

# Transcript of the Sheku Bayoh Inquiry

Thursday, 2 May 2024

1

2

(10.10 am)

3

LORD BRACADALE: Good morning Lord Mulholland, will you take

4

the oath.

5

A. Yes.

6

FORMER LORD ADVOCATE FRANK MULHOLLAND (sworn)

7

LORD BRACADALE: Ms Grahame.

8

MS GRAHAME: Thank you, good morning.

9

Examination-in-chief by MS GRAHAME

10

Q. You are Frank Mulholland?

11

A. I am.

12

Q. What age are you?

13

A. 65 last week.

14

Q. You are a senator of the College of Justice?

15

A. I am.

16

Q. And for the public listing, that means you're a judge

17

who sits in the High Court in the Court of Session?

18

A. Yes.

19

Q. And you were Lord Advocate from May 2011 until around

20

May 2016?

21

A. Yes.

22

Q. And in that capacity you were involved in the

23

investigation into the death of Mr Bayoh?

24

A. Yes.

25

Q. At the point in time when you left the role of

26

Lord Advocate, I think that was shortly prior to the

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1 final PIRC report having been received by Crown Office?

2 A. Yes, although I wasn't there when it was received.

3 There was an interim report I think had been submitted

4 whilst I was in office.

5 Q. So you had received the interim or the first report from

6 PIRC, but you were not in office when the final

7 report --

8 A. No.

9 Q. -- was received? Thank you. And you were not involved

10 with the arrangements that were in place after the final

11 PIRC report was received?

12 A. No.

13 Q. Allocating the team or the advocate depute?

14 A. No, that was someone -- that was a successor in

15 Crown Office.

16 Q. That was James Wolffe?

17 A. Yes, yes.

18 Q. And James Wolffe was your successor?

19 A. He was.

20 Q. Have you had any chance to watch any evidence in

21 the Inquiry at all?

22 A. No, I decided not to read any other witnesses'

23 statements and I decided not to read -- not to see or

24 view any of the evidence.

25 Q. Well, in that case, let me tell you about the blue

26 folder that's sitting in front of you.

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- 1 A. Yes.
- 2 Q. That provides you with hard copies of your Inquiry  
3 statements and you can use them as you wish and if  
4 there's anything you would like to refer us to within  
5 your statement, please let me know and we can have it  
6 brought up on the screen.
- 7 A. Okay. Thank you.
- 8 Q. When I ask you specific questions about your statement,  
9 it will come up on the screen so that everyone in the  
10 room can see, but it will only shown a paragraph or  
11 perhaps two, but if there's other areas you would like  
12 me to refer to, please feel free to tell us.
- 13 A. Okay.
- 14 Q. And equally, if there are any documents that you feel  
15 you should see which I've not let you look at or not  
16 provided you with, please let us know and we'll try and  
17 get them at the next break.
- 18 A. I gave the witness support person a number of two  
19 documents.
- 20 Q. Well, I will have a look at those in the break and we  
21 can deal with them, unless I am already going to speak  
22 to you about them.
- 23 A. Yes.
- 24 Q. Could we start first of all with your first Inquiry  
25 statement which was from March, which is SBPI 000476,  
26 I believe. And as you'll see, that's come up on the

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- 1 screen. You'll recognise that as your statement for  
2 the Inquiry?
- 3 A. I do.
- 4 Q. And if we looked at the final page -- there's 22 pages.  
5 If we looked at the final one, you'll see it's dated,  
6 it's been signed although the copy we see on the screen  
7 is redacted, but I'm correct in saying it's signed on  
8 11 March 2024?
- 9 A. Yes.
- 10 Q. And the final paragraph we see on the screen, 126,  
11 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 public published on the Inquiry's website."
- 16 A. I'm aware of that.
- 17 Q. Thank you. And you were doing your best to give a true  
18 and accurate recollection of your involvement when you  
19 gave your statement?
- 20 A. Yes.
- 21 Q. Then we have the second Inquiry statement, SBPI 00536,  
22 and again this was taken by the inquiry team in April.  
23 5 April 2024. It's seven pages long and if we can look  
24 at the final page, we should say that, as I understand  
25 it, you signed this on 15 April 2024. There we are.
- 26 A. Yes.

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1 Q. And again, if we look at the final paragraph, it's the  
2 same wording, paragraph 34, that you believe the facts  
3 stated in this statement are true and you understand  
4 this statement may form part of the evidence before  
5 the Inquiry and be published on the Inquiry's website?

6 A. Yes.

7 Q. Thank you. And again, you were doing your best to give  
8 a true and accurate recollection of your involvement?

9 A. Yes.

10 Q. Could I begin by asking you about the topic of  
11 disclosure?

12 A. Mm-hm.

13 Q. And there's two aspects to this I'm interested in. So  
14 this is in relation to your involvement as Lord Advocate  
15 and the disclosure that you gave to the family.

16 A. Yes.

17 Q. And we've heard that they were represented by their  
18 solicitor, Mr Amar Anwar.

19 A. Yes.

20 Q. Perhaps we could look at -- there is a paragraph in your  
21 own statement, paragraph 94 in the first statement,  
22 which touches on disclosure, but I have some additional  
23 questions.

24 You talk about not being aware of any undertakings  
25 and promises made by you beyond the general one, this is  
26 to the family, that the Inquiry would be thorough, that

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1 the issue of possible racial motivation would be  
2 investigated and that:

3 "I would continue to meet with the family and the  
4 crown would not make any public statement on the  
5 investigation."

6 Looking behind that aspect of it, we understand from  
7 other evidence that we've heard that you authorised  
8 disclosure of material available to the crown to the  
9 family through their solicitor?

10 A. To their solicitor, yes.

11 Q. Yes, and as I understand it a number of documents were  
12 disclosed --

13 A. Mm-hm.

14 Q. -- on your authority and you also permitted them to  
15 watch CCTV --

16 A. Yes.

17 Q. -- of the events at Hayfield Road. As part of that, did  
18 you require Mr Anwar to sign any formal undertaking or  
19 disclosure or confidentiality agreement in relation to  
20 that disclosure that you authorised?

21 A. No, but I mean there's a background to it. I worked or  
22 been involved in cases which Mr Anwar has represented  
23 families over the years. For example, I prosecuted the  
24 murder of a Scottish Asian lad called Imran Khan who was  
25 murdered in Pollokshaws in Glasgow and that was the  
26 first time I came across Mr Anwar who represented the

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1 family of the young lad, and there was issues about the  
2 mother, didn't speak very good English and that's  
3 whether I got to know Mr Anwar who assisted in liaison  
4 with the family in that case.

5 I also did work on the Chhokar case after the  
6 collapse of the first two trials, and Mr Anwar  
7 represented the family and I again ensured that as Lord  
8 Advocate that this was given top priority through the  
9 cold case unit and there required to be liaison with the  
10 family. I remember going out to speak to Mr Chhokar's  
11 family with Mr Anwar, Aamar Anwar who assisted, and the  
12 liaison with the family to ensure that they were told  
13 and advised of what the process was leading to a  
14 double-jeopardy application and a successful prosecution  
15 in that case.

16 I also worked with Mr Anwar in the murder of  
17 Emma Caldwell, which was sent to the cold case unit when  
18 I was Lord Advocate and I liaised with Margaret Caldwell  
19 with the assistance of Mr Aamar Anwar in that case. So  
20 there has been a lot of very high profile, very  
21 important, very difficult cases for the families to  
22 navigate through and I worked with Mr Anwar in these  
23 three big inquiries -- big cases so I trust Mr Anwar.  
24 He has never breached any confidentiality that -- any  
25 information that I've given him and he of course has his  
26 duties as a solicitor and it seemed to me that there's

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1 an Article 2 right for effective participation by the  
2 family. The source of that is paragraph 435 of Human  
3 Rights in Scotland edited by Robert -- Lord Reed, the  
4 Chair of the Supreme Court, and Jim Murdoch and that  
5 explains the Article 2 rights that there requires to be  
6 effective participation by the family, which I was well  
7 aware of and tried -- did my best to ensure.

8 So it seemed to me that it's important to -- because  
9 the family are going to do -- the solicitors for the  
10 family are going to do their own investigations. It was  
11 a mandatory fatal accident inquiry at the very least so  
12 what I wanted to do was to ensure that he had the  
13 material to instruct his experts and part of my  
14 obligation in terms of Article 2, effective  
15 participation, was to explain the process to the family,  
16 listen to their concerns, listen to any points that they  
17 want to make, answer them if I could and ensure that  
18 they were participants in the process so that was part  
19 of that so.

20 And give you a wider aspect on disclosure, I led the  
21 crown through two Supreme Court disclosure cases. I  
22 argued them myself. I wrote the disclosure manual for  
23 the crown with John -- the late John Dunne and John  
24 Watt, who now heads the parole board, as I also have  
25 done a number of appeals in the Appeal Court in  
26 Edinburgh on disclosure matters. So applying all that



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1 knowledge, experience, judgment, I determined that  
2 I would disclose matters to Mr Anwar so that he can  
3 conduct his own inquiries and that's participation for  
4 the family. So that's a background to it.

5 Q. Thank you very much. Did you have any concerns against  
6 this background that you've explained of risks to future  
7 criminal proceedings in the event that you made this  
8 disclosure?

9 A. Well, I thought about it. I mean I just didn't make it  
10 in a vacuum, that decision, I thought about it.  
11 Firstly, there's a statutory inquiry inevitable, right,  
12 so there's preparation required by the family's legal  
13 representatives. Secondly, in relation to the potential  
14 criminal proceedings, I could not see how that would  
15 prejudice any potential criminal proceedings. The  
16 family -- a lot of the family lived in London, they were  
17 not witnesses or wouldn't be witnesses. I couldn't see  
18 how they would be witnesses. Collette Bell lived in  
19 Fife and there were some family and friends in Fife.

20 Collette Bell would be a witness to background as  
21 far as I could see it. She wouldn't be a witness to  
22 fact, in other words what went on that resulted in  
23 Sheku Bayoh's death. So applying my judgment, I took  
24 the view that I couldn't see or the risk to potential  
25 criminal proceedings was very, very small.

26 Q. Thank you. We have heard evidence from James Wolffe who

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1 was your successor and we've heard about the differences  
2 in approach that were taken by you in relation to  
3 disclosure and by Mr Wolffe.

4 A. Yes.

5 Q. And I would like to ask you about some of his evidence  
6 so that you can comment on that.

7 A. Mm-hm.

8 Q. Perhaps if we could have his Inquiry statement on the  
9 screen, SBPI 00529. There's three or four paragraphs of  
10 relevance and what I'll do is I'll briefly look at those  
11 on the screen and then we can discuss his evidence  
12 together.

13 A. Yes.

14 Q. Paragraph 60, please. There we are and it's just after  
15 the --:

16 "When the issue arose in the context of further  
17 detailed disclosure requested by Mr Anwar in February  
18 and March 2017... "

19 So this is after you had left the role of  
20 Lord Advocate and James Wolffe had taken office?

21 A. Yes.

22 Q. "I was presented with a dilemma. On the one hand, it  
23 would have been contrary to my own experience of crown  
24 practice for disclosure of the sort requested to be made  
25 in the context of a live criminal investigation. That  
26 general practice reflected a compelling public interest

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1 in avoiding any risk of prejudice to future criminal  
2 proceedings. On the other hand, in this case Mr Bayoh's  
3 family had already been given certain disclosure and  
4 were now seeking further disclosure. Mr McGowan's  
5 advice in paragraphs referred to in a minute and an  
6 email was consistent with my own experience. I also  
7 recall having a brief discussion with the APCC,  
8 assistant principal Crown Counsel, about the issue."

9 I'll briefly let you see the minute that he's  
10 referring to. SBPI 00529. Sorry. That's a statement.  
11 It must be COPFS 00529 I think.

12 A. So is this a Steve McGowan minute?

13 Q. Yes. We'll leave this. I've got the wrong reference  
14 there. I don't want to cause difficulty.

15 Having read the minute and having discussed it with  
16 Mr Wolffe, we can see that advice was given to him in  
17 relation to disclosure by Mr McGowan. Let's move on to  
18 61 which is on the screen:

19 "I took the view that my overriding responsibility  
20 at that stage was to avoid any risk to the integrity of  
21 criminal proceedings should they eventuate. It would  
22 neither be in the interest Mr Bayoh's family nor in the  
23 public interest if disclosure of information by the  
24 crown whilst the investigational was pending were to  
25 prejudice a future prosecution. I also had to be  
26 mindful that if information were to be disclosed to the

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1 family in this case, issues would likely arise in other  
2 death cases to which Article 2 applied about the  
3 disclosure of similar information whilst an  
4 investigation was ongoing."

5 And then moving on to 62:

6 "I considered whether the investigative obligation  
7 under Article 2 of the European Convention on Human  
8 Rights required a different approach to be taken and  
9 took the view that it did not. It seemed to me that the  
10 question of compliance with the UK with its obligation  
11 under Article 2 fell to be addressed in light of the  
12 whole process of the investigation and inquiry which  
13 could be anticipated. I expected the position in  
14 relation to disclosure to be different in the context of  
15 an FAI or indeed a public inquiry once any issue of  
16 criminal proceedings had been resolved. Not only would  
17 the family of the deceased see the evidence being led at  
18 the Inquiry, but they would likely be represented and  
19 would receive disclosure in that context. I accordingly  
20 concluded that further material should not be disclosed  
21 where that disclosure presented a risk of prejudice to  
22 future criminal proceedings. As regards the specifics  
23 of what information could safely be disclosed without a  
24 risk of prejudice future criminal proceedings, I relied  
25 on the judgment of the professional prosecutors directly  
26 involved in the case."

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1           So let's go back to 60 first of all, and, you'll see  
2           that this was -- he describes it as dilemma and he talks  
3           about his general practice, crown practice, for  
4           disclosure at that time. This was in the context where  
5           the final PIRC report had been received and the process  
6           of crown precognition was underway and the issue was  
7           whether to give the family further disclosure at that  
8           stage.

9           A. What was asked? What was a request or what disclosure?

10          Q. We'll have to see if I can get -- I think the difficulty  
11          will be I don't have the access to the minutes on the  
12          screen at the moment.

13          A. Yes.

14          Q. My understanding of the position is that further  
15          disclosure of expert reports was specifically requested  
16          and my reading of the minute, which we can't see at the  
17          moment, is that that was specifically raised by  
18          Mr McGowan, the request for expert reports?

19          A. Well, without knowing in detail what the actual request  
20          was and what the reason for it is kind of difficult to  
21          comment on the specifics. I would just make a general  
22          observation. It's very easy to say, well, I can't give  
23          you it because there's a risk of prejudice to future  
24          criminal proceedings. I think you have got to drill  
25          down and, well, what is the risk?

26                 And what I'm saying to you is when I took the

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1 decision, which I stand by, I think it was the right  
2 decision with the benefit of hindsight, I drilled down  
3 to look at what is the risk of prejudice and what was  
4 the purpose that this disclosure -- when I dealt with  
5 the matter, what was the purpose of this request? And  
6 as I understood it, it was in relation to families  
7 instructing their own experts and their own inquiry so  
8 it seemed to me that it was consistent with my  
9 obligations in Article 2. I couldn't see what the risk  
10 was and James Wolffe's statement he's not articulated  
11 what the risk was.

12 As I said, I couldn't see that information being  
13 prejudiced, prejudicial. For the family that lived in  
14 London, they were not going to be witnesses, and in  
15 relation to Collette Bell, she was not a witness to what  
16 happened. So I took the view, and as I say I stand by  
17 it, that the risk to future criminal proceedings was  
18 very low.

19 Q. Thank you.

20 A. And also you have the duties of a solicitor as well.

21 Q. All right.

22 A. Obligations of a solicitor in ethics.

23 Q. The evidence we've heard from Mr Wolffe on 1 May  
24 yesterday was that he had taken the view that Article 2  
25 or he had been told that a view had been taken that  
26 Article 2 required disclosure, but he was not convinced

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- 1           that that was correct in the context of a criminal  
2           investigation. Do you wish to comment on that?
- 3           A. I disagree with him.
- 4           Q. You disagree. And he gave evidence that the crown had a  
5           responsibility and needed to be able to investigate, as  
6           it, were in a private space and to reach its conclusions  
7           and then take whatever course was the right course.
- 8           A. Well, I agree with that that the crown needed to do its  
9           work in a private space. I mean I issued the one and  
10          only time in my time as a law officer, I was nine years  
11          a law officer, a media release saying that the crown  
12          wouldn't make any public statement, that all the stories  
13          in the press were upsetting for the family and asking  
14          the media to essentially stop at a report responsibly.  
15          So obviously you need to conduct your inquiries, the  
16          crown, in a space that you can do that, but I mean the  
17          crown has got loads of experience in dealing with high  
18          profile investigations and prosecution and not being  
19          affected by outside noise, for want of a better phrase.
- 20          Q. Thank you. I have been provided with the minute I was  
21          looking for earlier. COPFS 03943A. It's not on the  
22          play list. If you don't mind I'll read out an  
23          excerpt --
- 24          A. This is --
- 25          Q. -- just to complete this.
- 26          A. Steve McGowan's minute?

