

STATEMENT OF WITNESS

STATEMENT OF ALASDAIR McLEOD FRASER

DATED THIS *17th* DAY OF *September* 2009.

I, ALASDAIR McLEOD FRASER, 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 been Director of Public Prosecutions (DPP) for 20 years. I was appointed by Sir Patrick Mayhew, the then Attorney General for Northern Ireland, in April 1989. The Office of the Director of Public Prosecutions (ODPP) ceased to exist in 2005. In June of that year, the Justice (Northern Ireland) Act 2002 was brought into effect establishing the Public Prosecution Service (PPS) of which I am now head as Director.
3. The Prosecution of Offences (Northern Ireland) Order 1972 established the ODPP and set out the Director's functions and his relationship with police. The principal provision is Article 5 which places a duty on the Director to consider facts and information brought to his notice, whether by the Chief Constable or others, with a view to initiating or continuing criminal proceedings.
4. Within the Prosecution of Offences (Northern Ireland) Order 1972, Article 6(3) places a duty on the Chief Constable to furnish the Director from time to time, with facts and information with respect to indictable offences alleged to have been committed against the law of Northern Ireland and such other

offences as the Director may specify. At the Director's request, the Chief Constable must ascertain and furnish information regarding any matter which he considers requires investigation, on the grounds that it may involve an offence against the law of Northern Ireland or information which may appear to the Director to be necessary for the discharge of his functions.

5. In respect of cases reportable by the Chief Constable to the Director it is the function of the Chief Constable and members of the police force to investigate alleged or suspected offences and to furnish relevant facts and information to the Director. It is the function of the Director with a view to the initiation or continuation of criminal proceedings, to consider the facts and information brought to his notice by the Chief Constable, and where the Director thinks proper to initiate, undertake and carry on criminal proceedings. The broad and important principle is that investigation is for the Chief Constable, not for the Director. The Director may request an investigation, and he may draw attention to particular aspects of an investigation which will be important for the purposes of a prosecution. The conduct of an investigation is however for the Chief Constable and the Director cannot control the manner in which an investigation is conducted by police. However, if there was evidence and information available which indicated that an offence had been committed, and the Chief Constable was not carrying out an investigation, then the Director would consider exercising his power to direct him.

6. Prior to the Justice (Northern Ireland) Act 2002 there was no statutory provision requiring the DPP to give the police advice in matters relating to the prosecution of offences. There were, however, administrative arrangements in place between the Director and the Chief Constable. In a complex case, where the police wanted to discuss issues which might not be clear or the course the investigation ought to pursue, it was open to police to seek advice in relation to prosecutorial matters. Further,, one can envisage circumstances where the Director himself, perhaps being aware of an ongoing investigation, might wish to be briefed by police, and during the course of that briefing, may well offer advice on prosecutorial issues.

7. In 2005 the Code for Prosecutors was published. Prior to that, there was a Handbook for Prosecutors. The Test for Prosecution is set out in both the Handbook and the Code. The test was the same in 1997 as it is now. It is a two-fold test. There is the evidential test, posing the question: Is there sufficient evidence to afford a reasonable prospect of obtaining a conviction? And the public interest test: Is prosecution required in the public interest? . If the advice of Counsel was sought, it would only be in relation to the evidential test, not the public interest test.
8. The evidential test is a constant: it asks whether there is sufficient evidence to provide a reasonable prospect of a conviction. The application of the public interest test is no different in Northern Ireland than in England and Wales. However, there may be particular public interest considerations, for example if an offence was motivated by sectarianism that would clearly be a public interest factor which would militate in favour of a prosecution
9. I have been asked whether there is a different test for prosecution, de facto or otherwise, in the case of allegations against police officers. The approach and test applied to allegations against police officers does not, and never has, differed from those against a civilian. There is no higher test for prosecution for police officers. The police and those acting in support of the police were and are subject to the same law as binds the people and the test for prosecution is applied in exactly the same way in respect of them.
10. I have been asked whether the evidential test for prosecution was affected by the mode of trial being with or without a jury. The only question under this limb of the test is whether there is a reasonable prospect of conviction before an impartial tribunal, properly directed in accordance with the law. This is an objective standard which takes no account of the mode of trial. While for a variety of reasons, it could be difficult for police from time to time to carry out a fully effective investigation this did not arise from or influence the mode of trial.

