

# Transcript of the Sheku Bayoh Inquiry

Monday, 29 April 2024

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LORD BRACADALE: Good morning, Ms Miller. Will you raise your hand and say the words of the oath.

LINDSEY MILLER (sworn)

Examination-in-chief by MS THOMSON

LORD BRACADALE: Ms Thomson.

MS THOMSON: Good morning. You are Lindsey Miller?

A. Yes.

Q. May I ask how old you are?

A. 52.

Q. You are employed by the Crown Office and Procurator Fiscal Service?

A. I am.

Q. What is your current role?

A. I am deputy crown agent for operational support.

Q. Before I ask you any questions, can I ask you to take a look inside the blue folder? Is it just there to your left. You should find within that folder a Rule 8 request that the Inquiry sent to you.

A. Yes.

Q. It's undated. It has reference SBPI 00456, but we don't need that on the screen. This is the procedure that we use whereby we can ask witnesses to provide us with a written statement and that request sets out a number of questions that you were asked to cover in your response.

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1           Can we please pull up on the screen your response,  
2           which is SBPI 00428. This is your response to the  
3           request. If we scroll to the very bottom, we'll see  
4           that it was prepared by you and signed on  
5           4 January 2024. Your signature has been redacted, but  
6           hopefully will appear on the version in hard copy in  
7           front of you?

8           A. Yes.

9           Q. And if we can look at the very last paragraph of the  
10          statement which is 93 pages long -- sorry -- 93  
11          paragraphs long, it reads:

12                   "I believe the facts stated in this witness  
13                   statement are true. I understand that this statement  
14                   may form part of the evidence before the Inquiry and be  
15                   published on the Inquiry's website."

16          And so you prepared this statement in that  
17          knowledge?

18          A. I did.

19          Q. And did you do your best to provide a full and accurate  
20          response to the questions that you were asked?

21          A. I did.

22          Q. Ms Miller, you have hard copies of the request and your  
23          response in front of you. Any passages that I would  
24          like to refer you to I'll bring up on the screen, but  
25          those documents are there to assist you and you can look

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1 to them at any point and if there's anything that you  
2 would like me to bring up on the screen, please just say  
3 and we can do that.

4 I want to begin by asking you some questions about  
5 your legal career, your roles and experience. When did  
6 you qualify as a solicitor?

7 A. 1996.

8 Q. When did you join the Crown Office?

9 A. 1994.

10 Q. You explain in your statement that as at May 2015 you  
11 were the procurator fiscal for organised crime and  
12 counterterrorism?

13 A. Yes.

14 Q. If we could perhaps bring your statement back up and  
15 have a look at that paragraph. You say:

16 "At the time of Mr Bayoh's death, I was the  
17 procurator fiscal for organised crime and  
18 counterterrorism and the head of the Serious and  
19 Organised Crime Division, which was a senior civil  
20 service post. I had been in that role since  
21 November 2013. In that role I had strategic  
22 responsibility within COPFS for a number of specialist  
23 areas of prosecution work, including the investigation  
24 and prosecution of organised crime, serious economic  
25 crime, terrorism offences, international cooperation,

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1           proceeds of crime recovery, civil recovery, the  
2           Lockerbie bombing investigation, wildlife and  
3           environmental crime and complaints against the police.  
4           I reported to the then director of Serious Casework."

5           A. Yes.

6           Q. Now, before I ask you any questions really about the  
7           content of that statement, can I draw your attention to  
8           the first line there and I see that you have spelt  
9           Mr Bayoh's name with an "E" rather than an "A", it's  
10          BAYOH, and I think as we go through your statement we'll  
11          see that that misspelling is repeated. Can I assume  
12          that was inadvertent?

13          A. I can only apologise, yes, that's inadvertent.

14          Q. You mention at the bottom of this paragraph that your  
15          portfolio of responsibilities within the Crown Office at  
16          the time of Mr Bayoh's death included complaints against  
17          the police. We've heard about CAAPD, the Complaints  
18          Against the Police Division or Department. Did that  
19          fall within your remit then, CAAPD?

20          A. Yes.

21          Q. You explain elsewhere in your statement that whilst you  
22          were not in the day-to-day management of the  
23          investigation into Mr Bayoh's death, you had  
24          responsibility and supervision for the team members who  
25          were so responsible. Can you explain what does having

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1 responsibility and supervision in this context involve  
2 if you're not involved in the day-to-day management?

3 A. In that role I was often copied in to submissions that  
4 were going to the law officers, I was asked to clear  
5 material that was being seen by more senior members of  
6 staff, I had regular meetings with that team to discuss  
7 their workload, any areas of concern and if there are  
8 any high profile cases, as with any of these units  
9 within my responsibility, I would regularly discuss the  
10 progress of investigations or investigative strategy.

11 Q. Okay. You also explain in your statement that in  
12 May 2016 you became the deputy crown agent for Serious  
13 Casework, however you retained responsibility for CAAPD;  
14 do I understand that correctly?

15 A. Yes, that's correct.

16 Q. You explain at paragraph 36, if we could look at that  
17 briefly please at the bottom of that paragraph. Thank  
18 you:

19 "When my role within COPFS changed in 2016, I  
20 retained oversight of this particular investigation for  
21 continuity purposes and because I had met Mr Bayoh's  
22 family on a number of occasions and it was thought to be  
23 good practice and helpful for the family to have  
24 continuity via senior COPFS officials, particularly as  
25 in June Lord Mulholland demitted office as

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1 Lord Advocate."

2 So here you talk about your role changing but  
3 retaining oversight of this investigation for continuity  
4 purposes. Was there any difference between your role  
5 before and after May 2016 when you changed post?

6 A. Not particularly. Somebody replaced me in a role of a  
7 different title but essentially carrying out the same  
8 role I had had pre-2016, but I took the view and in  
9 discussion with the Lord Advocate we thought it was  
10 important that I retained an involvement in the same way  
11 as I had before.

12 Q. Who was it that replaced you?

13 A. It was Liam Murphy as procurator fiscal for specialist  
14 casework, as it then came.

15 Q. How long did this oversight of the investigation last,  
16 did it continue up until the prosecutorial decision in  
17 2018 and beyond?

18 A. Yes.

19 Q. We've heard at the relevant time the head of CAAPD was  
20 Les Brown?

21 A. Yes.

22 Q. That the precognoscers who worked on the narrative were  
23 Alisdair McLeod and Erin Campbell?

24 A. Yes.

25 Q. And the precognoscer who worked on the analysis was

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1 Fiona Carnan. Were you responsible for all members of  
2 the team?

3 A. Ultimately, yes, they were within the division for which  
4 I had responsibility so yes.

5 Q. Did you directly provide supervision and support to all  
6 members of the team?

7 A. Yes.

8 Q. Okay. I wonder if we can look at the initial letter of  
9 instruction from the crown to the PIRC at COPFS 02539.  
10 So you'll see it was sent by Stephen McGowan. It's  
11 dated 5 May of 2015 and it's addressed to Irene  
12 Scullion, head of investigations at the PIRC, and if we  
13 can scroll down to look at the text, please. So the  
14 letter is issued in terms of section 33A of the 2006 Act  
15 and at this particular point in time, two instructions  
16 were given:

17 "There are two areas which require investigation.  
18 These are the circumstances leading up to the incident,  
19 namely Mr Bayoh's movements late on Saturday, 2 May and  
20 during the early hours of Sunday, 3 May prior to contact  
21 with the police, including his attendance at the  
22 Dick/MacLeod home address and events following his  
23 attendance there and the incident in which the police  
24 became involved with Mr Bayoh shortly after 7.00 am on  
25 3 May."

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1           If we look at the bottom of the screen, we see:

2           "My colleague Les Brown, head of CAAPD, will be the  
3           senior fiscal with oversight of this case and will bring  
4           in such assistance from the COPFS as required."

5           Now, both Mr McGowan and Mr Brown have already given  
6           evidence before the Inquiry and we understand there was  
7           an earlier version of this letter also in Mr McGowan's  
8           name and signed by him, but he doesn't think that it was  
9           ultimately issued and it said that David Green, who was  
10          head of the SFIU, the Scottish Fatalities Investigation  
11          Unit, would have the oversight of the investigation. So  
12          it appears that at some point on 5 May a decision was  
13          taken within Crown Office that the investigation should  
14          sit within CAAPD rather than SFIU. I wondered if you  
15          could assist us with who took that decision?

16         A. I genuinely can't recall. I assume I would have been  
17          involved in the discussion, but now I have no  
18          recollection of how that came about. I know David Green  
19          was involved in the initial call about Mr Bayoh's death,  
20          but as for who took that decision and how it came about,  
21          I'm afraid I can't recall now.

22         Q. Okay, Mr McGowan was also asked this question and he  
23          couldn't recall either, but I'll tell you what he said  
24          in his evidence. He said:

25                 "I don't specifically recall any discussion about



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1           it. There must have been a discussion about it. I  
2           imagine that would have involved myself, John Logue,  
3           Lindsey Miller, but I don't recall the specific  
4           discussion."

5           And he was asked:

6           "Who would have authority to make a decision of that  
7           sort?"

8           And he said:

9           "Either of us could have made that decision. CAAPD  
10          sat within Lindsey Miller's remit so she would have had  
11          to have been involved in that. Mr Logue oversaw both of  
12          us, but any of us would really have had the technical  
13          authority, but there must have been a discussion as  
14          reflected between the two drafts of the letter, I just  
15          don't recall it."

16         A. Yes, I would agree with that.

17         Q. You would agree with that. And can you assist us as to  
18          why the decision was taken that this investigation  
19          should sit within CAAPD rather than SFIU?

20         A. I anticipate it was because the nature of the work that  
21          CAAPD did was focusing on police practice and procedure,  
22          a range of criminality processes that the police undergo  
23          training, all of that is dealt with by CAAPD. They  
24          focus primarily on criminal allegations, but they also  
25          look at training and the roles that police officers

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1 perform day in, day out. There is always the ability to  
2 consult and seek assistance from SFIU, so there's no  
3 suggestion that if it's sat with CAAPD, it's sat within  
4 a silo in COPFS, but in my view CAAPD would have the  
5 specialism and the subject matter expertise to deal with  
6 some of the issues that we knew were likely to come out  
7 in the course of this investigation.

8 Q. Would it have made any practical difference if the  
9 investigation had remained within SFIU?

10 A. I think it would have led to similar calls on CAAPD time  
11 if it had sat with SFIU. Their function is obviously  
12 the investigation of sudden and unexpected fatalities.  
13 I think that the nature of this investigation focused  
14 very much more on the actings of the police officers  
15 involved.

16 Q. Okay. Can we bring your statement back up on the  
17 screen, please. And look at paragraph 44. You were  
18 asked questions about the ECHR and at paragraph 44 you  
19 say:

20 "During the investigation there were multiple  
21 discussions amongst officials about COPFS obligations  
22 under Article 2 of ECHR both in terms of the nature of  
23 the unprecedented levels of disclosure provided to  
24 family via the legal representative, but also in terms  
25 of the nature and extent of the crown investigation on

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1           the basis that this was a death at the hands of the  
2           state.

3           "Article 2 is referenced in a series of briefing  
4           documents, emails and correspondence, to which I was  
5           copied or offered in the course of the investigation,  
6           recognising that in accordance with our guidance the  
7           investigation's conclusions must be based on a thorough,  
8           objective and impartial analysis of all relevant  
9           elements. Failing to follow an obvious line of inquiry  
10          undermines to a decisive extent the investigation's  
11          ability to establish the circumstances of the case and  
12          the identity of those responsible. COPFS must ensure  
13          that all lines of inquiry relevant to the death are  
14          considered, including responses received from third  
15          parties, expert opinion and concerns raised by nearest  
16          relatives. The investigation must be prompt and and be  
17          open to public scrutiny depending on the facts and  
18          circumstances of the death and supportive of the  
19          participation of nearest relatives.

20          "I do not recall any specific discussion referencing  
21          Article 14 as it specifically relates to protection from  
22          discrimination on race and religious grounds, but all of  
23          those involved in the investigation were conscious,  
24          certainly in my discussions with them, of the crown's  
25          obligations and core values to treat all with

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1 professional and respect."

