Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Briefing by Rt Hon Sir Declan Morgan (Lord Chief Justice) and Northern Ireland Judicial Appointments Commission

4 June 2014

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Sydney Anderson
Mr Stewart Dickson
Mr Tom Elliott
Mr William Humphrey
Mr Seán Lynch
Mr Alban Maginness
Ms Rosaleen McCorley

Witnesses:

Rt Hon Sir Declan Morgan	Lord Chief Justice
Ms Mandy Kilpatrick	Northern Ireland Judicial Appointments Commission
Ms Clare McGivern	Office of the Lord Chief Justice

The Chairperson: I welcome the Rt Hon Sir Declan Morgan, the Lord Chief Justice for Northern Ireland, to the meeting. I also welcome the chief executive of the Northern Ireland Judicial Appointments Commission (NIJAC), Ms Mandy Kilpatrick; and Clare McGivern from the Lord Chief Justice's office. A separate meeting folder was provided to members for this session, and information on pages 2 to 7 of the Committee papers provides further information on the judicial appointments process and further correspondence from Judge Marrinan that we received yesterday. Judge Marrinan's further correspondence will be treated as further evidence, in accordance with the position agreed by the Committee on 7 November 2013, which was that all written material provided by Judge Marrinan to the Committee should be treated as formally submitted evidence.

With that said, I formally welcome the Lord Chief Justice to the meeting. I ask you to make some opening comments, and then we will move on to the substantive issues.

Rt Hon Sir Declan Morgan (Lord Chief Justice): Thank you very much, Mr Chairman. I am grateful for the welcome and the opportunity to meet you. When we were waiting, we were shown to the Armoury, and you will be glad to know that we left everything behind us, so hopefully this will be a friendly meeting.

I am here today as both head of the judiciary and chairman of the Judicial Appointments Commission. I have always indicated my willingness to meet the Committee; I believe that it is a sign of a healthy democracy. It is also important for public confidence that we respect each other's role, and that is the spirit in which I have come here today. My aim, therefore, is to be as helpful as possible to the

Committee. As regards your interest in judicial appointments, the help that I can give you must, however, be within what I consider to be the constitutional and statutory constraints. I accept that the Committee takes a wider view of its remit than I do but trust that you will recognise my position and respect the limitations on what I feel able to discuss. However, I want to place on record my high regard for Judge Marrinan. He has an excellent record of judicial service and commitment, and I have the utmost personal and professional respect for him.

Turning to judicial appointments, NIJAC is responsible for recruitment to just over 650 judicial offices. Since it was established in June 2005, around 60 separate competitions have been run. That has generated more than 1,600 applications, resulting in 327 appointments across the courts and tribunals in Northern Ireland. Many of those appointments have been of lay or medical post holders. Over 100 appointments have been made since the devolution of justice in 2010, and all those positions have been advertised and recruited in open competition. Apart from the three complaints by Judge Marrinan, there has been only one other complaint to the Judicial Appointments Ombudsman, but it was not upheld. You may see that that is dealt with in the ombudsman's report for the period ending, I think, 31 March 2010 or 2011, which sets out the nature of that complaint.

I will deal with the selection process. As an initial step in any recruitment process, NIJAC sets out the merit criteria in a personal profile, which is accompanied by a job description. The personal profile identifies the qualities that we are looking for in an applicant and the competencies required for the role. The merit criterion is weighted appropriately and assessed by means of selection tools, such as an interview, a case study or, in some cases, role play.

As well as settling the personal profile, the merit criteria and the assessment tools, the selection panel now, at the outset, will fix an appointable threshold at shortlisting and final stage. Only those passing the threshold will go to the next stage or be deemed appointable. The selection panel for any salaried scheme will usually comprise four members, one of whom will be a judge of an equivalent or higher tier, and at least one of whom will be a lay commissioner.

When recruiting for the High Court bench, we now shortlist by interviewing all those who apply. Candidates may be asked questions in relation to a case study and other aspects of the personal profile to assess how they meet the essential elements of that profile. Those who are shortlisted will be called back for a further assessment, which normally includes a further interview and case study. This will examine, in depth, the knowledge, skills and personal qualities of the role.

In assessing individual applicants against the agreed criteria, NIJAC, consistent with guidance from the Labour Relations Agency, requires each panel member to score each candidate individually, before collectively reaching agreement on the candidate's final position. This process is known as moderation.

In her contribution to the Committee on 8 March 2012, you will recollect that Mrs Ruth Laird, then a lay commissioner, described this phase as:

> *"where the cut and thrust of debate and discussion will go on".*

At the moderation stage, there is a robust discussion to establish to examine the strengths, weaknesses and development areas of each candidate. The purpose of this process is to achieve consistency and accuracy in assessing each candidate; it is certainly not about adopting an average of all the individual scores. In fact, this can be the longest part of the selection process, and it is where the combined experience of the panel comes to the fore.

Challenge and balanced judgement is a healthy part of the decision-making process. Invariably, this will involve some adjustment of marks and perhaps a change of view by some of the selection committee on the most meritorious candidate. NIJAC's guidance provides that selection committee members must record where and why they agreed to change. Where members cannot unanimously agree on the mark for a particular skill or quality, the majority view will prevail. If the selection committee cannot reach agreement, under the guidance, the chairman of the selection committee reaches a decision and records the reasons. This has been and still is the practice.
If the selection committee feels that further reflection may help, its members can adjourn and renew the discussion on another day. Prior to any recommendation, successful applicants will be subject to a series of checks to ensure that they are in good standing for judicial office. That includes a conflict-of-interest interview. Unsuccessful candidates are offered feedback in a way that is intended to be constructive and perhaps of value in helping them to prepare for future judicial appointments.

I hope that that gives you a sense of the rigorousness with which we approach our selections. Improvements have undoubtedly been made to our processes, as we have learned from experience.

I want to look at my position as Lord Chief Justice, as chair of NIJAC. I have thought carefully about my own role and responsibilities as chair of NIJAC, particularly since, as we are all aware, in Scotland and England and Wales the judicial appointment bodies are chaired by laypersons. Northern Ireland is, however, different. Our political establishment is different; our arrangements for judicial appointment are different and are cast to remove — to the fullest practical extent — any role for Northern Ireland Ministers. That was a deliberate decision by the main political parties. In the Second Reading debate on the Northern Ireland Act 2009, Nigel Dodds said:

> *"I would have thought that most people in Northern Ireland were somewhat reassured by the fact that there should be no suggestion of political interference in the appointment of High Court judges, given the role that they play."*

This self-denying ordinance by our local parties recognises that we are a society emerging from conflict. That is also clearly reflected in our political structures. The Minister of Justice is selected on a basis that differs from how our other Ministers are selected. Other Ministers are selected under d'Hondt, which is, in itself, a particular feature of our democracy. As long as we have such measures that reflect our emergence from conflict, I think that we should accept the recommendation of the Commonwealth Lawyers' Association, a body that is familiar with countries coming out of conflict. It recently carried out a detailed study of constitutional provisions. In May 2013, it recommended model clauses for constitutions that provided, among other things, that the Judicial Appointments Commission should be chaired by the Chief Justice.

I hold the position of chair by virtue of my office as Chief Justice, and I nominate five other judicial members, one of whom is a lay magistrate. An independent assessor from the Office of the Commissioner for Public Appointments (OCPA) participates in my selection process. The Bar and the Law Society nominate a member each, and the lay commissioners are selected by the First Minister and the deputy First Minister. There is no judicial involvement in those selections. Under statute, those involved in the arrangements for nominating and appointing to the commission are to secure, so far as is practicable, that, as a whole, the membership is reflective of the community.

There is a key role here for all of us, but perhaps particularly for the First Minister and the deputy First Minister. It is both their opportunity and responsibility to ensure that the lay commissioners reflect the community and the public interest and are of the calibre and robustness necessary to deal with the judicial appointments process. All our lay commissioners are individuals of substance and have an excellent track record of service and contribution to the work of NIJAC. That is to the credit of those who appointed them, but I refer you again to the remarks of Mrs Laird about the important role that lay commissioners play in NIJAC. By way of example, the chair of the selection committee that will appoint the next High Court judge is a lay person, as was the person selected to chair the last County Court judge competition.

Finally, I understand that the Committee may also want to discuss the matter of sentencing. That is one of the most difficult things that a judge has to do, and it is never taken lightly. I also fully appreciate the public interest and the need for public confidence. It is a challenge, as the details and complexity of a case lie well below the headlines, but that is what the judge must deal with. Obviously, I cannot discuss individual cases today, but if there are questions of a general nature that you wish to ask, I am happy to assist as far as I can. There is much to think about, but I hope that what I have said is helpful, and I am sure that you will have some questions for me on judicial appointments and other topics.

Thank you very much, Mr Chairman.

The Chairperson: Thank you, Lord Chief Justice. We will get to the sentencing aspect when we conclude on the judicial appointments process. You will have to advise the Committee on what you feel you can answer and what you do not want to answer.

The genesis of this was the evidence provided by Des Marrinan, which, at the time, I said I found profound and alarming. That is what spawned the Committee to continue looking into judicial appointments, and that is why, when we conclude this meeting today and before the end of recess, we will agree the terms of reference for an inquiry into the judicial appointments process. We will do that work before this mandate is completed. There are questions that I want to put about the Des Marrinan case in particular, which will touch on the broader remit of the judicial appointments process as well.

Before I get to that, we have had an exchange of letters over the past few months now, which I think has been unfortunate. Nevertheless, you have clearly felt it necessary to try to establish boundaries, but can you explain to me why, on 24 October, before Des Marrinan gave evidence to the Committee, your office contacted the Committee wanting to come before it and stating that you would be available on 14 or 21 November?

Rt Hon Sir Declan Morgan: Yes. The reason for that was that I was aware, as a result of notification, possibly from Judge Marrinan or others, that he proposed to come before the Committee, and I wanted to do two things. First, I wanted to alert the Committee to what I perceived as the legal difficulty over its position, because my position has always been that this should have been referred to the Select Committee of the Ministry of Justice, which has political responsibility for decisions of the Lord Chancellor, and that this Committee, for reasons that I have tried to explain, does not have responsibility for scrutiny of the decision. I was also anxious to ensure that I should give the Committee the assistance that I could in relation to the process because it was clear to me that the letter appeared to misunderstand the process. I wanted to ensure that the Committee had as much information in its deliberations as I felt I could give, albeit within the parameters of my concerns.

The Chairperson: Hopefully, we can achieve that today because the understanding that I had from that letter was that you were very keen to deal specifically with what Des Marrinan had communicated with the Committee about. Subsequent letters firmed that up, and there was one where you indicated that you wanted to make clear that neither you nor Lord Justice Coghlin could lend yourselves to such unconstitutional conduct. To me, that was a chilling paragraph to include in the letter, given that we have ensured that this Committee is acting within its remit. We received legal advice that is contrary to yours; therefore we are assured that we are within our remit to ask about the situation. That is why I welcome the engagement, but you will be aware of the phrase, "It takes two to tango". We want to engage positively, but, over the past months, all I have received are barriers and obstacles that have been put up against that engagement.