11. I am asked to explain the process of certification prior to 2007, when the Diplock courts were abolished. Certification was a statutory scheme that started in 1973. The statute provided a list of offences in a schedule which became known as scheduled offences. The charge of murder, for example, was a scheduled offence and the magistrate before whom an accused individual would first appear was generally not permitted to consider a bail application. Bail for a scheduled offence was solely a matter for the High Court or the Crown Court. All scheduled offences were tried by a Judge sitting alone. There was, however, provision for a certificate to be issued by the Attorney-General, de-scheduling any offence, including murder, which he did not consider to be connected to the emergency, as a result of which the case would be tried before a jury. I would set out the facts of the case together with a recommendation and the Attorney would decide whether or not, in his view, the offence was connected to the emergency. In some cases this could be a difficult judgement, in other cases it was clear. If the Attorney thought that it was connected to the emergency he would not issue a certificate and the trial would take place before a judge sitting alone. If he thought it was not connected to the emergency, he would issue a certificate and the case would then be tried before a Judge sitting with a jury. Whilst not every case of sectarian conduct would be considered by the Attorney to be connected to the emergency, if the Attorney took the view that a case concerned heightened tensions in a sectarian context, then he might well consider it to be connected to the emergency. That, I understand, is what happened in the Robert Hamill case.

12. The Diplock courts have, since 2007, been succeeded by a new system. Again, a Judge sits alone but the process has been changed. Responsibility for the decision as to what the mode of trial now rests with the Director. The procedure has also been reversed, in the sense that it is presumed that all trials will take place with a jury, unless the Director issues a certificate to the contrary, resulting in a non-jury trial. The Director will only issue a certificate if he considers that any of a number of statutory conditions are met and in view of this that there is a risk that the administration of justice might be impaired if the trial were to be conducted before a jury.

13. As far as I can recollect, my first involvement in the murder investigation of Robert Hamill was in July 1997 when the issue of certification was brought to my attention by a letter from Mr Richard Monteith, of Richard Monteith Solicitors, dated 28 May 1997 [19050].
14. I have been asked about meetings which took place between Detective Superintendent McBurney, Superintendent Hook and the Deputy Director on 12 May 1997, and Detective Superintendent McBurney, Superintendent Harvey, Mr Junkin and Mr Kitson on 13 May 1997. Minutes of these meetings have been produced and shown to me containing the page numbers [31613], [19069] and [31603]. It is not clear to me whether advice was being sought here or the investigation team were updating the prosecutor as to what stage the proceedings had reached. The meeting with the Deputy Director appears to be more of a briefing. The minutes and manuscript notes of the meeting with Mr Junkin and Mr Kitson appear to be a mix of a briefing and seeking advice, but it was more, I believe, a briefing with particular reference to anticipated bail applications and issues concerning the medical evidence. I note that the name Atkinson appears in Mr Kitson's manuscript note.
15. Documents [31613], [19069] and [31603] make no reference to the Independent Complaints Police Commission ("ICPC"). The relationship of the ICPC was with the police, not the ODPP. I have no recollection of the ICPC formally advising the ODPP when they were supervising a murder investigation involving police officers or a serious offence in which people were charged on an indictment. I do not rule out that if the ICPC were supervising the police in an investigation, and dictating the line of questioning, then the prosecutor should have been made aware of this development.
16. I have been asked should or could the DPP have instructed the police to investigate Tracey Clarke's accusations against Reserve Constable Atkinson as part of the murder investigation and not treat Ms Clarke's accusations against Reserve Constable Atkinson as a separate issue with its own DPP file.

Whilst the Director could require the Chief Constable to investigate a certain matter it was not open to the Director to require police to investigate in a particular manner. The Director could ask whether an investigation could be conducted in a particular manner but would only do so if there was a proper basis for so doing. The involvement of Superintendent Hooke, Superintendent Harvey and Superintendent McBurney would have led me to believe that the investigative strategy had been carefully considered and approved at the level of the Chief Constable.