2 Now, a number of witnesses before you have been  
3 asked about Articles 2 and 14 and that the principles  
4 that can perhaps be distilled from the case law have  
5 been put to them and witnesses have agreed that for an  
6 investigation into the death by the state to be  
7 Article 2 compliant it requires to be effective; would  
8 you agree with that?

9 A. I would.

10 Q. And to be effective an investigation must be adequate.  
11 Can I make you aware, Ms Miller, that the proceedings  
12 are being transcribed?

13 A. Yes.

14 Q. Thank you. Where the death follows the use of force by  
15 state agents, an adequate investigation must be capable  
16 of leading to a determination of whether force used was  
17 or was not justified; do you agree?

18 A. I do.

19 Q. And the standard to be applied is that of no more than  
20 absolutely necessary when considering the use of force?

21 A. I agree.

22 Q. Further, when a death is at the hands of state agents,  
23 Article 14, taken in conjunction with Article 2, poses  
24 an additional duty on an authority to take all  
25 reasonable steps to unmask any racist motive and to

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1           establish whether or not ethnic hatred or prejudice may  
2           have played a role in the events?

3           A. I agree.

4           Q. And that investigation should be pursued with vigour?

5           A. Yes, that's correct.

6           Q. So these are positive obligations on both the PIRC and  
7           crown in terms of Article 2 and 14?

8           A. Yes.

9           Q. And they would required to be discharged both through  
10          the PIRC's investigation and through the crown's  
11          investigation?

12          A. Yes.

13          Q. And central to the crown investigation, of course, is  
14          the precognition process?

15          A. Yes.

16          Q. Okay. I want to begin by asking you some questions  
17          about the PIRC investigation and then we'll move on to  
18          look at the precognition process. Can we bring up  
19          perhaps paragraph 77 of your statement. You say here:

20                 "It was important to take into account Mr Bayoh's  
21          race at all stages of the investigation, in particular  
22          to understand whether the police response to the calls  
23          from the public and the manner in which they sought to  
24          detain him was in any way effected because he was a  
25          black man and indicative of racial bias."

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1           So you anticipated that at all stages of the  
2           investigation account would be taken of Mr Bayoh's race.  
3           That would apply both to the PIRC investigation as well  
4           as the crown investigation?

5           A. Yes.

6           Q. Yes. You say:

7                    "Whether the manner in which the officers sought to  
8           detain him was indicative of racial bias... "

9                    Was that a question that you expected the PIRC to  
10          address?

11          A. Yes, I did.

12          Q. What expectation did you have as to how they would take  
13          account of race during their investigation?

14          A. I expected them to analyse the initial instructions to  
15          the officers, what they had been told, what their  
16          understanding was when they attended the locus, what  
17          their training was in terms of detention and restraint  
18          and to include that in their analysis to be provided to  
19          the crown.

20          Q. And in particular what was your expectation as to how  
21          the PIRC would investigate whether the police response  
22          and the manner of detention were indicative of racial  
23          bias?

24          A. I would expect them to review and certainly through  
25          discussions we had had with the family and their

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1           representative there were concerns about policing  
2           response in that local area, particularly around issues  
3           of race. That certainly was passed to the PIRC and I  
4           would have expected them to investigate that and provide  
5           detail on it in their report.

6           Q. Okay. And beyond that particular issue, where else do  
7           you anticipate they would look for evidence indicative  
8           of racial bias?

9           A. In the overall context of the circumstances.

10          Q. Do you consider that it was clear to the PIRC what was  
11          expected of them?

12          A. Yes.

13          Q. How was it communicated to them what your expectations  
14          were?

15          A. In the initial letter of instruction and I believe there  
16          was a follow-up letter from Mr Brown which set out in  
17          significant detail what was expected of them.

18          Q. That first written letter to the PIRC makes no mention  
19          of race. We looked at it a moment ago, perhaps we can  
20          bring that letter back up on the screen again. We  
21          looked at this paragraph already.

22                 There are two areas which require investigation and  
23                 they are and I'll read it short the circumstances  
24                 leading up to the incident and then the incident itself.  
25                 So there's no mention of race within before four corners

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1 of the initial letter of instruction. Mr McGowan, who  
2 was the author of this letter, was asked whether he  
3 considered giving a specific direction to consider race  
4 and this is what he said in his oral evidence. He said:

5 "I didn't consider doing it, because in my view it  
6 was entirely obvious that a black man having died in  
7 contact with the police, race would be at the forefront  
8 of the mind of any competent investigator, as it was in  
9 the forefront of our minds, so I don't think I did  
10 consider it."

11 And he said too:

12 "It would have been stating the obvious."

13 Would you agree with his sentiments?

14 A. Yes, I would.

15 Q. Mr Brown was also asked a similar question and he said:

16 "I think my position is I don't accept that it  
17 required a letter of instruction from the crown to  
18 consider race. The letter of instruction was for an  
19 effective investigation to be carried out."

20 Again, is that something that you would agree with?

21 A. Yes, I agree.

22 Q. In her evidence Kate Frame, who was the Commissioner  
23 back in 2015, was asked whether she considered that this  
24 letter of instruction permitted PIRC to actively  
25 investigate whether race was a factor and she said and I



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1 quote:

2 "I would have expected a specific direction from  
3 Crown Office about that."

4 Would you wish to offer any comment on that?

5 A. I would disagree with that. This is a letter of  
6 instruction, but I don't consider that she would be  
7 restrained by the four corners, as you called it, of the  
8 instruction. It's not like terms of reference for  
9 nonstatutory or statutory inquiries where they're very  
10 specific and inquiries need to stay within those -- the  
11 parameters of those terms. I think it would be obvious,  
12 as Mr McGowan has said, that race should be considered  
13 and could be considered by the PIRC.

14 Q. Ms Frame's evidence was put to Mr McGowan and he said:

15 "In this letter of instruction we were not setting  
16 terms of reference or parameters for an investigation.  
17 It was not like heads of investigation such as an  
18 inquiry like this may have. What we were doing is we  
19 were asking the PIRC to investigate something. So it  
20 wasn't a case of specific terms of reference and they  
21 had to work within those terms of reference. They were  
22 expected to gather evidence and follow the evidence in  
23 my view and that evidence would take them where it took  
24 them."

25 So he's expressing a similar sentiment to you

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1            talking about the letter of instruction not being  
2            restrictive, it doesn't set terms of reference, there  
3            was no requirement to stay within the instruction given.

4            Now, you mentioned there being a further letter and  
5            I think that's a letter dated 2 September?

6            A. Yes.

7            Q. Which we will look at shortly, but the Inquiry has heard  
8            evidence that between the date of the initial  
9            instruction and the letter of 2 September they were  
10           taking cognisance of race, but race was not a positive  
11           line of investigation. So Mr McSporran was taken to his  
12           policy log where he has recorded an entry which is dated  
13           9 May that says:

14           "Although not directed by Crown Office at this  
15           stage, taking cognisance of any issues of race if they  
16           emerge."

17           So it appeared that the PIRC were not taking a  
18           positive line of investigation in relation to race and  
19           so, for example, when the officers gave their statements  
20           on 4 June, the interview strategy didn't cover race, but  
21           were you aware of that?

22           A. I wasn't aware of the interview strategy. We are  
23           sometimes sighted on interview strategy but not as a  
24           matter of course, so I wasn't aware of that.

25           Q. Would you have expected the interview strategy to cover

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1 race?

2 A. Yes. I think Mr McSporran's assessment there sounds  
3 quite passive and not looking positively to investigate  
4 that.

5 Q. Again, Mr McGowan was taken to the entry in  
6 Mr McSporran's policy log and he said that taking  
7 cognisance sounds passive, as you have just said:

8 "So as you say it it is sounds as if it arrises,  
9 then you look at and see what it takes, but in my mind  
10 the best investigative practice would have required that  
11 to be an active line of investigation which was pursued  
12 and so questions would be asked about that of almost any  
13 witness and things may emerge that would be followed  
14 up."

15 Would you agree with --

16 A. Yes.

17 Q. -- what he had to say about that? Were you aware that  
18 the PIRC did not appear to have a positive line of  
19 inquiry around race at that time?

20 A. No, I wasn't. We wouldn't as a matter of course see an  
21 investigating officer's policy log. We would in certain  
22 circumstances but in the circumstances of the  
23 investigation of Mr Bayoh's death I wouldn't have  
24 expected to see it and I didn't know what was in it.

25 Q. Does it concern you to hear that the PIRC were not

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1           advancing a positive line of investigation --

2           A. Yes.

3           Q. -- into these issues.

4                   Now, a report which has been variously described as  
5           a first report or an interim report was received in the  
6           Crown Office in August 2015. Did you read that first  
7           report?

8           A. I did.

9           Q. I understand that the statements of the police officers  
10          may have been appended to that report. Did you read  
11          those?

12          A. From memory, I did.

13          Q. The report itself is just more than 350 pages in length  
14          and there are references to a black male, a black guy,  
15          threat level, terrorist risk. There is however no  
16          mention of race, racism, race discrimination, racist and  
17          the analysis doesn't cover race or discrimination or  
18          Article 15, even just to raise and exclude these issues.  
19          Do you wish to offer any comment on that?

20          A. I think the report was deficient.

21          Q. Can you expand on that?

22          A. I think that it should have covered the issues you've  
23          raised. I think the question of race was a crucial  
24          pillar of the investigation and should have been set out  
25          in the report to the crown.

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1 Q. We heard from Mr Brown that concerns as to the content  
2 and quality of the report prompted a more directive  
3 approach by the crown and the letter of 2 September was  
4 then issued. Did you have any part to play in shaping  
5 this more directive approach?

6 A. I don't recall. I will have seen it. A lot of the  
7 correspondence that was being sent to the PIRC had been  
8 passed to me for authorisation and final sign off, so I  
9 will have seen a version of that before it went to the  
10 PIRC.

11 Q. Okay. Let's bring it up on the screen. It's  
12 COPFS 02557 and if we can get our bearings. So this is  
13 a letter that we can see from the reference has been by  
14 Mr Brown, his signature is at the bottom, addressed to  
15 Kate Frame and dated 2 September. There is a reference  
16 of to a meeting with the family, and the Lord Advocate,  
17 and:

18 "The Lord Advocate confirmed that the PIRC would be  
19 instructed to carry out investigations in respect of a  
20 number of matters in order that a properly informed  
21 decision may be taken by the crown as to the most  
22 appropriate way to proceed.

23 "The following matters require further investigation  
24 in this regard."

25 And there then follow a number of bulletpoints. If

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1           we can perhaps scroll all the way down to page 4, and if  
2           we stop here, please, the bulletpoint that's at the top  
3           of the screen is the one that relates to race so let's  
4           look at that:

5           "I require confirmation from the Commissioner that  
6           issues of race and whether there is any evidence of  
7           racial motivation is a primary focus in the PIRC  
8           investigation. The investigation should examine whether  
9           there is any evidence that any of the officers involved  
10          has expressed any racist views or opinions in the past,  
11          in particular someone indicated that officers from  
12          within the Fife area had been investigated for texting  
13          racial slogans and that one of the officers was referred  
14          to him. The family have enquired as to whether any of  
15          those officers apparently involved in that inquiry were  
16          in the group of officers engaged with Mr Bayoh.

17          "Associated with this aspect of the Inquiry, I have  
18          already been in correspondence with you regarding the  
19          investigations that have been instructed in relation to  
20          allegations of previous criminal conduct by  
21          Constable Alan Paton. The family of Mr Bayoh believe  
22          that he has a history of racism."

23          Does that jog your memory at all? Do you recall  
24          having seen this at least in --

25          A. Yes.

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1 Q. -- draft? So far as race is concerned then, there's a  
2 request for confirmation from the Commissioner that  
3 issues of race and whether there is any evidence of  
4 racial motivation is a primary focus in the PIRC  
5 investigation and then there is a direction that the  
6 investigation should examine three particular areas,  
7 racist views in the past, text messages I think that  
8 were shared by other officers and whether any of the  
9 officers who attended Hayfield Road were associated with  
10 the sharing of those messages and concerns about  
11 Mr Paton, Constable Paton.

12 We've heard evidence that these three particular  
13 lines of inquiry reflect concerns that had been raised  
14 by Mr Bayoh's family; was that your understanding?