Rt Hon Sir Declan Morgan: I do not accept that at all, Mr Chairman. I have made it clear in every letter that I have sent to you that I am perfectly happy, and, indeed, anxious, to attend the Committee with a view to discussing judicial appointments policy. You have taken seven and a half months to find space to hear me on that matter. I am disappointed by that, but I realise that you are a busy Committee with other things to do. It may well be that it simply was not convenient for you to hear what I had to say on the judicial appointments policy.

I am disappointed, but I am sorry that my reference to constitutional behaviour should have caused offence, because I sense that it did. If it did, I apologise because it was not intended to. I suppose that, as a lawyer, I am inclined to say things as I see them without necessarily recognising that there are those who are on the receiving end who may think that, in some way or other, it is intended to be adversarial or in some sense disrespectful to the Committee. As I said in my opening remarks, I think that it is important that there should be respect for all those who hold public office in this jurisdiction, and I come here today to do the best that I can, within the boundaries that I feel are imposed on me, to ensure that I show my respect to the Committee.

The Chairperson: Finally, before I get into more substantive issues, we received disturbing correspondence from Des Marrinan yesterday. Hopefully, someone will pass that to you. Hopefully you will be able to clarify to the Committee whether this is true, but he indicated that you contacted him after his appearance and threatened him with disciplinary action.

Rt Hon Sir Declan Morgan: I did not threaten him with disciplinary action, but I contacted him after his appearance before the Committee because he suggested that he would not get a fair hearing from senior judges in this jurisdiction. I told him that I considered that to be — I cannot remember the precise term — disrespectful to the senior judges in this jurisdiction, who, as far as I can see, have always behaved independently and would do so when required.

I am not sure whether you are aware of it, but there is a precedent for decisions of the Lord Chief Justice, and indeed the Lord Chancellor, having to be dealt with by a puisne judge where the puisne judge found that there had been unlawfulness. The notion that a senior judge in this jurisdiction would have the least difficulty in dealing independently with a decision that I happened to make or that any other judge happened to make is, frankly, risible. If, on the rare occasions when I do sit at first instance and make a judgement, it can be referred to the Court of Appeal. I have been on occasions reversed by the Court of Appeal and by the Supreme Court. I have no difficulty whatsoever with making decisions and being accountable for them; however, I do take issue with the suggestion that

the judges of this jurisdiction are so mealy-mouthed or lacking in independence that they would have difficulty in dealing with issues on their merits. I was surprised at that comment from Judge Marrinan, because he is one of those judges who, I would have thought, would have the courage and independence to take exactly that course if he was faced with it. I did not threaten him with disciplinary action; I told him that in other circumstances I would have had to consider disciplinary action in relation to any judge who had made such comments about the judiciary. However, in light of the fact that he had been ill, and I recognised that the issue was very close to him, I did not think it would be appropriate for me to take the matter any further.

The Chairperson: Given the gravity of what he indicated to the Committee and the personal trauma it had caused him, which was evident to everybody, to then communicate with him after his evidence — he indicates in the second paragraph that you said that you were minded to subject him to disciplinary action, but, because of his illness in the past, you were not going to pursue that option — would, to me, have had a chilling effect on Des Marrinan. It also, when we talk about constitutional boundaries, interferes with the Committee, given that we had him as a witness. We indicated that we may well need to come back to the issue with him, and in the interim you have corresponded with him, threatening disciplinary action.

Rt Hon Sir Declan Morgan: I did not threaten him with disciplinary action, as I have indicated to you. However, I have a responsibility to ensure that the rule of law in this jurisdiction is respected. Where people suggest that the judges of this jurisdiction are neither courageous nor independent enough to make the decisions required of them, it is my responsibility to ensure that I make that clear, both to those who do it and to the public generally.

The Chairperson: He indicated in his correspondence to us that he firmly rejected your allegations and was seeking clarification, which he has not got. Let me quote what he said to the Committee:

> *"I felt intimidated by his letter and felt it was wrong to write in such terms to a witness who might yet be required to give further evidence to the Committee. My health suffered again as a direct result of this letter and I required further consultant treatment."*

Rt Hon Sir Declan Morgan: What are you asking me to comment on?

The Chairperson: Given that information, in hindsight, do you not believe that your letter was inappropriate?

Rt Hon Sir Declan Morgan: No, because I have a responsibility to ensure that those who denigrate the independence and courage of judges in this jurisdiction should have it pointed out to them that they are in error, particularly where a judge casts doubt on the independence, courage and integrity of colleagues. It seems to me that I have no option. The fact that I indicated to the judge that I would not take action because of his position was designed to recognise that I understood that he was a person who might be adversely affected if I were to go down that road. I consider that that was entirely appropriate. He has never indicated to me that it had any effect on his health. I do not want to go into the detail of it, but I have regularly had contact with his presider, because I have been concerned about his welfare, to ensure that the steps that have been taken in relation to his working conditions have not adversely affected his health and that, so far as possible, they have been beneficial to him. Indeed, I had lunch with him no more than four to six weeks ago on an entirely amicable basis, and he made no reference to any of this to me.

The Chairperson: We have now added it to the evidence that he gave to the Committee.

Rt Hon Sir Declan Morgan: And you have my evidence as well. No doubt you will be able to take all of it into account.

The Chairperson: We certainly will, but you indicate the slur that Mr Marrinan caused when he gave evidence to the Committee. Maybe he was wrong. I quote:

> *"Many in the legal profession know that what happened was very wrong and have contacted me to express their sympathy and distaste for the commission's behaviour. Several senior judges, including High Court judges, are included in that group."*

It would appear that Des Marrinan is not alone.

Rt Hon Sir Declan Morgan: No High Court judge has expressed any concern to me about the way in which the competition was handled. I am concerned that Judge Marrinan was so affected by his failure to succeed in this competition. He is a person whom I have known for many, many years; we have worked together and had perfectly amicable social relations. He was supportive of me in my appointment to the High Court bench; he was supportive of me in my appointment to Chief Justice. The last thing in the world that I would have wanted is that Judge Marrinan should have felt unwell as a result of his failure to succeed in this competition.

The Chairperson: If you are content, I would like to go through the procedural issues and how NIJAC operates, as some of it pertains to this particular competition.

In the evidence that we received, we see that the ombudsman did uphold a complaint on the perception of bias and that there were closed minds.

Rt Hon Sir Declan Morgan: I think the term that he might have used was "perception of unfairness", but I stand to be corrected on that. Again, I need to be careful about the extent to which I can go into that. All I will say is that, as you know, about 24 or 26 complaints were made. One of those was a complaint about whether or not the selection committee should have recused itself. That complaint was rejected by the ombudsman, as you know. The chief executive, who wrote to Judge Marrinan after the first interview, indicated that the committee had accepted his representation that there should not be a requirement for written work. He did not respond to the suggestion that the committee should recuse itself. It was on that basis, as I understand it, that that finding was made. I recognise that the chief executive who was then in post should have advised Judge Marrinan that the committee had decided not to recuse itself.

The Chairperson: Is it normal not to complete the process of moderation? That was one of the complaints that the ombudsman upheld in this particular competition.

Rt Hon Sir Declan Morgan: The moderation process should always be completed. Without going into it, you have access to the findings of the complaints committee that I chair, where we touched on that and reached a conclusion. The moderation process should of course always be completed. It does not have to be completed — I think that there was some issue about this in your discussions — on the same day. We take the view that, sometimes, the opportunity to go back and re-examine the papers with a fresh mind on a subsequent day is an appropriate way in which to conduct matters. We are sufficiently confident in the ability of our commissioners to resist any sense of outside pressure or anything of that kind to feel that we can do that.

I have sought to make sure that the Committee is aware that it is the case, on occasion, that people disagree, and that, sometimes, that disagreement cannot be resolved. Take, as an example, if three people say that a candidate should get no more than 15 and one person says that a candidate should get no less than 17 in relation to a particular skill. There has to be a mechanism for working out the answer. The answer and the approach of NIJAC, both before the time that I became chairman in July 2009 and subsequently, is that the majority view should prevail. In other words, in those circumstances the moderation mark should be 15. That is to reflect the fact that it accords with the consistent view of the majority of members. Any other result, it seems to me, would mean that the consistent view of the majority of members would not be respected. That is the policy, and if, at the end of the day, there is no agreement on moderation, that is the way in which the moderated score is determined. That was one issue that I was concerned about when I saw the letter that provoked my correspondence of 24 October.

The Chairperson: Let us leave aside the moderation process in this case, although that is important because it was only when the score seemed to be heading in a certain direction that the decision was to stop.

Rt Hon Sir Declan Morgan: One needs to be careful about this. The discussion on moderation had gone on all afternoon and well into the early evening. You have in your papers the position on the scores, as I understand it. That was not a half-hour discussion but a long and detailed discussion in which you will see the views of the members about the moderated score for the skill that was not filled in. You will know, if they had had to moderate on the night, as a result of what I have explained to you, what the moderated score would have been, and, even without your calculators, you will presumably be able to work out what the outcome would have been in those circumstances.

The Chairperson: Between the first stage and until the second interview, there was correspondence from Lord Justice Coghlin, who presided over the panel, indicating that they were not prepared to appoint on the basis of one mark. Is it normal in a competition that, if there is a difference of only one mark between candidates, they do not appoint someone?

Rt Hon Sir Declan Morgan: People are likely to be in place for 15 to 20 years in these jobs, and it is quite difficult to remove people from office, so you cannot really make a mistake. You have to try to ensure that you have got it right, and our view is that, when candidates are very close together, you should reflect on whether or not you are satisfied that the competition has been testing enough to ensure that the distinction that you have satisfies you that you have the right candidate. In most cases, that will lead to the candidate who has most marks getting the post, as long as he or she satisfies, but people are urged to reflect on the basis that it should not become a pure arithmetic exercise. The problem is that, if you go behind the arithmetic, you have to be able to justify and articulate exactly why you did not follow the arithmetic, and that places a very heavy burden on those who are conducting the selection process if, for some reason, they go outside the arithmetic. It did not happen in this case obviously, because there was no question of anybody being appointed on that basis.

The Chairperson: There was only one mark of a difference between them and both of them —

Rt Hon Sir Declan Morgan: There was no difference between them.

The Chairperson: In the first stage, was there not a difference of one mark?

Rt Hon Sir Declan Morgan: There was no difference. That was the point. Once you understand moderation, you can see that there was no difference.

The Chairperson: Given that there was no difference, the recommendation was made, the Lord Chancellor knocked it back —

Rt Hon Sir Declan Morgan: No, sorry, when there was no difference, there was then a second stage. The second stage was used to continue the moderation process, and there was a clear winner after the second stage. I am not sure where we are now in the process. The selection committee has done its work.

