

## Northern Ireland Affairs Committee

### Oral evidence: Addressing the Legacy of Northern Ireland's Past: The UK Government's New Proposals , HC 284

Tuesday 21 June 2022

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Members present: Simon Hoare (Chair); Mr Gregory Campbell; Stephen Farry; Sir Robert Goodwill; Bob Stewart.

Questions 545 - 576

#### Witnesses

I: Jon Butcher, OIOC Chief Constable, Operation Kenova; Mark Hamilton, Deputy Chief Constable, Police Service of Northern Ireland.



## Examination of witnesses

Witnesses: Jon Boutcher and Mark Hamilton.

Q545 **Chair:** Good morning, colleagues. It is the longest day of the year today. I hope this will not be the longest meeting of the Committee. As I say that, I look to Mr Campbell for approbation. That is good news. Can I welcome our witnesses, Deputy Chief Constable Mark Hamilton and Jon Boutcher, the head of Operation Kenova? Gentlemen, thank you very much indeed for joining us.

Can I start with a question that we have been asking all of our witnesses? To what extent have the Government consulted with you both with regard to their latest proposals? Does the new Bill, which is before Parliament, represent an improvement on the current arrangements for trying to deal with legacy issues?

**Mark Hamilton:** Good morning, Chair. Thank you. Apologies for not appearing personally in front of you. We had the flight and hotels booked, but, given the prospect of the rail strike and the Tube not working, we decided that maybe—

**Chair:** I do not chastise you for that, Mr Hamilton. It is nice of you to join us by whatever mechanism. We are grateful.

**Mark Hamilton:** Thank you for allowing me to join. On your first point about consultation, the first I saw of the Bill personally was when it was published. The Northern Ireland Office spoke to us about the quantity of work we were doing and the facts about what we were doing. We were not involved in the drafting of the Bill or consulting on the Bill other than that, and we had no involvement in it in that sense. We had previously provided a return, as many did, to the public consultation on the Stormont House agreement, which is some years old now, but we have not actively been involved in the Bill.

In terms of improvement on the current arrangements, thinking about this from a policing perspective, it is an entirely different proposal to the current mechanisms of the Police Service of Northern Ireland. Currently, the chief constable has the sole statutory responsibility, alongside the Police Ombudsman, for the investigation of all matters relating to the Troubles. Our approach is one of investigative review followed by investigations, and then we are also heavily engaged with the work around the inquests and civil litigation. Our work has been founded solely upon trying to follow the investigative principles as enshrined in the European convention and the various and numerous deliberations of many courts over the years.

In reading this Bill, it declares at its outset that it is about limiting legal proceedings, criminal investigations and police complaints. That is a departure from the current arrangements. It talks about conditional immunity, which does not exist under the current arrangements as far as



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the police service is concerned. It talks about compellable co-operation, which again is a difference as far as the police are concerned.

It is judge-led, which is also a different approach. At the minute, the sole responsibility lies with the chief constable or the Police Ombudsman. The emphasis is more, as I read it, on truth recovery as opposed to investigation and criminal justice outcomes. The chief constable's role primarily is to try to achieve criminal justice outcomes through either our legacy investigation branch or the work we have commissioned out through Operation Kenova, Operation Klina and other investigations over the years. We have then been required, and happy to do so, to participate heavily in the work around disclosure of information and co-operation with inquests.

This effectively moves from a policing function to what is described in the Bill as reconciliation and information recovery. It is entirely different to how we are currently doing business. It is quite a significant change to how we do business.

**Q546 Chair:** Just pausing there, in your assessment, is there merit in that approach? The words you have used and the tone you have deployed suggest to me that you are not entirely convinced by that. You said last year that people still have a right to want justice and, describing the position of the PSNI, you said, "Our position as a justice agency is to deliver justice". Would you prefer to see, were you to be drafting the legislation, that focus on truth and reconciliation with a continuance of the access to justice model that we have in operation currently?

**Mark Hamilton:** All we can talk about is our experience working with victims. Our experience to date is that we as a police service have been asked to carry out criminal investigations. Our experience as a police service is that, over many years now, effectively since the formation of the Police Service of Northern Ireland, we have had a pretty consistent and heavy volume of questions from people around the issues that happened in the period known as the Troubles. That is our experience of it.

**Q547 Chair:** That is your experience, which is readily understood. What is your view as a senior PSNI officer?

**Mark Hamilton:** As an independent and impartial agency, we are not here to express a view on the policy direction of the Government. We are here to try to provide the assistance that we can in terms of the impact this will have on us and our assessment of our experience of this. We do not believe it is our role to express a view on the Government's direction or the will of Parliament.

**Q548 Chair:** I am not going to use phrases such as "drawing a line" and "bringing closure", because individuals will respond to different sets of circumstances in different ways. It is not for Westminster or Whitehall to dictate how the human spirit responds to things. Given the fact that that



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is a laudable aim for people across the Northern Ireland still today affected by the legacy of the Troubles, is your assessment as a senior police officer that the proposals before Parliament will help in that process, will not help or will be neutral? Does it solve problems or does it cause as many problems as it seeks to solve?

**Mark Hamilton:** We are by no means unaware of the depth of public feeling around the Bill as proposed. With respect, whether or not it causes problems remains to be seen, but there are clearly a lot of challenges ahead for people. That is very clear. The mood of our politicians and of many groups has been made very clear.

What is the difference? If we roll back to when the Historical Enquiries Team first operated in the mid-2000s, there was an element of its work that provided information to families. The investigatory process of the Historical Enquiries Team, though, was severely challenged by local reports and by Her Majesty's Inspectorate of Constabulary, and was found to be deficient. There is probably an appetite on the part of families and people in Northern Ireland for more information than the PSNI is currently providing to them and more informality in some of that than just our stated position, which we are very firm on, of delivering article 2-compliant investigations.

You will talk to Jon in a moment; I do not want to speak for him. There is or has been considerable support for not necessarily what we have asked Jon to do, which is in line with the chief constable's statutory duty under the Police Act and, in our view, the European convention. How Jon has gone about it has won a lot of praise in terms of the way he has engaged with families and the risks that have been taken with information.

Going forward, outwith any opinions on the Bill, I certainly believe that there is a strong appetite for people to have more information, to have it provided in a way that is less adversarial than the processes that exist at the minute, to have easier access and to have trust and confidence in the people who are delivering it to them.

