not aware of what Sergeant McCabe termed the “disturbing procedure”, namely the inappropriate manner in which Garda Naughton dealt with Mr. C at interview. That aspect of the case first came to light in the letter from the solicitor for Mr. B dated 30th November 2007, and later in the court note to the unit sergeant on 3rd December 2007. It is regrettable that nobody pursued the matter with Garda Naughton.

**Supervision by unit sergeants**

5.54 Garda Naughton was an inexperienced garda. He had two years’ experience in total (including his probationary period). He had full police powers for a period of approximately one year only. In the matter under review he was not adequately supervised. The fact that Garda Naughton had at least three different unit sergeants from April 2007 to September 2007 may partially explain this lack of supervision. There was no supervision by his direct supervisors regarding the retention of the CCTV footage, the interviewing of witnesses, or the interviewing of Mr. C. It was Sergeant McCabe who identified the deficiencies in the investigation.

5.55 Sergeant Philip Fyfe gave evidence that from May 2007 until his retirement in September of that year he was Garda Naughton’s unit sergeant. Sergeant Fyfe stated that “he had no hand, act or part” in the investigation. In a subsequent written submission, however, he informed the commission that this evidence was mistaken, and that he was not Garda Naughton’s unit sergeant. Garda Naughton believed that he may have had four or five unit sergeants during this investigation, but could not recall with any certainty.

5.56 Sergeant Pauric Jones became Garda Naughton’s unit sergeant on 17th July 2007. He remained in that position until 11th September 2007. He had been newly promoted to the position and this was his first time acting as a unit sergeant. He does not recall Garda Naughton bringing the difficulties of the CCTV footage to his attention. He did
not identify any deficiencies in the investigation, or provide any guidance or direction to Garda Naughton. He did not at any stage see the investigation file, which was not prepared until after his departure. His only involvement was to request, on 13th August 2007, that Garda Naughton forward the investigation file. It would be unduly harsh to criticise him, because he was Garda Naughton’s unit sergeant for a very short period - less than two months.

5.57 Sergeant Quinn was transferred to Bailieboro on 11th September 2007 having being newly promoted on 22nd August 2007. He was the unit sergeant responsible for unit D. He did not read the investigation file or provide any guidance or direction to Garda Naughton regarding the securing of CCTV or the interviewing of witnesses. At some time between 23rd December 2007 and 5th January 2008, Sergeant Quinn spoke to Garda Naughton and ascertained that the CCTV footage of the incident had not been secured. He was also aware of the deception employed by Garda Naughton in his interview with Mr. C. He knew from correspondence of 30th November 2007 that the solicitor for Mr. B, was alive to this issue. Sergeant Quinn frankly and helpfully accepted in his evidence to the commission that he should have involved himself in the investigation, that as the unit sergeant he should have identified the deficiencies and attempted to remedy these.

5.58 A unit sergeant is required by the Garda Code to provide guidance and support to the members of his or her unit. The appropriate guidance cannot be given where the unit sergeant is not aware of what incidents are being investigated by the gardaí in the unit. It is not sufficient that problems are addressed only where specifically brought to the sergeant’s attention by the members of the unit.

5.59 In the matter under review, Garda Naughton was left without the guidance or direction to which he was entitled.
The Byrne / McGinn report

5.60 In the course of its investigation of Sergeant McCabe’s complaints regarding the assault on Charles McMahon, the Byrne / McGinn investigation took statements from the following members of An Garda Síochána: Superintendent Noel Cunningham, Superintendent Michael Clancy, Superintendent Maura Lernihan, and Sergeant Maurice McCabe. Surprisingly, no statement was taken from Garda Naughton.

5.61 In the matter under consideration in this chapter, the Byrne / McGinn report concluded that:

* A copy of the investigation file in relation to the investigation carried out into the alleged assault on Mr McMahon was obtained from the Superintendent, Bailieboro. The charge against [Mr. B] was dismissed at Virginia District Court on the 17th January, 2008.

* The original investigation carried out by Garda Padhraig [sic] Naughton, Bailieboro, was not carried out in a timely and professional manner. There were delays in interviewing witnesses which required explanation. These matters were highlighted by Sergeant McCabe to Superintendent Clancy when he reported that the shortcomings were either ‘neglect of duty or Inexperience’ [sic] by the junior investigating member.

* Superintendent Clancy considered Sergeant McCabe’s report and believed that the junior members’ inexperience gave rise to the problems as stated. As a result, he verbally and informally cautioned the member and informed him that in the event of a repetition he would be subject to a disciplinary investigation. Sergeant McCabe was advised accordingly and he in turn agreed to monitor Garda Naughton’s future progress.

* It appears that Sergeant McCabe was not in Court on the date in question and his assertion that the Judge criticised Garda Naughton’s investigation was inaccurate. In fact, the lack of the availability of the C.C.T.V. evidence in Court and the fact that evidence of the main prosecution witness was unreliable caused the case to be dismissed.
This incident is recorded on PULSE (I.D 3936265) as Assault Causing Harm which is updated to reflect the true position. No further action is required in this case.

5.62 Sergeant McCabe’s complaints were not adequately addressed in the Byrne / McGinn report for reasons dealt with hereafter.

5.63 The report states that:

There were delays in interviewing witnesses which required explanation. These matters were highlighted by Sergeant McCabe to Superintendent Clancy who believed that the shortcomings were either ‘neglect of duty or Inexperience’ by the junior investigating member.

5.64 The most serious breach of proper garda practice was in the questioning of Mr. C, when Garda Naughton falsely told him that he had seen CCTV footage of him striking the injured party. It was an unacceptable method of investigation. Sergeant McCabe had said that the “disturbing manner of interviewing was appalling”. The Byrne / McGinn report does not engage with this matter at all. This was a significant omission. And, the report merely contains the rather bland formula: “[t]he original investigation carried out by Garda Padhraig Naughton, Bailieboro, was not carried out in a timely and professional manner.” This fails to convey the actual deficiencies in the investigation. There is no finding on Sergeant McCabe’s criticism of the interview conducted by Garda Naughton.

5.65 However, this unfortunate omission can be explained. Although the commission considers that the phrase “disturbing manner of interviewing was appalling” was an obvious reference to the inappropriate conduct of Garda Naughton at the interview, Chief Superintendent McGinn took a different view. She told the commission:

“I don’t accept that what Sergeant McCabe was saying to me in his complaints that the issue was the wrong--- when he described about the interviewing process being appalling. I don’t think he was actually talking about Garda Naughton’s putting the question. I think my understanding, rightly or wrongly, was that the CCTV was not available. If I did not make the jump to the fact that it was the incorrect question to put well that was my mistake”.

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She later said that the improper mode of questioning “...wasn’t on my radar at that time. Even thought I was aware of it, I was putting it down to the non-availability of CCTV as opposed to the trick question”. The commission accepts that such a view was genuinely held by Chief Superintendent McGinn. There had been a large number of complaints.

There is no evidence that Sergeant McCabe was asked what he was specifically referring to, in the many interviews with him. The nature of his complaint could have been readily ascertained on this matter. As acknowledged by Assistant Commission Byrne in his evidence before the commission:

“Q: It would have been quite simple to phone Sergeant McCabe and say what do you mean by this?

‘A: Yes absolutely, that is correct’

The Byrne / McGinn report described Sergeant McCabe’s “assertion that the Judge criticised Garda Naughton’s investigation” as being “inaccurate”. In fact, the judge criticised the absence of CCTV evidence, which was clearly as a result of Garda Naughton’s failure to secure it, and was therefore a criticism of the investigation itself. The solicitor for Mr. B told the commission that the judge did criticise the investigation regarding the timing of the taking of statements, specifically some statements being taken months after the assault. The Byrne / McGinn investigation was not aware of this. While they may not have been expected to interview Mr B’s solicitor, they should have interviewed Garda Naughton. If they had done so, they may have been in a position to confirm Sergeant McCabe’s description of the judge’s criticism. However, Chief Superintendent McGinn had possession of Inspector Cunningham’s contemporaneous note of what had transpired at court. She “didn’t see any issue for Garda Naughton about what happened in court” and said, “... I don’t think he did anything wrong.” In those circumstances she told the commission that she “didn’t have a reason to interview Garda Naughton”. The Byrne / McGinn report correctly stated that the evidence of the main prosecution witness, Mr. C, was unreliable, and this was also a reason for the dismissal of the case. The issue of Mr. C’s credibility was, at least in part, based on the false assertions.
which had been put to him in interview with Garda Naughton. It would have been better had this matter been included in the Byrne / McGinn report.

5.70 The assertions of Sergeant McCabe that the judge “severely criticised and devoured Garda Naughton”, that he ordered Garda Naughton down from the witness box, that he commented on the credibility of the gardaí, and that he apologised to the injured party when stating that he had no option but to dismiss the case because of Garda Naughton, were not dealt with at all in the Byrne / McGinn report. However it would be unfair to criticise it on that account, because the judge’s comments on the case, or Sergeant McCabe’s understanding of those comments, were of only peripheral relevance to his complaints.

Conclusion

5.71 The investigation of this incident was characterised by delay and error. Garda Naughton received virtually no guidance from his supervisory sergeants as to how to further the investigation. He made mistakes and his manner of interviewing Mr. C was inappropriate. The solicitor for Mr. B in cross-examination quite properly used this material to undermine the prosecution case. Sergeant McCabe correctly identified the deficiencies in the investigation and the steps necessary to rectify them. Superintendent Clancy also reacted appropriately and provided guidance in an attempt to salvage the prosecution.
Chapter 6  Two Incidents Involving Mr. Jerry McGrath.

The investigation by An Garda Síochána of two incidents in 2007 involving Jerry McGrath, i.e. the assault on Mary Lynch near Virginia, Co. Cavan on 30th April 2007 and the abduction of a child during the burglary of a house in Tipperary on 9th October 2007, and the management and coordination by An Garda Síochána of those investigations, in particular in relation to the question of bail.

The facts

6.1 On Friday 7th December 2007 Ms. Sylvia Roche Kelly, together with her sister and a friend, went to Limerick city to celebrate her birthday. Late that night Ms. Roche Kelly met Mr. Jerry McGrath of Cashel, Co. Tipperary, in a night club. He had earlier booked a room in a hotel in Limerick.

6.2 In the early hours of 8th December 2007 Ms. Roche Kelly accompanied Mr. McGrath to his hotel room. There, he murdered her.

6.3 On 12th December 2007 Mr. McGrath was charged with the murder of Ms. Roche Kelly, and on 12th January 2009 at the Central Criminal Court, having pleaded guilty to that charge, he was sentenced to life imprisonment.

6.4 At the time he committed the murder, Mr. McGrath was on bail for a serious offence involving a child in Tipperary.

6.5 At the time of the offence in Tipperary and the subsequent murder of Ms. Roche Kelly, Mr. McGrath was also on bail on charges arising out of a serious incident where he assaulted a woman taxi driver in Virginia, Co. Cavan on 30th April 2007.

The Virginia investigation

6.6 In the early hours of 30th April 2007 Ms. Lynch was working as a taxi driver in Kells, Co. Meath. At around 2:15 am she was approached by Mr. McGrath. He asked her if she would take him to Virginia, Co. Cavan and she agreed to do so. On the directions
of Mr. McGrath she drove to a relatively isolated location. Ms. Lynch stopped at a house in the area indicated by Mr. McGrath. He got out of the taxi and then perpetrated a serious assault on Ms. Lynch. The details of the assault are described at paragraph 6.19 below. Following the assault, Mr. McGrath got back into the car and Ms. Lynch drove to Virginia where she waited until the arrival of her husband and the gardaí, who had been alerted to the incident by her.

6.7 Ms. Lynch was met in Virginia by Garda Padraig McEvoy and Sergeant Phillip Fyfe at approximately 3:30 am. Ms. Lynch pointed out the man who had assaulted her to the gardaí. He identified himself as Jerry McGrath of Cashel, Co. Tipperary.

6.8 Garda McEvoy cautioned Mr. McGrath and arrested him for an offence contrary to section 3 of the Non-Fatal Offences against the Person Act 1997.

6.9 Ms. Lynch attended the emergency department of Our Lady’s Hospital in Navan at 4:30 am on 30th April 2007. A medical report was subsequently prepared on 22nd June 2007 by Dr. Leandre Powys. Ms. Lynch’s injuries included bruising to the left eye and puncture marks to the shoulder. In addition, clumps of her hair had been pulled out.

6.10 Mr. McGrath was brought to Bailieboro garda station by Garda McEvoy and Sergeant Fyfe. At 4:03 am he was detained by Garda Thomasina Connolly, the member in charge, under the provisions of the Criminal Justice Act 1984, for the investigation of an assault contrary to section 3 of the Non-Fatal Offences against the Person Act 1997.

6.11 Mr. McGrath was detained until 1:15 pm on 30th April 2007. In the custody record his address is noted as Cashel, Co. Tipperary.

6.12 Mr. McGrath was interviewed twice during his detention. In the first interview, conducted by Garda McEvoy and Sergeant Fyfe, he admitted verbally abusing Ms. Lynch but denied assaulting her. In a second interview conducted by Garda McEvoy and Garda Peter O’Sullivan he admitted that he physically assaulted Ms. Lynch and gave an account of the assault that was broadly consistent with her complaint.
Having been cautioned Mr. McGrath made a statement to Garda McEvoy and Garda O'Sullivan in which he repeated the admissions of assault that he had previously made. Part of that statement reads as follows:

*At this stage I lost it. I grabbed the taxi driver by the hair. I don’t know why I did this, there is a lot of things going on in my life at the moment... I remember kicking the taxi driver on her side it would have been her right side. I don’t know what came over me. I tried to grab the keys from the ignition but all that came away was the key ring, the keys to the car stayed in the ignition. I remember the taxi driver was roaring at me “just go away, I’ll give you money”. I think I kicked her 3 or 4 times. I don’t recollect if I punched her. I think this attack went on for about 3 to 4 minutes and then somehow the situation calmed down. I got into the front of the taxi. The taxi driver said to me “I’ll drop you into Virginia because I don’t know where you live”, she was crying she was very emotionally upset.*

A decision was made to charge Mr. McGrath with assault contrary to section 2 of the Non-Fatal Offences against the Person Act 1997. The commission was told that before a charge sheet could be printed in respect of an offence the PULSE entry relating to the matter had to be “reviewed” by a sergeant. The review function in this instance was performed by Sergeant Thomas Murray. However, as appears to have been the practice, the incident was not reviewed in any meaningful way. Rather, the matter was clicked as reviewed in a superficial sense only. This was to enable the printing of the charge sheet.

At 1:10 pm on 30th April 2007 Mr. McGrath was charged by Garda Padraig McEvoy with the summary offence of assault contrary to section 2 of the Non-Fatal Offences against the Person Act 1997. He was released on station bail in his own bond of €300 to appear at Virginia District Court on 17th May 2007. He acknowledged the bond on a standard form before Garda Seán Daly.

At that time the standard form of station bail did not include a condition to “*observe the peace and to be of good behaviour*”, which is now included in standard bail recognisances. The only condition was to appear in court when required to do so.
The district officer of Bailieboro district on 30\textsuperscript{th} April 2007 was Superintendent Maura Lernihan. She directed the extension of Mr. McGrath’s detention by telephone, as she was not in the station at the relevant time. The extension was directed for a period of a further six hours from the expiration of the first six hours of detention.

The incident was entered on the PULSE system as “assault minor”. The narrative of that entry read: “\textit{i/p (taxi driver) assaulted by passenger while bringing him home, s/o subsequently arrested and detained in station. i/p had bruising on neck, and lower abdomen and black eye. also had some hair pulled out}.”

A formal statement of complaint was taken from Ms. Lynch later on 30\textsuperscript{th} April 2007 at Bailieboro garda station by Garda Connolly, and on 10\textsuperscript{th} May 2007 a statement was taken from her husband, George Lynch. The statement taken from Ms. Lynch runs to over four pages and is a full and detailed account of what happened to her. An excerpt from Ms. Lynch’s statement reads as follows:

\begin{quote}
I tried to drive off and he took the keys out of the ignition. When he took the keys out he start \textit{[sic.] pulling my hair and telling me to get out of the car... I knew if he could get me out of the car I was in very bad danger. He pulled lumps of hair out of my head. He was trying to pull me out of the car but I had my seat belt on he kept telling me to lean forward and I could see that his zip was open. I tried to pull back into the car and he stood back and starting \textit{[sic.] kicking me into my stomach on my right hand side. He was shouting at me all the time verbally abusing me... He had \textit{[sic.] pulling at my T shirt and was biting my shoulder on the flesh.}
\end{quote}

On 17\textsuperscript{th} May 2007 Mr. McGrath appeared before Virginia District Court in relation to the assault on Ms. Lynch. His bail was made subject to further conditions: that he reside at his parents’ address in Co. Tipperary and also that he not interfere with any witnesses in the case. He was remanded on continuing bail to 21\textsuperscript{st} June 2007.

On 21\textsuperscript{st} June 2007 at Virginia District Court, Mr. McGrath was remanded on continuing bail to 20\textsuperscript{th} September 2007, on which date he was further remanded to 18\textsuperscript{th} October 2007.

On 25\textsuperscript{th} September 2007 a file with a covering report was submitted by Garda McEvoy seeking directions on the appropriate charge in respect of Mr. McGrath.
Paragraph 4 of the covering report states that the charge of section 2 assault was preferred against Mr. McGrath “on the direction of the office of the Director of Public Prosecutions.” This was incorrect, as no such direction had been sought or given by the DPP. Garda McEvoy has since explicitly acknowledged this error. He failed to give the commission any plausible explanation for how this error occurred, merely saying, “I can't explain it, it’s just it was an error on my behalf, I typed it in error.”

6.23 All the statements contained in the file were from members of An Garda Síochána, with the exception of the statements of Ms. Lynch and her husband, which were taken early on in the investigation. The medical report of Dr. Powys was also appended to the file submitted to Superintendent Clancy.

6.24 On 3rd October 2007 Superintendent Michael Clancy sent a report to Sergeant Michael Sheridan, who was then the sergeant in charge of unit B in Bailieboro and Garda McEvoy’s unit sergeant. He sought amendments to the file and he requested that the file be returned as soon as possible, “preferably within 2 days”, in order to get directions. This report commended Garda McEvoy for his efforts in preparing the file. In his report Superintendent Clancy made no reference to the apparent delay in submitting the file for directions, although, as the superintendent told the commission the delay was obvious, and was a matter of concern.

6.25 The file was resubmitted and forwarded by Sergeant Sheridan to Superintendent Clancy on 13th October 2007. Sergeant Sheridan recommended that Mr. McGrath be charged with the offence of assault causing harm contrary to section 3 of the Non-Fatal Offences against the Person Act 1997. Superintendent Clancy agreed with that recommendation in his report to the state solicitor on 17th October 2007 and further recommended summary disposal of the matter.

6.26 On 8th November 2007 the DPP, through professional officer Ms. Grainne Glynn, gave directions in relation to the assault on Ms. Lynch. She directed that a charge of assault under section 3 of the Non-Fatal Offences against the Person Act 1997 be preferred, and also a charge of making off without payment of the taxi fare. She directed that the charge under section 2 of Non-Fatal Offences against the Person Act 1997 be withdrawn. She further directed summary disposal of the case only in the event of a plea of guilty. She explained her recommendation by making reference to what she rightly describes as the “savagery of the attack.”
On 12th November 2007 the state solicitor for Co. Cavan, wrote to the district officer at Bailieboro enclosing the DPP’s directions in relation to the assault on Ms. Lynch, and those directions were sent from the district office to the sergeant’s office in Bailieboro on 14th November 2007.

On 15th November 2007, Sergeant Sheridan instructed Garda McEvoy to prefer the two new charges and to withdraw the charge contrary to section 2 of the Non-Fatal Offences against the Person Act 1997 as directed by the DPP when the matter was next before the court. On the same day Sergeant McCabe annotated the Lynch file with a note to Sergeant Sheridan: “For attention of Garda McEvoy. Can you supervise this as Garda McEvoy may need assistance”. In response to the above note Sergeant Sheridan wrote to Garda McEvoy, after outlining the DPP’s directions: “I can assist you in any aspect should you so require.”

On 3rd December 2007, Mr. McGrath appeared before Virginia District Court. Garda McEvoy charged him as directed by the DPP, and withdrew the section 2 assault charge. The judge transferred the cash bail from the charge of assault contrary to section 2 of the Non-Fatal Offences against the Person Act 1997, and ordered that Mr. McGrath be “remanded on continuing bail to 7/01/08”. There was no new application for bail, nor was there any objection to bail. Having considered a medical report on Ms. Lynch, the judge accepted jurisdiction in the matter.

By this time Mr. McGrath was also on bail in relation to charges of burglary and assault contrary to section 3 of the Non-Fatal Offences against the Person Act 1997, arising out of a serious incident in Co. Tipperary on 9th October 2007. This matter will be dealt with in greater detail below. Mr. McGrath had spent a number of weeks in custody on those charges immediately after his arrest. Inspector Patrick McMorrow, who acted as court presenter, standing in for Superintendent Clancy on 3rd December 2007, was not aware of these facts. However, it does appear that the court in Virginia was informed by Superintendent Clancy, at least of the fact that Mr. McGrath was in custody when the Virginia matter was remanded in his absence on 18th October 2007. It is clear from a note on the court file from Sergeant Murray dated 14th October 2007 that Mr. McGrath’s solicitor had informed him of the fact that his client was then in custody. This was confirmed by Sergeant Murray on checking the PULSE system. However, there does not appear to have been any further enquiry into the factual
background of that matter. It appears that Sergeant Murray’s note was not seen by Superintendent Clancy before he submitted the file for directions.

6.31 Superintendent Clancy’s report to the sergeant in charge, Bailieboro, dated 4th December 2007 noted that the accused was remanded on continuing bail to the same court on 7th January 2008 “for mention, to indicate plea or contest”.

6.32 On 8th December 2007, Mr. McGrath murdered Ms. Roche Kelly in Limerick.

6.33 Following the murder of Ms. Roche Kelly, Garda O’Sullivan was appointed liaison officer for Ms. Lynch, the injured party in the Co. Cavan incident. He met with her and her husband on 15th December 2007. Garda O’Sullivan had participated in the second interview with Mr. McGrath in Virginia Garda Station during his detention on 30th April 2007 and was familiar with the case.

6.34 On 16th December 2007, Garda O’Sullivan reported to the sergeant in charge, Bailieboro on his meeting with Ms. Lynch and her husband. This report was forwarded to the superintendent, Bailieboro by Sergeant McCabe, with a note to the effect that it related to an assault on Ms. Lynch by Mr. McGrath. In that report Garda O’Sullivan indicated that he had given her “an undertaking to keep her informed of all developments in relation to her case.” Garda O’Sullivan also confirmed that it was Ms. Lynch’s express desire to be in court when the matter was dealt with.

6.35 Ms. Lynch told the commission that Garda O’Sullivan telephoned her husband George Lynch on 5th January 2008 to inform her that there was no need for her to attend court on 7th January 2008 as the case would not be going ahead on that date.

6.36 In a report dated 8th September 2011 to Mr. Declan Farrell of GSOC, Garda O’Sullivan stated that:

*Sometime after this meeting and before the court hearing date which was fixed for Virginia District on the 7th of January 2008 I received a phone call from Sgt Maurice McCabe. Sgt McCabe directed me to phone Mary Lynch and to inform her that she would not be required in court because her case was not going ahead and that he Sgt McCabe was going to have this case brought before the Circuit Court in Cavan at a later date. I phoned Mary Lynch as directed and informed her not to attend court.*

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In his evidence to the commission, Garda O’Sullivan said:

Sometime after Christmas, but before the court date, I was told by Sgt McCabe – now in that report I wrote that I received a phone call, having thought about that since I made this report to GSOC, that may have been a conversation in Sgt McCabe’s office but the import was still the same. He said to me that he wanted me to ring Mary Lynch to tell her not to go to court because he was going to get her case into the Circuit Court.

Sergeant McCabe emphatically denies directing Garda O’Sullivan to contact Ms. Lynch to tell her not to attend court. In an interview with Mr. Farrell of GSOC on 1st September 2011, Sergeant McCabe said he did not give Garda O’Sullivan any instruction to contact Ms. Lynch as he “would have no reason to”.

The commission accepts the evidence of Sergeant McCabe on this matter. Firstly, in circumstances where he clearly had no power “to get her case into the Circuit Court” it is inherently unlikely that he would tell Garda O’Sullivan to inform Ms. Lynch that he would do so. Secondly, because he had no involvement in the investigation of the offence, it is also unlikely that Sergeant McCabe would have asked Garda O’Sullivan to contact Ms. Lynch. Thirdly, Garda O’Sullivan was unable to give any reason for the change of recollection of what appeared to be an inconsequential matter, over seven years after the event. He was unable to give any context for this change of memory and he had no note of the matter. Although the commission accepts the evidence of Sergeant McCabe on this issue, the attribution of any improper motive to Garda O’Sullivan in respect of his evidence would not be justified on the evidence.

Another aspect of the evidence in the case against Mr. McGrath merits comment. GSOC was concerned, inter alia, with the question of who decided to release Mr. McGrath on bail at the expiration of his period of detention in Bailieboro. Mr. Farrell of GSOC telephoned Garda O’Sullivan about this. Garda O’Sullivan stated that he informed Mr. Farrell that he believed Sergeant McCabe had directed the release of Mr. McGrath. Sergeant McCabe has always vehemently denied any involvement with the release of Jerry McGrath, and when Mr. Farrell contacted him, he stated that he had nothing to do with it. He further stated that he was not in the garda station at the relevant time. Consequently, Mr. Farrell immediately contacted Garda O’Sullivan again and informed him of Sergeant McCabe’s version of events. Garda O’Sullivan
told the commission that in this conversation he accepted Sergeant McCabe’s account. He explained that when he had previously suggested that Sergeant McCabe had directed the release of Mr. McGrath he had been speaking to Mr. Farrell in a “general manner” in respect of how the station operated and further stated, “that is what I presumed or assumed would have happened.” Mr. Farrell’s recollection of the first phone call with Garda O’Sullivan is that Garda O’Sullivan told him that Sergeant McCabe was in charge of the McGrath investigation. Mr. Farrell told the commission that it was possible Garda O’Sullivan misheard or misunderstood his question, and he also stated that in the second phone call Garda O’Sullivan had said that he understood that Mr. Farrell wanted to know who “was in charge of the station.”

6.41 The commission accepts that Sergeant McCabe had no role in the investigation of the offences committed by Mr. McGrath, nor in his detention or release. The suggestion that Sergeant McCabe had, in two separate respects, played a pivotal role in how matters developed was a cause of deep concern to him. Indeed, the fact that GSOC had spoken to him on the basis of information suggesting he was responsible for the release of Mr. McGrath was deeply upsetting to him and led to him recording a subsequent conversation with Garda McEvoy. It cannot be safely said that there was a deliberate attempt to wrongly implicate Sergeant McCabe in the decision to release Jerry McGrath or in the mistaken decision to tell Ms. Lynch that there was no need for her presence in court when the case was disposed of. However, Sergeant McCabe’s fears in that regard, at that time, were perfectly understandable.

6.42 Notwithstanding the fact that Ms. Lynch’s case was listed “for mention to indicate plea or contest”, it was disposed of on 7th January 2008. The solicitor for the accused indicated that her client wished to plead guilty to the offence and the judge decided to deal with the offence on that day. The judge asked Inspector Noel Cunningham, who was court presenter on the day, whether he was in possession of the relevant facts.

6.43 Although the matter was listed for mention, there remained a real possibility that the matter would be disposed of on that day, in the event of a plea of guilty. The following exchange occurred in evidence to the commission by Superintendent Cunningham:

Q. And that in the normal course of events then, if a plea was indicated, it would be dealt with there and then?
A. Yes.

Q. Or if it was particularly complicated or lengthy, it might be let stand in the list; is that right?

A. Rarely, it would often just be dealt with there and then, judge.

6.44 Unfortunately, Ms. Lynch was not present to give evidence, having been told that her presence was not required. Although the absence of Ms. Lynch is unlikely to have had any bearing on the final outcome of the case, she was entitled to be in court at the disposal of the case, and had told the gardaí of her wish to be present.

6.45 Ms. Lynch continues to be sceptical of why she was told her presence was not required and she is not at all satisfied that the case was presented properly in her absence. However, Inspector Cunningham presented the facts fully and competently to the judge. The commission has no doubt that Inspector Cunningham fully emphasised the serious effect of the assault on her. His note taken at the time shows that he informed the court of the “enormous impact of the case on injured party.” Moreover, the judge described the offence, according to the note taken at the time by Inspector Cunningham, as “the worst aggravated assault he had dealt with” and imposed a nine month prison sentence. The maximum penalty for the offence was twelve months and, taking into account a practice of a deduction of one quarter in the event of a plea of guilty, the judge imposed a penalty in the higher range of what was possible. Newspaper accounts of the hearing also make it clear that the matter was taken most seriously by the judge.

6.46 Although under the provisions section 5 of the Criminal Justice Act 1993, the victim had a statutory right to give evidence of the effects of a sexual offence or an offence involving violence or threat of violence, this was not done in the present case. Ms. Lynch suffered a terrifying ordeal, and but for her considerable courage and quite remarkable presence of mind, the consequences might have been considerably worse. She dealt with her ordeal in a most admirable manner. It was regrettable that in those circumstances she was not given the opportunity to address the court.

6.47 The commission has been told the giving of victim impact evidence is quite unusual in the District Court. However, it is not unheard of and indeed the commission was
told about a separate incident where the same judge did hear oral evidence from a victim prior to sentence.

6.48 It was also open to Inspector Cunningham to have asked the judge to put the matter back so that Ms. Lynch could be present, but he did not give this any consideration at the time.

**Deficiencies in the Virginia investigation**

6.49 There were a number of deficiencies in the garda investigation into the assault on Ms. Lynch. These matters will be referred to *seriatim*. They include:

- The inappropriate charge brought against Mr. McGrath in Bailieboro on 30th April 2007;
- The failure to communicate the serious nature of the assault on Ms. Lynch;
- The failure to revisit the question of bail on 3rd December 2007;
- The failure to keep Ms. Lynch informed of developments in the case;
- The failure to ensure Ms. Lynch was in court when the case was disposed of;
- The inordinate delay in furnishing a file to the DPP in Ms. Lynch’s case;
- The furnishing of undated witness statements;
- The failure to supervise Garda McEvoy;
- The lack of proper note taking;
- The failure to check PULSE records and incomplete knowledge of matters relevant to the investigation.

**The inappropriate charge**

6.50 Although Mr. McGrath had been arrested and detained for an offence under section 3 of the Non-Fatal Offences against the Person Act 1997, he was charged with an
offence under section 2 of the Act, and released on cash bail in the sum of €300, in circumstances that gave rise to some disagreement between witnesses at the commission. It was an error of judgment to prefer a charge under section 2 rather than section 3 of the Non-Fatal Offences against the Person Act 1997 in view of what the officer in the office of the DPP later accurately termed “the savagery of the attack.” A charge under section 3 of the Act would have been more appropriate in circumstances where the injured party had suffered bruising and had clumps of hair pulled out, and the victim was advised by the gardaí themselves to go to hospital. Indeed Chief Superintendent Clancy told the commission that he had “no doubt”, once he examined the file, that the appropriate charge to prefer was section 3 of the Non-Fatal Offences against the Person Act 1997. The only scope for debate was whether the charge would be dealt with in the District Court or Circuit Court.

6.51 As a result of the selection of the charge under section 2 of the Non-Fatal Offences against the Person Act 1997, the incident was automatically categorised in the PULSE system as an “assault minor”. The narrative in the PULSE system read as follows: “i/p (taxi driver) assaulted by passenger while bringing him home, s/o subsequently arrested and detained in station. i/p had bruising on neck, and lower abdomen and black eye. also had some hair pulled out.”

6.52 The consequences of preferring the inappropriate charge cannot be ascertained with any degree of certainty. However, firstly, had a charge under section 3 of the Non-Fatal Offences against the Person Act 1997 been preferred, the granting of bail on such a charge, and the terms of bail, if indeed granted at all, could possibly have been subject to more stringent conditions. As an assault contrary to section 2 of the Non-Fatal Offences against the Person Act 1997 is not a “serious offence” within the meaning of the Bail Act 1997, the jurisdiction to refuse bail is limited to where there are objections based on possible interference with witnesses, possible destruction of evidence, or fear of absconding. Secondly and more importantly, had the more serious offence been preferred, it is more likely that this fact would have been drawn to the attention of the judge when the gardaí in Co. Tipperary were objecting to bail for the offences committed there. Such information may have led to a different outcome in the bail application in that case. As the charge was categorised in the PULSE entry as “assault minor”, it did not accurately reflect the ferocity of the attack, although the PULSE narrative did refer to the bruising which Ms. Lynch sustained.
There is some difficulty in establishing who made the decision to prefer a charge under section 2 of the Non-Fatal Offences against the Person Act 1997, rather than the appropriate charge of assault causing harm under section 3 of the same Act.

Garda McEvoy told the commission that he alone was responsible for preferring the charge under section 2 of the Act, and for releasing Mr. McGrath on bail. He said that he did so on his own initiative, and without consulting anybody. The only input by anybody else was by Sergeant Murray, who was required to “review” the charge before it could be printed by the PULSE system. The evidence from Sergeant Murray and Garda McEvoy was that this was a perfunctory action rather than an actual review of the file. He told the commission that this was not an unusual practice.

Superintendent Cunningham’s position was that he had no input into the charging of Mr. McGrath with the offence under section 2 of the Non-Fatal Offences against the Person Act 1997 on 30th April 2007. He told the commission that he was not consulted by Garda McEvoy about the charge and release and was clear that he had no involvement in reviewing the charge before it was printed. Prior to 2013 Superintendent Cunningham believed that his only role in the matter was on the day he presented the evidence before the District Court in January 2008. However, in December 2013 an enquiry from Chief Superintendent Sheridan alerted Superintendent Cunningham to the fact that he may have been acting district officer in Bailieboro on the day Mr McGrath was detained. As a result Superintendent Cunningham secured his desk diary for 2007 and found a note which he said clearly related to this incident. He explained that the note he made on the day, which read “Custody, assault taxi driver admission, €300 bail”, was merely a record of what had happened, and was not a note of any advice that he had given to Garda McEvoy. In fact the note contained an incorrect name, albeit the correct details in respect of the McGrath incident, and Superintendent Cunningham explained that this further demonstrated that the note related to what had already been done by Garda McEvoy, rather than to a discussion as to what he should do in respect of the charge.

Garda O'Sullivan, a much more experienced garda than Garda McEvoy, assisted at the interview of Mr. McGrath, but had no input into the selection of charge. Garda O’Sullivan stated in evidence that he assumed that Garda McEvoy would have gone to his sergeant for advice as to how to proceed. Apart from helping with the interview
Garda O’Sullivan had no further role in the investigation at that stage and was not asked to provide any further assistance.

6.57 On 28th October 2010, following a conversation (referred to above at paragraphs 6.40 – 6.41) with Mr. Farrell of GSOC, Sergeant McCabe rang Garda McEvoy. That conversation was partially recorded, and at the commission Sergeant McCabe produced a transcript of what had been recorded, and a note of his recollection of the unrecorded part of the conversation. Both parties to the conversation accept that the conversation took place as recorded. Superintendent Cunningham was not a party to the conversation.

6.58 Garda McEvoy’s evidence that the decision to charge Mr. McGrath with an offence under section 2 of the Non-Fatal Offences against the Person Act 1997 was his alone, and that he did not discuss other options with anyone is difficult to reconcile with the partially recorded conversation on 28th October 2010. The recording contains the following exchange:

   Maurice – Sorry I’m with you now. What are you saying about Noel?

   Padraic – No, the only person I spoke to that day about that was Noel Cunningham who gave the direction to charge him with a Section 2

   Maurice – Ah very good .very good

   Padraic – Now you see I didn’t mention that to Farrell. I didn’t mention that.

   Maurice – Yeah, that’s no problem.

   Padraic – you see I was trying not to get people involved, you know what I mean.

6.59 Sergeant McCabe has a note of Garda McEvoy stating “it was a cover up for Superintendent Cunningham” at the beginning of this conversation. However, this note was taken one to two weeks after the conversation and is not audio recorded.

6.60 Garda McEvoy initially told the commission that he could not remember the conversation. However, he was given an opportunity to listen to the tape recording, and he did not dispute that the voice recorded on tape was his. He could give no
explanation to the commission for telling Sergeant McCabe that Superintendent Cunningham was responsible for directing a charge contrary to section 2 of the Non-Fatal Offences against the Person Act, 1997 if such were not the case. He merely said “I don’t know why I said it but it’s not correct what I said.” He also denied that he was “covering up”.

6.61 In the recorded conversation, Garda McEvoy explained why he did not mention the involvement of Superintendent Cunningham to Mr. Farrell of GSOC, who was attempting to ascertain the facts surrounding the charging and releasing of Jerry McGrath in Bailieboro station. He also explained to the commission what he meant by the phrase “you see I was trying not to get people involved, you know what I mean”. His explanation was as follows:

I didn’t mention it because I was under the impression that Noel Cunningham wouldn’t remember this, this event happening and dragging him into this and him being asked, does he remember this and him saying: ‘No, I don’t remember it’ and then coming back to me and saying: Well, you said this and he’s saying that.

6.62 This explanation is very difficult to understand. Although the recorded conversation clearly supports the proposition that Garda McEvoy was asserting that Superintendent Cunningham authorised the charge contrary to section 2 of the Non-Fatal Offences against the Person Act, 1997 Garda McEvoy told the commission that Superintendent Cunningham had no part in the decision to prefer the charge under section 2. In answer to counsel for Superintendent Cunningham, Garda McEvoy also rejected any suggestion of “collusion” on this matter. There is no evidence of any collusion between Superintendent Cunningham and Garda McEvoy in the matter.

6.63 In his report dated 25th September 2007 Garda McEvoy stated that the charge under section 2 of the 1997 Act was “on the direction of the office of the Director of Public Prosecutions.” This was not correct as no such direction had been sought from or given by the DPP. Garda McEvoy first told the commission that it was a typographical error but when pressed he said “I can’t explain it, is just it was an error on my behalf, I typed it in error”. The failure to give a satisfactory explanation for such a fundamental error strengthens the inference that Garda McEvoy was concerned
with possible embarrassment caused by preferring the charge contrary to section 2 of the Non-Fatal Offences against the Person Act 1997.

The failure to communicate the serious nature of the assault on Ms. Lynch

6.64 Detective Sergeant John Long was the investigating member in respect of the offences committed by Mr. McGrath in Co. Tipperary. When Detective Sergeant Long became aware that Mr. McGrath was on bail for the offence in Virginia sub district, he took steps to ascertain the nature of the offences. He made two telephone calls, and on the second call managed to speak to somebody connected with the case. Detective Sergeant Long cannot now remember the name of the person with whom he spoke and no note was taken by him of that conversation. His evidence was as follows:

Q. Can you remember whether the person you spoke to was the investigating member of that incident or someone with a first-hand knowledge of it?

A. Somebody with first-hand knowledge. I do not know whether he was the investigating member or not but it was somebody... It was a brief conversation. I was told this was dispute with a taxi driver, an assault, a dispute with a taxi driver.

Q. Were you given any further details about what had happened to the taxi driver?

A. No. And to put some of the blame on myself as well I was investigating the abduction of a 5 year old girl. My mind wasn't ready for a dispute with a taxi driver. If that had been anything to do with a child –

Q. Yes?

A. I would have driven to Cavan basically to find out about it but once I heard this was a dispute with a taxi driver.

6.65 It is clear that the seriousness of the case was not conveyed to Detective Sergeant Long by the unknown person “with first-hand knowledge”. However, from the entry in the PULSE system, and the charge preferred, he considered, not unreasonably, that
it was a minor assault. Nothing in the telephone conversation caused him to alter this impression. Although it is impossible to say what the effect of this lack of communication was, it is likely that, had Detective Sergeant Long been made aware of the gravity of the facts in the Cavan case, he would have so informed the judge at the bail hearing in the Tipperary offences.

The failure to revisit the question of bail on 3rd December 2007

6.66 An opportunity to revisit the question of bail arose on 3rd December 2007 when, pursuant to the directions of the DPP, the charge under section 2 of the Non-Fatal Offences against the Person Act 1997 was withdrawn, and a charge of assault causing harm under section 3 of the same Act was preferred. When the new charge was preferred against Mr. McGrath, the judge remanded the accused on continuing bail, without any objection from the gardaí.

6.67 Superintendent Clancy in his report to GSOC dated 12th September 2011 dealt with the matter as follows:

I understand that there is an issue as to why the judge in Cavan was not informed during the remand hearings prior to conviction for the Cavan crime, that Mr. McGrath was awaiting trial on other charges relating to crimes that occurred elsewhere since the incident on 30th April 2007. It is quite clear that to do so would have been contrary to law and to good professional prosecutorial practice. The accused is entitled to a fair trial for the offence for which he was charged without having his trial Judge prejudiced before the case was heard. In accordance with Court procedure and case law, evidence of character and previous behaviour is given after conviction. This was done in this instance. It is a well established principle that a person awaiting trial while on bail is entitled to the presumption of innocence. In relation to the status of Mr. McGrath’s bail relative to the Cavan charge, the Gardaí had no legal authority to oppose his bail bearing in mind section 2 of the Bail Act 1997.
Superintendent Clancy was not the Court presenter on the 3rd December 2007 and was giving his view in principle on the question of bail. Superintendent Clancy’s statement that “the Gardaí had no legal authority to oppose bail bearing in mind section 2 of the Bail Act 1997,” was only correct in relation to the original charge which was preferred, because an offence under section 2 of the Non-Fatal Offences against the Person Act 1997 (with which Mr. McGrath had first been charged) was not a “serious offence” as defined in the Bail Act 1997. However, the position changed completely on 3rd December 2007 when, pursuant to the directions of the DPP, a charge under section 3 of the Non-Fatal Offences against the Person Act 1997 was preferred. At that juncture, it was open to the gardaí to oppose bail on the new charge, as the charge under section 3 of the Non-Fatal Offences against the Person Act 1997 constituted a “serious offence” for the purposes of section 2 of the Bail Act 1997. Contrary to Superintendent Clancy’s view, it would not have been either “contrary to law” or “to good professional prosecutorial practice” to inform the court of the pending serious charges in Co. Tipperary. Section 2 (2) the Bail Act 1997 specifically states that “a court shall take into account and, where necessary, receive evidence or submissions concerning” amongst other things, “…any other offences in respect of which the accused person is charged and is awaiting trial.”

On 3rd December 2007 it was open to the gardaí to object to bail on the new more serious charge that had been preferred, and it was open to them to inform the court of the offences in respect of which Mr. McGrath had been charged in Co. Tipperary.

The narrative on the PULSE system on the incident in Tipperary reads:

updated- 9/10/07- offender disturbed by injured party at 3.15am. offender had a hold of injured parties 5 yr old daughter around the neck and was leading her downstairs. He was cornered in the kitchen and tackled by the injured party. Garda John Ivers, who lives [nearby], arrived on the scene and arrested the offender on suspicion of burglary. Suspect currently detained at Tipperary garda station and child being medically examined at Waterford Hospital. Scene is being examined by divisional scenes of crime unit and entry seems to have been gained via unlocked rear door. Offender may have had possession of hurley during
Unfortunately, neither Garda McEvoy nor his superiors considered the PULSE narrative at the time when the new charges were preferred in Co. Cavan. Had they done so, it may have led to a reassessment of the question of bail, rather than to acquiescence in the transfer of the existing bail to the new charges. Due to this failure an opportunity was lost to revisit the question of bail.

It is not possible to state what effect the disclosure of the fact that Mr. McGrath was facing serious charges in Tipperary might have had on the judge’s decision concerning bail if it had been brought to his attention. However, it must be borne in mind that Mr. McGrath had honoured the terms of his bail at the time, and that he had no previous convictions. Those factors would undoubtedly have been taken into account by the judge, and it may well be that the bail conditions would not have been altered even had the information about the Tipperary charges been disclosed to the court. However, the failure to apprise themselves of the background to the Tipperary charges resulted in the gardaí failing to address the question of whether there should be an objection to bail.

In 2012, following a GSOC recommendation, Superintendent Gerard Wall was asked to carry out an internal investigation, which will be discussed in more detail later in this chapter. Superintendent Wall told the commission that Mr. McGrath should have been released without charge pending a file being sent to the DPP. There are practical reasons for this approach. Firstly, it is desirable to seek the directions of the DPP rather than preparing a “holding charge”, in order that the appropriate charge is proceeded with from the start. He also considered that this way of proceeding had the added advantage of putting added pressure on the investigating garda to prepare the investigation file without delay for onward transmission to the office of the DPP. There may also be other advantages such as a reduction in unnecessary court appearances. However, had that approach been taken in the matter under consideration, then the application for bail in respect of the Tipperary charges would certainly have taken place without reference to the assault on Ms. Lynch.

It would have been preferable either to charge Mr. McGrath with a assault causing harm contrary to section 3 of the Non-Fatal Offences against the Person Act 1997 in
the first place, or to release him pending a file being sent to the DPP, rather than to charge him with a minor assault contrary to section 2 of the Non-Fatal Offences against the Person Act 1997. That charge resulted in an inappropriate classification of the occurrence as a “minor assault” which could mislead any other member enquiring into the matter.

**The failure to keep Ms. Lynch informed of developments in the case**

6.75 Ms. Lynch told the commission that, on very many occasions after her ordeal, she phoned the gardaí to enquire about the case, but that she was not kept informed as to the progress of the investigation. Garda McEvoy told the commission that it had been agreed with Ms. Lynch that her husband would be the point of contact for gardaí. Garda McEvoy says he phoned Mr. Lynch on at least two occasions, but he cannot recall how many times. He accepted that his contacts related to the case being adjourned and informing Mr. and Ms. Lynch of the next court date, rather than giving them any substantive information about the investigation. He stated that he was not informed by his colleagues of her phone calls to the garda station. Garda McEvoy was responsible for the investigation, but he made no efforts to keep Ms. Lynch informed about the state of the investigation, despite the fact that it should have been quite clear that this was a most traumatic experience for her.

**The failure to ensure Ms. Lynch was in court when the case was disposed of.**

6.76 The circumstances which led to Ms. Lynch not being present in court have been set out above at paragraph 6.42 – 6.48 above. Although the absence of Ms. Lynch is very unlikely to have had any bearing on the outcome of the case, she was very anxious to be present at the disposal of the case. Moreover, she was entitled to be present. The failure on the part of the gardaí to ensure that she was given that opportunity is a matter which still upsets and annoys her many years after the event.

6.77 What happened after the hearing of the assault on Ms. Lynch is also a matter of some dispute. Ms. Lynch states that Inspector Cunningham phoned her and discussed what had happened in court.
Superintendent Cunningham denied that he phoned Ms. Lynch after the matter was disposed of, and said that as he was still presenting cases in court he asked Sergeant Martin Conroy to phone Ms. Lynch on his behalf. Sergeant Conroy corroborated that aspect of Superintendent Cunningham’s account.

It is unnecessary to resolve the conflict of evidence as to who contacted Ms. Lynch following the disposal of the case. There is no doubt that Ms. Lynch was very upset to be told that the case had been disposed of in her absence.

Some days after the hearing Superintendent Clancy and Inspector Cunningham, visited Ms. Lynch at her home. These senior gardaí in the district spent about two hours with her and apologised for the error, as indeed they should have done. The evidence of Chief Superintendent Clancy was that the meeting went quite well and that Ms. Lynch appeared to be satisfied with the explanation given. However, Ms. Lynch considered that the meeting was worthless, although she put it in much stronger terms than that.

Ms. Lynch refused to accept the apology. There were two further visits by Chief Superintendent James Sheridan and Superintendent Thomas Maguire and there was little else the gardaí could do about the matter at that stage.

_The delay in furnishing a file_

Much of the evidence in relation to the ultimate prosecution for the assault on Ms. Lynch was gathered by gardaí by June 2007. However a file was not furnished by Garda McEvoy to Superintendent Clancy until 25th September 2007.

Garda McEvoy explained this delay was due to pressures of work. He stated that he was the only driver on his unit and he was detailed as driver for “every shift” and therefore he had little time to make progress on his files. Unfortunately he did not communicate his problem to his unit sergeant.

Garda McEvoy was in charge of the investigation, but no action was taken by him between June and September 2007. This delay was unsatisfactory and excessive and is not fully explained by the fact that he had driving duties.
The furnishing of undated witness statements

6.85 In this case two undated witness statements were taken by Garda McEvoy which is not an acceptable practice in an investigation.

The failure to supervise Garda McEvoy

6.86 The deficiencies in this investigation could have been avoided had there been adequate supervision of Garda McEvoy. Garda McEvoy did not seek, nor was he given, any assistance from a superior, from the time of the charging of Mr. McGrath to the preferring of new charges following the DPP’s directions in November 2007. It is unfortunate that Garda McEvoy’s ongoing conduct of the investigation was not supervised by a sergeant. Garda McEvoy did not inform his unit sergeant that, due to the rostering of his shifts, he had not sufficient time to make progress on his files.

6.87 None of Garda McEvoy’s unit sergeants took any active role in this investigation. Sergeant Sheridan had no role in the investigation and only arrived in Bailieboro after the file in the case had been sent for directions to Superintendent Clancy. On 3rd October the file was returned through Sergeant Sheridan to Garda McEvoy for amendments and the file was returned to Superintendent Clancy with a recommendation. On the receipt of the directions of the DPP, they were passed on to Garda McEvoy through Sergeant Sheridan with a note appended by Sergeant McCabe – “For the attention of Garda McEvoy. Can you supervise this as Garda McEvoy may need assistance.” Sergeant Sheridan passed on the directions with a note to Garda McEvoy stating, “I can assist you in any matter should you so require.” On 3rd December 2007 Garda McEvoy charged Mr. McGrath, in accordance with the directions of the DPP, and the charge under Section 2 of the Non-Fatal Offences against the Person Act 1997 was withdrawn. No criticism can be levelled against Sergeant Sheridan for his limited actions in this case.

6.88 Superintendent Lernihan did not consider the issue of supervision to any great degree. Her evidence was that she knew that there was a sergeant in the station during the detention of Mr. McGrath and she did not make any further enquiries.
The lack of proper note taking

6.89 There was an unfortunate lack of note taking in this investigation. Garda McEvoy has no notes of his conversations with Ms. Lynch, even though he was the investigating member.

6.90 Detective Sergeant Long did not note the name of the person in Bailieboro station to whom he had spoken about Mr. McGrath and the Ms. Lynch case.

The failure to check PULSE records and incomplete knowledge of matters relevant to the investigation.

6.91 Unfortunately Garda McEvoy was not aware that Mr. McGrath had further charges pending from October 2007 for the Tipperary offences and therefore, he did not bring this important matter to it to the attention of Inspector McMorrow, the court presenter in Virginia. Had he checked the PULSE records he would have been aware of this information.

6.92 Garda McEvoy told the commission that, as a result of his experience in the case of Ms. Lynch, he has altered his practice and now checks the PULSE system to see whether it has been updated prior to court appearances.

6.93 This flaw in the investigation was summarised correctly by Mr. Jon Leeman of GSOC, in his final report dated 13th August 2012, as follows:

*What is clear is that no enquiry was launched by Baileboro Gardaí to establish the details of the incident in Tipperary. This should have been done, at the very least to establish whether the incident in Tipperary had any bearing on the assault on Mary Lynch. There was no apparent enquiry with Gardaí in Tipperary by any member in Baileboro. The failing to carry out any such enquiry meant that when Jerry McGrath was subsequently re-charged with offences that now fell under the remit of the Bail Act 1997 (as amended), Gardaí were completely unprepared to deal with any bail application. If there was no requirement to research the Tipperary incident, or conduct any further enquiries...*
regarding Jerry McGrath up to and including the 18th of October 2007, there was a clear onus on Gardaí to do so once they received directions from the DPP to charge Jerry McGrath with serious offences for which the Bail Act now applied.

The Tipperary offences

6.94 On 9th October 2007 at approximately 3:30 am Mr. McGrath entered as a trespasser the home of a family in Dundrum, Co. Tipperary. He had with him a hurley which had been taken from the house next door. He entered the bedroom of their five year old daughter and applied pressure to her neck. The child’s mother woke to find Mr. McGrath carrying her daughter down the stairs. Mr. McGrath was intercepted by her husband. The gardaí were called. Shrewdly they contacted John Ivers, an off duty Garda, who was a neighbour of the family. Garda Ivers assisted in restraining Mr. McGrath and then arrested him on suspicion of burglary. Mr. McGrath was held until the arrival of more gardaí. The child was brought to South Tipperary General Hospital. She had suffered bruising to her neck and had petechial spots around her eyes. Photographs were taken by medical staff of the child’s injuries which were set out in a medical report.

6.95 Mr. McGrath was detained at Tipperary Town garda station under section 4 of the Criminal Justice Act 1984. His detention was extended by Superintendent Gerard Redmond and further extended by Chief Superintendent Pat Murphy. During his detention Mr. McGrath was interviewed and he ultimately admitted placing his hands on the child’s neck tightly and stated that his intention was to take the child out of the house. During the first interview in garda custody, Mr. McGrath was asked whether he lived at home with his parents. He responded “mainly with friends, I try not to live with my parents, mainly with friends.” A custody record was opened in respect of Mr. McGrath. His address is noted as “NFA/Ballywalter, Cashel” which is the address of his parents.

6.96 At 9:05 pm Mr. McGrath was released from detention and rearrested by Detective Sergeant Long. On the directions of the DPP he was charged with offences of
burglary, and of assault contrary to section 3 of the Non-Fatal Offences against the Person Act 1997. He was held in custody until he appeared in court the following day.

6.97 The initial PULSE entry made in the narrative section on PULSE for the incident in Tipperary reads: “youth discovered in house arrested at scene. nothing taken or damaged.”

6.98 Later, on 9th October 2007, the narrative on PULSE was properly updated with a detailed account of the incident in Tipperary as follows:

updated- 9/10/07- offender disturbed by injured party at 3.15am. offender had a hold of injured parties 5 yr old daughter around the neck and was leading her downstairs. He was cornered in the kitchen and tackled by the injured party. Garda John Ivers, who lives [nearby], arrived on the scene and arrested the offender on suspicion of burglary. Suspect currently detained at Tipperary garda station and child being medically examined at Waterford Hospital. Scene is being examined by divisional scenes of crime unit and entry seems to have been gained via unlocked rear door. Offender may have had possession of hurley during the incident and this aspect is being investigated. Incident may be reclassified at a later date.

6.99 On the same date as the offence in Tipperary, Superintendent Gerard Redmond of Tipperary made a written report to the chief superintendent, Thurles, containing a narrative account of the incident. It also included a note on the suspect, Mr. McGrath. It referred to his parents’ address in Co. Tipperary and stated:

It is believed that he has not resided there for some time and is presently NFA and residing from time to time with friends in the [area of the burglary]. He has previous history on Pulse for minor assault, public order, criminal damage and most recently was the suspect for the UT of a telescopic handler on 7/9/2007 - Pulse ID- refers - this incident is currently under active investigation.

That report was prepared when Mr. McGrath was still detained at Tipperary garda station. It included updated information on the status of the victim. It was also noted
that the divisional scenes of crime unit was examining the scene and that the suspect was being interviewed.

6.100 On 10\(^{th}\) October 2007 Mr. McGrath appeared in Limerick District Court in relation to the offences in Co. Tipperary and was remanded in custody to 12\(^{th}\) October 2007. On one of those dates the judge ordered a psychiatric report on Mr. McGrath. There was no application for bail.

6.101 At Thurles District Court, on 12\(^{th}\) October 2007 Mr. McGrath was remanded in custody until 23\(^{rd}\) October 2007, on which date he was again remanded in custody to Limerick District Court on 30\(^{th}\) October 2007 for a bail application.

6.102 On 28\(^{th}\) October 2007 Sergeant Long submitted a file to his superintendent recommending charges of aggravated burglary, assault, abduction of a child and endangerment in relation to the Tipperary case. The incident was referred to as “extremely serious.” There were twenty-three statements on the file and eight documentary exhibits.