The Chairperson: The point from the previous evidence was that this was the process, the moderation did its work, and there was a rounding up and a rounding down —

Rt Hon Sir Declan Morgan: There was no rounding. That, again, is both a misunderstanding and a misdescription. There was a robust exchange of analysis of the quality of the evidence, what it demonstrated, what it should lead to and why people had different views about the candidates. That is what moderation is about; it is not about rounding one way or the other.

The Chairperson: The comment made in the evidence that I put to Des Marrinan at the time was that Professor Morrison seemed to be the main centre of attention, yet Mr Justice Weatherup had consistently marked Des Marrinan down. He was out of kilter with the other three, yet the focus was on Professor Morrison's score.

Rt Hon Sir Declan Morgan: The point is that, in moderation, as I have tried to explain, there is a robust discussion about what the evidence demonstrates, the qualities it demonstrates and the appropriate arithmetic mark to place on that. Now, as I have tried to explain, that invariably leads to a difference of evaluation of the quality of the evidence and, therefore, influences the appropriateness of the scores. The scores that come out in moderation are almost never the same as the score of an individual member.

I am sure that all of you who have been in this type of process know this or know something of it. Obviously, the processes differ depending on how rigorous they are, but, from my point of view, I find it entirely unsatisfactory that individual scores should simply be averaged out. It seems to me not to be a rigorous process at all. It does not involve people having to defend and explain why they have come to the view that they have about a particular quality. Somebody being required to think through and be able to explain why they have come to the view helps to ensure that the process has the robustness that we think it has.

The Chairperson: A number of us, including me, have been in this type of process. I sit on the board of governors for two schools, and I appoint teachers. It is always made clear to me that, in that process, you always complete the moderation process. In this case, in the first stage, your panel did not. It totted up four of the competencies but did not complete the fifth.

Rt Hon Sir Declan Morgan: Mr Chairman, I do not know the purpose of this question being repeated. I think that I have answered it and that I have pointed out to you that it is not just an answer that I am giving today; it is an answer that I gave when I chaired the complaints committee. I have never taken issue with that matter; all that I am seeking to do here is to make sure that there is an understanding of the processes that would apply so that you are in a position to understand what would have happened had the moderation been completed.

The Chairperson: We move to the second stage interview. There is now a clear difference between the two candidates, and there are only two candidates. The recommendation is made to the Lord Chancellor and is knocked back.

Rt Hon Sir Declan Morgan: Then there is a complaint.

The Chairperson: While the complaint is being made, there is another recommendation against the commission, which the ombudsman upheld, stating that it had dismissed the work of the ombudsman's office and carried on regardless.

Rt Hon Sir Declan Morgan: I do not think that the ombudsman put it quite like that. Let me try to explain what the majority saw as the appropriate way forward. Our view was that, at that stage, we had accepted the recommendation about who the winner on the selection process was. We then debated whether it was for us to wait for the ombudsman's report and then decide what consequence it should have for the outcome, or whether we should send our work to the Lord Chancellor and indicate to him that there was an outstanding complaint and that he, as the person having political responsibility, should determine to what extent that recommendation was affected by the ombudsman's report. We concluded that we should do the second of those; in other words, we sent it to the Lord Chancellor, pointing out that there was a complaint so that he could then decide how he should respond to the complaint. The ombudsman took a different view. I entirely accept that.

The Chairperson: We then get to the point, in this competition, at which the Lord Chancellor has knocked it back. Ultimately, the commission can press ahead because the Lord Chancellor can ask you only to reconsider, but, for whatever reason, the commission decided not to do so. The competition is then recommenced, and we were, I think, already two years into the process. Rather than me saying it, the following is Des Marrinan's evidence:

> *"The rational, fair and reasonable next step, I argue, was to recommend me as the sole remaining and clearly appointable candidate. Following its now established pattern of unfairness, the commission refused to endorse me and chose instead to abandon the competition in a peremptory fashion without consultation or explanation of any kind."*

Rt Hon Sir Declan Morgan: There are a couple of things about that. First, as you know, our statutory responsibility is to promote diversity and to ensure that we select the best available candidates. As you say, time had passed by the stage that this matter came to us. The statutory onus on us to respond is contained in section 5(6) of the Justice Act. For the reasons that we have explained, we recognised that that enabled us to reopen the competition if we thought it appropriate and wished to do so.

We felt that, with the passage of time, there were likely to be other candidates out there who would not have been in a position to apply two years earlier. We recognised that we were down to a pool of three, all of whom were judicial office holders and only two of whom had got through the initial shortlisting process. We decided that the public interest in diversity and in the selection of the best available candidates outweighed the private interests of the people who were involved; that is the judgement that we made.

In the next High Court competition that followed, there were 13 applicants, 11 of whom had never applied for High Court appointment before. They included a range of women, solicitors — we had never had a solicitor candidate before — and practising members of the Bar. In my view, that vindicated the view that we took that that was the right way forward in the public interest.

The Chairperson: At every stage, Des Marrinan had been told that this was a live competition.

Rt Hon Sir Declan Morgan: It was a live competition. The only thing that we did was to reopen the possibility of other applicants coming in.

The Chairperson: On the diversity aspect, were there not already a number of other posts available for appointment?

Rt Hon Sir Declan Morgan: There were other posts available for appointment, but, at the time that we made the decision, we had intended to advertise all of them together. We saw this as an opportunity to ensure that we would get a good range of candidates.

The Chairperson: I am trying to put myself in the shoes of the applicant, who, in this case, was Des Marrinan.

Rt Hon Sir Declan Morgan: I understand that, and that is why I said that we had to balance the need to ensure that we were fair to him with the need to ensure that we respected the obligation that was placed on us to act in the public interest. The question was whether to proceed with a competition in which there were only two, or maybe even one, live candidate, that started after the exclusion of the other candidate, and that, at any time, had only three existing judicial office holders — it was going to be judges appointing judges, if you like, and that is the charge that would be laid against us — or whether it was appropriate to ensure that others whom we thought may be interested, and experience showed were interested, should be given the opportunity to come into the competition and compete with those who were left. If those who were left were better, they would have been appointed. If they were not better, they would not be appointed. As a result, we ended up with the best candidates on merit who were available at the time.

The Chairperson: I am still struggling with the public interest aspect. Let us define public interest. There is a starting point —

Rt Hon Sir Declan Morgan: The public interest is in diversity and in making sure that the best candidate on merit who is available is appointed. Available does just not mean who has applied. It means available.

The Chairperson: If diversity is the argument, there is still no female High Court judge.

Rt Hon Sir Declan Morgan: As you know, Mr Chairman, I was asked the same question when I came to this Committee either last year or the year before. At that stage, I said that six posts will potentially arise in the High Court in the period up to the summer of 2017. I expressly invited the Committee to bring me back in 2017 if there is not at least one woman judge among them.

The Chairperson: If we are all here after those elections, we will do that.

Rt Hon Sir Declan Morgan: That invitation might be taken up in certain circumstances if this turns out not to be the case.

The Chairperson: The time lapse, however, was not as a result of Des Marrinan, and that is where it seems punitive on him. He was the only other acceptable candidate. He was well above the threshold of what was deemed required.

Rt Hon Sir Declan Morgan: A threshold was not fixed. That is another of the misunderstandings. The fixing of a threshold for appointability and shortlisting was introduced shortly after I was appointed. Before that, we fixed minima that had to be satisfied for each and every category. We still do that, but, of course, the appointability hurdle is significantly higher than the sum of the minima.

The Chairperson: I think that 79% was mentioned.

Rt Hon Sir Declan Morgan: That was the minimum. If you did not get 79%, you would have failed one or other of the five categories. However, we would not use that as appointability criteria. We would be looking for something in excess of that. In the last County Court competition, the bar was set at 85%; that is the sort of approach that would now be taken.

The Chairperson: Lord Justice Coghlin initially described both candidates as excellent.

Rt Hon Sir Declan Morgan: They are both excellent. I rate all my County Court judges as excellent. One of the things that we will not touch on today but that I will say in passing because it is a tribute to them is that, when I came to the Committee last year, Mr McCartney asked me a number of questions about delay in the criminal justice system. One of the concerns was about the outstanding number of criminal trials in Belfast in particular. I think that there were 322 in October 2012. We had brought it down to 220 in April 2013. I am glad to tell the Committee that, thanks to the sterling work of my County Court judges, the figure is now down to 91. That represents real commitment and real effort by excellent judges in dealing with a problem.

The Chairperson: Some may regard the two-year time lapse as being punitive on the only applicant who successfully met the criteria and who should have been appointed had you not recommenced the competition. That was not of his making in that, for at least a year, a recommendation was not made. Indeed, I think that the ombudsman upheld the complaint because your office became involved with DETI to do with disqualification issues with the Presbyterian Mutual Society.

Rt Hon Sir Declan Morgan: I entirely accept that. We did not know what the timescale was likely to be, and, as chairman of NIJAC, I considered it appropriate for us to make an enquiry of DETI to let us know how long it would be. I asked my PPS in the judicial office to make that enquiry. The ombudsman's view was that I should have asked my chief executive in NIJAC to make the enquiry. There was no criticism of the fact that I made the enquiry. It was considered an entirely appropriate thing to do. Simply, the letter or call came from the wrong person. I am not going to take issue with the ombudsman on that, although, for reasons that I would go into with him and perhaps have a longer discussion with him about, one needs to recognise that my office is appointed the chair of NIJAC — it is not an accident that I am the chair of NIJAC — and there is, therefore, a crossover. The question is where the boundary to the crossover is between my role and that as chair of NIJAC.

The Chairperson: This is my final point before I bring in members who want to raise other issues. I think that Mr Maginness made this point on the recommencement. You referred to the powers under section 5(6), where it states:

> *"after doing so, either re-affirm its selection or select a different person to be appointed, or recommended for appointment, to the office".*

I put that to Des Marrinan and asked him this: if statute states that the commission must move on to select someone else, did the commission break the law in failing to appoint you? His response was:

> *"Yes, in my view, it did. It was an illegal act, in my view."*

Rt Hon Sir Declan Morgan: I think that he is wrong about that. I do not mean any disrespect to him when I say that I think that he is wrong. With a bit of luck, I will be able to tell him straight away that I think that he is wrong. Take the example of only one candidate being considered appointable, and who is disqualified, and three unappointable candidates. If faced with those circumstances, how do you select a different person?

The Chairperson: You are faced with —

Rt Hon Sir Declan Morgan: Let me put the point to you again: if you have a competition in which you have one appointable person and three unappointable people, and the one appointable person is then excluded, for one reason or another, and is therefore no longer in the competition, and you are faced with the section 5(6) requirement to recommend someone else for appointment, how on earth can you do that, unless you reopen the competition? That is why the judge has just got it wrong on that issue.

The Chairperson: Was Des Marrinan, then, one of three other appointable —

Rt Hon Sir Declan Morgan: No, no. I am trying to make the point that section 5(6) does not have the effect that he thought it had; section 5(6) is actually the basis for reopening the competition. That is the point that I am trying to make.