Q549 **Chair:** Thank you. Let us turn now to Jon Boutcher. Mr Boutcher, could you say a little bit about the engagement and the picking of your brain that the NIO might have undertaken, given your direct experience of dealing with this? Let us start with that.

**Jon Boutcher:** If I could just explain, I am not in London this morning merely because, as you pointed out, it is 21 June today, which is a day that a number of victim groups hold out as a day of reflection to look back at what happened during the Troubles and remember those who were lost. There are a number of events in Belfast and Northern Ireland today. That is the only reason I am not sitting in front of you today. I apologise.

**Chair:** There is no need to apologise at all, Mr Boutcher.



**Jon Butcher:** I have had a lot of engagement with the NIO from the beginning of Operation Kenova. I have had regular meetings with them at all levels. I have explained in great detail the issues and challenges that I have faced through the Kenova journey, which I had somewhat expected but to some degree had not expected in comparison with criminal investigations into organised crime or terrorism conducted from London.

As an example of that engagement, most recently I provided them with a document, which I was asked to write by my oversight groups, giving my view of the operational implications of the proposed Bill for my three independent oversight bodies. I shared that with the NIO and the NIO responded to me yesterday. There is active engagement now on the Bill that is happening, if that is the answer to your first question, Chair.

Q550 **Chair:** It is. That is helpful. Thank you. As Mr Hamilton alluded to a moment or so ago, the work you are doing—according to some, against expectation—is and has commanded widespread support and respect across the communities. Would your view be that the Government have effectively missed a trick? Should the Government effectively have upscaled, in terms of scope and resource, the work you and colleagues are doing, given that you have that bedrock of cross-community respect?

**Jon Butcher:** The work we have done with the NIO to explain Kenova—we have followed some very simple and basic principles in what we do, our investigative approach, our approach to victims and families and our methodology, to achieve the praise that we have—is not necessarily reflected in the Bill. That is why I want to work hard with the NIO to try to address that. Upscaling a lot of the elements of Kenova is doable; it is very achievable. For some elements, it would not be so achievable. The Bill could have reflected more of the things we have managed to do in Kenova.

It has been hard fought. I talked about this in my previous evidence to this inquiry. In some areas of information recovery, we had problems that I did not anticipate, which we have now overcome. That has changed attitudes and culture in the security agencies about providing information. Understandably, they were concerned about the security of material and what would happen to it. With all the requisite reassurance and security accreditations put in place, we have managed to get the material that gives us a clear understanding, where it still exists, of what happened in the cases we are examining for those families.

In the Bill—I am sure we will get into some of this during questions—there are three or four things that are fundamentally flawed. Some work to amend these would change the views of a number of groups and interested parties about the effectiveness of the proposed Bill moving forward. I am keen to get involved in that.

Q551 **Chair:** Could you share with us what changes might be needed in order to achieve that?



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**Jon Butcher:** Northern Ireland is a unique environment, which we all need to recognise. With regards to previous evidence that you have heard in the sessions over the last week or so, I have heard it said that there have been countless inquests and investigations into these cases over many years.

To a certain extent that is true. However, at the time of the Troubles the security forces could not investigate these cases properly, because it was too dangerous for them to do that. The intelligence that certain elements within the security forces obtained about who was responsible for these cases could not be and was not shared with the detectives investigating those crimes. Although we as organisations knew, potentially, who had committed those crimes, the people investigating those crimes were not told that information.

Because one of the two communities could not be seen to co-operate or talk to the police, these cases were often not dealt with anywhere near as well as people would have wanted. That very much includes the RUC at the time. Inquests were mentioned during recent evidence. People have said that there have been countless inquests. Those inquests that occurred during the Troubles all resulted in open verdicts. Families were not even aware, the majority of the time, that the inquests were taking place. Efforts to apply the rule of law were made with as much gusto as possible by the security forces, but in effect the information that was required and the mechanisms that we rely on in the UK to deal with these awful crimes could not be applied.

We are in a new starting base. There has been a transition period post the conflict, post the Good Friday agreement and, indeed, before. Efforts were made to investigate these crimes by very stellar and well-regarded people, whether it is John Stevens or Judge Cory. The HET did some good work, which Mark referred to, although it was not for a criminal investigative process.

When you speak to the people who conceived and ran those inquiries, they say they did not get the access to the information they should have done because of a residual culture of protecting that material. This Bill presents an opportunity to start again with a clean slate and get this right. It has the benefit of being able to learn from Kenova. There is no monopoly on good ideas with Kenova; there are other things that we would do differently.

We have been reviewed to death, almost, with regard to independent examination by subject matter experts, whether that is around our investigative approach, our intelligence approach or our approach to victims and families. A lot of the fruits of those inquiries, which have been shared with the NIO, would do well to see their way into this Bill. That would undoubtedly make it article 2 compliant and would give the confidence in this Bill that is needed to the constituencies that are relying on it, which are the victims across all the different sectors.



Q552 **Chair:** Do you have concerns about compliance vis-à-vis article 2 as the Bill is currently drafted?

**Jon Butcher:** I am not a lawyer and you have heard from various legal experts about article 2 compliance. The investigation—I will talk about investigation and review, because this is a really important point—has to be effective. To be effective, it has to have unfettered access to all the information that is available about that case—not what is reasonable to provide, but unfettered access.

The Bill as currently proposed leaves lots of unanswered questions, because it talks in an interchangeable way about reviews and investigations without defining what they are. What is a review? What is the minimum standard that a family can expect? In the document I gave to the oversight groups and to the NIO, I provided a position around how, as a minimum position in all the cases we have examined, we applied a process map to make sure that we did not miss anything, whether that was information or people we should speak to about what happened in those cases.

When you talk about reviewing investigations, although it is semantics, families are so knowledgeable and aware about legacy process. Some of them have lived through this for almost 50 years. Normally in the UK we have a criminal investigation, which is defined in the CPIA—the Criminal Procedure and Investigations Act. It talks about the senior investigating officer, somebody like me or somebody who would work for me, getting all the information available to prosecute the people responsible for these crimes. You have a criminal investigation first.

