STATEMENT OF WITNESS

STATEMENT OF KEVIN CHARLES PATRICK MCGINTY

DATED THIS 10th **DAY OF** September **2009**

I, KEVIN CHARLES PATRICK MCGINTY, declare that this statement is true to the best of my knowledge and belief and I make it knowing that if it is tendered in evidence at the Inquiry I will be liable to prosecution if I have wilfully stated in it anything which I know to be false or do not believe to be true.

1. The Inquiry has disclosed a number of documents to me. Where I make specific reference to a document in my statement I have given the number of the relevant page.

2. I have held the same position in the Attorney General's office since 1997. I advise the Attorney General in respect of his or her responsibilities in Northern Ireland as Attorney General for Northern Ireland. Subject to the supervision of the Director General of this office I am, and have been, the main adviser in relation to Northern Ireland matters. The Director General of the office is familiar with Northern Ireland matters but the bulk of the responsibility falls to me and I work directly to the Attorney General. At the time of the events covered by this statement the Attorney General was Lord Goldsmith QC.

3. There is a statutory relationship between the Attorney General for Northern Ireland and the Director of Public Prosecutions for Northern Ireland. That relationship is now defined by the Justice (Northern Ireland) Act 2002 but at the time of these events the relationship was defined by the Prosecution of Offences Order 1972. There is essentially no difference between the two Acts as to the nature of the relationship. The Director is responsible to Attorney General for the discharge of his functions. The Attorney General is answerable to Parliament for the actions of

the Director and through him the work of his office. The Attorney General has a statutory responsibility of superintendence and a power of direction. The power of direction means he can direct the Director in respect of prosecution policy and in respect of individual prosecutorial decisions.

4. The nature of superintendence is that the Attorney General is kept informed by the Director of sensitive or complex cases or cases that by their nature may result in significant media coverage or questions from MPs or Assembly Members. The amount of information provided in respect of any case, the stage in its life in which information is passed on and the degree of involvement by the Attorney General will vary from case to case. Occasionally, the Attorney General will be asked to review a decision taken by the Public Prosecution Service. On other occasions, the Director will indicate to the Attorney General that he is minded to reach a decision in a case and will provide the Attorney General with the information and reasoning on which his proposed decision is based. This allows the Attorney General to comment or express a view which is then taken into account by the Director before a final decision is reached.

5. The Director may also seek the Attorney General's advice on the public interest in commencing or continuing a prosecution.

6. It is a fundamental aspect of the relationship between the Attorney General and the Director of Public Prosecution that the Director acts independently. It is a function of the Director's office that he is responsible for the prosecutorial decisions taken by him or in his name. This independence is not undermined by the power of superintendence. The Attorney General may, when informed of a case, suggest other inquiries or consideration that ought to be made or given before a decision is reached. The Attorney General may challenge the conclusions reached by the Director and discussions, sometimes robust, may follow, but the final decision is always that of the Director. The Director will give careful weight to the arguments of the Attorney General but the decision remains his to take. This remains the same

when the Director seeks the Attorney General's advice on the public interest. The advice will inform the Director's decision but it remains his decision to take.

7. The Attorney General would only intervene in a case and direct the Director in respect of a decision if he or she concluded that the proposed decision of the Director was unreasonable, taking into account all relevant issues of law and evidence. Lawyers may form different views based on the same facts and law and neither view would necessarily be wrong. The Attorney General would not issue a direction in a case simply because he or she did not agree with the decision to be made by the Director or because it is not one they would have reached themselves. The Attorney General would only issue a direction if he or she concluded that the proposed decision was unreasonable. This test applies whether the Attorney General has been engaged by the Director in his consideration of a case or where the Attorney General has been asked by a victim, MP, Assembly Member or anyone else to review a decision already taken by the PPS.