The Chairperson: Des Marrinan elaborated on that comment:

"even if the commission acted technically within its power, it was so irrational and so unfair that, had I felt confident about going for judicial review and not fearful that I might end up bankrupt by doing so, I would have been very hopeful, given a fair wind, that a judge would have found the decision to be irrational and have the appearance of bias against me."

Rt Hon Sir Declan Morgan: If Desmond felt and had been advised that he had a good case, he was entitled to pursue it. If he had difficulties about my conduct in any of this — I do not think that he had because he expressly disavowed that in his evidence — he knows, as he explained to you, that there is a complaints procedure whereby any complaint about me would be investigated by a Supreme Court judge. During the four and a half years that we have been looking at this, there has been no complaint of any sort about me or any judge associated with the process. That is because there is no basis for it.

The Chairperson: If you were in Des Marrinan's position, with the prospect of litigation, as he touched on, to the cost of a quarter of a million pounds had he been unsuccessful —

Rt Hon Sir Declan Morgan: There are ways and means of doing these things. I recognise that, if somebody wanted to do that, there are mechanisms that he could consider, such as pro bono representation or a protective costs order, which would ensure that costs were kept to a minimum. If there was a real public interest in the issue that he wished to pursue, there is a mechanism that ensures that costs are kept to an affordable limit. It is used regularly for challenges to environmental decisions, and there is a great deal of authority in it. If he had complaints about the conduct of a judge, he could have made a complaint about the conduct of a judge, which would then have been dealt with by a judge of the Supreme Court, at no cost whatsoever to him. There were mechanisms available if one wished to take it further, and they were not used. The reason why they were not used is, in my view anyway, that they would not have stood any reasonable prospect of success.

Again, I do not want to appear to be in the least critical of Desmond. He is a very good and hard-working judge, and, as I said, I have the utmost respect for him. However, he got some things wrong. In his evidence, he made the point that some may think that he has acted obsessively. I am not saying that he has acted obsessively, but I do think that one needs to be very careful not to be a judge in your own cause.

The Chairperson: The point that some members of the judiciary may make is that, as the Lord Chief Justice, the chairman of NIJAC and the chairman of the complaints committee that looked into the competition, is that not exactly the case for you?

Rt Hon Sir Declan Morgan: All the decisions that I have taken, I have taken on advice, or they were decisions that I was required to take. When I have needed advice, I have taken it — for instance, with the reopening of the competition and on the view that I took about what I can do for this Committee. I did not just dream it up. I took advice. As you know, I took advice in relation to my appearance before the Committee and then set out the terms of that advice in correspondence with you.

I am trying to be as open and transparent as possible. I perfectly understand that the Committee did not feel able to share its advice with me. I know the rules about bodies such as this sharing advice; were you to show it to me, you would probably have to start showing it to everybody every time that you got advice. I am not anxious, at least, about that. However, it is that bit easier for me because I generally come to see you only once a year or so if I have advice about things that I can manage to tell you what it is.

The Chairperson: I will park my line of questioning for now and bring in other members.

Mr McCartney: Thank you very much for your presentation. In many ways, I am surprised that you have answered some of the questions to date, because —

Rt Hon Sir Declan Morgan: I am trying to do what I can.

Mr McCartney: — and we appreciate that. I thought that your advice was that you should not enter into any —

Rt Hon Sir Declan Morgan: I should not enter into scrutiny. The point is that I can get into policy and process, but my advice is that I should not enter into scrutiny. Scrutiny is not a white line; there is a

grey area around there. I am trying to make sure that I do not stray from grey into black. That is what I am trying to do.

Mr McCartney: We are advised about the questions that we can or cannot ask, and answering is a matter for you. However, in his evidence to the Committee, Des Marrinan said:

> *"in more than one letter to the Lord Chief Justice, the chairman of the complaints committee, that they were not prepared to award the competition on the basis of one mark".*

Is that factual or is it —

Rt Hon Sir Declan Morgan: Sorry, will you just give me that again?

Mr McCartney: Lord Justice Coghlin said:

> *"in more than one letter to the Lord Chief Justice, the chairman of the complaints committee, that they were not prepared to award the competition on the basis of one mark".*

Is that factual?

Rt Hon Sir Declan Morgan: You have whatever letters there were, so you are able to see what is there. There was definitely a remark of that kind in the correspondence. I have to make the point that, if you go through the process — I am straying into grey here — and apply the moderation in the way that we always have, as I explained, the result is not a difference of one mark. The result is equality.

Mr McCartney: Why, then, would Lord Justice Coghlin say that?

Rt Hon Sir Declan Morgan: He would say that because I think that the point being made by Judge Marrinan was that he was one point ahead, but he was not.

Mr McCartney: My reading is that Lord Justice Coghlin seems to accept the fact that "they" — the selection committee — were not prepared to award the competition on the basis of one mark —

Rt Hon Sir Declan Morgan: I can well understand why they might not have awarded the competition, for the reasons I gave earlier. If you have two candidates in the competition who are close together, the first thought that should cross your mind is, "Has this competition been rigorous enough in separating out the qualities of these candidates"? When looking at an appointment as important as this, one of the things that you should look at, in my view, is to consider whether you should have a further round to test the candidates. That is a discretionary judgement that, it seems to me, should be open to any selection committee that is faced with this type of situation.

Mr McCartney: Yes, but in a competition of this type, given the calibre of the people involved, one mark could be a considerable margin of merit.

Rt Hon Sir Declan Morgan: That is where the area of discretionary judgement would come in. It would be a matter of discretionary judgement because you would look at, among other things, the balance of the marks because there are five different areas. You would stand back and ask yourself whether you are clear that you now have, if you like, a clear winner or the person who is best candidate on merit. All that I am saying is that the mark should not prevent this question being asked in a rigorous and robust process: "Do we need to do anything further to make sure that we have the right person?".

Mr McCartney: After all that rigour, if someone still —

Rt Hon Sir Declan Morgan: In the end, you have to make a decision. Let us be absolutely frank about it. You can come to a situation in which the arithmetic marks are the same, and you have to make a decision.

Mr McCartney: But —

Rt Hon Sir Declan Morgan: Pardon me, I am sorry for interrupting. For instance, under the Equality Act 2010 in England and Wales, which we do not have here, the provisions are that, where the candidates are equal, there should be — I will use this term, and I do not mean in the way in which it might sound — a bias towards under-represented groups.

Therefore, you can have situations in which the marks are equal, and, in those circumstances, you have to make a decision on whether you go for something further or whether you think that there is no point in doing so because the candidates are very evenly matched. If it is the latter, you need to be able to document and articulate why you believe that one candidate is, on merit, better than the other.

Mr McCartney: The point that I am making is that, if someone wins the competition by one mark —

Rt Hon Sir Declan Morgan: If someone wins the competition because that person is considered the best candidate on merit, that can be by one mark, yes.

Mr McCartney: And then the moderation is not completed, and, in the next run, you get a different result.

Rt Hon Sir Declan Morgan: I will say this for the last time, because I am probably straying into the black now. I really cannot go any further than this. If you examine the moderation and take into account what I have told you about NIJAC's processes and procedures for it, you will see that the notion that a candidate won by one mark is not correct.

Mr McCartney: I have no reason to doubt what you are saying, but Lord Justice Coghlin seems to be of the same opinion, and he seems to be relating it to the case in question. Therefore, the issue of one mark is not something abstract or something that cannot happen in a competition. It seems to have been said here very clearly that it happened in that instance.

Rt Hon Sir Declan Morgan: No, it is not. All that I can say to you is that it is not. I am in the black. You will need to go back and look at the context of the letter, but I am telling you that it is not.

Mr McCartney: That is a fair point. NIJAC gave us a number of documents. They are not tabulated in any way.

Rt Hon Sir Declan Morgan: I hope that you found them to be of some assistance.

Mr McCartney: They were. Is this one about the procedures in 2008?

Ms Mandy Kilpatrick (Northern Ireland Judicial Appointments Commission): I think that I sent those through. It is on the procedures of 2008 that applied in 2009.

Mr McCartney: You sent us a second set, which is for 2012. Is that the set of documents that will guide any further selection process?

Rt Hon Sir Declan Morgan: At the moment, those are the up-to-date documents, yes.

Mr McCartney: The more recent one is more explicit. Paragraph 7.1(iii) from the 2012 document states:

> *"ensuring that all paper work is fully and appropriately completed and signed including the moderated assessment form and assessment matrix merit list;".*

That is to be done on the day.

Rt Hon Sir Declan Morgan: On the day of the assessment event, the chairperson is responsible for it, but that does not mean that the paperwork will be completed. We may decide to adjourn on x and meet again on such-and-such a day.

Mr McCartney: It does not say anywhere in this document that there is provision for adjournment.

Rt Hon Sir Declan Morgan: I sincerely hope that you can, because I have done it. It was one of the occasions on which I felt there was a need for it.

Mr McCartney: I can only take this as it is presented. It is understandable that, on the day, there will be a degree of flexibility, but if we take "on the day" to mean the day of completion, the completion of the matrix and the moderation should take place.

Rt Hon Sir Declan Morgan: As I said to the Chair, you will see that I dealt with that as chair of the complaints committee. I am sure that you have read my findings and will know the findings that we made. I have never taken any issue with that.

Mr McCartney: There is an acceptance that the guidelines were not followed.

Rt Hon Sir Declan Morgan: I have never taken any issue with the fact that the ombudsman's conclusion on that was a conclusion that all of us accepted. The thing that I have been worried about, and one of the reasons that I wanted to speak to the Committee, is that I was not entirely sure that people had worked out what the consequence of what the outcome would have been if the figure had been filled in.

Mr McCartney: Yes, but the procedure —

Rt Hon Sir Declan Morgan: As I say, I am not taking issue.

Mr McCartney: I know that you are not, and I appreciate that, but, in high office, and particularly in judicial office, if there is a set of guidelines that are required to be followed but are not followed — it is found by the Lord Chief Justice that they were not followed, and that finding is upheld by the Judicial Appointments Ombudsman — I think that the public perception would be that the competition should be declared null and void.

Rt Hon Sir Declan Morgan: As I tried to indicate, the ombudsman, who looked at this very carefully, did not accept that. Part of the reason that he did not accept it was because he understood that the error here was the failure to fill in a figure, and if the figure had been filled in, the competition would have proceeded in exactly the way in which it did.

Mr McCartney: But can you understand why —

Rt Hon Sir Declan Morgan: Of course I do. I am not trying to take issue with you in any sense. It is something that should not have happened. I accept that, but, once you are informed of all the facts, I do not accept that it affected the outcome of the competition in any way. That is the point that people need to understand. It did not affect the outcome of the competition at all, because, once you know what the position was, you can see that the competition was inevitably going to take the direction that it did.

Mr McCartney: Again, I understand. It is difficult to ask questions without the circumstance in which they are presented, but, given that other complaints were made, would it not have been in the best public interest to do otherwise, rather than have us find ourselves in the position of being in breach of our own guidelines — again, it is a judicial office — and proceeding by explaining it away.