Over time, after a criminal investigation, the investigation would be reviewed in accordance with the Homicide Act. Under the National Police Chiefs Council, which has a manual that was revised most recently in November last year, there is a review process to make sure that those investigations that were conducted in the past have not missed anything.

With language like “review/investigation”, families are concerned—and I understand this concern—that their cases will be looked at superficially; that only the readily available information will be considered; that there will not be the active seeking out of lines of inquiry or the robust recovery of material held by the intelligence agencies, which previously was kept within those agencies and not shared even with inquiries post the conflict and the Troubles. That needs to be set out in straightforward and simple language so those families know they are going to get a review or investigation—call it what you will—that will make sure every possible line of inquiry has been explored for them to understand what happened to their loved ones.

The NIO will then potentially say to your Committee, “One size cannot fit all, because that is too much work. It would take 25 years”. That is poppycock; that is nonsense. We have mechanisms in place. Thanks to the brilliant support from the various agencies, we have direct access to



the information they hold. We have tried and tested processes to get that information very quickly. We are currently doing it for Operation Denton, which is 127 murders that we have currently identified. It is happening in a very expeditious way.

The Bill needs to set out what exactly the new unit will do for families. That can be done very easily and will reassure people. I am happy to share the description I provided to them with the Committee.

**Q553 Chair:** Finally from me, can I have a yes or no answer, Mr Boutcher? From what you are hearing in conversations, engagements and the like with victims and victim representative groups, is there a danger that they just will not play ball with this new set of ideas?

**Jon Boutcher:** There is. To give you a one-line answer, I am worried that we are going to open a shop that no one is going to visit other than potentially people who are encouraged, maybe through the security forces, and who, particularly with the military, have never had any information given to them, because they accepted that their loved ones were lost in a war situation. There is a real risk of that, yes.

**Q554 Sir Robert Goodwill:** I would like to ask a little about the scope of the Bill as it has been drafted and how that scope maybe compares to Operation Kenova, which has been very widely applauded for the way it has been handled and delivered. Indeed, the impression I get from your answers already, Mr Boutcher, is that maybe not all the lessons have been learned. The definition in the Bill talks about other harmful conduct or Troubles-related offences. Is that a complete catch-all? Does that have a wider scope than what Operation Kenova has looked at? Could we find that almost anything that happened during the Troubles will come under that definition?

**Jon Boutcher:** This is an area where precision is needed with regard to the Bill. I heard some of the debate about where serious sexual offences such as rape would sit with regard to this Bill. The Secretary of State and Minister answered the question in the House by saying that those offences would be investigated, if rapes had occurred, because of the coercive behaviour of, particularly, the paramilitaries.

The Bill needs to be precise around those issues. Operation Kenova is a criminal investigation. We have come across cases in which individuals we have been looking at have been accused of rape with regard to the power and control they have had due to their status within terrorist organisations. Those issues have to be investigated. I do not need to explain to this Committee the impact that they caused for those victims.

Although the Secretary of State and the Minister were very clear in Parliament about the position of rape, which was helpful, if it is not set out in the Bill, it will leave confusion for everybody when the Bill is introduced. The answers are extremely helpful with regard to that particular issue, but the Bill needs to be precise on those matters.



**Q555 Sir Robert Goodwill:** Yes, I understand. The definition of other harmful conduct is “any conduct forming part of the Troubles which caused a person to suffer physical or mental harm of any kind (excluding death)”. Serious physical or mental harm is defined using a list of eight conditions. We can absolutely understand that a rape, murder, assault or serious offence would be recognised as an offence, but this seems to take it further to people who were mentally affected by what had gone on. Does this take the scope further than we need to take it? Will the people who come forward be self-limiting in what they consider as coming within the scope?

**Jon Butcher:** That is a really hard question to answer. The definition that is in the explanatory notes is very broad around harmful conduct. I was interested that the “seriously injured” aspect was added to the Bill. That was the NIO listening particularly to SEFF, which had lobbied for that quite hard.

There is a reality here. These victims have been through an unimaginable hell not only at the time but since in trying to get answers to questions. We need to provide a mechanism that gives them the answers, but we also need to make sure that there are parameters and—this is probably the trade-off the Government are looking for—the framework is such that it can be done within a certain amount of time. Everybody has to give a little bit on this.

Outside of those very serious offences that I have talked about, which are standalone criminal offences in themselves, we need to be cautious, because of the time this could take and the encroachment that could occur. That does not deny at all the suffering that people have had, which often is unseen.

**Sir Robert Goodwill:** Mr Hamilton, do you have anything to add to that comprehensive reply?

**Mark Hamilton:** We had no appreciation that sexual offences and so forth would form any part of Troubles-related offences. That is not how we would have viewed the world. Jon is quite right: the precision of the Bill around issues such as rape, child abuse offences and so forth needs to be clear.

**Q556 Sir Robert Goodwill:** As I read it, if ‘my sister who has subsequently died had been raped and I have mental issues following from that’, that would come within scope.

**Mark Hamilton:** That is where there needs to be precision as to what is in scope and around the immunity issue. We need to be very clear about what is in scope for the conditional immunity. Our understanding, as a law enforcement agency, is that we never would have considered, in a Troubles-related context, that that was Troubles-related behaviour, whatever that might be.



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On a very practical note, if I may, we considered the issue of non-homicide offences a number of years ago in Police Service of Northern Ireland. We took a position that we would not proactively investigate non-homicide offences other than where there was obvious evidence or where there was a breach of article 3 of the European Convention on Human Rights. That was partly to do with the volume of offences. At a rough estimate, 44,000 people reported physical injuries during the Troubles. That in no way includes those who have and continue to have serious mental injuries and mental trauma, people who suffer from physical and mental trauma, and people who suffer from grief.

It is really difficult to quantify our understanding of the injury and loss we are talking about. On a very practical basis, over a number of years we have consolidated all our homicide material. We have a large homicide store, which, under any circumstances, for anybody, we would want to give direct access to. I am happy to talk about some of our concerns as to how information is accessed.

Very practically, the information about matters that are not homicide-related is going to be very difficult to find for people. We do not have a compendium or a library of all the evidence or reports readily at hand for matters that are non-homicide-related. We would need to have a very extensive process of trying to find all those records. Over the years, there will have been records for compensation claims. Some matters will be related to homicide offences and therefore will be easier to find, but it will be a difficult and large task to recover the information around matters that are not connected to a homicide. To this point, the Police Service of Northern Ireland has not engaged proactively in investigations beyond homicide, other than where article 3 is clearly engaged.