15 A. Yes, that's right. That's what I was referring to  
16 earlier.

17 Q. Mr Brown gave evidence that he intended this to be a  
18 general instruction, the requirement that the  
19 Commissioner confirm the issues of race or evidence of  
20 racial motivation were primary focus. He intended this  
21 to be a general instruction in which he then went on to  
22 highlight three specific concerns raised by the family.

23 Now, the Inquiry has heard that the PIRC's  
24 consideration of race didn't really go beyond those  
25 three specific lines of inquiry. Did you anticipate

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1           that their investigation would be broader in its scope?

2           A. I did and I would take that from the first sentence and  
3           that bulletpoint:

4                     "The issues of race and whether there is evidence of  
5           racial motivation is a primary focus in the PIRC  
6           investigation."

7           Q. What did you expect from the PIRC in carrying out this  
8           investigation into race and whether there's any evidence  
9           of racial motivation?

10          A. I expected that to form certainly a significant portion  
11          of the report to the crown, again looking at some of the  
12          factors I identified earlier in my evidence about police  
13          officers, their background, any issues they were aware  
14          of, what they were told at the time of their response  
15          and, more generally, I suppose across the police force  
16          what was the position of Police Scotland.

17          Q. Okay. Now, given that the first report submitted in the  
18          August of 2015 was deficient in your view certainly  
19          insofar as its consideration of race was concerned, was  
20          any consideration given within the crown to providing  
21          more in the way of guidance and direction to the PIRC at  
22          this stage, rather than a general instruction or a  
23          request for reassurance followed up with what were in  
24          effect three bulletpoints or lines of inquiry?

25          A. I don't recall any specific discussion about that, but



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1 I'm aware from my own meetings with the PIRC and also  
2 Mr Brown's role that there was regular engagement on  
3 this investigation. So even if you take that  
4 bulletpoint and the three issues as a starting point,  
5 that certainly wouldn't be the end of the discussion and  
6 I would expect there to be ongoing dialogue, as we would  
7 with any agency as the inquiry progressed.

8 Q. Thank you. When Mr McGowan gave evidence he was asked:

9 "We've heard that the PIRC's consideration of race  
10 didn't really go beyond these three specific aspects and  
11 I wonder whether with hindsight this was an opportunity  
12 for the crown to have provided more in the way of  
13 guidance to the PIRC, perhaps by providing additional  
14 examples of lines or perhaps by stating that the  
15 expectation was that they applied their own minds to the  
16 issue and perhaps reported back to the crown in terms of  
17 how they proposed to take this aspect of the inquiry  
18 forwards."

19 And Mr McGowan said:

20 "In hindsight we could have, but again I go back to  
21 the context and the context is a number of discussions  
22 in which these were discussed and the context is also  
23 that the people that we were dealing with at PIRC were  
24 very experienced. Although PIRC was a new organisation,  
25 the Commissioner was an experienced prosecutor and the

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1 director of investigations and the senior staff were  
2 very, very experienced police officers and very  
3 experienced detectives, who to my own knowledge had  
4 dealt with very complex cases. On reflection given what  
5 you told me, yes, we could have put more in, but I would  
6 be disappointed if today as we sit here now, if a  
7 similar incident occurred, we would have to specify in  
8 the body of the letter of instruction these are the  
9 lines of inquiry you should follow."

10 Would you agree with what Mr McGowan had to say?

11 A. I would.

12 Q. You mentioned there being ongoing dialogue between PIRC  
13 and the crown. Was this telephone calls, emails,  
14 meetings?

15 A. I think as far as Mr Brown was concerned that was the  
16 nature of the contact. I had from early 2017 onwards  
17 quarterly meetings with the Commissioner, not just about  
18 this case, but about the range of the casework that PIRC  
19 was undertaking, so that was mostly face-to-face with  
20 some email contact.

21 Q. Ms Frame in her evidence said that the PIRC had sought  
22 guidance about how to assess whether the officer's  
23 actions had been influenced by race and that a greater  
24 degree of direction and guidance would have been  
25 helpful. Do you have any comment to make on her

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1 evidence?

2 A. That's her view. I think I go back to what Mr McGowan  
3 said and what I agreed with that she was a very  
4 experienced prosecutor who had in fact before been  
5 appointed to be the Commissioner, had been the head of  
6 CAAPD. The PIRC officials involved were very senior at  
7 the time of their retirement from respective police  
8 forces, very senior, very experienced. I would have  
9 expected them to be able to discharge the instructions  
10 such as they were that were provided by the crown  
11 without needing to be taken step-by-step through an  
12 investigation of this sort.

13 Q. In her evidence Ms Frame said that no guidance was given  
14 about the evidence from which inferences might be drawn  
15 and the guidance had been sought. Were you aware of  
16 the PIRC looking for guidance as to how to approach  
17 their examination of the question of race?

18 A. No, I don't recall. I may have been -- I don't recall,  
19 but again I would have expected those with the  
20 experience at the PIRC to be able to look at the  
21 evidence that they had been and gathered and to draw  
22 those inferences.

23 Q. You mentioned that you had an expectation that the PIRC  
24 would look at the backgrounds of the officers, look at  
25 the information provided, their knowledge effectively,

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1           on arrival at the locus, and look across the police  
2           force in general.

3           Mr McGowan in his evidence said that he expected the  
4           PIRC to gather and follow the evidence and he said:

5           "I would be disappointed if we had to specify these  
6           are the sorts of things you need to look for, whether  
7           it's the language of the officers before, the language  
8           of the officers after, how they have dealt with other  
9           people, whether there's anything in their past, you  
10          know, whether there are any racial tropes or stereotypes  
11          applied in any of the material that's been produced.  
12          I would be disappointed if we had to do that now."

13          So he referenced language, racial tropes and  
14          stereotypes and a comparison of the treatment of  
15          Mr Bayoh with how the officers had dealt with other  
16          people. How did those suggestions fit with your own  
17          expectations as to how the PIRC might have looked at  
18          issue of race?

19          A. I would agree with all of that.

20          Q. And again, Mr McGowan said:

21          "I didn't understand that we were looking for  
22          anything complex or novel. It all goes down to those  
23          questions of looking at all the circumstances to say  
24          what can we discern about why the officers acted in the  
25          way that they did and you can get that from all of the

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1 surrounding circumstances."

2 A. Yes.

3 Q. And you're nodding agreement.

4 A. Yes.

5 Q. Okay. I want to move away from the PIRC investigation  
6 and ask you some questions now about the crown  
7 investigation, again with the focus on race. And I  
8 would like to begin by looking at what you say in your  
9 statement about a meeting that you were present at on  
10 14 May 2015.

11 So if we could perhaps bring up your statement again  
12 and look at paragraph 79 and this was a meeting with the  
13 Lord Advocate who at that point in time was  
14 Lord Mulholland. I think in the questions that lie  
15 behind these answers you had been taken to a note and a  
16 notebook. I don't think we need that for present  
17 purposes, but the quotation "you know me on this race  
18 stuff" is one that you attribute to Lord Advocate. You  
19 say it was his response to Mr Anwar asking for question  
20 of race to be looked at by the PIRC:

21 "This was said in the presence of Mr Bayoh's family  
22 and he was looking to reassure them that the issue of  
23 race was one which was very much front and centre of the  
24 investigation for which he had overall responsibility.

25 "During this discussion the Lord Advocate confirmed

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1           that there would be a detailed investigation by the  
2           PIRC, so therefore independent and not involving the  
3           police. He advised the family that at the very least  
4           there would be a fatal accident inquiry as Mr Bayoh had  
5           decided in police custody. He also indicated that if  
6           there was sufficient evidence linking an assault to  
7           Mr Bayoh's death then there could be a prosecution for  
8           murder or culpable homicide and indicated that he would  
9           have no hesitation in raising a prosecution if that  
10          evidential threshold was met."

11           So this was 14 May and the Lord Advocate said to the  
12          family that the issue of race would be front and centre.

13           Now, we see that the Lord Advocate gave a commitment  
14          to there being at the very least an FAI. Do you know  
15          what was meant by "at the very least"?

16          A. That was in the context that it was mandatory for there  
17          to be a fatal accident inquiry as Mr Brown had died in  
18          lawful custody. What he was setting out -- my  
19          recollection was that there was -- all options were  
20          still to be consider, so this was an investigation that  
21          was looking a the actings of the officers and that if  
22          criminality was identified, then if the evidential  
23          threshold was met there could be criminal proceedings.

24          Q. Thank you. We can scroll up the page just a little bit,  
25          please, to look at the paragraph above. So this was in

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1 the context of Mr Anwar having asked a question about  
2 race being examined by PIRC and:

3 "The Lord Advocate was looking to provide  
4 reassurance that the issue of race was one which was  
5 very much front and centre of the investigation for  
6 which he had overall responsibility."

7 Can we take it that the Lord Advocate anticipated or  
8 he understood that he was anticipating that race would  
9 be front and centre not only of the PIRC investigation,  
10 but also the crown investigation?

11 A. Absolutely, yes.

12 Q. Okay. How did you anticipate that the lawyers within  
13 CAAPD would investigate whether race was a factor in the  
14 circumstances of this incident?

15 A. I'm really looking at the factors that you've discussed  
16 with me this morning that Mr McGowan outlined. So we  
17 would be looking at statements from eye witnesses,  
18 statements from the officers, the officers' training  
19 records, any suggestion of a misconduct, anything within  
20 the materials provided by Police Scotland about -- about  
21 training, about the officers themselves, and in the  
22 focus on them with Mr Bayoh at the locus, their actings  
23 and was there anything that could be drawn -- any  
24 inference that could be drawn from that that suggested  
25 it was indicative of racial bias.

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1 Q. Okay. Had guidance been published within Crown Office  
2 as to how to recognise racial bias in an investigation  
3 of this sort?

4 A. There's certainly considerable guidance in relation to  
5 the investigation of racially motivated crime and the  
6 use of the then racial aggravations when preparing cases  
7 for prosecution.

8 Q. We've already looked at what was chapter 44 I think of  
9 the Precognoscer's Handbook which deals with section 50A  
10 and section 96, the racial motivation for racial  
11 aggravations. So that chapter of the handbook certainly  
12 dealt with the nuts and bolts of how to approach those  
13 two sections and it explored what the threshold was for  
14 each, but in terms of where to look for evidence of  
15 racial bias, how to approach that task, was there any  
16 published guidance?

17 A. I'm not sure that there is. I might be wrong about  
18 that, but I'm not sure that there is on that specific  
19 issue.

20 Q. Okay. Do you think that's something that might be  
21 helpful?

22 A. Yes.

23 Q. Okay. Was there training for the staff involved in the  
24 precognition process on how to recognise racial bias?

25 A. In the context of investigation, I don't think so. In



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1           the context more generally of how prosecutors and staff  
2           will go about their daily duties, yes, but I think  
3           they're two separate things.

4        Q.   Okay.  We've heard evidence that racial bias can be  
5           overt, shouting a racist slur for example, and there's  
6           no evidence of that here.  The Inquiry has also heard  
7           that evidence of racial bias can also be overt --  
8           sorry -- covert, subtle, harder to detect, would you  
9           agree with me that if you only look for evidence of  
10          overtly racist behaviour then you may overlook the more  
11          subtle behaviours that are indicative of bias?

12       A.   Yes, there are issues such as what we would call  
13          "micro-aggressions" so phrases, words, actions on the  
14          face of it which might not be overt commentary you're  
15          talking about, but certainly are indicative of a  
16          particular bias.

17       Q.   And would you agree with me that if you only look for  
18          evidence of overtly racist behaviour then your  
19          investigation might not unmask a racist motive?

20       A.   Yes, I would agree with that.

21       Q.   Mr McGowan was also asked where did he anticipate the  
22          team within CAAPD would look for evidence of racial  
23          motivation.  He said:

24                "It would be in all of the evidence so it would be  
25          in the evidence of the statements, so things which were

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1           said in statements which might cause you to have a view.  
2           They would be in things like the police radio chatter,  
3           the airwave chatter I think it was. That was all  
4           available to us. We would be looking in that. We would  
5           be looking in all of the documents that were prepared.  
6           We would be looking at the policies that I think we were  
7           then gathering. We would be looking across the piece  
8           for evidence of that."