6.103 On 30\(^{th}\) October 2007 the solicitor for Mr. McGrath, applied for bail. Detective Sergeant Long opposed the application for bail on seven separate grounds:

- The serious nature of the charges before the court;
- The weight of evidence against the accused;
- The length of sentence on conviction;
- The DPP was considering more serious charges;
- The fact the defendant gave his address on arrest as “no fixed abode” and said he was living rough;
- The fact the defendant lives in the same neighbourhood as the family of the injured party and the fact that they were terrified;
- The possibility that the defendant would commit further crimes of a similar nature.
6.104 The prosecution was represented at the hearing of the application by Inspector Thomas O’Brien of Henry Street garda station. Prior to the court date, Detective Sergeant Long discussed the question of bail with Superintendent Gerard Redmond and it was decided to firmly oppose the application for bail.

6.105 When Detective Sergeant Long gave his evidence objecting to bail, he was not cross-examined. The commission was informed that there were no submissions on either side following the evidence.

6.106 The judge had before him a psychiatric report, which was not seen by the gardaí or the defence solicitor.

6.107 Mr. McGrath was granted bail on his own bond in the sum of €200, with one independent cash surety of €2,000, which sum was put up by his father. Further, he was required to reside with his parents, sign on daily at Cashel garda station, not to go within two miles of the location of the incident, not to interfere with any witnesses in the case, and to observe a curfew between 9:00 pm and 8:00 am.

6.108 On 9th November 2007 Mr. McGrath’s case in Tipperary was remanded on the same terms to await the DPP’s directions in the case.

6.109 The investigation file on the Tipperary matter was forwarded to the state solicitor for Co. Tipperary (South Riding), on 12th November 2007.

6.110 On 23rd November 2007 the DPP directed prosecution on indictment. A direction issued not to prosecute for a charge of endangerment contrary to section 13 of the Non-Fatal Offences against the Person Act 1997, for reasons contained in that letter of direction. The directions were forwarded to the superintendent, Tipperary, by the state solicitor by letter dated 26th November 2007 and were received by him the following day.

6.111 On 27th November 2007 gardaí in Tipperary received directions to charge Mr. McGrath with 3 offences: aggravated burglary, assault causing harm, and false imprisonment.

6.112 On 1st December 2007 Mr. McGrath failed to sign on at Cashel garda station as required by his bail conditions.
6.113 On 7th December 2007 Ms. Sylvia Roche Kelly left Sixmilebridge in Co. Clare to celebrate her birthday in Limerick City with her sister and a friend. Late that night Ms. Roche Kelly met Mr. McGrath in a night club in Limerick. He had booked a hotel room in Limerick. Ms. Roche Kelly went to his room with Mr. McGrath, where she was murdered by him in the early hours of 8th December 2007.

6.114 After the murder, Mr. McGrath left Limerick and travelled home by taxi. He stopped off in Cashel garda station to sign the bail book. The bail book records his having signed it that day at 12:40pm. Having signed on, Mr. McGrath went home and then travelled to Waterford, where he boarded a bus for London, and from there he travelled to Edinburgh.

6.115 On 10th December 2007 Detective Sergeant Long made an application in Limerick District Court to revoke Mr. McGrath’s bail for failure to comply with his signing-on conditions. A warrant issued for the arrest of Mr. McGrath. By the following day he had returned to Ireland, and made himself available to gardaí. He was arrested and detained in relation to the investigation into the death of Ms. Roche Kelly.

6.116 On 14th December 2007 Detective Sergeant Long executed the warrant for Mr. McGrath before Thurles District Court and further charged him as previously directed on 27th November 2007. The matter was remanded to 11th January 2008 for service of a book of evidence. On the same date Detective Sergeant Long reported to Superintendent Courtney on the further charging.

6.117 On 12th January 2009 Mr. McGrath pleaded guilty to the murder of Ms. Roche Kelly before the Central Criminal Court and was sentenced to life imprisonment.

6.118 On 11th February 2009 Mr. McGrath was arraigned and pleaded guilty before Clonmel Circuit Court to six counts on the indictment to include offences of burglary, assault, and false imprisonment.

6.119 There was no charge of abduction of a child contrary to the Non-Fatal Offences against the Person Act 1997 preferred against Mr. McGrath, and in that respect the Guerin report is inaccurate. The terms of reference of this commission contain the same error.
6.120 Sentencing took place on 13th February 2009. Mr. McGrath was sentenced as follows: ten years for false imprisonment, eight years for burglary (four counts), and four years for assault causing harm. All sentences were to run concurrently from that date. The court was told that Mr. McGrath was not on bail at the time of the offences. This was not correct. This matter is dealt with in paragraphs 6.132 to 6.135 below.

The actions of Detective Sergeant Long

6.121 Detective Sergeant Long opposed bail vigorously on the grounds outlined above in paragraph 6.103. However, at the bail hearing, he did not mention the fact that the accused was on bail on a charge under section 2 of the Non-Fatal Offences against the Person Act 1997 for the offences in Co. Cavan. Detective Sergeant Long gave slightly different reasons for that. He told the commission:

*I believed, going back to the other thing, my previous point, this was, in my opinion, was a very minor incident.*

Q. Yes.

A. I believed there were seven very strong grounds to object to bail and I thought, if I was asked: ‘What is he on bail for?’ and I was going to say a dispute with a taxi driver. I don't believe it would have greatly furthered my case.

Q. All right. This was a decision that you made, I suppose, tactically or strategically. Is that right? I mean in fairness to you, what I am getting at, it is not something you just simply forgot or something like that?

A. No, I could have made other grounds. I could have given other evidence...

Q. In relation to the Virginia matter, would it have done your objection any harm to mention it, in your view?

A. I don't believe, it couldn't have done any harm.
6.122 However in his statement to GSOC he put the matter somewhat differently:

*I did not put forward as an objection to bail the fact that he was involved in the incident in Cavan as I felt that the grounds I had submitted for the objections to bail were stronger, and if I had been cross-examined I would have been able to substantiate my objections and may have used the Cavan incident.*

6.123 The GSOC report on the matter correctly stated that there was an onus on Detective Sergeant Long to put forward the strongest case possible in objecting to bail. It added “*and it is difficult to understand why he did not mention the entirely relevant fact that Jerry McGrath had committed the Tipperary offence whilst already on bail.*”

6.124 The commission does not share that difficulty. Detective Sergeant Long’s judged that the assault in Cavan, which he had no reason to believe was other than a minor incident, was insignificant in the context of the other strong objections to bail which he had. He was conscientious and concerned as is evident from the fact that he had prepared a sketch to demonstrate the proximity of the victim’s home with that of the accused, and by the fact that he had a discussion with a senior officer prior to the bail application. Furthermore he told the commission: “*I was ready for an argument to fight or whatever*”. The commission accepts this unchallenged evidence.

6.125 Detective Sergeant Long could have, and probably should have, mentioned the fact that Mr. McGrath was on bail in relation to the assault in Cavan. He made a judgment call to do otherwise. However, there is no real likelihood that the decision he made materially affected the outcome of the application. In this context, it must be borne in mind that Mr. McGrath had honoured his bail in Cavan, that the charge preferred at that stage was merely an assault under section 2 of the Non-Fatal Offences against the Person Act 1997, that he had no previous convictions, and that he was entitled to the presumption of innocence. Indeed, as outlined above, there is a view that Mr. McGrath should not have been charged at all until the file had been returned from the DPP.

6.126 However, any criticism of Detective Sergeant Long on account of this omission must be very minor indeed.
6.127 It is easy to understand the sentiments contained in the heartfelt letter of Superintendent Redmond to GSOC in June 2012, in which he stated:

> Any amount of dressing up of issues being raised by a GSOC investigator who is now obliged to undertake an investigation into the activities of the Gardaí in this particular case does not take from the fact that the Gardaí in Tipperary strenuously objected to the granting of bail to Jerry McGrath.

and later on in the same letter:

> It is not acceptable that the blame [sic.] may now be conveniently laid at the feet of Gardaí involved in the case whose responsibilities in the Tipperary investigation were fulfilled.

6.128 The investigation in Tipperary was impressive in many respects. When the call was received at the garda station, the gardaí had the presence of mind to contact Garda Ivers who lived nearby the victim. Mr. McGrath was detained at the house of the victim and was arrested by Garda Ivers. The gardaí recognised the gravity of the offence and with commendable alacrity got the investigation underway. Detective Sergeant Long, who was in charge of the investigation, was particularly active. A report containing statements and documentary exhibits was furnished to his Superintendent on 28th October 2007, less than three weeks after the commission of the offence.

6.129 There was further criticism of Detective Sergeant Long in the GSOC report: “It is clear to the Designated Officer that the level of enquiry carried out by Detective Sergeant Long was entirely insufficient, given the gravity of the incident he was investigating.”

6.130 This criticism is unduly harsh. Detective Sergeant Long rightly followed up the information he had by telephoning the gardaí in Cavan. When he was unable to get information on the first call he persisted and followed up with a second one. He was entitled to rely on what he was told which reinforced the impression already conveyed in the PULSE entry, which was that this was a minor assault under the section 2 of the Non-Fatal Offences against the Person Act 1997.
6.131 Had the incident in Virginia been classified as assault under section 3, apart from the different considerations that may have applied concerning the granting of bail at that time, it is probable that the gardaí in Tipperary would have been put on notice of the serious nature of the incident. As Superintendent Redmond put it:

> Well that is my understanding in relation to this and if it was a section 3 assault, a more serious assault, you would certainly be looking at the narrative in more detail to see what the narrative actually outlined and beyond that then, as part of the investigative process, you would make a call to your colleagues in whatever district would be involved to find out the background to the assault.

6.132 A further matter arises in relation to the involvement of Detective Sergeant Long in the Tipperary investigation. It concerns the evidence that he gave in the Circuit Court on the sentencing of Mr. McGrath where he incorrectly told the court that Mr. McGrath was not on bail at the time of commission of the offence, when in fact he was. The significance of this is that if the Tipperary incident was committed while Mr. McGrath was on bail, the court would be entitled to consider this an aggravating factor when sentencing, and also could have imposed a sentence consecutive to the one imposed for the assault on Ms. Lynch.

6.133 The evidence given by Detective Sergeant Long to the effect that the accused was not on bail was as a result of a simple misunderstanding, and was, as he told the commission “It was just a pure slip”. He was under the mistaken impression that he was being asked whether Mr. McGrath was on bail on the charge of the murder of Ms. Roche Kelly, and not about whether he was on bail at the time of the commission of the offences before the Circuit Court that day. He had no desire to mislead the court, nor had he any reason to do so.

6.134 The error was inconsequential. The question of a consecutive sentence did not arise because Mr. McGrath had already completed his sentence for the offences in Bailieboro. The fact that he was on bail when he committed the offences before the court was an aggravating factor. However, even had the sentence imposed by the court been longer on that count, it would undoubtedly have expired long before the completion of the sentence imposed on the murder charge.
6.135 However, it is readily understandable that this would have been a matter of serious concern, and even suspicion, on the part of Mr. Lorcan Roche Kelly.

Lorcan Roche Kelly and An Garda Síochána

6.136 In March 2008 Gwen Bowen, solicitor for Lorcan Roche Kelly, the husband of the late Ms. Roche Kelly, wrote to Superintendent Courtney seeking information in relation to Mr. McGrath’s bail status at the time of the murder. This was an understandable request in the circumstances. While one could understand some delay to allow for the preparation of internal reports relating to Mr. McGrath’s status, there was an inordinate delay in addressing this legitimate query.

6.137 On 17th December 2009 Deputy Commissioner W.I. Rice, Strategy and Change Management, wrote to Mr. Roche Kelly’s solicitors, setting out what he said was the garda response to the issues raised in their correspondence.

6.138 It was highly unsatisfactory for Mr. Roche Kelly that he had to wait for over 18 months for a response to his reasonable query of March 2008, especially in circumstances where his life had been deeply affected by a horrible crime.

GSOC: the Roche Kelly complaint

6.139 On 30th June 2009 GSOC acknowledged receipt of a complaint, dated 25th June 2009, from Mr. Lorcan Roche Kelly. The Assistant Commissioner, Human Resource Management, was notified of this by GSOC. Mr. Roche Kelly alleged neglect of duty on the part of the gardaí in Thurles and Cavan / Monaghan. He further complained that An Garda Síochána had refused to respond appropriately to his requests for specific information in relation to the garda submissions made to the District Courts concerning Mr. McGrath's bail status at the time that he was remanded by those courts in October, November, and December 2007.

6.140 On 17th September 2009 Commissioner Conor Brady of GSOC deemed the Roche Kelly complaint admissible.
6.141 On 21st October 2009 GSOC, in exercise of its powers pursuant to section 92(a) of the Garda Síochána Act 2005, referred the Roche Kelly complaint to the Garda Commissioner for investigation, and requested the nomination of an officer to investigate the complaint under the disciplinary regulations of the gardaí. The intention at this stage was to have a supervised investigation.

6.142 On 28th October 2009 the Assistant Commissioner, South Eastern Region, was notified of the decision of GSOC and advised to make an appointment of an officer to investigate the allegations made by Mr. Roche Kelly in accordance with the provisions of regulation 42 of the Garda Síochána (Discipline) Regulations 2007.

6.143 In his reply dated 5th November 2009 the Assistant Commissioner, South Eastern Region, noted that the allegations could involve the Divisional Officer, Tipperary Division and/or senior officers in Cavan/Monaghan Division. He therefore recommended that an assistant commissioner outside the South Eastern and Northern Region be appointed to investigate the matter.

6.144 On 22nd December 2009 Assistant Commissioner William Keane, Southern Region, was appointed as deciding officer pursuant to the provisions of regulation 14 of the Garda Síochána (Discipline) Regulations 2007.

6.145 As Assistant Commissioner Keane had been the divisional officer in Limerick at the time of the murder of Ms. Roche Kelly and was involved in the subsequent prosecution of Mr. McGrath, it was deemed inappropriate for him to act as deciding officer in the matter. Consequently, on 9th March 2010, Assistant Commissioner Dermot Jennings, Eastern Region, was appointed by Assistant Commissioner Louis Harkin, Human Resource Management, as deciding officer, pursuant to the provisions of regulation 14 of the Garda Síochána (Discipline) Regulations, 2007 and on the same date GSOC was notified.

6.146 However, following a review of the case and representations made by Ms. Bowen, GSOC reassumed responsibility for the investigation of the complaint under the provisions of section 94(12) of the Garda Síochána Act 2005.

6.147 In effect, GSOC having handed over the matter to the gardaí, was now taking it back.
6.148 On 30th April 2010 a statement was taken from Mr. Roche Kelly at the offices of his solicitors in Sixmilebridge, Co. Clare, by Detective Inspector Frank Keenaghan and Chief Superintendent Thomas Conway for GSOC.

6.149 On 31st May 2010 GSOC wrote to Assistant Commissioner Jennings and to garda headquarters notifying them that pursuant to section 103 of the Garda Síochána Act 2005, the commission had decided in accordance with section 94(12) of the same Act to take over the investigation and to commence an investigation pursuant to section 98 of the Act (which provides for the investigation of complaints “that appear to involve offences”). Section 94(12) reads: “Nothing in this section prevents the Ombudsman Commission from deciding at any time to take over a complaint referred by it to the Garda Commissioner.”

6.150 On 12th July 2010 Mr. Farrell of GSOC took a statement from Ms. Lynch in relation to the Roche Kelly complaint.

6.151 On 20th July 2010 Garda McEvoy made a statement to GSOC. Garda McEvoy also made a number of written responses to six allegations made by Ms. Lynch in her statement. Garda McEvoy admitted in the undated covering letter to these responses that “the DPP did not make a direction as to the section 2 assault charge against Jerry McGrath as stated.”

6.152 On 27th October 2010 Mr. Farrell took a statement from Sergeant Fyfe in relation to the Roche Kelly complaint. He confirmed that he had participated in the first interview with Mr. McGrath and thereafter finished his duty and went home. He could not recall giving Garda McEvoy any advice or guidance.

6.153 In the course of the investigation of the Roche Kelly complaint further statements were taken from Detective Sergeant Long (two statements), Sergeant Murray, Sergeant Sheridan, Superintendent Clancy, Sergeant McCabe, Inspector McMorrow, and Superintendent Redmond, as well as from Mr. Roche Kelly.

6.154 On 18th March 2011 Chief Superintendent Brendan Cloonan, Internal Affairs, sought to be informed of the current state of the investigation by GSOC in accordance with section 103 of the Garda Síochána Act 2005.
On 12th April 2011 Detective Sergeant Long was given notice of an investigation pursuant to section 95 of the Garda Síochána Act 2005, into the Roche Kelly complaint.

On 20th April 2011 Mr. Farrell took a statement from Mr. McGrath.

On 4th November 2011 Ms. Bowen wrote to GSOC complaining about the lack of progress in relation to investigating the Roche Kelly complaint.

On 7th March 2012 Sergeant McCabe sent a letter and statement to Mr. Leeman of GSOC. He alleged that Superintendent Clancy “did nothing at all” with the information he had. This was a reference to the note on the court file from Sergeant Murray indicating that Mr. McGrath had been in custody. Sergeant McCabe also denied having anything to do with the release of Mr. McGrath on station bail.

In March 2011 Mr. Leeman of GSOC, reviewed the investigation and determined that the investigation under section 98 of the Garda Síochána Act should be discontinued in the absence of sufficient evidence of an offence by any member of the gardaí, which is a requirement for proceeding under that section.

However, at the same time, he determined that the matter warranted further investigation in accordance with section 95 of the Garda Síochána Act 2005, which applies to investigations that “do not appear to involve offences”.

Mr. Leeman further reviewed the investigation on 31st May 2012. The effect of this review was that complaints which were originally treated as “serious” and in which dismissal was a potential sanction, were now being investigated as being “less serious” under the Act. This had the effect that the potential sanctions were less severe in the event of the complaints being sustained on investigation.

Detective Sergeant Long was informed by letter dated 5th June 2012 from GSOC that the alleged breaches were now “less serious”, if proved. Garda McEvoy likewise was informed on the same date, and on 22nd June 2012 the Assistant Commissioner, Human Resource Management, was informed. Those letters also invited their recipients to attend at an interview and / or to make submissions to GSOC.

On 13th June 2012 Inspector McMorrow sent a memo to Mr. Farrell in relation to Mr. McGrath’s appearance at Virginia District Court on 3rd December 2007. He stated that
it was the function of the sergeant in charge of the station to update the acting district officer on issues arising from files scheduled for court. He said he had no knowledge or background information on the file.

6.164 On 20th June 2012 Superintendent Gerard Redmond sent a memo to GSOC in answer to questions posed in relation to Mr. McGrath’s bail. He stated that the gardaí in Tipperary had “strenuously objected to the granting of bail to Jerry McGrath”.

6.165 On 5th July 2012 oral submissions were made on behalf of Detective Sergeant Long by his solicitor, Mr. Michael Hegarty, and he furnished written submissions on 17th July 2012.

6.166 On 17th July 2012 written submissions were forwarded by Sergeant Sheridan to Mr. Farrell. In that submission he is critical of the explanation offered by Sergeant Long in relation to Mr. McGrath’s bail application.

6.167 On 13th August 2012 a comprehensive report pursuant to section 97 of the Garda Síochána Act 2005 was submitted to garda headquarters by Mr. Leeman of GSOC. It is unnecessary to go into the details of this thirty five page report, other than to deal with the recommendations. That report notified the gardaí that the GSOC investigation had concluded. The report recommended that disciplinary proceedings be initiated in accordance with regulation 45 of the Garda Síochána (Discipline) Regulations 2007 against Garda McEvoy and Detective Sergeant Long.

6.168 In respect of Detective Sergeant Long, Mr. Leeman’s report stated:

The designated officer believes that there is sufficient evidence to indicate that Detective Sergeant Long may have been in neglect of duty as defined by regulation 5 Section 2 (a)(ii) of the Garda Síochána (Disciplinary) Regulations 2007, for failing to carry out appropriate research into the Cavan incident, for failing to inform the court on the 30th October 2007 that Jerry McGrath had committed the offences whilst already on bail, and for failing to inform the court on the 13th February 2009 that the Tipperary offences were committed whilst Jerry McGrath was on bail.
6.169 Although Mr. Leeman believed that there was sufficient evidence to indicate that Detective Sergeant Long may have been in neglect of duty on three separate grounds, he was not making any findings, as that was not his function. Moreover he was clearly entitled to recommend as he did. The observations made by the commission in respect of Detective Sergeant Long set out earlier in this chapter should not be taken as a criticism of Mr. Leeman.

6.170 In respect of Garda McEvoy the following is the position outlined in Mr. Leeman’s report:

*The designated officer believes that there is sufficient evidence to indicate that Garda McEvoy may have been in neglect of duty as defined by regulation 5, Section 2 (a)(ii) of the Garda Síochána (Disciplinary) Regulations 2007, for failing to carry out necessary checks prior to 3rd December 2007 and failing to ensure that the Court Presenter, and in turn the Court, was properly informed of relevant facts to be considered when the issue of bail arose. Accordingly, the designated Officer recommends that Section 45 is invoked and disciplinary proceedings instituted.*

6.171 Following the recommendation of GSOC on 13th August 2012, Superintendent Gerard Wall, Kilrush, was appointed by Assistant Commissioner Fintan Fanning, Human Resource Management, to decide whether the two named members were in breach of discipline and whether any disciplinary sanction was required.

6.172 On 8th November 2012 Superintendent Wall reported that he found no breach of discipline on the part of either Detective Sergeant Long or Garda McEvoy.

6.173 On 20th December 2012 Assistant Commissioner Fintan Fanning wrote to GSOC informing them of Superintendent Wall’s findings. In relation to Detective Sergeant Long he referred to Superintendent Wall’s conclusion that the Detective Sergeant “made an experienced and calculated decision”. Assistant Commissioner Fanning stated the file was “now closed”.

6.174 By letter of 2nd January 2013 from Mr. Leeman, GSOC requested an explanation in relation to the decision not to discipline Garda McEvoy and Detective Sergeant Long.
6.175 On 21st January 2013 Assistant Commissioner Fanning wrote to GSOC responding that “there is no provision within the legislation for the Commissioner to be asked to justify his decision in respect of any matter.” However, Assistant Commissioner Fanning then went on to give a short explanation of Superintendent Wall’s reasoning.

6.176 Mr. Roche Kelly first complained to GSOC on 25th June 2009. The recommendation of GSOC was dated 12th August 2012, over three years later. The enquiry was a large one. Undoubtedly, the investigation required the gathering together of a number of reports and witness statements. However, it is clear that part of the delay is attributable to the fact that when GSOC handed the matter over to the gardaí, time was lost because of the inability to find a suitable deciding officer to deal with the matter. The fact that GSOC had divested themselves of the matter in October 2009 and then retook responsibility for examining the complaint on 31st May 2010 following representations on behalf of Mr. Roche Kelly was also a factor in the delay. In circumstances where members of GSOC were not challenged on this delay by any of the parties appearing before the commission, it would be wrong to attribute blame to GSOC or to any one individual.

6.177 Although the commission does not attribute or apportion blame for the delay in the matter, it was clearly very unsatisfactory that Mr. Roche Kelly had to wait so long to have his complaints adjudicated on. This combined with the regrettable delay by An Garda Síochána in responding to his initial request for information can only have added to his distress and dissatisfaction with the manner in which matters connected to the death of his wife were addressed.

Ms. Lynch’s complaints to the Byrne / McGinn investigation and to GSOC

6.178 On 6th January 2010, following media reports in relation to a garda investigation into alleged wrongdoing by gardaí in Bailieboro, Ms. Lynch contacted the divisional office in Letterkenny, where Chief Superintendent McGinn was based, and she made a statement on 14th January 2010.

6.179 By letter in late 2010, while the complaint of Mr. Roche Kelly remained under investigation by GSOC, the complaint made by Ms. Lynch to Chief Superintendent
McGinn was also referred to GSOC by Assistant Commissioner Kenny, Northern Region.

6.180 The substance of the 2010 Lynch complaint was essentially that she had not been kept abreast of the progress of her case and in particular she was told that her presence was not required in court on the day it happened to be finalised.

6.181 Both the Roche Kelly complaint and the 2010 Lynch complaint were, in effect, being dealt with in parallel by GSOC. In that regard, a number of relevant statements had already been taken during the investigation of the Roche Kelly complaint.

6.182 On 12th April 2011 garda headquarters was notified by Mr. Leeman of GSOC that GSOC had determined that the Lynch complaint was admissible under section 87 of the Act and had decided that it should be investigated in accordance with that section.

6.183 However, by letter dated 15th April 2011, Mr. Leeman pointed out that the reference to the investigation being in accordance with section 98 of the Garda Síochána Act 2005 (which applies to complaints that appear to involve offences) was an error and in fact Ms. Lynch’s complaint had been designated for investigation under section 95 (“conduct that does not appear to constitute an offence”).

6.184 On 27th April 2011 Mr. Farrell of GSOC took a further statement from Ms. Lynch. She complained, *inter alia*, about the lack of information concerning her case and the fact that Mr. McGrath was released on bail. Her husband, Mr. George Lynch made a statement to GSOC on the same day.

6.185 On 1st September 2011 Sergeant McCabe was interviewed by GSOC in relation to the handling of the Lynch case. He also handed over a written statement and a short statement alleging that Superintendent Clancy’s recommendation for summary disposal was “disgraceful”. Superintendent Clancy, in his report to the DPP, recommended summary disposal of the offence under section 3 of the Non-Fatal Offences against the Person Act 1997. He explained that he had the authority to direct that charge on his own initiative, but decided in this instance to refer the matter to the DPP because this assault “was somewhat different.” Moreover, he was aware of the provisions of section 13 of the Criminal Procedure Act 1967 which authorised the dealing with certain indictable offences in the District Court on a plea of guilty. In effect, he was seeking the DPP’s directions on the question of summary disposal only
in the event of a plea of guilty. However, he did not expressly say so, and he should have explained his position in that respect more clearly. Notwithstanding this criticism, there is no basis for Sergeant McCabe to describe the recommendation as “disgraceful”. The recommendation, in respect of a person with no previous convictions was unremarkable, although a different view of the matter might also reasonably be taken. However, it cannot go unobserved that the decision may have been different had any enquiry been made of the factual background to the Tipperary charges. In any event the DPP directed summary disposal only in the event of a plea of guilty. This was a decision which the DPP was entitled to make and cannot be criticised for it.

6.186 On 12th September 2011 Superintendent Clancy sent a further letter to Mr. Farrell regarding the 2010 Lynch complaint to explain the position in relation to Mr. McGrath’s appearances before Virginia District Court. He also stated that he met Ms. Lynch with Inspector Cunningham at her home after Mr. McGrath was sentenced and that she and her husband were “satisfied” with the explanation of how matters had developed. This assessment was clearly not shared by Ms. Lynch.

6.187 In October 2011 the GSOC investigation into Ms. Lynch’s complaint was discontinued in accordance with section 93(1)(c) of the Garda Síochána Act 2005 and garda headquarters was so notified by letter of 25th October 2011 from Mr. Leeman. The stated reasons for the discontinuance of the investigation were as follows:

Mrs. Lynch originally complained to the Gardaí and this complaint was subsequently forwarded to GSOC. Initially it was considered that the complaint related to behaviour occurring within the prescribed six month period. It is now accepted, however, that the complaint related to behaviour occurring outside this period and consideration should have been given to extending time for good reason in accordance with section 84 of the Garda Síochána Act 2005. As this was not done GSOC considers that, in the interests of fairness, the GSOC investigation into Ms. Lynch’s complaint should be discontinued and the matter returned to the Gardaí.
On 25th October 2011 Garda McEvoy was informed by GSOC that the 2010 Lynch complaint investigation was to be discontinued.

It was most unsatisfactory for Ms. Lynch that the GSOC investigation into her complaint had to be discontinued due to an error on its part. However, it should be said that once GSOC became aware of its error, it took the appropriate action.

Subsequent garda action in the Lynch complaint

The matter having been returned to the gardaí when the GSOC investigation was discontinued, Chief Superintendent, Internal Affairs, by letter dated 16th November 2011, referred the Lynch matter to Chief Superintendent Rooney for consideration as to whether Ms. Lynch’s complaint should be investigated in accordance with the Garda Síochána (Discipline) Regulations 2007.

In late 2011, Chief Superintendent Rooney directed Superintendent Thomas Maguire, Ballyconnell, to review the garda investigation in respect of the allegations made by Ms. Lynch to establish if any breach of discipline had occurred.

Chief Superintendent James Sheridan furnished a report, dated 14th March 2012, to the Chief Superintendent, Internal Affairs.

On 13th April 2012 Chief Superintendent Sheridan reported that he had disposed of the matter by having Superintendent Sean Farrell, Ballyconnell “give appropriate counselling to Garda McEvoy of the necessity of keeping victims of crime properly updated on the progress of investigations referring to them”. Garda McEvoy was stationed at Ballyconnell garda station and the counselling was given on 12th April 2012.

The Byrne / McGinn report, in March 2010, identified a number of concerns arising out of Ms. Lynch’s statement and its review of the investigation file. These matters are dealt with at pages 130 – 133 of their report. The report concluded that “in all the circumstances known to this investigation the file has been forwarded to Assistant Commissioner Northern Region for investigation and report to a conclusion with particular emphasis on identifying any corporate risk to the Garda organisation.”
6.195 Chief Superintendent McGinn recommended that an officer be appointed to monitor the investigation into the complaints and to communicate directly with Ms. Lynch.

6.196 By the time the Byrne / McGinn report was completed, Ms. Lynch’s complaint had not yet been forwarded to GSOC. This was done in December 2010.

Second Lynch complaint to GSOC

6.197 Ms. Lynch made a second complaint to GSOC on 9th January 2013. This complaint was deemed admissible in November 2013 and is still being investigated by GSOC. It would be inappropriate for the commission to comment on this matter.

Sergeant McCabe’s complaint in the “Dossier”

6.198 In the dossier furnished to An Taoiseach on 19th February 2014, Sergeant McCabe alleges that Superintendent Clancy had full details of the two serious incidents but did nothing. It is alleged that he failed to notify the DPP of the Tipperary charges when seeking a direction on the Cavan matter. It was also alleged by Sergeant McCabe that he failed to make contact with gardaí in Tipperary and failed to make any application to revoke Mr. McGrath’s bail in Cavan. Sergeant McCabe’s complaint of 23rd February 2012 to the confidential recipient makes the same allegations. He also alleges that, when Superintendent Clancy became aware of Ms. Roche Kelly’s murder, there was an urgent attempt to dispose of Mary Lynch’s case “as quickly as possible and at all costs”.

6.199 The first complaint is that Superintendent Clancy failed to notify the DPP of the Tipperary charges when seeking a direction on the Cavan matter. This has already been referred to, above. It appears that by the time the file was sent to the DPP’s office there had been no communication within An Garda Síochána other than the bare fact that Mr. McGrath had been in custody for a period on the Tipperary charges. Sergeant McCabe also complains that Superintendent Clancy failed to make contact with gardaí in Tipperary. The responsibility to ascertain the full particulars of the Tipperary incident lay in the first instance with Garda McEvoy, and thereafter with his
supervising sergeants. The Tipperary case was not adverted to at all, either in Garda McEvoy’s original file nor in the final file submitted by Sergeant Sheridan to Superintendent Clancy. In those circumstances it is not surprising that the matter was not referred to in Superintendent Clancy’s report to the DPP. Further, Superintendent Clancy told the commission that he was unaware of Sergeant Murray’s report referencing the Tipperary incident until after he had completed his report to the DPP. Had he been aware he said it would not have affected his recommendation.

6.200 Sergeant McCabe also complained that Superintendent Clancy failed to make any application to revoke Mr. McGrath’s bail in Cavan. This has already been dealt with in paragraphs 6.66 – 6.72 above. Although Superintendent Clancy or his nominated inspector could have raised an objection to bail on 3rd December 2007, on the new charge under section 3 of the Non-Fatal Offences against the Person Act 1997, Mr. McGrath had complied with the conditions of his bail.

6.201 It cannot be said with any confidence that had such objections been made that this would have affected the granting of bail or the conditions of that bail.

6.202 The final complaint is that when Superintendent Clancy became aware of Ms. Roche Kelly’s murder, the Cavan case was disposed of “as quickly as possible and at all costs”. The commission can find no evidence to substantiate this complaint. Superintendent Clancy was not the court presenter in court on the day that Ms. Lynch’s case was finalised. Although it was possible that Mr. McGrath would plead guilty on that date, Superintendent Clancy had no way of knowing what instructions Mr. McGrath would give to his solicitor in that regard.

Conclusion

6.203 On 30th April 2007 Mary Lynch was the victim of a savage assault and only escaped far more serious injury through her own bravery and initiative. The investigation into that offence was characterised by delay and lack of effective supervision of the investigating member. Further, through no fault of her own Ms. Lynch was denied her right to be present when the matter was ultimately dealt with in court. However, despite her understandable misgivings about the way in which the matter was investigated the case was ultimately presented in a professional fashion before the district judge who accepted jurisdiction in the matter.
On Friday 7th December 2007 Ms. Sylvia Roche Kelly was brutally murdered by Jerry McGrath at a time when he was on bail for other offences committed in Virginia, Co. Cavan and Dundrum Co. Tipperary. The circumstances in which he came to be on bail are outlined above. Bail was objected to in strenuous terms by the gardaí in Tipperary. However, bail was granted by the court having heard and considered those objections. While it is natural in the light of subsequent events to question the approach taken, the commission is satisfied that the approach of the gardaí in Tipperary was a reasoned and considered one. However, this does not excuse the original misclassification of the Virginia assault and the lamentable failure to communicate effectively within An Garda Síochána to ensure that accurate and relevant information is shared.

Lorcan Roche Kelly was left in the dark for an excessive period in relation to his request for information. He deserved better treatment from An Garda Síochána.

The GSOC investigations were thorough, and necessarily lengthy. Certain aspects of the investigation are ongoing and further comment on them would be inappropriate. However, Mr. Roche Kelly was not well served by the fact that a considerable period of time elapsed in deciding who should investigate his complaints, and under what statutory provision those complaints might be investigated.
Chapter 7  Incident in Cafolla’s Restaurant.

The investigation by An Garda Síochána of a public order incident in Cafolla’s restaurant, Bailieboro, Co. Cavan on 5th August 2007

The facts

7.1 On 5th August 2007, shortly after 3 pm, three men entered Cafolla’s restaurant in Bailieboro and ordered food. One of the men emptied the contents of a vinegar bottle and replaced it with urine. Having eaten a meal, the men left the premises. The incident was captured on CCTV in the restaurant.

7.2 Ms. Majella Cafolla, the owner of Cafolla’s restaurant, reported the matter to Bailieboro garda station. Gardaí accompanied her to a public house near the restaurant, where she identified one of the culprits.

7.3 The gardaí interviewed the man, who, after caution, admitted his part in the offence.

7.4 On 31st January 2008 the DPP directed that the suspects be prosecuted for an alleged offence contrary to section 6 of the Criminal Justice (Public Order) Act 1994.

7.5 Summonses had been applied for four days prior to the receipt of the DPP’s directions. The wording in the summonses issued is not exactly the same as that in the DPP’s directions, but both the summonses and the directions were for an offence contrary to section 6 of the Criminal Justice (Public Order) Act 1994.

7.6 At Bailieboro District Court on 6th June 2008, all three accused pleaded guilty.

7.7 The two accused most actively involved in the incident both received three month sentences, suspended on conditions, including that they stay away from the restaurant. The other accused was dealt with under the provisions of section 1(1) of the Probation of Offenders Act 1907.

7.8 Each of the men was ordered to pay €500 each to Ms. Cafolla but she requested that the sum of €1,500 in aggregate be paid instead to the Garda Benevolent Trust Fund.
The garda investigation

7.9 On 5th August 2007, when Ms. Cafolla made her complaint in Bailieboro garda station, she met Garda Fearghal McCarthy, who was the investigating garda, and Garda Rudy Kelly. At that time, Garda McCarthy was a probationer garda. Ms. Cafolla told the commission that when she told the gardaí about the matter they thought it was funny. She was understandably unhappy with their attitude as she was extremely upset about the incident. Garda McCarthy and Garda Kelly both denied that they adopted a light-hearted approach to the complaint. However, the commission accepts the evidence of Ms. Cafolla on this point. She was a most impressive witness, well disposed towards the gardaí in general and with no animosity towards the gardaí involved.

7.10 Both gardaí accompanied Ms. Cafolla to a public house close to her premises where the incident had occurred. There she pointed out the main culprit to the gardaí. She told the culprit, in the presence of gardaí, that he was barred from her premises. Ms. Cafolla then returned to her restaurant, and the gardaí spoke with some men outside the public house. One of them admitted, after caution, that he had put urine in a vinegar bottle, and he apologised for the incident.

7.11 What occurred at this stage is in dispute. According to Ms. Cafolla the main offender returned to her premises, in the company of the gardaí, having expressed a wish to apologise to Ms. Cafolla. Ms. Cafolla took particular exception to the fact that gardaí brought the offender inside the door of the restaurant, in circumstances where the offender was barred from the premises to the knowledge of the gardaí. She felt she had handed the problem over to the gardaí but they had “brought the problem back to me” and that she “found it intimidating.”

7.12 Garda McCarthy and Garda Kelly both denied that they brought the offender to the restaurant. Garda McCarthy said that he had returned to the restaurant with Garda Kelly but without the offender, in order to inform Ms. Cafolla about the admission that had been made. Garda McCarthy stated that the offender followed them to the restaurant.

7.13 The commission accepts the evidence of Ms. Cafolla. Garda McCarthy was given an opportunity to deal with this issue in the process of his disciplinary inquiry in June.
2010, but he failed to address it at all in his response. If the allegation was incorrect, it is highly probable that he would have so stated at that time.

7.14 An entry was made into the PULSE system on 5\textsuperscript{th} August 2007 regarding the complaint:

\begin{quote}
Male went into restaurant and stole a bottle of vinegar. He emptied the contents and urinated into the vinegar bottle. He then proceeded to leave the bottle on table on restaurant [sic] cautioned in relation to incident and admitted same.
\end{quote}

7.15 Ms. Cafolla made a detailed statement to the gardaí on 8\textsuperscript{th} August 2007. The statement reads as follows:

\begin{quote}
My name is Majella Cafolla of the above address. On the 5\textsuperscript{th} August 2007 at 15.05pm, three men entered my premises; Caffolla’s Fast food take away Restaurant. They sat at table 7. They ordered there [sic] food and while they were waiting for the food one of them whom I know from the town as [Mr. D] got up and went to the bathroom, he came back from the toilet. I was on my laptop at the back of the restaurant and they were shouting jokes at me, like you’re taken [sic] the piss, are you pissed off. They were laughing really hard making references towards the pee. After they have eating [sic] they got up to pay there [sic] bill and they were hysterically laughing, so I got up to check what were they laughing at. They had done something; I knew there wasn’t anything missing from the table, but here was liquid spilt on the ground which turned out to be vinegar. So I checked the bottle on the table which was still full to the brim and then two more customers entered the restaurant, a male and his child and they sat at table 3. At this the three males went into hysterical laughter outside the door and looking back into the restaurant. So it was very obvious that they had something done to the mans table, I looked at the vinegar bottle on table no. 3 and my vinegar is clear, the colour of the vinegar in the bottle was a urine colour, I asked the gentleman and his child to move to a different table and told him I had a spillage. At this stage I went to check the cameras. So when I played back the cameras I could see that he was on four of the cameras. As it turned out the chap in the yellow T-shirt from ... took the vinegar bottle off table No. 2 and
spilled the contents onto the floor and pushed it around the table to [Mr. D], who put the empty down his trousers which is visible on camera and [Mr. D]’s [sic] went straight up to the Bathroom, he is visible on all cameras from his table to the toilet and back again. So the bottle was empty when he went up to the bathroom but it was full when he returned and he put it on the table and it is clear to see that it was a yellow coloured liquid in the vinegar bottle. He placed the bottle beside the menu for a couple of second after he took it out of his trousers and you can see that he looks around to see if anybody is watching before he placed it on table 3 and spent awhile fixing everything on the table so it didn’t look out of place, he then took the salt off table 3 and bought it over to his table seven. And then they went in a hysterical of laughing and ate the food. When I seen what happened on the camera I took the bottle and followed the three men to the Benjamin’s pub, cause I know they drink there, I walked up to the bar and I put the bottle up in front of him and told him he was a dirty despicable bastard urinating in a bottle in my restaurant. I said you forgot to take it with you, don’t come near my restaurant, your barred. I went to the door turned around and said if you didn’t all hear me, that dirty despicable bastard urinated in a vinegar bottle in my restaurant and I have you on seven cameras and I am going to the guards. So I came up to the Guards and told them what happened, I was accompanied by two guards down to the Benjamin pub, I pointed out the males to the guards and I said this is the so called gentleman you are looking for. He was brought outside and I just walked. Five minutes after the two guards came up to my Restaurant with [Mr. D], he asked if he could talk to me alone but I said no.

7.16 Some days after the incident, Garda McCarthy came to Ms. Cafolla’s premises. He requested her to download the CCTV footage of the incident and stated that he would return to collect it a day or two later. Ms. Cafolla said that when Garda McCarthy did not return to collect the CCTV, she went to Bailieboro garda station with the relevant CCTV footage. A garda in the public office took possession of it and placed it in the locker of the garda “dealing with the matter”. Ms. Cafolla was told that Garda McCarthy was not on duty because he was “off sick”.
Ms. Cafolla’s evidence about the CCTV footage is disputed by Garda McCarthy. His recollection was that he called to her two or three days after his first request that Ms. Cafolla download the footage, and was told that she had not yet downloaded it. He called back again, but Ms. Cafolla was not there. Garda McCarthy then drove to Ms. Cafolla’s home, some distance outside the town, where he met her. She told him that she would bring the CCTV footage to the garda station. Garda McCarthy has no notes of these visits nor does he now recall where Ms. Cafolla lived. The commission accepts the evidence of Ms. Cafolla.

The complaint of Ms. Cafolla that nobody called on her to collect the downloaded CCTV footage was an issue in the disciplinary inquiry, in which Superintendent Noel Carolan was the deciding officer. If Garda McCarthy made the efforts to secure the CCTV footage that he outlined in his evidence, he would undoubtedly have referred to those efforts in his report made in the disciplinary inquiry. If the failure to obtain it was attributable to Ms. Cafolla, then Garda McCarthy would certainly have pointed that out to Superintendent Carolan. However, the report contains no such reference and Garda McCarthy’s only explanation was, “I can only say like what I have in the report is what I put in it at the time, that’s all I can say.” He added that he would have informed Superintendent Carolan of that in the course of interview. Superintendent Carolan does not have any notes of what was said at that interview apart from what is contained in his report dated 16th November 2010. Neither does he recall what was discussed apart from in general terms.

Some weeks later Ms. Cafolla called the garda station to make enquiries about her case. She was told that a different garda would be dealing with the matter. She enquired about the CCTV footage that she had already given to the gardaí. The garda to whom she was speaking told her that he checked the locker of the garda who had been dealing with the case, but the disc with the CCTV footage was not there. She was asked to make another copy of the CCTV footage of the incident for the garda who would now be dealing with the case. She was told the garda now investigating would be in contact with her but she was not given the name of that garda. Despite the assurances given to Ms. Cafolla, no garda contacted her.

It is of concern that an injured party cannot ascertain the name of the member who is investigating her complaint. It is also of concern that although Ms. Cafolla had twice gone to Bailieboro garda station with the CCTV footage, and handed it over to the
gardaí, she had not been given a receipt on either occasion. Neither of those copies of CCTV footage was placed on the investigation file. The CCTV footage that was eventually put on the investigation file was given to Sergeant Maurice McCabe by Ms. Cafolla in December 2007, after he had become aware that her case had not been progressing satisfactorily and that no summonses had yet issued.

7.21 Having been told that a garda would be in contact with her, Ms. Cafolla heard nothing for another two or three weeks. Some time later, at the takeaway hatch to her restaurant, she met Garda Kelly and asked what was happening in the case. He told her that the file had been sent to the DPP “because they were finding it hard to figure out what category to charge them with”.

7.22 In her evidence Ms. Cafolla said that, when she asked whether the matter was going to court, Garda Kelly told her:

No, it’s in hand, it’s gone to the DPP and they have to make a decision on it.

She went on to say:

I was like, okay, fair enough, that’s grand. I was happy enough with that because it didn't mean anything to me except that I thought it was being dealt with.

7.23 Ms. Cafolla was told by Garda Kelly that it normally takes two weeks to get a reply from the office of the DPP. Accordingly, some weeks later, she again contacted Bailieboro garda station. She learned that Garda Kelly too, was on sick leave. In or around December 2007 Ms. Cafolla talked to Sergeant Thomas Murray, who contacted Sergeant McCabe.

7.24 Within a day of her conversation with Sergeant Murray, Ms. Cafolla received a telephone call from Sergeant McCabe. He apologised on behalf of the gardaí and asked if he could call to speak with her. When she mentioned that the file had gone to the DPP, he told her that it had not. He also apologised about the way the case had been dealt with, and told her that she could make a complaint about the matter. She said that Sergeant McCabe called back later to say that he had discussed the matter with the state solicitor. At this time there was some discussion also of Ms. Cafolla’s concerns about the way the investigation had been handled. She asked Sergeant McCabe to talk to Garda Kelly and to “tell him he shouldn't be telling lies”. She said that Sergeant McCabe told her she would “have to make a complaint yourself in
writing, that is totally up to you. If you want you can go over to the police station and do that yourself.”

7.25 Ms. Cafolla told Sergeant McCabe that, as it was Christmas week, she would make a complaint at a later stage. However, she did not do so.

7.26 Superintendent Clancy was made aware of this incident in or around 16th October 2007 and his assistance was requested in relation to the selection of an appropriate charge. On 18th October 2007 Superintendent Clancy sent a request to sergeant in charge, Bailieboro, to furnish the investigation file within two weeks.

7.27 The sergeant in charge of Bailieboro at that time was Sergeant McCabe. However, Sergeant McCabe was on sick leave during the relevant period. A number of different sergeants acted as sergeant in charge of the station during his absence.

7.28 Sergeant Murray, as acting sergeant in charge of Bailieboro, forwarded the request to Sergeant Miller, sergeant in charge of unit A, as he was Garda McCarthy’s supervising sergeant.

7.29 On 29th October 2007 Sergeant Miller made a report of the incident addressed to the sergeant in charge, Bailieboro. In it he briefly set out the facts of the case. He referred to the difficulty in coming up with an appropriate charge to fit those facts. He forwarded the file for directions, stating that:

...the only recommendations open to me are that [Mr. D] be summoned for an offence under Sect 4 of Criminal Justice (Theft and Fraud Offences)Act 2001 or that no proceedings be taken.

7.30 Sergeant Miller, in his report, apologised for the delay in forwarding the file, explaining that “Gda McCarthy is the investigating member and is currently off sick.” In fact Garda McCarthy was on sick leave for a period of 140 days between 4th September 2007 and 22nd January 2008 due to an injury sustained off duty. Attached to Sergeant Miller’s report were the statement of Ms. Cafolla, the statement of Garda Kelly, a list of the previous convictions of Mr. D, and a printout from the PULSE system.

7.31 A handwritten note over the signature of Sergeant Murray, date-stamped 29th October 2007, was addressed to “Sgt “A” Bailieboro”. Sergeant Murray recommended that “[Mr. D] and his accomplice be interviewed in relation to this
incident and cautioned statements taken before a direction is given... A prosecution under sec.2 criminal damage Act may cover the offence. For early return, please”. Sergeant Murray was acting sergeant in charge on that date.

7.32 Cautioned statements were taken from Mr. D and Mr. E on 13th December 2007, and from Mr. F on 21st December 2007.

7.33 Sergeant Miller made a further report on 21st December 2007. The cautioned statements were appended to the report, along with the material which had accompanied the first report and a list of previous convictions for one of the suspects. In the report, again addressed to sergeant in charge, Bailieboro, who was Sergeant McCabe, Sergeant Miller discussed the contents of the cautioned statements, and the possible charges that might be preferred. He was of the view that there was “very little option but to recommend that these gentlemen be prosecuted and that they be prosecuted for theft”. He also discussed the possibility of prosecuting for criminal damage and the possibility that they be summonsed for both offences and that “one be withdrawn in court”.

7.34 Sergeant Miller told the commission that he considered that there was sufficient time to issue a summons before a summary offence would become statute barred on the 5th February 2008.

7.35 On 21st January 2008 Sergeant McCabe furnished a formal report to the superintendent, Bailieboro, Superintendent Clancy. In the report, Sergeant McCabe outlined the facts of the case and referred to the excellent quality of the CCTV footage. He also reported that:

Ms. Caffolla is very disappointed with the Garda investigation and how she was treated and I would agree with her. I am carrying out a full investigation into this incident as the file submitted to me on the 21st December 2007 needs major attention.

7.36 As the state solicitor had requested a preliminary report for onward transmission to the DPP for “urgent views on the case” and advice as to what charges would be appropriate, Sergeant McCabe asked Superintendent Clancy to forward the report to the state solicitor immediately without reviewing the file, contrary to normal practice.

7.37 The file was forwarded to the DPP for directions on or about 21st January 2008.
7.38 On 31st January 2008 the DPP directed that the suspects be prosecuted for an alleged
offence:

...that on the 5th day of August 2007 at Caffolas [sic] Takeaway Restaurant, 
Market Square, a public place, in (said District), did engage in behaviour to
wit, urinating in a vinegar bottle and placing it on a table with intent to
provoke a breach of the peace or being reckless as to whether a breach of the
peace may be occasioned. Contrary to section 6 of The Criminal Justice

7.39 On 1st February 2008, very shortly before the six month limit for instituting summary
proceedings expired, Sergeant McCabe directed Garda McCarthy to apply for a
summons for an offence contrary to section 6 of the Criminal Justice (Public Order)
Act 1994 for each of the three suspects. As Sergeant McCabe was not yet in
possession of the directions from the DPP, the wording of the charge contained in
the summonses does not exactly reflect the direction issued by that office.

7.40 The case was heard in Bailieboro District Court on 6th June 2008, where all three
accused pleaded guilty. The penalties imposed have been set out in paragraphs 7.6 to
7.8 above.

7.41 The investigation had many defects:

- Ms. Cafolla was not treated with proper respect when she first reported the
  matter. The gardaí treated the complaint in a light-hearted manner or as Ms.
  Cafolla stated “they just thought it was a bit funny at the time.”

- The fact that the main culprit was brought back to Ms. Cafolla’s restaurant
  was upsetting for her.

- The undertaking by Garda McCarthy to retrieve the CCTV footage from Ms.
  Cafolla after she was asked to download it, was not honoured.

- Ms. Cafolla brought the CCTV footage of the incident to the garda station on
  two occasions. She was not given a receipt in exchange for that CCTV
  footage on either occasion, nor was the fact that the CCTV footage was
  received logged in any way. The CCTV footage was not kept in a secure
  place.
• Ms. Cafolla was told by Garda Kelly that the file had gone to the DPP, when in fact this was not the case. This should not have happened: injured parties are entitled to be kept informed of the state of an investigation. Not only was Ms. Cafolla not kept properly informed by Garda Kelly; she was in fact misled.

• There was an unwarranted delay in completing the file. The fact that Garda McCarthy was on sick leave, and that Garda Kelly too was on sick leave for a time, is only a partial explanation for this delay. The delay in deciding on a charge had the result that the time limit for issuing the summonses had nearly run out. Were it not for the foresight and initiative of Sergeant McCabe in having summonses applied for pending the arrival of the directions of the DPP, the prosecution would have been out of time.

• There was a lamentable lack of note taking. There were no notes taken of any enquiries made by Garda McCarthy after the initial complaint was made. Therefore it cannot be ascertained when he spoke with his supervisors seeking advice about the appropriate charge. Additionally, his attempts to acquire the CCTV footage are not documented.

Sergeant McCabe’s request for assistance

7.42 On 28th January 2008 a meeting took place between Sergeant McCabe and Superintendent Clancy, at which Sergeant McCabe raised a large number of concerns about various policing matters in Bailieboro, which he had listed in a letter to Superintendent Clancy on the same date. The letter did not specifically mention the incident with which we are concerned.

7.43 The letter contains the following:

Re – Issues at Bailieboro Garda Station.

I list a number of issues that need to be addressed at Bailieboro Garda Station:

• Members not turning up for duty on time.
• Members not turning up for duty at all.
• Members not signing on or off in diary.
• Members not doing foot patrol.
• Investigation files not being done.
• Investigation files very poor.
• Incidents not being investigated.
• Members constantly hanging around the station.
• Public Officers reading paper and watching television on duty
• Calls not attended to.
• Garda members making out duty detail.
• Members not performing the duty they are detailed for.
• Summons not being followed up.
• Warrants not being executed.
• No briefings.
• No supervision on 24 hour basis.
• Crime Unit not performing public order duty at weekends.
• No guidance to junior members.
• Member’s non performance.
• Clique forming.
• Coffee/Tea breaks constantly.
• Very unprofessional approach to incidents by P/Gardaí.
• Reported incidents to Gardai not created on Pulse.

The above are some of the issues and are quite serious and I can stand by anything I have mentioned. I have tried and attempted to address all the issues but I am failing, through no fault of my own. The above seems to be the acceptable standard in Bailieboro and I am receiving no help addressing the same.

I cannot put up with the situation any longer and under the Health and Safety Act I request an hour meeting with you at your convenience to
discuss the matters and to see what process you can put in place to deal with the issues.

It is unfair on Probationers that these low standards are being accepted, are not being dealt with, and that they are being trained into this system of low standards.

Forward for your information and attention please,

It was signed by Sergeant McCabe.

7.44 The list is of matters that were of genuine concern to Sergeant McCabe. Superintendent Clancy was asked by the commission:

Q. Did you accept the thrust of the complaints he made in terms of the bullet points in terms of what he was complaining about?

A. I did. The one about the late files in particular, within say a few days of my arrival at Bailieboro District I came across it myself on my desk, files coming in late.

7.45 The list of complaints cannot be held to be specifically referable to the incident under review in this chapter – indeed the heading “Issues at Bailieboro Garda Station” makes it clear that these were general concerns, and not concerns particular to this incident.

7.46 Sergeant McCabe’s complaint in respect of Superintendent Clancy was that “[h]e completely brushed me aside, would not listen to my concerns...”

7.47 At the time of receipt of the letter there was a meeting between Sergeant McCabe and Superintendent Clancy. Superintendent Clancy thinks that the meeting lasted twenty minutes to half an hour but Sergeant McCabe thinks it lasted about two hours. Superintendent Clancy’s evidence was that he told Sergeant Mc Cabe that “these are issues that are within the remit of your responsibility and this is a matter about setting standards and to communicate this to the people under his command”.

That afternoon Superintendent Clancy attended a briefing in the conference room at Bailieboro garda station. At that briefing he brought up serious issues that had arisen from his discussion with Sergeant McCabe. Superintendent Clancy stated that he would arrange a meeting with all the unit sergeants. He had made some preparations
for that meeting, but the meeting did not take place because of the unavailability of some of the participants, and it was not rescheduled.

7.48 Sergeant McCabe’s perception of what transpired at the meeting between him and Superintendent Clancy was different to that of Superintendent Clancy.

7.49 Superintendent Clancy considered that what he had done was helpful: Sergeant McCabe thought otherwise. It was true, as Superintendent Clancy stated, that some of the issues mentioned were a matter primarily for Sergeant McCabe. It was also helpful that Superintendent Clancy attended the briefing following the meeting with Sergeant McCabe and addressed some of his concerns. He also took steps to set up a meeting with the unit sergeants, which was subsequently cancelled. He spoke to two unit sergeants separately. Unfortunately, Superintendent Clancy did not inform Sergeant McCabe why the meeting with all the sergeants was not held. Had he done so, Sergeant McCabe might have been more confident that his concerns were being taken seriously. Sergeant McCabe’s evidence was that he did not know the reasons why the meeting with all the sergeants was not held.

7.50 At the commission, Chief Superintendent Clancy expressed regret for the fact that no meeting took place prior to his departure from Bailieboro some six weeks later.

7.51 Sergeant McCabe had candidly admitted in his letter to Superintendent Clancy of 28th January 2008 that he was failing to address all the issues, but that such failure was “through no fault of [his] own”, and stated that he “cannot put up with the situation any longer”. The advice given by Superintendent Clancy was sensible and pertinent. His attendance at the briefing meeting was appropriate and helpful. However, any proper reading of the document furnished by Sergeant McCabe should have revealed that it was a near desperate cry for help from a concerned member of the force. Unfortunately, Superintendent Clancy failed to appreciate the depth of feeling manifested in the letter. In those circumstances, it is quite understandable that Sergeant McCabe formed the impression that his concerns were not fully appreciated, and that more help should have been given to him.