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1 Q. This is the minute dated 7 February 2017 from  
2 Stephen McGowan to the then Lord Advocate and others.  
3 And I will read out from paragraph 11:

4 "Throughout the course of the PIRC investigation the  
5 family and their solicitor received disclosure of  
6 information reflecting their rights under Article 2 in  
7 order to facilitate the instruction of their own expert  
8 witness or witnesses.

9 "12. It is clear however that following receipt of  
10 the report by PIRC that the focus and direction of this  
11 investigation, which remains a live criminal  
12 investigation, has now passed to the crown. Given that  
13 precognitions are confidential, our advice is that we  
14 should not share the detail of what we have learned or  
15 the precognitions themselves. Our investigation at this  
16 stage should remain confidential and there is a real  
17 likelihood that a number of family members are potential  
18 witnesses in any future proceedings. In light of this,  
19 it will be important that the expectations of the family  
20 and their solicitor, particularly regarding disclosure  
21 at this stage, should be carefully managed."

22 And then 13:

23 "Similarly, whilst we have thus far shared expert  
24 reports with the family, we do not recommend sharing the  
25 new reports that we are instructing at this stage."

26 And there's a reference to paragraph 5 above which



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1 details a number of expert reports that were being  
2 instructed at that stage, including an osteoarticular  
3 pathology report and a further expert pathology report.  
4 So I'm sorry I can't show you on the screen.

5 A. No, that's fine. I get the gist of that. What I would  
6 comment is that Mr McGowan and James Wolffe were dealing  
7 with a different situation. The final report is in and  
8 the crown is now doing its precognition preparation.  
9 When I made the decision, it was a different set of  
10 circumstances and I took the view and, as I have said, I  
11 stand by, I think it was the right decision.

12 And I just like make a general observation and my  
13 time as a law officer is that you are given advice on a  
14 regular basis by permanent members of staff in COPFS.  
15 I know Mr McGowan. I know him personally. I have a  
16 high regard of his abilities. But the advice you get is  
17 not always right and at the end of the day, it is the  
18 Lord Advocate or whoever has taken the decision, could  
19 be Crown Counsel senior Crown Counsel in those  
20 circumstances, that is the decision-maker and regardless  
21 of what the advice is, it is a person that's got to make  
22 the decision so -- but it's a different set of  
23 circumstances it seems to me from the excerpts you've  
24 read from Mr McGowan.

25 Q. Thank you. And then another aspect of the evidence  
26 we've heard from James Wolffe yesterday. It was he

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1           said:

2           "One risk in the context of a possible criminal  
3           prosecution of the police officers is the question of,  
4           you know, the crown has to be independent and  
5           demonstrably independent. One would not want to end up  
6           with a position where it could be said or any issue  
7           could be raised about, as it were, the independence of  
8           the crown investigation, regardless of how that might  
9           have been affected."

10           And did you consider when you were dealing with the  
11           matter the issue of crown independence?

12           A. Of course. I consider crown independence all the time  
13           to ensure -- it was a frequent mantra from me on a whole  
14           raft of cases about crown independence. In my time as  
15           Lord Advocate, very unpopular decisions were taken in  
16           certain cases commensurate with the crown's independence  
17           and it might be helpful if at one stage bring up a  
18           letter I wrote to Pamela Paton who was the wife of, is  
19           it, Alan Paton, Constable Alan Paton?

20           Q. Yes, we've heard her evidence.

21           A. Well, she was upset at a lot of the media reports about  
22           what had happened and who was saying what and she  
23           emailed in -- I don't have access to the email, but I  
24           responded to her letter with a letter of two pages which  
25           I set out in great detail the crown's obligations and I  
26           explained that liaising with the family, meeting with

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1 the family, is not in any way an indication that the  
2 crown was representing any one particular party in this  
3 and I explained what the crown's obligation were in  
4 relation to Sheku Bayoh's family.

5 Q. Thank you.

6 A. So what you have -- I mean you cannot shut the crown  
7 down from speaking to people affected by investigation,  
8 case and decisions. That is not a breach of your  
9 independence as a decision-maker. As a prosecutor, you  
10 have to speak to people and listen to what they have got  
11 to say. That doesn't affect your independence. As far  
12 as I can see, no one ever suggested to me that the crown  
13 weren't independent in its investigations into the death  
14 of Sheku Bayoh so it was considered.

15 Q. Thank you.

16 A. Considered all the time in a whole raft of cases.

17 Q. I believe the letter has been added now, COPFS 04836A,  
18 and this may be the letter that you're referring to.

19 A. It might be quite helpful if I could have that on screen  
20 just to go through it, please.

21 Q. Yes, I have just asked for that to be. It will just  
22 take a moment I think. So it's COPFS 04836A. This is a  
23 letter from you, the Right Honourable Frank Mulholland  
24 QC, and if we can move down it says PC Paton's wife,  
25 14 October 2015?

26 A. That's the one. There was an email had come into the

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1 private office and I think -- if you just scroll down,  
2 I think she was upset, amongst other things, at  
3 something that Les Brown had said to her in a phone call  
4 so I wanted to set out what the crown's position in this  
5 was.

6 And you'll see from the second paragraph I state  
7 that the investigation into the death of Sheku Bayoh is  
8 at the instance of me who is statutorily responsible for  
9 the investigation of all deaths in Scotland.

10 Investigation conducted by PIRC who acted -- sorry --  
11 who act under my directions and superintendence. I set  
12 out what the decisions at the end of the day required to  
13 be taken. I set out, state emphatically that:

14 "The Lord Advocate is impartial and will take  
15 decisions following a full and thorough investigation.  
16 The crown has a long and proud history of conducting  
17 impartial investigations and this one will be no  
18 different. Please do not think that because the family  
19 of Sheku Bayoh are involved in the process that  
20 impartiality is compromised. They will not be involved  
21 in the decisions, which is right, but have a legal right  
22 to be kept advised of progress in an investigation of  
23 this nature. It is important that the family have  
24 confidence in the process so that they can have  
25 confidence that the decisions taken are taken following  
26 a full and thorough investigation and that the family

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1 understand why the decisions were taken. The family are  
2 not being treated any differently than other families in  
3 similar circumstances."

4 If we can go on to the next page, please:

5 "I'm sure you will agree that all parties affected  
6 by this decision, including the police officers  
7 involved, should have confidence that decisions were  
8 taken following a full and thorough investigation with  
9 expert opinion from the most eminent experts available.  
10 I appreciate the amount of publicity this case has  
11 generated and that this has been difficult for the  
12 persons affected. I should note that the crown has not  
13 been responsible for the publicity and I have said very  
14 little about the case, other than to talk about the  
15 process. I have not and will not talk publicly about  
16 the evidence, as to do so would be tantamount to  
17 prejudicing the investigation before it's completed. I  
18 hope that at the end of the process you will have the  
19 answers you and all parties affected seek."

20 I then go on to deal with what she was saying in  
21 relation to Les Brown and she was also -- I think in her  
22 email she was upset about a BBC documentary that was due  
23 to be broadcast and I explain that I can't prevent the  
24 broadcasting of that, but any matters which are raised  
25 in the documentary which will be thoroughly  
26 investigated --

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- 1 Q. Thank you.
- 2 A. -- is what I said. So that sets out what the crown  
3 position is in independence and, as I said, liaising and  
4 speaking to families of deceased persons affected by  
5 this is not in any way compromising an independence.
- 6 Q. So when you considered the obligations under Article 2,  
7 but also the importance of retaining crown independence,  
8 you resolved it in this way and this letter reflects  
9 your thought processes?
- 10 A. Yes, and I would just add to that that Article 2  
11 requires an independent investigation.
- 12 Q. Mm-hmm.
- 13 A. So there are procedural requirements and one of them is  
14 effective participation and I remember checking as -- I  
15 dealt with a number of cases over the years, deaths,  
16 call them at the hands of a state, as you know, a death  
17 in custody is another way of phrasing it, so I -- when I  
18 became aware of Sheku Bayoh's death, I checked the  
19 books.
- 20 Q. Thank you.
- 21 A. And Article 2 obligations.
- 22 Q. Thank you. There was only one other aspect that we  
23 heard in evidence from James Wolffe and that was his  
24 evidence that let's say one went to a position of very  
25 open disclosure to any party, and let's take it away  
26 from this case, you know, taking views about how the

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1 crown should proceed with its investigation and so on  
2 and so forth, issues about how that would be perceived  
3 down the line in the context, but he also talks about a  
4 concern, or he gave evidence about a concern, regarding  
5 putting himself or the crown under pressure to make  
6 similar disclosures in other cases also. Did you have  
7 any concerns in that regard?

8 A. No, what I did was I looked at the circumstances of this  
9 case and and I applied my mind to what is the prejudice.  
10 It's very easy, it seems to me, to hide behind, well, it  
11 could be prejudicial. I think you have a duty to drill  
12 down and try and identify what the potential prejudice  
13 is and when I did that and gave consideration to that,  
14 as I've said, I think it was a very small risk so I took  
15 the view that it was appropriate in those circumstances  
16 for the reasons I was being asked to disclose, in other  
17 words to instruct the experts, and duties and  
18 obligations of the solicitor, my past experience of  
19 Aamar Anwar, he never breached a confidentiality when me  
20 speaking to him, him speaking to me, it seemed to me  
21 that I should instruct the disclosure for that to  
22 happen, which I did.

23 It's a different situation when the crown is doing  
24 their investigations and it's being precognosed after  
25 the full report has come in from PIRC, so it's a  
26 different set of circumstances, but I'm the

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1 Lord Advocate, it's up to me to make the decision. I  
2 thought about it, I thought about it in depth and that's  
3 the decision I took and I stand by it.

4 Q. Thank you. We've heard that the different approaches  
5 had an impact on the family and I'm interested in your  
6 perspective about the benefits of your approach in  
7 relation to building trust and confidence in the family?

8 A. Well, I've been a front line prosecutor in the  
9 High Court as an advocate depute, as a senior advocate  
10 depute for, what, ten years. In my work as a member of  
11 COPFS and senior positions I had met families in very  
12 difficult situations for them. To give you an example,  
13 the day after the collapse of the World's End trial,  
14 I was asked to go in and meet the families. As you can  
15 imagine, that was a very, very difficult conversation.  
16 So I have experience of those difficult conversations  
17 and helping families through very traumatic troubled,  
18 upsetting, distressing times.

19 Now, my approach is always -- I mean, for example,  
20 I was involved in as Lord Advocate in the Lockerbie  
21 case. I went out to Washington to speak to the families  
22 at Arlington on the anniversary so I have got experience  
23 in that. I dealt with the Chhokar families. I also  
24 dealt with the murder of Elaine Doyle, a young girl that  
25 was murdered in Greenock, and there was I think over  
26 25 years before the perpetrator was brought to justice.



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1 I dealt with very much under the radar confidential not  
2 speaking to Mrs Doyle and Mrs Doyle's family and her  
3 husband who passed away before. So what I'm saying is  
4 I've got lengthy experience, probably more experience at  
5 the time I was Lord Advocate than anyone in the crown in  
6 dealing with families in these types of situations.

7 What are the benefits of it? Well, firstly, the  
8 benefit is it helps the families. They don't ask --  
9 they didn't ask to be put in this position. They didn't  
10 ask to have to or come up to Edinburgh and meet people.  
11 They were happy getting on with their lives in London  
12 and Fife and then something happened that's propelled  
13 them into this alien situation that it seemed to me that  
14 on a human level, on a professional level, it was  
15 important to speak to the families to explain the  
16 process, to listen to them, listen to their concerns,  
17 answer any questions that they have. If I could answer  
18 them at that time and involve them in the process,  
19 effective participation, which is required in the law.  
20 That's my approach, and through my lengthy -- now  
21 lengthy legal career that's what I've done and, again, I  
22 stand by that. I think that is the right approach.

23 Let me tell you in my experience with the family of  
24 Sheku Bayoh they were a nice family put into this  
25 position. They were not -- and I had a number of  
26 meetings with them, they were not looking for revenge.

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1 They were not looking for someone to pay a price for  
2 this regardless of their involvement. What they wanted  
3 was they wanted answers. They wanted to know what  
4 happened, why it happened, whether anyone is responsible  
5 for what happened, whether anything could have prevented  
6 the death of a partner, son, brother, and they wanted to  
7 be listened to and it seemed to me that that was hugely  
8 important in this case.

9 And the other thing you have got to remember is the  
10 background to this. You -- we need to be deaf not to  
11 know of the difficulties that the Stephen Lawrence  
12 murder had and caused and the loss of public trust in  
13 the judicial process, prosecutorial process, the  
14 investigatory process. And in Chhokar it was quite  
15 clear from the two inquiries, the Jandoo inquiry which  
16 looked at how it was dealt with, the liaison with the  
17 family, and the Sir Anthony Campbell inquiry about the  
18 process that the crown had failed the Chhokar family.  
19 And as Lord Advocate I wasn't -- I was going to do  
20 everything I could to prevent that happening under my  
21 watch, which is why I liaised, spoke to, listened to the  
22 family of Sheku Bayoh and, again, I think that was the  
23 right thing to do and I don't regret it and if it  
24 happened tomorrow, I would do the same thing.

25 Q. Thank you. I would like to move on to the issue of race  
26 and you have discussed this in both statements. Perhaps

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1 if we could look at paragraph 6 of your statement:

2 "The reason I involved myself from the beginning of  
3 the investigation... "

4 Here we are:

5 "The reason I involved myself from the beginning of  
6 the investigation into the death of Sheku Bayoh was in  
7 light of my experience of 30 years as a prosecutor. I  
8 have been involved in numerous high profile and complex  
9 cases. I was not involved in the initial investigation  
10 into the death of Surjit Singh Chhokar, but I dealt with  
11 the fall-out from the case and the Jandoo report which  
12 concluded that the COPFS was institutionally racist. I  
13 prioritised this case for re-investigation and  
14 superintended the subsequent murder case through the  
15 double-jeopardy application and trial. I was not going  
16 to let what happened in the Chhokar case happen again  
17 with Sheku Bayoh; namely, poor liaison with the family,  
18 not addressing issues of colour nor investigating racial  
19 motivations ...."

20 And is that colour of his skin?

21 "... if any for what happened. That is why I became  
22 involved at an early stage."

23 And was that something you were immediately -- you  
24 say "at an early stage", was that something you were  
25 immediately conscious of?

26 A. As soon as I heard about it I knew from experience that

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1 this was going to be high profile, that issues of race,  
2 racial motivation, were going to be front, left and  
3 centre in relation to the investigation and as  
4 Lord Advocate you're the leader of the prosecution  
5 service and it would be an abrogation of my  
6 responsibility as Lord Advocate to leave that to someone  
7 else. It seemed to me that this is what I required to  
8 do was to step up to the plate and superintend.

9 I can't deal with -- I don't have the time to deal  
10 with the day-to-day goings on, but I needed to know  
11 about the case, about the circumstances. I also needed  
12 to know where the investigations were going, because it  
13 is very important in relation to resourcing the  
14 investigation of the inquiry that I know where  
15 investigation is at and what the issues are, because if  
16 additional resources were required, it's my job to get  
17 the money for it to fund those additional inquiries.  
18 For example, in the Lockerbie case one of the things I  
19 did was to get additional funding for investigation and  
20 there are other cases where that's happened. So again,  
21 that was something which I needed to know, you know,  
22 whether they had sufficient resources and I mean it's  
23 stating the obvious that with the constraints in the  
24 public purse, you know, it's can be a battle to get  
25 additional resources if they're required and I need to  
26 know what the position is in relation to that.

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1 Q. At that stage, at that early stage, what were your  
2 expectations of the crown and your staff and how the  
3 investigation would be conducted?  
4 A. Well, at the initial stage is that it hadn't been over  
5 to the crown yet, because the PIRC final report was not  
6 in so we at that stage. I think there was an interim  
7 report which was submitted during my time. So the crown  
8 was not at the stage of conducting its own  
9 investigation. So obviously I would give thought to  
10 that.

11 What my view would be that it would require very  
12 experienced and senior Crown Counsel, maybe at principal  
13 advocate depute level, that the Crown Counsel appointed  
14 to the case would need to be supported with an assistant  
15 Crown Counsel, that given the importance of this that  
16 the people in COPFS that were dealing with it would  
17 require to be experienced and have the ability and track  
18 record to be able to deal with cases of this importance  
19 and magnitude. There were complexities in this in  
20 relation to the pathological evidence, so you required  
21 an intellect to be able to navigate through that. There  
22 were also issues -- other issues in the case about  
23 toxicology, about positional asphyxiation, a whole raft  
24 of issues that were not day-to-day issues that you would  
25 have to deal with. So my view was it would need to be  
26 prosecutors, I'm not talking about Crown Counsel,

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1 permanent prosecutors of COPFS who have the ability and  
2 the experience to be able to undertake that.