9           Would you agree with that?

10          A. Yes, I would.

11          Q. And at what stage of the investigation did you expect  
12           the crown to be on the look out for evidence of racial  
13           bias or motivation?

14          A. At every stage.

15          Q. Okay. And who within the team was responsible for  
16           scrutinising the evidence and assessing it for relevance  
17           to the question of race?

18          A. That would be those involved in what we call the  
19           precognition, the case preparation process, so the  
20           procurators fiscal depute who were analysing the  
21           evidence as it came in and were responsible for  
22           preparing what became the narrative and analysis for the  
23           crown.

24          Q. So that would be Alisdair McLeod?

25          A. Alisdair McLeod and Erin Campbell and --

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1 Q. Fiona Carnan?

2 A. -- Fiona Carnan with oversight obviously directly  
3 Mr Brown and from me if required.

4 Q. We've heard that Mr Brown was a countersignatory to the  
5 precognition?

6 A. Yes, that's right.

7 Q. So direct oversight by Mr Brown and then you sat above  
8 that?

9 A. Yes.

10 Q. How confident were you that the team within CAAPD who  
11 were working the precognition had the necessary skill  
12 set?

13 A. Confident, we brought in Mr MacLeod and Ms Campbell from  
14 the wider Serious and Organised Crime Division to deal  
15 with this, so they weren't in CAAPD from memory at the  
16 time that it took over the investigation. Mr MacLeod  
17 had experience of investigating police corruption cases  
18 in the past. He also had experience from health and  
19 safety investigations of fatalities, which I think was  
20 important in this context, given what we were looking  
21 at. He had significant experience of large and complex  
22 cases.

23 Similarly, Ms Campbell was an experienced prosecutor  
24 and had worked on a number of large and complex  
25 investigations within the division and I felt certainly

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1           that they were the right fit to assist Mr Brown.

2           Q.   And what about Ms Carnan? She was the procurator fiscal  
3           depute who prepared the analysis of the evidence. Were  
4           you satisfied that she had the necessary skills?

5           A.   Yes, she had already been, I think from memory, in CAAPD  
6           and when Ms Campbell left, Ms Carnan I think began to be  
7           involved at that stage, so again I had no concerns about  
8           her involvement.

9           Q.   Okay. Ms Carnan explained in her written evidence to  
10          the Inquiry that before the date she became involved in  
11          the case she had no previous involvement in the  
12          investigation of deaths in police custody and she didn't  
13          specifically recall any deaths that she had investigated  
14          where race was a factor and Mr Brown also confirmed  
15          again in his written evidence that he had no experience  
16          of investigating a death in custody and no experience of  
17          racism being a factor to consider when investigating a  
18          death in custody or the actions of on-duty police  
19          officers

20                 Were you aware of those limitations to their  
21          experience?

22          A.   Yes, that's not dissimilar to my own experience.

23          Q.   Looking and bearing in mind that perhaps there wasn't  
24          specific guidance available to the team at the time as  
25          to where to look for evidence of racial motivation or

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- 1 training on that particular topic and given the  
2 limitations to their experience, do you consider that  
3 the team were as well equipped as they might have been?
- 4 A. No, in hindsight there is more that we could have done  
5 to support them in investigating that aspect of the  
6 case. I think looking from what we did at the  
7 beginning, it was about their experience of complex  
8 investigations, about in some cases fatality and police  
9 actings, but not the specific issues around being able  
10 to identify racial bias.
- 11 Q. Okay, and what more do you feel with the benefit of  
12 hindsight might have been done to support the team?
- 13 A. Specific training or, you know, bring in those with  
14 expertise to assist.
- 15 Q. And was any consideration given at the time to bringing  
16 in those with expertise to assist?
- 17 A. No, not that I'm aware of, certainly not by me.
- 18 Q. And when you say those with expertise, do you have in  
19 mind staff within COPFS or external?
- 20 A. External I think. We do have the -- and I think I have  
21 referred to it my statement, we have the equality  
22 network, we have the inclusion network, but I think it  
23 would be helpful to have those from outwith COPFS with  
24 the relevant skill set and the experience to assist.
- 25 Q. Do you have any thoughts today as to who outwith COPFS

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1           might have been approached?

2           A. No specific recommendations. I know, for example,  
3           Deborah Coles was advising the family, Mr Anwar. Had  
4           she not been, she would have been somebody that I would  
5           have considered. I know she had significant experience  
6           and had also advised other inquiries commissioned by the  
7           Home Office. That's the kind of expertise I would be  
8           thinking we should involve in cases like this.

9           Q. And you yourself explain in your statement that you do  
10          not have experience of racism being a factor to  
11          investigate in relation to a death in custody?

12          A. Yes.

13          Q. But you do also explain that you were the secretary to  
14          Sir Anthony Campbell's inquiry and I wonder if we can  
15          look at what you say about that at paragraph 72 of your  
16          statement:

17                 "I was aware of the findings of the inquiry into the  
18          investigation of the murder of Stephen Lawrence by  
19          Sir William Macpherson of Cluny and the issues he  
20          identified within the Metropolitan Police Service of  
21          institution racism.

22                 "Further, having been secretary to Sir Anthony  
23          Campbell KC's nonstatutory inquiry into the actings of  
24          the crown and the crown's decision-making regarding the  
25          murder of Surjit Singh Chhokar, which followed closely

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1 after the Macpherson review, I was conscious of the  
2 issues considered in that inquiry which focused on the  
3 crown, particularly Sir Anthony's definitions which he  
4 outlined in his report. Racism is in legal terms  
5 unlawful racial discrimination and it may be direct or  
6 indirect. Direct discrimination includes less  
7 favourable treatment of a person on the ground of colour  
8 or some other forbidden ground. Indirect discrimination  
9 arises where members of different ethnic groups are  
10 treated equally in a formal sense, but where a practice,  
11 procedure or rule puts the members of one ethnic group  
12 at a substantial disadvantage compared with another  
13 without any objective justification. Direct and  
14 indirect discrimination may occur without any intention  
15 to discriminate or any discriminatory motive. In the  
16 context of this inquiry, I take institutional racism to  
17 mean racial discrimination which is not only an  
18 individual discriminatory act, but is systemic in the  
19 sense that it results from a practice or procedure that  
20 operates within the institution.

21 "During my examination on the decision that were  
22 made, I have been alert to the danger of what has been  
23 described by Lord Nicholls of Birkenhead's as  
24 'subconscious motivation'. As he said:

25 "'All human beings have preconceptions, beliefs,

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1 attitudes and prejudices on many subjects. It is part  
2 of our make up. Moreover, we do not always recognise  
3 our own prejudices. Many people are unable or unwilling  
4 to admit even to themselves that actions of theirs may  
5 be racially motivated'."

6 So do you consider that your experience as secretary  
7 to that inquiry was an advantage to you when you were  
8 surprising or overseeing this investigation?

9 A. Yes.

10 Q. Can you elaborate on that and explain how it brought you  
11 benefit?

12 A. In the course of Sir Anthony Campbell's inquiry we  
13 looked not only at the purpose, nature and extent of the  
14 investigation into Mr Chhokar's death, but the training  
15 that staff had had and their own understanding of direct  
16 and indirect racism and that was obviously analysed in  
17 the context of whether the decisions made by the crown  
18 in relation to the investigation of Mr Chhokar's death  
19 were motivated by conscious or unconscious bias and I felt  
20 that some of that learning was of assistance when  
21 looking at the investigation into Mr Bayoh's death.

22 Q. You clearly knew about subconscious motivation. We see  
23 that the quotation from Lord Nicholls set out in  
24 Sir Anthony's report. Did you expect that CAAPD would  
25 examine the subconscious motivation of the officers when



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- 1           considering racial bias?
- 2       A. I did, maybe not using that terminology, but I did
- 3           perhaps along the lines more of unconscious bias, but
- 4           certainly I expected that to be considered.
- 5       Q. And how did you expect them to go about that task?
- 6       A. In their analysis of their findings from the
- 7           consideration of the evidence as a whole.
- 8       Q. Okay. And how did you expect that to look? Could it be
- 9           a question of drawing inferences in the absence of overt
- 10          examples of racial bias?
- 11       A. Yes, if there were no overt examples, but there were
- 12          inferences to be drawn by actings, behaviours, I would
- 13          expect that to form part of the analysis of the crown.
- 14       Q. Did you share with the team any of your learning from
- 15          your time as secretary to Sir Anthony's report?
- 16       A. We talked about it, but only in very general terms. We
- 17          were aware -- Mr Brown and I were obviously in the
- 18          service at the time, as was Mr McGowan. I think it was
- 19          almost taken as read in some ways and in hindsight
- 20          perhaps should have been more overt from us in our
- 21          discussions with the team.
- 22       Q. And looking back, with the benefit of course of
- 23          hindsight, do you think there might have been a benefit
- 24          to the team if you had shared with them the particular
- 25          experience that you had through working with Sir Anthony

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1           and the learning that you've shared with us today in  
2           terms of an approach to subconscious motivation --

3           A. Yes.

4           Q. -- or unconscious bias and how to identify it?

5           A. Absolutely, yes.

6           Q. Can we scroll a little further down the page, please.  
7           Stop there and look at the second paragraph. Here you  
8           reference an October 2017 Dame Eilish Angiolini KC, now  
9           Lady Angiolini, a former Lord Advocate published a  
10          report commissioned by the Home Office into deaths in  
11          police custody:

12                        "This report was scrutinised by the CAAPD team  
13                        preparing the report into Mr Bayoh's death to ensure  
14                        that any learning, findings and recommendations could be  
15                        taken into account."

16                        Who did you understand was scrutinising this report?

17          A. Mr Brown and I also reviewed it and a submission was  
18           prepared before the Lord Advocate on the learning and  
19           the outcomes of Lady Eilish's report to inform what we  
20           were doing in the investigation into Mr Bayoh's death.

21          Q. If we can look at the next paragraph, please:

22                        "The recommendations of relevance to the Bayoh  
23                        Inquiry in the Angiolini report included restraint,  
24                        mental health of suspects, training for police officers,  
25                        and separation to prevent conferral. There were also

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1           comments about the disproportionate response by police  
2           to suspects who are of black and minority ethnic  
3           background, where it was documented that restraint tends  
4           to last for longer, there is less attempt to deescalate  
5           through nonphysical means et cetera."

6           So in this particular report concerns were raised  
7           about the disproportionate response to suspects who were  
8           black or of minority ethnic background and that  
9           disproportionate response can include less by way of  
10          attempts to deescalate through nonphysical means.

11          I wonder if we can hold that thought and look also  
12          at paragraph 40 of your statement where you comment on  
13          your own experience of the use of force by officers in  
14          other cases. It's that bottom paragraph, thank you.  
15          You say here:

16          "My experience from countersigning CAAPD cases was  
17          that often officers were very quick to deploy methods in  
18          accordance with their training which could be viewed as  
19          exacerbating the situation, such as drawing batons,  
20          deploying CS spray, tasers, et cetera, rather than  
21          trying to engage with individuals to try and calm them  
22          down and avoid direct confrontation. My email [and  
23          clearly in the underlying question you have been  
24          referred to an email] simply reflected my concern at  
25          that time that such training might not be possible and

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1           my concern that the default setting of many police  
2           officers confronted with a potentially dangerous  
3           situation, both to themselves and the wider public,  
4           would be to draw some sort of weapon to deal with and  
5           try to contain the situation, particularly in what I  
6           have described as a collapsing timeframe."

7           So Lady Angiolini expressed concerns around less in  
8           the way of attempts to deescalate where a suspect is of  
9           a black or minority background. You talk here about  
10          your own experience of officers being quick to use  
11          methods that could be seen to exacerbate the situation,  
12          rather than trying to engage to calm things down and  
13          avoid direct confrontation.

14          Now, are you talking here about your experience of  
15          officers behaving in this particular way in general or  
16          with reference or in the context to -- or black and  
17          ethnic minority suspects?

18        A. No, that's in general from my experience of dealing with  
19        CAAPD cases. There were a number that I saw where the  
20        initial response was to draw a weapon or deploy CS spray  
21        or in one case release a police dog, for example, and  
22        there was significant injury to the victim, so that  
23        wasn't in the context of black and minority ethnic  
24        individuals, that was just in general.