7.52 A discussion took place which, on Sergeant McCabe’s account, may even have lasted two hours and during which advice was given. Superintendent Clancy attended the briefing meeting that afternoon and actively participated in it and an attempt was made to set up a meeting with the unit sergeants. In light of these
matters the assertion of Sergeant McCabe that Superintendent Clancy brushed him aside is unfounded.

7.53 Superintendent Clancy had no intention of intimidating Sergeant McCabe, nor was he discouraging Sergeant McCabe from “bringing issues to him again.” However, it is understandable that Sergeant McCabe may have got that impression, and may have got the impression that he was being told in effect that these were his problems and that he should sort them out himself.

7.54 Had Superintendent Clancy shown more empathy or appreciation of Sergeant McCabe’s deep personal distress on the occasion in question it is likely that this would have been more useful than the actions actually taken by him, appropriate though they were. In so stating, no criticism is intended of Superintendent Clancy’s competence or assiduity. After the meeting Superintendent Clancy noted in his journal after the meeting that Sergeant McCabe had thanked him.

Analysis of Sergeant McCabe’s complaints

7.55 Sergeant McCabe’s allegations in relation to this incident are contained in the Byrne/McGinn report, in complaints made to the confidential recipient, and in the dossier of 19th February 2012, given to Mr. Micheál Martin TD, and forwarded to An Taoiseach.

7.56 In considering the complaints of Sergeant McCabe, the Byrne / McGinn investigation had possession of the document of 28th January 2008 which had originally been given by him to Superintendent Clancy. While tasked with inquiring into a daunting list of very specific complaints, that investigation also examined the complaints in the context of that document containing more general complaints. Module 6 of the Byrne / McGinn report deal with this letter.

7.57 The specific complaints of Sergeant McCabe in his statement of 28th April 2008 about the matter relating to Ms. Cafolla are set out below and will each be dealt with in turn:

*On the 5th August 2007 I [sic] serious incident occurred in a restaurant in Bailieboro where culprits spilled out vinegar out of the container and replaced it with urine. They left the urine bottle on the table for*
unsuspecting customers to pour it onto their chips and watched as a father and son sat at the table concerned waiting for their food and most probably use the vinegar container.

When the owner discovered what was happening she quickly intervened and rang the Gardaí.

Two Gardaí arrived and laughed and ridiculed the injured party despite one of the culprits admitting that he urinated into the vinegar container and placed it back on the table.

The injured party was furious and disgusted with the way she was treated by the Gardaí.

Nothing was done about the incident until the owner made numerous calls to the Garda station and eventually I became aware of it.

I reported the inactions and behaviour of the Gardaí to Superintendent Clancy on the 21st January 2008 and on the 28th January 2008 and requested help to sanction the Gardaí involved for the inappropriate way they dealt with the case. He refused to take any action against the Gardaí concerned.

7.58 The incident was nasty, unpleasant and grossly insulting, and while it would be possible to view it as just an ill-mannered, insulting, and coarse prank, Sergeant McCabe cannot be faulted for classifying it as serious. He was quite entitled, also, to form the opinion that the father and son would, “most probably”, use the vinegar container.

7.59 Ms. Cafolla intervened rapidly, and showed both courage and presence of mind at the time of this incident. The assertion that the gardai “laughed and ridiculed the injured party” is not borne out either in her original statement or in her later lengthy statement of complaint about the handling of this incident. Nor is it contained in her evidence to the commission. The evidence of Ms. Cafolla is that when she went to Bailieboro garda station with her complaint “they just thought it was funny at the time”. Although overstated, the essence of Sergeant McCabe’s complaint is correct.

7.60 Ms. Cafolla was undoubtedly and justifiably dissatisfied with the way the case was dealt with and investigated, although she was content with the outcome of the case in
court. She explained her reasons to the commission and they are essentially the same as the defects in the investigation outlined above in paragraph 7.41.

7.61 The gardaí involved in the investigation made a number of mistakes which have been outlined above in paragraph 7.41. However it is incorrect to assert that nothing was done about the incident until Ms. Cafolla made numerous calls to the garda station and Sergeant McCabe became aware of the incident. Moreover the following are some of the actions that had been taken before Sergeant McCabe became involved in any way with the case.

- On arrival Garda McCarthy had spoken to Ms. Cafolla and ascertained the nature of her complaint.
- The main culprit had been identified. He had been cautioned, and had apologised.
- His response after caution had been noted by Garda McCarthy.
- The culprit had been brought back to the restaurant to apologise even though this action was inappropriate.
- A statement had been taken from Ms. Cafolla by Garda Eamonn Mallee.
- Garda Kelly had made a statement.
- On 16th October 2007 Superintendent Clancy had sent a copy of the PULSE incident details to the sergeant’s office asking for a copy of the investigation file within “two weeks”.
- Sergeant Miller had furnished a report for the investigation file on 29th October 2007.
- Sergeant Murray had furnished a memorandum recommending that outstanding statements be taken from certain individuals, and Sergeant Miller had caused those statements to be taken. On 21st December 2007 he also had produced another report recommending prosecution.

7.62 Sergeant McCabe is again inaccurate in the final part of his complaint. He accepted in evidence that he did not bring the specific issues of inappropriate behaviour by Garda McCarthy and Garda Kelly to the attention of Superintendent Clancy, but that
he did show him his report (which makes no reference to “inactions” by the gardaí).
Sergeant McCabe suggested that Superintendent Clancy ought to have made
enquiries on foot of that report and in particular, the fact that Ms. Cafolla was “very
disappointed with the Garda investigation and how she was treated...”

7.63 The inappropriate way in which the case was dealt with, which Sergeant McCabe
considered to warrant sanctions, is not specified in the complaint. Sergeant McCabe
does not set out the reasons for the disappointment of Ms. Cafolla, or the reasons
why he agreed with her. Sergeant McCabe told the commission that the
inappropriate way the case was dealt with was solely in respect of the “way she was
treated by the Guards, ridiculed and fun”. It did not concern either the fact that one
of the culprits was brought back to Ms. Cafolla’s restaurant, or the untruth that she
was told by Garda Kelly.

7.64 Neither the report of 21st January 2008 nor the memorandum of 28th January 2008
prepared by Sergeant McCabe affords any support for the contention that he
“requested help to sanction the Gardaí involved for the inappropriate way they dealt
with the case”. His evidence to the commission only went as far as stating “...what I
had in the report was that the injured party wasn’t happy with the way it [sic] was
treated and it was on that basis I thought something would be done in relation to it.”

7.65 Sergeant McCabe did not, either specifically or by implication, request help to
sanction the gardaí involved. He did not explain to Superintendent Clancy either
orally or in writing the actions of the gardaí which he considered to warrant
sanctions. In those circumstances, it is unreasonable of him to complain of
Superintendent Clancy’s failure to apply such sanctions.

The Byrne / McGinn report

7.66 When investigating this complaint, statements were taken from Ms. Cafolla,
Superintendent Noel Cunningham, Superintendent Michael Clancy, and
Superintendent Maura Lernihan by Detective Inspector Michael Finan and Detective
Garda John Jones, who were part of Chief Superintendent McGinn’s investigation
team. They also had possession of the investigation file.

7.67 The Byrne / McGinn report found as follows:
The review has established that the investigating Gardaí did not act professionally or appropriately which caused Ms. Cafolla some distress. Garda Rudy Kelly, Bailieboro, misled Ms. Cafolla into believing that the file had been forwarded to the D.P.P. when clearly this was not the case.

This finding is a justification of Sergeant McCabe’s complaints about the investigation.

7.68 Sergeant McCabe did much to further the investigation. He was involved with the form that the charges took, he was instrumental in the issuing of the summonses and he ensured that the matter came before the courts.

7.69 The Byrne / McGinn report also found that:

While Sergeant McCabe was aware that the investigating Gardaí behaved inappropriately towards the injured party, he did not take any immediate action himself or bring this matter to the attention of his District Officer.

In fact, almost immediately after becoming aware of the matter and probably the very next day, Sergeant McCabe went to visit the injured party. He apologised for the misinformation given to her by Garda Kelly. He also informed her of her right to complain. He acted promptly and commendably. The commission was surprised to hear that the Byrne / McGinn report, in this passage, intended to refer to disciplinary action. It did not state that, and, moreover, the word “immediate” seems far less pertinent in the context of a disciplinary action than in the context of a tardy investigation where urgent measures might have to be taken. Neither was it clear to the commission from the context that the report was referring to disciplinary action. However, the commission accepts the evidence of Chief Superintendent McGinn on the matter, and notes that the actions of Sergeant McCabe were mentioned in the facts uncovered by the investigation.

7.70 Chief Superintendent McGinn agreed that the report, as drafted, may have been unfair to Sergeant McCabe, albeit unintentionally, because of a failure to elaborate on what she meant.

7.71 In a letter of 25th May 2010 to Assistant Commissioner, Northern Region, Chief Superintendent McGinn also found that:
The investigation of this matter fell well short of the required standard and the injured party was not truthfully kept informed of the progress of the investigation.

I am of the view that a disciplinary investigation should be commenced.

This finding in the course of the Byrne / McGinn investigation upheld, albeit in a formulaic manner, Sergeant McCabe’s complaints about the serious flaws in the investigation.

7.72 The Byrne / McGinn report stated Sergeant McCabe did not bring the matter to the attention of the district officer. It would have been more accurate to state that he did not do so except in vague terms. The report does not mention the good work of Sergeant McCabe in getting the matter to court – of course, it is not obliged to do so.

7.73 The Byrne / McGinn report, while recommending that disciplinary action be taken in relation to both Garda McCarthy and Garda Kelly, did not comment on the fact that Superintendent Clancy had not taken such action.

The disciplinary inquiry

7.74 By letter dated 25th May 2010, Chief Superintendent McGinn wrote to the Assistant Commissioner, Northern Region, recommending that disciplinary proceedings be taken. The letter contains the following passage:

Good practice would suggest that these matters should be investigated independently. I, therefore, recommend that any disciplinary investigation be carried out by an officer from outside the Northern Region.

7.75 This recommendation was not followed. On 21st June 2010, Assistant Commissioner Kieran Kenny appointed Superintendent Noel Carolan of Carrick-on-Shannon, which was within the northern region, as deciding officer for the purpose of the disciplinary investigation into the conduct of both Garda Kelly and Garda McCarthy. Superintendent Carolan was transferred on promotion to the northern region from Dublin just five months before his appointment as deciding officer. He had not previously served in the region. The fact that the recommendation was not followed was not of any significance.
7.76 As part of his investigation, Superintendent Carolan took a statement from Ms. Cafolla dated 7th September 2010. This is identical to the statement that was taken by Detective Inspector Finan and Detective Garda Jones in January 2009 for the Byrne / McGinn report.

7.77 A statement was taken from Sergeant McCabe on 9th September 2010 in which he described how he first became involved with the case in November or December 2007 as a result of a phone call from Sergeant Murray who reported the facts to him. He said that he was also told that the owner of the restaurant was complaining that the two gardaí who attended did nothing about it. He met with Mr. and Ms. Cafolla shortly afterwards, received an account of the incident from them, and viewed the CCTV footage. He said that she complained about the way she had been treated by the gardaí who arrived at the scene. She stated that her complaint was not taken seriously by the gardaí on the day and that every time she enquired about the case she was told by the two gardaí that the file was with the DPP. Sergeant McCabe stated “I knew that no file had gone to the DPP in this case”.

7.78 Sergeant McCabe went on to state that he compiled a file on the facts of the case and submitted it to the state solicitor’s office to forward to the DPP, and that he thought he had contacted the state solicitor by telephone prior to sending the file. He said the file had been typed in his office, as was the minute to be signed by Superintendent Clancy. He said that he asked Superintendent Clancy to sign that minute, which he did. He said that he had never had to resort to this type of practice before, and that he was conscious of the six month limitation for summary proceedings. Shortly before the six months was up, he said he considered that he should issue a summons. He said that Superintendent Clancy should have contacted the DPP before this. Sergeant McCabe said that on 1st February 2008 he issued, or directed to be issued, a summons for an offence contrary to section 6 of the Criminal Justice (Public Order) Act 1994 for each of the three accused and he referred to the subsequent course of proceedings. He expressed the view that:

…it is very unfair to commence or contemplate disciplinary proceedings against any Gardaí when the Superintendent in charge of the area at the time, Superintendent Clancy, did not want to nor had no will to have this case investigated or send the file to the DPP.
7.79 On 16th November 2010 Garda Kelly furnished a report to Superintendent Carolan in which he denied telling Ms. Cafolla that a file had gone to the DPP. He stated that as he was not investigating the incident, he did not have any information on the file and that therefore he would not have informed the injured party as to where it was located. In the statement, he also denied the allegation that he told the injured party it would take two to three weeks to get the file from the DPP. However, in his evidence to the commission he said that he did not remember his interactions with Ms. Cafolla and said he was not in a position to dispute the evidence of Ms. Cafolla to the effect that he had indeed informed her that the file in the matter had been sent to the DPP when, in fact, it had not been sent.

7.80 In his report of 16th November 2010 to the Assistant Commissioner, Northern Region, Superintendent Carolan noted the complaint of Ms. Cafolla that she had been told by Garda Kelly that a file had been sent to the DPP when, in fact, that was not the case. He noted also that Garda Kelly had denied this allegation. He determined that Garda Kelly was in breach of discipline (neglect of duty) and the disciplinary action that he decided should be taken was “advice”. He administered the advice and “informed Garda Kelly of his obligations and responsibilities to truthfully inform an injured party of the progress of the relevant investigations.”

7.81 On 30th October 2010 Garda McCarthy furnished a report to Superintendent Carolan. He stated that he had spoken to the main offender, who apologised for the incident after caution. He reported that he had also asked her for CCTV footage of the incident and that she said she would have to download it for him. He said that Ms. Cafolla attended Bailieboro garda station the following day at his request and “gave me a statement in relation to the incident”. This is not correct. Firstly, Ms. Cafolla attended the garda station some three days after the incident, and not the following day. Secondly, she made her statement, not to Garda McCarthy, but to Garda Mallee. Thirdly, it is notable that he did not address the central question about getting the CCTV footage in good time. This matter has been dealt with in paragraphs 7.16 – 7.18.

7.82 Garda McCarthy said that he consulted with his unit sergeant, Sergeant Miller, as to what offence or offences could be prosecuted, and that he also consulted with legal training staff in Monaghan. He said that on 7th September 2007 he was involved in an accident as a result of which he was unfit for duty for a period of five to six
months. He said that, upon returning to work, he successfully prosecuted the three males for public order offences. He added:

*This incident occurred during my Probation Phase. Three years later I am deeply shocked and upset to find that I am accused of being in breach of discipline “Neglect of Duty.” I feel I in no way acted in Breach of discipline that being I did not Neglect my Duty [sic]*

7.83 Superintendent Carolan determined that Garda McCarthy was in breach of discipline (neglect of duty) and the disciplinary action that he decided should be taken was “advice”. He administered the advice and informed Garda McCarthy that he had “statutory obligations to secure all available evidence when investigating a criminal offence, that he should have secured the CCTV at the earliest opportunity and that all investigations must be conducted thoroughly and in accordance with the Human Rights of all parties involved”.

7.84 Little needs to be said about Superintendent Carolan’s disciplinary inquiry, other than that it was conducted properly, the conclusions amply justified, and the disciplinary action taken appropriate.

7.85 In a letter dated 23rd January 2012 to the then confidential recipient under the Garda Síochána Act 2005 and the Garda Síochána (Confidential Reporting of Corruption Or Malpractice) Regulations 2007, Sergeant McCabe wrote as follows:

*Re-Wrongdoing and Malpractice in Cavan/Monaghan Division.*

*Mr Connolly,*

*...*

*Superintendent Clancy refused to send a file to the D.P.P. on an endangerment involving the attempted poisoning of a young boy and his father. He refused to have it investigated. (REDACTED) carried out the investigation behind his back, sent a file to the D.P.P. and successfully prosecuted all 3 offenders. The case was also upheld following a Garda investigation.*
7.86 The confidential recipient passed that letter on to the Minister for Justice on the same date. The secretary general of the department in turn passed it on to the Commissioner of An Garda Síochána.

7.87 This complaint can be dealt with briefly. There is no evidence that Superintendent Clancy refused to send a file to the DPP, nor is there evidence that he refused to have the matter investigated. Sergeant McCabe himself said in his statement to Superintendent Carolan that the file had been typed in his office, as was the minute to be signed by Superintendent Clancy. He said that he asked Superintendent Clancy to sign that minute, and that he did so. There is no evidence to support a contention that this file concerned a case of endangerment; there is no evidence in the file of any attempted poisoning, either of a young boy or his father. The reference to carrying out the investigation behind the back of Superintendent Clancy presumably refers to the fact that Sergeant McCabe had been in contact with the state solicitor himself.

7.88 In the dossier given to Mr. Martin T.D. and forwarded to An Taoiseach, outlining his concerns about a number of issues including the one under review in this chapter, Sergeant McCabe gave an account of the incident and had a number of complaints to make.

7.89 These complaints will be dealt with, seriatim:

- “Majella Caffolla [sic] calls the Gardaí and Sergeant Miller, Gardaí McCarthy and Kelly arrive down and treat Majella with ridicule and fun”

  The evidence of Ms. Cafolla is that she called to the garda station. Garda McCarthy and Kelly were present at the scene, but Sergeant Miller was not. The question of how she was treated is dealt with at paragraph 7.41 above.

- “She is very annoyed with the behaviour of the Gardaí.”

  This is correct. Ms. Cafolla was rightly annoyed because of the inadequacies of the investigation set out in paragraph 7.41 above.

- “Over the next few months she kept ringing the station enquiring about her case and she was told on each occasion that the file had gone to the D.P.P.”

  Ms. Cafolla contacted the garda station in Bailieboro on several occasions concerning her case. However she did not state that she was told on those occasions that the file had been sent to the office of the DPP. Her account of
the matter was that she was so informed by Garda Kelly at the serving hatch of her restaurant.

- “She becomes suspicious and a friend of her told her to ask for me, Sergeant McCabe. She reported the incident to me and when I view [sic] the footage I was appalled.”

Sergeant McCabe, Ms. Cafolla, and Sergeant Murray all stated that Sergeant McCabe became aware of the incident because of a telephone call he received from Sergeant Murray, and that he then initiated contact with Ms. Cafolla. Sergeant McCabe’s intervention in this case was because of the telephone call from Sergeant Murray. The viewing of this nasty little incident would invoke feelings of great annoyance to an observer, and sergeant McCabe’s reaction was justified.

- “No file was ever sent to the D.P.P. and no investigation was ever done.”

Clearly Sergeant McCabe intends to convey that no file was sent to the DPP prior to his involvement with the case. However it is incorrect to state that no investigation was ever done. There were a number of steps taken in the investigation prior to the involvement of Sergeant McCabe. They are set out in paragraph 7.631 above.

7.90 Sergeant McCabe reported the matter to Superintendent Clancy on 21st January 2008. Sergeant McCabe contacted the DPP through the state solicitor seeking directions as to what charges should be brought against the offenders. Superintendent Clancy did sign the minute as requested and the file was, indeed, sent to the DPP.

7.91 The DPP’s directions were dated 31st January 2008, and received by the state solicitor on 1st February. The direction was forwarded to the superintendent, Bailieboro, marked for the attention of Sergeant McCabe on 4th February 2008, the last day before the expiry of the six month time limit for preferring the offences.

7.92 It is to the credit of Sergeant McCabe that he had the prescience to have summonses applied for on 1st February 2008, in anticipation of the possibility that the directions of the DPP might be late. In so stating no criticism is intended of the office of the DPP. Sergeant McCabe showed a diligence and commitment to duty without which this prosecution may have faltered.
Conclusion

7.93 The commission finds that Ms. Cafolla was not well served by An Garda Síochána in this case. She put the matter very well during her evidence to the commission:

*I am not being the criminal but I am the victim and it has a knock on effect and people need to know they need to do things properly. That is why it is in place so that things like this don’t happen to people that and that's for my children and I wouldn't let them disrespect the gardaí ever even because there is as far as I’m concerned the only person who helped me was the man that I met that day Mr. McCabe and another gentleman who came from the station and interviewed me were very nice as well. But the thing about it is it doesn't happen to other people that is all.*

*Like I said I don't want anybody in trouble for any reason other than there is protocol and it should be followed. So do whatever you have to do, I don’t know the legal end of it, but I am not here to tell a lie and I have nothing to gain.*
Chapter 8  Assault in Cootehill.

The investigation by An Garda Síochána of an incident of assault and false imprisonment of a girl in Cootehill, Co. Cavan on 2\textsuperscript{nd} September 2007

The facts

8.1 At about 6:00 am on the morning of 2\textsuperscript{nd} September 2007, a seventeen year old girl was walking home in the Cootehill area of Co. Cavan when she was assaulted.

8.2 At 10:15 am on 21\textsuperscript{st} January 2008 Garda Laura Martyn arrested a suspect, Mr. G, for an offence under section 3 of the Non-Fatal Offences against the Person Act 1997. The suspect was detained under section 4 of the Criminal Justice Act 1984 at Bailieboro garda station. During the course of his detention he was interviewed once with the assistance of an interpreter. This interview lasted approximately 22 minutes. He denied any involvement in the incident.

8.3 The suspect was released without charge at 12:43 pm.

8.4 There was no prosecution in the matter.

The garda investigation

8.5 On 2\textsuperscript{nd} September 2007 Garda Martyn was observer in the district patrol car with Sergeant Thomas Miller. Both were attached to Bailieboro garda station which is open twenty-four hours every day. Sergeant Miller was the unit sergeant in charge of unit ‘A’ and Garda Martyn was a junior member attached to that unit. They received a call directing them to go to the sub district of Cootehill to the home of the victim to investigate an allegation of assault. Cootehill garda station is not open twenty-four hours a day, and was closed at the time of the call. Calls received at Cootehill garda station out of hours were forwarded to Bailieboro garda station.

8.6 Garda Martyn and Sergeant Miller were met by the victim’s parents at her home. Garda Martyn had a conversation with the victim. She established some details in
relation to the incident. Garda Martyn then took a written statement from the victim in the kitchen of the house in the presence of her parents. It is unclear if Sergeant Miller was present while the statement was taken.

8.7 The victim made the following statement:

My name is [redacted] and I live at the above address. Last night I was out in Cootehill with two of my friends. I was walking up home at around six o’clock this morning. My two friends, two lads walked me near home to the ivy bar. [redacted] and [redacted] are the names of them. I proceeded to walk by myself from the ivy bar to my own house on the footpath. As I was walking down the road I met a male walking towards me. He was stumbling along the footpath. I walked past him. He was small, black hair, he was a bit taller than myself around 5ft5. He has a tight haircut and he had really round eye. He was wearing all black, black jeans and black top. I know him from around the town. As I walked past, I turned around and looked back and he was coming walking after me. I started walking faster and I could hear him getting faster.

He grabbed my shoulder; I had started running at this stage. He put his hand over my mouth. I struggled to get away and I screamed out the lads names. Then I fell and I got up and I ran towards the town. I met the lads at McMullen’s Gala. He grabbed me around the entrance of my estate because I had just turned up home. I know he is a foreign national because as he walked past me he was stumbling so he said sorry. I think I know him from the school maybe picking up kids. He is in his late 30’s early forty’s. He is eastern European, Lithuanian or Polish nationality. I did not receive any injuries from this just shock. When he grabbed me, he had a tight grip on myself, I was trying to shout but couldn’t really when his hand was over my mouth. My parent’s names are [redacted]. I am seventeen years old. This statement has been read over to me and it is correct. I have been offered to make any changes I deem necessary but I do not wish to do so.

8.8 The statement was signed by the victim and witnessed by her parents and Garda Martyn.

8.9 Following the taking of the statement, Garda Martyn “liaised with Cootehill Gardaí with this incident to try to verify any suspects for the attack.” This was normal
practice in relation to an offence that had been committed in the Cootehill area which was being investigated by gardaí assigned to Bailieboro station. Garda James Morrisroe, who was attached to Cootehill garda station, apprised himself of the facts of the incident on commencement of his tour of duty that day through a check of the PULSE system. He also contacted Garda Martyn. Garda Morrisroe continued to have an important role in the investigation, and was in regular contact with Garda Martyn and Sergeant Miller.

8.10 It is unclear whether Sergeant Miller notified his district officer, Superintendent Michael Clancy of the incident. However, on 2\textsuperscript{nd} or 3\textsuperscript{rd} September 2007 Sergeant Maurice McCabe notified Superintendent Clancy of the incident. Superintendent Clancy recorded the briefing in his journal in which he noted, “I directed investigation”. Superintendent Clancy told the commission that his note was a record of a “formal direction that an investigation take place” and was not to be read as an indication that he had a hands-on role in the investigation itself. The note also reflects his wish to remain “briefed with progress”.

8.11 Garda Martyn checked for CCTV footage in the area of the incident but none was found. She checked CCTV footage on a construction site near the housing estate where the injured party lived, but it was not working at the time of the incident. She also checked with friends of the injured party who were with her that night but no one reported that they had seen anything relevant. There are no notes or records of these enquiries.

8.12 There was a routine management accountability meeting on 5\textsuperscript{th} September 2007. In relation to this investigation a decision is recorded to have a “photo fit” of the suspect compiled. This did not happen.

8.13 It was arranged to have a check-point set up in the relevant area, “between 5 am and 6 am in order to gather information on the crime”. Although the commission has been told that this did occur, no information has been provided either as to who was involved in this exercise or as to its outcome.

8.14 Within ten days of the incident, following his discussions with Sergeant Miller and Garda Martyn, Garda Morrisroe had nominated a suspect. This appears to have been done primarily on the basis of the victim’s description that, “[h]e was small, black
hair, he was a bit taller than myself around 5ft5. He has a tight haircut and he had really round eye. He was wearing all black, black jeans and black top. I know him from around the town.” Garda Morrisroe said that the description of the culprit matched the description of a foreign national whom he had arrested and prosecuted for a public order incident the previous November.

8.15 The case was further discussed at an accountability meeting on either 11th or 12th September 2007. Superintendent Clancy’s notes contain the address of the nominated suspect and it appears from the note that “Suspect – surveillance” was directed.

8.16 The victim told the commission that, after the incident, she saw her assailant on two occasions in Cootehill. On the first occasion, perhaps a week or two after the incident, she was travelling in the car with her mother when she saw the man “walking out down the road”. When she got home her father telephoned the gardaí in Cootehill. She told the commission that “they had said that they’d drive out the road to see if they could see him but then they rang back and said that they took a spin out and that he seemed to be gone.” In relation to the second sighting she said, “I was up town one day, I went into the shop, just into the supermarket, Supervalu in the town, and I actually just kind of walked past him. I think we let the guards know again about that but I never heard anything more about it since that.”

8.17 The victim’s father told the commission that, on the two occasions when his daughter saw her assailant after the assault, he telephoned the gardaí in Cootehill. On the first occasion a few minutes after the sighting of her assailant by his daughter, he called the gardaí. They telephoned him back later to tell him that “they done the check and they couldn’t spot him or they didn’t spot him.” On the second occasion, after his daughter had seen her assailant in the supermarket, he telephoned the gardaí again. On this occasion also, the gardaí telephoned him back to say, “that there was no spotting of him, there was no sighting of him.” He said that they made no reference to checking the CCTV footage in the supermarket even though the supermarket had CCTV at that time. The victim’s father cannot remember which gardaí he spoke to. He explained that he contacted Cootehill garda station because it would “be quicker for Cootehill to come out”.

8.18 There does not appear to be any note or record of these calls being received nor any record of any steps taken by gardaí on foot of the reported sightings.
Investigation - 12th September 2007 to 8th April 2008.

8.19 Garda Martyn stated that she kept in contact with the victim. However the victim does not remember this happening and Garda Martyn kept no record of this contact.

8.20 Such ‘surveillance’ as was carried out in the investigation was not systematic or organised. Garda Morrisroe drove past the home of the suspect on several occasions. He told the commission that:

I was to keep an eye out for the suspect, track his movements, whenever I was working. For example, it had been mentioned that the suspect may have been seen around the schools, with his children going to school, so if I was working early in the morning I would check the route from his house to the two national schools where his children may have been attending.

The commission has not been furnished with any details of the dates or times when Garda Morrisroe carried out these duties, but it appears that it was during his regular tours of duty, and that the suspect was not in fact sighted by him. It seems that his intention was to ascertain whether the suspect appeared at any of these locations on a regular or predictable basis. If this was established it was intended that the victim carry out an informal identification of the suspect, if possible.

8.21 The use of the word ‘surveillance’ in subsequent garda reports may have misleadingly given the impression that the suspect had deliberately gone to ground or as Garda Martyn put it had become “slightly housebound.” Garda Martyn, the investigating garda, was not aware of the fact that surveillance was carried out.

8.22 Garda Morrisroe also checked CCTV footage in a petrol station on the route from Cootehill town to the housing estate where the injured party lived. There was nothing of evidential value found on it. There were no written notes in respect of this.

8.23 Garda Morrisroe also made an enquiry with the social welfare office, but he has no written record of this.

8.24 Sergeant Chris McCormack, sergeant in charge, Cootehill garda station, conducted house-to-house enquiries to no avail. He explained to the commission that an incident
like this would have been “the talk of the town” when it occurred. He also checked for CCTV footage in the housing estate where the victim lived.

8.25 From the outset of the investigation Garda Martyn, Garda Morrisroe and Sergeant Miller envisaged that the victim would identify her assailant by seeing him around the town or by means of an informal identification procedure. A considerable amount of time was allowed to pass in the hope that this could be done.

8.26 Sergeant Miller’s reason for not holding a formal identification parade was that, “the suspect’s unusual appearance and short stature (5ft 5) leaves a formal id as an almost impossible task.” Garda Morrisroe and Garda Martyn also make reference to his “singular appearance.” The perception that the suspect had “bulging eyes” was also mentioned (this was not the description given by the victim in her statement where she describes her assailant as having “really round eye”). None of the matters mentioned above constitute a valid reason to fail to hold an identification parade. The custody record in respect of Mr. G records his height as being 5’8”, although the victim thought that her assailant was about 5’5”. A height of 5’8” cannot be regarded in any way unusual in the Irish population. To advance this height as a factor which might render a formal identification as “an almost impossible task” is absurd. Even if the suspect were 5’5” it would be no bar to the holding of a formal identification parade. If “bulging eyes” constituted a bar to the use of a formal identification parade the same objection would also apply to the use of photographs for an informal identification. The gardaí had no problem with the latter. The photograph of the suspect seen by the commission does not show an “unusual appearance”.

8.27 Garda Morrisroe cited the unlikelihood of getting eight to twelve eastern Europeans to volunteer to stand on an identification parade as a reason for not holding an identification parade. That implies that where the suspect was eastern European, then the parade had to be made up entirely of eastern Europeans. This proposition is quite incorrect in law. The fact that the suspect was eastern European in no way justifies the failure to hold an identification parade.

8.28 Garda Morrisroe referred to the option of a formal identification parade as perhaps having applicability in an “ideal world”. The holding of a formal identification parade was never seriously considered in this investigation. The evidence of Garda Martyn was that “...from the start the informal route was something that I was always going
to go with”. Indeed she stated to the commission that she “now knows that it is not best practice”.

8.29 The commission was told that Bailieboro garda station was totally unsuitable for holding an identification parade. This view, expressed by Sergeant Miller, was endorsed by Superintendent Clancy. However it is irrelevant in view of the matters outlined in the previous paragraphs. Steps should have been taken to hold a formal identification parade. The victim saw her assailant in Cootehill on two occasions. On each occasion the gardaí were contacted by her father. On each occasion he was told that the gardaí had followed up the matter. It is regrettable that these sightings of the assailant were not conveyed to Garda Martyn who was in charge of the investigation.

8.30 The arrest of the suspect on 21st January 2008 was planned for some time. In fact it had originally been scheduled to take place the previous week but was postponed to that date. Sergeant Miller was on leave on 21st January 2008.

8.31 At 10:15 am on 21st January 2008 Garda Martyn arrested the suspect for an offence under section 3 of the Non-Fatal Offences against the Person Act 1997. She cautioned the suspect and conveyed him to Bailieboro garda station arriving at 10:40 am. An interpreter was contacted and arrived at the garda station at 11:44 am. At 11:55 am the suspect was detained under the provisions of section 4 of the Criminal Justice Act 1984 by Garda Rudy Kelly. The suspect was fingerprinted and photographed by Detective Garda Declan Doyle at 11:57 am. A custody record was commenced in respect of the suspect. In section ‘A’ entitled, “Details Concerning Person in Custody” certain matters relating to the suspect were recorded including his address, his nationality, his height was recorded as 5’8”, his hair colour as black, his eye colour as brown, his eye type as round, and he was noted to have a light moustache. The suspect was brought to the interview room by Garda Martyn and Garda Morrisroe at 12:10 pm. According to the handwritten memorandum, the interview commenced at 12:14 pm and concluded at 12:36 pm. The interview was conducted with the assistance of a Lithuanian interpreter and lasted 22 minutes. Garda Kelly checked on the suspect in the interview room at 12:39 pm and he was returned to the day room at 12:41 pm. The suspect was released at 12:43 pm.

8.32 There is a conflict of evidence as to the release of Mr. G from detention. Garda Martyn told the commission that at the conclusion of the interview with Mr. G she
spoke to Sergeant McCabe and that he told her to release the suspect. Sergeant McCabe adamantly denies that this conversation took place.

8.33 It is unlikely that Sergeant McCabe would have authorised the suspect’s release. Firstly, only days before the arrest, he had requested the file on the basis that the investigation had not progressed in a satisfactory manner. In those circumstances, it is somewhat implausible that he would have authorised the release of the prisoner had he been informed of the content and duration of the interview. Secondly, on 12th February 2008 Sergeant McCabe wrote to Superintendent Clancy complaining *inter alia* about the poor use that had been made of the detention. If he himself had authorised the release of the prisoner he would not have made that criticism, as it would have been a complaint about his own behaviour. Thirdly, despite this matter being the subject of investigation and inquiry for a number of years, the contention that Sergeant McCabe authorised the release of Mr. G emerged for the first time during the evidence heard by the commission. Garda Martyn maintained that she had told Superintendent McFadden that “Sergeant McCabe had told me to release”. However, Superintendent McFadden did not record this in his contemporaneous note and moreover, he has no recollection of it being said. He told the commission that he believes that he would have noted it had it occurred. Finally and most significantly, Sergeant Miller was specifically asked by Inspector Cunningham, in a letter dated 28th February 2008, “*who was consulted before the prisoner was released?*”. Sergeant Miller did not address this matter at all in his lengthy written report dated 21st March 2008. His explanation to the commission that he “never knew there was an issue with this investigation” is singularly unconvincing. It was “an issue” at the time because Inspector Cunningham had specifically asked for such information.

8.34 After the release of the suspect, Garda Martyn contacted the photograph collator and requested eleven photographs of foreign nationals. On 5th February 2008 Garda Martyn attended at the home of the victim and showed her twelve photographs including a photograph of the suspect. The victim told the commission that her assailant was not in any of the photographs shown to her by Garda Martyn.

8.35 The victim told the commission that at the meeting with Garda Martyn on 5th February 2008, she informed Garda Martyn that she had seen her assailant on two occasions. Garda Martyn denies this. Moreover, in her report dated 5th February 2008
she noted that the victim “stated that she has not seen the man in the Cootehill area since the attack.”

8.36 The commission accepts the evidence of the victim and her father. She had no conceivable reason to invent the sightings of her assailant. The commission accepts the evidence that her father contacted the gardaí on two occasions when she reported the sightings to them. He had no reason to invent those telephone calls. It is highly unlikely that the victim would have positively and wrongly stated to Garda Martyn that she had not seen her assailant when in fact she had seen him.

8.37 Garda Martyn submitted a report dated 5th February 2008 to the sergeant in charge, unit ‘A’, Sergeant Thomas Miller. She included the following with the file: statement of the victim, statement of Garda Martyn, memorandum of interview with the suspect, a PULSE print-out and the custody record.

8.38 It is a matter of concern that, despite the fact that the victim explicitly informed Garda Martyn that her assailant was not included in the photographs shown to her, that man continued to be the main suspect.

8.39 On 8th February 2008 Sergeant Miller sent a report to the sergeant in charge, Bailieboro. He stated that Mr. G remained the main suspect but the victim had not identified him through a photographic identification. He stated that “considerable investigation” had been carried out by Garda Martyn and Garda Morrisroe to link the suspect to the incident but that there was insufficient evidence to put any charges against him. Sergeant Miller noted that the suspect was still living in Cootehill, “[h]owever seems to rarely leave the house and at the moment is currently unemployed which gives no opportunity to do an informal id.” He stated that the delay in effecting an arrest was to allow the injured party to carry out an informal identification but no chance to do so arose. He concluded by stating “efforts will continue and updates reported.” These remarks of Sergeant Miller were apparently made without knowledge of the fact that the victim had seen her assailant on two occasions. As regards the difficulty of holding an identification parade, this is discussed at paragraphs 8.26 to 8.29 above.

8.40 In a report to the superintendent, Bailieboro, dated 12th February 2008, Sergeant McCabe made certain observations on the file submitted by Garda Martyn. He noted
that the file was very late, that the arrest was made the day after a request for the file was sent, that a photograph identification was carried out on 5th February 2008 but that no informal identification was done before this. Furthermore he stated that no CCTV had been seized, that the suspect was “only interviewed for 31 minutes and was then released”, and that “the [i]njured party’s statement describes this incident as possibly an attempted rape but the Garda investigation does not reflect this.”

8.41 Inspector Noel Cunningham, on behalf of the superintendent, sent a handwritten note to the sergeant in charge dated 28th February 2008. In relation to the investigation he made pertinent observations as follows:

_This is a poor investigation into a serious incident and reflects as much on the supervision as the investigation._

_It is not understood and an explanation is required why a briefing document was not prepared for such a serious incident and why two members were left to investigate this serious crime. Why was an id parade not carried out, surely the suspect is not so individual in his appearance as to prevent a situation where the Gardaí could not put together a formal id parade. Was he asked to stand on one when being questioned? Who was consulted before the prisoner was released?_

_A comprehensive report is sought by ‘return of post’ on how this investigation is to be progressed._

8.42 Inspector Cunningham’s report was forwarded to the sergeant in charge, Unit ‘A’. 

8.43 Sergeant Miller responded to the reports of Sergeant McCabe and Inspector Cunningham by report dated 21st March 2008. The report is as follows:

_Matters raised by Sgt. i/c are addressed as follows:_

1. Interim report was initially submitted and both myself and Gda Martyn liaised with the District Officer and Sgt. i/c, Cootehill on the matter. It was decided to give as much time possible to allow [the victim] an opportunity for an informal id. The suspect’s house was monitored by Gda Morrisroe to identify a possible time to do this but the only method would have been through a contrived situation where good practice would not have been
adhered to and any id would have been of poor evidential value. When no opportunity arose District Officer was gain [sic] liaised with and it was decided to proceed with an arrest and the difficulties in relation to an id parade were outlined. Thus I do not accept that there is an issue with regard to the time of the submission of the file.

2. With regard to point 2 I do not agree with the comment of the Sergeant i/c. The reminder from his office was not received by me prior to the arrest nor could it have been as I was on leave on the 21.1.2008 and according to his report it was issued from his office on the 20.1.2008. The arrest was organised the previous week between Gda Martyn and Gda Morrisroe. Thus I find the first comment of this point to be very much in error. As regard the id it was carried out at this stage as we did not have a picture prior to the arrest. Why an id parade has not been carried out is explained elsewhere in this report.

3. CCTV in the vicinity was checked but there was nothing of evidential value and the only camera which may have given a good picture of the suspect was in [a named area] and was operated by the construction company but this was not recording on the night/ morning in question.

4. Again with regard to this matter I accept thirty one minutes was a short interview but given the evidence the members had available to them there was very little that could be put to this man other than to continually repeat themselves which is not accepted as good practice. I was on leave on this date having had a family matter which required my attendance. I was consulted by phone later as to the lack of progress.

5. While I accept that the motive of the assault may have been ultimately sexual no where in [the victim’s] statement is this stated or alluded to. It is equally a possibility that the motive was monetary gain by means of robbery. No actions of a sexual nature were carried out by the suspect, which may have given evidence sometimes available in the case of a sexual assault.

With regard to the issues raised by the District Officer his comments regarding supervision are noted.
As regards a briefing document, on a number of occasions I discussed this matter with the District Officer and in addition with the Sgt i/c Cootehill who was cooperative with advice and manpower. All three of us met on one occasion and discussed the investigation and possible ways to progress the matter. While Gdai Martyn and Morrisroe did take the leading roles in the investigation help was provided by other members in Cootehill and Gda Martyn's own unit.

In relation to the suspect and the id parade, yes his appearance was very distinguished. He was 5ft5 with bulging eyes and had strong eastern European appearance and both Gardai feel it would have bordered on impossible to get a suitable line up.

Progression of Investigation

In order to progress this matter Gda Martyn has been in regular contact with [the victim] to encourage her to keep a look out for this man in town and should she see him she has been provided with contact numbers.

The suspects movements are also been [sic] monitored by Gda Morrisroe to establish an opportunity to hold an informal id parade. It is believed he has children at school in Cootehill but he does not collect them or drop them though this is still being monitored to see does the situation change.

Contact has also been made with social welfare to see if he attends their offices and contact is still being made and will continue to be to see if an opportunity is presented to hold an informal id.

The option could also be considered of asking the suspect to volunteer for an id parade but after the photo id the evidential value would be very limited in addition to the difficulty of carrying out the parade.

I am open to suggestion and direction on any possibilities, as I have been to date on this investigation. I will arrange to have a meeting with Gdai Morrisroe and Martyn in the next week to explore all avenues and attempt to progress the matter.

Forwarded for your attention please.
This report was forwarded to the superintendent by the acting sergeant in charge, Bailieboro garda station.

In his report dated 8th April 2008, Superintendent Cunningham again made welcome and pertinent observations:

Sgt. Miller’s report of the 8th February 2008 states that if [the victim] saw the suspect in person ‘she may be able to identify him’. It is not understood why anything other than a formal id parade would therefore be used.

The case stated ‘DPP – v – Reilly’ specifically refers to a person who had very distinctive features and enshrines to principles of formal id parades in such circumstances. To suggest, with the number on [sic] ethnic minority groups residing in our district that a parade could not be constructed in [sic] fanciful in the extreme.

Members should now secure and familiarise themselves with the above case.

The preparation of a proper briefing document would have obviated the suggestion that only repetitive questioning was the line that could be taken on the date. There is clearly no developments of the questions asked as in the suggestion that he is only out at night with his family followed by an admission that he was prosecuted for public order in the early hours without a family member present.

Continue with your investigation. Please submit working copy of the taped interview for perusal by this office.

The above report was forwarded to Sergeant Miller who noted the points and stated that the investigation was to continue. The report was sent back to the superintendent with a copy of the videotape of the interview on the 14th April 2008.

Nothing further occurred in relation to this matter until the 21st April 2011 when the PULSE system was updated with the entry “updated i/p looked at photos id parade could not identify the s/o. Insufficient evidence to prosecute.”

In his initial complaint about this investigation, Sergeant McCabe contended that Superintendent Cunningham was guilty of “gross dereliction of duty” and saw “no
“problem” with this investigation. At that time Sergeant McCabe was unaware of the two reports written by Superintendent Cunningham referred to above. He would not have made such a criticism had he been so aware. However, the unjustified criticisms of Superintendent Cunningham were undoubtedly a cause of worry and stress for him. Far from seeing no problems with the investigation, Superintendent Cunningham made timely and sensible criticisms of the main aspects of the investigation.

8.49 Superintendent Clancy did not have a direct role in the conduct of the investigation. He directed that an investigation take place and considered the involvement of the crime unit. He satisfied himself that the investigation was adequately resourced because of the involvement of Garda Morrisroe who had a number of years of experience on the crime unit. He was also reassured by the involvement of Sergeant McCormack who had an established detection record and knowledge of the Cootehill area. However, despite the fact that accountability meetings were held, the decision to delay an arrest in order to pursue the informal identification was not addressed.

8.50 The investigation into this offence had many defects:

- There was inordinate delay in the investigation. Sergeant Miller’s explanation that the delay was to allow the victim as much time as possible for an informal identification does not adequately explain it. The suspect had been identified within ten days of the incident and the injured party had ample time to make observations around her local area. Indeed she reported such observations as she made. The commission does not accept that observation of the suspect’s house excuses the delay in the investigation.

- Appropriate steps should have been taken to hold an identification parade. No persuasive reason has been given for invoking an informal identification procedure.

- The investigation file was incomplete. Sergeant Miller, Sergeant McCormack, and Garda Morrisroe did not provide statements. The photographs used in the photograph identification were not retained and did not form part of the file. These photographs have not been made available to the commission.
The notes in this investigation are inadequate. Three notebook entries from Garda Martyn, three journal entries from Superintendent Clancy, and an accountability meeting record are the only contemporaneous notes available. There are no notes of the liaison that took place with the gardaí in Cootehill; there are no notes whatsoever of the dates, times, and duration of the surveillance; there are no notes of the enquiries made about CCTV; there is no note of Garda Martyn’s contact with the victim’s friends; and there is no note of the time, date, and duration of the checkpoint which had been directed, nor of the personnel involved. The commission did not learn who was involved in the check point and no witness identified anyone who was involved in it.

At an accountability meeting on 5th September 2007 reference was made to contacting a superintendent in the Technical Bureau to have a photo fit compiled, but this was not done.

The legality of the arrest and detention of the suspect is very doubtful. There is no power of arrest for an offence under section 2 of the Non-Fatal Offences against the Person Act 1997. It is a summary only offence attracting a maximum penalty of six months imprisonment and / or a fine. Section 4 of the Criminal Law Act 1997 provides a right of arrest for a serious offence. There is a right of arrest and detention for an offence under section 3 of the Non-Fatal Offences against the Person Act 1997 as it is a serious offence which attracts a penalty of five years. Harm is defined in the act as “harm to body or mind and includes pain and unconsciousness”. The victim, in her statement to Garda Martyn stated, “I did not receive any injuries from this just in shock”. Garda Martyn when asked if there was ever any intention to get a medical report replied “no”. The victim told the commission that she did not attend a doctor after the incident nor did the gardaí ask her to attend a doctor for any reason. Chief Superintendent McGinn told the commission that a medical report is required for a prosecution under section 3 of the act. It is hard to see how an arrest under section 3 of the Non-Fatal Offences against the Person Act 1997 could have been justified on the evidence available to Garda Martyn.

Further, Garda Martyn has no note or clear memory of the basis of her application to have the suspect detained. There appears to be no record at all of the reasons
why the member in charge of Bailieboro garda station on 21st January 2008, Garda Rudy Kelly, considered it necessary to detain the suspect for the proper investigation of the offence. These matters alone, or in combination, could have led to the exclusion of evidence obtained in the course of the detention.

- There is no record of the reply of the suspect when arrested and cautioned for the alleged offence.
- The interview with the suspect was dismal. Sergeant Miller attempted to justify the short length of the interview by stating that the repetition of questions was not good practice. There does not appear to have been any attempt to ask any questions other than the most anodyne or to challenge or even explore the few answers given. The injured party had stated, “I think I know him from the school maybe picking up kids”. This was an opportunity to obtain information as to whether his children were attending school, what schools they attended, who was responsible for dropping them off and collecting them and matters of that nature. Unfortunately such information was never sought. The failure to develop this line of questioning is exacerbated by the evidence given by Garda Morrisroe that he “was to keep an eye out for the suspect, track his movements, whenever I was working. For example, it had been mentioned that the suspect may have been seen around the schools, with his children going to school, so if I was working early in the morning I would check the route from his house to the two national schools where his children may have been attending” It is hard to avoid the conclusion that the interview had no serious forensic focus.
- There was no discussion or planning as to how the interview might be approached. This is surprising, as the arrest had been planned in advance.
- Garda Morrisroe and Sergeant Miller are recorded as assisting gardaí on the PULSE record for this incident. Superintendent Clancy told the commission he had considered involving the Crime Unit in this investigation at the outset however he stated:

  *I was anxious that there would be some level of experience and expertise, but when I was informed that Garda Morrisroe was involved, and I knew he was a previous member of the Crime Unit in the division, and had quite considerable*
experience in the investigation of incidents, that really addressed that particular resource issue, and also the fact that Sergeant McCormack was very much involved in the investigation.

- Notwithstanding Garda Morrisroe’s previous garda experience, no strategy was discussed prior to the interview. Garda Morrisroe told the commission that he had interviewed numerous suspects under S3 of the Non-Fatal Offences Against the Person Act 1997.

- It is regrettable that there was a lack of communication between Cootehill garda station and Garda Martyn. She was not informed that the victim had sighted her assailant on two occasions.

The Byrne / McGinn report

8.51 On 30th May 2008 Sergeant McCabe handed a document entitled “[t]he following are a few of a number of issues I have reported to Garda management and they failed / refused to deal with the issues”. Included in this document is the following bullet point in relation to the incident involving the victim, “cootehill rape investigation suspect only arrested days after I looked for the file and interviewed for ‘20’ minutes which I highlighted and no action taken.” This allegation was investigated as part of the Byrne / McGinn investigation.

8.52 The Byrne / McGinn report includes a summary of the incident as stated in the victim’s statement. Having rightly stated that the matter was “poorly investigated initially by Garda Martyn”, the following criticisms in particular were made:

- There was a delay in obtaining relevant CCTV footage;
- No medical examination of the injured party took place;
- No formal identification parade was held in an effort to have the suspect identified;
- There was a delay of four months in effecting arrest of the suspect;
- An inadequate interview of suspect took place while in custody; and
The investigation file was not submitted for five months after the incident.

8.53 The Byrne / McGinn report stated that in April 2008 Superintendent Cunningham directed further enquiries and it noted that “the matter is still under investigation.” It stated that Superintendent Cunningham was critical of the investigation but “gave pointers as to how to progress it” and that he considered that there was no evidence to support the assertion of a sexual motivation. This is correct insofar as there was no evidence to sustain a charge of sexual assault, although that may well have been the motive for the attack. Superintendent Cunningham noted that no independent CCTV was available. In his concluding comment on this investigation Superintendent Cunningham correctly observed that “it was, at the very most, a section 2 Non-Fatal Offence against the Person (minor assault) not an assault causing harm.”

8.54 Superintendent Clancy noted in his report to the Byrne / McGinn investigation that the incident was first reported to him by Sergeant McCabe on 2\textsuperscript{nd} September 2007 when he was told that two members of the station party, namely Sergeant Miller and Garda Martyn were investigating. He said that progress in the case was reviewed during conferences including at management accountability meetings attended by sergeant in charge, Bailieboro and sergeant in charge, Cootehill garda station. His account of the conduct of the investigation was as follows:

\begin{quote}
The initial investigation focussed on interviewing [the victim] and all other available witnesses. Local enquiries, viewing all available CCTV and taking possession of all relevant footage was a priority. A special checkpoint was arranged to be carried out near the scene at the same time on the same night of the weekend in order to establish what persons would likely travel at that time of the morning.

Both Sergeant McCabe and Sergeant in charge Cootehill kept me up to date with developments. A motive for the assault was not established. A sexual or a robbery motive seemed unlikely as the suspect did have the opportunity to carry out either without interference. No definite suspect emerged immediately.
\end{quote}
Garda Laura Martyn was assigned to liaise with the [the victim] and she did this on a regular basis keeping the injured party fully up to date and addressed any concerns she might have had. [The victim] was satisfied that the Gardai were doing everything they could to progress the investigation.

During the course of the investigation, Mr. G 40 yrs, a Lithuanian National emerged as a possible suspect. The investigation team generated a profile of Mr. G Local surveillance was arranged on his movements. Gardai did not have a photograph of Mr. G in order to assist with the investigation.

On 21st January 2008, Mr. G was arrested under section 4 of the Criminal Law Act 1997 and detained at Bailieborough Garda Station under section 4 of the Criminal Justice Act 1984. During the course of the interview, Mr. G denied involvement in the alleged assault of [the victim]. Mr. G was photographed while in custody.

On 5th February 2008, [the victim] failed to identify Mr. G from a Photo ID arranged by using a collage of photos. The investigation team did consider holding a formal ID parade but for operational reasons it was not feasible.

It would appear that Sergeant McCabe first sought the investigation file on 20th January 2008 from the investigating members. Sergeant McCabe submitted the investigation file to the Superintendent in Bailieborough on 12th February 2008.

8.55 Although CCTV is noted as a “priority” there was no mention of it in Superintendent Clancy’s contemporaneous notes of the meeting, and no footage was obtained in any location. There are no notes or records of any special checkpoint being carried out and no person present at the checkpoint has been identified to the commission.

8.56 Superintendent Clancy observed in his report to the Byrne / McGinn investigation that a sexual or a robbery motive seemed unlikely as “the suspect did have the opportunity to carry out either without interference.” The commission does not agree with this reasoning. If that reasoning were correct it would also apply to the offence that was actually committed because in that offence too the assailant had “the opportunity to carry out either without interference.” However, in his evidence he added, “I probably would like to tailor my remarks, because I am going against what I say
about keeping an open mind. I would like to curtail my remarks on that because it is about keeping an open mind.”

8.57 The Byrne / McGinn report noted that, “this investigation is ongoing and no definitive suspect has been identified in the case. The shortcomings in the investigation were addressed by Superintendent Cunningham who ensured that all matters were properly investigated.” This may be inadvertently misleading. Although undoubtedly Superintendent Cunningham addressed the shortcomings in the investigation, his directions were not followed up.

8.58 The Byrne / McGinn report observed that the classification of the incident on the PULSE system as “detected” did not seem to be correct in that Mr. G was shown as a “suspected offender” rather than a “suspect.” It was observed that the current status required to be re-classified and updated and specifically that the detection status should be “undetected”.

8.59 There are a number of matters in the Byrne / McGinn report that merit comment:

- Superintendent Cunningham, in his report to the Byrne / McGinn investigation, stated that “it was, at the very most, a section 2 Non-Fatal Offence against the Person (minor assault) not an assault causing harm”. He was correct in that assessment of the offence as there was no harm to the victim. The Byrne / McGinn report however stated that “sexual assault was almost certainly a factor in this case”. It criticised the investigation on the grounds that no medical examination of the victim took place. The obvious implication is that such criticism was in the context of a sexual assault. Surprisingly the explanation for this criticism given by Chief Superintendent McGinn to the commission was entirely different. She stated, “I was satisfied from looking at the material it wasn’t a rape in Cootehill and it came down to between section 2 and a section 3 assault, and the difference between the two would be a medical report.” The absence of a medical examination was being raised in evidence in the context of an assault contrary to section 2 or section 3 of the Non-Fatal Offences against the Person Act 1997 rather than in the context of a sexual assault. Chief Superintendent McGinn might have been expected to comment on the validity of the arrest and detention of the suspect
for an offence contrary to section 3 of the Non-Fatal Offences against the Person Act 1997 when there was no medical evidence of harm.

- Although the report rightly criticised the initial investigation on the grounds that no identification parade was held, it is surprising that the report did not engage with Superintendent Clancy’s odd assertion that the holding of an identification parade was not feasible for “operational reasons”. In fact the holding of an identification parade was never contemplated and Superintendent Clancy’s assertion should not have gone unchallenged.

- It is strange that the investigation should have expressed the view that “there was a delay in obtaining relevant CCTV footage”. It is a fact that no CCTV footage was obtained. There was no evidence available to ground a finding of delay because there are no records of times when efforts were made to obtain CCTV footage. Information as to the time when the footage was sought was a prerequisite for such a finding. Sergeant Miller stated in his report that CCTV in the vicinity was checked but there was nothing of evidential value. He also stated that the only camera which may have given a good picture of the suspect “was not recording on the night / morning in question.” Therefore, any delay would not have made any difference to the investigation.

- The report concluded that “sexual assault was almost certainly a factor in this case”. It may indeed have been a factor in the case but robbery is also a possible motive. The reason that there was not a more serious incident is because the victim escaped. This was not a “rape investigation”, as was asserted by Sergeant McCabe. This was an exaggeration of both the evidence of the incident and the nature of the investigation. There was no evidence either of an attempted rape or sexual assault disclosed in the victim’s statement.