3 Now, Les Brown, I know Les Brown, I know him very  
4 well, I hold him in very high regard, I have no doubt  
5 about his experience and ability to be able to deal with  
6 that so I was reassured that he was directing the  
7 investigation. I also knew that Lindsey Miller, who is  
8 another person I hold in high regard, had a role, a  
9 superintendent's role, an involvement in this so -- and  
10 I can't remember at this stage there were others as  
11 well. But prior to meeting the family, I would have a  
12 briefing meeting so I would have the key personnel down,  
13 I would discuss where we are, what the issues are, the  
14 questions that were raised by the family have they been  
15 answered, what are the answers, what's your fears,  
16 what's your concerns, have we properly resourced this.  
17 So all that information would be flowing to me from  
18 them. And also there's a byproduct of that as well, in  
19 the sense that the staff, permanent staff, dealing with  
20 this case know that they have got the Lord Advocate's  
21 support and that is very, very important, because these  
22 are difficult cases to deal with. And there are people  
23 of that caliber and dedication to public service who  
24 step up to the mark to be able to deal with these  
25 challenging and difficult cases and they have to be  
26 supported as well, and that's what I was doing as

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1 Lord Advocate, so it's a two-way process.

2 Q. Thank you. We've heard from Stephen McGowan in evidence  
3 and perhaps we could put his Inquiry statement on the  
4 screen, SBPI 00431, and if we could look at paragraph  
5 63:

6 "In my view everyone was aware that race was matter  
7 at the heart of this investigation. From the first  
8 telephone call I had from David Green, the question of  
9 the deceased's race and whether it was a factor was  
10 discussed. No one was in any doubt that it was an  
11 issue. Whilst no specific instructions were given to  
12 consider race as a motive, my recollection was that it  
13 was clearly discussed at the time and everyone involved  
14 was seized of the requirement to investigate the  
15 potential for race to have been a motive."

16 Would you agree with that?

17 A. Entirely.

18 Q. Right. And --

19 A. I think I said something similar in my statement as  
20 well.

21 Q. I think in paragraph 78 you say:

22 "Race was front and centre from the outset of the  
23 investigation. A black man has died in police custody.  
24 It was obvious."

25 In relation to -- the comment here that we have on  
26 the screen mentions that no specific instructions were

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1 given to consider race as a motive. So we've looked in  
2 detail at the instructions that were given by the crown  
3 to PIRC when it came to the actual investigation into  
4 the death of Mr Bayoh and there were no specific  
5 references to race at that time. Was that something you  
6 were aware of?

7 A. No, it would probably be unnecessary because race was an  
8 issue, you know, left, front and centre. There's a  
9 letter which was sent by Les Brown. I gave the number  
10 to witness support. There's a Les Brown to John  
11 somebody. Is it John Mitchell of PIRC? And there's a  
12 reference to -- in that letter -- if we could have the  
13 letter up it may assist you.

14 Q. All right. I'm advised that it is COPFS 6256 --  
15 sorry -- 062562.

16 A. Yes, John Mitchell.

17 Q. Is this the -- this is dated 13 January. Well, it says  
18 2015?

19 A. It's wrong.

20 Q. It must be 2016.

21 A. It must be 2016. Yes. So if we could just scroll down.  
22 We are talking about the paragraph when the final report  
23 is --

24 "... read the comments in respect of the allegation  
25 of racism in Fife Division and note that some  
26 statistical analysis had been carried out, but would



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1 question whether the figure is indicative that  
2 institutional racism played no part in the approach of  
3 the officers to Sheku Bayoh as stated by  
4 John McSporran."

5 I mean the investigators went to the -- they looked  
6 at the complaints against the police for the various  
7 forces before it was amalgamated into Police Scotland.  
8 They drilled down into whether complaints were being  
9 made of racially prejudiced conduct by police officers,  
10 and they then compared that with similar complaints  
11 across the other police forces so it's a seam of work  
12 which was important to be done, indicative of race  
13 being, you know, a key issue in the case. And it says:

14 "The importance of ensuring the issues of race are  
15 fully addressed as part of the PIRC investigations has  
16 been highlighted in our previous meetings. From a crown  
17 perspective, your investigation has to consider whether  
18 race had any influence in the way that the incident was  
19 dealt with as part of a wider consideration, as well as  
20 whether there was any evidence of overt racism, where  
21 the latter will be explored as part of your  
22 investigations relating to Constable Paton. However,  
23 you will no doubt recollect the discussions at our last  
24 meeting with the Lord Advocate where your attention was  
25 drawn to the behaviour of a [I think it should be  
26 'former' as opposed to 'formal'] Fife officer who

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1 appears to have been responsible for distributing racist  
2 communications and offensive images."

3 So what I'm saying is that any information that  
4 would suggest or that could support racial motivation  
5 was passed on to PIRC. It was front, left and centre at  
6 meetings with PIRC and Les Brown is clearly dealing with  
7 it and clearly knows it's a key issue and refers the  
8 discussions with -- involving me in which these issues  
9 were being discussed.

10 So to answer your question if there was -- there's a  
11 form -- is it section 33 direction?

12 Q. 33A.

13 A. 33A if that was not included in that then it doesn't  
14 mean that race wasn't an issue. It clearly was from the  
15 very beginning.

16 Q. We've heard evidence that a number of letters of  
17 instruction were sent first of all under section 33A by  
18 the crown to PIRC to formally instruct them to  
19 investigate the death of Mr Bayoh and that during that  
20 period up to the end August at least, there were no  
21 references to race as part of that instruction in  
22 correspondence from the crown to PIRC. And that during  
23 that period PIRC were -- as we've heard evidence  
24 described the situation as they were taking cognisance  
25 of race if issues emerged, but they did not pursue any  
26 active lines of investigation in relation to race. Were

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1           you aware of that at the time?

2           A. I certainly was not aware of it at the time and it would  
3           be inconsistent with, you know, the example of the work  
4           being undertaken by PIRC to look at statistics in  
5           complaints against the police and that type of stuff and  
6           investigate -- there was specific instructions given to  
7           PIRC to investigate allegations that were being made  
8           against certain officers so that seems to me to be  
9           inconsistent with what PIRC were doing.

10          Q. I shall perhaps explain that from 2 September 2015 we've  
11          heard evidence that there was a letter from the crown to  
12          PIRC asking for confirmation that race was a priority in  
13          the investigation and that was the first reference --

14          A. Who was that from?

15          Q. That was a letter from Les Brown to PIRC on 2 September  
16          2015 and that was the first reference in crown  
17          correspondence to inviting confirmation that race was a  
18          priority in the investigation. From September onwards  
19          that letter specifically instructed PIRC to investigate  
20          issues that you've identified in this letter, the Fife  
21          officers' issues, history of racism, prior misconduct.

22                 So certainly from September 2015 there was reference  
23          to race in crown correspondence and specific  
24          instructions given, but in the period prior to that,  
25          from 3 May up to that specific letter, the PIRC  
26          investigation had simply taken cognisance of race, but

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1 not -- we've heard evidence not actively pursued a line  
2 of investigation regarding race.

3 A. Well, I'm surprised to hear that.

4 Q. Right. And were you aware of that at the time?

5 A. No. I find it surprising given -- I mean it's the  
6 interaction with PIRC is not just letters.

7 Q. Mm-hmm.

8 A. There's conversations, and conversations with people  
9 involved in the investigation in PIRC and Kate Frame,  
10 who headed PIRC at the time, and it was quite clear in  
11 the conversation that certainly I was party to that race  
12 was front, left and centre.

13 Q. So -- and we've heard that you had a number of meetings.

14 A. Yes.

15 Q. You had a meeting with Kate Frame and John Mitchell from  
16 PIRC on 14 May 2015. As far as you're concerned, in  
17 your communications with PIRC, did you effectively  
18 communicate that race was a priority in this  
19 investigation?

20 A. I mean it was weaved into the conversations. I would be  
21 astonished if -- amazed if PIRC thought that you know  
22 waited until September to the letter which you've  
23 referenced to investigate racial motivations.

24 Q. Shortly prior to the letter from the Crown the PIRC also  
25 received a letter from Mr Anwar specifically raising the  
26 issue of race and after that letter was received they

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1 did include race into the policy log that they retained  
2 but we've heard evidence that that was really the first  
3 point at which the matter became a more active line of  
4 investigation.

5 A. Well, I mean you're telling me something that I wasn't  
6 involved in, but I just -- race was front, left and  
7 centre from the very beginning as far as I was concerned  
8 and that occurred in conversations.

9 Now, Aamar Anwar is well entitled to formalise it  
10 and put it in a letter, he's quite right to do so, but  
11 that doesn't mean that this wasn't under consideration  
12 from the very beginning. As Lord Advocate, I knew, I  
13 dealt with Chhokar, I dealt with a number of what's  
14 under the broad umbrella of hate crime. I was involved  
15 in -- at the Crown Office in the murder of Mark Scott,  
16 who was a young lad that walked through Bridgeton and  
17 was murdered just because he was wearing a green scarf.  
18 So it's not just race for me. Right across the board it  
19 seemed to me that it was something which I was -- that  
20 was a priority to me.

21 Q. Can we look at paragraph 169 of your first Inquiry  
22 statement and I think you emphasise here the  
23 significance of race as far as you were concerned. 169  
24 says the question of race. It doesn't seem to be the  
25 correct reference. Let's leave that to one side. Can I  
26 ask you given your -- the significance of race to you

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1 and the experience you had in that, and you've commented  
2 about race and racial motivation being important aspects  
3 of this investigation, what were your expectations of  
4 PIRC during this period from 3 May 2015 up to  
5 2 September 2015 at least that initial period?

6 A. Well, they would be conducting an inquiry. They were  
7 the investigators. They would report the results of  
8 that inquiry to the crown when those investigations were  
9 complete. I mean what my expectations would be it would  
10 a thorough investigation. It would be an investigation  
11 dealing with all of the issues in the case, including  
12 race. It would deal with the issues about the cause of  
13 death. It would instruct the -- or obtain expert  
14 evidence from a raft of experts, experts in their field,  
15 and that they would report the results of their  
16 inquiries, together with their analysis, recommendations  
17 in a final report to the crown.

18 Q. In relation to race, did you expect PIRC to not simply  
19 identify overt examples of racism if they existed, but  
20 to look at underlying references that may be indicative  
21 of racism or racial motivation?

22 A. Of course.

23 Q. To consider --

24 A. I mean that's part of the work that they did in the  
25 statistical analysis. I mean PIRC was -- it was a  
26 fairly new organisation. It used to be complaints or

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1 Criminal Complaints Against the Police, so it was their  
2 own forces that dealt with that so they had their  
3 Criminal Complaints Against the Police Department in  
4 each of the police forces, then of course you had  
5 Police Scotland, and that resulted in having to set up  
6 PIRC so that there's an independent investigators  
7 independent from the police looking at Article 2  
8 requirements as well. That was required.

9 It used to be stated that, well, the independence  
10 comes from the involvement of the crown so albeit it's  
11 investigated by the police officers of the same force,  
12 at the end of the day it's going to be the crown that  
13 ultimately investigates and takes a decision. So that  
14 was the prevailing view at the time, but of course  
15 things move on and with the advent of Police Scotland it  
16 was decided, and I think it was the right decision, to  
17 set up an independent body and that's how PIRC came into  
18 being, but Kate Frame used to head the Criminal  
19 Complaints Against the Police Department at the  
20 Crown Office before she left to be head of PIRC so she  
21 had -- she had great experience in dealing with these  
22 types of cases.

23 Q. Thank you. Did you -- in terms of your expectation of  
24 Crown Office and to some extent PIRC, did you expect  
25 them to consider whether Mr Bayoh had been treated  
26 differently by the officers because he was black?

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- 1 A. Of course. It's all part of it.
- 2 Q. We've talked about Article 2. Were you -- given your  
3 experience in relation to race, were you also conscious  
4 of the obligations on PIRC and the crown in relation to  
5 Article 14 in conjunction with Article 2?
- 6 A. Well, Article 14 you require an Article 2 or some other  
7 article obligation before Article 14 kicks in, but I was  
8 well aware of that. I think it's in my statement as  
9 well, because I set out what the case law Convention  
10 jurisprudence is in this area and what the obligations  
11 are on the investigatory agency, PIRC and the crown.
- 12 Q. And we've heard that in terms of Article 14 in  
13 conjunction with Article 2 that both the crown and PIRC  
14 would have the duty to take all reasonable steps to  
15 unmask any racist motive and to establish whether or not  
16 ethnic hatred or prejudice might have played a role;  
17 would you agree with that?
- 18 A. Absolutely, I think I refer to it in my first statement.
- 19 Q. I think paragraph 33 may contain that. There we are.
- 20 A. Well, there it is.
- 21 Q. And when you say "take all reasonable steps to unmask  
22 any racist motive", how did that translate to your  
23 expectations of PIRC's role? How would you have  
24 expected them -- what steps would you have expected them  
25 to take?
- 26 A. Well, the overarching is to carry out that obligation as



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1 part of the investigation. What steps? Well, I mean  
2 that's for the investigators to identify what steps to  
3 discharge that obligation, but what they need to do is  
4 they need to investigate it up hill and down dale to  
5 identify or rule out any racist motive and that is overt  
6 or covert in the sense of unconscious prejudice, racial  
7 prejudice, that type of --

8 Q. So if we have heard evidence that there was language  
9 used within the statements of officers referring to  
10 Mr Bayoh as "coloured", making connections or possible  
11 links between the colour of his skin and terrorism,  
12 matters of that sort, the use perhaps in the surrounding  
13 circumstances of racial tropes or racially stereotypical  
14 language, of detrimental derogatory comments regarding  
15 black people or possibly to be interpreted in that way,  
16 are these the types of adminicles of evidence that you  
17 would have expected PIRC to be identifying and  
18 considering?

19 A. Absolutely. You know, use of language is important and  
20 that can -- that can identify an issue in relation to  
21 the wrong use of language. It can display a mindset,  
22 what the mindset is, and language is important and  
23 that's one of the things that we looked at when I  
24 chaired the diversity group at the Crown Office when I  
25 was Lord Advocate to looked at the language used.

26 I mean I grew up in the 70s and some of the language

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1 used that was part of everyday vocabulary people, if  
2 you're looking back 2024, you would be horrified. Some  
3 of the programs that were broadcast in the 70s under the  
4 guise of comedy, you look back and you're horrified at  
5 it. So it's important.

6 And I mean people always say, well, it's freedom of  
7 speech. Well, it might be freedom of speech, but if  
8 you're on the receiving end of it, it's not freedom of  
9 speech to the person on the receiving end so language is  
10 important and the use of language and the wrong use of  
11 language can give an insight into person's mindset and  
12 motivation.

13 Q. And for those listening, can you explain why is evidence  
14 as to -- that would relate to mindset or motivation be  
15 of value to the crown in the job that the crown are  
16 doing?

17 A. Well, it would be -- I mean I make the general point  
18 that I was aware at the time that -- and I had stepped  
19 down at the time that the final report and the work that  
20 the crown did and what the evidence was when the crown  
21 were preparing a case. So I'm really talking about this  
22 at a sort of overarching level but, for example, I think  
23 you referred to terrorist.

24 Q. Yes.

25 A. Well, I make a very obvious point, would the mindset be  
26 if it was a white person, would that person be referred

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1 to as a terrorist. So what I'm saying is language, use  
2 of language a, wrong use of language can be -- can be  
3 revealing sometimes and deserved of investigation.

4 Q. Thank you. And moving away from language at the moment,  
5 would you also have expectations that PIRC initially  
6 would consider perhaps patterns of behaviour, underlying  
7 patterns, whether they had used sprays or batons at  
8 other knife incidents, for example, or only in relation  
9 to this particular incident, would you have considered  
10 it a relevant line of inquiry to look into whether they  
11 treated all knife calls as potentially terrorist  
12 related?

13 A. Of course. An example I gave but patterns of behaviour  
14 are important. In my current job I deal with patterns  
15 of behaviour on a daily basis in trials so of course  
16 they're important.

17 Q. And what kind of pattern of behaviour, if identified, be  
18 indicative of -- how would that assist the crown in the  
19 job they have to do?

20 A. Well, I mean it depends what the patterns of behaviour  
21 are, but patterns of behaviour, along with the use of  
22 inappropriate language, can indicate -- can give an  
23 indication into someone's mindset.

24 Q. Right.

25 A. And motivations.

26 Q. Thank you. And then I think --

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- 1 A. But as I say, I don't know what the evidence was --
- 2 Q. No.
- 3 A. -- at the end of the day because I had stepped down by
- 4 then, but as a general point, as a general point of
- 5 principle, yes, I agree with that.
- 6 Q. And in your experience would you recognise that
- 7 comparator evidence could be of assistance in relation
- 8 to an investigation, for example, comparing actions
- 9 taken with -- in this particular circumstance compared
- 10 to how actions would be normally taken against a white
- 11 man?
- 12 A. Of course. I mean PIRC looked at the patterns of
- 13 behaviour as an example in relation to complaints
- 14 against the police, whether there was a spike in racial
- 15 complaints against police officers for Fife when
- 16 compared with other forces so these things -- these
- 17 things matter and is a legitimate line of inquiry, but,
- 18 again, I didn't see the results of the investigation so
- 19 I'm commenting on a general level.
- 20 Q. Yes. And finally, would you also consider it to be a
- 21 relevant line of investigation to consider the speed at
- 22 which officers elected to use force, for example,
- 23 against Mr Bayoh and consider whether there were any
- 24 underlying indications or from which an inference could
- 25 be drawn?
- 26 A. Well, it's very difficult to answer that question

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1 without the full panoply of circumstances that the  
2 police officers were dealing with so I don't think you  
3 could look at that in isolation. You would need to look  
4 at that in the round, what are the circumstances  
5 pertaining to that, you know, speed time in relation to  
6 whatever actions the police are proved to have taken.