Rt Hon Sir Declan Morgan: I am not trying to explain it away.

Mr McCartney: But it was explained away in a sense, because what you are saying is that the guidelines were broken but that if the form had been filled in properly, it would not have affected the competition. The core point that I am making is that the guidelines were not adhered to. That is the issue.

Rt Hon Sir Declan Morgan: Of course the guidelines were not adhered to to the letter. The point that I am trying to make is that, where there has been any form of breach in procedure — we deal with this all the time — the question that you have to ask is whether the breach of procedure adversely affected the process. You can have a breach of procedure that does not adversely affect the process. That is what this was. That is what I have tried to explain. I do not think that I can take it any further.

Mr McCartney: No, that is fine. I appreciate that. When Judge Marrinan was in front of us — I do not know the mind, so I can go only by what he said — he spoke in glowing terms about all the judges and the people that he worked with. The point that he made was that he had no faith in the process, in the sense that asking other people to sit in judgement of a colleague is a difficult thing to do.

Rt Hon Sir Declan Morgan: I do not accept that. As a puisne judge, I would not have had the least difficulty in dealing with a case in which somebody was suggesting that the Lord Chief Justice had behaved unlawfully. I would have considered it my duty to ensure that I dealt with the case independently and courageously, and, if a finding were necessary to decide that the Lord Chief Justice had behaved improperly, the finding would have been made. I would be appalled to think that any of my colleagues think differently. If they do, they should never have been appointed. Judges have to be courageous and they have to be independent.

Mr Humphrey: Thank you for your presentation and your answers so far. As Lord Chief Justice, do you think that the whole debacle is unedifying and potentially damaging to the judicial system and to NIJAC?

Rt Hon Sir Declan Morgan: Yes, I do. Again, I do not resile from any of that. The four complaints that were upheld by the ombudsman are the only complaints that have ever been upheld against NIJAC. I am the chair of NIJAC, and I recognise that there is an issue of public confidence that I have to address. If I may say it again, I was anxious to come here so that I could, if you like, put more flesh on the bones of all the issues, in so far as I felt able to do so. I agree that there is a responsibility on NIJAC, and on me as its chair and as the Lord Chief Justice, to ensure that public confidence in the judicial appointments process is secured.

Mr Humphrey: Thank you for your candid answer. Following on from that, do you think that a review of the process and procedures needs to happen to give people that confidence?

Rt Hon Sir Declan Morgan: I think that one of the things that should engender public confidence is that the whole point about having a Judicial Appointments Ombudsman is that the ombudsman, as you will see, has made a series of recommendations. In broad terms, we have implemented those recommendations. The ombudsman's task, as the person most intimately involved in the process here and in England and Wales, is to bring best practice to our attention. He has been doing that, and we have been implementing it.

We have done things that are designed to ensure that we will improve yet further the process. For instance, one of the things that we are doing at the moment is looking at devising, working in conjunction with our colleagues in England and Wales, a qualities and abilities approach to the selection of judges. That will broadly ensure that the qualities and abilities work right the way through from the top to the bottom and that the weighting of those qualities and the hurdle that you may identify would differ, depending on the sort of task. That is only an example of the fact that we recognise that, if you are not continuously improving, you are not doing your job.

Mr Humphrey: I appreciate what you say about the ombudsman. As Lord Chief Justice, the head of the judiciary in Northern Ireland, and given your years of experience and your position as a law officer, do you think that a review should happen?

Rt Hon Sir Declan Morgan: It depends what you mean by a "review". I think that it is good governance for people to carry out searching reviews of all public authorities to identify whether they are doing the job as well as they should be. I welcome a review, because I see it as a mechanism to ensure that tasks are carried out to the highest standard. That is what we are there to do. Therefore, I would welcome that.

You are part of a good governance approach, and we are anxious to assist in everything that we can do.

Mr Humphrey: Given the experiences and difficulties that have arisen over the issue, do you believe that there should be a separation of the role of Lord Chief Justice and chair of NIJAC?

Rt Hon Sir Declan Morgan: No, I do not, for the reasons that I have given you, or at least not at this stage. When Mr Dodds made the remark in the debate on the 2009 Act, which, if you remember, the

late Paul Goggins introduced, the latter, in a passage that I have not referred to, explained why it was felt that the judicial appointments process should not have direct political involvement from Ministers.

Lay members are, of course, appointed by the First Minister and the deputy First Minister. They are appointed in a rather different way from how my judges are appointed. We appoint strictly on merit, depending on the competition, which we have overseen by a member of the Office of the Commissioner for Public Appointments (OCPA). As I understand it, the position in OFMDFM is that the list of appointable names goes up to it, and it chooses whomever it wants. I am not suggesting that there is anything wrong with that approach. From OMFDFM's point of view, it will want to ensure — that is the political involvement, if you like — that the people whom it gets are people whom it feels will represent the public interest in the way in which it wants it represented. Therefore, there is some degree of ministerial involvement, but the process was designed to reflect the fact that we are emerging from a period of conflict. Where that is the case, and until we move on, the Lord Chief Justice is the right person to chair NIJAC. As it happens, that has been copper-fastened by the view of the Commonwealth Lawyers Association (CLA). That is not just some bunch of lawyers. It is chaired by James Dingemans, who is a High Court judge. The CLA is very widely respected throughout the world, and the model constitution touches not just on judicial appointments but on other aspects and, in broad terms, is the baseline for anybody who is looking at revising the constitution within the Commonwealth. I think that what we have actually represents best international practice at the moment.

Mr Humphrey: When you say "at this stage", what are the circumstances in which you believe that separation of the two positions would be sensible?

Rt Hon Sir Declan Morgan: I would have no issue about separation of the two positions in circumstances in which we had got to the stage at which the Minister of Justice was appointed on a straightforward basis, initially, presumably, by d'Hondt, and where d'Hondt ended. If we had a legislative move that did not require d'Hondt any more, there would be a case for taking that as a sign that we had moved on and come out of conflict, rather than were still emerging from it. In those circumstances, although I would still ask anybody looking at it to recognise best international practice, I would not have anything like the same concerns.

Mr Humphrey: In the context of d'Hondt being triggered and the Justice Ministry being addressed in the way in which other Ministries are addressed —

Rt Hon Sir Declan Morgan: And d'Hondt out of the way.

Mr Humphrey: — who would you see being the chair of NIJAC?

Rt Hon Sir Declan Morgan: The way in which it is done in England is that, unlike the other lay members, it is an open competition, in which, I suppose, the Lord Chief Justice could apply — unless he was excluded. I am sure that he would be treated fairly. *[Laughter.]* If whatever process was undergone and the lay person — the chair who was appointed on merit, presumably under the Commissioner for Public Appointments process — was then scrutinised by the Select Committee on the Ministry of Justice to decide whether it is accepted that the chair is independent, it seems to me that there must be a mechanism in place then for ensuring that there is a no vote, from even a minority, if there was a lack of independence. All of that, of course, raises the spectre that you would sit for a very long time without a chair if there were a series of noes, just as I, I am sorry to say, have sat since June last year with one lay person fewer than I ought to have. Although three names or more went up to the First Minister and the deputy First Minister in October 2013, and although I have written to them asking where on earth my nominee is, apart from an acknowledgement, I have not had a response.

Mr Elliott: Thanks very much for the presentation. Apologies, but I am going to go back to something that Mr McCartney highlighted. It is difficult to move away from Judge Marrinan's case to what would be a general issue, but I am going to try to generalise it. The issue is around guidance. You did say, Lord Chief Justice, that, provided there was no breach in procedure, it would not require any further action.

Rt Hon Sir Declan Morgan: No, I did not. I said that you would have to look at any breach of procedure to see what the consequence should be flowing from the breach.

Mr Elliott: Yes. The ombudsman felt that the guidance was not followed fully.

Rt Hon Sir Declan Morgan: In relation to?

Mr Elliott: In relation to the moderation process. In fairness, you said that you accepted that.

Rt Hon Sir Declan Morgan: Of course. As you can see from the papers, I have accepted that.

Mr Elliott: What I am trying to do is separate the difference between a breach of procedure and a breach of the guidance.

Rt Hon Sir Declan Morgan: The breach of procedure is the breach of the guidance. The two are the same.

Mr Elliott: OK.

Rt Hon Sir Declan Morgan: The guidance sets the procedure. The breach was not concluding in the way in which the guidance required.

Mr Elliott: Are you saying that that was a breach of procedure?

Rt Hon Sir Declan Morgan: I am saying that there was a breach of procedure, yes. The point that I am making is that, where there has been a breach of procedure, you then have to look to see what the nature of the breach was and what consequence should flow from it. We do this all the time in all sorts of employment cases and governmental issues. When there has been some breach of procedure, the question arises of what the consequence is. Generally, what you have to examine is what would have happened but for the breach of procedure.

Mr Elliott: What follow-up was there to that? What consequences were there?

Rt Hon Sir Declan Morgan: There was obviously a finding. However, look at what the breach of procedure was. The ombudsman considered that there was no question of maladministration as a result of the breach of procedure. It seems to me that the reason for that is that the ombudsman saw that all the material was there to enter the figure in the quality. It is obvious what the figure should have been. It simply was not entered, but it should have been entered.

Mr Elliott: I appreciate that. Does NIJAC take any further actions to try to overcome that for future processes?

Rt Hon Sir Declan Morgan: Yes, and that is why —

Mr Elliott: Sorry, if I can just finish.

Rt Hon Sir Declan Morgan: Yes, sorry.

Mr Elliott: My next question was going to be around your review of your own processes. Do you take any examples from jurisdictions such as Wales or Scotland that may be helpful?

Rt Hon Sir Declan Morgan: We spent quite a lot of time engaging with Scotland, England and Wales. For instance, our new chief executive and one of our commissioners went over to a very interesting diversity conference that was held in Scotland about two months ago. As with all these things, it is very often the discussions that you have on the side that enable you to start thinking about things that you could or should be doing. I met Christopher Stephens, the head of the English Judicial Appointments Commission (JAC), at a conference in January that we both attended and at which we both participated on the panel. I have met the chief executive of the JAC in England and discussed with him issues that we were having with large numbers of applicants for posts and what the best way was to shortlist, which I brought back to the chief executive and which we are in the process of discussing at NIJAC.

The document that Mr McCartney referred to, which is dated November 2012, did not just emerge out of the air. It was a product of a recognition that we needed to put together for those who were

involved in the process clear advice about the things that they should do. That was intended to, and did, reinforce with those who were involved the need to ensure that they comply with procedures.

Mr Elliott: That is the wider review dealt with. What about the specifics? It was identified where there was a breach, where the moderation was not followed through on. How is that dealt with?

Rt Hon Sir Declan Morgan: That is the ombudsman's task. The ombudsman's task is to examine any breach or complaint that has occurred and to determine what the outcome should be as a result. The ombudsman concluded that the breach that he found, and that the complaints committee found, did not amount to maladministration.