**Q557 Sir Robert Goodwill:** When Jon gave evidence previously, I recall that he talked about there being nine tonnes of paperwork that could be sifted through just for the serious offences. Is that the right figure?

**Mark Hamilton:** For documents alone, we have millions and millions and millions of documents. A lot of that is in retrievable format, although the formats are old and degenerating. We have done a huge amount of information recovery for the homicide offences, for civil litigation and for the coronial process. We are well ahead, but, if you expand it into the broader notion of all Troubles-related conduct, that is a huge undertaking.

You said nine tonnes, Jon. I am not sure how much information we weigh. We give the stuff to you. We had lorryloads of material transferred from Belfast to Jon's team just relating to, at that point, the Stakeknife investigation. There is no lack of material.

**Q558 Bob Stewart:** Good morning, gentlemen. Thanks so much for joining us. Mr Boutcher, are the Government's information recovery proposals under the ICIR comparable to Operation Kenova, which you run?



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**Jon Butcher:** The devil will be in the detail. Currently, no, they are not. They do not represent what we do on Kenova. That is why there is a requirement to define this minimal standard. That would give confidence to the various groups that are currently critical of the Bill. Currently, no.

Q559 **Bob Stewart:** When you spoke to us before in 2020, you described how there was a “systematic failure to disclose information to investigators” that hampered legacy investigations—I think I quote exactly—and “remains an ongoing challenge for Operation Kenova”. Are you now content, sir, with the powers of the ICRIR commissioners in requiring individuals or organisations to disclose information relevant to the review?

**Jon Butcher:** Just to reassure you and the panel, I am confident that the material I asked for from the MoD, the security services and the PSNI has been provided. Originally, when we started Kenova, it was not provided in the way I would have expected if I were conducting an investigation into international terrorism, into al-Qaeda or Islamic State. You have to remember that we were on one of the sides of this. The reason for that failure of provision in the past was simply to protect informers’ details and to protect methodology. We applied “neither confirm nor deny” too readily.

We have got past that. We have memoranda of understanding with the security services. I have extremely good relationships with all the heads of those organisations and we have access directly to the material. We go into those premises ourselves to search their archives. We have direct access.

In the draft Bill, it states that there is a duty to give the ICRIR full disclosure. I would have stopped there, but the Bill goes on to say “of all relevant material that is reasonably required for it to fulfil its functions”. That sort of language concerns families. It should not, but, because there is a history here of families not getting information and having to have a tug of war through various civil cases, the reality is that there is a lack of trust.

We just need some clarity and reassurance that there will be unfettered disclosure and access to information to the ICRIR and that consequences will exist, if that does not occur. I am confident. I know some families are still suspicious that I am being hoodwinked. We are good at what we do. I have worked in this environment for 35 years. We have full access. It has not occurred in the past; I accept that. That should not have been the case, but there were reasons for it that I also understand. I try to see things from everybody’s perspective. We need to be tighter with our language to reassure families and interested parties about the disclosure issue.

**Mark Hamilton:** If I may, this is an important point for the chief constable as well. We are the body that probably has the biggest repository of information. We would be very clear, and were clear in our



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Stormont House agreement consultation, that our preferred position is, as Jon describes, that there is direct access for investigators and not a drip-feed disclosure process where, as an agency, we have to try to understand the relevance.

In any criminal investigation, my expectation is that I will go somewhere and take the evidence that I need. We would be very supportive of a disclosure process that effectively facilitates direct access to everything that we have and, other than helping them understand what is sensitive information, takes us out of the consideration of whether something is relevant. That is effectively what Jon is talking about. The chief constable would be very supportive of that position.

When the investigators come and take over, we hand over the keys to the murder archive and let people take the material they need, and similarly for the intelligence products. That would be the ideal position for us.

**Q560 Bob Stewart:** Mr Boutcher, are there any constraints on you? If you are given information that is highly classified, for instance, do you have any flexibility in passing it on? Are you required to pass it on? In other words, it will be an inducement for you not to be given information if you have to pass it on. Can I just ask for your comment on that? I could see that being a problem, as I am quite sure you would.

**Jon Boutcher:** Yes, I understand the question. With the Troubles, some of the information attracts the highest security classification in the UK. All of my team are vetted to the highest level to look at information. Our premises and the security of how the information is held, whether electronically or in physical form, are accredited to the highest standard, which is agreed by MI5. There is no reason why we cannot have that material.

Some of what happened during the Troubles was incredibly sensitive and difficult, and that remains the case today. There have been occasions—I invite this; I welcome this position—where MI5 has said that I or one of my direct deputies could see information, but they would rather the investigative team did not see it. I have accepted that, because then it is still me making the decision on the relevance of that material.

There is a reality. I am responsible for making sure I do not give any information out that would put anybody's life at risk, identify an informant or in any way compromise our tactics to deal with organised crime and terrorism today. I am alive to that, because I used to be the national policing lead for all of those issues. The security agencies are now confident that the information is safe with Kenova.

To answer your question, there is nothing that exists that I should not be made aware of. The security agencies have been very forward leaning in the last couple of years with that position.



Q561 **Bob Stewart:** I get that. I am sorry to keep on the point. Does that mean you filter the information? You might not necessarily pass it on, but you use it for your investigation although you cannot be open about it.

**Jon Boutcher:** I might not be able to speak publicly about it. I might have to gist it. We call it gist-ing it, where we do not identify where that information might have come from. For the practicalities of this, that information will often highlight for me where there are investigative opportunities for me to go and explore and to recover evidence that, had I not had access to it, I would never have been alive to.

It is the same model that we would use in an investigation in London; I have to be alive to the same safeguards. There should be no difference between doing something that is Troubles-related and doing something that is international terrorism-related. That is effectively how we have applied Kenova.

**Mark Hamilton:** Jon operates under the same principles as the Police Service of Northern Ireland in terms of public disclosure of sensitive information. As a public body, we have to align ourselves with our duties under article 2 of the European convention.

