HOUSE OF COMMONS

Northern Ireland Affairs Committee

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

Wednesday 22 June 2022

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Watch the meeting

Members present: Simon Hoare (Chair); Stephen Farry; Sir Robert Goodwill; Claire Hanna; Fay Jones; Ian Paisley.

Questions 598 - 657

Witnesses

I: Barra McGrory, former Northern Ireland Director of Public Prosecutions; Sir Declan Morgan, former Northern Ireland Lord Chief Justice.

Examination of witnesses

Witnesses: Barra McGrory and Sir Declan Morgan.

Q598 **Chair:** Good afternoon, colleagues, and good afternoon to our two witnesses: Sir Declan Morgan, former Northern Ireland Lord Chief Justice—you are very welcome, Sir Declan; thank you for joining us in person—and Barra McGrory, the former NI Director of Public Prosecutions, who is joining us virtually. Good afternoon to you, Mr McGrory. Again, we are grateful for your time. Thank you for joining us today, as we continue to explore the Government's proposals with regards to legacy.

Sir Declan, let me start by asking you this question. The Secretary of State has described the current system for dealing with legacy cases as broken. Ministers have cited the length of time, the absence of resource and people being very unsatisfied or dissatisfied with what comes out at the end of the process. Is that your view of the current system? Are you persuaded by the changes the Government are proposing?

Sir Declan Morgan: First of all, I agree with the proposition that the current system is defective and unfair. It has developed in a piecemeal fashion. We had the HET, which was put in place around 2006. It was a bit confused as to whether it was a review body or an investigatory body.

The other things that then happened were, in many ways, the product of litigation. We had the Legacy Investigation Branch, which took over from the HET eventually. The Coroners' Courts had long been trying to deal with legacy matters. In November 2015, Mr Farry's colleague, who was then Justice Minister, Mr Ford, decided that this was a problem that he no longer wanted to deal with, so he asked or decided that I should become president of the Coroners' Courts. I indicated to him that I did not think that was going to be very fair if I did not have the resources to do what was required.

There has been extensive civil litigation and judicial review litigation. In my engagement with the community, I first indicated publicly my view that the position was unfair when I spoke to the Victims and Survivors Forum in 2015, to which I had been invited by Judith Thompson, who I thought was a wonderful advocate for victims in Northern Ireland. I then talked to the inquest families in 2016. That was after extensive consultation with the UN rapporteur, the Council of Europe, the First and Deputy First Ministers and other parties in Northern Ireland.

My concern at that stage was to ensure that, if we proceeded with something in relation to inquests, we did not discover three or four years later that the European Court of Human Rights was going to find that it was incompatible with the convention. That remains for me an issue. Whatever we do here, we must not end up with that. The worst possible outcome is that the Supreme Court upholds this and the European Court of Human Rights finds that it is incompatible, because that will merely

entrench the difficulties that this has caused for the political system in Northern Ireland.

The problem in a nutshell, in a sense, is that there is a developed jurisprudence in relation to deaths involving state actors under article 2 of the convention, but there has been a total failure to put anything similar in place for those who cannot avail of those article 2 rights, and yet it is the position that the inquests have demonstrated various failures in relation to the investigations that were carried out, as is shown by the fact that, of the 56 inquests, 40 were referred to the coroners by the Attorney General or the Advocate General.

In terms of the reason for those failures, it is very easy to be critical of the investigators, but they were in a very difficult position at the time. Therefore, I see no advantage or purpose in trying, as it were, to attribute blame or fault in relation to that.

Q599 **Chair:** You think contextualisation is important with regards to this matter.

Sir Declan Morgan: Yes, absolutely. It is important, because it seems to me that trust and confidence has been lost as a result of the disparity between the opportunities of those whose relatives have been killed or those who have been injured as a result of state activity and those many hundreds or thousands of people who have lost their lives as a result of terrorist activity, who seem not to have had, either from this Government or the local parties, any proposal put forward that addresses their needs.

If I can move on a little, as Chief Justice one of the things I did from time to time was ask the political parties in Northern Ireland to come in and have a chat in my bailiwick. There were no cameras, and I thought you were therefore more likely to be able to get a conversation going. In 2019, before the pandemic, viewing this problem as not really moving on and wanting to try to do something before my successor was going to be handed it on a plate, I said to the parties that I was minded to try to rejuvenate the Stormont House agreement in my speech at the beginning of term in 2019, with an add-on of some form of forum in which victims would have an opportunity to tell their story and have their voices heard.

I indicated that I would not do that if any of the parties indicated that it would be unhelpful in the political process. I got a letter in August from one of the parties to say that they thought it would be unhelpful, so I was not in a position to do that. From my point of view, that was a disappointment, but I thought it would be inappropriate for me to do it.

Having identified what I see as the unfairness, it seems to me that we have an opportunity here—it is the first opportunity we have had—to do something for all of the victims. I would be horrified to think that we could lose the chance to do this. Unlike some of those who have come before you, my position is that, if there are problems with this Bill, we should seek to rescue to them. I do not adhere to the view that this is

something that is beyond the will or the capability of the Houses of Parliament.

Q600 **Chair:** In broad terms, you are broadly content with the overarching thrust of the Bill, if I can put it in those terms.

Sir Declan Morgan: I have not said that. I have to indicate at an early stage that, although I am a retired judge, I am still a judge. Therefore, I do not intend to express any view as to, for instance, whether or not the Bill is compatible or incompatible with the convention. There are issues in the Bill that, it seems to me, present challenges. It might be helpful for me to indicate what those challenges are, as I see them.

The first challenge is the issue in relation to the ending of inquests. The position in inquests is this. As you may know, I put forward a five-year plan in relation to inquests, which had a very stormy history before eventually getting funding. Year zero was the year beginning April 2020. I will come back to this, but you need a year zero because it takes time to set anything like this up. Year one was April 2021. We are now at the beginning of year two.

Of the 56 inquests that comprise the legacy inquests, 20 have been heard so far. Of those, three are still waiting for decisions. There are three that are at hearing. That leaves 36. Of those 36, five are listed for hearing in the course of year two, which brings you down to 31. A further 10 are already identified as year three cases, which will get hearing dates, other things being equal, between the end of 2022 and 2023. That would leave standing, as it were, 21 inquests. Some of those inquests relate to multiple people. For instance, the Stalker/Sampson inquest relates to four people. That would leave 18 cases to be dealt with.

The reason I say year zero is that, even if the commission were set up in May 2023, it is not going to do anything until 2024, until it gets going. The question from a human rights perspective is going to be, "How do you justify preventing those 18 cases being heard? What is the interest that justifies or compels that outcome?"

In doing that, before the European Court anyway, the Government will have to recognise the commitments that they have made to the implementation of the McKerr judgments, which are still ongoing before the Council of Europe. They will have to deal with the fact that putting those cases into this commission is almost certainly going to take a longer time than it will to deal with the inquest.

That is my first question; there will be a challenge there. I have two other points, if you do not mind. If I get them out now, you can take me apart later.

Chair: We are not a "take you apart" Committee.

Sir Declan Morgan: I do not know. From what I can see you do a fair enough job.

Ian Paisley: We take each other apart.

Chair: We can bank that as a compliment, colleagues.

Sir Declan Morgan: The other thing, Chair, is that you have to speak for yourself. I am looking around the table, and I suspect there are people who are well able, if they put their minds to it, to make life—

Chair: I am the mere milk of human kindness made manifest, so do not worry about that.

Sir Declan Morgan: I am not going to comment on that either. If I may go on to the question of civil cases, I have tried to find out where we are with those. Around 2019 I decided that I should look at where everything stood in relation to civil cases. At that stage, civil cases were part of the ordinary action list. I changed that. I appointed a legacy judge. The legacy judge has control over civil cases, inquests and any judicial review applications concerning legacy. They are all coming in together, as it were. I asked that judge to start proactively finding out what was going on.

There were about 400 civil cases that were identified, but a lot of them had stayed silent for a very long time; neither side had put their heads above the water. We then wrote out in March 2021 to all of those in those cases, and we got about 200 cases, which tends to suggest that the other 200 cases are either resolved or things had moved on or there may not be a great deal left there. We then set about getting those cases ready for hearing.