Mr Elliott: That was in that particular case.

Rt Hon Sir Declan Morgan: Yes.

Mr Elliott: I assume that you would not want to have that breach continue through other cases.

Rt Hon Sir Declan Morgan: No.

Mr Elliott: What I am trying to get at is this: are there mechanisms in NIJAC to make changes where procedure or guidance was not followed properly?

Rt Hon Sir Declan Morgan: One of the things that we do with every selection team is go through a process of ensuring that it is retrained regularly if its members have not been working in the field. If they are working in the field, one of the tasks is to chase up. We now do that. The staff will not let you out of the room until you have completed the paperwork. It is a very effective way of doing things, and it makes sure that everything gets done. You hand the paperwork over to the staff, the staff look at it, and, if there is something that is not done, you get it straight back and do not get out until it is done.

Mr McCartney: You may not be able to answer this, but, in that case, was an explanation sought as to why it was not completed?

Rt Hon Sir Declan Morgan: The only explanation is the explanation that is contained in the papers that a conclusion had been reached. The conclusion had been reached, because they were in an obvious position of equality and were going to have to move on to the next round. I think that that is the reason.

Mr Dickson: Lord Chief Justice, thank you for being so frank and open with us. One would expect nothing less, because that is what you have said to us right from the very first time that you visited the Committee.

Rt Hon Sir Declan Morgan: Thank you for that.

Mr Dickson: In his letter to the Committee, Mr Marrinan goes on to say, with regard to his failure to be appointed, that:

> *"I suggest it is not unreasonable to suspect that there may be another reason in play — the very obvious one that the matters I drew to the Committee's attention about NIJAC's behaviour are so serious and demonstrate such a high level of unfairness that those concerned seek to avoid being made accountable for their behaviour."*

How do you address that comment?

Rt Hon Sir Declan Morgan: Obviously, I had not seen the letter until today —

Mr Dickson: I appreciate that.

Rt Hon Sir Declan Morgan: — when you felt it necessary to show it to me, although I see that it is dated yesterday lunchtime.

I understand that the judge has a perception that he was treated unfairly. I think that he has just got that wrong, but I understand that he has that perception. I understand that some of the perception arises from what happened at the end of the first round of interviews. You will see that the judge complained about the fact that he was being asked to produce written work. He felt that, as a result of that, there should have been recusal. Of course, the complaint about the requests for written work was not upheld. That is hardly surprising, because the last County Court judge to be appointed to the High Court before Judge Marrinan was Sir Anthony Hart, who had 250 pieces of published judgements and rulings, any of which he could have selected as examples of work. Despite what was in his application form, I do not really want to go into what the judge had.

I hope that, by coming here, I have made it plain that I think that it is important that NIJAC is accountable. I also want to make it plain, in case it was not plain beforehand in my correspondence about whether it was this Committee's responsibility to carry out the scrutiny, that my view is that that scrutiny should have rested, as it did, with the ombudsman and the Select Committee of the Ministry of Justice. It is its job to scrutinise the Lord Chancellor's political decisions, and he was politically responsible for this competition. I know that you disagree with that, and that is fine. I am simply alerting you to the fact that, if anybody thought that it was because I did not want there to be accountability, they were completely wrong. It was a question of who should carry out the accountability.

Mr Dickson: In general terms, would you agree with me that there are effectively two levels of information and advice that come from any ombudsman for any sphere of public office, regardless of whether it is for judicial appointments or other public sector appointments — one is about learning experiences, of which there may be a small number here, and the other level is those that are so substantive that they have a major effect on the outcome of whatever the issue is — and that, in these circumstances, these are learning points rather than anything more substantive?

Rt Hon Sir Declan Morgan: You are absolutely right about that. I know that you are looking at this in the context of a review, but I will make one other point about the ombudsman. I think that there is an awful lot to be said for a role for ombudsmen in a governance mode. In other words, examining, not only by way of complaint but generally, the work of a body like NIJAC, and bringing suggestions of best practice on an ongoing basis. I cannot possibly see what objection any organisation could have to, for instance, an expert reassessment from an outside source of how well or badly it has been doing its job every year. If you are looking at arrangements, I suggest that you take that on board and consider whether it might be helpful.

The Chairperson: I am assuming that were there to be a complaint about a current application, you would not have the constitutional issues about the Committee looking into it.

Rt Hon Sir Declan Morgan: No, I do not think that I would. I cannot see that there would be the same difficulty at all.

Mr A Maginness: Thank you, Lord Chief Justice, for coming. It has been very helpful. You have covered a number of points that one would not have anticipated that you would cover.

Rt Hon Sir Declan Morgan: It sounds as though I am breaking the law. *[Laughter.]*

Mr A Maginness: Perhaps you are. *[Laughter.]*

Rt Hon Sir Declan Morgan: If you are going to find me guilty, Mr Maginness, I suppose you had better tell me what the penalty is going to be. *[Laughter.]*

Mr A Maginness: Helpful as it has been, we could have had this discussion earlier.

Rt Hon Sir Declan Morgan: I agree. We could have had it on 14 November.

Mr A Maginness: But, given the correspondence that took place —

Rt Hon Sir Declan Morgan: The correspondence of 24 October expressly said that I was happy — I do not want to get into this discussion, but the point that I hoped to have made in the letter was —

The Chairperson: It was a simple "available to meet" on 14 November or 21 November.

Rt Hon Sir Declan Morgan: Yes. I do not think that it would be clearer than that.

The Chairperson: Although we did respond, indicating that we wanted to do preliminary work. We wanted Lord Justice Coghlin —

Rt Hon Sir Declan Morgan: The point made to me was that I am a bit late in coming. I think that it was because I was a bit late in being invited.

Mr A Maginness: Well, the correspondence indicated a disciplinary. I will leave it at that.

Rt Hon Sir Declan Morgan: I do not think that this is going to help any of us.

Mr A Maginness: I am a bit disappointed with your response to Mr Humphrey in relation to the chair of NIJAC. It seems to me that the confusion of two important positions of Lord Chief Justice and chair is not healthy. That can lead to difficulties and I think that it may have led to difficulties in the competition that we are discussing. I put the proposition to you that, even though we have not, perhaps, matured as politically as one would like, the appointment of a lay chair would be preferable to avoid any confusion over the office of Lord Chief Justice — that would protect your office, its integrity and so forth. Is that not a fair point?

Rt Hon Sir Declan Morgan: I understand the point, and I understand how somebody may take that view. If you are considering that option, I suggest that you look at the model constitution proposed by the Commonwealth Lawyers' Association. There are a number of papers that discuss this issue and where this responsibility should lie. A number of reasons are advanced there. The issue is one that requires careful consideration. Can I suggest that perhaps your secretary might be able to gather the papers together and you could look at the reasoning? If necessary, I am sure that if anybody wants to write to *[Inaudible.]* who I have always found very helpful in relation to all of those things involving the Commonwealth, I am sure that he would be more than happy to give you a steer as to why the Commonwealth lawyers came to the view that they did. I am just looking at international best practice.

Mr A Maginness: I think that is very helpful and I am sure that the Clerk will take that on board and the Committee will take it on board in due course. But you would not rule out a lay chair; it is a matter of timing, that is really what you are saying.

Rt Hon Sir Declan Morgan: Scotland, England and Wales have lay chairs. As I said, my view about that would be very different in circumstances where the politics had become different.

Mr A Maginness: The other point, which has been raised before in this Committee when considering NIJAC, and I think the attorney made reference to it when he was giving evidence to the Committee, is that he felt that the senior judges, including your good self, had too much influence in the appointment process. In order to counter and rectify that, would it not be appropriate to reduce the judicial element and have more lay input to the actual appointment process?

Rt Hon Sir Declan Morgan: First of all, can I just look at England and Wales? England and Wales have five lay members and five judicial members. It does not include in its judicial members the lay magistrate and the lay tribunal member, so in fact it has seven judicial members and then two people from the professions, so the lay representation in England and Wales is, on one view, considerably less than we have here. The balance is actually not markedly different at all, even with the lay chair, from the balance that we have here.

You have to take into account the way in which we operate. The fact that the chair of the committee that is going to appoint the next High Court judge, whenever that arises, is a layperson does not happen by accident. It happens because we value the laypeople. The chair of the committee, as you know, has a range of responsibilities but also a range of rights, including a casting vote, at the end of the day. Both of those chairs that I referred to in the County Court and High Court competitions are women. That was not by accident either. That was something that we deliberately put in place. The point that I am trying to get across is that the attorney asserted that there was undue influence by senior judges. I am not aware of the attorney ever setting foot inside NIJAC at any stage in his career.

I brought Ruth Laird, who is a lay member, to this Committee in March 2012 and I ask you to think about reading her evidence again. So far as the pertinent points are concerned, let me just read you what she said. After explaining what she did, she said:

> *"I want to dispel any notion that our contribution is less than effective; I also want to dispel the notion that we are dominated in any way or unduly influenced in any direction. The absolute rigour of our debate can be well demonstrated to anyone who wants to attend the commission's meetings."*

As I understand it, she is the only lay member that this Committee has ever heard evidence from, so where is the evidence that there is any undue influence by senior, junior or other judiciary? The answer is that there is none.

On the question of the Committee maybe seeing us in action, as it were — it just reminded me as I read that — we have changed our method of working slightly, or at least we are going to change it from October. What we are now going to do is have business meeting in the morning and a themes meeting in the afternoon in order to look at policy issues. The first of those is around the High Court competition, but at the moment we are setting up a theme meeting on the afternoon of our February 2015 meeting to look at diversity. We want to think of this as part of our outreach, and the theme meetings seem to us to be opportunities for those who are interested to come along, participate in and hear the debate and maybe even go away and tell us whether or not the senior judiciary is having an undue influence. Let me make it clear that there is a standing invitation to any member of this Committee who would like to come to our theme meeting on diversity to attend. We would be delighted to have you or some nominees come along. The diversity issue is one that seemed to us to be extremely important, and we would be delighted to have a contribution to the debate from members of the Committee.

Mr A Maginness: I might take you up on that.

Rt Hon Sir Declan Morgan: We might even buy cake, Mr Maginness, if we know you are coming, albeit I will have to buy it myself.

Mr A Maginness: We might bring some with us.

Ms Kilpatrick: Can I add something to that? The concern from my perspective and that of the administration is about a perception of the involvement of the judiciary. On the other side of the coin, we are working very closely with the legal community, medical members and others who come forward, and their concern is that we are a human resources (HR) function without sufficient appreciation of the role of the job. Therefore, it is important to note that the panel looks both at the specifics of the job along with the HR function of interviewing someone in a competence-based process. For us, it would be quite difficult to try to not use the judges because of their role in knowing what the expectations are. So, everyone has to try to balance the different assessments that they are taking from that process.