The disciplinary investigation

8.60 The Byrne / McGinn report concluded “Divisional Officer, Cavan / Monaghan to deal with any discipline issues that might arise and ensure that investigations are pursued
to a conclusion.” On 25th May 2010 Chief Superintendent McGinn wrote to Assistant Commissioner, Northern Region, Kieran Kenny, pointing out that as a result of the enquiries certain disciplinary matters had come to light and requested that they be investigated. Chief Superintendent McGinn stated, “[g]ood practice would suggest that these matters should be investigated independently. I, therefore, recommend that any disciplinary investigation be carried out by an Officer from outside the Northern Region.”


8.62 Superintendent McFadden, being the superintendent in Sligo at the time of his appointment, was stationed in the Northern Region. His involvement in the disciplinary investigation was contrary to the recommendation by Chief Superintendent McGinn in her report of 25th May 2010. However Superintendent McFadden was not made aware of this recommendation. Assistant Commissioner Kenny gave evidence that under the disciplinary regulations he was required to satisfy himself that the deciding officer had no previous involvement with the case. He went on to state:

So I was aware at the time that there were a number of superintendents in my region who hadn’t served in the Cavan / Monaghan Division and who wouldn’t have had involvement with the case at any stage. I identified Superintendent McFadden as being a person that I deemed appropriate to carry out the investigation.

In the circumstances no criticism can be made of the Assistant Commissioner. He also accepted that he redacted the report of Chief Superintendent McGinn in which it stated that a deciding officer from outside the Northern Region should be appointed. Superintendent McFadden received the redacted version of this report and was not aware of Chief Superintendent McGinn’s recommendation.

8.63 Upon receiving appointment documents from Assistant Commissioner Kenny on 30th June 2010, Superintendent McFadden sent an email to Sergeant McCabe seeking to
interview him in relation to the disciplinary investigation. A meeting was arranged for 8th July 2010 at Mullingar garda station. At that meeting Superintendent McFadden obtained a statement from Sergeant McCabe. In his statement Sergeant McCabe stated that he was aware of a serious incident where a young girl was “attached [sic] and grabbed by a male suspect and was attempted to be dragged up an alleyway in Cootehill.” Sergeant McCabe accepted in evidence that this description was inaccurate. He went on to state:

I received the file from Garda Martyn in early February 2008 and I noted a number of poor procedures in the case as outlined in my report. I put this down solely to poor guidance and leadership by Superintendent Clancy. I believe it is very unfair to hold Garda Laura Martyn in any way responsible for the failure in this investigation.

The commission does not share the view expressed in the last sentence in the quote above.

Superintendent McFadden then compiled a report dated 4th October 2010. In this report Superintendent McFadden considered the interview with Sergeant McCabe on 8th July 2010, the statement of the injured party, the investigation file, and the report of Sergeant Miller dated 21st March 2008. He concluded “[i]t is my view as deciding officer in this case that no further action is taken against Garda Laura Breege Martyn.” Superintendent McFadden’s conclusion was reached without interviewing Garda Martyn as required by regulation 14 of the discipline regulations. The report was forwarded to Assistant Commissioner Kenny. Assistant Commissioner Kenny furnished Superintendent McFadden’s report to Chief Superintendent, Internal Affairs, by letter dated the 18th October 2010. The letter stated “[i]n view of Superintendent McFadden’s findings, I have decided to discontinue the investigation into the alleged breaches of discipline in respect of Garda Martyn.” A letter dated 29th October 2010 was sent to Assistant Commissioner Kenny by Chief Superintendent, Internal Affairs. It stated “[c]urrently the option not to hold an interview with the member is not provided for under the Discipline Regulations.” Clarification was sought as to whether Garda Martyn had been interviewed by the deciding officer. Superintendent McFadden told the commission that the failure to interview Garda Martyn prior to his report of 4th October 2010 was an oversight on his behalf.
8.65 The correspondence from Chief Superintendent, Internal Affairs, was forwarded to Superintendent McFadden. Assistant Commissioner Kenny stated in his letter dated 4\textsuperscript{th} November 2010 “\textit{please ensure that this matter is concluded and the member is then advised that you have decided to discontinue the investigation or that you find the member not in breach of discipline}.” Superintendent McFadden contacted Garda Martyn by telephone and told her that he, as deciding officer, had decided that she was not in breach of discipline. He arranged to meet with her on 13\textsuperscript{th} December 2010. They discussed the investigation and Garda Martyn acknowledged the Form I.A. (L) 12.

8.66 On 13\textsuperscript{th} January 2011 Assistant Commissioner Kenny wrote to Chief Superintendent, Internal Affairs, concerning the disciplinary investigation and stated that the investigation was complete and Garda Martyn was found \textit{“not in breach of discipline.”} The relevant forms were attached to the correspondence. This was the end of the matter from a disciplinary perspective.

8.67 The disciplinary investigation was superficial and the initial investigation proceeded to conclusion without interviewing Garda Martyn who was the subject of the inquiry. This was a most unusual process and contrary to the disciplinary regulations themselves. Strangely there was an attempt to correct this fundamental error by arranging an interview with Garda Martyn after the event during which she was informed of the conclusion which had already been reached. Although the result may not have been different had the disciplinary investigation been conducted correctly and although Superintendent McFadden was entitled to reach the conclusion he did the disciplinary investigation was deeply flawed.

\textbf{Conclusion}

8.68 The victim was not well served in this investigation. The lack of an identification parade, the poor quality of the interview, and the fact that Garda Martyn was not informed by her colleagues that the victim’s father had reported two sightings of his daughter’s assailant were the most striking flaws in this case.
8.69 The failure to hold an identification parade, or at least to plan for one, was a widespread misunderstanding as to the legal principles relating to visual identification and the holding of identification parades.

8.70 There was a regrettable failure to plan for the interview with the suspect prior to his arrest.

8.71 The legal basis for the arrest and detention of the suspect is very doubtful. This could have had serious consequences in the event of a prosecution.

8.72 The fact that the suspect remained a “suspected offender” on the PULSE system despite his denials, and the victim’s indication that he was not included in the photographs which had been shown to her is difficult to understand or justify.
Chapter 9 Dangerous Driving Incident, Lakeside Manor Hotel.

The investigation by An Garda Síochána of a dangerous driving incident at the Lakeside Manor Hotel, Virginia, Co. Cavan on 27th December 2007

The facts

9.1 At about 2:30 am on 27th December 2007, security staff at the Lakeside Manor Hotel in Virginia, Co. Cavan, had occasion to eject three men and one woman from the hotel. They got into a BMW motor car which was parked near the hotel. The car started and manoeuvred slowly at first, but suddenly reversed towards the entrance to the hotel at speed.

9.2 Three people were hit by the speeding car and all three received minor injuries.

9.3 The car left the scene before the arrival of the gardaí.

9.4 On 30th August 2010 gardaí arrested a man on suspicion of endangerment, contrary to section 13 of the Non-Fatal Offences against the Person Act 2013.

9.5 On 4th January 2011 the Director of Public Prosecutions directed that no prosecution be brought.

The garda investigation

9.6 In the early hours of 27th December 2007, shortly after the suspects had left the scene, Sergeant Tom Murray arrived at the scene of the crime at the Lakeside Manor Hotel. He spoke briefly to the doorman and obtained an account of what had transpired. He also got some details of the registration number of the motor car driven by the offender, and then drove off in pursuit of it. He was unsuccessful in his attempts to locate it, and returned to the hotel, where he viewed CCTV footage of the incident. The security man was unable to copy the footage onto a disc at the time, but said he would be able to do so later. Sergeant Murray caused the matter to be
entered on the PULSE system where he was described as the investigating officer. He finished duty at 4:00 am on 27th December 2007, and was then absent for six days on annual leave and rest days.

9.7 The Lakeside Manor Hotel is in the Virginia sub-district. At about 2:30 pm on the afternoon of 27th December 2007, Sergeant Murray spoke to Garda Caroline Bradley of Virginia garda station by telephone. He “instructed that the matter required immediate attention and investigation by members there.”

9.8 Garda Bradley brought the matter to the attention of Garda Adrian O’Hanlon of Virginia garda station, when he came on duty later that evening. Sergeant Murray also notified Sergeant Martin Conroy, and Sergeant Maurice McCabe, (with whom he was in regular contact) within a few days of the incident.

9.9 On 29th December 2007 Garda O’Hanlon was contacted by Sergeant Kevin Gavigan of the crime unit in Bailieboro garda station, with an offer of assistance from his unit.

9.10 As a result, on 31st December 2007 Garda Adrian O’Hanlon, Garda Jerome Crawford, Garda Ronan Geraghty, and Garda Ciaran Flanagan visited a particular address in Laytown, Co. Meath to make enquiries concerning the car involved in the incident.

9.11 On 1st January 2008 following a telephone conversation with Garda O’Hanlon, Sergeant McCabe, who was off duty at the time, accompanied him to Skerries, Co. Dublin to make further enquiries about the car involved in the incident (Garda O’Hanlon had experienced some difficulties in getting somebody to accompany him, as there was nobody available from the crime unit at that time). They went to a specific address, on foot of information which had been provided by Sergeant Murray. The enquiries did not prove fruitful.

9.12 Later on the same day, Garda O’Hanlon and Sergeant McCabe viewed CCTV footage of the incident at the Lakeside Manor Hotel, and late that night they drove to Navan to make further enquiries.

9.13 Having viewed the CCTV footage, Garda O’Hanlon telephoned Sergeant Murray and informed him of the enquiries. Sergeant McCabe was present for that
conversation. Sergeant Murray informed the commission that Sergeant McCabe had told him that there was a “book being done on it”, by which he meant a more serious investigation was being instigated.

9.14 What happened after that is a matter of dispute.

9.15 The central issue in this chapter concerns the question of who was the investigating garda in the case. That matter was strongly contested in evidence and there was irreconcilable evidence given by different witnesses.

9.16 Sergeant Murray was the first person to arrive at the scene and he commenced the investigation. His name was entered in the PULSE system as the investigating officer. However, he told the commission that he handed over the investigation to “the sergeant in charge of Virginia Garda Station”. The sergeant in charge of Virginia station at that time was Sergeant Martin Conroy.

9.17 Sergeant Murray spoke to Garda Bradley on the afternoon of 27th December 2007. She accepted that the effect of the conversation was that the matter would now have to be investigated from Virginia. However, this did not mean that she was the investigating member because she expected any such appointment would come from her sergeant in charge.

9.18 Garda O’Hanlon also denied that he was the investigating garda. He carried out some initial investigations, firstly with the assistance of the members of the crime unit in Bailieboro, and later, on 1st January 2007 with Sergeant McCabe. After a visit to Skerries to make enquiries, Garda O’Hanlon and Sergeant McCabe viewed the CCTV footage of the incident at the Lakeside Manor Hotel. Sergeant McCabe told Garda O’Hanlon:

_I will be going to the Super tomorrow about this incident, there will be a book, an investigation set up, you may and you may not be brought in on it. That was his last words to me. You may and you may not be brought in it._
9.19 Garda O’Hanlon was asked:

*Q:* So, do I infer from what you are saying at this juncture at least you hadn’t formed a view that you were now the investigating member or anything of that nature?

*A:* Definitely not, under no circumstances, no.

9.20 He was not given any more tasks in the investigation at that time. He said, “*The next I heard of this investigation was I received a request in December ’08.*” Later, on 26th March 2009, Garda O’Hanlon was “*appointed to investigate the incident*” by Superintendent Cunningham.

9.21 Sergeant Martin Conroy considered that the investigation was taken over by Sergeant McCabe, at his own request. His evidence was that the following exchange took place between himself and Sergeant McCabe on 31st December 2007:

*A:* And he said: ‘Martin, there is an incident happened at the Lakeside Manor in your area’, and I said: ‘Yeah, I am aware of that, all right.’ He said: ‘It’s more serious than it is listed on the PULSE.’ I said: ‘Yeah, I see that all right, that there was different factors in the narrative and from what I have been told.’ He said: ‘It was Bailieboro gardaí, Tom Murray, and whoever, that were at the scene and that he wasn’t that happy with the way that matters had been dealt with. He said: ‘If you don’t mind, Martin, myself and Adrian will look after this one. I know it’s in your area.’ I said to him: ‘Maurice, there is no problem, I can look after our own stuff over here, there is no need for you to get involved in it.’ Maurice insisted or persisted that he would like to take it on, himself and Adrian O’Hanlon, would like to take it on, I think basically because it was Bailieboro guards that were there first, I think was the reason for it. So that was that first day.

*Q.* Just before moving off that, did Sergeant McCabe indicate to you what he was unhappy with?

*A:* No. Not that I can recall.
9.22 As a result of that conversation Sergeant Conroy assumed that Sergeant McCabe and Garda O’Hanlon were conducting the investigation.

9.23 Sergeant McCabe denied that he had any conversation with Sergeant Conroy during which he suggested taking over the investigation from the gardaí in Virginia garda station and said that, “I was amazed to hear it here for the first time and annoyed.”

9.24 The evidence of Chief Superintendent Clancy is important in determining the question as to whether a conversation took place between Sergeant Conroy and Sergeant McCabe in which the latter took over the investigation, and thus determining who was in charge of the investigation.

9.25 Chief Superintendent Clancy told the commission that Sergeant McCabe had suggested in early January that the matter be discussed at a conference. The superintendent agreed that it would be a suitable topic for discussion at an accountability meeting. Such meetings are held weekly by the district officer to discuss investigations and are attended by all sergeants in charge within the district to discuss incidents being investigated.

9.26 Following that conversation, Chief Superintendent Clancy stated that the matter was raised at a routine accountability meeting in Bailieboro in mid-January 2008 at which Sergeant Conroy was present. After that meeting he spoke to Sergeant Conroy and gave him certain directions in connection with the case. Chief Superintendent Clancy’s recollection of the meeting is fading, but he told the commission that he believes that one of his directions at that meeting was to direct a search of all the BMW cars within a certain geographical spread, “using the National Vehicle File to assist”. He also believes that there may have been a discussion about the possibility of obtaining more evidence in the nightclub. His evidence was that there were five to ten points discussed and he gave directions to Sergeant Conroy. Chief Superintendent Clancy told the commission that “[w]hen I had them jotted down I tore it out and I gave it to Sergeant Conroy”.

9.27 Sergeant Conroy disputed the account given by Chief Superintendent Clancy and told the commission:

A: I have no recollection of it anyway.
Q: What do you say?

A: What can I say other than that, I have no recollection of that meeting. If there was such a meeting, as you say, I would have told him that Sergeant McCabe had given me an undertaking, begged me, asked me to take over the investigation, himself and Garda O’Hanlon.

Q: Of course. There are number of, as I say, features that would allow this to, if you like, stand out in your mind?

A: Yes.

Q: This is, of course, the only thing in your mind in relation to this... this is the only detail that you have in relation to this?

A: Yes.

Q: Then, of course, no such meeting could have taken place, on your account?

A: On my account, no.

9.28 Sergeant Conroy, when asked if it was possible that a meeting happened, replied:

I accept that it is possible. I received communications from some of these enquiries early on, from a Garda Grant, in relation to this specific thing I believe, had I notes of a meeting, an accountability meeting in relation to a dangerous driving incident at Lakeside Manor and I was to reply in writing and I replied in writing that I had no notes of this accountability meeting.

9.29 The evidence of Chief Superintendent Clancy on this point is convincing and decisive. The commission is aware of the lack of documentation now available through no fault of either Sergeant Conroy or Chief Superintendent Clancy. The commission is acutely aware that the events being described took place many years ago, and that the recollection of witnesses is likely to be affected by the passage of time and has borne those factors in mind in coming to its findings. In his evidence on various points, Chief Superintendent Clancy qualified his evidence by use of phrases such as “I can’t recall” or “I have no recollection of that”. This underlines how
careful he was in his testimony. Chief Superintendent Clancy told the commission, “I certainly would not agree that I have a problem with my recollection of the meeting with Sergeant Conroy, I am absolutely certain that it happened and I will go to my grave knowing that that meeting happened”. The commission accepts the evidence of Chief Superintendent Clancy that he had a meeting with Sergeant Conroy in which he gave him specific instructions about the investigation.

9.30 Had there been a conversation as a result of which Sergeant McCabe took over the investigation of the case, it is inconceivable that Sergeant Conroy would not have immediately told Superintendent Clancy that the directions given to him should properly be given instead to Sergeant McCabe as the investigating officer. Indeed Sergeant Conroy himself conceded as much. He told the commission “If there was such a meeting, I would have told them, that Sergeant McCabe was looking after it, yeah.”

9.31 Moreover, Sergeant Conroy stated that the telephone conversation with Sergeant McCabe was on 31st December 2007. It is highly improbable that Sergeant McCabe would describe the incident as more serious than might appear from the PULSE record, before he had actually seen the CCTV footage of the incident on 1st January 2008.

9.32 Furthermore, the reason attributed to Sergeant McCabe for wishing to take over the case, namely that he was dissatisfied with the way the matter had been handled, is also highly improbable, notwithstanding the evidence of Sergeant Conroy that “it didn’t strike me as odd.” The investigation was only at an early stage, and it is difficult to see what errors had been made at that time that would give rise to dissatisfaction on the part of Sergeant McCabe as to how the case had been dealt with.

9.33 In addition, it is probable that if Sergeant McCabe had taken over the investigation, he would have so informed Superintendent Clancy of this fact when talking to him about the incident shortly afterwards.

9.34 Sergeant McCabe did not take over the investigation from the gardaí in Virginia, either alone or with Garda O’Hanlon, nor did he ask to do so.
Sergeant Conroy was in charge of the investigation, and must be held responsible for the delay, at least until such time as he left to serve in Kosovo in October 2008. He had been selected in January 2008 to go on an overseas mission. Between the end of January and October of that year he was involved in preparation for that mission. He had to attend at courses in connection with it which entailed his absence from Virginia. This may offer a partial explanation for his inactivity in the incident under review. However, as sergeant in charge, Virginia garda station, he ought to have ensured that all investigations and tasks were being completed. He was given certain directions by Superintendent Clancy, as sergeant in charge, Virginia garda station, and he did not carry them out himself. Neither is there any evidence to suggest that he instructed Garda O’Hanlon to carry out any duties in connection with the investigation on foot of Superintendent Clancy’s directions.

In the initial stages of the investigation, Garda O’Hanlon carried out the duties he was asked to perform in a competent manner. He was not, however, the investigating garda and it would be unfair to attribute any blame to him, for failures in the investigation in this case.

Efforts to locate the file

Following the directions given by Superintendent Clancy to Sergeant Conroy, which were not followed up by him, the case lay in abeyance. Unfortunately nothing was done in relation to the investigation for a period of over fourteen months from mid-January 2008 until 26th March 2009. This inordinate and unjustifiable delay led to the appropriate charge being statute barred.

That situation might have continued indefinitely, and the lack of investigation may have gone unnoticed, but for Sergeant McCabe’s complaint dated 28th April 2008. This was followed up in a statement to the Byrne / McGinn investigation.

Pursuant to that complaint, efforts were made to locate the file and to ascertain who was investigating the case.

On 14th November 2008, Chief Superintendent McGinn requested the file in the matter from Superintendent Cunningham for the purposes of her enquiries. He, in turn, requested the investigation file from Sergeant Murray, who was still described
in the PULSE entry as the investigating garda. Sergeant Murray in his report dated 3\textsuperscript{rd} December 2008 to Superintendent Cunningham stated that he “contacted and notified members of Virginia Garda station of the incident, and instructed that the matter required immediate attention and investigation by members there.” He said that he “was aware of and satisfied that investigations were carried out from Virginia Garda Station.”

9.41 On 18\textsuperscript{th} December 2008 a copy of Sergeant Murray’s report was sent to Garda O’Hanlon with a hand written note from Sergeant Bolger saying “[p]lease submit investigation file into this matter by return as requested by the district officer.” In response, Garda O’Hanlon furnished a report on 20\textsuperscript{th} December 2008 to his unit sergeant, Sergeant Bolger, in which he stated that he did not have the investigation file because he was not the investigating member.

9.42 On 5\textsuperscript{th} January 2009 Superintendent Cunningham wrote to the sergeant in charge, traffic unit, asking for the names of those who had been briefed on the incident. On 11\textsuperscript{th} January Sergeant Murray replied that he had briefed Sergeant Conroy, Garda O’Hanlon, Garda Bradley, and Sergeant McCabe on 27\textsuperscript{th} December 2007.

9.43 On 19\textsuperscript{th} January 2009 Superintendent Cunningham wrote to Sergeant Bolger, sergeant in charge, Virginia garda station, requesting a comprehensive report on the matter and this message was duly passed on to Garda O’Hanlon with the handwritten note, “please submit a full and comprehensive report on your involvement in this case by return.”

9.44 On 3\textsuperscript{rd} March 2009 Garda O’Hanlon sent on a report to his unit sergeant, giving details of the part he played in the investigation. This was forwarded to Superintendent Cunningham on 5\textsuperscript{th} March 2009.

9.45 On 4\textsuperscript{th} March 2009 Superintendent Cunningham also received correspondence concerning the investigation file from Chief Superintendent Rooney together with attached correspondence from Chief Superintendent McGinn asking for the file in this case “as a matter of urgency.” Chief Superintendent Rooney asked him to send on the outstanding file “by return.”

9.46 On 9\textsuperscript{th} March 2009 Superintendent Cunningham replied to Chief Superintendent Rooney stating that an investigation file was not available and he enclosed the
reports that he had requested from the members of the gardaí involved. He stated that on the basis of the reports he believed that the matter required “full investigation.”

9.47 By letter dated 23rd March 2009, Chief Superintendent Rooney replied. The body of the letter reads as follows:

*I have received your correspondence dated 9th March 2009 in above matter. As District Officer Bailieboro, it is your responsibility to thoroughly investigate the incident recorded under PID4554591 in accordance with procedure.*

*From a perusal of the file, it is obvious to me that this serious incident was not investigated. Proceed with a full and proper investigation of the incident.*

*Identify the member(s) whose responsibility it was to investigate the matter and submit their names within one week.*

*I will then appoint a Superintendent to conduct a Disciplinary Investigation.*

**No disciplinary proceedings**

9.48 On 23rd March 2009 Chief Superintendent Rooney wrote to Chief Superintendent McGinn. In the letter he stated “[u]nless you have any good reason to take over the Disciplinary Investigation which I propose to direct, I will proceed with it.” Chief Superintendent Rooney clearly considered it important that the matter be dealt with expeditiously.

9.49 In her reply dated 30th March 2009, Chief Superintendent McGinn stated:

*I have discussed this matter with the Assistant Commissioner Byrne who is of the view that any disciplinary matters arising out of the complaints of Sergeant McCabe will be dealt with in their entirety on completion of the current investigation and after the Commissioner has had an opportunity to make a decision on all the matters.*
In that regard, I recommend that disciplinary proceedings should not commence at this time.

9.50 Chief Superintendent Rooney persisted in his efforts to have a disciplinary inquiry held. On 23rd April 2009 he wrote to the Assistant Commissioner, Northern Region, attaching Chief Superintendent McGinn’s letter of 20th March 2009, and stated:

*I see no good reason why any disciplinary investigation should be delayed. There is a clear breach of discipline disclosed on file. I await your direction in this matter.*

9.51 Assistant Commissioner, Northern Region, wrote to Assistant Commissioner Byrne on 18th May 2009 attaching Chief Superintendent Rooney’s letter and stated:

*I would appreciate your observation as to whether this matter comes under the remit of your investigation, or is a separate discipline investigation warranted as suggested by the Chief Superintendent.*

9.52 In a handwritten note, Assistant Commissioner Byrne responded to Assistant Commissioner, Northern Region on the 19th June 2009 as follows:

*Investigations in this case should proceed by C/Supt C/M in his minute of the 23rd March ’09. My investigation relates to processes & procedures and is not a disciplinary one.*

In light of Chief Superintendent Rooney’s view, Assistant Commissioner Byrne changed his mind and recommended that the disciplinary proceedings should take place at that stage.

9.53 That response was received by the office of the Assistant Commissioner, Northern Region on 23rd June 2009. However the message was not conveyed to Chief Superintendent Rooney, and he was left under the impression that he could not initiate disciplinary proceedings at that stage. Had disciplinary proceedings been initiated in June 2009, they would have been within a reasonable time of the breach alleged. It is unfortunate that this correspondence was lost and that Chief Superintendent Rooney was not told of the decision of Assistant Commissioner Byrne. The commission attaches no personal blame to the Assistant Commissioner, Northern Region.
Despite the best efforts of Chief Superintendent Rooney, no disciplinary inquiry was ever held in this matter.

The resumed investigation

The investigation itself, (as opposed to efforts to locate the file and allocate responsibility) resumed on 26th March 2009, when Garda O’Hanlon was formally directed by Superintendent Cunningham to investigate.

Statements were taken from the victims and the security staff at the Lakeside Manor Hotel in late June and early July 2009. On 2nd July 2009, a person suspected of being present in the car, but not of driving it, was arrested and questioned about the incident.

Garda O’Hanlon sustained an injury on duty and he was unable to work between August 2009 and June 2010. As a result, Garda Jerome Crawford was appointed to complete the investigation. On 24th November 2009 he furnished an investigation file and report to sergeant in charge, Bailieboro garda station crime unit, who at that time was Sergeant Annemarie Lardner. He gave details of the progress of the investigation and stated that efforts were being made to locate a named suspect. That report was forwarded through the usual channels to Superintendent Featherstone, Bailieboro, who, in turn furnished the report to Chief Superintendent Rooney, Cavan / Monaghan. He also sent a copy to Chief Superintendent McGinn and to Assistant Commissioner Kieran Kenny, Northern Region. On 3rd August 2010, Inspector Alan Cunningham, on behalf of the superintendent in Bailieboro, forwarded an up-to-date report from the sergeant in charge, Virginia garda station, to Chief Superintendent Rooney, Cavan / Monaghan. The inspector stated that the progress of the investigation “will be subject of the weekly district accountability meeting.”

On 30th August 2010 Garda John Maher arrested a man in Dublin on suspicion of an offence of endangerment contrary to section 13 of the Non-Fatal Offences against the Person Act 1997. He was taken to Harcourt Terrace garda station and detained and questioned. In the course of interview he admitted being the driver of the car involved in the incident in the Lakeside Manor Hotel in the early hours of 27th December 2007. He denied, however, that he intended to drive the vehicle at the
victims, and maintained that he did so by accidentally putting the vehicle into reverse gear instead of first gear.

9.59 The file was completed by Garda O’Hanlon on 4th October 2010. A further statement had to be taken in relation to the obtaining of the CCTV footage.

9.60 A file was submitted to the state solicitor on 13th December 2010, almost three years after the commission of the offence. The state solicitor, in turn, forwarded the file to the office of the Director of Public Prosecutions (DPP) for directions.

9.61 By letter dated 4th January 2011 the directing officer stated as follows:

   Dear Sir,

   I refer to your communication of 20.12.10.

   It would seem that a charge under section 53 of the RTA would have met this case. That is long statute barred.

   If the injuries had been serious a charge of dangerous driving causing serious injury could have been viable, but fortunately for the citizens concerned the injuries were minor in nature. Consequently a dangerous driving charge to proceed on indictment cannot be considered.

   The recommendation of a charge of endangerment is noted. The difficulty now is that since the Supreme Court judgement in Cagney & McGrath, a charge of endangerment should not be brought where there is no other viable charge available, such as dangerous driving which is now not possible as it is time barred. In other words the Court has indicated that endangerment charges should not be brought as a default charge where more appropriate charges are not available.

   In reference to the above file, please be advised that the directions are as follows: [Named suspect]: No Prosecution

   I would be less concerned about the delay issue, in spite of the unusual features of the delay here. The CCTV footage and witnesses seem to be still available. Delay will prohibit a prosecution where the accused can show that because of the delay he is prejudiced in defending himself.
Such prejudice usually includes such factors as witness no longer being available, evidence no longer being in existence. However, for the reasons set out above there should not be a prosecution here.

9.62 The directing officer of the DPP commented that he “would be less concerned about the delay issue”. This cannot be interpreted as condoning the delay in the investigation which led to the correct charge being statute barred. The remarks must be understood as being in the context of the type of delay which might cause prejudice to a fair trial.

Summary

9.63 The investigation in this case was seriously flawed by reason of delay. Nothing was done to advance the investigation for a period of over fourteen months from January 2008. This was caused by the confusion as to who was investigating the offence.

- Sergeant Murray handed over the case on 27th December to gardaí in Virginia garda station, but unfortunately the PULSE system was not brought up-to-date either by Sergeant Murray or anybody else to reflect that fact. As a result Sergeant Murray appeared on the PULSE system as investigating garda for over a year after he ceased to be such.

- There was no written report sent through the proper channels outlining that handover.

- Sergeant Murray thought that Sergeant Conroy in Virginia garda station was investigating the matter.

- Sergeant Conroy told the commission that he thought that Sergeant McCabe and Garda O’Hanlon were investigating.

- Sergeant McCabe considered that the matter was being investigated by the gardaí in Virginia.

- Superintendent Clancy considered the investigation to be the responsibility of Sergeant Conroy as sergeant in charge, Virginia garda station.
As a result of his enquiries at that time, Superintendent Cunningham believed that Garda O’Hanlon was the investigating garda and so stated in a letter dated 13th May 2009. He was not aware at the time that Superintendent Clancy had given specific directions to Sergeant Conroy in January 2008. Had he been so aware, his view may have been different. Superintendent Cunningham told the commission:

Q: If what Superintendent Clancy tells us is established, the answer to the question: Who is responsible for the investigation? It would have been Sergeant Conroy?

A: Yes, the investigation and I know I am sounding very strange in this regard but the investigation is delegated to the sergeant in charge of the station, that is his job to get it done. Who does it for him is his job. That’s why he has the stripes.

Garda O’Hanlon, however, considered that he was merely tasked with certain duties, and that having carried them out, that he might or might not be required again.

9.64 “Who is the investigating Garda?” is a question which should be susceptible of an immediate and accurate answer. It is of concern that in this case it was the cause of confusion and uncertainty.

9.65 It is of further concern that an investigation could lie dormant for many months, apparently unnoticed by anybody. Assistant Commissioner Derek Byrne’s evidence in that regard was as follows:

A:...there was a huge delay in the investigation.

Q: Yes?

A: And it was lost, no-one took particular responsibility for it.

Q: Yes?

A: So that is where the corporate failure occurs. We have injured parties out there that we haven’t serviced, and no matter what way you look at it literally or technically, we have failed corporately.
9.66 At the time of this incident there was no management or operational systems in place to deal with circumstances where there was a failure of or by a member of the Gardaí to investigate a crime. In circumstances where there is a failure to take responsibility for an investigation “corporate failure occurs” as Assistant Commission Byrne put it.

9.67 As a result of the inactivity on the part of the gardaí from mid-January 2007, for a period of over fourteen months, the charge considered appropriate by the DPP was statute barred by the time that Garda O’Hanlon was directed to investigate the incident in March 2009.

9.68 The general public and the victims of the crime were entitled to a better service than was afforded them in this investigation.

Sergeant McCabe’s complaints

9.69 Sergeant McCabe’s complaints in relation to this matter are contained in a statement of complaint he made to human resource management dated 28th April 2008. It reads as follows:

On 26th December 2007 a serious endangerment case occurred at Virginia, Co. Cavan. It involved a person being ejected from a disco. This person got into his vehicle, drove at the door staff and patrons twice, and knocked down 5 persons. The whole incident was captured on CCTV and was alarming. I got involved in the case in the middle of January 2008 when it was passed by Bailieboro Gardaí who would not investigate it or want to investigate it, to Garda O’Hanlon and he required assistance because crime unit or other members would not assist. I asked Superintendent Clancy to hold a conference on the incident as it was very serious and needed guidance and help. He refused on three occasions to hold a conference and showed no interest at all in the case despite it being so serious. No conference has ever been held on the incident and offender/s have not been interviewed to date, 28/04/2008.
Further to a request, Superintendent Clancy furnished a report to the Byrne / McGinn investigation dated 30th November 2009. The findings of that investigation are discussed below. In relation to this incident he states:

*I was aware that an alleged traffic collision occurred at Lakeside Manor Hotel on the early hours of the morning of 27th December 2007. A driver of a motor car allegedly reversed his car towards the doorway of the Disco Hall hitting a pedestrian and knocking him to the ground and then drove forward allegedly hitting against another pedestrian. It was alleged that the driver of this car drove off in the Kells direction. No person was injured as a result of the incident. I was aware that Sergeant T. Murray of Bailieborough attended at the scene and commenced an investigation into the incident. Sergeant Murray ascertained that the offending vehicle was a blue BMW. Sergeant Murray arranged for circulation of the details of the offending vehicle. Sergeant Murray arranged a search for the blue BMW.*

*The incident occurred in Virginia Sub District. I was aware that Sergeant Murray forwarded details of the incident to Sergeant in Charge, Virginia later on that same date for follow up investigation.*

*I recall having a conference with Sergeant Martin Conroy, Sergeant in charge, Virginia to review progress in the investigation. I recall from that meeting that there were a number of tasks identified which required attention. I directed Sergeant Conroy to ensure that these actions were acted upon. I was aware that members from Bailieborough Station gave assistance to the Gardaí in Virginia in the investigation. Progress in the ongoing investigation was kept under review.*

Superintendent Cunningham furnished a response to the Byrne / McGinn investigation in which he outlined his efforts in this matter. He stated that he first became aware of the matter on 24th November 2008, when he sought a copy of the file (Superintendent Cunningham told the commission that the date was in fact 14th
November 2008). He carried out enquiries to establish who was investigating the matter and whether a file existed. He stated in that report that when he discovered that no file was in existence he reported the matter to the Chief Superintendent Rooney on 9th March 2009, who in turn, directed him to complete the investigation and to identify the members whose responsibility it was to investigate the matter. Superintendent Cunningham reported to Chief Superintendent Rooney on 13th May 2009 and he stated:

In answer to your question of the 23rd March 2009 I believe the responsibility to investigate this incident lay with Garda O’Hanlon of Virginia Garda Station.

9.72 In the meantime, Superintendent Cunningham forwarded the file to the sergeant in charge, Virginia garda station, to complete the investigation and he reported back to the divisional officer on 13th June 2009 (the report was in fact dated 13th May 2009). Superintendent Cunningham concluded his response to the Byrne / McGinn investigation by stating that:

I am aware that a suspect has now been identified, that the CCTV of the incident has been recovered and the file is completed other than questioning the suspect for whom an alert has been placed on Pulse.

9.73 Although Superintendent Cunningham cannot remember if, in that response, he attached his report of 13th May 2009 to Chief Superintendent Rooney, in which Garda O’Hanlon is indentified as being in charge of the investigation. However, this information was readily available to the compilers of the Byrne / McGinn report, had they sought it.

Analysis of Sergeant McCabe’s complaints

9.74 Sergeant McCabe’s first complaint is that gardaí did not investigate the incident or did not want to investigate it and that Garda O’Hanlon “required assistance because crime unit or other members would not assist.”
This complaint is unfounded. The gardaí in Bailieboro garda station did not show unwillingness to investigate the matter. On the contrary, Sergeant Gavigan on his own initiative telephoned gardaí in Virginia garda station and offered assistance. Furthermore, such assistance was provided. Three members of the crime unit accompanied Garda O’Hanlon on a visit to Laytown in connection with the investigation. There is no evidence of a reluctance to investigate the matter. Moreover, Garda O’Hanlon made no such complaint to Sergeant McCabe. At most there was some difficulty for Garda O’Hanlon in getting some assistance on New Year’s Day 2008. Sergeant McCabe was asked for, or offered to help, which he did.

Sergeant McCabe’s second complaint was, “I asked Superintendent Clancy to hold a conference on the incident as it was very serious and needed guidance and help. He refused on three occasions to hold a conference and showed no interest at all in the case despite it being so serious No conference has ever been held on the incident and offender/s have not been interviewed to date, 28/04/2008”

These allegations are also without foundation save only for the allegation that “offender/s have not been interviewed to date, 28/04/2008”, which although factually correct, does not seem to have been the focus of the complaint.

Superintendent Clancy did not refuse on any occasion, still less three times, to hold a conference on the matter. In fact, once Sergeant McCabe brought the matter to his attention in early January 2008, Superintendent Clancy pursued the matter at an accountability meeting which was held in mid-January 2008. Immediately after the meeting he took up the matter with Sergeant Conroy in his capacity as sergeant in charge, Virginia garda station. Moreover, during that discussion, which he termed “a conference”, Superintendent Clancy gave specific directions to Sergeant Conroy on some possible lines of enquiry and handed him a piece of paper on which he had written them down some relevant points.

So far from showing “no interest at all in the case”, Superintendent Clancy acted quite appropriately in this matter.

Sergeant McCabe was unaware of the steps taken by Superintendent Clancy at the time he made his complaint to Chief Superintendent McGinn, and in his evidence to the commission he withdrew his complaint on this matter. This withdrawal was no
doubt welcome, late though it was. However, Superintendent Clancy should not have had to answer for accusations founded on Sergeant McCabe’s lack of knowledge at the time he made his complaints, of what had been done by the superintendent.

The Byrne / McGinn report

9.81 The Byrne / McGinn report on this incident is very short although allowance must be made for the limited information available at the time it was being prepared. Under the hearing “Observations/Actions Required”, there are just three paragraphs. The first is a recital of some of the facts and the third states that the PULSE system has not been updated to reflect the “present position where a suspect has been identified.” The middle paragraph, which is the only paragraph to deal with the issue under examination, in its entirety, reads as follows:

It is clear that no proper management of this investigation took place as stated by Sergeant McCabe in his complaint. When the matter was highlighted by this investigation to divisional officer Cavan/Monaghan, it then received the necessary attention that it required.

9.82 This is an inadequate response to Sergeant McCabe’s complaints even allowing for the limited information available. The reader of this report is not informed whether or not Sergeant McCabe’s specific complaints are upheld.

9.83 Sergeant McCabe’s complaint was not, in essence, about the lack of proper management of the investigation in a general sense; it was quite specific and largely targeted Superintendent Clancy.

9.84 Although the allegations of Sergeant McCabe were unfounded, the authors of the report owed it to Sergeant McCabe, and indeed to Superintendent Clancy, to deal with them.

9.85 The first paragraph of the executive summary of the Byrne / McGinn report, referring generally to the complaints of Sergeant McCabe, contains the following sentence:
In particular the complaint centred around the alleged failure of Superintendent Michael Clancy, Bailieboro, (now Monaghan), to act on concerns that he had brought to his attention.

9.86 The statement that there are “no adverse findings” against Superintendent Clancy, relied on in submissions on behalf of Assistant Commissioner Byrne and Chief Superintendent McGinn, relates to matters dealt with in Module 6 of the Byrne / McGinn inquiry, and not to the complaints which are the subject matter of this commission. The fact that the inquiry sought and obtained a response from Superintendent Clancy to the complaints is not evidence of adequate engagement. In its recommendation in the executive summary there is a further reference to Sergeant McCabe’s complaint to the confidential recipient against Superintendent Clancy, in which it is indicated that the complaints are rejected. However in that passage of the report the complaints are not dealt with separately or specifically, and there is nothing to show that they were analysed in any depth.

9.87 The Byrne / McGinn report states “[i]t is clear that no proper management of this investigation took place as stated by Sergeant McCabe in his complaint.”

9.88 Nowhere in the complaint does the word ‘management’ appear, though it could be implied.

9.89 Concerning the “lack of proper management,” Chief Superintendent McGinn casts the net widely. She considers the failures in management to encompass:

- Sergeant Murray for not updating the PULSE record and for not handing over the case in writing;
- Sergeant McCabe himself for not briefing Superintendent Clancy in writing;
- Garda O’Hanlon for not furnishing a report and inadequate “self-management”;
- Sergeant Conroy as the sergeant in charge of Virginia; and, lastly
- Chief Superintendent Clancy, for reasons that she explained as follows:

  A: Well, that's what I am saying, overall there was no proper investigation, yes, because it escalates.
Q: You were complaining or agreeing that Chief Superintendent Clancy was in the wrong, why didn't you say so?
A: I suppose I was doing it from the level that there are a number of layers, as we talked about before, and the fact that there was no management at all of this investigation.

Q: Why on earth didn't you say so?
A: It was an organisation failure in relation to this.

9.90 It is probable that Sergeant McCabe would have been surprised to hear that his complaint was interpreted as a complaint against Sergeant Murray, Garda O’Hanlon, Sergeant Conroy as well as against Superintendent Clancy. In addition he would certainly have found it bizarre if he thought his complaint would be interpreted as being been partly against himself.

9.91 In those circumstances, where “lack of management” was held to have encompassed all those people, Sergeant Gavigan did well to elude the net - especially when there was a specific complaint (albeit unfounded) against the crime unit, of which he was in charge at that time.

9.92 Assistant Commissioner Byrne had a different view of what the finding meant. He did not attribute any failure to Superintendent Clancy, nor was he particularly concerned with Sergeant Murray’s failure to complete a written report, or with the fact Sergeant McCabe informed Chief Superintendent Clancy about the incident orally rather than in writing. His view, which is shared by the commission, is that the essential defect in this case was in the delay in the investigation. He attributed the delay to Sergeant Conroy and / or Garda O’Hanlon. Assistant Commissioner Byrne also differs from his colleague in that he does not criticise Sergeant McCabe.

9.93 If the authors of the report differ to such a degree on what they intend to convey by stating that there was a lack of proper management, it is unlikely that the reader of the report or those to whom it was addressed could have been assisted.
Disciplinary action: another attempt

9.94 In a letter dated 26th May 2010 Chief Superintendent McGinn wrote to the Assistant Commissioner Northern Region. Having noted that there was no proper management of this investigation and that a proper criminal investigation was not commenced for a period of time, she stated that “the initial investigation of this matter fell well short of the required standard. I am of the view that a disciplinary investigation should be commenced into this matter.”

9.95 Chief Superintendent McGinn went on to state that:

Chief Superintendent Rooney prepared the way for the initiation of a disciplinary investigation on 23/3/2009, by requiring Superintendent Bailieboro to identify the member(s) whose responsibility it was to investigate the matter...

9.96 It would appear that Chief Superintendent McGinn was unaware of Assistant Commissioner Byrne’s change of view in June 2009, regarding the disciplinary investigation in this matter, as seen in paragraph 9.52 above. Assistant Commissioner Byrne had in fact agreed that Chief Superintendent Rooney should proceed with the disciplinary inquiry. This was not conveyed to Chief Superintendent Rooney.

9.97 It is unclear whether or not Chief Superintendent McGinn’s correspondence and recommendation was forwarded by the Assistant Commissioner, Northern Region to the Chief Superintendent, Cavan / Monaghan, so that disciplinary proceedings would be initiated.

9.98 The persons identified for possible disciplinary action were identified in that letter as being “those whose responsibility it was to investigate the matter”. Any possible action against those responsible for “no proper management” was not contemplated. It may well be that disciplinary action against those responsible for the management of the investigation would not have been warranted. It should, however, have been considered.
9.99 The letter also noted that:

... a decision was made not to proceed with any disciplinary inquiry until all the allegations were examined. Sergeant McCabe was involved in the investigation of this incident and it would have been necessary that he be interviewed in the course of any disciplinary investigation.

9.100 It is hard to understand why the involvement of Sergeant McCabe in the investigation of the incident was invoked to justify the postponement of a disciplinary inquiry. Sergeant McCabe’s involvement in the investigation was to comply with a request made by Garda O’Hanlon to accompany him to Laytown on 1st January 2008 to make an enquiry which proved fruitless, at which time Sergeant McCabe was off duty. His only other involvement was to view CCTV footage of the incident on the same day and to bring the matter to his district officer. His minor part in the investigation was carried out properly. Moreover the authors of the report had been furnished with the report of Superintendent Clancy, in which no criticism whatsoever is made of Sergeant McCabe. In addition it was clear that Superintendent Cunningham was not in any way criticising him. The only person to attribute charge of the investigation to Sergeant McCabe was Sergeant Conroy, and no statement from him was furnished to the Byrne / McGinn investigation. There was evidence before the commission that he was contacted in Kosovo in relation to the Byrne / McGinn investigation, but that he was not spoken to about this specific matter. The letter could be interpreted as suggesting that Sergeant McCabe might be subject to a possible disciplinary inquiry. There is no evidence that would justify such action. However, the letter is also capable of being understood as merely contemplating his assistance in another capacity.

9.101 Chief Superintendent Rooney had ensured the members responsible for the investigation were identified by the superintendent, Bailieboro garda station. However, no further steps were taken in the disciplinary action which had been contemplated by Chief Superintendent Rooney, despite the findings of the Byrne / McGinn report.
9.102 Following the receipt of the Byrne / McGinn investigation, Assistant Commissioner Kenny wrote to the chief superintendent, Cavan / Monaghan, on 12th July 2010. Having pointed out that the PULSE entry did not appear to reflect the current position of the investigation of the incident, he requested to be brought up to date on the progress of the investigation and also to be given the names of the members responsible for it.

9.103 Superintendent Clancy as acting chief superintendent, responded by letter dated 15th July 2010. He enclosed a report of Superintendent Cunningham in which Garda O’Hanlon was identified as being the member in charge of the investigation.

9.104 On 2nd December 2010 Superintendent John G. O’Brien, who was the superintendent in Bailieboro, wrote to the chief superintendent, Cavan / Monaghan. His letter contains the following:

The investigation took place and the file is near ready to be sent to the DPP for directions. There is no doubt that when the investigation file is examined by the DPP some very serious questions will be asked about a fifteen month delay in starting an investigation into this incident.

Ordinarily I would view this as a very serious breach of discipline; however I am aware that Sergeant Maurice McCabe investigated this incident for some days after the 27th December 2007.

Therefore, before an investigation begins into the reasons for the delay I am to enquire if this matter forms part of the investigations being conducted by Chief Superintendent McGinn into allegations about certain Gardaí attached to Bailieboro Garda station and if so can her investigation team supply me with material so that I can explain to the DPP the reason for the delay.

Without pre-empting the response of the investigation team, if they have not investigated it, then this is a serious breach of discipline and should be investigated as such.
9.105 Insofar as there may be a suggestion in that letter that Sergeant McCabe could be held to be in anyway responsible for the delay, it must be rejected, as it must have been clear to Superintendent O’Brien at that stage that Sergeant McCabe was not in any way responsible for the delay in investigating the case.

9.106 In fact as already stated, Chief Superintendent McGinn had, on 26th May 2010, expressed a view to the Assistant Commissioner, Northern Region, that a disciplinary inquiry should be held.

9.107 However, no action was taken in relation to a disciplinary investigation. In response to a query by Chief Superintendent Sheridan on 7th March 2014 as to the state of the disciplinary action, the Assistant Commissioner, Northern Region responded as follows on 13th March 2014:

> With reference to above and your correspondence of even date attached file regarding this matter is forwarded for your information.

> To date disciplinary proceedings have not yet commenced regarding this matter. As Sergeant M. McCabe is alleged to have been involved in the investigation of this incident it may be the case that the complainant, Sergeant McCabe could also be subjected to the disciplinary process.

> Sergeant McCabe and Garda Sinead Kilian have also commenced civil legal proceedings in respect of their complaints. I am of the opinion that it would not be appropriate at this time to commence disciplinary proceedings in respect of this or other cases involving either Sergeant McCabe or Garda Kilian, where they may also be implicated.

> The situation can again be reviewed at the conclusion of legal proceedings.

9.108 This was a legitimate view formed by the Assistant Commissioner, and no criticism can be levelled against him for forming it. However, with the knowledge in its possession, the commission considers that Sergeant McCabe played a creditable,
albeit minor, part in this investigation and, from that perspective, considers that disciplinary proceedings against Sergeant McCabe would have been inappropriate.

9.109 Furthermore, it is not readily apparent to the commission how the existence of legal proceedings by Sergeant McCabe in an unrelated matter could justify the postponement of disciplinary proceedings.

9.110 The reason why no disciplinary proceedings were instituted, as has already been noted, and as stated by Assistant Commissioner Byrne in his evidence to the commission, was that the office of the Assistant Commissioner, Northern Region, failed to inform Chief Superintendent Rooney that he should proceed as he had intended to. Assistant Commissioner Byrne had confirmed that the Byrne / McGinn investigation did not include a disciplinary function.

9.111 There was a further failure to initiate proceedings following the recommendation of Chief Superintendent McGinn in May 2010.

9.112 The institution of disciplinary proceedings in this case, over eight years after the incident, and many years after the lapses of those who might be subject to those proceedings - and that does not include Sergeant McCabe - would be quite unfair.

**Conclusion**

9.113 As can be seen from the findings at paragraph 9.63, above, this investigation never recovered from the fundamental failure to properly identify who was investigating it. The PULSE system continued for two years to describe Sergeant Murray as the investigating officer after he had ceased to be such. The commission agrees with Assistant Commissioner Byrne that the injured parties and members of the public were not well served in this investigation.

9.114 Chief Superintendent Rooney’s understandable desire to initiate a disciplinary process was frustrated as a result of the communication failures highlighted above and as a result no disciplinary inquiry took place.
9.115 Disciplinary proceedings against Sergeant McCabe in this investigation would have been entirely misconceived and unjustified. However, it is not at all clear that they were ever contemplated.

9.116 Sergeant McCabe’s complaints against Superintendent Clancy in relation to this incident are rejected.
Chapter 10 Incident in Crossan’s Public House.

The investigation by An Garda Síochána of an assault in Crossan’s public house in Bailieboro, Co. Cavan on 23rd May 2007

The facts

10.1 On 23rd May 2007 Mr. R was assaulted in Crossan’s public house in Bailieboro, Co. Cavan. He suffered injuries to the head and face.

10.2 He was assisted from the public house by a friend, Mr. Y, who brought him back to his flat. Mr. R was collected there by his wife and she brought him home.

10.3 As a result of his injuries Mr. R attended at Cavan General Hospital. The diagnosis was “minor head injury and concussion”.

10.4 On 13th March 2008 two suspects were arrested in connection with the assault and detained under section 4 of the Criminal Justice Act 1984. In the course of that detention each of the men was interviewed twice, after having been cautioned.

10.5 One of the men was charged with assault causing harm contrary to section 3 of the Non-Fatal Offences against the Person Act 1997. He was brought before Monaghan District Court where he was remanded on bail.

10.6 On 28th November 2007 the injured party made a statement withdrawing his complaint.

10.7 On foot of a direction of the DPP the charge of assault causing harm contrary to section 3 of the Non Fatal Offences against the Person Act 1997 was withdrawn.
10.8 On 27th May 2007 Ms. R, the wife of Mr. R, accompanied by his mother, called to Bailieboro garda station and made a complaint that Mr. R had been assaulted.

10.9 It was alleged that the CCTV footage of the assault had been shown in Crossan’s public house some days after the incident.

10.10 On 27th May 2007, the same day as the complaint, Probationer Garda Sean Daly visited Mr. R at his home for the purpose of obtaining a statement. Mr. R declined to make a statement, although it appeared to Garda Daly that he was under pressure from his wife to do so.

10.11 Later on 27th May 2007 Mr. R attended at Bailieboro garda station, where he made a statement of complaint. That statement did not identify any of the assailants or any witnesses.

10.12 On the following day, 28th May 2007, Mr. R again attended at Bailieboro garda station. On this occasion Garda Daly asked Garda Peter O’Sullivan, who had over twenty years’ experience, to help him. Mr. R told the commission that his assailants were “not the type of boys to be messed with”. He was afraid for his family and for himself. Garda O’Sullivan told Mr. R that the gardaí knew “these boys” and that “everybody is afraid to take these lads on”. Following Garda O’Sullivan’s encouragement, Mr. R gave a more detailed statement to Garda Daly. He identified two assailants by name as well as a number of potential witnesses to the assault. He also informed gardaí that he had been told that the CCTV footage of the assault on him was played in the bar of Crossan’s public house on 25th May 2007, two days after the assault occurred.

10.13 Garda Daly took statements from a number of persons who were in the public house at the time of the incident. Those statements are undated. The first of those witnesses was Mr. Z. Garda Daly cannot now recall how long after the completion of Mr. R’s statement, the witness statement from Mr. Z was taken.
Garda Daly also took an undated statement from Mr. Y. The following portion of his statement was critical to the decision to prosecute Mr. X:

[Mr. X] was on top of [Mr R] hitting him in the face. [Mr. X] got 5 to 6 boxes into [Mr. R’s] face... [Mr. X] had been pulled off Mr.R. I think by [Mr. Z.]. I took [Mr. R] out of the pub and back to my flat. His face was covered in blood.

He told the commission that this statement was taken a “good time after the Monday the 28th [May 2007]”.

In addition, Garda Daly took undated statements from Mr. Z and Mr. W. He told the commission that he was unable to recall when he took these statements.

The misunderstanding about the CCTV footage

The incident was reported to the gardaí on 28th May 2007, four days after it occurred. Garda Daly was immediately directed by Sergeant Tom Murray, his unit sergeant, to ascertain if there was any CCTV footage of the assault available. Garda Daly, accompanied by Garda Lisa Stephens, visited Crossan’s public house to seek any relevant CCTV footage. On 4th June 2008, over a year later, Garda Daly made a statement concerning the visit in which he stated “...he [Mr. Noel Crossan, the licensee] was unable to locate the footage as there was no recording of it on the system. The search for the footage was strictly supervised by Garda Stephens and I [sic].” Garda Stephens made a similar statement dated 3rd June 2008. The statements record Mr. Crossan as having been cooperative, both in showing the gardaí the CCTV equipment, and in playing the footage recorded on the system. It was later confirmed by technical analysis that the footage recorded on the system was stored for three days only.

Despite the fact that the licensee had cooperated, a mistaken view to the contrary was formed within the gardaí. Consequently, at a meeting on 3rd July 2007 attended by
Superintendent Maura Lernihan, Sergeant McCabe and Garda Daly it was decided that it was necessary to obtain a warrant to search Crossan’s public house. Unfortunately, Garda Daly did not inform the more senior gardai that Mr. Crossan had been cooperative, nor did he inform them that no CCTV footage was available. It is not clear why he failed to do so. After the meeting Garda Daly prepared the information to be sworn in order to obtain the warrant. As it was his first time to do such a task, he enlisted the help of Garda Ronan Geraghty.

10.19 On foot of an information sworn by Superintendent Lernihan, a warrant was obtained to search Crossan’s public house for the purpose of seizing the CCTV footage of the incident. However, given that the publican was cooperative there was no need to obtain a warrant. In the information grounding the application for the warrant, it was stated that Garda Daly had requested the CCTV footage of the incident, and had been told that there was no such footage available, but that there was information from a reliable source that after the request had been made by Garda Daly, the CCTV footage of the incident had been played on a big screen to a large number of people.

10.20 On 6th July 2007 the district judge issued a warrant under section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997 (as amended). It had to be executed by the member named therein, Superintendent Lernihan, within seven days of issue. On 12th July 2007 Garda Geraghty was contacted by Superintendent Lernihan. He was directed to go to Crossan’s public house to obtain the CCTV footage for examination. Mr. Crossan cooperated fully and the material was handed over for examination.

10.21 Despite the fact that the licensee was again cooperative, the erroneous belief to the contrary still persisted.

10.22 On 23rd July 2007 Garda Geraghty reported to the sergeant in charge of the crime unit, Sergeant Kevin Gavigan, and sought an examination of the hard drive which had been seized in Crossan’s public house. In turn, Sergeant Gavigan wrote to the superintendent, Bailieboro, recommending that the CCTV footage be forwarded to the Computer Crime Investigation Unit (CCIU) in Harcourt Square, Dublin 2 for examination. On 30th July 2007 Inspector Noel Cunningham, for the superintendent,
wrote to the chief superintendent, Cavan / Monaghan, requesting an examination of the hard drive by the CCIU. The sergeant in charge, Bailieboro, was informed of the request.

10.23 On 1st August 2007 the following comment appears in the correspondence register in the office of the sergeant in charge, Bailieboro: “App to have CCTV footage from public house”. On 7th August 2007 the following further comment appears: “Letter for examination of CCTV – attached to file. File required ASAP”.

10.24 On 8th August 2007 Chief Superintendent Rooney forwarded the application for examination of the footage on the hard drive to the Detective Chief Superintendent, Garda Bureau of Fraud Investigation.

10.25 On 7th November 2007 Detective Sergeant Michael Gibbons (CCIU) set out to Garda Geraghty the procedures involved in a request for an examination of a computer hard drive. By letter dated 13th November 2007, Sergeant McCabe wrote to the superintendent seeking to have the examination of the hard drive expedited, as proceedings would be issued in the case shortly. On 15th November 2007 Inspector Cunningham wrote to the Garda Bureau of Fraud Investigation (of which CCIU was a part) seeking an early report.