I am told that 30 of those cases were dealt with this term. There are a further 60 cases that involve the provision of weapons to loyalists, in which there are allegations of collusion. The closed material proceedings in relation to the intelligence in those are now complete, and those cases are in a position to press on as well. It looks to me as though, by the time we come to the passage of this Bill, we could well be looking at something that might comprise less than 100 active civil cases.

My point in relation to that is, as I will come back to, previous attempts to deal with this issue, in 2009 through Eames-Bradley and 2014 in the Stormont House agreement, both placed a five-year time limit on getting things done. I put a five-year time limit on the inquests. One has to ask oneself what the reason for that was. The reason was that you have to recognise that there are very differing views about looking at the past. Some people who are victims manage to cope by moving on in different ways, and they do not really want to reopen the issues of the past. Others have handed down the obligation to do something about injustice from generation to generation, and it is horrendous to see it. That applies whether you are a police victim, an Army victim or a civilian victim.

It seems to me that there should be a time limit in place in relation to these things to balance the rights of the various parties. If we manage to

get a solution to this legacy issue, we will remove a huge impediment in relation to the development of politics in Northern Ireland on a consensual basis. The prize here is so great that I am reluctant to accept the notion that we should depart from this Bill. If we depart from this Bill, it seems to me that the people we are talking about may well get nothing; nobody will come back to it. It has proved absolutely toxic. The local parties have been quite unable to come to any agreement in relation to it.

Stormont House has sat there since 2014. All that has happened politically is people have argued about it. They have not done anything about coming forward with a solution that suggests how we might go forward.

Again, with the civil cases, I have looked at this. If you are looking for ways out from this Bill, you might want to ask why we do not put a time limit of three to five years for the completion of the civil cases and make sure we put the resources there to make sure they happen. It is quite common in civil cases to have a limitation period, which can be as severe as you want it to be.

It seems to me that the Bill could properly say, "If you want to initiate a civil case, you have until whatever day the Bill is passed. If you do not have it going by then, you do not get it going". That would still be consonant with the rule of law. It would be a lot easier to defend than a position in which the Government are saying, "You are suing us. We are going to stop you doing that".

Q601 **Chair:** Would that strengthen the argument around article 2 compliance?

Sir Declan Morgan: Yes, it would. The article 2 issue is likely to involve looking at the whole package. You are looking at the package to see whether or not it does what it says on the tin, in other words whether it is promoting reconciliation and the development of harmony within Northern Ireland. There are ways of looking at this that potentially might do that.

On the other side of this, if you leave things the way they are and all of the parties in Northern Ireland are saying, "This does not work", there are going to be two difficulties. First, if there is a Sewel motion about this Bill, there may be great difficulty in passing it. Secondly, the European Court is going to look to say, "We allowed this sort of arrangement in Croatia because there was agreement by that community that it was the way forward". Spain did this after Franco. They moved on in that way. If the community does not accept that this is the way forward, it becomes much more difficult for the European Court to accept it. I see a challenge there, which will have to be addressed.

There is undoubtedly going to be a challenge in relation to the prosecution element. There is one particular point that I wanted to draw to your attention in that, if I might. It may be that Mr McGrory has looked

at this as well. Under section 19, which deals with immunity, it is very interesting to see how the section is crafted, in terms of the point at which you can apply for immunity. It is said that it is up to the point that a decision is made to prosecute.

Those familiar with the criminal justice system will know that, if there is a police investigation going on in relation to a case, a stage of that will be the interview of the suspect under caution, followed by either reporting the matter to the PPS or charge. Charging is not an indication of a decision to prosecute. It may be the start of the criminal proceedings, but it is not the decision to prosecute; that is taken by the PPS once they have reviewed all the papers.

The way that this works, if you look at it carefully, is that, if I am a terrorist offender who has not been caught in relation to anything and I am faced with these proposals, I might go to my legal advisers and say, "What should I do about this?" I would have thought there was a fair chance that many legal advisers will say, "You have not been called for interview. Nobody has come to question you. There is no reason in the wide world why you should do anything".

Even when you are called for interview, that is the stage at which again you can go to your legal adviser and say, "Is there any risk of me actually being prosecuted?" because they would have to show you some of their hand in terms of where they are with the case. The legal adviser will then say, "You have two options here. You can sit on your hands. They do not look as though they have very much"—

Q602 **Chair:** Or you can apply for immunity and see how it goes.

Sir Declan Morgan: Or you can go for immunity. If that is right, the only group who will go for immunity are those who have been the subject of investigations, brought in for questioning and it looks like there is a viable case. It seems to me like that is a vanishingly small number of people.

Again, the question then arises of why you would put immunity in place for such a small number of people in the circumstances. You must be able to justify that. That presents a challenge.

Q603 **Chair:** Declan, let us pause there. Let us bring in Mr McGrory. Thank you for that. You have set the scene very neatly and you have given us some food for thought. Mr McGrory, what is your response to the Secretary of State's description of the current system being broken? Could you just give us your assessment with regards to the Bill and its desirability, workability and the like?

Barra McGrory: Like Sir Declan, with whom I agree entirely in respect of his very comprehensive comments, I also believe that the system is broken and something needs to be done.

I come at this from a different perspective than Sir Declan. I come at it as someone who has spent a lifetime in the criminal justice system; it has been nigh on 40 years, I am sorry to have to say. For a large part, I was a criminal defence lawyer throughout the Troubles. I mainly defended republicans, but I also defended loyalists, unionist politicians and members of the police. I have a fairly broad experience of that role. As you know, I served for six years as the DPP in the Northern Ireland jurisdiction, so I have prosecutorial experience as well.

One of my problems with the existing system and indeed the proposed alternative is that criminal prosecutions at this stage are not going to work for all sorts of reasons, one of them being that there is such a considerable removal in time from many of the events, some of which are now 50 years old and the majority of which are at least 25 years old, that the chances of a successful criminal prosecution are now very slim.

In order to embark on a prosecutorial process, there needs to be a comprehensive investigation. The fruits of that investigation then need to be closely examined by the prosecuting authority. The prosecuting authority cannot bring a prosecution unless there is a reasonable prospect of success. All of the material has to be examined and analysed. The prosecuting authority has to identify material that can be relied upon and material that cannot be relied upon but is available for the application of the disclosure test. In any case, that is a significant undertaking and requires a very significant resource.

You have had Jon Boutcher with you recently. He raised the fact that he has no idea when the outcome of that prosecutorial assessment is going to come in respect of the considerable number of files he has submitted to the PPS. That gives you an indication of the complexity of the situation.

Q604 **Chair:** Can we just clarify? You are talking about resource.

Barra McGrory: Yes.

Q605 **Chair:** Is that the financial resourcing of it or just the person power to read, process, analyse and determine?

Barra McGrory: It is both. In order to get the person power, you need a very significant financial resource.

Q606 **Chair:** Let me put it another way. Are the people who would be able to do that important job of work if the money were available, or is it the case that as much money as possible could be thrown at it but it would take forever to clear the backlog because there is such a small number of people who can do the job?

Barra McGrory: I did wonder, when I was DPP, if the HIU ever came into being, the original Stormont House agreement investigatory body, where on earth I would get the personnel to perform the prosecutorial function. I began to ask myself, as a prosecutor, "Why would we do this?"

In 1998 we voted, in Northern Ireland, to release all the prisoners, to empty the prisons. The mechanism that was used to do that brought in a regime that prevented any prisoner convicted of such an offence of serving any more than two years. After all that I described, if there is a successful prosecution—do not forget that there is a very high standard of proof and burden of proof on the prosecuting authority—the end result is a maximum of two years in prison. The Bill, I believe, proposes to reduce that to nil.

I am left wondering why we are looking at prosecutions. This is before I come to immunity, and I do have something to say about that. We are bringing people up to the top of the hill in terms of their expectation of prosecutions—I accept a prosecution is the ultimate form of accountability in terms of serious wrongdoing—only to disappoint them either in respect of whether or not we are going to bring a prosecution or what that prosecution will actually result in. It will not result in condign punishment. One has to question the value of it. I am saying that as someone who was a chief prosecutor and as someone who initiated some significant investigations, including Kenova, because that is the law still currently.

The other thing I wanted to say is that I spent a lot of time disappointing victims, in respect of whom there were investigations into wrongdoing concerning their relatives, when I explained why we could not bring a prosecution. I could see the damage, disappointment and upset that caused those people. I worry about the fact that the current imperative for a prosecutorial process is a political issue.