Mr A Maginness: Thank you for that. I do not want to go over well-trodden ground, but the Chair put a question to you about section 5(6)(a) of the Justice (Northern Ireland) Act 2002. I will read the relevant part of it:

> *"after doing so, either re-affirm its selection or select a different person to be appointed, or recommended for appointment"*

It strikes me, looking at that, that there is no room for, as it were, recommencing a process, as was the action taken by NIJAC.

Rt Hon Sir Declan Morgan: The term "recommencement" has been bandied about. It is quite important to look, in practical terms, at what we did. We opened the competition to anyone else who was qualified to apply. That is why the term "recommencement" is quite difficult. If you can find for me the word that describes opening the competition to other candidates, I am happy to accept that in place of "recommencement".

Mr A Maginness: There is a net question that the Committee is struggling with. In a situation where you had, effectively, a two-horse race, one horse was disqualified. I do not mean that offensively in

any way, but one candidate was not acceptable to the Lord Chancellor. In that situation, you had one other candidate left who was suitable.

Rt Hon Sir Declan Morgan: There never was a finding on that. That is part of the difficulty here and part of the reason why we have changed our practice. Our practice now is to define the appointability limit, and the appointability limit in previous competitions was determined after the successful candidate was identified. We then asked, "Is there any reason not to appoint this candidate?". That was the approach. It was not, in my view, the best approach, but the difficulty always was — I say "the difficulty", but the other thing to remember is that a selection committee always had the option of appointing a reserve and did not do so in this case. There were only four candidates, only three of whom made it through the sift. Once the other candidate was out, there were only two, both of whom were male judicial office holders. Our obligation under the statute is to seek to promote diversity and to make sure that we get the best candidate available. At the time when we came to make the decision, what we were faced with was in effect: should we exclude the 11 people who applied and were waiting to go from the next High Court competition — that is what the public interest was about — or did the private interest of the judge outweigh our public obligation? We took a view on that. People may take another view; the judge undoubtedly did, but that was the view that we took.

Mr A Maginness: I think that the Committee might struggle with that explanation.

Rt Hon Sir Declan Morgan: It may do, but the other side of this is that if we had turned round and appointed the sole remaining judicial office holder, I can assure you that — I do not know which papers this would have been in — the story would have been about judges appointing judges. That would inevitably have been the other approach. That is not the reason why we made the decision that we did, but there is no point in pretending that it was not a difficult decision. No matter which way you look at the decision, it was always going to be a problem.

Mr Anderson: Thank you, Lord Chief Justice, for coming along today and presenting to us. In your description of Judge Marrinan and, indeed, all your judges, I think that you said that they were all very good, hard-working, respected judges.

Rt Hon Sir Declan Morgan: I have the utmost respect for all of them.

Mr Anderson: That being the case — I do not want to delve too much into this letter — and with so much respect for them, why should you, or anyone, need to write to one of those respected judges saying that you were minded to take disciplinary action?

Rt Hon Sir Declan Morgan: Because if somebody denigrates the integrity and courage of my judicial complement, who else is going to take issue with the person who does that? It is my job to stand up for the integrity, courage and independence of my judges.

Mr Anderson: Have you changed your opinion in any way of Judge Marrinan as a result of this?

Rt Hon Sir Declan Morgan: I think that he probably made the comment without having thought it through. He has indicated to me that he did not intend any disrespect in the correspondence that he sent back to me. As far as I was concerned, that was the end of the matter. Although the correspondence may have suggested to you that the judges would not have been independent and courageous enough to make whatever decision was required, his correspondence to me seemed to me to indicate that he was not in any way seeking to denigrate those people. I was satisfied with that.

Mr Anderson: You said that maybe he got it wrong. Was it not about a difference of opinion rather than about him getting it wrong?

Rt Hon Sir Declan Morgan: No, it is not a difference of opinion when you assert that independent judges of integrity would not give you a fair hearing. I am sorry, but that is not a difference of opinion. That is a statement that goes to the very heart of the rule of law.

Mr Anderson: OK. I am just trying to get my head around this, given the respect that you, as the Lord Chief Justice, have for Judge Marrinan and your other judges.

You talked about Judge Marrinan being asked for written work maybe at the end of the first process. Will you expand on that? Was he, along with others, aware from the outset that that was part of the criteria?

Rt Hon Sir Declan Morgan: No, what happened was, as you will have seen from the papers, that when they decided that they should proceed with a second assessment, they had to decide which assessment tools they were going to use. As you can understand, in the High Court, you have to write a lot of judgements. I wrote, I think, 58 judgements last year. I have already written 26 judgements in this calendar year. One of my judges has already written over 30 judgements this calendar year. You need to be able to write, to write well and to write expeditiously. You cannot muck around and fail to get judgements out, because that deprives litigants of what they are entitled to.

So, perhaps not surprisingly and because of certain comments about the extent to which he had judicial work available, the selection committee suggested that one of the assessment tools might be two pieces of written work. The judge then wrote to indicate that he felt considerably disadvantaged by that, for the reasons that he gave. He asked the members to recuse themselves as a result of that. The selection committee wrote back and said, "All right, we won't ask for pieces of written work".

Mr Anderson: So, not agreeing to submit written work did not affect him in any way — that was not considered.

Rt Hon Sir Declan Morgan: No.

Mr Anderson: OK.

Rt Hon Sir Declan Morgan: My view is that the ability to write judgements expeditiously is an extremely important part of the job of a High Court judge. I would not want you to go away with the impression that I would oppose that being used an assessment tool in future. I have gone to my Crown Court judges as a result of this and said to them, "Write and put it on the Internet and our intranet, so that people can see the work that you do". Sir Anthony Hart, who was a very busy judge, could still produce 250 judgements. Many of my younger judges' judgements are well into double figures. Having had the encouragement I have given them, they would find it very hard to say that they were disadvantaged now if somebody wanted or thought it proper to use that as a tool.

Mr Anderson: If I remember clearly, in your opening remarks, you talked about improvements having been made in the processes and that you have learnt from past experiences.

Rt Hon Sir Declan Morgan: Yes.

Mr Anderson: Has anything been learned from this process?

Rt Hon Sir Declan Morgan: Yes, I mean —

Mr Anderson: What would you say would be —

Rt Hon Sir Declan Morgan: Among the things learnt is the redrafting and issuing of the document about the selection committee to involve staff in ensuring that they adhere to procedures. There is a recognition of the importance to be attached to that. There is a recognition of the importance that the ombudsman places on a separation between NIJAC and the Chief Justice's office, which is why I am here with the chief executive of NIJAC and my legal adviser from my own unit. We have sought to take all of those things on board.

We are also conscious of taking other steps that I think will help in this. I am keen on having a kind of roadshow, where you are coming up with the prospect of senior appointments. Were we looking at making a High Court appointment, I would be keen to roadshow it with the pool who would generally come forward — the solicitors, members of the Bar and members of the County Court bench. The roadshow would be done in a way that tried to help them to present their applications in the best possible light. I would probably end up doing quite a bit of it myself if that is the route that we go down, but there are obligations on us to make sure that we reach out to the appointable pool, make clear that all of them are welcome to apply and that we are anxious to have the best possible people.

Mr Anderson: You talked about having six or so vacant positions in 2017. Do you see those getting out to such people?

Rt Hon Sir Declan Morgan: Yes.

Mr Anderson: Is there any sign of rolling them out before then?

Rt Hon Sir Declan Morgan: That is what I would like to do. Depending on the circumstances, three of those might arise between now and autumn 2015. Potentially, three further positions might arise by autumn 2017. If we go down that route, it might be quite helpful for us to have three positions come forward all at once. There are always ifs and buts around this, but, if three positions were to come up at once, it would be an extraordinary opportunity to get out there and talk to people.

I have been a strong supporter of a process of involving women at the top of the legal profession, which has been going on now for around 18 months. I talked to the president of the Law Society about setting up a women in law project, which involved a series of lectures given by women on a range of important subjects. I then talked to the Family Bar Association and persuaded it to engage in something similar. It has just completed a four-lecture series on this, showcasing the best women and getting solicitors and barristers to realise the respect that ought to be paid to them. I want to go back out to all those groups, if we have a High Court competition, to encourage them to think hard about whether it is the time for them to come forward.

Mr Lynch: You touched on the point I was going to raise about women. We brought it up last time. Have you looked at the practices in the South of Ireland where there have been very successful appointments?

Rt Hon Sir Declan Morgan: On the last occasion, or maybe it was the first occasion, that I came here, I indicated that I had gone to talk to Susan Denham about this. She told me two things that I thought were helpful: first, she said that you need to have what she called a "sisterhood", in other words, the type of atmosphere where people had to be prepared to look after others as well as themselves; and secondly, she mentioned the importance of mentoring. What we have done through the women in law project is set up a group of mentors within the professions. It is there in order to help women who are at junior, medium and senior levels in the profession to think about how they should move forward.

We have always had difficulty in having mentoring through the judiciary, particularly the senior judiciary, because, at the end of the day, the High Court is a male-dominated area. I am not sure that it is as welcoming as it could be. With the recent appointment of Judge McColgan, the County Court now has a cohort of female judges. Fifty per cent of the district judges civil are female and some of them have participated in the mentoring process. It is ongoing. I think that mentoring is a very positive way forward in changing culture, which is what I want to do.

The Chairperson: I know that time is pressing, so I will not keep you for too much longer, but I would like to move on to sentencing issues.

Thank you for your candid approach on the issue of judicial appointments. I think it is better that we have these exchanges, flush out the issues and move on from that point. I appreciate the new dimension you have brought to justice having been devolved through your role as Lord chief Justice and head of NIJAC. I want to place on record that I appreciate and value the approach you have taken in that respect.

Rt Hon Sir Declan Morgan: I am grateful for that, Mr Chairman. That is very kind of you.

The Chairperson: There were a couple of areas we had touched on that we wanted to speak with you about: animal cruelty and attacks on the elderly. There has been some media attention and public concern of late relating to the sentences being administered in cases of animal cruelty. Is it an area that you have had to look at of late, given that public attention?

Rt Hon Sir Declan Morgan: As you know, I set up a sentencing group in 2010 to develop policies in relation to sentencing and to reach out to other areas that maybe were not reached before. However, more importantly, it was to ensure transparency about how sentencing is approached in this jurisdiction. Since then, we have had 35 Court of Appeal sentencing guideline judgements; six Crown

Court sentencing guideline judgements; 104 Magistrates' Court sentencing guidelines, including guidelines on animal cruelty and the Welfare of Animals Act (Northern Ireland) 2011; and we have had four sentencing case compendia, which deal with fuel and tobacco smuggling, tiger kidnapping, child cruelty and intellectual property crime.

Again, I have to be careful — and I seem to spend my life saying that in this Committee, but I have to be careful because I cannot talk about individual cases. At the moment, I am aware of only four prosecutions that have reached the courts under the 2011 Act, three of them in the Magistrates' Court and one in the Crown Court. It is important to understand that the justice system and the criminal justice system is a joined-up system. Everybody has to understand their part and be able to play their role. That includes the judges, and it seems to me that there may need to be some mechanism for ensuring that everybody understands one another's position.