8. If the Attorney General concluded that a proposed decision of the Director was unreasonable then he or she would intervene and direct the Director. If this was to occur then the decision would no longer be that of the Director's but would be a decision of the Attorney General. To my knowledge, no Attorney General has issued a direction in respect of an individual prosecution decision since the office of Director (and the power of direction) was created in 1972. I understand that in 1974 the then Attorney General, [redacted] QC MP, directed the then DPP, [redacted] CB QC, that for a temporary period, no charges of membership of a proscribed organization should be laid. I believe this was intended to encourage a period of ceasefire that had been entered into by the IRA. Such a direction was temporary in nature and was directed towards policy and not any individual case.

9. The Attorney General is rarely required to take prosecution decisions. Even in respect of those cases where her consent is required before a prosecution can be commenced, the Director will first of all have reached a decision that the Test for

Prosecution is met before the papers are sent to the Attorney General. Thereafter, it is still open to the Director to stop the prosecution, if for example he thinks the evidence or public interest no longer merits the prosecution continuing. Only if the Attorney General directs or enters a nolle prosequi can it be said that he or she has made a prosecutorial decision. There has been no such direction since 1972 and I cannot recall a nolle presequi being entered before the courts in Northern Ireland whilst I have held this post.

10. It was against this background that the case of R v Atkinson, Atkinson and Hanvey was considered. Although I now have little actual memory of the events, I am confident that this was a case with which the Attorney General was well informed. There are a number of reasons why I am of that view. The first is that this was a case which had received much media coverage and in which allegations of the most serious kind were being made against the police. The Attorney General would have been informed of the decisions being made in respect of prosecutions arising from the murder and of difficulties the prosecution faced. It was also a case which required a degree of co-ordination between departments, not least in respect of the setting up of the independent review to be carried out by Judge Cory. The Attorney General met with the Judge twice. I also recall that at the time of the Atkinson, Atkinson and Hanvey prosecutions Cory had reported and there was an issue over whether his report in this case could be published without redactions and whether the report might give rise to defence arguments about prejudicing the trial. At some stage also, the Attorney General had to consider whether an Inquiry could be held before the trials had concluded. These factors make me confident that the Attorney General was familiar with the issues arising from this case.

11. The Director of Public Prosecutions, Sir Alasdair Fraser, wrote to me on 18 March 2004 [page **33908**] regarding the case of R v Atkinson, Atkinson and Hanvey and the evidence of Andrea McKee. In his letter he said he was minded to offer no evidence and enclosed documents supporting his decision. These documents were the summary of events prepared by case officer Ivor Morrison, dated 18 March

[page **33909**]; the opinion of senior counsel Gerald Simpson QC, dated 15 March [page **40230**]; the minute of case officer Ivor Morrison, dated 16 March.

12. As I have explained, this was a case with which both the Attorney and I had been familiar from the very beginning and the letter from the Director would not have come as a surprise or considered in isolation. We knew that Ms McKee had not turned up at court because the Director would have told us. This would have been one of a number of discussions I had had with the Attorney to keep him informed. Not everything would be in writing as it was usual for me to meet with the Attorney General and to update him on this and other matters orally. In very general terms, updates about ongoing Northern Ireland issues were more usually given orally as so much might be going on at any time. An oral briefing also allowed the Attorney General to quickly raise any issues that concerned him or on which he wanted further information. A written submission would normally be used if the Attorney General was required to reach a decision. A submission to the Attorney General would have gone to him on the relevant file with all relevant papers flagged for his consideration.

13. On receiving the letter from the Director, I prepared the submission now shown at page **40221**. The submission is misdated and should read 18th March 2004. Once the Attorney General had considered the papers I was called down to discuss the issues raised with him. I cannot now remember exactly what was said but the Attorney would have had the papers before him. He would have read the papers, would have spoken to me about them, and would have told me what his concerns were, if any. I would have put forward and expanded the arguments used in the submission and tried to address any of the points he made. I do not have a note of my meeting with the Attorney General but that is not uncommon.

14. Following that discussion with the Attorney General I rang the Director at home that evening to discuss what the Attorney General had said. A summary of the conversation is the Director's note at page **33886.** Again, I have no personal

recollection of the contents of the call. I should explain that I usually speak to the Director on a daily basis, often more than once. This contact with him and his senior staff is an important aspect of the Attorney General's superintendence as it provides me with information that I can then pass on to the Attorney General if required.