No one seems to be brave enough to say, "Maybe we should look at an alternative". Anyone I came across, in my many years dealing with victims, wanted a form of accountability. These are people who believe a wrong was done. Their relative was killed by an act of terrorism or by an act of collusion by state forces. Whatever it may be, they want somebody to have to answer and somebody in a position of authority to be able to say, "Somebody did you wrong here". They want a process of accountability.

What worries me about the emphasis on prosecutions is that it does not deliver accountability, because so few of them will ever succeed. In the circumstances, is the outcome really what the criminal process is meant to be about? In normal circumstances, if one's loved one is murdered or very seriously injured or oneself is injured and there is a criminal prosecution, there is a reasonable chance that there will be a successful outcome and, as difficult as it may be, that the consequence will be some significant punishment. Society recognises that as the ultimate form of accountability. We can never deliver that. We can never deliver it.

This is not a call for a free pass. My view is that there must be an alternative process. That is where I would echo the comments by the former Lord Chief Justice before me. We have in existence a civil process

where there is a lower burden of proof. That is not easy either, but there is a tried and tested process. We have very experienced judges. We have a legacy judge, who is doing a fantastic job of streamlining and organising the processing of the existing civil claims.

I would prefer to see significant resource being put into that system—whether that is the appointment of more judges or the assistance of an investigative team to gather information across the various agencies that hold it—in order to assist with the processing of the existing processes within the rule of law.

We make choices in society. We make choices in criminal law to give people who plead guilty a discount. Sometimes the victims do not like that, but we make those choices because it makes the system work better; it means people may own up to things they would not have owned up to. Society accepts that as a choice.

Do we want to speak about immunity in a moment?

Q607 **Chair:** We will come on to that. Before I bring in Claire Hanna, I want to ask you to reflect on this point very briefly. The Committee hears what you say, which is self-evident, about the very small number of prosecutions. Is that the right rubric to use to come to a decision as to how best to move forward?

We have heard evidence from groups representing survivors. They accept the very low percentage likelihood of having a day in court, but the mere fact that hope is alive—there may be some folder somewhere or some photograph or some piece of evidence that suddenly slots into place, which potentially allows a prosecution to come forward—is what a lot of people find sustaining. It is not in the pursuit of bloody vengeance but more in an innate belief in the stately progress of justice.

Barra McGrory: I absolutely get that. I would never want anyone to think that I would think for a moment that it is in pursuit of vengeance. Criminal justice is the ultimate form of justice, and people are entitled to that. Not only are we not delivering criminal justice in respect of these legacy cases, but the priority or the imperative of criminal justice is inhibiting other processes. That is where the choices have to be considered.

No one is ever going to volunteer information if there is the threat of a criminal prosecution, whether it is in respect of themselves or in respect of others. Do not forget that much of the violence that we suffered over the Troubles came from within communities. It came from neighbours.

My difficulty is that, when one elevates criminal justice in the way in which we must do in normal circumstances, we do not expect co-operation and we are not going to get it. That is the difficulty. While we maintain criminal justice as a priority, we are not ever going to get to a point where the value of the civil justice system is going to be maximised.

Q608 **Claire Hanna:** Thank you to both of our witnesses for their engagement today. Sir Declan, thank you for your contribution on this to date, including the creation of the specialist legacy inquests system. We have referenced that part of the Bill, the proposal to restrict civil actions if they are begun after 17 May. You have already suggested what might be an amendment to that. What is your view on that proposal? What will it do to the Coroners Service's existing plan?

Sir Declan Morgan: If the Bill were to stop inquests mid-track, as it were, in May 2023, my concern is that everything would then sit for a year at least. Having set up a number of organisations myself—I expect all of you have this experience—you do not get something going for at least a year with something of this magnitude.

One of the reasons you will not get it going in anything like that time is the fact that, as the evidence that has been given to this Committee indicates, whoever takes this on is going to have to engage in a very wide consultation exercise with all of the people who are stakeholders in relation to this in order to seek to secure their confidence and their trust. One of the things they will want to make clear is that, because the people who do this will be a public authority, they will be bound by the convention and they will have to ensure they act in a convention-compliant way.

My concern is that what will happen is the remaining cases, however many there are, whether it is 31 or 21 that are left, will sit on the backburner for some time. Some of those cases are quite complex. Work has already been done in relation to them. It is hard to explain or justify why it is that people who have been engaged in preparation for the hearings should suddenly find that nothing is to happen and the ballpark has changed. The difficulty there will be securing the confidence of those people in whatever new organisation is established.

Q609 **Claire Hanna:** In terms of confidence and the public and citizens' buy-in, you had previously framed that programme of inquests as a rule of law issue. You locate everything as a rule of law issue. If those processes were derailed, where does that leave the rule of law in Northern Ireland and the gains that have been made in recent years?

Sir Declan Morgan: The convention is not some kind of black letter statute that says, "You have to do this and you have to do that". The United Kingdom was deeply involved in the creation of the convention. It is a quasi-political instrument, as it were. That is why I would not be prepared to express a view about convention compatibility, because you have to wait to see what the argument is and what the justification is. The justification, at the end of the day, will be looking at how this is gaining the trust of the community and contributing to reconciliation.

What happened in Croatia was they reached a situation where they decided that this was a way forward for them. The South African model was something different. The Spanish model never really went to the

court at all. Everybody just agreed that they were going to forget about it.

Chair: Great silence.

Sir Declan Morgan: Exactly, yes. They agreed to wipe the slate clean. They have brought it back up again now.

Claire Hanna: They did not forget forever.

Sir Declan Morgan: It does not go away forever. I am afraid I just cannot stop myself saying that I do not agree with Barra about prosecutions. The people we are talking about, who feel completely let down by a system that has shown no interest in addressing their issues, ought to have the comfort of knowing, if there is evidence that justifies a prosecution, the prosecution should be pursued and they should have the confidence of knowing that will happen.

If it happens at all, it will be in a small basket of cases. The only way to deal with that is for the investigative team—that is the other thing: it must be investigative, rather than review—to have either in-house or at hand a small team of specialist prosecutors to make sure that only those cases that really are going anywhere get any sort of detailed attention. Having looked at the way things have gone in relation to some of these prosecutions, the number that will need to be dealt with is much smaller than people anticipate. On the prosecution side, I do not think the manpower issues will turn out to be a problem.

I also cannot, I am afraid, resist saying something else to you. Mr Boutcher talked about the slowness of the Northern Ireland system. He is quite right about that. Since 2012, I have sought to persuade the Department of Justice to follow the English practice of abolishing committal. I am not sure whether you understand or have experience of this, but in Northern Ireland every serious case goes to the magistrates' court and it sits there for anything up to a year before it is sent to the Crown court. Once you abolish committal, the case is in front of the Crown court judge within a week. If anybody wants to plead guilty, for instance, they can do it then. You cannot do it in a magistrates' court.

It means you can completely speed the process up. It is a step change for people like the PPS and the police to have to deal with that. This would be part of it. At the end of 2021, the Assembly passed the legislation. It is there and able to be used. For some reason, the Justice Minister has indicated that it will not be commenced until 2024, which I find extremely disappointing. I am sure there will be a reason for it. Somebody has said, "We cannot do it". It is very disappointing. The Northern Ireland system needed a kick up the behind in order to get going. It took nine years from my pushing to do this for it to happen.

What we have to deal with in relation to the prospect of prosecutions it seems to me we can deal with within the rule of law, as Barra says, with

a specialist team. That will cause some disruption to the PPS and they will have to find some new people, but it is not by any means impossible. All of that can be done.

Q610 **Claire Hanna:** Colleagues will pick up on some of those issues. Did you want to add anything to that, Mr McGrory, about the issue around the impact on the rule of law if this programme and these processes are derailed?

Barra McGrory: I do want to stress that the only circumstance in which I would suggest that one might look away from prosecutions and towards a civil process is where that civil process offers a very high degree of accountability in terms of its resourcing, its due process provisions and the fact that it would have a significant judicial element that would adjudicate on the wrongdoing or otherwise of the individuals accused.

If I may comment on the immunity, if you do not mind, there are a number of problems with the immunity contained in the proposed statute, other than that which has been identified by Sir Declan. One of those is the fact that, for example, anyone who has a conviction for a Troubles-related offence is not eligible to apply for this immunity. Therefore, you are immediately ruling out a very significant body of people who have the information that people crave in terms of any other process, which might seek to elicit information for people.