25        Q. Given that the concerns that you had were general rather

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1           than specific to black and ethnic minority suspects, did  
2           you anticipate that the CAAPD team might consider as  
3           part of their investigation and analysis of the evidence  
4           whether the officers who engaged with Mr Bayoh had used  
5           batons and sprays in other comparable situations or  
6           relatively comparable situations involving white  
7           suspects?

8           A. Yes, that would be the normal course of an investigation  
9           in CAAPD. You would look at an officer's training  
10          record. You would also look at any allegations of use  
11          of excessive force, for example, so you would have that  
12          material as a matter of course.

13          Q. Okay. We've heard that use of force forms routinely  
14          required to be completed, also use of spray forms?

15          A. Yes.

16          Q. Would you have anticipated that those sorts of forms  
17          might have been gathered such that the person  
18          considering them might look to discern a pattern, if  
19          there were a pattern apparent from the use of batons or  
20          sprays on other occasions?

21          A. Yes, those forms are supposed to be completed if a  
22          weapon is drawn, if force is used, or if is CS or PAVA  
23          spray is deployed.

24          Q. Again, given concerns expressed here and in  
25          Lady Angiolini's report about excessive use of force,

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1           would you have had an expectation that CAAPD would have  
2           examined the tactical options that were open to the  
3           officers and, in particular, those first on the scene?

4           A. Yes, that would be not only analysing what they said  
5           they did, but also what their training was in terms of  
6           their range of options and which one to -- which one to  
7           use.

8           Q. And insofar as their training might have indicated a  
9           requirement for a preclusion, that is to say a lesser  
10          force option should have been tried and failed or  
11          otherwise discounted as inappropriate, would you have  
12          expected there to have been an examination of what  
13          lesser force options were potentially available to the  
14          officers and then a consideration as to the  
15          reasonableness or otherwise of the option that they  
16          selected?

17          A. Yes.

18          Q. Would you have expected there to have been a  
19          consideration of the officers' readiness to use force  
20          and the speed at which events unfolded?

21          A. Yes, perhaps with the assistance of an expert in that --  
22          in that field, officer safety training, and the range of  
23          option officers could deploy and should deploy depending  
24          on the circumstances.

25          Q. I wonder if we can look at the bottom of paragraph 73,

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1 please. Now, there are two paragraphs that have been  
2 numbered 73 I think in error and then we jump to 75, so  
3 the one above that is actually 74, so if we could scroll  
4 up a little more. There we are. It's the paragraph  
5 that beginnings "Similarly in the course of the  
6 investigation". Thank you, if we could look at this,  
7 please. You say that:

8 "In the course of the investigation into Mr Bayoh's  
9 death we were keen to learn from CPS colleagues about  
10 their experience of investigating deaths in police  
11 custody and restraint deaths in particular. We wanted  
12 to discuss how they dealt with such cases and what  
13 expert evidence they obtained. We had a particular  
14 interest in the review of the no proceedings marking in  
15 the Sean Rigg case. We were looking to confirm how CPS  
16 reach assessment of criminal threshold in relation to  
17 deaths during restraint process; ascertain what expert  
18 evidence was crucial; understand how they evaluate  
19 recorded footage; understand their method of instruction  
20 of restraint experts and how they evaluate opinion;  
21 confirm how they evaluate the adequacy of training given  
22 to officers. We were looking for reassurance that we  
23 were not missing anything obvious and that the way we  
24 were proceeding was broadly consistent with CPS  
25 practice, subject of course to the jurisdictional

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1 differences. We were provided with senior CPS contacts  
2 with whom the CAAPD team could discuss preparation of  
3 the final reports in the investigation into Mr Bayoh's  
4 death."

5 Now, can you tell me when you had this opportunity  
6 to make contact with colleagues of the CPS?

7 A. It was an ongoing series of discussions following  
8 Mr Bayoh's death. We had regular meetings or I  
9 certainly I did with my CPS counterparts in the Special  
10 Crime and Counterterrorism Division, but I think the  
11 specific issues were around trying to identify expert  
12 witnesses and that was around late 2016, early 2017,  
13 from memory.

14 Q. Was anyone involved in these discussions other than  
15 yourself?

16 A. No, I don't think so. Perhaps Mr Brown and I certainly  
17 got the detail of the colleague from the CPS was passed  
18 to Mr Brown so he and I think Crown Counsel could speak  
19 to that, that CPS contact. So Mr Brown and I discussed  
20 really what we were looking for from CPS colleagues to  
21 assist and then I made contact and asked the questions.

22 Q. And were the answers that you received fed back into the  
23 CAAPD team?

24 A. Yes, I passed what I got from the CPS team directly to  
25 Mr Brown.



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1 Q. If we can scroll further down this page, please. Again,  
2 it's paragraph 73. It is actually 74. There is a  
3 discussion about meetings -- if we can stop there,  
4 please -- with Deborah Coles, and in the first paragraph  
5 there you recall there being three meetings at which she  
6 was present, you have notes from two of them and your  
7 give an explanation elsewhere as to why you didn't note  
8 the first meeting, your notepad having been locked away.  
9 You say:

10 "I recall being introduced to her at Mr Anwar's  
11 offices with Mr Brown around July 2015 where her role as  
12 an advisor to the family was set out."

13 And you explain in the next paragraph that the next  
14 meeting you noted was 15 October with the Lord Advocate  
15 and Mr Anwar:

16 "Ms Coals advised us at that time of Dame Elish  
17 Angiolini's appointment by the Home Secretary to chair  
18 the review of deaths in custody. She also advised of  
19 the role of Dame Anne Owers as chair of the Independent  
20 Police Commission who had come from a human rights  
21 inspectorate of prisons background [scroll down] and set  
22 out what she saw as failures in police investigations  
23 not capturing evidence in the golden hours, stopping  
24 collaboration of officers, treating them as suspects  
25 until proved otherwise. These points were taken into

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1 account in the crown investigation."

2 How were these matters taken into account in the  
3 crown investigation?

4 A. The matters that Ms Coles had raised?

5 Q. If that's what you're referring to.

6 A. Yes, that's what I was referring to. The discussions  
7 that we had with Ms Coles were incredibly informative  
8 and assisted our thinking as the investigation  
9 progressed. So when I say these points were taken into  
10 account, they were certainly noted by me and by Mr Brown  
11 and we discussed these issues often as our investigation  
12 progressed.

13 Q. You said earlier in your evidence, in the context of the  
14 discussion we had about with the benefit of hindsight  
15 might external expertise been brought in to assist the  
16 team, you said if Deborah Coles hadn't been advising the  
17 family then she was the sort of person you might have  
18 had had in mind -- sorry -- I'm paraphrasing because  
19 I don't have access to the realtime transcript at the  
20 moment.

21 Did you consider -- just so I can be clear in my  
22 mind, did you consider back in 2015 the possibility of  
23 engaging her and discount that because of her role in  
24 advising the family or is it just now with the benefit  
25 of the hindsight that you're recognising that perhaps

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1 she would have been a good person to have brought on  
2 board, albeit there may still have been an obstacle to  
3 get around if she was advising the family?

4 A. It's with the benefit of hindsight and knowing the  
5 expertise that she has and how helpful she was in  
6 discussions about raising issues she thought the crown  
7 should take cognisance of.

8 Q. Okay. We've already identified that in the letter of  
9 2 September, the three specific lines of inquiry  
10 relating to race were lines of investigation that had  
11 been suggested by the family, and we've also heard  
12 evidence that the family and their legal team suggested  
13 the names of a number of experts to the crown and to  
14 PIRC and the reports were in the fullness of time  
15 commissioned.

16 I think you're perhaps suggesting that Ms Coles  
17 acting as a representative of the family was a potential  
18 obstacle to the crown drawing on her expertise and I'm  
19 just wondering if I could invite you to reflect on that  
20 and I wonder whether it's an obstacle. I appreciate  
21 this is all with the benefit of hindsight and it didn't  
22 occur to you at the time to look to engage her or have  
23 an ongoing dialogue with Deborah Coles, but I'm  
24 wondering whether it might have been possible to work  
25 around the fact that she was providing advice and

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1 representation to the family and if that really would  
2 have been an obstacle to the Crown Office perhaps having  
3 the benefit of her expertise and drawing on that  
4 expertise in their own investigation?

5 A. I hadn't thought about it until you raised it. I don't  
6 think necessarily the fact that she was assisting the  
7 family would be an obstacle. Obviously in terms of  
8 Article 2 we have a responsibility to take into account  
9 the views of the family and any -- any suggestions  
10 within reason that they might provide in the context of  
11 an investigation. On one view there's no reason why we  
12 couldn't have asked Ms Coles to assist further.

13 Q. Okay. And Ms Coles made you aware that Lady Eilish had  
14 been appointed to review the deaths in custody. Was any  
15 consideration given to perhaps making contact with  
16 Lady Eilish and looking to drawing on her experience as  
17 her own investigation progressed?

18 A. No, not at that time, albeit she had contacted the crown  
19 to advise us that her report was due to be published and  
20 she thought that there were findings within it that  
21 would be of assistance to us in our investigation.

22 Q. Deborah Coles also mentioned Dame Anne Owers as Chair of  
23 the IPCC, was any consideration given to making contact  
24 with her?

25 A. Not that I'm aware of and certainly not by me.

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1 Q. And again, with the benefit of hindsight, might there  
2 have been a benefit to the crown investigation in making  
3 contact with Lady Elish or perhaps Dame Anne Owers?

4 A. Yes.

5 Q. I want to turn now to look at the analysis or the  
6 approach that was taken by the CAAPD team to the  
7 analysis of the evidence. We don't need to look at the  
8 analysis chapter in the precognition itself. I won't be  
9 bringing it up on the screen. As you are aware, this  
10 was prepared by Fiona Carnan and there is no  
11 consideration of race set out in the analysis chapter of  
12 the precognition at all.

13 She was asked about her approach to race in her  
14 written statement and in her evidence and I would like  
15 to invite your comment on the approach that she took.  
16 So I wonder if we can bring up her Inquiry statement.  
17 It is SBPI 00379, paragraph 45, please. So she was  
18 asked:

19 "To what extent was race a factor in your analysis  
20 of the actions of the police officers? In your view was  
21 this sufficient to inform Crown Counsel of the impact,  
22 if any, that Mr Bayoh's race had on the actions of the  
23 police officers who engaged him?"

24 She said:

25 "I was concerned with considering whether the

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1 actions of any of the officers, either individually or  
2 collectively, amounted to criminality. My focus was on  
3 the actions of the officers during the period of their  
4 engagement with the deceased and the evidence of how  
5 they conducted themselves thereafter. I did not  
6 identify criminality on the part of any officers  
7 involved. Had I identified criminality, it would then  
8 have been part of my analysis in respect of criminality  
9 to consider whether the conduct was racially aggravated  
10 under section 50A(1)(b) of the Criminal Law  
11 (Consolidation) (Scotland) Act 1995 or whether race was  
12 a motivating factor that would amount to an aggravation  
13 of the conduct of the accused officers in terms of  
14 section 96(2) of that Act."

15 And if we can read this in conjunction with  
16 paragraph 38, please, where she expands on the approach  
17 that she took. She explains here:

18 "I was not involved in gathering evidence about  
19 race. If my analysis of evidence had established that  
20 there was sufficient evidence to support criminal  
21 charges against any of the officers, the question of any  
22 racial motivation or intention would have been addressed  
23 at that stage. Since the analysis of evidence did not  
24 identify criminality by any officer, the question of  
25 racial aggravation did not arise since no offence had

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1           been identified."

2           In her oral evidence she was taken to both of these  
3 paragraphs and asked:

4           "Am I right to understand this was essentially a  
5 two-stage process. You would look for evidence of  
6 criminality first."

7           And she said:

8           "Yes.

9           "And if you found criminality, evidence of  
10 criminality, if and only if you found evidence of  
11 criminality, then you would go looking for evidence of a  
12 racial aggravation or motivation for that criminality."

13           And she replied "That's right" and I asked her "Does  
14 that fairly set out the approach that you took?" and she  
15 said "yes".

16           Can I invite your comment on the approach that was  
17 taken by Ms Carnan and how it fits with your  
18 expectations of the approach that she would have taken?