Jon has indicated that perhaps in the past there has been too much reticence. During the journey through Kenova and through the inquests we have had to be challenged on that, which is fair. Ultimately, there is still sensitive information that could affect people's lives. It would be a breach of law for a body like ours, Jon's or anybody to deliberately put information into the public arena that would harm someone's life. Everybody I know who is working in this field at the minute is highly sensitised to that. It does not mean that information cannot always come out, but certainly the source of information, names and attribution, will often be held back.

As Jon has described, in any investigation intelligence documents are used as a direction to try to find evidence. The intelligence itself is not necessarily always brought out into the open part of an investigation. However, Jon also talked at the start about disclosure rules. It is a legal duty upon us and upon Jon that, in any criminal investigation, everything we have seen is discoverable to the prosecutors and the judge. There are legal processes to protect that information, if it is sensitive. Our expectation going forward would be that all the current checks and balances are there and, equally, that all of it can be overseen and checked by a judge, if it is going into a public court.

Q562 **Mr Campbell:** Mr Boutcher, I just want an overall sense of your view of where the Bill is at the moment. I know you said a few minutes ago that the devil is in the detail, as is so often the case with these issues, but this time last year you said that the prospect of potential justice for some families could be taken away by a Bill like this. Is that your position now, having read the content of the Bill insofar as you understand it at the moment?



**Jon Butcher:** A lot of the Bill is down to interpretation and the devil is in the detail. I will say this. I drafted codes of practice for the Terrorism Act. It is very difficult to get this right first time. Until the tyres hit the road, you often do not know how things are going to work. There is a lot of responsibility on the chief commissioner and the commissioner for investigations.

As the Bill is currently drafted, I would have concerns about the access to information and about the rigor with which these reviews can occur. Kenova-style criminal investigations have highlighted evidence that now sits with the Public Prosecution Service. I have a concern that that would not be the case with the Bill as it is currently drafted. That is the concern of families. That might be down to our interpretation of the Bill. Working with the NIO, maybe those creases can be ironed out.

I want to talk about those cases, because this is an important point. Forgive me; I will make it very briefly. We provided the Public Prosecution Service with 33 files. It has come back on one effective submission, which was about an offence of perjury against the alleged agent Stakeknife, which I will talk about in detail in my public report, which will be released before the end of this year.

The other cases still sit with the PPS. It has been overwhelmed with the volume of material we have given it. It has priorities to deal with threats to society today, contemporary issues such as sexual offences, violent crime and paramilitary activity. What is not in the Bill, and needs to be, is clarity around the criminal justice process and the efficiency and effectiveness of the timing of that.

The Director of Public Prosecutions would not disagree with me that it is not acceptable that decisions take so long. The criminal justice process in Northern Ireland is so much slower than in England, Wales and Scotland. Legacy is slowest of all. The Bill is silent on that. That is achieved through disclosure timescales and elements that make sure that a prosecution happens not in five or seven years but in two or three years, or even less. That is a missing element to the Bill.

To answer your question, I would be concerned that the Kenova-style approach would not be applied with the current Bill. Through some amendments, it could be and should be.

Q563 **Mr Campbell:** I just want to ask one final question to both of you. I suppose this is a more general question. A couple of weeks ago, I was concerned by a Police Ombudsman's report into events of some 30-odd years ago. This was just a specific concern that I had about a more general issue. When we are looking at any legacy issues, which the Bill seeks to address, there is very often a complete loss of context. The context of the time that the events being looked at occurred is completely lost or overlooked. It is referred to that there was a shooting or a murder, but then there is a total concentration on what should have happened, might have happened or could have happened. There is no



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context to explain what happened at the time and the lead-up to the event.

Is that a concern that you would have going forward? The Bill seeks to address that with a sledgehammer, in that it just draws a line under everything.

**Jon Butcher:** As I am sure you will know, Mr Campbell, we are very conscious of the threats the security forces faced during the Troubles. In fact, as you and your Committee will be aware, during the Troubles the RUC was the most dangerous policing organisation in the world to be a part of. It lost more police officers than any other police force in the world. That is not lost on me and I reflect on that in my report very clearly.

This Committee heard some evidence from the Northern Ireland Retired Police Officers Association. Kenova has an exceptionally good relationship with them, with the veterans' groups and with all victims' groups. The police officers' families did get some information—an example was given by Mr Albiston specifically—about what happened to their loved ones, but the Kenova experience is not the same. I am delighted that Mr Albiston was able to do that, but many police families really had to accept what happened. They were not given information.

I am regularly reminded by families of those in the security forces that a lot of the platforming and shouting comes from victims and the security forces are forgotten. When they went to work on a given day, they did not know whether it was their turn or whether they might not return home. All of that is very front and centre with regard to our approach.

I will say this. The police and the security forces are held to a higher standard. We accept that when we sign up. Where anybody in the police service or the security forces more broadly committed any acts, wilfully and deliberately, that led to the deaths of people, where any member of the security forces donned a balaclava, took a gun in their hand, went out and committed any criminal offences, we should go after them with more vigour than anybody else. We will and we do, but that was incredibly rare. There are some examples of that in the work I am doing on the Glenanne gang, but overwhelmingly we found that the security forces did their best to protect society in unimaginably difficult circumstances. That context is not forgotten.

**Mark Hamilton:** I would fully endorse everything that Jon has just said. My own connection to policing in Northern Ireland goes back many, many, many years. I am acutely aware of the pain that many members of the security forces and their families suffered and continue to suffer.

The contextual issue is very important. It is very important for people who worked in the Troubles to know that the context they worked in is understood and recognised. That is part of the whole process of recognising and respecting the full story, recognising and respecting



everyone's suffering. That area of context is an area of trust and confidence for people. Anything that is going to work here in Northern Ireland has to enjoy the trust and confidence of victims, their families and other associated people.

In my experience of the critique of the Police Service over the last number of years and right up to the present day, there is a difference between how we as the police see the context and how individual members of the public and their families who interacted with the police see things. It is important to note that, just because I see it one way, that does not mean others see it exactly the same way, if only for the fact that they do not have the experience and understanding of how our organisation works, in the way I might.

Throughout the Troubles, there was a whole range of experiences, across everybody, between the communities, between the services, and in how people understood things were operating. For some, that knowledge of what should or could have happened has been important, for others less so. I would agree that understanding the context is helpful for everybody in getting a sense of everyone's role, everyone's feelings and everyone's position on what went on.