17. I have been asked should the police have notified my office sooner in relation to the acquisition of telephone billing, which supported Tracey Clarke's original statement, and confirmed contact between the Atkinson and Hanvey houses on the morning of 27th April 1997. The telephone records were obtained in May 1997. My office was not aware of them until we received the police investigation file dealing with the neglect complaint and the specific allegations against Reserve Constable Atkinson from Superintendent McBurney in February 1998. It was open to police to inform my office at an earlier stage that they had advanced their inquiries by securing the telephone details.

18. I have been asked to speculate on my course of action had my office been made aware of Andrea McKee's written statement, dated 29 October 1997. In this statement Andrea McKee said that her husband, Michael McKee, was responsible for the telephone call recorded from Reserve Constable Atkinson's address to the Hanveys on the morning of 27 April 1997. I am told that, at the time, the police believed this statement to be false, and considered Mrs McKee's original verbal account, made on the 8th May 1997, to be true. I am told, therefore, that the police allowed Mrs McKee to make a statement which they knew to be manifestly wrong, and which she later went on to admit was incorrect. This is a matter which should have been drawn to our attention, but was not. The decision to take Mrs McKee's written statement was a police matter. However, had my office been made aware of it, then I have little doubt there would have been communication between my office

and police as to whether they had questioned Andrea McKee about her earlier verbal account.

19. A file note, dated 13th October 1997, has been produced and shown to me [18093]. The note indicates that I was spoken to by Roger Davison and Raymond Kitson regarding the Robert Hamill case, and that I instructed them that Gordon Kerr QC should consult with witnesses that week if possible. Gordon Kerr QC was one of the most experienced senior Counsel that ODPP instructed. He is one of the Director's nominated Counsel

20. I have been asked about the evidence of Colin Prunty. I was aware that there had been a consultation between Gordon Kerr QC, Ronald McCarey and Mr Prunty on 30 October 1997. Subsequent to that, and following the release of Forbes, the Hamill family contacted Mr Kitson as it had become apparent that Mr Prunty was now stating that it was Forbes who he had seen kick Mr Hamill. A further statement was taken from Mr Prunty, as a result of which a second consultation was held on 5 November 1997 between Mr Kerr QC, Mr Prunty and Mr Kitson. During the course of that consultation, Mr Prunty was shown photographs of Lunt and Forbes in order to ascertain who it was he had seen kick Robert Hamill. The written advice of Mr Kerr QC was sought and was subsequently provided on 13 November 1997. That advice was sent to me by Mr Kitson.

21. This case had a high profile in the community. I asked to be kept informed about progress in relation to it, for example in the note at [18122]. I take responsibility for decisions which are taken by my Service, and I make that absolutely plain. I am responsible for the decision maker's decisions. I asked to be kept informed, not necessarily to become a decision maker, but rather in a supervisory way.

22. I have been referred to a minute, dated 9th December 1997, from Mr Kitson to myself [18335]. Mr Hamill's family had written to the Secretary of State, who then was [REDACTED]. [REDACTED] had in turn contacted the Attorney General. For

the purposes of providing a report for the Attorney, I wrote to Mr Kitson and he provided a written account of all relevant developments.

23. The following day, on the 10th December 1997, a letter - produced and shown to me [18216] - was sent to the Attorney General's office in London. I have a further copy of the same letter, [18230], on which I have handwritten a note that says, "Mr Gordon Kerr QC read this on 10 December 1997 and was entirely content." My signature follows and the date of 10 December 1997.
24. Mr Kerr QC was involved at the time as this was an important letter. It had to be as complete and accurate as possible. It was important that I informed the Attorney General fully as to what had occurred over a period of weeks where there had been a considerable amount of activity. Hence, my turning to Mr Kitson for a report. I took Mr Kitson through his minute. I raised a number of questions and drew his attention to differences between his conclusions and those of Counsel, Mr Kerr QC. Mr Kitson explained the differences and I recorded it in the manner that he described. Because of the differences between Mr Kitson and Counsel, and that I was attributing views to Counsel that were not in his opinion even though Mr Kitson had assured me that his minute was accurate, I considered that the right thing to do was to invite Counsel into my office and give Mr Kerr the opportunity of reading the letter, raising with him the differences and asking him whether or not he was content I did that.
25. The principal differences between Mr Kitson and Counsel were their views as to whether there was sufficient evidence to prosecute for affray in relation to some of those individuals originally charged with murder. Counsel also addressed Article 3 of the Criminal Justice. Mr Kitson did not in his minute. They were significant differences. Mr Kitson had consulted with counsel after he had received his opinion. Mr Kitson expressed his views in relation to affray about two, perhaps three, of the suspects . I was not present at the discussions, but there was a debate between them on the matter. I found it difficult to divine what exactly Counsel had meant on certain issues in his opinion and greater clarity was obtained by the consultation process.