Another significant problem with the immunity provisions is that they take this away from the public prosecutor and give it to the information commissioners. In my view, that is a very dangerous thing. As I understand it, there are only two ways to get immunity from prosecution at the moment. One is by way of royal prerogative and the other is through the Director of Public Prosecutions under the Serious Organised Crime and Police Act.

Within the Serious Organised Crime and Police Act, there is a very rigorous process. The person proposing or seeking a reduction in sentence or immunity does so as an assisting offender. There is a scoping process. There is then a cleansing process, after which there is an exhaustive police investigation in order to permit the prosecutor to decide whether this person should be taken on board as an assisting offender. Then, in almost every circumstance I know of, the offender is required to plead guilty to everything they have done wrong. Then and only then do they qualify as an assisting offender and they help with the prosecution of other individuals.

There is a huge price to be paid on the part of the individual seeking immunity, and rightly so. That person is expected to cleanse themselves and hand over all information. That information is checked, and it takes years to do this. There is a very significant case that comes to my mind, which was in my office when I was DPP. It took years before we were even at the point of deciding whether or not we could rely on that individual.

What worries me about the proposals concerning immunity is that they are far too woolly. They do not seem to envisage any of those processes. There is no requirement on the person seeking immunity to assist, before they are granted immunity, in the detection of others. It is taken away from the existing prosecutorial system. It is the basis upon which prosecutions are expected to continue that people will be able to go outside of the existing prosecutorial system and avail of this immunity.

That damages the existing prosecutorial system. While I completely accept that Sir Declan does not agree with me in respect of my overall view about prosecutions—I expect I am very much in the minority in that regard—if we are going to continue with the system of prosecutions, this proposed immunity is very risky and will do untold damage to the reputation of the criminal justice system as it stands.

Q611 **Ian Paisley:** Thank you to our witnesses for their evidence so far. Sir Declan, a number of the witnesses we have already had before our Committee have indicated to us that the Bill in its current format is not article 2-compliant, which you touched on. You appear to be proposing an amendment to make it article 2-compliant in regard to civil cases. Am I right to say that that would be via an extension to the current process of civil cases until it discharges the outstanding 80 to 100 cases?

Sir Declan Morgan: It seems to me that, if an amendment to that effect were passed, it would be less of a challenge to say, at that stage, "No new cases can proceed".

Q612 **Ian Paisley:** What would there be left for the Bill to do?

Sir Declan Morgan: The only thing the Bill would do on the civil cases is prevent any new cases in this period of what is now 56 to 24 years ago, full stop.

Q613 **Fay Jones:** Sir Declan, you may not be able to comment on this, but I hope you can. The Northern Ireland Justice Minister calls this "an egregious interference with the independence of the justice system in Northern Ireland". How do you respond to those comments?

Sir Declan Morgan: I was disappointed by the comments. I listened to a good bit of the evidence given by Naomi Long, for whom I have a great deal of respect. From my perspective, the local parties have not been able to come to an agreement as to the way forward. It is important for them to indicate that that is the position.

We have to put our cards on the table. Victims will expect that from us. It is not really good enough for all the parties, for different reasons, to say, "We do not agree with this". The question is, "What do you have instead?" Where are victims going to get some kind of recognition? If what you are saying is, "This Bill should fall", as I know some contributors have, that is it; victims are not going to get anything.

I am not saying it is the Minister's fault at all. I am not suggesting that, but I do not accept that, when the local Assembly parties are unable to find a way forward, one can say there is some problem about the British and Irish Governments or the British Government, as it may be, coming forward with a proposal. I do not see the problem there.

Q614 **Chair:** There are those who would say it is the Stormont House agreement. It is there in the title: "agreement".

Sir Declan Morgan: It was an agreement between the Governments. I raised this in a contribution I made to the All-Party Parliamentary Group on the Rule of Law. There was a whole series of contributions about how awful the Government's proposal was, and I said, "Instead of talking about how awful it is, can we think about what would be put in its place?" I suggested the Stormont House agreement, and there was a sharp intake of breath all around. The parties do not sign up to the Stormont House agreement. The unionist party made it clear that they do not.

Chair: The UUP has made that clear.

Sir Declan Morgan: The UUP has indicated that they do not. I am not sure what the position of the DUP is. I have seen no sign of the local parties coming forward with a draft Bill, showing the way forward and showing that they can get the support of the community for what they are going to do. I have seen no sign of that.

If there is a Bill that has the support of the parties and has been put to the Assembly, I would like to see it. You have had seven years to do it, and you have done nothing. I am not blaming you either, because in the end the local parties are held back by their own electorate, which are completely lacking in trust in relation to dealing with legacy issues.

For many of them, the problem is that they are afraid that dealing with legacy issues will suddenly become a rewriting of history. That is why people are nervous about trying to face up to it at home. I know you do not like it.

Claire Hanna: No.

Stephen Farry: It is not correct, Sir Declan.

Claire Hanna: It is not correct. That is why we do not like it.

Stephen Farry: It is not a case of not liking it.

Sir Declan Morgan: If that is not correct, Stephen, I am still wondering why you wrote to me and told me not to speak in 2019.

Chair: Please, Sir Declan. I am sorry. If we descend into "I did", "I wrote", "he said", "somebody else thought" and "my grandmother once intimated in my ear that she might do something else", we will descend into chaos.

Claire had indicated that she wanted to come in on that point. I am going to ask her to do so briefly, and then I will ask Stephen and then I will ask Mr Paisley. Let us start with Ms Hanna and let us keep it—

Claire Hanna: I am trying to formulate it as a question, because you are here as the witness and we are here not to speak but to ask questions. You are incorrect.

Chair: With some leniency, you can do what you like.

Claire Hanna: Is it justified if I do an intonation at the end to suggest it was all a question?

Chair: You can pretend to be Australian.

Q615 **Claire Hanna:** There was a large degree of consensus. You are correct to say that the Ulster Unionist Party did not support the Stormont House agreement, and their reasoning was around some of the exclusions around crimes short of murder. Again, that is one of the things that could have been addressed. I do not think you are correct to say that there was not consensus.

Sir Declan Morgan: Can I ask you a question?

Chair: No, we do not have witnesses asking questions. That way ends in chaos.

Claire Hanna: I reply to every email I get.

Chair: Claire, you have made your point.

Q616 **Claire Hanna:** I have not, actually. You are saying there was not, but there was a much broader degree of political consensus among society as a whole around the Stormont House agreement. Why would that not be the starting point? Why should that not be the starting point and amended, rather than this Bill, which goes wholly outside of that consensus?

Sir Declan Morgan: If that is the question, I will answer it. You have had from December 2014 to do it. You have not done it. We have gone nearly seven and a half years. I am not surprised that somebody has decided that is too long.

Q617 **Stephen Farry:** I have a question along similar lines to Sir Declan. Sir Declan, do you recognise that in 2014 the Alliance Party gave full support to the Stormont House agreement? It was not an agreement between two Governments; it was an agreement between the political parties. No doubt Ian will clarify the DUP's position in a moment, but my understanding was that the DUP at the time supported it. They have since resiled from it.

The issue is not so much that the parties did not take it forward. The parties took it forward. It was the UK Government that did not take it forward for whatever reason. That is the source of our frustration. The

point still stands that, if we are to see the Government taking its own unilateral view, it could easily have been the text of Stormont House that was taken forward as much as this new draft.

Further to that, Sir Declan, do you recall that in New Decade, New Approach the commitment of the Government at that stage was to legislate for the Stormont House agreement and not an alternative? Indeed the section in New Decade, New Approach was entitled "The Stormont House agreement".

Sir Declan Morgan: You are asking me a lot of things about what the Government did or did not want to do. As you know, because you were there at the meeting in the summer of 2019, I sought to get agreement for a joint proposal to allow me to talk about the Stormont House agreement in September 2019, to which I had added on some kind of facility for victims to have a say in something like what had happened at the historical institutional abuse inquiry, which was headed by Sir Anthony Hart.

Nobody came back to say, "Yes, we need to move this on. This is a way for you to do that". Apart from the official unionists, all the other parties were there.