In looking at the proposed Bill, I note that the conduct and the format of reviews is for the commissioner to decide. Whether or not there needs to be more active precision in the Bill to describe what that means is probably a matter for the legislature to discuss. If this Bill is successful, we will wait to see the exact nature of the reports that are issued and whether they will address the issues that you have raised.

**Mr Campbell:** The only reason I raise that is that anyone in Northern Ireland under 40 years of age will have no personal contact or understanding of some of the events that are being reported on when we are talking about legacy issues. Almost all of these are either 1970s or mid-1980s-related events. That is why I raise the issue. I do have a piece in one of the morning papers this morning about this very issue. Context is often overlooked and often not taken account of.

Q564 **Stephen Farry:** Good morning to our witnesses. I want to follow up on the article 2 issue. The Chair and others have already teased out some of the issues around the comparison between the powers of Kenova and those of the proposed new body. I will ask this to Mr Boutcher in particular. Could you also comment in relation to the article 2 considerations around the operational independence of the new body compared to what you currently have in Kenova? How important is that independence to the article 2 compliance piece overall?

**Jon Boutcher:** When we began working on Kenova, article 2 really was front and centre. Many families I went to meet had heard, I dare say, English accents before. They had been told there was going to be an investigation previously and, for one reason or another, nothing had actually happened to their satisfaction.



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Applying the requirements of article 2 and that independence, as a then serving chief constable in England, was really important. I set up a number of independent groups. The independent steering group contains six people who have conducted investigations across the world, and who understand the complexities of political issues and victim issues. That includes Nuala O'Loan, who was the first Police Ombudsman, who had a really good understanding of the specific and unique challenges in Northern Ireland in legacy investigations.

We set up an independent victims' group to monitor how we dealt with victims. The victim focus group has done a review on Kenova, which I very much recommend to the NIO, around the need for this Bill to be more victim-focused. Of course, we have an independent governance board as well.

Those issues are not window dressing. They are there to make sure that what we are doing is properly overseen. We are not marking our own homework. Any independent reviews that we have commissioned go to those bodies. Those bodies then question the people who conducted those reviews. You can only do so much, but we have tried to do everything possible to make sure that the independence is writ large and front and centre.

From a governance perspective—this is a difficult dilemma for the Secretary of State; I recognise that—the Bill is entirely owned by the Secretary of State, which is normal in legislative arrangements such as this. With regard to the Troubles, some people will see the Secretary of State as potentially being on one side, regardless of individuals, simply because he—it is currently “he”—is part of the architecture of Government.

We need to work hard to come up with ways—it could be through your Committee; I do not know—of providing additional levels of independence and oversight of the appointments of commissioners, in order to at least demonstrate to interested parties and families a more open approach to ensure there is independence and oversight. That is without criticism of the Secretary of State. There are opportunities to come up with some new thinking for the Bill in order to provide some reassurances there. That is key. There is a lack of trust currently.

**Q565 Stephen Farry:** Apologies if this is quite a pointed question, but, as things currently stand in terms of how the ICRIR is proposed, in the current context, Jon, could you serve on it?

**Jon Butcher:** I have been asked this by a number of families. These are not Kenova families, but families who would benefit from this Bill, because they currently do not have any avenue to get information and to get to the truth. I would want the Bill to be acceptable to the victims' groups and the interested parties. The Bill does need to have some amendments, which the NIO assures me it is keen to talk to me and others about.



The Bill could be suitably amended, which I think is the approach. Because of the cycle of our democracy, I do not think another opportunity like this will come along. It will be 25 years after the Good Friday agreement that this new unit is created. That is unacceptable. We should not be waiting another five or six years for another chance to come along. All efforts should be made by everybody to work to amend this Bill to something that can receive broad consensus. Then yes, but currently I am focused on finishing what I have to do on Kenova.

Q566 **Stephen Farry:** In relation to what you are currently doing, Jon, on Kenova, my understanding of article 2 is that the investigation has to be something that is capable of leading to a prosecution without necessarily doing so.

**Jon Butcher:** Yes.

**Stephen Farry:** Notwithstanding that point, with Mr Campbell you just alluded to the files you have passed to the PPS. Could you just confirm to us the number that you have managed to successfully provide to the PPS, just to give an indication of the scale of the work you have undertaken?

**Jon Butcher:** There are 33 files currently with the prosecutor. I have a very good relationship with Stephen Herron, the Director of Public Prosecutions. One of the questions previously asked by this Committee was whether the current processes could work. If investment was sufficiently there in the current processes, with the work that we and others have done to change the mindset around the culture of disclosure, with a more forward-leaning approach to victims and information recovery, the current processes could work, but there need to be some parameters around the lawfare that occurs in Northern Ireland.

Often people go through civil processes simply because they cannot get any change out of the criminal justice system; they cannot get a criminal investigation into what happened and have not had one at all in their particular case. This can work, but, as I say, certain amendments need to be made to the Bill. I would encourage people to work collectively to do that.

Q567 **Chair:** Mr Butcher, on the subject of amendments, I am due to be drafting and tabling several amendments to the Bill later today. If you have any thoughts on what they might or might not include, please feel free to drop me an email and I will take a look. I agree with you. Certainly, my conversation with Ministers is that they are not seeing this Bill as carved into tablets of stone. It is an organic set of proposals.

I just want to ask Mr Hamilton a question. Mr Hamilton, working on the basis that the Bill is as it is, setting aside potential amendments at the moment, do you have any concerns that the approach the Government are adopting runs the risk of jeopardising the reputation and rapport across the communities that the PSNI has?



**Mark Hamilton:** That is a very good question, Chair. I have concerns at the minute that the relationship between the Police Service of Northern Ireland and the communities on the legacy issue is already very sensitive and quite often quite fractured. It has been relayed to me that it remains an obstacle to community trust and confidence. Our experience as a police service in this arena is that it has become hugely complex and hugely litigious for us. We struggle to win the trust, confidence and satisfaction of communities.

As I said at the start, there are bits that have worked well for us. Some of the elements of the HET were well received by the communities. That has to be said. Others were heavily criticised. We have managed to bring some cases before the courts. Again, a lot of issues were raised around those cases.