26. I was satisfied, having discussed the matter with Mr Kerr, that he was content with the position as set out in my letter to the Attorney General. Mr Kerr was not pressurised to change his view on the prosecution in any way.
27. The relationship between the Attorney General and the Director is set out in the Prosecution of Offences (Northern Ireland) Order 1972. The Director is subject to the superintendence of the Attorney General and can be directed by the Attorney General in any matter. He is also responsible to the Attorney General for the discharge of his functions. In order to assist the Attorney General in responding to the Secretary of State I was providing information with regard to how these matters had been dealt with which would permit him to answer the correspondence.
28. In 1999, after Marc Hobson was acquitted of murder and convicted of affray, Barra McGrory of PJ McGrory & Co took over representation of the Hamill family from the [REDACTED] practice. Mr McGrory wrote to me asking for explanations about the decisions not to prosecute in the Hamill case and for a review of the decisions relating to Mr Lunt and Mr Bridgett. Mr McGrory indicated that his clients were considering a judicial review[18253]. I have also been shown my minute to the Deputy Director dated 20 July 1999 in response to Mr McGrory's letter [18251].
29. Mr McGrory's letter of 20 July 1999 caused me to initiate a review of prosecution decisions including the decisions in relation to Mr Lunt and Mr Bridgett. My opinion was that there was a reasonable possibility, should Mr McGrory disagree with our response, of a judicial review of the decisions and I wanted to be assured or otherwise as to the correctness of the decisions which Mr Kitson had reached. The review was conducted by Mr [REDACTED], reporting to the Deputy Director. As I had been involved in the process of the decisions, and formed my own view of their correctness, I considered it right to ask Mr [REDACTED] to report to the Deputy Director. I put responsibility on the Deputy to oversee Mr White's review, to ensure it was conducted thoroughly.

30. I would not describe a review as unusual, but equally it is not a frequent occurrence. There is a section in our Code to deal with the review of a decision. Obviously, the prosecution is concerned with the finality of its decisions but if there was additional evidence available, or if someone has concerns with the decision which we have reached, and asked for it to be reviewed, we would do so. If I considered there to be a risk of being judicially reviewed then I want the prosecution to be sure that everything was in order.
31. In this particular case, Mr McGrory was not offering new evidence, but in one case, he was drawing my attention to certain observations made by the Judge in the Hobson trial. Unfortunately, the trial Judge did not have the background knowledge and information as to what had occurred in relation to Mr Prunty.
32. I have been shown a document between myself Ms [REDACTED], dated 8 October 1999 [37620]. It is reply to a fax received on the 7 October 1999, (unpaginated) from the Attorney General's office. I have been asked what the Attorney General's office had raised in this fax as an issue in the Robert Hamill case. It related to a comment or observation which the government wished to make in connection with the Hobson trial and prosecution decisions. The fax contains a letter sent to Ms [REDACTED], dated 6 October 1999, saying that the government has received a note from the Irish side of the Anglo-Irish Secretariat, instructing them to raise their extreme concern about the circumstances surrounding Mr Hamill's death. They said it was believed to be in the public interest for the reasons for the DPP's decisions to be made public. The letter sought advice on how to respond and in that context it was given to me to comment. Hence, my letter to Ms [REDACTED] of 8 October 1999.
33. My reply to the Attorney General's office does not indicate any restrictions on the release of information [37620]. I am replying in terms of the propriety of the government's comments, which in my view were somewhat understated in the letter. It would not be proper for the government to comment because that would have been trespassing upon my independence, about which I am protective.