Chair: Mr Paisley, you can have a very quick word. Then I am going to give a quick line to sum up and then we will move on to another question.

Q618 **Ian Paisley:** I was interested. You appeared to be about to give us an answer to a point that Mr Farry had written to you.

Sir Declan Morgan: Yes, Mr Farry wrote to me on 21 August 2019. I will read you, essentially, what I was saying: "The Chief Justice considers there is an imbalance relating to legacy matters and that the Stormont House agreement is unlikely to sufficiently address it. He considers there may be potential for a commission/inquiry approach as a bolt-on to the Stormont House agreement to bring issues into the public space.

"It could operate in a similar way to the historical institutional abuse inquiry, with space for everyone's facts to be given and the understanding that those who provide evidence would not be subject to prosecution. A three-person panel could be established to include an independent member and a representative from each community. The process could be supported by academics, historians, lead to a conflict resolution centre, visitors centre for future generations, aim to address issues for those who want them dealt with, et cetera".

The letter from Mr Farry indicated that "only in the event that the Stormont House arrangements are officially dismissed or it is unambiguously clear they are indefinitely stalled should other proposals be considered". That was 21 August 2019.

Q619 **Ian Paisley:** That gambit by you to bring forward a proposal to stimulate

the juices, to say, "Here is a proposal. Here are my additions to it to improve it", and to deal with some of the vexed issues was actually, in your view, stopped by that response.

Sir Declan Morgan: I took the view that I should not interfere with the political process, because I was already, as it was, stepping outside what I considered to be my remit.

Chair: This exchange underscores very clearly the point that Sir Declan made a little while ago, which is that a lot has been promised and talked about, et cetera, and precious little has been delivered. In essence, the ability to alight upon a deliverable consensus-building approach has failed, for all sorts of reasons, through all sorts of circumstances.

I think that that was not a point that Sir Declan sought to demur from, which was that, in essence, this Bill is the last-chance saloon. With all the history of how long and complicated it has been, nobody in their right mind is going to come and touch it again. I am slightly paraphrasing, Sir Declan, what you were saying, but that was my takeaway from what you said.

Colleagues, we can spend the next 20 minutes or half an hour going over 2014 to now, why we started at 2014 and why we are here now, or we can look at the Bill we have in front of us and how best to shape it to try to make it work to meet some of the concerns that Sir Declan and Mr McGrory have raised.

Ian Paisley: Quite frankly, what has been put on the record is explosive. It is explosive in the sense that, with respect, Stephen, we have been arguing on a matter here, and here is a readymade solution, which we support. From what we have heard today, this explosive revelation is that it may actually never have been supported in the way that could have made it come into action between 2014 and 2019. If anyone wants to see truth, in terms of why there is no consensus for Stormont House, it is not unionists who have held us to ransom. It has been a number of parties.

Stephen Farry: Can I have a right to reply, in fairness?

Chair: You can. You are not obliged to answer this, Mr Paisley. We know what the SDLP's position is with regards to Stormont.

Ian Paisley: Our position is very public and clear. We withdrew our consent from Stormont House.

Chair: When was that?

Ian Paisley: I think that it was made at a speech that our then leader gave, around about 2016 or 2017. It was very shortly thereafter.

Chair: Mr Farry, I am going to give you a right of reply. I am sure that not everybody will be pleased by this but then I am going to try to move things on.

Stephen Farry: I appreciate we are very far from this Bill, but, given that an accusation has been made by Sir Declan, I think that it is only just—

Sir Declan Morgan: There is no accusation.

Stephen Farry: I could also say, Sir Declan, that there is an inconsistency in how you initially presented what happened, or what you then read out, in terms of your proposition. Earlier on in this evidence session, you mentioned that this was about some sort of forum to allow victims to come forward as a bolt-on to Stormont House. You then went on to say, in terms of reading out the correspondence, that this was about a proposal for a broader commission of inquiry.

In that context, yes, we wrote in 2019 to say that we did not feel it was appropriate, because we thought that that was actually a drift away from Stormont House. That was not, in my view, helpful at that time, especially as we were in negotiations ahead of New Decade, New Approach. I think that, at that stage Stormont House was potentially viable, as proven by the text in New Decade, New Approach. Therefore, we did not support what you were suggesting, in terms of moving away and putting in place something else that was at odds, in our view, with the thrust of the Stormont House agreement. We stand by that.

Sir Declan Morgan: I can see that you are upset about it, Mr Farry.

Stephen Farry: I am surprised.

Q620 **Chair:** I do not want to have a conversation on this. Sir Declan, you obviously came up with some proposals and some thoughts. Do you accept the basic premise that any solution to this problem has to come from elected politicians, to be implemented by the legal profession, the judiciary, coroners, anybody else that might be involved, because they have the democratic mandate to author those policies, rather than from the judicial side of the Executive?

Sir Declan Morgan: Yes, absolutely. The point that I have sought to make is that we waited 24 years since the agreement. This is extremely difficult. One should not underestimate how difficult it is. We have been part of a piecemeal, unsatisfactory system and it needs a structure, which only the politicians can give it.

Q621 **Chair:** It is a point that my colleague, Mark Francois, has made on the Floor of the House on a number of occasions. Dealing with legacy has been in the last three Conservative Party manifestos. After the general election we are in a position to deliver something, and it has taken now seven years to get round to doing even that. I am not seeking an answer, either from Mr Farry or from you, Sir Declan, now, but for you to reflect upon this, if you would.

Sir Declan, you have quoted from a letter purporting to come from Mr Farry in response to a proposal that nobody has seen. It may be helpful to the Committee, and indeed for the public record, if that proposal, that

response and your response to that response could be submitted as papers. If either party decides not to do so, that is fine, but it may be helpful. We seem to have a lot of slightly partial quotes.

Sir Declan Morgan: I would be reluctant to put it unless Mr Farry is happy that I should.

Chair: Have a conversation offline about this.

Q622 **Stephen Farry:** I am quite struck by someone who says that they are still an active judge entering into what I can only say is party political point-scoring by bringing it up in the first place. If you are saying that it is confidential and that you have to consider whether to put it in the public domain, having read from it initially suggests that you are leading in that direction anyway.

Sir Declan Morgan: The letter is not marked "confidential", Mr Farry, as you know, and what you indicated was what would be appropriate for me to do and I took that.

Q623 **Stephen Farry:** Why did you read it out? As someone who is currently a judge, why did you choose to read it out today?

Sir Declan Morgan: The reason that I did it was to emphasise the point that—

Q624 **Stephen Farry:** Are you in the habit of breaching confidentiality?

Sir Declan Morgan: It was not confidential.

Stephen Farry: You said it was.

Chair: I am now drawing a line under that, I am afraid, gentlemen.

Ian Paisley: It is FOI-able, surely.

Stephen Farry: I am happy for it to be published.

Sir Declan Morgan: It is a matter for you, Mr Farry.

Stephen Farry: We will reflect on that and come back.

Ian Paisley: Never a dull moment.

Stephen Farry: We should bring in Barra McGrory as well for an opinion. Do not forget that Barra McGrory is here as well.

Chair: Yes, indeed. I would love to be able to say, "Let us strike that last five or 10 minutes from the record", but I do not think that even I have the power to do that, have I? No, I have not. My powers are limited.

Ian Paisley: Some people dared to say this would be a dull session. How dare they?

Chair: I do not know whoever dares to say that any of our sessions are

dull.

Q625 **Ian Paisley:** The ICRIR will be limited to carrying out review of Troubles death and, in its words, "other harmful conduct", which I understand is defined as conduct that causes physical or mental harm. It is a fairly long definition of what harmful conduct is. In your view, Sir Declan, is the scope of that broad enough?

Sir Declan Morgan: I have indicated that whoever does this has to be convention-compliant. That means that "review" should be replaced by "investigate". In effect, rather than simply doing what the HET did, this body should have the power to carry out investigation. I do not understand that there is controversy about that, because the explanatory notes make clear that there should be. The use of the term "review" is only part of what needs to happen. There needs to be review and investigation.

There is the issue in relation to other harmful conduct. As I understand it, the reviews or investigations are in relation to other harmful conduct that causes the damage that is identified within the statute, in other words the very serious consequences. I agree that the previous attempts at this have not really been able to deal with the large number of people who suffered injuries, some of them extremely serious injuries, as a result of what happened in the Troubles.