19       A. That's not how I would have expected the approach to be.  
20 I would have expected the approach to be overall  
21 consideration of the officers' actions before, during  
22 and after the incident and, as I talked about before,  
23 their general training and background in the police  
24 force. I don't -- I think it's too prescriptive and too  
25 restrictive an approach if we are considering the issue

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1 of race as a whole in this investigation.

2 Q. Okay. So you anticipated that she would explore the  
3 issue of race as part of the overall exercise of  
4 examining criminality?

5 A. Yes.

6 Q. Can we look at Fiona Carnan's second statement, please,  
7 SBPI 00462 paragraph 8. It's quite a short paragraph  
8 and it might not be immediately available so I'll simply  
9 read it out to you.

10 She had been asked about the racial tropes and  
11 negative stereotypes and it was drawn to her attention  
12 that there weren't any references to them in her  
13 analysis and she said:

14 "I've made no reference in my analysis of evidence  
15 to the use of racial tropes or negative stereotypes  
16 being used by any of the response officers in their  
17 statements. However, it's unlikely that I would have  
18 done so since the use of racial tropes is not criminal.  
19 Evidence about negative attitudes of officers to  
20 Mr Bayoh's race would not be relevant to the analysis  
21 unless criminality was identified."

22 Do you have any concerns about that approach?

23 A. I can understand where she's coming from. She was  
24 looking at it in the context of a criminal investigation  
25 and, as she says, to have those thoughts or even certain



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1           circumstances to voice them is not necessarily criminal,  
2           but I think when you're looking at the engagement with  
3           and detention of a black man by police officers in  
4           public, there is a wider set of considerations and that  
5           would involve looking at issues such as tropes or  
6           stereotypes. Bearing in mind that while the  
7           precognition she was preparing was for Crown Counsel to  
8           take a decision on whether or not criminal proceedings  
9           were appropriate, at the very least, as we've talked  
10          about before, there was to be a fatal accident inquiry  
11          and much of the information in gathered in the course of  
12          a criminal investigation can be relevant for the  
13          purposes of an inquiry into the circumstances of a death  
14          if there were to be no criminal proceedings so I would  
15          have expected there to be an assessment of those aspects  
16          in the course of the precognition, even if they weren't  
17          directly relevant to the issue of criminality.

18        Q. Thank you. Can you bear with me just one moment,  
19        please.

20                Sir, I am about to move on to a new chapter. I  
21        wonder if that might be a convenient point to break.

22        LORD BRACADALE: We'll take a 20 minute break at this stage.

23        (11.28 am)

24                                (A short break)

25        (11.56 am)

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1 LORD BRACADALE: Ms Thomson.

2 MS THOMSON: Thank you. Ms Miller, before the break we were  
3 discussing the approach that Fiona Carnan took to her  
4 analysis of the evidence and the preparation of the  
5 analysis chapter in the precognition and I would like to  
6 continue with that theme. So we have spoken about  
7 racial tropes and stereotypes. I would like to move on  
8 to evidence relating to terrorism and threat levels.  
9 There was evidence available to Ms Carnan that some of  
10 the officers were concerned that they were attending a  
11 terrorist incident, some made reference to an increase  
12 in the threat level to severe and Ms Carnan explained in  
13 her evidence that she had fact checked that and she had  
14 confirmed that there had indeed been an increase in the  
15 threat level to severe.

16 Now, the first on the scene were Constables Walker  
17 and Paton and of course their statements were available  
18 to her. Constable Walker said in his statement:

19 "It did cross my mind that he was doing this to get  
20 the police there bearing in mind we're on a severe  
21 threat level for an attack on the police."

22 And Ms Carnan agreed that the severe threat level  
23 referred to by Constable Walker related to the threat of  
24 a terrorist attack on the police specifically.

25 Constable Paton said in his statement:

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1            "It also ran through my mind that this male could be  
2 part of a terrorist plot."

3            And later in his statement, at a point in time where  
4 he had been incapacitated by his own spray, he described  
5 "thinking about the Lee Rigby boy, the soldier who was  
6 killed."

7            So Ms Carnan was reminded of what Constables Walker  
8 and Paton had said in their statements and then she was  
9 asked:

10           "As part of the process that you went through in  
11 your analysis and in ensuring Article 2 and 14  
12 compliance, did you consider why the possibility of  
13 terrorism crossed their minds."

14           And she said:

15           "I asked the question, although I think it had  
16 already been answered, why they had considered  
17 terrorism, because they had a briefing, they had two  
18 briefings in the early months of 2015."

19           She was asked:

20           "Did you consider whether they would have thought  
21 about terrorism if Mr Bayoh had been white?"

22           "No.

23           "Did you consider whether they thought about  
24 terrorism every time they went to a knife call?"

25           "No.

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1           "And did you consider why Constable Paton thought  
2 about Lee Rigby in particular?

3           "I simply noted his position.

4           "You didn't give thought as to why they thought  
5 about Lee Rigby?

6           "No, I didn't interpret it as being influenced by  
7 his race.

8           "Did you consider whether Constable Paton would have  
9 been thinking about Lee Rigby if Sheku Bayoh had been  
10 white?

11          "I can't ask that question.

12          "Did you consider whether there was evidence from  
13 which the inference could be brawn that the colour of  
14 Mr Bayoh's skin was relevant to their concern that the  
15 incident was relating to terrorism?

16          "I did not make that assessment."

17          Can I invite your comment on that chapter of her  
18 evidence and how that fitted with your expectations as  
19 to the approach that would have been taken within CAAPD?

20        A. I don't want to be overly critical, but I would have  
21 expected a different approach. It was certainly very  
22 clear to me on the basis of the evidence that I had seen  
23 and just general experience, life experience, that it is  
24 unlikely had Mr Bayoh been white that the police  
25 officers would have had those thoughts.

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1           The initial terrorism threat increase was I think  
2           the January of that year and we had been involved in  
3           disseminating information to our own staff where there  
4           were shared premises with police officers because of  
5           that threat, but I think it is obvious to many people  
6           that if somebody is of black or minority ethnic descent,  
7           the use of the word "terrorist" in relation to them can  
8           be used as a racial slur and, in my view, it should have  
9           been taken into account both in terms of the analysis  
10          prepared by Ms Carnan and the consideration by  
11          Crown Counsel as part of that overall decision-making.

12         Q.   When he gave evidence Mr McGowan was also asked to  
13           comment on the passage that I have heard to you and he  
14           said:

15                 "So that information about the terrorist incident  
16           that was available at a very early point in the case and  
17           I recall that. My own view is it would have been  
18           relevant to ask why it was they thought it was terrorism  
19           and to consider whether Mr Bayoh's race had anything to  
20           do with that and whether or not had Mr Bayoh been white,  
21           they would have wondered the same thing. That's a  
22           relevant question."

23           And he was asked:

24                 "Where might an analyst have looked to find the  
25           answers to those questions?"

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1                   And he said:

2                   "In the evidence as a totality."

3                   I see you nodding.

4           A.   Yes.

5           Q.   Is there anything in that that you would disagree with?

6           A.   No, I think Mr McGowan and I agree.  From what you have

7                read of his evidence, we're in agreement on that.

8           Q.   There was also evidence available to Ms Carnan that

9                Constable Good also thought about Lee Rigby.  She said

10               in her statement:

11                "I was also thinking at point of the Lee Rigby

12                incident in London, mainly due to the fact of the

13                coloured male and the potential terrorist connotations."

14                So leaving to one side the issue of the phrase

15                "coloured male", she clearly made a link between the

16                colour of Mr Bayoh's skin and potential terrorist

17                connotations and Ms Carnan was asked when she gave

18                evidence here before the Inquiry:

19                "Did her statement not perhaps cause you to wonder

20                whether others who also thought about terrorism and

21                Lee Rigby had done so because of the colour of

22                Mr Bayoh's skin?"

23                And she said:

24                "I have to say, no, it didn't."

25                Does that concern you?

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1       A. Yes, it is to me indicative of at least unconscious bias  
2       on the part of the police officer.

3       Q. Yes. She was asked did she consider whether the link  
4       that Constable Good made between the colour of  
5       Mr Bayoh's skin and potential terrorist connotations was  
6       reasonable or whether it could be indicative of racial  
7       stereotyping and she said:

8               "I considered it was not unreasonable given the  
9       briefings.

10              "Was it indicative of racial stereotyping?

11              "Possibly."

12              She was asked:

13              "Are you saying that now with the benefit of time to  
14       reflect or did you think that at the time?"

15              And she said:

16              "I don't think I thought it at the time.

17              "Even though she said in terms that she had made a  
18       link between the colour of his skin and terrorism?

19              "Yes.

20              "At the time you didn't think of that as racial  
21       stereotyping? With the benefit of hindsight and  
22       reflection, your evidence today is that it could be  
23       indicative of racial stereotyping?

24              "Yes.

25              "And if it had occurred to you at the time or if you

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1 had thought about it that way at the time, is it  
2 something that you might have included in the analysis?

3 "It's possible, yes."

4 Can I invite you comment on what she said in her  
5 evidence?

6 A. I think that it is something that should have been  
7 included in the analysis and she's obviously reflected  
8 that with the benefit of hindsight. I don't think  
9 necessarily that it would have made any difference in  
10 relation to the consideration of criminality, but it is  
11 something that should have been within that document for  
12 the consideration of Crown Counsel.

13 I don't know, however, whether Crown Counsel and  
14 Ms Carnan discussed that separately in terms of what was  
15 or was not within the analysis.

16 Q. So Constable Good made a link between the colour of  
17 Mr Bayoh's skin and potential terrorist connotations and  
18 you said that to your mind that was indicative of  
19 unconscious bias at least and then you clarified that  
20 you were referring to unconscious bias on the part of  
21 Constable Good, not on the part I assume of Ms Carnan.

22 Can we perhaps just explore that. Mrs Carnan didn't  
23 think about it at all. She didn't consider  
24 the possibility of unconscious bias in what Constable  
25 Good said. She didn't consider at the time whether her



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1 language was indicative of racial stereotyping. Do you  
2 have any view to offer as to whether that could be  
3 indicative of unconscious bias on the part of Ms Carnan  
4 herself?

5 A. I think I would have to say potentially, yes.

6 Q. I also asked Ms Carnan in her evidence about the  
7 language that was used more generally in the officer's  
8 statements and, again, I would like to read to you a  
9 chapter. I'm sorry the transcripts don't come up on the  
10 screen, but I'm just reading from the transcript of the  
11 evidence that's available to me:

12 "I'm sure you'll be aware of racist stereotypes in  
13 society that black men are more violent, unpredictable,  
14 aggressive. You will have come across those stereotypes  
15 I would imagine.

16 "I have.

17 "And did you examine the officers' statements for  
18 language of that sort?

19 "No.

20 "Did you consider patterns of behaviour whether, for  
21 example, they had used their sprays or drawn their  
22 batons at previous knife incidents?

23 "No, I was simply concerned with this incident.

24 "Did you consider whether they treated all knife  
25 calls as potentially terrorist related.

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1 "No, that wasn't a question I asked.

2 "Did you consider looking for comparator evidence,  
3 for example, looking at Walker, Paton or Tomlinson's  
4 history of use of spray or Tomlinson's history of use of  
5 force involving a baton with a view to establishing  
6 whether those officers had ever used sprays or batons  
7 before?

8 "No.

9 "Or whether they had used sprays or batons when  
10 detaining a white suspect?

11 "No.

12 "Did you consider whether the speed with which the  
13 officers elected to use force against Mr Bayoh was  
14 because he was black?

15 "That wasn't my understanding. I think I have  
16 explained in one of the answers my understanding of  
17 their perception was based on a whole lot more than the  
18 colour of his skin.

19 "Okay. Did you consider whether Constable Walker  
20 and Constable Paton's decision to opt for a hard stop  
21 may have been influenced by Mr Bayoh's race?

22 "Again, we didn't cross the threshold into  
23 criminality, so that wasn't a consideration per se.

24 "So you have explained you took a two stage process.  
25 You look forward evidence of criminality. You didn't

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1 find it so you didn't get past first base essentially?

2 "Yes.

3 "And it would only have been if you found evidence  
4 of criminality that you would have scrutinised the  
5 evidence for the evidence that might allow you to draw  
6 an inference from racial aggravation?

7 "Yes."