7 Q. And in the absence of overt examples, would it be  
8 necessary for PIRC or for the crown to consider the  
9 whole circumstances in detail?

10 A. Oh, the whole circumstances have to be looked at as part  
11 of the investigation into all the circumstances.

12 Q. And was it any part of your expectation -- given what  
13 you've told us about your experience and how you viewed  
14 the significance of race, was it any part of your  
15 expectation that the issue of race would not be fully  
16 explored from the very beginning?

17 A. No, as I say front, left, centre, as soon as I heard  
18 about it, I knew and I wasn't alone in that.

19 Q. We've heard evidence from Mr McGowan in relation to the  
20 steps taken by the crown after the final PIRC report was  
21 received and his evidence is that in light of the  
22 circumstances that existed at that time and the work  
23 that was done by the precognoscers and Crown Counsel  
24 that, as he put it, there were further steps that could  
25 have been taken. In relation to all reasonable steps to  
26 unmask any racist motive, he said there were further

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1 steps that could have been taken.

2 A. I wasn't there at the time so I don't know what the  
3 further steps were, what he had in mind, but what the --  
4 if there were further steps to be taken, these were  
5 identified as part of the precognition process and those  
6 further steps required to be taken.

7 Q. Right. Perhaps we could look at your second statement  
8 now, please. And I think you point out in paragraph 2  
9 that you've actually been away from Crown Office now for  
10 around eight years.

11 A. Yes.

12 Q. Could we look at paragraph 4:

13 "The Jandoo report following the death of  
14 Surjit Singh Chhokar looked at inter alia liaison with  
15 the family and questions of how the crown dealt with  
16 racism and racially motivated crime. I was not involved  
17 in the Jandoo or the Campbell reviews at the time, but  
18 I was aware of the findings of the reviews. I was also  
19 aware that crown accepted the findings and  
20 recommendations of the reviews. I was not involved in  
21 the implementation of the recommendations of the  
22 reports."

23 But at paragraph 9 you do go on to say -- sorry --  
24 paragraph 6 you say:

25 "From memory, after the Jandoo report all policies  
26 were reviewed to make sure they were equitable and

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1 fair."

2 And:

3 "The prosecution policy was reviewed to ensure that  
4 racial motivation was identified and embedded in  
5 reporting and decision-making."

6 Then if we can move to paragraph 9, please, you say:

7 "I know from personal experience that precognition  
8 templates were amended to ensure that precognoscers were  
9 alive and required to address any issues or potential  
10 issues of racial motivation. A section was added to the  
11 precognition template narrative. I was involved in  
12 designing the templates."

13 I'm interested in exploring this issue with you.

14 A. Yes.

15 Q. But I'm conscious it's now half past 11?

16 LORD BRACADALE: We'll take a 20-minute break.

17 (11.30 am)

18 (A short break)

19 (11.55 am)

20 LORD BRACADALE: Ms Grahame.

21 MS GRAHAME: Thank you very much. We were looking at

22 paragraph 9 of your Inquiry statement and if we could  
23 have that back on the screen and you'll remember this  
24 related to something known as precognition templates.  
25 Tell us what precognition templates were.

26 A. Well, a bit of a history to get to explain. In the

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1           nineties what we wanted to do at the Crown Office was to  
2           try and improve the quality of precognitions and  
3           precognitions are -- originally were a bundle of  
4           statements and that then through the 60s then developed  
5           into assisting Crown Counsel with a narrative taken from  
6           the statements as to what the evidence say happened,  
7           together with an analysis of the evidence, sufficiency,  
8           problems with witnesses, et cetera, and recommendations.

9           So that's how it developed 60s and 70s. And of  
10          course what you had was you developed a mix of staff.  
11          So you had legally qualified procurator fiscal deputies  
12          who were doing precognition work and you also had  
13          precognition officers or non-legally qualified and when  
14          that was looked at we decided that you had to help and  
15          focus the mind of precognoscers, in particular  
16          precognition officers, as to the issues that required to  
17          be identified in a narrative and analysis,  
18          recommendations. So a group was set up of which I was  
19          involved, precognition working group, I may be wrong in  
20          that, but that's my recollection, and part of the work  
21          that was done was to develop templates. So in other  
22          words you have -- you're dealing with a robbery case so  
23          you would set a template for a robbery case as to what  
24          should be covered in the precognition. Of course it's  
25          not prescriptive. It depends on the case and what the  
26          evidence was, but it was designed to help the



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1 precognoscer as to what the issues are and I remember,  
2 although you know I have been away a long time from the  
3 crown, but I remember, because I was involved in  
4 designing the templates that motivation, racial  
5 motivation, homophobic motivation, et cetera was entered  
6 into the templates to help precognoscers with  
7 identifying what the issues that they required to  
8 address were.

9 Q. So it was designed as a prompt perhaps to remind  
10 precognoscers, whether legally qualified or not, that  
11 racial motivation, issues to do with race or other types  
12 of protected characteristics should be addressed in the  
13 narrative and analysis?

14 A. Not all cases obviously.

15 Q. No.

16 A. But as you say it's a prompt and it's like a menu from  
17 the template. If it's not an issue in the case, you  
18 don't need to address it, but it's, as you say, a prompt  
19 would be the best way to describe it.

20 Q. So something embedded automatically prompts the  
21 precognoscer to at least consider whether it's relevant  
22 to the case they have in hand?

23 A. Yes.

24 Q. And you have recalled here that those templates did have  
25 some entry which required people to consider racial  
26 motivation?

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1 A. That's my recollection. It's a long time --

2 Q. All right.

3 A. -- since these were produced. I have not kept a copy.

4 I am not with the crown. I have been away for a long

5 time, but that's my recollection.

6 Q. Because in light of this, we have explored the issue --

7 the Inquiry team have explored the issue of precognition

8 templates. Let me show you one which is in relation to

9 the CAAPD department, so COPFS 06461. It relates to a

10 standard CAAPD report and this --

11 If we can look at the top, it says "Criminal

12 Allegations Against the Police Division" and if we move

13 down, it invites the following entries to be included:

14 officer complained against, complainer, allegations,

15 linked criminal proceedings, chapter 24 disclosure,

16 category, and move down, circumstances. And that would

17 normally be contained within the narrative.

18 And then moving down, "Analysis of evidence.

19 Recommendation re criminal proceedings and malicious

20 complaint," and then "reported by". And as you will

21 see, if can move right down to the bottom, there's no

22 reference in this template of race, none whatsoever.

23 We've gone back to the crown who have continued to

24 look for other templates that may have existed. I have

25 been advised this morning that they're not able to find

26 any that include the issue of race.

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1 A. Well, it's my recollection. I drafted them. I drafted  
2 some of them. I didn't draft the CAAPD ones.

3 Q. Right.

4 A. But it's my recollection.

5 Q. So if you -- if at some point you drafted those with --  
6 to include race, given you experience, it would now  
7 appear that at least some of these templates do not  
8 include race. Do you have any comment to make about  
9 that?

10 A. Well, what I'm talking about from recollection is in the  
11 nineties. It's a long time ago and it's moved on, they  
12 may have moved on, I'm just speculating, I don't know.  
13 All I know is my recollection was that in drawing up  
14 templates there was a reference to racial motivation.

15 Q. At one time, perhaps in the nineties when you were  
16 drafting these templates, you obviously took the view  
17 that to have race added into them was something to be  
18 done and of benefit. Can you think of any reason why it  
19 would not be of benefit now to have race?

20 A. Of course, it would be of benefit now.

21 Q. Yes, all right. Thank you.

22 A. Not only race, but all the protected characteristics  
23 should be, if it's an issue in the case then of course.

24 Q. Would that -- in the same way you thought it would be of  
25 assistance to precognoscers, legally qualified or not,  
26 would it continue to be of benefit perhaps to

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1 precognoscers?

2 A. Of course.

3 Q. Yes. Can we turn now, please, to paragraph 24 of your  
4 statement in relation to Simon San -- sorry -- this must  
5 be the first -- sorry -- it will be the second Inquiry  
6 statement.

7 You're giving examples and you mention the murder of  
8 Simon San, a Chinese delivery driver, and you talk about  
9 the accused, John Reid, punched Mr San who fell and  
10 struck his head on the roadway and died from a cerebral  
11 bleed 30 to 40 minutes after the punch. Reid had flown  
12 the locus and went to a flat and confessed to another  
13 person and used racist language. The question was  
14 whether the crime was racially motivated. The answer on  
15 the evidence was that it was not racial aggravated. We  
16 made sure that the information was placed before the  
17 court. We also ensured this was fully explained to the  
18 family of Mr San.

19 So again, you've raised a number of issues here.  
20 This was a case which you yourself prosecuted, was it,  
21 or were involved in?

22 A. I was involved in it. I don't think I presented the  
23 narrative to the court on the plea, but I was involved  
24 in it, yes.

25 Q. Right. And you've talked there about the use of racial  
26 language, although you mention that it was after the

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1 actual --

2 A. I think it was about 30 minutes had lapsed and it was  
3 from memory the place he went to after punching Mr San.

4 Q. Right. You've talked there about placing the  
5 information before the court and explain the purpose of  
6 that.

7 A. Well, I mean there's a number of purposes. Firstly,  
8 it's to allow the court to give the court the  
9 information so they can take it into account in  
10 sentence. Secondly, it places the information in a  
11 public domain so that the public, the media, the family  
12 are all aware of it, that it's not suppressed, not  
13 hidden. And it also gives accountability, public  
14 accountability, in the sense that this is your  
15 assessment of the evidence and it allows anyone who  
16 disagrees with that assessment to challenge it, make it  
17 known, challenge it in writing, for example, or  
18 whatever.

19 Q. Thank you. Can we look now at paragraph 31. And we'll  
20 have that on the screen. It's a short paragraph. This  
21 is where you're asked about training, and you talk here  
22 about unconscious bias and racial language and you give  
23 an example in this paragraph and talk about:

24 "Whether it's a direct quote from a witness or an  
25 accused, this type of racial language was not to be  
26 used."

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1           And you talk about the significance of that and I  
2 noticed in paragraph 24 when you're talking about San,  
3 that you also say racist language was used.

4           Two points about this paragraph in particular.  
5 First of all, the example you give you've spelled out  
6 specifically and I wondered why in one paragraph you've  
7 described it as racist language without spelling it out  
8 in terms, but in this paragraph you have spelled it out  
9 in terms. Was there any reason for that distinction  
10 being drawn?

11       A. Not really. I can't think of any reason. I've just  
12 wanted to make the point that I was seeking to make  
13 about the use of such language and ensuring that that  
14 language is not used in a pre-cognition unless it's a  
15 direct quote, a piece of evidence.

16       Q. Right. Was this a direct quote from --

17       A. I think it was from --

18       Q. -- the case that you're referring to?

19       A. I think that was an example I gave, but in the  
20 Simon San case I recollect that 30 minutes after the  
21 incident that type of language was used in a  
22 conversation to someone else in a house about referring  
23 to someone in such pejorative language.

24       Q. Right. You've referred to that and give that as an  
25 example of unconscious bias. In this day and age, do  
26 you think that is unconscious bias?

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- 1 A. It would be both I think.
- 2 Q. Both conscious and unconscious. In any event, it's of  
3 relevance to any matters of criminality?
- 4 A. Of course.
- 5 Q. Yes, and you would expect in a narrative or analysis for  
6 that type of language to be addressed?
- 7 A. Of course. But, you know, when you're looking at what  
8 is the evidence that the actual crime was racially  
9 motivated, so you need to look at whether that could be  
10 a link to the actual crime or is it just -- is it racist  
11 attitudes and views. So I mean there's issues to be  
12 addressed which prosecutors should be experienced enough  
13 and able enough to be able to work their way through  
14 that.
- 15 Q. And I think the key is for those issues to be raised and  
16 addressed and considered?
- 17 A. Of course.
- 18 Q. Regardless of the ultimate decision taken, that's a  
19 matter for the crown, but it would be important for  
20 these types of matters, the use of language such as this  
21 to be addressed specifically within the body of the  
22 precognition?
- 23 A. Of course.
- 24 Q. Thank you. Can I move on to another section of your  
25 statement, paragraph 49, which I think is your first  
26 statement. And I think in at this section, it's called

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1 section 4, and you start to talk about or maybe earlier  
2 above that there's a section 4 is mentioned and there  
3 you start to talk about the postmortem. There we are.

4 Section 4:

5 "Postmortem examination and release of Sheku Bayoh's  
6 body."

7 And you have given the Chair a detailed explanation  
8 of the final postmortem report.

9 A. Yes.

10 Q. Could we look at paragraph 49, please:

11 "Overall it was not possible for the pathologist to  
12 be sure what had been the most significant factor in  
13 death and as such the cause of death was best regarded  
14 by them as being sudden death in a man intoxicated by  
15 MDMA (ecstasy) and alpha-PVP whilst being restrained."

16 And you say:

17 "The results of the postmortem examination would  
18 have informed the further investigations instructed by  
19 the crown and undertaken by PIRC."

20 We've heard evidence that the final postmortem  
21 report was received on 18 June after the toxicology  
22 results were in.

23 A. Yes.

24 Q. And various other investigations of that sort, although  
25 the postmortem itself had been carried out on 4 May.

26 Regardless of whether the ultimate proceedings were



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1 a criminal trial or an FAI, the crown would wish to lead  
2 evidence, regardless of which forum it was, from a  
3 pathologist to establish what caused or materially  
4 contributed to the death; do you accept that?

5 A. Yes.

6 Q. And there were three factors named in the cause of death  
7 from the final postmortem report and they were MDMA  
8 (ecstasy), alpha-PVP, and restraint.

9 Now, I think in paragraph 49 you say:

10 "It wasn't possible for the pathologist to be sure  
11 what had been the most significant factor in the death."

12 But would you agree that all three of those factors,  
13 the MDMA, the alpha-PVP, and the restraint, were a  
14 material contribution to death?

15 A. According to the pathological evidence.

16 Q. Yes.

17 A. Just make an obvious -- well, I think it's an obvious  
18 point that part of the crown investigations dealing with  
19 the pathology, one of the things, and you've got what  
20 the pathologist considered contributed to the death of  
21 Sheku Bayoh, one of the things you've got to deal with  
22 is to rule out matters. So at an inquiry or a criminal  
23 prosecution you may be met with, well, is it  
24 such-and-such, has that been considered, and it's  
25 really, really a duty of the investigator to look at the  
26 pathology, identify any possible other explanations and

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1 rule that out if possible and get expert evidence on  
2 that and even that would include speculations,  
3 speculative cause of deaths, that type of thing.

4 And the reason is that you may be faced at say a  
5 criminal prosecution with a defence pathologist who's  
6 putting forward a theory and if you haven't dealt with  
7 it, ruled it out or whatever, then your investigation is  
8 deficient and what you're doing is you're -- there's a  
9 hole in it which someone else could fill.

10 Q. Obviously if the defence pathologist comes up with a new  
11 theory, you would anticipate the crown would be given an  
12 opportunity to explore that themselves?

13 A. You would.

14 Q. So in relation to cause of death you would want to rule  
15 out things such as natural disease of some description?

16 A. Yes.

17 Q. Such as perhaps an infection or an underlying medical  
18 condition?

19 A. Yes.

20 Q. You would want to rule out a prior assault --

21 A. Yes.

22 Q. -- such as a stabbing or a head injury or something  
23 along those lines?

24 A. Yes.

25 Q. You would want to look at removing the possibility of  
26 any underlying, as I've said, preexisting condition of

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- 1           some description. And the final postmortem report  
2           actually addressed all of those issues, did it not?
- 3           A. Mm-hm.
- 4           Q. And Dr Shearer and Dr Bouhaidar took the view that all  
5           of those could be excluded as causes of death and the  
6           cause of death for Mr Bayoh was these three factors,  
7           MDMA, alpha-PVP and restraint. So if it's sufficient  
8           for the crown's purposes to lead evidence at trial or an  
9           FAI as to what caused or materially contributed to  
10          Mr Bayoh's death, can I ask you in relation to this  
11          paragraph, was it not sufficient for the crown to simply  
12          proceed on the basis of the cause of death given by  
13          Dr Shearer and Dr Bouhaidar? Why was it necessary in  
14          your view to consider what was the most significant of  
15          those three factors?
- 16          A. Well, I mean the case law is such that that is something  
17          which will be an issue at the case, to what extent did  
18          all three or taken individually -- for example, if it's  
19          put to the pathologist, well, actually it was alpha-PVP  
20          which could have caused death without any contribution  
21          from MDMA or restraint, then that's something which you  
22          would have to address and that's what precognition  
23          consultation with the pathological witnesses would do  
24          and it may be that you need to get a further opinion  
25          when someone with -- a specialist in a particular area.
- 26          Q. And my understanding of the position, and it will

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1 obviously be a matter for the Chair, that alpha-PVP, for  
2 example, could of itself cause death?