We should not forget them and there has to be a way of finding a way to recognise them as well. It seems to me that one also has to recognise that, if we are going to do this in a timescale that we have always talked about of about five years, which is there to enable us to move on to the future, for our children and others, the extent to which we are going to be able to do something for those people is going to be limited.

Q626 **Ian Paisley:** Would the review/investigate distinction that you have made require a different type of skillset or practitioner, or would it be the same type?

Sir Declan Morgan: It seems to me that the director of investigations is likely to be someone who is experienced in organising and conducting investigations. Therefore, I would have thought that the commission would be in a position to do that, with the right personnel in place. The selection of the personnel should be quite carefully done and probably would be better done by identifying the qualities that were sought in relation to the various members, then allowing people to apply and having a proper appointment system, to which the Secretary of State could, technically, be the appointer, but he would get a recommendation.

Q627 **Ian Paisley:** Mr McGrory, could I run that latter issue past you of review/investigate, in terms of the skillset, following on from Sir Declan's answer?

Barra McGrory: Thank you, Mr Paisley, for giving me the opportunity to say something about this. I agree with Sir Declan in respect of the

problems that are thrown up by the term "review". One other problem that I also foresee is that, even if "review" is changed to "investigate", what do you do with the fruits of the investigation? Who adjudicates on who did wrong and who did not do wrong under this scheme?

This brings me back to my overarching point that there needs to be accountability. Accountability can only be achieved by a robust investigation, followed by some form of due process in which somebody in authority makes a decision as to who did what. Whether that authority is a criminal court or a civil court—and you have my views on that—it requires a judicial tier.

I do not see anything wrong with the existing judicial tier. It needs to be resourced, but what is missing for me, in this legislation, is a read-across from the fruits of any information-gathering process, whether it be by way of investigation or otherwise, and an ultimate arbiter or decision-maker. For me, that is the problem.

Q628 **Ian Paisley:** No, I get that point. Sir Declan, a related issue that we have been looking at and has come up each time is the issue of sexual offences and the Troubles and Troubles-related crime. Should sexual offences, economic crime offences and torture offences be included or excluded? It appears to us that they are all encompassed in this. Are we right in our assumption?

Sir Declan Morgan: My understanding—I hasten to add that I have not looked at this Bill with a fine-tooth comb—is that the reviews that are carried out are carried out in relation to people who have suffered the injuries that are listed within article 1 or whatever it is of the Bill. I have looked at those injuries and it seems to me that severe psychiatric harm is probably the only one that would arise in relation to sexual offences, so far as I can see. Somebody may be able to point out how that may happen.

If you are going to have a proposal of this kind, where there are certain types of cases where you are going to open the door to review, you can do it by identifying the offences, which should be looked at, identifying the harm, which is what appears to be the case here, and in a generic way by saying "any indictable offence", or something of that kind, or any offence under various Acts. The approach that has been taken here, as I understand it, is to identify types of harm. It did not seem to me that there were likely to be many sexual offence cases that would fall within that bailiwick.

Q629 **Ian Paisley:** If that is the case, if there are not many, do you think it would be worthwhile therefore the Government, from their point of view, excluding them?

Sir Declan Morgan: As I think Father Ted said, "That would be an ecumenical matter".

Chair: It was actually Father Jack who said it, not Father Ted. It was the

Holy Stone of Clonrichert, if you remember; that was the episode. I am showing off my detailed knowledge of the excellent comedy that is "Father Ted".

Ian Paisley: He goes into "Columbo" as well at times.

Chair: I do. I am multitalented. You have not seen my Miss Marple, Ian, so do not worry about that.

Q630 **Ian Paisley:** Mr McGrory, in terms of the sexual offences and the economic crime debates, do you think that those issues should be directly excluded from this type of Bill, or should we just proceed and clear up all these matters?

Barra McGrory: They would be excluded if they are identifiable as wrong being done in the context of the Troubles, though maybe more the mischief there is that that is criminality that might have happened ancillary to or outside of the paramilitary activity, but went undetected because of it, if you understand me. If one is going to investigate everything, I do not see why it would not be included.

Ian Paisley: I have one final area, which the Chair knows about. That is to get a view from you, gentlemen, on how this sits, in your experience, with what is or is not happening in the Republic of Ireland and the legacy issues. Sir Declan, you are probably aware of some of those concerns. Would you have a view on how that aspect of the Troubles could be addressed, especially murders around the border and jurisdictional problems around getting justice?

Q631 **Chair:** These were points, Sir Declan, that the deputy chief constable alluded to yesterday in oral evidence.

Sir Declan Morgan: There is no doubt that there are difficulties. Mr Hamilton raised this issue of the ILOR and the way in which you have to be investigating an offence before you can get it. It is all the more reason for indicating that it is important to try to get agreement across the island, in terms of looking at the things that have happened here. I know that there are many people in the Republic of Ireland who also take the view that Ireland itself needs to take a look at its article 2 obligations in the past. I agree with that.

Q632 **Ian Paisley:** If an amendment came in that made the Bill more or less article 2-compliant, it would certainly address the concerns that the south of Ireland has expressed, not to us but in the pages of the press, that, because it is not article 2-compliant, it would not have anything to do with it.

Sir Declan Morgan: Article 2 compliance would open the door to so many things that have the potential to put us into a position that we have never been in before, where this politically toxic issue, as we have seen today, I am afraid, can be put to one side. The prize here is enormous, absolutely enormous.

Q633 **Ian Paisley:** Mr McGrory, on the Republic of Ireland, you will have worked with the prosecutors in the south of Ireland in probably all of your experiences over the last, I think you said, 40 years. In terms of dealing with that aspect, that leg of the three-legged stool, how would you try to address that with this Bill going forward?

Barra McGrory: Whatever we do ought to be mirrored on the other side of the border, so that there is an equanimity of approach, in my opinion, whatever the outcome of this is.

Q634 **Ian Paisley:** That would be a very big commitment by the Republic of Ireland to mirror this.

Barra McGrory: The Republic has already mirrored in a number of respects, in terms of the public inquiries, for example, into certain controversial deaths. It is not unusual for there to be an agreed approach into these matters. I do not know the extent of the volume of investigation or materials available in the Republic of Ireland. I would not imagine that it is anywhere near as much as we have north of the border.

I am all for an equal approach. I worked very closely with my counterpart in the Republic of Ireland when I was DPP, Claire Loftus, to ensure that we were singing from the same hymn sheet in respect of how we approached matters.

Q635 **Chair:** Could I ask a very quick word about the commissioners? In your judgment, who should sit as commissioners? I have tabled an amendment to the Bill to say that at least one of them should be international by office, as it were. Also, how should they be appointed? We have heard evidence. It is proposed in the Bill that the Secretary of State appoints them. Many would see the Secretary of State as a representative of the UK Government. The UK Government were an actor within the agreement that we are talking about.

Is there merit in—and I pray in aid I also have an amendment to this effect—saying that there should be pre-appointment hearings by one of our Select Committees here in the Commons, either this or justice, and then the potential for an affirmative vote in the Commons to give a democratic imprimatur to their appointment?

Sir Declan Morgan: There should be some process. I can see from the point of view of the victims that many of them, I think, would be comforted by someone from another jurisdiction, an outside jurisdiction, sitting on it. It is important to identify the job, as it were, for the people who are doing it. I agree there should be a sense of obvious independence about the process. Just because the statute says that the Secretary of State appoints, that means the Secretary of State puts their signature at the bottom of the letter, as it were. It seems to me that the appointment process should be transparent.

Q636 **Chair:** I am going to guess, Mr McGrory, that you would not demur from that.

Barra McGrory: I could not agree more.

Stephen Farry: There is a nice softball defence of the Northern Ireland legal system coming first to both of you.

Chair: Please note the words "coming first".

Q637 **Stephen Farry:** Yes, "coming first". This is the good cop one. Do either of you recognise the term or the concept of vexatious investigations or prosecutions, given that that is at the heart of some of the rationale as put forward by the Government for this Bill itself?

Barra McGrory: There is no such thing as a vexatious prosecution. Anything that is not of any merit does not get past first base. I know what you are getting at. I bear the scars of some ferocious criticism in the very building in which you sit of some of the decisions that I had to make as Director of Public Prosecutions. That bitter experience has partly influenced me to come to the view of "Are we deepening divisions by pursuing prosecutions?"