34. With regards to my reply to the Attorney General's office, [37620], one of the enduring debates is the extent to which the Director can and should provide reasons for decisions for no prosecution. I think, within this letter, I was probably reflecting the policy at that time. The policy at that time was much more restricted than it has now become. At that time, my policy would have been to provide reasons in general terms. My policy now would be to provide as detailed reasons as I can yet recognising, of course, that there will be circumstances where this is not possible.
35. The final paragraph of my letter to the Attorney General's office refers to the coroner, Mr Leckey. There is a note that says "may consider whether to proceed to make arrangement to hold an inquest." I can not reconstruct the details of this note from memory but I would not have written it unless there was some basis to do so. It is a fair summary to say that I was aware that Mr Leckey was considering an inquest and I was drawing that to the attention of the Attorney General's office.
36. I have been shown a file note that I made on 13 June 2000, [28746]. This was in response to an article in the Belfast Telegraph quoting the Taoiseach, Mr [REDACTED]. The purpose of the file note was simply to record that I was somewhat puzzled that he had made a reference to new evidence about which we were unaware.
37. I have been shown a file note that I made on 22 June 2000, [18976], in relation to a telephone call from the Chief Constable. I did not link the report in the Belfast Telegraph with this conversation, but there is a possibility they were related. I cannot recall the fact of the conversation and I have relied upon the file note. My record of the conversation is likely to be accurate but its content is not in accord with the known facts. I am surprised that I did not recognise that what I was being told did not make a great deal of sense. However, it was in 2000, time had moved on, and it was an unheralded call. This sort of telephone call from the Chief Constable was infrequent. Crime Branch generally dealt with most matters regarding prosecutions. I have not

noted why the Chief Constable came directly to me in this instance and therefore I cannot say.

38. I have had the opportunity to read Raymond Kitson's minute of 27 June 2000 [17625- 17627] in which he subsequently informed me of what had occurred in a meeting between himself, the police, and ICPC the previous day. Mr Kitson told me that he had discussed two issues. The first being whether Detective Superintendent McBurney was right to have taken a witness statement from Andrea McKee as opposed to a statement under caution. In respect of that, he had not offered advice. He went on to say the police were seeking advice on how to proceed with the investigation. On reading the minute, it seemed to me that he was anticipating that they would have to provide some form of report in writing to allow him to offer advice. At that stage, he felt he was not in a position to assist.
39. I would not exclude the possibility of the police approaching my office for advice in relation to the taking of Andrea McKee's statement. I do not know whether one would give that advice or whether one would conclude: "Well you have a legal advisor; this is an investigative step. It is a matter for which you might be liable in terms of disciplinary proceedings. And in these circumstances, as it does not concern prosecutorial matters, I am not going to help you." But we would certainly have had an interest in the statement and I would have thought that had Detective Superintendent McBurney come seeking advice, a means of offering advice in terms of prosecution could have been found.
40. My opinion is that Mr Kitson was not being difficult in terms of asking the police for something in writing in regards to the advice they were seeking. They were clearly skirting in or about the issue of immunity for Andrea McKee, for which Mr Kitson had no authority. Mr Kitson was aware that any issue of immunity was mine to deal with.
41. I have been asked to speculate on my response had the police presented a request for immunity for Andrea McKee prior to their visiting Mrs McKee in

Wrexham. The important thing to realise is that the prosecuting authority does not offer immunity. The prosecution considers a request from the police to treat a person, who otherwise would be prosecuted, as a witness. Therefore, the basis of that would be to satisfy the prosecutor that the suspect had made a full and honest account of what has occurred, and to bring that to the prosecutor with a recommendation in respect of certain matters, such as the likelihood of the witness maintaining her evidence; the possibility of pressure being brought to bear on the witness; and whether or not police believed the witness' account was accurate. In this case, I would not have said to the police, "I can do this prospectively". I would not have given to them any such undertaking or assurance, if that had occurred.