15. With regard to the prosecution of Atkinson, Atkinson and Hanvey, the Attorney General was aware that Andrea McKee was due to attend the preliminary inquiry to give evidence on Monday 22 December 2003. He was informed that on Sunday 21 December 2003 Detective Constable Murphy telephoned Ms McKee. Ms McKee confirmed to D/Con Murphy that she would not be attending the preliminary inquiry because her son was ill. I have been shown a note by DC Murphy of the conversation between her and Ms McKee [page **74234**]. I have not seen it before and it was not part of the papers before the Attorney General so I do not want to comment on it.

16. It is a well known, if not always acknowledged, defence tactic to have witnesses called at a preliminary inquiry to see if they will turn up to give evidence. This is not unique to Northern Ireland. If a key witness does not attend to give evidence then the prosecution have to seek an adjournment. This will sometimes be granted and sometimes not. If it is granted, the prosecution would be required to provide an explanation for the failure of their witness to attend. This case had already been adjourned once because of a defence application that the first magistrate allocated to hear it was unsuitable. Ms McKee was the primary prosecution witness; indeed she was the only witness that could give evidence that an offence had actually taken place and therefore her presence was absolutely essential. When she failed to attend, the defence would, quite rightly, have argued strongly that the case should be dismissed.

17. I have been shown a handwritten note by the court clerk at Craigavon courthouse [page **34061**]. It states that in the case of Robert Atkinson, Eleanor Atkinson and

Kenneth Hanvey the principal prosecution witness, Andrea McKee, is unable to attend because her son is ill. The case was adjourned until 2 January 2004 for production of medical evidence and re-listed for 8 March 2004 providing the evidence was satisfactory.

18. When the case was adjourned on 22 December 2003 it was done so on the basis of the information Andrea McKee had given to DC Murphy about her son being ill and her not being able to leave him to travel. It had been reported that the child had an ear infection, mumps, swollen testes and was at risk of fitting. I have been shown two witness statements by Dr [redacted], a GP at Strathmore medical practice in Wrexham, dated 24 December 2003 [page **34042**] and 30 December 2003 [page **59853**]. In my view, whilst these statements indicate that the child was indeed unwell with an ear infection and the possibility of mumps, they do not support the degree of illness claimed by Ms McKee. Specifically, the first statement [page **34042**] records that the doctor saw the child on the day Ms McKee was to attend court (22nd December). Whilst the doctor confirmed an ear infection in both ears there is no mention of the other serious complications put forward by Ms McKee.

19. Given that what Ms McKee had reported was an ear infection, mumps, swollen testes and the risk of fitting, and this had been passed on to the court, neither the court nor the defence in my view could have been satisfied with the adequacy of these statements. It was inevitable that the prosecution was required to seek further evidence to support the account she had given for her reason not to attend. By making the claim she did, the issue became not whether her child was ill but whether she had been truthful in her explanation for her failure to attend court.

20. The issue for the prosecution is whether it can put to the court an honest explanation for its main witness having failed to attend to give evidence. The prosecution needed a medical certificate or other evidence to support the account it had forwarded to the court on 22 December, based on what Ms McKee had said, which was that the child had mumps, swollen testes and a risk of going into a fit.

Having sought evidence from the doctors it was clear that other evidence would be required to support the account given to the court. Further enquiries were made of Ms McKee. The result of those enquiries and the investigation that followed only indicated that Ms McKee was prepared to put forward a complex and untruthful account in an attempt to support what she had said earlier about the seriousness of her child's illness and the reason why she had been unable to attend court.

21. I have been shown the opinion of Gerald Simpson QC, dated 15 March 2004 [page **40231**], in which he states that he believes Ms McKee's explanation to be untruthful in light of police inquiries. Gerald Simpson QC is an extremely experienced criminal silk. He had had opportunity to speak and consult with Ms McKee and his views as to her credibility would have held weight. His opinion in support of the Director's statement would have been persuasive for the Attorney General.