10.26 On 13th November 2007 the following comment is contained in the correspondence register: “App to examine CCTV for Crossan’s public house”. The note on 22nd November 2007 reads: “CCTV to be examined by Section in HQ”.

10.27 In a letter of 15th November 2007 Inspector Cunningham expressed concerns to Sergeant McCabe about what was believed to be the non-cooperation of the licensee of Crossan’s public house. A separate report was requested in that regard.

10.28 By letter dated 21st November 2007 Sergeant McCabe replied to the superintendent in Bailieboro. Regarding the request for a separate report on the non-cooperation of the licensee, he indicated that the issue of non-cooperation of the licensee formed part of the case and would be highlighted in the investigation file, when submitted. He added “You will understand my reason when you see the file”. The letter then goes on to
state that “I must report that I have received no investigation file into this incident to date despite the assault happening in May 2007”.

10.29 On 30th November 2007 Superintendent Clancy wrote to Sergeant McCabe directing that the issue of non-cooperation of the licensee with regard to the CCTV footage be brought to the attention of the judge at the annual licensing court. The following note appears in the correspondence register in the office of the sergeant in charge on 10th December 2007: “Non-cooperation of L to be brought to the attention of the Annual Licensing Court”.


10.31 In a letter dated 6th March 2008 to Sergeant McCabe concerning the investigation, Superintendent Clancy gave certain directions. He indicated, inter alia, that “it would be a distinct advantage if the CCTV footage from the hard drive was available”.

10.32 By report dated 13th March 2008 Garda Geraghty confirmed that he had seized the CCTV on 12th July 2007 at 3:40 pm. He reported that Garda Martin Hogan of CCIU had determined that the hard drive in the CCTV equipment had only three days memory. Although some footage had been saved from December 2006 there was none remaining for the night in question.

10.33 Much of the concern about the perceived non-cooperation of the licensee of Crossan’s public house arose without knowledge of the important fact that, on 28th May 2007, Garda Daly and Garda Stephens had “strictly supervised” the search for the footage in Crossan’s public house and that there was no relevant footage available just four days after the incident.

10.34 In fact the search for the CCTV footage and the obtaining of the search warrants were unnecessary actions. They were based on the mistaken, though legitimately held, belief of Superintendent Lernihan that the contents of the information that she had sworn were correct. It was unfortunate and surprising, that Garda Daly, who was involved in the preparation of the draft information to obtain the search warrant, did not correct the important misapprehension on the basis of which that warrant was sought.
It was also regrettable that neither Garda Daly nor Garda Stephens made a statement about the matter until early June 2008 (Garda Daly on 4th June 2008 and Garda Stephens on 3rd June 2008) over a year after their visit to Crossan’s public house to retrieve the CCTV footage, and that neither of them made a written note of their activity, either in their garda notebooks or elsewhere.

Mr. Crossan could have been in danger of losing his license on the basis of a misconception by the gardaí as to his cooperation with them in this investigation.

**Delay and withdrawal of complaint**

The correspondence register in the office of the sergeant in charge, Bailieboro, refers to this file for the first time on 1st August 2007. It contains the following entry:

> “Letter for examination of CCTV – attached to file. File required ASAP”.

The correspondence register in the office of the sergeant in charge discloses that a reminder to furnish the investigation file was sent to Garda Daly on 27th August 2007.

No less than five further reminders were sent to Garda Daly between that date and the end of October: on 12th September, 2nd October, 8th October, 24th October, and 31st October 2007.

On 21st November 2007 Sergeant McCabe replied to the superintendent, Bailieboro, in relation to another aspect of the investigation, and added that he “must report that I have received no investigation file into this incident to date despite the assault happening in May 2007”.

The correspondence register in the office of the sergeant in charge records that on 22nd November 2007 a note was sent to the sergeant in charge of unit C (Sergeant Tom Murray): “for full investigation file ASAP”.

The note sent to Garda Daly on 28th November 2007 is as follows: “Report to Supt from Sgt McCabe. The file is required by return of post”.
On or about 28th November Mr. R, the victim of the assault, withdrew his complaint. His statement of withdrawal is undated and it reads as follows:

*I now wish to withdraw [the statement of 27th May] and an additional statement I made in relation to incident [sic]. I am doing so of my own free will and I am not under pressure or I have not been threaten [sic] to do so.*

The procuring of the statement of withdrawal was clearly a most important and significant feature of this garda investigation. It was rightly described by both Superintendent Clancy and Assistant Commissioner Byrne as a "very serious issue".

There is a conflict of evidence surrounding the withdrawal of the statement of complaint by Mr. R on 28th November 2007. Mr. R’s recollection was that Garda Daly called to his home on the day in question. There was a general conversation before discussing the case. Mr. R was asked:

*Q. What did he say to you?*

*A. He says [Mr. R] things don’t seem to be going well. He asked me had he any more information on the case, I said I hadn’t, what more could I do? I gave the two names, I made a statement. He says to me: I think the evidence – it doesn’t seem to be going anywhere, there is insufficient evidence and trusting the gardaí in Bailieboro to do, he says to me – I asked him his opinion on what do you think and he says I don’t think it will go any further, [R]. So he says, if you want to finish it up or what and I...*

Later he said:

*A. He says the matter is basically closed, there is insufficient evidence. It is not going to happen. You know do you want to finish it off.*

Mr. R said that when Garda Daly arrived at his house, he had with him a piece of paper containing the statement of withdrawal of the complaint. Mr. R stated “I’m not exactly sure whether it was handwritten or typed but it wasn’t written in my house”.
Mr. R did not read the document, but he was aware that on signing it, he was “just withdrawing my statement or withdrawing my complaint.” As a result of what Garda Daly told him, Mr. R signed the statement of withdrawal.

10.47 Ms. R, the wife of Mr. R, described the circumstances of the withdrawal of the complaint as follows:

A. Basically, you know, he called to the house and he had a piece of paper. He just said about, you know the case, he said there was insufficient evidence and that it wasn’t really going anywhere. I suppose, like [Mr. R] said, you ask questions, and I know it’s not up to ask the guards all the time but you do, you look for advice.

Q. Yes. Do you remember him saying there was insufficient evidence?

A. Yes, I do.

Q. You’ve made reference to a piece of paper there, can you just explain that?

A. Well he was carrying a piece of paper in his hand.

Q. Yes. Did he explain what it was?

A. Well, he was just saying about the case, that it was really going nowhere and there was insufficient evidence.

Q. Yes.

A. And that if he wanted to withdraw his statement he could, that it wasn’t really going any further.

10.48 Garda Daly’s version of events is quite different. He denies that he had already a prepared statement of withdrawal when he arrived at the house of Mr. R. He says that the statement was prepared in the house. He said that after Mr. R had indicated that he
wished to withdraw his complaint, he wrote down the statement of withdrawal, which Mr. R then signed. In his report of 29th April 2008 to the sergeant in charge Garda Daly reported “I stated to him that there was a lack of additional evidence at this time”. His version in this report is that he told Mr. R that “[t]here were no results from the CCTV as yet and that the only evidence was his statement and that of [Mr. Y.]”. His reported that Mr. R had stated that he wanted to forget about the whole thing and that he had wished to withdraw his complaint, and that at that point he had signed a statement of withdrawal.

10.49 The commission accepts the evidence of Mr. and Mrs. R. Although their recollection is naturally affected by the passage of time, and was not always accurate, they were nonetheless impressive witnesses. They were clearly not motivated by any animosity towards the gardaí. Indeed Ms. R said that Garda Daly was “very polite” and “a lovely guard” and said that “[a]ll the guards have always been, you know, supportive”. In particular, the commission accepts their evidence on the very significant issue concerning the statement of withdrawal of the complaint. The commission is satisfied that it was prepared by Garda Daly before he visited Mr. R, and that he brought it to his house. He wrongly procured the withdrawal of the complaint.

10.50 Garda Daly obtained the statement of withdrawal to cover his own significant failure to carry out an adequate investigation into the assault, which statement was now being scrutinised by his superiors. The following matters support that conclusion.

10.51 The timing of the statement of withdrawal is significant. It was obtained just after the six-month time limit for bringing summary proceedings had expired. Garda Daly had attempted to contact Mr. R shortly prior to this. A direct effect of a statement of withdrawal was that it no longer mattered that Garda Daly had failed to carry out a proper investigation in time. Garda Daly’s probation period had already been extended under the Garda Síochána (Admissions and Appointments) Regulations 1988 (as amended). He had already received notice under regulation 16. Assistant Commissioner Byrne told the commission:

...the six month rule I think was kicking in here. The Garda was getting a number of reminders ... So the most convenient route I would think for Garda
Daly, it is my view, I still hold the same view, that getting a statement of withdrawal closed the door for him and made it very easy for him...

10.52 Moreover, he was under a great deal of pressure to furnish the investigation file, and had not done so despite numerous requests. In those circumstances, the statement of withdrawal of the complaint would ease such pressure. The commission was informed by Garda Daly that ‘...regardless if the statement of withdrawal was made or not, I mean I still would have got you know backlash from you know management like it’s still going to be an investigation whether he withdrew it or not’.

10.53 Garda Daly did not report the statement of withdrawal to anyone until January 2008. It might have been expected that he would mention to his unit sergeant who he met on an almost daily basis. From November 28th to December 31st 2007 his unit sergeant, the sergeant in charge, and the superintendent had all been seeking his investigation report as well as an explanation for the delay in the investigation file. If matters had unfolded in the manner claimed by Garda Daly, it is probable that he would have told his superior officers that a statement of withdrawal had been obtained.

10.54 It is doubtful that Mr. R would have withdrawn his complaint if he had been told that the gardaí were waiting for the evidence from the CCTV footage as was reported by Garda Daly. Mr. R believed that the CCTV footage of the assault on him existed and was shown in the public house. Had Mr. R been informed that the CCTV footage was outstanding and was being subjected to technical examination, it is likely that he would have awaited the outcome of that examination. Garda Daly knew there was nothing of evidential value on the CCTV footage having viewed it with Mr. Crossan.

10.55 There was in fact sufficient evidence for Mr. X to be charged in November 2007. In March 2008 Superintendent Clancy directed that Mr. X be charged with an offence of assault causing harm contrary to section 3 of the Non-Fatal Offences against the Person Act 1997. In his report dated 28th April 2008 Sergeant Murray recommended that he be charged with the same offence. Inspector Cunningham also recommended that the prosecution under section 3 “should stand” in his report of 7th May 2008. For their recommendations, all three of them relied on the evidence that had been had.
been obtained by Garda Daly by November 2007, namely the statement of Mr. R, and the statement of Mr. Y.

10.56 Unfortunately Garda Daly lost the original signed version of the statement which may have helped to ascertain what actually happened.

10.57 Mr. R was not forced to make the statement withdrawing his complaint, but he was persuaded to do so by Garda Daly. The purpose of Garda Daly’s visit to Mr. R’s house was to obtain such a statement.

10.58 On 30th November 2007 Superintendent Clancy in a letter to Sergeant McCabe directed that the issue of the alleged lack of cooperation in respect of the CCTV footage be brought to the attention of the annual licensing court. That letter included the following sentence: “I require a report from the investigating member for the delay in completing this investigation and the submission of the file”. Sergeant McCabe forwarded the letter to Sergeant Murray, who passed it on to Garda Daly with a request for a report on the matter.

10.59 On 14th December 2007 the correspondence register contained the entry: “despite numerous reminders file has not been submitted”. On the same day Sergeant McCabe wrote to Superintendent Clancy stating that despite repeated reminders he had not received the investigation file and that the matter was urgent. He added, “I must bring this to your attention as this delay in submitting the file will be an issue in court”.

10.60 A further reminder was sent on 21st December 2007.

10.61 On 28th December 2007 Superintendent Clancy replied to Sergeant McCabe’s letter of 14th December stating that he required “an immediate explanation from Garda Daly and his unit Sergeant.” Sergeant McCabe passed this on to Sergeant Murray, who passed it on to Garda Daly.

10.62 Garda Daly compiled a report dated 1st January 2008, although this was not furnished to Sergeant Murray or Sergeant McCabe until a later date. There had been nine or ten reminders sent to him by that time. In this report, Garda Daly formally recorded for the first time that Mr. R had furnished a statement of withdrawal of his complaint to
him on 28th November 2007. Garda Daly recommended that “the matter receive no further Garda attention” in circumstances where Mr. R no longer wished to proceed with the matter.

Findings on investigation.

10.63 The Garda investigation into this case was poor. It included the following significant failings:

- Garda Daly wrongly obtained a statement of withdrawal from Mr. R in an attempt to dispose of the matter and to avoid the implications of his failure to investigate the matter in a timely or adequate manner, in particular having regard to the fact that his probation period had been extended. The commission’s findings on this incident are detailed above.

- The delay in compiling the file was inordinate and inexcusable. Garda Daly was reminded on at least twenty occasions to furnish the file, and only furnished an incomplete file on 3rd March 2008. The commission appreciates that Garda Daly had personal problems at the time. Such difficulties may help to explain the delay in investigating the assault on Mr. R but they cannot justify it.

- Internal communications during the investigation were poor. The failure of communications caused unnecessary work in relation the CCTV footage as and in the application for a warrant. Further, the gardaí considered objecting to the renewal of the publican’s licence.

- Mr. R, in his statement, named people who were in the public house at the time of the incident. There was an inordinate delay in interviewing these people.

- The delay in obtaining statements from important witnesses until many months after the incident was another flaw in this investigation.

- The statements made by witnesses are unsigned, and many of them are undated.
The failure to note any details of the encounter with Mr. R in November 2007 when signing the statement withdrawing his complaint was unacceptable. There was also a failure to note important steps in the investigation, and in particular the enquiries made in Crossan’s public house on 28th May 2007. It is regrettable that statements by Garda Geraghty and Garda Stephens about this matter were not made until over a year after the event. There was an almost complete absence of note taking by Garda Daly.

The matter should have been put on the PULSE system much earlier than 2nd March 2008, which was over nine months after the incident occurred.

The loss of the original statement withdrawing the complaint was clearly unsatisfactory.

The supervision of Garda Daly was inadequate. Sergeant Murray admitted, with refreshing candour, that he did not adequately supervise the investigation and accepted responsibility for this. Although Sergeant Murray knew about the incident from a very early stage, sufficient action was not taken to ensure that it progressed at a reasonable pace, even after he became aware that his superiors were concerned at the delay in furnishing the investigation file. The duty of supervision was all the more important in the case of a probationer garda whose probation had been extended.

Sergeant Murray’s colleagues including Sergeant McCabe, told the commission of the high quality police work done by him. The commission is aware from other modules of the good work done by Sergeant Murray. During the course of this investigation Sergeant Murray was responsible for two units: unit C and the traffic unit. He was extremely busy. Garda Daly recalled the following scene: “I remember walking in the door and seeing him, I don’t know if he even noticed me, he was bogged down in paper. I turned on my heels and left because I just felt I was going to add to his stress and worry”. Sergeant Murray was trying to do the job of two sergeants. Organisational rather than an individual factors were the main cause of his inadequate supervision of Garda Daly, and criticism of Sergeant Murray can be only be very mild.
Any criticism of Sergeant Murray must also be set against the commendable efforts that he made later on, when he was directed by Superintendent Clancy to take personal charge of the investigation. He then carried out significant investigative work and was clearly most anxious to rescue the prosecution. None of that investigative work led to any probative material as to guilt or innocence and ultimately Sergeant Murray was satisfied to recommend the prosecution based primarily on the original evidence obtained by Garda Daly, in particular the second statement of Mr. R and Mr. Y. If Sergeant Murray had read the file earlier he would have reached the same recommendation that he reached in March 2008.

Sergeant McCabe’s complaints


On 28th January 2008 a meeting took place between Sergeant McCabe and Superintendent Clancy, at which Sergeant McCabe provided a written list to Superintendent Clancy of issues which he described as “quite serious”, and which he believed needed to be addressed at Bailieboro garda station. This meeting is discussed in detail elsewhere in this report. The issues listed included:

- Investigation files not being done;
- Investigation files very poor;
- Incidents not being investigated;
- Member’s non-performance.

Sergeant McCabe told the commission that, when making the above complaints, he had in mind a number of incidents, including the assault on Mr. R. He regarded the investigation of the assault on Mr. R as an example of the “system of low standards” and neglect of duty and supervision about which he had concerns.
Complaints relating to the investigation of the assault on Mr. R also featured in a document entitled “Brief Proven Facts Pertaining to my Complaint” given to Chief Superintendent McGinn by Sergeant McCabe in January 2009. In it he complained, amongst other things, of a refusal “to investigate a serious assault” and “[a]llowing certain members to go unaccountable and unsupervised”. He complained of the “lack of standards, accountability, duty to public and management support”. He made specific reference that garda management “allowed disturbing practices in crime investigations” and allowed certain members to “go unaccountable and unsupervised”.

Sergeant McCabe elaborated on his concerns in a second statement to Chief Superintendent McGinn dated 15th October 2008. Each of his specific complaints is considered below.

In his statement to Chief Superintended McGinn on 15th October 2008 Sergeant McCabe complained:

All I wanted was for the public to get 100% policing service and they did not get that. I was thwarted and not supported in my endeavours to provide this 100% policing service. If Superintendent Clancy had dealt with the issues I brought to him we would not be at this position now.

Later in his statement he complained:

Under Superintendent Clancy I reported to him on numerous occasions, orally and in writing, incidents and cases, some that were almost statute barred within his district, yet there were no follow-ups and these cases did in fact go statute barred. Indiscipline was rife and any attempts I made were simply ignored. I now set out a few of the issues and problems I encountered under Superintendent Clancy, issues of low standards which needed help and help and support were not given. All the issues have already been reported to Superintendent Clancy and it is my opinion that he has done nothing about them.

The specific complaints made by Sergeant McCabe are dealt with seriatim in the following paragraphs.
Before Superintendent Clancy arrived in the District, in May 2007, [Mr.R] a member of the public, was very badly assaulted in a pub in Bailieboro resulting in serious injuries and permanent injuries. Ambulance personnel and his wife were called to the scene and he was rushed to Cavan Hospital.

10.73 Mr. R was indeed “very badly assaulted” as stated by Sergeant McCabe, even though the injuries which he sustained were described in medical terms as “minor head injury and concussion”. The assault and the injuries sustained in it were serious enough for the District Court Judge to refuse jurisdiction. However, there is no evidence that the injuries were permanent. It is also incorrect to say that an ambulance was called and that the injured party was rushed to hospital. In fact after the assault he was brought to the house of Mr. Y and was later brought home by his wife. He did not attend the hospital until two days after the incident. However, these factual inaccuracies do not go to the heart of the Sergeant McCabe’s complaints.

The next night the culprits watched the incident in the same pub with their friends which was captured on CCTV and gloated.

10.74 It is not disputed that the CCTV footage was viewed after the assault by a barman. There were also rumours that the incident was shown in the public house to a number of people. This may be true despite the fact that there have been denials that such a viewing took place.

10.75 Sergeant McCabe then referred to a personal trauma experienced by Mr. And Mrs R. which was being linked by them to the assault. It is unnecessary to go into the details of the event. Subsequently it emerged that this trauma was not being linked to the events under investigation, and it is not necessary to pursue the matter further.

Probationer Garda Sean Daly was the investigating member, supervised by Sergeant Tom Murray. The owner of the premises refused to surrender the CCTV and it took one month of constant persuasion by me to get [sic] the member concerned to get a warrant to seize the hard drive which they
eventually did. Both members and another member, Garda Roan Geraghty [sic] assured me the hard drive was sent to Garda HQ.

10.76 Probationer Garda Daly was the investigating officer. Sergeant Murray, as his unit sergeant, had primary and immediate responsibility for his supervision. The owner did not refuse to surrender the CCTV footage. There is no evidence to suggest any reluctance on the part of anybody to seek a search warrant, which, in the event, was obtained under the erroneous impression that Mr. Crossan was not cooperating. The hard drive was indeed sent to Computer Crime Investigation Unit and revealed that “the unit had only three days memory” with the exception of footage from December 2006 which had been saved. Sergeant McCabe’s mistaken view as to the lack of cooperation on the part of the publican was widely shared.

Despite 40 reminders in writing, orally and pleading with them no file was submitted. I sent two applications to Garda HQ for hard drive to be examined as a matter of urgency, 13/11/07, 22/11/07 to learn in early 2008 that the hard drive never left the member’s locker.

10.77 While there was some dispute as to the precise number, there were at least twenty reminders sent to Garda Daly in respect of the investigation file. These came from various sources including Superintendent Clancy, Sergeant McCabe and Sergeant Murray. On any view, the failure to furnish the file, despite the reminders, was quite unjustified. The first request for a technical examination of the hard drive was made by Garda Geraghty on 23rd July 2007. The CCIU procedure was explained to Garda Geraghty on 7th November 2007. It is possible that in early 2008 the hard drive had not yet left Garda Daly’s locker. However, it was brought to CCIU for technical examination by Garda Geraghty on 11th March 2008, in accordance with CCIU procedures which require that the computer is not sent for examination until specifically requested by the CCIU member assigned to conduct the examination.

I requested help from Superintendent Clancy on numerous occasions orally and in writing to get the investigation file and eventually on 28/11/2007 and 14/12/2007 I had no option but to report in writing to Superintendent Clancy
stating my frustration and disgust that I had tried my utmost to obtain an Investigation file for five months and that he failed and refused to help or speak to the members concerned.

10.78 Sergeant McCabe told the commission that he had not sought the file from either Garda Daly or his unit sergeant prior to 21st November 2007. He also agreed that he had first informed Superintendent Clancy of the delay by correspondence dated 21st November 2007:

Q. You haven’t brought it to his attention orally at any stage prior to this?

A. Well I wouldn’t be the investigating member, there’s a sergeant on the unit...

10.79 Sergeant McCabe’s complaints about Superintendent Clancy in this regard are unfounded and there is no evidence to support the contention that Sergeant McCabe sought his help in relation to this matter prior to 21st November 2007.

10.80 The actions taken by Superintendent Clancy, in response to Sergeant McCabe’s letters of 28th November 2007 (“I require a report from the investigating member for the delay”) and 14th December 2007 (“I require an immediate explanation from Garda Daly and from his Unit Sergeant”), were appropriate as, indeed, is accepted by Sergeant McCabe himself. Neither Garda Daly nor Sergeant Murray complied with his requirement as set out above, and Superintendent Clancy did not ensure that his direction was complied with. He explained his error by stating that the electronic reminder system did not appear to have triggered a reminder in this instance to alert him to the fact that his direction had not been complied with.

In January 2008 Sergeant Murray informed me that [Mr. R] had made a statement of withdrawal in the case. I became suspicious of this and visited the home of [Mr. R] on the 25th February 2008. [Mr. And Mrs. R] informed me that Probationer Garda Sean Daly arrived at their house one evening and informed that that they had “no case” and that he wanted a statement of withdrawal. [Mrs. R ]stated that she became very upset at this moment and she stated that Garda Daly seemed understanding in her upset but yet
continued to tell them that they had no case. They were very disgusted and outraged at the way they had been treated by the Gardai and the fact that the case had never gone to court. They were forced to withdraw their complaint solely because I was looking for an investigation file on the matter. I spoke with Superintendent Clancy the next day and outlined all to him but he took no action for this serious breach of discipline. I immediately requested from Sergeant Murray all work carried out on the investigation and refused to go until he handed it over.

10.81 Sergeant McCabe told the commission that he was informed by Sergeant Murray in February that the complaint had been withdrawn and that he visited Mr. and Mrs. R a day or two later.

10.82 Sergeant McCabe was quite right to be suspicious of the fact that the complaint had been withdrawn, and it was reasonable of him to conclude that the requests for the investigation file were a factor in Garda Daly procuring the withdrawal of the complaint by Mr. R. Furthermore, as already stated, Mr. R was not “forced” into withdrawing his complaint. However he was encouraged to do so, and was misled by Garda Daly as to the state of the evidence in the case.

10.83 Having been informed by Sergeant Murray of the statement of withdrawal of the complaint a short time earlier, Sergeant McCabe visited Mr. and Mrs. R, probably on 25th February 2008. He discussed the case with Superintendent Clancy shortly afterwards, perhaps on 26th February. Superintendent Clancy was made aware of Sergeant McCabe’s concerns about the statement of withdrawal which had been made by Mr. Connolly.

10.84 The superintendent asked Sergeant McCabe to obtain the file, as he had been waiting for it for months. Superintendent Clancy was anxious to get the case “back on track”.

10.85 Garda Daly’s report dated 1st January 2008 was forwarded by Sergeant McCabe to Superintendent Clancy and received by him on 4th March 2008.

10.86 In a report of 3rd March 2008, Sergeant McCabe informed Superintendent Clancy of the complaints which had been made to him by Mr. and Mrs. R. He reported that a
complaint had been made to GSOC although he was aware that this was not the case. He told the commission that the reason for this untruth was that he felt Mr. and Mrs. R had been badly treated and that he knew that the reference to GSOC would ensure that the matter would receive attention. While his concern was genuine and commendable it is unacceptable to furnish false information in a report.

On 6th March 2008 Superintendent Clancy responded to the report of Sergeant McCabe made three days earlier. In that response:

- He directed that a medical report be obtained;
- He indicated that he was sending a further request to the Garda Bureau of Fraud Investigation for an expedited examination of the CCTV footage;
- He directed that Sergeant Murray “personally take charge of this investigation from here on”;
- He directed that a statement be taken from the licensee and/or the person in charge of the public house on the night in question;
- He directed the arrest and detention of the suspects. It was noted that “it would be a distinct advantage if the CCTV footage from the hard drive was available” prior to this;
- He directed that a statement be taken from Superintendent Lernihan.

Superintendent Clancy adverted to the fact that the statements taken so far were “lacking in detail and undated.” He also noted that no report accounting for the delay in completing the investigation and submitting the file had been received following a request made on 30th November 2007, and followed up in late December 2007. In addition, Superintendent Clancy noted that the family had been told that they had no case, and that a statement of withdrawal was sought from Mr. R. He required an immediate report from Garda Daly to respond to that. He also sought the original search warrant and statements regarding the continuity of transfer of exhibits.

By letter of the same day, 6th March 2008, Superintendent Clancy sought an expedited examination of the CCTV computer hard drive from CCIU.
10.90 Superintendent Clancy’s actions in response to Sergeant McCabe’s report of 3rd March 2008 were prompt, detailed, and appropriate. Unfortunately Sergeant McCabe was unaware of those actions, and has no recollection of seeing the directions given by Superintendent Clancy. The fact that he was on rest days for at least part of the relevant period after 6th March 2008 may account for this.

10.91 Sergeant McCabe’s complaints about Superintendent Clancy are not supported by the facts.

10.92 On 4th March 2008 Sergeant McCabe communicated his intention to leave his position as sergeant in charge, Bailieboro.

10.93 Superintendent Clancy ceased to be superintendent in Bailieboro on 18th March 2008, and a complaint about his failure to take disciplinary action is unjustified. Clearly he cannot be faulted for not taking such action in relation to the withdrawal of the statement in the short period prior to his ceasing to be superintendent in Bailieboro. He had only become aware of the matter in general terms in late February 2008, and in more detailed terms in early March. Moreover the full facts of the matter were not yet known, as the report sought from Garda Daly on 6th March 2008 was not furnished until sometime around 29th April 2008. As regards the inordinate delay, which was brought to his notice in late November 2007, Superintendent Clancy cannot be faulted for giving priority to obtaining the file and trying to advance the prosecution rather than concerning himself with disciplinary proceedings. In that context it should be noted that Garda Daly’s report dated 1st January 2008 was only received by Superintendent Clancy on 4th March 2008. In circumstances where Superintendent Clancy had acted appropriately there was nothing for Superintendent Cunningham to ‘cover up’.

10.94 Superintendent Clancy moved from Bailieboro on 18th March 2008 and responsibility for the matter then passed to Superintendent Cunningham who duly reported to Chief Superintendent Rooney on 2nd May 2008. In that report, Superintendent Cunningham noted, amongst other things, that Garda Daly had been found wanting in the past, and expressed a view that Mr. R contributed largely to the failures in the investigation. Although Sergeant McCabe may have had reason to disagree with that view, it was incorrect to suggest the report ‘contained lies’.
On 7th May 2008 a file in the matter was sent by Superintendent Cunningham, via the state solicitor, to the DPP recommending that ‘the S.3 charge ... should stand’. On 23rd May 2008 the state solicitor sent the DPP’s directions of 22nd May 2008 to the Superintendent, Bailieboro, directing that the charge under section 3 of the Non-Fatal Offences against the Person Act 1997 be withdrawn. On 9th June 2008, Sergeant Murray sent a report to the Superintendent, Bailieboro, addressing some of the DPP’s concerns about the CCTV footage. However, the DPP’s directions did not change, and on 19th September 2008 at Bailieboro District Court the charge was withdrawn as per the DPP’s directions.

The Byrne / McGinn report

In the working papers of the Byrne / McGinn investigation into Sergeant McCabe’s complaints, a number of pertinent issues were identified by the investigation team. These were then forwarded to Superintendent Clancy and Inspector Cunningham.

They read as follows:

Issues:

   What caused this delay? (Supt M. Clancy and Supt N. Cunningham)

2. In his report to Superintendent, Bailieboro, dated 9th June, 2008, Sergt T. Murray, Bailieboro, outlines the reasons why C.C.T.V. was not available, supported by statements from the members concerned. This was in answer to the D.P.P.’s decision to discontinue a prosecution against [Mr. X], partly because the defence would raise a legitimate defence regarding it not being available. Sergt Murray requested that this additional information be brought to the attention of the D.P.P.
Was this additional information brought to the attention of the D.P.P.? (Supt N. Cunningham)

3. Sergt McCabe alleges that he requested help from Supt Clancy on numerous occasions orally and in writing to get this investigation file and on 28/11/07 and 14/12/07 he had no option but to submit reports in writing to Supt Clancy stating his frustration and disgust that he had tried his utmost to obtain an investigation file for 5 months and that he (Supt Clancy) had failed and refused to help or speak to the members concerned.
Is this allegation correct? (Supt M. Clancy)

4. An explanation regarding the taking of a statement of withdrawal from the injured party in report format was received from Garda Sean Daly on 29th April, 2008, which was in response to Superintendent Clancy’s query of the 6th March, 2008
Did you accept this explanation? (Supt Cunningham)

5. Sergt McCabe alleges that despite him (Supt Cunningham) knowing the full facts he wrote a minute to the Chief Superintendent’s office in Monaghan (dated 6th May, 2008) stating that Sgt McCabe’s minute raised serious concerns and on the other hand denying that this was a serious assault.
Supt Cunningham saw no issues whatsoever in the investigation, agreed with Garda Daly’s explanation of the 20/04/08 and then proceeded to blame the injured party for the Gardai not doing their work. Sergt McCabe states that it is his opinion that to write a minute such as this is disgraceful and wrong. In his opinion this is evidence that when serious issues were raised no senior officer was willing to deal with it.
Is this allegation correct? (Supt N. Cunningham)

10.97 The Byrne / McGinn report summarised the deficiencies in the garda investigation, with considerable understatement:
The original investigation carried out by probationer Garda Sean Daly, Bailieboro, was not carried out in a timely and professional manner and falls below the minimum expected standard.

10.98 This formulaic summary fails to express the egregious nature of the failures in the investigation:

- the inappropriate withdrawal of the complaint;
- the inordinate delay;
- the failure to take statements adequately;
- the failure to act on the very numerous requests for an investigation file;
- the lack of supervision of Garda Daly by his unit sergeant;
- the failure to act on a direction from the superintendent;
- the loss of the original statement of withdrawal, a most essential exhibit; and
- the failure to enter the matter in the PULSE system for many months.

However, bearing in mind that it was intended for the Garda Commissioner and Assistant Commissioner Human Resources, Assistant Commissioner Byrne was of the view that the formula used would be understood by those to whom it was addressed.

10.99 The Byrne / McGinn summary does not fully convey the serious and numerous deficiencies in the investigation, as set out in Sergeant McCabe’s complaint, but there is no evidence that there was any intention to conceal the deficiencies in the investigation.

10.100 Assistant Commissioner Byrne told the commission that he was upholding Sergeant McCabe’s complaints.

10.101 The manner in which the statement withdrawing the complaint was dealt with was unsatisfactory. Although the statement of withdrawal was identified as a serious wrongdoing from the outset by the investigation team, drafts of the final report did not refer to it until the following note by Chief Superintendent McGinn appeared in a ‘comment box’: “Are we going to mention statement of withdrawal [sic], timing of
same and manner in which it was taken to cover ourselves”. There was, however, no question of concealing of anything. The words ‘cover ourselves’ have no negative connotations and do not denote a ‘cover up’.

10.102 The final report describes the circumstances surrounding the withdrawal of the complaint of Mr. R as something:

which could be considered to be a dubious practice in the circumstances of the case and having regard to the fact that a summary prosecution would become statute barred imminently.

10.103 This finding fails to indicate whether the complaint is sustained or rejected.

10.104 Chief Superintendent McGinn was of the view that she could not go further in the wording of the final report in order to be fair to everybody, including Garda Daly.

10.105 Assistant Commissioner Byrne, on the other hand, told the commission that he was “finding in favour” of Sergeant McCabe regarding the complaint concerning the statement of withdrawal. He stated “absolutely it is quite apparent I would think that I am finding in favour”. The commission cannot agree. The report neither expressly nor by implication indicates that the complaint of Sergeant McCabe is being upheld.

10.106 It is evident that the authors of the report are not in agreement as to the merits of the complaint made by Sergeant McCabe about the withdrawal of the statement. Chief Superintendent McGinn was of the view that it might be unfair to Garda Daly to uphold the complaint, and Assistant Commissioner Byrne considered that it was “quite apparent” that the complaint was being upheld. The sentence conveyed two different meanings, even to the authors, which cannot be regarded as satisfactory.

10.107 The circumstances in which the statement came to be withdrawn were central to Sergeant McCabe’s complaint and were a matter of importance to the Byrne / McGinn investigation. This aspect of the complaint should have been dealt with. Chief Superintendent McGinn told the commission that the matter had to be “determined” and that it could not be left “hanging in the ether”. Assistant
Commissioner Byrne maintained that it was clear that he was finding in Sergeant McCabe’s favour. Ultimately, however, he accepted that this finding was not “expressly stated”, nor was it to be found in the report “in black and white”. While the commission accepts that the issue was not ignored by the Byrne / McGinn investigation, the passage in question is ambiguous. It is not clear that this aspect of the matter had in fact been resolved in Sergeant McCabe’s favour.

10.108 The next assessment formed by the Byrne / McGinn report is also less than satisfactory. It stated:

Inspector Patrick McMorrow, Monaghan, was appointed by a Chief Superintendent to investigate the matter to establish if there was a breach of discipline… Following investigation no breach of discipline was established.

10.109 The statement is unintentionally misleading insofar as it suggests that Inspector McMorrow had a function in relation to a establishing the existence or otherwise of a breach of discipline, whereas he had no mandate to do so, as appears from the letter of 16th May 2008. The letter merely states “[p]lease investigate the issues arising in the manner of the investigation conducted into the assault on [Mr. X]. Report in one month”.

10.110 Inspector McMorrow furnished a report as requested, and he did not conduct a disciplinary inquiry. It is not surprising therefore, that in his report, although some criticism of Garda Daly is contained, Inspector McMorrow offers no opinion on a breach of discipline.

10.111 Moreover this mistaken understanding of events formed the basis for concluding that no further action was required. Assistant Commissioner Byrne candidly admitted that had he realised the mistake, he would have recommended disciplinary action against Garda Daly.

10.112 This finding of the Byrne / McGinn report is hard to understand, as an earlier working draft of the report demonstrates a correct understanding of Inspector McMorrow’s function. The sentence in an earlier draft of the report, “following his report no disciplinary proceedings were instituted”, indicates an understanding of the fact that Inspector McMorrow did not conduct a disciplinary investigation. No satisfactory
explanation has been advanced for the change from the correct understanding contained in the draft report to the incorrect statement contained in the final report.

10.113 Assistant Commissioner Byrne rightly stated that “it was a gross misinterpretation by ourselves... we know for certain by looking at the reports that it wasn’t a discipline investigation”. He was correct also in his admission that “[w]e didn’t get it right. I didn’t get it right. Our investigation, Byrne / McGinn, didn’t get it right. We missed it, it wasn’t captured and the consequence is that Garda Daly wasn’t disciplined and that Mr. R wasn’t properly served as a result of miscalculation, a misunderstanding, an error on the part of Byrne / McGinn. That is it in essence, judge.”

10.114 A significant aspect of Sergeant McCabe’s complaint was that the conduct of Garda Daly was not properly investigated. Assistant Commissioner Byrne was in “total agreement” with Sergeant McCabe, and yet because of the error mentioned above, no disciplinary action was taken.

10.115 Equally surprising is that Chief Superintendent McGinn and Assistant Commissioner Byrne knew that Inspector McMorrow’s report had not been concluded. They had been informed of this in writing on 24th February 2009 by Chief Superintendent Rooney when he forwarded Inspector McMorrow’s report. The Byrne / McGinn investigation was aware of this because it had enquired into the status of Inspector McMorrow’s report. Chief Superintendent McGinn knew of Inspector McMorrow’s investigation when she interviewed Mr. and Mrs. R. She wrote to Chief Superintendent Rooney by letter dated 18th February 2009 seeking confirmation that an inspector had interviewed Mr. and Mrs. R. She enquired “what is the nature and current status of this investigation”. Chief Superintendent Rooney replied by letter dated 24th February 2009 that Inspector McMorrow’s investigation “has not been concluded”.

10.116 The Byrne / McGinn report referred to Mr. and Mrs. R’s assessment of the evidence:

    *Mr and Mrs R appear to accept that the evidence available did not support a prosecution.*

10.117 Mr. and Mrs R’s understanding of the state of the evidence emanated from the incorrect information which they had been given by Garda Daly. They were unaware
of the fact that there was sufficient evidence to warrant a prosecution. This was the view of Sergeant Murray, Superintendent Clancy, and Inspector Cunningham, all of whom were experienced professionals.

10.118 This passage in the Byrne / McGinn report gives the erroneous impression that the reason this prosecution did not proceed was because of a lack of evidence, when in fact it was the statement of withdrawal of the complaint that had made the prosecution unsustainable.

10.119 The report continued to emphasise the absence of evidence:

\[ \text{Notwithstanding the fact that probationer Garda Daly approached [Mr. X] in relation to withdrawing his complaint... the fact that the CCTV system operated on a three day relay made the prosecution against the offender unsustainable.} \]

10.120 This finding of the Byrne / McGinn report is also incorrect. There was evidence, which if accepted by the court, was such as could warrant a conviction. Assistant Commissioner Byrne told the commission “I think the word ‘unsustainable’ was a bad choice of words” and what he meant was it was going “to cause problems.” The issue in relation to the CCTV footage was raised by the professional officer in the DPP’s office. He stated:

\[ \text{Were a prosecution to proceed I have no doubt that the defence would raise the legitimate defence that they are hampered because the prosecution had failed to provide them with the relevant CCTV footage (Braddish and Dunne).} \]

That concern was dealt with by Sergeant Murray. The decision referred to requires that the gardaí seek out and preserve all evidence having a bearing or potential bearing on the issue of guilt or innocence. In the case under consideration, the CCTV footage of the incident was erased after three days, and that was before the making of the complaint. As stated in Sergeant Murray’s report of 9th June 2008, this could not amount to a failure by An Garda Síochána. Inspector Cunningham made the same point in his report to the DPP. Sergeant Murray took steps to demonstrate that the gardaí had in fact complied with their obligations as set out in those decisions. He
procured statements from Garda Stephens and Garda Daly which detailed the attempts by An Garda Síochána to obtain the CCTV evidence. In his report of 9\textsuperscript{th} June 2008 he requested that these be provided to the professional officer in the DPP so that he might reconsider his direction to withdraw the charge. Despite the efforts of Sergeant Murray, the DPP did not change his direction that the proceedings be withdrawn.

10.121 Chief Superintendent McGinn told the commission that “I knew by the time the complaint was made the CCTV was irrelevant because it was wiped’’.

10.122 The Byrne / McGinn report in its conclusions ignored the primary reason why the proceedings were withdrawn. The professional officer had set out clearly and unambiguously in his direction that ‘[t]he withdrawal of [Mr R’s] complaint has made a prosecution against [Mr. X] unsustainable’.

10.123 Assistant Commissioner Byrne agreed that “the preeminent or the substantial, substantive issue in the view of the DPP was the statement of withdrawal...”

10.124 The internal papers for the Byrne / McGinn report show a clear understanding of the issue of the withdrawal of the complaint:

\begin{quote}
An examination of the file clearly shows that the matter was not promptly or properly investigated and that Garda Daly returned to [Mr. R] with a prepared statement which indicated that [he] wished to withdraw his complaint. [He] signed this statement at the request of gardaí.
\end{quote}

Unfortunately, the gravity of this issue, and its central role in the decision not to prosecute, are not addressed in the final report.

10.125 An Garda Síochána never explained to Mr. and Mrs. R that the reason why the prosecution did not proceed was because of the statement of withdrawal wrongly procured by Garda Daly.

10.126 Assistant Commissioner Byrne quite rightly did not agree that Mr. R’s injuries were permanent or that an ambulance had been called to the scene of the assault. These
matters were peripheral to the main complaints by Sergeant McCabe. Association between the events investigated in this chapter and the personal trauma experienced by Ms. R featured in the complaint passed on by Sergeant McCabe to the Byrne / McGinn investigation and were also passed on in his report to Superintendent Clancy of 3rd March, 2008. At the time Byrne / McGinn made their report this matter was not being pursued by Ms. R.

10.127 The Byrne / McGinn report refers to the record of the incident in the PULSE system, but there is no comment on the fact that it was not entered into the system until many months after the incident. However, this omission from the Byrne / McGinn report may be explained on the basis that this was not a complaint made by Sergeant McCabe.

10.128 When Assistant Commissioner Byrne and Chief Superintendent McGinn met Sergeant McCabe in the Hillgrove Hotel on the 11th October 2010 they presented Sergeant McCabe with a table summarising their findings. In respect of the complaint about matters with which this chapter is concerned the table indicated that his complaint was “not upheld”, although in fact, as Assistant Commissioner Byrne told the commission, Sergeant McCabe’s complaints in respect of the serious deficiencies in the investigation and the wrongful procuring of the statement of withdrawal were in fact accepted as being well founded.

**Conclusion**

10.129 The errors in the Byrne / McGinn report detailed above go against Sergeant McCabe’s complaints. They suggest that the complaints are largely unfounded, when in fact the complaints made were mainly justified. It is clear from the evidence of Assistant Commissioner Byrne that he considered Sergeant McCabe’s complaints in this matter substantiated. The working papers of the investigation also conveyed that understanding. However, in the final report the commission is left with the impression that there was a reluctance to deal with the complaint of Sergeant McCabe on its merits.
10.130  The statement of withdrawal was a matter of central importance in this investigation. The fact that it was the main reason for the charges not proceeding is not stated in the report.

10.131  It is not surprising that Sergeant McCabe was sceptical of the findings of the Byrne / McGinn report concerning this incident.

10.132  The relationship which should exist between the gardaí and members of the public was articulated memorably by Mrs. R in the course of her evidence. She said:

    [My husband] and I, you know, were raised in Bailieboro, it’s a small town, so if you have trouble or you’re concerned or anything, your first stop is the garda station. They are who you trust, they’re who you go to, and that’s what we did, we went to them.

10.133  Unfortunately, in this instance their trust was not justified.
Chapter 11 The Michael Molloy Investigation and the Missing Computer.

The investigation by An Garda Síochána of sexual offences and child pornography offences in respect of which Michael Molloy was convicted in 2009, having particular regard to the loss of a computer seized during the course of that investigation

The facts

11.1 On 11th September 2007, at Bailieboro garda station, a man made a complaint that his son had been sexually abused by Fr. Michael Molloy, a priest.

11.2 On September 14th 2007 gardaí searched two addresses associated with the suspect and obtained items of evidence, including a computer. The items were taken to Bailieboro garda station.

11.3 Fr. Molloy was arrested on 14th September 2007 and interviewed in Bailieboro garda station.

11.4 In March 2008, Fr. Molloy again attended Bailieboro garda station, accompanied by his solicitor. He made a statement after caution.

11.5 On 19th December 2008 Fr. Molloy was charged with a number of offences in accordance with the DPP’s directions.

11.6 On 22nd July 2009, at Cavan Circuit Court, Fr. Molloy pleaded guilty to one count of defilement of a child under the age of 15 years, one count of defilement of a child under the age of 17 years, and one count of possession of child pornography.

11.7 On 23rd November 2009, Fr. Molloy was sentenced to five years imprisonment on the count of defilement of a child under 15 years of age, three years on the count of defilement of a child under 17 years, and three years on the count of possession of child pornography, all sentences to run concurrently.

11.8 On 21st September 2010, the Bishop of Kilmore wrote a letter to Cootehill garda station requesting the return of the computer which had been seized by the gardaí on
14th September 2007 in connection with the investigation of the offences by Fr. Molloy.

11.9 The computer was never located by the gardaí.

**The garda investigation**

11.10 On 11th September 2007 the crime was reported by the father of the victim. The garda who received the complaint notified Sergeant Kevin Gavigan, and he met with Superintendent Michael Clancy. The gravity of the offences was appreciated, and detailed statements were taken that day from the victim, his father, and also from his mother, who had transcribed certain relevant text messages received on her son’s mobile phone. The phone itself was obtained by gardaí along with the note the victim’s mother had made of the text messages. The phone was later technically examined.

11.11 On 13th September 2007, two days after the complaint was made, gardaí obtained warrants to search two addresses associated with Fr. Molloy. Sergeant Gavigan opened the PULSE system for the purpose of generating the form of the information to be sworn to obtain search warrants for the relevant addresses. Sergeant Gavigan was called out of the room and Garda Ronan Geraghty completed the task.

11.12 Unfortunately, through error, the forms for the warrants under section 10 of the Sexual Offences (Jurisdiction) Act 1996, which were not applicable in the case, were obtained instead of the correct forms for warrants under section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997.

11.13 Both addresses in respect of which search warrants had been obtained were searched on 14th September 2007. A trained crime scene examiner from the divisional scenes of crime unit, Sergeant Paul Carroll, and a member attached to a garda telecommunications unit, Garda Pearse O'Shannon, participated in the search of the parochial house which had been previously occupied by Fr. Molloy but not at that time.
Fr. Molloy was living at a different address and when the gardaí arrived he admitted them. He was arrested and brought to Bailieboro garda station, where he was detained. A mobile phone seized from him at the time of his arrest was later technically examined.

In his statement, made on 11\textsuperscript{th} September 2007, the victim described repeated sexual assaults by Fr. Molloy between July 2006 and early September 2007. The assaults were preceded by grooming activity in May and June 2006, which included the playing of a pornographic DVD. The victim had difficulty connecting the offences to any specific dates or events. However, he stated that one incident of serious sexual assault occurred in March or April 2007, following evening mass, after he had installed or updated antivirus software on a computer in the parochial house, occupied at that time by Fr. Molloy. He described the computer, its operating system, and the software he installed.

Investigating gardaí realised the significance of this evidence which might establish a specific date for an offence. Garda O'Shannon, in a statement made on 19\textsuperscript{th} September 2007, said that he was asked to assist in the search for any electronic equipment or digital media that might be present. Sergeant Carroll, in an additional statement made on 8\textsuperscript{th} November 2010, explained the presence of Garda O'Shannon at the search by saying “there were allegations which were dated by the installation of a programme on a computer” and “Garda O'Shannon was more qualified to deal with the computer”.

Garda O'Shannon found a personal computer in the parochial house, and he noted the properties of an antivirus software program which had been installed. Although the setup file for the software was created in early June 2007, he noted that this could be either the date of first installation or the date of an upgrade. The name of the software matched that given by the victim in his statement. Garda O’Shannon asked Sergeant Carroll to photograph the “properties screen” for the antivirus software. He then seized the computer as an exhibit, employing appropriate forensic procedures. He marked the computer as an exhibit (with his initials) and later that day, he brought it, along with eight other exhibits, to Bailieboro garda station, where he gave it to Garda Sinead Killian, the designated exhibits officer.
On 14th September 2007 Fr. Molloy was interviewed four times in Bailieboro garda station. He admitted to possessing a pornographic DVD and to having had conversations and to having exchanged sexually explicit text messages with the victim. He denied sexual activity with the victim. Gardaí showed him a video recording of the victim engaged in sexual activity with a male. This recording was on the mobile phone which had been seized from Fr. Molloy. He made no comment when it was shown to him. Fr. Molloy was photographed, fingerprinted and a saliva sample was taken from him. He was released from garda custody without charge.

Some months later, in March 2008, Fr. Molloy again attended Bailieboro garda station, accompanied by his solicitor. On this occasion he made a statement after caution.

The file for the DPP in this case was compiled by Superintendent Noel Cunningham, although there had been a considerable amount of preparatory work done by Garda Andrew Scannell. On 4th June 2008, in response to a letter from Chief Superintendent Colm Rooney dated 26th May 2008 and headed “3rd REMINDER”, Superintendent Cunningham forwarded a minute to the Chief Superintendent, Monaghan, explaining that matters arising from Fr. Molloy’s last statement needed to be clarified and that the victim had to be interviewed further.

In the completed file, Superintendent Cunningham stated:

Evidence in this case comes from a variety of sources including Statements made by [the victim], admissions made by Fr. Michael Molloy. The evidence is strongly supported by evidence gleaned from Fr. Molloy’s mobile phone and evidence from [the victim’s] mobile phone, supported by forensic examination. [The victim] states that Fr. Molloy engaged in sexual activity with him on about 35 different occasions from May 2006 to 5th September 2007.

The report of Superintendent Cunningham does not mention the computer found in the parochial house, although it is referred to in the statements of the victim and of Garda O’Shannon, which were included in the file sent to the DPP. There was no statement from Garda Killian in that file.
11.23 Superintendent Cunningham expressly informed the DPP that the search warrants were defective, having been obtained in error pursuant to a statutory provision that had no application to the facts of the case.

11.24 The covering report from Superintendent Cunningham to the state solicitor, for transmission to the DPP contains the following recommendation: “Summary disposal is recommended in the event of a plea, and the District Court accepting jurisdiction.” This recommendation is surprising and difficult to comprehend given the gravity of the offences and the strength of the evidence.

11.25 Superintendent Cunningham explained to the commission that his recommendation to the DPP was because of concerns he had about the victim of the crime. He told the commission that:

    I was conscious that this young man was in a very bad place at this stage. I was conscious that he might not be able to sustain, I suppose I’d describe it as the robust cross-examination et cetera that he might be subjected to in the event of a full contested matter...

He stated that:

    ...notwithstanding the fact... that he was only a child in the eyes of the law, certain things could be construed by a defence in relation to what he had said in relation to his, I suppose ‘participation’ in the events and it may have subjected him to a pretty robust cross-examination

11.26 Defilement had not been preferred as a charge at the time Superintendent Cunningham gave his recommendation, but it would have been reasonably anticipated. Superintendent Cunningham focused on the sexual assault aspects of the case. At least some of the offences were committed when the victim was under fifteen years of age, therefore the defence of consent was not available in respect of them. The charge of possession of child pornography was not in any way dependent on the evidence of the victim. In those circumstances the commission considers it unlikely that the victim would have been subjected to a “robust” cross-examination. Such a course of action would be likely to harm the defence case rather than assist it.
Moreover, in view of the fact that been there had been a confession to the crimes made in the presence of his solicitor, it was likely that Fr. Molloy would plead guilty. A “full contested matter” was improbable.

Superintendent Cunningham told the commission that he was conscious that:

...cases which had come before the Circuit Court may not have... rape cases, maybe not in relation to young juniors like this, but other rape cases hadn’t received, you know, for mitigating reasons and good reasons, of course, may not have received custodial sentences or long custodial sentences et cetera et cetera.

Insofar as the explanation in the preceding paragraph purports to be at least a partial reason for the recommendation of summary disposal on a plea in this matter, it is on the basis that the sentence in the Circuit Court was unlikely to be much heavier than the cumulative maximum of two years which could be imposed on summary disposal of the case in the District Court. The commission rejects this contention as being improbable. The five year sentence actually imposed could not be regarded in any way as being harsh, and it is not surprising that it was not appealed.

Superintendent Cunningham advanced another reason for recommending summary disposal of the case in the event of a guilty plea. He said that “[h]is condition deteriorated hugely during the course of the investigation. The difference between this young man at day one when he was interviewed and at the second time when he was interviewed was dramatic. This young man, faced with the prospect of having to give evidence in a trial, may well not have given evidence at all Judge, the case may never have got to court.” He told the commission that his “second statement was extremely difficult to get from him” and that “his condition deteriorated hugely during the course of the investigation”. In circumstances where there was a danger of the case collapsing because of the failure of the victim to attend, Superintendent Cunningham considered that “half a loaf is better than no bread”. He referred to the maximum of two years which could be imposed by the District Court if sentences were consecutive, and expressed the view that it would be better than a failed prosecution on indictment.
However, Superintendent Cunningham, when asked whether the victim or his parents had explicitly indicated that he was a reluctant witness or would not come to court, candidly stated “there was never any reluctance, that wasn’t what I am saying, I’m saying that his physical, mental condition had deteriorated”.

Superintendent Cunningham made his assessment without recourse to any medical report on the victim, and as has been already stated the likelihood of the case being contested was remote.

Despite the explanations proffered, the commission remains surprised that such a recommendation was made by a garda officer with the experience of Superintendent Cunningham.

There is no evidence that the computer was lost at the time Superintendent Cunningham furnished his report, or, that if it was, that Superintendent Cunningham knew about it. There is no evidence to support any allegation that in omitting to refer to the computer in his report Superintendent Cunningham was attempting to conceal anything from the DPP or that he was sweeping anything under the carpet.

The failure to explain the reasons for the recommendation of Superintendent Cunningham to the DPP was also unfortunate. A reason might be expected for what appeared on its face to be a surprising recommendation; the failure to inform the DPP that the basis for the recommendation was a concern about the victim’s health and capacity to give evidence, could have proved fatal to the prosecution.

On 2nd December 2008 the DPP directed that Fr. Molloy be prosecuted on multiple counts of defilement of a child, a count of sexual assault, a count of production of child pornography and a separate count of possession of child pornography. The directing officer acknowledged that the issue with the search warrants “could put at risk significant evidence”, but directed a prosecution in light of the other available evidence. He made no reference to the computer.

On 19th December 2008 Fr. Molloy was charged in accordance with the DPP’s directions.

Fr. Molloy’s solicitors sought to make arrangements for the defence to examine the exhibits in the case. Garda Killian had, by this time, left Bailieboro garda station, and
it was necessary for her to transfer the exhibits to another member. This was arranged at the request of Sergeant Gavigan.

11.39 The handover of the exhibits occurred on 1st July 2009 and was recorded in a statement made by Garda Killian on that date and in a handwritten receipt signed by her and Sergeant Damien Martin, to whom she transferred the exhibits. There was no mention of the computer either in her statement or on the signed receipt.

11.40 In Cavan Circuit Court on 22nd July 2009 Fr. Molloy pleaded guilty to three offences, and on 23rd November 2009 he was sentenced to five years imprisonment on one of the defilement charges, and concurrent sentences of three years imprisonment on the other counts.

11.41 The investigation had major flaws:

- the search warrants were defective;
- there was a failure to have the computer forensically examined;
- the computer was lost;
- an explanation for the recommendation of summary disposal on a guilty plea was not given to DPP.

11.42 The investigation started out well, and the gardaí promptly took extensive statements from the injured party and his parents. In addition, they speedily obtained search warrants and executed those warrants. At an early stage in the investigation the gardaí appreciated the potential importance of technical evidence that might be obtained from the mobile phones of the victim and of the perpetrator, and from the computer in the parochial house.

11.43 However this good work was more than counterbalanced by the fact that the search warrants obtained by the investigation were defective. This had the potential to be harmful to the prosecution case, and as the DPP stated “it could put at risk significant evidence”.

11.44 Had the accused not pleaded guilty, the possible exclusion of the evidence obtained on foot of the defective warrants and the loss of the computer may have posed problems
for the prosecution. However, there was strong evidence against the offender which was not dependent on the evidence obtained on foot of the searches.