The external investigations started in the 2000s. The genesis of Jon's investigation was the Rosemary Nelson investigation. That is where we took the idea of bringing in an external chief constable from. While we are still, and have been found to be, legally independent, what we have found works and what the courts have supported us in doing is to have practical independence brought in by people who are not currently investigators in Northern Ireland or part of our structures. That seems to be the critical aspect for most people. We want to be reassured that that independence will win people's trust and confidence. At the minute, we are fairly consistently challenged on our current approach.

Q568 **Chair:** Quite a lot of these proposals are going to rest in the confidence or otherwise in the commissioners. There is a lot of scope for the commissioners here, notwithstanding the roles and responsibilities of the Secretary of State. In the Second Reading debate, which I am guessing both of you gentlemen might have listened to or read a transcript of, notwithstanding the proposal of a High Court judge as a commissioner and probably chairing the commission, the Minister of State, on behalf of the Government, was not opposed to the idea of having somebody from an international body—it could be the UN—or with experience of conflict resolution internationally. They were alert and alive to the benefits that might bring. There is also the potential of having a designated commissioner seat reserved for a nominee from the Republic.

Would that be helpful in order to try to garner as much support, but most importantly faith and confidence, in the robustness of the commissioner proposal?

**Mark Hamilton:** I am just reflecting back, for example, on the Patten commission, which was an international body chaired by a UK lead. The work that followed behind it was overseen by international people to assist with confidence. The decommissioning process was overseen by Mr de Chastelain. In terms of trying to assert independence, which is a critical aspect of article 2, history has shown in Northern Ireland that the involvement of international people has so far been beneficial.



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Q569 **Chair:** Mr Hamilton, just before I turn that question to Mr Boutcher, what are your thoughts or observations on having a commissioner nominated by the Irish Government?

**Mark Hamilton:** I do not have a particular view.

Q570 **Chair:** Might it be helpful?

**Mark Hamilton:** The issue that will be raised is that the cross-territoriality of the Bill does not exist in that sense. There will be an issue that, while offences have been committed on both sides of the border over the Troubles, there may well be seen to be some sort of disparity there, which could probably be raised.

Q571 **Chair:** Just on that point, we have taken evidence and had discussions on the lack of progress from Dublin with regard to bringing forward their own proposals. I appreciate that Anglo-Irish relations are at a pretty low point at the moment, but is that a frustration or concern that you have, given the amount of people who moved from the north to the south of the border to run away?

**Mark Hamilton:** I will be careful what I say about Anglo-Irish relations, if I may.

**Chair:** This is just between you and me, Mr Hamilton.

**Mark Hamilton:** Yes, I am conscious it is just the two of us, Chair. I will be careful around that. I do not want to expose Jon too much here either, but the process of exchanging information around investigations is bound by different laws on different sides of the border and by different processes. It is not always very straightforward. Call it a frustration or a difficulty. Compliance with different regimes on different sides of the border remains something that has to be factored into these investigations.

Q572 **Chair:** From a pursuit of justice point of view, carved out solely within this area and not a widening of the jurisdiction, a commonality of approach and a uniform nature with regard to the regulations again would not be unhelpful in delivering meaningful solutions to families.

**Mark Hamilton:** Again, I want to be really careful that I am not trying to suggest things to the Irish Government, but the commonality of approach across jurisdictions is helpful.

**Chair:** Mr Hamilton, this is from a policing point of view.

**Mark Hamilton:** Yes. From a policing point of view, we have always said that being more aligned and co-operative must be to the benefit of the justice system, victims and families. I could not dispute that at all.

Q573 **Chair:** Thank you. I rather presupposed that that would have been your response and I am grateful for it. Mr Boutcher, do you have a thought or two with regard to the commissioners? Mr Farry has already tried to



tempt you to fill one of the seats; there are some vacancies left. What are your thoughts on the international appointment?

**Jon Butcher:** The drafters of the Bill, the NIO, have put in there the opportunity for international commissioners, which is a good thing. I am possibly freer to speak than Mark. There should be an equality of opportunity for victims north and south. Our Glenanne gang work involves 93 incidents, nine of which were in the south. The perpetrators came from the north, planned their attacks, potentially hijacked cars and went into the south to commit crimes. I have a good relationship with the commissioner of An Garda Síochána.

This goes to the point of review and investigation again. It is worth just quickly branching off to that. We currently have some challenges—which is why Mark mentioned it—in getting information from the south because the Glenanne gang work, Operation Denton, is a review. The international arrangement for mutual assistance, the international letter of request process, is based on mutual assistance for criminal investigations. The Irish Government and the Department of Justice are currently working hard to provide a statutory instrument and a secondary piece of legislation to allow them to share information with me that they hold about their inquiries into those nine incidents in the Republic.

That is just an example of why review and investigation need to be cleared up for this Bill. If we ultimately got to a position—and this discussion and Bill might just be part of that journey—where the Irish were also able to do something that coalesced an approach between the two for victims, that would be ideal for everybody. Nobody would be in disagreement with that.

Q574 **Chair:** The Government have described their Bill as delivering a victims-centred approach to investigations and legacy. Is it?

**Jon Butcher:** The Bill is missing elements that would make it victim-focused. The Government will talk—and this is all positive progress—about giving victims more information than they have had before. Because of the current lack of trust, that does not answer the exact question. They want to know what happened. They do not just want more information; they want the information. I am conscious of the safeguards we have discussed in this session about security of information provision. Exactly the same rules should be applied for families where offences occurred during the Troubles in Northern Ireland as for any offences that occurred in England, Wales or Scotland. It needs to be victim-focused. Some more work needs to be done on the amendments to make it so.

Even today, there is an opportunity. It is 21 June. You opened by saying it is the longest day of the year and the solstice. In fact, the work done by Lord Eames and Denis Bradley talked about having a day of reflection for victims when lessons could be learned from the past, to make sure that we never went there again and that we remembered those who were injured and killed. Potentially, communities could initially do that in their



own way, which could evolve to more of a joint process. Something referencing and mentioning such a day in the Bill would have been an act of good faith towards victims from the Troubles. More work needs to be done to make it victim-focused. It is not words; it is deeds that families want.

**Mark Hamilton:** It remains to be seen. It is hard to read a Bill, which is a legal process, and get a true sense of how things are going to happen. As I said earlier, the trust and confidence of victims in these processes is absolutely crucial, and that is something that we have lengthy experience of trying to manage. In a previous question, it was also commented that the weight of responsibility is going to be on the commissioners. Whether or not victims are actively at the heart of this process remains to be seen.