3 A. Well, that's the issue I'm saying. You would need to  
4 look at what is the contribution, could each of these  
5 individually on their own without -- and that would be  
6 highly relevant I would have thought. Restraint for  
7 example on its own, highly relevant in relation to the  
8 investigation.

9 Q. We've heard evidence that restraint on its own can cause  
10 death.

11 A. Well, that's the type of thing that you need to  
12 investigate and get -- identify the definitive position  
13 so that you know where you are in relation to the  
14 decision-making.

15 Q. But if it's sufficient for the crown to simply lead  
16 evidence to prove that restraint, for example, was a  
17 material cause of death, why did the crown need to  
18 investigate further what proportion or whether it was  
19 significant or otherwise? You already have a report  
20 saying it is a material cause of death, that restraint  
21 was significant, it could not be excluded as de minimis.

22 A. Well, you would want to speak to the pathologist to find  
23 out what they meant by that.

24 Q. Yes, so in terms of your expectations after that report  
25 came in, would you have expected either PIRC or your own  
26 staff to speak to Dr Shearer or Dr Bouhaidar to explore

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- 1           these issues and discuss the postmortem?
- 2           A. I would.
- 3           Q. We've heard evidence from the lead investigator at PIRC
- 4           that that wasn't done?
- 5           A. Well, it's a matter for PIRC to answer, but I would
- 6           certainly expect the crown to do that.
- 7           Q. And we've heard evidence from Les Brown that in fact as
- 8           matters progressed with the investigation Crown Counsel
- 9           specifically accepted that cause of death was a given.
- 10          They refer to the case of Johnstone against HMA, which
- 11          I'm sure you're aware of, it's in the Bench Book as I
- 12          understand it, that what was provided in the final
- 13          postmortem report where restraint was specifically named
- 14          as one of the factors which contributed to death, and
- 15          that was sufficient. So was there -- was there a need
- 16          for the crown to explore this proportion issue further?
- 17          A. I can only speak personally. If it was me as
- 18          Crown Counsel that was dealing with the case, I would
- 19          want the pathologist conducting the postmortem to be
- 20          spoken to and consulted with as to what is the
- 21          contribution, primary, major, what minor, and that in my
- 22          experience in dealing with pathology, very important
- 23          I would have thought.
- 24          Q. Would it matter if it was a minor cause of death if it
- 25          has provided a material contribution to death?
- 26          A. Well, legally it wouldn't matter, but in relation to the

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1 evidence, it does matter. For example -- if for example  
2 you prosecuted police officers on the back of following  
3 this and restraint played a minor part, then that would  
4 if they were convicted affect sentence, for example,  
5 I would have thought so it is relevant.

6 Q. Right. Les Brown also gave evidence on 17 April that:

7 "From what I do recollect was that the  
8 Lord Advocate, and I was in agreement with this, he was  
9 keen to try to separate out, so far as possible, whether  
10 it was possible -- sorry, I'll rephrase that. He was  
11 keen to see whether it was possible to separate out the  
12 extent to which each of those factors had played a  
13 part."

14 A. Well, for the reason I've explained.

15 Q. We've heard that there were a number of reports  
16 ultimately obtained by the crown from a number of  
17 forensic pathologists.

18 A. Mm-hm.

19 Q. We've heard that not only was there this report from  
20 Dr Shearer and Dr Bouhaidar, who I should say were not  
21 being criticised by anyone else, that there was also  
22 forensic pathology reports from Professor Crane, a  
23 Dr Nat Carey, a Dr Lawler. There were a number of  
24 pathologists and ultimately all said the same cause of  
25 death, subject to one element. They also added in the  
26 struggle against restraint as well as the restraint.

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- 1 Can you now envisage why so many pathologists would be  
2 required?
- 3 A. Well, in a case like this, which is complex  
4 pathologically, it gives confidence. It can flag up  
5 issues that haven't been considered by the pathologists  
6 and, as you said, I think you said that the additional  
7 pathologists had mentioned struggle so that was flagged  
8 up. I mean I haven't seen those reports, but in my  
9 experience of complex cause of death then it seems to me  
10 that it's sensible to get third opinions on other  
11 matters on that.
- 12 Q. We've heard evidence that the final forensic pathologist  
13 who looked at this from the first instruction until the  
14 final report was received, there were a number of  
15 communications and reports during that period, but that  
16 period took 14 months.
- 17 A. Sorry. Give me that again.
- 18 Q. So from the first instruction -- there were a number of  
19 letters of instruction, but from the first date of the  
20 first one to the final report that was received was a  
21 period of 14 months.
- 22 A. For the pathology report?
- 23 Q. For the final report from the final pathologist. And I  
24 wonder if you were concerned in any way about the  
25 impact -- often experts can cause -- can take a  
26 considerable period of time. I'm wondering for your

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1 thoughts about the impact of delay, the period of time  
2 that that took and the impact on the overall  
3 investigation.

4 A. Well, it's difficult to say, and the time taken I think  
5 is demonstrative of the fact that it was complex, and  
6 there's other -- I mean there's issues to consider  
7 around this. And for me what I want is I want a  
8 thorough report, thorough investigation, there weren't  
9 matters that have been raised to be considered, and if  
10 the report took 14 months, then if that's what it took,  
11 you know, for the report to be completed and all these  
12 matters to be considered and, as you say, it's not  
13 disputed the original postmortem and cause of death  
14 issued in the report 14 months later, that just  
15 demonstrates it was well thought out, I would say, and  
16 carefully considered by the pathologist.

17 And you have got to remember as well is that the  
18 pathologist would be well aware of the profile of this  
19 case and the pathologist would know that it was  
20 important to be thorough, to be careful, to get it  
21 right.

22 Q. At the time you were Lord Advocate, was it the normal  
23 course of events that when a final postmortem became  
24 available to the crown and a two doctor postmortem that  
25 that would -- the thoroughness and the way that was  
26 written, the way that was conducted, would that



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- 1 generally be reviewed by a subsequent pathologist to  
2 check it was thorough and considered?
- 3 A. Just depends. I mean the importance of this case and  
4 the profile that this case had and the issues in  
5 relation to restraint, postural asphyxia, intoxication,  
6 all this, it's important I would have thought that the  
7 crown has confidence in the original pathologist's view  
8 and to get a third opinion on specific issues. I can't  
9 see anything wrong with that.
- 10 Q. All right. From your recollection, when this final  
11 postmortem report came in, was there anyone in your --  
12 in Crown Office or yourself to have any concerns about  
13 the pathologists, that's Dr Shearer and Dr Bouhaidar?
- 14 A. No, I don't think -- you mean the ability of and  
15 experience of the pathologist? Certainly I didn't.
- 16 Q. All right, thank you. I would like to move on to a  
17 comment that is in a document which is Lindsey Miller's  
18 Inquiry statement, SBPI 00428, and this relates to a  
19 period after the first PIRC report has been received so  
20 it's after the 7 August. It relates to a meeting  
21 which -- paragraph 59, please, a -- meeting which you  
22 had with the family on 12 August.
- 23 Now, this is Lindsey Miller's Inquiry statement to  
24 the Inquiry:
- 25 "The first part of my note from 12 August 2015 is  
26 not a note of a meeting with Mr Bayoh's family, but the

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1 note of a premeet before the anticipated meeting with  
2 the family."

3 So there was a meeting with you I think prior to  
4 meeting with the family.

5 "I was present at that meeting along with the  
6 Lord Advocate, John Logue and Stephen McGowan. I have  
7 not attributed the comment about the PIRC report being a  
8 'piece of rubbish' to anyone, simply noted that it was  
9 said, and I cannot now recall whether that was said by  
10 someone at the meeting directly, or them quoting someone  
11 else. I say that because of the use of quotation marks,  
12 which suggests one of the attendees at the meeting was  
13 quoting someone else."

14 Do you remember who said the first PIRC report was a  
15 piece of rubbish?

16 A. News to me. I didn't certainly say it and I didn't have  
17 a knowledge and I wouldn't describe it is that. So I  
18 have no knowledge of that.

19 Q. Right. Do you remember from that meeting anyone in your  
20 hearing saying that?

21 A. No, I don't.

22 Q. Right. What was your view of the first PIRC report?

23 A. You mean the interim report?

24 Q. Yes, we've heard that -- I think Les Brown when he gave  
25 evidence corrected me when I called it an interim report  
26 and he said it wasn't actually designed initially as an

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1 interim report, he thought that would be the PIRC  
2 report, but subsequently, because further investigations  
3 were required by the crown, that it then became referred  
4 to as an interim report by others.

5 A. I understood it to be an interim report.

6 Q. Did you?

7 A. I didn't really have a view on it to be honest, because  
8 it was an interim -- whatever terminology used -- it was  
9 an interim report, a final report to come in. You would  
10 work through the final report once it came in and you  
11 would conduct your own investigation. I didn't have a  
12 view on whether it was a good, bad, indifferent report  
13 at all.

14 Q. Right. In your role, did you actually read that first  
15 PIRC report or did you rely on information from staff?

16 A. A bit of both actually, but I remember I did read it  
17 when it came in.

18 Q. What parts of it did you read?

19 A. I read -- I don't think I read the appendices and I  
20 particularly --

21 Q. We've heard that was statements and the like.

22 A. Yes, I didn't read that. I read the actual body of  
23 report itself with a particular focus on the  
24 circumstances which were set out in it and I think I  
25 looked at the pathology as well.

26 Q. Right. In relation to your expectations after that

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1 first interim PIRC report was obtained, what -- how did  
2 you envisage matters progressing from that point?

3 A. What do you mean from the interim report to call it  
4 that?

5 Q. From the interim report.

6 A. Right.

7 Q. We've heard that after that -- we've heard evidence from  
8 Les Brown that he looked through a number of matters, he  
9 then did a letter on 2 September.

10 A. Yes.

11 Q. Detailed letter giving further more detailed directions  
12 to PIRC.

13 A. Sorry. What year was that?

14 Q. That was 2015.

15 A. Yes, okay.

16 Q. So the first or the interim report is received,  
17 Les Brown head of CAAPD works on that and does a  
18 detailed letter of the 2 September --

19 A. Yes.

20 Q. -- instructing a number of lines of investigation for  
21 PIRC to pursue. They then took a period of around one  
22 year --

23 A. Mm-hm.

24 Q. -- between August 2015 and August 2016 for the final  
25 PIRC report to be received.

26 A. Well, exactly that. That's what I would expect.

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1 Les Brown, experienced, able, been in charge of  
2 investigation, preparation, from the crown's point of  
3 view to go through it, identify the issues which need to  
4 be addressed, let PIRC know about them and these will be  
5 addressed in the final report.

6 Q. And what sort of engagement did you have with Les Brown  
7 in relation to the work that was being done during that  
8 period, that year?

9 A. Not in detail, a kind of overview. It would tell me  
10 what the issues are, but it's the official's job to  
11 interact with PIRC at the end of the day, to move it  
12 forward and the final report comes in, to conduct the  
13 crown investigations, to prepare case papers, document,  
14 precognition, call it what you want, and identify  
15 Crown Counsel to report it to them.

16 Q. Right. I would like to move on to an issue regarding  
17 instruction of experts.

18 A. Mm-hm.

19 Q. We've heard that PIRC were asked to identify experts --

20 A. Mm-hm.

21 Q. -- as part of their investigation. Prior to the final  
22 report being received by the crown, PIRC were to gather  
23 in CVs and they were to make recommendations to the  
24 crown as to who should be instructed and then once the  
25 crown had approved an expert, the PIRC prepared a draft  
26 letter of instruction which would be checked by

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1 Crown Office and then sent off to the expert. And that  
2 was happening at the period of time shortly prior to the  
3 final PIRC report being prepared and submitted.

4 Can I ask you, did you have any concerns at that  
5 time about PIRC being asked to do this work in relation  
6 to experts, particularly medical experts? We've heard  
7 evidence that maybe their experience of doing that was  
8 limited.

9 A. No, because it would be superintended by the crown and  
10 it's the crown's decision in what experts are instructed  
11 and the investigators would have an input in that. They  
12 made recommend -- I think it was a letter, a detailed  
13 letter setting out suggested experts, but ultimately  
14 it's a decision for the crown.

15 Q. So were you happy that your staff would ultimately take  
16 the final view about which experts were to be  
17 instructed?

18 A. Yes, I think is there not -- there's a memorandum of  
19 agreement between PIRC and the crown.

20 Q. Yes, we've heard evidence about that.

21 A. Right, I think it may be covered in that.

22 Q. But were you comfortable that your staff would deal with  
23 the issues of who was to be instructed and how they were  
24 to be instructed?

25 A. That was my understanding. I was comfortable with that.

26 Q. We've heard that the first couple of experts that were

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1 instructed were a Dr Payne-James and a Dr Steven Karch?

2 A. Mm-hm.

3 Q. And they were instructed -- actually the work had been  
4 progressed prior to the final PIRC report, but they were  
5 instructed shortly after that was received.

6 Can we look at paragraph 117 of your Inquiry  
7 statement. I think this is Lindsey Miller's on the  
8 screen. There we are. 117. "Issues regarding  
9 Dr Steven Karch", you have addressed this in your  
10 statement:

11 "The recommendation of this expert was initially  
12 proposed by PIRC. It would have been done through an  
13 assessment of his experience and qualifications.  
14 Dr Karch is a forensic pathologist who is expert in  
15 cardiac pathology. He is a fellow of the Faculty of  
16 Forensic and Legal Medicine of the Royal College of  
17 Physicians in London. He served as a cardiac  
18 pathologist in the office of San Francisco Medical  
19 Examiner and is the author of a number of books and has  
20 given evidence in a number of trials ...."

21 Do you remember now was his name first mentioned by  
22 PIRC or from someone in Crown Office?

23 A. I can't answer that, because I can't remember who the  
24 genesis of Dr Karch was.

25 Q. Right. You have said that:

26 "It would have been done through an assessment of

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- 1 his experience and qualifications."
- 2 Who did you expect to carry out that assessment of
- 3 his experience and qualifications?
- 4 A. Well, the people that were involved in the process was
- 5 PIRC and Les Brown.
- 6 Q. Would you have expected PIRC to carry out that
- 7 assessment or Les Brown?
- 8 A. To have an input. To have an input.
- 9 Q. Would you have expected them to work together on that?
- 10 A. Yes.
- 11 Q. Right. And was it your expectation that either PIRC or
- 12 Les Brown would assess independence, impartiality of
- 13 Dr Karch and confirm he had no conflicts?
- 14 A. Well, yes, I would expect that, if that information was
- 15 identifiable. I think there was an issue with him.
- 16 I think part of it was that he went to the press.
- 17 Q. Yes, you deal with that in your statement. I'm
- 18 interested in his experience and qualifications, first
- 19 of all.
- 20 A. Yes.
- 21 Q. So who would you have expected to address those issues
- 22 regarding his qualifications and his experience?
- 23 A. Both, Les Brown and PIRC.
- 24 Q. To work together on that?
- 25 A. Work together, yes.
- 26 Q. And in terms of assessing his independence and



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- 1           impartiality?
- 2           A.  It's part of it.
- 3           Q.  And any conflicts that he may have had?
- 4           A.  Part of it, yes.
- 5           Q.  Part of it.
- 6                     Now, we've heard evidence, and there is evidence
- 7           available to the Chair, that Dr Karch was not in fact a
- 8           forensic pathologist, he had never conducted any
- 9           autopsies, and we have other evidence available to
- 10          the Chair that he was being instructed for the purposes
- 11          of expertise in toxicology.  Do you have any
- 12          recollection of that?
- 13          A.  No.
- 14          Q.  No.  So what was your understanding of why Dr Karch was
- 15          being instructed?
- 16          A.  As it says in paragraph 117, the cardiac pathology.
- 17          Q.  Right.  And why were you interested in cardiac
- 18          pathology?
- 19          A.  I think -- I need to go back to the original postmortem
- 20          report, but from memory it was cardiac arrhythmia was
- 21          referred to so that would be an issue.  You would need
- 22          an expert for that just to look at that as an issue.
- 23          Q.  That was your recollection of the reasons --
- 24          A.  That's my recollection.
- 25          Q.  -- the reasons why.
- 26          A.  But as I say, I didn't have a detailed involvement in

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1           that, in the selection of Dr Karch or looking at his  
2           qualifications, independence, objectivity, that type of  
3           thing.

4           Q. Do you remember any part of the instruction being in  
5           relation to toxicology or the drugs that were mentioned  
6           in the final postmortem?