11.45 Cases of ongoing sexual abuse often cause difficulties for the prosecution in establishing, with any precision, a particular date for an offence. In the case under review, the date of one of the alleged offences could be ascertained by reference to an antivirus program on the culprit’s computer that had been installed or updated by the victim. This fact in itself made the computer an important exhibit.

11.46 Suggestions that there was no necessity to have the computer technically examined must be rejected. It had to be forensically examined if evidence was to be given about when the computer programme was updated, which was relevant to prove the date of a particular offence. Garda O’Shannon who had secured the computer in the parochial house told the commission that he was not qualified to give the expert technical evidence required in court, and that he understood that the computer was to be sent for expert analysis.

11.47 Inspector Gavigan told the commission that the victim himself had told him that there was no evidence contained in the computer. This cannot justify a failure to have it examined. Apart from the necessity for such examination set out in the preceding paragraph, it cannot be excluded that it contained evidence of this, or indeed other crimes. The intention was to have the hard drive forensically examined, but nobody ensured that it was.

11.48 Both Superintended Clancy and Superintendent Cunningham told the commission that it was an error not to have the computer forensically examined.

11.49 Inspector Gavigan initially attributed the failure to have the computer forensically examined to the delays in the Computer Crime Investigation Unit (CCIU). He ultimately accepted it was an oversight not to send the computer for forensic examination.

11.50 Significant efforts were in fact made to identify other potential victims of Fr. Molloy. This involved contact with the Catholic Church and social work agencies in various parts of the country were Fr. Molloy had worked, as well as an examination of text messages on his phone. These efforts were in marked contrast with the failure to examine the computer.
The loss of the computer

11.51 The loss of any important piece of evidence in garda custody is a matter for concern. Where the exhibit in question is a full-sized and bulky computer, its loss is all the more surprising.

11.52 The disappearance of the exhibit in the context of the present case inevitably gives rise to the suspicion of it being removed to protect Fr. Molloy. However, it would be quite unjustified, in default of any evidence whatever, to attribute that motive for the disappearance of the computer. There is nothing to show that the circumstances of its loss were such as to show a deliberate attempt to remove important evidence to undermine the prosecution.

11.53 Likewise there is no evidence to support the possibility that the computer was stolen from the garda station, either by a member of the gardaí or somebody else with access to the station.

11.54 The commission heard from retired Superintendent Colm Featherstone and Garda Peter O’Sullivan, who were responsible for the clear-out of the property room in Bailieboro garda station on the introduction of the Property and Evidence Management System (PEMS). There is absolutely no evidence of the computer having been taken in that exercise.

The search for the lost computer

11.55 On 21st September 2010 the Bishop of Kilmore sent a letter to Cootehill garda station requesting that the computer be located and returned as a matter of urgency. He said that it contained many valuable parish records and said that it had not been returned “despite repeated efforts” by another named priest. The sergeant in charge, Cootehill, forwarded that letter to the superintendent, Bailieboro, stating that some of the parish records on the computer were of interest in the context of an ongoing fraud investigation.
11.56 Ultimately, that investigation also resulted in a conviction and a statement taken at a later date suggests that there were, in fact, no relevant records on the computer.

11.57 Following the receipt of the letter from the bishop, Superintendent John G. O’Brien made enquiries of Garda O’Shannon, Garda Killian, Sergeant Gavigan and Sergeant McCabe about the missing computer. They all furnished reports.

11.58 On 6th October 2010 Sergeant Gavigan reported to the superintendent that he had executed the search warrant at the parochial house on 14th September 2007 with Sergeant Carroll and Garda O’Shannon, where Garda O’Shannon had seized the hard drive of the parish computer. He also reported that he had left the house to deal with the prisoner before the computer was removed from the house. Finally, he stated that a thorough search of Bailieboro garda station had been carried out and the hard drive had not been located.

11.59 On 12th October 2010 Garda O’Shannon reported that he did not retain any exhibits, but that he handed them all over to the exhibits officer, Garda Killian, on 14th September 2007. He said that he “understood that [the computer] was to be subject to a forensic examination at the Computer Forensic Section, located at the fraud office, Harcourt Square.”

11.60 On 24th October 2010 Garda Killian reported to Superintendent O’Brien that she had handed the hard drive to Sergeant McCabe on the 14th September 2007. This matter is dealt with below at paragraph 11.61 and following.

11.61 On 22nd November 2010 Sergeant Gavigan reported again to the superintendent. He said that he had not received a statement of evidence or an exhibits chart from Garda Killian and mentioned that neither were in the book of evidence. He said that he had no record of Garda Killian handing any exhibits to Sergeant McCabe.

11.62 On 9th January 2011 Sergeant McCabe furnished a report to Superintendent O’Brien stating that he could not assist in the matter as he had no knowledge of the whereabouts of the computer, and noted that Garda Killian’s notebook entry recorded that it had been placed in the property room. He said that he presumed that the computer would have required forensic examination and suggested that the “Jobs Book” for the investigation “should shed some light on the matter”.

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11.63 Garda Killian’s account, in her report of 24th October 2010, was that she had supplied a statement of evidence to Sergeant Gavigan “a number of days after Mr. Molloy’s arrest” along with a “table of contents” (i.e. an exhibits chart) regarding the items she received. She reported handing the computer over to Sergeant McCabe:

...at the time POS01 along with DS10 (an Hitachi TV DVD Combo, Silver found in Lisdarn) were too big to be placed into my locker and were handed over to Sergeant McCabe, Sgt I/C, to be placed in the property store. Perhaps there may be a record of same noted in the property book. At the same time, 3 shotguns and ammunition found during the search were also handed over to Sgt McCabe.

11.64 She furnished a copy of her statement of evidence, a certified copy of her official notebook for 14th September 2007, and a copy of the exhibits chart. She drew Superintendent O’Brien’s attention to the fact that “in my statement of evidence I have not mentioned the handover of POS01 but I have recorded it in notebook [sic] and table of contents.”

11.65 Garda Killian’s notebook entry initially did not record her handing over the computer to Sergeant McCabe, but it did record the handover of the other four items, which were of no probative value in the investigation. The note read: “@ 2:25pm 3PC, 4PC & 5PC & 6PC handed to Sgt McCabe to be placed in the property record”. Those exhibits were three shotguns and ammunition found in the parochial house.

11.66 Several pages later in her notebook there was a further note made after 5:15 pm. It read: “[computer] - property room, 3PC, 4PC, 5PC, 6PC -> Sgt McCabe at 2:25pm” This suggests that the computer went to the property room at 2:25 pm. However Garda Killian said that it was not meant to convey that meaning, and was intended to indicate that at that time she told to Sergeant McCabe that she intended to hand him over the computer later on.

11.67 There was yet another note book entry which stated “DS10 → Sgt McCabe Property room @ 5.10 pm”. DS10 was a TV/DVD set.

11.68 In her evidence to the commission Garda Killian gave the following account of transferring the custody of the computer to Sergeant McCabe:
...5pm is when DS5, 6, 7, 8, 9 and 10 came in –

Q. Yes.

A. -- so I assuming that is when I had noted that it was at 5.10 I had gotten the Hitachi computer.

Q. All right. What the note really indicates at this stage is in fact looking back on it you received it in and round 5.10?

A. Correct.

Q. And that you formed a view that it was to go to the property room?

A. I have the arrow, it is to go Sergeant McCabe property room at 5.10pm.

Q. All right. It is not to be read as a suggestion that you in fact gave it to him at 5.10pm?

A. No, no.

Q. Have you a memory of transferring that item to Sergeant McCabe at any stage?

A. Giving him the TV/DVD combo.

Q. YES?

A. I do.

Q. Can you assist us with that, when do you say that happened?

A. I can recall that whenever I finished duty altogether I had the laptop there, I placed the memory stick in it, transferred my exhibits chart to the memory stick, put all of the exhibits that was remaining with me into a big brown evidence bag, had the TV/DVD combination, I packed up everything, had the TV/DVD combination underneath my arm, walked up to the Sergeant’s office and informed Sergeant McCabe there is the combination thing, the television and DVD combination thing and I said the computer was too heavy to bring up along with it and I said I would go back down and get and he said to me, it is fine, I will get it. That was it.
Q. So at the end of your tour of duty, to understand you, you go upstairs, you have packed away everything else in your own exhibits bag for the purposes of being secured?

A. Yes.

Q. You bring the TV combo upstairs with you?

A. Yes.

Q. You tell Sergeant McCabe that the hard drive is downstairs in the interview room?

A. Yes.

Q. In relation to that your memory is that Sergeant McCabe indicated that he would go down and get it?

A. He would get it himself. I said I would go back down and get it and he said: It is fine, I will get it

Q. That exchange is not reflected in your notes?

A. No, it wouldn’t be reflected in this because I had finished, as far as I was concerned, with my notebook and I had obviously packed away.

Q. Sorry?

A. I don’t have it in my actual notebook.

Q. No. Why?

A. I just didn’t put it in my notebook. As far as I was concerned when I said it to Sergeant McCabe at 2.35 that the exhibit was for him that was it.

Q. Everything else is very, very meticulously detailed. Here is something that you had, and why don’t you record that transaction?

A. I just had it that it was handed, in my eyes when I say handed over I don’t mean physically handed over, in my eyes I had told him this exhibit is going to you.
**Q.** Where do you record the hand over to Sergeant McCabe of this particular item?

**A.** I just have it reflected in the exhibits chart. When I went back on my notebook I have asterisks beside the different exhibits and I note that I do have one for POS-1, POS-1 property room 3PC, 4PC, 5PC, 6PC Sergeant McCabe, at 2.25.

She told the commission that she had recorded the handover in her exhibits chart. Her evidence was as follows:

**Q.** In relation to that exhibits sheet, particularly having regard to the fact you were going holiday, as I understand it, did you do anything in relation to having this prepared at that juncture for the investigating team?

**A.** I remember that when the last of the exhibits was handed back to me, as I say, I packed up, but I remember taking my memory stick, putting the exhibits chart onto the memory stick and printing a copy of the exhibits chart off.

**Q.** There and then?

**A.** There and then.

**Q.** And can you remember what you did with the exhibits sheet?

**A.** I remember handing it to Sergeant Gavigan.

**Q.** And where did you do that?

**A.** I think it was in the hallway of the -- if you just come out of the public office there’s a hallway there.

**Q.** And you’re in no doubt about that?

**A.** Absolutely no doubt about it. And I specifically remember his reaction to it because I can remember the way he looked at me, as much as to say, I can’t believe you actually have this done.

**Q.** All right, so it looked like he was impressed by the work you had done?

**A.** Absolutely.
This evidence gives rise to serious difficulties for Garda Killian. She states that the handing over of the computer was recorded in the exhibits chart handed to Sergeant Gavigan. A copy of what purported to be that exhibits chart was given by her to the commission in a sealed evidence bag. However, although the exhibits chart received by the commission in a sealed evidence bag does refer to the handover of the computer to Sergeant McCabe, the exhibits chart on the garda investigation file contains no mention of any such handover of the exhibit. The documents are different. The exhibits chart was the main documentary evidence of the handover of the computer to Sergeant McCabe. In view of the confusion caused by the discrepancy outlined above, it cannot be relied on to establish that it was handed over to Sergeant McCabe. In addition, neither version of her exhibits chart recorded that DS10 (the Hitachi TV DVD Combo) was given to Sergeant McCabe.

Further difficulties for Garda Killian arise from a text message sent by her to Sergeant McCabe on 24th October 2010 (the same day as her report to the Superintendent) which reads as follows:

>sorry to land this on ya, but accordin to my notebook the guns, tv and comp were handed over to you. I specifically rem tom murray being there too cos it was in one of the interview rooms i was in and he was lookin at the guns.

The clear meaning conveyed by this message is that the computer was handed over to Sergeant McCabe in the interview room when Sergeant Tom Murray was present. The evidence establishes that time as being in the afternoon sometime after 2 pm. This however is at variance with her evidence to the commission that she transferred the custody to Sergeant McCabe at around 7:25 pm. Garda Killian told the commission:

>I think what I meant in relation to this was, I was more than likely trying to refresh Sergeant McCabe’s memory of the computer, of when I mentioned it to him initially rather than when I said it was physically handed over.

This explanation is less than convincing and strains the meaning of the words.

If Garda Killian remembered transferring custody of the computer to Sergeant McCabe in the manner which she described to the commission it is hard to understand why she would not have said so in the text, instead of conveying a quite different account.
On 14th March 2011 Garda Killian received a phone call from Superintendent O’Brien concerning the issue. According to Superintendent O’Brien’s note of the call in his diary, Garda Killian claimed that Sergeant Murray was present when she handed over the computer, and she told him that Sergeant Murray had an interest in guns. Garda Killian disputes this. Her evidence to the commission was that although she told Superintendent O’Brien that Sergeant Murray was present when she spoke to Sergeant McCabe in relation to the computer, she did not tell him that she had handed it over at that time.

Superintendent O’Brien’s evidence in respect of this phone call was that Garda Killian confirmed that she had handed over the computer at 2:25 pm to Sergeant McCabe in the interview room and that Sergeant Murray was present. He told the commission “she was confirming to me what I had in front of me, which was that the items were handed over at 2.25...” and that “the message I got from her in that telephone conversation that afternoon was that she had handed the items over to Sgt McCabe”. Garda Killian told the commission that she handed the computer over to Sergeant McCabe some time after 7 pm, in the circumstances set out in paragraphs 11.66 and 11.67 above. Superintendent O’Brien stated that she did not give him that account, which he first heard when she gave evidence to the commission. The commission accepts the evidence of Superintendent O’Brien.

Had the account which Garda Killian furnished to the commission been correct she would have been expected to give that account to Superintendent O’Brien in the course of his inquiry into the missing computer.

The commission does not accept that Sergeant McCabe was handed the computer by Garda Killian at around 7:25 pm in the manner described by her to the commission. The text message to Sergeant McCabe, the entry in her notebook, the note in the diary of Superintendent O’Brien, are strongly indicative of the fact that Garda Killian was maintaining that the handover of the computer took place in the afternoon at around 2.25 pm. Although that time was not specifically mentioned in the text message, or in the diary of Superintendent O’Brien, it can be established by reference to the fact that it was the time when Sergeant Murray was present.

Garda Killian failed to properly record the custody of the exhibit. That conclusion was drawn by Detective Superintendent Tom Maguire in his disciplinary report of 6th...
August 2013 and in his evidence to the commission. She also failed to properly place the item in an exhibit bag and label it.

11.79 The commission spent significant time considering a second version of Garda Killian’s statement of 4\textsuperscript{th} October 2007. Both statements were identical in content, save only for the addition of a sentence in the second version: “\textit{at 2.25pm on 14th September 2007 I handed POS 01, 3PC,4PC, 5PC and 6PC to Sergeant Maurice McCabe}” (emphasis added). Garda Killian denied that the second version of her statement was hers or that she made that amendment. The second version came to light as part of a subsequent disciplinary inquiry carried out by Detective Superintendent Maguire in respect of the lost computer. There is a difference between what Garda Killian says she sent to Detective Superintendent Maguire in the post and what was received by him. It is highly improbable that the statement was altered in the post. Detective Superintendent Maguire did not alter it.

11.80 Detective Superintendent Maguire wrote to Chief Superintendent James Sheridan on 6\textsuperscript{th} September 2013 about these two statements. Detective Superintendent Maguire stated in his report that the actions and conduct of Garda Killian during the course of his investigation were “of concern”. He explained to the commission that his concern was about the fact that Garda Killian had changed the statement. The chief superintendent reviewed the file. He did not consider that Garda Killian had deliberately sought to mislead, and he noted that it would have been better practice for a second statement to have been furnished. He took a benign view of the fact that there were two statements, and decided that no further action was warranted.

\textbf{Disciplinary proceedings}

11.81 Superintendent O’Brien prepared a report dated 12\textsuperscript{th} or 13\textsuperscript{th} July 2011 for Chief Superintendent Rooney, Cavan / Monaghan. He set out Garda Killian’s position that she had handed the computer to Sergeant McCabe at about 2:25 pm on 14\textsuperscript{th} September 2007 along with four other items. He said that she had recorded that transaction in her notebook and in the tracking form, that is the exhibits chart, or “\textit{table of contents}” as Garda Killian described it, but not in her statement.
Superintendent O’Brien stated that his predecessor, Superintendent Featherstone, arranged a clear out of the property store in 2009. There is a record of the other four items, (which were recorded in Garda Killian’s notebook as having been handed directly to Sergeant McCabe) in the property book at that time.

Superintendent O’Brien reported that he had spoken to Sergeant McCabe in June 2011, and the sergeant could give no explanation for the missing computer, although he did remember the other four items because Sergeant Murray had commented on them at the time.

Superintendent O’Brien concluded that there was nothing of evidential value on the computer in relation to the sexual assault case. This was an incorrect finding. The computer had not been forensically examined, and moreover, the precise date of one of the offences might have been ascertained by reference to the installation of antivirus software on it.

Superintendent O’Brien also expressed the view that Sergeant McCabe was in breach of discipline in that it was neglect of duty to fail to properly record an exhibit which he received.

Following Superintendent O’Brien’s report, Chief Superintendent Rooney appointed Detective Superintendent Tom Maguire, Ballyconnell, as deciding officer in accordance with regulation 14 of the Garda Síochána (Discipline) Regulations 2007 “to examine the full facts surrounding the loss of [the computer]”.

The report of Detective Superintendent Maguire was dated 3rd February 2012. In it he stated that he had received a complete investigation file from Superintendent O’Brien on 22nd September 2011 and that, as a result, on 5th October 2011 he had sought reports from Garda O’Shannon, Garda Killian, and Sergeant McCabe. He said that he had examined the investigation file, and that, from his own enquiries, he was of the
opinion that Sergeant McCabe was in breach of discipline in that he failed to exercise proper custodial care over the computer which, he said, Sergeant McCabe had received from Garda Killian on 14th September 2007.

11.89 As a result, on 10th February 2012, disciplinary proceedings were commenced against Sergeant McCabe. Chief Superintendent Sheridan, Cavan / Monaghan, issued Form I.(A.)11 appointing Detective Superintendent Maguire as deciding officer to investigate an alleged breach by Sergeant McCabe, “[t]hat you, Sergeant Maurice McCabe failed to exercise proper custodial care of a computer hard drive marked with exhibit POS1, which you received from Garda Sinead Killian on the 4th September 2007”.

11.90 The investigation gave rise to a considerable amount of work for Detective Superintendent Maguire. Sergeant McCabe sought, both by himself and through his solicitor, access to a substantial volume of documentation to assist in his defence of the allegation of breach of discipline. Detective Superintendent Maguire sought and received legal advice as to what should be disclosed.

11.91 On 11th April 2012 Detective Superintendent Maguire received a letter, dated 14th March 2012, from Sergeant McCabe seeking twelve specific categories of documents. Some, but not all, of the material sought was disclosed in early January 2013.

11.92 The formal disciplinary interview finally took place on 21st June 2013.

11.93 Sergeant McCabe made extensive submissions in his defence at that interview and provided a written submission. In that submission he outlined his concerns about the fairness of the disciplinary process but stated that it was nonetheless his intention to fully cooperate with the investigation. He said that he had nothing to do with the investigation of the sexual assaults on the victim. He stated that he had never had the computer in his possession and that, therefore, there could not have been any breach of duty on his part. He stated that the computer was not forensically examined. He made a number of complaints about the investigation.

11.94 Following the interview at which Sergeant McCabe made those and other submissions, he was notified by Detective Superintendent Maguire on 24th July 2013 that he was not in breach of discipline. A central reason for the decision was, according to Detective Superintendent Maguire, “the obvious inconsistency in the
evidence of Garda Killian, the only evidence against Sergeant McCabe”. The disciplinary investigation ended with a report on 6th August 2013 which concluded that “finding Sergeant McCabe be in breach of discipline in this case would be unsafe”. Detective Superintendent Maguire was right in finding Sergeant McCabe not to be in breach of discipline.

11.95 However, the disciplinary proceedings are subject to a number of criticisms.

11.96 In his report to Chief Superintendent Sheridan dated 3rd February 2012, Detective Superintendent Maguire stated that he had examined the investigation file and from his own enquiries he was of the opinion that Sergeant McCabe was in breach of discipline. He told the commission was that this was a mistake and that in fact he had not formed any firm view on the matter. The commission accepts his evidence. However, the fact that prior to his appointment to investigate Sergeant McCabe, Detective Superintendent Maguire appeared to express a clear view on the matter in a signed document would have made any adverse finding in that investigation at least vulnerable to the possibility of a judicial review. This error seems to have gone unnoticed either by Chief Superintendent Sheridan or Detective Superintendent Maguire himself.

11.97 Detective Superintendent Maguire was asked to identify any members who should face disciplinary proceedings. In his report of 3rd February 2012 he decided that Sergeant McCabe alone should be disciplined. He expressed his opinion that “Sergeant Maurice McCabe is in breach of discipline”. He did not suggest that Garda Killian should also be subject to disciplinary proceedings. While he had not formed a firm view that Sergeant McCabe was in breach of discipline, he did reach a conclusion as to the next step to be taken in the disciplinary process. His decision was based on a paper review, where there was a conflict of fact between the exhibits officer and the sergeant in charge. He appeared to accept Garda Killian’s version of events over the version of Sergeant McCabe. Before reaching that conclusion, he did not speak to Garda Killian or interview anyone else. Had he done so he might have been alerted to the inconsistencies which he later found.

11.98 In his report dated 6th August 2013 in which he found that it “would be unsafe” to find Sergeant McCabe in breach of discipline, Detective Superintendent Maguire referred to inconsistencies in Garda Killian’s version of events. Earlier, when deciding
to recommend disciplinary proceedings in respect of Sergeant McCabe and not in respect of Garda Killian, Detective Superintendent Maguire was in possession of almost the same information. The only significant additional documentation was the second altered statement and her denial of any knowledge of its alteration.

11.99 Detective Superintendent Maguire should have provided the two statements of Garda Killian to Sergeant McCabe, once he became aware of their existence. He had been asked for all statements and all relevant documents by Sergeant McCabe’s solicitors. The reply to his solicitors in January 2013 indicated that all statements had been given to Sergeant McCabe, when in fact that was not the case.

11.100 The failure to provide the two statements was explained by Detective Superintendent Maguire on the basis that he believed that the existence of the altered statement was more to Sergeant McCabe’s benefit than detriment. He was asked “did you give him the two statements at the meeting?”, and he relied, “no, I did not”. He continued, “I hadn’t decided whether I would give him the statements or not”, and he explained, “… my view on it was, it was more to his benefit than his detriment and I wanted to hear what he had to say about the computer and then I would make my decision”. He was then asked, “… because it was to his benefit and not to his detriment, was that not a reason to give it to him?”. His answer was, “[maybe so, judge]”. It was a compelling reason to provide the two statements to Sergeant McCabe.

Sergeant McCabe’s complaints

11.101 In a complaint to the confidential recipient of 12th January 2012 it was alleged that:

[Superintendent Clancy] failed to have a case conference, jobsbook, regular meetings and interest in a case of Child Pornography and rape of a minor in September 2007 where the offender was a priest. A computer, which was seized during a search with warrant, went missing on his watch and was never located. He did not report this matter to his superiors, the DPP, the victim’s family or the defence. Potential victims and evidence was lost as a result.

11.102 In an undated document, Sergeant McCabe complained in addition to the above that:
• a false accusation was made against him of removing a computer in the case;
• the warrants used were defective;
• the computer was not forensically examined;
• the computer was lost;
• there was no jobs book;
• there were no case conferences;
• someone altered Garda Killian’s second statement and inserted POS1 into her statement without her knowledge;
• Chief Superintendent Rooney, Chief Superintendent Sheridan, Superintendent O’Brien and Detective Superintendent Maguire failed to act or report on the irregularities;
• Chief Superintendent Rooney, Chief Superintendent Sheridan, Superintendent O’Brien and Detective Superintendent Maguire “went all out to blame” Sergeant McCabe;
• Detective Superintendent Maguire failed in a number of respects, including failing to investigate the loss of the computer, to interview anyone, to disclose the altered statement, and failing to investigate or report the “wrongdoing” he uncovered.

11.103 The commission has found a number of serious deficiencies in the investigation as detailed above and highlighted by Sergeant McCabe.

11.104 The allegations against Superintendent Clancy are manifestly unfounded. There can be no doubt about the existence of a jobs book; it has been shown to the commission. However, in this module a misunderstanding appears to have been shared, with even Inspector Gavigan claiming in evidence that there was no jobs book. The jobs book, despite being a document covered by discovery, was only produced by An Garda Síochána after the module commenced. The assertion that there was no jobs book was first recorded in the report of Superintendent O’Brien of 12th July 2011.
Moreover, entries in the jobs book show that there were frequent meetings to review and advance the investigation, and that Superintendent Clancy showed an active interest and involvement in the case. The time when the computer went missing cannot be established with any accuracy, and certainly cannot be proved to be before 18th March 2008, when Superintendent Clancy ceased to be superintendent in Bailieboro.

In default of any proof that the computer was missing before 18th March 2008, and that Superintendent Clancy knew, or should have known about it, Superintendent Clancy cannot be responsible for not reporting the matter to his superiors, the victim’s family, or the defence. It was not for him to report the matter to the DPP because he had ceased to be superintendent in Bailieboro by the time the file went to the DPP. Any allegation that Chief Superintendent Rooney, Chief Superintendent Sheridan, Superintendent O’Brien and Detective Superintendent Maguire failed to act or report on the loss of the computer is not substantiated.

It is correct to say that a computer, which was seized during a search with warrant, did go missing. Garda Killian, as the exhibits officer, was responsible for the computer and the other exhibits.

It is correct to say that “[p]otential victims and evidence was lost as a result”. The report of Superintendent O’Brien of 12th July 2012 states that nothing of evidential value was found on the computer. However, it had not been forensically examined, and such examination as had been carried out revealed evidence that might have helped to establish the date of one of the offences.

Conclusion

The investigation was seriously flawed because of the matters set out at paragraph 11.41 and it is unnecessary to revisit these matters.

Notwithstanding the flaws in the investigation the culprit was convicted of serious offences.
11.111 Unfortunately, the commission has been unable to ascertain what happened to the computer.

11.112 It is difficult to understand why Sergeant McCabe was the only person subjected to disciplinary proceedings for the loss of the computer, as Garda Killian was the exhibits officer in the case. The decision to subject him to a disciplinary investigation was based on a paper review in which there was a clear conflict of fact. It was the first time in his long career that he faced such proceedings. He was, quite rightly, exonerated. Sergeant McCabe knew that he did not have custody of the computer and that he had not been guilty of any neglect of duty. Sergeant McCabe formed the view that there may have been a “plot” against him and that other members of An Garda Síochána, “went all out to blame him”. While there is no evidence to establish any concerted attempt to blame Sergeant McCabe, it was understandable that he might connect the commencement of disciplinary proceedings with the complaints he had made a short time earlier and that he might feel aggrieved. There is no doubt that to be subjected to such a process was very stressful particularly having regard to Sergeant McCabe’s long years of good service and the overall context of his complaints. The stress was exacerbated by delays and difficulties in the disclosure of relevant documents and information as set out above. Moreover, the commission has been told that disciplinary proceedings are measures of last resort. This makes the use of such proceedings against Sergeant McCabe all the more difficult to understand.
Chapter 12  PULSE Records

Allegations of malpractice and corruption with PULSE records

Background

12.1 By paragraph 1 (i) of its terms of reference the commission was charged with the investigation of allegations of malpractice and corruption made by Sergeant McCabe in relation to PULSE records seized from him on 11th October 2010 at the Hillgrove Hotel, Monaghan.

12.2 It is necessary to understand both the circumstances in which these allegations of Sergeant McCabe came to be made and investigated, and the nature of the PULSE system itself.

12.3 On 11th October 2010 Sergeant McCabe met with Assistant Commissioner Byrne and Chief Superintendent McGinn at the Hillgrove Hotel, Monaghan. The purpose of the meeting was to inform Sergeant McCabe of the then completed outcomes of the Byrne / McGinn investigations in relation to the specific complaints made by Sergeant McCabe. A document had been prepared by the Byrne / McGinn team setting out the allegations and their findings. This document was prepared in advance of the meeting and handed to Sergeant McCabe at the commencement of the meeting. In this document, 42 allegations had been set out in modules. Assistant Commissioner Byrne told the commission that he had identified 46 separate issues in relation to the matters raised by Sergeant McCabe and two further matters had come under the scope of his investigation independently of Sergeant McCabe’s complaints. The purpose of the meeting was to explain each finding to Sergeant McCabe.

12.4 Each complaint was categorised as being: upheld, not upheld, or investigation ongoing. As each finding was explained, Sergeant McCabe, who was accompanied by Sergeant Dominic Flynn of the Association of Garda Sergeants and Inspectors (AGSI), was given the opportunity to ask questions and he did so. Sergeant McCabe indicated satisfaction with some of the findings and unhappiness with others. Sergeant McCabe and Assistant Commissioner Byrne disagree as to how the meeting
progressed. Assistant Commissioner Byrne stated that the matters were discussed in
detail while Sergeant McCabe contended that the reasons for some of the findings
were not set out. Sergeant McCabe was unhappy that the prepared document ran to
merely five pages and indicated only in short form what complaints were or were not
upheld.

12.5 Near the end of the meeting Assistant Commissioner Byrne indicated to Sergeant
McCabe that one of his findings was that Sergeant McCabe had some responsibility
for matters that had arisen, because he was sergeant in charge of Bailieboro garda
station. Sergeant McCabe was unhappy with this conclusion. He then informed
Assistant Commissioner Byrne and Chief Superintendent McGinn that he had
evidence of other serious wrongdoing. He left the hotel briefly and returned carrying
two boxes of documents containing printouts of records generated by the PULSE
system. Sergeant McCabe indicated that the material disclosed evidence of the misuse
of the PULSE system by members of An Garda Síochána. While Sergeant McCabe’s
previous complaints had aspects relating to the PULSE system, after examination it
was apparent that this was new material.

12.6 PULSE records are confidential. Assistant Commissioner Byrne was concerned about
the circumstances in which the documents were generated and how they came to be in
the possession of Sergeant McCabe.

12.7 Assistant Commissioner Byrne would not allow the documents to be removed from
the hotel by Sergeant McCabe. Subsequent events at the hotel have been the subject of
controversy. However, those events are outside the terms of reference of this
commission. Assistant Commissioner Byrne took possession of the boxes of
documents.

12.8 Assistant Commissioner Byrne took the boxes to Dublin where he secured them in his
office without further examination. On 12th October 2010 he sought a written report
from Sergeant McCabe accounting for his possession of the boxes.

12.9 On 2nd November 2010 the garda commissioner appointed Deputy Commissioner
W.I. Rice to investigate, inter alia, matters which arose from the examination of the
documents secured by Assistant Commissioner Byrne. In response to a direction from
Deputy Commissioner Rice on 19th November 2010, Assistant Commissioner Byrne handed over the boxes of documents to him.

12.10 Deputy Commissioner Rice corresponded with Sean Costello and Company, solicitors for Sergeant McCabe, in relation to all of these matters and he asked Sergeant McCabe to attend a meeting to identify issues arising from the PULSE documentation that had been obtained by him.

12.11 There were 1,153 individual PULSE documents relating to incidents in Bailieboro and neighbouring districts. These were catalogued by Deputy Commissioner Rice’s team, which included Chief Superintendent James Sheridan. They were divided into two broad categories. 624 of the incidents were referred back to the Cavan / Monaghan divisional officer, Chief Superintendent Colm Rooney, to “advise on the final outcome of the incidents referred to.” This aspect of the matter will be explored further below. 529 incidents were separately identified and grouped together as it was “unclear” what issues arose in relation to those incidents. Sergeant McCabe’s further assistance was specifically sought in relation to those incidents and it was proposed to hold a meeting with him.

12.12 Although it initially appeared that Sergeant McCabe was prepared to attend such a meeting, he did not do so because he considered that the return of a large number of the incidents to the divisional officer for investigation was inappropriate. Sergeant McCabe thought that those matters should have been examined “independently”. Further, developments dealt with elsewhere in this report had the result that Sergeant McCabe “lost faith” in An Garda Síochána. By June 2011 Sean Costello and Company Solicitors were corresponding with the Minister for Justice and Equality calling for the establishment of a Commission of Investigation.

12.13 Assistant Commissioner Byrne had no further role in the investigation of the matters concerning the PULSE printouts. The Byrne / McGinn team had also examined a number of PULSE anomalies identified by Sergeant McCabe. This is dealt with in their report but this commission is concerned only with the PULSE reports seized from Sergeant McCabe in October 2010.

12.14 Deputy Commissioner Rice had a very extensive brief and it is important to identify the precise nature of what was required of him in respect of the seized PULSE
printouts. Deputy Commissioner Rice told the commission that his task included the examination of the PULSE printouts and in that context he decided to refer matters back to the divisional officer for Cavan / Monaghan, Chief Superintendent Rooney, for a report. This decision was taken notwithstanding the fact that Sergeant McCabe had made a complaint about Chief Superintendent Rooney.

12.15 Chief Superintendent Rooney was directed on 25th March 2011 in the following terms:

    Your report should set out the final outcome for each of the PULSE incidents referred to. Any incident listed which states it was dealt with by the Byrne/McGinn Enquiry has been finalised and does not require any further report.

12.16 The primary intention of Deputy Commissioner Rice in returning the 624 incidents to Cavan / Monaghan was to have them completed by the people who “should have completed them in the first place.”

12.17 Deputy Commissioner Rice did not perceive any difficulty in sending the matters back to the division from which they had emanated. He was firmly of the view that the investigating member who put the incident into the PULSE system should also be responsible for accurately updating it. Implicit in this approach was his view that the problem with the incidents was a failure to update them to reflect the reality of each investigation.

12.18 In referring the PULSE printouts back to Chief Superintendent Rooney, Deputy Commissioner Rice did not contemplate the preparation of individual reports on each incident explaining why particular PULSE incidents were not updated. The commission acknowledges that the preparation of an individual report in relation to every incident would have been an onerous task. Deputy Commissioner Rice required the entries to be corrected and updated to reflect the current position. Consequently, Chief Superintendent Rooney’s response on 9th June 2011 takes the form of a terse letter attaching the ‘final outcome’ of the PULSE incidents in table form.
Issues

12.19 The issues raised by Sergeant McCabe in relation to the use of PULSE were diffuse and wide ranging. They concerned many hundreds of incidents involving scores of gardaí and hundreds of members of the public.

12.20 In October 2012 Sergeant McCabe communicated with the Department of Transport. He made extensive allegations of wrongdoing by members of An Garda Síochána in relation to the annulment of road traffic offences. These matters became the subject of public and Dáil debate and became known as the “ticket fixing” controversy. The matters raised were the subject of an inquiry and report by Assistant Commissioner John O’Mahoney.

12.21 The issues with which this commission is concerned are confined to the matters arising from the documents taken from Sergeant McCabe in the Hillgrove Hotel. It is important that these issues do not become confused with the other matters mentioned above which do not form part of the terms of reference of this investigation. Although the commission heard some limited evidence connected with those issues where it was relevant to establish chronology or to provide context, this chapter does not relate to “ticket fixing”.

12.22 The commission has sought to identify the complaints made in order to clearly distinguish these matters from the “ticket fixing” controversy.

12.23 Identifying the issues of central concern was difficult. All of the offences with which the PULSE issue is connected were minor, in the sense contemplated by the Constitution, that is offences which can be tried summarily. It is also reasonable to describe many of the offences with which this chapter is concerned as being minor in the sense of being at the lower end of the spectrum of criminal offences. Further, some of the pulse printouts deal with incidents that are not criminal at all. However, the commission accepts that some minor offences, such as dangerous driving or driving without insurance may have most severe consequences. Furthermore, the offences and incidents covered by the material examined by the commission are in areas where members of the public and members of An Garda Síochána commonly interact. Public confidence in An Garda Síochána is undoubtedly connected with the
handling of those matters. In consequence the allegations made were potentially serious.

12.24 A better understanding of the nature of the complaints can be arrived at by an examination of volume three of the documents sent by Sergeant McCabe to the Office of An Taoiseach and which became known as the “dossier”. Many of the complaints in this volume of the dossier have a repetitive quality, given the nature of the matters involved. However, common threads emerge. The commission has identified the following matters as being central to the complaints:

- Offences detected but not prosecuted within statutory time limits or at all;
- Summonses and/or charge sheets not issuing despite suspects admitting their guilt;
- Incidents being mis-described as criminal incidents when they are non-crime incidents;
- Individuals being mis-described in PULSE entries. In particular, individuals being categorised as “suspected offenders” when there is no evidence to support such a categorisation;
- Negative drug searches being entered on the system as if the searches were positive;
- Wrongful inflation of crime figures through misuse of PULSE;
- Inaccurate narrative entries;
- Inaccurate narrative updates;
- A generalized but serious charge that many of the PULSE incidents complained of were “corruptly” updated, or updated to “cover up” wrongdoing after the seizure of the documents at the Hillgrove Hotel and the subsequent return of the 624 printouts to the divisional officer for Cavan / Monaghan;
A contention that the issues raised in respect of PULSE should have been “independently” investigated and that it was wrong to refer the 624 incidents back to the divisional officer for Cavan / Monaghan.

Methodology

12.25 The task facing the commission in its examination of this area was potentially immense. A full examination of 1,153 PULSE incidents would not only have been a vast undertaking but moreover, it would have been of only limited usefulness. Each incident involved an investigating garda and, usually, a number of assisting and supervisory gardaí, together with members of the public who were questioned. A full examination of all of the incidents could have involved over a thousand separate small inquiries, each involving the examination and possibly cross examination of a number of witnesses. Adopting such a course would have unduly and unacceptably prolonged the commission’s work with little purpose. In this regard the commission’s terms of reference specifically direct that the commission “should 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.” Further, as will be seen below, steps have already been taken by the commissioner of An Garda Síochána to introduce a more robust review procedure in relation to the use of PULSE and consequently the matters complained of are now far less likely to arise. Sergeant McCabe told the commission that he welcomed this new review procedure. Consequently the commission decided that it would not be an efficient or desirable use of public money to unduly prolong the inquiry into these matters in circumstances where the result might merely amount to a recommendation for the implementation of a review procedure which has already been adopted.

12.26 Nonetheless the matters raised were of public importance and needed to be addressed. The commission adopted the following approach. There were 182 PULSE incidents complained of which were also contained in the third volume of the dossier sent to the Office of An Taoiseach. These particular incidents were accompanied by individual narratives of complaint by Sergeant McCabe. In those narratives Sergeant McCabe set out where he contended that the particular PULSE entry misrepresented the true
situation. He also set out instances where PULSE entries had been updated in a manner which was inaccurate or possibly dishonest. Furthermore, many of these particular incidents contain updates which post date the meeting at the Hillgrove Hotel and Sergeant McCabe alleged that many of these updated entries were intended to cover up what he had found.

12.27 The commission considered that all of these 182 incidents could be taken for further analysis, because it appeared that all of Sergeant McCabe’s general complaints about misuse of the PULSE system were contained, if at all, in these entries. In addition, the initial complaints in respect of these entries were set out and did not require further evidence. It transpired that 2 of the incidents did not have accompanying detail and therefore 180 incidents were further examined.

12.28 The work done on the limited sample of 180 was cumbersome and time consuming. The commission was helped by an on site examination of the workings of the PULSE system at garda headquarters on 9th and 30th September 2015.

12.29 The commission examined the PULSE entries as they now appear for each of the respective incidents. These are the PULSE entries, including narrative updates, as they would appear to a member of An Garda Síochána using PULSE. Further, through a technical electronic audit exercise, the commission was also able to examine the PULSE system in a more sophisticated way. This allowed for an examination of the incidents from the date of first entry onwards including every change, and the identity of the person making the entry or change.

12.30 The incidents can be broken up into broad categories of road traffic offences, drug related offences, and public order offences. Firstly, the commission examined each incident individually from the point of detection. Thereafter, it examined the audit of PULSE entries in respect of each incident to ascertain by reference to PULSE updates how an incident was further investigated (if at all). Particular emphasis was placed on the precise status of the incident being investigated and the entries concerning members of the public concerned with those incidents whether as suspects or witnesses, or in some other capacity. Where matters were updated in the PULSE system the issue of summonses and/or charge sheets and the court outcomes of these cases were also cross checked. In relation to road traffic matters the commission was
also given access to the Driving Licence and Insurance Production Database (DLIP) to further examine the accuracy of PULSE updates.

12.31 Sergeant Gavin Scott, of the Information and Communication Technologies section of An Garda Síochána, gave evidence on the operational features of PULSE. They are summarised below to enable the reader to properly understand the complaints about the PULSE entries and the commission’s findings in relation thereto.

PULSE

12.32 The acronym PULSE means Police Using Leading Systems Effectively. Briefing in preparation for the introduction of PULSE began in 1998 for all ranks of An Garda Síochána. The PULSE system was introduced from 1999 to 2003 and since then there have been many updates in the light of developments in policing, for example, the Fixed Charge Processing System which was introduced in 2006 and the Automatic Fingerprint Identification System which was introduced in June 2009.

12.33 The central purpose of PULSE is to collect information in an electronic format. There are some obvious benefits to such a system such as a reduction of garda administration and paperwork, improved support for front-line policing and investigations, improvements in garda planning and management activities, and easier retrieval of information. However, PULSE is not a performance management system, nor is it a system for monitoring the work product of gardaí. Moreover, despite common misconceptions, PULSE was not designed as a case management system nor was it used as such at the time with which the commission is concerned.

12.34 Although the commission was told that such a function is now being introduced, the PULSE system was not intended to replace the investigative process associated with incidents but was intended to assist gardaí in the conduct of investigations by having speedy access to data from a central location.

12.35 The PULSE system is built around five sections or “items of interest”: Person, Vehicle, Object, Location, and Organisation. Further, there are 22 “system areas” within those “items of interest” dealing with a range of policing duties including responses to incidents, charges, bail, summonses, court outcomes, firearms, collating
and intelligence, letters to crime victims, warrants, and many other matters. One of the most significant “system areas” is the “incident”. The incident tab is the means by which a member of An Garda Síochána enters and classifies an occurrence which takes place during his or her tour of duty. As set out in the PULSE user manual, a member of An Garda Síochána is obliged to record all occurrences coming to his or her notice. This obligation is fulfilled when the incident has been created on PULSE by or on behalf of the reporting member.

12.36 The member investigating an incident has a responsibility to ensure all occurrences are entered on PULSE in a complete and timely manner. The member must also ensure that incidents are updated following any developments in investigations or where new information is received.

12.37 In the early years of the PULSE system garda members had to return to, or attend at, a station with a computer terminal which was connected to PULSE in order to operate the system. The commission heard evidence of members having to queue in order to access such a terminal to enter a relevant occurrence. This diminished the efficiency of the PULSE system. Accordingly the Garda Information Service Centre (GISC) was introduced into An Garda Síochána in 2006.

12.38 GISC is an expert service operated by civilians which enables members of An Garda Síochána to input incidents by telephone without having to return to a garda station. In addition to helping with data entry, members of GISC also review incidents to ensure they meet the required quality standards. GISC staff (called incident creation representatives) use an “Incident Creation Guideline Document” for this purpose. However, the responsibility for crime classification itself remains with the garda providing the information. GISC was fully functional during the time period with which the commission is concerned.

12.39 The PULSE system requires that individuals associated with an incident are attributed with a particular role. To properly understand the complaints made about the use of the PULSE system it is necessary to be aware of the significance of the role ascribed to individuals connected to an “incident” in that system. The role that a person plays in connection with an incident, whether a crime incident (such as theft, criminal damage, or public order incidents) or a non-crime incident (such as missing persons or searches), is important and a person’s role should be accurately described on the
PULSE system. Some designated roles can only relate to “crime incidents”. An inbuilt PULSE validation system restricts the user’s ability to enter crime related roles in to “non crime incidents”. Thus marking a “non-crime incident” as “detected” is not permitted because only a crime can be marked “detected”.

12.40 It may assist the reader to set out some of the more common roles from the available menu on the PULSE system.

*Investigating Garda* - This term is used to log the garda who is responsible for investigating an incident.

*Assisting Garda* - This term is used to log a garda who is not the reporting or investigating garda but is involved in the investigation or has had a part to play in the incident at some stage.

*Suspect* - This term is used to designate the person who the gardaí think probably committed an offence.

*Suspected Offender* - This term is used when proceedings have commenced against a suspect or an incident is to be marked detected without a proceedings being issued in accordance with Crime Counting Rules.

*Garda Witness* - This term is used when a garda member is a witness to an incident.

*Witness* - This term is used to record any person who may have been a direct or indirect witness to the incident and may have information regarding the incident.

*Injured Party* - This term is used for recording the details of the victim of a crime.

*Missing Person* - This term is used to record a person who is the subject of a missing person investigation.
Nominated SIO - This term is used to log the identity of a senior investigating officer (where applicable). The SIO is appointed by the Divisional Critical Management Team to investigate serious crime occurrences and critical incidents.

Questioned in Relation To - This term is used to record any person who may have been questioned by gardaí regarding a specific incident to which the person is connected. It does not automatically indicate that a person is a suspect or an injured party or a witness. The person may have information regarding an incident or not and it was deemed appropriate to ask questions of that person. In many cases when a suspect is no longer a suspect this term will be used to record the person as they would have been questioned regarding the incident.

Reported By - This term is used to log the identity of the person who reported the incident to the gardaí.

Reporting Garda - This term is used to log the identity of the member who attends the scene, or if the scene is not visited, the member who takes full particulars from the complainant.

Searched - This term is used where a person was the subject of a search by the gardaí.

Sought in connection with - This term is used to log the identity of a person who may or may not be involved in the incident, a person who needs to be eliminated from an investigation, or a person who has information that could assist the gardaí. It is a method or recording on PULSE a person to whom the gardaí wish to speak.

12.41 It can be seen from the non-exhaustive list above that there is ample scope to accurately describe any given person’s role in relation to an occurrence. Furthermore, a person’s role may change and the PULSE system allows for the evolution of an investigation to be reflected. A person initially thought to be a witness may become a
suspect. The designation of a person as a “suspected offender” is a matter of some importance. It signifies that the crime is regarded as detected and solved and that the person so designated committed it. A person can rightly remain on the PULSE system as a “suspected offender” even if they have not been prosecuted, for a variety of valid reasons, or where there has been a prosecution but no conviction (for example where evidence has been ruled inadmissible by a trial judge). However, it is clear that a person should not be described as a “suspected offender” for a “non-crime incident”, or where there is no evidence that the person committed a crime.

12.42 Since 2009, when a person is convicted in court, the court outcome will be automatically transferred to PULSE electronically using the relevant charge sheet or summons reference number to associate the result to the correct incident. The transfer of this information will not change the person’s role on PULSE which will be recorded as “suspected offender”.

12.43 When an occurrence is marked “detected” it signifies that the occurrence involves a recognised criminal offence committed by a “suspected offender”. The PULSE system will require the nomination of a “suspected offender” before the occurrence can be validly marked “detected”. From a crime counting perspective this has an obvious importance. A criminal offence may be classified as “detected” when criminal proceedings have been commenced against at least one person for the criminal offence. In addition the designation of a person as a “suspected offender” can also have a further significance, for example, in relation to garda vetting.

12.44 An indispensable aspect of the PULSE system is the review functionality which was part of the PULSE system since 1999. Review requirements developed over the years. Examination of PULSE entries by a supervisor has now been recognised as integral to the proper working of the system. When the direct entry of incidents onto PULSE by garda members was established across the organisation, the review function was done electronically. It remained a task for a supervisor only, usually a sergeant, although another member of garda rank could be nominated by a superintendent if necessary. To assist supervisors and gardaí in the review process a test review button was added in 2004. If clicked it can identify any missing criteria associated with the incident.

12.45 In 2006, following the establishment of GISC, the review function was divided into two parts. GISC staff were responsible for reviewing incidents to ensure they met the
required quality standards but the responsibility for ensuring the correct crime classification remained the responsibility of the reporting garda. GISC has a quality review function but the sergeant/supervisor role is more focussed on the operation or investigation. GISC is responsible for ensuring the incidents are recorded accurately and fully in accordance with the Crime Counting Rules and for highlighting any missing information. The supervisor’s role included monitoring information about the incident, ensuring the investigation was conducted properly, and checking the narrative for updates. Another important duty of the supervisor was to ensure an effective review of the classification of the crime. A number of HQ directives were circulated over the years dealing with these matters.

12.46 A significant development took place in 2015 when a new role was provided for on PULSE called “nominated supervisor”. While this development falls outside the time period of the PULSE incidents with which the commission is directly concerned, it is nonetheless a development of singular importance for reasons that will be clear below. Each investigation now has a “nominated supervisor” assigned whose responsibilities include monitoring the course of the investigation including the submission of files for directions. This also includes reviewing PULSE incidents to ascertain how investigations are progressing.

12.47 The responsibilities of “nominated supervisors” include the following tasks:

- To monitor and supervise all incidents where he/she is assigned as “nominated supervisor”;
- To monitor the details of incidents recorded on PULSE as soon as practicable and to thoroughly scrutinise PULSE incidents to ensure their accuracy and clarity and that the correct category and incident type have been assigned;
- To ensure the completeness of incidents including that mandatory and other appropriate fields have been completed;
- To follow up incidents that are inaccurate or incomplete and ensure incidents are being properly investigated;
- To attend daily district performance accountability meetings as required;
• To review the progress of active investigations with the investigating member(s) under his/her responsibility on a regular basis;

• To provide advice and guidance to investigating members during the course of investigations and ensure that investigations are completed in an efficient and timely manner.

12.48 There is now an automated link between the investigating garda and “nominated supervisor”. When the identity of the investigating garda is put in and confirmed, the system will automatically select the “nominated supervisor” for an incident. The “nominated supervisor” will, inter alia, provide supervision and advice to the investigating garda;

12.49 Another matter of particular relevance for some of the specific PULSE incidents with which the commission is concerned is the exact nature and meaning of the designation “caution”. The commission has seen a range of documents dealing with the historic and present use of this designation, particularly as it relates to members of the public who are warned by a member of An Garda Síochána as to their conduct without being charged or prosecuted. A particular difficulty arose in circumstances where a person might be entered on to the PULSE system as having been “cautioned” for an offence which they had admitted but who might be unaware that this fact had been recorded.

12.50 Historically the term “caution” could be used on the PULSE system to mark an incident as “detected”. It was considered a detection status that could be used when a garda member had used his discretion not to prosecute a person for an offence but instead dealt with the matter informally by way of warning or caution. It was regarded as a suitable way of dealing with minor infringements of legislation, particularly road traffic legislation. When a person was given the detection status of “caution” it allowed the incident to be marked as “detected”, and the person involved would be recorded with a role of “suspected offender”. The detection status “caution” was removed from PULSE in February 2010, and was at that stage no longer available for use by members. The fact that a person had been cautioned would then form part of the narrative relating to the entry. This detection status was made available again in 2013 and the fact that a person is cautioned is recorded as a detection and not just part of the narrative.
12.51 The current procedures for recording informal cautions on PULSE are as follows. In the event that a member of An Garda Síochána decides to use his or her discretion to deal with an offence by way of an informal caution he or she shall ensure that the person receiving the informal caution is told in simple language that an informal caution has been given, and that the occurrence will be recorded on PULSE. If the person is willing to accept the informal caution, a note should be made by the member in the official garda notebook that the person was so informed. This type of informal caution is not to be confused with formal cautions, either under the juvenile diversion scheme, or under the adult caution programme.

12.52 A particular difficulty arises in respect of some of the specific PULSE incidents concerning the recording of searches under misuse of drugs legislation. Clearly, a drug search can have a negative result but nonetheless there are sound reasons for recording the fact that a search took place. Sometimes the matter is not recorded appropriately despite the fact that the facility for recording a negative result is available on PULSE. A negative drug search is, in fact, a non-crime incident.

**Analysis and Conclusions**

12.53 Just over 58% of the PULSE printouts examined by the commission related to motoring offences. Over 25% related to drugs offences, almost all deriving from searches under section 23 of the Misuse of Drugs Act 1977 (as amended). The rest of the printouts relate to a variety of offences including public order offences and offences under intoxicating liquor legislation.
12.54 This report has listed in 12.24 above, the salient features of Sergeant McCabe’s complaints about the PULSE entries. The vast majority of complaints made by Sergeant McCabe in this regard are borne out, at least in part. In relation to the motoring offences there was a clear pattern of members of the public being stopped for having no insurance or some other deficit in their documentation in relation to tax and / or driving licence. In a number of those incidents the member of the public is recorded as having admitted the offence. However, the examined printouts reveal a failure to prosecute in many instances.
12.55 An examination of the PULSE narratives revealed that in many incidents the narratives in respect of the occurrence were updated. The updating of a PULSE narrative is normal and indeed it would be wrong not to update the narrative to reflect the true position in relation to any given investigation. In the incidents examined some of the updating took place prior to the seizure of the documents despite the contention of Sergeant McCabe that they occurred afterwards. However, the preponderance of the updates took place after the seizure and, therefore, some years after the actual occurrence itself. In this regard the commission has found a clear pattern of updates which suggest that the underlying offence was not in fact committed. The most common example of this is a narrative update which states the driver in question did in fact have insurance / tax on the date they were stopped and their documents were produced on a date after that. In most cases the offence will have been marked detected and the driver will have remained on the system as a “suspected offender” until the narrative was subsequently updated to read e.g. “questioned in relation to”.

12.56 However, in this context the commission also heard evidence in relation to, and examined documents from the Driving Licence Insurance Production System (DLIP).
This database was developed with PULSE and the DLIP is filled with information obtained by gardaí. In addition, the vehicle database system on PULSE is updated by the Department of the Environment, Community and Local Government arising from the fact that all vehicles within the state are registered with that department. Once the occurrence is put into the PULSE system the member of the public is by law given a number of days to produce the relevant documents, for example proof of insurance cover. This can be done at a garda station nominated by the member of the public. The fact of production of relevant documents is then put into the DLIP database which can be consulted by the member of An Garda Síochána at the expiry of the statutory time period for production. If there has been no production then the member of the public might expect to be subject of a prosecution.

12.57 The commission has found that in relation to almost all of the motoring offences where PULSE has been updated to suggest that documents were produced, there is no corresponding entry in the DLIP database to confirm that this is so. There are two possible explanations: either members of the public produced valid documents to the knowledge of the investigating members and there was in each instance a failure to record this on DLIP, or the relevant narratives were being updated to give the impression that prosecutions were not initiated because members of the public had produced documents when they had not in fact done so. Either situation is unacceptable. The commission has serious concerns in this regard, particularly when this pattern is contrasted with only one single incident, out of the number examined, where an investigating member in his report to supervisors accepted that a person was not prosecuted due to his error and oversight, for which he frankly apologised. This member also indicated that he had reviewed his note taking systems to prevent a reoccurrence. A greater number of explanations of this type might have been expected. It is also a matter of concern that a further consequence of this pattern is that offences were marked “detected” and persons as “suspected offenders” for a number of years before the PULSE entries were updated.

12.58 The commission was also able to detect a clear pattern in relation to the entries relating to the drugs offences. All of these were minor matters involving incidents of possession of very small amounts of controlled drugs or searches where no drugs at all were discovered. In respect of a number of incidents where drugs were found, (and indeed where there were admissions), Sergeant McCabe’s complaint that there was no
subsequent prosecution is correct. However, the incidents themselves were entered as “detected” and the subject of the search was invariably entered as a “suspected offender”. Further, it appears that the narrative of many of these incidents was updated after the meeting in the Hillgrove Hotel. The common theme in relation to those updates is that the failure to prosecute appears to be explained on the basis that the offender was “cautioned”. This is also troubling. There is no “caution” system for drugs offences similar to the caution used in the Juvenile Diversion Scheme or Adult Caution Scheme. The commission has set out, above, some of the historic conceptual difficulties that have arisen with the use of an informal caution and its subsequent entry onto PULSE. However, even bearing that in mind it is difficult to conceive of a reason why the PULSE narrative would not indicate that the person was cautioned (rightly or wrongly) at the time of the original occurrence if that was in fact what transpired. The appearance is given that the updating of the PULSE narrative some years later is more consistent with an attempt to excuse the failure to prosecute. A further difficulty evident in most of these incidents is that, even after the update, the incident remains marked “detected” and an individual entered as a “suspected offender”, who will also be unaware that he or she have been recorded on the system in this way.