No prosecution gets to serious consideration if it is in any way vexatious. They have to go through a significant investigative stage. The evidence is sifted by the PPS, even at an initial stage, at the prosecutorial advice stage. Then it goes through a rigorous process of analysis in the Public Prosecution Service before it gets to the application of a reasonable prospect of conviction. If that test is not met, there is no prosecution. It is a test in which there have been many judicial reviews before the divisional court in which the former Lord Chief Justice has sat. There is no basis upon which there has been any vexatious prosecution.

Sir Declan Morgan: I agree. I have no basis at all for considering that there have been any vexatious prosecutions. We try to get, for instance, specialist prosecutors organised in rape cases and sexual offences cases. There is a case for developing a body of specialist expertise within the PPS. That was what I was talking about when I said that there would be attached, if you like, to the investigatory office, a small group, which would be able to look at these cases.

Cases that did not need to be referred would not get referred. Cases that were referred, you would apply the same test, but there are circumstances in which you would say, "We have looked at this. We do not need to go any further". Then there would be other cases where they might say, "We need to go a bit further". Those judgments would be the judgments of experienced prosecutors who were familiar with the issues in these types of cases.

Q638 **Stephen Farry:** This is the second question. These are getting progressively more difficult and challenging for both of you. Both of you have cautioned about the limited expectations of successful prosecutions, which is fair enough. However, is there still not merit in an article 2-compliant investigation taking place and the discipline that that brings in

terms of interrogation of evidence, even if it does not necessarily lead to the end point of a prosecution? Do both of you recognise that the process itself, or that type of process, has value and, at times, that interrogative approach may be more likely to deliver results than what may, at times, be a more self-serving approach, where people come forward and say what they want to say, especially if it is not challenged?

Sir Declan Morgan: I have tried to suggest that those who are engaged in this exercise will have to act in an article 2-compliant manner and a convention-compliant manner overall. It seems to me that the way to do that is that, when you start to look at the cases, you look at the material levels there, the open source material that was there and any other source material that was there. That will then indicate whether there is a basis for further investigation.

In some cases, having looked at the material, it may well be that there is no scope for further investigation and that will be the end of the matter. That is a perfectly proper article 2 process if the case is one where there is nothing to bring you any further than you are. You do not start reinvestigating the case. You recognise what investigation has taken place and look to see whether there are further issues that should happen. That is perfectly article 2-compliant.

It seems to me that the door being opened to carry out the investigation bit in the cases where it is appropriate is what we need to look at. We know that, for a whole host of reasons, in many of these cases there were significant difficulties in relation to the carrying out of the original investigation. The papers that are available may provide some further clarity.

Barra McGrory: The problem with article 2 is that is also sits alongside article 6, in terms of fair process and fair trial. If this proposed body carries out a review and is going to come to any conclusions, it cannot do so without offering everyone their say. It does not appear to me to be empowered, within this legislation, to come to any conclusions adverse to any individual.

We have considerable litigation about this in the Northern Irish jurisdiction, as the former Lord Chief Justice knows. It throws up a lot of problems. This is my difficulty with prosecutions. If you come to the point where you are not prosecuting, what are you doing with all that information? Where does it go? Nobody adjudicates on it and that is one of my big difficulties.

Q639 **Stephen Farry:** This is my final question to both of you. You have each expressed serious reservations around the proposed immunity aspect of the Bill while, at the same time, encouraging the parties to be pragmatic in potentially seeking to adopt it.

Sir Declan Morgan: If I misquoted you, you just misquoted me. I am not suggesting that immunity should be adopted.

Q640 **Stephen Farry:** Do you mean at all?

Sir Declan Morgan: I am not suggesting that immunity should, because I am not suggesting anything. I am saying that there are challenges.

Q641 **Stephen Farry:** I was being fairly conservative in the way I was phrasing that. I am happy to apologise. I will let both of you state clearly your position on that. In the context that immunity is central to the legislation, but both of you are, at the same time, advocating us to be pragmatic around the legislation, do you think that that is something that, realistically, can be fixed and addressed in the legislation to create a satisfactory outcome here?

Sir Declan Morgan: Say somebody goes to Mr McGrory, who is still in practice, and says to him, "Mr McGrory, what should I do? There is a suggestion that I might have been involved in such-and-such an incident and have done something". I would be astonished if Mr McGrory said anything other than, "You should sit tight". If that is the case, I scratch my head and ask, "Who actually is going to come forward?", other than the people who are at the very point of being put before the Crown Court for a very serious offence, of whom there might be one or two.

I have characterised that as a challenge and I could well see that somebody may take the view that it does not stack up. It is not a price worth paying, if you like. We do not need to pay it.

Q642 **Stephen Farry:** Maybe I will ask in a different way. If the immunity aspect was struck out from the Bill, do you see the rest of the structure remaining, or is this a house of cards that will all collapse?

Sir Declan Morgan: It remains. If I can put it in another way, it seems to me that you could say that the commission is the last time that there will be proactive public engagement with review of these cases. This is it, in other words. Once that review is complete, short of somebody coming into a police station and saying, "I want to put my hands up. I am about to die. I have been to my confessor. I want to admit that I have done this, that or the other", I would not see any further likelihood of prosecutions.

Q643 **Stephen Farry:** I will go to Barra McGrory for the final say in this round.

Barra McGrory: I have grave reservations about any statute that proposes to abolish not just part of the rule of law, but the totality of the rule of law. It puts forward a proposal in respect of immunity that, for different reasons identified by Sir Declan and myself, I think is unworkable. It also, in the same breath, proposes to abolish the outstanding inquests and civil processes that are in existence. It is all in the same breath. It is audacious, coming from a House in a state that considers itself to have brought the concept of the rule of law around the world. It is absolutely astonishing.

My problem is that, while I have concerns about the viability of the prosecutorial system, there has to be a very robust alternative, even if that were to be considered. That is not within this proposal, in fact far from it.

Q644 **Sir Robert Goodwill:** I have a quick follow-up to Stephen Farry's first point when he talked about vexatious prosecutions. I was reassured that they would never happen. There may be a perception out there that, because of the asymmetric nature of the evidence that is available, those who served in the Armed Forces are more likely to be prosecuted than those who were in the various terrorist organisations, given that they knew who pulled the trigger. There was no doubt who it was who shot somebody. It is whether that was a legal or illegal killing. Sir Declan, do you think that some of the groundswell of opinion on both sides of the Irish Sea to do something to address this is something to do with the fact that we see soldiers being brought to court and, in most cases, acquitted, but put through that sort of terrible ordeal, many years after they served their country?

Sir Declan Morgan: Broadly, I agree with much of that. Unfortunately, we do not have the personnel records of the Provisional IRA and the UVF to be able to search through them and find out who did what. Of course, the DNA evidence on the weapons has disappeared. It was not just that the terrorists got away with a two-year prison sentence. They also got away with getting rid of much of the evidence that would have got them.

My point about the specialist prosecution team is that I do not think that there have been vexatious prosecutions. There are difficulties inherent in prosecuting cases that are very old and in different circumstances. It was a very different environment that people were dealing with, where you had the involvement of the RMP in terms of the investigations that were ongoing. I wonder whether the issues there really need to be bedded down in the specialist prosecution team that is taking this on.

I could see much merit in a prosecution team that had the advantage of experience in Northern Ireland and in this jurisdiction being part of that team that would support the investigatory element. That might be a reassurance to some of those who are concerned about the balance that there, in terms of the way in which this is done. That balance might be capable of being achieved without having to deal with the problems that there are in an immunity system.

Your test would remain the same, but the way in which it is applied in these types of circumstances might need to be different, in the same way as for sexual offence prosecutions you need specialist prosecutors. That is something that everybody is gradually coming to recognise.

Barra McGrory: I have had the opportunity to give some of Sir Declan's contributions some thought this afternoon. Maybe the answer is not just specialist prosecutors but a specialist prosecutor.

One of my difficulties in all this has been that the Public Prosecution Service is a creature of the Good Friday agreement. It was conceived of during the criminal justice review as the first entirely independent prosecuting authority in the Northern Ireland jurisdiction. It was not called the Public Prosecution Service for nothing. It mirrors the Crown Prosecution Service in England and Wales and obviously the term "Crown" was taken out of it and it is called the Public Prosecution Service for a very good reason, so that it would have cross-community acceptance.