8 So she was candid that these questions simply  
9 weren't asked. Do you have any comment or concern to  
10 express in relation to that passage of her evidence?

11 A. I think it is too prescriptive an approach. It's clear  
12 from what you've read to me that she was focusing solely  
13 on the actings of the officers in relation to  
14 establishing whether or not there was evidence of  
15 criminality, but it was clear from certainly my  
16 understanding of what the Lord Advocate wanted and the  
17 discussions more generally about this investigation, and  
18 particularly what the family had asked for, that we  
19 should be examining the issue of race and the approach  
20 of the officers to Mr Bayoh because of his race.

21 Q. Again, this passage was put to Mr McGowan when he gave  
22 evidence and he said:

23 "They're all relevant questions so I've referred to  
24 looking at the totality of the evidence. Those would be  
25 questions that you would asked and the answers to those

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1           questions would be part of the totality which I would  
2           expect her to look at, all relevant questions."

3           Again, you're nodding your agreement.

4           A. I don't disagree with anything there.

5           Q. So with hindsight, do you consider that the crown  
6           explored the issue of race appropriately?

7           A. I'm conscious Ms Carnan wasn't involved from the  
8           beginning of the investigation and was preparing an  
9           analysis based on the work of others and I'm also  
10          conscious that I didn't ask her directly and a lot of  
11          her thinking is what you've discussed with me this  
12          morning, but it's clear if that was her thinking then  
13          certainly it wasn't in her mind as she was preparing the  
14          analysis of the evidence, which I think is a gap in the  
15          crown's investigation.

16          Having said that, there were others who had been  
17          involved, were aware of the issues that we were focusing  
18          on and what we had asked the PIRC to focus on and  
19          overall the report was being prepared for the  
20          consideration and decision-making of Crown Counsel so  
21          there were other opportunities not just within that  
22          document for these issues to be explored.

23          Q. Thank you. And again, with the benefit of hindsight, do  
24          you consider that all reasonable steps were taken to  
25          unmask any racist motive by the crown?

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1 A. I think on the basis of Ms Carnan's evidence, no.

2 Q. I would like to move away from Ms Carnan's analysis of  
3 the evidence to look at what has been called an  
4 incremental process or a linear process. Ms Carnan made  
5 clear in her evidence that it was no part of her remit  
6 from Mr Brown to consider whether there were grounds for  
7 an FAI. Her role was restricted to an analysis of the  
8 evidence in respect of any potential criminality by the  
9 police.

10 Now, Mr Brown was asked about this and I wonder if  
11 we can bring up his Inquiry statement SBPI 00419, and if  
12 we can turn to paragraph 105. So here he references an  
13 incremental strategy approved by the Lord Advocate and  
14 he says:

15 "A key element of that strategy was to resolve the  
16 issue of potential criminality and to get to a point  
17 where Crown Counsel could take a decision in this regard  
18 with the necessary confidence thus permitting the  
19 investigation to move forward to other areas in  
20 anticipation in an inquiry whose forum had yet to be  
21 determined."

22 And if he look to the next paragraph, please:

23 "The precognition that was requested by  
24 Crown Counsel was created for the limited purpose of  
25 enabling Crown Counsel to take a decision on potential

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1           criminality but was not intended to be the end of the  
2           investigative process by the Crown, particularly in  
3           relation to race and implicit bias and further detailed  
4           inquiry would likely have been undertaken had an FAI  
5           been instructed. This would in my opinion have been  
6           highly likely to have required precognition of the  
7           police officers involved, where their approach to the  
8           incident would have been probed, scrutinised and  
9           evaluated."

10           Was it your understanding at the time that this  
11           incremental process was being followed?

12        A. Yes, that was -- that was the process at the time where  
13           the criminal investigation took place and thereafter  
14           preparation for a fatal action inquiry or similar  
15           inquiry followed. That's not the now because we have  
16           realised that that adds in significant delay in relation  
17           to the preparation for proceedings and we deal with  
18           those more in tandem and in parallel now, but at the  
19           time it was the criminal investigation first, followed  
20           by fatality investigation.

21        Q. You talk about this in paragraph 32 of your statement  
22           and I wonder if we could bring that up. Third paragraph  
23           down:

24           "If an individual has died in police custody or  
25           following contact with the police, then the first aspect

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1 of the investigation is likely to establish whether  
2 there is any criminality linked to the individual's  
3 death. Following that, further work we do not require  
4 to be carried out by the crown because it is mandatory  
5 for there to be an FAI in those circumstances. It is  
6 not therefore unusual for there to be a precognition  
7 prepared for Crown Counsel setting out the nature of the  
8 investigation, the narrative of the facts as known and  
9 recommendations based on those findings when there are  
10 no reasonable grounds to suspect particular individuals  
11 as that precognition would thereafter be of assistance  
12 in preparation for of any FAI."

13 So that's much the same as what you said in evidence  
14 today that this is the approach that was taken in 2015.  
15 Mr McGowan referred to it as a "linear approach" when he  
16 gave his evidence.

17 So you understood that was what would happen,  
18 although you say and we've heard already from Mr McGowan  
19 that procedures have since changed and that the broader  
20 aspects of an investigation that might be relevant to an  
21 FAI, which are perhaps not directly relevant to  
22 criminality, are considered and investigated in parallel  
23 or in tandem.

24 We heard from Mr McGowan that SFIU health and safety  
25 and the custody deaths team now take the parallel

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1 approach. He thought it was perhaps too early to say  
2 whether there were any visible benefits or obvious  
3 benefits from that approach. Aside from dealing with  
4 the issue of the built-in delay to the two stage  
5 process, do you see there being any benefit from this  
6 parallel approach over the linear or incremental  
7 process?

8 A. Other than addressing some of the delays, I think that  
9 there would be sharing of information and subject matter  
10 expertise across those teams and actually some of the  
11 teams have members of staff from all three of those  
12 units working on cases. So I think it allows the  
13 investigation to have the picture of a whole of the  
14 circumstances and looking at both criminality and if  
15 that is ruled out, then preparation for an inquiry can  
16 be a lot -- a lot more expeditious.

17 Q. Now John Logue appeared to be unaware this approach was  
18 taken in this particular case. Again, I would like to  
19 read you just an extract from the transcript of this  
20 evidence and then invite your comment. He said that  
21 what he would expect to happen is that an investigation  
22 would identify a number of issues which needed to be  
23 considered and he said:

24 "It was clear to all of us who were involved in the  
25 initial days that the question of criminality was an



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1 immediate or obvious issue which would need to be  
2 explored in the investigation and in simple terms was an  
3 immediate priority. There may be wider issues which  
4 relate to broader learning which could come out of a  
5 fatal action inquiry or inquiry of this nature, but the  
6 priority would be to reach a decision on the criminal  
7 aspect as quickly as possible.

8 "I would not expect that that would mean that those  
9 individual elements would be isolate off from each other  
10 and dealt with one at a time. The investigation I would  
11 expect would have had an understanding of all of them  
12 and be trying to make progress on all of them at the  
13 same time as perhaps identifying particular priorities.  
14 I'm not aware of an investigation where we would take a  
15 compartmentalised approach and say we're only going to  
16 looking at this and we're not going to look at anything  
17 else until we finished looking at this.

18 "I think our approach as much as possible is to  
19 progress the whole investigation. One of the challenges  
20 we found in recent years has been that with creating the  
21 specialist units we may find ourselves with an  
22 investigation where perhaps more than one team is  
23 involved and therefore there needs to be coordination.  
24 We've learned that you may be need to progress parallel  
25 investigation in two separate teams at the same time,

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1           rather than allowing one team to reach a conclusion  
2           before the other team then takes over. That simply  
3           builds delay into the process. So for example you  
4           wouldn't want a team looking at a criminal investigation  
5           and no one else dealing with the broader aspects that I  
6           have referred to until the team is finished. You would  
7           try to make sure there was sharing of information and  
8           progress on all aspects at the same time."

9           So it seems that Mr Logue anticipated the parallel  
10          approach being taken was perhaps unaware that an  
11          incremental approach had been taken, but certainly what  
12          he describes there appears to be the type of approach  
13          that we've heard from you and from Mr McGowan is  
14          followed nowadays?

15         A. Yes, that's right. From about 2017 or 2018 onwards, we  
16         began to convene case management panels, which I think I  
17         have referred to in my statement, and that was looking  
18         to identify the range of issues for which we would be  
19         seeking Crown Counsel's instructions or direction and  
20         that would cover both when there are fatalities the  
21         criminal investigation and aspects arising out of the --  
22         aspects which might arise out of a fatal accident  
23         inquiry. I think what Mr Logue is describing is the  
24         position as it has been over the last few years, but it  
25         is not what the position was at the time of the

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1 investigations into Mr Bayoh's death.

2 Q. Okay. So certainly the way things are done now is that  
3 the criminal investigation and the broader issues  
4 relevant to an FAI will be investigated and progressed  
5 in parallel. That avoids delay and it allows both parts  
6 of the investigation to make progress --

7 A. Yes.

8 Q. -- at the same time?

9 A. That's right.

10 Q. Okay. And as you said earlier in your evidence before  
11 we had the break, you said:

12 "When you're looking at the engagement with and  
13 detention of a black man by police officers in public,  
14 there's a wider set of considerations and that would  
15 involve looking at issues such as tropes or stereotypes,  
16 bearing in mind that while the precognition was for  
17 Crown Counsel to take a decision whether or not criminal  
18 proceedings were appropriate, at the very least we have  
19 talked about there was going to be an FAI and much of  
20 the information being gathered in the course of a  
21 criminal investigation can be relevant for the purpose  
22 of an inquiry into the circumstances of a death if there  
23 were to be no criminal proceedings. So I would have  
24 expected there to be an assessment of those aspects in  
25 the course of the precognition, even if they weren't

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1 directly relevant to criminality."

2 So you acknowledge that there may be an element of  
3 overlap between a criminal investigation and the broader  
4 aspects that might be relevant to an FAI and I suppose  
5 in case of this type overlapping areas of interest might  
6 include what happened and, in particular, the actions of  
7 the officers as well as cause of death, use of force and  
8 race?

9 A. Yes, all those.

10 Q. Okay. When Mr Logue gave his evidence he was asked a  
11 series of questions by the Chair. Even though an  
12 incremental approach was taken in this case, Mr Logue  
13 agreed with the Chair you could not consider the  
14 question of criminality without also considering the  
15 question of race. He said would have expected CAAPD to  
16 investigate race as part of their exercise of  
17 investigating criminality. He said you would have to  
18 look at race in order to ascertain whether there was any  
19 evidence that did have a bearing on criminality relating  
20 to race, that he would see that as part of a thorough  
21 investigation of the kind that would inspire confidence  
22 in the family.

23 Is there anything in that chapter from Mr Logue's  
24 dialogue with the Chair that you would disagree with?

25 A. No, I don't disagree with that.

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1 Q. With your ongoing responsibility for CAAPD and even  
2 after 2016 when your role changed your continuing  
3 oversight of the crown investigation, did you read the  
4 narrative and the analysis that were sent to  
5 Crown Counsel?

6 A. I did sometime after it was submitted to Crown Counsel,  
7 yes.

8 Q. Okay. So you didn't see it before it was submitted to  
9 Crown Counsel?

10 A. I don't recall, no.

11 Q. Okay. And in the course of your evidence today and the  
12 discussion we have had today, you've identified or have  
13 agreed with me perhaps that there are a number of  
14 deficiencies in the way that the analysis was approached,  
15 were they apparent to you when you read the narrative  
16 and analysis?

17 A. No, not necessarily. I -- again, I was looking at it  
18 through the lens of identification of criminality.  
19 I think it was almost unsaid by that stage that the  
20 crown -- that race was still an issue that we could have  
21 and should have been looking at. Whether it should have  
22 been contained in the analysis, I think we have  
23 discussed today that, yes, it should have been. I don't  
24 think necessarily it would have impeded Crown Counsel's  
25 decision-making, because of the purpose for which the

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1           precognition was prepared, but that's not to say it  
2           shouldn't have been perhaps more prominent or it  
3           shouldn't have been prominent within the narrative and  
4           the analysis.

5           Q. And we've heard from a number of witnesses that the  
6           purpose of this precognition was to assist Crown Counsel  
7           in taking a decision?