12.59 Another unsatisfactory feature of the controlled drugs incidents relates to searches where no drugs were found. In a number of these incidents members of the public have been entered as “suspects” even though no controlled drugs have been found on their person and no crime has been committed. The commission accepts that such searches should still be recorded for a number of practical reasons, such as, to account for police work being done in this area or for intelligence gathering. However, the complaint that members of the public were placed on the PULSE system as suspects and remained on it where no crime had been committed is correct. This practice was discontinued with the introduction of the PULSE role ‘searched’ in 2008.

12.60 In the public order incidents examined there was also a pattern which showed incidents which were not the subject of prosecution marked as “detected” and members of the public entered as “suspected offenders”. Again, updated narratives suggest that the person concerned was in fact cautioned which purports to explain why there was no prosecution.
12.61 There were a small number of offences (eight) under intoxicating liquor legislation roughly approximating to the offence colloquially known as “found on”. Again, a pattern was clear where the original narrative detailed the offence, which was marked “detected” and members of the public were entered as “suspected offenders”. It again emerged that narratives were updated some years later indicating that the members of the public concerned were in fact cautioned.

12.62 The commission is aware of the contention that Sergeant McCabe has cherry-picked examples to suit his complaints and that these incidents complained of are not representative. The exercise carried out by the commission is also a selective analysis for the reasons already explained above. There were several thousand PULSE incidents in 2007 containing over 15,000 items of data in Bailieboro Garda District. The incidents complained of and examined represent a very small percentage of the overall number of PULSE entries. Although it cannot be concluded that a wider sample would produce the same or similar results, there is a sufficient basis from the examined material to conclude that issues of concern arise in relation to aspects of the operation of PULSE during the time period concerned.

12.63 The commission’s criticisms should not be taken as an indication that An Garda Síochána should operate an inflexible rule of prosecuting every minor infraction. The commission understands the use of a transparent, intelligible system of discretion as a tool of effective policing.

12.64 In many of the incidents complained of in the ”dossier”, Sergeant McCabe contended that either the incident is evidence of corruption or that the narrative was updated in a manner which was corrupt. This specific aspect of the complaints seems to be based on the fact that after the PULSE printouts were seized at the Hillgrove Hotel many of them were returned to the division from which they had emanated.

12.65 The contention that the decision to return a number of the PULSE incidents to the Cavan / Monaghan Division to be updated was itself corrupt is not correct. It is clear that the decision to return the 624 incidents was a decision taken in good faith by Deputy Commissioner Rice on the basis of a view that the infirmity in the incidents was that they were not up to date. It is difficult to know whether a different course may have been adopted if Chief Superintendent Sheridan was taken through the
PULSE incidents directly by Sergeant McCabe as was originally envisaged. This did not come to pass for the reasons outlined above.

12.66 Further, the commission rejects the suggestion that updating the incidents was itself corrupt. Once Deputy Commissioner Rice had taken the view he did, Chief Superintendent Rooney followed his direction and reported back with the updated outcomes effected by the relevant investigating members. It is not a criticism of retired Chief Superintendent Rooney to state, as indicated above, that serious questions arise in relation to the integrity of many of the individual updates themselves. Moreover, Sergeant McCabe’s complaints about the individual incidents were not brought to the attention of the investigating members themselves or the relevant divisional officer by Sergeant McCabe over the course of the time period covered by the incidents.

12.67 The decision to return the matters to Cavan/Monaghan in the first instance may be understandable on the basis of the perceived infirmity with the PULSE entries. However, it would have been better to separately require an individual report from each investigating garda explaining the rationale behind each PULSE update in order to properly understand why a particular PULSE entry did not accurately reflect the true position in respect of any given incident.

12.68 An individual accounting for the PULSE entries may have provided answers to lingering questions. For example, if insurance was in fact produced by a driver why was it not entered on the DLIP system by the investigating member? It might also have revealed why, if a person was in fact cautioned at the time of the occurrence, this fact was not recorded as part of the original narrative entry.

12.69 The recent introduction of the “nominated supervisor” role should prevent a re-occurrence of the issues examined by the commission. This is a welcome and overdue development. A “nominated supervisor” appointed at the commencement of an investigation will be responsible for ensuring that the investigation of an incident will be appropriately directed. Furthermore, the “nominated supervisor” will monitor the accuracy of PULSE entries throughout an investigation in order to ensure that the PULSE system clearly reflects the actual position. This important development should not be regarded as a dilution of the primary responsibility of an investigating member to ensure that all PULSE entries in relation to an incident are clear and accurate. The
benefits of the PULSE system are substantially diminished if entries are not up to date or inaccurate or both. The commission has been critical in other contexts of a failure to keep proper notes or written records. An electronic record containing inaccuracies that result in the record being positively misleading is equally undesirable.
Chapter 13  Investigations by An Garda Síochána, Minister for Justice and Equality, and the Department of Justice and Equality into the Complaints of Sergeant McCabe.

The investigation by An Garda Síochána and the Minister for Justice and Equality and Department of Justice and Equality of complaints made by Sergeant Maurice McCabe in relation to matters at (a) to (i) in the terms of reference

Introduction

13.1  In this chapter of the report, the commission examines the responses of An Garda Síochána, the Minister for Justice and Equality and the Department of Justice and Equality to the complaints made by Sergeant Maurice McCabe. This section should not be read in isolation. Each individual complaint contained in the terms of reference has been examined in other chapters. It is not proposed to repeat the examination of those complaints here. It is necessary to set out the chronology of complaints made by Sergeant McCabe and how the complaints were dealt with.

Initial complaint to human resource management

13.2  In a statement dated 28th April 2008 Sergeant McCabe made a formal complaint to the human resource management section of An Garda Síochána of “[h]arassment, [b]ullying, [d]iscrimination and [v]ictimization” against Superintendent Michael Clancy under the bullying and harassment policy. This statement is extensive and deals with a wide range of issues.

13.3  The complaint was received on 2nd May 2008. Catherine Clancy was Assistant Commissioner, Human Resource Management, at that time, and upon receipt of the complaint she requested a “firm recommendation” from Chief Superintendent John Grogan, Human Resource Management, as to how the matter should be dealt with.
Chief Superintendent Grogan advised that there were so many serious allegations that an investigation under the bullying policy would be too narrow and would be inappropriate.

He advised that the then Assistant Commissioner, Northern Region, Derek Byrne, should be requested to nominate an external chief superintendent to investigate “all issues raised, this should include the bullying, harassment aspect as well as those allegations in relation to performance of duty.”

Chief Superintendent Grogan told the commission that the recommendation for an external chief superintendent was “so that it would be seen to be an independent investigation.”

On 9th May 2008 Assistant Commissioner Clancy wrote to Assistant Commissioner Byrne to convey the recommendation of Chief Superintendent Grogan.

The letter requested that a Chief Superintendent “other than the local Divisional Officer” be nominated to investigate all of the allegations made and that “the investigation should include the [b]ullying and [h]arassment aspect.”

On 13th May 2008 Assistant Commissioner Byrne appointed Chief Superintendent Terry McGinn, an external chief superintendent stationed at Letterkenny garda station, to conduct the investigation.

There is a twenty eight day time limit for the investigation of complaints under the bullying and harassment policy. The time limit can be extended with the consent of all the parties. In relation to Sergeant McCabe’s complaint against Superintendent Clancy, time was extended on two separate occasions. On 15th September 2008 Superintendent Clancy indicated that he did not consent to a third extension of time for the investigation. The effect of this was that the complaint was out of time and was therefore discontinued under that particular policy.

Sergeant McCabe decided that he wished to pursue his complaints through the Office of the Confidential Recipient. The Office of the Confidential Recipient was established by the Garda Síochána (Confidential Reporting of Corruption or Malpractice) Regulations 2007. The function of the confidential recipient was to receive confidential reports of corruption or malpractice made anonymously by
members of An Garda Síochána. Under the regulations the confidential recipient was obliged to transmit each report to the Commissioner of An Garda Síochána, save where the allegation was of corruption or malpractice against the Commissioner of An Garda Síochána, in which case the report was to be transmitted to the Minister for Justice.

Sergeant McCabe’s criticism of the appointment of Assistant Commissioner Derek Byrne

13.12 Sergeant McCabe was critical of the appointment of Assistant Commissioner Byrne to examine his complaints because of the assistant commissioner’s previous connection with the northern region. The history of that appointment is set out below.

13.13 On 14th October 2008 Mr. Brian McCarthy, the Garda Síochána Confidential Recipient, wrote to the then Commissioner Fachtna Murphy and enclosed a confidential report in relation to practices at Bailieboro garda station. This report had been made by Sergeant McCabe. He told the commission that he has waived any right to confidentiality in respect of his communications with the confidential recipient.

13.14 On 28th October 2008 Commissioner Murphy sent the report to Assistant Commissioner Byrne, National Support Services, for “urgent investigation and report.”

13.15 Assistant Commissioner Byrne was transferred from the northern region to national support services on 29th October 2008.

13.16 On 15th October 2008, as part of the investigation into the complaint made by Sergeant McCabe to human resource management, Sergeant McCabe met with Chief Superintendent McGinn and Superintendent Eugene McGovern at the offices of his solicitors.

13.17 A further statement was taken from Sergeant McCabe in which he made complaints against Chief Superintendent Colm Rooney who at that time was responsible for the Cavan / Monaghan Division of the gardaí. He retired from that position on 2nd December 2011.
There was now a complaint to Chief Superintendent McGinn against a member of equal rank to her. Therefore it was necessary under garda policy to appoint an assistant commissioner - a member of superior rank - to investigate the complaints against Chief Superintendent Rooney.

On 28th October 2008 a case conference was held at the human resource management section of An Garda Síochána about the complaints which had been made by Sergeant McCabe. Assistant Commissioner Byrne, Chief Superintendent McGinn and Chief Superintendent Grogan attended.

On 29th October 2008 Assistant Commissioner Nóirín O’Sullivan was appointed to the human resource management section of An Garda Síochána.

On 30th October 2008 Assistant Commissioner O’Sullivan was given a draft letter appointing Assistant Commissioner Byrne to “commence a consolidated investigation into Sergeant McCabe’s complaints.” However this letter was not sent. Commissioner O’Sullivan told the commission:

... you will see that my signature on it is actually crossed out and I have a number of notations on the bottom of the letter. I had taken up duty in HRM having been transferred there and this was a letter that was put in front of me, part of routine correspondence, and I wanted to apprise myself of all the papers relating to this case because this particular case was new to me at the time.

One of the notations identified by Commissioner O’Sullivan is as follows: “?? Independent Assistant Cmr”. Commissioner O’Sullivan told the commission that she was aware Sergeant McCabe had made an allegation against Chief Superintendent Rooney who had a duty to report directly to the Assistant Commissioner, Northern Region and:

...that in those circumstances it may have been more appropriate to appoint an independent assistant commissioner... But my consideration at the time if Assistant Commissioner Byrne had remained as the Assistant Commissioner of the Northern Region he would have been potentially investigating a complaint into one of his own direct reports which could in some way complicate perceived objectivity.
Assistant Commissioner O’Sullivan had concerns about the perceived objectivity of Assistant Commissioner Byrne. Assistant Commissioner Byrne told the commission that those concerns were not communicated to him nor was he asked whether his previous position caused him any difficulty in this regard. However, he also told the commission that he could understand the “thought process” behind the concern relating to perception.

13.23 However, Commissioner O’Sullivan went on to tell the commission that this concern was allayed because Assistant Commissioner Byrne was transferred to national support services on 29th October 2008.

13.24 On 6th November 2008 Assistant Commissioner Byrne was appointed to oversee the completion of Chief Superintendent McGinn’s investigation. Assistant Commissioner Byrne was now in charge of parallel investigations: the complaint made to human resource management and the report made to the confidential recipient.

13.25 On 7th November 2008 Sergeant McCabe’s solicitors were informed by Assistant Commissioner O’Sullivan that, “Assistant Commissioner National Support Services will oversee the completion of Chief Superintendent McGinn’s investigation.”

13.26 On 6th November 2008 Assistant Commissioner O’Sullivan wrote to the Assistant Commissioner, Northern Region, Michael Feehan, seeking a report on Chief Superintendent McGinn’s investigation into Sergeant McCabe’s complaints by 14th November 2008.

13.27 Assistant Commissioner Feehan’s only input was to forward a report to human resource management in response to the request of Assistant Commissioner O’Sullivan. It was received at human resource management on 19th November 2008. There is no suggestion that he made any comments on the merits of appointing Assistant Commissioner Byrne.

13.28 In a handwritten note attached to the report Assistant Commissioner O’Sullivan wrote to Chief Superintendent Grogan as follows:

*Having read this file & the serious allegations contained within and in particular the contents of the statement made by Sgt. McCabe on 15th October 2008 alleging a formal complaint against Chief Supt. Rooney, I am*
of the view that given A/C Byrne’s previous involvement, it may be appropriate that an Assistant Commissioner with no previous connection to the Northern Region & Cavan / Monaghan Division should be appointed to investigate this matter. Given the seriousness of the allegation a comprehensive, chronological & consolidated report should now be prepared to brief the Cmr.

13.29 Chief Superintendent Grogan did not recollect discussing that note with Assistant Commissioner O’Sullivan. However, he stated that the note was “about independence”.

13.30 Commissioner O’Sullivan stated in answer to a question:

> [w]hen I received the consolidated report, it was obvious, as I said earlier, that Assistant Commissioner Byrne had now moved to the National Support Services, so he was in the national remit, there was nothing that I reviewed in any of the papers, including what I got in these papers from the then Assistant Commissioner Northern Region, Michael Feehan, to suggest that there was anything that I should change my mind or there was any need to change any of the appointments that had been made.

Q. The perceived difficulty that might arise in terms of Assistant Commissioner Byrne examining the activity of Chief Superintendent Rooney, that was no longer a concern?

A. That was no longer a concern because he was no longer the Assistant Commissioner to whom Chief Superintendent Rooney would have been reporting.

13.31 Assistant Commissioner O’Sullivan expressed possible concerns about the perceived objectivity and independence of the investigation. Her explanation for being no longer concerned is curious in circumstances where:

- The concern was about Assistant Commissioner Byrne’s “previous involvement” in the region and the fact that he had transferred to national support services did not change that position.
The note states “it may be appropriate that an Assistant Commissioner with no previous connection to the Northern Region and Cavan / Monaghan Division should be appointed to investigate this matter.”

At the time she expressed her concerns about Assistant Commissioner Byrne he had already been transferred. It is difficult to see how the concern expressed in the note was not still operative.

13.32 The appointment of Assistant Commissioner Byrne affected Sergeant McCabe’s perception of the investigation. Moreover, Assistant Commissioner Byrne told the commission that he was aware that Sergeant McCabe had expressed concern at his appointment during the investigation. It is not an adverse reflection on Assistant Commissioner Byrne to say that his appointment was unlikely to inspire confidence in Sergeant McCabe.

**Further reports made by Sergeant McCabe to the confidential recipient**

13.33 On 25th August 2009 Mr. McCarthy wrote to the commissioner informing him that he had “received an allegation of victimisation and harassment from the confidential reporter in this case which is stated to have arisen from the making of a report by him.” The commissioner forwarded this matter to Assistant Commissioner Byrne for his “appropriate attention.”

13.34 On 26th November 2009 Mr. McCarthy wrote to the commissioner informing him of a further complaint, “concerning the existence of a social networking website which seeks to ridicule and criticise the confidential reporter for getting in touch with my office.” Sergeant McCabe considered that the material on the website was directed at him. The website showed a large artificial rat called “Maurice”. It was vile and offensive.

13.35 On 2nd December 2009 Sergeant McCabe sent photographs from the website to the confidential recipient which were then forwarded to the commissioner. This complaint was also referred to Assistant Commissioner Byrne for investigation. A file was sent to the DPP and, on the basis of the available evidence, no prosecution was directed.
Notwithstanding the direction of the DPP, which is not criticised, it is readily understandable that Sergeant McCabe felt he was being subjected to nasty and odious material on the website because he had made a report to the confidential recipient. This naturally caused distress and upset to him and his family. The material remained online for some time.

**Appointment of Deputy Commissioner Rice**

On 11\(^{th}\) October 2010 Sergeant McCabe met with Assistant Commissioner Byrne and Chief Superintendent McGinn at the Hillgrove Hotel, Monaghan. The purpose of the meeting was to inform Sergeant McCabe of the available results of the Byrne / McGinn investigation into the specific complaints which had been made by him. Sergeant McCabe was handed a five page document, prepared in advance of the meeting, setting out in summary form the findings of the investigation team. There is some disagreement between Sergeant McCabe and Assistant Commissioner Byrne as to what happened at the meeting. Assistant Commissioner Byrne maintains that the results of the investigation into each complaint were discussed in some detail, whereas Sergeant McCabe contends that the rationale for many of the findings was not explained to him. Sergeant McCabe was upset because Assistant Commissioner Byrne attributed some of the fault in the matters under investigation to Sergeant McCabe himself.

Sergeant McCabe lodged a report with the confidential recipient about this meeting. In addition, his solicitors wrote to the commissioner requesting:

> a full and detailed inquiry be undertaken again into the original complaints, the complaints made thereafter and the matters to which he wishes to make a full statement so as to set out the importance and context of the documents contained in the boxes now held by Assistant Commissioner Byrne.

The commissioner appointed Deputy Commissioner W.I. Rice to investigate the complaint made to the confidential recipient and to review the investigation which had been completed by Assistant Commissioner Byrne.
By letter dated 3rd November 2010, Sergeant McCabe was informed of Deputy Commissioner Rice’s appointment. In a letter dated 15th November 2010 Sergeant McCabe’s solicitor wrote to the private secretary to the commissioner setting out Sergeant McCabe’s concerns with the Byrne investigation. The letter stated:

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\text{[o]ne of the issues which he had previously raised was that Assistant Commissioner Derek Byrne was Assistant Commissioner in respect of the area under investigation. His concern was that there was a long delay in the investigation and when he finally received the “Summary of the Findings” that these did not deal with the matters raised. For example it did not set out the evidence which had been gathered, the identity of and provision of statements obtained, how they were viewed and what reliance was placed on those statements and then ultimately the findings and recommendations.}
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This letter was forwarded to Deputy Commissioner Rice.

Correspondence was exchanged between Sergeant McCabe’s solicitors and Deputy Commissioner Rice about the nature of Deputy Commissioner Rice’s appointment, the time it would take to complete his task, and about access to documents.

On 26th November 2010 Deputy Commissioner Rice met with Sergeant McCabe. This was the only meeting between them in relation to the matter.

**Deputy Commissioner Rice’s report**

On 8th March 2011 Deputy Commissioner Rice reported to the commissioner on his review of Assistant Commissioner Byrne’s investigation into Sergeant McCabe’s complaints. The report sets out the findings of the Byrne / McGinn investigation.

The Rice report made no criticisms of, and found no fault with, the Byrne / McGinn investigation, apart from one matter regarding a duty roster, with which the commission is not concerned.

On 7th April 2011 Deputy Commissioner Rice wrote to Sergeant McCabe’s solicitors informing him that a review of Assistant Commissioner Byrne’s investigation had been carried out and that “[t]he Commissioner has read and agreed with my findings...
that the investigation carried out by Assistant Commissioner Byrne and Chief Superintendent McGinn was professional, impartial and with propriety.” This terse communication was the only information provided to Sergeant McCabe about Deputy Commissioner Rice’s review of the particular aspects of the Byrne / McGinn investigation with which the commission is concerned. It did nothing to allay his concerns about the exercise carried out by Deputy Commissioner Rice.

13.46 On 28th April 2011 Deputy Commissioner Rice wrote to Sergeant McCabe requesting, inter alia, an interview about the PULSE system print outs which had been taken from him at the Hillgrove Hotel. This interview did not take place for reasons examined elsewhere in this report.

The remit of Deputy Commissioner Rice.

13.47 Sergeant McCabe had requested, through his solicitors, a full and detailed inquiry into the original complaints. Deputy Commissioner Rice had been appointed to review the investigation carried out by Assistant Commissioner Byrne. Deputy Commissioner Rice stated that his understanding of the review was “to look at each of these modules to see had he done what I would have expected him to have done.”

13.48 Deputy Commissioner Rice agreed that what he had carried out was a process review and told the commission that his role was not:

\[
\text{to carry out a forensic examination, I was there to either reassure or not the commissioner that I was satisfied that this was properly carried out, and the commissioner accepted that ... I wasn’t there to nitpick and I never saw that as my role ... I was there to see was I satisfied that this was properly carried out, and, yes, it was.}
\]

13.49 His letter of appointment dated 2nd November 2010 states:

\[
\text{Your [sic] are hereby appointed to carry out such investigations as are necessary into the criminal allegations made and related matters that directly arise from the meeting between Assistant Commissioner Byrne and Sergeant McCabe on the 11th October 2010 at the Hillgrove Hotel, Monaghan.}
\]
In addition, you will now take responsibility for overseeing the completion of all outstanding issues which require investigation in relation to the report from the Garda Síochána Confidential Recipient concerning practices in Bailieboro Garda station. In this regard you should review the extensive investigation already completed by Assistant Commissioner Byrne to determine what further investigations might be required in addition to the remaining outstanding issues that were notified to Sergeant McCabe at the meeting in question and that are also listed as ongoing in the document dated 11th October 2010 and handed to Sergeant McCabe at that meeting.

13.50 Sergeant McCabe understood the exercise conducted by Deputy Commissioner Rice to be much broader in scope.

13.51 Deputy Commissioner Rice acknowledged that there may have been a misunderstanding by Sergeant McCabe as to the precise nature of his brief. He stated, “... I was just carrying out a review. It wasn’t an investigation, if you want to put, you know, the letters around an investigation, with a team and going through and meeting people and taking statements again, that was never the intention.” Deputy Commissioner Rice accepts that he probably should have given more information in relation to his remit and that it “might have been fleshed out better” in the correspondence with Sergeant McCabe’s solicitors.

13.52 The report was critical of Sergeant McCabe. Deputy Commissioner Rice stated:

because the investigation was in relation to allegations made by him and to just pointing out that if he was making allegations about other people, he himself should have looked at himself and said hold on I should have been doing A, B or C.

As appears from the above there was considerable focus on Sergeant McCabe himself. This could understandably lead to the view formed by Sergeant McCabe that he was as much under scrutiny as the merits of his complaints.

13.53 In addition, the absence of any clear and explicit explanation of the methodology employed by Deputy Commissioner Rice did nothing to alleviate Sergeant McCabe’s concerns about the thoroughness of the review.
On 16\textsuperscript{th} June 2011 Sergeant McCabe’s solicitors wrote to the minister requesting the establishment of a commission of investigation. The letter enclosed, \textit{inter alia}, the letter of Deputy Commissioner Rice dated 7\textsuperscript{th} April 2011 regarding his review of the Byrne / McGinn investigation. The letter expressed dissatisfaction with the investigations to date and stated that, “[o]nly an independent, fair and transparent investigation would suffice.”

\textbf{Complaint to the Minister for Justice and Equality}

On 23\textsuperscript{rd} March 2009 Sergeant McCabe sent an email to the then Minister for Justice, Equality and Law Reform, Mr. Dermot Ahern T.D., in which he referred to a complaint he had made “\textit{in relation to malpractice and corruption in Bailieboro Garda District, Cavan} ...”. He stated that those matters were being investigated and that a preliminary report had been forwarded to garda headquarters by the investigation team, which, he said, had uncovered bad practices and bad procedures.

Sergeant McCabe complained about comments reported on the front page of the \textit{Anglo Celt} newspaper on 12\textsuperscript{th} March 2009 and attributed to Chief Superintendent, Colm Rooney, Cavan / Monaghan, in which he described complaints about investigations in Bailieboro as “\textit{absolute rubbish and that he had been briefed on a number of issues and there was no criminality involved}.” The report in the \textit{Anglo Celt} was of a meeting in which Chief Superintendent Rooney spoke to councillors and answered questions. Sergeant McCabe considered that it was “\textit{appalling}” that the chief superintendent would speak in that way while the Byrne / McGinn investigation was ongoing.

In the email, Sergeant McCabe requested “\textit{an independent person to oversee the investigation because the whole investigation has been tainted and undermined by his comments}.”

On 11\textsuperscript{th} May 2009 the minister’s private secretary replied to Sergeant McCabe’s email and stated that the conduct of the investigation was a matter for the commissioner and that the minister “\textit{has no role in directing him in such operational matters}.”

No criticism can be levelled at the former minister for adopting that course of action.
Complaint of Mrs. Lorraine McCabe

13.60 On 6th April 2011, Mrs. Lorraine McCabe, the wife of Sergeant McCabe, sent an email to the then Minister for Justice and Equality, Mr. Alan Shatter T.D. In the email she referred, *inter alia*, to the reports her husband had made about the conduct of gardaí in Co. Cavan and further complained that “[a]ll matters were covered up”.

13.61 The private secretary to the minister replied by letter dated 14th April 2011. This letter gave details of how to make a complaint to GSOC, the contact details of the commission, and the time limits for such complaints.

13.62 On 5th May 2011 Mrs. McCabe sent a further email referring to reminders she had sent on 13th and 25th April.

13.63 On 6th May 2011, the minister’s private secretary responded stating that the matter would be brought to the attention of the minister.

13.64 The matter was referred to the commissioner and members of An Garda Síochána were appointed to speak to Mrs. McCabe and Sergeant McCabe.

13.65 No criticism can be made of the course of action adopted by the minister at that time. The response to the complaints of Mrs. McCabe was appropriate.

Request for a commission of investigation

13.66 On 16th June 2011 Sergeant McCabe’s solicitors sent a letter to the Minister for Justice and Equality by registered post. The letter was marked “*Strictly Private and Confidential, Addressee Only*”.


13.68 The letter enclosed a twenty two page statement made by Sergeant McCabe on 15th October 2008 at his solicitors’ office in the presence of Chief Superintendent McGinn and Superintendent McGovern. It set out in detail a number of his concerns, including concerns about Superintendent Clancy and Chief Superintendent Rooney. The letter
also included a copy of a statement that Sergeant McCabe had made to Deputy Commissioner Rice on 26th November 2010. The letter further included copy letters from Deputy Commissioner Rice dated 7th April 2011 and 28th April 2011.

13.69 On 9th August 2011 there was further correspondence from Sergeant McCabe’s solicitors to the minister. The letter referred to a document sent from Chief Superintendent Rooney, Cavan / Monaghan Division, to the Assistant Commissioner, Northern Region and circulated to each district office in the Cavan / Monaghan Division. It was entitled “RE: Allegations made by Sergeant Maurice McCabe, Bailieboro Garda Station”.

13.70 The document contained the following passage:

> [t]he investigation concluded that there were no systemic failures identified in the management and administration of Bailieboro Garda District. A number of minor procedural issues were identified. On further investigation at local level no evidence was found to substantiate the alleged breach of procedures. The Assistant Commissioner further concluded that there was no criminal conduct identified on the part of any member of the District force.

It also stated that “the high standards and professionalism of the District force in Bailieboro” had been vindicated. This document is the subject matter of ongoing legal proceedings and it would be inappropriate for the commission to comment on it.

13.71 In their letter dated 9th August 2011 to the minister, Sergeant McCabe’s solicitors stated that in view of the above document they were writing with “even greater concern”. Their letter stated that the matter had been referred to in the Dáil and enclosed a newspaper article referring to the matter.

13.72 On 10th August 2011 the private secretary to the minister replied that the matter was receiving attention, and further replied by letter dated 29th August 2011 stating that the correspondence of 16th June 2011 and 9th August 2011 had been noted. It stated that it was understood that the complaints of Sergeant McCabe were “under investigation by the Garda Síochána and the Garda Síochána Ombudsman Commission. In the circumstances, it would be inappropriate for the Minister to intervene.”
In fact, the complaints of Sergeant McCabe were not under investigation by the Garda Síochána Ombudsman Commission, although the minister had been led to understand otherwise by his officials. This error was inconsequential. When asked whether he had any complaints regarding this error, Sergeant McCabe sensibly replied “I would say to be honest with you it was just an error. I would not have any criticism of it whatsoever.”

January 2012 complaint to the confidential recipient

The exact circumstances in which this complaint came to be made are unclear. Sergeant McCabe maintains that in January 2012 he thought that the complaints process had been exhausted when he was contacted by the confidential recipient who told him that matters were “very much alive”. Sergeant McCabe told the commission, “I didn’t go to Mr. Oliver Connolly, he asked to see me.”

Mr. Connolly’s “position” and “belief” is that Sergeant McCabe contacted him after an intermediary had requested Mr. Connolly’s permission to pass on his phone number to Sergeant McCabe.

In any event Sergeant McCabe met Mr. Connolly to discuss his complaints and how they might be addressed. One of the particular grievances held by Sergeant McCabe at this stage was that Superintendent Clancy had been placed on a promotion list. Sergeant McCabe considered that Superintendent Clancy had been wrongly placed on that list having regard to Sergeant McCabe’s complaints about him. Superintendent Clancy’s name had appeared on a list for promotion in September 2011 yet some three months elapsed before this meeting took place.

What transpired at the meetings between Sergeant McCabe and Mr. Connolly is not entirely clear, and there is a difference in recollection both as to the nature of the exchanges and the sequence of events. However, the confidential recipient and Sergeant McCabe were both aware that one of the legal consequences of a complaint being made against the commissioner under the regulations was that the complaint would have to be sent to the Minister for Justice. It is also clear that Sergeant McCabe
regarded the involvement of the minister in his complaints as a desirable development and that was part of his reason for making the complaint.

13.78 It would be a gross abuse of process, and most unfair to the commissioner, to invoke the regulations in the absence of a genuine complaint. The evidence before the commission falls short of establishing that such was the case. Although the complaint of Sergeant McCabe against the commissioner was motivated, in part, by his desire to ensure that the matter came before the minister, the commission is satisfied that Sergeant McCabe did hold genuine concerns that there was some impropriety in the promotion of Chief Superintendent Clancy.

13.79 After meeting with Mr. Connolly, Sergeant McCabe made a complaint against the then Commissioner Martin Callinan and Assistant Commissioner Byrne. The complaint was made under the corruption and malpractice regulations. It related to the alleged role of the commissioner in the placing of Superintendent Clancy on a promotion list.

13.80 On receipt of the written complaint, Mr. Connolly wrote to the minister on 23rd January 2012. He enclosed the confidential report of the same date, which had been received in relation to the Commissioner of An Garda Síochána, Martin Callinan. The letter referred to regulation 7(2) of the Garda Síochána (Confidential Reporting of Corruption or Malpractice) Regulations 2007, which required him to transmit the report to the minister.

13.81 Mr. Connolly told the commission that, while he “might provide some form of advice to a reporter” during the process of a report being made to the confidential recipient, Sergeant McCabe’s complaint was “executed under his own hand”. Regulation 5(4) of the Garda Síochána (Confidential Reporting of Corruption or Malpractice) Regulations 2007 provided that “information disclosed under paragraph (3) shall be in such form as the confidential recipient may require”. Mr. Connolly told the commission he “felt there was a context for providing some form of advice around the role... I felt that was the function.” He also said that this advice would be given in the context of addressing the concerns of the confidential reporter about the process.

13.82 The report stated, inter alia, that the reporter wished to make a complaint against the commissioner under the charter established under the Garda Síochána (Confidential
Reporting of Corruption or Malpractice) Regulations 2007 in relation to placing Superintendent Clancy on a promotion list. The report referred to Garda Síochána Code 9.17 which reads as follows:

If a member on a promotion list is guilty of or is suspected of any conduct that would render the member unsuitable for promotion, it will be the duty of superiors to report the matter at once. It will be the duty of the Divisional Officer to make a full report on the facts of the case to Commissioner, Human Resource Management as soon as possible. Where there is likely to be a delay in ascertaining all the facts, an interim report will be furnished.

13.83 There was also a complaint against Assistant Commissioner Byrne for reasons given in the report.

13.84 In evidence to the commission Sergeant McCabe withdrew all allegations of impropriety of any type against Assistant Commissioner Byrne in the matters with which this commission is concerned. This is in contrast to the position he adopted concerning the former commissioner, see paragraph 13.88. Sergeant McCabe’s only subsisting complaints against Assistant Commissioner Byrne are in relation to the quality of the Byrne / McGinn report. These complaints have been addressed by the commission in its examination of the various individual incidents.

13.85 The complaint dated 23rd January 2012 against the commissioner included the following:

I find it hard to understand that the Commissioner of An Garda Síochána has rewarded Superintendent Clancy and placed him on a promotion list for the rank of Chief Superintendent. One of the incidents alone is enough to question Superintendent Clancy’s suitability for his present rank let alone promotion. It has sent out a message to the force that if you ignore your duty, are grossly negligent, hide and cover up, you will be deemed suitable for promotion.
It also stated:

I now wish to make a complaint against Commissioner Martin Callinan and I make it under the charter of the Garda Síochána (Confidential Reporting of Corruption or Malpractice) Regulations 2007. Garda Code 9.10 (1) (d) states “promotion lists list the most suitable eligible Superintendents in the Service”. It is my belief that Commissioner Callinan should have known of the malpractice, some of which is listed above and has made a serious error of judgement by placing Supt Clancy on a promotion list. The evidence is clear and it is corruption as defined by An Garda Síochána’s Charter on Confidential Reporting. Gardaí engaged in falsifying records, erasing official records, erasing reported incidents, destroying official records, altering official records, covering up serious investigations and gross dereliction of duty on a massive scale and it appears that the Commissioner was or is aware of it all. It also questions the whole PULSE system when Gardaí can erase, alter, destroy etc etc any record or information without any accountability or sanction.

Sergeant McCabe submitted that his allegations of corruption were to be taken in the context of the charter provided for under the An Garda Síochána (Confidential Reporting of Corruption and Malpractice) Regulations 2007. In this charter ‘corruption’ is not specifically defined but it includes not only conduct that falls within the remit of the criminal law but also other matters such as maladministration and abuse of power. He submitted that his allegations of corruption were to be understood other than in the sense of criminal activity.

The complaint of corruption against the commissioner was in “placing Supt Clancy on a promotion list”. Sergeant McCabe told the commission he was “guarded” in his complaints against the commissioner by stating in his report to the confidential recipient that, “Commissioner Callinan may not have been given all the evidence in my complaints and he may have been misled by the investigation team.” This does not alter the fact that a complaint of corruption subsisted. Sergeant McCabe maintained in his evidence to the commission that it is his belief that the commissioner has “influence in promotions”. He did not withdraw his allegation.
against the commissioner despite being invited to do so. The following exchange occurred:

_Q. Just a couple of questions very briefly, just to confirm on behalf of Commissioner Callinan that the complaint that you made against him in your letter to the recipient on 23rd January 2012 you accept that that was without foundation now, is that correct?_

_A. No, I am not saying that Mr. Smith. I have spoken about it here, I was guarded in relation to that, he may not have known the full facts._

13.89 It must be stated clearly and unambiguously that there is not a scintilla of evidence to support an allegation of any type of corruption against the former commissioner.

13.90 In the context of any such grave allegations the former commissioner is entitled to have his reputation vindicated. In the matters under consideration any aspersions cast on the integrity of the former commissioner were unfounded and were deeply hurtful.

13.91 The former commissioner, Mr. Callinan, was not responsible in any way for placing Superintendent Clancy on a promotion list. He had no power to do so.

13.92 Superintendent Clancy went through the normal selection process set out in the Garda Síochána (Promotion) Regulations 2006. This involved a competitive process, held by a promotion board appointed in the manner set out in those regulations.

13.93 No criticism has been made of that process. There is no evidence to suggest that the process was not carried out appropriately, or in accordance with the requirements of the regulations.

13.94 Having succeeded in the competitive process, Superintendent Clancy was entitled to have his name put on the promotion list published in accordance with the Garda Síochána (Promotion) Regulations 2006.

13.95 The first and only involvement of the commissioner was to present the details, to the secretary general of the Department of Justice and Equality, of the next successful candidate on the “Chief Superintendent Promotion List”. This he did by letter dated 10th January 2012.
The details of the candidates were then presented to the government by the Minister for Justice and Equality.

The government made the appointment on 7th February 2012.

Garda Síochána Code 9.17 reads as follows:

*If a member on a promotion list is guilty of or is suspected of any conduct that would render the member unsuitable for promotion, it will be the duty of superiors to report the matter at once. It will be the duty of the Divisional Officer to make a full report on the facts of the case to Commissioner, Human Resource Management as soon as possible. Where there is likely to be a delay in ascertaining all the facts, an interim report will be furnished.*

Insofar as that part of An Garda Síochána Code is relied on, the following observations are pertinent.

At the time of the promotion of Michael Clancy to the rank of Chief Superintendent, the commissioner had no reasonable grounds to suspect that Superintendent Clancy was “guilty of or suspected of any conduct that would render the member unsuitable for promotion”. On the contrary, in reliance on the conclusions of the Byrne / McGinn report, the review thereof by Deputy Commissioner Rice, and the fact that the voluminous documentation had been also subject to examination by the DPP, the commissioner was entitled to conclude that there was nothing to prevent the promotion of Superintendent Clancy. Had he acted otherwise than he did, he might well have been subject, not only to criticism, but to possible legal action by Superintendent Clancy.

It was not incumbent on the commissioner to conduct a separate inquiry of his own. The commission is satisfied he was entitled to rely on all the matters referred to in the previous paragraph.

It was submitted that the Byrne / McGinn report, in its executive summary, showed that the complaints against Superintendent Clancy had been dealt with and that “no adverse findings” were made. Indeed the phrase “no adverse findings” is contained in the executive summary, but only in the context of Module 6 of that report. The relevant portion of that executive summary reads:
Module 6 deals specifically with complaints made by Sergeant McCabe against his District Officer, Superintendent Michael Clancy. The complaints made by Sergeant McCabe are not substantiated in any way and no adverse findings are made against Superintendent Clancy who has answered allegations levelled against him by Sergeant McCabe.

That module of the report does not deal with matters examined by this commission, although one of the eight matters dealt with is connected with matters discussed in detail in Chapter 7 of this report. The passage in the Byrne McGinn report referred to cannot be said to exonerate Superintendent Clancy in the matters complained of and examined by this inquiry.

13.103 In its recommendations in the executive summary there is a further reference to Sergeant McCabe’s complaint to the confidential recipient against Superintendent Clancy, in which it is indicated indirectly that the complaints are rejected. However the complaints are not dealt with separately or specifically and there is nothing to show that they were analysed in any depth.

13.104 That assessment of “no adverse findings” that was considered to have been made in the passage in executive summary dealt with in paragraph 13.102 above, was confirmed in a review carried out by Deputy Commissioner Rice.

13.105 In a report to the commissioner dated 27th January 2012, Deputy Commissioner Rice cited that the investigation “had been carried out professionally, impartially and with propriety.” His report ends as follows, “[i]n summary, I am of the view that despite the allegations levelled against him I find no evidence of corruption or malpractice on the part of Superintendent Clancy.”

13.106 The commissioner was clearly entitled to decide that the provisions of An Garda Síochána Code relating to “conduct that would render the member unsuitable for promotion” had no application in the case of Superintendent Clancy.
13.107 On 23rd January 2012, the confidential recipient, Mr. Oliver Connolly, wrote to the Minister for Justice and Equality, Mr. Alan Shatter T.D., enclosing the confidential report of the same date, which he had received from Sergeant McCabe about the Commissioner of An Garda Síochána, Mr. Martin Callinan. The fact that the complaint was against the commissioner obliged the confidential recipient to transmit the report to the minister. On 24th January 2012 Mr. Connolly also forwarded documentation accompanying the complaint.

13.108 The report was made by Sergeant McCabe who told the commission that he has waived any right to confidentiality in respect of his communications with the confidential recipient. He agreed that confidentiality was a “non-runner” having regard to the specific nature of his complaints and the investigations that had already taken place. It was not an adverse reflection on the confidential recipient.

13.109 The Garda Síochána (Confidential Reporting of Corruption or Malpractice) Regulations 2007 set out the duties of the minister on receipt of a confidential report at regulation 8 (2) which reads as follows:

On receipt of such a report, the Minister, unless he or she has reason to believe that the allegation contained in it was not made in good faith or is false, frivolous or vexatious, shall cause the allegation to be investigated or take such other action as he or she considers appropriate in the circumstances.

13.110 The former minister, Mr. Shatter, was, as he told the commission,

…intimately aware of the legislation of this area, of the contents of the particular Statutory Instrument made under the Garda Síochána Act that set up the confidential recipient and of the other related legislation that we have had a lot of discussion on.

13.111 It was also apparent from the evidence of Mr. Michael Flahive, Assistant Secretary of the Department of Justice and Equality, that the department was fully aware of the legal situation regarding confidential reports and how they should be dealt with.
The minister’s duties are set out in the regulations. Firstly he had to determine whether the complaints were made otherwise than “in good faith or were false, frivolous or vexatious”. On receipt of the complaints he took them very seriously. His unchallenged evidence to the commission was that he:

had very substantial concerns about its content. This I regarded at the time as enormously serious, I mean this was an allegation of corruption and malpractice against our chief of police, against the Garda Commissioner.

At that point, having decided the complaints should be examined on the merits, the minister was faced with two choices: either to “cause the allegation to be investigated” or alternatively to “take such other action” as he considered appropriate in the circumstances.

The minister promptly consulted the secretary general of the department and asked him to obtain the observations of the commissioner as a matter of urgency. He also spoke to the assistant secretary of the department, Mr. Michael Flahive.

Before deciding on what course of action to adopt, the minister was manifestly entitled to seek the views of the then commissioner. Any suggestion to the contrary is rejected. It was an obvious, prudent and sensible thing to do. Indeed he would be open to justified criticism had he acted otherwise.

On 24th January 2012 – the day following the receipt of the report – the Secretary General of the Department of Justice and Equality, Mr. Brian Purcell, forwarded the report to the Garda Commissioner, and asked him for his comments. The letter was in the following terms:

Dear Commissioner,

I enclose a copy of a confidential report which the Minister has received from the confidential recipient, Oliver Connolly, under regulation 7 (2) of the Garda Síochána (Confidential Reporting of Corruption or Malpractice) Regulations 2007.

As you will see, the report contains certain allegations and under regulation 8 (2) of the regulations, on receipt of such a report, the Minister, unless he or she has reason to believe that the allegations contained in it
were not made in good faith or are false, frivolous or vexatious, must cause the allegations to be investigated or take such other action as he or she considers appropriate in the circumstances.

I would be grateful if you could let me have any comments you may wish to make on this report before the Minister decides on his course of action. It would be helpful if I could receive any such documents as a matter of urgency.”

13.117 The commissioner replied by letter dated 27th January 2012. The following are the relevant extracts from the letter:

Re: Confidential Report received by the Minister for Justice & Equality from the Confidential Recipient, Oliver Connolly, under regulation 7(2) of the Garda Síochána (Confidential Reporting of Corruption or malpractice) Regulations 2007.

Dear Secretary General,

I am in receipt of your letter of 24 January 2012, with attachments, wherein you seek my comments, as a matter of urgency, on the subject matter. While I do not know the identity of the confidential reporter, there are, however, remarkable similarities with a previous complaint made under the same scheme which were extensively investigated by Assistant Commissioner Derek Byrne and Chief Superintendent Terry McGinn. The substance of these complaints refers, in the main, to the management of Bailieboro and Monaghan Garda Stations and the file was subsequently forwarded to the Director of Public Prosecutions who directed no prosecutions in the matter. Hereunder is a log of the complaints made by Sergeant Maurice McCabe who, as will be seen, exposed his position as the confidential report.

On 2nd May, 2008, a written complaint in the form of a statement dated 28th April, 2008, was received at the office of Assistant Commissioner, Human Resource Management, Garda Headquarters from Sergeant Maurice McCabe, 24261F, then attached to Bailieboro Garda Station, (now attached to Mullingar Garda Station). In his complaint, Sergeant McCabe alleged that he had been victimised in his role as Sergeant in Charge at
Bailieboro and highlighted alleged neglect of duties by Gardaí at Bailieboro, failure by Garda members to investigate complaints, poor work practices and lack of supervision within the Bailieboro Garda District. In particular, his complaint centred around the alleged failure of Superintendent Michael Clancy, Bailieboro, (now Monaghan), to act on concerns that he had brought to his attention.

Assistant Commissioner, Human Resource Management referred the complaint to Assistant Commissioner, Northern Region for investigation on 9th May, 2008, stating that: ‘While Sergeant McCabe has made his complaint under the Bullying and Harassment Policy, I believe his allegations are so wide ranging that an investigation under the said policy would be too narrow and inappropriate. Accordingly, please nominate a Chief Superintendent other than the local Divisional Officer to carry out an investigation into all of the allegations made’. Chief Superintendent Terry McGinn, Donegal Division was appointed to investigate the allegations by Assistant Commissioner, Northern Region, on the 13th May, 2008.

On the 15th October 2008, a report was received from the Garda Síochána Confidential Recipient, dated 14th October 2008. In brief, in accordance with the procedures set down in the Garda Síochána (Confidential Reporting of Corruption or Malpractice), Regulations 2007 S.I. 168 of 2007, the report deals with a number of practices at Bailieboro Garda Station over a number of years commencing in 2004. The report contains allegations which relate primarily to an alleged unwillingness on the part of Senior Gardaí in the station to follow up on a number of serious incidents of which they were allegedly aware, the incidents having been brought to their attention. Assistant Commissioner Derek Byrne was appointed by the Commissioner to investigate these matters and report in course on the outcome of his investigations.

Subsequently, a further report was received from the Garda Síochána Confidential Recipient, dated 25th, August, 2009. In brief, in accordance with the procedures set down in the Garda Síochána (Confidential Reporting of Corruption or Malpractice), Regulations 2007 S.I. 168 of
2007, the report deals with an allegation of victimisation and harassment made by the Confidential Reporter, which is stated to have arisen from the making of the report to him, i.e. the Confidential Reporter.

...

The Assistant Commissioner’s extensive investigation, and supporting documentation, was presented in a 10 (ten) volume file. Assistant Commissioner Byrne forwarded all the investigated complaints, in modular format, to the Director of Public Prosecutions who having considered the material directed no prosecution on the basis that no criminality was disclosed against any member.

From an examination of the letter of the 23rd January 2012 to the Confidential Recipient, titled “Wrong Doing and Malpractice in the Cavan/Monaghan Division”, I have extracted twelve individual complaints. I can report that eleven of the complaints have already been thoroughly examined in the above mentioned investigation by Assistant Commissioner Byrne and Chief Superintendent McGinn. I am satisfied that no adverse findings, or no evidence of corruption or malpractice, were discovered on the part of Superintendent Michael Clancy. The twelfth case outlined in the letter refers to a case of “child pornography and rape of a minor in September 2007 where the offender was a priest in the District”. This investigation commenced in Bailieboro in September 2007 and centred on offensive and inappropriate behaviour with a fourteen year old boy. It is apparent the investigation was efficiently and speedily carried out and resulted (November 2009) in the Priest being sentenced to five year concurrent sentences at Cavan District Court.

...

On 09/11/2011 a tabulated report was received from Chief Superintendent Cavan/Monaghan detailing the outcome of the 624 incidents referred to him for clarification. The majority of the incidents related to Road Traffic and minor Public Order offences and reflect no impropriety by Superintendent Michael Clancy.
The remaining 529 documents proved problematic in trying to identify issues or defects in procedures and as such it was deemed essential to obtain clarification from Sergeant McCabe as to matters he was complaining of. Many of the incidents referred to searches, nomination of suspect etc. To date the Sergeant has declined to assist the investigation of these printouts (529) despite a number of items of correspondences from the Deputy Commissioner to Sergeant McCabe and his legal representatives. On the face of it the investigation officers, who are experienced investigators, cannot find any obvious issue for Superintendent Clancy. It should be noted that the Confidential Recipient at that time requested sight of the PULSE printouts taken into possession by Assistant Commissioner Byrne and an inspection of the documents was facilitated at the Office of Deputy Commissioner Rice.

Separately, the Deputy Commissioner was directed by the Commissioner to review the investigation of Assistant Commissioner Byrne and Chief Superintendent McGinn. Assisted by Chief Superintendent Sheridan, he reviewed all the modules of the investigation and conclude they were carried out professionally, impartially and with propriety. What is notable is the fact that during the period the subject of the investigation seven Superintendents served as District Officer of Bailieboro District and while Superintendent Clancy Served in the District for a period of approx seven months there is a specific focus on his tenure in office as distinct from the other six officers.

The Assistant Commissioner found that the complaints made by Sergeant McCabe were not substantiated in any way and no adverse findings are made against Superintendent Clancy who had answered all allegations levelled against him by Sergeant McCabe.

... 

In summary, having caused enquiries with both Deputy Commissioner Rice and Assistant Commissioner Byrne in the context of the above and the investigations carried out and compared them to the matters highlighted to the Confidential Recipient report now, I am satisfied that the substantial
content of the complaints have in fact already been fully explored in Assistant Commissioner Byrne’s extensive investigation under the confidential reporting structures. This report has been reviewed by Deputy Commissioner Rice who has satisfied himself that Assistant Commissioner Byrne’s investigation was conducted in a proper manner.

... 

Having regard to the outcome of the previous investigations and the review conducted by Deputy Commissioner Rice, I am of the view that no evidence was found of any wrongdoing (corruption or malpractice) on the part of Superintendent Clancy or Assistant Commissioner Byrne in discharging their duties in the context of the matters complained about to the Confidential Recipient.

13.118 The facts that there had been an extensive investigation of the matter by an assistant commissioner and an experienced chief superintendent, that their findings had been reviewed by a deputy commissioner, and that the report had been sent to the DPP for consideration, were all matters which had taken place before the commissioner was asked for his comments.

13.119 It is clear from the matters mentioned in the preceding paragraphs, that in seeking the views of the commissioner, the minister was not asking him to investigate himself, or to adjudicate on a complaint made against him. Sergeant McCabe in a report made through the confidential recipient in May 2012, rhetorically asked, “[h]ow can any member of An Garda Síochána make a complaint against a senior Garda Officer or the Commissioner when the result is asking that particular officer in question to investigate himself?” The minister simply requested a report from the commissioner on the matters raised.

13.120 In his evidence to the commission, Sergeant McCabe did not take issue with that course of action. He was asked:

“Q. ...do you accept, and I am putting the proposition to you to agree or disagree with it, that in fact it was a reasonable thing for the minister to do, which is to go to the commissioner and seek an account from the commissioner in relation to the complaint that had been received?
A. Yeah you could certainly use the word reasonable.”

13.121 As demonstrated in the analysis of the various incidents with which the commission is concerned, both the Byrne / McGinn report and review thereof by Deputy Commissioner Rice, on which the commissioner placed reliance, were deficient in a number of respects. For example, while the review refers to the investigation of the offences committed by Fr. Molloy as having being carried out “efficiently and speedily” that investigation had serious shortcomings including the procurement of invalid search warrants and the failure to have the computer, this computer was ultimately lost. Further, the review of the Byrne / McGinn report carried out by Deputy Commissioner Rice was a process review only.

13.122 Notwithstanding the shortcomings identified by this commission in the Byrne / McGinn investigation into Sergeant McCabe’s complaints, it was appropriate for the minister to rely on the commissioner’s report, and it was not necessary for him to independently verify all the matters contained in it.

13.123 The former minister told the commission that it was not on the basis of one single factor but on the “conglomeration of the background information” furnished to him that he came to the conclusion “at that point in time there was no basis for me taking further action.” Those factors were as follows:

- A wide ranging investigation had been undertaken by Assistant Commissioner Byrne and Chief Superintendent McGinn.
- Their investigation had been reviewed by Deputy Commissioner Rice.
- Eleven of the twelve matters had been referred to the Garda Síochána Ombudsman Commission under the regulations. The former minister told the commission that GSOC had statutory powers which enabled it if it thought “there was something untoward in the manner in which these matters were being dealt with or something that should have alerted them ab initio once they learnt of them, to engage in investigation independent of the Gardaí”.
- That the papers had been considered by the DPP who had not recommended any prosecution(s).
• “The implausibility of the allegation that the Garda Commissioner had effectively put someone onto the promotion list in circumstances where there was an independent interview system and examination system” as the former minister put it.

13.124 An additional factor in former minister’s response was that he was aware that the complaints of Mr. Lorcan Roche Kelly were the subject of an investigation by GSOC.

13.125 These were pertinent and cumulatively most compelling considerations which amply justified the minister in acting as he did.

13.126 The commission rejects any suggestion that the minister should have referred the matter to an official in his department to assess the quality of the Byrne / McGinn report, and the review thereof by Deputy Commissioner Rice, on both of which the commissioner had relied.

13.127 The following evidence of Sergeant McCabe on this issue is also relevant:

“Q. ...At the end of the first page there the is Minister is saying: ‘It follows from this that any question of the Garda Commissioner having a case to answer arises only in the event that the Superintendent has been found to have committed the alleged malpractices.’ Do you see that?

A. Yes.

Q. Is that a proposition you agree with or disagree?

A. Well, you know according to the findings of the investigation each of the two Superintendents were found to have no case to answer.

Q. Yes?

A. So, I do agree with what you are saying.

Q. Or what the Minister is saying?

A. Yeah.

Q. You agree with that?

A. Yeah.
Q. He then points out that he calls the report to be sought from the Garda Commissioner on the matter?

A. Yes.

Q. Was that a reasonable step to take?

A. Well, I did think that the Minister would have dealt with it himself. But then again if you go back, up to the Garda Commissioner he got the findings.

Q. Yes, but I mean could he do other than at this stage at least seek a report from the Commissioner? I think we have seen countless examples in the course of other modules of complaints being made about X or Y and the first step that a body takes is to seek a report from that person about the complaint. There wouldn't be anything unusual with that, would there?

A. No there wouldn't, no.”

Q. Then the Minister makes the point in the letter that the Garda Commissioner is saying to him at least at that stage that while it is a confidential report it appears to be very similar to the other one. Is that right?

A. Yes.

Q. Again, would that be a matter that it would be reasonable for the Minister to regard as relevant?

A. Yes, yes.

... 

Q. He then indicates that he has also been informed that review or that investigation was itself reviewed?

A. Yeah.

Q. Then having regard to that he forms the view that there was no evidence found of corruption or malpractice on the part of the named Superintendent or Assistant Commissioner Byrne. Is that right?

A. Yes.
Q. Given that at that point the focus of your complaint was the placing of Superintendent Clancy on the promotion list, is the Minister's response a reasonable one having regard to the information available to him in relation to that?

A. Having regard to the information available to him, yes.

13.128 As appears from the above, Sergeant McCabe does not now question the decision of the minister to consult the commissioner and to rely on the information supplied by him in coming to his determination. However, Sergeant McCabe would have preferred if the minister considered the matter himself.

13.129 On 3rd February 2012 a letter was sent by the minister to the confidential recipient.

13.130 A prior internal email dated 3rd February 2012, from the private secretary to the minister to the Assistant Secretary of the Department of Justice and Equality indicates that the minister had read and approved the letter.

13.131 The letter to the confidential recipient concluded “there is no evidence to support any further action by me in relation to the allegation made in the confidential report against the Garda Commissioner.”

13.132 Mr. Connolly met with Sergeant McCabe on 9th February 2012 to discuss the minister’s response to the confidential report.

13.133 Mr. Connolly read through the letter dated 3rd February 2012, discussed the contents with Sergeant McCabe, and explained that this was the minister’s position, and that no further action was to be taken. Mr. Connolly stressed to the commission that notwithstanding Sergeant McCabe’s waiver of confidentiality, that in principle he still regarded himself as bound by the confidentiality requirements of the office he held at that time and that he had always operated on the basis of a “fundamental expectation of confidentiality” during his tenure.

13.134 It is clear that part of the meeting was recorded by Sergeant McCabe and this was done without the knowledge or consent of Mr. Connolly. This was described by Mr. Connolly as a “betrayal” of his expectation of confidentiality. A purported transcript of this recording subsequently entered the public domain.
13.135 In the recording certain inappropriate and unpleasant views, opinions and attitudes were attributed to the former minister, which he adamantly repudiated in his evidence. His denials were unchallenged and uncontradicted, and are unreservedly accepted by this commission.

13.136 In circumstances where the former minister did not hold the views, opinions and attitudes wrongly attributed to him the commission appreciates the hurt and damage done to him.

13.137 Moreover, Sergeant McCabe accepts that the recorded conversation was “absolutely” not evidence that any such views were ever held by Mr. Shatter.

13.138 Mr. Shatter told the commission of the baleful consequences for him of the release of the transcript into the public domain and the controversy it generated. It would be beyond its terms of reference for the commission to comment further on those matters.