7           A. I can't recall that. That doesn't mean that wasn't the  
8           case but --

9           Q. Right.

10          A. -- I don't recall that.

11          Q. And then if we look at paragraph 120:

12                        "It's my recollection that there was a  
13                        misunderstanding that Dr Karch was instructed on excited  
14                        delirium. This was not the case. He was instructed on  
15                        his expertise on cardiology."

16          A. That's my recollection.

17          Q. And so if there's been any suggestion or concern  
18           expressed by other witnesses that he was instructed on  
19           the basis of his views on excited delirium, does that  
20           accord with your recollection?

21          A. No, because I was specifically -- I remember asking  
22           about this, because I think it was raised at one of the  
23           meetings with the family and I remember specifically  
24           asking is he being instructed on excited delirium.  
25           I was reassured that he wasn't. It was in relation to  
26           that area. That's my recollection.

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- 1 Q. So certainly in terms of your understanding and  
2 awareness at that time --
- 3 A. Mm-hm.
- 4 Q. -- you were not seeking an opinion from Dr Karch --
- 5 A. No.
- 6 Q. -- on excited delirium?
- 7 A. Yes. Earlier in my evidence I talked about ruling out  
8 things, because it's as important as ruling in things,  
9 and excited delirium was something that would have to be  
10 dealt with, ruled out or whatever so I remember that,  
11 but I wasn't heavily involved in that area, but I do  
12 remember saying, look, if this is an issue, you need to  
13 look at this and you need to either rule it out or rule  
14 it in and if you need expert evidence on it, you would  
15 need to get expert evidence on it and the expert  
16 evidence may be that, look, this is bogus or whatever,  
17 this is not a factor. So that is something that you  
18 would want to address.
- 19 Q. And if the final postmortem report from Dr Shearer and  
20 Dr Bouhaidar ruled out excited delirium and said it's  
21 not a pathological condition and spoke of perhaps being  
22 more a psychiatric condition at best, but not one for  
23 pathologists, would you have considered it needed to be  
24 ruled out further based on that?
- 25 A. I think I would. I would want to have the confidence,  
26 reassurance, that that was ruled out.

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1 Q. And if it was possibly considered at that stage to be a  
2 psychiatric condition, what sort of expert would you  
3 consider the crown would have to go to do that ruling  
4 out exercise?

5 A. It's kind of difficult to say in the abstract. I would  
6 need to look at what the information is about  
7 psychiatric condition. I would, if I was dealing with  
8 it, that particular issue, I think I would take  
9 soundings, I would speak to people that I respected,  
10 I would take soundings on it and try and identify an  
11 appropriate perhaps psychiatric witness that would speak  
12 about it and explain what it is and why that's not a  
13 factor in this particular case so that evidence is  
14 available to present to the court. But it depends. It  
15 may be it's a combination of both say a third opinion in  
16 relation to the two pathologists that said it's not a  
17 pathological condition, it's a psychiatric condition, I  
18 might get a third opinion in that -- on that and I would  
19 also consider whether or not to get expert psychiatric  
20 evidence.

21 Q. And so would the crown be looking to instruct a  
22 consultant psychiatrist or someone along those lines to  
23 express a view?

24 A. It's a possibility. I don't know. I need to look at,  
25 you know, what the circumstances are. It may be it's  
26 a -- you know, it's a step-by-step approach. You know

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1           you've got further information and you look at that and,  
2           you know, your mind is focusing in on the issue and what  
3           particular experts, if any, that may be required to deal  
4           with that, but, as I say, part of the preparation of a  
5           case is to prove what it's not.

6           Q. Right. And do you remember why Dr Payne-James was  
7           instructed? You've talked to us about Dr Karch. Do you  
8           remember why --

9           A. No.

10          Q. -- Dr Payne-James was instructed?

11          A. I don't.

12          Q. Do you remember anything about him?

13          A. No.

14          Q. Do you remember what specialism --

15          A. I remember the name.

16          Q. The name.

17                    Can we look at the letters of instruction that were  
18                    sent by PIRC to those experts. Let's look at Dr Karch's  
19                    first, PIRC 03434B. See this is a letter from Dr --  
20                    from PIRC to Dr Karch in August 2015. This letter  
21                    actually was sent out just shortly after the interim  
22                    PIRC report was sent. And if we could look at the  
23                    actual instructions, you see there letters (a) to (d):

24                    "Please accept this letter as formal instruction to  
25                    produce an expert witness report and documents are  
26                    attached."

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1           There's an expert witness package attached. You'll  
2 see that it refers to:

3           "The physiological effect of the drugs detected in  
4 the toxicology sample, individually or in combination,  
5 on the deceased in the circumstances of his arrest.

6           "(b) The physiological effect of the CS PAVA spray,  
7 individually or in combination, on the deceased in the  
8 circumstances of his arrest.

9           "(c) The physiological effect of the physical  
10 restraint of the deceased in the circumstances of his  
11 arrest.

12           (d) And the physiological effect of all three in  
13 combination."

14           There's no reference there to cardiology or cardiac  
15 pathology or, in fact, any reference to the heart at  
16 all?

17 A. Well, that's contrary to my understanding.

18 Q. All right. And then can we look at the other letter of  
19 instruction, PIRC 03435A. This is the letter of  
20 instruction dated 10 August 2015 to Dr Payne-James, and  
21 can we look at his instruction also further down the  
22 page, please, looking for (a) to (d) also. There we  
23 are:

24           "Please accept this letter as formal instruction."

25           And you'll see that (a) to (d) are in exactly the  
26 same terms and we've heard that Dr Payne-James and

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1 Dr Karch are different -- work in different fields, but  
2 the letter of instruction appears to simply cover the  
3 same wording and the same questions to each doctor.

4 Do you have any concern looking at that?

5 A. Well, I mean I wasn't involved in it, no knowledge of  
6 it, certainly contrary to my understanding. I don't  
7 know why and I don't have a recollection of why this  
8 expert was instructed.

9 Q. Right. But in terms of your expectations regarding  
10 instructing further experts, would you have expected  
11 their letters to be tailored to each particular  
12 specialism that they have and seeking an opinion from  
13 each expert within the realms of their areas of skills,  
14 qualifications, expertise?

15 A. I would and, further, I would expect -- in addition to a  
16 letter of instruction, I would expect conversations to  
17 take place with the expert in advance of the letter of  
18 instruction.

19 In my experience if you're instructing an expert you  
20 would have had detailed conversation with the expert.  
21 You would want to see the expert's CV. You would  
22 want -- do some research yourself to check expertise of  
23 the expert. You would also, again, do some research on  
24 whether there's issues with a particular expert. You  
25 would speak to the expert having done that homework.  
26 You would identify from speaking to them what their area

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1 of expertise is, what they could add if anything, what  
2 they would need if an expert was appropriate, what  
3 information they would need, what is the limit of their  
4 expertise, and whether or not they would accept the  
5 work, timescales in reporting, all these things you  
6 would -- I mean there's a process. It's just not --  
7 I wouldn't suggest it's formulaic. Instruction of an  
8 expert is an important thing.

9 Q. Thank you.

10 A. And takes time.

11 Q. I would like to move on to an issue regarding what was  
12 known and described in evidence as a reviewing  
13 pathologist. Can I just explain a little of the context  
14 of the evidence that we've heard so far.

15 We've heard that there was a forensic pathologist  
16 instructed called Dr Lawler and there were a number of  
17 letters of instruction and reports sent to him and we've  
18 heard evidence from Les Brown that -- about the genesis  
19 of that idea that there would be this reviewing  
20 pathologist and I would like to -- he thought you were  
21 the Lord Advocate at the time that this issue arose and  
22 I would like to ask if you remember this.

23 A. So when was Dr Lawler?

24 Q. He wasn't instructed when you were still Lord Advocate,  
25 but I'll tell you what the evidence of Les Brown is, and  
26 see if it prompts any memories. So he talked about a



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1 reviewing pathologist:

2 "This was a course of action that had been I think  
3 suggested by the Lord Advocate at an early stage in the  
4 investigation."

5 And he later clarified that he meant it was  
6 Frank Mulholland, as he recollected, that raised the  
7 question of the benefit of having a reviewing  
8 pathologist. And he talked about identifying a  
9 reviewing pathologist and identifying Dr Lawler and, as  
10 I understood his evidence, it was to have a pathologist  
11 come in and review all the reports that had been  
12 obtained by the crown.

13 And I'm wondering if in light of Les Brown's  
14 suggestion that you were the Lord Advocate that came up  
15 with the idea and suggested the idea and discussed it  
16 with him, do you remember that?

17 A. I don't. He wasn't instructed during my time.

18 Q. No, not at that time.

19 A. If I'd suggested it, he would have been instructed at an  
20 early stage I would imagine, but I don't -- I don't --  
21 when you put it to me, I don't think it's necessarily a  
22 bad idea in a complex case such as this. Someone can --  
23 an experienced pathologist who's reviewing matters can  
24 identify issues that you haven't thought of or give  
25 information to you and expertise on areas that perhaps  
26 you've not considered.

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1           So if a sort of overview, third person pathologist  
2           overview, was to happen you would want that person in  
3           pretty close to the start so he's not been instructed so  
4           and I mean I have got a decent memory, I don't recollect  
5           that, and the fact that he wasn't instructed during my  
6           time would maybe -- would support the fact that maybe it  
7           wasn't me, but I'm not sort of departing from that could  
8           be a good idea. It would depend on the circumstances.

9           Q. Have you in your experience used a review -- a  
10           pathologist in this way as a reviewing pathologist --

11          A. Yes.

12          Q. -- prior to the involvement with --

13          A. Yes.

14          Q. You have. Can you explain to us how that works.

15          A. Well, cold cases, for example. In cases where the  
16           pathology -- at the time you have a postmortem report  
17           and, you know, 20 years down the line you're looking at  
18           a case, there may be issues with the pathology, the  
19           general pathologist at the time. You might want someone  
20           to look at that, not to become an expert witness, but to  
21           look at it to give you an understanding of what the  
22           issues are, could be, what the defects are.

23           I mean you've got to remember, we all deal with  
24           medical evidence, pathological evidence, but we're not  
25           pathologists so it can assist in those types of cases.  
26           I have seen it done in complex -- in cases of complex

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1 pathology to give you a reassurance, but I mean I'm just  
2 going kind of setting out in general terms when it can  
3 be of use.

4 Q. Is that a pathologist who would -- other evidence we've  
5 heard is a pathologist could become part of the team to  
6 help the prosecutors understand evidence and work  
7 through that evidence?

8 A. I'm not sure part of a team in the sense of the  
9 prosecution investigators but without instructing that  
10 pathologist as an expert witness, it can help to  
11 identify to give a commentary on what's went on before  
12 and identify any issues, any flaws, any defects,  
13 anything that you need to address.

14 Q. Right.

15 A. So there is benefit to it but it depends on the  
16 circumstances.

17 Q. Well, given your own experience of having a pathologist  
18 assist, would you expect that pathologist, that forensic  
19 pathologist, to then be asked to comment on the opinions  
20 of a consultant psychiatrist, a consultant in emergency  
21 medicine or a consultant clinical toxicologist so  
22 separate areas of specialism.

23 A. It's out with their expertise.

24 Q. Sorry?

25 A. It's out with their areas of expertise.

26 Q. And would you agree if it's out with their areas of

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1 expertise it would not be admissible?

2 A. What's the point.

3 Q. What's the point.

4 A. But I mean I wouldn't even do it, ask an expert witness  
5 who's a for example a reviewer, to comment on areas out  
6 with their expertise, what's the point.

7 Q. Thank you.

8 A. If I wanted someone to comment on toxicological  
9 evidence, it would be a review toxicologist.

10 Q. Right. Presumably if you wanted someone to comment on  
11 toxicology evidence, you would want them to have formal  
12 qualifications in toxicology.

13 A. Of course, and experience.

14 Q. And experience. The combination would be required?

15 A. Yes.

16 Q. Can I move on, please, to another matter. If we look at  
17 SBPI 00476, there we are, back to your statement and  
18 paragraph 80, please.

19 "PIRC and the Scottish Police Federation media  
20 releases are of course a matter for PIRC and SPF. I was  
21 aware that the family were concerned and upset at such  
22 releases and anonymous briefings and as a result I wrote  
23 to the Chief Constable on 21 May 2015 expressing concern  
24 about SPF press briefings. The following is an extract  
25 from this letter."

26 And then you quote:

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1            "I share your concern in relation to the briefing of  
2            the press and agree that it is very unfortunate that the  
3            Police Federation saw fit to put information into the  
4            public domain at such a sensitive time and when the  
5            facts had still to be established. This was in my view  
6            unhelpful and caused the family of the deceased  
7            considerable distress on the day that I met with them at  
8            Crown Office together with their solicitor ..."

9            Can I ask you, obviously you have expressed concern  
10           there about comments made by the SPF, why did you elect  
11           to write to the Chief Constable rather than SPF?

12          A. I think from recollection the Chief Constable had raised  
13           it with me as well, so -- I mean the action I took was  
14           to put something out in the media, I think you have got  
15           the media release.

16          Q. We'll come on to that.

17          A. Yes, so I didn't see -- I thought the Chief Constable  
18           was an appropriate person to write to to express that.

19          Q. Did you copy that to SPF?

20          A. No, I don't think I did.

21          Q. Why not?

22          A. Not sure.

23          Q. Was there any reluctance to address matters direct with  
24           the SPF?

25          A. Not on my part. I wouldn't hesitate in addressing  
26           issues but I can't remember the circumstances at the

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- 1 time but what was agreed.
- 2 Q. At that time was there any reason not to write to the  
3 SPF?
- 4 A. No, I mean you have made the point to me and I think  
5 it's a good point.
- 6 Q. All right. Let's look at some other paragraphs, 99, 100  
7 and 102 and I think you also make comments about media  
8 issues. 99:
- 9 "I wrote to the Chief Constable on May 2015  
10 expressing my concern at the SPF briefing."
- 11 Is that the same matter that you addressed in the  
12 earlier paragraph at 80, if we look back at 80?
- 13 A. Yes, I think it is.
- 14 Q. I think it seems to be the same date, it seems to be --
- 15 A. Yes.
- 16 Q. Is that the same?
- 17 A. I think it is.
- 18 Q. That's the same, all right, thank you. Then if we can  
19 look at 100, 102. I think 100 is just the same  
20 quotation.
- 21 A. Yes.
- 22 Q. And you say at 102:
- 23 "I was so concerned about the press briefings and  
24 the effect that that was having on the family that I  
25 unusually issued a press release on 22 October 2015 ..."
- 26 A. Yes.

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1 Q. "... calling for restraint and to allow the crown and  
2 PIRC to get on with their jobs."

3 And I think is it fair to say you did have concerns  
4 about what was happening in the press during?

5 A. Yes, I mean out of the blue you're reading stuff in the  
6 press that about the case and, you know, the case was  
7 under investigation, it seemed to me it was not helpful  
8 and at one of the meetings the family expressed their  
9 concern, their upset at it. And I have never done that  
10 before or since.

11 Q. Right.

12 A. So it indicates the importance I regarded to it and it  
13 did quiet -- I think from memory it quietened it down.

14 Q. So what in particular was it that prompted you actually  
15 issuing your own press release?

16 A. Well, to do something about it, to try and, you know,  
17 kill it. It wasn't just the Scottish Police Federation;  
18 there was others that were in the press as well.  
19 I don't know the source of it but there seemed to be a  
20 steady stream of information that seemed to me the best  
21 way to deal with it to lance the boil would be to issue  
22 the press release that I did.

23 Q. Did you ever find out who the others were?

24 A. No, and I wouldn't be -- how would you find out that  
25 with confidentiality of journalists, that type of thing.  
26 I wouldn't even attempt to go down that road; it's not

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1 my business. My business is to deal with a drip in the  
2 media and that's why I did what I did.

3 Q. We'll remain on this topic but I'm conscious of the  
4 time.

5 LORD BRACADALE: Stop for lunch, sit at 2 o'clock.

6 (1.01 pm)

7 (Luncheon adjournment)

8 (2.03 pm)

9 LORD BRACADALE: Ms Grahame.

10 MS GRAHAME: Thank you. We were dealing with the press  
11 release that you issued just before lunch. Could we  
12 have that on the screen, COPFS 00975. So this is from  
13 October 2015 and it's listed here, Lord Advocate,  
14 Frank Mulholland QC said:

15 "The investigation into that death of Sheku Bayoh is  
16 being conducted by PIRC under the direction of the crown  
17 and both are well aware of all the evidence, the lines  
18 of inquiry and the issues surrounding this case. The  
19 crown and PIRC are not influenced by comments made in  
20 the media and that is how it should be. However,  
21 speculation and a running commentary on the  
22 investigation can be upsetting to the family of  
23 Sheku Bayoh as well as the families of the officers  
24 involved.

25 "A decision will be taken at the end of this  
26 extremely complex investigation as to whether or not



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1 criminal proceedings should be raised. An inquiry will  
2 also be held at which all the relevant evidence will be  
3 heard, open to the public and the media, and it is right  
4 that it this forum where the evidence will be rigorously  
5 tested and judicially assessed.

6 "PIRC and the crown should be allowed to get on with  
7 their job."