8           A. Yes, that's right.

9           Q. And I think you've agreed with me too that the question  
10          of criminality cannot be entirely divorced from the  
11          question of race and that to look at criminality  
12          thoroughly you must also consider the question of race?

13          A. Yes.

14          Q. And I'm wondering to what extent the precognition served  
15          its purpose, even if its purpose was a limited one, in  
16          assisting Crown Counsel given there is no analysis of  
17          race whatsoever in the analysis section?

18          A. It would have assisted to an extent. I'm also conscious  
19          that in cases like this where you have allocated  
20          Crown Counsel that they will often be responsible for  
21          directing or instructing particular lines of inquiry in  
22          the course of that preparation. As I have said, I think  
23          it is a gap in the investigative process by the crown,  
24          but just as the PIRC report wasn't the end of the line  
25          for any investigation by a law enforcement agency, the

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1            submission of the precognition is not the end of the  
2            line for the crown's investigation and if there were  
3            particular issues that Crown Counsel wished to be  
4            addressed before taking a decision, then it was open to  
5            Crown Counsel to instruct that and certainly I'm  
6            conscious in relation to certain aspects of the  
7            investigation that was done.

8            Q.    Okay.

9            A.    So from that perspective it is a gap and there were a  
10           number of other issues which the Crown Counsel wished  
11           the case team to a focus on. I'm not sure if that  
12           necessarily answers your question, but I think to the  
13           extent it was a narrow set of circumstances looking at  
14           criminality, it was certainly a step in the right  
15           detection. It wasn't as I would have expect to see it  
16           because it didn't contain, as you say, the analysis of  
17           the race, but that was something which could have been  
18           explored further.

19           Q.    So should we understand that it was effectively left to  
20           Crown Counsel to advise the team if she wished any  
21           further consideration to be given to the question of  
22           race?

23           A.    I think that's almost placing Crown Counsel in that  
24           difficult position because there were these gaps, as I  
25           have talked about, but that was one option. If she felt

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1           it was required, she could have -- she could have asked  
2           for further work to be done. I'm also conscious she had  
3           from early days had access to a lot of the material in  
4           the case, separate obviously from the narrative and the  
5           analysis and I was in discussion, regular discussion,  
6           with Mr Brown and the team, so I wouldn't want to say it  
7           was ultimately Crown Counsel's responsibility. The  
8           responsibility sat with the case team in the preparation  
9           of the precognition to identify these factors.

10          Q. Of course, I didn't mean to suggest that --

11          A. No, no.

12          Q. -- the responsibility necessarily sat with  
13             Crown Counsel, but I suppose for Crown Counsel to  
14             instruct further inquiries in relation to race, that  
15             would require Crown Counsel to recognise that these  
16             issues had not been addressed --

17          A. Yes.

18          Q. -- in the narrative or analysis?

19          A. Yes.

20          Q. And you yourself as a highly experienced prosecutor, you  
21             have been in position now for 30 years, have given a  
22             very candid evidence that even when you read the  
23             narrative and the analysis, there wasn't a red flag that  
24             these were issues that hadn't been addressed at the time  
25             that you read it?



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1 A. That's correct.

2 Q. Can you bear with me a second, please.

3 Just one final matter, please, Ms Miller. You had  
4 the opportunity to read the precognition, including the  
5 analysis, and I appreciate that your evidence, your very  
6 candid evidence, is that when you read it you didn't  
7 identify what you now consider to be deficiencies  
8 because your focus was very much on criminality and you  
9 were reading the precognition through that particular  
10 lens.

11 If you had identified that the issue of race hadn't  
12 been thoroughly explored and it hadn't been explored at  
13 all on the face of the analysis, would there have been  
14 an opportunity for you to have raised that either with  
15 the CAAPD team and/or with Crown Counsel to ensure that  
16 that investigation was adequately progressed?

17 A. Yes, it's certainly in my role at that time as deputy  
18 Crown Agent for serious case work it was not unusual for  
19 me to discuss matters with Crown Counsel after the  
20 submission of precognition where we thought there were  
21 additional inquiries that could have and should have  
22 been carried out, so it was certainly open to me to  
23 raise it directly with Crown Counsel at that time.

24 Q. Thank you. I have no further questions. Thank you.

25 LORD BRACADALE: Thank you. Are there any rule 9

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1 applications?

2 Ms Miller, would you mind withdrawing to the witness  
3 room while I hear a submission.

4 Submission by MS MITCHELL

5 MS MITCHELL: I'm obliged. Firstly I would like to ask this  
6 witness -- there are only two issues. The first that I  
7 would like to ask this witness about is she said that  
8 she had three meetings with Deborah Coles and I wanted  
9 to ask whether or not during the course of those  
10 meetings she recalled speaking to Deborah Coles about  
11 the disproportionate use of force by police officers  
12 against black men, about racial tropes and stereotypes  
13 and also did she explain about excited delirium being a  
14 racist issue in and of itself. The Chair and the  
15 assessors will recall that Les Brown and Stephen McGowan  
16 spoke to Deborah Coles at a meeting arranged by  
17 Mr Anwar, but their recollection of what was discussed  
18 at that time was very limited.

19 The second question that I would like to ask about  
20 relates to something which arose during the course of  
21 the Inquiry hearing this morning where the witness  
22 indicated that Dame Elish Angiolini contacted the crown  
23 and indicated that there might be parts of the report  
24 that she considered important for the crown and what  
25 I would like to explore a little more is when did she

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1 contact the crown, who did she contact, what did she  
2 identify as important and how was her advice actioned?  
3 So really just to explore the detail of that contact and  
4 how that affected matters.

5 LORD BRACADALE: Yes, very well. I shall allow you to  
6 explore these two matters. We'll have the witness back,  
7 please.

8 Ms Miller, Ms Mitchell KC, who represents the  
9 families of Sheku Bayoh, has some questions for you.

10 Questions by MS MITCHELL

11 Q. My first question relates to meetings that you had with  
12 Deborah Coles and I'm wondering if I can explore to what  
13 extent you recall the terms of that conversations that  
14 were had during that time. Do you remember the purpose  
15 for which the meetings were convened?

16 A. I remember that certainly in relation to the first  
17 meeting in Mr Anwar's office in 2015 that Mr Brown and I  
18 were asked to meet with Mr Anwar and he said Ms Coles  
19 might be present and it might be helpful for the crown  
20 to meet with her. In relation to the other meetings  
21 which I have a recollection she was present with the  
22 family in advising the family so it's part of that wider  
23 engagement with the family.

24 Q. And you said that you found the engagement with Ms Coles  
25 helpful. I'm wanting really to find out in what way

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1           that was able to help you. Can you recall specifically  
2           what ways that was of assistance to you?

3           A. She clearly had significant knowledge of issues  
4           particularly in England and Wales of deaths in custody  
5           of some of the issues that had come out of inquests in  
6           England where there were deaths in custody and had that  
7           expertise if you like and she was talking in general  
8           terms but talking to us about things we might want to  
9           look at in the course of the crown investigation.

10          Q. Okay. And can you remember what those things that she  
11          might want to look at were?

12          A. I think I might have referenced some of them in my  
13          statement but I can't remember the specifics now.

14          Q. I wonder if I might ask whether or not you recall that  
15          she spoke to you about the disproportionate police use  
16          of force against black men, might that have been one of  
17          the issues?

18          A. Yes, yes, that was and that was reflected in her work  
19          with Lady Elish and the Home Office Inquiry and  
20          certainly was one of the factors that we considered  
21          after the publication of that inquiry.

22          Q. And did she raise with you the idea of consideration of  
23          racial tropes and stereotypes of police officers dealing  
24          with black men?

25          A. That was mentioned in meetings that we had, whether it

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1           was her or Mr Anwar, I can't remember, but, yes, I do  
2           remember them being raised in meetings with  
3           representatives of the family.

4       Q.   And do you remember during the course of any of those  
5           meetings a discussion or her telling you about excited  
6           delirium being a racial issue in and of itself?

7       A.   That was mentioned -- I couldn't tell you now that it  
8           was Ms Coles that said it but, yes, that was mentioned  
9           and I think it was one of the issues we were looking to  
10          explore with some of the expert witnesses, the excited  
11          delirium issue and particularly related to race.

12       MS MITCHELL: I wonder if I might explore that a little  
13          further, my Lord, I have only been given authority to  
14          ask about the issues that were raised but it seems that  
15          if excited delirium was to be explored with any of the  
16          experts it might be an idea to simply ask that question.

17       THE ARBITRATOR: Yes, very well.

18       MS MITCHELL: I'm obliged. You probably heard what I just  
19          said. In fact you will have absolutely heard what I  
20          just said. What we -- were in particular that last  
21          issue but any of the others explored with those  
22          witnesses?

23       A.   I wasn't involved obviously directly with the engagement  
24          with the witnesses but that concept I think a number of  
25          research papers were identified that looked at that

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1           concept and then they were discussed with the experts  
2           that were instructed by the crown but other than that  
3           I couldn't give you much more direct information from my  
4           own knowledge.

5       Q.   And two things, who was it that did that gathering  
6           together of those documents?

7       A.   Mr Brown and the CAAPD team and thereafter I think  
8           Crown Counsel and Mr Brown consulted with a number of  
9           time experts.

10      Q.   And do you know what the reports were about?  Were they  
11           about excited delirium?

12      A.   They were about the concept of excited delirium and my  
13           recollection is that that had, for want of a better  
14           phrase, been "debunked" by experts.  It wasn't  
15           something, from memory, that held a lot of credibility,  
16           certainly from the discussions I had with colleagues.  
17           It was something that had been raised with us but there  
18           were concerns that it was not something that was  
19           relevant for investigation.

20      Q.   Moving on to my second issue, you explained in your  
21           evidence earlier that Dame Elish contacted the crown --

22      A.   Yes.

23      Q.   -- and actually highlighted, flagged up parts of the  
24           report which she considered might be important --

25      A.   Yes.

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- 1 Q. -- from the crown perspective. First of all, who did  
2 she contact?
- 3 A. The Lord Advocate's private office.
- 4 Q. Okay. And do you know what the content of the contact  
5 was about, ie, what parts of the report she specified  
6 she thought might be important for the crown?
- 7 A. No, she didn't specify any particular parts the report  
8 hadn't been published at that point so she flagged to us  
9 that publication was imminent subject to the timescales  
10 of the Home Office and that she thought there were  
11 findings in the report that would be of relevance, she  
12 didn't flag anything -- from recollection anything  
13 specifically.
- 14 Q. So she effectively put you on notice --
- 15 A. Yes.
- 16 Q. -- that that would be something for you to do?
- 17 A. Yes.
- 18 Q. Was it yourself that dealt with that that took the  
19 report and looked at it and analysed it in respect of  
20 the investigation of the death of Mr Bayoh?
- 21 A. Mr Brown, I asked him to have the first pass, if you  
22 like, and to prepare an analysis and where it might be  
23 of relevance in relation to the death of Mr Bayoh but  
24 more generally for the work of the crown, given the role  
25 I had at the time and then he and I discussed the

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1 content of the report and what we might want to bring  
2 out it in the investigation into Mr Bayoh's death  
3 specifically.

4 Q. And how was that actioned, what specific actions did you  
5 take as a result of it?

6 A. That was in the context of the findings that we reported  
7 to the Lord Advocate and that they would be taken into  
8 account and if any particular expert witness were  
9 required to assess some of these issues that they would  
10 be instructed and consulted with.

11 Q. But what were they about?

12 A. The issues that I have flagged in my statement so the  
13 disproportionate length of time for restraint for  
14 particularly males of black minority, ethnic origin,  
15 mental health issues, the policing response in general  
16 when looking to detain somebody who is a suspect so  
17 those were the issues that we were focusing on.

18 MS MITCHELL: I'm obliged.

19 LORD BRACADALE: Thank you. Thank you very much, Ms Miller,  
20 for coming to give evidence to the Inquiry. I'm very  
21 grateful for your input. When the Inquiry adjourns, you  
22 will be free to go. The Inquiry will now adjourn until  
23 tomorrow morning at 10 o'clock. Mr Wolffe, former  
24 Lord Advocate, who was due to start giving his evidence  
25 on Wednesday is now available to begin his evidence





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