42. It is my view that a full statement or confession by an individual concerned with seeking immunity should be taken under caution, as opposed to being taken in the form of a witness statement. If immunity was going to be considered at some stage, and a decision made, the individual should have been aware of the fact that they were liable for prosecution from the outset and a statement taken under caution, or interview conducted under caution, with the results available to me, as the prosecutor, to make a decision. Had the police approached me in advance, they would have received advice on these terms. It was a well beaten path (for my office), having been through a series of very significant trials in the 80s.
43. I have been asked to comment on the separation of the prosecution of Michael and Andrea McKee. My recollection is that Mrs McKee and her husband, Mr Michael McKee, were prosecuted for doing an act with intent to pervert the course of justice. The counts on the indictment were separately drafted but concerned essentially the same issue in relation to Mr McKee's telephone call. Both Mr and Mrs McKee appeared before the same Judge on the same day and were sentenced.
44. I have been shown a file note of 25 October 2002, prepared by Mr Morrison for my attention [20021]. I have also seen a preceding document of 24 October 2002, from Mr Kitson. The document from Mr Kitson is a memo

referring to a parliamentary question asked by Mr [REDACTED]. As part of this process, I believe Mr Morrison must have prepared information which would be incorporated by the Attorney's Office in a reply although I cannot see to whom the question was addressed.

45. I was present at a meeting on the 26 February 2004, between my office and senior Counsel to discuss Andrea McKee as a witness. From a record, [33979], I can see that other people present were Senior Assistant Director, Mr [REDACTED], Ivor Morrison, an Assistant Director, along with Gerry Simpson, senior Counsel at the Bar. I asked Mr Simpson QC to consult with Mrs McKee at this juncture as I needed to be sure that every proper step to advance the case had been taken. I expressed the view that in all the circumstances, the witness may remain credible; that was the main issue we were discussing. It was important that I should take what I described as an informed decision as to how the case might be progressed and, I noted Junior Counsel, Miss Smith, and the Assistant Director, Mr Morrison, had consulted with the witness but Senior Counsel had not, and I instructed him to do so.
46. It was my decision not to proceed with Andrea McKee's evidence. I have been shown a letter I wrote to Mr McGinty at the Attorney General's office, dated 18 March 2004, [33908], regarding the withdrawal of the prosecution case. I wrote that I was minded, upon Counsel's advice, not to proceed with the prosecution on the basis of her general credibility. In due course my decision was made after very careful consideration and thought having regard to the advice that I had received from Senior Counsel and advice received earlier from Christine Smith and Ivor Morrison; all three of whom had seen and consulted with the witness. I concluded that the test for prosecution was no longer met.
47. There were a number of factors that I weighed in reaching my decision. I refer to my minute of a conversation with Kevin McGinty on 18 March 2004 [33666]. I recorded that I agreed with Counsel that he could not advance Andrea McKee as a credible witness. Mrs McKee had pleaded guilty to an

offence of doing an act with intent. This was certainly an important factor. She had originally lied and provided a defence to Reserve Constable Atkinson about a telephone call to the Hanvey household. While Mrs McKee had now given what we had taken to be a truthful account of what had happened in 1997, she had subsequently failed to appear at the preliminary inquiry to give evidence and lied about what had occurred with regards to her son at Pendine Park Medical Centre in order to explain that failure; an untruth which Counsel gave her the opportunity to change yet she maintained it. Weighing all these factors, I believed that she would continue to lie under cross-examination if she was called as a witness. I came to the view that she had demonstrated a capacity to change her story as and when it was necessary and I did not regard the events at Pendine Park as being merely peripheral. In my estimation these events had moved to the centre of the issue of credibility.

48. I note that I included in my minute that in any event Mrs McKee was an accomplice and that the judge would have to warn the jury about the danger of convicting without corroboration. I am satisfied that a judge would inevitably have exercised his discretion to warn the jury to exercise caution before acting on the evidence of Andrea McKee without supporting independent evidence.
49. I have been asked to comment on Andrea McKee's visit to the Pendine Park Clinic with her son and how it came to the court's attention, and further progressed into becoming an issue for the prosecutor with regards to the truthfulness of the witness. My recollection is that there was a requirement to establish what had happened. The adjournment was not simply an "adjournment simpliciter".
50. I have asked Mr Kitson to write to the Inquiry to provide certain information in regard to conviction rates, recommendations from the Police Ombudsman and delay in forensic reports. .

SIGNED:



ALASDAIR MacLEOD FRASER