When we reflected across this meeting about the work of Operation Kenova, I tried to draw the distinction between what and how, in the sense that what we have asked Kenova to do is very clear. It is to discharge the chief constable's functions on his behalf under a number of statutory instruments, but how it has been conducted has been the defining factor for it.

If this Bill becomes law, how this is enabled, the guidance put out around it and the approach taken by the commissioners will prove whether victims are at the heart of it. Only victims will then be able to give that final judgment.

Q575 **Bob Stewart:** I have two relatively quick questions about reviews. First, the Northern Ireland Human Rights Commission has suggested that there will be fewer reviews under the new proposals. Secondly, is its five-year timetable for requests for reviews fair?

**Mark Hamilton:** Certainly, on my reading of it, there would be fewer reviews. When Hugh Orde started our work in the mid-2000s, it was to examine all fatal incidents that had occurred during the Troubles with HET doing review and then handing over to the PSNI for investigation. When we changed the model, we went to a slower, more article 2-compliant review process. The case sequencing model has every case in it. It is being adjusted at the minute following the McQuillan Supreme Court judgment, but there is an expectation that there is a possibility that every homicide could be reviewed. This Bill requires people to ask for reviews, and there are a number of avenues to do that, but it certainly does not guarantee that every one would be reviewed.

Is the five-year timescale fair? I suppose it is practical in terms of saying there is a window here for trying to achieve this while there is still a possibility of family members and protagonists being alive. As Jon said, we are 25 years past the Good Friday agreement and 28 years past the first ceasefire. Giving everyone some impetus to drive this forward, provided it is resourced properly and has the capacity to deliver within that five-year period, is neither fair nor unfair; it just focuses minds.



Again, from our experience, if we are going to do this, you need to put the horsepower behind it. You need to put the money and people into it. The structures need to be supported quickly and it will need a lot of effort if there are a sizeable number of requests for review. As it is currently proposed, it certainly does not say that it is going to do every case, so that would imply that there will be fewer reviews.

**Jon Butcher:** I agree. There will be fewer reviews and, as Mark described there, it will depend on what the final Bill and the commission look like. When we started this, nobody really knew what Kenova was. It was just a word. You have to prove yourself. It is not tea, sympathy and lots of nice conversations that have given us credibility with people; it has been giving the information. Most of the families we deal with have been told what we have found. They have seen those files being submitted and understand the evidence that has been presented that we have recovered.

Five years is doable. It will be a challenge, but it is doable. You have to set a timeframe—this has gone on for so long—for society to move forward, but it cannot move forward unless we get this right and families feel that they have access to whatever information is there. For some families, there will not be information. For some families we have met, very little is now known, particularly for the earlier period of the Troubles. As long as they have been listened to, have been acknowledged and have the confidence that everything that could be done has been, they will be in a good place. It is quite cathartic for them to realise that there are no hidden secrets and they know everything there is to know.

Five years is doable, but there is wriggle room for another two. As I mentioned earlier, you could do this in five years, but prosecutions might take another seven, although they might be quite rare. There is just an element of tidying up the criminal justice part of this, although prosecutions would be challenging. My final word on that is that I am confident we have presented evidence to the public prosecutor that gives it something to think about regarding prosecutions because of the information we have recovered, both forensically and in witness testimony.

**Chair:** Mr Butcher, we have five minutes before you have to leave us. This may very well be our last question. We have a few outstanding, which we may need to send to you for a written answer if that is okay, but we might have covered some of the stuff. I am going to turn to Gregory Campbell.

Q576 **Mr Campbell:** This is just a quick one on the issue of the Independent Commission for Reconciliation and Information Recovery, and the bar for anyone coming forward to be eligible for immunity. Given both of your wide experience in different scenarios of people who have been involved in criminal activity and terrorism, what do you think of that issue of setting the bar at a certain level in order to gain immunity?



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**Jon Butcher:** For speed, I will quickly go first if I can, Mr Campbell. It is incredibly low. Lots of comments have been made about it being perpetrator friendly. I am concerned. That is one of the elements I have raised to my oversight groups and shared with the NIO. I will share the same document with you for the Chair and the Committee.

All a person has to do is give their account. That has to describe their conduct in a Troubles-related event and has to be true to the best of their knowledge. I can give you lots of examples from Kenova of speaking to people who had given false accounts to families, sometimes through third parties, for all sorts of reasons. Some of them had been to help the families understand what had happened. Those accounts were wrong. You have to be robust in investigating any sort of immunity application. Families feel it is far too perpetrator-focused, and the bar is certainly lower than I have known in any criminal justice context. I may comment on the document I will share with you.

**Mark Hamilton:** You asked about our experience of people involved in these offences. We usually get no comment when we are talking to them. In the history of the Troubles, there has been limited appetite for people involved in terrorist offences to disclose them under any circumstances.

My exposure or experience of immunity issues for police services is fairly negligible other than our understanding of the issues that were raised around the decommissioning of weapons. When I read the Bill and looked at the criteria of "best of your knowledge and belief", it said to me that there was going to be a very onerous responsibility upon the senior judges and so forth to calibrate that. I would have thought that, beneath that, they would develop guidance as to how they tested that knowledge and belief.

I am also unsighted as to where this sits legally because I am not a lawyer, but I would have thought there was a huge weight on the senior judges to decide that, with processes to corroborate whether what they have said to be to the best of their knowledge or belief is truthful.

Again, it is probably a bit of a journey for people to go with that to try to understand the absolute detail around it. If the Bill goes as currently envisaged, there will be a huge responsibility on the judges to try to sift that.

**Mr Campbell:** Terrorists tell lies, Mr Chairman. Who would have thought it? Thank you.

**Chair:** I am glad we were all sitting down when we learned of that. Yes, indeed. Because of Mr Butcher's further commitments, I am going to draw this panel session to a close. Gentlemen, can I thank you very much indeed for your attendance this morning and for taking our questions? There were a few that we may need to drop you a line on. Please feel free to submit to us any further information you wish to. That offer remains with regard to thoughts for amendments to the Bill. Please let me know



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and I will certainly give them due consideration. Thank you very much indeed.