Let me give you an example of that. I recently organised a joint training session between the judges, the Bar and the Law Society. The topic was the way in which vulnerable witnesses, particularly in sexual cases, should be treated in Northern Ireland. I was determined that we should not have a repeat of the ghastly scenes that occurred in cases of that sort in England and Wales. This was, it seemed to me, a mechanism for getting the message across to the professionals that they were going to have to approach it in a particular way and, if they did not do so, they could expect the judges to come down on top of them like a ton of bricks, and that maybe the Court of Appeal would not be particularly receptive to people who were complaining about the fact that they had done so. This is an example of trying to think a little outside the box, instead of just sitting in a court and waiting for a case to come to you.

I can only really look at one case that went to the Crown Court, and a number of things struck me as being quite odd. There were 23 counts on the bill of indictment in that case, and 19 were not proceeded with by the prosecution. I do not know what the reasons for that were. There were seven defendants, three of whom were not proceeded against by the prosecution. I do not know what the reasons for that were. Only four of the counts were proceeded with.

It struck me that, when you are bringing a case to court, you need to ensure that you have people who understand the issues and are experienced on them, such as those who have been appointed by the counsels to do this. There are maybe nine specialist investigators who have been appointed. You need to make sure that they also understand about evidence-gathering and not just about finding the incident. They have to understand about evidence-gathering, which is the process of taking forensic evidence and having an interview strategy so that it is effective in securing appropriate admissions.

A prosecution service must able to give direction about further investigations that need to be undertaken before the case comes to court to make sure that, when it does so, it is in good order. In the sexual area, you tend to have specialist teams who do that. In the PSNI, for instance, there are specialist care centres that look after women who are assaulted or affected in that way, and, when I looked at this case, I could not help but wonder about how much coordinated thinking there has been about the way in which these cases are presented. I will leave that thought with you.

The Chairperson: That is very helpful, because people will often say, "We need to go back and look at the legislation". We only recently legislated on the issue, and there is a response to say that we maybe need to increase the sentences or ask whether we need to give the director the power if it is an unduly lenient sentence. However, in essence, you are saying that we can increase the framework, but that, if all this work is not going on, it will not really make a difference.

Rt Hon Sir Declan Morgan: To be fair, we have had only four cases, and there may be a learning curve, as there is with a lot of things. Before I say an awful lot more, I am quite interested to have all those areas explored to see whether there may be something in them.

Mr McCartney: You talked about the system being joined up, which is an obvious observation. What role would a judge have where there are 21 or 23 charges and 19 are not proceeded with, and seven defendants, three of whom were not proceeded against? Can the judge ask appropriate questions in relation to that?

Rt Hon Sir Declan Morgan: It is difficult, because the judge is not the prosecutor and, of course, the moment you start asking questions about why people are not prosecuting this or that, you can see that the defendant is going to get a bit agitated if you are then going to hear the trial.

The general rule is that the decision to prosecute is entirely for the prosecution service. If it is clear to judges, based on the papers before them, that it is a very unwise decision, they can say to the authorities, "I think you should have this reviewed". In other words, they can, in effect, say to the prosecutor, "Go back to the DPP and ask him whether he really wants to do this". Of course, it would depend on papers actually showing the judge that these concessions were ones that should not be made. What that judge does not know is whether the witnesses on the paper saying that x, y and z happened have actually gone into consultation with the PPS and said, "Well, actually, I was not there." That is the bit that you do not know.

Mr McCartney: We are all cautioning ourselves about being careful, but is there any room for contempt of court in a case where a person makes mitigation, which is accepted, but then openly and flagrantly ignores the mitigation when they leave the court?

Rt Hon Sir Declan Morgan: I do not think so. There might be contempt of court if somebody said, "That judge wasn't an independent and courageous judge", or something of that kind, because it might be possible in those circumstances to deal with that as a contempt in the face of the court, but the circumstances in which you can do that outside the court are very difficult. If they did it inside the court then you would be entitled to take action.

Ms McCorley: Go raibh maith agat. Thanks very much for coming to the Committee today. You were talking about people maybe not having their work done appropriately at times and maybe not coordinating properly with other agencies, resulting in those scenarios, which are actually very damaging, because the public just take the view that somebody got off. He or she did 19 very wrong things and got off scot-free.

Rt Hon Sir Declan Morgan: I agree with that.

Ms McCorley: It is very damaging to the justice system and the people who work in it. Do you think, in those circumstances, penalties should be imposed on people who are at fault in carrying out their work?

Rt Hon Sir Declan Morgan: The question is always this: what do we want to do? Do we want to spend time finding out whether somebody got something wrong and made a mistake or do we want to retrain them to make sure that they do not do it again? If you are looking at a limited resource, all I can say is that I can well understand the argument for saying that the important thing is to get the right people trained to do the right job. I am not saying it happened in this case, because I do not have sufficient knowledge about it, but if I was in the position of some of those involved in that case, the first thing I would do would be to do a lessons-learned exercise in relation to why all of that happened. I would review procedures and maybe even get the ombudsman in to see whether they could help. I would look around for help.

I wonder how this is dealt with by police and prosecution divisions in England and Wales. Has somebody gone to talk to them? They have had an Animal Welfare Act in place since 2006. Has somebody gone to talk to them about the way in which these things are investigated and prosecuted, the evidence gathering that goes on, the mechanisms, and whether they use specialist teams to do it? Maybe they have, but in my view that would be the focus of the way forward. But then, I am not an expert; I am just a judge.

Ms McCorley: Regarding lessons learned, are you saying that that is your approach and that you would look at areas where you feel that something went wrong? You might not know the detail, but you have an instinct that there is an area there that needs looked at.

Rt Hon Sir Declan Morgan: If I felt that it was important for us to examine lessons learned in relation to judiciary, we would do that as quickly as possible through the judicial studies board. We have a mechanism for doing that, and I regularly encourage those on the judicial studies board not to get so excited about the more esoteric aspects of European Union law or, perhaps, the very latest case on contract or whatever it is.

The important thing from my point of view is that we give judges the everyday, practical tools to get on with the job effectively. That includes things such as addressing the jury in a way that the jury will understand so that it will understand the way in which the case has progressed and the importance of the evidence. That is a lot more important than looking at those esoteric points.

Ms McCorley: I have one question on animal cruelty. There has been public outrage, and everybody knows about a particular case. In general, there is outrage that there are offences that are not dealt with stringently enough. What would you say to people who say to us that there should be sentences of up to five years, as is the case in America and the South of Ireland?

Rt Hon Sir Declan Morgan: That is entirely for the legislature. It is nothing to do with me. If you decide to do it, that is fine, and we will impose sentences accordingly.

The Chairperson: There has been debate for a while about mandatory minimum sentences for attacks on the elderly. From your experience, is this an issue that the Assembly needs to be looking at, or is there any evidence to suggest that, when these cases are brought to the courts, the appropriate sentences were not being given?

Rt Hon Sir Declan Morgan: Again, I think that this is also an area where, if I may say so, there may be room for thinking about a joined-up approach. One of the things that is sometimes not appreciated is the effect of an attack on the elderly, not just any physical effect but the way in which the confidence of an older person can be completely undermined as the result of an incident that might, on the face of it, seem to be not that serious. It could be someone spending too much money on a roofing job or getting their paving area redone and finding that they were defrauded in the sense that they paid too much. I have seen that the effect on elderly people of finding that they were conned in that way, quite apart from physical attacks, can be extremely significant to the quality of life they enjoy. This is where I think that the importance of having good victim impact statements is critical, because, in all sentencing, harm is an critical aspect of sentencing.

We had a case today in the Court of Appeal, which was a bad case. We affirmed a sentence of 14 years imprisonment in relation to a rape and other sexual offences case, but the case attracted the sentence that it did because there was good evidence of harm to the victim. That was an extremely important aspect and, for us, was a major factor in taking the view that we did about the case. I wonder whether, in relation to the elderly, there is something to be said for making sure that the police officers who are looking after these cases are looking for the psychological impact just as much as they are looking for the physical impact. From the evidence that I have, broadly, I believe that the judges are following through.

If it is of any help to you, I sent a person from my legal unit, who is also a deputy district judge, to the Pensioners Parliament, which was looking at the question of impact on the elderly. He did a presentation on that along with Claire Keatinge, the Northern Ireland Commissioner for Older People, and talked about the position on the legal side. The Pensioners Parliament discussed the question of statutory minimum sentences, and the Commissioner for Older People indicated that treating the elderly as a specific vulnerable group, which would then be an aggravating factor for the offence, would be a better way forward than having a statutory minimum sentence.

We should look again to see whether we can find an up-to-date sentencing case in relation to attacks on the elderly. We have a case that demonstrates that, in circumstances of significant attacks, sentences of 15 years would be appropriate as a starting point. It is always important to say that 15 years is a starting point. If someone comes in with a record on top of that or there is any indication of other activity, it would go up quite considerably.

The Chairperson: Do any other members have any other questions about sentencing?

Mr Dickson: I will comment very briefly on the point that the Lord Chief Justice has made. In a sense, what you have said has been very helpful. What a judge does not know is not going to influence how he or she sentences. Therefore, it is vital — and this point was very well made — that the whole impact of the offence is considered when victim impact statements are produced. As the Lord Chief Justice said, the impact may not just be the broken arm or the black eye. It could be people being mis-sold something. That could cause deep psychological trauma, with the person saying to themselves, "I would never have been conned like that 10 years ago". People really have their confidence shaken in those circumstances. However, unless the judge is told this, it is not going to affect the sentence.

Mr Elliott: Does the Probation Board have any further role to play in relation to that?

Rt Hon Sir Declan Morgan: Do you mean regarding the offender?

Mr Elliott: I mean in putting forward a more accurate, substantial or reflective report.

Rt Hon Sir Declan Morgan: I do not think that the probation service interviews the victims. It interviews the offender, but it does not interview the victims.

Mr Elliott: Is there not a victims' service through the Probation Board now?

Rt Hon Sir Declan Morgan: There is a victims' service. I am sorry, I am thinking of the pre-sentence reports. The Probation Board prepares these for the courts and does not interview the offender. However, there is a focus on victims now that maybe there was not in the past. There is a victims' service that assists with the preparation of impact statements. It seems to me that there is definitely work to be done on communicating the impact of offences on elderly people to the courts.

Mr Elliott: There may be a mechanism for doing it through the Probation Board.

Rt Hon Sir Declan Morgan: There could be, through the victims element of the Probation Board. That would definitely be worth following up.

The Chairperson: Lord Chief Justice and your team, thank you for once again making yourself available to the Committee. You have been very generous with your time, and we appreciate that.

Rt Hon Sir Declan Morgan: As I did this time last year — I know this from looking back at the notes — I indicate that, if it would be of assistance to you, I will be happy to come back to talk to the Committee about whatever happen to be the matters of controversy that trouble you in a year's time. Thank you very much.

The Chairperson: Thank you.