8 Do you see that and that's where it ends?

9 And if I can to go back to your first Inquiry  
10 statement. And if we look at paragraphs 84 and 85, and  
11 you have been asked to comment on a statement from  
12 Mr Ade Johnson:

13 "He states that me calling publicly for calm and  
14 commentary to stop made the family feel that they were  
15 put in the same bracket as the SPF."

16 85:

17 "I was not intending to put the family in the same  
18 bracket as the SPF. In the media release I stated,  
19 however, speculation and the running commentary on the  
20 investigation can be upsetting to the family of  
21 Sheku Bayoh, as well as the families of the officers  
22 involved. I was not suggesting the family were leaking  
23 information and briefing the press. The terms of this  
24 media release is pored over by officials and that head  
25 of communications to get it right. I am sorry if  
26 Mr Johnson is upset by this, but in my opinion it could

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1 not have been phrased better. It was not directed at  
2 the family."

3 And I think probably I missed the first couple of  
4 lines of the press release actually when I read it out.  
5 I wonder if we could go back just for a moment to  
6 COPFS 00975. I didn't read out the top line:

7 "The Lord Advocate has today called for restraint  
8 from all parties in the provision and publication of  
9 information in respect of the death of Sheku Bayoh."

10 So you call for restraint from all parties in regard  
11 to that.

12 A. It wasn't the family. It was not my intention -- I  
13 never thought that the family were leaking information  
14 to the press, it never crossed my mind, it still  
15 doesn't. I don't think they were and I was concerned  
16 about the family of Sheku Bayoh and the effect it was  
17 having on them and I was also concerned about the  
18 families of the officers involved and it was with the  
19 best of motivation to try and put -- put a stop to it.

20 Q. And was that your aim in speaking out in this way which  
21 you said before lunch you had never taken this step  
22 before?

23 A. Yes, that was essentially it. And if you just scroll  
24 down a bit:

25 "The crown and PIRC are not influenced by comments  
26 made any media and that's how it should be."

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1 I mean there was one view that the information in  
2 the media was with a view to putting pressure on PIRC  
3 and the crown, so I just wanted to make that point  
4 absolutely clear, but there's reference to the family;  
5 "it can be upsetting to the family of Sheku Bayoh as  
6 well as the families of the officers involved".

7 I never -- it never crossed my mind that the family  
8 were leaking information to the press. I still don't  
9 believe it.

10 Q. Looking at this press release with the benefit of  
11 hindsight, do you think it could have been phrased  
12 differently?

13 A. Well, the press release is -- you know, the point I was  
14 making is it's not just me, this is communications input  
15 and officials input. Maybe a call for restraint from  
16 all parties in the provision, "all parties" where  
17 there's a -- you know, could that be taken as implied  
18 criticism of families in some way? All I can say it was  
19 never intended that way, and it never crossed my mind.

20 Q. So who was this directed to, this call for restraint?

21 A. It was directed at the information that was appearing in  
22 the media and I was hoping that the people that were  
23 leaking that information to the press would read this.

24 Q. And were you aware of any particular source of  
25 information?

26 A. Well, I wouldn't like to say. I mean I didn't know who

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1 was leaking to the press. It wasn't my business to find  
2 out and if I tried to find out, then I wouldn't find out  
3 because of journalistic confidentiality protection of  
4 sources and all that type of stuff so it was pretty  
5 pointless to even to attempt to find out.

6 Did I know who? No, I didn't know. All I know was  
7 that there was information in the media, and it looked  
8 as if some of that information had been leaked by  
9 persons who knew so that is -- I mean I could have  
10 written -- you are right, I could have written to the  
11 SPF and others, I don't know, but I thought that the  
12 best way to deal with this would be to deal with it head  
13 on and put this and I did give consideration to this.

14 And it had been raised by the family and, as I said  
15 to you earlier, it's very important that you listen to  
16 what the family has said and I listened and tried to do  
17 something about it. It did from memory quieten it down  
18 somewhat so I think it was the right thing to do.

19 Q. Thank you. Can I ask you about some comments that have  
20 been made in another statement the Inquiry has, a  
21 statement from Aamar Anwar, SBPI 00549. And I'm  
22 interested in paragraphs 224 and 226. 224 and this is  
23 Mr Anwar:

24 "I have been asked what my or the family's  
25 expectations were of the Lord Advocate when we requested  
26 that he take action in relation to the media releases

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1 that the SPF were issuing. I think the family's  
2 expectation was that they would be robust with the  
3 Scottish Police Federation whether it was material that  
4 they were putting in a public domain or whether it was  
5 letters they were writing to people threatening them or  
6 whether it was the media statements that they were  
7 making was interfering with the integrity of the  
8 investigation, that it was inflammatory, that it was  
9 prejudicing an ongoing live criminal investigation,  
10 whereas the Federation were just simply propagating the  
11 idea this was a fatal accident inquiry. That was a  
12 constant mantra, 'there will be a fatal accident inquiry  
13 at which all these issues will be discussed', almost  
14 excluding completely and utterly that there's supposed  
15 to be a live criminal investigation."

16 Was it your recollection that that family's  
17 expectations of you was that you would be robust with  
18 the Scottish Police Federation in relation to their  
19 engagement with the media?

20 A. No, that's not my recollection.

21 Q. Can you remind us, please, what was your recollection?

22 Were the SPF included within that or not?

23 A. Well, they were included with all parties, so it was all  
24 the people that were leaking, all the bodies,  
25 organisations, leaking information to the press, it was  
26 directed at them.

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1 Q. But not exclusively to the Scottish Police Federation?

2 A. Not exclusively, no.

3 Q. Right. And can we look at paragraph 226, please:

4 "The family feel that the media has been used by the  
5 SPF to smear Sheku and attempt to bully the family into  
6 silence, to call them or their representatives liars and  
7 complicit in this process has been the Crown Office and  
8 PIRC."

9 Do you wish to make any comment about that  
10 suggestion?

11 A. It's not the case for my time when I was at the crown.

12 Q. Right. And just to go back briefly to 224 --

13 A. But I mean the family are entitled to express their  
14 views. If they thought that they can express their  
15 views, but you asked me, is that correct? No, it's not.

16 Q. Right. And given the family's concern, as is expressed  
17 in 226, do you consider there was anything more you  
18 could have done to address that concern?

19 A. Other -- I mean I was absolutely committed to liaising,  
20 speaking, keeping up a regular dialogue with the family  
21 and the family solicitors. I was hoping that in that  
22 process it would give them confidence in the  
23 independence, objectivity of the crown.

24 Smearing, it's not my style. I have no -- certainly  
25 my time with the crown, I know of no one that would  
26 engage in that type of behaviour and I certainly --

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1           there was no attempt to bully the family into silence.  
2           They had -- they had Aamar Anwar acting for them. They  
3           had me. They could speak to me at anytime. It would be  
4           arranged the meeting of course, but there was a regular  
5           dialogue with the family and I would never even -- never  
6           thought, never called, their representatives or them  
7           liars in any way, they were certainly not liars and all  
8           I wanted to do was to help them navigate through a very  
9           difficult distressing process for them that's not been  
10          of their making, they were thrust into this and on a  
11          human level I wanted to help them.

12         Q. It will of course be a matter for the Chair, but it may  
13          be one interpretation of this paragraph that the  
14          concerns of the family are that SPF were attempting to  
15          smear Mr Bayoh, bully the family and calling the  
16          representative liars, rather than asserting that it was  
17          the crown doing those things. Was that something that  
18          was drawn to your attention in relation to the SPF?

19         A. I can't say it wasn't, but I don't have a recollection  
20          of it. The SPF will need to answer for that themselves,  
21          I can't answer on their behalf, but the press release  
22          was designed that the people that were leaking this  
23          information into the press should be aware of it and I  
24          honestly hoped that the press release would result in an  
25          end to this.

26         Q. And then specifically in relation to the concern that

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1 the Crown Office were complicit in this process, this  
2 smearing by SPF?

3 A. It's not the case.

4 Q. And is there anything that you reflecting on the events  
5 at this time, anything you can think of that could have  
6 been done by Crown Office to make it absolutely clear  
7 that the crown were not complicit in these matters?

8 A. Well, you can make it clear directly to the family if  
9 you needed to. I didn't think that I needed to do that  
10 and the crown weren't complicit, weren't in any way  
11 smearing or complicit in smearing the family. I had  
12 great respect for the family and I felt for the position  
13 that they had -- that they had -- were in that had been  
14 thrust upon them.

15 What else could the crown -- I mean it's a matter of  
16 trust. Even a statement that we'll not doing it, if  
17 they don't believe it then it's a matter for them, but  
18 it won't deal with it. What you have got to do is build  
19 up trust in how you're dealing with the case, with the  
20 investigation.

21 Q. And if we can go back briefly to 224, the paragraph we  
22 looked at a moment ago, where the family's expectation  
23 was you would be robust with the  
24 Scottish Police Federation. I'm interested in the  
25 comment at the end of that paragraph:

26 "The Federation were just simply propagating this



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1 idea this was a fatal accident inquiry. That was a  
2 constant mantra, 'there would be a fatal accident  
3 inquiry at which all these issues will be discussed',  
4 almost excluding completely and utterly that there's  
5 supposed to be a live criminal investigation."

6 I'm interested in this aspect of the family's  
7 impression that there was perhaps an overemphasis, if I  
8 can put it that way, on the FAI rather than the live  
9 criminal investigation?

10 A. Well, I mean I can't speak for the family and what their  
11 perception is, but I can reassure you it was a live  
12 criminal investigation and in support of that I think in  
13 the documentation that certainly I was shown there  
14 was -- I instructed Les Brown or the investigator team  
15 to speak to the Health and Safety Division of the  
16 Crown Office and also the Health and Safety Executive to  
17 place them on notice that in addition to individual  
18 criminality we were looking at systemic criminality  
19 under the Health and Safety at Work Clause and I think  
20 there's documentation I have seen to confirm that that  
21 was carried out.

22 The Health and Safety Executive said that thank you  
23 very much, we'll keep a watching brief. So what I was  
24 doing was ensuring that the relevant health and safety  
25 unit, the Crown Office and the investigators, health and  
26 safety investigators, were placed on notice that they

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1 had an interest.

2 I had years ago prosecuted Transco, I knew health  
3 and safety law in great detail, I had set up the Health  
4 and Safety Executive -- a Health and Safety Division in  
5 the Crown Office to bring expertise in health and safety  
6 matters. There's also reference -- I mean I can't put  
7 my finger on it just now, but from what I've read PIRC  
8 had obtained standard operating procedures, training,  
9 the extent of training for police officers in restraint  
10 arrest techniques, deployment of sprays, and all that  
11 was of a view to be in a position to assess that aspect  
12 of the criminality.

13 And what I do is I use that as an example to point  
14 out that this was a live criminal investigation. It was  
15 mandatory to hold an FAI, that's parked, that will  
16 happen, but this is about a live criminal investigation  
17 and that's all about reassuring the family, reassuring  
18 the public that this is being extensively properly  
19 investigated, but, you know, if it was just to  
20 facilitate a fatal accident inquiry it could have been  
21 done in months, quite frankly.

22 Q. I think there may be an issue about whether an FAI was  
23 mandatory in terms of the legislation, but I think from  
24 your perspective, as I understand your statement, it was  
25 anticipated that there would be a public interest in  
26 holding an FAI?

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- 1 A. Well, I saw it as mandatory. It's a death in custody.
- 2 Q. And as I say, it may be the position that there is a  
3 disagreement about whether this was truly a death in  
4 custody.
- 5 A. Well, whoever disagrees, I was Lord Advocate, I saw it  
6 as a mandatory fatal accident inquiry at the very least.
- 7 Q. And at the very least, it is a death following police  
8 contact and --
- 9 A. Well, it was in custody, was it not? That's the point.
- 10 Q. That will be a matter for submission.
- 11 A. Well, a matter for submission, I can tell you how I saw  
12 it. I saw it as a death in police custody.
- 13 Q. All right. Talking about the Health and Safety  
14 Executive, we have heard evidence and there's other  
15 evidence available to the Chair that the crown and PIRC  
16 would have welcomed the involvement of the HSE in  
17 relation to this matter. The HSE declined to engage in  
18 the investigation.
- 19 And I'm interested in evidence we've heard that it's  
20 not open to the crown to direct the HSE to investigate.  
21 If they decline, that is the end of the matter. I'm  
22 interested in any perspective you have about whether  
23 that is something that the crown would have wished to  
24 pursue if they had had the power to do so?
- 25 A. Well, I'll go back to Transco and the debrief coming out  
26 of the Transco trial. I made the point that it would be

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1 helpful to have the power to direct the Health and  
2 Safety Executive and that was fed in and, I can't swear  
3 to this, I think there was some correspondence with  
4 either the Health and Safety Executive or the UK  
5 Government with someone who was a looker who had  
6 responsibility for this area and it was decided to leave  
7 things as they are.

8 Q. Was this at the time of Transco?

9 A. Post -- the debrief coming out of Transco.

10 Q. All right. Thank you. Can I ask you to look at another  
11 paragraph in your statement, 476, if we can go back to  
12 that, and look at paragraph 124. You were asked about a  
13 handover of the investigation between you and your  
14 successor, Mr Wolffe, and you say:

15 "I spoke to James Wolffe by telephone and reiterated  
16 the importance of this inquiry including the need to  
17 maintain good and regular liaison with the family."

18 I'm interested in your recollection of that  
19 telephone conversation.

20 A. Well, I have a very good recollection of the telephone  
21 conversation. I can tell you how it came about.

22 Q. Please do.

23 A. Having been appointed the Solicitor General and then  
24 Lord Advocate, I know from personal experience that on  
25 taking up office there is a lot of detailed briefing  
26 which is provided to the new law officer by senior

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1 officials at the Crown Office. I remember when I first  
2 took up post as a Law officer that briefing took the  
3 best part of a week. It's not only the Crown Office in  
4 relation to criminal matters. It's also SGLD, Scottish  
5 Government Legal Directorate, in relation to the array  
6 of civil cases so and you also get briefing from the  
7 crown agent about -- I've forgotten the phrase now --  
8 it's about treasure and various other matters, Cramond  
9 Lion -- finds that the public make. So there's a vast  
10 array of briefings, quite onerous actually to go through  
11 it, it's very detailed and officials are there to  
12 present it, explain it, you can ask questions.

13 So when I demitted office the first thing I did was  
14 hand the BlackBerry in without deleting anything and  
15 handed that over to the crown agent. What I then did  
16 was my personal mobile I gave the number of that to the  
17 private office and said to the private office that if  
18 James wishes to telephone me about anything, just pick  
19 up the phone. If I'm not available at that time, I  
20 promise I'll get back to you.

21 Three weeks -- three weeks into James' post as  
22 Lord Advocate he phoned me, I was at home, it was in the  
23 evening and the call took about an hour. We went  
24 over -- I gave James advice, a lot of advice, as to what  
25 to look out for, how to deal with certain situations,  
26 about Cabinet, his attendance at Cabinet, about dealing

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1 with the crown officials. I mean James didn't have the  
2 background that I had, I had worked for the crown for  
3 30, 40 years, so I wanted to be as helpful as possible  
4 to him. Including in the telephone call went through a  
5 number of high profile cases, the Sheku Bayoh  
6 investigation was one of them, and I said, look, James  
7 you really need to ensure that you maintain good regular  
8 liaison with the family. I described the family, where  
9 they were from and how to deal with it and I suggested  
10 that he dealt with it personally to ensure that the  
11 family have -- know that it's being dealt with at the  
12 highest level. There were other matters which are  
13 irrelevant to here, but it was a lengthy conversation  
14 and what I wanted to do was to help James in his new job  
15 as Lord Advocate and that was an important case which --  
16 I didn't go into the evidence in detail, but I did  
17 mention the liaison with the family.

18 Q. And when you described good and regular liaison with the  
19 family, did you give any indication of what that had  
20 been -- how that looked under you?

21 A. Well, in a general conversation I would be talking about  
22 the meetings that I had with the family and Amar Anwar  
23 and I think, although I can't swear to it, but I think  
24 I would have said I met with them around about every two  
25 months or so, I may have mentioned that, so -- but  
26 I didn't go into detail in here. That's not my business

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1 to go into the evidence: one, because we didn't even  
2 have the final report at the time and, two, the crown  
3 really hadn't embarked on its own investigations, but I  
4 wanted him to know that it was important because I knew  
5 it was important and James being a new Lord Advocate it  
6 was important to him as well and I didn't want him to,  
7 you know, be on the receiving end of criticism for not  
8 doing that job. And I wanted to ensure that the family  
9 were -- continued to be helped.

10 Q. Thank you. Can I ask you about the use of the word  
11 where the "reiterated"? You "reiterated" the importance  
12 of this inquiry. Can I ask why you selected that word  
13 or did it mean anything beyond --

14 A. It didn't really.

15 Q. No.

16 A. It's just I suppose my words.

17 Q. Is it essentially you emphasised the importance?

18 A. Yes, that's essentially what --

19 Q. Thank you.

20 A. -- what it meant. I think from recollection James was  
21 very receptive to that, fully understood that, so I  
22 tried to help James as much as I could.