One of my difficulties, as Director of Public Prosecutions, was that I felt that every time we decided a legacy case, whether it was to take it or not take it, we brought the Public Prosecution Service into the political debate. There were those who were critical of the decision one way or another, whether they be aggrieved families because a soldier was not prosecuted or colleagues of some of yours in the House of Commons, taking umbrage that former members of the British Army were being prosecuted. It ended up bringing the organisation that I led, which was intended to be entirely above all this, into the fray.

That is one of the reasons why I came to the view that maybe there is another way. Maybe Sir Declan's concept of special prosecutors might be developed into a standalone prosecution authority to deal with legacy issues. It would, of course, apply all the same standards, but it would take the politics out of everyday prosecutions in the jurisdiction of Northern Ireland, which was one of the difficulties that I personally faced and that my successor is facing. There are a number of challenges, I am sure, underway to some of his decisions.

That is where I am coming from in this regard. Sir Declan and I are completely agreed. I come to this not just as a former prosecutor, or as a current criminal lawyer, but as a citizen of Northern Ireland. I have adult children and I want them to lead their lives free from all this. I want to see a society, as does Sir Declan, that can reach a point where this is behind us. We are never going to get there unless something is done urgently to deal with this question, to provide a system of accountability, to resource it. The current proposal, for reasons I have already stated, does not go anywhere near achieving that.

It has been a very useful discussion, from my point of view, because there may be some ideas that have maybe come to you folk that can be developed.

Q645 **Ian Paisley:** This is a yes or no, Mr McGrory. Sir Declan made the view about abolishing the committal proceeding at magistrates' court. How do you feel about that—yes or no?

Barra McGrory: Yes.

Q646 **Chair:** I have a short question, which should also get a short answer. Notwithstanding your reservations about immunity—bear with me for a

moment and pretend it is there—should immunity granted be revocable if, subsequent to its granting, it is discovered that it was based on the delivery of falsehoods?

Barra McGrory: Yes.

Chair: Thank you. That will do me nicely.

Sir Declan Morgan: I would like to think about that.

Q647 **Chair:** I apply for immunity. You grant it. I have told you a pack of lies.

Sir Declan Morgan: That is the point. How much investigation is the body that is charged with this actually going to carry out? As Barra says, if you are in a SOCPA situation, you get taken away for a couple of weeks and you are interrogated about everything, from what you did in the morning until you went to bed at night. Then they make a judgment as to whether you are telling the truth. There is nothing in this process that indicates that there is anything like that here. It does not work as a system to have somebody saying you are immune on the basis of maybe a statement they have made to a solicitor. You can put a solicitor's statement in.

Q648 **Chair:** It has to be made to a panel of the commissioners.

Sir Declan Morgan: Yes, but it could be put into the commissioners having consulted with a solicitor that he has made this statement and there you are. It just seems to me that there is not a mechanism for putting this person through the mill, as it were, to see whether they are actually telling the truth and what other things they have been up to. Those other things may be relevant to whether they get up to this particular thing.

Barra McGrory: You have been able to give a more expansive answer.

Q649 **Claire Hanna:** That is where there is quite a lot of consensus and there has been a lot of frustration expressed. For what it is worth, the SDLP entirely shares your frustration. I will say, a little bit defensively, that, far predating my mandate, we have engaged in this. We supported Eames-Bradley and Haass, imperfect though it was, because it was agreement, and we supported Stormont House, because it was agreed.

Sir Declan Morgan: You cannot get them across the line.

Q650 **Claire Hanna:** There has been—not by you—a cynical attempt to try to say that nothing else has worked and that is why we have to bring this through. You have correctly identified some of the major failings in this. We are concerned with the narrative being created that nothing else has worked so we have to just go with whatever the Conservative Party have come up with as a way to aid reconciliation. I am coming to a question. I think that you previously, and fairly recently, had indicated support for Eames-Bradley, and we agree.

Sir Declan Morgan: It is like Sunningdale was the rider for the 1998 agreement. Eames-Bradley is an obvious rider for an agreement here.

Q651 **Claire Hanna:** We agree. It is the high water mark and each subsequent negotiation and output has degraded the outcomes for victims and survivors. I will say that that is why we are not prepared to just accept this degradation.

Sir Declan Morgan: Can I answer the question now? My bottom line is this. If this end result is not ECHR-compliant, it will be a disaster.

Claire Hanna: That was my next question.

Sir Declan Morgan: That is my answer. Whatever else happens, it must be ECHR-compliant; otherwise our tribes will simply disappear into their various areas and we will not resolve anything. We will have lost the opportunity. If we can make this ECHR-compliant, there is something here that has opportunities for Northern Ireland that we have not had in the past.

That is what is really driving me. I cannot let go of this because it seems to me that we will never see an opportunity to do it again and we will continue to have this cancer floating around in our society. That is why I am trying to see whether the Government can be persuaded that our interests need to be balanced, for instance, with the interests of the soldiers, who are obviously concerned about what has happened, and the catastrophe it would be if we put in place something that turned out not to be ECHR-compliant is recognised. I do not care how we make it ECHR compliant, to some extent, as long as it actually works and gets the confidence of the community.

Q652 **Claire Hanna:** The human rights commissioner said that it was not ECHR-compliant. Do you agree with that assessment?

Sir Declan Morgan: As a judge, I would want to hear the arguments. There may be arguments advanced that will affect the question of ECHR compliance and how it should be approached in this type of situation. I would want to hear them. That is my first answer.

Q653 **Chair:** Let me phrase Ms Hanna's question a different way. Sir Declan, you have read the Bill. On a reading of the Bill, which is, in essence, the written submissions of Her Majesty's Government, if they were put before you for a judicial opinion with regards to the likelihood or not of securing the stamp of ECHR compliance, what is your assessment?

Sir Declan Morgan: I am not going to give you an answer. It would be wrong of me as a retired Lord Chief Justice to give an opinion in the absence of hearing the argument. That is why I have talked about challenges and I think they all are challenges. It would be wrong of me, as a judge who sits, to give an opinion on something in the absence of hearing the arguments.

Q654 **Claire Hanna:** You had previously said that there are myriad different

ways that it could have attempted to satisfy the article 2 requirements. I think that the Secretary of State said that his different ways mostly satisfy the article 2 compliance. I am not saying you are not prepared to answer that. That is fair enough. You are not going to give a view.

Sir Declan Morgan: I am not expressing a view on whether this is or is not compliant. I am certainly not saying it is and I am not saying it is not.

Q655 **Claire Hanna:** Mr McGrory, would you express a view on it?

Barra McGrory: Yes. I have the luxury of not being a former judge but being a practising senior counsel.

Chair: You may still become one, Mr McGrory.

Barra McGrory: I am far too old. I cannot see how this could conceivably be ECHR-compliant. It abolishes all due process. It abolishes any tribunal that can come to any finding in respect of the issues that would be examined. I cannot see how that would possibly meet the standards set by the European Convention on Human Rights, in my humble opinion.

Sir Declan Morgan: If that is the view that the Committee comes to, I would urge the Committee to carefully think through what changes would make it compliant. Do not let it fall. Think through what changes will make it compliant.

Ian Paisley: You suggested one today.

Sir Declan Morgan: I put forward what might be answers to some of the challenges.

Q656 **Ian Paisley:** "Reconciliation" is a very heavy phrase that needs to be properly unpacked. The Secretary of State has said that this is a step to true reconciliation. From what you are saying, it is probably that it might be a step towards reconciliation.

Sir Declan Morgan: The question of reconciliation in Northern Ireland, and any society like this, is always difficult. In the Republic of Ireland, particularly in some rural areas, the sides that were lined up in the civil war are still voting the same way. This does not just disappear as a result of some magic bullet, but I think that it would be part of a wider process, which will take a long time before we achieve this.

Q657 **Ian Paisley:** Mr McGrory, does it deserve an acclamation that this is a step to true reconciliation?

Barra McGrory: Unfortunately, it does not. It needs serious revision. I too—I have already said it—deeply desire a process that will bring us closer to reconciliation, but I am afraid that requires a firmer degree of accountability than this proposal offers.

Chair: Gentlemen, can I thank you for your time? You have given us the benefit of your considerable expertise and experience in this important

area. The Committee is grateful to both of you.