22. The issue before the Attorney General was whether he thought the conclusion that the Director was minded to reach – that is that Ms McKee was not a credible witness – was a reasonable one. The issue of whether or not Ms McKee had been truthful about the seriousness of her child's illness and whether or not she had visited Pendine surgery as claimed is, of course, separate from the issue of whether the evidence she gave in support of the prosecution was true. The Attorney General was aware that Ms McKee had pleaded guilty to an offence of perverting the course of justice. The Attorney General was aware of the seriousness of the offences faced by Atkinson Atkinson and Hanvey. He was also aware that the evidence to be given by Ms McKee was of paramount importance in determining whether the Test for Prosecution was met. He knew that Ms McKee would be treated as an accomplice and that the judge would have to give a warning to the jury about placing weight on her uncorroborated evidence. In those very particular circumstances, the credibility of Ms McKee would have been crucial to any prosecution and a central issue for the defence. Ms McKee had already lied in proving the alibi. It appeared that she then decided that she would not attend court

to give evidence and, in support of that action, provided an embellished account of the seriousness of the ill health of her son. When that account was tested by the prosecution she made further untruthful claims in an attempt to support her original claim. She was seen separately by both junior and senior prosecution counsel. She was given the opportunity to recant her earlier untruths but she refused to accept that she had not told the truth. It was the view of counsel that Ms McKee could not be put forward as a person in whose credibility the prosecution could have any confidence.

23. The prosecution is under an obligation to act fairly at all times and whilst it must properly be robust in pursuing prosecutions it must do so fairly. It is of fundamental importance that it only uses witnesses that it considers truthful. To do otherwise would be a gross abuse of its powers. In the light of the material placed before him, the Attorney General was satisfied that the decision to discontinue this case was a reasonable one and that he had no cause to issue a direction to the Director to continue with this prosecution.

24. I have been asked about my opinion as set out in my submission to the Attorney General of 18 March 2004 as documented at page **40222** that Ms McKee "*would be torn to bits by defence counsel about these issues.*" Had I known the submission was to have a wider circulation I might have used different language. But I remain of the view that the credibility of Ms McKee would be the central issue at the trial of Atkinson, Atkinson and Hanvey and that following effective defence cross-examination which would establish that on other occasions Ms McKee had shown herself ready to lie and say whatever supported her case, there would be no reasonable prospect of a jury being satisfied beyond reasonable doubt that in respect of the alibi Ms McKee was now telling the truth.

25. In my submission [page **40222**] I stated my opinion that "*the facts as set out justify the decision to end the case.*" Furthermore I advised the Attorney that "*your involvement in Hamill and Cory would be liable to be misinterpreted as an attempt*

to put off an inquiry." In March 2004 there was considerable political and public pressure to commence the Public Inquiries that were to follow the Cory Reports. We had advised that there were fundamental difficulties about having an Inquiry commence before prosecutions had been completed. I have been asked whether it was politically expedient to have the Atkinson case discontinued so in that this would allow the Inquiry to be commenced. Such considerations played no part in the decision of the Director or of the Attorney General.

26. I have been asked whether the Attorney General had been given sufficient time and information in order to reach a properly informed decision in this case. As I have explained, the case was one with which the Attorney General was already familiar. The Attorney often has to look at things at very, very short notice and this would not have been a rushed decision. [redacted] took his office very seriously. He had strong views, he was a skilful and accomplished lawyer and knew his own mind. He was acutely aware of the need for public confidence in the criminal justice system. He would not have allowed so important a decision to pass unless he was satisfied that he was in a position to reach a properly informed decision. In my opinion I was given a sufficiently clear analysis from the DPP in order for the Attorney General to form a view of whether the case should continue.

27. Once the Attorney General had decided not to intervene in the case he sent a letter to [redacted], copied to [redacted], explaining his reasons [page **33878**]. I can confirm that this letter was faxed from my office on 24 March 2004 despite being dated as 18 March 2004. As it was faxed at 13.41 it was most likely signed that day. The date of 18 March 2004 is a drafting error on my part – probably from using an old template.

SIGNED: .....

KEVIN CHARLES PATRICK MCGINTY

DATED: 10.09.09