23 Q. Thank you. Now, can I go back to one thing that you  
24 mentioned earlier before lunch regarding the interim or  
25 PIRC report, the first PIRC report --

26 A. Yes.

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- 1 Q. -- that you received. You had that in August 2015?
- 2 A. Yes.
- 3 Q. And you talked earlier in your evidence about you hadn't  
4 read the appendices?
- 5 A. No.
- 6 Q. But you had read -- did you read the whole report or --
- 7 A. Well, I can't swear to -- I certainly read the narrative  
8 of what happened, I certainly read the pathology, and  
9 there will be other the introduction and that type of  
10 stuff.
- 11 Q. We've heard that this was a substantial document, over  
12 350 pages in length. There was no reference in that  
13 document however to race, racism, discrimination, racial  
14 discrimination, anything of that sort, not even to raise  
15 it and exclude it, although it was recognised that  
16 Mr Bayoh was a black man. Did you notice when you  
17 reviewed that report that that was missing?
- 18 A. Well, no, I didn't stick out. As I have said before,  
19 race was front, left, centre. PIRC were alive to it.  
20 This was an interim report, the final report still to  
21 come in, so it wasn't particularly -- it didn't stick  
22 out. I wasn't concerned about it, nobody drew that to  
23 my attention. I just was under the impression that in  
24 the final report, which would be more comprehensive than  
25 the interim report it would be dealt with.
- 26 Q. Was it not something that you noticed? Given your views



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1 on the importance of race and race being front and  
2 centre or race being at the heart of this that it was --  
3 was it not noticeable by its absence?

4 A. Well, I knew from Les Brown conversations,  
5 correspondence, that race was under investigation given  
6 examples of that, so I just assumed that as an interim  
7 report that race will be dealt with in the final report  
8 so, no, I didn't have a concern about that.

9 Q. Are you saying there was correspondence you had from  
10 Les Brown that said race was under investigation?

11 A. Well, there was -- I think I referred this morning to  
12 the letter from Les Brown --

13 Q. Yes.

14 A. -- to Jim Fleming.

15 Q. I am interested in the period up to the first PIRC  
16 report which was August 2015, so in that period from the  
17 death of Mr Bayoh on 3 May 2015 up to August 2015,  
18 7 August, when the PIRC report, first one, was sent to  
19 the crown, during that period, as the evidence we've  
20 heard indicates that the first time race was mentioned  
21 by the crown in correspondence with PIRC was dated  
22 2 September 2015, so that's at a later date, that's  
23 after the first report?

24 A. Well, I mean I can only tell you about conversations and  
25 my perception and the perception of senior lawyers at  
26 the Crown Office, including Les Brown, and in

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- 1           conversations with PIRC that race was front, left,  
2           centre.
- 3       Q.   Certainly we have evidence that there were meetings  
4           between you and, as we said earlier, Kate Frame and  
5           John Mitchell, and you've talked about conversations  
6           with PIRC regarding race and the importance of race, did  
7           it not strike you as odd that race wasn't mentioned in  
8           the first PIRC report?
- 9       A.   It didn't strike me, because it was an interim report,  
10          or whatever terminology.  You know, I've dealt with a  
11          number of interim reports on various matters.  It's the  
12          final report that matters.  And if there's any  
13          deficiencies in the final report, then it will be  
14          highlighted because then the crown has got a duty to  
15          investigate it as well and if there's any deficiencies in  
16          the PIRC investigation, then that should be remedied by  
17          the crown and instructions to PIRC to do X, Y and Z in  
18          relation to the investigation of race if they've not  
19          dealt with it.  So at that stage in reading that report,  
20          no, I didn't, it didn't strike me as particularly  
21          unusual or noteworthy.
- 22       Q.   Did you have any hand at that stage in instructing  
23           Les Brown to address the issue of race with PIRC to make  
24           sure that this wasn't being left out of account?
- 25       A.   Well, it was my understanding that it was being  
26          addressed through Les and the crown team and I'd made

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1 absolutely clear -- I didn't need to make it clear that  
2 race was an issue, you know, right at the heart of this.  
3 So I mean the journey through this, from Day 1 the  
4 people in the crown, including myself, knew this was a  
5 key issue in this, absolutely critical, along with a lot  
6 other issues. I don't want to say it was this and  
7 only -- along with other, but it was absolutely the key  
8 issue as far as I was concerned and as far as Les Brown,  
9 Lindsey Miller and others working on it and the  
10 conversations with PIRC, discussions with PIRC through  
11 Les and my discussions, I was under no misapprehension  
12 that PIRC were ignoring race. It was my impression that  
13 they knew it was an important issue in the case. So  
14 when I read the interim report, it didn't strike me  
15 because I knew that my understanding that it was being  
16 investigated by PIRC.

17 Q. Right. Could you give me a moment, please. Thank you  
18 very much. I have no further questions.

19 LORD BRACADALE: Lord Mulholland, can you help me with one  
20 thing, taking you back to the first issue that you  
21 discussed this morning, which was the issue of  
22 disclosure of expert reports and the like to the family,  
23 and the difference of approach between you and your  
24 successor Mr Wolffe, and one point that you made in the  
25 context of Mr McGowan's minute was that Mr McGowan and  
26 James Wolffe were dealing with a different situation:

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1           "The final report was in and the crown was now doing  
2           its precognition preparation. When I made the decision,  
3           it was a different set of circumstances."

4           Can you explain to me what the significance of the  
5           different stages is?

6           A. Well, the different set of circumstances is the fact the  
7           final report is in so it's now under the crown for  
8           investigation, so that's a different set of  
9           circumstances and at that stage the crown will review  
10          what the evidence is, review the expert evidence, review  
11          whether further experts should be instructed, and at  
12          that stage -- so that is different from the stage that I  
13          dealt with was before the final PIRC report had been  
14          received and indeed before the interim report was  
15          received so that's what I meant by a different set of  
16          circumstances.

17          I don't know their thinking at the time that  
18          Steve McGowan's minute and the Lord Advocate --  
19          James Wolffe Lord Advocate made that decision. I can  
20          only tell you how I saw it. I didn't see -- I saw there  
21          was little prejudice to potential criminal proceedings  
22          and I took the view that to facilitate the family --  
23          family's solicitor instructing their own experts that I  
24          should do that.

25          LORD BRACADALE: And if you had still been the Lord Advocate  
26          by the time the crown were preparing the precognition,

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1           would you have changed your position as a result of the  
2           changed circumstances?

3           A. I would only have changed my position if there was a  
4           particular reason to do it. I would have kept the  
5           undertaking I gave unless I could rationalise a change  
6           in approach, a change -- a set of circumstances or  
7           something of that nature.

8           LORD BRACADALE: Thank you.

9           A. So it's difficult to project yourself because I had  
10          stepped down at the time.

11          LORD BRACADALE: I appreciate that.

12                   Now, are there any Rule 9 applications?

13          Ms Mitchell. Nobody else.

14                   Lord Mulholland, would you mind withdrawing to the  
15          witness room while I hear a submission.

16          A. Okay.

17

18                                   Submissions by MS MITCHELL

19          MS MITCHELL: I just have one issue that I would like to  
20          raise and it relates to some evidence the Inquiry has  
21          heard into the murder of Simon San.

22                   As the Inquiry will have heard, Lord Mulholland in  
23          writing gave evidence about this matter and he also gave  
24          evidence today at the hearing. He was -- he spoke on  
25          whether or not the crown considered the matter racially  
26          motivated and he explained about placing information

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1 before the court about the family identifying it as a  
2 racist matter even though the crown did not do so. And  
3 just for the purposes of the Inquiry, it's at page 53 of  
4 evidence and following.

5 In writing at paragraph 24 of his statement, which  
6 is recorded by my learned friend again this morning  
7 reading it out, the question was whether the crown was  
8 racially motivated. The answer in the evidence was  
9 that:

10 "It was not racially aggravated. We made sure that  
11 the information was placed before the court. We also  
12 ensured this was fully explained to the family of  
13 Mr San.

14 "So again you raised a number of issues here. This  
15 was a case that you yourself prosecuted, was it, or  
16 involved in?"

17 And he said it wasn't. He didn't think he was the  
18 person who had presented it. And my learned friend goes  
19 on:

20 "Right. You've talked about placing the information  
21 before the court and explained the purpose of that."

22 And what he said is:

23 "Well, there's a number of purposes. Firstly, it's  
24 to allow the court -- to give the court the information  
25 so they can take it into account in the sentence.  
26 Secondly, it places the information in a public [I'm not

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1           sure how that's been translated] Domain [thank you] so  
2           the public, the media and the family are well aware of  
3           it so it's not expressed, not hidden. It gives  
4           accountability, public accountability, in the sense that  
5           this is your assessment of the evidence and it allows  
6           anyone who disagrees with that assessment to challenge  
7           it, to make it known, challenge it in writing, for  
8           example, or whatever."

9           Now, unfortunately the report -- so what happened  
10          after this hearing is that Lothian and Borders, who were  
11          the police service dealing with the case, did a  
12          year-long review of their involvement in this matter and  
13          I'm now reading from a newspaper article saying what the  
14          outcome of that was and I have given -- passed these on  
15          to my learned friend. The newspaper article on  
16          23 August 2011 indicated that:

17          "After a year-long internal inquiry overseen by  
18          Deputy Chief Constable Steve Allen, Allen confirmed that  
19          the force should have treated Mr San's death as a racist  
20          murder."

21          And then he goes on to make various different  
22          further apologies.

23          After that time it appears but on the same day, the  
24          Crown Office issued a statement indicating that it was  
25          alert to the question of racial motivation from the  
26          beginning of the investigation and after careful

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1 consideration of all the available evidence provided to  
2 the crown by the police Crown Counsel concluded that  
3 there was no evidence to show that the attack on  
4 Mr San was racially motivated.

5           Thereafter, it appears at some point Mr Anwar called  
6 upon the Lord Advocate to -- at some point in that day  
7 called upon the Lord Advocates to itself carry out a  
8 crown inquiry in relation to the handling of the case  
9 and there seems to be an additional press release by the  
10 crown that said:

11           "In addition to CO's statement 23 August, we can  
12 confirm the Lord Advocate will not be instructing an  
13 inquiry and is satisfied with the crown's prosecution of  
14 the case. Mr John Logue, the area procurator fiscal for  
15 Lothian and Borders has offered to meet with Mr San's  
16 family to discuss any questions which they might now  
17 have."

18           After that very long explanation -- hopefully I  
19 won't have to go into that detail with the Former  
20 Lord Advocate, but after that very long explanation,  
21 what I would like to ask is whether or not -- why he  
22 didn't call for inquiry into the way the Crown Office  
23 had dealt with the issue of race in the present case of  
24 Mr San.

25           And I say that's important because this inquiry has  
26 evidence before it that Crown Office were trained in



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1 respect of issues of race, this was an incident that  
2 happened relatively soon before the incident in this  
3 case and that might have been an opportunity for -- for  
4 the crown to engage with the matter and consider it. In  
5 particular, as it is quoted in one of the newspaper  
6 articles, it might have saved another family in the  
7 future from having to fight for answers from the  
8 authorities and I just would like to ask be there was a  
9 reason there wasn't an inquiry, given the very clear  
10 distinction between the year-long investigation and what  
11 Lothian and Borders had identified and what the  
12 Crown Office's position was.

13 LORD BRACADALE: Yes, very well, I shall allow you to ask  
14 these questions.

15 Can we have the witness back, please.

16 Lord Mulholland, Ms Mitchell, who's senior counsel  
17 for the families of Sheku Bayoh, has some questions for  
18 you.

19 Questions by MS MITCHELL

20 MS MITCHELL: It just relates to one issue that I want to  
21 ask you about and, in fact, it's about the case of  
22 Simon San, which you referred to earlier in your  
23 evidence and you gave evidence this morning the question  
24 was whether or not the crown was racially motivated and  
25 you said the answer on the evidence was that it was not  
26 racially aggravated and then you went on to explain

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1 about the crown having put evidence about what the  
2 family thought in front of the court and that allowed  
3 that to be made public, as it were.

4 Do you recall that after Mr San's case was in court  
5 there was an investigation done by Lothian and Borders  
6 police into their handling of the case?

7 A. Very vaguely. When I say there was -- the crime wasn't  
8 racially motivated, what I mean was that there was no  
9 evidence that the crime was racially motivated. There's  
10 a fine distinction there. But to answer your question  
11 directly, I've got a vague recollection of it so -- but  
12 I couldn't give you chapter and verse as to what it  
13 involved.

14 Q. Do you remember the outcome of that --

15 A. No.

16 Q. -- inquiry? The outcome of that matter was that after a  
17 year-long inquiry by Lothian and Borders Police, Deputy  
18 Chief Constable Steve Allen confirmed that the force  
19 should have treated Mr San's death as a racist murder  
20 and he apologised to the family and explained the  
21 various different things that were going to be done by  
22 Lothian and Borders Police in respect of that, one of  
23 which include the force's procedures being significantly  
24 overhauled.

25 At that time, there was a call by Mr Anwar asking  
26 the Crown Office for it to review its handling of the

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1 matter. Do you recall that?

2 A. No, I don't.

3 Q. No.

4 A. I'm not saying that that didn't happen, but I don't  
5 recall that.

6 Q. There appears to be a Crown Office release about it so?

7 A. Well, I don't recall it is the answer.

8 Q. Okay.

9 A. But in relation to the prosecution, we were dealing with  
10 what the evidence was at the time.

11 Q. Yes, indeed.

12 A. Evidence available at that time. Lothian and Borders  
13 Police had an investigation, am I right in thinking that  
14 that was post the criminal prosecution?

15 Q. It appears to be so.

16 A. Yes, so that -- the findings of that wouldn't have been  
17 available at the time that the case was dealt with,  
18 disposed of.

19 Q. Yes, indeed, it was a year later.

20 A. Yes.

21 Q. I don't suggest in any way that the crown could have  
22 gone back and revisited the prosecution issue. What I'm  
23 wondering is whether or not in light of that finding  
24 that after a year's investigation Lothian and Borders  
25 Police took the view that they ought to have dealt with  
26 that in that way and the crown was asked by Mr Anwar to

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- 1 review its practices and procedures --
- 2 A. I don't remember that. I'm not saying it didn't happen,  
3 but I don't remember that.
- 4 Q. Indeed. What appears to be said in a document online  
5 and, again, in fairness to you, you don't have it before  
6 you, but perhaps in a future hearing that might become  
7 available, but this document purports to say:
- 8 "We can confirm the Lord Advocate will not be  
9 instructing an inquiry and is satisfied with the crown's  
10 prosecution of the case. Mr John Logue, the area  
11 procurator fiscal for Lothian and Borders, has offered  
12 to meet with Mr San's family to discuss any questions  
13 which they might now have."
- 14 A. What was the date of that?
- 15 Q. That appears to be 23 August 2011.
- 16 A. Right. Okay well, John Logue is now the Crown Agent, so  
17 that means, from what you tell me, that that was looked  
18 at in some detail to generate that response. I can't  
19 speak to that, because I have no recollection of it, I  
20 need to see the paperwork and that may jog my memory,  
21 but I genuinely have no recollection. I remember there  
22 was a bit of a furore at the time that Deputy  
23 Chief Constable made certain statements. I think he  
24 gave a Newsnight interview, if I remember rightly.
- 25 Q. You know more than me in respect of that matter.
- 26 A. Well, there was a bit of -- let me put it this way,

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1 without knowing the intimate detail, there was a bit of  
2 a controversy about what was said.

3 Q. But in any event, the crown didn't conduct an inquiry?

4 A. Well, I think it's confirmation of that in this  
5 statement, but I can't -- I can't explain why, because I  
6 can't remember. I need to see the paperwork.

7 Q. That may be something that could be done. I'm obliged.

8 A. Okay.

9 LORD BRACADALE: Thank you. Lord Mulholland, thank you very  
10 much for coming to give evidence to the Inquiry. I'm  
11 very grateful for your time. When the Inquiry adjourns,  
12 you'll be free to go.

13 A. Thank you.

14 LORD BRACADALE: That brings this hearing to a close, though  
15 it is likely that some further evidence in relation to  
16 the subject matter of this hearing will be introduced at  
17 a later stage.

18 The next hearing will begin on 4 June 2024 when  
19 the Inquiry will hear evidence, including evidence in  
20 relation to the issue of race.

21 My assessors and I and the Inquiry team are very  
22 conscious that tomorrow is the ninth anniversary of the  
23 death of Sheku Bayoh and we know and understand that  
24 each anniversary is a difficult and distressing time for  
25 members of the families and friends of Sheku Bayoh.

26 I want to take this opportunity to recognise the

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1 continuing commitment of the families to the Inquiry and  
2 I renew the commitment of the Inquiry to a thorough and  
3 independent examination of the evidence.

4 The Inquiry will now adjourn.

5 (2.53 am):)

6 (The hearing was adjourned to 10.00 am on 4 June 2024)

7

8

9

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