13.139 It should also be said that Mr. Callinan, the former commissioner, denied in equally forceful terms any inappropriate views imputed to him in so far as this could be inferred from the released transcript. The evidence of the former commissioner is also unreservedly accepted by the commission in this regard and is unchallenged.

13.140 The exchanges between the department, the minister and the commissioner during the handling of Sergeant McCabe’s complaint were at all times professional and appropriate.

13.141 Sergeant McCabe told the commission that after the discussion with Mr. Connolly the confidential reporting mechanism was no longer of any use to him. Nonetheless he complained again to the confidential recipient in May 2012.

May 2012 complaint to the confidential recipient

13.142 On 9th May 2012 Sergeant McCabe made a further report through the confidential recipient. This report related to the manner in which his complaint of January 2012 had been dealt with by the minister and must be read in that context.
Sergeant McCabe, in particular, criticised the minister for seeking “a report from the persons I had complained of, the Commissioner.” Sergeant McCabe requested a meeting with the minister and further requested that “the minister, or his [o]fficials, to take a look at the evidence on the investigations [f]iles and they will see what occurred in Cavan / Monaghan.”

In view of the fact that the commission has already found that the January 2012 report was dealt with appropriately, it is unnecessary to address this complaint separately.

The former commissioner became aware of the May 2012 letter only in the course of this commission of investigation and found some of the matters contained therein “very offensive and quite shocking”. The contents of the May 2012 letter were put to Mr. Callinan in detail during cross examination by counsel on behalf of Sergeant McCabe. At the end of that cross examination counsel on behalf of Sergeant McCabe said “...insofar as his letter was read or understood by the commissioner to make allegations of corruption against him personally, insofar as it has that effect any such meaning is withdrawn.”

Request for inquiry under section 42 of the Garda Síochána Act 2005, as amended

On 4th September 2012 Sergeant McCabe’s solicitors wrote again to the Minister for Justice and Equality. This letter, like that of 16th June 2011, was marked “STRICTLY PRIVATE & CONFIDENTIAL” and “ADDRESSEE ONLY” (emphasis in the original). This letter also asked the minister to exercise his statutory powers pursuant to the section 42 of the Criminal Justice Act 2007 (which substitutes section 42 of the Garda Síochána Act 2005). The letter referred to a reply from the minister’s private secretary over twelve months earlier and to the request of Sergeant McCabe for the establishment of a commission of investigation. The relevant portion reads as follows:

When replying on the 29th August 2011, your Private Secretary, Mr Damien Brennan stated that the complaints made by our client were under investigation by the Garda Síochána and the Garda Síochána Ombudsman Commission and that in these circumstances, it would be inappropriate for the Minister to intervene.
With due respect, it would not appear that the Minister has given proper consideration to the provisions and powers as vested by virtue of the provisions of Section 42 of the Criminal Justice Act, 2007. That section entitles the Minister to direct the holding of a special enquiry relating to matters concerning An Garda Síochána. Section 42 (1) specifically provides:

“The Minister, with respect to any matter considered by him or her to be of public concern, may by order, appoint a person to—

(a) Inquire into any aspect of administration, operation, practice or procedure of An Garda Síochána or the conduct of its members and

(b) Make a report to the Minister under the provision of the inquiry.”

The matters as reported by Sgt. McCabe are of an extremely serious nature, they are undoubtedly matters of public concern as defined and as such, it would not be appropriate for An Garda Síochána to carry out an investigation into its own practices.

We are now enclosing three booklets of documentation provided by our client relating to Malpractice and Corruption within An Garda Síochána in the Cavan Monaghan Division. The incidents as they are documented in the booklets are of extremely serious [sic], they unquestionably involve corrupt practices and they are very much outside of the scope of any inquiry or investigation that might be ordinarily conducted by the An Garda Síochána and / or by the Garda Síochána Ombudsman’s Commission.

Furthermore, we wish to highlight the fact that the allegations are being brought to your attention by a serving member of An Garda Síochána and the matters are being brought to your attention as the Minister for Justice and Equality has overall responsibility for the supervision of the police force of the State.
In the circumstances, we trust that you will revise your position as stated in correspondence dated 29th August 2011. We await hearing from you in early course.

13.147 Sergeant McCabe was now calling on the minister to exercise his powers under section 42 of the Garda Síochána Act 2005, as amended, rather than asking for a commission of investigation to examine his complaints. The letter enclosed three booklets of documents which were the basis for the request for a section 42 inquiry.

13.148 Section 42 of the Criminal Justice Act 2007 amends section 42 of the Garda Síochána Act 2005 to read as follows:

The Minister, with respect to any matter considered by him or her to be of public concern, may by order, appoint a person to –

(a) Inquire into any aspect of administration, operation, practice or procedure of An Garda Síochána or the conduct of its members and

(b) Make a report to the Minister under the provision of the inquiry.

13.149 Following receipt of the letter of 4th September 2012, a memorandum was prepared for the minister by Mr. Kevin Clarke, principal officer, garda division, Department of Justice and Equality.

13.150 The memorandum was passed on to Mr. Michael Flahive, Assistant Secretary of the Department of Justice and Equality. He wrote a note on the top of the document addressed to the secretary general of the department with a request to discuss the document. The question of a section 42 inquiry was not ignored by the department and was the subject of discussion between Mr. Flahive and Mr. Purcell. It certainly appeared to them that it would be necessary to get some views from the Commissioner of An Garda Síochána before the question of a section 42 inquiry could be fully addressed.

13.151 On 18th October 2012 the minister’s private secretary wrote to Sergeant McCabe’s solicitors noting that the correspondence received from Sergeant McCabe’s solicitors was marked “STRICTLY PRIVATE & CONFIDENTIAL” and “ADDRESSEE ONLY”
(emphasis in the original). He requested confirmation that there was no objection to the correspondence and enclosures being forwarded to the commissioner for his views.

13.152 On 22nd November 2012 a further letter was sent to the solicitor for Sergeant McCabe asking for a response to the letter of the 18th October 2012.

13.153 On 3rd January 2013 a further reminder was sent.

13.154 A letter from Sergeant McCabe’s solicitor dated 16th January 2013 stated, *inter alia*, that the letter of the 18th October 2012 had not been received.

13.155 In the course of a letter dated 11th March 2013 concerning another matter, reference was again made to the letter of the 18th October 2012 and a copy of the letter was enclosed. In addition to seeking a response to enquiries seeking permission to pass on the material received from Sergeant McCabe marked “*STRICTLY PRIVATE & CONFIDENTIAL, ADDRESSEE ONLY*”, the private secretary to the minister also explained that, in view of the existence of civil proceedings against the minister by Sergeant McCabe, “*the question of a meeting does not arise at this time.*” Sergeant McCabe agreed that a meeting at that time may not have been wise.

13.156 On 22nd May 2013 another letter was sent to the solicitors for Sergeant McCabe again asking for confirmation that Sergeant McCabe had no objection to the documentation enclosed in the letter of 4th September 2012 being furnished to the garda commissioner for his observations.

13.157 A number of reminders were sent to Sergeant McCabe’s solicitors, and the former minister had personal input into at least three of them. This displayed personal and active concern on his part.

13.158 There was no response addressing the confidentiality of the documentation and enclosures dated 4th September 2012 and the correspondence about that matter ended. The enquiry made by the department as to confidentiality was perfectly reasonable in the context of all the previous correspondence between Sergeant McCabe and the department.

13.159 The minister had not refused to exercise his power under section 42 of the Garda Síochána Act 2005, as amended, to establish a special inquiry; he had merely sought
agreement to his sending the three booklets to the garda commissioner for his observations, as a preliminary step before deciding whether to establish such an inquiry.

13.160 In view of the fact that, despite numerous requests, it had not been communicated to the minister whether or not he had permission to refer the confidential material onwards for advice, he cannot be faulted for not taking further action concerning an appointment of someone to conduct an inquiry under section 42 of the Garda Síochána Act 2005, as amended.

13.161 In December 2013 the advice of the Attorney General’s Office on the matter was sought on how to deal with the material included in the correspondence marked “STRICTLY PRIVATE & CONFIDENTIAL, ADDRESSEE ONLY”.

13.162 On 18th December 2013 the advice of advisory counsel in the Attorney General’s Office was sent to the Secretary General of the Department of Justice and Equality marked for the attention of Mr. Kevin Clarke.

13.163 The former minister was unaware of the fact that the advice of the Attorney General’s Office had been furnished to an official in the department on 18th December 2013 until the publication of the Guerin report. The failure to inform the minister, while unfortunate, was in this context of little significance.

13.164 In addition to the request by Sergeant McCabe’s solicitors for an inquiry under section 42 of the Garda Síochána Act 2005, as amended, Sergeant McCabe in an email dated 12th December 2012 communicated directly with the Department of Justice and Equality regarding “ticket fixing”. That email referred to the outcome of Sergeant McCabe’s complaint to the confidential recipient which was conveyed to him in February 2012.

13.165 On 20th December 2012 Mr. Purcell wrote to Commissioner Callinan seeking additional details of the outcome of the investigations mentioned in his report dated 27th January 2012.

13.166 Mr. Purcell told the commission that further details were sought at this time due to the request for a section 42 inquiry and Sergeant McCabe’s direct communication with the department dated 12th December 2012.
Mr. Shatter told the commission:

...I was conscious that there were three folders or the three volumes we had that accompanied the letter of September 2012, a portion of it replicated the cases that were referenced in the earlier January 2012 letter. So I suggested to Brian on the basis that we weren’t in a position to reveal to the commissioner any of the other matters, I simply said to him could he correspond with the commissioner to see is there some additional information of relevance on the 12 cases that might give us some further insight or assistance in these matters. That was the origin of the letter of 20th December. I never saw the reply.

Upon receipt of Mr. Purcell’s request dated 20th December 2012 the commissioner referred the matter to Deputy Commissioner Rice who forwarded the matter to Assistant Commissioner Byrne.

On 26th February 2013 the commissioner sent a report to the secretary general addressing the letter of 20th December 2012.

Mr. Purcell told the commission the report was not furnished to the minister:

...but, yes, it should have gone to the minister as I said not necessarily when it came in straight away but following appropriate attention or consideration in the Garda division and then if it came back up the line it would have then in the normal course of events it would have either gone or there would have been a discussion with the minister at that stage but for whatever reason that didn’t happen.

Mr. Shatter explained that he made enquiries throughout 2013 as to whether there were any developments on the matter. He told the commission that on the 26th February 2014, while preparing to give a speech in the Dáil, Mr. Purcell gave the report of the commissioner dated 26th February 2013 to him for the first time and:

...apologised for my not having seen it. I was taken aback that I hadn’t seen it...And I read it. One of the problems with all this is ex post facto rationalisation and I don’t want to engage in that, but if I could put it this way: There was content in that letter which if I had seen before would have
given rise, I think, to my asking further questions. That was my perception of it when I saw it. I couldn’t understand why I hadn’t been given it earlier.

13.172 The report should have been furnished to the minister and the fact that it was not communicated was an internal department failure. Mr. Shatter’s uncontradicted evidence is that no explanation was given to him for this occurrence.

Conclusion

13.173 No allegation of actual bias is now made against Assistant Commissioner Byrne nor is there any evidence which could sustain such an allegation. However, in circumstances where concern had been expressed that an assistant commissioner with no previous connection to the northern region should be appointed to investigate the matter it remains unclear why this was not acted on. This would have ensured that no question could have arisen relating to the perceived objectivity of the investigation.

13.174 The precise nature of Deputy Commissioner Rice’s remit in reviewing the Byrne / McGinn investigation should have been clarified at an early stage. The perception remained that this was more than a process review. This increased Sergeant McCabe’s concerns about the conduct of the review.

13.175 The initial complaint to the Minister for Justice, Equality and Law Reform in 2009 (Mr. Dermot Ahern T.D.) was dealt with appropriately by the department and no criticism arises in relation to it.

13.176 The complaint by Sergeant McCabe to the confidential recipient in January 2012 was undoubtedly connected to Sergeant McCabe’s desire to have his complaint examined by the minister. There was an allegation of corruption against the former commissioner. There is no evidence to support this hurtful allegation.

13.177 On receipt of the reports transmitted to the department by the confidential recipient they were taken seriously and addressed promptly. The evidence of the assistant secretary of the department, Mr. Flahive, establishes that the gravity of matters was immediately appreciated. The statutory provisions applicable to the complaint were fully understood.
The minister’s request for a report from the commissioner arising out of the complaint in January 2012 was entirely reasonable and appropriate. In seeking that report the minister was not asking the commissioner to investigate himself.

In deciding that no further step was warranted at that time the minister and his officials took into account all relevant factors and the decision taken was quite appropriate.

Mr. Callinan did not influence the promotion of Chief Superintendent Clancy. He was qualified to be on the promotion list and he was fully entitled to be considered by the promotion board.

Neither the department nor the minister can be faulted for failing to take further action on a request for an inquiry under section 42 of the Garda Síochána Act 2005, as amended, in circumstances where Sergeant McCabe continued to assert a claim of confidentiality over relevant correspondence and enclosures.
Chapter 14  Conduct of Policing in Bailieboro.

The general conduct of policing at Bailieboro Garda District in 2007/2008 with reference to the management and operational structure and resource allocation for Bailieboro Garda District, at the relevant times, including:

- The number of probationer gardaí assigned to Bailieboro Garda District;
- The number and experience of sergeants available to supervise and monitor on a daily basis the work of those probationer gardaí;
- The significance, if any, of the absence of an inspector permanently allocated to Bailieboro garda station;
- The stability, continuity, and experience available at district officer level in Bailieboro District;
- The arrangements in operation for the supervision and monitoring of probationer gardaí in relation to their operational and, specifically, investigative duties, and
- The standard of accommodation at Bailieboro garda station and its possible impact on the performance of the policing function.

Introduction

14.1 In this chapter the commission reports on the general conduct of policing in Bailieboro Garda District, not in a comprehensive fashion, but only by reference to certain specific matters set down in the terms of reference. Those matters are firstly the “management and operational structure” and secondly “resource allocation” to the district at the relevant time. The commission’s examination is confined to the years 2007 and 2008. The management and operational structure is set out first. There follows an examination of the number of probationer gardaí and the impact of this on the level of supervision available for them and provided to them by their supervisory sergeants. The report then considers whether the absence of an inspector at Bailieboro at the relevant times was of significance, and examines the effect of the turnover of senior garda officers on the service provided. The chapter then addresses the issue of
the supervision and monitoring of probationer gardaí. It concludes with a consideration of the accommodation in Bailieboro garda station and its possible impact on the matters under examination by the commission.

Management structure and resources, Bailieboro Garda District

Garda management structure and garda strength

14.2 A full account of the garda management structure for the Bailieboro Garda District and of its garda strength was prepared by Chief Superintendent Rooney, Chief Superintendent Clancy, and Superintendent Cunningham and provided to the commission. This was the principal material relied on by the commission in its examination of this matter. At the relevant times the total number of gardaí in the Bailieboro district was sixty eight. This number was made up as follows:

- 1 superintendent,
- 12 sergeants,
- 55 gardaí (including 1 detective garda and 6 crime unit gardaí),
- Total number of sworn members – 68.

In addition, one inspector was assigned in July / August, 2008, firstly on a temporary, part-time basis, and later on a permanent basis.

The district contained a district crime unit, a district traffic unit, an immigration officer, and seven clerical officers.

Financial resources

14.3 In 2007 the budgetary vote for An Garda Síochána was €1,437,342,000, and in 2008 the vote was €1,577,538,000 (these figures are inclusive of any supplemental votes that may have arisen). There was no evidence to show that a lack of financial
resources was a cause of the failures in policing with which this commission is concerned.

**Adequacy of resources**

14.4 Sergeant McCabe did not complain about the lack of resources available in Bailieboro. On a few occasions a lack of personnel in Bailieboro may have contributed to problems examined by the commission. Another sergeant told the commission that the fact that he was sergeant in charge of traffic unit as well as unit sergeant led to inadequate supervision of a junior garda. The fact, in one case, that a garda was assigned as a driver in addition to his other duties may have played some part in his delay in dealing with the file in an investigation in which he was concerned. However, a lack of resources was not a significant factor in failures in Bailieboro examined by this commission. The failures were those of individuals.

**The probationer gardai**

14.5 At the material time training of garda recruits was delivered through An Garda Síochána Student / Probationer Education / Training and Development Programme. This was a two year programme aimed at training competent gardaí. There were five separate but integrated phases. Following completion of Phase III, Module 2 of this training course, and after approximately fifty-eight weeks studying police theory and exposure to practical policing, students were assessed on the basis of their progress. If successful they were “attested”.

14.6 “Attestation” is the formal process of appointment as a member of An Garda Síochána when the garda makes his or her solemn declaration as to the performance of duties before a peace commissioner, pursuant to section 16 of the Garda Síochána Act 2005.

14.7 The attestation ceremony marks the transition from the status of “Student” to the status of “Probationer” garda and the commencement of a period of two years probationary service in a designated garda training station. After attestation the probationer garda has all the legal powers of a member of An Garda Síochána (including powers of arrest) together with all of the duties and responsibilities of a garda.
It is reasonable to expect that by virtue of his or her training, assessment and attestation, a probationer garda is competent to perform quality police work. However a probationer garda is still at the earliest stage of his or her career and in need of continuing supervision and management.

The commission was told that probationer gardaí are competent to carry out all general police duties including: the investigation of traffic accidents, burglaries, assaults, and criminal damage incidents; the detection of road traffic offences, drugs offences, and public order incidents; the first response to serious crime incidents; the taking of statements from injured parties and witnesses; responding to victims and domestic violence incidents; and the inspection of licensed premises. They are not regarded as competent in specialist areas. They have all the resources of the district available to support them.

In the period between 2005 and 2009 An Garda Síochána recruited in or around 2000 students / probationers. Assistant Commissioner Jack Nolan described a demand within the force for probationers: “[a]n influx of 2000... people into the garda organisation allowed the organisation to do lots of things that it would not have been able to do without them.”

Numbers of probationer gardaí assigned to Bailieboro Garda District

The commission heard the following evidence:

- In the period 2007/2008 the number of probationers attached to the Cavan / Monaghan Division was 54 in January 2007, peaked at 86 in March 2008, and was 62 in December 2008. The total number of gardaí in the Cavan / Monaghan Division was 308 in January 2007, peaked at 338 in September 2008, and was 332 in December 2008.

- Bailieboro district had 13 probationer gardaí attached to it in January 2007, 22 in March 2008, and had 9 in December 2008. The total strength of gardaí in the Bailieboro district was 51 in January 2007, was at 58 in March 2007, and was 53 in December 2008. This number includes gardaí on their probationary period at that time.
Assignment of probationer gardaí to garda units

14.12 It was policy in the district for probationers to be accompanied in their duties by more experienced members where possible. However, during the period 2007/2008 there were occasions where probationer gardaí had to work on their own due to the lack of availability of more experienced members.

14.13 Probationers were assigned to garda units, which generally comprised 4 or 5 gardaí under the supervision of a garda sergeant. Sergeants were responsible for the management and supervision of all members of the unit, including probationers. Probationers were expected to look to their sergeants for leadership, assistance, advice, and for supervision of their investigations and other garda work. Sergeants were expected to actively provide this. Probationers were regularly assessed at district and divisional level. In the Cavan / Monaghan Division a dedicated training sergeant, based in Monaghan, monitored their progress in a systematic and formal manner. The ongoing assessment of probationer gardaí involved participation of both the training sergeant and the sergeant in charge. Assistant Commissioner Nolan stated that, during phase IV of their training, “if they weren’t displaying the proper ethos or the proper characteristics that were required”, they could be “held back”. By this he meant their probation period would be extended.

14.14 At the time under consideration by the commission, the highest number of probationers in the Cavan / Monaghan Division was assigned to Bailieboro. There were, on average, five probationers per unit. In some units there was only one experienced garda. The demands on the more experienced members in other areas of policing had the result that routine policing duties fell to probationers. The commission also heard evidence on the development of specialist garda units in 2007/2008, which was made possible by the arrival of probationers into districts. One example of such a development was “Operation Anvil”, which was targeted at burglaries, and travelling criminals. Another was the strengthening of the Garda Traffic Corps to a national strength of approximately 1,200 and the establishment of additional garda units in different garda divisions. Some experienced gardaí moved to these specialist units. An unintended result of this in Bailieboro was that probationer
gardaí had to undertake some of the duties previously performed by more experienced gardaí.

14.15 The commission heard detailed evidence of how the progress of probationer gardaí was evaluated. The role of the sergeant was described as being of paramount importance in the training of probationer gardaí. In evidence Assistant Commissioner Nolan described this role in the following terms:

_Sergeants play a vital role in providing the support and monitoring necessary, to ensure that junior members are afforded an opportunity to learn, and that the garda customer receives a professional and competent service. Probationer gardaí are allocated to a unit where a supervisory sergeant is attached. Participation in operational policing is a core development area for any probationer garda. Probationer gardaí are required to demonstrate a clear willingness and ability to perform the core functions of police officers, to prepare and submit investigation files and to give competent and professional evidence in court. Sergeants, through regular monitoring of Probationer gardaí in the operational field have a responsibility to assess the Probationer and provide ongoing corrective guidance where performance is not to required standards._

14.16 The recruitment and training of student and probationer gardaí was carried out appropriately and in a comprehensive manner by An Garda Síochána. There were good training facilities and programmes in place. However, the development of probationers into good and effective gardaí depended on two further critical factors: firstly, the taking of responsibility by probationers for their own actions and performance; and secondly, effective communications with their sergeants in their role as supervisors. Failures in those areas were a factor in several of the investigations examined by the commission.
Number and experience of sergeants

14.17 The number of sergeants was as follows:

- On 31st March 2007, 9 sergeants were attached to the Bailieboro district. This was out of a total of 63 in the division and of 1,940 sergeants nationally. At this time there were 19 probationer gardaí attached to the district.

- On 31st December 2007, 12 sergeants were attached to the Bailieboro district out of a total of 69 in the division and of 2,083 sergeants nationally. At this time there were 20 probationer gardaí attached to the district.

- On 31st March 2008, 12 sergeants were attached to the Bailieboro district out of a total of 69 in the division and of 2,069 sergeants nationally. In March 2008 there were 22 probationer gardaí in the district. In April 2008 this number fell to 14.

- On 31st December 2008, 13 sergeants were attached to the Bailieboro district out of a total of 72 in the division and of 2,228 sergeants nationally.

- In the period 2007/2008 6 sergeants were allocated to Bailieboro garda station on a permanent basis.

14.18 In Bailieboro garda station there was a sergeant in charge of the station and one unit sergeant for each unit. Sergeant McCabe was replaced on unit D by an additional permanent sergeant in July 2007. During the same period, Ballyconnell Garda District, in Cavan/Monaghan Division, had a sergeant in charge and three unit sergeants. Ballyconnell also had an inspector. Normally, a sergeant is assigned to each unit. If this is not possible, sergeants may be assigned to assume responsibility for more than one unit, but only on a temporary basis. In exceptional circumstances a sergeant may be allocated supervisory responsibility for an additional unit. The same person was, for example, a unit sergeant and also sergeant in charge of the district traffic unit from March 2006 to September 2008. Sergeants from other stations in the district were re-allocated to Bailieboro, as required, to cover deficits in supervision during periods of sick or annual leave, attending court or attending courses.
14.19 The role of sergeant is set out in the Garda Síochána Code. Requirements for promotion to the rank are described under a heading of “Team leading and standard setting”. Those requirements are explored in the promotion process by reference to a candidate’s experience in:

- Acting as a positive role model to less experienced colleagues by establishing clear standards in all areas of responsibility.
- Guiding and in some cases tutoring staff on correct procedures.
- Showing consideration of the welfare of colleagues and public.
- Constantly monitoring and where appropriate, intervening to maintain and improve quality of service and standards.
- Helping to develop a strong team spirit and identity by encouraging open and participative ways of working to achieve work goals.

14.20 The commission was told that there was no demand from experienced sergeants to transfer to Bailieboro. The view was expressed that:

...there is little option for management but to allocate a greater number of newly promoted sergeants than might otherwise be the case ... The impact of [the Ranks Order] is that a sergeant must actually retire, resign or be promoted before a new promotion can take place. As a consequence, there can be a supervisory deficit while awaiting the allocation of a newly promoted sergeant. That policy inevitably causes a lack of continuity to which any problems which may have arisen in Bailieboro may be attributed.

14.21 Some of the sergeants in Bailieboro at the period under review were very experienced and others were newly appointed. All newly promoted sergeants were experienced in operational and investigative duties prior to their promotion. It would be unusual for a member of garda rank to be promoted with less than ten years service.

14.22 Lack of experience of sergeants was not a problem in a Bailieboro nor was it a factor in any of the infirmities in the investigations examined by the commission. Although some of them were new to the role of sergeant all of them were experienced members
of An Garda Síochána. They had been trained for the rank of sergeant and assessed as being competent. In the incidents under review they were not confronted with any unusual or particularly onerous duties. The numbers assigned were adequate, and the sergeants were sufficiently trained to carry out the management and supervisory duties entrusted to them. Although there were, no doubt, times when, for various reasons, there was more pressure than normal on individuals, there is no evidence that probationer gardaí were given work duties beyond their level of competence, or given especially difficult cases. The police duties involved, including supervisory duties, were of a routine nature.

14.23 The failures of individual gardaí was compounded by poor communications between them and their sergeants and by ineffective supervision in many cases examined by the commission. Responsibility for poor communication in these cases must be shared equally between the gardaí and their sergeants. Responsibility for ineffective supervision rests with the sergeants.

14.24 The working environment within Bailieboro garda station was difficult and tense due to a number of factors, some of which fall outside the scope of the commission’s terms of reference to examine. The situation was aptly described by Deputy Commissioner W.I. Rice, in a letter of 2nd December 2009, as “extremely complex”. In addition, the poor conditions in the station did little to make things easier or to improve the morale. The poor accommodation at Bailieboro was not conducive to good supervision and monitoring, although it were not the prime cause of the problems.

The absence of an inspector

14.25 The commission was informed by Assistant Commissioner Nolan that it was not uncommon for a district to have no inspector attached to it. Inspectors would be made available on particular operations or for particular demands. He stated that the traditional role of the inspector was to assist the superintendent and to carry out delegated duties. He also stated that the role of inspector was different in nature to that of sergeant in charge, and that the presence of an inspector does not relieve the sergeant in charge of his supervisory functions. When he was asked to express a view
as to whether the assignment of an inspector to Bailieboro would make things better, Assistant Commissioner Nolan stated, “What an inspector would have contributed to Bailieboro at that time I have no doubts they would have added significant value, but I can’t... I would only be guessing at what exactly they would have done in that regard”.

14.26 The commission was told that Bailieboro Garda District was the only district in the Cavan / Monaghan Division that did not have a land border with Northern Ireland. The commission was told that, historically, the border districts had a greater need for an inspector. The progress of the peace process had reduced that requirement in more recent years, and the demands on the policing service in Bailieboro Garda District became comparable to, or greater than, districts where an inspector was allocated. In addition, the emergence of the night-time economy, and the increasing targeting of the district by travelling criminals placed great demands on the garda service.

14.27 A decision was taken to allocate Inspector (now Superintendent) Cunningham on a temporary, part-time basis to Bailieboro during 2006 - 2008 to assist with management. He had therefore shared responsibility for both Monaghan and Bailieboro Districts. Inspector Cunningham spent approximately two week days as well as weekends in Bailieboro. He assisted with operations when there was a higher risk of public order incidents occurring.

14.28 In November 2005 the Cavan / Monaghan Division had six inspectors. Three of these were assigned to the divisional headquarters in Monaghan and there was one inspector each in Ballyconnell, Carrickmacross, and Cavan. There was no inspector assigned to Bailieboro. In response to a request from garda headquarters to make a business case for the allocation of additional garda resources which would be available in 2006 and in subsequent years, Chief Superintendent Rooney submitted a case for the Cavan/Monaghan Division on 7th November 2005. He argued for an increase in divisional resource by an additional 119 gardaí, 16 sergeants and, of particular interest to the commission, he also made a case for the allocation of one inspector for the Bailieboro Garda District. He stated his argument in the following terms:

Bailieboro District is a busy district in the Cavan / Monaghan Division with a considerable amount of travelling criminal oriented crime, with many gangs travelling to the District from DMR. There is no Inspector allocated to
Bailieboro District which has 8 stations and a strength of 10 Sergeants and 43 Gardaí. There is a continuing demand for the assistance of an Inspector in the District necessitating the temporary transfer of an inspector into the District regularly through the year. Because of the level of work generally in the District I am satisfied that the allocation of an additional Inspector to the Division to be allocated to Bailieboro would considerably enhance the police service to the Division and enhance local management and support District commitment to improving the policing service.

However, no inspector was assigned to Bailieboro at that time.

14.29 On 12th September 2006 garda headquarters wrote to each assistant commissioner, following a decision of government to allocate 73 additional posts in An Garda Síochána at the rank of inspector, inviting them to submit a business case for the allocation of inspectors. Chief Superintendent Rooney submitted the response of the Cavan / Monaghan Division by letter dated 22nd September 2006. Again he made the case for the appointment of an inspector to the Bailieboro Garda District. The case included the following arguments:

- The district force, which includes 11 probationer gardaí, is active, relatively junior and in need of direction and supervision. The age profile of garda members averages 31 years.

- PULSE records project an increasing level of police engagement in the district. This can be attributed to the increasing population, ease of access by Dublin based criminal gangs to the district, and an increased garda emphasis on public order policing at weekends.

- Bailieboro District is managed by a district officer and supervised by nine sergeants allocated to the district. For successive district officers who have been appointed to Bailieboro Garda District that deployment has been their first appointment on promotion. All of the district officers so appointed have been in receipt of lodging allowance and have not taken up permanent residence in the district. Their tenure has varied from a few months to a maximum of approximately two years.
This time his application was successful, and on 8th August 2008, with the approval of the Commissioner, one inspector was allocated to Bailieboro garda station. Inspector McMahon was transferred from Ballyconnell District to Bailieboro District in a permanent capacity with effect from 12th August 2008.

A witness representing members at sergeant and inspector ranks told the commission that the management of a district as busy as Bailieboro warranted the assignment of an inspector. He said that Ballyconnell had an inspector, despite that he considered the Ballyconnell workload to have been only about a fifth of that in Bailieboro. He regarded that as indicative of an overall lack of resources allocated to Bailieboro at that time. He considered that the absence of an inspector contributed to the lack of continuity caused by a high turnover of superintendents.

Similar views were expressed by a witness representing the view of members at garda rank. This witness considered that there should have been an inspector given the large number of probationers assigned to the station and the high turnover of experienced sergeants.

Sergeant McCabe’s view was that if a garda inspector had been attached to Bailieboro Garda District, ‘perhaps that inspector may have had case conferences, crime meetings, or other ideas which might have dealt with problems that arose. Sergeants in Sub Districts would be more supervised’.

The Garda Code specifies the purpose of the rank of garda inspector and the responsibilities of the member serving at that rank. The Code envisages the purpose as a management and coordinating role for the operational delivery of police service. Some of the responsibilities specified for the rank of inspector of particular relevance to the commission’s terms of reference are:

- The operational direction of members in routine or specified activities;
- The efficient deployment of resources and personnel;
- Conducting investigations into complaints or other internal evaluation activities;
- Providing a close support role for the district officer;
• Providing in-service training and supporting the ongoing development of member’s skills.

14.35 The availability of an inspector with such responsibilities would have been of assistance in Bailieboro Garda District at the relevant time. It is probable that many of the matters that are criticised by this commission would not have occurred or would have been rectified at an early stage if there had been an inspector in Bailieboro during the period with which the commission is concerned.

14.36 Although the commission was told that an inspector was primarily a resource for the assistance of the chief superintendent, it is clear that the Garda Code envisages the possibility of an inspector being “otherwise assigned”. The Garda Code allows for a wide role and range of responsibilities for an inspector where circumstances require it.

14.37 Apart from those reasons put forward by Chief Superintendent Rooney and others, the particular tensions and problems within Bailieboro garda station made the assignment of an inspector to that station an obvious and appropriate intervention. Such an assignment would have been of help in Bailieboro.

**Stability, continuity and experience at district officer level**

14.38 During the period 2007/2008, three superintendents served in Bailieboro Garda District. Superintendent Lernihan served for a period of seventeen Months, Superintendent Clancy for a mere seven months, and Superintendent Cunningham for fifteen months. Superintendent Lernihan was the only superintendent transferred to Bailieboro garda station on promotion from outside the Cavan / Monaghan Division, but both Superintendent Clancy and Superintendent Cunningham brought with them a wealth of relevant experience from within the Cavan / Monaghan Division.

14.39 The commission heard evidence that the average length of service of a district officer in a district was between eighteen months and two years. Senior officers reported their understanding of the average at eighteen months while Assistant Commissioner Nolan understood the average to be about two years. Many superintendents wanted to move to other areas, to further their careers, and for a variety of other reasons. Persons with family or other attachments elsewhere or superintendents with ambition could be keen
to move. If a person was from an area within the division he or she might not be interested in promotion and his or her period of tenure could be longer. The situation was described as prevailing all over the country and not just in Cavan / Monaghan Division. Assistant Commissioner Nolan stated that “[i]t is pretty much a fact of organisational life that superintendents move and develop. But I would like to say, Judge, that I think they contribute effectively”.

14.40 There were differing views as to the effects of these relatively short periods of service of superintendents in Bailieboro. In general it appeared to the commission that the senior members of the gardaí did not consider this to be a problem. However, the perception among members at Bailieboro was that there was a high turnover of district officers and that the short duration of their tenures was not conducive to stability within the district. Sergeant McCabe saw this as a problem as district officers showed no attachment to the area and tried to leave the area as soon as they could. A witness representing members at sergeant and inspector ranks said that:

[i]t appears Bailieboro was seen as something of a training ground for newly promoted Superintendents. Coupled with the lack of an Inspector this had a destabilising effect on [sic.] station. Furthermore, each Superintendent had their own management style, which the station party needed to become accustomed to every time someone new was appointed.

Similar views were expressed by witnesses representing members at garda rank. It is understandable that this perception by members contributed to their low sense of morale in 2007 and 2008, especially when seen in the context of the other problems in Bailieboro, including the state of accommodation of their station.

14.41 There may be many different reasons for the movement of superintendents from one area to another. Sometimes officers will be transferred because of organisational demands and despite their personal preferences. However, the commission was surprised at the relatively short time superintendents remained in a district. It is very doubtful that a tenure of eighteen months to two years at superintendent level is conducive to the stability, consistency, intimate local knowledge and leadership which is needed in a garda district and which may be legitimately expected by the communities being served by the force.
14.42 There are also financial implications involved in a superintendent’s decision to stay in an area. The operation of the lodgings allowance system was put forward in evidence as one reason why some superintendents might not want to remain in certain districts. Assistant Commissioner Byrne stated:

...you are transferred at public expense and you get limited expenses in what are called ‘Lodging Allowances’. These really don’t cover your expenses to stay in a house in the district ... That lasts for a maximum of 15 months. In fact it lasts a maximum of 12 months and you are forced during that 12 months ... to try to sell your house in Dublin and buying a house in Bailieboro ... So a Superintendent that is there for 18 months may find himself absent from home covering the expenses himself or herself.

Evidence was given of a human resource practice, agreed with the representative associations, of a first in / first out policy. Under that policy superintendents with longest service were given priority in changing to a district more suited to their personal and family needs.

14.43 The commission does not know whether the framers of the ‘Lodging Allowance’ scheme knew that it would contribute to the patterns of rotation of superintendents and short durations of tenure. However a review of operation of the scheme by the appropriate authority might be helpful.

14.44 Despite the fact that the commission is critical of the practice of superintendents serving in a district for such a short time, it does not consider that this contributed in any significant fashion to the problems in Bailieboro.

Supervision and monitoring of probationer gardaí

Performance management systems

14.45 The commission has found many instances where the gardaí failed in the performance of their duties. These failures would probably have been avoided if principles of
personal responsibility, communication, supervision, and performance management had been applied.

14.46 An Garda Síochána, in a submission to the commission, stated that:

...a **key function of Supervisors/Managers is to manage performance and as such personnel appointed to such positions are educated on the various management disciplines which performance management is a key element.** It is incumbent on managers and supervisors alike to ensure the performance of members within their control is regularly monitored. In the event that a manager resorts to disciplinary procedures they must ensure the conduct subject of the disciplinary procedures relates to misbehavior as opposed to poor performance.

14.47 The commission was concerned by the apparent absence, in many instances, of an active management style of supervision, especially in those cases where it was absolutely necessary. A sergeant described how daily supervision and monitoring of probationer gardaí was carried out by sergeants. He explained how the PULSE system was used to exercise an overview of the investigations and work progress of the probationers. Of concern to the commission was his evidence that “[i]f the incident was not recorded on PULSE the sergeant had no way of knowing about it unless informed directly by the investigating garda”. In 2007/2008 PULSE was not intended to be used as a performance management tool and was not designed for that purpose.

14.48 The commission considers that personal and active contact between probationers and their sergeants is essential and should be the normal and primary method of communication between them.

14.49 The commission was told by Assistant Commissioner Nolan that in 2007 there was no formal performance management system in place directed at the performance of individual gardaí, although a framework did exist at divisional and district levels to manage police accountability generally. In the mid 1990s efforts were made to introduce performance management systems to deal with the performance of individual gardaí. The commission was told of a system called the Performance, Development and Review system but the evidence was that this system never “got off the ground”. In 2007 an attempt was made to introduce a system called Accountability
Growth Model, but that attempt was not successful. Assistant Commissioner Nolan gave one reason for this in the following terms: “[t]here has been, how would I put it, representative association ambivalence towards it and lots of difficulties in introducing it”. Later in evidence he stated that “[i]t has been difficult to get the agreement of all of the parties involved such as the staff associations on how an individualised performance management system could be introduced across the organisation”.

14.50 The PALF system (Performance Accountability Learning Framework) was developed in a partnership approach within An Garda Síochána, and a pilot project was introduced in 2012 in three specific areas. Assistant Commissioner Nolan told the commission that although this system was now developed and ready for use in the garda organisation it had not yet been introduced. As described to the commission, it appears to contain all the appropriate attributes of a performance management system, as generally recognised. Such a system, if properly implemented, is likely to improve garda performance. It would encourage a culture in which gardaí and their sergeants can communicate properly. It would also assist with monitoring and supervision of performance.

14.51 The commission has been informed that the PALF performance management system is to be commenced within An Garda Síochána in the second quarter of 2016. While this is to be welcomed, it is disappointing that this is only happening some eight or nine years after the events in Bailieboro which have been examined by the commission.

14.52 During the years 2007/2008 there was no performance management system in use for garda members, and, little evidence of an active management approach to cases of underperformance of gardaí in Bailieboro.

Risk management

14.53 The commission wished to ascertain what, if any, risk management methods had been used by An Garda Síochána to assess the impact of underperformance by members of gardaí including sergeants. In The Garda Síochána Corporate Strategy, 2007 – 2009,
it was stated, “[w]e will develop a risk management register and matrix”. That development was described in that document as a “Strategic Imperative”.

14.54 The commission was told that had current risk management practices been in place in 2007/2008 they would have helped significantly to identify and help with some of the problems in Bailieboro. Had there been proper management of risk and of performance in the matters under consideration some of the problems examined by the commission may not have arisen or, if they did, may have been dealt with appropriately.

**Standard of accommodation in Bailieboro garda station**

14.55 Bailieboro garda station was built around 1870 as a barracks for the Royal Irish Constabulary and originally included domestic accommodation as well as being a work place. A flat roofed single storey extension was built in or around 1970.

14.56 Both Superintendent Clancy and Superintendent Cunningham gave evidence of the making of improvements to the station “as interim measures pending the availability of funding to build a new station”. In 2007, a two-floor pre-fabricated building was constructed in the station yard in an effort to improve conditions. In 2008, work was done to the interior of the building, including refurbishment of the inspector’s office, refitting the public office and the intoxicyser room, installing an air conditioning unit in the district office, and improving sanitation facilities for male and female gardaí.

14.57 There is general agreement that Bailieboro garda station was not fit for purpose. This view is shared by the commission based on what it heard and taking into account what it found on its visit to the station in March 2015. The deficiencies in accommodation at Bailieboro were known to An Garda Síochána for a long time.

14.58 It is not necessary to document all the defects or inadequacies in the garda station which was in a run down and unfit condition. However amongst the more notable defects are:

- Unsuitable reception facilities to process arrested persons;
• Unsuitable blood / urine / doctor’s room to process suspected excess alcohol cases;

• Inadequate parking facilities for official garda vehicles or for seized vehicles;

• The lack of a purpose built parade room for briefing of members;

• The lack of a reception room to facilitate private consultation with members of the public;

• Inadequate clerical officer work space;

• The lack of a dedicated incident room space to conduct serious criminal investigations;

• Inadequate storage space for official equipment necessary for garda operations;

• The lack of a suitable space to allow gardaí to conduct an identification parade;

• No unit sergeant’s office to facilitate supervision at operational level;

• Unsuitable recreation room space (recreation room shared as conference room space);

• Inadequate kitchen / canteen facilities;

• Lack of hot water for showers in men’s changing / WC area;

• The fact that sewage back-up can occur which causes foul odour in the station;

• The changing areas for members are inadequate;

• There was no shower room or rest room for female members until 2007;

• There were no proper facilities for hosting inter-agency meetings;

• The heating system was old and prone to regular break downs;

• The inadequate storage space.
14.59 The conditions in Bailieboro garda station were deplorable, and were not conducive to either good policing or good morale. However those conditions were not the cause of the deficiencies and failures in the investigations found by this commission. They were due to the failures of individuals to carry out their duties properly.

Conclusion

14.60 The examination by the commission of the issues of management and resources showed that there were problems at many levels. Ultimately, however, the failures investigated by the commission were at a human level and caused by poor individual performance and, in many instances, by poor supervision.
Chapter 15  Recommendations

15.1 The terms of reference of this commission, unlike those of some other commissions of investigation, make no explicit reference to the making of recommendations. This may be because this commission was largely concerned with the investigation of specific incidents, and with how the various complaints of Sergeant McCabe were dealt with. In addition the structural or management issues, which the commission was asked to examine, were not only confined to the Bailieboro Garda District, but were further circumscribed in the terms of reference. However, the commission considers that it is not precluded from making some recommendations, observations, or suggestions which arise directly from the matters it investigated, in the hope that they might be of use to the Gardaí and to policy makers.

15.2 The commission heard much conflicting evidence from various witnesses including senior members of the force, as to the duties of a sergeant in charge in Bailieboro. The commission accepts that the duties set out in the Garda Code applicable to sub districts were applicable to Bailieboro garda station. Those responsibilities, as set out in the code, are extremely wide and, perhaps unrealistic. The commission has heard evidence that, in practice, what is expected of a sergeant in charge varies from station to station.

- Accordingly, the commission considers that detailed and specific information, as to the precise scope of the duties of a sergeant in charge within the framework of the code, should be set out in a written job specification relevant to the role for each station. A sergeant in charge should acknowledge his or her understanding of the role as described in that job specification.

- Consideration should be given to setting out the duties of a sergeant in charge in the code in a more helpful manner.

15.3 The importance of the role of the sergeant in charge has been emphasised many times in the course of the commission, and there is widespread agreement that he or she plays a pivotal role in the running of a garda station, and has wide ranging responsibilities. The role was described as being ‘the glue that holds a station
together’. The commission has heard evidence that a sergeant in charge may suffer financially on appointment to such role, unless he or she does overtime on weekends.

- The commission suggests that a review be undertaken on the terms and conditions applicable to the role of sergeant in charge to adequately reflect the responsibility of the role.

15.4 The right to furnish a victim impact statement in all courts, including the district court is enshrined in law, but is not always availed of in practice. The commission was told that victim impact reports were seldom used in certain courts.

- The commission considers that it should be standard procedure that a victim impact statement, where relevant, should be furnished in all courts.

15.5 Both the prosecution and the defence have a right to see the contents of any psychiatric report on which a judge relies in making a decision.

- The right to see, and if necessary to make submissions on any report on which a judge may place reliance, should be availed of in all cases.

15.6 In some of the incidents under examination the involvement of unit sergeants was very limited. The supervision of, and assistance to junior members is essential to the proper functioning of any garda district.

- The duties of unit sergeants in supervising and assisting members of their units, not merely on request, but as a matter of routine, should be stressed, and monitored regularly by superintendents or divisional officers.

- Evidence has been given that a new performance management system is about to be introduced into An Garda Síochána. The commission suggests it be implemented immediately. A systematic approach to management of performance, for members and officers, should be part of the culture of An Garda Síochána.
15.7 In nearly all cases examined by the commission there was a lack of proper recording and note taking. Appropriate recording of incidents and adequate note taking are essential for the proper investigation of crime. The commission is aware of the provision for note taking in garda training.

- All ranks should be diligent in taking proper notes. Unit sergeants should regularly monitor the performance of their unit members in that regard.

15.8 The commission has heard evidence of considerable delays in having material examined by the Computer Crime Unit in Dublin, due to shortage of staff. These delays have to be considered in deciding whether it is worthwhile or appropriate to send material to the unit for forensic examination in any individual case. These delays exist despite the best efforts of the personnel who work there.

- The commission considers that the Computer Crime Unit should be afforded adequate resources and personnel to carry out its functions in an efficient and timely fashion.

15.9 The proper framing of the terms of a garda disciplinary inquiry was an issue which arose in one module of the commission’s work, and there was uncertainty as to how the terms of such an inquiry should be framed.

- Templates should be furnished to divisional officers to cover all possible breaches which may be the subject matter of disciplinary inquiries.

15.10 The lack of adequate communication with the victims of crime was a feature in many of the modules examined by the commission. The commission is glad to note the coming into effect of Directive 2012/29/EU in November, 2015 dealing with the rights of victims. The provisions of this directive are such as to address the failings identified by this commission.
15.11 The examination of the complaints about the PULSE system entries showed certain failures in the cases examined by the commission. In order to benefit properly from PULSE, it is essential that members of the gardaí continue to be familiar with its operation.

- The commission suggests that continuing professional development (CPD) in respect of the PULSE system be implemented.

15.12 The garda station in Bailieboro is not fit for purpose. The commission is aware that in An Garda Síochána Building and Refurbishment Programme 2016-2021, announced by the Minister for Justice and Equality and the Minister of State at the Office of Public Works on 21st October 2015, the building of a new garda station is planned and the commission welcomes this. However, the commission recognises that the events giving rise to this commission of inquiry, and the inquiry itself have been matters which were the cause of stress to the gardaí in Bailieboro. There was a perception that the gardaí were working “under a cloud” for many years.

- The commission considers it of the utmost importance that the end of this inquiry will herald the beginning of a new era for the gardaí in Bailieboro.

- The commission considers that, given the unique situation in Bailieboro, even more priority should be given to the construction of a new garda station there. Such a move would be much more than a symbolic gesture. It would help boost morale and would herald a new era in the provision of services to the community by the gardaí in Bailieboro.

15.13 The commission was surprised to hear that a period of service for superintendents of eighteen months to two years was normal, not only in Bailieboro, but throughout the country. The commission is aware that complex and diverse factors are involved in the allocation of superintendents to districts, but the length of time mentioned appears to be unduly short, and not conducive to stability, continuity, or team building in a district.

- The commission recommends that this question be examined in detail by a competent authority.
15.14 The commission is aware of the fact that the incidents examined in this inquiry took place many years ago, and that the gardaí in Bailieboro have worked under the shadow of those events for a long time. It is hoped that the closing of this inquiry will enable the gardaí in the area to put the unhappy events, the subject matter of this inquiry behind them, learning lessons where appropriate, and to proceed to “faithfully discharge the duties of a member of the Garda Síochána with fairness, integrity, regard for human rights, diligence and impartiality, upholding the constitution and the law and according equal respect to all people,” in accordance with their solemn declaration under section 16 of the Garda Síochána Act 2005.

- Bearing the foregoing in mind, and in the very particular circumstances pertaining, the commission considers that the institution of any disciplinary proceedings, which might conceivably arise out of its findings, would not be helpful.
Appendix 1

Witnesses and Observers.

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<tr>
<td>1.</td>
<td>Ms. Lorraine Browne</td>
<td>MacGuill &amp; Company</td>
<td>Mr. Hugh Hartnett S.C.</td>
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| 2.  | Gda. Feargal McCarthy | Hughes Murphy | Mr. Patrick McGrath S.C.  
Mr. Eoin Lawlor B.L. |
| 3.  | Gda. Sinead Delaney | Hughes Murphy | Mr. Patrick McGrath S.C.  
Mr. Eoin Lawlor B.L. |
| 4.  | Sgt. Regina McArdle | Smyth O’Brien Hegarty | Mr. Desmond Dockery B.L. |
| 5.  | Insp. Patrick A. O’Connell | Smyth O’Brien Hegarty | Mr. Desmond Dockery B.L. |
| 6.  | A.C. Catherine Clancy | Ms. Annemarie Ryan, Chief State Solicitor’s Office. | Mr. Colm Smyth S.C.  
Mr. Garret Byrne B.L.  
Mr. Michael MacNamee B.L. |
Mr. Garret Byrne B.L.  
Mr. Michael MacNamee B.L. |
Mr. Garret Byrne B.L.  
Mr. Michael MacNamee B.L. |
| 9.  | Sgt. Tom Miller | Smyth O’Brien Hegarty | Mr. Desmond Dockery B.L. |
| 10. | Insp. Kevin Gavigan | Smyth O’Brien Hegarty | Mr. Desmond Dockery B.L. |
Mr. Garret Byrne B.L.  
Mr. Michael MacNamee B.L. |
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<td>Insp. Raymond Mc Mahon</td>
<td>Smyth O’Brien Hegarty</td>
<td>Mr. Desmond Dockery B.L.</td>
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<td>14</td>
<td>Sgt. David Burke</td>
<td>Smyth O’Brien Hegarty</td>
<td>Mr. Desmond Dockery B.L.</td>
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</table>
| 15  | Retired C.S. John Grogan     | Ms. Annemarie Ryan, Chief State Solicitor’s Office. | Mr. Colm Smyth S.C.  
|     |                              |                                         | Mr. Garret Byrne B.L.                       
|     |                              |                                         | Mr. Michael MacNamee B.L.                   |
| 16  | Mr. Conor Brady              | Mason Hayes & Curran                    | Ms. Úna Ní Raifeartaigh S.C.                 |
| 17  | Sgt. Maurice McCabe          | Sean Costello & Company                 | Mr. Michael McDowell S.C.                   
|     |                              |                                         | Mr. Breffni Gordon B.L.                     |
| 18  | Mr. Kevin Duffy              | Mason Hayes & Curran                    | Ms. Úna Ní Raifeartaigh S.C.                 |
| 19  | Mr. George O’Doherty         | Mason Hayes & Curran                    | Ms. Úna Ní Raifeartaigh S.C.                 |
| 20  | C. S. Terry McGinn           | Daniel Spring & Company                 | Mr. Conor Power SC.                         
|     |                              |                                         | Mr. Cathal Ó Braonáin BL                     |
| 21  | AC Derek Byrne               | Daniel Spring & Company                 | Mr. Conor Power SC.                         
|     |                              |                                         | Mr. Cathal Ó Braonáin BL                     |
| 22  | Gda. Padraig Naughton        | Hughes Murphy                           | Mr. Patrick McGrath S.C.                    
|     |                              |                                         | Mr. Eoin Lawlor B.L.                        |
| 23  | Gda. Conor Rice              | Hughes Murphy                           | Mr. Patrick McGrath S.C.                    
|     |                              |                                         | Mr. Eoin Lawlor B.L.                        |
| 24  | Gda. Gary McDonnell          | Hughes Murphy                           | Mr. Patrick McGrath S.C.                    
<p>|     |                              |                                         | Mr. Eoin Lawlor B.L.                        |
| 25  | Sgt. Pauric Jones            | Smyth O’Brien Hegarty                   | Mr. Desmond Dockery B.L.                    |
| 26  | Sgt. Anthony Quinn           | Smyth O’Brien Hegarty                   | Mr. Desmond Dockery B.L.                    |
| 27  | A civilian technician (#1)   | Not represented                         | Not represented                             |</p>
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<td>Mr. Lorcan Roche Kelly</td>
<td>Ms. Gwen Bowen</td>
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Appendix 2

Acronyms.

AGSI    Association of Garda Sergeants and Inspectors
GRA     Garda Representative Association
GSOC    Garda Síochána Ombudsman Commission
DPP     Director of Public Prosecutions
PULSE   Police Using Leading Systems Effectively
PALF    Performance Accountability Learning Framework
PEMS    Property and Evidence Management System
CCIU    Computer Crime Investigation Unit
DLIP    Driving Licence Insurance Production
GISC    Garda Information Service Centre
SIO     Senior Investigating Officer
CPD     Continuing Professional Development
CSSO    Chief State Solicitor’s Office
Appendix 3

Order Establishing the Commission and Terms of Reference.

COMMISSION OF INVESTIGATION (CERTAIN MATTERS RELATIVE TO THE CAVAN/MONAGHAN DIVISION OF THE GARDA SÍOCHÁNA) ORDER 2015

S.I. No. 38 of 2015

WHEREAS, pursuant to section 3(1) of the Commissions of Investigation Act 2004 (No. 23 of 2004), the Minister for Justice and Equality, 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 19 November 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 the Cavan/Monaghan Division of the Garda Síochána) Order 2015.

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 Minister for Justice and Equality 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 or
her under the Act.

Notice of the making of this Statutory Instrument was published in
“Iris Oifigiúil” of 6th February, 2015.

SCHEDULE

Commission of Investigation (Certain Matters relative to the Cavan/Monaghan Division of
the Garda Síochána)

Terms of Reference

1. The Commission is directed to investigate the following matters:

(a) The investigation by An Garda Síochána of a public order incident and possible
sexual assault on a bus at Kingscourt, Co Cavan on 25 February 2007;

(b) The investigation by An Garda Síochána of an assault at the Lakeside Manor
Hotel, Virginia, Co Cavan on 14 April 2007;

(c) The investigation by An Garda Síochána of two incidents in 2007 involving Jerry
McGrath, i.e. the assault on Mary Lynch near Virginia, Co Cavan on 30 April 2007
and the abduction of a child during the burglary of a house in Tipperary on 9 October
2007, and the management and coordination by An Garda Síochána of those
investigations, in particular in relation to the question of bail;
(d) The investigation by An Garda Síochána of a public order incident in Cafolla’s restaurant, Bailieboro, Co Cavan on 5 August 2007;

(e) The investigation by An Garda Síochána of an incident of assault and false imprisonment of a girl in Cootehill, Co Cavan on 2 September 2007;

(f) The investigation by An Garda Síochána of a dangerous driving incident at the Lakeside Manor Hotel, Virigina, Co Cavan on 27 December 2007;

(g) The investigation by An Garda Síochána of an assault in Crossan’s public house in Bailieboro, Co Cavan on 23 May 2007;

(h) The investigation by An Garda Síochána of sexual offences and child pornography offences in respect of which Michael Molloy was convicted in 2009, having particular regard to the loss of a computer seized during the course of that investigation;

(i) The investigation by An Garda Síochána of the allegations made by Sergeant Maurice McCabe of malpractice and corruption in relation to PULSE records seized from him on 11 October 2010 at the Hillgrove Hotel, Monaghan;

(j) The investigation by An Garda Síochána and the Minister for Justice and Equality and Department of Justice and Equality of complaints made by Sergeant Maurice McCabe in relation to matters at (a) to (i);

(k) The investigation by An Garda Síochána and the Garda Síochána Ombudsman Commission of Garda disciplinary issues arising out of the above matters;

(l) The general conduct of policing at Bailieboro Garda District in 2007/2008 with reference to the management and operational structure and resource allocation for Bailieboro Garda District, at the relevant times, including:

- The number of probationary Gardaí assigned to Bailieboro Garda District;
• The number and experience of Sergeants available to supervise and monitor on a daily basis the work of those probationary Gardaí;

• The significance, if any, of the absence of an Inspector permanently allocated to Baileboro Garda Station;

• The stability, continuity, and experience available at district officer level in Bailieboro Garda District;

• The arrangements in operation for the supervision and monitoring of probationary Gardaí in relation to their operational and, specifically, investigative duties, and

• The standard of accommodation at Bailieboro Garda station and its possible impact on the performance of the policing function.

2. The Commission should 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.

GIVEN under the Official Seal of the Government,

3 February 2015.
ENDA KENNY,
Taoiseach.